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 October 2023, the NLRB issued a final rule 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:

In March 2021, Democrats in the House of Representatives passed the Protecting the Right to Organize (PRO) Act (H.R. 20, S. 567, 118th Congress). Included among the myriad drastic labor policies within the bill is a provision that dramatically expands the joint-employer standard. Additionally, in October 2023, the National Labor Relations Board (NLRB) issued a final rule that pushes the standard beyond anything we've seen previously. CDW originally filed comments on the proposal in December 2022. In November 2023, CDW, along with 11 other business entities, filed a lawsuit against NLRB in the U.S. District Court for the Eastern District of Texas over the final rule. A bicameral group of members of Congress, in November 2023, introduced a Congressional Review Act resolution to overturn the final rule.

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 final rule 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 final rule 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.

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 was introduced in the 118th congress after passing the House of Representatives in the 117th Congress, and the NLRB final rule takes effect on February 26, 2024. 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 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.