

## **Changes to the Joint Employer Standard**

*NLRB's Plans Threaten Entrepreneurs, Local Franchised Business Owners  
and Other Small Businesses and Their Employees*

*The National Labor Relations Board (NLRB or Board) is considering overturning the existing joint employer standard used to determine when a business should be considered responsible for the labor practices of another. The proposed changes threaten to disrupt decades of established law and undermine the relationships between a brand company and local franchise business owners; contractors and subcontractors; and businesses and their suppliers and vendors – all of which have created millions of jobs and allowed hundreds of thousands of individuals to achieve the American dream of owning their own small business. Simply put, countless industries and business relationships are at risk.*

### **THE CURRENT JOINT EMPLOYER STANDARD IS CLEAR AND WORKABLE**

The current joint employer standard has been in place since 1984. Under this standard, the Board considered an entity to be a joint employer if it exercised *direct and immediate control* over another business's employees, including having the ability to hire, fire, discipline, supervise or direct an individual. Two entities are joint employers only when they share that direct control over the terms and conditions of employment for the same employees.

In today's world, large and small businesses alike have contractual relationships with dozens, hundreds or even thousands of franchisees, vendors, and contractors. The joint employer standard is intended to protect these businesses from unnecessary involvement in labor negotiations or fights involving workplaces in which they do not maintain any control and are not in a position to either investigate or remedy unfair labor practices. The standard has allowed hundreds of thousands of small and local businesses to flourish, creating millions of jobs.

### **CURRENT NLRB ACTIONS THREATEN THE EXISTING JOINT EMPLOYER STANDARD**

Unfortunately, the NLRB has taken recent actions that suggest the agency intends to alter the current joint employer standard. On April 30, 2014, the Board granted review in *Browning-Ferris*, a case in which the Board is considering whether a recycling company is the joint employer of subcontracted workers who perform sorting and cleaning duties at its facility. In upholding the existing standard, the Regional Director overseeing the case ruled that *Browning-Ferris* was *not* a joint employer, but the Board chose to review the decision anyway. The Board's General Counsel, who acts as a prosecutor, filed a brief in the case urging the Board to loosen its standard. On May 12, the Board requested input from stakeholders on whether or not the Board should update the standard. In December 2014, the General Counsel issued 13 separate complaints against McDonald's USA, LLC for employment decisions of individually-owned franchised restaurants. A final decision on *Browning Ferris* has yet to issue.

**POTENTIAL IMPACT: AN ATTACK ON THE AMERICAN DREAM**

Insight into the Board's intentions can be found in the amicus curiae brief filed in *Browning-Ferris* by the NLRB's General Counsel. The General Counsel advocated for altering the standard to include entities that maintain only *indirect* control of employees as opposed to the current standard, which requires direct control of business decisions. Essentially almost any economic or contractual relationship could trigger a finding of joint employer status under the proposed new standard.

The impact of such a change would be substantial to contractual relationships between businesses, from the franchise model to those between contractors and subcontractors and suppliers and vendors. Local franchise owners under the current joint employer standard are able to rely on the corporate franchisor for the business model and well-known logo, but the franchisee is responsible for making the individual business succeed and is liable for its business practices. Thus, the franchise model provides a means for individuals across the country to start their own small businesses and operate it as their own. A change in the joint employer standard could completely upend this successful legal and economic model.

In addition, under current law, larger national businesses can rely upon goods and services provided to them via contracts with thousands of local small businesses without facing joint employer liabilities. If larger companies and brands become liable for the employment decisions of their franchisees, subcontractors and vendors, the result will be a chilling effect on business-to-business relationships; the impacts of which will fall most heavily on the shoulders of local small businesses. Thus, the changes proposed by the NLRB's General Counsel threaten to make it far more likely that instead of operating as individually-owned enterprises, local small businesses will be subsumed by larger corporations, which will stifle entrepreneurship and business innovation and flexibility.

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As noted, the NLRB's General Counsel issued 13 separate complaints against McDonald's USA for its franchisees' employment decisions and is moving toward litigating the cases. Meanwhile, a decision in *Browning-Ferris* is expected any day. Accordingly, the Coalition for a Democratic Workplace encourages Congress to preserve the NLRB's existing joint employer standard.