COALITION FOR A
DEMOCRATIC WORKPLACE

Protecting Local Businesses

In December 2017, the NLRB issued its decision in Hy-Brand Industrial Contractors, *overruling its own controversial 2015 decision in* Browning-Ferris Industries. *In* Hy-Brand*, the Board returned to the traditional joint employer standard, used to determine when two or more employers share responsibility and liability over the same group of employees. The* Browning-Ferris *decision had drastically expanded the joint employer standard, disrupting decades of established law and undermining and putting at risk business relationships across the economy, threatening the ability of individuals to achieve the American Dream of owning their own business. Congress, the NLRB, and the new administration must continue their work to reinstate the long-standing, traditional joint employer standard to protect local businesses and the American Dream.*

NLRB ISSUES *HY-BRAND* DECISION:

On December 14, 2017, the National Labor Relations Board (NLRB) issued its decision in *Hy-Brand Industrial Contractors (Hy-Brand)*, overruling the Board's 2015 decision in *Browning-Ferris Industries (BFI)*. The *Hy-Brand* decision restored the traditional joint employer standard under which the Board only considered two entities to be joint employers 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, traditional 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 UPENDED THE JOINT EMPLOYER STANDARD:

Unfortunately, on August 27, 2015, the Board issued its decision in *BFI* drastically 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 Industries 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 *BFI* 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 traditional 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 traditional 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 held liable for the employment decisions of their franchisees, subcontractors, and vendors. The result was a chilling effect on business-to-business relationships, which fell 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:

While the *Hy-Brand* decision is a step in the right direction, a future NLRB under a different administration could reinstate the *BFI* standard. In order to prevent that from occurring, Congress should move to pass legislation codifying the traditional standard into law. The Save Local Business Act (H.R. 3441) would reinstate the traditional standard and require that to be joint employers, entities must have "actual, direct and immediate" control over an employee. We strongly urge Congress to quickly pass H.R. 3441 to codify a clearer, more sensible standard into law. Congress should also work to codify a common standard across all federal labor laws, a critical step to protect the American Dream for hundreds of thousands of current and future business owners across the country.