MINORITY VIEWS
H.R. 3459, "PROTECTING LOCAL BUSINESS OPPORTUNITY ACT"
114th CONGRESS, 1ST SESSION
DECEMBER 1, 2015

In today's increasingly fissured workplace, characterized by a myriad of subcontracting, employee leasing and temporary employment arrangements, "Who is the boss?" is a relevant question when it comes to determining who is accountable for bargaining with workers over the terms and conditions of employment. The "Protecting Local Business Opportunity Act" of 2015 (H.R. 3459) allows joint employers who share or codetermine employment-related decisions, but exercise that control indirectly, to avoid accountability for unfair labor practices or collective bargaining obligations under the National Labor Relations Act (NLRA). Allowing employers who retain the right to control the essential terms and conditions of employment to escape responsibility to bargain collectively with workers, would essentially eliminate the workers' rights under the NLRA.

The bill narrows the definition of "employer" under Section 2(2) of the NLRA (29 U.S.C. §152(2)) to provide that two or more employers are "joint employers" only if their control over the terms and conditions of employment is "actual, direct, and immediate." This would replace the longstanding common law test which provides that an employer is one "who controls or has the right to control" the terms and conditions of employment, even if that "right to control" is not exercised.

This legislation follows closely on the heels of two actions by the NLRB over the past year:

1) The General Counsel of the National Labor Relations Board (NLRB) issued a consolidated complaint against McDonald's USA, as a joint employer, along with its franchisees concerning alleged unfair labor practices in connection with demonstrations as part of the "Fight for $15 and a Union." That case is in the early stages of pre-trial litigation, and its outcome is unknown.[1]

2) The NLRB's August 27, 2015 decision in Browning Ferris Industries (BFI),[2] where the Board reinstituted the common law test for determining whether two or more entities are joint employers.

The *BFI* decision re-established a two-pronged test for determining if two or more entities are joint employers under the NLRA: (1) both are "employers" within the meaning of the common law; and (2) both share or codetermine those matters governing the essential terms and conditions of employment.

[1] There were 13 complaints issued involving 78 alleged unfair labor practice charges. *See:* "NLRB Office of the General Counsel Issues Consolidated Complaints Against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers," NLRB Press Release, December 19, 2014.
[2] *Browning Ferris Industries of California and Teamsters Local 350,* 362 NLRB No. 186 (2015).

That test had been in place prior to 1984, but had been systematically eroded though a series of decisions during the Reagan and Bush Administrations that were inconsistent with the common law. For example, a 2002 case held that for an entity to be a joint employer with another employer, it must exercise "*direct* and *immediate*" control. This was a new test that the Board applied without any explanation or even acknowledgment. Moreover, this new test was squarely at odds with the common law definition of employer.[3]

THE PURPORTED NEED FOR LEGISLATION TO PROTECT FRANCHISEES' INDEPENDENCE IS CONTRADICTED BY TESTIMONY AT THE SEPTEMBER 29, 2015 LEGISLATIVE HEARING

The Majority's justification for this legislation is that the *BFI* decision will cause franchisees to lose control over their small businesses, and that the Board's decision thus "threatens to steal the American dream from the owners of the nation's 780,000 franchise businesses and millions of contractors."[4] This argument is premised on the belief that the *BFI* decision established a precedent that will allow the NLRB to decide that McDonald's USA is a joint employer with its franchisees, and therefore all franchisors will become liable as joint employers with their franchisees. In turn, the proponents hypothesize that this would spur franchisors to take over the day-to-day management of their franchisees as a means of limiting the potential liability created by their franchisees. This view is divorced from reality.

First, contrary to the overheated hyperbole that the *BFI* decision is "designed" to "eradicate franchising and irreparably damage every small business built on the franchise model,"[5] the NLRB takes a reasoned, case-by-case approach when assessing whether a franchisor is joint employer. For example, the NLRB's General Counsel (GC) recently determined that Freshii's, a fast-casual restaurant franchisor with over 100 stores in over a dozen countries, would <u>not</u> be deemed to be a joint employer of its franchisees, because its control was limited to maintaining brand standards and food quality. Freshii's Operations Manual, which discusses employment policies, is optional. This NLRB guidance was published as an Advice Memorandum.[6]

Second, the argument that franchisees would be swallowed up by their franchisors because of the *BFI* decision was undermined by franchisee testimony at the September 29, 2015, legislative hearing on H.R. 3459 before the Subcommittee on Health, Employment, Labor and Pensions (HELP) of the Committee on Education and the Workforce.

The two franchisee witnesses—a Burger King franchisee and a franchisee who operated six Nothing Bundt Cakes bakeries—testified that they feared the *BFI* decision would cause their franchisors to take over employee relations at their franchisees in order to limit the franchisor's

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[3] See: *Airborne Express*, 338 NLRB 597 (2002) (The essential element in this analysis is whether a putative joint employer's control over employment matters is "direct and immediate.")
[4] Press Release, Education and the Workforce Committee, September 9, 2015, on the introduction of H.R. 3459.
[5] Testimony of Fred Weir, President of Meadowbrook Restaurant Co., Inc., before the Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and the Workforce, U.S. House of Representatives, August 27, 2015, pp. 2. Mr. Weir testified on behalf of the Coalition to Save Local Businesses (CSLB) and the International Franchise Association (IFA).
[6] See: *Nutritionality, Inc., d/b/a Freshii*, Case 13-CA -134294 et al., Advice Memorandum, April 28, 2015. http://apps.nlrb.gov/link/document.aspx/09031d4581c23996

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 or have the right to exercise such control.

> **Statement by Mara Fortin (owner and operator of Nothing Bundt Cakes franchises):** "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."
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> **Q. by Rep. Guthrie:** "Do you or do [sic] the franchisor hire and fire and determine the work of your employees?"
>
> **A. by Mr. Braddy (owner and operator of a Burger King franchise):** "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."
>
> **Q. by Rep. Guthrie:** "But it is you as the business owner, not the -- what role does the franchisor play in any of your -- those issues?"
>
> **A. by Mr. Braddy:** "None at all."
>
> **Q. by Rep. Guthrie:** "None at all. Thank you. My time expired."

Any unbiased reading of the *BFI* decision would not find these franchisees joint employers with their respective franchisors.

Franchisees also contended that a contracting relationship where there is "potential control" could establish a joint employment liability.

> **Testimony of Mr. Braddy: "**In fact, the recent NLRB ruling in *Browning-Ferris Industries of California, Inc.*, would allow those who indirectly affect my business- such as my landscapers and waste disposal company- to become my joint employer."
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> **Q. by Rep. Polis:** "I also want to go to Ms. Fortin. Now, in your case, from your testimony, you said the real-world consequences of the NLRB's decision is it would lead to consolidation among our franchisors and loss of autonomy for local franchise business operations.
>
> My question is, how do you get that out of the *BFI* case, if it has to do with contractors? Or are you just talking about a hypothetical outcome for other cases that might be pending?"

> **A. by Ms. Fortin:** "I mean, I don't think anyone here can truly answer what is going to happen. I look at words like "indirect,'" "reserved," "potential." Any contractual relationship at that point is on the table."

It is a misreading of the Majority opinion in the *BFI* case to state that mere "potential control" or that "any contractual relationship" raises the possibility of joint employer liability. In fact, the Board rejected the General Counsel's recommendation that "potential control" of labor relations may be sufficient to ground a joint employer relationship or "where 'industrial realities' make an entity essential for meaningful bargaining." Rather, the Board Majority adopted the common law test that found the "right to control" labor relations necessary to ground a joint employer relationship if, for instance, such a right is enshrined in a contract between a contractor and sub-contractor. A "right to control" is a legal, not an economic concept.

What has created confusion is a misleading dissent in the *BFI* decision which proclaimed that the Majority opinion had adopted a "potential control" standard that would, among other things, treat parent corporations and their subsidiaries as joint employers. However, the Majority specifically declined to address that circumstance, or franchisor-franchisee law, and in no way adopted a "potential control" test. Instead, as required by the Taft-Hartley Act, the Board tethered joint employer law to the common law and limited its decision to the facts before it.

THE LEGISLATIVE HEARING REVEALED THAT H.R. 3459 CREATES A PERVERSE INCENTIVE THAT WOULD UNDERMINE FRANCHISEE INDEPENDENCE

Two witnesses at the September 29 legislative hearing pointed out that an unintended effect of H.R. 3459 is that it would likely result in franchisors exercising more control over their franchisees—the very consequence that the Majority says it seeks to avoid. Dr. Ann Lofaso, a Professor of Law from West Virginia University, testified:

> "[O]ne unintended and perverse effect of the proposed legislation is that it can embolden franchisors to take more control over the franchisee's labor relations because it, the franchisor, would have less liability concerns."

Michael Harper, professor of law at Boston University and reporter for the recently completed *Restatement of Employment Law*, testified:

> "I think that this legislation, if passed, would send a message that you can -- to the franchisors or larger businesses -- that you can control the employees of the franchisees if you use the franchisee owners, like Ms. Fortin, as a middle manager."

Thus, this bill reduces a franchisor's potential liability as a joint employer and gives franchisors greater latitude to control the employment practices of their franchisees. Freed from liability as a joint employer, this bill will open the door for franchisors to exercise greater control over franchisees than they could exercise under the common law standard.

As a corollary, the *BFI* decision benefits 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 and/or other liability under the NLRA. That

potential liability will incentivize franchisors to distance themselves from control over their franchisees' labor relations.

That point was underscored by Professor Harper in his written testimony:

> "[t]he *BFI* decision should help protect the decentralized franchise model by encouraging franchisors to continue to rely on independent franchisee control of employment decisions."

FRANCHISING FLOURISHED UNDER THE TRADITIONAL JOINT EMPLOYER TEST PRIOR TO 1984

The *BFI* decision does not "upend a franchise model that has worked well for decades."[7] Prior to 1984, franchisors faced the same legal landscape on the joint employer issue as that established under *BFI,* and none of the disasters arose that are being predicted by the advocates of this legislation. In fact, the franchising model flourished during that time. As Professor Harper testified, this fact undermines the claim that the *BFI* decision somehow threatens franchising or other efficient forms of business cooperation.

Moreover, if a franchisor wants to avoid joint employer status, it can simply modify its franchising agreement so that it does not have sufficient control of the employees' terms and conditions to incur an obligation to bargain. As Professor Harper testified at the hearing:

> "If a franchisor continues to delegate authority over all employment decisions to its franchisees, and retains no right to control scheduling or work pace or other conditions of employment, it cannot be subject to bargaining obligations."

THE HISTORY OF THE NLRB's JOINT EMPLOYER STANDARD IS ROOTED IN THE TAFT-HARTLEY ACT OF 1947

Among the "employers" who may be joint employers under the NLRA are those employers who, while contracting with an otherwise independent company, have retained for themselves sufficient control over the "essential terms and conditions of employment" that the two companies share or codetermine those matters.[8]

The policy question is how much control is required for an entity to be deemed an "employer". Congress and the courts have relied upon the common law to help answer the question of who is an "employer" in an employment relationship.

The legislative history of the Taft-Hartley Act of 1947, a law intended to reduce the economic power of unions, stated that the definition of an employment relationship should be governed by

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[7] U.S. Representative Phil Roe (R-TN) Press Release, August 27, 2015.

[8] "Essential terms and conditions of employment" include hiring, firing, discipline, supervision, and direction. It can also include dictating the number of employees to be supplied; controlling scheduling, seniority, and overtime; assigning work; and determining the manner and method of work performance.

the common law principles of agency.[9] In 1968, the Supreme Court stated that the "common law agency test" should be applied in establishing whether there is an employment relationship under the NLRA.[10]

As far back as 1933, the *Restatement of Agency* defines an employer as one who "controls or *has the right to control* the physical conduct of the other in the performance of the service.[11] Thus, under the common law, the employer does not need to exercise direct and immediate control in order to determine the essential terms and conditions of employment, because the putative employer (the one purchasing labor services from another entity) can indirectly determine working conditions through contractual arrangements, such as setting salary caps on what the supplier of labor may pay its employees—whether such control is exercised or not.

In 1982, the Third Circuit Court of Appeals reaffirmed that where two or more employers exert significant control over the same employees and the evidence shows that they share or co-determine those matters governing essential terms and conditions of employment, they constitute 'joint employers' within the meaning of the NLRA.[12] Yet two years later, beginning in 1984 (during the Reagan era) and for the next 30 years the NLRB began to narrow the joint employer standard to eliminate any consideration of evidence of the putative employer's right to control, and by 2002 (under the Bush administration) the NLRB required that the putative employer's control must be "direct and immediate."[13]

Given the explosive growth of outsourcing, leasing and contingent work, and its responsibility to apply the NLRA to the "complexities of industrial life," it was prudent for the NLRB to re-examine the joint employer test in *BFI* case and determine whether the traditional test for a joint employer that was in place prior to 1984 should be reinstated.

THE *BFI* DECISION APPROPRIATELY REJECTED THE "DIRECT AND IMMEDIATE CONTROL" TEST AND REINSTATED THE LONGSTANDING AND MORE PREDICTABLE COMMON LAW TEST OF THE "RIGHT TO CONTROL" TEST

BFI operates a municipal recycling facility in Milpitas, California, but contracted with Leadpoint Business Services to hire many of the workers who carry out the sorting of recyclable materials under a cost reimbursement contract. BFI also employs 60 of its own employees at this facility. Teamsters Local Union sought to organize 240 Leadpoint workers, and named BFI as a joint employer in the petition for an election.

In determining whether BFI and Leadpoint were joint employers, the NLRB followed the common law agency test as set forth in the *Restatement of Agency*. It states that an "employer"

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[9] 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).

[10] *NLRB v United Insurance* 390 U.S. 254 (1968).

[11] *See* RESTATEMENT OF THE LAW OF AGENCY 1933, §2(1); *see also* RESTATEMENT (SECOND) OF AGENCY 1958, §2(1).

[12] *NLRB v. Browning Ferris Industries of Pennsylvania, Inc.* 691 F.2d 1117, 1122-1123 (3rd Cir. 1982).

[13] *Airborne Express*, 338 NLRB 597 (2002) (discussing whether a joint employer's control is direct and immediate).

is someone who "controls or *has the right to control*" the essential terms and condition of employment.

The NLRB found that BFI, while not directly employing the workers sorting recyclables, capped the maximum wage that Leadpoint could pay to its workers at a rate that could not exceed what BFI paid its own workers doing comparable work. BFI also set the line speed, assigned work to Leadpoint employees ahead of assignments made by Leadpoint, and retained the right to reject the hiring of any Leadpoint employee "for any reason or no reason." As such, BFI codetermined hiring and disciplinary practices. Without compelling BFI to the bargaining table, the NLRB found that an essential party to negotiations would be missing. BFI is now challenging this decision.[14]

Proponents of this legislation dispute that the *BFI* decision merely returns to the pre-1984 holdings based on the common law test, and that pre-1984 cases show that actual control must be exercised in order for there to be a joint employer relationship, <u>not</u> simply the right to control. Former NLRB Member Charles Cohen testified at the legislative hearing that in "almost all" of the prior cases there was evidence of actual control by the joint employer. Unfortunately, Mr. Cohen did not provide any citations to support that contention in his testimony, and a review of pre-1984 joint employer cases finds a number where the "right to control" was used as the indicia of control over labor relations. .

- In the 1968 *Southland Corporation, d/b/a Speedee 7-Eleven, case*[15] the Board applied the same common law "right to control" test that the Board applied in *BFI* in finding that a franchisor was not a joint employer with a franchisee. The decision stated:

  > "We have long held that the critical factor in determining whether a joint employer relationship exists is the control which one party exercises over the labor relations policy of the other. It is immaterial whether this control be actually exercised so long as it may potentially be exercised by virtue of the agreement under which the parties operate."

This case is very similar to the facts and result in *Freshii.* As in *Freshii*, the franchisee was independently responsible for hiring, firing, discipline and all labor relations. Likewise, in both cases there was a very detailed policy manual covering operations and employee relations; however, there was no evidence that the franchisees were required to follow the recommendations contained therein.

- In *Hoskins Ready-Mix Concrete* the Board affirmed that both the actual exercise of control set forth in a contract, as well as the power retained in a contract to exercise "overall supervision and direction" but not exercised, are separate indicia, and are each sufficient to find that an entity is a "co-employer."[16]

[14] NLRB issued an unfair labor practice complaint against BFI for its refusal to recognize or bargain with the union as a joint employer on October 23, 2015 (32-CA-160759).
[15] 170 NLRB 1332 (1968).
[16] 161 NLRB 1492, 1493 n.2 (1966).

- In *Jewel Tea Co*. a joint employer relationship was found because, although not exercised, a license agreement gave the Licensor "the power to control effectively the hire, discharge, wages, hours, terms and other conditions of employment" of the employees of licensees who conducted retail operations in Jewel Tea Company's retail outlets. The Board stated:

> "That the licensor has not exercised such power is not material, for an operative predicate for establishing a joint employer relationship is a reserved right in the licensor to exercise such control…."[17]

These cases show a consistency in reasoning over the breadth of almost seven decades. They also rebut the argument that the Board expanded the definition of an employer beyond its traditional common law moorings.

THE ELEPHANT IN THE ROOM: THE *MCDONALD'S* CASE

Despite the very narrow focus of the *BFI* decision on a subcontracting relationship, franchisors are whipping up a controversy with their franchisees where none really exists. The *BFI* decision itself may have gone by barely noticed were it not for the unfair labor practice complaints against McDonald's USA and dozens of its franchisees following a series of strikes and protests to increase pressure to raise the minimum wage and secure union representation for McDonald's fast food workers as part of the "Fight for 15 and a Union" campaign.

The complaints alleged that McDonald's USA and a number of its franchisees violated the NLRA by, among other things, threatening, discharging and disciplining employees in retaliation for engaging in union activity. McDonald's USA was named a joint employer because it allegedly exercises significant control over the franchisee employees' terms and condition of employment.

As opposed to the *Freshii's* case noted above, the NLRB's General Counsel contends that McDonald's control goes beyond what is necessary to accommodate a franchisor's legitimate interest in protecting its brand. Importantly, the issuance of a complaint does not constitute the Agency's final determination, and this matter is now in litigation before an Administrative Law Judge.

Thus, any conclusions about what the McDonald's case means for franchisees is premature, and any rush to legislate at this time is equally premature. Representative Jared Polis, Ranking Member of the HELP Subcommittee, stated at the conclusion of the legislative hearing:

> "I think it is important the National Labor Relations Board follow their process, including in the pending McDonald's case, without Congress prejudging their motives or undermining their authority before a decision is made.
>
> Once there is a ruling, I look forward to convening again and seeing whether there is any legitimacy to the fear that some of you have expressed with regard to the practices of

[17] 162 NLRB 508, 509-10 (1966).

> your franchisees or franchisors. If there is, I think you will find great sympathy on both sides of the aisle; if not, then those fears are largely unwarranted and the *[BFI* decision*]* will not have any impact at all on your business."

THE CONTINGENT WORKFORCE IS PROLIFERATING, COMPELLING A RE-EXAMINATION OF THE INDUSTRIAL REALITIES CONFRONTING MILLIONS OF AMERICAN WORKERS WHO WORK FOR TEMPORARY OR PERMANENT STAFFING AGENCIES

The contingent workforce, i.e., temporary or part-time workers, and employees working under contract for a specific period or project, has steadily increased in prominence in the U.S. economy over the past several decades. Before the 1970s, temporary employment agencies generally only offered short-term secretarial help, day laborers, and nursing services, and did not represent a statistically significant portion of private sector employment. Around 1975, however, "temporary employment agencies began to provide workers for many different types of jobs, including maintenance work, custodial services, legal services, and computer programming," and thereafter began to experience tremendous growth.[18] The temporary help services industry—a subset of the overall contingent workforce – grew from 518,000 to 1,032,000 workers during the 1980s, and reached over 1% of total employment by 1990. The percentage doubled to 2% by 2000.[19] In 2013, there were approximately 3.4 million jobs in this staffing sector, accounting for 2.5% of U.S. employment.[20] In February 2015, the most recent Bureau of Labor Statistics survey indicated that overall contingent workers accounted for as much as 4.1% of all employment, or 5.7 million workers[21]

Contingent work arrangements involve a supplier of temporary help, a firm who "assigns" workers to a user firm, while the temporary help firm "place[s] these workers for legal purposes on [its] own payroll, billing client firms in an amount covering wages, overhead, and profit."[22] This "pushes liability for adherence to a range of workplace statutes . . . outward to other businesses."[23] The user firm can influence the supplier firm's bargaining posture by threatening to cancel its contract with the supplier firm if wages and benefits rise above a set cost threshold.

These developments, coupled with the facts of the BFI case, provided ample reason for the NLRB to revisit the joint employer standard. As the *BFI* decision stated:

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[18] *From Widgets to Digits: Employment Regulation for the Changing Workplace*, Katherine Stone, *pp*. 67 (2004).
[19] *See Id. See also* U.S. Bureau of Labor Stat., Luo, et al., *The Expanding Role of Temporary Help Services from 1990 to 2008*, MONTHLY LAB. REV., August 2010, at 3, 4.
[20] *WHO'S THE BOSS: Restoring Accountability for Labor Standards in Outsourced Work, National Employment Law Project*, Catherine Ruckelshaus, Rebecca Smith, Sarah Leberstein, Eunie Cho, pp. 19 (May 2014).
[21] U.S. Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements,* February 2005
[22] *The Contest Over "Employer" Status in the Postwar United States: The Case of Temporary Help Firms*, George Gonos, 31 L. & SOC'TY REV. 81, 84-85 (1997). *See also* Stone, at, p. 68; Edward A. Lenz, *Co-Employment - A Review of Customer Liability Issues in the Staffing Services Industry*, 10 THE LAB. LAW. 195, 196-99 (1994) (describing various contingent employment arrangements).
[23] *Enforcing Labor Standards in Fissured Workplaces: The U.S. Experience*, David Weil, 22 THE ECON. & L. REL. REV. 33, 36-37 (2011).

> "[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."[24]

H.R. 3459 CREATES AMBIGUITY IN THE NLRA'S DEFINITION OF EMPLOYER AND JOINT EMPLOYER AND WILL SPAWN NEEDLESS UNCERTAINTY

As noted above, the legislative history of the Taft-Hartley Act stated that the definition of an employment relationship should be governed by the common law principles of agency.[25] Under the Restatement of Agency, an "employer" is one who "controls or *has the right to control* the physical conduct of the other in the performance of the service." That definition is rooted in hundreds of years of common law. In contrast, H.R. 3459 creates a new test, requiring that a joint employer's control must be "actual, direct and immediate." The common law does not define these terms and they are not explained in *Airborne Express*, the 2002 NLRB case from which they are taken.[26]

The definition of joint employer under H.R. 3459 creates great uncertainty. Franchisees operating under the same franchise agreement may be treated differently based on whether the franchisor has recently exercised its control over some, but not others. And a franchisor may be a joint employer with a franchise today, but not tomorrow based on whether the franchisor is still exercising its authority. Rather than creating clarity, these terms raise questions: What does it mean for control to be "immediate?" Is control exercised two weeks ago sufficient? Two days? Two minutes? What is "actual" control? Isn't all control actual, whether or not it is direct? Adding these terms to the definition of "employer" will create uncertainty for employers and employees.

AMENDMENTS

Five amendments were offered by Democratic Members at the October 28, 2015 mark-up, as part of an effort to refocus the Committee's work on the unaddressed, but pressing needs of the American workforce. The legislation offered in these amendments is also included in the Working Families Agenda that is being promoted by Democrats to boost wages, help workers balance their work and family responsibilities, and level the playing field by ending workplace discrimination.

1. Representative Polis offered as a substitute amendment, the *Equality Act.* The *Equality Act* adds "sexual orientation" and "gender identity" to the protections from employment

[24] *Browning Ferris Industries of California and Teamsters Local 350,* 362 NLRB No. 186 (2015)

[25] 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).

[26] *See:* Footnote 12

discrimination in Title VII of the Civil Rights Act that already exist based on race, color, religion, sex, and national origin. In addition, the legislation includes protections from discrimination on the basis of sexual orientation or gender identity in housing, public accommodations, federal funding, credit and jury service.

2. Representative Pocan offered as a substitute amendment, the *Workplace Action for a Growing Economy (WAGE) Act. The WAGE Act* strengthens protections available to workers under the NLRA by requiring employers to post employee rights under federal labor law; ensures that NLRB orders are enforced without undue delay; and authorizes monetary penalties for unfair labor practices.

3. Representative Wilson offered as a substitute amendment, the *Payroll Fraud Prevention Act.* The *Payroll Fraud Prevention Act* amends the Fair Labor Standards Act (FLSA) to prevent the misclassification of workers as independent contractors that results in lost wages, and makes it a violation of the FLSA to misclassify employees.

4. Representative Bonamici offered as a substitute amendment, the *Schedules that Work Act.* The *Schedules That Work Act* protects all employees from retaliation for requesting a more flexible, predictable or stable schedule; ensures that employers post schedules two weeks in advance; and provides additional pay for certain especially difficult shifts, including call-in shifts, split shifts, and shifts from which employees are sent home early.

5. Representative Clark offered as a substitute amendment, the *Paycheck Fairness Act. The Paycheck Fairness Act* will help close the wage gap by strengthening the Equal Pay Act of 1963 in critical ways, including: requiring employers to prove that pay disparities between women and men are job-related and consistent with business necessity, putting the remedies for violations of the Equal Pay Act on par with the remedies for other civil rights violations, and prohibiting retaliation against workers for discussing their pay.

The Chair ruled these five amendments were non-germane, and no vote was taken on the underlying amendments.

ROLL CALL VOTE

H.R. 3459 was reported on a straight party line vote of 21 ayes and 15 nays.

CONCLUSION

A primary goal of the NLRA is to help to restore the equality of bargaining power between employers and employees. At a time when there are millions of workers employed under arrangements that separate employees from the entity that directly or indirectly controls their terms and conditions of employment, H.R. 3459 would deny workers the right to bargain with all of the entities that have effective control, whether that control is exercised or reserved. It is worth noting that in more than a third of union organizing drives, the employer fires at least one worker. Given that such union avoidance strategies are commonplace, it is clear that workers

employed by a subcontractor need protections from the dismissal of a subcontractor by the lead employer for engaging in activities protected under the NLRA. However, this bill undermines efforts to hold the lead employer accountable and could render the collective bargaining process futile.

H.R. 3459 jettisons the longstanding common law used to define "employer" in an employment relationship. In the *BFI* decision, the NLRB re-instated the common law of agency to determine whether an entity was a joint employer. The Taft Harley Act of 1947 directed the NLRB to use the common law of agency. This same test was in place prior to 1984, and subcontractors and franchising entities were able to prosper under that traditional test for a joint employer.

This bill will further exacerbate wage stagnation and income inequality, by making collective bargaining a fruitless exercise in the increasingly fissured workplace.

ROBERT C. "BOBBY" SCOTT
Ranking Member

HAKEEM S. JEFFRIES

MARK DeSAULNIER

MARK POCAN

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