MEMORANDUM

TO: Democratic Members and Staff, Committee on Education and Workforce
FR: Democratic Staff
DA: September 11, 2017
RE: September 13 Joint Workforce Protections and Health, Employment, Labor, and Pensions Subcommittee Legislative Hearing: "H.R. 3441, *Save Local Business Act*"

On Wednesday, September 13 at 10:00 A.M., the Workforce Protections Subcommittee and the HELP Subcommittee are scheduled to hold a joint legislative hearing on H.R. 3441, the *Save Local Business Act*.

Democratic Witness

- **Michael Rubin**, Partner, Altshuler Berson LLP, San Francisco

Mr. Rubin is a labor lawyer who represents low-wage workers and labor unions. He has argued in the U.S. Supreme Court, the California and Nevada Supreme Courts, and state and federal appellate courts. Mr. Rubin litigated a class action on behalf of warehouse workers that alleged Walmart, a warehouse operator, and staffing agencies to be joint employers.

Republican Witnesses

- **Zachary Fasman**, Proskauer Rose LLP, New York City. Mr. Fasman is a management-side attorney specializing in the National Labor Relations Act.
- **Granger MacDonald**, National Association of Homebuilders, Kerrville, Texas. Mr. MacDonald is the CEO of a homebuilding company that frequently contracts with third parties to manage remote properties.
- **Tamra Kennedy**, Twin Cities Taco Johns, Roseville, Minnesota. Ms. Kennedy is a franchisee owning nine fast-food locations in Minnesota and Iowa.

Bill History

Republicans introduced H.R. 3441 on July 27, 2017, following the July 12, 2017 Committee hearing entitled "Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship." H.R. 3441 creates a new, narrow definition of a joint employer under the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA), substantially limiting who workers may hold responsible for wage theft or unfair labor practices.

Committee Republicans are advancing H.R. 3441 in order to foreclose employers who exercise control over working conditions from being deemed a joint employer under the NLRA or FLSA. The campaign to overturn current joint employment standards was launched by the International Franchise Association in 2015 following two events:

> 1) On December 19, 2014, the National Labor Relations Board's (NLRB) General Counsel named McDonald's USA a joint employer with its franchisees in a complaint alleging unlawful retaliation against employees who protested for better wages as part of

the "Fight for $15 and a Union." This case remains pending before an administrative law judge.

2) On August 27 2015, the NLRB reinstated its joint employment standard in its *Browning Ferris* case, which found that a waste-management company jointly controlled the employment conditions of its subcontracted workers.

In the 114th Congress, Congressman Kline introduced the Protecting Local Business Opportunity Act (H.R. 3459), which sought to narrow the joint employer standard under the NLRA, but not the FLSA. The Committee reported this bill on October 28, 2015 with a party-line vote of 21-15.

Additionally, House Republicans have included a rider in the FY 16, FY 17 and FY 18 Labor-HHS appropriations bills that would prevent the NLRB from applying the current joint employer standard articulated in *Browning Ferris*.[1] Due to bicameral opposition from Democrats, riders in FY 16 and FY 17 have not survived.

Overview of H.R. 3441

1) H.R. 3441 establishes a new, narrow definition of joint employer that is so narrow that any entity can arrange its relationships with subcontractors to avoid liability.
2) H.R. 3441 cripples the right to bargain for better wages and conditions under the NRLA when workers have joint employers.
3) H.R. 3441 empowers employers to evade liability for wage theft, overtime and child labor violations under the FLSA.
4) By amending the FLSA, H.R. 3441 potentially strips workers of recourse for violations of the Migrant and Seasonal Agriculture Protection Act and the Equal Pay Act.
5) H.R. 3441 fails to protect small businesses and gives franchisors a blank check to dictate franchisees' employment practices, leaving franchisees on the hook for any legal violations.

H.R. 3441 Establishes a New, Narrow Definition of Joint Employer

Labor and employment laws have long held that, when more than one employer has the right to control the terms and conditions of employment, they may be liable as joint employers. This commonly arises for permatemps or subcontracted employees who perform work on behalf of a client company that directs the employees' work, but does not write the employees' paycheck.

In recent years, employers have increasingly moved away from direct hiring of employees to the use of leased employees, permatemps, and subcontracting as a means to reduce labor costs and liability. Approximately 3 million Americans are employed by temporary staffing agency on any given day, performing work on behalf of a client company that directs the employee's work, but

[1] The FY 2018 Labor-HHS Appropriations rider states: "SEC. 408. None of the funds made available by this Act may be used to issue, enforce, or litigate any administrative directive, regulation, representation issue, or unfair labor practice proceeding, or any other administrative complaint, charge, claim, or proceeding based on the standard for determining whether entities are 'joint employers' set forth by the National Labor Relations Board in *Browning Ferris Industries of California, Inc.*, 362 NLRB. No. 186 (Aug. 27, 2015)."

does not write the employee's paycheck.[2] Since the end of the recession in mid-2009, almost one-fifth of all job growth has been through temp agencies.[3]

In the NLRA and FLSA, entities are found to be joint employers when more than one party meets each statute's definition of an employer. Under the NLRA, the term "employer" includes "any person acting as an agent of an employer, directly or indirectly."[4] Under the FLSA, the term "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency."[5]

H.R. 3441 keeps each statute's definition for an employer, but adds a new definition for "joint employer." An entity under this bill can only be a joint employer if it "directly, actually, and immediately…exercises significant control" over what the bill describes as "essential terms and conditions of employment." These bill defines these terms and conditions: "hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, and administering employee discipline."

H.R. 3441's definition of a joint employer is so narrow that any entity can arrange its relationships with staffing agencies or subcontractors to avoid liability. Because H.R. 3441 requires that a joint employer must control *all* of the listed terms of employment, an entity is no longer a joint employer as long as it delegates at least one of those terms to another entity, no matter how much control it retains. Further, because a joint employer can only exert control "directly, actually, and immediately" under the bill, an entity can convey all employment directions through an intermediary without ever being considered a joint employer.

As Mr. Rubin describes in his written testimony for this hearing:

> In practical effect, this means there will be no more "joint employment" under the FLSA or NLRA, because once an FLSA or NLRA employer…delegates *any* significant control over *any* terms or conditions of its workers' employment, it ceases to exercise "direct" control over those terms and conditions and is no longer a potential "joint employer" under the bill's definition.

H.R. 3441 Cripples the Right to Bargain for Better Wages and Conditions Under the NLRA When Workers Have Joint Employers

When workers organize unions, the NLRA guarantees them the right to collectively bargain for better wages and conditions without fear of retaliation. Where multiple entities control the essential terms and conditions of employment, this right is effectively futile if workers cannot

[2] Employees on Nonfarm Payrolls by Industry Sector and Selected Industry Data, Bureau of Labor Statistics, https://www.bls.gov/news.release/empsit.t17.htm (last accessed Jul. 7, 2017).
[3] Michael Grabell, "The Expendables: How the Temps Who Power Corporate Giants are Getting Crushed," *ProPublica* https://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushe (June 27, 2013).
[4] 29 U.S.C. § 102(2).
[5] 29 U.S.C. § 203(d).

bargain with those entities. H.R. 3441's definition of a joint employer so narrow that it effectively writes the concept out of law.

Proponents of H.R. 3441 target the NLRB's 2015 *Browning Ferris* decision, which reinstated the traditional joint employer standard it used prior to 1984.[6] Here, the NLRB found that a client employer (BFI) and its staffing agency (Leadpoint) were joint employers and had a joint duty to bargain with the Teamsters union. BFI operates a municipal recycling facility in Milpitas, California, but contracted with Leadpoint to hire workers sorting recyclable materials under a cost reimbursement contract. BFI contractually capped the maximum wage that Leadpoint could pay—at a rate that could not exceed what BFI paid its own workers. BFI also reserved and exercised the right to overrule any of Leadpoint's personnel decisions, and assigned shifts to the workers through Leadpoint's supervisors. When the Teamsters sought to organize 240 Leadpoint workers, it named BFI as the joint employer with Leadpoint in a petition for a union election.

The NLRB's traditional joint employer test first asks whether there is a common law employment relationship, then asks whether the employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. In examining whether there is a common law relationship, the NLRB uses the standard that Anglo-American courts have used for centuries to determine whether there is a "master-servant" relationship.[7] The NLRB considers both the employer's "right to control" in addition to its actual exercise of control. That control may be either direct or indirect, such as through the other joint employer as an intermediary.

Proponents argue that H.R. 3441 restores the joint employer standard in effect from 1984 to 2015, but the standard created by this bill is significantly narrower. The standard initiated by the Reagan and Bush administrations limited joint employer status only to those who exercise "direct and immediate control" over the terms and conditions of employment.[8] The NLRB in *Browning Ferris* found this standard too restrictive because it did not consider whether the client employer had "reserved" control, where it has a contractual right to overrule the subcontractor's employment decisions, and indirect control when the client employer directs employees through the subcontractor. H.R. 3441 goes much further by listing all the factors a joint employer must control. Under this bill, even if an alleged joint employer's exercises direct control, it is not a joint employer as long as it declines to exercise control over at least one of the listed terms of employment. The NLRB's *Browning Ferris* decision is currently on appeal before the U.S. Court of Appeals for the D.C. Circuit, and a decision is expected this fall.

Under the pre-*Browning Ferris* standard, it was at least possible, however difficult, to find a joint employer relationship. Under this bill, an employee may never be found to have joint employers.

For hundreds of thousands of permatemps like the BFI/Leadpoint's employees, this bill would force down wages. At recycling plants near BFI's facility, unionized employees make anywhere from $19 to $30 per hour. The subcontracted Leadpoint workers only make $12.50 per hour.

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[6] 362 NLRB No. 186 (2015).

[7] As articulated by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), determining an employment relationship under common law depends on "the hiring party's right to control the manner and means" by which the worker accomplishes the project.

[8] *Airborne Freight Co.*, 338 NLRB 597 (2002).

This bill would enable unscrupulous employers to more easily subcontract their labor for the purpose of keeping wages low and avoiding their bargaining obligations under the NLRA.

H.R. 3441 Empowers Employers to Evade Liability for Wage Theft, Overtime and Child Labor Violations Under the FLSA

As mentioned above, H.R. 3441 amends the FLSA's definition of employer by appending the bill's definition of a joint employer to the current definition of employer. The FLSA governs our nation's federal wage, hour and child labor laws. This statute dictates what the minimum wage is, who is eligible for minimum wage and overtime and establishes child labor laws. The FLSA also lays out remedies for workers when an employer violates provisions in the act.

The FLSA has long held that a single individual may be employed by two or more employers at the same time under the FLSA. What is considered joint employment under the FLSA is much broader than the NLRA's definition of joint employment under the common law. This is primarily because of the FLSA's definition of "employ." The FLSA defines "employ" as "to suffer or permit to work,"[9] the broadest definition of "employ" in any federal statute. This was Congress' intent: Senator Hugo Black was quoted as describing the "suffer or permit" definition as "the broadest definition that has ever been included in any one act."[10] Unlike the common law definition, which centers on a control test, the FLSA's "suffer or permit" definition relies on the economic relationship between an employee and potential employer.

The courts have found that a joint employment relationship can be found by assessing the economic realities between an employee and a putative joint employer. In the Ninth Circuit case *Bonnette v. California Health & Welfare Agency*,[11] the court set four factors to be used when establishing joint employment relationships. They examine whether the alleged employer:

1. Had the power to hire and fire employees,
2. Supervised and controlled employee work schedules or conditions of employment,
3. Determined the rate and method of payment, and
4. Maintained employment records.[12]

Bonnette was the standard for the economic realities test used for determining joint employment under the FLSA, and was translated to many other circuits. However, since the case was decided in 1983, several circuit courts have amended and added to this list based on the facts of the case. Courts have found joint employment relationships under the FLSA with respect to labor contractors, farming companies and in sectors ranging from the janitorial sector to garment manufacturing. The courts have <u>not</u> found joint employer status with respect to franchisors.[13]

H.R. 3441 does not amend the FLSA's definition of "employ;" it amends the statute's definition of employer. This proposed change to the FLSA is fundamental. By restricting what has historically been a broadly-construed and flexible definition of joint employment, H.R. 3441

[9] 29 U.S. Code § 203(g).
[10] *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945).
[11] 704 F.2d 1465 (1983).
[12] 1 Ellen C. Kerns et al., *The Fair Labor Standards Act,* § 3-65.
[13] *Id.*

revises over half a century's worth of joint employment standards across the United States. The real impact of this bill would be that workers in industries with the highest wage and hour violations and fastest growing sectors, like service and construction, would not be able to hold both the client and the supplier of labor jointly liable for wage and hour violations.

Prior iterations of the joint employer bill did not include an amendment to the FLSA. Committee Republicans contend that, because different federal circuit courts have different standards for interpreting joint employment under the FLSA, Congress must step in and create a uniform standard to increase certainty for businesses. The joint employment standard under the FLSA has always been a fact-specific standard. This bill changes that approach with a rigid one-size-fits-all approach. No one set of economic realities factors is applicable to all cases.

By Amending the FLSA, H.R. 3441 Potentially Strips Workers of Recourse for Violations of the Migrant and Seasonal Agriculture Protection Act and the Equal Pay Act

Migrant and Seasonal Agriculture Protection Act

H.R. 3441 may also have implications for farmworkers covered under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The MSPA, the principle labor statute protecting agriculture workers, establishes wage, health, safety, and recordkeeping standards for seasonal or temporary farmworkers. Frequently, farmworkers are recruited, hired, supervised, or transported by intermediaries, often referred to as farm labor contractors (FLC), to work on farms. Farm operators seeking to avoid compliance responsibilities under MSPA may contend that the FLC's they engage are the farmworkers' sole employer responsible for compliance. However, the MSPA statute and its regulations incorporate the FLSA's broad definition of "employ" and its joint employment framework. The MSPA regulations make it clear that the terms employer and employee have the same meaning under both the FLSA and the MSPA.[14] As the MSPA regulations read, "Joint employment under the Fair Labor Standards Act is joint employment under the MSPA."[15] This means where a farmworker is economically dependent on a farm operator, he or she may be jointly employed by the FLC and the farm operator.

The legislative history of MSPA demonstrates that Congress incorporated the FLSA's broad definition of "employ" for the direct purpose of adopting the FSLA's joint employer doctrine. Congress believed this standard was the "central foundation" of MSPA's protections and necessary to "reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers."[16]

While H.R. 3441 does not directly amend the FLSA's definition of "employ," which the MSPA references, this bill creates uncertainty since the bill's new definition of "joint employer" under the FLSA will similarly upend the MSPA's joint employment framework.

Equal Pay Act

[14] 1 Ellen C. Kerns et al., *The Fair Labor Standards Act,* § 3-65.
[15] 29 C.F.R. §500.20(h)(5)(i).
[16] H. Rep. No. 97-885, 97th Cong., 2d Sess., 1982.

The Equal Pay Act (EPA) is a part of the FLSA. Signed into law in 1963, the EPA prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions.[17] Because the EPA is a part of the FLSA, the same employer, employ, and employee standards apply. Thus, narrowing the scope of who is considered a joint employer under the FLSA may impact the ability to bring equal pay claims under the EPA.

H.R. 3441 Fails to Protect Small Businesses and Gives Franchisors a Blank Check to Dictate Franchisees' Employment Practices, Leaving Franchisees on the Hook for any Legal Violations

The Majority will contend that this bill protects the franchising business model because the current joint employer standards create uncertainty and hinder the formation of small businesses. The Majority has also claimed that this legislation would protect the independence of small franchisees by ensuring that franchisors would not feel compelled to take control of franchisees' labor relations in order to limit their own potential liability. Committee Republicans contend that the current standards "threaten[] to upend small businesses, undermine their independence, and put jobs and livelihoods at risk."[18] These arguments have no merit.

As an initial matter, H.R. 3441 does not reduce franchisees' exposure to liability. A franchisee is an employer under the NLRA and the FLSA no matter how broad or narrow the joint employer standard is. The question is whether the franchisor is also liable. This bill insulates franchisors from any potential liability as a joint employer, and empowers them to exercise control over franchisees while leaving franchisees exposed to liability. If the franchisor mandates a policy that could violate the NLRA or the FLSA—such as firing workers who try to form a union—then the franchisee may be forced to choose between abiding by their franchisor's direction or compliance with the law.

One impetus for the Majority's arguments is pending litigation where the NLRB's General Counsel named McDonald's USA as a joint employer alongside dozens of franchisees. The complaint alleged unfair labor practices including threatening, disciplining, and discharging employees in retaliation for engaging in union activity. The complaint issued in December 2014, eight months prior to the *Browning Ferris* decision, so it applied the pre-*Browning Ferris* standard. The issuance of the complaint does not constitute the NLRB's final decision, as this matter is still being litigated before an administrative law judge. Amongst franchisors, McDonald's control over its franchisees is unique because it directs its franchisees through prescriptive operating manuals and it owns the real estate used by its franchisees. Even so, it is far from clear that McDonald's will be held liable by the NLRB.

[17] The Equal Pay Act of 1963. The Equal Employment Opportunity Commission https://www.eeoc.gov/laws/statutes/epa.cfm.

[18] Press Release, Committee on Education and the Workforce, July 27, 2017 https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=401928.

The NLRB takes a reasoned, case-by-case approach when assessing whether a franchisor is a joint employer. For example, the NLRB's General Counsel recently determined that Freshii's, a fast-casual restaurant franchisor, would not be deemed to be a joint employer with its franchisees, because its control was limited to maintaining brand standards and food quality.[19] The threshold for joint employment liability is control over labor-management relationships; control over brand standards does not cross that threshold.

Conclusion

As subcontracting becomes increasingly common, maintaining and expanding joint employer standards are necessary for workers fighting for better wages and conditions. H.R. 3441 replaces almost a century of law with chaos, creating uncertainty for workers and enabling unscrupulous employers to evade obligations under the NLRA and FLSA.

[19] See: *Nutritionality, Inc., d/b/a Freshii*, Case 13–CA -134294 et al., Advice Memorandum, April 28, 2015 http://apps.nlrb.gov/link/document.aspx/09031d4581c23996.