COALITION FOR A
DEMOCRATIC WORKPLACE

Protecting Local Businesses

On September 14, the National Labor Relations Board issued a notice of proposed rulemaking announcing its plan to reinstate the pre-2015 joint employer standard under the National Labor Relations Act. The rulemaking would effectively overturn the Board's Obama-era Browning-Ferris Industries (BFI) decision, which drastically expanded the joint employer standard and disrupted decades of established law. The BFI decision continues to undermine business relationships across the economy and threaten the ability of individuals to achieve the American Dream of owning their own business. CDW strongly believes the BFI standard must be overturned and plans to file comments encouraging the Board to move forward with this vital rulemaking.

TRADITIONAL JOINT EMPLOYMENT & THE NPRM

The National Labor Relations Board's (NLRB) notice of proposed rulemaking (NPRM) would reinstate the traditional joint employer standard used to determine when two or more companies are joint employers over a group of employees under the National Labor Relations Act (NLRA). Joint employers are responsible for bargaining with any union representing the joint employees and are mutually liable for any violations of the NLRA 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 standard, which was in place from 1984 until August 2015, two or more entities were considered to be joint employers only if they exercised *direct and immediate control* over the essential terms and conditions of employment for the employees in question; this included having the ability to hire, fire, discipline, supervise, or direct the 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.

The Board's NPRM will once again establish that joint employers must exercise *direct and immediate control* over essential terms and conditions of employment. If finalized, the Board will provide stability for the economy while ensuring true joint employers remain covered under the NLRA.

BFI STANDARD THREATENS SMALL AND LOCAL BUSINESSES

The traditional standard was overturned by the Obama-era NLRB in August 2015, when the Board issued its decision in *BFI.* The *BFI* decision drastically expanded the NLRA's joint employer standard by extending it to situations where companies shared *indirect* or even just

unexercised potential control over the terms and conditions of employment. This confusing standard created uncertainty and radically increased the number of business relationships that could trigger joint employer status. The *BFI* decision impacted every contractual relationship between businesses, from the franchise model to those between contractors and subcontractors and suppliers and vendors.

For example, 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 and operate their own small business. This successful legal and economic model, however, relied on the traditional joint employer standard, and the changes under *BFI* completely upended those relationships.

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. This resulted in a chilling effect on business-to-business relationships, which fell most heavily on local small businesses. The changes to the standard made it far more likely that instead of operating as individually-owned enterprises, local small businesses would be subsumed by larger corporations, stifling entrepreneurship, business innovation, and flexibility.

PREVIOUS ATTEMPTS TO FIX THE STANDARD

The Trump-era NLRB has already attempted to reinstate the traditional standard. On December 14, 2017, the NLRB issued its decision in *Hy-Brand Industrial Contractors*, which purported to overrule *BFI* and reinstate the traditional standard. The Board was unfortunately forced to vacate 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 effect.

Additionally, 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 *BFI* decision. This presented the Board with an opportunity to reverse *BFI* through new adjudication and reinstate the traditional standard.

ADDITIONAL ACTION IS IMPERATIVE

Congress, President Trump, and the NLRB should continue to pursue all available avenues to reinstate the traditional joint employer standard, including decisions, rulemaking and legislation, in order to provide a workable standard that allows local businesses and entrepreneurs to create jobs. This will strengthen the American economy and provide opportunities to achieve the American Dream.