



COALITION FOR A **DEMOCRATIC WORKPLACE**

Protecting Local Businesses

On May 9, the NLRB announced its [intent to propose a new rulemaking](#) on the joint employer standard. Through this rulemaking the Board will be able to obtain public input on the consequences of Browning-Ferris and the benefits of restoring the original standard. The Browning-Ferris decision drastically expands 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.

TRADITIONAL JOINT EMPLOYMENT:

From 1984 until August 2015, the National Labor Relations 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, 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, drastically expanded the NLRA's standard for determining joint employer status to include *indirect* or even just *unexercised potential control* over the terms and conditions of employment. This confusing standard has created uncertainty and drastically expanded the number of business relationships that could trigger joint employer liability.

THE IMPACT:

The changes to the joint employer standard substantially impacts 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 is 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.

Attempts to Fix This Situation

On December 14, 2017, the NLRB attempted to rectify this situation in [Hy-Brand Industrial Contractors](#), which purported to overrule BFI and reinstate the prior long standing joint employer standard. The Board later [vacated the Hy-Brand decision](#) in response to a controversial opinion by the agency's inspector general and ethics officer. As a result, BFI's expansive and confusing standard is once again in force.

Thankfully, the NLRB is now trying to fix the damage done by *Browning-Ferris* through notice-and-comment rulemaking. On May 9, the NLRB announced its [intent to propose a new rulemaking](#) on the joint employer standard. Through this rulemaking the Board will be able to obtain public input on the consequences of *Browning-Ferris* and the benefits of restoring the original standard.

In addition, the General Counsel of the NLRB, Peter Robb, issued a memorandum ([Memorandum GC 18-02](#)) on December 1, 2017, instructing all Regional Offices to submit for review all cases involving "significant legal issues" to the NLRB's Division of Advice, including cases that deal with the joint employer standard and the application of the *Browning-Ferris* decision. This presents the Board with an opportunity to reverse BFI through new adjudication and gives the NLRB another opportunity to reinstate the traditional joint employer standard.

ACTION IS IMPERATIVE:

Congress, President Trump, and the NLRB should move to codify into law the traditional joint employer standard through decisions, rulemaking and legislation in order to provide an understandable, predictable and workable standard that allows local businesses and entrepreneurs to create jobs. This will strengthen the American economy and provide avenues

for the American Dream. CDW will continue to fight against expansions to joint employer liability.