

Protecting Local Businesses

Under President Obama, the National Labor Relations Board (NLRB or Board) expanded the joint employer standard used to determine when one business should be considered responsible for the labor practices of another. The changes disrupted decades of established law and undermined the business 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 business. Simply put, countless industries and business relationships are at risk. Congress, the NLRB, and the new administration must reinstate the long-standing joint employer standard to protect our local businesses and the American Dream.

THE LONG-STANDING JOINT EMPLOYER STANDARD WAS CLEAR AND WORKABLE

From 1984 until August 2015, the Board considered two entities to be joint employers only if both exercised *direct and immediate control* over the essential terms and conditions of employment for a group of employees; this included having the ability to hire, fire, discipline, supervise or direct the employees. Joint employers are responsible for bargaining with any union representing the joint employees and are mutually liable for any violations of the National Labor Relations Act either entity commits with respect to those 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 long-standing joint employer standard provided clarity and protected these businesses from unnecessary involvement in labor negotiations and disputes involving workplaces in which they do not have direct control. The standard allowed hundreds of thousands of small and local businesses to flourish, creating millions of jobs.

NLRB ACTIONS HAVE UPENDED THE JOINT EMPLOYER STANDARD

Unfortunately, on August 27, 2015, the Board issued its decision in *Browning-Ferris Industries* altering the joint employer standard. In the case, the Board considered whether a recycling company was the joint employer of subcontracted workers who performed sorting and cleaning duties at its facility. The Regional Director who oversaw the case ruled that Browning-Ferris was *not* a joint employer. However, the NLRB took up the case and in its decision expanded the definition to include employers with *indirect* or even the *unexercised potential* of control. Since *Browning-Ferris* was issued, the Department of Labor has also pursued a looser joint employer standard under other federal labor laws, including the Fair Labor Standards Act, and issued a sweeping 2016 guidance significantly compounding the uncertainty created by the Board.

THE IMPACT

The changes to the joint employer standard substantially impact contractual relationships between businesses, from the franchise model to those between contractors and subcontractors and suppliers and vendors. Under the former joint employer standard, local franchise owners could rely on the corporate franchisor for the business model and well-known logo, but the franchisee was responsible for making the individual business succeed and was liable for its business practices. Thus, the franchise model provided a means for individuals across the country to start their own small business and operate it as their own. The change in the joint employer standard completely upended this successful legal and economic model.

Additionally, under the previous standard, larger national businesses were able to rely on goods and services provided to them via contracts with thousands of local small businesses without facing joint employer liabilities. Now, larger companies and brands could be liable for the employment decisions of their franchisees, subcontractors, and vendors. The result will be a chilling effect on business-to-business relationships, which will fall most heavily on the shoulders of local small businesses. The changes to the standard threaten to make it far more likely that instead of operating as individually-owned enterprises, local small businesses will be subsumed by larger corporations, stifling entrepreneurship, business innovation, and flexibility.

CONGRESS MUST ACT NOW

The Senate must confirm President Trump's nominees to the NLRB as soon as possible and encourage them to reinstate the longstanding and effective joint employer standard in order to bring stability back to business relationships nationwide. Congress should also move to pass legislation reinstating the prior standard and requiring that to be joint employers, entities must have “actual, direct and immediate” control over an employee. Reinstating the previous NLRB standard as well as codifying a common standard across federal labor laws is critical to protecting the American Dream for hundreds of thousands of current and future business owners across the country. We strongly urge Congress to quickly confirm President Trump's nominees to the Board and pass legislation to codify a clearer, more sensible standard into law.