

**Opening Statement of Ranking Member Bobby Scott
Committee on Education and the Workforce
Markup of H.R. 3441, the “Save Local Business Act”
Wednesday, October 4, 2017**

Thank you, Madam Chair.

The bill we are considering today would eviscerate worker protections under the National Labor Relations Act and the Fair Labor Standards Act, by eliminating longstanding avenues for workers to recover stolen wages and secure recourse for unfair labor practices.

Labor and employment laws have long provided recourse for workers who have joint employers, a situation that arises when more than one entity controls the terms and conditions of employment. Joint employment standards under the NLRA ensure that workers can collectively bargain with all of the parties that control the terms and conditions of employment. Similarly, joint employment standards under the FLSA ensure that the appropriate companies can be held accountable for violations pertaining to everything from wage theft to equal pay. Joint employment arrangements are only becoming more common as the

workplace is increasingly fissured through the use of permatemps, subcontractors and employee leasing arrangements, and the Committee should ensure that workers' rights are not eroded by this trend.

The bill we are considering is rooted in misplaced criticism of the National Labor Relations Board's 2015 decision in *Browning Ferris Industries*, where the NLRB held that the client employer, BFI, and its staffing agency, Leadpoint, were joint employers at a municipal recycling facility, and therefore jointly had a duty to bargain with the Teamsters union. BFI capped the wages Leadpoint could pay workers, set the line speed and scheduling, and reserved the right to overrule Leadpoint's hiring decisions. If the NLRB had certified a union with only Leadpoint as an employer, then collective bargaining would be a futile exercise, because Leadpoint lacked the ability to bargain over these key matters without BFI's permission.

In this case, the NLRB reinstated the traditional standard for a joint employer, which it had applied consistently throughout its history up

until it was inexplicably narrowed by the Board in 1984. This traditional standard is rooted in common law of agency, and was expressly called for in the Conference Report to the Taft Hartley Act of 1947. The common law defines an employer as one who controls or has the right to control the terms and conditions of employment. In the *Browning Ferris* case, the Board also required that the employer must exercise sufficient control over the terms and conditions of employment to permit meaningful collective bargaining.

The Fair Labor Standards Act provides an even broader definition of employer, which considers the economic realities of the employment relationship. The FLSA is designed to ensure that companies are not able to evade accountability by using intermediaries, labor brokers or layers of subcontractors. Employers have no need to fear this standard unless they violate the law.

H.R. 3441 rewrites both the NLRA and the FLSA by adding a new, narrow definition of “joint employer.” Under the legislation, a person

may only be a joint employer only if they “directly, actually, and immediately” exercise control over nine listed terms of employment, including hiring and firing, determining rates of pay and benefits, day-to-day supervision, assigning work schedules, positions and tasks, and administering discipline. If an entity controls all of these terms except one, then it might not be a joint employer under the definition. Even if the entity determines rates of pay, it may not be liable for wage theft under the FLSA.

Alternatively, the entity could have control over all of the terms, but if it exercises that control indirectly through the subcontractor, then the entity is still immune from any liability under this bill. Under the NLRA, this would cripple a union’s right to negotiate with the entities that actually control the terms and conditions of work. It also leaves employees without recourse for wage and hour violations.

This bill goes even further: if there are two employers exercising control over an employee’s work, and both entities deny being an employer for

purposes of a wage theft claim, then the employee may have no employers with liability for the violations. At our Committee hearing on September 13, I raised this concern. Michael Rubin, a labor law practitioner who has litigated joint employer claims on behalf of low-wage workers, testified that it is possible that there would be no employer liable for violations under this bill in cases where there are multiple employers responsible for aspects of an employee's hiring, pay and discipline.

He explained that, for example, if one company is in charge of hiring, another company sets wages, and both companies share responsibility for firing, then neither company would control all nine terms of employment. If the employee goes to court, or to the NLRB, and both companies say that they're not the employer, then the bill provides the judge or the NLRB with no guidance on how to resolve this problem.

A judge could find that an employee wasn't paid overtime, and also that nobody owes back pay for the lost overtime payments. H.R. 3441 could

set off chaos and impose needless harms to employees navigating our legal system.

I appreciate that the Majority attempted to deal with this problem.

However, the Amendment in the Nature of a Substitute (ANS) creates even more confusion, because an entity is not a joint employer unless it exercises “significant control over essential terms and conditions of employment.” However, it is still very unclear how a court will read these nine enumerated conditions – are these all essential for a party to be liable when there are multiple entities controlling the workplace? Alternatively, how many of the nine conditions would a company have to control in order for two employers to be deemed joint employers?

The bill provides no guidance on these vital questions.

The September 13th hearing on this bill also debunked the argument that current joint employer standards threaten the independence of franchisees. The NLRB has long held that a franchisor cannot be a joint

employer if it only governs brand management standards. Whether it is a joint employer only depends on whether the franchisor would control directly or indirectly the terms and conditions of employment. Indeed, no franchisor has ever been found to be a joint employer with a franchisee under the NLRA or the FLSA.

In fact, the NLRB in *Browning Ferris* plainly stated that the decision does not affect franchising. Despite that, a well-organized campaign has been spun up linking the decision to an unfair labor practice complaint that named McDonald's USA as a joint employer along with its franchisees. The question of McDonald's liability is pending before an administrative law judge, the outcome of this case is unknown, and in any event, the complaint was issued under the pre-*Browning Ferris* standard that the Majority claims it prefers.

The title of this bill, *the Save Local Business Act*, is misleading. Despite claims that H.R. 3441 will protect the independence of franchisees, we learned at four hearings over the past two years that the bill will insulate

franchisors from liability while leaving franchisees solely on the hook for decisions required by the franchisor. If the franchisor mandates a policy that could violate the NLRA or the FLSA, the franchisee is forced to accept shared control without shared responsibility. This bill shields franchisors at the expense of franchisees.

Madam Chair, I am also troubled that this Committee is advancing legislation that is tailored to protect a defendant in the middle of a pending administrative law proceeding at the NLRB. It may be that McDonald's USA was intimately involved in controlling its franchisees' labor relations. Or it may be that no liability exists. A determination on the facts and the law has yet to be rendered, and rushing to legislate without the facts is premature.

Although we may disagree with each other on the merits of this legislation, I would like to thank the Chair for pursuing regular order.

I urge a no vote on this bill, and yield the balance of my time.