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before the

Subcommittee on Health, Employment, Labor, and Pensions
United States House of Representatives

September 29, 2015

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

Chairman Roe, Ranking Member Polis, and Members of the Subcommittee, thank you for your invitation to participate in this hearing. I am honored to appear before you today.

By way of introduction, I am a Senior Counsel in the law firm of Morgan, Lewis & Bockius LLP, where I represent employers in many industries under the National Labor Relations Act (NLRA). From 1994 to 1996, I had the privilege of serving as a Member of the National Labor Relations Board (NLRB or Board), and was appointed by President Clinton and confirmed by the U.S. Senate.[1]

The Protecting Local Business Opportunity Act (H.R. 3459) would restore the critical role that Congress should play in formulating our national labor and employment policy.[2] The legislation constitutes a measured response to the NLRB's usurpation of the role of Congress in defining "employer" under the NLRA. During the 45 years I have practiced labor law, I cannot recall a single Board decision so rife for potential abuse and mischief, nor one that would intrude the NLRB into the contractual relationships for so many industries and companies.

As anyone well versed in labor relations would know, this decision is all about enhancing union leverage in situations where independent companies are not responsible for the employees of other companies. In my testimony today, I will describe why Congressional action is needed to reverse the NLRB's overreach on the joint employer doctrine.

A. The *Browning-Ferris* Decision

In its August 27, 2015 decision, the Board overruled its long-standing joint employer jurisprudence, announcing that it will no longer require *direct* and *immediate* control over terms and conditions of employment to establish a joint employer relationship between two or more separate businesses.[3] Instead, a joint employer relationship may be found based on the *mere potential* to control terms and conditions of employment, even if that control is *indirect* and/or

[1] I am not speaking on behalf of Morgan, Lewis & Bockius, the National Labor Relations Board, or any other specific company or organization, and my testimony should not be attributed to any of these or other organizations. My testimony reflects my own personal views, although I wish to thank David R. Broderdorf for his efforts in helping me to prepare this testimony.

[2] H.R. 3459 would make a simple addition to the definition of "employer" under Section 2(2) of the NLRA: "Notwithstanding any other provision of this Act, two or more employers may be considered joint employers for purposes of this 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."

[3] *Browning-Ferris Industries of California, Inc*., 362 NLRB No. 186, slip op. 2, 15-16 (Aug. 27, 2015).

unexercised. This new ambiguous standard has 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. Based on the decision's faulty rationale, a future NLRB decision could extend to the franchise model as well.

Moreover, the Board did not confine itself to potential, indirect, and unexercised control. It went on to expand the terms and conditions of employment that would meet the potential/indirect control standard. Thus, "essential terms and conditions of employment" will not be limited to the core subjects of wages, hours, hiring, firing, and discipline. It also will include subjects such as the number of workers to be supplied, scheduling, overtime, productivity, work assignments, and "the manner and method of work performance."[4] And, what's more, as demonstrated by its decision, the NLRB will rely on the thinnest of anecdotal evidence of isolated involvement or oversight in any of these areas to deem the putative joint employer in "control," thereby deploying a trip wire for business operations and imposing a virtually impossible standard for policing and managing contractor relationships.[5]

The NLRB also held that a joint employer will be required to bargain "only with respect to such terms and conditions which it possesses the authority to control."[6] This could create a bizarre dynamic at the bargaining table and require a joint employer to be involved in bargaining on some subjects but not others. Collective bargaining typically involves many tradeoffs that would be unworkable under this approach. For this and other reasons, the Board is not simply returning to the "traditional" test for joint employer status that existed more than 30 years ago; in fact, the Board has created a whole new scheme for defining joint employer – or partial joint employer – status and collective bargaining obligations under the Act.[7]

Perhaps the most disingenuous aspect of *Browning-Ferris* is that over the last several years, the Board adopted a directly contrary approach to that adopted here where that suited its policy objectives to enhance union leverage. For instance, with respect to the Board's determination of independent contractor or supervisory status, both designations that remove individuals from the NLRA's coverage, the Board has expressly held that it considers only *actual* evidence of control, authority, or rights.[8] The Board majority in *Browning-Ferris* attempts to explain away that disingenuous result in a brief footnote, but without any convincing rationale.[9]

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[4] 362 NLRB No. 186, slip op. 15.

[5] Such anecdotal evidence in *Browning-Ferris* of actual control was limited to two instances where Browning-Ferris requested the removal of two contract employees for misconduct, a single pre-shift meeting to advise the contractor on the day's tasks, and "on occasion" talking with contractor employees about productivity issues. Yet this limited contact or oversight is commonplace and indeed occurs with most contractor-customer relationships. 362 NLRB No. 186, slip op. 36 (dissent).

[6] 362 NLRB No. 186, slip op. 16.

[7] As the dissenting Board members aptly summarized, the Board majority's assertion it has resurrected the Board's pre-1984 standard is based on a misreading of older decisions. While that prior standard may have considered evidence on indirect or potential control, it generally viewed evidence on direct control to be dispositive or critical to the joint employer determination. 362 NLRB No. 186, slip op. 32-33 (dissent).

[8] *See* 362 NLRB No. 186, slip op. 24 (citing cases).

[9] 362 NLRB No. 186, slip op. 14, n.72.

B. The Prior Joint Employer Standard Was a Balanced and Certain Approach to Administering the NLRA

A fundamental issue under the NLRA, and other labor or employment statutes for that matter, is "who is your employer"? Having a balanced and consistent approach on that most basic issue is paramount, and H.R. 3459 would restore what was lost in *Browning-Ferris*.

The three-member majority believed that its policy preference justified radically increasing the number of "employers" for thousands if not millions of employees – and all without any Congressional mandate for change. If left unchecked, *Browning-Ferris* will afford the Board, and its designated regional directors, substantial and unfettered discretion to use potential control and indirect control evidence to achieve results-oriented outcomes in representation and unfair labor practice cases. There can be no consistency in applying or understanding this overbroad and ambiguous standard, other than to say that the regional director or Board will be able to reach whatever outcome deemed desirable, in that case, from a policy perspective.

The importance of consistency and clarity in the law and legal standards cannot be overstated. That is especially true for the basic definition of "employer," from which all of the NLRA's obligations flow. Here, the Board's prior long-standing and consistent application of its joint employer analysis created a workable and predictable standard that many companies applied in structuring their relationships with their many suppliers and contractors. Reversing precedent in such a radical fashion, on the other hand, already has created instability, unpredictably, and uncertainty.

The Board's prior standard struck an appropriate balance between a company's right to manage its relationships with its contractors and suppliers, and the right of employees to organize a union and to have an employer at the bargaining table that is able to engage in meaningful collective bargaining. That standard ensured that a company was at the bargaining table if it exercised *actual control* over the terms and conditions of employment of its contractor's employees, as opposed to potential or indirect control through the terms of the business agreement between the company and its contractor. If, for example, the putative joint employer directed the work of its contractor's employees and engaged in overt measures of control, such as on wages or discipline, a joint employer relationship routinely was found and the joint employer had an obligation to participate in collective bargaining.[10]

An arm's length business agreement between a company and a supplier or contractor should not rise to a joint employer relationship simply because the company has established production, safety or quality standards that the contractor is expected to meet to receive payment. Commercial oversight of contractor efficiency and quality is routine, and should be expected, where one entity contracts with another for services. Companies have legitimate business

[10] *See, e.g., In re Aldworth Co.*, 338 NLRB 137, 140 (2002) (finding joint employer status where, among other things, the contracting employer disciplined the contractor's employees and assigned them work); *Quantum Resources Corp.*, 305 NLRB 759, 760 (1991) (finding joint employer status based on the putative employer's close and routine supervision of unit employees); *see also N.K. Parker Transp., Inc.*, 332 NLRB 547, 549 (2000) (citing evidence of employer's distribution of common work rules and safety procedures, as well as drug testing, and the employer's monitoring of compliance with respect to employee discipline as basis for joint employer finding); *W.W. Grainger, Inc.*, 286 NLRB 94, 96 (1987) (effectively recommending discipline, evaluating work performance, exercising the right to refuse employment of certain drivers, and day-to-day supervision enough for joint employer relationship).

reasons for including these types of terms in their agreements with suppliers and contractors.[11] Agreements such as these should not give rise to a joint employer relationship unless the company exerts *actual, direct control* over the contractor's employees. That is a reasonable and balanced approach to the joint employer test, formerly in place for decades, which the Board jettisoned in *Browning-Ferris*.

C. The New Standard Will Harm the Business Community, Including Small Businesses, and Undermine an Even-Handed Application of the NLRA in Several Key Areas

I now turn to practical issues with the new joint employer test. Those issues are myriad, but in this testimony I address only the most impactful ones.

1. Expanded Unfair Labor Practice Liability

Companies will now be exposed to greater and potentially automatic liability for unfair labor practices committed by their contractors and suppliers. Joint employers are generally liable for unfair labor practices committed by the other employer.[12] This is true even when the company has little or no control over the contractor or its employees, is not in a position to investigate and remedy unlawful actions by the contractor, is not aware of the contractor's actions, and may even affirmatively require that the contractor comply with the law (*e.g.*, through a supplier code of conduct).

There is a serious danger that application of the potential and indirect control standards would expand a company's liability for unfair labor practices committed by a contractor, and based not on any act or omission by the company. Such liability could be imposed solely by virtue of an arm's length contractual relationship with a contractor or supplier.

2. Unworkable Collective Bargaining Negotiations

Now that two or more employers may be swept into union negotiations, either on all mandatory subjects of bargaining or perhaps only some, the Board has provided no guidance for how such bargaining is to work in practice. For instance, if the two or more putative employers have conflicting financial or commercial interests – as they often do – how are they to bargain a *single* collective bargaining agreement with a union?[13]

In addition, if the two or more employers are parties to a commercial contract for a specific duration, does that durational limit also define the obligation for the putative joint employer to participate in collective bargaining negotiations? And should the ultimate collective bargaining agreement be negotiated to mirror the contractual duration between the commercial parties? Again, such critical questions for the business community are not answered by the

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[11] As the dissent stated in *Browning-Ferris*, "[s]uch global oversight, as opposed to control over the manner and means of performance (and especially the details of that performance), is fully compatible with the relationship between a company and an independent contractor." 362 NLRB No. 186, slip op. 36 (dissent).

[12] *Whitewood Maintenance Co.*, 292 NLRB 1159, 1162-63 (1989).

[13] Indeed, the Board also is in the process of considering a reversal of precedent on the issue of whether the NLRB *can force* two or more employers to create a multi-employer bargaining relationship to negotiate with a union representing the principal's employees and the principal/contractor's jointly-employed employees in a single bargaining unit. *Miller & Anderson*, Case No. 05-RC-079249.

Board majority, and sufficient answers cannot be found in any historical Board precedent given the sweeping nature of the new, unworkable standards.

3. Impediments to Cancellation or Renegotiation of Commercial Contracts

In the ordinary course, commercial parties negotiate contracts for a defined length of time, subject to potential cancellation or renewal. That widely-held practice is now subject to considerable uncertainty and confusion if a joint employer relationship can be found. A putative joint employer's decision not to renew, or to cancel, the commercial agreement could give rise to virtually automatic Section 8(a)(3) discrimination liability, Section 8(a)(5) failure to bargain liability, and imposition of a collective bargaining agreement – with another third party – under *frozen* terms and conditions.[14] Commercial bargaining will thus merge with, and be hostage to, collective bargaining under the NLRA. That massive intrusion into ordinary commercial negotiations and freedom of contract goes to the heart of the Board majority's fallacy in adopting the new *Browning-Ferris* test.

4. Limits on Secondary Boycott and Picketing Protections

In 1947, Congress expressly amended the NLRA to prohibit "secondary" boycotts and picketing directed at neutral employers.[15] Congress intended for secondary or neutral employers not to be drawn into labor disputes between an employer and its own employees. Now, in a single decision wholly unrelated to those secondary boycott provisions, the Board has undercut those very provisions by expanding the universe of "employers" that automatically lose neutral status based on their commercial relationship with a third party. This combined with the Board's prior "bannering" decisions,[16] has the effect of erasing secondary boycott restrictions from the law. And once deemed an "employer," a formerly neutral company can be subject to union pressures at *all* of that company's operations throughout the United States and not just the single site or area where the joint employer liability originated.

5. Decrease in Responsible Contractor or Hiring Programs

Finally, the new joint employer standard will have the likely unintended consequence of discouraging companies from adopting responsible contracting policies or supplier codes of conduct, or promoting special hiring programs for certain groups, such as veterans. The new standard exposes companies to joint employer liability if they require or even encourage their contractors and suppliers to meet certain safety and/or minimum labor standards, or otherwise promote special programs on hiring and employment issues. Companies, under this new standard, are now discouraged from asking their contractors and suppliers to meet these legitimate standards, which are intended not to establish *control* over the contractor's employees but, instead, to promote safety, compliance with the law, and larger societal goals.

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[14] 362 NLRB No. 186, slip op. 40-41, 44 (dissent); *see also CNN America, Inc.*, 361 NLRB No. 47 (Sept. 15, 2014).

[15] 29 U.S.C. § 158(b)(4).

[16] *See, e.g., Carpenters & Joiners of Am. Local 1827 (United Parcel Serv. Inc.)*, 357 NLRB No. 44 (2011); *Sheet Metal Workers Local 15 (Galencare Inc. d/b/a Brandon Reg'l Med. Ctr.)*, 356 NLRB No. 162 (2011); *Southwest Reg'l Council of Carpenters (New Star Gen. Contractors Inc.)*, 356 NLRB No. 88 (2011); *Carpenters & Joiners of Am. (Eliason & Knuth of Ariz. Inc.)*, 355 NLRB No. 159 (2010).

Labor unions, human rights groups and the international labor community all have urged companies to adopt responsible contracting policies or supplier codes of conduct in order to ensure that the company's suppliers and contractors, both domestically and internationally, adhere to minimum labor standards, provide safe working conditions for their employees, and adopt environmentally friendly practices.[17] The policies may require that suppliers and contractors pay a living wage, accurately pay and report employees' overtime, provide health insurance or other welfare benefits, prohibit certain materials that are deemed to be harmful to the environment, require updates to facilities, and mandate the use of certain types of safety equipment. The Board should not be in the business of creating disincentives for companies to adopt these policies. Yet *Browning-Ferris* does precisely that.

I urge passage of H.R. 3459 for all of the reasons discussed herein.

This concludes my prepared testimony. Thank you again for the invitation to appear today. I would be happy to answer any questions that Members of the Subcommittee may have.

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[17] *See generally* Eduardo Porter, *Dividends Emerge In Pressing Apple Over Working Conditions in China*, N.Y. Times, Mar. 6, 2012.