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NLRB's New Joint Employer Standard Threatens Business Formation and Job Creation

Congress Should Rein in Labor Board's Pro-Big Labor Activism

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In August 2015, the National Labor Relations Board (NLRB) unilaterally changed the definition of joint employment in a way that could expose tens of thousands of businesses across the United States to increased costs and liability. The NLRB's action will block a path toward entrepreneurship, reduce job creation, expand employer liability, increase employment insurance costs, lead to a surge in lawsuits, and disrupt thriving business models. The underlying motive of the NLRB's move is to ease union organizing.

In the case, *Browning-Ferris v NLRB*, the Board overturned decades-old precedent that held a joint employer relationship existed when one company exercised "direct and immediate" control over another company's workforce. Under the NLRB's new definition, companies may be held liable for labor violations committed by other employers with whom they contract, even if they only exercise indirect control, unexercised potential control, and a vague notion of "economic and industrial realities."¹

The expanded joint employer standard eases union organizing drives and entrenches unions in a workplace. Third parties would be redefined as joint employers with a unionized company or of a company where an organizing campaign is underway. The rule also allows unions to take actions against a third party that were previously illegal, including protests, boycotts, and pickets. Unions could then use these tools to browbeat employers into so-called neutrality agreements that give union officials greater access to workers, bypass secret-ballot elections, and bar employers from opposing organizing campaigns, in exchange for unions agreeing not to engage in protests or boycotts.

Unions benefit from a broader joint employer standard in other ways. If a group of employees of a temp agency form a union, the union or some of the employees may be able to pressure the company by filing an unfair labor practice NLRB complaint against a client of the temp agency if it were to discontinue using the temporary staffing agency.

How Does It Affect Workers? Supporters of the NLRB's change of the joint employer standard—mainly organized labor—argue that companies have increased the use of contracting and franchising to insulate themselves from collective bargaining obligations and pay lower wages. In reality, these are well established business practices, for good reason. Companies use contractors and temporary staffing agencies to outsource non-core

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business functions in order to focus on the firm's primary purpose. Franchising allows companies to grow with minimal capital investment. It also reduces risk, and minimizes responsibilities for franchise managers, allowing them to focus on day-to-day operations.

The NLRB's new joint employer standard will increase liability and collective bargaining obligations on franchisees' parent companies as well as for contractors and clients of temp agencies, in ways that will reduce job creation, with dire consequences for America's economy. Currently, there are 94 million Americans out of the workforce and another 6 million underemployed.²³ Now is not the time to enact policies that make it harder for businesses to create jobs.

Franchising, contracting, and temporary staffing firms are leading job creators in today's economy. In total, the U.S. economy only created 2.65 million jobs last year.⁴ Franchises accounted for 14.19 percent of that. In 2015, franchise businesses created a total of 376,000 jobs—48,600 in December alone.⁵

Temporary staffing agencies have become a major force in today's economy. They create opportunities for workers to gain experience and skills. Many workers change career paths, and temp agencies allow those individuals to gain the skills needed to switch fields. In 2014, 2.9 million Americans were employed by temp agencies, slightly more than of 2 percent of the workforce.⁶

How Does It Affect Business Owners? According to research released in December by FRANdata, an information and analysis provider to the franchise industry, the NLRB's new joint employer standard would put at risk at least 40,000 small businesses operating in over 75,000 locations.⁷ This is the case for a number of reasons.

Previous to the new joint employer standard, a franchise parent company was not responsible for labor violations committed by a franchisee. But now that a franchisor can be dragged into a franchisee's employment-based legal disputes, costs will increase for everyone. McDonald's Corporation, which the NLRB has named a joint employer, has already spent over \$1 million in supplying internal documents to the Board, as well an unknown amount in legal fees.⁸

Employer liability insurance premiums, which are normally based on how many workers a company employs, will certainly rise. If the NLRB were to aggressively apply its new joint employer standard, large companies that contract or franchise could be on the hook for many more employees, which would greatly raise the cost of liability insurance—both for them and for individual franchisees.

The ruling takes away many incentives for starting a small business. Entrepreneurs value autonomy and the flexibility of being their own boss. Many franchisee owners question whether those incentives will still exist under the new joint employer standard. John Sims, owner of a Rainbow Station early education center franchise in Richmond, Virginia, is concerned that his franchisor will become "active in the operation of my business."⁹ Mara

Fortin, a Nothing Bundt Cakes franchisee, fears she will not be able to “grow or expand given this climate of uncertainty and increased risk.”¹⁰

The uncertainty Fortin cites is a result of the ambiguous nature of the NLRB’s ruling. To determine whether a business has enough control over a group of workers to trigger joint employer status, the NLRB uses vague terms like “economic realities” and “totality of circumstances” that give employers very little guidance on whether their business relationships qualify them as joint employers. This uncertainty could stunt the growth in franchising demonstrated in recent years.

Policy Recommendations. A bill now making its way through Congress would restore the traditional joint employer standard, which fostered the creation of thousands of business relationships that have served entrepreneurs, workers, and consumers for decades. The Protecting Local Business Opportunity Act (H.R. 3459) has already passed the House Education and the Workforce Committee, and has been referred to the floor of the House of Representatives.¹¹ The bill would return stability and certainty to thousands of business relationships across the country, and alleviate entrepreneurs’ concern about losing the workplace flexibility and autonomy that made them want to start a business in the first place.

Congress created the National Labor Relations Board to act as a neutral arbiter in labor disputes in a way that represents the public interest. However, in the years since its creation in the 1930s, the Board has become highly politicized. With members appointed by the President, NLRB case precedent regularly flip-flops depending on which party controls the White House. That has created great uncertainty in federal labor policy for decades.

Congress should pass a bill similar to the National Labor Relations Reorganization Act (NLRRA) of 2011 that abolishes the highly politicized Board.¹² The NLRRA would transfer enforcement of the National Labor Relations Act to the Department of Justice and the NLRB’s rulemaking and election duties to the Department of Labor. Congress should also consider transferring the NLRB’s adjudicatory role for workplace disputes to an Article III court, where judges serve lifetime appointments, unlike NLRB members, who are serve five-year terms and are more likely to consider the existing administration’s political priorities.

Conclusion. The franchise business model, contracting out of a business’ non-core functions, and the use of temporary staffing agencies are at risk. These industries create thousands of jobs annually and generate opportunity for entrepreneurs to start new businesses. The NLRB’s new joint employer standard, by making larger firms liable for the employment practices of entities it may not be able to control, will result in reduced opportunities for entrepreneurs and fewer jobs.¹³ Congress should act now to reverse it.

Notes

¹ *Browning-Ferris Industries of California, Inc. and FPR-II, LCC v. Sanitary Truck Drivers and Helpers local 350, International Brotherhood of Teamsters*, Case 32-RC-109684 (2015), <https://www.nlr.gov/case/32-RC-109684>.

² Data retrieved from Bureau of Labor Statistics, “Labor Force Statistics from the Current Population Survey,” January 15, 2016, <http://data.bls.gov/timeseries/LNS15000000>.

³ “Employment Situation Summary,” Bureau of Labor Statistics, January 8, 2016, <http://www.bls.gov/news.release/empsit.nr0.htm>.

⁴ Patrick Gillespie “U.S. adds 2.65 million jobs in 2015 for 2nd best year since 1999,” CNN Money, January 8, 2016, <http://money.cnn.com/2016/01/08/news/economy/us-economy-jobs-second-best-year-since-1999/index.html>.

⁵ Jonathan Maze, “Franchise restaurants added a lot of jobs last year,” *Nation’s Restaurant News*, January 6, 2016, <http://nrm.com/blog/franchise-restaurants-added-lot-jobs-last-year>.

⁶ Max Mihelich, “Special Report: Staffing Still Soaring,” *Workforce*, October 1, 2014, <http://www.workforce.com/articles/20792-record-high-staffing>.

⁷ Andrea Wells, “New Look in Franchise Liability,” *Insurance Journal*, January 11, 2016, <http://www.insurancejournal.com/magazines/coverstory/2016/01/11/394052.htm>.

⁸ Erik Larson, “McDonald’s Fights to Avoid Employee Status for Franchise Workers,” *Bloomberg Business*, October 15, 2015, <http://www.bloomberg.com/news/articles/2015-10-30/mcdonald-s-fights-to-avoid-employee-status-for-franchise-workers>.

⁹ “3 small businesses tell how the NLRB’s ‘joint employer’ ruling will affect them,” *Coalition to Save Local Businesses*, August 31, 2015, <http://savelocalbusinesses.com/2015/08/31/3-small-businesses-tell-how-the-nlrbs-joint-employer-ruling-will-affect-them/>.

¹⁰ *Ibid.*

¹¹ H. R. 3459 “Protecting Local Business Opportunity Act,” 114th Congress (2015-2016), <https://www.congress.gov/bill/114th-congress/house-bill/3459/text>.

¹² H.R. 2926 “National Labor Relations Reorganization Act of 2011,” 112th Congress, 2011–2013, <https://www.govtrack.us/congress/bills/112/hr2926>.

¹³ Aloysius Hogan, “The NLRB Joint Employer Cases: An Attack on American Business,” *Competitive Enterprise Institute*, June 2015, <https://cei.org/sites/default/files/Aloysius%20Hogan%20-%20The%20NLRB%20Joint-Employer%20Cases%20-%206-4-15.pdf>.