TESTIMONY OF ZACHARY D. FASMAN

BEFORE THE HOUSE EDUCATION AND LABOR COMMITTEE

SUBCOMMITTEES ON WORKFORCE PROTECTION AND

HEALTH, EMPLOYMENT, LABOR AND PENSIONS

September 13, 2017

Chairwoman Foxx, Ranking Member Scott, Subcommittee Chairman Byrne, Ranking Member Takano, Subcommittee Chairman Walberg, Ranking Member Sablan and Distinguished Members of the Committee and Subcommittees:

My name is Zachary D. Fasman and I am a partner in the law firm of Proskauer Rose, LLP, practicing in the Firm's New York office. I graduated with honors from the University of Michigan Law School in 1972 and have been practicing labor and employment law for the past 45 years, during which time I have had extensive experience under the National Labor Relations Act, the Fair Labor Standards Act and other federal labor laws. I also have had extensive experience with the collective bargaining process, having negotiated hundreds of bargaining agreements during my career. I am a member of the Advisory Board of the Center for Labor and Employment Law at NYU Law School, a member of the Labor Relations Committee of the U.S. Chamber of Commerce, a Fellow of the College of Labor and Employment Lawyers, and have held various leadership positions in the Labor Law Section of the American Bar Association.

I have written several books and numerous articles on labor and employment law during my career. I delivered a lengthy paper entitled "Joint Employers under Employment Law" at the 68th Annual NYU Labor Conference in 2015. I submitted an amicus brief to the NLRB in the Browning-Ferris case, urging the NLRB not to alter its joint employment test, on behalf of the Coalition for a Democratic Workplace and 15 national trade organizations. And I have been

counsel to CNN America in one of the most significant recent joint employer cases under the National Labor Relations Act, *CNN America, Inc.*, 361 NLRB No. 47 (2014), a case that consumed 82 trial days which until the recent McDonald's litigation was the second-longest hearing in the NLRB's history. I am pleased to advise the Committee that on August 4, the District of Columbia Circuit Court of Appeals held that the NLRB had erred in departing from the "direct and immediate" control test to find that my client and a contractor who performed services for it were joint employers under the NLRA.

I am appearing here as an individual, and the views I express are my own and not the views of any clients I represent or organizations on which I serve.

LEGAL ISSUES

I strongly support H.R. 3441, which would restore the traditional "direct and immediate control" test for joint employment under the NLRA and the FLSA, overturn the NLRB's ill-advised 2015 ruling in *Browning-Ferris, Inc.*, 362 NLRB No. 185 (2015), and codify this important standard to prevent future NLRB panels from embarking on this unwise course. In my view as a practicing labor lawyer, *Browning-Ferris* is nothing short of a disaster. My co-panelists and many others have addressed the economic impact of that ruling upon business, which is highly significant.[1] I would like to concentrate on some of the troubling legal questions that the ruling raises.

1. <u>The Dangers of a Hypothetical Test</u>. I am sure the Committee members know the history of the joint employer controversy, but let me restate briefly what is in my opinion the critical legal issue.

[1] *See, e.g.*, Testimony of G. Roger King before the House Education and Workforce Committee, July 12, 2017.

Beginning in 1984 and continuing until the NLRB's 2015 *Browning-Ferris* decision, the NLRB and the courts determined whether two separate entities were joint employers by assessing whether each exerted such direct and significant control over the same employees that they "share or codetermine those matters governing the essential terms and conditions of employment. . . "[2] The Board applied this analysis by evaluating whether a putative joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction" and whether that entity's control over such matters was direct and immediate.[3] And it deliberately – and wisely – distinguished direct and immediate control from situations where the alleged joint employer's supervision was limited and routine.[4]

This standard, which was based upon the **actual conduct** of the parties as opposed to hypothetical after the fact legal conclusions about retained but unexercised authority, afforded stability and predictability in business relationships while allowing collective bargaining between unions and the "direct" employer that actually set the terms and conditions of employment. For more than 30 years, the NLRB and the courts applied this standard by determining the **actual relationship** between the two businesses in question; who hired, fired, disciplined, supervised or directed the employees. *See generally AT&T v NLRB*, 67 F 3d 446 (2d Cir. 1995) (joint employer finding cannot be based upon only one indicia of control; putative joint employer must be involved in hiring, firing and discipline of employees); *NLRB v Clinton's Ditch Coop. Co.*,

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[2] TLI Inc., 271 NLRB 798 (1984), enforced without op. sub nom., Gen. Teamsters Local Union No. 326 v. NLRB, 772 F.2d 894 (3d Cir. 1985); Laerco Transp. & Warehouse, 269 NLRB 324 (1984).

[3] *Airborne Freight Co.*, 338 NLRB 597 (2002); *see TLI Inc.*, 271 NLRB at 798 (*citing Laerco Transp.*, 269 NLRB 324 (1984)).

[4] *See, e.g., SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 443 (2d Cir. 2011) (finding supervision that is "limited and routine" in nature does not support a joint employer finding, and that supervision is generally considered "limited and routine" where a "supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.") (citation omitted); *A.M. Property Holding Corp.*, 350 NLRB 998, 1001(2007); *G.Wes Ltd. Co.*, 309 NLRB 225, 226 (1992).

778 F. 2d 132 (2d Cir. 1985) (limited supervision of employees not sufficient for joint employer finding).

In *Browning-Ferris*, however, the NLRB decided to abandon **actual conduct** and base its future decisions not on what actually happened in the workplace but on hypothetical concepts; whether the alleged joint employer had the "potential" to control aspects of the workplace, either "directly or indirectly", even though it never had exercised that authority. According to the Board's three member majority, joint employer status now will be found where one entity either (1) actually directly controls another employer's employees' terms and conditions of employment; (2) where that entity has "indirect" control of terms and conditions of employment, whatever that might mean; or (3) where the alleged joint employer simply has the "potential" right to exert such control. As the *Browning-Ferris* dissent pointed out, virtually every business that subcontracts part of its operation falls into this category, as contracting parties will always will have some form of economic control over the relationship, even if they have never exercised it. As the dissent stated: "anyone contracting for services, master or not, inevitably will exert or and/or reserve some measure of indirect control by defining the parameters of the result desired to ensure he or she gets the benefit of his or her bargain." 362 NLRB No. 186 (2015) slip op. at 29 (and cases there cited).

That is the key problem of the *Browning-Ferris* decision; it sweeps virtually every contracting relationship within its boundaries. In practice, it is no standard at all. As the *Browning-Ferris* dissent stated, "[n]o bargaining table is big enough to seat all of the entities that will be potential joint employers under the majority's new standards." 362 NLRB No. 186 (2015), slip op. at 21. A business that merely contracts for a specific number of personnel at designated times – clearly controlling only the result of the relationship, and not the terms of

employment for the employees – is liable to be considered a joint employer under *Browning-Ferris*.

The dissenters in *Browning-Ferris* claimed that the new standard promotes "no certainty or predictability regarding the identity of the employer." 362 NLRB No. 186 (2015), slip op. at 22. I disagree; in fact, it does just the opposite. It assures every contracting business throughout the entire United States that it is likely to be considered a joint employer with every one of its subcontractors, because – and here I agree with the dissent – "anyone contracting for services, master or not, inevitably will exert or and/or reserve some measure of indirect control by defining the parameters of the result desired to ensure he or she gets the benefit of his or her bargain." 362 NLRB No. 186 (2015) slip op. at 29. A prudent business seeking to comply with the law will have to assume that the NLRB or a reviewing court, applying this standard, will find it liable to the subcontractor's employees under the NLRA or the FLSA, even if it retains no control over them. This will ensure an unprecedented level of business disruption, and cannot be what Congress ever intended.

To make this clear, recall that the Board majority in *Browning-Ferris* emphasized that "the total factual context" must be "assessed in light of the pertinent common law principles" and that the Board would consider the various ways in which joint employers may "share" or "codetermine" terms and conditions of employment, including specifying the number of workers to be supplied; the times the workers will be expected to work; and the assignment of work and the method of performance. The majority referenced a number of factors as evidence of indirect control that might arise in any given case, including:

- owning and controlling the place of work;

- "dictating the essential nature of the job, and impos[ing] the broad, operational contours of the work," including the number of workers to be provided, defining the work and how quickly the work should be completed[5];
- setting the hours when the work will have to be performed, seniority and overtime;
- prescribing minimum qualifications necessary for completion of the work, including requiring the contractor to ensure that the personnel have the appropriate qualifications including certification and training;
- reserving the right to reject an individual;
- inspecting the contractor's employees' work;
- providing work directions to the contractor that the contractor's supervisors use in their directives to the contractor's employees;
- agreeing to a price for the services in the form of a cost-plus formula.[6]

How these factors will be applied in any given case remains to be seen, but it certainly requires no stretch of the imagination to foresee that an NLRB comprised of members with the views of the *Browning-Ferris* majority would conclude that every contractor with a cost-plus contract retains "potential" control sufficient to make it a joint employer.

The problem with this formulation – or indeed any formulation that is not based upon the parties' **actual conduct** – is that it negates freedom of contract and allows imposition of joint employer liability **after the fact**, based upon administrative decisions about the level of "potential" or "indirect" control retained but unused by the alleged joint employer. To illustrate the reach of this concept, consider a business that contracts with a security company, a common practice given the level of training and licensing requirements for security guards who may carry weapons. The two contracting businesses agree that the security company will hire, fire, pay, discipline and supervise its own employees, and in fact that is how the relationship is conducted. The contracting company in fact makes no decisions about the employment of the security guards, but does specify in the contract how many guards it needs and the locations and hours when it needs them. Under an **actual control** standard, the security company properly is

[5] 362 NLRB No. 185 (2015) at 14.

[6] *See* 362 NLRB No. 185 (2015) at 14-15; at 36 (dissenting opinion).

considered the employer of the guards, and the contracting company is not a joint employer. Yet under the NLRB's "indirect" and "potential" control standard, as explained in *Browning*-Ferris, the contracting company might well be considered a joint employer with the security company because it specifies how many guards it needs and the hours when they are needed. It then could be required to bargain with the union representing the security guards, solely because it has specified how many guards it needs and when it needs them. If the standard is applied by the courts under the FLSA, it would render the contracting company liable for wage-hour violations in which it had no hand and over which it exerted no control.

Basing a decision on "indirect" or "potential" control, as opposed to how the parties **actually conduct** business in the workplace, thus would allow administrative agencies or courts to ignore the parties' actual practices and impose unanticipated retroactive liability on businesses that require stability and predictability in their contractual relationships. Companies that in fact have little or no say in how workers are paid or treated should not be held liable for workplace practices that are expressly contracted away to another party, and over which they have retained no control. This is not only improper, but has a number of serious consequences in the bargaining context.

2. Collective bargaining will become confused and unpredictable. Ironically, the justification for the revised standard is to allow employees and their union representatives to bargain with companies that exercise "control" over some aspect of the workplace. Yet the *Browning-Ferris* majority stated that "[a]s a rule, a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control" and that duty will not extend to terms that are limited in scope so as to negate "meaningful collective

bargaining."[7] Does this mean that an alleged joint employer may refuse to bargain about some subset of the many mandatory subjects of bargaining that employers confront at the bargaining table? It is by no means fanciful to imagine a bargaining session in which the "joint employers" disagree about who has the responsibility for a given practice, with their disagreement making it impossible to reach agreement on a given issue. The presence of multiple parties with conflicting interests at the bargaining table – where a joint employer must bargain about the terms and conditions which it "directly, indirectly or potentially" controls – is certain to complicate bargaining almost beyond recognition. It is difficult enough to bargain a detailed labor contract between one employer and a union on subjects ranging from wages, seniority, leaves of absence, health care and the like. Injecting another partially-related business into the mix, and fomenting legal arguments about which business is responsible for what aspects of the employment relationship, is certainly not a recipe for prompt and efficient resolution of bargaining agreements. Complicating the bargaining process in this way makes little sense under a statute which is designed to foster the practice of collective bargaining.

None of this is justified by trying to ensure that all parties that can influence the terms and conditions of employment must be required to participate in bargaining. Collective bargaining always takes place against an economic background. Terms and conditions of employment may be set by local or federal law or by provisions of a procurement contract. In the defense industry, for example, wages of contractor personnel are directly impacted – if not established – by defense procurement contracts. Yet we do not require the Department of Defense to sit at the bargaining table of first tier government contractors like Boeing or

[7] 362 NLRB No. 185 (2015) slip op. at 16.

Northrop, even though the terms of the defense contract are a major determinant of wages. In like fashion, state and municipal governments are not required for effective bargaining between a state or local contractor and its personnel, even though state or municipal contracts may directly limit the amount of money that a contractor can pay to its unionized workers.

Problems arising from subcontracting and the "contingent workforce" are not solved by adding multiple employers with conflicting interests at the bargaining table, particularly where this addition raises possible internecine conflicts and numerous practical questions about the scope of bargaining that will take years to elucidate. The party with "direct and immediate" control over the terms and conditions of employment – and not companies that have tangential, indirect or "potential" control over some issues that may affect employees – is the employer and only it should be required to bargain.[8]

3. Workplace disputes will spread across businesses without practical limitations. In the 1947 Taft-Hartley Act, Congress sought to confine labor disputes to the "primary" employer of the employees in question, and outlawed strikes and picketing against related businesses, deemed "secondary" employers. It is not clear at this point that a joint employer finding under the *Browning-Ferris* standards will necessarily allow picketing that otherwise would violate the law's ban on secondary boycotts. But certainly this is a possibility, and if a joint employer was found to be sufficiently related to the "primary", picketing could take at the joint employer's facilities. Picketing that otherwise would be unlawful secondary activity could be used to place pressure on the joint employer in connection with the labor dispute with the primary employer,

[8] *See also Browning-Ferris*, 362 NLRB No. 186 (2015) at 37-43 (expanding upon how the new test will disrupt bargaining relationships under the NLRA.) Although the *Browning-Ferris* ruling does not by its own terms apply to franchisors and franchisees, for large franchisors with thousands of separate franchise establishments, the Board's expansive standard potentially could require having to manage labor practices and engage in collective bargaining in thousands of separate units across the country. The NLRB's prosecution of McDonald's based upon such a theory illustrates the potential reach as well as the adverse consequences of applying such a standard.

including by persuading employees of the joint employer to join striking primary employees. The dispute also could extend to workers of other firms who could refuse to enter the premises and perhaps to customers to refrain from doing business with the primary employer. Expanding joint employer status, to the extent it could authorize such secondary activity, is plainly inconsistent with the intent of Congress under the NLRA.

4. Imposing liability upon "joint employers" under the Fair Labor Standards Act based upon "indirect" or "potential" control does not serve the goals of the statute. I am sure the Committee is well aware that the profusion of FLSA lawsuits has reached epic proportions. During the 12-month period ending on March 31, 2016, plaintiffs filed 9,063 FLSA cases in federal district courts, compared with 4,699 trademark suits, 1,070 anti-trust cases, and 1,053 securities cases.[9] At the same time, while there have been numerous decisions on joint employer status under the FLSA, there is no commonly accepted test for joint employer liability under the statute. Some courts rely upon a four factor "economic reality" test; others add as many as six or eight factors to that test, others consider whether the putative joint employer can discipline or discharge an employee, while new and novel – and different – tests continue to arise in federal courts across the country. Employers with multi-state operations have no idea what standards will apply to their operations, or when they may be held responsible – after the fact, if the NLRB's *Browning-Ferris* standards are applied – for another employer's wage and payroll practices.

There is no justification for such confusion. Indeed, just the opposite is true; as the Supreme Court has aptly observed, "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v Friend*, 557 U.S. 77, 94 (2010) (citing *First Nat. City*

[9] Administrative Office of the United States Courts, Federal Judicial Caseload Statistics Table C-2 (June 2017).

Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983) (recognizing the "need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation")). Congress can and should resolve this quagmire by enacting H.R. 3441, and establishing once and for all that a joint employer relationship will be found under the FLSA only where the putative joint employer in fact "directly and immediately" controls the essential terms and conditions of employment in the workplace. An evidentiary test based upon facts and the parties' actual practices is the only way to ensure consistent application of the statute throughout the United States.

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In my judgment, H.R. 3441 solves these problems by defining the term "joint employer" under the NLRA and the FLSA based upon the standards applied by the NLRB for 30 years prior to *Browning-Ferris*. The bill would properly limit joint employment to situations where the putative joint employer "actually" exercises "significant direct and immediate control" over the "essential terms and conditions of employment", which the bill defines to include hiring, firing, discipline, setting rates of pay and benefits, day to day supervision, assigning individual work schedules, positions and tasks. These are the very tasks that courts of appeals have identified as the essential terms and conditions of employment. Significantly, this bill would not deny any employee the right to join and form a union or to bargain with his or her employer. It would merely establish that the proper employer for bargaining is the employer that actually sets the terms and conditions of employment in the workplace, and not some affiliated entity which has a commercial relationship with the employer.

H.R. 3441 reestablishes a reality-based test based upon actual and provable conduct, and does not base joint employer liability on hypothetical constructs such as potential but

unexercised reserved control. It sets forth a clear and well-accepted standard that can readily be employed by the NLRB, the Department of Labor and the courts to identify when joint employer liability should be imposed. It also codifies these standards so that the NLRB – which has a history of reversing itself on significant questions like this when the political winds and the Board's membership changes – cannot undertake the *Browning-Ferris* experiment again in the future.

This is appropriate and necessary legislation. I would urge the Committee to report favorably on this bill and recommend its passage to the House of Representatives.