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Hearing On

"Redefining Joint Employer Standards: Barrier to Job Creation and Entrepreneurship"

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Introduction

Chairwoman Foxx, Ranking Member Scott, and Members of the Committee, I thank you for inviting me to testify today on this Committee's consideration of legislation to amend our nation's employment and labor statutes to redraw the boundary lines that set the scope of these statutes. These boundary lines have been drawn in a series of decisions by the Supreme Court, primarily based on the common law of agency, because none of the statutes provide an independently meaningful definition for the 'employees' and 'employers' they cover. The lines are not set ultimately by the Department of Labor or the National Labor Relations Board.

These Supreme Court decisions should not be disturbed. The decisions both accurately follow legislative intent and provide lower courts and the federal executive adequate doctrine for the implementation of this intent. Any departure from this doctrine by the executive branch can be rebuffed easily by the federal courts, including if necessary, the Supreme Court. Selective Congressional intervention -- such as legislation to overturn executive branch opinions defining joint employment -- before completion of the processes of judicial review only would engender greater legal uncertainty, troublesome inconsistencies between the common law and federal statutory law, and the erosion of protections for the American worker.

I understand that many Members of this Committee have been convinced that the National Labor Relations Board's decision in *Browning-Ferris Industries of California (BFI),*[1] departs from common law doctrine articulated by the Supreme Court. As I stated in testimony I delivered on September 29, 2015, to your Subcommittee on Health, Education, Labor and Pensions, I disagree with that assessment. The *BFI* decision not only was narrowly framed and based on the common law, but also could have been decided without a modification of Board doctrine. But if I am wrong about *BFI* or the doctrine on which it is based, and the Board adheres to that doctrine, we all, including the Board, will be told by the federal judiciary that the Board instead must comply with the Court's common law-based principles.

I also understand that many Members of this Committee are particularly concerned about application of the *BFI* doctrine to franchising, no doubt based on the Board's General Counsel's attempt to prove that McDonald's jointly employs its franchisees' employees. Yet neither that litigation nor any other has produced a post-*BFI* Board decision, let alone any judicial review of such a decision, on joint employment in the real franchising industry. I hear the cries that *BFI* and the McDonald's litigation has produced anxiety about the elimination of franchises. But any such anxiety has been generated by lobbyists and lawyers looking for fees, not by any actual contraction of franchises.

With all due respect, I think this Hearing is in reaction to a lobbyist-manufactured tempest in a teapot. This Committee should be focusing on how to ensure the protection and training of the American workforce in rapidly changing global labor markets, not speculative pseudo-problems that even if real, could easily be controlled by the federal judiciary.

I make these assertions, which I will elaborate, based on research I completed as a Reporter for the American Law Institute's Restatement of Employment Law, published in 2015 after adoption by the ALI membership. I was primarily responsible for drafting the chapter covering the definition of the employment relationship. I think I have a good understanding of the development of the common law definition of employment to govern

[1] 362 N.L.R.B. No. 186 (2015).

respondeat superior vicarious liability and its application as a defining boundary for employment statutes.

The Common Law Definition of the Employment Relationship

In an era preceding employment statutes, the common law developed in the nineteenth and early twentieth century a definition of what it described as a master-servant relationship and what we now call an employment relationship for one purpose: assigning liability to a business for harm caused by negligence and other torts committed by a perhaps insolvent worker while in service to that business. It was for purposes of defining this *respondeat superior* vicarious liability that three Restatements of Agency have defined what is now treated as an employment relationship. *Respondeat superior* liability is called "vicarious" or imputed liability because it does not depend on any tort being committed by the owner or other principal of the business. The common law decisions held, and continue to hold, that such assignment of vicarious liability served salutary deterrent and distributive purposes, but only if the workers were at least under the legal control of the particular business and were really in service to that business rather than pursuing their own independent ends or those of some other independent business. Work performed while pursuing the independent interests of the worker's own business, not aligned with the ends of an employer, is the work of independent contractors, rather than servants or employees in an employment relationship on which vicarious liability can be based.

I found in my research as Reporter for the Restatement of Employment Law that the same common law analytic standards of (1) legal authority to control, and (2) aligned rather than independent interests, apply to claims against multiple employers as well as claims against single employers for purposes of vicarious liability.[2] Thus, federal courts, including the Supreme Court,[3] have interpreted federal employment statutes to contemplate joint employment where the common law would do so. In recognition of this law, the Restatement of Employment provides that an

[2] See, e.g., Morgan v. ABC Mfr., 710 So. 2d 1077, 1085 (La. 1998); Vargo v. Sauer, 457 Mich. 49, 69, 576 N.W. 2d 656 (1998). See also Kelley v. Southern Pac. Co., 419 U.S. 318 (1974) (application under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60); Restatement Second, Agency §§ 226 ("person may be the servant of two masters … at one time as to one act, if the service to one does not involve abandonment of the service to the other").

[3] See, e.g., Boire v. Greyhound Corp., 376 U.S. 473 (1964).

employee may have two or more employers under the same standards governing the employment relationship with a single employer.[4]

Why the Supreme Court Uses the Common Law Definition of the Employment Relationship

Although American employment statutes often exclude from coverage certain employment relationships, such as those with public sector employers or very small businesses, they do not offer meaningful definitions of the employment relationships they do cover. Some offer only a circular definition. The Occupational Safety and Health Act of 1970 (OSH Act), for instance, defines an employer as "a person engaged in a business affecting commerce who has employees," and defines an employee as "an employee of an employer who is employed in a business of his employer."[5] The Employment Retirement Income Security Act of 1974 (ERISA), like the anti-discrimination statutes, defines "employee" as "any individual employed by an employer."[6]

The National Labor Relations Act (NLRA) does not even make such a futile attempt to define employment. The pre-Taft Hartley Board thought that this freed it to define the employment relationship more broadly than does the common law, to include some subordinate independent contractors. Only *after* the Supreme Court concurred with the Board's more expansive interpretation,[7] did the Taft-Hartley Congress in 1947 by expressly excluding independent contractors from the definition of employee make clear to the Court and the Board that it wanted the common law to guide the scope of the NLRA in the absence of express language to the contrary.[8]

The Court and the Board have heeded Congress's direction with respect to the NLRA. The Board attempts to justify any doctrine concerning included employment relationships by reference to the common law and the Court judges the adequacy of Board doctrine against a common law standard.[9] Moreover, the Court now holds that the common law is to

[4] See Restatement of Employment Law § 1.04(b) (2015).
[5] 29 U.S.C. § 652(5) and (6).
[6] 29 U.S.C. § 1002(6).
[7] See NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).
[8] See 29 U.S.C. § 152(3).
[9] See, e.g., NLRB v. Town and Country Elec., Inc., 516 U.S. 85 (1995).

govern the meaning of any vague, circular definition of the employment relationship such as those I quoted above. As stated in a key 1989 decision, "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."[10]

The Court's use of the common law standard not only limits executive discretion to expand the reach of employment statutes beyond legislative intent, it also has a strong policy foundation. The common law understands that it is just and efficient to make employers liable to third parties for torts committed by employees whom the employers have the authority to control, whenever those employees are serving the employers' interests. Employers should internalize the costs of work that is fully to their benefit. The same principles apply to assigning responsibility for the employee benefits and protections promised by our employment statutes. Employers that benefit fully from the work of employees whom they have the authority to control should be assigned responsibility for ensuring that these benefits and protections are secured.

Why Congress Should Not Disturb the Common Law Definition

As any lawyer should understand, the common law represents the developing and cumulative wisdom of generations of judges. I found in my research as Reporter that the particular development governing the definition of the employment relationship has continued in thousands of state and federal courts, including the Supreme Court, during our age of employment statutes. That development has continued in cases presenting myriad, complicated and mutating economic relationships in our dynamic capitalist economy. The enactment of any legislation directed at an isolated executive decision can only create confusion and inconsistency, and thereby aggravate the judicial challenge in interpreting our employment statutes. No abstract legislation can define the employment relationship without using new elastic and ambiguous words such as "essential terms and conditions," "actual," "direct," and "immediate," used in H.R. 3459 introduced two years ago in the last Congress.

[10] Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). See also, e.g., Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992).

That legislation in my view threatened to deny many American workers the opportunity to choose a bargaining unit that could bargain effectively with the multiple employers that control their work and compensation. Yet a statute ostensibly directed at joint employment could pose an even greater threat to employment law and American workers by compromising more generally the common law definition of the employment relationship. Such a compromise is a threat because the common law, as I noted above, applies the same standards to single as to joint employment. If there is a somehow tighter standard for joint employers, why should there not be for single employers?

A statute that rejects the common law thus may do more than direct the courts to make meaningful collective bargaining more difficult, and to deny employees a solvent joint employer to sue where another employer is insolvent. Such a statute may move courts to tighten the common law definition of employment, so that more employees are classified as independent contractors without *any* employer being responsible for ensuring the protections and benefits of employment laws. It may result in employers responsible under the common law for the torts of workers on customers or other members of the public not being responsible for the protection of their own workers.

The Fair Labor Standards Act Departure from the Common Law

My stress on the common law does not apply as directly to the Fair Labor Standards Act (FLSA). This statute elaborates its circular definition of the employment relationship by stating that it includes: "to suffer or permit to work."[11] While this phrase is not less ambiguous than those in other employment statutes, the Supreme Court interpreted the phrase -- based primarily on the FLSA's legislative history -- to be sufficiently broad "to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category."[12] Despite this statement, and many others from the Supreme Court and lower federal courts, that the FLSA encompasses more economic relationships than do other employment statutes, in my research as an ALI Reporter I found no sharp distinction between the FLSA cases and the

[11] 29 U.S.C. § 203(g).
[12] Walling v. Portland Terminal Co., 330 U.S. 148 (1947).

common law cases. Following a directive from the Supreme Court,[13] the lower federal courts apply a so-called "economic realities" test based on multiple factors, many of which are similar to those used under common law multifactor tests posited by the Supreme Court and the Second Restatement of Agency. Significantly, like the common law, the FLSA's so-called "economic realities" test also is applied to joint employment.[14] Thus, any legislative modification of the joint employment standard for the FLSA could be as disruptive to legal standards for the protection of employees by even a single employer as would legislative modification of the joint employment standard under other statutes.

In any event, beyond the need for lobbyists to justify their fees, it is hard to understand what might move this Committee to amend the FLSA's definition of the employment relationship. There has been no judicial or even executive action, like the Board's *BFI* decision, that might have an effect on applicable doctrine. The January 20, 2016, Administrator's Interpretation No. 2016-1 from the Department of Labor's Wage and Hour Division certainly is not such an action. It has no legal effect, and is not entitled to *Chevron* deference[15] from the courts. Moreover, it does little more than describe judicial decisions and then use the elastic word "dependent" without any meaningful explanation of its meaning. Its illustrations present easy cases. Even if it remained in effect during the current administration, it would not have found traction in the courts.

Furthermore, franchisors and contractors concerned about their liability for their franchisees' or subcontractors' FLSA violations only need to include hold harmless indemnification clauses in their contracts with the franchisees and subcontractors. Such clauses will protect the franchisors and contractors in any case other than those involving insolvent franchisees or subcontractors. In such cases of insolvency, does this Committee actually want to prevent employees from obtaining compensation from the responsible employers that injured third parties could sue under the common law?

[13] See Rutherford Corp. v. McComb, 331 U.S. 722 (1947).
[14] See, e.g., Zheng v. Liberty Apparel Company Inc., 355 F.3d 61 (2d Cir. 2003).
[15] See Christensen v. Harris County, 529 U.S. 576, 587-88 (2000).

The Common Law Poses No Threat to Small Independent Businesses

I understand that franchisor lobbyists have convinced many franchisees and other small businesses that their independence is threatened by the lobbyists' broad reading of the *BFI* decision and the Board General Counsel's aggressive administrative litigation against McDonald's. I understand the lobbyists argue that their clients will have to completely take over the operations of franchisees and stop subcontracting if they are exposed to the risk of liability under employment laws. I think franchisees and other small businesses unfortunately have been misled by this specious argument. Legislation framed to address the *BFI* decision is not needed to protect franchisees or other small businesses, and indeed could lead to a contraction of those businesses' independence.

First, as I noted, any dominant business in an ongoing contractual relationship can protect itself through the use of indemnification clauses. No franchisor or other business needs to modify an efficient business model to avoid liability under employment laws.

Second, franchisors and businesses that contract out peripheral work would agree that their business models are not primarily structured to avoid responsibility under employment laws. Franchisors use their franchise system to raise capital and to motivate entrepreneurial franchisee owners beyond the typical motivation of managers without capital at risk. Businesses subcontract work beyond the core competencies from which they can garner their greatest profits.

Third, the Board's *BFI* decision purports to follow the common law. As I have explained, it is subject to judicial review by courts that require the Board to follow the common law. If the decision does not do so, or if it is applied in ways that are inconsistent with the common law, the Board will be reversed by the courts. Franchising and subcontracting have thrived during judicial application of the common law standard and will continue to do so under that standard. The *BFI* decision itself has no relevance for the traditional and authentic franchisor-franchisee relationship where the franchisor determines the nature of the product sold under its brand, but

allows the franchisee to determine the identity, compensation, hours, and working conditions of its employees.

Fourth, modifying the common law standard probably would result in franchisors, and other economically dominant businesses, exerting greater, not lesser, control over franchisees and subcontractors. This is because allowing franchisors and contractors to control their franchisees or subcontractors in ways that would impose vicarious liability under the common law without bearing any potential responsibility for the observance of employment laws would eliminate a disincentive to such control. As their business models have developed under the common law, franchisors and contractors have been content to allow smaller associated businesses significant discretion over employment matters. If a modification of the common law allows them to exert more control without any potential liability, franchisors and contractors increasingly may use modern computer technology to exert that control.

Passing legislation to insulate franchisors and large business contractors from responsibilities under employment statutes may be good for those businesses. But it certainly does not protect real franchisees and other small businesses or the entrepreneurial opportunities such businesses may offer.