

**Testimony of Edward Martin  
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Tilson Home Corporation**

**Hearing on  
“Stealing the American Dream of Business Ownership:  
The NLRB’s Joint Employer Decision”**

**Before the  
Senate Committee on Health, Education, Labor, and Pensions  
October 6, 2015**

## **Introduction**

I appreciate the opportunity to participate in today's hearing on the National Labor Relations Board's (NLRB) joint employer standard. My name is Ed Martin. I am a home builder from Austin, Texas, and the President and Chief Executive Officer of Tilson Home Corporation. I am also a past president of the Texas Association of Builders and have been active in the National Association of Home Builders' (NAHB) leadership structure at the local, state and national levels throughout my career.

I have more than 30 years of broad-based experience in the housing industry. I have worked as an HVAC technician, a leasing agent, and as an attorney representing the multifamily industry. Currently, I am the President of Tilson Homes, one of the largest custom home building production companies in the United States.

I began working at Tilson Homes during law school, and the company has grown considerably since that time. We currently employ 140 individuals, including construction supervisors, design and drafting professionals, and warranty technicians. The majority of these employees are full-time staff with competitive salaries and benefits.

We are a "Build on Your Lot" custom home builder, meaning we design and construct every inch of the home to the customer's specifications on their own personal property. On average, we build 300-500 homes per year at an average price of \$270,000. This year, we will construct approximately 400 homes. Building quality, affordable housing for our customers and their families is our top priority.

The building industry is made up of a vast system of general contractors and subcontracted businesses. Beyond our full-time staff, Tilson Homes contracts with 287 companies and specialty trades to perform a range of services, including HVAC work, cleaning, landscaping, and roofing, amongst other specialties.

It is important for our company and the housing industry at large to stay current on policies that affect our ability to contract with the myriad of specialty trades needed to build a home. Timely delivery of homes is inextricably tied to our ability to promptly schedule trades and manage issues that could lead to production delays, such as weather-related incidents or labor shortages. For these reasons, we have been closely monitoring the developments at the NLRB regarding its joint employer standard.

### **The New *Browning-Ferris* Standard is Limitless, Unrealistic in Real World**

The new joint employer standard adopted by the NLRB in *Browning-Ferris* is alarming. Under the decision, Tilson Homes could be considered a joint employer if it has indirect control or the potential to exercise control or co-determine the essential terms of a subcontractor's employee's employment, including hiring and firing, discipline, supervision, scheduling, seniority and overtime, and assigning work and determining the means and methods of performance. This is a radical departure from the traditional standard of "direct and immediate control."

According to the dissenting opinion in *Browning-Ferris*, all business-to-business relationships, including subcontracting, could fall under the umbrella of this standard. The NLRB acknowledged that issues related to the nature and extent of a putative joint-employer's control over particular terms and conditions of employment "are best examined and resolved in the context of specific factual circumstances."<sup>1</sup> That being said, one of the factors of significant discussion in both the majority and dissenting opinions in *Browning-Ferris* is scheduling.

The discussion of scheduling is important to home builders because we are, by our very nature, schedulers. At Tilson Homes, our construction supervisors' chief responsibility is to ensure the specialty trades are scheduled on time in order to meet the consumer's delivery date. With an average of 22 subcontractors needed to build a home, we are greatly concerned about our inability to limit our exposure to joint liability under the National Labor Relations Act (NLRA) under the new *Browning-Ferris* test.

The new "indirect or potential" control standard in *Browning-Ferris* is ambiguous, at best. We question whether the simple act of choosing a project's completion date would trigger a finding of joint employment. For example, if Tilson Homes contracted with a painting company for a home in Austin, would we be prevented from telling the subcontractors when to paint the walls or even when the walls would be constructed? Would we be prevented from scheduling installation of the fire sprinklers or cabinets? Would the roof be completed in time for the codes inspector to visit? This would be akin to ordering a pizza, but allowing the delivery service to show up at the driver's discretion.

It is also common for general contractors to request additional labor or time on the job site when weather-related delays jeopardize deadlines. Would the act of requesting two additional workers to get a deck installed trigger a finding of joint employment? If a project gets delayed due to heavy rainfall, would I not be able to tell the contractor to double his labor and meet the construction deadline? If I know one of the trades' employees is a diligent and efficient worker, would I not be able to request the specific worker on my job site? Would it be fair for the NLRB to prohibit this worker from being requested?

Let us take another example from a typical relationship between a homeowner and a remodeler. If I am, as a homeowner, doing a renovation of my bathroom, I may very well meet the standards set by *Browning-Ferris* as a joint employer. In the real world, the homeowner is going to be involved in decisions regarding when the workers begin their day, leave for the day, and will generally set deadlines for project completion. If, as the homeowner, I am dissatisfied with the work product, I will not hesitate to fire the company doing the work. If I am uncomfortable with one of the workers coming into my home, I will ask the company to send someone else. This is not atypical for a remodeling project, but *Browning-Ferris* creates such blurry lines that a homeowner *could* be viewed as a joint employer in certain circumstances.

Under the new standard, I believe that each of these factors could be assessed in a finding of joint employment. It could be argued that indirect or potential control over just one of the essential terms of employment, such as scheduling, would not be sufficient to justify a finding of

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<sup>1</sup> *Browning Ferris Industries* at 16.

joint employment. The NLRB, however, has not excluded such a possibility. In reality, businesses could be found to be joint employers of another company's workers by merely doing one of the aforementioned actions – scheduling or requesting additional labor or even a specific worker. There is no certainty or predictability regarding the identity of the employer under this new standard. It is fundamentally unrealistic.

### ***Browning-Ferris Will Harm Housing Affordability***

The nation's housing markets are beginning to see widespread consistent, sustainable growth. Home builders are major job creators. Currently, the industry employs 694,000 individuals in the builder category and 1.761 million as residential specialty contractors, for an industry total of 2.46 million. These workers and entrepreneurs are spread out across the nation. Since the start of 2014, 201,000 jobs have been added by home builders and remodelers. More are expected with continued gains in construction activity.

In order to meet the housing needs of a growing population and replacement requirements of older housing stock, the industry should be constructing about 1.4 million new single-family homes each year and more than 1.7 million total housing units. In comparison, home builders in 2014 constructed only 647,000 single family homes and 354,000 multifamily units.

According to NAHB estimates, construction of 1,000 single family homes creates 2,970 full-time equivalent (FTE) jobs. Similarly, 1,000 new multifamily units results in 1,130 FTE jobs and \$100 million in remodeling expenditures creates 890 jobs. This means as we return to normal levels, home builders will have millions of jobs to fill. According to the most recent release of the NAHB/First American Leading Markets Index, the U.S. market is running at 92% of normal economic and housing activity. As the recovery continues, there will be millions of more jobs in home building and related trades. Congress should consider policies that support a continued housing recovery.

Policies that reduce labor market flexibility, such as those that limit the use of independent contractors, will reduce the number of local home building firms. The industry is highly decentralized, supporting a large number of local, competitive firms.<sup>2</sup> At Tilson Homes, each of the specialty trades we contract with has an average of 15 employees, varying from 5 to 150 employees. Besides being a sector that supports local small businesses, a large number of such small firms in the industry promotes competition, providing a benefit for prospective home buyers.

The *Browning-Ferris* decision will make home builders employers of other company's workers. The decision calls into question the very basic idea of what it means to be a business. Employers will be forced to re-examine their entire business model since it affects their responsibilities not only at the NLRB, but with other federal agencies such as the Internal Revenue Service, the U.S. Department of Labor, or for the purposes of the *Affordable Care Act*.

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<sup>2</sup> As of 2012 (the most recent data available), there were 48,557 residential construction firms. See "Construction Job Openings Steady, Hiring Slowing" by Robert Dietz at <http://eyeonhousing.org/2015/09/construction-job-openings-steady-hiring-slowing/>.

Without the human resources departments typical of large firms, small firms will find it challenging to compete. This will lead to a centralization of the industry, with less competition among small firms and higher home prices. Decentralization of the market is better for the housing recovery because more competition among small firms will yield more affordable housing options for consumers. If the goal of the NLRB is to put small home builders out of business, this may very well be the outcome.

## **Conclusion**

Codifying the NLRB's traditional definition of "direct and immediate control" will provide certainty and predictability of the identity of the employer. If left unchecked, the *Browning-Ferris* decision will be damaging to the marketplace and housing affordability. For these reasons, I strongly encourage Congress to restore the traditional definition of joint employment and ensure a level playing field for all businesses. It is imperative that our government does not act to raise the cost of housing through policies that limit the ability of businesses to organize as independent contractors.

Thank you again for the opportunity to testify today.