Opening Statement of Ranking Member Bobby Scott
Full Committee Hearing
"Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship"
Wednesday, July 12, 2017 at 10:15 a.m.

Thank you, Madam Chair.

In recent years, employers have increasingly moved away from direct hiring of employees to the use of leased employees, perma-temps and subcontracting as a means to reduce labor costs and shift liability. Approximately 3 million Americans are employed by temporary staffing agency on any given day, performing work on behalf of a client company that directs the employee's work, but does not write the employee's paycheck. Since the end of the recession in mid-2009, almost one-fifth of all job growth has been through temp agencies.

Data shows that the consequences for workers employed in these arrangements are lower wages, fewer benefits and less workplace safety.

And what marks these arrangements is that control over the employees' employment is increasingly held by more than one employer. Our labor

and employment laws have long held that more than one entity can serve as an employer.

Without joint employer standards, contingent workers may have no remedies for unfair labor practices, safety violations or wage theft. To find that one or more entity is jointly responsible under an employment or labor law requires a showing that two or more entities share the right to control the work. While the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act have a broader definition of "employer," the National Labor Relations Act (NLRA) and other statutes based in the common-law impose a narrower test to find a joint employer.

There has been a torrent of misplaced criticism over the National Labor Relations Board's (NLRB) August 2015 decision in *Browning Ferris Industries*, where the NLRB held that the client employer (BFI) and the staffing agency (Leadpoint) were joint employers at a municipal waste recycling facility, and therefore had a joint duty to bargain with the

Teamsters Union. In that case, BFI exercised both direct and indirect control over the employees of the staffing agency. Direct control included oversight of employees' production, time card submissions, setting line speed and rejecting the hiring of any individual selected by the staffing agency. Reserved control included the contractual right to set the maximum hourly pay the Leadpoint workers could earn. Of course, collective bargaining over wages would be a futile exercise, if the party that controlled the wage level was not at the table.

In the BFI decision, the NLRB reinstated the common law test for an employer, as was called for in the Taft Hartley Act of 1947, by defining an employer as one who controls or has the right to control the terms and conditions of employment. This was the same test the NLRB applied in many cases prior to 1984, a period – I would note – in which franchising flourished.

However, between 1984 and 2002, the NLRB issued a series of decisions that narrowed the common law test, eventually limiting an

employer to only those who exercised "direct and immediate" control over employment matters. The newly expressed concern about "redefining" who is a joint employer seems quite selective. Bush and Regan-era Boards redefined the standard, and the Obama-era Board restored the traditional common law standard.

The court in BFI plainly stated that the decision did not address joint employer liability for franchisors. Yet, most of the criticism for the BFI decision comes from franchisors such as McDonalds, which was named as a joint employer in unfair labor practice complaints along with its franchisees eight months prior to the BFI decision. That case is before an administrative law judge.

Attacks against the common law standard used in BFI are cleverly masked as concern for protecting the independence of franchisees. In truth, the push to narrow the joint employment standard protects franchisors at the expense of franchisees.

Last Congress, this Committee reported legislation that purported to protect franchisees from franchisors taking over their business operations because of concern about franchisors reducing potential joint employment liability. The bill misleadingly named "Protecting Local Business Opportunity Act" limited joint employers to those who have "actual, direct, and immediate" control over employment matters.

However, what we learned is that this bill actually insulated a franchisor from liability as a joint employer, leaving the franchisee solely on the hook for decisions exercised through the franchisor's indirect control. That bill should have been named the "Franchisor Empowerment Act", because it freed franchisors from liability as a joint employer, while opening the door for franchisors to exercise greater control over franchisees' labor relations.

That point was underscored in testimony from the last Congress by Professor Michael Harper where he noted that:

> ‘‘[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.’’

Press reports indicate that the Majority will introduce legislation to nix the NLRB’s common law definition of joint employment under the NLRA and shield some employers from having to collectively bargain with workers. Apparently, the scope is yet to be determined, but according to press reports, the U.S. Chamber of Commerce is involved in crafting the proposal. Perhaps we will gain more clarity here today.

I welcome our witnesses, and want to thank them for taking the time to prepare their testimony. I also want to express my appreciation for those who had to travel some distance to be with us today, as we look forward to hearing from you.