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Save Local Business Act Introduced in the House

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The House Education and the Workforce Committee held a joint subcommittee hearing last week to analyze the "Save Local Business Act" (H.R. 3441 – Byrne), a measure that would amend the National Labor Relations Act and the Fair Labor Standards Act to limit joint employer liability. If passed, the Act would reverse the current "Browning-Ferris" rule, which sets forth a broad definition of "joint employer," imposing liability and requiring bargaining in situations where a business possesses only potential and indirect control over the employees in question.

The Browning-Ferris rule stems from the March 2, 2015 NLRB decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), wherein the Board decided to readdress the then-current joint employer standard.

Under the new test, the Board will find that two or more statutory employers are joint employers of the same statutory employees if they will possesses sufficient control over employees' terms and conditions of employment to "permit meaningful collective bargaining." The Board will no longer require that a statutory employer not only *possess* the authority to control employees' terms and conditions, but also *exercise* that authority. Rather, reserved authority to control terms and conditions of employment – even if not exercised – may be sufficient. This new test represents a marked departure from the Board's previous test, which found a joint employer relationship only when the statutory employer exercised "direct and immediate" control over the essential terms and conditions of employment, like the right to hire, terminate, discipline, supervise, and direct those employees. An appeal of *Browning-Ferris* is currently pending in the D.C. Circuit Court of Appeals.

Efforts to overturn the Browning-Ferris rule have been ongoing since 2015, and the Save Local Business Act marks the latest attempt. If passed, the Act would redefine "employer" under the NLRA to include the following:

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).

The definition of “employer” under the FLSA would also be amended to include a reference to the NLRA’s definition.

During last week’s hearing, the subcommittee heard from Rep. Tim Walberg (R-MI), Rep. Bradley Bryne (R-AL) and various business owners among others. Chairman Walberg attacked the Browning-Ferris rule as a threat to jobs, entrepreneurship, and local employers across the country and urged the committee 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.” Chairman Bryne added that: “As a former labor attorney, I can tell you it used to be very clear in legal terms how you become someone’s employer. But that’s no longer the case since the [NLRB] stepped in.” Committee members also heard from small business owners, like Tamra Kennedy, who explained the impact of the Browning-Ferris rule on the franchisor-franchisee business model and her concerns that the rule will continue to erode her autonomy to run her own business. Similarly, a second-generation home builder, speaking on behalf of the National Association of Home Builders, explained the importance of contracting in his industry and how the Browning-Ferris rule limits the ability to contract with other companies.

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