

Joint Employment Explained: How H.R. 3441 Legalizes a Corporate Rip-Off of Workers

Introduction

Under our nation's long-standing laws dating back as far as the early 1900s, companies that share control with their subcontractors over working conditions may also share accountability for violations of workers' rights. More than one employer can be found to be responsible, jointly with another, so that companies provide better oversight of working conditions, and in so doing, ensure broader compliance with basic labor and employment laws.

But today, corporate lobbyists are exaggerating the scope of joint employment to make sure corporations can escape their responsibilities when they hire their workers through temp agencies or outsource their workers to smaller firms.

H.R. 3441, the so-called Save Local Business Act, would amend the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA) to prevent workers from holding more than one employer jointly accountable for wage theft, child labor, and other unfair labor practices even when the employers exercise and share control over illegal working conditions.

Some employers use temp agencies and subcontractors to try to duck responsibility for workplace violations. Now they're attacking joint employment because it tries to hold them accountable.

This bill is bad policy for two reasons:

- It would open the door to widespread wage theft and worker harms across the economy, and especially in our nation's growth industries.
- It would insulate outsourcing corporations from liability, hurting law-abiding small businesses.

What Does ‘Joint Employment’ Mean? Why Does It Matter?

A worker can have more than one employer under longstanding federal and state protections. For example, a hospital receptionist who is working through a temp agency may be employed by both the hospital and the temp agency. A cable installer who is working for a subcontractor to the cable company may be employed both by the subcontractor and the cable company.

For more than a century, labor and employment laws have permitted more than one employer to be liable as a joint employer where they each have the right to control the terms and conditions of employment, regardless of which employer actually issues a worker’s paycheck. The FLSA’s broad definition of employer, based on state child labor protection laws, was intended to cut through any contracting arrangements that shielded companies from responsibility for work occurring in their businesses. Its broad definitions enable more than one entity to be responsible when required. The NLRA’s definition of employer is narrower, but it too permits more than one responsible employer when there is shared control.

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Only an employer is responsible for a worker's wages and working conditions. The joint employment doctrine has been used over the years so that disreputable corporations can’t skirt the law simply by pushing liability onto subcontractors or staffing agencies. Some employers use temp agencies and subcontractors to try to duck responsibility for workplace violations, and now they’re attacking joint employment as a concept because it tries to hold them accountable.

How Are Employers Attacking Joint Employment?

HR 3441, the so-called “Save Local Business Act,” seeks to dramatically narrow the long-standing definitions of “employer” in the FLSA and NLRA, to encompass only those employers that “directly, actually, and immediately, and not in a limited and routine manner, exercise[] significant control over the essential terms and conditions of employment.” While at first blush this may sound uncontroversial, it’s clear that this bill is neither good for workers nor for law-abiding businesses—especially small businesses.

H.R. 3441 opens the door to widespread wage theft and worker harms in our nation’s growth industries.

The bill’s narrowing of who’s responsible as an employer would allow low-road companies to benefit from workers’ labor while shirking any responsibility to them simply by using an intermediary contractor.

The bill would undermine protections for millions of workers across the economy, especially in low-wage sectors where subcontracting is common: construction, agriculture, garment, janitorial, home care, delivery and logistics, warehousing, retail, temp and staffing, and manufacturing, just to name a few.

Wage theft and other workplace dangers are prevalent in many of these jobs, and even under current law, millions of workers today are no longer sure who their boss is—and indeed, have no way to navigate the intricacies of companies' contracting relationships to ascertain who is responsible for workplace violations. When there's no clear line of accountability, work conditions are more likely to deteriorate: pay declines, wage theft increases, and workplace injuries rise. In addition, outsourced jobs pay less—sometimes as much as 30 percent less—than in-house jobs, likely due to a lack of worker and subcontractor bargaining power. In today's economy, we should be looking for ways to increase workers' pay and economic security, not laying the groundwork for more sweatshops.

Real-life examples of this “who's the boss” accountability problem abound: A temporary worker on his first day on the job at a Bacardi bottling plant in Florida died when he was crushed in a machine; Bacardi said it was the temp agency's sole responsibility but never trained the temp agency or the worker. Corn detasslers in Indiana sought unpaid wages from the farm labor contractor who disappeared; the court said they could recover their pay from the grower, who exercised control over the whole operation.

Were this bill to pass, it would be far more difficult to hold a warehouse, construction site, or farm operator jointly liable for minimum wage or child labor violations that occur in their worksites. A company could make major decisions about the job conditions on its site that all but dictate terms and conditions of work, but avoid “employer” status by funneling directions through a supervisor placed by a temp agency or farm labor contractor, often a struggling, barely solvent small business.

When a subcontractor cannot pay or make a worksite safe, the joint employer rules ensure that workers have remedies against the contracting company for the legal violations. In its simplest sense, the joint employment doctrine recognizes that in an equation involving three key stakeholders—a contracting firm, the business with which it contracts, and the worker who does the work that benefits the contracting firm—the worker has no control over the terms and conditions of employment, is least able to know and affect who's actually calling the shots, and should not be the one left holding the bag for failings on the part of the business partners. The worker should have a right to recover when cheated out of wages, exposed to dangerous working conditions, or otherwise treated unlawfully. The businesses are free to duke it out among themselves as to who bears the costs, after the worker has been made whole, but the worker should not bear those costs.

The bill hurts law-abiding small businesses.

Although framed as a bill to help protect the independence of small businesses, including those that operate as franchisees, the bill would in fact insulate corporations, including franchisors, from liability. Small companies that very often cannot afford to subcontract out necessary business operations would be at a competitive disadvantage against large corporations that can and do outsource and could escape liability for any labor law violations. In addition, franchisees whose business practices are all but dictated to them by larger corporations will be hung out to dry for decisions that aren't their own, without any indemnification from the entity that often all but forces labor and employment violations on them.

For example, if a staffing company, temp firm, or subcontractor uses child labor or cheats its workers out of wages or overtime pay owed, the company at the top that's calling the shots—and whose take-it-or-leave-it contract may have made the labor violations all but inevitable—should not be able to hide behind the subcontractor to escape responsibility for those illegal practices, and leave the workers who have been wronged or the small business holding the bag.

To be sure, there's nothing inherently wrong with contracting out, especially when it's done with above-board companies. Contrary to corporate talking points, 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.

Nothing in the laws in their current form, or in court and agency decisions interpreting them, opens up the door to wholesale joint employer status in every workplace that uses contract labor. Joint employment only comes into play when the larger entity has some power to control the job and conditions of work. Indeed, there are no reported cases under the FLSA holding a corporate franchisor jointly responsible for its franchisee's wage theft. When a franchise relationship is properly established to provide for independent operation of the business, there is no joint employer liability.

Conclusion

Corporations that engage low-road contractors and then look the other way gain an unfair advantage over companies that play by the rules, resulting in a race to the bottom that rewards cheaters. It's one reason why the job quality of what were formerly middle-class jobs in America is suffering today. Working people struggle enough in today's economy. Don't let Congress make this worse by legislatively rigging the system in favor of corporations that don't care about the workers who build their businesses.