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HOUSE OF REPRESENTATIVES
REPORT
114–355

PROTECTING LOCAL BUSINESS OPPORTUNITY ACT

DECEMBER 1, 2015.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KLINE, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3459]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 3459) to clarify the treatment of two or more employers as joint employers under the National Labor Relations Act, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Protecting Local Business Opportunity Act".

SEC. 2. TREATMENT OF JOINT EMPLOYERS.

Section 2(2) of the National Labor Relations Act (29 U.S.C. 152(2)) is amended by adding at the end the following: "Notwithstanding any other provision of this Act, two or more employers may be considered joint employers for purposes of this Act only if each employer shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate.".

H.R. 3459, PROTECTING LOCAL BUSINESS OPPORTUNITY ACT

COMMITTEE REPORT

PURPOSE

H.R. 3459, the *Protecting Local Business Opportunity Act*, protects small businesses such as franchisees and subcontractors from an assault on their independence. The bill restores the long-held standard for determining "joint employer" status under the *National Labor Relations Act* (NLRA or the Act) that was recently overturned by a decision of the National Labor Relations Board (NLRB or the Board). Specifically, the bill codifies the standard used by the Board prior to August 27, 2015, by amending the NLRA to provide that two or more employers are joint employers only if each shares and exercises actual, direct, and immediate control over the essential terms and conditions of employment.

COMMITTEE ACTION

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Subcommittee holds NLRB oversight hearing

On June 24, 2014, the Subcommittee on Health, Employment, Labor, and Pensions (HELP) held an NLRB oversight hearing titled "What Should Workers and Employers Expect Next from the National Labor Relations Board?" Witnesses before the subcommittee were Mr. Andrew F. Puzder, CEO, CKE Restaurants Holdings, Inc., Carpinteria, California; Mr. Seth H. Borden, Partner, McKenna Long & Aldridge, New York, New York; Mr. James B. Coppess, Associate General Counsel, AFL–CIO, Washington, DC; and Mr. G. Roger King, Of Counsel, Jones Day, Columbus, Ohio. Witnesses discussed upcoming NLRB cases as well as Board policy and cited changes to the joint employer standard as one of the most significant and controversial issues before the Board at that time.

Subcommittee examines potential changes to the NLRB's joint employer standard

On September 9, 2014, the HELP Subcommittee held a hearing on potential changes to the NLRB's joint employer standard titled "Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?" Witnesses at the hearing were Mr. Todd Duffield, Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart, Atlanta, Georgia; Mr. Clint Ehlers, President, FASTSIGNS of Lancaster and Willow Grove, Lancaster and Willow Grove, Pennsylvania, testifying on behalf of the International Franchise Association; Mr. Harris Freeman, Professor, Western New England University School of Law, Springfield, Massachusetts; Ms. Catherine Monson, Chief Executive Officer, FASTSIGNS International, Inc., Carrollton, Texas, testifying on behalf of the International Franchise Association; and Mrs. Jagruti Panwala, owner of multiple hotel franchises in the northeastern United States, Bensalem, Pennsylvania. Witnesses spoke about how an expanded joint em-

ployer standard would negatively impact franchises and other small businesses.

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Subcommittee field hearing in Mobile, Alabama

On August 25, 2015, the HELP Subcommittee held a field hearing titled "Redefining 'Employer' and the Impact on Alabama's Workers and Small Business Owners" in Mobile, Alabama. Witnesses at this hearing were Mr. Marcel Debruge, Burr & Forman LLP, Birmingham, Alabama; Mr. Chris Holmes, CEO, CLH Development Holdings, Inc., Tallahassee, Florida; and Colonel Steve Carey, Owner and Operator, CertaPro Painters of Mobile & Baldwin Counties, Daphne, Alabama, testifying on behalf of the Coalition to Save Local Businesses and the International Franchise Association. Witnesses testified an expanded joint employer standard would threaten the independence of small businesses in Alabama and deter franchisors from licensing new franchisees.

Subcommittee field hearing in Savannah, Georgia

On August 27, 2015, the HELP Subcommittee held a field hearing titled "Redefining 'Employer' and the Impact on Georgia's Workers and Small Business Owners" in Savannah, Georgia, regarding the NLRB's joint employer standard. Witnesses at this hearing were Mr. Jeffrey Mintz, Shareholder, Littler Mendelson P.C., Atlanta, Georgia; Mr. Kalpesh "Kal" Patel, President and COO, Image Hotels, Inc., Pooler, Georgia; Mr. Alex Salgueiro, Savannah Restaurants Corp., Savannah, Georgia; and Mr. Fred Weir, President, Meadowbrook Restaurant Company Inc., Cumming, Georgia, testifying on behalf of the Coalition to Save Local Businesses and the International Franchise Association. Witnesses testified an expanded joint employer standard would hurt small business growth in Georgia and create significant barriers to entry for potential franchise owners.

H.R. 3459, Protecting Local Business Opportunity Act, introduced

On September 9, 2015, Representative John Kline (R–MN), Chairman of the Committee on Education and the Workforce, introduced the *Protecting Local Business Opportunity Act* (H.R. 3459). Recognizing the threat to small businesses posed by the NLRB's decision in *Browning-Ferris Industries of California, Inc. (BFI)*,[1] the legislation amends the NLRA to restore the long-held standard that two or more employers can only be considered joint employers for purposes of the Act if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate.

Senator Lamar Alexander (R–TN), Chairman of the Senate Committee on Health, Education, Labor, and Pensions, introduced companion legislation, S. 2015, on the same day.

Legislative hearing on H.R. 3459, Protecting Local Business Opportunity Act

On September 29, 2015, the HELP Subcommittee held a legislative hearing on H.R. 3459, the *Protecting Local Business Oppor-*

[1] 362 NLRB No. 186 (2015).

tunity Act. Witnesses at the hearing were Mr. Ed Braddy, President, Winlee Foods, LLC, Timonium, Maryland, testifying on behalf of himself and the National Franchisee Association; Mr. Kevin Cole, CEO, Ennis Electric Company, Inc., Manassas, Virginia, testifying on behalf of the Independent Electrical Contractors; Mr. Charles Cohen, former Member of the NLRB and Senior Counsel, Morgan, Lewis & Bockius, LLP, Washington, D.C.; Ms. Mara Fortin, President and CEO, Nothing Bundt Cakes, San Diego, California, testifying on behalf of herself and the Coalition to Save Local Businesses; Mr. Michael Harper, Professor, Boston University School of Law, Boston, Massachusetts; and Dr. Anne Lofaso, Professor, West Virginia University College of Law, Morgantown, West Virginia. Witnesses testified H.R. 3459 would restore the joint employer standard that had worked well for workers and business owners for decades and would protect opportunities for small business growth.

Committee passes H.R. 3459, Protecting Local Business Opportunity Act

On October 28, 2015, the Committee on Education and the Workforce considered H.R. 3459, the *Protecting Local Business Opportunity Act.* Representative Buddy Carter (R–GA) offered an amendment in the nature of a substitute, making a technical change to clarify a reference to "employers" in the Act. The Committee voted to adopt the amendment in the nature of a substitute by voice vote. Five additional amendments were offered and ruled out of order, as they were non-germane to the underlying legislation. The Committee favorably reported H.R. 3459, as amended, to the House of Representatives by a vote of 21–15.

SUMMARY

The *Protecting Local Business Opportunity Act*, will codify the NLRB's previous "joint employer" standard used for decades prior to the Board's decision in *BFI* on August 27, 2015. The bill amends the NLRA to provide that two or more employees may be considered joint employers under the NLRA only if each shares and exercises actual, direct, and immediate control over essential terms and conditions of employment.

COMMITTEE VIEWS

BACKGROUND

In 1935, Congress passed the NLRA, guaranteeing the right of most private sector employees to organize and select their own representatives.[2] The NLRA established the NLRB, an independent federal agency, to fulfill two principle functions: (1) to prevent and remedy employer and union unlawful acts, called "unfair labor practices" (ULPs), and (2) to determine by secret ballot election whether employees wish to be represented by a union. In deter-

[2] The NLRA does not cover all employees and employers in the United States. For example, public sector employers (state, local, and federal employees), employers covered by the *Railway Labor Act* (airlines and railroads), agricultural laborers, and supervisors are not covered by the Act. 29 U.S.C. § 152(2)–(3).

mining whether employees wish to be represented by a union, the NLRA is wholly neutral.[3]

In 1947, Congress passed the most significant amendment to the NLRA, the *Taft-Hartley Act*,[4] abandoning "the policy of affirmatively encouraging the spread of collective bargaining . . . [and] striking a new balance between protection of the right to self-organization and various opposing claims."[5] The *Taft-Hartley Act* clarified that employees have the right to refrain from participating in union activity,[6] prohibited unions from certain practices to coerce employees or employers,[7] codified employer free speech,[8] and made changes to the determination of bargaining units.[9]

Previous joint employer standard

Prior to *BFI*, the NLRB used a long-held and well-established standard to determine whether two separate entities should be considered joint employers. This standard analyzed whether alleged joint employers shared control over or co-determined the essential terms and conditions of employment, including hiring, firing, discipline, supervision, and direction of employees.[10] Notably, the Board required this control to be actual, direct, and immediate for finding joint employer status.[11]

At the legislative hearing on H.R. 3459, former Board Member Charles Cohen described the previous standard as follows:

> *The Board's prior standard struck an appropriate balance between a company's right to manage its relationships with its contractors and suppliers, and the right of employees to organize a union and to have an employer at the bargaining table that is able to engage in meaningful collective bargaining. That standard ensured that a company was at the bargaining table if it exercised actual control over the terms and conditions of employment of its contractor's employees, as opposed to potential or indirect control through the terms of the business agreement between the company and its contractor.*[12]

BFI DECISION

In *BFI*, a Teamsters local sought to organize recycling sorters directly employed by Leadpoint Business Services (Leadpoint), a subcontractor of BFI. The Teamsters asserted BFI was a joint em-

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[3] *NLRB* v. *Savair Mfg*., 414 U.S. 270, 278 (1973).
[4] 29 U.S.C. § 141 *et seq*.
[5] Archibald Cox, *Some Aspects of the Labor Management Relations Act of 1947*, 61 Harv. L. Rev. 1, 4 (1947).
[6] 29 U.S.C. § 157.
[7] *Id.* § 158(b).
[8] *Id.* § 158(c).
[9] *Id.* § 159(d).
[10] *TLI, Inc*., 271 NLRB 798. 798–99 (1984), *overruled by BFI*, 362 NLRB No. 186 (Aug. 27, 2015).
[11] *Airborne Express*, 338 NLRB 597, 597 n.1 (2002) ("essential element in [joint employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate.), *overruled by BFI*, 362 NLRB No. 186 (Aug. 27, 2015); *AM Prop. Holding Corp*., 350 NLRB 998, 1000 (2007) ("In assessing whether a joint employer relationship exists, the Board . . . looks to the actual practice of the parties."), *overruled by BFI*, 362 NLRB No. 186 (Aug. 27, 2015).
[12] *Protecting Local Business Opportunity Act: Hearing on H.R. 3459 Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. (Sept. 29, 2015) (written testimony of Charles I. Cohen at 3) [hereinafter Cohen Written Testimony].

ployer with Leadpoint. The NLRB regional director applied the established joint employer standard and found BFI did not exert sufficient control over Leadpoint's employees to be a joint employer. The regional director directed an election with Leadpoint as the sole employer, and the Teamsters appealed.

On appeal, the Board adopted a new, broader standard and found that BFI was a joint employer with Leadpoint. The Board held that two or more entities are joint employers if (1) there is a common-law employment relationship with the employees in question and (2) the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.[13] The Board rejected the previous requirement that the joint employer's control be actual, direct, and immediate, specifically overruling three decades of Board precedent.[14] Instead, the "right to control," even if it is not actually exercised, is now evidence of joint employer status.[15] At the legislative hearing on H.R. 3459, former Board Member Cohen noted that under the new standard, "a joint employer relationship may be found based on the *mere potential* to control terms and conditions of employment, even if that control is *indirect* and/or *unexercised*." [16]

BFI dissenting opinion

In response to the three-member majority's decision, NLRB Members Phillip A. Miscimarra and Harry I. Johnson, III, wrote a scathing dissent. They noted that not only was the majority decision a radical departure from the current standard, but also that it has the potential to reach all manner of industries and greatly disrupt labor-management relations.

Board Members Miscimarra and Johnson warned:

> *In sum, today's majority holding does not represent a "return to the traditional test used by the Board," as our colleagues claim even while admitting that the Board has never before described or articulated the test they announce today. Contrary to their characterization, the new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor or successor, creditor-debtor, and contractor-consumer business relationships under the Act. In addition, because the commerce data applicable to joint employers is combined for jurisdictional purposes, the Act's coverage will extend to small businesses whose separate operations and employees have until now not been subject to Board jurisdiction. [W]e believe the majority impermissibly exceeds our statutory authority, misreads and departs from prior case law, and subverts traditional common-law agency principles. The result is a new test that confuses the definition of a joint employer and will predictably produce broad-based instability in bargaining relationships. It will do violence as well to other requirements imposed by the Act, notably including*

[13] *BFI*, 362 NLRB No. 186, slip op. at 2 (2015).
[14] *Id.* at 16.
[15] *Id.*
[16] Cohen WrittenTestimony at 1–2 (emphasis in the original).

the secondary boycott protection that Congress afforded to neutral employers.[17]

The dissenters went on to address the substantial impact the decision could have on contract negotiations:

> *Collective bargaining was intended by Congress to be a process that could conceivably produce agreements. One of the key analytical problems in widening the net of "who must bargain" is that, at some point, agreements predictably will not be achievable because different parties involuntarily thrown together as the "bargainers" under the majority's new test will predictably have widely divergent interests. Today's marked expansion of bargaining obligations to other business entities threatens to destabilize existing bargaining relationships and complicate new ones. Even if one takes an extremely simplistic user-supplier scenario, the new standard's conferral of joint-employer status—making many clients an "employer" of contractor employees, while making contractors an "employer" jointly with the clients—will produce bargaining relationships and problems unlike any that have existed in the Board's entire 80-year history which clearly were never contemplated or intended by Congress.*[18]

CONSEQUENCES OF THE NEW JOINT EMPLOYER STANDARD

The *BFI* decision will have far-reaching consequences on labor-management relations and the U.S. economy. While the framers of the NLRA never envisioned such a broad standard, *BFI* will benefit unions at the expense of small businesses on the picket line, at the bargaining table, and before the Board. The disastrous results—fewer jobs, greater corporate control over local businesses, and the disruption of commercial activity—will be reflected throughout the economy.

Expanded union power

Unions have long sought a broader test to protect "concerted activity"[19] and to bring more parties to the bargaining table. Prior to *BFI*, there were reasonable limits on union activity against neutral employers, such as secondary boycotts.[20] However, if a previously neutral employer (*i.e.,* a franchisor or contracting company) is deemed a joint employer, a previously illegal secondary boycott would then be NLRA-protected concerted activity. This would allow a union to pressure one of the employers into a neutrality agreement or voluntary recognition.[21]

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[17] *BFI*, 362 NLRB No. 186, slip op. at 23–24 (Miscimarra and Johnson, Members, dissenting).
[18] *Id.* at 38.
[19] *See* 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .".).
[20] *See Id.* § 158(b)(4). In a secondary boycott, a union and its members refuse to work for, purchase from, or handle the products of a business with which the union has a dispute.
[21] A "neutrality agreement" is a contract between a union and an employer under which the employer agrees to support a union's attempt to organize its workforce. "Voluntary recognition" is when employees persuade an employer to voluntarily recognize a union after showing majority support by signed authorization cards or other means.

Former Board Member Charles Cohen, testifying before the HELP Subcommittee, explained how BFI undermines the NLRA's policy on secondary boycotts:

> *In 1947, Congress explicitly amended the NLRA to prohibit "secondary" boycotts and picketing directed at neutral employers. Congress intended for secondary or neutral employers not to be drawn into labor disputes between an employer and its own employees. Now, in a single decision wholly unrelated to those secondary boycott provisions, the Board has undercut those very provisions by expanding the universe of "employers" that automatically lose neutral status based on their commercial relationship with a third party. . . . [O]nce deemed an "employer," a formerly neutral company can be subject to union pressures at all of that company's operations throughout the United States and not just the single site or area where the joint employer liability originated.*[22]

Labor attorney Jeffrey Mintz, testifying before the HELP Subcommittee in Savannah, Georgia, also noted how expanding the joint employer standard will permit what were previously considered to be prohibited secondary boycotts:

> *A business not previously exposed to labor disputes involving the employees of a business with which they engaged could become embroiled under the proposed standard. The NLRA generally permits unions to use economic weapons such as strikes, pickets and boycotts at an employer's facilities if it has a labor dispute with the employer. However, the NLRA prohibits unions from using such economic weapons against "neutral" third parties. Where, however, a joint employer relationship exists between the employer directly involved in the labor dispute and a secondary employer, the joint employer is considered an "ally" of the primary employer, and consequently, loses the NLRA protection against union pressure. See, e.g., Teamsters Local 557, 338 NLRB 896 (2003) (noting that third party loses its neutrality where it exercises substantial control over picketers' terms of employment).*[23]

As discussed in the *BFI* dissent, with more parties at the table, unions can force employers with opposing interests to compete against one another. For example, a contractor might want greater control over work hours while the contracting employer's primary concern is production. In such a situation, collective bargaining will now pit employers against each other to the union's advantage. Mr. Cohen indicated such negotiations are unworkable:

> *Now that two or more employers may be swept into union negotiations, either on all mandatory subjects of bargaining or perhaps only some, the Board has provided no guidance for how such bargaining is to work in practice. For in-*

[22] Cohen Written Testimony at 5 (citation omitted) (emphasis in original).

[23] *Redefining "Employer" and the Impact on Georgia's Workers and Small Business Owners: Field Hearing in Savannah, Georgia, Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce,* 114th Cong. (Aug. 27, 2015) (written testimony of Jeffrey Mintz at 9) [hereinafter Mintz Written Testimony].

> *stance, if the two or more putative employers have conflicting financial or commercial interests—as they often do—how are they to bargain a single collective bargaining agreement with a union?* [24]

New barriers for contractors

The economic benefits of contract work will be greatly diminished by the new joint employer standard. For instance, many manufacturing plants contract out janitorial work so that they can efficiently focus on manufacturing. Under the new joint employer standard, however, the manufacturing company may be liable for the janitorial company's employment actions and would be forced to bargain with the janitorial company's employees. This would greatly reduce the benefits of contracting out work and make the manufacturing company less efficient as a result, which in turns threatens economic growth and job creation.[25]

Additionally, the threat of joint liability will stop many contractors from working with new or small subcontractors. Kevin Cole, CEO of the Ennis Electric Company, speaking on behalf of the Independent Electrical Contractors, testified to this at the legislative hearing:

> *This new standard . . . prevents us from working with certain start-ups or new small businesses that may have a limited track record. For example, my company will take on certain small businesses as subcontractors, which will often times be owned by minorities or women, and help mentor them on certain projects. With this new standard, I'm now less likely to take on that risk. I am also less likely to bid on federal contracts over $1.5 million, under which the Federal Acquisition Regulation (FAR) system mandates I subcontract with small businesses.*[26]

Destruction of the modern franchise model

BFI will also irreparably disrupt the franchise model. Applying the new standard, franchisors may be joint employers with their franchisees based on indirect control of the franchisees' operations. Thus, the NLRB's expanded definition of joint employer will eliminate the primary benefit of the franchise system, which gives franchise small business owners complete discretion over their workforce while also enjoying the advantages of associating with a franchisor's brand name. With franchisors and franchisees now deemed joint employers, the franchisor's potential liabilities will go up, requiring increased involvement in franchisee stores. In addition, a franchisor deemed to be a joint employer will also now have to participate in collective bargaining with any of its franchisees that become unionized. These added liabilities and responsibilities will reduce franchisees' independence and increase costs for the

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[24] Cohen Written Testimony at 4.

[25] *See, e.g.,* Letter from Joe Trauger, Vice President, Human Resources Policy, National Association of Manufacturers, to the Honorable John Kline, Chairman, House Education and the Workforce Committee (Oct. 26, 2015).

[26] *Protecting Local Business Opportunity Act: Hearing on H.R. 3459 Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. (Sept. 29, 2015) (written testimony of Kevin Cole at 3).

franchisor, costs that will transferred to small business owners and consumers.

Furthermore, because of these increased liabilities, franchisors will be more restrictive with their franchise sales. They will likely require greater experience and resources from new franchisees, thereby reducing new small businesses opportunities under the franchise model. This will mean fewer opportunities for entrepreneurs, fewer businesses serving local communities, and less job growth in those communities. Testifying prior to the *BFI* decision at the HELP Subcommittee hearing on June 24, 2014, Andrew F. Puzder, CEO of CKE Restaurants Holdings, Inc., summarized the significant lost opportunities that will result from expanding the joint employer standard:

> *The NLRB's current standard has been in place for over 30 years. During that time the franchise business model has proven enormously successful at enabling individuals to own and operate their own businesses, creating substantial economic growth and jobs. The franchise model has provided countless entrepreneurial opportunities for women, minorities, and veterans. If the NLRB were to change that standard so as to hold franchisors responsible as joint employers with their franchisees, it would significantly and negatively impact both the franchise business model and the small businessmen and businesswomen who have invested the time, energy and money in the hopes of becoming successful franchisees . . . .*[27]

During hearings, the HELP Subcommittee heard from legal experts and franchise small business owners how *BFI* would cause harm to the franchise system. At the legislative hearing, Ed Braddy, a Burger King franchisee who owns and operates a restaurant in Baltimore, Maryland, warned "the new joint employer standard will destroy smaller restaurant operators like me." According to Mr. Braddy, the new standard will result in franchisors repurchasing franchises, consolidating operations by selecting larger operators, or taking away the independence of franchisees by implementing detailed franchisee and employee policies, making him "no more than a glorified manager in [his] own restaurant."[28] Mr. Braddy concluded:

> *I am concerned that those who created this new standard believe it will help the "little guy" and put more mandates on large corporations. As a one-store operator in an inner-city neighborhood, I can tell you that nothing is further from the truth. The new joint employer standard will hurt me, my employees and the neighborhood I support. Please restore the definition to require actual, direct, immediate control over the essential terms of employment.*[29]

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[27] *What Should Workers and Employers Expect Next From the National Labor Relations Board?: Hearing Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce,* 113th Cong. (June 24, 2014) (written testimony of Andrew F. Puzder at 1).

[28] *Protecting Local Business Opportunity Act: Hearing on H.R. 3459 Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce,* 114th Cong. (Sept. 29, 2015) (written testimony of Ed Braddy at 3).

[29] *Id.* at 4.

Mara Fortin, owner of several Nothing Bundt Cakes franchises and speaking on behalf of the Coalition to Save Local Businesses, testified at the legislative hearing that due to the *BFI* decision, she could lose control of her own business. Ms. Fortin cautioned:

> *My franchisor had nothing to do with hiring my employees or setting their wages and benefits. My franchisor has nothing to do with the day-to-day operations of my small business. But if they are to be considered a joint employer, my franchisor may decide to exert more control over my business, relegating me to a middle manager role for which I did not sign up.*[30]

At the HELP Subcommittee hearing on September 9, 2014, Jagruti Panwala, an independent owner and operator of five hotels in the northeastern United States, also testified about her concerns that expanding the joint employer standard could cause her to lose control of her business. Mrs. Panwala stated:

> *At its very core, any decision imputing liability for franchisees' employment decisions onto the franchisor, may cause franchisors to impose control over the daily operations of each business in an effort to mitigate against any claims. Essentially, I would no longer be in business for myself. Moreover, with a more hands-on approach to the franchise relationship, franchisors may require an added presence at my properties. They may insist on reviewing employment matters in advance and try to direct the decision making process. If this were to happen, I would essentially become an employee of the parent corporation and no longer an entrepreneur. I would lose the equity I have built in my business overnight based on the decision of an unelected bureaucrat in Washington.*[31]

Clint Ehlers, a FASTSIGNS franchisee also testifying at the September 9, 2014, hearing, expressed concerns about the threat of expanding the joint employer standard to the independence of his small business:

> *I bought a franchise so that I could run my own business, not so that I could be a part of someone else's. I take pride in my success, and hold myself accountable for my failures. . . . The real impact of a new standard that considers my franchisor the joint employer of my workers is that I will have less independence and less control over the business that I worked so hard to build.*[32]

Retired Air Force Colonel and current CertaPro Paint franchisee Steve Carey explained at the Mobile, Alabama, field hearing how the new joint employer standard would reduce opportunities for prospective small business owners:

> *If CertaPro is going to be responsible for the liabilities arising out of the operation of the business, and oversight*

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[30] *Id.* (written testimony of Mara Fortin at 6).

[31] *Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?: Hearing Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce,* 113th Cong. (Sept. 9, 2014) (written testimony of Jagruti Panwala at 3–4) (emphasis in original).

[32] *Id.* (written testimony of Clint Ehlers at 5).

of the workforce, why would they hand control over to me? Many businesses may feel this way and opportunities for local business ownership will decline dramatically. I know how fortunate I am to own my business after my long service in the military. While CertaPro provides advice and support, I am the decision-maker when it comes to my business. The success or failure of my business is, essentially, all on me—and that's exactly what I signed up for. It would be a real shame to take these opportunities away from other veterans looking to start their "second life" as a local franchise business owner as well.[33]

Also testifying in Mobile, Alabama, Firehouse Subs franchisee Chris Holmes expressed similar concerns:

While it is quite clear that the NLRB wants to negatively impact the business model of some of America's largest companies through this action, it is ironic that what they will actually be doing is hurting America's smallest businesses. The real effect will be small franchisee operators essentially losing their business to an often larger franchisor—making the large company larger and the franchisee extinct. If your goal was to push small business operators to the curb and stifle investment into new start-up businesses, you couldn't come up with a more effective tool than this joint employer decision.[34]

At the Savannah, Georgia, field hearing, Kal Patel, a hotel franchisee and past board member of the Asian American Hotel Owners Association (AAHOA), testified about the threat of a new joint employer standard to the franchise model:

As an hotelier, I have come to depend on the franchise model as the most advantageous means to small business ownership. Consequently, I am deeply concerned that the NLRB's efforts to expand the definition of joint employer status will transfer control of small businesses from independent hotel owners and operators to large corporations. An expanded joint employer legal standard intimated by the NLRB would compel franchisors to take an active role in staffing decisions due to the newly manufactured potential for liability. Franchisees, including the majority of AAHOA members, would lose independence in decision making and would effectively become employees of the franchisor because they would be forced to follow someone else's directives.[35]

Alex Salgueiro, a Burger King franchisee, agreed. He concluded, "The new joint employer standard as proposed by the NLRB will

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[33] *Redefining "Employer" and the Impact on Alabama's Workers and Small Business Owners: Field Hearing in Mobile, Alabama, Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. (Aug. 25, 2015) (written testimony of Steve Carey at 4).

[34] *Id.* (written testimony of Chris Holmes at 3).

[35] *Redefining "Employer" and the Impact on Georgia's Workers and Small Business Owners: Field Hearing in Savannah, Georgia, Before the House Subcomm. on Health, Employment, Labor and Pensions, Comm. on Educ. and the Workforce,* 114th Cong. (Aug. 27, 2015) (written testimony of Kal Patel at 3).

quickly destroy a successful business model which has been in place for decades."[36]

Fred Weir, a Zaxby's franchisee, also spoke about the negative consequences of the new joint employer standard. He stated:

> *Mr. Chairman, the new joint employer proposal from the NLRB would drain the life from the hundreds of thousands of small businesses that operate just like mine. The new standard would force operational changes on the franchisor, and on franchisees. Since the NLRB appears determined to change the measure of who controls the business, the balance of control between franchisor and franchisee will have to change. The franchisor's magnified liability will mean substantially diminished control for the franchisee.*[37]

In addition to the concerns expressed by franchisees, labor attorney Marcel Debruge argued at the Mobile, Alabama, field hearing that the new standard was ill-conceived from the perspective of management and franchisors. He cautioned, "[E]mployers are all-but-guaranteed to incur greater legal costs because they would share liability for a temporary employee or franchisee's actions."[38]

Likewise, at the Savannah, Georgia, field hearing, labor attorney Jeffrey Mintz reasoned:

> *Disturbing the well-established standard applied to determine whether a joint employer relationship exists and, more particularly, opting for a broader, ambiguous standard, would require many employers to revisit, analyze and likely revise their current business practices which could negatively impact many other businesses and their employees.*[39]

The result of such revisions would likely be increased franchisor control and fewer locally owned franchises. As Catherine Monson, CEO of FASTSIGNS International, explained in her testimony at the September 9, 2014, hearing:

> *Faced with potential liability for their franchisees' employment decisions, franchisors may be forced to exercise operational control over all the employment and human resources decisions of franchisees, undermining the franchise business model. . . . This increased franchisor control would significantly disrupt the franchise relationship. Franchisors . . . would have less incentive to participate in the business model going-forward if they were responsible for areas of operation historically reserved to and exercised by their franchisees.*[40]

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[36] *Id.* (written testimony of Alex Salgueiro at 3).

[37] *Id.* (written testimony of Fred Weir at 3).

[38] *Redefining "Employer" and the Impact on Alabama's Workers and Small Business Owners: Field Hearing in Mobile, Alabama, Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce,* 114th Cong. (Aug. 25, 2015) (written testimony of Marcel Debruge at 5) [hereinafter Debruge Written Testimony].

[39] Mintz Written Testimony at 2.

[40] *Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?: Hearing Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce,* 113th Cong. (Sept. 9, 2014) (written testimony of Catherine Monson at 4).

Former NLRB Member Cohen noted at the legislative hearing franchisors may respond in an alternative way. He argued the new standard would likely discourage franchisors from "promoting special hiring programs" for underrepresented groups, such as veterans, out of fear that these programs would be used as evidence of joint employer status with their franchisees.[41]

Other business relationships disrupted by BFI

Franchises and contractors will not be the only ones hurt by the *BFI* decision. As Mr. Cohen testified, "This new ambiguous standard has the potential to apply to a wide variety of business relationships."[42] In their *BFI* dissent, Board Members Miscimarra and Johnson discussed the numerous industries and businesses that may be jeopardized:

The number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited:

- *Insurance companies that require employers to take certain actions with employees in order to comply with policy requirements for safety, security, health, etc.;*
- *Franchisors . . .;*
- *Banks or other lenders whose financing terms may require certain performance measurements;*
- *Any company that negotiates specific quality or product requirements;*
- *Any company that grants access to its facilities for a contractor to perform services there, and then continuously regulates the contractor's access to the property for the duration of the contract;*
- *Any company that is concerned about the quality of the contracted services;*
- *Consumers or small businesses who dictate times, manner, and some methods of performance of contracts.*[43]

Testifying before the HELP Subcommittee, labor attorney Jeffrey Mintz also warned of the decision's vast implications. As he noted, "In addition to franchise businesses, a revised standard would affect relationships and have potential economic consequence within supply chains, dealer networks and staffing companies."[44] Labor attorney Marcel Debruge further explained to the subcommittee that many automakers rely on the flexibility of temporary workers to survive during economic downturns, but they will likely be unable to continue this practice under the new joint employer standard.[45] The new standard thus has the potential to interfere with countless business relationships.

POST-BFI CASES

The Board will soon begin applying the expanded joint employer standard to subsequent cases, as the NLRB general counsel and regional directors already have. For example, on November 5, 2015,

[41] Cohen Written Testimony at 5.
[42] *Id.* at 2.
[43] *BFI, 362 NLRB No. 186, slip op. at 37 (Miscimarra and Johnson, Members, dissenting).*
[44] Mintz Written Testimony at 7.
[45] Debruge Written Testimony at 4–5.

the Board granted review of a regional director's dismissal of the union's petition seeking to represent workers it claimed were jointly employed by a construction company and a staffing company.[46] The grant of review indicates the Board may reverse the regional director's decision and find joint employer status. In April 2015, the NLRB's Associate General Counsel for the Division of Advice issued an advice memorandum in *Nutritionality, Inc. d/b/a/ Freshii*, concluding the franchisor was not a joint employer with its franchisees under both the pre-*BFI* standard and the new standard proposed by the general counsel in *BFI*.[47] However, the memorandum tells us little about future Board decisions. As former Board member Charles Cohen pointed out to the HELP Subcommittee, the memorandum is not binding on the Board and has no precedential value.[48] A single, fact-specific, non-binding advice memorandum is not evidence of anything but the narrow, prosecutorial decision made in that case. Moreover, this same general counsel has found merit and issued complaints in nearly 100 unfair labor practice charges alleging McDonald's USA LLC is a joint employer with its franchisees.[49]

LEGISLATION IS NEEDED TO ADDRESS THE ACTIONS OF THE NATIONAL LABOR RELATIONS BOARD

Congress is responsible for establishing and revising standards in federal labor law. The NLRB's decision in *BFI* threatens the independence of small businesses and takes away opportunities for many Americans to own a business. The *BFI* decision extends liability to entities that have never been considered joint employers under the NLRA. The *Protecting Local Business Opportunity Act* will return certainty and predictability back to consumers, employees, and employers by reinstating the previous joint employer standard enjoyed for decades prior to *BFI*. H.R. 3459 will clarify that two or more employers will be considered joint employers under the NLRA only if each employer shares and exercises actual, direct, and immediate control over essential terms and conditions of employment.

CONCLUSION

Over the last several years, the NLRB has issued multiple decisions and rules intended to benefit organized labor. By redefining what it means to be a joint employer, the NLRB has discarded decades of labor policy and set a dangerous precedent that will lead to higher costs for consumers, fewer jobs for workers, and less opportunity for individuals to realize the dream of owning a small business. The *Protecting Local Business Opportunity Act* will restore policies in place long before the NLRB's most recent radical decision. This commonsense proposal will roll back a decision that will wreak havoc on working families and small business owners

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[46] *Retro Environmental, Inc./Green JobWorks, LLC*, Case 05-RC-153468 (NLRB Nov. 5, 2015) (order granting petitioner's request for review of regional director's decision and order).

[47] Advice Mem., NLRB Office of the Gen. Counsel, Div. of Advice, Case Nos. 13–CA–134294, 13–CA–138293, and 13–CA–142297 (Apr. 28, 2015).

[48] *Protecting Local Business Opportunity Act: Hearing on H.R. 3459 Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. (Sept. 29, 2015) (oral testimony of Charles Cohen).

[49] *See* NLRB, McDonald's Fact Sheet, https://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet.

across the country. This bill will restore balance to labor relations by preventing the disruption of countless small businesses—franchises, contractors, subcontractors, and other independent businesses—and allow future entrepreneurs to pursue the American Dream.

SECTION-BY-SECTION ANALYSIS

The following is a section-by-section analysis of the *Protecting Local Business Opportunity Act* as reported favorably by the Committee.

Section 1. Provides that the short title is the "Protecting Local Business Opportunity Act."

Section 2. Amends the *National Labor Relations Act* to allow two or more employers to be considered joint employers for purposes of the Act only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate.

EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 3459 codifies the standard used by the Board prior to August 27, 2015, by amending the NLRA to provide that two or more employers are joint employers only if each shares and exercises actual, direct, and immediate control over the essential terms and conditions of employment.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the CBO letter.

EARMARK STATEMENT

H.R. 3459 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House rule XXI.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: October 28, 2015

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 1 Bill: H.R. 3459 Amendment Number: _____

Disposition: Ordered favorably reported to the House, as amended, by a vote of 21 yeas and 15 nays.

Sponsor/Amendment: Mr. Roe - motion to report the bill to the House with an amendment and with the recommendation that the amendment be agreed to, and the bill as amended do pass.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. KLINE (MN) (Chairman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mr. HINOJOSA (TX)		X	
Mrs. FOXX (NC)	X			Mrs. DAVIS (CA)		X	
Mr. HUNTER (CA)	X			Mr. GRIJALVA (AZ)		X	
Mr. ROE (TN)	X			Mr. COURTNEY (CT)		X	
Mr. THOMPSON (PA)	X			Ms. FUDGE (OH)		X	
Mr. WALBERG (MI)	X			Mr. POLIS (CO)		X	
Mr. SALMON (AZ)	X			Mr. SABLAN (MP)		X	
Mr. GUTHRIE (KY)	X			Ms. WILSON (FL)		X	
Mr. ROKITA (IN)	X			Ms. BONAMICI (OR)		X	
Mr. BARLETTA (PA)			X	Mr. POCAN (WI)		X	
Mr. HECK (NV)	X			Mr. TAKANO (CA)		X	
Mr. MESSER (IN)	X			Mr. JEFFRIES (NY)			X
Mr. BYRNE (AL)	X			Ms. CLARK (MA)		X	
Mr. BRAT (VA)	X			Ms. ADAMS (NC)		X	
Mr. CARTER (GA)	X			Mr. DeSAULNIER (CA)		X	
Mr. BISHOP (MI)	X						
Mr. GROTHMAN (WI)	X						
Mr. RUSSELL (OK)	X						
Mr. CURBELO (FL)	X						
Ms. STEFANIK (NY)	X						
Mr. ALLEN (GA)	X						

TOTALS: Aye: 21 No: 15 Not Voting: 2

Total: 38 / Quorum: 13 / Report: 20

(22 R - 16 D)

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House rule XIII, the goal of H.R. 3459 is to protect small businesses such as franchisees and subcontractors by restoring the long-held standard for determining "joint employer" status under the NLRA.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 3459 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The committee estimates that enacting H.R. 3459 does not specifically direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the committee has received the following estimate for H.R. 3459 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 12, 2015.

Hon. JOHN KLINE,
Chairman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3459, the Protecting Local Business Opportunity Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Anthony, who can be reached at 226–2820.

Sincerely,

KEITH HALL.

Enclosure.

H.R. 3459—Protecting Local Business Opportunity Act

H.R. 3459 would amend the National Labor Relations Act (NLRA) to define "joint employer" to mean two or more employers who each share "actual, direct, and immediate control" over the terms and conditions of employment. In a recent ruling by the National Labor Relations Board, the Board concluded a "joint employer" relationship could be established when an employer exercises control over employment matters indirectly or such control is reserved to an employer by contract. In that ruling, the Board found that a company that had contracted with a staffing agency was a "joint employer" of the contract employees because the company had reserved the right to control some of the terms and conditions of their employment in its contract with the staffing agency. The bill would make it less likely that companies with similar contracting arrangements would be considered "joint employers" under the NLRA and, therefore, less likely such companies would be subject to collective bargaining and provisions related to unfair labor practices.

Implementing the bill would not affect the operations of federal and state agencies because the NLRA excludes federal governmental entities as well as states and political subdivisions of states from the definition of "employer" under the act.

Enacting H.R. 3459 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 3459 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2026.

H.R. 3459 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Christina Hawley Anthony. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 3459. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

NATIONAL LABOR RELATIONS ACT

* * * * * * *

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. *Notwithstanding any other provision of this Act, two or more employers may be considered joint employers for purposes of this Act only if each employer shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate.*

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 3 of this Act.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

* * * * * * *

MINORITY VIEWS

In today's increasingly fissured workplace, characterized by a myriad of subcontracting, employee leasing and temporary employment arrangements, "Who is the boss?" is a relevant question when it comes to determining who is accountable for bargaining with workers over the terms and conditions of employment. The "Protecting Local Business Opportunity Act" of 2015 (H.R. 3459) allows joint employers who share or codetermine employment-related decisions, but exercise that control indirectly, to avoid accountability for unfair labor practices or collective bargaining obligations under the National Labor Relations Act (NLRA). Allowing employers who retain the right to control the essential terms and conditions of employment to escape responsibility to bargain collectively with workers, would essentially eliminate the workers' rights under the NLRA.

The bill narrows the definition of "employer" under Section 2(2) of the NLRA (29 U.S.C. 152(2)) to provide that two or more employers are "joint employers" only if their control over the terms and conditions of employment is "actual, direct, and immediate." This would replace the longstanding common law test which provides that an employer is one "who controls or has the right to control" the terms and conditions of employment, even if that "right to control" is not exercised.

This legislation follows closely on the heels of two actions by the NLRB over the past year:

1) The General Counsel of the National Labor Relations Board (NLRB) issued a consolidated complaint against McDonald's USA, as a joint employer, along with its franchisees concerning alleged unfair labor practices in connection with demonstrations as part of the "Fight for $15 and a Union." That case is in the early stages of pre-trial litigation, and its outcome is unknown.[1]

2) The NLRB's August 27, 2015 decision in Browning Ferris Industries (BFI),[2] where the Board reinstituted the common law test for determining whether two or more entities are joint employers.

The *BFI* decision re-established a two-pronged test for determining if two or more entities are joint employers under the NLRA: (1) both are "employers" within the meaning of the common law; and (2) both share or codetermine those matters governing the essential terms and conditions of employment.

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[1] There were 13 complaints issued involving 78 alleged unfair labor practice charges. *See*: "NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers," NLRB Press Release, December 19, 2014.

[2] *Browning Ferris Industries of California and Teamsters Local 350,* 362 NLRB No. 186 (2015).

That test had been in place prior to 1984, but had been systematically eroded though a series of decisions during the Reagan and Bush Administrations that were inconsistent with the common law. For example, a 2002 case held that for an entity to be a joint employer with another employer, it must exercise "*direct* and *immediate*" control. This was a new test that the Board applied without any explanation or even acknowledgment. Moreover, this new test was squarely at odds with the common law definition of employer.[3]

THE PURPORTED NEED FOR LEGISLATION TO PROTECT FRANCHISEES' INDEPENDENCE IS CONTRADICTED BY TESTIMONY AT THE SEPTEMBER 29, 2015 LEGISLATIVE HEARING

The Majority's justification for this legislation is that the *BFI* decision will cause franchisees to lose control over their small businesses, and that the Board's decision thus "threatens to steal the American dream from the owners of the nation's 780,000 franchise businesses and millions of contractors."[4] This argument is premised on the belief that the *BFI* decision established a precedent that will allow the NLRB to decide that McDonald's USA is a joint employer with its franchisees, and therefore all franchisors will become liable as joint employers with their franchisees. In turn, the proponents hypothesize that this would spur franchisors to take over the day-to-day management of their franchisees as a means of limiting the potential liability created by their franchisees. This view is divorced from reality.

First, contrary to the overheated hyperbole that the *BFI* decision is "designed" to "eradicate franchising and irreparably damage every small business built on the franchise model,"[5] the NLRB takes a reasoned, case-by-case approach when assessing whether a franchisor is joint employer. For example, the NLRB's General Counsel (GC) recently determined that Freshii's, a fast-casual restaurant franchisor with over 100 stores in over a dozen countries, would *not* be deemed to be a joint employer of its franchisees, because its control was limited to maintaining brand standards and food quality. Freshii's Operations Manual, which discusses employment policies, is optional. This NLRB guidance was published as an Advice Memorandum.[6]

Second, the argument that franchisees would be swallowed up by their franchisors because of the *BFI* decision was undermined by franchisee testimony at the September 29, 2015, legislative hearing on H.R. 3459 before the Subcommittee on Health, Employment, Labor and Pensions (HELP) of the Committee on Education and the Workforce.

The two franchisee witnesses—a Burger King franchisee and a franchisee who operated six Nothing Bundt Cakes bakeries—testified that they feared the *BFI* decision would cause their franchisors

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[3] *See: Airborne Express,* 338 NLRB 597 (2002) (The essential element in this analysis is whether a putative joint employer's control over employment matters is "direct and immediate.")

[4] Press Release, Education and the Workforce Committee, September 9, 2015, on the introduction of H.R. 3459.

[5] Testimony of Fred Weir, President of Meadowbrook Restaurant Co., Inc., before the Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and the Workforce, U.S. House of Representatives, August 27, 2015, pp. 2. Mr. Weir testified on behalf of the Coalition to Save Local Businesses (CSLB) and the International Franchise Association (IFA).

[6] *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.

to take over employee relations at their franchisees in order to limit the franchisor's joint employer liability. However, in response to questioning, both testified that they have absolute and total control over their employment policies, and that their respective franchisors do not exercise control over their business operations or have the right to exercise such control.

> Statement by Mara Fortin (owner and operator of Nothing Bundt Cakes franchises): "I hire my own workers, set their wages, benefit packages, et cetera. I manage my inventory and I purchase equipment. I pay taxes as my own small business with my own employer identification numbers. And I help my employees when they are in need of assistance.
>
> My franchisor plays no part in any of these key functions that only a true and sole employer performs."
>
> Q. by Rep. Guthrie: "Do you or do [sic] the franchisor hire and fire and determine the work of your employees?"
>
> A. by Mr. Braddy (owner and operator of a Burger King franchise): "I schedule interviews every other Wednesday. I sit down with eight people every other Wednesday. Even though I am not hiring, I do the interviews because I always like to have a waiting list of people who want to work.
>
> So I do all the hiring. I don't allow my managers or my assistants to terminate anyone because I want to make sure that once I let someone go it is for a good reason."
>
> Q. by Rep. Guthrie: "But it is you as the business owner, not the—what role does the franchisor play in any of your—those issues?"
>
> A. by Mr. Braddy: "None at all."
>
> Q. by Rep. Guthrie: "None at all. Thank you. My time expired."

Any unbiased reading of the *BFI* decision would not find these franchisees joint employers with their respective franchisors.

Franchisees also contended that a contracting relationship where there is "potential control" could establish a joint employment liability.

> Testimony of Mr. Braddy: "In fact, the recent NLRB ruling in *Browning-Ferris Industries of California, Inc.*, would allow those who indirectly affect my business—such as my landscapers and waste disposal company—to become my joint employer."
>
> Q. by Rep. Polis: "I also want to go to Ms. Fortin. Now, in your case, from your testimony, you said the real-world consequences of the NLRB's decision is it would lead to consolidation among our franchisors and loss of autonomy for local franchise business operations.
>
> My question is, how do you get that out of the *BFI* case, if it has to do with contractors? Or are you just talking about a hypothetical outcome for other cases that might be pending?"
>
> A. by Ms. Fortin: "I mean, I don't think anyone here can truly answer what is going to happen. I look at words like "indirect," "reserved," "potential." Any contractual relationship at that point is on the table."

It is a misreading of the Majority opinion in the *BFI* case to state that mere "potential control" or that "any contractual relationship" raises the possibility of joint employer liability. In fact, the Board rejected the General Counsel's recommendation that "potential control" of labor relations may be sufficient to ground a joint employer relationship or "where industrial realities" make an entity essential for meaningful bargaining." Rather, the Board Majority adopted the common law test that found the "right to control" labor relations necessary to ground a joint employer relationship if, for instance, such a right is enshrined in a contract between a contractor and sub-contractor. A "right to control" is a legal, not an economic concept.

What has created confusion is a misleading dissent in the *BFI* decision which proclaimed that the Majority opinion had adopted a "potential control" standard that would, among other things, treat parent corporations and their subsidiaries as joint employers. However, the Majority specifically declined to address that circumstance, or franchisor-franchisee law, and in no way adopted a "potential control" test. Instead, as required by the Taft-Hartley Act, the Board tethered joint employer law to the common law and limited its decision to the facts before it.

THE LEGISLATIVE HEARING REVEALED THAT H.R. 3459 CREATES A PERVERSE INCENTIVE THAT WOULD UNDERMINE FRANCHISEE INDEPENDENCE

Two witnesses at the September 29 legislative hearing pointed out that an unintended effect of H.R. 3459 is that it would likely result in franchisors exercising more control over their franchisees—the very consequence that the Majority says it seeks to avoid. Dr. Ann Lofaso, a Professor of Law from West Virginia University, testified:

> "[O]ne unintended and perverse effect of the proposed legislation is that it can embolden franchisors to take more control over the franchisee's labor relations because it, the franchisor, would have less liability concerns."

Michael Harper, professor of law at Boston University and reporter for the recently completed *Restatement of Employment Law*, testified:

> "I think that this legislation, if passed, would send a message that you can—to the franchisors or larger businesses—that you can control the employees of the franchisees if you use the franchisee owners, like Ms. Fortin, as a middle manager."

Thus, this bill reduces a franchisor's potential liability as a joint employer and gives franchisors greater latitude to control the employment practices of their franchisees. Freed from liability as a joint employer, this bill will open the door for franchisors to exercise greater control over franchisees than they could exercise under the common law standard.

As a corollary, the *BFI* decision benefits franchisees who want autonomy to manage their employment practices, because franchisors who involve themselves in their franchisees' labor rela-

tions will risk incurring a bargaining obligation and/or other liability under the NLRA. That potential liability will incentivize franchisors to distance themselves from control over their franchisees' labor relations.

That point was underscored by Professor Harper in his written testimony:

> "[t]he *BFI* decision should help protect the decentralized franchise model by encouraging franchisors to continue to rely on independent franchisee control of employment decisions."

FRANCHISING FLOURISHED UNDER THE TRADITIONAL JOINT EMPLOYER TEST PRIOR TO 1984

The *BFI* decision does not "upend a franchise model that has worked well for decades."[7] Prior to 1984, franchisors faced the same legal landscape on the joint employer issue as that established under *BFI*, and none of the disasters arose that are being predicted by the advocates of this legislation. In fact, the franchising model flourished during that time. As Professor Harper testified, this fact undermines the claim that the *BFI* decision somehow threatens franchising or other efficient forms of business cooperation.

Moreover, if a franchisor wants to avoid joint employer status, it can simply modify its franchising agreement so that it does not have sufficient control of the employees' terms and conditions to incur an obligation to bargain. As Professor Harper testified at the hearing:

> "If a franchisor continues to delegate authority over all employment decisions to its franchisees, and retains no right to control scheduling or work pace or other conditions of employment, it cannot be subject to bargaining obligations."

THE HISTORY OF THE NLRB'S JOINT EMPLOYER STANDARD IS ROOTED IN THE TAFT-HARTLEY ACT OF 1947

Among the "employers" who may be joint employers under the NLRA are those employers who, while contracting with an otherwise independent company, have retained for themselves sufficient control over the "essential terms and conditions of employment" that the two companies share or codetermine those matters.[8]

The policy question is how much control is required for an entity to be deemed an "employer". Congress and the courts have relied upon the common law to help answer the question of who is an "employer" in an employment relationship.

The legislative history of the Taft-Hartley Act of 1947, a law intended to reduce the economic power of unions, stated that the definition of an employment relationship should be governed by the

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[7] U.S. Representative Phil Roe (R–TN) Press Release, August 27, 2015.

[8] "Essential terms and conditions of employment" include hiring, firing, discipline, supervision, and direction. It can also include dictating the number of employees to be supplied; controlling scheduling, seniority, and overtime; assigning work; and determining the manner and method of work performance.

common law principles of agency.[9] In 1968, the Supreme Court stated that the "common law agency test" should be applied in establishing whether there is an employment relationship under the NLRA.[10]

As far back as 1933, the *Restatement of Agency* defines an employer as one who "controls or *has the right to control* the physical conduct of the other in the performance of the service.[11] *Thus, under the common law, the employer does not need to exercise direct and immediate control in order to determine the essential terms and conditions of employment,* because the putative employer (the one purchasing labor services from another entity) can indirectly determine working conditions through contractual arrangements, such as setting salary caps on what the supplier of labor may pay its employees—whether such control is exercised or not.

In 1982, the Third Circuit Court of Appeals reaffirmed that where two or more employers exert significant control over the same employees and the evidence shows that they share or co-determine those matters governing essential terms and conditions of employment, they constitute "joint employers" within the meaning of the NLRA.[12] Yet two years later, beginning in 1984 (during the Reagan era) and for the next 30 years the NLRB began to narrow the joint employer standard to eliminate any consideration of evidence of the putative employer's right to control, and by 2002 (under the Bush administration) the NLRB required that the putative employer's control must be "direct and immediate." [13]

Given the explosive growth of outsourcing, leasing and contingent work, and its responsibility to apply the NLRA to the "complexities of industrial life," it was prudent for the NLRB to re-examine the joint employer test in *BFI* case and determine whether the traditional test for a joint employer that was in place prior to 1984 should be reinstated.

THE BFI DECISION APPROPRIATELY REJECTED THE "DIRECT AND IMMEDIATE CONTROL" TEST AND REINSTATED THE LONGSTANDING AND MORE PREDICTABLE COMMON LAW TEST OF THE "RIGHT TO CONTROL" TEST

BFI operates a municipal recycling facility in Milpitas, California, but contracted with Leadpoint Business Services to hire many of the workers who carry out the sorting of recyclable materials under a cost reimbursement contract. BFI also employs 60 of its own employees at this facility. Teamsters Local Union sought to organize 240 Leadpoint workers, and named BFI as a joint employer in the petition for an election.

In determining whether BFI and Leadpoint were joint employers, the NLRB followed the common law agency test as set forth in the

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[9] Congressional Record, Senate, at 1575–1576 (1947), *reprinted* in 2 Legislative History of the Labor Management Relations Act, 1947, 51 (1948), and House Conf. Rep. No. 510 on H.R. 3020 at 36 (1947) *reprinted in* 1 Legislative History of the Labor Management Relations Act, 1947, at 540 (1948).

[10] *NLRB v United Insurance* 390 U.S. 254 (1968).

[11] *See* RESTATEMENT OF THE LAW OF AGENCY 1933, § 2(1); *see also* RESTATEMENT (SECOND) OF AGENCY 1958, § 2(1).

[12] *NLRB v. Browning Ferris Industries of Pennsylvania, Inc.* 691 F.2d 1117, 1122–1123 (3rd Cir. 1982).

[13] *Airborne Express*, 338 NLRB 597 (2002) (discussing whether a joint employer's control is direct and immediate).

Restatement of Agency. It states that an "employer" is someone who "controls or *has the right to control*" the essential terms and condition of employment.

The NLRB found that BFI, while not directly employing the workers sorting recyclables, capped the maximum wage that Leadpoint could pay to its workers at a rate that could not exceed what BFI paid its own workers doing comparable work. BFI also set the line speed, assigned work to Leadpoint employees ahead of assignments made by Leadpoint, and retained the right to reject the hiring of any Leadpoint employee "for any reason or no reason." As such, BFI codetermined hiring and disciplinary practices. Without compelling BFI to the bargaining table, the NLRB found that an essential party to negotiations would be missing. BFI is now challenging this decision.[14]

Proponents of this legislation dispute that the *BFI* decision merely returns to the pre-1984 holdings based on the common law test, and that pre-1984 cases show that actual control must be exercised in order for there to be a joint employer relationship, *not* simply the right to control. Former NLRB Member Charles Cohen testified at the legislative hearing that in "almost all" of the prior cases there was evidence of actual control by the joint employer. Unfortunately, Mr. Cohen did not provide any citations to support that contention in his testimony, and a review of pre-1984 joint employer cases finds a number where the "right to control" was used as the indicia of control over labor relations.

• In the 1968 *Southland Corporation, d/b/a Speedee 7-Eleven, case*[15] the Board applied the same common law "right to control" test that the Board applied in *BFI* in finding that a franchisor was not a joint employer with a franchisee. The decision stated:

> "We have long held that the critical factor in determining whether a joint employer relationship exists is the control which one party exercises over the labor relations policy of the other. It is immaterial whether this control be actually exercised so long as it may potentially be exercised by virtue of the agreement under which the parties operate."

This case is very similar to the facts and result in *Freshii*. As in *Freshii*, the franchisee was independently responsible for hiring, firing, discipline and all labor relations. Likewise, in both cases there was a very detailed policy manual covering operations and employee relations; however, there was no evidence that the franchisees were required to follow the recommendations contained therein.

• In *Hoskins Ready-Mix Concrete* the Board affirmed that both the actual exercise of control set forth in a contract, as well as the power retained in a contract to exercise "overall supervision and direction" but not exercised, are separate indicia, and are each sufficient to find that an entity is a "co-employer."[16]

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[14] NLRB issued an unfair labor practice complaint against BFI for its refusal to recognize or bargain with the union as a joint employer on October 23, 2015 (32–CA–160759).

[15] 170 NLRB 1332 (1968).

[16] 161 NLRB 1492, 1493 n.2 (1966).

• In *Jewel Tea Co.* a joint employer relationship was found because, although not exercised, a license agreement gave the Licensor "the power to control effectively the hire, discharge, wages, hours, terms and other conditions of employment" of the employees of licensees who conducted retail operations in Jewel Tea Company's retail outlets. The Board stated:

> "That the licensor has not exercised such power is not material, for an operative predicate for establishing a joint employer relationship is a reserved right in the licensor to exercise such control . . ." [17]

These cases show a consistency in reasoning over the breadth of almost seven decades. They also rebut the argument that the Board expanded the definition of an employer beyond its traditional common law moorings.

THE ELEPHANT IN THE ROOM: THE MCDONALD'S CASE

Despite the very narrow focus of the *BFI* decision on a subcontracting relationship, franchisors are whipping up a controversy with their franchisees where none really exists. The *BFI* decision itself may have gone by barely noticed were it not for the unfair labor practice complaints against McDonald's USA and dozens of its franchisees following a series of strikes and protests to increase pressure to raise the minimum wage and secure union representation for McDonald's fast food workers as part of the "Fight for 15 and a Union" campaign.

The complaints alleged that McDonald's USA and a number of its franchisees violated the NLRA by, among other things, threatening, discharging and disciplining employees in retaliation for engaging in union activity. McDonald's USA was named a joint employer because it allegedly exercises significant control over the franchisee employees' terms and condition of employment.

As opposed to the *Freshii's* case noted above, the NLRB's General Counsel contends that McDonald's control goes beyond what is necessary to accommodate a franchisor's legitimate interest in protecting its brand. Importantly, the issuance of a complaint does not constitute the Agency's final determination, and this matter is now in litigation before an Administrative Law Judge.

Thus, any conclusions about what the McDonald's case means for franchisees is premature, and any rush to legislate at this time is equally premature. Representative Jared Polis, Ranking Member of the HELP Subcommittee, stated at the conclusion of the legislative hearing:

> "I think it is important the National Labor Relations Board follow their process, including in the pending McDonald's case, without Congress prejudging their motives or undermining their authority before a decision is made.
>
> Once there is a ruling, I look forward to convening again and seeing whether there is any legitimacy to the fear that some of you have expressed with regard to the practices of your franchisees or franchisors. If there is, I think you will

[17] 162 NLRB 508, 509–10 (1966).

> find great sympathy on both sides of the aisle; if not, then those fears are largely unwarranted and the *[BFI decision]* will not have any impact at all on your business."

THE CONTINGENT WORKFORCE IS PROLIFERATING, COMPELLING A RE-EXAMINATION OF THE INDUSTRIAL REALITIES CONFRONTING MILLIONS OF AMERICAN WORKERS WHO WORK FOR TEMPORARY OR PERMANENT STAFFING AGENCIES

The contingent workforce, i.e., temporary or part-time workers, and employees working under contract for a specific period or project, has steadily increased in prominence in the U.S. economy over the past several decades. Before the 1970s, temporary employment agencies generally only offered short-term secretarial help, day laborers, and nursing services, and did not represent a statistically significant portion of private sector employment. Around 1975, however, "temporary employment agencies began to provide workers for many different types of jobs, including maintenance work, custodial services, legal services, and computer programming," and thereafter began to experience tremendous growth.[18] The temporary help services industry—a subset of the overall contingent workforce—grew from 518,000 to 1,032,000 workers during the 1980s, and reached over 1% of total employment by 1990. The percentage doubled to 2% by 2000.[19] In 2013, there were approximately 3.4 million jobs in this staffing sector, accounting for 2.5% of U.S. employment.[20] In February 2015, the most recent Bureau of Labor Statistics survey indicated that overall contingent workers accounted for as much as 4.1% of all employment, or 5.7 million workers.[21]

Contingent work arrangements involve a supplier of temporary help, a firm who "assigns" workers to a user firm, while the temporary help firm "place[s] these workers for legal purposes on [its] own payroll, billing client firms in an amount covering wages, overhead, and profit."[22] This "pushes liability for adherence to a range of workplace statutes . . . outward to other businesses."[23] The user firm can influence the supplier firm's bargaining posture by threatening to cancel its contract with the supplier firm if wages and benefits rise above a set cost threshold.

These developments, coupled with the facts of the BFI case, provided ample reason for the NLRB to revisit the joint employer standard. As the *BFI* decision stated:

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[18] *From Widgets to Digits: Employment Regulation for the Changing Workplace,* Katherine Stone, pp. 67 (2004).

[19] *See Id. See also* U.S. Bureau of Labor Stat., Luo, et al., *The Expanding Role of Temporary Help Services from 1990 to 2008,* MONTHLY LAB. REV., August 2010, at 3, 4.

[20] *WHO'S THE BOSS: Restoring Accountability for Labor Standards in Outsourced Work, National Employment Law Project,* Catherine Ruckelshaus, Rebecca Smith, Sarah Leberstein, Eunie Cho, pp. 19 (May 2014).

[21] U.S. Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements,* February 2005.

[22] *The Contest Over "Employer" Status in the Postwar United States: The Case of Temporary Help Firms,* George Gonos, 31 L. & SOC'TY REV. 81, 84–85 (1997). *See also* Stone, at, p. 68; Edward A. Lenz, *Co-Employment—A Review of Customer Liability Issues in the Staffing Services Industry,* 10 THE LAB. LAW. 195, 196–99 (1994) (describing various contingent employment arrangements).

[23] *Enforcing Labor Standards in Fissured Workplaces: The U.S. Experience,* David Weil, 22 THE ECON. & L. REL. REV. 33, 36–37 (2011).

> "[T]he primary function and responsibility of the Board . . . is that 'of applying the general provisions of the Act to the complexities of industrial life.' If the current joint-employer standard is narrower than statutorily necessary and if joint-employment arrangements are increasing, the risk is increased that the Board is failing in what the Supreme Court has described as the Board's "responsibility to adapt the Act to the changing patterns of industrial life." [24]

H.R. 3459 CREATES AMBIGUITY IN THE NLRA'S DEFINITION OF EMPLOYER AND JOINT EMPLOYER AND WILL SPAWN NEEDLESS UNCERTAINTY

As noted above, the legislative history of the Taft-Hartley Act stated that the definition of an employment relationship should be governed by the common law principles of agency.[25] Under the Restatement of Agency, an "employer" is one who "controls or *has the right to control* the physical conduct of the other in the performance of the service." That definition is rooted in hundreds of years of common law. In contrast, H.R. 3459 creates a new test, requiring that a joint employer's control must be "actual, direct and immediate." The common law does not define these terms and they are not explained in *Airborne Express*, the 2002 NLRB case from which they are taken.[26]

The definition of joint employer under H.R. 3459 creates great uncertainty. Franchisees operating under the same franchise agreement may be treated differently based on whether the franchisor has recently exercised its control over some, but not others. And a franchisor may be a joint employer with a franchise today, but not tomorrow based on whether the franchisor is still exercising its authority. Rather than creating clarity, these terms raise questions: What does it mean for control to be "immediate?" Is control exercised two weeks ago sufficient? Two days? Two minutes? What is "actual" control? Isn't all control actual, whether or not it is direct? Adding these terms to the definition of "employer" will create uncertainty for employers and employees.

AMENDMENTS

Five amendments were offered by Democratic Members at the October 28, 2015 mark-up, as part of an effort to refocus the Committee's work on the unaddressed, but pressing needs of the American workforce. The legislation offered in these amendments is also included in the Working Families Agenda that is being promoted by Democrats to boost wages, help workers balance their work and family responsibilities, and level the playing field by ending workplace discrimination.

1. Representative Polis offered as a substitute amendment, the *Equality Act.* The *Equality Act* adds "sexual orientation"

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[24] *Browning Ferris Industries of California and Teamsters Local 350,* 362 NLRB No. 186 (2015)

[25] Congressional Record, Senate, at 1575–1576 (1947), *reprinted in* 2 Legislative History of the Labor Management Relations Act, 1947, 51 (1948), and House Conf. Rep. No. 510 on H.R. 3020 at 36 (1947) *reprinted in* 1 Legislative History of the Labor Management Relations Act, 1947, at 540 (1948).

[26] *See:* Footnote 12

and "gender identity" to the protections from employment discrimination in Title VII of the Civil Rights Act that already exist based on race, color, religion, sex, and national origin. In addition, the legislation includes protections from discrimination on the basis of sexual orientation or gender identity in housing, public accommodations, federal funding, credit and jury service.

2. Representative Pocan offered as a substitute amendment, the *Workplace Action for a Growing Economy (WAGE) Act. The WAGE Act* strengthens protections available to workers under the NLRA by requiring employers to post employee rights under federal labor law; ensures that NLRB orders are enforced without undue delay; and authorizes monetary penalties for unfair labor practices.

3. Representative Wilson offered as a substitute amendment, the *Payroll Fraud Prevention Act.* The *Payroll Fraud Prevention Act* amends the Fair Labor Standards Act (FLSA) to prevent the misclassification of workers as independent contractors that results in lost wages, and makes it a violation of the FLSA to misclassify employees.

4. Representative Bonamici offered as a substitute amendment, the *Schedules That Work Act. The Schedules That Work Act* protects all employees from retaliation for requesting a more flexible, predictable or stable schedule; ensures that employers post schedules two weeks in advance; and provides additional pay for certain especially difficult shifts, including call-in shifts, split shifts, and shifts from which employees are sent home early.

5. Representative Clark offered as a substitute amendment, the *Paycheck Fairness Act. The Paycheck Fairness Act* will help close the wage gap by strengthening the Equal Pay Act of 1963 in critical ways, including: requiring employers to prove that pay disparities between women and men are job-related and consistent with business necessity, putting the remedies for violations of the Equal Pay Act on par with the remedies for other civil rights violations, and prohibiting retaliation against workers for discussing their pay.

The Chair ruled these five amendments were non-germane, and no vote was taken on the underlying amendments.

ROLL CALL VOTE

H.R. 3459 was reported on a straight party line vote of 21 ayes and 15 nays.

CONCLUSION

A primary goal of the NLRA is to help to restore the equality of bargaining power between employers and employees. At a time when there are millions of workers employed under arrangements that separate employees from the entity that directly or indirectly controls their terms and conditions of employment, H.R. 3459 would deny workers the right to bargain with all of the entities that have effective control, whether that control is exercised or reserved. It is worth noting that in more than a third of union organizing drives, the employer fires at least one worker. Given that

such union avoidance strategies are commonplace, it is clear that workers employed by a subcontractor need protections from the dismissal of a subcontractor by the lead employer for engaging in activities protected under the NLRA. However, this bill undermines efforts to hold the lead employer accountable and could render the collective bargaining process futile.

H.R. 3459 jettisons the longstanding common law used to define "employer" in an employment relationship. In the *BFI* decision, the NLRB re-instated the common law of agency to determine whether an entity was a joint employer. The Taft Harley Act of 1947 directed the NLRB to use the common law of agency. This same test was in place prior to 1984, and subcontractors and franchising entities were able to prosper under that traditional test for a joint employer.

This bill will further exacerbate wage stagnation and income inequality, by making collective bargaining a fruitless exercise in the increasingly fissured workplace.

ROBERT C. "BOBBY" SCOTT,
Ranking Member.
MARK DESAULNIER.
JOE COURTNEY.
MARK TAKANO.
JARED POLIS.
SUZANNE BONAMICI.
MARCIA L. FUDGE.
RAÚL M. GRIJALVA.
HAKEEM S. JEFFRIES.
MARK POCAN.
GREGORIO KILILI CAMACHO SABLAN.
KATHERINE M. CLARK.
FREDERICA S. WILSON.
SUSAN A. DAVIS.
ALMA S. ADAMS.
RUBÉN HINOJOSA.

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