HR POLICY ASSOCIATION
The Association of Chief Human Resource Officers

Testimony of

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For the

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Hearing on

Joint Employer Policy and Legal Issues

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[1] *Workplace 2020: Making the Workplace Work*. HR Policy Association, Apr. 2017. Web. http://hrpolicy.org/Content/documents/Workplace_2020_Report_WEB_06-07-17.pdf.

Chairwoman Foxx, Ranking Member Scott, and distinguished members of the Committee:

Thank you for this opportunity to again appear before the Committee. I am testifying today on behalf of HR Policy Association where I serve as Senior Labor and Employment Counsel. My biographical information is attached to my written testimony. I request that my written testimony and the exhibits thereto, in their entirety, be entered into the record of this hearing.

HR Policy Association is a public policy advocacy organization representing chief human resource officers of major employers. The Association consists of more than 380 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, these companies employ more than 10 million people in the United States, and their chief human resource officers are generally responsible for employee and labor relations for their respective companies. Recently, the HR Policy Association published *Workplace 2020: Making the Workplace Work*, a report representing the general views and experiences of the Association's membership on the trends shaping the workforce, the outdated policies that govern it, and the way forward.

❖ Overview

Policy and legal questions as to whether separate and distinct entities are "joint employers" and correspondingly whether a worker is an "employee" or an "independent contractor" are perhaps the two most important labor and employment questions facing the country today.[2] As you no doubt have heard from a number of your constituents, including particularly franchisees and other small and independent business owners, the regulatory and legal issues associated with the questions of joint employer and independent contractor status are becoming increasingly difficult and expensive to answer. These questions, however, are not solely issues and problems for small employers and franchisees. Our member companies, which constitute some of the largest employers in the country, view joint employer and independent contractor issues as some of the most important challenges they face today in the labor and employment area.

[2] The joint employer doctrine, which includes situations where separate legal entities have chosen to handle aspects of their employer-employee relationship jointly, should not be confused with the "single employer doctrine." The single employer doctrine (a/k/a "integrated enterprise" doctrine) involves situations where multiple legal entities are found to: (1) have common ownership or financial control, (2) have common management, (3) have centralized control of labor relations, and (4) interrelations of operations. These indicia have been utilized by the courts in various fashions. The one common thread in most of the single employer findings, however, has been common ownership of the entities in question. *See Baker v. Stuart Broadcasting Co.*, 560 F.2d. 389 (8th Cir. 1977) and *Wells v. Firestone Tire & Rubber, Co.*, 421 Mich. 641, 364 N.W.2d. 670 (Mich. 1984). Further, as discussed later in the testimony, it is important to understand the differences between vertical joint employer relationships and horizontal joint employer relationships.

The reasons for these concerns by small, medium, and large size businesses are many and varied, but eventually all relate to the increasingly difficult regulatory and litigation climate that has developed in this area. At the base of this discussion is the potential for application of the legal doctrine of joint employer status, and its potential far reaching effects on all entities found to be a joint employer. This is a very powerful legal doctrine where unrelated entities can be jointly and severally liable for statutory violations, even if the other entity or entities that are found to be part of the joint relationship are wholly responsible for the violation, and the entity that is additionally being held jointly liable had no involvement in such matter or any practical means to prevent the alleged violation. Indeed, the non-actor joint employer may not even have any knowledge of the event(s) or circumstances that were involved until being served with a complaint in an administrative or judicial proceeding. This potential for unforeseen liability can result in considerable financial exposure in many different situations under an ever-expanding number of labor and employment regulations and statutes.

Although employer exposure to increased liability as a result of the National Labor Relation Board's (NLRB) recent decision in the *Browning-Ferris* case has received considerable attention—as it should—the potential for litigation risk is arguably even greater under other federal labor statutes such as the Fair Labor Standards Act (FLSA), the Occupations Safety and Health Act (OSH Act), and various federal employer discrimination statutes. The potential for broad legal exposure is particularly present in supply chain relationships that many large employers have with hundreds of unrelated business entities. In such relationships, if the user employer requires even minimum employment standards be met by suppliers in the labor relations area, the user employer may be found to be a joint employer. The social pressure, indeed, can be great in this area on large employers. For example, it is easy to recall numerous recent media stories where employers are being asked to assume social responsibility for the employment actions for all of their suppliers even if they have no ability to directly supervise such off-site workers or, as a practical matter, to oversee the day-to-day working conditions that are present in many remote areas of the world. Our member companies have and will continue to accept on a voluntary basis their corporate social responsibility in this area, but they do not want to be saddled with overreaching rules and regulations, and be exposed to onerous and expensive litigation. Finally, franchisors have experienced similar considerable legal exposure in their relationship with franchisees with whom they have, as a practical matter, little ability to oversee on a daily basis.

Employees are also increasingly left in a quandary as to their status in this joint employer discussion. Predictability and certainty as to their relationship with one or more employers has become increasingly problematic. Indeed, as outlined further in this testimony, workers in certain instances may be penalized by not being provided certain workplace benefits due to an employer's concern that the extension of such benefits to supplier employed individuals would make it a joint employer.

There is a great need for common sense to be brought into this area. Regulatory agencies and the courts need to do a "reality check." Further, the joint employer area merits thorough and

serious attention by this Committee—this is an area that needs an immediate legislative solution. Specifically, the HR Policy Association recommends the following outline for joint employer legislation:

- ➢ A simple and concise definition of the term "joint employer" for federal labor and employment statutes. The National Labor Relations Act (NLRA), FLSA, OSH Act, and various federal employer discrimination statutes, at a minimum, should be subject to this uniform definition.
- ➢ Before a regulatory agency or court could reach a legal conclusion of joint employer status, factual findings would have to be made that the entity or entities in question had the authority to: (1) hire and fire; (2) determine rates of pay and methods of payment; (3) manage payroll and leave policies; (4) directly supervise on a day-to-day basis the workers in questions, including determination of work schedules, assignment of positions and tasks, and administration of discipline; and (5) maintain employee records required by law.
- ➢ Authority in the above areas would have to be found to be direct, actual, and immediate.
- ➢ Federal preemption and safe harbors should be provided to any employer who meets the above criteria to preclude such employers from being subjected to increasingly onerous state and local labor and employment legislation and litigation. This approach would help to address the increasing phenomena of "reverse preemption" where certain state legislation and municipal ordinances have unduly influenced national labor and employment policy.

The Association also urges the Committee to do a long-range study regarding the potential to establish a new worker classification definition—the independent worker. This classification of a worker is discussed in a thoughtful and comprehensive study entitled "A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent Worker'" by Seth D. Harris and Alan Krueger. While there remain issues regarding this proposal and how this new classification system would work, the concept of permitting workers to remain independent while receiving certain benefits from employers and also being covered by certain federal employment statutes certainly merits consideration given the continuing litigation and controversy regarding independent contractor status and joint employer classification.

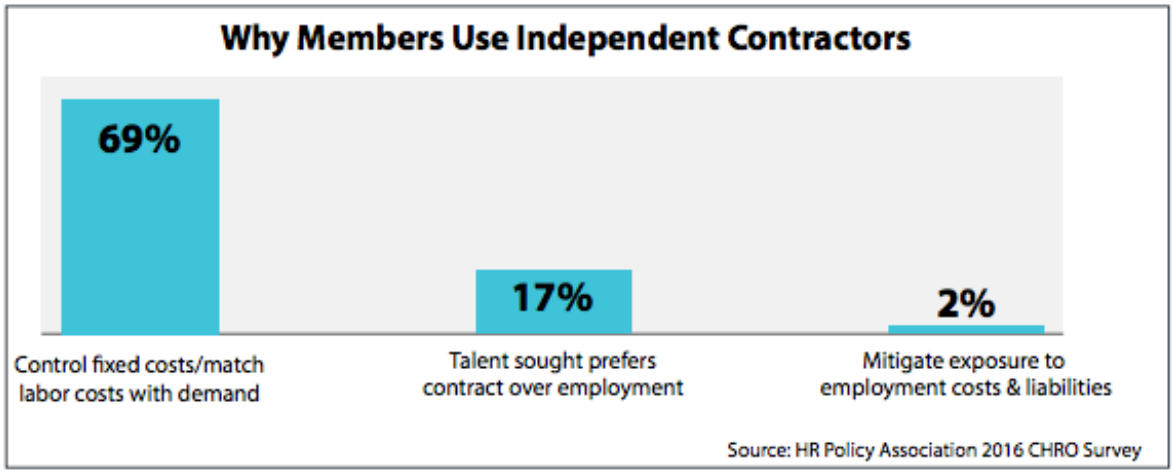
Finally, discussions of legislative solutions in this area, like in many areas in the labor and employment field, have the potential to result in highly partisan positions being taken by various stakeholders. Hopefully, such an approach can be avoided. While it is true that plaintiff-oriented attorneys and their clients on occasion hit the "legal jackpot" and win a case involving FLSA issues or prevail in an employee misclassification status case, such "victories" are few and far between. The vast majority of your constituents never see the fruits of such so-called victories, and even the successful workers in such litigation often only receive small payments while their attorneys receive large payouts in fees. Contrasted with these so-called victories is the harsh reality that employers are increasingly faced with additional regulatory compliance costs

and litigation defense expenses that curtail job development and limit wage and benefit growth. The only real winners in the current status quo of ambiguity and excessive litigation in the joint employer area are lawyers, and perhaps law professors, who can write interesting academic articles about this subject.

❖ **Joint Employer Workplace Discussions Frequently Have Proceeded from Misinformation and Incorrect Assumptions**

The discussion of joint employer issues has often started in academic and regulatory settings from the premise that employers outsource and subcontract work and enter into relationships with various business entities to affirmatively avoid coverage of federal and state employment statutes such as the NLRA, FLSA, OSH Act, and various anti-discrimination statutes. The "thinking" that flows from this premise is that employers who are engaging in such activities should be closely scrutinized, and subject to various penalties and regulation to discourage them from entering into such business relationships. Further, this type of analysis then concludes that the definition of "joint employer" should be considerably broadened to include a multitude of workplace relationships that traditionally have not been found to constitute a joint employment situation. This line of thinking is not only unfortunate, but incorrect.

An objective and thoughtful analysis in the joint employer area should begin with an entirely different premise—the reason that virtually all business entities outsource work is to maximize efficiency, productivity, and quality. Most functions that employers assign or contract out to other entities or to independent contractors are jobs or services that are not part of their core business function, and that they cannot perform in a cost efficient or quality efficient manner. Indeed, as illustrated by the following chart, virtually all outsourcing, subcontracting, or independent contractor relationships are not initiated by a desire to avoid "employee status" under various federal and state employment laws.



❖ **Increased Joint Employer Litigation Expenses and Conflicting Joint Employer Definitions**

As the HR Policy Association highlighted in the *amicus* brief it filed last week along with the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Retail Federation, and the Retail Litigation Center, with the U.S. Supreme Court supporting DirecTV's petition for certiorari in the case *Hall v. DirecTV*, 846 F.3d 757 (4th Cir. 2017)—and which is attached to the testimony as Exhibit 1—FLSA cases alone are at record levels in the federal courts. During the 12-month period ending on March 31, 2016, plaintiffs filed 9,063 FLSA cases in federal district courts, compared with 5,507 patent cases, 1,070 anti-trust cases, and 1,053 securities cases.[3] Further, a Westlaw search of federal district court decisions in 2016 revealed over 100 decision addressing claims of joint employer status under the FLSA alone. Franchisors and franchisees have been particularly hard hit in this legal area with litigation involving such entities increasing from only 3 in 2007, to 15 in 2012, and to 38 in 2016. Additionally, the General Counsel of the NLRB has initiated one of the most expansive proceedings in the Board's history by issuing dozens of complaints against McDonald's USA, LLC and independently owned and operated McDonald's franchisees located in New York, Philadelphia, Chicago, Indianapolis, Sacramento, and Los Angeles.

Currently, there are almost as many different versions of the legal test for who is a joint employer under the FLSA as there are Circuit Courts of Appeal in the United States. For example, the First Circuit (ME, NH, MA, RI) applies a four factor economic realities test (a.k.a. the *Bonnette* test), while the Second Circuit (NY, VT, CT) uses the *Bonnette* test but adds six functional control factors. On the other hand, the Third Circuit (PA, NJ, DE) uses the *Bonnette* test but also considers whether an employer can impose discipline on an employee, while the Fourth Circuit (MD, VA, WV, NC, SC) just created a novel "completely disassociated" test that looks at the relationship between the employers. In yet another approach, the Eleventh Circuit (AL, GA, FL) uses a distinct eight-factor test that is related to the economic realities test.

Moreover, the new joint employer test that the NLRB developed in the *Browning-Ferris* case[4] is exceedingly broad and ambiguous, and arguably permits a finding of joint employer status even if the entities in question possess unexercised and indirect authority to control terms and conditions of employment.[5] Remarkably, to further complicate the joint employment issue, the Equal Employment Opportunity Commission (EEOC) submitted an *amicus* brief in the *Browning-Ferris* case and argued that the Board should adopt the EEOC's 15 factor standard,

[3] See Administrative Office of the United States Courts, Federal Judicial Caseload Statistics Table C-2 (June 2017).
[4] *Browning-Ferris Indus. Of Cal., Inc., D/B/A BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015).
[5] "Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to joint employer inquiries". *Browning-Ferris Industries of Calif., Inc.*, 362 NLRB No. 186 (2015).

which it described as "more flexible, more readily adaptable to evolving workplace relationships and realities."[6]

Policymakers need to enact legislation to clarify and simplify these widely varying joint employer tests for a number of reasons:

➢ **Decrease Regulatory Compliance and Litigation Expenses**

As noted in the above section, there has been a significant increase in joint employer litigation with regulatory agencies and courts applying differing and conflicting standards. There is no positive return on investment to employees, businesses, and indeed the nation as a whole for these types of expenditures. The resources currently being expended in this area could and should be expended to achieve other objectives, including investment for job creation, employee training, and for increased worker wages and benefits.

➢ **Importance of National Consistency**

Geographic consistency is particularly important for large multistate employers and franchisors. A uniform and consistent approach in the joint employer area will significantly reduce unnecessary and costly regulatory compliance and litigation expense. Many businesses operate across multiple circuit court jurisdictions, and are subject to multiple competing standards for determining compliance with federal labor laws. Surely, Congress did not intend this to be the case when it enacted these statutes. To simplify compliance and reduce unnecessary administrative costs, a uniform definition for joint employer status should apply to federal employment laws.

➢ **Need for Stability and Predictability in Business Arrangements**

As the Supreme Court noted in its decision in *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010), "predictability is valuable to corporations making business and investment decisions." Novel and disparate legal decisions are threatening to penalize and deter longstanding economically sensible business arrangements, including but not limited to employers and subcontractors and franchisors and franchisees. The United States Court of Appeals for Fourth Circuit recent decisions in *Hall v. DirecTV* and *Salinas v. Commercial Interiors*, 848 F.3d 125 (4th Cir. 2017) and the NLRB's *Browning-Ferris* decision threaten to deter companies from entering into business relationships that promote meaningful commerce and are good for both employees and shareholders alike.

➢ **Employer Good Deeds Should Not Be Punished**

[6] Brief of the EEOC as Amicus Curiae, *Browning-Ferris*, 3C-RC-109684 (filed June 15, 2014).

Many companies have, and many more would like to have, the freedom to establish corporate social responsibility (CSR) standards for their contractors, franchisees or others—be it pay, benefits, training, drug testing, background checks, etc.—without having to be drawn into a joint employment relationship and perhaps expensive and protracted litigation.

For example, in 2015, one company announced a new CSR initiative where it would only do business with suppliers that provided certain employees with at least 15 days of paid leave annually. The NLRB argued that this request by the user company made it a joint employer with the supplier company in question even though it did not exercise any type of direct control over the terms and conditions of employment of the employees of the supplier employer. Ironically, the user company in question had, shortly before this unfortunate regulatory action occurred, been praised by President Obama's White House as being an example of a leading employer in the country that was promoting socially responsible terms and conditions of employment.

The HR Policy Association has brought this unfortunate regulatory overreach to the attention of the United States Court of Appeals for the D.C. Circuit in an *amicus* brief in the pending *Browning-Ferris* case. Attached as Exhibit 2 to this testimony is a copy of the Association's *amicus* brief in the *Browning-Ferris* case. If the NLRB's broad new joint employer decision is not overturned by the courts, such standard no doubt will deter other companies from adopting such policies. Indeed, some law firms that represent employers have issued alerts cautioning companies to limit requirements that they impose on their business partners affecting those partners' employees to avoid inadvertently creating joint-employment relationships.

➢ **Need to Shield Employers from Secondary Boycott Activity and Bargaining Obligations with Unrelated Business Entities**

Certain joint employer recent decisions, including the NLRB's decision in the *Browning-Ferris* case, have the potential to permit secondary boycott activity and related corporate campaign initiatives against an entity that historically has not been found to be a joint employer. Indeed, such conduct without a joint employer finding would, in many instances, be prohibited as illegal secondary conduct under section 8(b)(4) of the NLRA. Stated alternatively, if an entity is a neutral in a labor dispute it cannot be lawfully the target of secondary boycott activities and otherwise immersed in a dispute with the labor organization that has initiated such activities against another entity. If the previously neutral employer in question, however, is found to be a joint employer with the primary target of the dispute, a labor union could proceed to engage in boycott and other secondary activates against the neutral joint employer entity without being in violation of the NLRA.

Additionally, under the NLRA, a joint employer finding could require an otherwise unrelated and separate business entity to have bargaining obligations with a union that successfully organized another entity in the joint employer relationship.

❖ **Certain Joint Employer Definitions, Including the NLRB's Definition, Deter and Interfere with New Employer-Worker Relationships**

There is a significant danger that the current overbroad definition of joint employer status will create new barriers to the movement of work at a time when flexibility is critical to ensuring that workers find work arrangements best suited to their skills, career development, income and family responsibilities. The reality is that in many instances, workers who possess skills in critical demand seek to be tied to the market, not to individual employers. Recognizing this reality is not just essential to ensuring that businesses can be at their competitive best but also to empower the workers themselves to ensure that their skills are put to maximum use in a way that serves their own needs and desire for job security.

The benefits to workers of non-traditional work relationships are often overlooked. These benefits can derive from a wide variety of motivations on the part of those workers, including:

➢ Flexibility, which fixed employment with a single employer may for certain workers impede through obligations and a commitment of time to the needs of that employer; and

➢ Marketability, combined with entrepreneurship that provides workers with a special set of skills in high demand that bolster the ability to make more money on their own (or as an employee of a firm specializing in those skills) and be more selective of jobs that match their interest as a "free agent."

Meanwhile, employers may be motivated by a variety of factors that have nothing to do with avoiding liability under federal labor laws, including:

➢ Managing the ebb and flow of staffing needs, which is necessitated by fluctuating market demands;

➢ A lack of availability of certain specialized skills, in which case an employer can only acquire those skills from entrepreneurial individuals or companies specializing in providing those skills; and

➢ Focusing on core competencies of the company, and thereby relying on other individuals or companies who may provide better service through its own core competency (*e.g.*, security).

Finally, if the current state of the law is permitted to continue in this area, it may have a disruptive and expensive impact on the federal procurement process. As the Committee is well

aware, the government, on a daily basis, contracts with thousands of entities for essential products and services. If the approach taken by the Fourth Circuit Court of Appeals in the *DirecTV* case prevails, the government may be found in numerous instances, to be a joint employer with various contractors, and subject to considerable litigation under joint employer theories. *See* 29 U.S.C. § 203(d) which defines "employer" to include a public agency. *See also Murphy v. Volt Information Sciences, Inc*., 203 Westlaw 5372787 at 2 (D.OR. September 24, 2013) (holding that federal government's waiver of sovereign immunity in family medical leave act case extends to joint employment).

- **The Current Legal Regime, with Its Extensive Regulatory and Litigation Outcomes, Will Impede Positive Developments for Workers**

Ultimately, the application of any definition of "employer" or "joint employer" depends on various "indicia [i.e., indicators] of employment." Being on a company's payroll is probably the clearest indicator but regulators look at a variety of other factors, such as control over schedule, work directions, the work performed, and whether a claimed "independent contractor" performs work for other companies. An overly rigorous enforcement of these factors forces companies to minimize these "indicia" in ways that are often harmful not only to those contingent workers but also to their own employees.

Thus, a company that has an on-site day care center or physical fitness program that is part of its wellness program may exclude from those benefits anyone who is not an employee of the company. In addition, a host company that contracts with an outside firm to provide physical security to its premises may believe that its employees' protection will be best served by certain hiring standards for the security personnel used by that firm. This may include drug testing and background checks, a minimum level of training, pay and/or benefits and so forth. Yet, if the host company seeks to impose those standards on the security firm, it increases the likelihood of being considered a "joint employer" of such individuals.

- **Certain of the Recent Joint Employer Decisions Have Ignored Congressional Intent and Misapplied the Law in this Area**

Certain decisions by regulatory agencies and courts in the joint employer area appear to be result-oriented with objectives to add a deeper pocket defendant or defendants. Such decisions appear to have little, if any, relationship with the substantial body of common law developed in the agency area. Further, some decisions have seemingly adopted a very liberal and self-imposed "humanitarian" mission of expanding the reach of the joint employer definition beyond what was intended by the Congress. For example, the Fourth Circuit's recent decision in the *Salinas* case stated that one of the rationales for the Court's holding was the premise that the FLSA has a "remedial and humanitarian…purpose [and therefore]…should be broadly interpreted and applied to effectuate its goals," *Salinas* 848 F.3d at 140. Such an approach is erroneous for a number of reasons including the fact that many, if not most, legislative enactments are remedial in nature. The Congress, not the courts, should be the decider of the

reach of a statute. Social engineering, whether it be under the FLSA or other statutes, is not the function of the courts. As the Supreme Court stated in the *Rodriguez v. United States* case, 480 U.S. 522, 525-26 (1987), "no legislation pursues its purpose at all costs," and that the correct statutory interpretation approach is that when a court analyzes the balance struck by Congress in a remedial statute, its goal should be to "neither liberally to expand nor strictly to constrict its meaning but rather to get the meaning precisely right," *Rodriguez* at 582.

The NLRB's holding in its *Browning-Ferris* decision is also a prime example of the will of Congress being ignored in the joint employer area. In 1947, the Congress expressly directed in the Taft-Hartley amendments to the NLRA that the Board utilize common law principles of agency when determining the questions of employee and employer status. The Congress specifically overruled an earlier Supreme Court decision in *NLRB v. Hearst Publications, Inc.*, 322, U.S. 111 (1944), which had disregarded common law principles of agency, and held that "independent contractors" could be considered "employees" under the NLRA. The legislative history to the 1947 Amendments is quite instructive on this question. For example, the House Committee Report accompanying the 1947 Amendments was quite critical of the Board and noted that the term "employee:"

> According to all standard dictionaries, according the law as the courts have stated it, and according to the understandings of almost everyone, with the exception to members of the National Labor Relations Board, means someone who works for another for hire…[and who] worked for wages or salaries under direct supervision…It must be presumed that when Congress passed the Labor Act, it intended words it used [such as "employee"] to have the meanings they had when Congress passed the Act, not new meanings that, nine years later, the Labor Board might think up…it is inconceivable that Congress, when it passed the Act, authorized the Board to give to every word in the Act whatever meaning it wished. H.R. Rep. No. 245 at 18, 80th Cong., 1st Sess. (1947). *See also Allied Chem. & Alkali Workers, Local Union No.1 v. Pittsburg Plate Glass Co.*, 404 U.S. 157 (1971).

It is clear that what Congress did in 1947 was designed to reinforce the applicability of common law agency principles to determine who is an employer and who is an employee under the NLRA. Thereafter, the Supreme Court has consistently utilized common law agency principles to determine who is an employee and who is an employer, *Town & Country, Elec., Inc.*, 516 U.S. 85 (1995).

As noted above, the Fourth Circuit Court of Appeals decision in the *Hall v. DirecTV* case also is a substantial deviation from not only joint employer tests utilized in other circuit

courts of appeal, but also is a substantial misinterpretation of the United States Department of Labor regulations in the joint employer area. Indeed, the Fourth Circuit's decision in the *Hall* case fails to understand the difference between vertical joint employer and horizontal joint employer relationships. In a vertical joint employer relationship, a worker has a relationship with an entity that supplies services to another entity, and allegations in this area generally state that both entities are the worker's employer. A horizontal joint employer relationship by contrast is a situation where an employee initially has a direct employment relationship with two or more entities, and the contention in these types of cases is that the entities in question should be treated as a joint employer for purposes of the FLSA. The Fourth Circuit, unfortunately, rejected the joint employer test that has been almost universally followed, at least in part, by other United States Courts of Appeal and as set forth in *Bonnette v. California Health & Welfare Agency*, 704 F.2d. 1465 (9th Cir. 1983), abrogated on other grounds by *Garcia v. San Antonio Metro Transit Auth*., 469 U.S. 528 (1985). The substantial legal deficiency in the Fourth Circuit reason is set forth in Exhibit 1, the Association's *amicus* brief in support of DirecTV's petition for certiorari.

❖ Solutions to Joint Employer Issues

➢ United States Department of Labor (USDOL) Action

The USDOL recently took thoughtful and immediate action in withdrawing two interpretation letters that had been previously issued by the Department. These previous interpretation letters broadened the definition of instances when joint employer status could be found and also narrowed definitional approach with respect to independent contractor issues. Although such AI's have minimal legal significance, they do reflect a significant policy change from the Department in joint employer and independent contractor area. Department of Labor—Administrative Interpretation No. 2016-1: Joint Employment Under the Fair Labor Standards Act and Migrant Seasonal Agricultural Workers Protection Act (January, 20, 2016) and Administrative Interpretation No. 2015-1: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors (July 15, 2015).

The Department should further examine a number of outdated regulations in the FLSA area as they relate to joint employer status. Specifically, the Department should reexamine the present regulation that discusses horizontal joint employer relationships and remove the phrase "completely disassociated" as such requirement is virtually impossible for employers to meet and is subject to incorrect interpretation as recently evidenced in the Fourth Circuit Court of Appeal's holding in the *DirecTV* case.[7]

[7] 29 C.F.R. 791.2

➢ **Legislative Action**

Legislation relief in this area is needed. Such legislation should include a uniform, simple, and concise definition of joint employer status under various federal labor and employment statutes, and include, at a minimum, the NLRA, FLSA, OSH Act, and federal employment discrimination statutes. Additionally, such legislation should require, before a finding of joint employer status could be made, that the entity or entities in question have the authority to (1) hire and fire; (2) determine rates of pay and methods of payment; (3) manage payroll and leave polices; and (4) supervise on a day-to-day basis the workers in question, including determining work schedules, assignment of positions and tasks, and administration of employee discipline; and (5) maintain employee records required by law.

The above basic principles track the common law in this area, and also incorporate the basic principles set forth in the *Bonnette* case, which as previously noted is the lead circuit case authority in the joint employer area.

In addition, before a finding of joint employer status could be found, a court and administrative agency should be required to find that the above authority is exercised directly, actually, and immediately.

Correspondingly, however, entities should not be considered a joint employer if they only exercise indirect supervision of the individuals in question to ensure compliance with the contractually mandated brand standards, performance measurement, product requirements, quality requirements, safety requirements, customer or other service obligations, or federal, state, and local statutory and regulatory obligations. Additionally, any entity that provides basic training to potential employees to ensure statutory and regulatory compliance, and an ability to participate in basic benefit plans such as retirement, health, dental, and life insurance, should not be deemed to be a joint employer.

➢ **Need for Preemption and Safe Harbor Status**

As the Committee is well aware, there continues to be a proliferation of state and local labor and employment statutes and ordinances. While some cost of living-geographical considerations arguably might support such a local diversified approach with respect to the minimum wage standards, no such justification exists in the joint employer area. Employers and employees should not be subject to different and conflicting outcomes with respect to the definition of joint employer status based upon the jurisdiction in which they live and do business. As outlined above, consistency and predictability in this area is very important, especially for the planning and implementation of productive business relationships. Further, the added cost of having to adjust compliance approaches in different jurisdictions, and the exposure litigation due to varying and conflicting standards, should be eliminated. A national uniform definition of joint employer status with corresponding "ERISA type" preemption should be included in any legislation in the joint employer area.

Additionally, taking a uniform approach to the definition of joint employer status would be a needed check against the increasing "reverse preemption" phenomena that has started to develop in this country. This phenomenon has developed due to certain states implementing very far reaching local labor and employment statutes forcing large employers, including franchises that operate in multistate areas, to essentially adopt the most liberal policy or statute in question for all of it operations throughout the country to ensure consistency and minimize regulatory and court litigation exposure. Federal labor and employment law policy should be set by the Congress, not by various state legislative bodies and local municipalities. Stated alternatively, what is enacted in Sacramento should not unduly influence employer practices in Alabama, North Carolina, Michigan, Virginia, or any other part of the country.

❖ Closing Thoughts

As noted above, a broad and overreaching definition of joint employer status could also harm workers. Clearly, any employer seeking to affirmatively avoid liability by constructing sham arrangements with workers should be prosecuted. However, those seeking to provide certain benefits to contingent workers in addition to their own employees should be protected through the creation of specific safe harbors such as:

- ➢ Allowing employers to include contingent workers in certain events with employees, such as team-building exercises, thus removing barriers to optimal productivity by maximizing communications and chemistry between employees and non-employees working toward common objectives;
- ➢ Allowing participation—at the contingent workers' option—in the company's health care or defined contribution retirement plan;
- ➢ Allowing contributions to government insurance programs, such as unemployment insurance, workers' compensation, and paid family and medical leave insurance;
- ➢ Requiring drug testing and minimum levels of training for those involved in sensitive areas, such as security, that affect the safety and wellbeing of the employers' own employees;
- ➢ Requiring its contractors to provide to their own employees certain minimum pay and/or benefits; or
- ➢ Establishing methods to facilitate compliance by their franchisees or contractors with various employment laws.

Finally, the Association urges the Committee to undertake a long-range study on the potential benefit of developing a new statutory category for employees—an independent worker

classification wherein workers could receive certain benefit from employers, be covered by certain federal labor and employment statutes, but would retain their independent worker status.[8]

Ms. Chairwoman, this concludes my testimony. I would be happy to answer any questions Committee members may have.

[8] See "A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent Worker'", by Seth Harris and Allan Krueger, The Hamilton Project (December 7, 2015).