MINORITY VIEWS
H.R. 3441, "SAVE LOCAL BUSINESS ACT"
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INTRODUCTION

The *Save Local Business Act* (H.R. 3441) dismantles longstanding legal protections for employees under the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA). It does so by allowing employers who jointly determine working conditions to evade responsibility for collective bargaining, and to avoid liability for wage theft, child labor, and equal pay violations committed by subcontractors and intermediaries over which they exercise control. Despite the bill's pro-business title, H.R. 3441 disadvantages franchisees by leaving them on the hook for decisions directed by their franchisors. All Democratic members of the Committee opposed H.R. 3441 during the October 4, 2017 markup.

BACKGROUND

In recent years, employers have increasingly moved away from direct hiring of employees to the use of permatemps and subcontracting to reduce labor costs and liability. For many workers, the name on the door of the building where they work may not be the name of the company that signs their paycheck. Approximately three million Americans are employed by a 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.[1] Since the end of the recession in mid-2009, one study found that almost one-fifth of all job growth has been through temp agencies.[2] Another recent study found that 94% of all new jobs between 2005 and 2015 involved alternative work arrangements—including temporary help agency workers, on-call workers, contract workers, and independent contractors.[3] The largest increase involved the percentage of workers hired out through contract companies, increasing from 1.4 percent in 2014 to 3.1 percent (of all employment) in 2015.[4]

As direct hire arrangements give way to increased use of subcontractors, permatemps, or employee leasing arrangements, accountability for compliance with labor and employment laws is at risk of being undermined if companies can shield themselves from liability by contracting out while retaining contractual control over the terms and conditions of employment. As the National Employment Law Project notes, under current law, "joint employer liability doesn't bar

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[1] Employees on Nonfarm Payrolls by Industry Sector and Selected Industry Data, Bureau of Labor Statistics (last accessed Jul. 7, 2017), available at https://www.bls.gov/news.release/empsit.t17.htm.

[2] Michael Grabell, "The Expendables: How the Temps Who Power Corporate Giants are Getting Crushed," *ProPublica* (June 27, 2013), available at https://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushe

[3] Katz and Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015," National Bureau of Economic Research Working Paper 22667, (Sept. 2016), available at www.nber.org/papers/w22667.

[4] *Id.*

companies from outsourcing; it simply means that the companies cannot also outsource responsibility for their workers when they control the conditions of their work."[5]

Congressional efforts to narrow joint employer liability over the past two Congresses were spurred by two events. First, on December 19, 2014, the National Labor Relations Board's (NLRB or Board) General Counsel alleged that McDonald's USA is a joint employer with its franchisees in a complaint alleging unlawful retaliation against employees who protested for better wages as part of the "Fight for $15 and a Union." This case remains pending before an administrative law judge. Secondly, on August 27, 2015, the NLRB reinstated its traditional joint employment standard in its *Browning Ferris*[6] decision, which found that a waste-management company jointly controlled the employment conditions of its subcontracted workers. That case is on appeal to the D.C. Circuit Court of Appeals.

In response to these events, in the 114th Congress the Education and the Workforce Committee reported the *Protecting Local Business Opportunity Act* (H.R. 3459) by a margin of 21-15, with all present Democrats opposing.[7] That bill sought to narrow the legal standard for a joint employer only under the NLRA.

Committee Republicans introduced H.R. 3441 on July 27, 2017, following the July 12, 2017 Committee hearing entitled, "Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship." That bill narrows the legal standard for a joint employer under both the NLRA and the FLSA. A legislative hearing was held on September 13, 2017, and a Committee markup was held on October 4, 2017.

DESCRIPTION OF H.R. 3441, THE *SAVE LOCAL BUSINESS ACT*

Labor and employment laws have long held that when more than one employer controls or has the right to control the terms and conditions of employment, whether *directly or indirectly*, they may be liable as "joint employers."[8] H.R. 3441 amends the NLRA and the FLSA by adding a new, narrow definition for "joint employer" to the existing definition of "employer" under each law and eliminates *indirect* control as indicia of joint employment.

H.R. 3441 confers joint employer status on a company if it "directly, actually, and immediately…exercises significant control over essential terms and conditions of employment."

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[5] *Joint Employment Explained: How H.R. 3441 Legalizes a Corporate Rip-Off of Workers*, National Employment Law Project (Sept. 8, 2017), available at http://nelp.org/publication/joint-employment-explained-how-hr-3441-legalizes-corporate-rip-off-workers/.

[6] 362 NLRB No. 186 (2015).

[7] H. Rept. 114-355 - *Protecting Local Business Opportunity Act* (Dec. 1, 2015).

[8] Under section 2(2) of the NLRA, an 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." Under the FLSA, an employer "includes any person acting *directly or indirectly* in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C. §203(d). (emphasis added)

Specifically, the bill identifies a non-exclusive list of nine essential terms and conditions: "hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline." Under this legislation as reported from Committee, a company can have *indirect* control over all of nine of these terms and conditions, and so long as it exercises that control through a subcontractor or intermediary, the company is immune from liability under the NLRA or the FLSA.

H.R. 3441 CREATES A ROADMAP FOR EMPLOYERS TO ELIMINATE JOINT EMPLOYER LIABILITY

H.R. 3441's definition of a joint employer is so narrow that any entity can arrange its relationships with staffing agencies or subcontractors to avoid liability. Because the bill requires that a joint employer control the "essential terms and conditions of employment," and describes nine of those terms, an entity may no longer be a joint employer under the bill as long as it delegates at least one of the nine listed terms to another entity, no matter how much control it retains. Further, because a joint employer must exert control "directly, actually, and immediately" under the bill, an entity can convey all employment directions through an intermediary without ever being considered a joint employer.

Michael Rubin, an attorney at Altshuler Berzon LLP who has litigated joint employer cases involving wage theft, testified at the legislative hearing on this very point:

> In practical effect, this means there will be no more "joint employment" under the FLSA or NLRA, because once an FLSA or NLRA employer…delegates *any* significant control over *any* terms or conditions of its workers' employment, it ceases to exercise "direct" control over those terms and conditions and is no longer a potential "joint employer" under the bill's definition.[9]

H.R. 3441 MAY LEAVE EMPLOYEES COMPLETELY WITHOUT RECOURSE FOR VIOLATIONS WHEN MULTIPLE EMPLOYERS CONTROL WORKING CONDITIONS

As originally drafted and introduced, H.R. 3441 provided that if one company controls some of the enumerated terms and conditions and another company controls the others, then each company could argue in their defense that they are not an employer because they do not control all nine terms. A court could find that neither company is a joint employer, and thus that neither company is liable as an employer. The bill provided no guidance on how to resolve this problem.

At the September 13, 2017 legislative hearing on H.R. 3441, Ranking Member Scott raised this concern with Michael Rubin.

[9] Testimony of Michael Rubin, before a joint hearing of the Subcommittee on Workforce Protections and the Subcommittee on Health, Employment, Labor and Pensions Regarding H.R. 3441 (Sept. 13, 2017) (emphasis added).

Mr. Scott: [I]f you have a Fair Labor Standards Acts violation and somebody comes in and says, "I'm not an employer under this definition," and then the other guy comes in and says, "I'm not an employer under this definition either," is it possible that nobody is responsible?

Mr. Rubin: Wow. In fact, as I look at the language of the Act, that is possible. Imagine this circumstance: Company A is in charge of hiring. Company A and B share responsibility for firing. And company B also sets wages. The worker says, who is my employer under this definition? Well, does either company, A or B, control the essential terms, which are then listed? There are 9 of them in the conjunctive? No. So in that case there may be no employer.

Mr. Scott: So if there's a finding that I wasn't paid overtime, nobody owes it?

Mr. Rubin: Neither company is a joint employer and arguably neither is an employer at all… [T]his language explodes uncertainty to the point where every single case, where any element, any term or condition of employment is shared, there's going to be litigation over whether either company would be [liable].

During the markup, Committee Republicans attempted to alleviate this concern through an Amendment in the Nature of a Substitute (ANS), but in doing so rendered the bill even more ambiguous. The ANS modified the bill primarily by changing the "and" to an "or," so that the nine essential terms and conditions are now listed in the disjunctive. These changes are set forth below. The relevant text to be changed is in bold italics and the new text is bold and underlined.

H.R. 3441 as filed	**The Amendment in the Nature of a Substitute (ANS)**
A person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over ***the*** essential terms and conditions of employment ***(including*** hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, ***and*** administering employee discipline***)***.	A person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment, <u>**such as**</u> hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, <u>**or**</u> administering employee discipline.

The changes in the ANS do not remedy the problem. The ANS states that a person is a joint employer only if such person "exercises significant control over essential terms and conditions of employment." Since the bill retains a list of nine "essential" terms and conditions that the person must control, the problem remains that a person who does not control all of the nine terms and conditions may not face any liability under the NLRA or the FLSA, regardless of how much control they possess. Even if the NLRB or courts interpreting the NLRA or FLSA avoid this

plain reading of H.R. 3441, the bill still provides no guidance over how many of the essential terms and conditions a person would need to control in order to be a joint employer.

Committee Republicans have promoted the need for this legislation because they contend it will provide needed clarity. Subcommittee Chairman Walberg stated:

> "It's time to settle, once and for all, what constitutes a joint employer, not through arbitrary and misguided NLRB decisions and rulings by activist judges, but through legislation. This is obviously an area of labor law that is in desperate need of clarity."[10]

At the October 4th markup, Ranking Member Scott tried to identify whether the bill provides improved clarity by asking the bill's sponsor, Representative Byrne, exactly how many of the nine listed terms and conditions a party would need to control. Mr. Byrne replied that this would depend on the "facts of each individual case" and how a judge or the NLRB analyzes those facts. Mr. Scott replied: "I think we are right back where we started from. We don't know what it means, whether you are an employer or joint employer or not."[11] This exchange exposed the fallacy of the Majority's argument, and demonstrates that this bill opens the door for uncertainty.

H.R. 3441 CRIPPLES WORKERS' FREEDOM TO NEGOTIATE FOR BETTER WAGES AND BENFITS WHEN THERE ARE JOINT EMPLOYERS

When workers organize unions, the NLRA guarantees them the right to collectively bargain for better wages and working conditions without fear of retaliation. Where multiple entities control the essential terms and conditions of employment, this right is rendered futile if workers cannot bargain with all those entities controlling wages and working conditions. The new definition of a joint employer under H.R. 3441 is so narrow that it effectively writes the concept out of law.

Committee Republicans have criticized the NLRB's 2015 *Browning Ferris* decision, which reinstated the traditional joint employer standard the Board used prior to 1984.[12] In this case, the NLRB found that a client employer (BFI) and its staffing agency (Leadpoint) were joint employers and had a joint duty to bargain with the Teamsters union. BFI operates a municipal recycling facility in Milpitas, California, but contracted with Leadpoint to hire workers sorting recyclable materials under a cost reimbursement contract. BFI contractually capped the maximum wage that Leadpoint could pay at a rate that could not exceed what BFI paid its own workers. BFI also reserved and exercised the right to overrule any of Leadpoint's personnel decisions and assigned shifts to the workers through Leadpoint's supervisors. When the Teamsters sought to organize 240 Leadpoint workers, it named BFI as the joint employer with Leadpoint in a petition for a union election.

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[10] Opening Statement of U.S. Representative Tim Walberg, at a joint hearing of the Subcommittee on Workforce Protections and the Subcommittee on Health, Employment, Labor and Pensions regarding H.R. 3441 (Sept. 13, 2017).

[11] U.S. House of Representatives Committee on Education and the Workforce, Markup of H.R. 3441, pp. 20-21 (Oct. 4, 2017).

[12] 362 NLRB No. 186 (2015).

Susan K. Garea, an attorney who represents the workers in *Browning Ferris*, explains:

> These workers want to negotiate better wages and working conditions in exchange for their back-breaking labor. Many concerns brought these workers to the Teamsters including their low wages and distress over the speed and safety of the work. These concerns cannot be addressed by negotiating with the temporary staffing agency. BFI must be at the table to negotiate over the speed of the streams, the number of workers per line or breaks, wages, safety protocols and other major terms and conditions of employment. Leadpoint has literally no control over these core terms and conditions of employment.[13]

The NLRB's traditional joint employer test asks: (1) whether there is a common law employment relationship, and (2) whether the employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. In examining whether there is a common law relationship, the NLRB uses the standard that Anglo-American courts have applied for centuries to determine whether there is a "master-servant" relationship.[14] The NLRB considers both the employer's "right to control" in addition to its actual exercise of control. That control may be either direct or indirect, such as through the other joint employer as an intermediary.

The Board's traditional joint employer test as articulated in *Browning Ferris* is consistent with the legislative history of the Taft-Hartley Act, which states that the definition of an employment relationship should be governed by the common law principles of agency.[15] Under the Restatement of Agency § 2(1), an employer is one who "controls or *has the right to control* the physical conduct of the other in the performance of the service."[16] In contrast to this centuries-old test, H.R. 3441 creates a completely new test, requiring that the joint employer's control must be "direct, actual, and immediate."

The practical effect of this bill is to suppress wages for hundreds of thousands of permatemps, such as the Leadpoint workers, by making it easier for putative employers to avoid their bargaining obligations under the NLRA. This point is illustrated in the chart below, which shows that at recycling plants in the vicinity of BFI's facility, employees covered by a collective bargaining agreement earn between $19 and $30 per hour, plus health and retirement benefits. The subcontracted Leadpoint workers only make $12.50 per hour, with no benefits.

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[13] Letter from Susan K. Garea, Esq., Beeson Taylor and Bodine, to Chairman Foxx and Ranking Member Scott, submitted for the record at the July 12, 2017 hearing before the Committee on Education and the Workforce entitled "Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship" (Jul. 10, 2017).

[14] As articulated by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), determining an employment relationship under common law depends on "the hiring party's right to control the manner and means" by which the worker accomplishes the project.

[15] 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).

[16] The *Restatement of Agency* is a set of principles issued by the American Law Institute, intended to clarify the prevailing opinion on how the law of agency stands.

WAGES AND BENEFITS OF MUNICIPAL WASTE SORTERS IN SAN FRANCISCO BAY AREA REPRESENTED BY TEAMSTERS LOCAL 350 COMPARED WITH LEADPOINT SORTERS AT THE BROWNING FERRIS INDUSTRIES (BFI) FACILITY (AUGUST 2017)[17]

	Recology (San Francisco)	South San Francisco Scavenger Company	California Waste Solutions (San Jose)	South Bay Recycling (San Carlos)	BFI direct-hire workers (grandfathered sorter) (Milpitis)	Leadpoint Sorters at BFI Facility (Milpitis)
Hourly Wages	$30.11	$22.88	$23.52	$24.60	$19.20	$12.50
Health Care Contribution/Hour	12.31	11.96	11.96	11.96	11.96	
Pension Contribution/Hour	*	4.85	3.18	6.3	3.15	
Retirement Security Plan Contribution/Hour	*	3.8		3.8		
Total	**$42.42**	**$43.49**	**$38.66**	**$46.66**	**$34.31**	**$12.50**

* Note: Recology SF has a defined benefit of $4,583.33/month.

The growing use of permatemps, coupled with the specific facts of the *Browning Ferris* case, provided ample reasons for the NLRB to return to its traditional joint employer standard. As the NLRB stated in that decision:

> [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.[18]

H.R. 3441 EMPOWERS JOINT EMPLOYERS TO EVADE LIABILITY FOR WAGE THEFT AND CHILD LABOR VIOLATIONS UNDER THE FLSA, AS WELL AS VIOLATIONS OF THE EQUAL PAY ACT

The Fair Labor Standards Act sets minimum wage, overtime, and child labor standards, and has long held that a single individual may be employed by two or more employers at the same time. The FLSA defines "employ" as "to suffer or permit to work."[19] Its

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[17] Susan K. Garea, Esq., Beeson Taylor and Bodine, and Teamsters Local 350 (Aug. 29, 2017).
[18] *Browning Ferris,* 362 NLRB No. 186 (2015) (internal citations omitted).
[19] 29 U.S.C. § 203(g).

definition is the "broadest definition [of employ] that has ever been included in any one act."[20] It is more encompassing than the definition of "employer" under the NLRA.

Congress developed the "suffer or permit to work" definition from several state laws. At the time, state legislatures had adopted a broad definition of employment to impose employer status on larger businesses that claimed ignorance when their labor intermediaries violated child labor laws. The state laws defined employers as entities that *directly or indirectly* employed a worker and defined the word "employ" more broadly than the common law "control or right to control test", but instead as "to suffer or permit to work." To "suffer" in this context means to acquiesce in, passively allow, or to fail to prevent the worker's work.[21] As noted by Bruce Goldstein, President of Farmworker Justice:

> This broad definition imposed liability on a company that had the power to prevent the work of the worker from happening and denied the business the ability to hide its head in the sand about what was happening in its business, including where it utilized labor contractors or other intermediaries which were considered employers of those workers.[22]

The courts have found that a joint employment relationship can be found by assessing the economic realities between an employee and a putative joint employer. Consideration of these economic realities is consistent with the approach used by courts to determine employment status generally.[23] In *Rutherford Food Corporation v. McComb*, the U.S. Supreme Court held that an employment relationship "does not depend on . . . isolated factors but rather upon the circumstances of the whole activity."[24]

In the Ninth Circuit case *Bonnette v. California Health & Welfare Agency*,[25] the court set four factors to be used when establishing joint employment relationships. Courts examine whether the alleged employer:

1. Had the power to hire and fire employees,
2. Supervised and controlled employee work schedules or conditions of employment,
3. Determined the rate and method of payment, and
4. Maintained employment records.[26]

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[20] *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (quoting 81 Cong. Rec. 7,657 (1938) (remarks of Sen. Hugo Black).
[21] Bruce Goldstein, Statement on *H.R. 3441* (Oct. 2, 2017), available at: http://democrats-edworkforce.house.gov/imo/media/doc/ESPAILLAT_FWJ%20Statement%20H.R%203441%20JtEmployer.pdf.
[22] *Id.*
[23] *United States v. Silk*, 331 U.S. 704, 713 (1947).
[24] In *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947), meat boners who worked on the premises of a slaughterhouse were hired by another employer under contract with the slaughterhouse. The Supreme Court held that the slaughterhouse was a joint employer for the purpose of minimum wage obligations under the FLSA because the boners' work was "part of the integrated unit of production".
[25] 704 F.2d 1465 (1983).
[26] 1 Ellen C. Kerns et al., *The Fair Labor Standards Act*, § 3-65.

Bonnette was the standard for the economic realities test used for determining joint employment under the FLSA, and was translated to many other circuits. Since the case was decided in 1983, several circuit courts have amended and added to this list of factors based on the facts of the case. Courts have found joint employment relationships under the FLSA with respect to labor contractors, farming companies, and in sectors ranging from the janitorial sector to garment manufacturing. Courts have not found a franchisor to be a joint employer under the FLSA.

The Majority contends that there is a need to legislate a change to the definition for joint employer under the FLSA based on recent Fourth Circuit decision *Salinas v. Commercial,*[27] which the Majority Views characterize as adopting "an expansive new joint employer standard." In the *Salinas* case, residential drywall workers who worked for a subcontractor in Maryland brought a claim for violations of the FLSA. Their subcontractor disappeared; the Court deemed the subcontractor defunct. The workers brought a claim against the general contractor as a joint employer. The *Salinas* decision applied a six factor test to assess whether there was an employment relationship between the prime contractor and the subcontractor's employees. The court found that the general contractor provided both direct supervision and supplied tools and equipment for performing the work. The Fourth Circuit's test was "designed to capture the economic realities of the relationship between the worker and the putative employer" and is well within the bounds of the FLSA.[28]

H.R. 3441 dramatically narrows who is liable as a joint employer under the FLSA and would allow low-road companies to benefit from workers' labor while shirking any responsibility to them simply by using an intermediary contractor.[29] H.R. 3441 would open the door to widespread wage theft in many growth industries, and reverse decades of judicial precedent and congressional intent. As noted by Michael Rubin in his testimony before the September 13th legislative hearing on this bill, "The bill completely abandons [the FLSA's] longstanding definition and the decades of case law applying it to circumstances where two companies co-determine and share responsibility for their workers' terms and conditions of employment."[30]

To illustrate this, Michael Rubin described an FLSA case he litigated:

> In a case we settled a few years ago in Southern California, hundreds of hard-working warehouse workers were employed in four warehouses, loading and unloading trucks for deliveries to Walmart distribution centers throughout the country. Walmart owned the warehouses and all of their contents. It contracted with a subsidiary of Schneider Logistics, Inc. to operate the warehouses. Schneider, in turn, retained two labor services subcontractors who hired the

[27] 848 F.3d 125 (4th Cir. 2017)
[28] *Id.* at 150.
[29] *Joint Employment Explained: How H.R. 3441 Legalizes a Corporate Rip-Off of Workers*, National Employment Law Project (Sept. 8, 2017), available at http://nelp.org/publication/joint-employment-explained-how-hr-3441-legalizes-corporate-rip-off-workers/.
[30] Testimony of Michael Rubin, before a joint hearing of the Subcommittee on Workforce Protections and the Subcommittee on Health, Employment, Labor and Pensions regarding H.R. 3441 (Sept. 13, 2017).

> warehouse workers. By contract, all responsibility for legal compliance rested solely with those two labor services subcontractors. Yet Walmart and Schneider had kept for themselves the contractual right to control almost every aspect of those warehouse workers' employment, directly and indirectly.
>
> The violations we found in those warehouses were egregious. But the only reason the workers were eventually able to obtain relief—through a $22.7 million settlement that resulted in many class members receiving tens of thousands of dollars each as compensation—was because the warehouse workers had demonstrated a likelihood of success in proving that Walmart and Schneider, as well as the staffing agencies, were the workers' joint employers. The two staffing agencies were undercapitalized . . . Only because the federal courts focused on the actual working relationships in those warehouses, as other courts have done in other joint-employer cases under the NLRA and FLSA, were the workers able to retain compensation for past violations, to obtain higher wages and significant benefits, and to have deterred future violations.[31]

At the September 13th legislative hearing, Representative Takano asked what these workers' remedy would be under this bill. Mr. Rubin's response: "They would have no remedy at all. Their only recourse would be against the labor services contractor, who" could only pay 7.5% of the total settlement amount.

Amending the FLSA's definition of employer also hinders workers' abilities to bring equal pay claims when multiple employers are responsible for the violation. More than 50 years ago, President Kennedy signed the Equal Pay Act of 1963 (EPA) into law. The EPA amended the FLSA to prohibit sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions.[32] Because the EPA is a part of the FLSA, the same definitions of "employer," "employ," and "employee" apply. Thus, narrowing the scope of who is considered a joint employer under the FLSA may impact the ability to bring equal pay claims under the EPA.

H.R. 3441 WILL CREATE UNCERTAINTY REGARDING JOINT EMPLOYER LIABILITY UNDER THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

H.R. 3441 will also create uncertainty for farmworkers, who are among our nation's most vulnerable workers. The Migrant and Seasonal Agricultural Worker Protection Act (MSPA), the principal labor statute protecting agriculture workers, establishes wage, health, safety, and recordkeeping standards for seasonal or temporary farmworkers. Joint employment standards under this law and the FLSA are vital to protecting the rights and protections afforded to these workers.

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[32] 29 U.S.C. § 206(d).

Frequently, farmworkers are recruited, hired, supervised, or transported by intermediaries, who are often referred to as farm labor contractors (FLC). Farm operators utilizing FLCs maintain control over working conditions, as Bruce Goldstein, President of Farmworker Justice, points out in his statement to the Committee:

> The economic reality is that few farm operators will risk their profitability and the survival of their business by delegating all responsibility to a labor contractor. Most farm operators who engage labor intermediaries exercise substantial decision-making regarding the impact of subcontracted workers on their business. . . In most cases, there is shared responsibility among the farm operator and the labor contractor so that the workers on the farm ensure the profitability of that business.[33]

Despite this shared responsibility, farm operators may contend that the FLC's they engage are the farmworkers' sole employer responsible for compliance. FLCs are thinly capitalized and often cannot afford to pay court judgements for violations. Under the MSPA, joint employer liability helps ensure covered workers have adequate avenues for redress.

In 1982, the Committee on Education and Labor incorporated the FLSA's broad definition of "employ" into the MSPA for the direct purpose of adopting the FSLA's joint employer doctrine. Congress believed this standard was the "central foundation" of MSPA's protections and necessary to "reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers."[34] According to the committee report, the joint employer standard is "the indivisible hinge between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of those duties."[35]

The MSPA regulations make it clear that the terms "employer" and "employee" have the same meaning under both the FLSA and the MSPA. As the MSPA regulations read, "[j]oint employment under the Fair Labor Standards Act is joint employment under the MSPA."[36] This means where a farmworker is economically dependent on a farm operator, he or she may be jointly employed by the FLC and the farm operator.

While H.R. 3441 does not directly amend the FLSA's definition of "employ," by creating a new, extremely narrow definition of "joint employer" under the FLSA, H.R. 3441 upends the FLSA's joint employer framework upon which the MSPA relies. It is unclear how this legislative change would impact the application of joint employment liability under the MSPA, creating significant uncertainty for our nation's migrant and seasonal farmworkers.

THE *SAVE LOCAL BUSINESS ACT* WOULD HURT LAW ABIDING CONTRACTORS BY FORCING THEM TO COMPETE ON AN UNLEVEL PLAYING FIELD

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[33] Bruce Goldstein, Statement for the Record on *H.R. 3441* (Oct. 2, 2017), p. 3., available at http://democrats-edworkforce house.gov/imo/media/doc/ESPAILLAT_FWJ%20Statement%20H.R%203441%20JtEmployer.pdf.

[34] H. Rep. No. 97-885, 97th Cong., 2d Sess., 1982.

[35] *Id.* at 6.

[36] 29 C.F.R. § 500.20(h)(5)(i).

H.R. 3441 forces law abiding construction contractors to compete on an unlevel playing field, because it allows unscrupulous competitors to be free from joint employer liability when they use subcontractors who can cut project costs by engaging in wage theft. For this reason, the Signatory Wall and Ceiling Contractors Alliance (SWACCA), an association of construction contractors, opposes H.R. 3441. They recently wrote: "The joint employment doctrine is an important means for forcing these unscrupulous contractors to compete on a level playing field and to be held accountable for the unlawful treatment of the workers they utilize."[37]

H.R. 3441 would exempt these unscrupulous contractors from liability by enabling them to exert even more control over the workers' terms and conditions while facing no liability for wage theft or overtime claims under the FLSA. As SWACCA noted, "H.R. 3441 would create a standard that would surely accelerate a race to the bottom in the construction industry and many other sectors of the economy. It would further tilt the field of competition against honest, ethical businesses."[38]

H.R. 3441 EMPOWERS FRANCHISORS TO DICTATE FRANCHISEES' EMPLOYEE RELATIONS, WHILE LEAVING FRANCHISEES EXCLUSIVELY ON THE HOOK WHEN THERE ARE VIOLATIONS

Committee Republicans have claimed that this bill protects the franchising business model because the NLRB's *Browning Ferris* decision created legal uncertainty which hinders the growth of that model. The Majority has also claimed that this legislation would protect the independence of small franchisees by ensuring that franchisors would not feel compelled to take control of franchisees' labor relations in order to limit their own potential liability. Committee Republicans contend that the current standard "threatens to upend small businesses, undermine their independence, and put jobs and livelihoods at risk."[39]

These arguments have no merit.

First, no franchisor has ever been found to be a joint employer with its franchisees under the NLRA or the FLSA. The *Browning Ferris* decision explicitly stated that it did not affect the franchise model, and the decision has not had any documented effect on the industry's growth.[40] Indeed, the franchise industry flourished in the decades before the NLRB narrowed its joint employer standard in 1984, using a standard identical to the one articulated in *Browning Ferris*.

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[37] Letter from the Signatory Wall and Ceiling Contractors Alliance to Speaker Paul Ryan and Minority Leader Nancy Pelosi (Oct. 5, 2017), available at http://democrats-edworkforce house.gov/imo/media/doc/SWACCA%20ltr%20of%20opposition%20-%20H.R.%203441.pdf.
[38] *Id.*
[39] Press Release, Committee on Education and the Workforce (Jul. 27, 2017), available at https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=401928.
[40] *Browning Ferris*, 362 NLRB No. 186 n.120 (2015) ("The dissent is simply wrong when it insists that today's decision 'fundamentally alters the law' with regard to the employment relationships that may arise under various legal relationships between different entities: 'lessor-lessee, parent-subsidy, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer.' None of those situations are before us today . . . As we have made clear, the common-law test requires us to review, in each case, all of the relevant control factors that are present determining the terms of employment.").

Franchise employment actually grew by 3 percent in 2015, the year *Browning Ferris* was decided, and by 3.5 percent in 2016. This rate is faster than the growth of franchising employment in the year prior to *Browning Ferris*.[41]

Second, the NLRB takes a reasoned, case-by-case approach when assessing whether any company, including a franchisor, is a joint employer. For example, the NLRB's General Counsel recently determined that Freshii's, a fast-casual restaurant franchisor, would not be deemed to be a joint employer with its franchisees, because its control was limited to maintaining brand standards and food quality.[42] The threshold for joint employment liability is control over labor-management relationships. Control over brand standards does not cross that threshold.

Testimony at a September 29, 2015 legislative hearing before the Subcommittee on Health, Employment, Labor and Pensions debunked the Majority's claim that the *Browning Ferris* standard has undermined franchisees' independence from their franchisors. Two franchisee witnesses—a Burger King franchisee and a Nothing Bundt Cakes franchisee—testified to this fear that franchisors would take over their employee relations in order to limit the franchisors' 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.

Mara Fortin (owner and operator of Nothing Bundt Cakes franchises) testified:

> 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.[43]

In an exchange between Representative Guthrie and Ed Braddy, a Burger King franchisee testifying on behalf of the International Franchise Association, Mr. Braddy was asked:

> Representative Guthrie: Do you or do [sic] the franchisor hire and fire and determine the work of your employees?

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[41] Karla Walter, "The So-Called 'Save Local Business Act' Harms Workers and Small Businesses," *Center for American Progress* (Oct. 3, 2017), available at https://www.americanprogressaction.org/issues/economy/reports/2017/10/03/168754/called-save-local-business-act-harms-workers-small-businesses/ (citing 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: https://www.franchisefacts.org/assets/files/FranchiseBizOutlook2015.pdf.

[42]See *Nutritionality, Inc., d/b/a/ Freshii*, Case 13-CA-134294 et al., Advice Memorandum (Apr. 28, 2015), available at http://apps nlrb.gov/link/document.aspx/09031d4581c23996.

[43] Testimony of Mara Fortin before the Subcommittee on Health, Employment, Labor and Pensions of the Committee on Education and the Workforce, H.R. 3459, *Protecting Local Business Opportunity Act* (Sept. 29, 2015), pp. 21 (Serial No. 114–28).

Mr. Braddy: 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.

Mr. Guthrie: But it is you as the business owner, not the -- what role does the franchisor play in any of your -- those issues?

Mr. Braddy: None at all.[44]

Based on this testimony, nothing in the *Browning Ferris* decision could establish that these franchisors are exercising sufficient control to be deemed a joint employer with their respective franchisees.

Third, H.R. 3441 does not reduce franchisees' exposure to liability. A franchisee is an employer under the NLRA and the FLSA and will always have liability under current law. The question is whether the franchisor also shares liability as a joint employer, if it shares control over its franchisees' employee relations. This bill insulates franchisors from potential liability as a joint employer if they exercise control through their franchise agreement; moreover, this liability shield empowers franchisors to exercise *indirect* control over franchisees while leaving franchisees exposed to liability. If the franchisor mandates a policy that could violate the NLRA or the FLSA—such as firing workers who try to form a union—then the franchisee may be forced to choose between abiding by their franchisor's direction or compliance with the law.

The current joint employer standards under the NLRA and the FLSA therefore benefit franchisees who want autonomy to manage their employment practices, because franchisors who involve themselves in their franchisees' labor relations will risk incurring a bargaining obligation or liability under the NLRA and FLSA. That potential liability will incentivize franchisors to distance themselves from control over their franchisees' labor relations.

COMMITTEE DEMOCRATS OFFERED AMENDMENTS TO FIX FLAWS IN H.R. 3441

Democrats offered the following seven amendments to the Amendment in the Nature of a Substitute to H.R. 3441, which was introduced by Representative Byrne (AL) as the base text at the beginning of the markup.

Amendment #1 – Strikes the bill's definition of a "joint employer" under the NLRA and replaces it with the traditional common law test articulated in *Browning Ferris*, and strikes the bill's definition of "joint employer" under the FLSA.

[44] Testimony of Ed Braddy before the Subcommittee on Health, Employment, Labor and Pensions of the Committee on Education and the Workforce, H.R. 3459, *Protecting Local Business Opportunity Act* (Sept. 29, 2015), pp. 84 (Serial No. 114–28).

Representative Norcross (NJ) offered an amendment to adopt the NLRB's traditional common law test for determining who is a joint employer. The Norcross amendment would ensure that workers can meaningfully collectively bargain where more than one employer exercises control over the terms and conditions of employment. The amendment also strikes the bill text regarding the definition of a joint employer under the FLSA.

The amendment was rejected 17 to 23, with all Democrats voting in favor of the amendment.

Amendment #2 – Prevents disputes under the bill from being subject to a pre-dispute arbitration agreement.

Representative Fudge (OH) offered an amendment that states that the provisions of this bill would not be subject to the terms of a pre-dispute arbitration agreement between an employee and the alleged employer, unless the arbitration agreement is pursuant to a collective bargaining agreement. The Fudge amendment would ensure that workers have full due process rights to hold employers responsible when they violate the NLRA or the FLSA. Over the past few decades employers have increasingly conditioned job offers on an employee's agreement to waive their right to seek recourse in the courts for employment related disputes and to submit such disputes solely to a private arbitrator. Employee win rates are far lower in mandatory arbitration than they are in federal or state courts, according to a report by the Economic Policy Institute.[45]

The amendment was rejected 16 to 23, with all Democrats present voting in favor of the amendment.

Amendment #3 – Prevents the bill from applying in cases when multiple employers control the terms of employment, but no person meets the test as an "employer" as set forth in H.R. 3441.

Ranking Member Scott (VA) offered an amendment to clarify that when there is a violation of the NLRA or the FLSA involving joint employers, but neither entity is deemed to be an "employer" under the criteria set forth in H.R. 3441, then the bill's provisions cannot be applied by a court. Representative Scott noted:

> I think it is clear under the amendment [in the nature of a substitute] that it is possible that nobody has total, direct control over the employment. It could be shared, and if it is shared everybody gets to escape liability. I do not think that is fair to the employee, and if that is not a possibility, then the provisions in the amendment would not make any difference. If it is a possibility, then the amendment fixes it.

The author of the bill, Representative Byrne, opposed the amendment saying it is "totally unneeded," and that "there is no unclear thing about this at all."[46] Mr. Scott replied: "I would just

[45] Alexander J.S. Colvin, "The Growing Use of Mandatory Arbitration," *Economic Policy Institute* (Sept. 27, 2017), available at http://www.epi.ogv/publication/the-growing-use-of-mandatory-arbitration/.
[46] Statement of the Representative Byrne, Committee Markup Transcript (Oct. 4, 2017), p.57.

say that if there is no chance that you could end up with no employer, then you should not be afraid of this amendment."[47]

The amendment was rejected 17 to 23, with all Democrats voting in favor of the amendment.

Amendment #4 – Holds a franchisor jointly and severally liable if a franchisee takes an action at the direction of a franchisor and such action violates the NLRA or the FLSA.

Representative Bonamici (OR) offered an amendment that states that when a franchisee takes an employment-related action at the direction of a franchisor and such action violates the NLRA or the FLSA, the franchisor shall be jointly and severally liable for such violation. The Bonamici amendment would ensure that small businesses, such as franchisees, are not treated unfairly under this legislation.

The amendment was rejected 17 to 23, with all Democrats voting in favor of the amendment.

Amendment #5 – Prevents provisions of the bill from applying unless the employee receives regular paystubs.

Representative Takano (CA) offered an amendment that states that the provisions of H.R. 3441 would not apply unless the employee receives regular paystubs that correspond to the work performed by the employee during an applicable pay period. The Takano amendment would ensure that workers have the tools to fight back against wage theft.

The amendment was rejected 17 to 23, with all Democrats voting in favor of the amendment.

Amendment #6 – Renames H.R. 3441 the "Wage Theft Immunity Act."

Representative Polis (CO) offered an amendment to rename this bill the "Wage Theft Promotion Act" given that this legislation eviscerates worker protections under the NLRA and the FLSA by eliminating longstanding avenues for workers to recover stolen wages or to secure recourse for unfair labor practices from employers who jointly control terms of employment., According to a recent report from the Economic Policy Institute, 2.4 million workers in the 10 most populous States lost $8 billion annually from minimum wage violations alone.[48] That is an average of 3,300 annually per year-round worker.

The amendment was rejected 17 to 23, with all Democrats voting in favor of the amendment.

Amendment #7 – An Amendment in the Nature of a Substitute to enact the Raise the Wage Act (H.R. 15), a bill to raise the minimum wage to $15 per hour.

Representative Wilson (FL) offered a substitute that increases the minimum wage to $15 per hour by 2024. Today's minimum wage workers earn less per hour, adjusted for inflation, than their counterparts did 50 years ago even though productivity has more than doubled over that

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[47] Statement of Ranking Member Scott, Committee Markup Transcript (Oct. 4, 2017), pp.58-59.
[48] David Cooper and Teresa Kroeger, "Employers Steal Billions from Workers' Paychecks Each Year," *Economic Policy Institute* (May 10, 2017), available at http://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year-survey-data-show-millions-of-workers-are-paid-less-than-the-minimum-wage-at-significant-cost-to-taxpayers-and-state-economies/.

same time period. Raising the minimum wage to $15 an hour by 2024 will lift pay for nearly 30 percent of the American workforce and reverse the growing trend in income inequality between those at the top and everyone else.

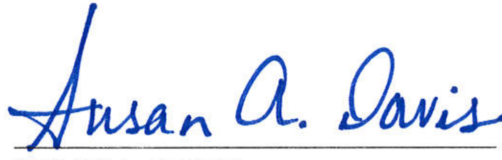
The amendment was ruled non germane.

CONCLUSION

H.R. 3441 enables unscrupulous employers to avoid their legal responsibilities under the NLRA and FLSA, while denying employees recourse for violations of law and inflicting collateral damage to adversely impacted businesses. We urge the full House of Representatives to reject this legislation.

The following organizations have opposed H.R. 3441: AFL-CIO; Center for American Progress; Economic Policy Institute; Farmworker Justice, International Brotherhood of Teamsters; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW); National Employment Law Project; North America's Building Trades Unions (NABTU); Service Employees International Union (SEIU); Signatory Wall and Ceiling Contractors Alliance; United Brotherhood of Carpenters and Joiners of America; United Farm Workers of America (UFW); United Food and Commercial Workers International Union (UFCW); and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW).

ROBERT C. "BOBBY" SCOTT
Ranking Member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RAÚL M. GRIJALVA

JOE COURTNEY

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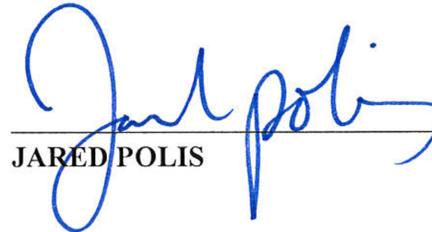
JARED POLIS

GREGORIO KILILI CAMACHO SABLAN

FREDERICA S. WILSON

SUZANNE BONAMICI

MARK TAKANO

ALMA S. ADAMS

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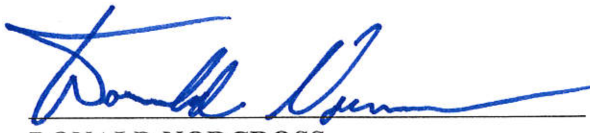
DONALD NORCROSS

LISA BLUNT ROCHESTER

RAJA KRISHNAMOORTHI

CAROL SHEA-PORTER

ADRIANO ESPAILLAT