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. House Democrats passed 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 their efforts to stop this assault on current and potential small business owners.

THE PRO ACT THREATENS SMALL AND LOCAL BUSINESSES:

In February 2020, House Democrats passed the Protecting the Right to Organize (PRO) Act, H.R. 2474 (Senate companion, S. 1306). Included among the myriad drastic labor policies within the bill is a provision that dramatically expands 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 NLRA violations 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, decades-old standard, entities can only be joint-employers if they exercised *direct and immediate* control over the essential terms and conditions of employment. This standard provides 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 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.

Under the PRO Act, however, the joint-employer standard would include situations where companies shared only *indirect* or even just *unexercised potential control* over the terms and conditions of employment. This standard was originally conceived by the Obama-era NLRB in its 2015 *Browning-Ferris Industries* (*BFI*) decision. Under the *BFI* standard nearly every contractual relationship could potentially trigger joint-employer status, from the franchise model to those between contractors and subcontractors and suppliers and vendors, needlessly exposing vastly more businesses to unwarranted joint-employer liability.

The franchise model, for example, which is rooted in the traditional joint-employer standard, allowed individuals to open their own small business with the support of the larger, more experienced franchisor. The franchisor provided the business model, well-known logo, and

some assurances and support, but the franchisee was responsible for making the individual business succeed and was liable for its business practices. The *BFI* standard, however, could potentially impose significant liability on the franchisor, forcing them to protect themselves via ending and/or limiting their support to their franchisees or exerting increased authority over them, essentially converting those small business owners into employees.

Additionally, the traditional standard allowed larger businesses to rely on goods and services provided by local businesses without facing uncertainty around joint-employer liability. Under the *BFI* and PRO Act standard, however, larger companies would be more likely to subsume local small businesses rather than work with individually owned enterprises, stifling entrepreneurship, business innovation, and flexibility. The *BFI* standard also hampers businesses' efforts to encourage "corporate responsibility" among franchisees, contractors, and vendors to the detriment of workers, consumers, and their communities.

To make matters worse neither the PRO Act nor the *BFI* decision defined key terms or provided guidance as to how to implement the new standard, resulting in massive uncertainty for the business community. This lack of clarity resulted in the US Court of Appeals for the DC Circuit returning the *BFI* case to the Board.

CURRENT STATE OF PLAY:

In February 2020, the NLRB issued its Joint-Employer Final Rule, which reinstated the traditional employer standard under the NLRA. The Final Rule establishes that an entity can only be a joint-employer if it actually exercises control over the essential terms and conditions of another employer's employees. CDW filed comments on the Board's proposed rulemaking with nearly 90 other employer organizations in January 2019.

Additionally, NLRB General Counsel, Peter Robb, issued Memorandum GC 18-02 in December 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 dealt with the joint-employer standard and the application of the *BFI* decision.

The US Department of Labor also issued a Joint Employer Final Rule, restoring the traditional standard under other federal labor laws. CDW submitted comments on the proposal in June 2019. Several state Attorneys General challenged DOL's Final Rule in federal court.

President Trump, Congress, 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.