



COALITION FOR A **DEMOCRATIC WORKPLACE**

Stop the Attack on Small and Local Businesses

Over the past several years Democrats in Congress and at the NLRB have tried to make drastic changes to labor policy in an effort to provide unions with more potential members and increase their dues revenue streams. One of their most egregious efforts centers around the joint-employer standard under the NLRA. Democrats in Congress have introduced the PRO Act, which would impose an expansive joint-employer standard across the economy, disrupting decades of established law and threatening the ability of individuals to achieve the American Dream of owning their own business. The Trump administration and Republicans on the NLRB and in Congress must continue to pursue all possible avenues to stop this assault on small business owners.

THE PRO ACT THREATENS SMALL AND LOCAL BUSINESSES

On May 2, 2019, Democrats in Congress introduced the Protecting the Right to Organize (PRO) Act ([H.R. 2474](#), [S. 1306](#)). Included among the myriad drastic labor policies within the bill is a provision that dramatically expanded the joint-employer standard.

The joint-employer standard under the National Labor Relations Act (NLRA) 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 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 joint-employer standard, which was in place from 1984 until August 2015, entities could only be joint-employers if they exercised *direct and immediate* control over the essential terms and conditions of employment. This standard provided clarity for businesses and protected them from unnecessary involvement in labor negotiations and disputes involving workplaces in which they do not have such control. This is especially prevalent and necessary in today's world, where large and small businesses alike have contractual relationships with dozens, hundreds, or even thousands of franchisees, vendors, and contractors. The traditional standard allowed hundreds of thousands of small and local businesses to flourish, creating millions of jobs.

Unfortunately, the PRO Act would drastically expand the joint-employer standard to include situations where companies shared only *indirect* or even just *unexercised potential control* over the terms and conditions of employment. This new standard was originally proposed by the Obama-era National Labor Relations Board (NLRB) in August 2015, when the Board issued its decision in [Browning-Ferris Industries \(BFI\)](#), and now Democrats in Congress are trying to codify the drastic change into law.

The *BFI* decision, and now the PRO Act, has led to massive uncertainty throughout the business community and exposed vastly more businesses to unwarranted joint-employer liability.



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Neither the PRO Act nor the *BFI* decision defined key terms or provided guidance as to how to implement the new standard. This lack of clarity resulted in the U.S. Court of Appeals for the D.C. Circuit returning the *BFI* case to the Board. It also meant that nearly every contractual relationship could potentially trigger joint-employer status, from the franchise model to those between contractors and subcontractors and suppliers and vendors.

For example, the franchise model, which was rooted in the traditional joint-employer standard, allowed local franchise owners to 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 to start and operate their own small business with some assurances and support. The changes considered under the PRO Act and in *BFI* jeopardize those relationships, as corporate franchisors are more likely to exert increased authority over franchisees, making those small business owners simply employees, or end and/or limit their support to their franchisees.

Additionally, the traditional standard allowed larger national businesses to rely on goods and services provided by local small businesses without facing joint-employer liabilities. Now larger companies and brands could be held liable for the employment decisions of these businesses. In order to protect themselves from such increased liability, larger corporations are more likely to subsume local small businesses rather than work with individually owned enterprises, stifling entrepreneurship, business innovation, and flexibility.

EFFORTS TO REINSTATE THE TRADITIONAL JOINT-EMPLOYER STANDARD

The Trump-era NLRB is working to reinstate the traditional standard. The Board's 2018 [Notice of Proposed Rulemaking](#) (NPRM) adopts the traditional joint-employer standard, requiring an entity to actually exercise control over the essential terms and conditions of another employer's employees to be considered a joint-employer. CDW filed [comments](#) on the proposal with nearly 90 other employer organizations on January 28, 2019.

Additionally, the Board's General Counsel, 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. This included cases that deal with the joint-employer standard and the application of the *BFI* decision.

ACTION IS IMPERATIVE

Congress, President Trump, and the NLRB must continue to fight against Democrats' unwarranted attacks on small and local businesses and continue to pursue all available avenues to reinstate the traditional standard. Restoring the traditional joint-employer standard will support the independence of local businesses and ensure entrepreneurs can still achieve the American Dream of owning their own small business, both of which will strengthen the U.S. economy.