"Legislative Hearing on H.R. 3459, Protecting Local Business Opportunity Act"
Subcommittee on Health, Employment, Labor, and Pensions
Tuesday, September 29, 2015
Opening Statement

Our economy is at a crossroads. The link between productivity and wage growth has been broken for 4 decades. The problem will only continue to get worse until Congress finally gets serious about fixing the income disparity in this country. There are countless ways that we could be addressing this, from paid sick leave to preventing misclassification of employees to preventing and punishing wage theft.

Study after study also shows that workers' diminished bargaining power is one of the key reasons that we've seen a decade of wage stagnation. And this is directly connected to the background case that prompted this bill.

The NLRB's recent Browning-Ferris Industries decision was important because more and more workplaces are using employee leasing arrangements, temporary employment and perma temp agencies to supply labor.

This decision was narrowly crafted, however, and returned the law to longstanding common law principles used throughout most of the 20th century, but were abandoned in 1984. As data shows, the 1970s and early 80s were not a bad time to be opening or running a franchise. Between 1971 and 1973 alone there was a 129% increase in franchise sales.

Moreover, the BFI decision explicitly states that it doesn't even touch the franchisor-franchisee relationship, which seems to be the basis for this legislation and the slew of partisan attacks we've seen targeting the NLRB (which, of course, are nothing new).

The BFI case is focused on contracting, subcontracting, temporary worker relationships, and whether BFI had the right to control terms of employment. Essentially BFI set up a shell game, so that the workers who sorted recyclables couldn't talk to and negotiate with those who are actually calling the shots regarding essential terms and conditions of employment. BFI set a ceiling for pay for workers, but the workers could only negotiate with a subcontractor called Lead Point, whose hands were tied when it came to raising wages. I think, if we set politics aside and consider the facts objectively, we can all agree that BFI should be considered a joint employer under these circumstances.

Now, this BFI case is only part of the picture. You will also hear about the pending McDonald's case from our witnesses today. But we must be cautious about jumping to conclusions based on this pending case, which is still in the discovery phase.

McDonalds has yet to be litigated, much less decided. With respect to franchising, however, there is another case involving a company called Freshii, a fast-food company, that provides us a window into how the NLRB will examine joint employers where there is a franchisor-franchisee relationship. A General Counsel's advice memo regarding Freshii, found that Freshii was not liable as a joint employer, because while Freshii controls brand quality, they do not have direct or indirect control over employee matters such as pay, punishment or collective bargaining.

As the NLRB notes, Freshii provides franchisees with an optional operations manual. Their system standards do not include any personnel and do not dictate or control labor or employment matters for franchisees such as hiring, pay and scheduling.

I quote from the NLRB Advice Memorandum: "There is no evidence that Freshii or its development agents are involved in the [franchisees']

labor relations or provided guidance about how to deal with a possible union organizing campaign." **Without objection I would like to submit for the record the Advice Memorandum regarding Freshii.**

What this makes clear is that the NLRB is looking at everything on a case-by-case basis. Some people are jumping to conclusions because of the open McDonald's case, but no one knows how the NLRB will rule. NLRB has not even concluded the discovery phase of the case.

The reaction to these cases is the bill we have before us, which I believe is a kneejerk reaction.

Don't get me wrong, I understand some of the questions and concerns from the business community. We should not be discouraging small businesses from opening, or imposing unwarranted liability on franchisors where they do not exercise control over franchisee's employment practices.

However, this legislation goes far beyond the BFI model, which most businesses don't fall under, and exempts joint employer relationships from common law, which applies to businesses in essentially every other type of law.

Most importantly, this bill runs completely counter to an explicit goal in the National Labor Relations Act, which is to ensure the equality of bargaining power between employers and employees. This bill would prevent employees from bringing all of the employers to the bargaining table who have a say over their terms and conditions of employment.

Instead of calling this bill the *Protecting Local Business Opportunity Act*, we should probably call it the *Futility in Collective Bargaining Act*, or even better, *The Shell Game Act,* if we want the title to actually reflect the bill's context.

There is a middle ground on this issue that provides companies and small businesses the assurances they need to not be liable, if they are not setting up a shell game. But instead of finding that middle ground, this bill takes a radical step by jettisoning the longstanding common law principles—namely, that an "employer" is a person who "controls or has the *right to control*" the terms and conditions of employment, in an effort to allow joint employers to remain hidden and unaccountable.

Instead of focusing on improving the economy and decreasing income inequality or improving workers' rights, this Committee is taking up yet another bill that chips away at the ability of workers to collectively bargain for a fair share of the fruits of their labor.

Since my colleagues assumed the majority in 2011, there have been 22 hearings and markups attacking the National Labor Relations Board.

Instead of focusing on an agenda to weaken the middle class, we should be discussing the items I hear about from my constituents through the mail and on the phone every day, and at town hall meetings when I am back in my district in Colorado.

We need legislation to raise the minimum wage; we need paid sick leave legislation; we need legislation to ensure that women receive equal pay for equal work; we need legislation to ensure that workers do not face employment discrimination based on whom they love; we need legislation to prevent employees from being misclassified as independent contractors. And the National Labor Relations Act needs to be updated so that it is more effective in protecting the rights of workers, and not simply a cost of doing business.

Mr. Chairman, I would hope we can begin addressing the needs of American workers, instead of taking up another ideological attack on unions and the NLRB.

I look forward to hearing the testimony from the witnesses, and I appreciate that some of you have traveled a good distance to be here.