



COALITION FOR A **DEMOCRATIC WORKPLACE**

Stop the Attack on Small and Local Businesses

Over the past decade Democrats in Congress and on the NLRB have tried to make drastic changes to the joint-employer standard under the NLRA. In March 2021, House Democrats passed the PRO Act, which would impose an expansive joint-employer standard across the economy, and in September 2022, the NLRB issued a proposed rulemaking that pushes the standard beyond all previous proposals. These changes will disrupt decades of established law and threaten the ability of individuals to achieve the American Dream of owning their own business. Republicans on the NLRB and in Congress must stop this assault on small business owners.

THE NEW JOINT EMPLOYER STANDARD THREATENS SMALL AND LOCAL BUSINESSES:

On March 9, 2021, Democrats in the House of Representatives passed the Protecting the Right to Organize (PRO) Act ([H.R. 842](#), [S. 420](#)). Included among the myriad drastic labor policies within the bill is a provision that dramatically expands the joint-employer standard. Additionally, on September 7, the National Labor Relations Board (NLRB) issued a new [notice of proposed rulemaking](#) that pushes the standard beyond anything we've seen previously.

The joint-employer standard under the National Labor Relations Act (NLRA) is used to determine when two or more entities are jointly responsible for the terms and conditions of employment over the same group of employees. These terms and conditions include, but are not limited to, having the ability to hire, fire, discipline, supervise, or direct employees. Joint-employers are responsible for bargaining with any union representing the joint-employees and are mutually liable for any NLRA violations either entity commits with respect to those employees. Joint-employer status, therefore, results in significant changes to an employer's liabilities and responsibilities under the law.

Under the traditional, decades-old standard, entities can only be joint-employers if they exercised *direct and immediate* control over the essential terms and conditions of employment. This standard provided clarity for businesses and protected them from unnecessary involvement in labor negotiations and disputes involving workplaces over which they do not have such control. This is especially necessary in today's world, where large and small businesses alike have contractual relationships with dozens, hundreds, or even thousands of franchisees, vendors, and contractors.

Under the PRO Act and the new rulemaking from the NLRB, however, the joint-employer standard would cover companies that shared only *indirect* or even just *unexercised potential control* over the terms and conditions of employment. This standard was originally conceived by the Obama-era NLRB in its 2015 [Browning-Ferris Industries \(BFI\)](#) decision. Under the *BFI* standard nearly every contractual relationship could potentially trigger joint-employer status, from the franchise model to those between contractors and subcontractors and suppliers and vendors, needlessly exposing vastly more businesses to unwarranted joint-employer liability. The proposed rulemaking goes further than both the PRO Act and *BFI* standard in that it would require a joint employer determination based on reserved or unexercised control in certain circumstances.



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The franchise model, for example, which is rooted in the traditional joint-employer standard, allowed individuals to open their own small business with the support of the larger, more experienced franchisor. The franchisor provided the business model, well-known logo, and some assurances and support, but the franchisee was responsible for making the individual business succeed and was liable for its business practices. The *BFI* standard, however, could potentially impose significant liability on the franchisor, forcing them to protect themselves by ending and/or limiting their support to their franchisees or exerting increased authority over them, essentially converting those small business owners into employees.

Additionally, the traditional standard allowed larger businesses to rely on goods and services provided by local businesses without facing uncertainty around joint-employer liability. Under the expanded standard, however, larger companies would be more likely to subsume local small businesses rather than work with individually owned enterprises, stifling entrepreneurship, business innovation, and flexibility. The new standard also hampers businesses' efforts to encourage "corporate responsibility" among franchisees, contractors, and vendors to the detriment of workers, consumers, and their communities.

To make matters worse neither the PRO Act nor the *BFI* decision defined key terms or provided guidance as to how to implement the new standard, resulting in massive uncertainty for the business community. This lack of clarity resulted in the US Court of Appeals for the DC Circuit returning the *BFI* case to the Board. The DC Circuit also criticized the *BFI* standard for ignoring the crucial step in the joint-employer analysis – that in order to qualify as a joint employer, an employer must possess sufficient control over the essential terms and conditions of employment to permit meaningful bargaining.

CURRENT STATE OF PLAY:

The PRO Act has already passed the House of Representatives, and the new NLRB proposed rulemaking is expected any day. Additionally, the Biden administration is undoing efforts undertaken by the Trump-era NLRB and Republicans in Congress to reinstate the traditional joint-employer standard.

In February 2020, the Trump-era NLRB issued a [Joint-Employer Final Rule](#), which reinstated the traditional employer standard under the NLRA. The Final Rule establishes that an entity can only be a joint-employer if it actually exercises control over the essential terms and conditions of another employer's employees. CDW filed [comments](#) on the Board's [proposed rulemaking](#) in January 2019. Additionally, then-NLRB General Counsel Peter Robb issued [Memorandum GC 18-02](#) in December 2017, which instructed all Regional Offices to submit for review all cases involving "significant legal issues" to the NLRB's Division of Advice, including cases dealing with the joint-employer standard and application of the *BFI* decision.

The US Department of Labor also issued a [Joint Employer Final Rule](#), restoring the traditional standard under other federal labor laws. CDW submitted [comments](#) on the proposal in June



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2019. Several state Attorneys General challenged DOL's Final Rule in federal court, successfully limiting its reach, and the Biden-era DOL [rescinded the Final Rule](#).

Republicans in Congress and on the NLRB must continue to fight against Democrats' unwarranted attacks on small and local businesses and continue to pursue all available avenues to reinstate the traditional standard.