



## COALITION FOR A **DEMOCRATIC WORKPLACE**

### **Protecting Local Businesses through a New Joint-Employer Standard**

*In September 2018, the National Labor Relations Board issued a Notice of Proposed Rulemaking announcing its plan to reinstate the traditional joint-employer standard under the National Labor Relations Act. The rulemaking would effectively overturn the Board's Obama-era Browning-Ferris Industries 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. The NLRB and Congress must pursue all possible avenues to overturn the BFI standard and reinstate the traditional joint-employer standard.*

#### **TRADITIONAL JOINT-EMPLOYMENT & THE NPRM**

The National Labor Relations Board's (NLRB) 2018 [Notice of Proposed Rulemaking](#) (NPRM) would reinstate the traditional joint-employer standard, which was in place from 1984 until August 2015. The joint-employer standard 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 violations of the National Labor Relations Act (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.

In today's world large and small businesses alike have contractual relationships with dozens, hundreds or even thousands of franchisees, vendors, and contractors. The traditional joint-employer standard provided clarity and protected 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 2018 NPRM adopts the long-accepted, practical requirement that the Board will only find a joint-employment relationship under the NLRA when a business or other entity actually exercises control over the essential terms and conditions of another employer's employees.

#### **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 [Browning-Ferris Industries](#) (*BFI*). The *BFI* decision radically expanded the 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. The Board's decision created confusion by not defining key terms or providing guidance as to how to implement the changes to the law. The standard led to massive uncertainty throughout the business community and drastically expanded the number of



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business relationships that could trigger joint-employer status, exposing almost every contractual relationship to unwarranted liability. The US Court of Appeals for the D.C. Circuit recently returned the *BFI* case to the Board, noting the *BFI* standard lacked clarity.

### **ATTEMPTS TO FIX THE STANDARD**

The Trump-era NLRB has already attempted to reinstate the traditional standard. On December 14, 2017, the NLRB reinstated the original joint-employer standard in [Hy-Brand Industrial Contractors](#). However, the Board subsequently [vacated the Hy-Brand decision](#) in response to a controversial opinion by the agency's inspector general and ethics officer.

Additionally, the General Counsel of the NLRB, Peter Robb, issued [Memorandum GC 18-02](#) on December 1, 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 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.

In its most significant move yet, the NLRB is now trying to undo this misguided policy change through its new NPRM. CDW filed [comments](#) on the proposal with nearly 90 other employer organizations on January 28, 2019.

### **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.