The So-Called 'Save Local Business Act' Harms Workers and Small Businesses

By Karla Walter October 3, 2017

The first eight months of the Trump administration have been marked by a continuous attack on existing worker protection laws.[1] Congress and the administration have weakened protections to ensure Americans are safe on the job; receive fair pay and benefits; can save for retirement; can access high-quality training programs; have a voice on the job; and are not discriminated against at work.

One of the latest attempts to dismantle worker protection laws is the poorly named "Save Local Business Act," introduced by U.S. House lawmakers in late July.[2] While the legislation is cast as a boon for small-business owners, it is actually an effort to unravel 80-year-old worker safeguards, specifically "joint-employer" responsibility requirements that help to hold companies that cheat workers out of earned wages or violate the right of workers to come together in unions accountable for those actions. In tandem with this effort, President Donald Trump is using his executive authority to ensure that his administration does not enforce these long-standing workplace laws.[3]

Yet joint-employer protections are as important today as when they were created—helping to ensure large corporations cannot escape liability for their own labor law violations by relying on smaller companies to supply their labor force. The true effect of the legislation is to let large corporations off the hook when they infringe on workers' rights, and, consequently, leave smaller companies solely liable for any workplace misdeeds and workers unprotected.

In contrast to near-unified opposition by Democrats to previous anti-worker legislation, a handful of Democratic lawmakers—along with numerous Republicans—support H.R. 3441, raising concerns that the bill may pass the House and possibly even become law.[4] This brief attempts to correct the misinformation about the "Save Local Business Act" and expose the bill and Trump's rollback of joint-employer protections for what they really are—a power grab by big corporations that comes at the expense of working people and small-business owners.

Key facts: 21st-century workers and small businesses need joint-employer protections

- For more than 80 years, American lawmakers recognized that the company that signs a worker's paycheck may not be the company that controls workplace conditions. Federal laws governing the minimum wage, collective bargaining rights, workplace safety, anti-discrimination, family and medical leave, and protections for migrant workers all include employment definitions that help ensure that companies that share control over workplace conditions are jointly liable for violations of the law.[5] Joint-employer responsibility is an infrequently used but powerful tool to ensure workers' rights are protected.

- Large corporations can reduce worker pay and increase corporate profits by outsourcing their workforce to smaller labor subcontractors. Likewise, fast-food franchisors can structure their contracts in ways that go beyond a corporation's need to control brand quality to provide it the authority to control work conditions at individual restaurants.[6]

- This retention of control by larger corporations can result in outsourced workers being cheated out of wages and deprived of their rights. For example, a 2009 study looking at the warehouse and logistics industry—which relies heavily on third-party logistics firms and staffing agencies—found that 25.2 percent of workers reported minimum wage violations; 44.3 percent reported not being paid overtime; and 66 percent reported being required to work off the clock.[7]

- Very few corporations that contract with a staffing agency or a franchise would be found to be a joint employer under existing protections—but large corporations are claiming that these responsibilities are harming industry growth. All evidence points to the contrary. The portion of the American workforce employed by temporary help agencies or as on-call workers, contract workers, independent contractors, or freelancers grew from 10.7 percent to 15.8 percent between 2005 and 2015.[8] In 2015 and 2016—as the Obama administration beefed up its enforcement of these protections—franchise employment grew by 3 percent and 3.5 percent respectively, outpacing growth in private, nonfarm employment.[9]

- The truth is that H.R. 3441 and Trump's efforts to prevent the enforcement of joint-employer responsibilities will harm workers and small businesses, while allowing large corporations to escape accountability for their actions.

Federal law holds companies with the power to improve conditions responsible

American worker protection laws have long accounted for the fact that the company that signs a workers' paycheck is not always the company that controls workplace conditions. Federal lawmakers crafting minimum wage, collective bargaining, workplace safety, anti-discrimination, family and medical leave, and migrant worker protection laws included broad definitions of employer to ensure that companies that share control over workplace conditions are jointly liable for violations of the law.[10]

For example, the Fair Labor Standards Act (FLSA)—the law governing child labor, federal minimum wage, and overtime—was enacted in 1938 using an expansive definition of employer. Federal lawmakers modeled the definition of the term "employ"—including the words "to suffer or permit to work"—after state-level child labor laws, which used this language to enforce penalties against lawbreaking businesses that used middlemen to hire and supervise child laborers, according to a brief by the National Employment Law Project and the Laborers' International Union of North America.[11] In this way, the law ensured that large companies with the power to regulate workers could not escape liability for violations that they knowingly permit to occur.

Over the years, courts have validated this robust definition of employer. For example, in the 1947 U.S. Supreme Court decision *Rutherford Food Corp. v. McComb,* the court found that meat boners employed by a labor subcontractor were also employees of the slaughtering plant because "the operations at the slaughterhouse constitute an integrated economic unit."[12]

However, Republican administrations in the latter half of the 20th century weakened the enforcement of these protections. Reagan-era appointees to the National Labor Relations Board (NLRB) narrowed the interpretation of joint employer under the National Labor Relations Act (NLRA), the federal collective bargaining law, in the 1984 decisions in *Laerco Transportation* and *TLI Inc.* The NLRB decisions required employers to not just have the right to control but also to exercise that right through direct and immediate control over employees.[13] And during the administration of former President George W. Bush, the U.S. Department of Labor (DOL) nearly stopped enforcing wage protection laws altogether, assessing fines on only 6 percent of companies found to have stolen wages and avoiding use of joint-employer protections in subcontracted workplaces.[14]

The Obama administration reasserted its power to enforce joint-employer protections in outsourced jobs in order to ensure that workers' rights on the job were protected.

In 2016, the DOL's Wage and Hour Division issued legal guidance detailing the types of subcontracting and labor outsourcing relationships that would create a joint-employment relationship for the purpose of enforcing minimum wage and overtime laws.[15] The guidance, chronicling decades of reported decisions, reasserted that a joint-employment relationship can be established not only when an outsourcing company has direct control over the work performed, but also based on an analysis of numerous factors. These include when the outsourcing company indirectly controls work through its contractual relationship with a labor supplier beyond a reasonable degree of oversight; when an employee's work is integral to the business; and when the relationship is between workers and the company is long term or indefinite.[16]

One year earlier, the NLRB issued a decision in *Browning-Ferris* that returned to the NLRB's long-standing definition of joint employer, thereby ensuring that recycling workers employed by a staffing firm and working on-site with regular employees were able to exercise their right to form a union and bargain collectively.[17] After considering the specific facts of the case, the NRLB determined that the workers, who had voted to form a union, had a right to bargain both with their direct employer—the staffing firm Leadpoint Business Services—as well as the contracting firm Browning-Ferris Industries. The NLRB reviewed the "totality of the circumstances" in reaching this decision, citing in particular, the fact that Browning-Ferris retained the right to enforce its own hiring standards; control termination decisions; and impose a ceiling on wages.[18] In its decision, the NLRB explained how the Reagan-era standard did not reflect current economic realities:

> *[The Reagan-era] requirements—which serve to significantly and unjustifiably narrow the circumstances where a joint-employment relationship can be found—leave the Board's joint-employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships. This disconnect potentially undermines the core protections of the Act for the employees impacted by these economic changes. In the Supreme Court's words, federal regulatory agencies "are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy."*[19]

The *Browning-Ferris* decision caused an uproar in the business community and among many Republicans on Capitol Hill. Yet corporate industry groups were even more alarmed by an ongoing NLRB case involving the world's largest franchisor, McDonald's USA LLC. McDonald's workers across the country alleged that they were punished after exercising their NLRA-protected right to participate in "Fight for $15" protests to demand higher wages and a union.[20] In 2014, the NLRB general counsel issued a complaint holding that McDonald's USA LLC and many local franchises should be held jointly responsible for illegally firing, threatening, or otherwise punishing Fight for $15 workers.[21] This still-pending complaint was issued under the old, narrower joint-employer standard prior to the *Browning-Ferris* revision.

In his opening arguments before an administrative law judge, NLRB attorney Jamie Rucker emphasized how the corporation "dictates working conditions" through its operating manual, corporate computer system, and business consultants.[22] Recalling an incident when a corporate operations consultant urged an owner to reduce employee wages in order keep them in line with the wages paid by other nearby franchises, Rucker argued that McDonald's, "is at the center of labor relations, and labor relations are conducted by employers, not by bystanders."[23]

The case is still being tried, and no decision has been issued. A ruling in favor of the Fight for $15 workers would apply only to workers in this case, not all franchisors. However, worker advocates believe these changes could open the door to a significant numbers of franchise workers, giving them the power to negotiate for better wages and benefits.

To be clear, the McDonald's case represents a rare instance where the federal government is pursuing joint-employer claims against a franchisor. Very few corporations that contract with a staffing agency or a franchise would be found to be a joint employer under the existing protections. To date, a franchisor has never been held liable as a joint employer under the FLSA.[24]

However, the ability to enforce joint-employer responsibility helps ensure compliance with workplace laws. For example, in July 2016, the Subway restaurant chain entered into a voluntary agreement with the DOL to improve minimum wage compliance across its 27,000 franchises.[25] In the three years prior, the DOL had required Subway franchises to pay more than $2 million in back wages for 6,000 workers.[26]

Indeed, the Obama-era regulatory changes combined with the administration's enforcement of workplace protections promised to help combat some of the most egregious violators and shift more control back to smaller companies.

Turning back the clock on worker protections

Unfortunately, President Trump and anti-worker lawmakers are moving to undo the Obama-era joint-employer reforms. In June, the Trump administration withdrew DOL's joint-employment guidance.[27] Moreover, President Trump nominated two Republican lawyers, William Emanuel and Marvin Kaplan to the NLRB.[28] As a result of their Senate confirmations, Republicans now hold a majority of seats on the board and are likely to roll back its recent joint-employer *Browning-Ferris* decision.[29]

Worse yet, lawmakers in Congress want to go even further by changing statutory definitions of employer that have been on the books more than 80 years. In late July, House lawmakers released the H.R. 3441, or the "Save Local Business Act," to significantly narrow the definition of employer under the FLSA and the NLRA.[30]

Under the proposed law, only corporations that directly supervise workers through setting individual rates of pay; hiring and firing workers; and being involved in the day-to-day supervision could be held responsible for compliance with the law. While the legislation creates a giant loophole for lawbreaking corporations—it does nothing to protect workers and small-business owners.

Ignoring the fact that an increasing share of American workers are employed by temporary staffing firms, franchises, and other sorts of labor suppliers, anti-worker lawmakers claim that the existing joint-employer language in the FLSA and NLRA is no longer necessary. Shortly prior to the bill's release, Rep. Tim Walberg (R-MI), chairman of the House Education and the Workforce Subcommittee on Health, Employment, Labor and Pensions, argued that "those are two old laws and weren't made for anything that we have in the present world."[31]

Indeed, supporters of the bill tie themselves in knots to argue that these changes are all about helping the little guy. House Education and the Workforce Committee Chairwoman Virginia Foxx (R-NC) issued a statement at the bill's release, asserting:

> *Right now, local employers across the country face an enormous amount of uncertainty because of a vague and confusing joint employer standard. Congress cannot sit on the sidelines while this harmful scheme threatens to destroy jobs and make it harder for entrepreneurs to achieve the American Dream of owning a business.*[32]

And at a recent hearing before the committee on the joint-employer standard, Mary Kennedy Thompson, a representative of the International Franchise Association and the Dwyer Group, a holding company for 11 franchisors, claimed that, "the franchising community is holding their breath right now," as the Obama-era policies prevent franchising corporations from offering opportunities to aspiring small-business owners.[33]

Yet, all existing evidence points to the contrary. According to data from the International Franchising Association—the main lobby group for corporate franchisors—the franchising industry grew throughout the Obama administration. Total franchise employment rose by 3 percent in 2015 and 3.5 percent in 2016, rates higher than franchise employment growth in the year prior to the *Browning-Ferris* decision, and outpacing growth in private, nonfarm employment.[34] New franchise establishments also steadily increased by 1.6 percent in 2015 and 1.7 percent in 2016.[35]

Likewise, employment at temporary staffing firms continued to grow. In a paper for the National Bureau of Economic Research, Lawrence Katz and Alan Krueger found that the portion of the American workforce employed by temporary help agencies or as on-call workers, contract workers, independent contractors, or freelancers grew from 10.7 percent to 15.8 percent between 2005 and 2015.[36]

And while opponents of worker protections like to claim that ensuring subcontractor compliance with worker protection laws is too confusing, large companies increasingly review their subcontractors' record of past compliance with workplace laws in order to ensure future compliance. For example, prior analysis from the Center for American Progress Action Fund shows that at least 8 of the top 10 U.S. Department of Defense contractors in 2016 had experience reviewing their own contractors' compliance record.[37]

Domestic outsourcing is reducing workers' wages and power

All of this begs the question, why are large corporations so enamored with labor subcontractors in the first place?

Many argue that corporations choose to outsource workers in order to focus on the corporation's core competencies—or its competitive advantages—but shedding workers can also be done for the wrong reasons. Without strong joint-employer protections and aggressive enforcement, domestic subcontracting can allow large companies to drive down labor costs and avoid direct oversight of compliance with a host of workplace protection laws, circumvent worker organizing, and too often lead to a race to the bottom.[38]

This sort of outsourcing of domestic labor is common in working-class jobs, particularly for janitorial positions and security officers, hotel and restaurant workers, homecare workers, agricultural laborers, coal miners, as well as construction and warehouse workers. Indeed, from Amazon and Uber to Walmart and McDonald's, many of the country's largest and fastest-growing companies rely on contracted labor or franchises to supply their workforce. [39]

In their NBER paper, Katz and Krueger estimate that 23.6 million Americans were employed by temporary help agencies or work as on-call workers, contract workers, independent contractors, or freelancers as of November 2015.[40] Franchises employed another 7.4 million American workers in 2015, according to a report prepared for the International Franchise Association.[41] Combined, this represents about 1 in 5 American workers.[42]

To be sure, most corporations that contract with a staffing agency or a franchise do not do so with the aim of violating worker protection laws nor would they be found to be a joint employer under existing protections. However, in some instances, corporations may be relinquishing the official title of employer but not control over their labor suppliers' basic business decisions or workplace conditions.

While franchising historically represented an arm's length contracting agreement, product and operations uniformity is increasingly essential to many fast-food corporations.[43] Some industry giants control almost every aspect of a fast-food franchisee's

business with operations manuals that stretch to nearly 1000 pages, dictating everything from requirements of workers' training, dress, and appearance to approved food and merchandise suppliers to participation in advertising, sales promotions, and required computer systems.[44] What's more, franchisors often dictate restaurant location while charging high royalty fees to business owners to operate their restaurant. And they can continually monitor franchise compliance through their computerized bookkeeping and scheduling systems, as well as through corporate business consultants whose job it is to scrutinize restaurant owners.[45]

While it is essential for franchisors to control brand quality, corporations can use franchise contracts and ongoing interactions to indirectly control restaurant workers, which can result in outsourced workers being cheated out of wages and deprived of their rights. Indeed, in the ongoing case against McDonald's, the NLRB attorney Jamie Rucker alleges that the corporation's human resources staff assisted stores in "talking to their employees about why they shouldn't unionize and why they weren't earning $15 an hour, identifying potential organizing activity, and changing the store procedures to stymie organizing efforts."[46] And Rucker explains, "In an email [one corporate human resources representative] noted that, "This is a partnership between McDonald's and the franchisee that requires 100 percent support," and related to, "co-employment liability."[47]

Moreover, a franchise restaurant owner, facing slim profit margins, may not be able to agree to any collectively bargained wage and benefits increases without first renegotiating the terms of their franchise agreement.[48]

And, according to New York University's Andrew Elmdore, "Since franchisors aggressively police nearly all cost variables, suppressing employee wages is one of the few ways that franchisees can boost store profit by cutting costs."[49] A review conducted by Bloomberg found at least one violation of the FLSA in 75 percent of investigations of fast-food restaurants conducted by the Department of Labor during the Obama administration. The 4,000 investigations resulted in the recovery of $14 million in back wages for 57,000 workers.[50]

Low wages and rampant workplace law violations are true of other sorts of labor suppliers as well. Moreover, the outsourcing may not stop with a single subcontractor. In the hotel and grocery industries, for example, janitorial work is often outsourced to cleaning companies which may in turn hire small businesses to provide workers for specific shifts or sites.[51] Every business owner in this chain needs to extract a profit, while labor represents one of the few business costs that subcontractors can control, according to Dr. David Weil, who spearheaded efforts to strengthen enforcement of joint-employer standards as head of the DOL's Wage and Hour Division during the Obama administration.[52]

As a result, these contracted workers are paid very low wages, and the incentives to violate the law are high. A 2016 study by researchers at the University of California, Berkeley Labor Center found that janitors working for a contracted cleaning company earned 20 percent less than noncontracted janitors.[53]

In the heavily outsourced coal mining industry, contract miners in underground operations have significantly higher rates of traumatic injuries and exposure to fatality risks as compared with direct employees of mining companies.[54] Another study looking at the warehouse and logistics industry—which relies heavily on third-party logistics firms and staffing agencies—found that 25.2 percent of workers reported minimum wage violations; 44.3 percent reported not being paid overtime; and 66 percent reported being required to work off the clock.[55]

Clearly, not every violation in these industries is due to large companies controlling the decisions of small businesses. Enforcement agencies and courts must decide whether a franchisor or contractor is a joint employer based on the specifics of the case.

The Obama-era reforms would have allowed this to happen. Workers would be able to hold accountable the companies with the real power to ensure compliance with workplace protection laws. And temporary staffing agencies, subcontractors and fast food franchisees could begin to enjoy greater independence as larger corporations chose to relinquish control in order to avoid being held responsible for their legal compliance. However, President Trump's executive actions and H.R. 3441 would rig the rules of the game in the favor of large corporations.

Conclusion

Corporate lobbyists would like working people and policymakers to believe that worker protection laws created in the 20th century are a thing of the past that should be cast aside along with flip phones and fax machines. But pro-worker policymakers should not be fooled. These protections provide an important check on corporate power. Without strong joint-employer protections, workers will be vulnerable to wage theft and violations of their rights, and small businesses will have less control over decisions effecting their businesses. Pro-worker lawmakers should stand up to attempts by President Trump and Congress to dismantle these important protections.

About the author

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Endnotes

1 Karla Walter and Alex Rowell, "President Trump's Policies Are Hurting American Workers" (Washington: Center for American Progress Action Fund, 2017), available at https://www.americanprogressaction.org/issues/economy/reports/2017/08/15/168366/president-trumps-policies-hurting-american-workers/.

2 *Save Local Business Act*, H.R. 3441, 115 Cong. 1 sess. (2017), available at https://www.congress.gov/115/bills/hr3441/BILLS-115hr3441ih.pdf.

3 U.S. Department of Labor, "US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance," Press release, June 7, 2017, available at https://www.dol.gov/newsroom/releases/opa/opa20170607.

4 Congress.gov, "Cosponsors – H.R. 3441 – 115th Congress (2017-2018)," available at https://www.congress.gov/bill/115th-congress/house-bill/3441/cosponsors (last accessed September 2017).

5 Catherine K. Ruckelshaus, "Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship," Testimony before the House Education and Workforce Committee Hearing on Redefining Joint Employer Standards, July 12, 2017, available at https://edworkforce.house.gov/uploadedfiles/ruckelshaus_-_testimony.pdf.

6 Andrew Elmore, "The Future of Fast Food Governance," *University of Pennsylvania Law Review Online 165* (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2903691; Aaron Vehling, "McDonald's Has Super-Sized Control Over Franchisees: NLRB," Law360, March 10, 2016, available at https://www.law360.com/articles/759396/mcdonald-s-has-super-sized-control-over-franchisees-nlrb.

7 Annette Bernhardt and others, "Broken Laws, Unprotected Workers," (Chicago: Center for Urban Economic Development; New York: National Employment Law Project; Los Angeles: UCLA Institute for Labor and Employment, 2009), available at http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1; Catherine Ruckelshaus and others, "Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work (New York: National Employment Law Project, 2014), available at http://www.nelp.org/content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf. Note that data comes from survey conducted by Bernhardt and others which includes "factory and packaging workers" as well as workers in "food, furniture manufacturing, transportation and manufacturing" occupations.

8 Lawrence Katz and Alan Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015." Working Paper (National Bureau of Economic Research, 2016), available at http://www.nber.org/papers/w22667.

9 IHS Markit Economics, "Franchise Business Economic Outlook for 2017" (2017), available at https://www.franchise.org/sites/default/files/Franchise_Business_Outlook_Jan_2017.pdf; IHS Economics, "Franchise Business Economic Outlook for 2015" (2015), available at http://www.franchisefacts.org/assets/files/FranchiseBizOutlook2015.pdf.

10 Ruckelshaus, "Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship."

11 National Employment Law Project and Laborers' International Union North America, Mid Atlantic Regional Organizing Coalition, *Mario Salinas, William Ascencio, Bernaldino Salinas, Franklin Henriquez v. Commercial Interiors, Inc.,* Brief Amicus Curiae in Support of Plantiffs-Appellant, February, 11, 2016, available at http://www.nelp.org/content/uploads/NELP-Amicus-Brief-Salinas-v-Commercial-Interiors.pdf.

12 *Rutherford Food Corp. v. McComb,* 331 U.S. 722 (1947), available at https://supreme.justia.com/cases/federal/us/331/722/case.html#F2.

13 National Labor Relations Board, "Laerco Transportation and Warehouse; California Transportation Labor, Inc.; American Management Carriers, Inc.; Cal-American Transport, Inc. and International Longshoremen's and Warehousemen's Union, Petitioner." Case 21- RC-17087 21, March 21, 1984, available at https://www.nlrb.gov/case/21-RC-017087; National Labor Relations Board, "TLI, Incorporated and Crown Zellerbach Corporation and General Teamsters Local Union No. 326 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America," Case 4-CA-13033, July 31, 1984, available at https://www.nlrb.gov/case/04-CA-013033; National Labor Relations Board, "Airborne Freight Company d/b/a Airborne Express, and its Joint Employers, Current Carrier Corporation, Agents Transportation Service and Expressman Courier Service Inc. and Teamsters, Chauffeurs, Warehousemen & Helpers, Local 251, a/w International Brotherhood of Teamsters, AFL–CIO." Cases 1-CA-32742 and 1-CA-32767, November 22, 2002, available at https://www.nlrb.gov/case/01-CA-032742.

14 David Madland and Karla Walter, "Enforcing Change: Five Strategies for the Obama Administration to Enforce Workers' Rights at the Department of Labor" (Washington: Center for American Progress Action Fund, 2008), available at https://www.americanprogressaction.org/issues/economy/reports/2008/12/08/5347/enforcing-change/; Anne-Marie Lasowski, "Fair Labor Standards Act: Better Use of Available Resources and Consistent Reporting Could Improve Compliance," Testimony before the House Committee on Education and Labor, July 15, 2008, available at http://www.gao.gov/new.items/d08962t.pdf.

15 Wage and Hour Division, *Administrator's Interpretation No. 2016-1: Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act* (U.S. Department of Labor, 2016), available at https://web.archive.org/web/20161222135911/https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf.

16 Ibid.

17 Danielle Corley and David Madland, "Unwarranted Outcry: NLRB *Browning-Ferris* Decision Re-Establishes Employer Responsibility" (Washington: Center for American Progress Action Fund, 2015), available at https://www.americanprogressaction.org/issues/economy/news/2015/12/09/126868/unwarranted-outcry-nlrb-browning-ferris-decision-re-establishes-employer-responsibility/.

18 Reuben Guttman, "Browning-Ferris's Footnote 44: Vindication a Quarter Century Later," *ACS Blog,* September 1, 2015, available at https://www.acslaw.org/acsblog/browning-ferris%E2%80%99s-footnote-44-vindication-a-quarter-century-later.

19 National Labor Relations Board, "Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and FPR-II, LLC, d/b/a Leadpoint Business Services, and Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Petitioner," Case 32–RC–109684 (August 27, 2015), available at https://www.nlrb.gov/case/32-RC-109684.

20 National Labor Relations Board, "NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers," Press release, December 14, 2014, available at https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against.

21 Ibid.

22 Vehling, "McDonald's Has Super-Sized Control Over Franchisees."

23 Alexia Elejalde-Ruiz, "Why should McDonald's be a joint employer? NLRB starts to provide answers," *Chicago Tribune,* March 10, 2016, available at http://www.chicagotribune.com/business/ct-mcdonalds-labor-case-0311-biz-20160310-story.html.

24 Thomas J. Power, "Fast Food Sweatshops: Franchisors as Employers Under the Fair Labor Standards Act," *CUNY Law Review 19* (2016): 337–372, available at http://www.cunylawreview.org/wp-content/uploads/2016/09/Fast-Food-Sweatshops-Franchisors-as-Empolyers-Under-FLSA.pdf.

25 Bloomberg BNA, "Voluntary Agreement Between The U.S. Department of Labor's Wage and Hour Division and Subway," July 26, 2016, available at http://src.bna.com/hd5 (last accessed September 2017).

26 Ben Penn, "Subway, DOL Compliance Deal a New Template for Franchises?", Bloomberg BNA, August 2, 2016, available at https://www.bna.com/subway-dol-compliance-n73014445701/.

27 U.S. Department of Labor, "US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance."

28 Lawrence Dube, "White House Picks William Emanuel for Labor Board," Bloomberg Law, June 28, 2017, available at https://bol.bna.com/white-house-picks-william-emanuel-for-labor-board/; Sean Higgins, "Senate moves forward on controversial NLRB pick," *Washington Examiner,* August 2, 2017, available at http://www.washingtonexaminer.com/senate-moves-forward-on-controversial-nlrb-pick/article/2630409.

29 Noam Scheiber, "Trump Takes Steps to Undo Obama Legacy on Labor," *The New York Times,* June 20, 2017, available at https://www.nytimes.com/2017/06/20/business/nlrb-trump-labor.html; Daniel Wiessner, "U.S. Senate tips labor board to Republican majority," Reuters, September 25, 2017, available at http://www.reuters.com/article/legal-us-usa-labor/u-s-senate-tips-labor-board-to-republican-majority-idUSKCN1C0322.

30 *Save Local Business Act*, H.R. 3441.

31 Tyrone Richardson and Hassan Kanu, "Republican Lawmakers Plan Rollout of Joint Employer Bill," *Bloomberg BNA,* July 6, 2017, available at https://www.bna.com/republican-lawmakers-plan-n73014461289/.

32 Bradley Byrne, "Byrne Introduces the Save Local Business Act," Press release, July 27, 2017, available at https://byrne.house.gov/media-center/press-releases/byrne-introduces-the-save-local-business-act.

33 U.S. House of Representatives, Committee on Education and the Workforce, "Hearing on 'Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship,'" July 12, 2017, available at https://www.youtube.com/watch?v=12XX54KJYOw&feature=youtu.be.

34 IHS Markit Economics, "Franchise Business Economic Outlook for 2017;" IHS Economics, "Franchise Business Economic Outlook for 2015."

35 Ibid.

36 Katz and Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States."

37 Karla Walter, "Companies Have Already Adopted the Best Practices of the Fair Pay and Safe Workplaces Executive Order" (Washington: Center for American Progress Action Fund, 2016), available at https://www.americanprogressaction.org/issues/economy/news/2016/06/09/139081/companies-have-already-adopted-the-best-practices-of-the-fair-pay-and-safe-workplaces-executive-order/.

38 Eileen Appelbaum, "Domestic Outsourcing, Rent Seeking, and Increasing Inequality." Working Paper (Center for Economic Policy Research, 2017), available at http://cepr.net/images/stories/reports/domestic-outsourcing-2017-01.pdf; David Weil, "How to Make Employment Fair in an Age of Contracting and Temp Work," *Harvard Business Review,* March 24, 2017, available at https://hbr.org/2017/03/making-employment-a-fair-deal-in-the-age-of-contracting-subcontracting-and-temp-work.

39 Greg Bensinger, "Amazon Taps 'On-Demand' Workers for One-Hour Deliveries," *The Wall Street Journal,* September 29, 2015, available at https://www.wsj.com/articles/amazon-taps-on-demand-workers-for-one-hour-deliveries-1443499263; Eunice Cho and others, "Chain of Greed" (Washington: National Employment Law Project, 2012), available at http://www.nelp.org/content/uploads/2015/03/ChainOfGreed.pdf; McDonald's Corp., "McDonald's Franchising," available at http://corporate.mcdonalds.com/mcd/franchising.html (last accessed September 2017); Becki Smith, "Uber's Labor Relations Is Driving It Into a Ditch," *Newsweek,* February 2, 2016, available at http://www.newsweek.com/ubers-labor-relations-driving-it-ditch-422285.

40 Katz and Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States."

41 IHS Markit Economics, "Franchise Business Economic Outlook for 2017."

42 Katz and Krueger use the Current Population Survey to find that 23.6 million Americans were employed by temporary help agencies or work as on-call workers, contract workers, independent contractors or freelancers as of November 2015. Franchises employed another 7.4 million American workers in 2015 according to the IHS report prepared for the International Franchise Association. Total employment was 149.4 million according to Katz and Krueger.

43 William L. Killion, "Chapter 1: The History of Franchising." In Alexander M. Meiklejohn, ed., *Franchising: Cases, Materials, and Problems* (Chicago: American Bar Association, 2013).

44 Elmore, "The Future of Fast Food Governance."

45 Vehling, "McDonald's Has Super-Sized Control Over Franchisees"; Brief of Service Employees International Union as Amicus Curiae, "Browning-Ferris Industries of California, Inc. et. al. before the National Labor Relations Board, Case 32–RC–109684, available at http://apps.nlrb.gov/link/document.aspx/09031d45817b2a3b.

46 National Labor Relations Board, "Hearing Before the Honorable Lauren Esposito, Administrative Law Judge, In the Matter of McDonald's USA, LLC, A Joint Employer, et al," March 10, 2016, document on file with author. The case is still being tried, and no decision has been issued. McDonald's maintains that it is not liable for any labor law violations occurring at its franchise locations.

47 Ibid.

48 Brief of Service Employees International Union as Amicus Curiae.

49 Elmore, "The Future of Fast Food Governance."

50 Penn, "Is the Franchise Model a Recipe for Fast-Food Wage Violations?"

51 Weil, "How to Make Employment Fair in an Age of Contracting and Temp Work."

52 Ibid.

53 Sara Hinkley, Annette Bernhardt, and Sarah Thomason, "Race to the Bottom: How Low-Road Subcontracting Affects Working Conditions in California's Property Services Industry" (Berkeley, CA: University of California, Berkeley Labor Center, 2016), available at http://laborcenter.berkeley.edu/pdf/2016/Race-to-the-Bottom.pdf.

54 Marric Buessing and David Weil, "Health and Safety Consequences of Mine-Level Contracting and Vertical Integration." Working Paper (2013); David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done To Fit It* (Cambridge, MA: Harvard University Press, 2014).

55 Bernhardt and others, "Broken Laws, Unprotected Workers"; Ruckelshaus and others, "Who's the Boss?" Note that data comes from survey conducted by Bernhardt and others which includes "factory and packaging workers" as well as workers in "food, furniture manufacturing, transportation and manufacturing" occupations.