COMMITTEE ON EDUCATION AND THE WORKFORCE

BILL SUMMARY

SAVE LOCAL BUSINESS ACT (H.R. 3441)

Introduced by Rep. Bradley Byrne (R-AL)

BACKGROUND

For more than 30 years, the National Labor Relations Board (NLRB) considered two or more employers "joint employers" if they had "actual," "direct," and "immediate" control over essential terms and conditions of employment. This standard provided stability and legal clarity for employers large and small, especially local franchisees and subcontractors. Unfortunately, unelected NLRB bureaucrats, federal regulators, and activist judges have taken steps to dramatically change what constitutes a "joint employer," creating uncertainty for America's job creators and entrepreneurs.

- ***Browning-Ferris Industries.*** In August 2015, the NLRB issued a 3-2 decision in *Browning-Ferris Industries* (BFI) that revised the joint employer standard and caused significant concern for every employer with a contractual relationship with a separate company, including franchisees. Under the standard set forth in BFI, companies sharing only "indirect" or "potential" control over another's workforce may be considered joint employers. The ruling overturned years of settled labor policy and blurred the lines of responsibility for decisions affecting the daily operations of small businesses across the country.

- ***Miller and Anderson.*** In 2016, the NLRB expanded the potential impact of BFI in *Miller and Anderson*. This case concerned a 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. *Miller and Anderson* changed that and reverted to a standard in which unions can petition for mixed bargaining units without employer consent. For a mixed bargaining 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.

- **DOL Wage and Hour Division's Administrator's Interpretation.** In January 2016, DOL's Wage and Hour Division issued an Administrator's Interpretation (AI) stating, "The concept of joint employment, like employment generally, should be defined expansively under the [*Fair Labor Standards Act* (FLSA)]." DOL took the approach that the joint employer standard should be "as broad as possible" and specifically targeted third-party management companies, independent contractors, and staffing agencies, as well as the construction, hospitality, agricultural, and warehouse and logistics industries.

  On June 7, 2017, Secretary of Labor Alexander Acosta announced the withdrawal of the AI on joint employment. However, the now-withdrawn AI's broad interpretation of joint employment indicates how the plaintiff's bar and some judges will continue to approach the issue.

- **Fourth Circuit FLSA Case.** In January 2017, the U.S. Court of Appeals for the Fourth Circuit adopted an expansive new joint employer standard under the FLSA in *Salinas v. Commercial Interiors, Inc*.

The new test finds joint employer status under the FLSA where "two or more persons or entities are not completely disassociated …" with respect to their separate workplaces. The Fourth Circuit's test seems to make any relationship or collaboration between two businesses a joint employment relationship because the two entities will not be completely disassociated.

To make matters worse, Salinas states that "one factor alone can serve as the basis for finding that two or more … entities are 'not completely disassociated.'" This test is even broader than the joint employer test under *Browning-Ferris,* and has contributed to a growing patchwork of joint employer standards across the country.

CONSEQUENCES FOR WORKERS, ENTREPRENEURS, AND LOCAL EMPLOYERS

- **Small business owners may have less freedom to operate their businesses.** If a franchisor is responsible for the employment decisions of its franchisees, the franchisor will have no choice but to exert greater control over the franchise small business.

- **Fewer individuals will have the opportunity to own their own business.** Concerns have been raised that the new joint employer standard will upend successful business models that have empowered countless Americans to achieve the American Dream of owning a business. There are also concerns that employers will be discouraged from contracting with small businesses for various services.

- **Higher costs for consumers and fewer jobs for workers.** If a franchisor is suddenly responsible for managing the daily operations of its franchisees, the franchisor will face higher administrative costs that will be passed onto the franchisee and ultimately result in higher prices for consumers or fewer jobs for workers. According to the American Action Forum, the new joint employer standard could result in 1.7 million fewer jobs.

SOLUTION: THE SAVE LOCAL BUSINESS ACT

Rep. Bradley Byrne (R-AL), chairman of the Subcommittee on Workforce Protections, introduced the *Save Local Business Act*. The legislation will reaffirm that two or more employers must have "actual, direct, and immediate" control over employees to be considered joint employers under the *National Labor Relations Act* and *Fair Labor Standards Act*. The *Save Local Business Act* amends the NLRA and FLSA by defining joint employer relationships as follows:

> *"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 to 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)."*

As a result, the bill will:

- ✓ **Roll back a convoluted joint employer scheme** that threatens job creation and undermines the American Dream.

- ✓ **Restore a commonsense definition of employer** to provide certainty and stability for workers and employers.

- ✓ **Protect workers and local employers from future overreach** by unelected bureaucrats and activist judges.