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REPORT
115–379

SAVE LOCAL BUSINESS ACT

NOVEMBER 1, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Ms. FOXX, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3441]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 3441) to clarify the treatment of two or more employers as joint employers under the National Labor Relations Act and the Fair Labor Standards Act of 1938, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Save Local Business Act".

SEC. 2. CLARIFICATION OF JOINT EMPLOYMENT.

(a) NATIONAL LABOR RELATIONS ACT.—Section 2(2) of the National Labor Relations Act (29 U.S.C. 152(2)) is amended—

(1) by striking "The term 'employer'" and inserting "(A) The term 'employer'"; and

(2) by adding at the end the following:

"(B) A person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment, such as hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline.".

(b) FAIR LABOR STANDARDS ACT OF 1938.—Section 3(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(d)) is amended—

(1) by striking "'Employer' includes" and inserting "(1) 'Employer' includes"; and

(2) by adding at the end the following:

"(2) A person may be considered a joint employer in relation to an employee for purposes of this Act only if such person meets the criteria set forth in section 2(2)(B) of the National Labor Relations Act (29 U.S.C. 152(2)(B)).".

PURPOSE

H.R. 3441, the *Save Local Business Act*, provides a commonsense standard under the *National Labor Relations Act* (NLRA) and *Fair Labor Standards Act* (FLSA) for determining whether a joint employment relationship exists. The bill restores the long-held standard for determining joint employer status under the NLRA that was overturned by a decision of the National Labor Relations Board (NLRB or the Board). Additionally, the bill provides a uniform joint employer standard under the FLSA. Specifically, H.R. 3441 amends the NLRA and FLSA to allow two or more employers to be considered joint employers only if each shares and exercises actual, direct, and immediate control over essential terms and conditions of employment. In doing so, the bill protects the independence of businesses, in particular small businesses such as franchisees and subcontractors.

COMMITTEE ACTION

113TH CONGRESS

Subcommittee hearing on NLRB issues

On June 24, 2014, the Subcommittee on Health, Employment, Labor, and Pensions (HELP) held an NLRB oversight hearing titled "What Should Workers and Employers Expect Next from the National Labor Relations Board?" Witnesses were Mr. Andrew F. Puzder, CEO, CKE Restaurants Holdings, Inc., Carpinteria, California; Mr. Seth H. Borden, Partner, McKenna Long & Aldridge, New York, New York; Mr. James B. Coppess, Associate General Counsel, AFL–CIO, Washington, D.C.; and Mr. G. Roger King, Of Counsel, Jones Day, Columbus, Ohio. Witnesses discussed upcoming NLRB cases as well as Board policy and cited changes to the joint employer standard as one of the most significant and controversial issues before the Board at that time.

Subcommittee hearing on potential changes to the NLRB's joint employer standard

On September 9, 2014, the HELP Subcommittee held a hearing on potential changes to the NLRB's joint employer standard titled "Expanding Joint Employer Status: What Does It Mean for Workers and Job Creators?" Witnesses were Mr. Todd Duffield, Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart, Atlanta, Georgia; Mr. Clint Ehlers, President, FASTSIGNS of Lancaster and Willow Grove, Lancaster and Willow Grove, Pennsylvania, testifying on behalf of the International Franchise Association; Mr. Harris Freeman, Professor, Western New England University School of Law, Springfield, Massachusetts; Ms. Catherine Monson, Chief Executive Officer, FASTSIGNS International, Inc., Carrollton, Texas, testifying on behalf of the International Franchise Association; and Mrs. Jagruti Panwala, owner of multiple

hotel franchises in the northeastern United States, Bensalem, Pennsylvania. Witnesses spoke about how an expanded joint employer standard would negatively impact franchises and other small businesses.

114TH CONGRESS

Subcommittee field hearing in Mobile, Alabama

On August 25, 2015, the HELP Subcommittee held a field hearing titled "Redefining 'Employer' and the Impact on Alabama's Workers and Small Business Owners" in Mobile, Alabama, in anticipation of the NLRB creating a new joint employer standard. Witnesses were Mr. Marcel Debruge, Burr and Forman LLP, Birmingham, Alabama; Mr. Chris Holmes, CEO, CLH Development Holdings, Tallahassee, Florida; and Col. Steve Carey, USAF, Ret., Owner and Operator, CertaPro Painters of Mobile and Baldwin Counties, Daphne, Alabama, testifying on behalf of the Coalition to Save Local Businesses and the International Franchise Association. Witnesses testified the new joint employer standard would threaten the independence of small businesses in Alabama and deter franchisors from licensing new franchisees.

Subcommittee field hearing in Savannah, Georgia

On August 27, 2015, the HELP Subcommittee held a field hearing titled "Redefining 'Employer' and the Impact on Georgia's Workers and Small Business Owners" in Savannah, Georgia, regarding the NLRB's joint employer standard. Witnesses were Mr. Jeffrey M. Mintz, Shareholder, Littler Mendelson, P.C., Atlanta, Georgia; Mr. Kalpesh "Kal" Patel, President and COO, Image Hotels, Inc., Pooler, Georgia; Mr. Alex Salguerio, Savannah Restaurants Corp., Savannah, Georgia; and Mr. Fred Weir, President, Meadowbrook Restaurant Company Inc., Cumming, Georgia, testifying on behalf of the Coalition to Save Local Businesses and the International Franchise Association. Witnesses testified the new joint employer standard would hurt small business growth in Georgia and create barriers to entry for potential franchise owners.

Introduction of H.R. 3459, Protecting Local Business Opportunity Act

On September 9, 2015, then-Committee on Education and the Workforce (Committee) Chairman John Kline (R–MN) introduced H.R. 3459, the *Protecting Local Business Opportunity Act*. Recognizing the threat to small businesses posed by the NLRB's August 2015 decision in *Browning-Ferris Industries of California, Inc. (Browning-Ferris)*,[1] the legislation amended the NLRA to restore the long-held standard that two or more employers can only be considered joint employers for purposes of the Act if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct and immediate. Chairman Lamar Alexander (R–TN) of the Senate Health, Education, Labor, and Pensions Committee introduced companion legislation, S. 2015, also on September 9, 2015.

[1] 362 NLRB No. 186 (2015).

Subcommittee Legislative Hearing on H.R. 3459, Protecting Local Business Opportunity Act

On September 29, 2015, the HELP Subcommittee held a legislative hearing on H.R. 3459, the *Protecting Local Business Opportunity Act*. Witnesses at the hearing were Mr. Ed Braddy, President, Winlee Foods, LLC, Timonium, Maryland, testifying on behalf of himself and the National Franchisee Association; Mr. Kevin Cole, CEO, Enniss Electric Company, Manassas, Virginia, testifying on behalf of the Independent Electrical Contractors; Mr. Charles Cohen, former Member of the NLRB and Senior Counsel, Morgan, Lewis & Bockius, LLP, Washington, D.C.; Ms. Mara Fortin, President and CEO, Nothing Bundt Cakes, San Diego, California, testifying on behalf of herself and the Coalition to Save Local Businesses; Mr. Michael Harper, Professor, Boston University School of Law, Boston, Massachusetts; and Dr. Anne Lofaso, Professor, West Virginia University College of Law, Morgantown, West Virginia. Witnesses testified H.R. 3459 would restore the joint employer standard that had worked well for workers and business owners for decades and would protect opportunities for small business growth.

Committee Passage of H.R. 3459, Protecting Local Business Opportunity Act

On October 28, 2015, the Committee considered and marked up H.R. 3459, the *Protecting Local Business Opportunity Act*. Rep. Buddy Carter (R–GA) offered an amendment in the nature of a substitute, making a technical change to clarify the Act. The Committee voted to adopt the amendment in the nature of a substitute by voice vote. The Committee then favorably reported H.R. 3459, as amended, to the House of Representatives by a vote of 21–15.

115TH CONGRESS

Subcommittee hearing on NLRB issues

On February 14, 2017, the HELP Subcommittee held a hearing titled "Restoring Balance and Fairness to the National Labor Relations Board." Witnesses decried the extreme, partisan decisions of the NLRB during the Obama administration, including the expanded joint employer standard. Witnesses were Ms. Reem Aloul, BrightStar Care of Arlington, Arlington, Virginia, testifying on behalf of the Coalition to Save Local Business; Ms. Susan Davis, Partner, Cohen, Weiss and Simon, LLP, New York, New York; Mr. Raymond J. LaJeunesse, Jr., Vice President, National Right to Work Legal Defense and Education Foundation, Springfield, Virginia; and, Mr. Kurt G. Larkin, Partner, Hunton & Williams LLP, Richmond, Virginia.

Full committee hearing on joint employer issues

On July 12, 2017, the Committee held a hearing titled "Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship" to examine the impact of expanding joint employer standards across federal labor laws, including the NLRA and the FLSA. Witnesses were Mr. Michael Harper, Professor, Boston University School of Law, Boston, Massachusetts; Mr. Richard Heiser, Vice President, FedEx Ground Package System, Inc., Chicago, Illi-

nois; Mr. G. Roger King, Senior Labor and Employment Counsel, HR Policy Association, Washington, D.C.; Mr. Jerry Reese II, Director of Franchise Development, Dat Dog, New Orleans, Louisiana, testifying on behalf of the Coalition to Save Local Business; Ms. Catherine K. Ruckelhaus, General Counsel, National Employment Law Project, New York, New York; and Ms. Mary Kennedy Thompson, Chief Operating Officer of Franchise Brands, Dwyer Group, Waco, Texas, testifying on behalf of the International Franchise Association. Witnesses testified about the importance of reigning in expanding joint employer standards.

Introduction of H.R. 3441, Save Local Business Act

On July 27, 2017, Subcommittee on Workforce Protections Chairman Bradley Byrne (R–AL) introduced H.R. 3441, the *Save Local Business Act*. In response to expanding joint employer standards under the NLRA and FLSA, the bill amends both laws to provide that two or more employers can only be considered joint employers if each shares and exercises control over essential terms and conditions of employment and such control over those matters is actual, direct, and immediate.

Joint subcommittee legislative hearing on H.R. 3441, Save Local Business Act

On September 13, 2017, the HELP and Workforce Protections Subcommittees held a joint legislative hearing on H.R. 3441. Witnesses were Mr. Zachary D. Fasman, Partner, Proskauer Rose LLP, New York, New York; Ms. Tamra Kennedy, President, Twin Cities T.J.'s Inc., Roseville, Minnesota, testifying on behalf of the Coalition to Save Local Business; Mr. Granger MacDonald, Chief Executive Officer, The MacDonald Companies, Kerrville, Texas, testifying on behalf of the National Association of Home Builders; and Mr. Michael Rubin, Partner, Altshuler Berzon LLP, San Francisco, California. Witnesses testified that H.R. 3441 clarifies the joint employer standard used under both the NLRB and FLSA and benefits workers and business owners.

Committee passage of H.R. 3441, Save Local Business Act

On October 4, 2017, the Committee considered and marked up H.R. 3441. Subcommittee on Workforce Protections Chairman Byrne offered an amendment in the nature of a substitute, making technical changes.[2] The Committee voted to adopt the amendment in the nature of a substitute by voice vote. The Committee then favorably reported H.R. 3441, as amended, to the House of Representatives by a vote of 23 to 17.

SUMMARY

The *Save Local Business Act* reaffirms that two or more employers must have "direct, actual, and immediate" control over employees to be considered joint employers. H.R. 3441 provides needed clarity to the job creators, entrepreneurs, and workers who are being adversely impacted by expanding joint employer standards.

[2] The amendment in the nature of a substitute clarified that a list of terms and conditions of employment included in the act are examples of what can be considered in a joint employer analysis, but not a comprehensive list, and control of every term and condition is not required for joint employment to be found.

In particular, the bill rolls back vague and convoluted joint employer schemes as created by the NLRB in *Browning-Ferris,*[3] by the U.S. Court of Appeals for the Fourth Circuit with respect to the FLSA in *Salinas* v. *Commercial Interiors, Inc. (Salinas),*[4] and by regulators and other courts. H.R. 3441 restores a commonsense definition of employer and protects workers and local employers from future overreach by unelected bureaucrats and activist judges.

COMMITTEE VIEWS

Background on the NLRB and the Browning-Ferris decision

Enacted in 1935, the NLRA guarantees the right of most private-sector employees to organize and bargain collectively with employers through representatives of their choosing, or to refrain from such activities. The NLRB is an independent federal agency established by the NLRA to fulfill two principal functions: (1) determine whether employees wish to be represented by a union and (2) prevent and remedy employer and union unlawful acts, called unfair labor practices.

From 1984 to August 2015, the NLRB determined whether two separate entities should be considered joint employers by analyzing whether the entities shared control over or co-determined the essential terms and conditions of employment.[5] Essential terms and conditions of employment could include hiring, firing, discipline, supervision, and direction of employees. Prior to *Browning-Ferris*, control over these employment matters needed to be "actual, direct, and immediate" for the Board to find two or more entities to be joint employers.[6] Thus, under this standard, the Board rarely found joint employer status.[7]

On August 27, 2015, the NLRB issued a 3–2 decision in *Browning-Ferris* that radically revised the joint employer standard, causing significant concern for every employer with a contractual relationship with a separate entity, including franchisees and subcontractors. Under the standard set forth in *Browning-Ferris*, companies sharing *indirect or potential* control over another's workforce may be considered joint employers. Under this standard, an employer could be held liable for the decisions of another entity—decisions of which the employer may not even be aware.

In *Browning-Ferris*, a Teamsters local sought to organize recycling sorters directly employed by Leadpoint Business Services (Leadpoint), a subcontractor of Browning-Ferris Industries (BFI). The Teamsters asserted BFI was a joint employer with Leadpoint. An NLRB regional director applied the traditional joint employer standard and found BFI did not exert sufficient control over Leadpoint's employees to be a joint employer. He then directed an election with Leadpoint as the sole employer. The Teamsters appealed to the Board.

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[3] 362 NLRB No. 186 (2015).
[4] 848 F.3d 125 (4th Cir. 2017).
[5] *TLI, Inc.,* 271 NLRB 798, 798–99 (1984), *overruled by BFI*, 362 NLRB No. 186.
[6] *See Airborne Express*, 338 NLRB 597, 597 n.1 (2002) ("[The] essential element in [joint employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate."); *AM Prop. Holding Corp.*, 350 NLRB 998, 1000 (2007) ("In assessing whether a joint employer relationship exists, the Board . . . looks to the actual practice of the parties.").
[7] Prior to 1984, the joint employer standard was less well-defined under the NLRA, but was generally never as expansive as the new standard from Browning-Ferris.

In its decision, the Board adopted a new standard and found BFI was a joint employer with Leadpoint. In ruling BFI to be a joint employer, the Board found the temporary labor service agreement between the two employers indicated BFI's indirect control over Leadpoint's employees. This agreement included BFI's ability to reject employees referred by Leadpoint, set specific productivity standards of Leadpoint's employees through Leadpoint's supervisors, and set wage ceilings for Leadpoint's employees performing comparable work to BFI employees.[8]

The Board held that two or more entities are joint employers if (1) there is a common-law employment relationship with the employees in question and (2) the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.[9] The Board rejected the previous requirement that the joint employer's control be actual, direct, and immediate—overruling three decades of Board precedent.[10] Instead, the "right to control," even if it is not actually exercised, is evidence of joint employer status.[11]

BFI has challenged the new joint employer standard at the U.S. Court of Appeals for the District of Columbia Circuit.[12] Over a dozen stakeholders filed amicus briefs arguing against the new standard because it is too broad, creates legal uncertainty that will lead to more litigation, and overturns a clear, bright-line test. In contrast, the Equal Employment Opportunity Commission filed an amicus brief in support of the NLRB's new joint employer standard, noting the test's "flexibility."[13] Oral arguments were held on March 9, 2017, but the Court has not yet issued its decision.

In July 2016, the NLRB expanded the potential impact of *Browning-Ferris* in *Miller and Anderson*.[14] This case concerned a "mixed" bargaining unit consisting of workers solely employed by one employer and workers jointly employed by two employers. Such mixed bargaining units have the potential to create conflicts of interest between differing sets of employees and employers all combined into one unit. Previously, establishing a mixed bargaining unit required the consent of both employers. Instead, *Miller and Anderson* reverted to a standard briefly used between 2000 and 2004, where unions could petition for mixed bargaining units without employer consent. For such a unit to be formed, a joint employer relationship must first exist. As *Browning-Ferris* makes a finding of a joint employer relationship more likely, there will be increased opportunities for mixed bargaining units.

Under *Browning-Ferris*, there is already the potential to force joint employers with conflicting interests to bargain together across the table from the union. Such conflicts of interest will likely only be exacerbated when bargaining units consist of solely employed and jointly employed workers.

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[8] *Browning-Ferris Industries*, 362 NLRB No. 186 at 18–20.
[9] *Id.* at 2.
[10] *Id.* at 16.
[11] *Id.*
[12] *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, Nos. 16–1028, 16–1063 & 16–1064 (D.C. Cir. 2016).
[13] Brief of the U.S. Equal Emp't Opportunity Comm'n as Amicus Curiae in Support of Respondent/Cross-Petitioner and in Favor of Enforcement, *Browning-Ferris Indus. of Cal., Inc.,* Nos. 16–1028, 16–1063 & 16–1064, at 6 (D.C. Cir.) (filed Sept.14, 2016).
[14] 364 NLRB No. 39 (2016).

The expanding joint employer standard under the FLSA

Enacted in 1938, the FLSA is the primary federal statute setting forth employment rules concerning minimum wages, maximum hours, and overtime pay. The FLSA covers some 135 million full- and part-time workers in the private sector and in federal, state, and local governments[15] and specifies minimum wage, overtime pay, child labor, and record keeping standards.[16]

Congress delegates authority to DOL to interpret the FLSA via regulations; however, state wage and hour laws are *not* preempted by the FLSA, so long as states' laws are more "protective" of employees.[17] In addition, the FLSA provides for enforcement actions by DOL and private litigation between employees and employers in which court interpretations further shape the contours of the law.

The FLSA, like the NLRA, currently defines only the term employer, not joint employer. This lack of a definition has led federal courts to develop various tests for determining whether two entities have a joint employer relationship under the FLSA. Standards vary from one federal circuit to another. For example, the First and Third Circuits examine the potential joint employer's control over essential terms and conditions of employment, such as the power to hire and fire the employee.[18] Another circuit looks to the "economic reality" of the relationship, such as whether the employee works primarily for the potential joint employer.[19] For the most part, the courts' various tests come down to whether the putative employer exercises authority and control over the employee, as would be expected in a traditional employment relationship.

DOL's Wage and Hour Division issued an Administrator's Interpretation (AI) in January 2016 on joint employment under the FLSA, further compounding the lack of judicial clarity.[20] The AI's analysis broadly interpreted joint employment under the FLSA, rejecting "control [over essential terms and conditions of employment] as the standard for determining employment."[21] The Obama administration's DOL said the AI was needed because the growing variety and prevalence of business models—such as third-party management companies, independent contractors, and staffing agencies—have made joint employment more common. The AI also highlighted certain industries where joint employment issues are more prevalent: construction, temporary staffing, hospitality, janitorial services, warehouse and logistics, and agriculture. However, stakeholders argued the AI would increase litigation and encourage companies to alter their business models or risk being exposed to significant liability.

On June 7, 2017, Secretary of Labor Alexander Acosta announced the withdrawal of the AI on joint employment.[22] However,

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[15] The FLSA applies to federal employees of the Library of Congress, the U.S. Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority.

[16] The FLSA specifically requires employers to maintain adequate records reflecting covered employees' hours of work and pay for all hours worked.

[17] 29 U.S.C. § 218.

[18] *See In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.,* 683 F.3d 462, 468–69 (3d Cir. 2012); *Baystate Alt. Staffing*, 163 F.3d 668, 675 (1st Cir. 1998).

[19] *See, e.g., Zheng v. Liberty Apparel Co.,* 355 F.3d 61, 71–72 (2d Cir. 2003).

[20] DEP'T OF LABOR, ADMINISTRATOR'S INTERPRETATION NO. 2016–1 (Jan. 20, 2016).

[21] *Id.*

[22] News Release, U.S. Dep't of Labor, US Sec'y of Labor Withdraws Joint Employment, Indep. Contractor Informal Guidance (June 7, 2017), https://www.dol.gov/newsroom/releases/opa/opa20170607.

the now-withdrawn AI's broad interpretation of joint employment indicates how the plaintiffs' bar and select judges are continuing to aggressively pursue the issue. Moreover, under future administrations, DOL's Wage and Hour Division could reissue the AI unless Congress amends the FLSA to preclude it.

This expansive approach was typified by a Fourth Circuit case decided this year. On January 25, 2017, the U.S. Court of Appeals for the Fourth Circuit adopted an expansive new joint employer standard under the FLSA in Salinas.[23] In this case, Commercial Interiors subcontracted with J.I. General Contractors for drywall installation on a project. When employees of J.I. General Contractors sued for overtime wages under the FLSA, they named both J.I. General Contractors and Commercial Interiors as employers.

On appeal, the Fourth Circuit ruled Commercial Interiors was a joint employer with J.I. General Contractors. The Fourth Circuit used a new test to find joint employer status under the FLSA where "two or more persons or entities are not completely disassociated with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker's employment."[24] The Court identified six factors courts should use in making that finding, including "[t]he degree of permanency and duration of the relationship between the putative joint employers."[25]

Moreover, *Salinas* states "one factor alone can serve as the basis for finding that two or more . . . entities are 'not completely disassociated.'"[26] As such, the Fourth Circuit's test seems to make *any* relationship or collaboration between two businesses a joint employer relationship because the two entities will not be completely disassociated from each other, even if the supposed joint employer has no direct authority or control over the other entity's employee.

This test for joint employer status under the FLSA is even broader than the *Browning-Ferris* test under the NLRA. One commentator noted, "No other court, and not even the Obama-era DOL, has interpreted joint employment this broadly."[27] While this test only applies to cases in the Fourth Circuit, other courts likely will be urged to adopt it.

Consequences of expanded joint employer standards

Unions have long sought a broader NLRA joint employer test to protect "concerted activity"[28] and bring more parties to the bargaining table. Prior to Browning-Ferris, there have been significant limits on union activity against non-employers, such as secondary

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[23] 848 F.3d 125 (4th Cir. 2017).
[24] *Id.* at 141 (internal quotation marks omitted).
[25] *Id.* at 141–42.
[26] *Id.* at 142.
[27] Hunton & Williams LLP, *4th Circuit Significantly Expands Joint Employer Liability Under FLSA With Incredibly Broad New Test* (Mar. 2017), https://www.hunton.com/images/content/2/7/v2/27717/4th-cir-expands-joint-employer-liability-flsa.pdf.
[28] *See* 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .").

boycotts.[29] However, if a previously neutral employer (i.e., a franchisor or contracting company) is deemed a joint employer, a previously illegal secondary boycott would then be NLRA-protected concerted activity. This would allow a union to pressure one of the employers into a neutrality agreement or voluntary recognition.[30]

The threat of liability for actions taken entirely by a contractor or franchise partner will make larger businesses less likely to work with smaller businesses. Under the FLSA, employers will be particularly cautious about avoiding any chance of joint employer liability. Over the past several decades, FLSA litigation has skyrocketed, seeing over a 500 percent increase between 1991 and 2012.[31] Adding another defendant as a joint employer to an FLSA case can be an attractive proposition to a plaintiff's attorney, even if that extra defendant was not directly involved in the actions behind the underlying claim. As a result, larger companies will be constrained in their willingness and ability to boost the economy from the ground up by partnering with smaller, local businesses with less of a track record.

The economic benefits of contract work will be greatly diminished by the expanded joint employer standards. For instance, many manufacturing plants contract out janitorial work so that they can efficiently focus on what they do best, manufacturing. Under the new joint employer standard, however, the manufacturing company may be liable for the janitorial company's employment actions and would be forced to bargain with the janitorial company's employees. Such a system may not be viable for many employers.

Expanded joint employer standards under the FLSA and NLRA will hurt the franchise model as well. Franchisors may be found to be joint employers with their franchisees based on indirect control of the franchisees' operations. This will eliminate the primary benefit of the franchise system, which gives franchisees complete discretion over their workforce while at the same time enjoying the advantages of associating with a franchisor's brand name. With franchisors and franchisees now deemed joint employers, the franchisor's potential liabilities will increase, requiring greater involvement in franchisee stores. These added liabilities and responsibilities will reduce franchisees' independence and increase costs for the franchisor. Furthermore, because of these increased liabilities, franchisors will be more restrictive with their franchise sales. They will likely require greater experience and resources from new franchisees, thereby reducing new small businesses opportunities under the franchise model.

The Committee heard from a variety of business owners about the negative impact of expanding joint employer standards. Ed Braddy, a Burger King franchisee who owns and operates a restaurant in Baltimore, stated, "[T]he new joint employer standard will destroy smaller restaurant operators like me." According to Mr. Braddy, the new standard will result in franchisors repur-

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[29] In a secondary boycott, a union and its members refuse to work for, purchase from, or handle the products of a business with which the union has a dispute.

[30] A "neutrality agreement" is a contract between a union and an employer under which the employer agrees to support a union's attempt to organize its workforce. "Voluntary recognition" is when employees persuade an employer to voluntarily recognize a union after showing majority support by signed authorization cards or other means.

[31] GOVERNMENT ACCOUNTABILITY OFFICE, FAIR LABOR STANDARDS ACT: THE DEPARTMENT OF LABOR SHOULD ADOPT A MORE SYSTEMATIC APPROACH TO DEVELOPING ITS GUIDANCE, GAO–14–69 (December 18, 2013).

chasing franchises, consolidating operations by selecting larger operators, or taking away the independence of franchisees by implementing detailed franchisee and employee policies, making him "no more than a glorified manager in [his] own restaurant."[32] Mr. Braddy concluded:

> I am concerned that those who created this new standard believe it will help the "little guy" and put more mandates on large corporations. As a one-store operator in an inner-city neighborhood, I can tell you that nothing is further from the truth. The new joint employer standard will hurt me, my employees and the neighborhood I support. Please restore the definition to require actual, direct, immediate control over the essential terms of employment.[33]

Kevin Cole, CEO of the Ennis Electric Company and speaking on behalf of the Independent Electrical Contractors, testified the new joint employer standard would deter those in the construction industry from working with small, start-up subcontractors. Mr. Cole stated:

> This new standard . . . prevents us from working with certain start-ups or new small businesses that may have a limited track record. For example, my company will take on certain small businesses as subcontractors, which will often times be owned by minorities or women, and help mentor them on certain projects. With this new standard, I'm now less likely to take on that risk. I am also less likely to bid on federal contracts over $1.5 million, under which the Federal Acquisition Regulation (FAR) system mandates 1 subcontract with small businesses.[34]

In his testimony, Charles Cohen, former NLRB Member, echoed Mr. Cole's concern the new joint employer standard would likely discourage companies from "promoting special hiring programs" and working with underrepresented groups such as veterans.[35]

Mara Fortin, owner of several Nothing Bundt Cakes franchises, testified that due to the Browning-Ferris decision, she could lose control of her own business. Ms. Fortin stated:

> My franchisor had nothing to do with hiring my employees or setting their wages and benefits. My franchisor has nothing to do with the day-to-day operations of my small business. But if they are to be considered a joint employer, my franchisor may decide to exert more control over my business, relegating me to a middle manager role for which I did not sign up.[36]

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[32] *Protecting Local Business Opportunity Act: Hearing on H.R. 3459 Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. (Sept. 29, 2015) (written testimony of Ed Braddy at 3).

[33] *Id.* at 4.

[34] *Protecting Local Business Opportunity Act: Hearing on H.R. 3459 Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. (Sept. 29, 2015) (written testimony of Kevin Cole at 3).

[35] *Id.* (written testimony of Charles Cohen at 5.) [Hereinafter Cohen Testimony]

[36] *Protecting Local Business Opportunity Act: Hearing on H.R. 3459 Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. (Sept. 29, 2015) (written testimony of Mara Fortin at 6) [Hereinafter Fortin Testimony].

Tamra Kennedy, owner of several Taco John's franchises, noted the opportunities lost to franchisees when franchisors have to withdraw support over joint employer concerns:

> My franchisor used to provide standard employee handbooks to its franchisees. But due to expanded joint employment liability, the company no longer provides me employee handbooks—even though my brand has the expertise and best practices that would be most helpful for me and my employees. Now, I must hire an outside attorney to write an employee handbook for me. It cost my business $9,000 to have outside counsel prepare my employee handbook. Not to mention, I need my attorneys to update my handbook each time the law changes. All told, I need to sell hundreds of extra tacos every day to cover this needless expense.[37]

Fred Weir, a Zaxby's franchisee, also spoke about the negative consequences of new joint employer standards. Mr. Weir stated that expanded joint employer standards "would drain the life from the hundreds of thousands of small businesses that operate just like mine. The new standard would force operational changes on the franchisor, and on franchisees."[38]

Among the many concerns raised, business owners were especially alarmed about the loss of flexibility and independence under these new standards. CertaPro Paint franchisee Col. Steve Carey, USAF, Ret., testified about the potential impact new joint employer standards would have on his industry:

> If CertaPro is going to be responsible for the liabilities arising out of the operation of the business, and oversight of the workforce, why would they hand control over to me? Many businesses may feel this way and opportunities for local business ownership will decline dramatically. I know how fortunate I am to own my business after my long service in the military. While CertaPro provides advice and support, I am the decision-maker when it comes to my business. The success or failure of my business is, essentially, all on me—and that's exactly what I signed up for. It would be a real shame to take these opportunities away from other veterans looking to start their "second life" as a local franchise business owner as well.[39]

Mary Kennedy Thompson of the Dwyer Group noted the broad implications of expanding joint employer standards across all sectors of the economy:

> Research from the American Action Forum in April 2017 projected that the new joint employer standard could re-

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[37] T*he Save Local Business Act: Hearing on H.R. 3441 Before the House Subcomm. on Health, Employment, Labor and Pensions and the Subcomm. on Workforce Protections, Comm. on Educ. and the Workforce*, 115th Congress (September 13, 2017) (written testimony of Tamra Kennedy at 3).

[38] *Redefining "Employer" and the Impact on Georgia's Workers and Small Business Owners: Hearing Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. (Aug. 27, 2015) (written testimony of Fred Weir at 3).

[39] *Redefining "Employer" and the Impact on Alabama's Workers and Small Business Owners: Hearing Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. (Aug. 25, 2015) (written testimony of Steve Carey at 4) [Hereinafter Carey Testimony].

> sult in 1.7 million fewer jobs in the entire private sector and 500,000 fewer jobs in the leisure and hospitality industry alone. It is imperative that the locally-owned businesses created by the franchise system remain open and continue to operate with the full support of their brand. The system gives entrepreneurs a leg up because they can rely on the proven-to-work tools that we as franchisors give them, and that system is currently in jeopardy.[40]

Kal Patel, a hotel franchisee and past board member of the Asian American Hotel Owners Association (AAHOA), testified before the HELP Subcommittee about the impact of the NLRB's Browning-Ferris decision. Mr. Patel stated:

> As an hotelier, I have come to depend on the franchise model as the most advantageous means to small business ownership. Consequently, I am deeply concerned that the NLRB's efforts to expand the definition of joint employer status will transfer control of small businesses from independent hotel owners and operators to large corporations. An expanded joint employer legal standard intimated by the NLRB would compel franchisors to take an active role in staffing decisions due to the newly manufactured potential for liability. Franchisees, including the majority of AAHOA members, would lose independence in decision making and would effectively become employees of the franchisor because they would be forced to follow someone else's directives.[41]

Labor attorney Jeffrey Mintz criticized the NLRB specifically for "disturbing the well-established standard applied to determine whether a joint employer relationship exists and, more particularly, opting for a broader, ambiguous standard" that would "require many employers to revisit, analyze and likely revise their current business practices which could negatively impact many other businesses and their employees."[42]

The threat of expanding joint employer standards under the FLSA was also addressed by labor attorneys testifying before the Committee. Zachary Fasman, Partner at Proskauer Rose, LLP in New York City, noted:

> 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,

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[40] *Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship: Hearing before the House Comm. on Educ. and the Workforce*, 115th Cong. (July 12, 2017) (written Testimony of Tamra Kennedy at 5) [Hereinafter Kennedy Testimony].

[41] *Redefining "Employer" and the Impact on Georgia's Workers and Small Business Owners: Hearing Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. (Aug. 27, 2015) (written testimony of Kal Patel at 3).

[42] *Id.* (written testimony of Jeffrey Mintz at 1).

> 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.[43]

Labor attorney Roger King of the HR Policy Association agreed in his testimony:

> 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).[44]

Mr. Fasman also noted:

> 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."[45]

Business models affected by the new standards

A broad range of business arrangements, well beyond the specific types at issue in *Browning-Ferris, Salinas,* and other recent decisions, will be considered joint employer relationships under new NLRA and FLSA standards. Franchised businesses, for example, are already being affected. Currently, the NLRB General Counsel is pursuing nearly 100 complaints against McDonald's under this joint employer theory.[46] But as Ms. Thompson noted in her testimony, "franchises are not the only business model threatened by the new standards."[47] A vast scope of businesses are reliant on vendor and contractor arrangements that may now be considered joint employer relationships.

In their dissent to the *Browning-Ferris* decision, NLRB Members Philip Miscimarra and Harry Johnson discussed the numerous industries and business relationships that may be affected by the Board's joint employer standard. The number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited:

- Insurance companies that require employers to take certain actions with employees in order to comply with policy requirements for safety, security, health, etc.;
- Franchisors (see below);
- Banks or other lenders whose financing terms may require certain performance measurements;

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[43] *The Save Local Business Act: Hearing on H.R. 3441 Before the House Subcomm. on Health, Employment, Labor, and Pensions and the Subcomm. on Workforce Protections, Comm. on Educ. and the Workforce*, 115th Congress (September 13, 2017) (written testimony of Zachary D. Fasman at 10) [Hereinafter Fasman Testimony].

[44] *Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship: Hearing before the House Comm. on Educ. and the Workforce*, 115th Cong. (July 12, 2017) (written testimony of Roger King at 3).

[45] Fasman Testimony at 11.

[46] NLRB, McDonald's Fact Sheet, *https://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet*.

[47] Kennedy Testimony at 5.

- Any company that negotiates specific quality or product requirements;
- Any company that grants access to its facilities for a contractor to perform services there, and then continuously regulates the contractor's access to the property for the duration of the contract;
- Any company that is concerned about the quality of the contracted services;
- Consumers or small businesses who dictate times, manner, and some methods of performance of contracts.[48]

Testifying before the HELP Subcommittee, Mr. Mintz stated that "in addition to franchise businesses, a revised standard would affect relationships and have potential economic consequence within supply chains, dealer networks and staffing companies."[49] Labor attorney Marcel Debruge further explained to the Subcommittee that many automakers rely on the flexibility of temporary workers to survive during economic downturns, but they will likely be unable to continue this practice under expanded joint employer standard.[50] Former Board Member Cohen testified expanded joint employer standards have "the potential to apply to a wide variety of business relationships in which one employer contracts for the work of another business entity's employees, including outside suppliers and on-site contractors."[51]

Richard Heiser, Vice President at FedEx Ground, Inc., noted in his testimony that "on a broader basis, it is important to consider how joint employment can affect all businesses—small and large."[52] He concluded that "many businesses are at risk of being embroiled in protracted litigation because of another company's alleged actions."[53]

Furthermore, the Subcommittee heard from a diverse group of small business owners, all of whom predicted expanded joint employer standards would without a doubt impact their businesses. Reem Aloul, owner of a BrightStar Care franchise, testified that expanding joint employer standards could impact "nearly any conceivable business relationship" and the franchise model in particular.[54] Jerry Reese II, Director of Franchise Development at Dat Dog, noted that joint employer uncertainty could be of especial concern to smaller local business like his as they "may run out of resources" due to the legal confusion.[55]

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[48] *BFI*, 362 NLRB No. 186, slip op. at 37 (Miscimarra and Johnson, Members, dissenting).

[49] *Redefining "Employer" and the Impact on Georgia's Workers and Small Business Owners: Hearing Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. (Aug. 27, 2015) (written testimony of Jeffrey Mintz at 7).

[50] *Redefining "Employer" and the Impact on Alabama's Workers and Small Business Owners: Hearing Before the House Subcomm. on Health, Employment, Labor, and Pensions, Comm. on Educ. and the Workforce*, 114th Cong. (Aug. 25, 2015) (written testimony of Marcel Debruge at 4–5).

[51] Cohen Testimony at 2.

[52] *Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship: Hearing before the House Comm. on Educ. and the Workforce*, 115th Cong. (July 12, 2017) (written testimony of Richard Heiser at 2).

[53] *Id.*

[54] *Restoring Balance and Fairness to the National Labor Relations Board: Hearing Before the House Subcomm. on Health, Employment, Labor and pensions, Comm. on Educ. and the Workforce*, 115th Cong. (Feb. 14, 2017) (written testimony of Reem Aloul at 4).

[55] *Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship: Hearing before the House Comm. on Educ. and the Workforce*, 115th Cong. (July 12, 2017) (written testimony of Jerry Reese II at 5).

Granger MacDonald, a homebuilder, testified about how expanded joint employer standards could greatly impact the construction industry:

> If MacDonald Companies contracted with a painting company for a multifamily building in San Antonio, by telling the subcontractors when to paint the walls or even when the walls would be constructed, we could be found a joint employer. To avoid a joint employer finding, would we be prevented from scheduling installation of the fire sprinklers or cabinets? Would the roof be completed in time for the codes inspector to visit? This would be akin to ordering a pizza, but allowing the delivery service to show up at the driver's discretion.[56]

These witnesses represent small, medium, and large businesses in urban, suburban, and rural markets around the country that provide a variety of services across different industries. Every one of them fear expanding joint employer standards would wreak havoc on their business. Expanding joint employer standards have the potential to affect countless business relationships, and the impact will almost always be negative.

Proponents of the NLRB's new joint employer standard have often cited an April 2015 non-binding advice memorandum from the NLRB general counsel's office to argue the franchise model will not be impacted by *Browning-Ferris*. In that memo, the general counsel's office stated that Freshii, a fast casual restaurant franchisor, was not a joint employer with its franchisees.[57] Unlike *Browning-Ferris*, which involved a staffing firm, the Freshii advice memorandum involved a franchisor and franchisee. Unions and Democrats have claimed this memorandum proves franchises should not be concerned about the *Browning-Ferris* decision or an allegedly expanding joint employer standard. The Freshii advice memorandum, however, was decided before the *Browning-Ferris* standard was in place and was released as a non-binding advice memorandum that has no value as precedent in other cases.

Thus, franchisors and franchisees across the country remain concerned about the potential effects of *Browning-Ferris* on the industry. In May 2017, 13 Democrat Representatives wrote a letter to the NLRB asking for clarification about the memorandum.[58] Specifically, the letter asked if the memorandum can be used as "a blueprint for all franchise systems," notwithstanding *Browning-Ferris*. On June 27, 2017, NLRB General Counsel Richard Griffin (D) replied in a one-page letter that the non-binding advice memo "speaks for itself" and should be read "in light of" subsequent developments including the *Browning-Ferris* decision.[59] Accordingly,

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[56] *The Save Local Business Act: Hearing on H.R. 3441 Before the House Subcomm. on Health, Employment, Labor and Pensions and the Subcomm. on Workforce Protections, Comm. On Educ. and the Workforce*, 115th Congress (September 13, 2017) (written testimony of Granger MacDonald at 3).

[57] Advice Memorandum regarding *Nutritionality, Inc., d/b/a Freshii* from Barry J. Kearney, Associate General Counsel, NLRB Office of the General Counsel, to Peter Sung Ohn, Regional Director, NLRB Region 13 (Apr. 28 2015), https://www.nlrb.gov/case/13-CA-134294.

[58] Letter from thirteen Members of the House of Representatives to Barry J. Kearney, Associate General Counsel, NLRB Office of the General Counsel (May 8, 2017), http://savelocalbusinesses.com/wp-content/uploads/2017/05/House-Dem-Letter-to-NLRB-5-10-17.pdf.

[59] Letter from Richard F. Griffin, Jr., NLRB General Counsel, to Rep. Scott H. Peters (June 27, 2017), http://src.bna.com/qjS.

employers cannot rely on the Freshii memorandum for meaningful guidance.

Needed legislation

Congress is responsible for establishing and revising, as necessary, standards in federal labor law. The NLRB's decision in *Browning-Ferris* and court decisions interpreting the FLSA uniquely threaten the independence of small businesses and reduce opportunities for many Americans to own a business. Expanded joint employer standards extend liability to entities that have never been considered joint employers previously. Legislation is the appropriate and necessary solution to this issue. The *Save Local Business Act* returns certainty and predictability back to consumers, employees, and employers by reinstating the previous joint employer standard used by the NLRB for decades before *Browning-Ferris*. H.R. 3441 clarifies that two or more employers are considered joint employers under the NLRA and FLSA only if each employer shares and exercises "actual, direct, and immediate" control over essential terms and conditions of employment.

CONCLUSION

H.R. 3441 restores the commonsense joint employer standard workers and employers relied on for decades before the NLRB overreached. H.R. 3441 clarifies two or more employers must have actual, direct, and immediate control over employees to be considered employers. This is the same standard that existed for more than 30 years before the NLRB dramatically expanded it—a standard that provides stability and legal clarity for employers and employees. Moreover, H.R. 3441 provides much needed uniformity to the joint employment standard under the FLSA and provides the certainty employers need to expand their businesses and increase hiring. Joint employment under the FLSA is far from settled law and is an area marked by inconsistency and increasing litigation. Without this bill, the patchwork of joint employer standards across the country will continue to grow, creating regulatory confusion for job creators doing business in multiple states.

This bill is a proportional response to misguided and unprecedented actions by the NLRB, Obama-era regulators, and activist judges. H.R. 3441 maintains existing worker protections while correcting an extreme, partisan, and confusing joint employer scheme that makes it harder for individuals to climb the economic ladder. The bill ensures an actual employer is the one legally responsible for complying with those protections.

SECTION-BY-SECTION ANALYSIS

The following is a section-by-section analysis of the Save Local Business Act reported favorably by the Committee.

Section 1. Provides that the short title is the "Save Local Business Act."

Section 2. Amends the NLRA to allow two or more employers to be considered joint employers for purposes of the Act only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is "actual, direct, and immediate."

Section 3. Amends the FLSA to allow two or more employers to be considered joint employers for purposes of the Act only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is "actual, direct, and immediate."

EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 3441 restores the long-held standard for determining joint employer status under the NLRA that was overturned by a decision of the NLRB and provides a uniform joint employer standard under the FLSA.

UNFUNDED MANDATE STATEMENT

Section 423 of the *Congressional Budget and Impoundment Control Act* (as amended by Section 101(a)(2) of the *Unfunded Mandates Reform Act,* P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates. This issue is addressed in the CBO letter.

EARMARK STATEMENT

H.R. 3441 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House Rule XXI.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: October 4, 2017

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 1 Bill: H.R. 3441 Amendment Number: 2

Disposition: Defeated by a vote 17 yeas and 23 nays

Sponsor/Amendment: Norcross - Amendment regarding the bill's definition of "joint employer."

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Ms. STEFANIK (NY)		X		Ms. BLUNT ROCHESTER (DE)	X		
Mr. ALLEN (GA)		X		Mr. KRISHNAMOORTHI (IL)	X		
Mr. LEWIS (MN)		X		Ms. SHEA-PORTER (NH)	X		
Mr. ROONEY (FL)		X		Mr. ESPAILLAT (NY)	X		
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
Mr. ESTES (KS)		X					
Mrs. HANDEL (GA)		X					

TOTALS: Aye: 17 No: 23 Not Voting: _____

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: October 4, 2017

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 2 Bill: H.R. 3441 Amendment Number: 3

Disposition: Defeated by a vote 16 yeas and 23 nays

Sponsor/Amendment: Fudge - amendment regarding arbitration.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Ms. STEFANIK (NY)		X		Ms. BLUNT ROCHESTER (DE)			X
Mr. ALLEN (GA)		X		Mr. KRISHNAMOORTHI (IL)	X		
Mr. LEWIS (MN)		X		Ms. SHEA-PORTER (NH)	X		
Mr. ROONEY (FL)		X		Mr. ESPAILLAT (NY)	X		
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
Mr. ESTES (KS)		X					
Mrs. HANDEL (GA)		X					

TOTALS: Aye: 16 No: 23 Not Voting: 1

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: October 4, 2017

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 3 en bloc Bill: H.R. 3441 Amendment Number: 4

Disposition: Defeated by a vote of 17 yeas and 23 nays

Sponsor/Amendment: Mr. Scott - Amendment regarding employer liability.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Ms. STEFANIK (NY)		X		Ms. BLUNT ROCHESTER (DE)	X		
Mr. ALLEN (GA)		X		Mr. KRISHNAMOORTHI (IL)	X		
Mr. LEWIS (MN)		X		Ms. SHEA-PORTER (NH)	X		
Mr. ROONEY (FL)		X		Mr. ESPAILLAT (NY)	X		
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
Mr. ESTES (KS)		X					
Mrs. HANDEL (GA)		X					

TOTALS: Aye: 17 No: 23 Not Voting: _____

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: October 4, 2017

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 3 en bloc Bill: H.R. 3441 Amendment Number: 5

Disposition: Defeated by a vote of 17 yeas and 23 nays

Sponsor/Amendment: Ms. Bonamici - Amendment regarding franchisees.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Ms. STEFANIK (NY)		X		Ms. BLUNT ROCHESTER (DE)	X		
Mr. ALLEN (GA)		X		Mr. KRISHNAMOORTHI (IL)	X		
Mr. LEWIS (MN)		X		Ms. SHEA-PORTER (NH)	X		
Mr. ROONEY (FL)		X		Mr. ESPAILLAT (NY)	X		
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
Mr. ESTES (KS)		X					
Mrs. HANDEL (GA)		X					

TOTALS: Aye: 17 No: 23 Not Voting: _____

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: October 4, 2017

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 3 en bloc Bill: H.R. 3441 Amendment Number: 6

Disposition: Defeated by a vote of 17 yeas and 23 nays

Sponsor/Amendment: Mr. Takano - Amendment regarding pay stubs.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Ms. STEFANIK (NY)		X		Ms. BLUNT ROCHESTER (DE)	X		
Mr. ALLEN (GA)		X		Mr. KRISHNAMOORTHI (IL)	X		
Mr. LEWIS (MN)		X		Ms. SHEA-PORTER (NH)	X		
Mr. ROONEY (FL)		X		Mr. ESPAILLAT (NY)	X		
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
Mr. ESTES (KS)		X					
Mrs. HANDEL (GA)		X					

TOTALS: Aye: 17 No: 23 Not Voting: _____

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: October 4, 2017

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 3 en bloc Bill: H.R. 3441 Amendment Number: 7

Disposition: Defeated by a vote of 17 yeas and 23 nays

Sponsor/Amendment: Mr. Polis - Amendment regarding bill title.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)		X		Mr. SCOTT (VA) (Ranking)	X		
Mr. WILSON (SC)		X		Mrs. DAVIS (CA)	X		
Mr. HUNTER (CA)		X		Mr. GRIJALVA (AZ)	X		
Mr. ROE (TN)		X		Mr. COURTNEY (CT)	X		
Mr. THOMPSON (PA)		X		Ms. FUDGE (OH)	X		
Mr. WALBERG (MI)		X		Mr. POLIS (CO)	X		
Mr. GUTHRIE (KY)		X		Mr. SABLAN (MP)	X		
Mr. ROKITA (IN)		X		Ms. WILSON (FL)	X		
Mr. BARLETTA (PA)		X		Ms. BONAMICI (OR)	X		
Mr. MESSER (IN)		X		Mr. TAKANO (CA)	X		
Mr. BYRNE (AL)		X		Ms. ADAMS (NC)	X		
Mr. BRAT (VA)		X		Mr. DeSAULNIER (CA)	X		
Mr. GROTHMAN (WI)		X		Mr. NORCROSS (NJ)	X		
Ms. STEFANIK (NY)		X		Ms. BLUNT ROCHESTER (DE)	X		
Mr. ALLEN (GA)		X		Mr. KRISHNAMOORTHI (IL)	X		
Mr. LEWIS (MN)		X		Ms. SHEA-PORTER (NH)	X		
Mr. ROONEY (FL)		X		Mr. ESPAILLAT (NY)	X		
Mr. MITCHELL (MI)		X					
Mr. GARRETT (VA)		X					
Mr. SMUCKER (PA)		X					
Mr. FERGUSON (GA)		X					
Mr. ESTES (KS)		X					
Mrs. HANDEL (GA)		X					

TOTALS: Aye: 17 No: 23 Not Voting: _____

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

Date: October 4, 2017

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 4 Bill: H.R. 3441 Amendment Number: 1

Disposition: Adopted by a vote 23 yeas and 17 nays

Sponsor/Amendment: Mr. Wilson - motion to report the bill to the House with an amendment and with the recommendation that the amendment be agreed to, and the bill as amended do pass.

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mrs. DAVIS (CA)		X	
Mr. HUNTER (CA)	X			Mr. GRIJALVA (AZ)		X	
Mr. ROE (TN)	X			Mr. COURTNEY (CT)		X	
Mr. THOMPSON (PA)	X			Ms. FUDGE (OH)		X	
Mr. WALBERG (MI)	X			Mr. POLIS (CO)		X	
Mr. GUTHRIE (KY)	X			Mr. SABLAN (MP)		X	
Mr. ROKITA (IN)	X			Ms. WILSON (FL)		X	
Mr. BARLETTA (PA)	X			Ms. BONAMICI (OR)		X	
Mr. MESSER (IN)	X			Mr. TAKANO (CA)		X	
Mr. BYRNE (AL)	X			Ms. ADAMS (NC)		X	
Mr. BRAT (VA)	X			Mr. DeSAULNIER (CA)		X	
Mr. GROTHMAN (WI)	X			Mr. NORCROSS (NJ)		X	
Ms. STEFANIK (NY)	X			Ms. BLUNT ROCHESTER (DE)		X	
Mr. ALLEN (GA)	X			Mr. KRISHNAMOORTHI (IL)		X	
Mr. LEWIS (MN)	X			Ms. SHEA-PORTER (NH)		X	
Mr. ROONEY (FL)	X			Mr. ESPAILLAT (NY)		X	
Mr. MITCHELL (MI)	X						
Mr. GARRETT (VA)	X						
Mr. SMUCKER (PA)	X						
Mr. FERGUSON (GA)	X						
Mr. ESTES (KS)	X						
Mrs. HANDEL (GA)	X						

TOTALS: Aye: 23 No: 17 Not Voting: _____

Total: 40 / Quorum: 14 / Report: 21

(23 R - 17 D)

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House Rule XIII, the goal of H.R. 3441 is to ensure a commonsense standard for determining whether a joint employment relationship exists.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 3441 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting H.R. 3441 does not specifically direct the completion of any specific rulemakings within the meaning of 5 U.S.C. 551.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 3441 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 27, 2017.

Hon. VIRGINIA FOXX,
Chairwoman, Committee on Education and the Workforce,
House of Representatives, Washington, DC.

DEAR MADAM CHAIRWOMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3441, the Save Local Business Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Anthony.

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 3441—Save Local Business Act

H.R. 3441 would amend the National Labor Relations Act (NLRA) to specify that a person may be considered a "joint employer" only if that person exercises significant control over employees' essential terms and conditions of employment. If enacted, the bill would effectively negate a 2015 ruling by the National Labor Relations Board in which the board concluded a joint employer relationship could be established when an employer exercises control over employment matters indirectly or has reserved such control by contract.

Implementing the bill would not affect the operations of federal and state agencies because the NLRA excludes federal governmental entities as well as states and political subdivisions of states from the definition of employer under the act.

Enacting H.R. 3441 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 3441 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 3441 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Christina Hawley Anthony. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 3441. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the *Congressional Budget Act.*

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

NATIONAL LABOR RELATIONS ACT

* * * * * * *

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code, or receivers.

(2) [The term "employer"] *(A) The term "employer"* includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(B) A person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment, such as hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or

having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 3 of this Act.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

* * * * * * *

FAIR LABOR STANDARDS ACT OF 1938

* * * * * * *

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) [**"Employer" includes**] *(1) "Employer" includes* any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(2) A person may be considered a joint employer in relation to an employee for purposes of this Act only if such person meets the criteria set forth in section 2(2)(B) of the National Labor Relations Act (29 U.S.C. 152(2)(B)).

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the Government Printing Office;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private nonprofit food banks and who receive from the food banks groceries.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Producer" means produced, manufactured, mined, handled, or in any manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virture of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Secretary of Labor, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided,* That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further,* That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—

(1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on the date of the enactment of this paragraph; and

(2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 6(a)(1).

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided,* That the sale is recognized as a bona fide retail sale in the industry.

(o) HOURS WORKED.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r)(1) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive rights to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), the activities performed by any person or persons—

(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physicially handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier,

if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency.

shall be deemed to be activities performed for a business purpose.

(s)(1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that—

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

(y) "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

* * * * * * *

MINORITY VIEWS

INTRODUCTION

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

BACKGROUND

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

As direct hire arrangements give way to increased use of subcontractors, permatemps, or employee leasing arrangements, accountability for compliance with labor and employment laws is at risk of being undermined if companies can shield themselves from liability by contracting out while retaining contractual control over the terms and conditions of employment. As the National Employ-

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

[2] Michael Grabell, "The Expendables: How the Temps Who Power Corporate Giants are Getting Crushed," *ProPublica* (June 27, 2013), available at 3https://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushe

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

[4] *Id.*

ment Law Project notes, under current law, "joint employer liability doesn't bar companies from outsourcing; it simply means that the companies cannot also outsource responsibility for their workers when they control the conditions of their work." [5]

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

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

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

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

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

H.R. 3441 confers joint employer status on a company if it "directly, actually, and immediately . . . exercises significant control over essential terms and conditions of employment." Specifically, the bill identifies a non-exclusive list of nine essential terms and

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

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

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

[8] Under section 2(2) of the NLRA, an employer "includes any person acting as an agent of an employer, *directly or indirectly,* but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." Under the FLSA, an employer "includes any person acting *directly or indirectly* in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C. §203(d) (emphasis added).

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

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

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

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

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

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

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

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

> *Mr. Scott*: [I]f you have a Fair Labor Standards Acts violation and somebody comes in and says, "I'm not an employer under this definition," and then the other guy comes

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

in and says, "I'm not an employer under this definition either," is it possible that nobody is responsible?

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

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

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

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

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

The changes in the ANS do not remedy the problem. The ANS states that a person is a joint employer only if such person "exercises significant control over essential terms and conditions of employment." Since the bill retains a list of nine "essential" terms and conditions that the person must control, the problem remains that a person who does not control all of the nine terms and conditions may not face any liability under the NLRA or the FLSA, regardless of how much control they possess. Even if the NLRB or courts interpreting the NLRA or FLSA avoid this plain reading of H.R. 3441, the bill still provides no guidance over how many of the essential terms and conditions a person would need to control in order to be a joint employer.

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

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

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

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

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

Committee Republicans have criticized the NLRB's 2015 *Browning Ferris* decision, which reinstated the traditional joint employer standard the Board used prior to 1984.[12] In this case, the NLRB found that a client employer (BFI) and its staffing agency (Leadpoint) were joint employers and had a joint duty to bargain with the Teamsters union. BFI operates a municipal recycling facil-

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

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

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

ity in Milpitas, California, but contracted with Leadpoint to hire workers sorting recyclable materials under a cost reimbursement contract. BFI contractually capped the maximum wage that Leadpoint could pay at a rate that could not exceed what BFI paid its own workers. BFI also reserved and exercised the right to overrule any of Leadpoint's personnel decisions and assigned shifts to the workers through Leadpoint's supervisors. When the Teamsters sought to organize 240 Leadpoint workers, it named BFI as the joint employer with Leadpoint in a petition for a union election.

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

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

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

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

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

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

[15] Congressional Record, Senate, at 1575–1576 (1947), *reprinted in* 2 Legislative History of the Labor Management Relations Act, 1947, 51 (1948), and House Conf. Rep. No. 510 on H.R. 3020 at 36 (1947) *reprinted in* 1 Legislative History of the Labor Management Relations Act, 1947, at 540 (1948).

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

ing that the joint employer's control must be "direct, actual, and immediate."

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

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

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

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

[17] Susan K. Garea, Esq., Beeson Taylor and Bodine, and Teamsters Local 350 (Aug. 29, 2017).

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

> [T]he primary function and responsibility of the Board . . . is that of applying the general provisions of the Act to the complexities of industrial life. If the current joint-employer standard is narrower than statutorily necessary and if joint-employment arrangements are increasing, the risk is increased that the Board is failing in what the Supreme Court has described as the Board's responsibility to adapt the Act to the changing patterns of industrial life.[18]

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

The Fair Labor Standards Act sets minimum wage, overtime, and child labor standards, and has long held that a single individual may be employed by two or more employers at the same time. The FLSA defines "employ" as "to suffer or permit to work."[19] Its definition is the "broadest definition [of employ] that has ever been included in any one act."[20] It is more encompassing than the definition of "employer" under the NLRA.

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

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

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[18] *Browning Ferris,* 362 NLRB No. 186 (2015) (internal citations omitted).
[19] 29 U.S.C. § 203(g).
[20] *United States v. Rosenwasser,* 323 U.S. 360, 363 (1945) (quoting 81 Cong. Rec. 7,657 (1938) (remarks of Sen. Hugo Black).
[21] Bruce Goldstein, Statement on *H.R. 3441* (Oct. 2, 2017), available at: http://democrats-edworkforce.house.gov/imo/media/doc/ESPAILLAT_FWJ%20Statement%20H.R%203441%20JtEmployer.pdf.
[22] *Id.*

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

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

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

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

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

H.R. 3441 dramatically narrows who is liable as a joint employer under the FLSA and would allow low-road companies to benefit

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[23] *United States v. Silk,* 331 U.S. 704, 713 (1947).

[24] In *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 730 (1947), meat boners who worked on the premises of a slaughterhouse were hired by another employer under contract with the slaughterhouse. The Supreme Court held that the slaughterhouse was a joint employer for the purpose of minimum wage obligations under the FLSA because the boners' work was "part of the integrated unit of production".

[25] 704 F.2d 1465 (1983).

[26] 1 Ellen C. Kerns et al., *The Fair Labor Standards Act,* § 3–65.

[27] 848 F.3d 125 (4th Cir. 2017).

[28] *Id.* at 150.

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

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

> In a case we settled a few years ago in Southern California, hundreds of hard-working warehouse workers were employed in four warehouses, loading and unloading trucks for deliveries to Walmart distribution centers throughout the country. Walmart owned the warehouses and all of their contents. It contracted with a subsidiary of Schneider Logistics, Inc. to operate the warehouses. Schneider, in turn, retained two labor services subcontractors who hired the warehouse workers. By contract, all responsibility for legal compliance rested solely with those two labor services subcontractors. Yet Walmart and Schneider had kept for themselves the contractual right to control almost every aspect of those warehouse workers' employment, directly and indirectly.
>
> The violations we found in those warehouses were egregious. But the only reason the workers were eventually able to obtain relief—through a $22.7 million settlement that resulted in many class members receiving tens of thousands of dollars each as compensation—was because the warehouse workers had demonstrated a likelihood of success in proving that Walmart and Schneider, as well as the staffing agencies, were the workers' joint employers. The two staffing agencies were undercapitalized . . . Only because the federal courts focused on the actual working relationships in those warehouses, as other courts have done in other joint-employer cases under the NLRA and FLSA, were the workers able to retain compensation for past violations, to obtain higher wages and significant benefits, and to have deterred future violations.[31]

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

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

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

[31] 29 U.S.C. § 206(d).

Amending the FLSA's definition of employer also hinders workers' abilities to bring equal pay claims when multiple employers are responsible for the violation. More than 50 years ago, President Kennedy signed the Equal Pay Act of 1963 (EPA) into law. The EPA amended the FLSA to prohibit sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions.[31] Because the EPA is a part of the FLSA, the same definitions of "employer," "employ," and "employee" apply. Thus, narrowing the scope of who is considered a joint employer under the FLSA may impact the ability to bring equal pay claims under the EPA.

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

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

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

> The economic reality is that few farm operators will risk their profitability and the survival of their business by delegating all responsibility to a labor contractor. Most farm operators who engage labor intermediaries exercise substantial decision-making regarding the impact of subcontracted workers on their business . . . In most cases, there is shared responsibility among the farm operator and the labor contractor so that the workers on the farm ensure the profitability of that business.[32]

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

In 1982, the Committee on Education and Labor incorporated the FLSA's broad definition of "employ" into the MSPA for the direct purpose of adopting the FSLA's joint employer doctrine. Congress believed this standard was the "central foundation" of MSPA's protections and necessary to "reverse the historical pattern of abuse

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

and exploitation of migrant and seasonal farm workers." [33] According to the committee report, the joint employer standard is "the indivisible hinge between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of those duties." [34]

The MSPA regulations make it clear that the terms "employer" and "employee" have the same meaning under both the FLSA and the MSPA. As the MSPA regulations read, "[j]oint employment under the Fair Labor Standards Act is joint employment under the MSPA." [35] This means where a farmworker is economically dependent on a farm operator, he or she may be jointly employed by the FLC and the farm operator.

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

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

H.R. 3441 forces law abiding construction contractors to compete on an unlevel playing field, because it allows unscrupulous competitors to be free from joint employer liability when they use subcontractors who can cut project costs by engaging in wage theft. For this reason, the Signatory Wall and Ceiling Contractors Alliance (SWACCA), an association of construction contractors, opposes H.R. 3441. They recently wrote: "The joint employment doctrine is an important means for forcing these unscrupulous contractors to compete on a level playing field and to be held accountable for the unlawful treatment of the workers they utilize." [36]

H.R. 3441 would exempt these unscrupulous contractors from liability by enabling them to exert even more control over the workers' terms and conditions while facing no liability for wage theft or overtime claims under the FLSA. As SWACCA noted, "H.R. 3441 would create a standard that would surely accelerate a race to the bottom in the construction industry and many other sectors of the economy. It would further tilt the field of competition against honest, ethical businesses." [37]

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

Committee Republicans have claimed that this bill protects the franchising business model because the NLRB's Browning Ferris decision created legal uncertainty which hinders the growth of that

[33] H. Rep. No. 97–885, 97th Cong., 2d Sess., 1982.
[34] *Id.* at 6.
[35] 29 C.F.R. § 500.20(h)(5)(i).
[36] Letter from the Signatory Wall and Ceiling Contractors Alliance to Speaker Paul Ryan and Minority Leader Nancy Pelosi (Oct. 5, 2017), available at *http://democrats-edworkforce.house.gov/imo/media/doc/SWACCA%20ltr%20of%20opposition%20-%20H.R.%203441.pdf*.
[37] *Id.*

model. The Majority has also claimed that this legislation would protect the independence of small franchisees by ensuring that franchisors would not feel compelled to take control of franchisees' labor relations in order to limit their own potential liability. Committee Republicans contend that the current standard "threatens to upend small businesses, undermine their independence, and put jobs and livelihoods at risk."[38]

These arguments have no merit.

First, no franchisor has ever been found to be a joint employer with its franchisees under the NLRA or the FLSA. The Browning Ferris decision explicitly stated that it did not affect the franchise model, and the decision has not had any documented effect on the industry's growth.[39] Indeed, the franchise industry flourished in the decades before the NLRB narrowed its joint employer standard in 1984, using a standard identical to the one articulated in Browning Ferris. Franchise employment actually grew by 3 percent in 2015, the year Browning Ferris was decided, and by 3.5 percent in 2016. This rate is faster than the growth of franchising employment in the year prior to Browning Ferris.[40]

Second, the NLRB takes a reasoned, case-by-case approach when assessing whether any company, including a franchisor, is a joint employer. For example, the NLRB's General Counsel recently determined that Freshii's, a fast-casual restaurant franchisor, would not be deemed to be a joint employer with its franchisees, because its control was limited to maintaining brand standards and food quality.[41] The threshold for joint employment liability is control over labor-management relationships. Control over brand standards does not cross that threshold.

Testimony at a September 29, 2015 legislative hearing before the Subcommittee on Health, Employment, Labor and Pensions debunked the Majority's claim that the Browning Ferris standard has undermined franchisees' independence from their franchisors. Two franchisee witnesses—a Burger King franchisee and a Nothing Bundt Cakes franchisee—testified to this fear that franchisors would take over their employee relations in order to limit the franchisors' joint employer liability. However, in response to questioning, both testified that they have absolute and total control over their employment policies, and that their respective franchisors do not exercise control over their business operations.

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[38] Press Release, Committee on Education and the Workforce (Jul. 27, 2017), available at *https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=401928*.

[39] *Browning Ferris*, 362 NLRB No. 186 n.120 (2015) ("The dissent is simply wrong when it insists that today's decision 'fundamentally alters the law' with regard to the employment relationships that may arise under various legal relationships between different entities: 'lessor-lessee, parent-subsidy, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer.' None of those situations are before us today . . . As we have made clear, the common-law test requires us to review, in each case, all of the relevant control factors that are present determining the terms of employment.").

[40] Karla Walter, "The So-Called 'Save Local Business Act' Harms Workers and Small Businesses," *Center for American Progress* (Oct. 3, 2017), available at *https://www.americanprogressaction.org/issues/economy/reports/2017/10/03/168754/called-save-local-business-act-harms-workers-small-businesses/* (citing IHS Markit Economics, "Franchise Business Economic Outlook for 2017" (2017), available at *https://www.franchise.org/sites/default/files/Franchise*_Business_Outlook_Jan_2017.pdf; IHS Economics, "Franchise Business Economic Outlook for 2015" (2015), available at: *https://www.franchisefacts.org/assets/files/FranchiseBizOutlook2015.pdf*.

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

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

> I hire my own workers, set their wages, benefit packages, et cetera. I manage my inventory and I purchase equipment. I pay taxes as my own small business with my own employer identification numbers. And I help my employees when they are in need of assistance. My franchisor plays no part in any of these key functions that only a true and sole employer performs.[42]

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

> *Representative Guthrie:* Do you or do [sic] the franchisor hire and fire and determine the work of your employees?
> *Mr. Braddy*: I schedule interviews every other Wednesday. I sit down with eight people every other Wednesday. Even though I am not hiring, I do the interviews because I always like to have a waiting list of people who want to work. So I do all the hiring. I don't allow my managers or my assistants to terminate anyone because I want to make sure that once I let someone go it is for a good reason.
> *Mr. Guthrie:* But it is you as the business owner, not the—what role does the franchisor play in any of your—those issues?
> *Mr. Braddy:* None at all.[43]

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

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

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

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

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

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

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

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

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

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

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

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

Representative Fudge (OH) offered an amendment that states that the provisions of this bill would not be subject to the terms of a pre-dispute arbitration agreement between an employee and the alleged employer, unless the arbitration agreement is pursuant to a collective bargaining agreement. The Fudge amendment would ensure that workers have full due process rights to hold employers responsible when they violate the NLRA or the FLSA. Over the past few decades employers have increasingly conditioned job offers on an employee's agreement to waive their right to seek recourse in the courts for employment related disputes and to submit such disputes solely to a private arbitrator. Employee win rates are far lower in mandatory arbitration than they are in federal or state courts, according to a report by the Economic Policy Institute.[44]

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

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

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

[44] Alexander J.S. Colvin, "The Growing Use of Mandatory Arbitration," *Economic Policy Institute* (Sept. 27, 2017), available at *http://www.epi.ogv/publication/the-growing-use-of-mandatory-arbitration/*.

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

The author of the bill, Representative Byrne, opposed the amendment saying it is "totally unneeded," and that "there is no unclear thing about this at all."[45] Mr. Scott replied: "I would just say that if there is no chance that you could end up with no employer, then you should not be afraid of this amendment."[46]

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

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

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

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

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

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

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

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

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

[45] Statement of the Representative Byrne, Committee Markup Transcript (Oct. 4, 2017), p.57.
[46] Statement of Ranking Member Scott, Committee Markup Transcript (Oct. 4, 2017), pp.58–59.

wage violations alone.[47] That is an average of 3,300 annually per year-round worker.

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

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

Representative Wilson (FL) offered a substitute that increases the minimum wage to $15 per hour by 2024. Today's minimum wage workers earn less per hour, adjusted for inflation, than their counterparts did 50 years ago even though productivity has more than doubled over that same time period. Raising the minimum wage to $15 an hour by 2024 will lift pay for nearly 30 percent of the American workforce and reverse the growing trend in income inequality between those at the top and everyone else.

The amendment was ruled non germane.

CONCLUSION

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

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

ROBERT C. "BOBBY" SCOTT,
Ranking Member.
SUSAN A. DAVIS.
RAÚL M. GRIJALVA.
JOE COURTNEY.
MARCIA L. FUDGE.
JARED POLIS.
GREGORIO KILILI CAMACHO SABLAN.
FREDERICA S. WILSON.
SUZANNE BONAMICI.
MARK TAKANO.
ALMA S. ADAMS.

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

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