EXPANDING JOINT EMPLOYER STATUS: WHAT DOES IT MEAN FOR WORKERS AND JOB CREATORS?

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

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C O N T E N T S

EXPANDING JOINT EMPLOYER STATUS: WHAT DOES IT MEAN FOR WORKERS AND JOB CREATORS?

Tuesday, September 9, 2014
House of Representatives,
Subcommittee on Health, Employment, Labor, and Pensions,
Committee on Education and the Workforce,
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:01 a.m., in Room 2175, Rayburn House Office Building, Hon. David P. Roe [Chairman of the Subcommittee] presiding.

Present: Representatives Roe, Wilson, Price, Salmon, Guthrie, Heck, Kelly, Brooks, Byrne, Pocan, Scott, Hinojosa, Courtney, Polis, Wilson, and Bonamici.

Staff present: Ed Gilroy, Director of Workforce Policy; Marvin Kaplan, Workforce Policy Counsel; Nancy Locke, Chief Clerk; James Martin, Professional Staff Member; Zachary McHenry, Legislative Assistant; Brian Newell, Communications Director; Krisann Pearce, General Counsel; Lauren Reddington, Deputy Press Secretary; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Alexa Turner, Legislative Assistant; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Melissa Greenberg, Minority Labor Policy Associate; Eunice Ikene, Minority Labor Policy Associate; Brian Kennedy, Minority General Counsel; Leticia Mederos, Minority Director of Labor Policy; Megan O'Reilly, Minority Staff Director; and Mark Zuckerman, Minority Senior Economic Advisor.

Chairman ROE. A quorum being present, the Subcommittee on Health, Employment, Labor and Pensions will come to order.

Good morning. Let me begin by welcoming our guests and thanking our witnesses for joining us. We appreciate you sharing your thoughts on a complicated and very important issue.

Each day, more than eight million Americans go to work at our nation's 757,000 franchisees businesses. The franchise model has encouraged entrepreneurship, the growth of small businesses, and job creation. Countless men and women invest their tears, sweat, and savings to realize the dream of owning their own business, and the franchise model has helped turn those dreams into a reality.

For most franchise employers, it is tough staying afloat even in the best of times. It is especially challenging when Washington bureaucrats change the rules in the middle of the game. In recent months, it has become clear the Obama National Labor Relations Board is determined to rewrite a franchise model that has worked and served workers, employers, and consumers well for decades.

At the center of this effort is Richard Griffin. As the agency's general counsel, Mr. Griffin has encouraged the board to blur the lines of responsibility between franchisor and franchisee. Most recently, he determined McDonalds, Inc., is a joint employer with its franchisees, a decision that no doubt sent shockwaves across the country. This radical effort is detached from reality for two important reasons.

First, it pretends the franchise business model doesn't exist. Since 1984, the NLRB has applied a straightforward test to determine whether two separate entities are joint employers of a business establishment. The board analyzes whether the alleged employers share control over essential conditions of employment, such as hiring, firing, discipline, supervision, and direction of employees. Control over these matters must be direct and immediate.

The current standard makes perfect sense when one considers how the franchise model works in the real world. As a chief executive officer of CKE Restaurants—a company that includes iconic brands like Hardee's and Carl's Jr.—Andrew Puzder is no stranger to the franchise business or this Subcommittee.

Here is how he has described the franchise business model: "The franchiser/franchisee relationship is built on a division of roles and responsibilities. The franchiser owns a unique system, which it licenses and protects as a brand. The franchisee operates an independent business under the brand's trademarks at one or more locations as a licensee. Franchisees independently choose who they hire, the number of people they hire, the wages and benefits they pay, the training that such employees undergo, the labor practices they use, how their employees are monitored and evaluated, and the circumstances under which they are promoted, disciplined, or fired."

Make no mistake, the current standard reflects the way franchise businesses have been owned and operated for decades. So why the sudden effort to dismantle policies that work?

As the Wall Street Journal noted in reaction to Mr. Griffin's decision, "This is a bonanza for trial lawyers who will be able to shake down the parent company for alleged labor violations at franchisees whose pockets aren't as deep. The other beneficiary is Big Labor. Under Mr. Griffin's law, they can leap-frog their direct managers to corporate headquarters, which are more vulnerable to the political pressure and less sensitive to local markets."

Which leads to the second reason why this radical effort is so detached from reality: It fails to recognize the difficult challenges facing workers in the Obama economy. Our nation remains mired in a jobs crisis. Workers are frustrated. After six years of President Obama's failed policies, I am frustrated, too.

Let me—I just held a hearing, in Indiana, Greenfield, Indiana, last week, and it struck me when I read the briefing memo that in 2009, 159 million people in this country—that is about 60 percent of us—got our health insurance through our business. Today, after five years of recovery, 150 million people get their insurance. We have lost—9 million people have lost their health insurance during a "recovery." I found that astonishing, that number. And that is the Pew Family Research. It is not me making that up.

Stocks prices on Wall Street are breaking new records while the wages on Main Street remain flat. Meanwhile, the prices for essential goods and services like food, gas, and health insurance have gone up.

That is not right, and working families deserve better. Yet today we are discussing an effort that will force small businesses to close their doors, or at the very least discourage new small businesses from being created. Workers will once again be on the losing end of this Big Labor bailout at a time they can least afford it.

I suspect some of my colleagues will protest today's hearing. It will likely be noted the board hasn't rendered a decision and suggest the Committee is once again putting the cart before the horse. We have heard our colleagues sing this tune before, and each time it has been followed by a radical shift in board policy.

The American people deserve to know what the federal government is up to and how it will affect their families. Hiding the truth behind some process nonsense isn't fair to the men and women who will have to live by the rules issued by this federal agency. Today's hearing will help shine a light on those consequences and I hope will encourage the NLRB to change course.

With that, I will now recognize my colleague, Congressman Mark Pocan, for his opening remarks.

[The statement of Chairman Roe follows:]

Prepared Statement of Hon. Phil Roe, Chairman, Subcommittee on Health, Employment, Labor, and Pensions

Each day more than eight million Americans go to work at our nation's 757,000 franchise businesses. The franchise model has encouraged entrepreneurship, the growth of small businesses, and job creation. Countless men and women invest their tears, sweat, and savings to realize the dream of owning their own business, and the franchise model has helped turn those dreams into a reality.

For most franchise employers, it's tough staying afloat in even the best of times. It's especially challenging when Washington bureaucrats change the rules in the middle of the game. In recent months, it's become clear the Obama National Labor Relations Board is determined to rewrite a franchise model that has served workers, employers, and consumers well for decades.

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Which leads to the second reason why this radical effort is so detached from reality – it fails to recognize the difficult challenges facing workers in the Obama economy. Our nation remains mired in a jobs crisis. Workers are frustrated. After six years of President Obama's failed policies, I am frustrated too. Stocks prices on Wall Street are breaking new records while wages on Main Street remain flat. Meanwhile, the prices for essential goods and services like food, gas, and health insurance have gone up.

That's not right and working families deserve better. Yet today we are discussing an effort that will force small businesses to close their doors, or at the very least, discourage new small businesses from being created. Workers will once again be on the losing end of this Big Labor bailout and at a time they can least afford it.

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Mr. POCAN. Great. Well, thank you, Chairman Roe. I want to thank the witnesses for their thoughtful testimony today.

I can't help but notice this committee has met more than 17 times over the last three and a half years for markups or hearings on the activities of the NLRB. By comparison, this Committee has not had a single hearing on raising the minimum wage, equal pay, job creation, or how to lower unemployment.

The focus of this morning's hearing is the National Labor Relations Board and the joint employer standard. Freedom of association and negotiating for improved working conditions are fundamental rights for all workers in this country, regardless of what type of employment they are in. As an owner of a specialty printing shop for more than 27 years, I understand the challenges small businesses are facing. I also understand the responsibilities businessowners have to their employees.

Splintered employment relations should not be a shield for unscrupulous employers who want to deny workers their fundamental rights. Joint employers should not be able to play hot potato with their employees' livelihoods or the livelihoods of their families.

As we turn the corner on the 17-plus NLRB hearings and markups, it seems that we should move our discussion to something more productive and recognize the realities facing today's workforce. Too many Americans are trapped in precarious, unstable, and low-paying jobs with little or no recourse under the law. We must do more to address the serious challenges workers face nationwide.

This hearing is another attempt by my friends on the other side of the aisle to undermine the reputation of the NLRB and interfere with its legitimate authority. At the last NLRB hearing held two months ago, we focused on the case of Browning-Ferris Industries. The board continues to deliberate over the facts of the Browning case. The Board has called for briefs as it reviews the joint employer standard. This is completely within its jurisdiction, and this hearing is not the appropriate place to try and adjudicate any board decision currently under consideration.

A review of the joint employer standard is timely, given the disturbing trends we are seeing in today's labor market. More and more, businesses are relying on temporary and contingent workers, franchisees, and other nontraditional forms of employment to limit their labor costs and exposure to liability.

While temporary employment is commonly seen as a path to permanent employment, increasingly it is not the case. There are now 2.87 million workers employed by temp agencies, and these workers fare much worse than others in the private sector.

Temporary workers make an average of $3.40 an hour less than their full-time counterparts. Temp workers have significantly less access to employer-provided benefits, with only 8 percent receiving health care benefits and only 9 percent receiving pension benefits through their jobs. And temporary workers are also more likely to go without sick days, paid vacation, and other benefits.

Perhaps most troubling is temp workers are often given insufficient job safety training. Forty-two percent of temp workers perform light industrial work. These construction and manufacturing workers have substantially higher rates of injury and higher on-the-job death rates. This is simply unacceptable.

Indirect employment relationships are also very common in the fast food industry, which almost exclusively uses a franchise model. While franchisors claim to have no direct control over the terms and conditions of employment, they can prescribe a wide range of factors that affect one's workplace conditions, such as the number of workers at a franchise, what hours they work, and their training.

Some fast food chains, such as McDonald's, even provide franchisees with scheduling software that sets and monitor workers' schedules, tracks sales data, labor costs, the labor needs of the franchise, and reviews wages. In many cases, fast food franchise agreements are so extensive that the only variable cost for a franchisee is labor.

In the few weeks we have remaining this session, I hope this Committee and this Congress will focus on the incredibly urgent priorities of the American people: raising the minimum wage; renewing unemployment insurance for the millions who still need it; stopping employment discrimination based on sexual orientation; ensuring paycheck fairness for women; and providing relief for the tens of millions of students and parents with student loan debt.

Thank you, Mr. Chairman. I yield back.

[The statement of Mr. Pocan follows:]

Prepared Statement of Hon. Mark Pocan, a Representative in Congress from the State of Wisconsin

Thank you, Chairman Roe.

I want to thank the witnesses for their thoughtful testimony. I can't help but notice this committee has met more than 17 times over the last three and a half years for hearings or markups on the activities of the NLRB. By comparison this Committee has not held a single hearing on raising the minimum wage, equal pay, job creation or how to continue to lower unemployment.

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Freedom of association and negotiating for improved working conditions are fundamental rights for all workers in this country-regardless of what type of employment they are in.

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Splintered employment relationships should not be a shield for unscrupulous employers who want to deny workers their fundamental rights. Joint-employers should not be able to play hot-potato with their employees' livelihoods, or the livelihoods of their families.

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Thank you. I yield back.

Chairman ROE. I thank the gentleman for yielding.

Pursuant to committee rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow such statements and other extraneous material referenced during the hearing to be submitted for the official hearing record.

It is now my pleasure to introduce our distinguished panel of witnesses. Our first witness, Ms. Catherine Monson, is the chief executive officer of FASTSIGNS International, headquartered in Carrollton, Texas. With more than 30 years of franchising and digital printing experience, Ms. Monson was named CEO of the International Signage and Graphic and Visual Communications Franchise Company in December of 2008.

Welcome.

Mr. Clint Ehlers is the owner of two FASTSIGNS franchises located in Lancaster and Willow Grove, Pennsylvania. Previously, he owned FASTSIGNS franchise in Culver City, California.

And welcome, Mr. Ehlers.

Our next witness is Mrs. Jagruti Panwala, Bensalem, Pennsylvania, is the owner of multiple hotel franchises. Mrs. Panwala has spent many years in various positions within the hospitality industry from administration to owner-operator.

Welcome.

Mr. Harris Freeman is a professor of legal research and writing at Western New England University School of Law in Springfield, Massachusetts. Professor Freeman's professional experience includes working in the private sector litigating employment, civil rights, and personal injury claims. In 2009, he was appointed to the Commonwealth Employment Relations Board, an appellate agency body that oversees public-sector labor relations in Massachusetts.

Welcome, Mr. Freeman. And from an obstetrician, a personal injury lawyer makes my palms sweat. So—

[Laughter.]

Mr. Todd Duffield is a shareholder with Ogletree, Deakins, Nash, Smoak & Stewart, PC. Mr. Duffield's practice includes union organizing campaigns and elections, unit clarifications, collective bargaining negotiations, grievance arbitration, and contract administration under the *National Labor Relations Act* and the *Railway Labor Act*.

Before I recognize you to provide your testimony, let me briefly explain our lighting system. You have five minutes to present your testimony. When you began, the light in front of you will turn green. When one minute is left, the light will turn yellow. When your time is expired, the light will turn red.

At that point, I will ask you to wrap up your remarks as best you are able. And I am not going to cut you off in the middle, but go ahead and wrap up. And after everyone has testified, members will each have five minutes for questions.

And with that, I will begin with Ms. Monson. You are recognized for five minutes.

STATEMENT OF MS. CATHERINE MONSON, CHIEF EXECUTIVE OFFICER, FASTSIGNS INTERNATIONAL, INC., CARROLLTON, TX (TESTIFYING ON BEHALF OF THE INTERNATIONAL FRANCHISE ASSOCIATION)

Ms. MONSON. Thank you very much, Chairman Roe, Mr. Ranking Member, and distinguished members of the subcommittee. My name is Catherine Monson, and I am CEO of FASTSIGNS International. And I am here today both as the CEO of this franchisor and also as a member of the board of directors of the International Franchise Association.

With over 30 years in franchising, I have been very active in the International Franchise Association for over 20 years on many committees, board membership for six years, and a frequent speaker at their events. The International Franchise Association is the oldest and largest trade association devoted to representing the interests of franchising. Its membership includes franchisors, franchisees, and suppliers.

Its mission is to protect, enhance, and promote franchising, and we do that through government relations, public relations, and educational programs. IFA membership spans 300 different industries, more than 11,000 franchisee members, 1,100 franchisor members, and 575 supplier members.

Far too often, franchising is confused as being fast food and hotels. In fact, many more business lines are involved in franchising than fast food and hotels, including accounting and tax services, automotive aftermarket, batteries, business services, campgrounds, childcare, clothing, retail, shoe stores, fitness and gyms, hair salons, hair cutting, handyman services, home improvement services, home inspection, lawncare. It goes on and on and on.

The reason fast food is so visible is everybody eats three meals every single day. Signage not so visible, because only people who need signage buy it, and they only buy it five to seven times a year. And that is why franchising is often seen as fast food.

I am absolutely passionate about franchising. I have seen franchising allow people to achieve the American Dream of business ownership. I have seen franchisees, like my franchisee here, Clint Ehlers, create jobs for employees, promote them, give them training and opportunities, provide a valuable service in the local marketplace, and through all that, build wealth for his family, save for his kids' college education, *et cetera.*

Franchising is a large community of diverse businesses, all that operate under a franchise model that is based on the franchisor, creating a brand operating systems, standards, *et cetera,* selecting great franchisees who then own, operate, and manage the businesses. We often say in franchising that the franchisee is in business for himself, but not by himself. He benefits from the brand, the training, the supply chain, the resources, the benefits of talking with other franchise owners, *et cetera.* But it is the franchisee who owns the business, runs the business, hires the employees, manages and motivates the employees, has his own employer identification number, and pays the taxes.

Successful franchisees determine the profitability in their own enterprise by how well they implement the business plan, the business model, and how well they motivate and manage their employees. It is the franchisee that creates the jobs and trains its employees. The employees work for the franchisee and not the franchisor brand.

The franchisee handles all areas of supervision, scheduling, discipline, promotion, wage changes, *et cetera.* The franchisor, FASTSIGNS International, has no input on the franchisee's labor relations. Franchising is an outstanding American success story, creating jobs and economic growth. Last year, in 2013, there were 759,000 franchise establishments in the United States employing over 8,327,000 employees, generating $803 billion of economic output.

The 2014 estimate is that franchise jobs will increase 2.6 percent—in other words, franchise establishments are going to generate 221,000 new jobs this year, and what we need now in the United States is more jobs. Many American franchise businesses have become world-renown brands and are a substantial asset in the trade balance of the United States, all without exporting a single job. Franchising truly is a great American success story.

The franchisor/franchisee relationship is built on a division of roles and responsibilities. The franchisor, like myself, creates the brand, the training, the tools, but then constantly improves it and refines it with the best practices we learn from our franchisees. The franchisee operates the independent business and manages every single one of the day-to-day operations.

As you are all aware, on July 29, the NLRB's general counsel announced he has authorized complaints against numerous McDonald's franchisees and McDonald's corporate as joint employers for alleged unfair labor practices. This marks a drastic change in the franchisee/franchisor relationship and a drastic change in law, as it has been understood.

Under the current standard, only legally separate entities that exert a significant degree of control over employees are considered joint employers. Under this new standpoint, it will completely change and I think destroy the franchise model. Typically franchise agreements are 20 years in term. Our average length remaining in FASTSIGNS is 11–1/2 years. And these contracts were negotiated while relying on the current, existing NLRB joint employer standard.

What the GC is attempting to do by enacting a new standard of who is and who is not an employer amounts to an impairment of contracts, and we and many, many others freely entered into these long-term contracts. The GC is essentially becoming an arbiter for those contracts by telling the parties, "Surprise!" That is not what our legal system is about. Our legal system stands for certainty, so businesses and business people can make informed decisions.

If the NLRB's new proposed joint employer standard becomes the law of the land, it will be tantamount to re-writing hundreds of thousands of contractual relationships by government fiat in ways the parties never contemplated to their mutual disadvantage.

As I look at my franchise—

Chairman ROE. Ms. Monson, could you go ahead and wrap up, please?

Ms. MONSON. As I look at my franchise business, if I think what I would have to do to protect myself if this new joint employer decision becomes law, I am going to have to quadruple, quintuple my workforce to be controlling and checking and auditing my franchisees. I am going to be demotivating my franchisees. I am going to be laying extra cost onto them. I am going to be taking on extra risk, possibly extra legal bills and lawsuits. It could be the demise of my organization and, thus, the 489 franchisees of FASTSIGNS in the U.S. may no longer have a brand to fly their flag under.

Thank you very much, Mr. Chairman and committee members, for allowing me to give my testimony.

[The statement of Ms. Monson follows:]

TESTIMONY OF CATHERINE MONSON
Chief Executive Officer
FASTSIGNS® International

Before the

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

"Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?"

SEPTEMBER 9, 2014

Introduction

Chairman Roe, Ranking Member Tierney, and distinguished members of the subcommittee, my name is Catherine Monson. I am Chief Executive Officer of FASTSIGNS® International. I am appearing before you today on behalf of both my company and the International Franchise Association (IFA). Thank you for the invitation to share our views on the issue of joint employer status.

I have been in franchising for over 30 years, working for multiple franchisors, starting with Sir Speedy Printing Centers in 1980. I worked for PIP Printing & Marketing Services and then became CEO of FASTSIGNS in 2009. FASTSIGNS, the sign industry's leading franchise system, founded in 1985, is a sign and visual graphics company that provides comprehensive visual marketing solutions to customers of all sizes across all industries to help them meet their business objectives. Our network of sign centers includes 489 locations in the United States, 26 locations in Canada, plus locations in the United Kingdom, Mexico, Brazil, the Caribbean, Saudi Arabia and Australia, for a total of 555 locations worldwide.

I have been an active member of the IFA for over 20 years, sitting on multiple committees, appearing as a frequent speaker at industry events, and serving for six years on the Board of Directors. The IFA is the oldest and largest trade association in the world devoted to representing the interests of franchising. Its membership includes franchisors, franchisees and suppliers. The IFA's mission is to protect, enhance and promote franchising through government relations, public relations and educational programs on issues that affect franchising. IFA's membership currently spans more than 300 different business lines, including more than 11,000 franchisee, 1,100 franchisor and 575 supplier members nationwide.

I am passionate about franchising. I have seen franchising help thousands of Americans achieve their dream of business ownership. Franchising is a large community of diverse businesses that all operate using the franchise business model to distribute their products or services. Under this model, entrepreneurs own their own businesses and acquire the right to operate those businesses using the trademarks, products and business strategies of a proven franchise system. In the process, the franchisee also receives the right to use a business plan, which the franchisor has crafted for all of its outlets. This business plan outlines a system of marketing, production and operational standards that maintain brand quality and uniformity. While franchise businesses are very common in the restaurant and hospitality industries, franchising is also popular across numerous other sectors, including health and wellness, child care, education, plumbing, senior care, signage, business services, personal services, retail and automotive.

In the franchising industry, we like to say that franchise owners are in business for themselves, but not by themselves. The franchise arrangement puts the franchisee in a better position than other small businesses by giving him or her access to resources unavailable to those other small businesses, including the uniform operating system. The franchisees run their own separate business, with a separate EIN, and pay all their own taxes. Successful franchisees determine the profitability of their enterprise by executing proven business plans, controlling their operating costs and managing the people who make this system work.

The franchisee creates jobs that provide training and upward mobility for its employees. The employees work for the franchise owner, not for the franchisor brand. The franchisee controls the hiring, firing, discipline, supervision and direction of those employees. The franchisor has no input into the franchisee's labor relations. Franchising creates jobs for millions of Americans and generates trillions of dollars in total sales, and franchising is growing at a faster rate than the economy as a whole. Moreover, many American franchised businesses have become world-renown brands and are a substantial asset to the trade balance of the United States, all without exporting a single job. Franchising is a great American success story, Mr. Chairman.

How the NLRB Plans to Change the Rules

On July 29, 2014, the National Labor Relations Board's General Counsel announced that he had authorized complaints against numerous McDonald's franchisees and McDonald's USA as "joint employers" for alleged unfair labor practices. The NLRB General Counsel's decision to issue complaints against both McDonald's franchisees and the franchisor marks a drastic change in National Labor Relations Board (NLRB) precedent regarding the franchisor/franchisee relationship. The General Counsel is asking the NLRB to impose liability on the franchisor for the labor relations of individual franchisees simply because the franchisor establishes general operational procedures for the franchisees' business, ignoring the fact that the franchisor has no involvement in or control over its franchisees' employment practices.

The NLRB General Counsel's latest move disregards established laws regarding the franchise model. If they are found to be joint employers, franchisors would be liable for individual franchisees' employment practices. Such a rule change could completely upend the franchise model and have devastating consequences for franchising as an economic force in the United States.

In fact, any change in the existing joint employer standard would significantly change the face of American business and impact every level of the supply chain. Multiple businesses and contractual relationships are based on this decades-old standard, which has been endorsed by Congress and the courts. Under the current standard, only legally separate entities that exert a significant and direct degree of control over employees, and their essential terms and conditions of employment, are considered joint employers. Essential terms and conditions of employment are those involving hiring, firing, discipline, supervision and direction of employment.

The General Counsel has yet to release any complaints in the McDonald's cases, or any memorandum or decisions outlining its new approach, so we are uncertain what the new rules might be. However, a look at the General Counsel's Amicus Brief in the pending *Browning-Ferris* case illuminates the underlying rationale behind the complaints. In that brief, the General Counsel asserts that "the Board should abandon its existing joint-employer standard". The General Counsel also asserts that companies may effectively control wages by controlling every other variable in the business. The General Counsel's new standard shifts the analysis away from the day-to-day control over employment conditions to operational control at the system-wide level. Under the new standard, franchisors would be joint employers whenever the franchisor exercises "indirect control" over the franchisee. The focus would be on "industrial realities" that make the franchisor a necessary party to meaningful collective bargaining. The NLRB would find joint employment even though the franchisor plays no role in hiring, firing, or directing the franchisee's employees.

Since brand standardization is the key to each franchise system, the General Counsel's proposed standard makes franchisors and franchisees particularly susceptible to joint employer findings. Virtually all franchisors prescribe operational procedures and requirements in their franchise agreements to preserve the quality and consistency of the products and services offered by franchisees and to maintain the value of their trademarks. However, the franchisor leaves the day-to-day management of the franchisees' businesses to the individual small business owners themselves. Under each franchise agreement, the franchisee is solely responsible for hiring and firing its own employees, training them, paying their wages, and setting their work schedules and work assignments.

The General Counsel is asking the NLRB to adopt a test such that any form of operational control or standardization will automatically trigger joint employment liability. In addition, franchising is heavily regulated under federal and state law. The controls required and anticipated by these regulations will automatically force the franchise model into the proposed new joint employer standard.

The General Counsel asserts that, prior to 1984, the NLRB consistently found joint employment where one entity exercised direct **or** indirect control over terms and conditions of employment of another entity's employees. With all due respect, the General Counsel is wrong. In cases dating back over forty years, the Board has never treated franchisees and franchisors as joint employers. These cases have involved several different franchise concepts – restaurants, retail, automotive, and others – and have focused on different areas of the relationship between franchisees and franchisors. In each case, the Board has consistently and unambiguously ruled that the limited control exerted by franchisors for the purpose of brand maintenance does not sustain a finding of joint employment. A joint employer finding is justified only when the franchisor is in a position to control the franchisee's labor relations. The General Counsel's attempt to use operational control as the main factor for finding joint employment clearly changes decades of precedent for franchisors and franchisees.

How the NLRB's Joint Employer Standard Will Change Franchise Operations

Right now, the old joint employer standard continues to be the law. It is up to the five members of the NLRB itself to make any official change. But the General Counsel's decision to issue a complaint against one of the country's leading franchisors puts all franchise businesses on notice. If the NLRB adopts the General Counsel's proposed rule, the NLRB will inject itself into complex business relationships that are completely unrelated to labor relations. Doing so casts doubt on its status as a neutral enforcer of the law.

When joint employer status is established, both entities may be liable for the other's unfair labor practices, including unlawful discipline or discharge of employees under the National Labor Relations Act (NLRA). Faced with potential liability for their franchisees' employment decisions, franchisors may be forced to exercise operational control over all the employment and human resource decisions of franchisees, undermining the franchise business model. Franchisees are owner-operators with a financial stake in the business. Without the ability to decide to hire and fire those employees who work for them, and oversee employee performance, there is less incentive for the franchisee to participate in the business model. This increased franchisor control would significantly disrupt the franchise relationship. Franchisors too would have less incentive to participate in the business model going-forward if they were responsible for areas of operation historically reserved to and exercised by their franchisees.

A new joint employer standard may make it easier for unions to organize multiple franchisees of a single franchisor. A new joint employer standard will increase the likelihood of union "corporate campaigns" against national franchisors and pressure franchisees to organize. As in the McDonald's case, union agents and community representatives engaged in corporate campaigns often use the NLRB complaint process as a weapon against employers. Individual franchisees will be involved in a long, expensive legal battle for neutrality. Franchisees cover their own operational expenses, including their legal bills. These small businesses cannot bear the cost of these fights and will be forced out of business. If the franchisor is forced to increase its control over franchisees' employment conditions given its ultimate joint employer responsibility for the franchisees' employees, the franchisor could face increased liability under other statutes.

On August 28th, in *Patterson v. Domino's Pizza,* the California Supreme Court rejected a new agency standard for vicarious liability because it was the franchisee, not the franchisor, which exerted exclusive control over the employees' employment conditions. The court rejected the idea that the imposition and enforcement of a uniform marketing and operational plan automatically saddle the franchisor with liability for the franchisee's employees. The court will impose liability only if the franchisor retained the employer's traditional rights of general control over day-to-day hiring, direction, supervision, discipline, and discharge of the franchisee's employees. Since there was no evidence of this day-to-day control, the court dismissed the claims against the franchisor.

Under the proposed new standard, franchisors would need to amend their franchise agreements to limit the operational control the General Counsel now would find to be dispositive of joint employer status. To avoid potential coverage under the operational test, franchisors must reduce involvement with franchisees on the local level, avoid training franchisee employees on brand standards, avoid enforcing operational requirements, avoid standardized employee handbooks and loosen rules regarding franchisee termination. All of these changes would negatively impact brand quality and uniformity and significantly undermine the entire franchise model. In addition, the changes would remove the positive operational tools and support the franchise model provides to individual business owners.

The new rules could dampen franchising efforts and economic growth. Franchise businesses are adding jobs faster than the rest of the private sector. With the current standard in place, franchise jobs are expected to increase 2.6% in 2014, or by 221,000 new jobs. With the current standard in place, the demand for franchise units is expected to expand by 12% this year. However, if franchisor and franchisee liability increases under new joint employment rules, those new jobs may evaporate. Because of the unanticipated high costs to franchisors and franchisees, franchisors will stop selling franchises and franchisees will stop buying. Without the franchise model, individual entrepreneurs would be deprived of the opportunity to own their own business, franchisors would be denied the opportunity to expand their business, and millions of jobs will be lost.

The cumulative cost of additional liabilities and litigation that a new joint employer standard would bring could force many franchisors out of business. Franchise growth would halt, and product quality would suffer without the franchisor's mechanisms to maintain brand standards. Local franchisees would suffer, as would the hundreds of thousands of workers they employ. This "domino effect" demonstrates that the repercussions of revising the joint employer standard are grave, and they are far-reaching.

Conclusion

Mr. Chairman, thank you again for allowing me to share FASTSIGNS' and IFA's views on the joint employer issue. FASTSIGNS and IFA believe that the NLRB General Counsel's new joint employer standard would have a devastating effect on the franchising industry, entrepreneurship and franchise jobs.

I would be happy to answer any questions you may have.

Chairman ROE. Thank you.

Mr. Ehlers, you are recognized for five minutes.

STATEMENT OF MR. CLINT EHLERS, OWNER, FASTSIGNS OF LANCASTER AND WILLOW GROVE, LANCASTER AND WILLOW GROVE, PA (TESTIFYING ON BEHALF OF THE INTERNATIONAL FRANCHISE ASSOCIATION)

Mr. EHLERS. Chairman Roe, Mr. Ranking Member, and members of the committee, thank you for inviting me to testify today on the impact that an altered joint employer standard will have on franchise businesses such as mine.

My name is Clint Ehlers, and I am the owner and operator of two FASTSIGNS locations—one in Lancaster and one in Willow Grove, both in Pennsylvania. I am testifying today on behalf of the International Franchise Association.

The recent announcement by the National Labor Relations Board Division of Advice that it would allow labor complaints to proceed against McDonald's Corporation, as well as against its franchisees, worries me a great deal. My concern is that my franchisor, in response to the NLRB's changes to longstanding joint employer standards, will take measures to protect itself that will end up reducing my autonomy as a franchise owner.

In 2006, I left a 17-year career in advertising and strategic marketing to fulfill my dream of becoming an entrepreneur and small-business owner. I spent many months researching different types of businesses and industries, both independently-owned and franchised. I decided to invest in FASTSIGNS. Not only was FASTSIGNS the leader in the sign and graphics industry, but it also had an excellent team of dedicated professionals with one goal in mind: to help me be as successful as I wanted to be.

Owning my own business lets me be the steward of my resources and impact the lives of my employees, as well as the members of the communities in which we operate. In 2007, I opened my first FASTSIGNS in Culver City, California, which we quickly grew into one of the top centers in the nation. I sold that center in 2012, October of 2012, and I moved my family to Pennsylvania, where we purchased FASTSIGNS of Willow Grove in 2013 and FASTSIGNS of Lancaster earlier this year. We currently have 14 full-time employees and two part-time employees, and I am hoping to expand my operations in the coming years.

In order to understand the impact of the NLRB's announcement, it is essential to understand the fundamental difference in the roles of franchisees and franchisors. The franchisor enforces brand standards that maintain the quality of the products and services, but it is the franchisee that manages the day-to-day operations of the business, including the hiring and the firing, wages, benefits, work schedules, and working conditions. Examples of the support that franchisors provide include assistance in site selection, sales and cost benchmarking, and purchasing power with various suppliers. Most importantly, they help me to monitor my product quality.

I agree that this type of support is necessary for the collective good of the system and it benefits each franchise that operates under the FASTSIGNS brand. The role of daily management of a franchise location, however, falls to me and decisions regarding those operations are mine alone. It is my decision to pay my hourly employees a fair wage, and I pick the health insurance plan that I offer my workers.

I recently had an employee who was struggled to manage childcare over the summer for his 12-year-old son, while he was working full-time at one of our stores. We were able to rework his scheduled hours on some days to accommodate summer camp, and on other days, we decided that he could bring his son to work. In fact, we later hired his son for a summer job doing various things like sweeping, cleaning, and taking the trash out.

This is the type of action that only an independent small-business owner can take to address this issue. If a large corporation were presented with a similar workforce management challenge, it would most likely consult its human resource teams to determine the policies of the company.

To the casual observer, the NLRB's decision could appear to be a good thing for a franchise owner like me, that if I screw up, my franchisor will be there to save me. Not only is this incorrect, but it reflects a fundamental misunderstanding of a franchise owner's motivations for starting a franchise business.

In almost every other aspect of my business, I am considered an independent owner. I have my own accountants, and I file my own taxes. I assume the financial risk when I start a business, and I take out loans for working capital. Similarly, if I were to get into any legal trouble, I would need to hire my own counsel.

I bought a franchise so that I could run my own business, not so that I could be a part of someone else's. I take pride in my successes, and I hold myself accountable for my failures. I work diligently to build lasting relationships with customers and integrate my business into the local community. The real impact of a new standard that considers my franchisor the joint employer of my workers is that I will have less independence and less control over the business that I have worked so hard to build.

If franchises are not independent, entrepreneurs will not seek to open new franchise locations at a time when our economy is thirsty for growth and expansion. Franchise small-business owners operate on almost every Main Street in America. My motivations are simple, and my intentions are sincere. I hope to succeed for my family, my employees, and my community.

I cannot imagine what I would do if I were stripped of my independence because another franchise owner hundreds of miles away is facing a lawsuit that has nothing to do with me. If the NLRB's recent joint employer determination is upheld, franchise owners everywhere would lose their autonomy.

The purpose of this proposal seems not to be to increase the accountability of those most responsible for employment decisions, but rather to find deeper pockets to pay higher damages from potential lawsuits. That is wrong and should not be allowed.

I thank you for inviting me to testify today, and I look forward to answering any questions that you have.

[The statement of Mr. Ehlers follows:]

TESTIMONY OF CLINT EHLERS
President
FASTSIGNS of Lancaster, PA and Willow Grove, PA

Before the

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

"Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?"

SEPTEMBER 9, 2014

Chairman Roe, Ranking Member Tierney, and members of the Committee, thank you for inviting me to testify today on the impact that an altered joint employer standard will have on franchise businesses such as mine. My name is Clint Ehlers, and I am the owner and operator of two FASTSIGNS locations – one in Lancaster, Pennsylvania and the other in Willow Grove, Pennsylvania. I appear today on behalf of the International Franchise Association.

The recent announcement by the National Labor Relations Board (NLRB)'s Division of Advice to allow complaints to proceed against McDonald's Corporation and its franchisees worries me a great deal. My concern is not that I will be charged with any labor violations, but that my franchisor, in response to the NLRB's changing long-standing joint employer standards, will take measures to protect itself that will end up reducing my autonomy as a franchise owner.

I opened my first FASTSIGNS store in Culver City, California in 2007 where we quickly grew that location to one of the top centers in the nation with 10 employees. We sold that center in October 2012 and moved to Pennsylvania, where we purchased a FASTSIGNS franchise in Willow Grove in March 2013 and FASTSIGNS of Lancaster in February 2014. We currently have 14 full-time employees and 2 part-time employees, and I am hoping to expand my operations in the coming years.

In 2006 I left a 17-year career in advertising and strategic marketing to fulfill my dream of becoming an entrepreneur and small business owner. I spent over 3 months researching different types of businesses and industries, both independently-owned and franchised. The franchise model appealed to me greatly because this was the first business I was going to invest in personally and I wanted to make sure that I had the support, brand name recognition, and value to make a wise investment of my family's savings. After looking at the widely varied franchise opportunities, we decided to invest in FASTSIGNS. Not only was FASTSIGNS the leader in the sign and graphics category, but it also had an excellent team of dedicated professionals with one goal in mind – to help make my business as successful as it could be. FASTSIGNS offered me the opportunity to capitalize on the strength of the brand, its brain trust of corporate employees and their buying power. In addition, they offered me the freedom to own my own business and the ability to make my own decisions – to bet my future on myself and my abilities. But most importantly, owning my own business gives me the responsibility to be a steward of my resources and impact the lives of my employees as well as the members of the communities in which we operate.

The Franchise Model – A Framework for Strong Brands and Small Business Success

As Ms. Monson alluded to in her testimony, in order to understand the impact the NLRB's announcement could have on franchises such as mine, it is essential to understand the fundamental separation of responsibilities of franchisees and franchisors. Every franchise system has brand standards that maintain the quality of products and services, and the strength of the FASTSIGNS brand has helped my business succeed from the day I opened the doors. However, brand standards do not extend to franchisee employment practices and policies. While FASTSIGNS supports franchise owners in providing high-quality products to customers, it is the franchisee that manages the day-to-day operations of the business, including hiring and firing, wage rates, benefits, work schedules, and working conditions.

FASTSIGNS, like other franchisors, supports its franchisees in a variety of ways. When opening a new location, it provides essential training in creating impactful visual communications for clients. It gives suggestions for site selection based on the experiences of franchisees in similar locations. It provides lists of high-quality suppliers, and often is able to negotiate excellent rates for needed inventory items to help franchisees keep our costs down. Perhaps most importantly, it monitors product quality and customer sentiments. The reason I support this type of monitoring by my franchisor is not because it needs to keep *me* honest; rather, I feel comfortable knowing that FASTSIGNS will take action to correct poor standards and product quality at *other* stores, where a bad experience could keep a customer from patronizing *any* FASTSIGNS franchise again. These standards are for the collective good of the system, and they are good for each individual franchise that benefits from a strong brand.

The brand management role, like I just described, belongs to the franchisor. The role of daily management of a franchise location, however, falls to franchisees like me, and decisions regarding these operations are mine, and mine alone, to make. It is my decision to pay my hourly employees a fair wage. I pick the health insurance plan that I offer my workers. When they need flexible schedules to manage other obligations, I am the one who personally works with employees to set schedules that work for the business and for the individual. For example, I recently had a full-time employee who was struggling to manage childcare for his 12-year-old son over the summer. After sitting down with him, we were able to re-work his scheduled hours on some days to accommodate summer camp, and on other days we decided that he could bring his son to work. In fact, we eventually hired his son to do various things like sweeping, cleaning, taking the trash out, etc. This allowed us as a company to teach a young man the value of hard work through a summer job while exposing him to the daily operations of a thriving business. In addition, we were able to show a valued employee that we are more than a company focused on profits – we are a business dedicated to serving our clients and our employees. This is the type of action that only an independent small business owner can take to address this issue. None of these actions I just mentioned involves my franchisor.

If a large corporation were presented with a similar workforce management challenge, it would most likely consult its human resources teams to determine the company's policies. And if the FASTSIGNS franchisor were truly a joint employer of my workers, I would need to consult FASTSIGNS before making these special arrangements with my employee. This is just one small reason I would not want FASTSIGNS to be involved in the day-to-day management of my business, or play any role in my traditional employer functions. The fact that I am the one responsible for this type of decision helps me run my business with flexibility and efficiency. I do not want or need a corporation to fall back on for this type of help. What I need most are policies that will enable me to manage my employees and my business in ways that will allow us to grow and succeed.

The Impact of a New Joint Employer Standard on Franchise Owners

Last month, the National Labor Relations Board's Division of Advice made the decision to allow unfair labor practice complaints against individual franchise owners to proceed with McDonald's Corporation also named as a defendant. It claimed that McDonald's is a joint employer of its franchisees' employees, and as such it was jointly liable for its franchisees' transgressions. To the casual observer, this could appear to be a good thing for a franchise owner like me –that if I screw up, my franchisor will be there to support me. Not only is this incorrect, but it reflects a fundamental misunderstanding of a franchise owner's motivations for starting a franchise business.

In almost every other aspect of my business, I am considered an independent owner. I have my own accountants, and I file my own taxes. I assume the financial risk when I start a business and take out business loans for working capital. Similarly, if I were to get into any legal trouble, I would need to hire my own attorney. FASTSIGNS would not, and should not, participate in legal disputes involving only my franchise.

I bought a franchise so that I could run my own business, not so that I could be a part of someone else's. I take pride in my successes, and hold myself accountable for my failures. I do not merely seek to imitate another location; I work diligently to earn new business, build lasting relationships with customers, and integrate my business into the local community. The real impact of a new standard that considers my franchisor the joint employer of my workers is that I will have less independence and less control over the business that I worked so hard to build. And since I would no longer be an independent owner, my business would be worth less.

If franchise owners have less independence and control, they can also expect lower profits. If profits are lower, there will be less demand from entrepreneurs to start franchised businesses. If fewer new locations open, the brand does not realize its growth potential. And that hurts each individual franchise owner in the franchise system. Similarly, if fewer entrepreneurs wish to start franchise businesses, my business is less valuable if I were to sell the business upon my retirement. A revised joint employer statement will result in fewer new franchised businesses, at a time when our economy is thirsty for growth and expansion.

Conclusion

I hope my testimony today has helped the members of this subcommittee better understand the perspective of franchise small business owners who operate businesses on almost every Main Street in America. My motivations are simple and my intentions are sincere – I take great pride in my independent franchise small business, and I hope to succeed for my family, my employees, and my community. I cannot imagine what I would do if I were stripped of my independence because a different business owner, hundreds of miles away, is facing a lawsuit that has nothing to do with me. If the NLRB's joint employer determination is upheld, franchise owners everywhere would lose their autonomy. The purpose of this proposal seems not to be to increase the accountability of the franchise owners who are most responsible for employment decisions, but rather to find deeper pockets to pay higher damages from potential lawsuits. That's wrong and should not be allowed.

I thank you for inviting me to testify before you today, and look forward to answering any questions you may have.

Chairman ROE. Thank you,

Mrs. Panwala, you are recognized for five minutes.

STATEMENT OF MRS. JAGRUTI PANWALA, OWNER, MULTIPLE HOTEL FRANCHISES, BENSALEM, PA (TESTIFYING ON BEHALF OF THE ASIAN AMERICAN HOTEL OWNERS ASSOCIATION)

Mrs. PANWALA. Thank you.

Chairman Roe, Ranking Member Tierney, and distinguished members of the subcommittee, thank you for the opportunity to testify before you today.

My name is Jagruti Panwala. My family and I are owners and operators of five hotels in the northeastern United States. And we employ over 200 people. I am also a first-generation American, an entrepreneur, and franchisee. I come before you today to discuss a significant threat to my livelihood and the livelihood of those I employ, many of whom I consider to be my family.

When I was only 22 years old, my husband and I bought our first Economy Inn, an independent motel with 35 operational rooms, in Levittown, Pennsylvania. We borrowed money from family and friends to make the down payment and secured a loan to get started.

In addition to working at the motel for more than 100 hours a week, I was also living at the hotel with my husband in room 201. Not only was I an owner and operator, but I was also a desk clerk, housekeeper, plumber, security guard, handyman, landscaper, and janitor.

Even after all of our efforts to build our business, it was still difficult to make ends meet, particularly in that market. In order to succeed as hoteliers, we realized it was not enough simply to run the operation efficiently, but we need to attract more customers. We found that we could do so by affiliating with a nationally recognized brand.

After Choice Hotels accepted our franchise application, we converted our Economy Inn into the Comfort Inn hotel. This was our first experience with franchising, or raising a flag of a national brand, as it is known in the industry.

Ultimately, franchising appealed to us because we still controlled our own business and simply paid fees for the use of a brand name. Since that time, I have worked with four different franchisors.

In addition to running my own family business, I also serve as a board member of the Asian American Hotel Owners Association, which is AAHOA. AAHOA members own over 40 percent of all hotels in the United States and employ over 600,000 workers, accounting for nearly $10 billion in payroll annually. Approximately 80 percent of the more than 20,000 properties AAHOA members own are franchised businesses. My story is nearly identical to those of nearly 13,000 members of this great association.

I am here today to explain my perspective as a franchisee and describe how an expanded definition of a joint employer status will have a devastating effect on my businesses, my employees, and the lodging industry.

The franchising model for hotels is straightforward. As a hotelier, it is my responsibility to identify the market, secure the financing, purchase the land, establish contracts, set prices, determine staffing needs, and run the daily operations of my business.

Conversely, hotel franchisors' responsibilities include providing construction guidelines, conducting marketing campaigns, developing training for management, and generally offering guidance to ensure the quality of their brand remains consistent from one hotel to the next.

In my role as a hotel operator, I determine the working environment. I assess the overall staffing needs for each property and make hiring decisions accordingly. I also set wages, benefits, hours, promotions, raises, and disciplinary procedures.

Mr. Chairman, it is for these reasons I am extremely alarmed by the radical decision of the NLRB general counsel to create joint employer status for franchisors. Assigning liability for employment decisions to the franchisor may cause franchisors to impose control over daily operations of each business in an effort to mitigate against claims. Especially, I would no longer be in business for myself.

Instead of acting as a licensor and providing guidance from time-to-time, the franchisor would likely feel the need to become a partner and try to have influence on my business and staffing decisions. In an effort to protect against liability, franchisors would likely have to take an active role in basic employment decisions like hiring, firing, wages, hours, and benefits. The franchisors may also try to dictate policies for promotions, raises, and advancement within my own company.

It is important to remember that most franchisors are public companies with different goals and morals than I have as a small-business owner. If this were to happen, I would essentially become the employee of a parent corporation and no longer an entrepreneur.

To be completely honest, if these were the conditions of the franchising model before I became an hotelier, I would have never entered into this business.

Mr. Chairman, Ranking Member Tierney, and the members of the committee, I sincerely thank you for the opportunity to share my story with you, because I have worked too hard and have overcome too many obstacles as an entrepreneur and as a first-generation American to sit by while bureaucrats and lawyers attempt to undermine my success and status as an employer and a business-owner.

I strongly urge this committee and the National Labor Relations Board to consider the tremendously adverse impact on franchisees and workers when deliberating policy proposals associated with the definition of a joint employer.

Thank you.

[The statement of Mrs. Panwala follows:]

"Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?"

House Committee on Education and the Workforce
Health, Education, Labor & Pensions Subcommittee

Testimony of Jagruti Panwala
Hotel Owner and Operator

September 9, 2014

Chairman Roe, Ranking Member Tierney, and distinguished members of the Subcommittee, thank you for the opportunity to testify before you today.

My name is Jagruti Panwala. My family and I am are owners and operators of five hotels in the northeastern United States and we employ over 200 people. I am also a first generation American, an entrepreneur and a franchisee. I come before you today to discuss a significant threat to my livelihood and the livelihood of those I employ, many of whom I consider to be family.

When I was only 22 years old, my husband and I bought the Economy Inn, an independent motel with 35 operational rooms, in Levittown, Pennsylvania. We borrowed money from family and friends to make the down payment and secured a loan to get started.

In addition to working at the Inn for more than 100 hours per week, we also lived in room 201. Not only was I an owner and operator, but I was also a desk clerk, housekeeper, plumber, security guard, handyman, landscaper and janitor. Even after all of our efforts to build our business, it was still difficult to make ends meet – particularly in that market. In order to succeed as hoteliers, we realized it was not enough to simply run the operations efficiently, but we needed to attract more customers. We found that we could do so by affiliating with a nationally recognized brand.

After Choice Hotels accepted our franchise application, we converted the Economy Inn into a Comfort Inn hotel. This was our first experience with franchising – or "raising a flag" of a national brand, as it is known in the industry. Ultimately, franchising appealed to us because we still controlled our own business and simply paid fees for use of the brand name.

Since that time, I have worked with four different franchisors: Choice Hotels International, Wyndham Hotels, InterContinental Hotels Group and Best Western.

In addition to running our family business, I also serve as a volunteer-board member of the Asian American Hotel Owners Association (AAHOA). AAHOA members own over 40% of all hotels in the United States and employ over 600,000 workers, accounting for nearly $10 billion in payroll annually. Approximately 80% of the more than 20,000 properties AAHOA members own are franchised businesses. My story is nearly identical to those of the nearly 13,000 small business-owner members of the association.

I am here today to explain my perspectives as a franchisee, and describe how an expanded definition of joint employer status will have devastating effects on my business, my employees and the lodging industry.

The franchising model as it pertains to lodging is straightforward. As an hotelier, it is my responsibility to identify the market, secure the financing, purchase the land, establish contracts, set prices, determine staffing needs, and run the daily operations of my business.

Conversely, hotel franchisors' responsibilities include granting franchise approvals, providing guidelines for construction, conducting marketing campaigns, developing training for management, and generally offering guidance to ensure the quality of their brand remains consistent from one hotel to the next.

Additionally, franchisors charge a onetime fee of $25,000 to $50,000 for use of their flag and monthly royalties of 10-15% of the gross revenues of the business.

In my role as the hotel operator, I determine the parameters of the working environment. I assess the overall staffing needs for each property and make hiring decisions accordingly. I also set wages, benefits, schedules, hours, break times, evaluation criteria, metrics for promotions and raises, and disciplinary procedures.

As I hope you can see, I am in no way an agent of the franchisor, and I am certainly not an employee of the franchisor. I am an independent small business owner, who makes decisions about my business and my staff autonomously. Affiliation with a franchisor can help generate revenues but, ultimately, success or failure and profitability of the hotel is based upon my decision-making – as it is with all small business entrepreneurs.

Mr. Chairman, it is for these reasons I am extremely alarmed by the radical decision of the NLRB's General Counsel seeking to confer joint employer status onto franchisors.

Assigning liability for employment decisions to the franchisor may cause franchisors to impose control over the daily operations of each business in an effort to mitigate against claims. Essentially, I would no longer be in business for myself.

Instead of acting as a licensor and providing guidance from time to time, the franchisor would likely feel the need to become a partner and try to have influence on business and staffing decisions.

In an effort to protect against liability, franchisors would likely have to take an active role in basic employee management determinations like hiring, firing, wages, hours, benefits, and schedules. Worse however, is that the franchisor may also try dictate policies for promotions, raises and advancement within my company. It is important to remember, most franchisors are public companies with different goals and motives than I have as a small business owner.

If this were to happen, I would essentially become an **employee** of the parent corporation and no longer an entrepreneur.

To be completely honest, if these were the conditions of the franchising model before I became an hotelier, I would have never entered into this business.

Mr. Chairman, Ranking Member Tierney and Members of the Committee, I sincerely thank you for the opportunity to share my story with you because I have worked too hard and overcome too many obstacles as an entrepreneur and as a first generation American, to sit idly by while bureaucrats and lawyers attempt to undermine my success and status as an employer – and a business owner.

In preparation for this hearing, I read portions of the NLRB General Counsel's brief in the *Browning-Ferris* decision. It essentially claimed that franchisors were the *true* employers who inserted "intermediaries" between themselves and employees in order to avoid collective bargaining over working conditions. Mr. Chairman, I am **no** intermediary. I am a business owner and a job creator. This sort of uninformed rhetoric is quite frankly, offensive, because it diminishes my accomplishments as a businesswoman.

I strongly urge this committee, and the National Labor Relations Board, to consider the tremendously adverse impacts on franchisees and workers when deliberating policy proposals associated with the definition of a "joint employer."

Thank you.

Chairman ROE. Thank you.

Professor Freeman, you are recognized for five minutes.

STATEMENT OF MR. HARRIS FREEMAN, PROFESSOR OF LEGAL RESEARCH AND WRITING, WESTERN NEW ENGLAND UNIVERSITY SCHOOL OF LAW, SPRINGFIELD, MA

Mr. FREEMAN. I would like to thank Chairman Roe, Congressman Pocan, and the entire subcommittee for this opportunity.

If I may begin with a little bit of a disclaimer that I hope won't detract from my time, given the chairman's introduction, I am not here today as an administrative law judge who functions in the public sector. I am speaking here as a professor and researcher who has done extensive work looking at contingent work and precarious employment, including under NLRB law. Nor am I here to deal with tortious conduct and personal injury, so rest assured, Chairman.

My testimony addresses the economic realities and legal issues relating to joint employer status in workplaces where extensive subcontracting of core business functions depends on temporary staffing services and franchising.

The National Labor Relations Board is looking to revive its traditional joint employer test as one means of making fundamental labor rights available to workers experiencing the precarious consequences of the profound transformations now occurring in the modern workplace. By re-examining its joint employer test, the board is fulfilling the responsibility that the Supreme Court has entrusted to it, that is, to adapt the Act to changing patterns of industrial life.

In my lifetime, no change in the workplace has been more upending than the rapid expansion of precarious low-wage work and subcontracting that has irreversibly fissured the 21st century workplace. In this context, temporary staffing and franchising account for a disproportionate share of economic growth, following the Great Recession of 2008. Last year, staffing services generated $109 billion in sales and a full 2 percent of the total jobs in the workforce.

Profits are high in this industry. In the first quarter of this year, True Blue, the largest U.S. staffing agency, had quarterly profits of $120 million on gross revenues of $453 million. Franchising is equally profitable, as evidenced by the fast food sector where, in 2012, the 10 largest franchises employed over 2.25 million workers and earned more than $7.4 billion in profits.

Unfortunately, soaring profits and substantial job growth in temping and franchising has advanced hand-in-glove with poverty-level wages and extraordinarily high rates of wage theft and health and safety violations.

For example, in metro Chicago, temp workers comprise over two-thirds of the 150,000 employees in the warehouse sector. They average $9 per hour, $3.48 an hour less than direct hires. Two-thirds of these workers exist with income under the poverty line.

A well-documented national epidemic of wage theft in the staffing industry is only making matters worse. Furthermore, OSHA complaints and protests by temp workers unearthed major health and safety issues facing these individuals.

In franchising, 75 percent of America's 3.5 million fast food workers are employed in franchise outlets. Numerous studies indicate that underemployment, poverty-inducing earnings, and wage theft are the norm. Households that include fast food workers are four times as likely to live below the federal poverty level. This is a failed and unsustainable business model that is subsidized by hardworking taxpayers. It is far different than the franchise model that has been discussed here today by the business individuals who are here representing their industries.

U.S. taxpayers now shell out about $3.8 billion a year to cover the cost of public benefits received by fast food workers employed at the top 10 franchises, because these workers must rely on government welfare programs to supplement their poverty-level wages.

These workplace ills are unquestionably subject to improvement, and that is why the board in the Browning-Ferris case is now reexamining the joint employer test. That is the case involving a recycling center where all of the workers are temps.

According to the Supreme Court, the NLRB's traditional joint employment test is designed to determine whether a putative joint employer possesses sufficient control over the terms and conditions of a workforce to qualify as a joint employer with the actual employer. Absolute control is not the standard. Rather, it recognizes that there might be a co-determination of terms and conditions of employment by two business entities.

In temporary staffing arrangements, the user employer, not the temp agency, controls the work environment of the temp workforce. For this reason, the contracts governing the temping arrangements typically cede to the client employer, management, and supervisory roles for the temp workers. This gives them a major role in co-determining the work conditions.

Staffing agencies only control wage payments, payroll, workers compensation, and the like. User clients, on the other hand, are contractually assigned all other employer responsibilities, including the right to remove any temp worker from the workforce. Many franchising arrangements are rather similar, in that it is virtually impossible to have a meaningful labor agreement without both the user client and the franchiser at the bargaining table.

Tightly controlled top-down franchising, unlike what is discussed here today, has expanded so that major franchisors like Burger King and other fast food corporations can maintain uniformity of brand, product and operations. Under these agreements, the terms and conditions of franchisee workers are co-determined by franchisors through operating manuals and communications with franchisees.

Sophisticated management systems allow the franchisor to dictate the number of workers required to do the job, the manner and pace of work, the supplies on the job, how equipment is used, not to mention grooming standards. Every one of these contract provisions is a condition of employment subject to collective bargaining.

When this is the reality, fundamental labor rights cannot be exercised without the franchisor's participation in collective bargaining or the remediation of unfair labor practices. Given these realities, the board is well within the authority granted to it by Congress to adapt its traditional joint employer test of temporary staffing and franchising. The statutory text of the NLRA and well-reasoned precedent plainly allow the board the discretion to craft the appropriate unit for collective bargaining purposes, including units of more than one employer.

In fact, the Labor Act's definition of employer is intentionally broad and gives the board wide latitude in determining whether a staffing agency is—

Chairman ROE. Mr. Freeman, if you could wrap up. You are a couple minutes over.

Mr. FREEMAN. I will certainly do that, Mr. Chairman. A return to the board's traditional better-reasoned standard is now necessary to achieve both the flexibility employers seek in their business plans and the fair treatment and decent wages that workers are now demanding.

A failure to do so runs the risk of rendering labor law irrelevant in the low-wage economy, obstructing the efficacy of collective bargaining, and increasing the potential for strikes and other forms of industrial unrest. It takes little imagination to foresee the potential for industrial strife when large concentrations of underemployed low-wage temps and franchised fast food workers are unable to meaningfully exercise their fundamental right to bargain and form unions.

Thank you for the opportunity to address your subcommittee.

[The statement of Mr. Freeman follows:]

Before the Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and the Workforce
United States House of Representatives

"Expanding Joint Employer Status:
What Does it Mean for Workers and Job Creators?"

Testimony of Professor Harris Freeman
Western New England University School of Law
Springfield, Massachusetts

I would like to thank the Chairman of the subcommittee, Congressman Roe, ranking member, Congressman Tierney, and the other members of the subcommittee for this opportunity. My testimony will focus on the economic realities and legal issues relating to joint employer status in workplaces where extensive subcontracting of core business functions depends on temporary staffing services and franchising relationships.

An examination of these two forms of business organization is critical for understanding why the National Labor Relations Board is looking to its traditional joint employer test as one means of making fundamental labor rights available to workers experiencing the precarious consequences of the profound transformations now occurring in the modern workplace. By re-examining its joint employer test, the Board is fulfilling the responsibility that the U.S. Supreme Court has held is entrusted to it, i.e., to "adapt the Act to changing patterns of industrial life."[1] In my lifetime, no change in the patterns of industrial life has been more upending than the rapid expansion of precarious low-wage work and subcontracting that has irreversibly fissured the 21st century workplace.

Temporary staffing and franchising account for a disproportionate share of the economic growth following the Great Recession of 2008. By 2013, staffing services

[1] *NLRB v. Weingarten*, 420 U.S. 251, 266 (1975).

generated $109 billion in sales and 2.8 million temp positions – a full 2.0 percent of total jobs. Profits are also high; In the first quarter of this year, True Blue (formerly Labor Ready), the largest U.S. staffing agency, had a profit of $120 million on gross revenues of $453 million. Franchising is equally profitable as evidenced by the fast-food sector of the restaurant industry where in 2012 the ten largest franchises employed over 2.25 million workers, earned more than $7.4 billion in profits and distributed another $7.7 billion in buybacks and dividends to shareholders.

Unfortunately, the economic impacts of temporary staffing and franchising are Janus-faced. Soaring profits and substantial job growth in these sectors has advanced hand in glove with poverty-level wages and extraordinarily high rates of wage theft and health and safety violations.

Compared to direct hires, temp workers experience a wage penalty, which is most severe for blue-collar temps who now comprise 42 per cent of the temporary staffing workforce. For example, in metro Chicago, temp workers that load and unload goods for WalMart and other big box stores comprise over two-thirds of the 150,000 workers in the warehouse workforce. They average $9 per hour or $3.48 less than direct hires. Almost two-thirds of these workers fall below the federal poverty line. A well documented, national epidemic of wage theft by unscrupulous staffing agencies and their clients only makes matters worse for temps. Further, OSHA complaints and protests by temp workers have unearthed major health and safety issues, causing OSHA to establish a Temporary Worker Initiative to determine, in part, when to hold staffing agencies and client employers jointly liable for violations impacting the temporary workforce.

There are more than 3.5 million fast-food workers and more than 75 per cent of them work in franchised outlets. Numerous studies indicate that under-employment, poverty-inducing earnings and wage theft are the norms. Households that include an employed, fast-food worker are four times as likely to live below the federal poverty level. The social costs of these conditions are born by U.S. taxpayers who shell out about $3.8 billion per year to cover the cost of public benefits received by fast-food workers employed at the top-ten fast-food franchises who are compelled to rely on government welfare programs to supplement poverty level wages.

These workplace ills, pervasive in temping and franchising arrangements, are unquestionably subject to correction through the issuance of unfair labor practice charges and collective bargaining. Accordingly, the NLRB is now rightfully re-examining its test for joint employer status in *Browning-Ferris Industries,*[2] a representation case involving temp workers employed at a large California recycling facility where the sorting work is performed entirely by a temporary staffing workforce.

According to the U.S. Supreme Court, the NLRB's joint employment test is designed to determine whether a putative joint employer "possesses sufficient control over the work of the employees to qualify as a 'joint employer' with [the actual employer]."[3] Joint employment occurs when "one employer, while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer."[4] Absolute control over the employees of another employer is not required. Rather, the test

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[2] Case 32-RC-109684
[3] *Boire v. Greyhound Corp.,* 376 U.S. 473, 481 (1964).
[4] *NLRB v. Browning-Ferris Industries of Pa., Inc.,* 691 F.2d 1117, 1123 (3rd Cir. 1982)

"recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment."[5]

In temporary staffing arrangements, the user employer controls the day-to-day work environment of the temporary workforce. This reality flows from the fact that temp agencies are "labor-only" contractors that neither own nor lease capital equipment utilized by temporary employees, which is under the sole control of the user employer. Accordingly, contracts governing temping arrangements typically conform to this reality, ceding to the client employer's management and supervisory employees a major role in co-determining the terms and conditions of work.

The standard staffing contract assigns to the staffing agency only control over wage payments, withholding of payroll taxes, provision of workers' compensation and ensuring civil rights compliance. User clients, on the other hand, are contractually assigned all other employer responsibilities traditionally associated with the production of goods and services: supervision and direction of day-to-day work; control of working conditions at the work site; responsibility for ensuring a safe work site including civil rights compliance, provide tools and equipment and determining the length of the temp workers' assignments.[6]

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[5] *Id.* (emphasis in original) citing *Cr. Adams Trucking, Inc.*, 262 NLRB No. 67 (1982); *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969); *NLRB v. Greyhound Corp.*, 368 F.2d 778, 780 (5th Cir. 1966).

[6] Managing Co-Employment Risk When Using a Staffing Agency (February 7, 2009), www.aquent.com/blog/managing-co-employment-risk-when-using-a-staffing-agency Last viewed June 17, 2014; previously viewed by author in 2001) as cited in Edward A. Lenz and Dawn R. Greco, Co-Employment: Employer Liability Issues in Third-Party Staffing Arrangements, 17 (American Staffing Association 4th Ed. 2007); A Manager's Guide to Understanding Co-Employment, Kelly Services (1995) (on file with author).

Tightly controlled business format franchisee arrangements have expanded significantly in the last decade to ensure that major franchisors like Burger King and other fast-food corporations can maintain uniformity of brand, product and operations that are essential to its business model. Under these agreements, control over franchisee workers' terms and conditions of employment are exercised through training, operating manuals, and communications with franchisees established in these business format agreements.[7]

Sophisticated management systems are in place to ensure that the franchisor brand is maintained and protected, creating a high-level of franchisor control over fast-food workers terms and conditions of employment. Through these systems, including unannounced, on-site visits by franchisor representatives, the franchisor can dictate the number of workers required to do the job, the manner and speed of the performance of every work task, the equipment and supplies used on the job, the manner in which equipment is used as well as employee grooming and uniform standards. Every one of these contract provisions dictated by the franchisor directly impacts terms and conditions of employment that are core of collective bargaining issues that can be addressed by the franchisee workforce's protected concerted activity.

Given these economic realities, the NLRB is well within the authority granted to it by Congress to adapt its traditional joint employer test to determine whether client employers of a temporary staffing agency and/or a major franchisor like Taco Bell are joint employers. Nothing in the statutory text of the NLRA or in well-reasoned precedent prevents the Board from returning to the traditional joint employer test that was the norm until 1980 when a rigid and narrower conception of joint-employment gained sway in Board proceedings.

[7] See Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 933-34 (1990).

The traditional, well-reasoned view of joint employment, also found in the majority opinion *M.B. Sturgis/JeffBoat* [8] and in the dissent in *Oakwood Care,*[9] permits the Board to craft the appropriate unit for collective bargaining purposes, including "the employer unit, craft unit, plant unit, *or other unit.*"[10] Similarly, the Act's definition of employer gives the Board wide latitude in determining whether a staffing agency's user client exercises the necessary indicia of control for joint employer status.

Notably, the current joint-employer test has virtually prevented any group of temp agency or fast-food franchise workers from achieving a voice in their workplaces. Given this, the NLRB's reassessment of joint-employer status is in no way extraordinary. Rather, it is consistent with Supreme Court precedent on the role of the agency to adapt federal labor law to changing conditions and entirely consistent with the powers vested in the agency by this Congress. Moreover, the Board's decision to take a hard look at its joint employer standard is both reasonable and practical as a means of considering how millions of low-wage workers can meaningfully exercise their fundamental right to collective bargain with their employers.

It is my view that a return to the Board's traditional, better-reasoned explication of the joint-employer standard is necessary to achieve both the flexibility employers seek <u>and</u> the fair treatment and decent wages workers are now demanding. A failure to do so runs the risk of rendering labor law irrelevant in the much of the low-wage economy, obstructing the efficacy of collective bargaining, and increasing the potential for strikes and other forms of industrial strife or unrest. It takes little imagination to foresee the potential

[8] 331 NLRB 1298 (2000).
[9] 343 NLRB 659 (2004).
[10] 29 U.S.C. §159(b). (emphasis added)

for industrial strife when large concentrations of under-employed, low-wage temporary workers and franchised fast-food workers are unable to meaningfully exercise their fundamental rights to bargain over the terms and conditions of employment that are jointly established by both of their employers.

Thank you for considering my comments.

Chairman ROE. Thank you.
Mr. Duffield, you are recognized for five minutes.

STATEMENT OF MR. TODD DUFFIELD, SHAREHOLDER, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., ATLANTA, GA

Mr. DUFFIELD. Thank you. Good morning, Chairman Roe, and members of the subcommittee. We have all heard the phrase, "If it ain't broke, don't fix it."

Well, for the past three decades, the board has adhered to the same standard for determining if two separate businesses are joint employers. The test is clear, it makes sense, and it has worked for 30 years. The standard provides a bright-line test that everyone—employers, employees, unions, the board, and the courts—can all apply.

Under the current standard, two separate entities are treated as joint employers if they share or co-determine essential terms and conditions of employment. In making this determination, the board evaluates whether the putative joint employer meaningfully affects matters such as hiring, firing, discipline, supervision, and direction of employees, and whether the putative joint employers' control over these matters is direct and immediate.

By tying joint employer status to direct and immediate control over fundamental aspects of the employment relationship, the board's current standard ensures that the joint employer is actually involved in or has actual authority over matters within the scope of the *National Labor Relations Act.*

Now, the general counsel for the NLRB has taken the position that the board should abandon the current test and replace it with one that focuses on indirect control or potential control, even if that control has never been exercised, and focusing on industrial realities that they claim otherwise make the business, or the putative joint employer, an essential party to meaningful collective bargaining.

The general counsel claims that this was the prior standard, but, in fact, prior to 1984, the board itself called the standard amorphous and appeals courts routinely could not find clear principles underlying the board's decisions. It was a mess that the board wisely cleaned up 30 years ago.

The general counsel's proposed standard ignores the common law agency principles that Congress directed the board to apply when it passed the *Taft-Hartley Act* in 1947. Instead of focusing on the relationship between the employees and their employer, the proposed standard focuses on the business relationship of two separate entities or two separate companies.

The general counsel's proposed standard also would overturn longstanding congressional policies not to enmesh employers in each other's labor disputes. Congress rejected a similar attempt in the mid-1970s, when legislation was proposed to amend the Act to allow common-situs picketing.

The proposed standard would virtually eviscerate secondary boycott protections in the *Taft-Hartley Act.* Section 8(b)(4) of the act is designed to protect secondary or neutral employers from being enmeshed in the labor disputes of the primary employer. The general counsel proposed standard would blur the concept of neutrality and make these protections useless.

Even more fundamentally for the nation's economy, the proposed standard would destroy or at least create a massive upheaval of established highly successful business models involving franchisors and franchisees throughout the country. Large-scale franchisors who retain only the control required to protect their brand, trade name, and trademark could be drawn into hundreds of collective bargaining relationships where they have little or no involvement whatsoever with the workplace.

Additionally, joint employers would be required by Section 8(a)(5) to execute bargaining agreements and subject themselves to contractual and unfair labor practice liabilities without having any control over the day-to-day operations of myriad locations throughout the country.

Rather than accept such liabilities, many companies undoubtedly will opt to cancel these arrangements, thus displacing small businesses and the millions of jobs that they create. As the California Supreme Court recently stated, to use control of business matters to infer control of personnel matters would stand the franchise relationship on its head.

But it is bigger than that. Beyond destroying franchise relationships, the proposed standard would disrupt many other established contractual business relationships like staffing operations, contractor, sub-contractor relationships, and a host of possible supply chain relationships.

The result would be a loss of jobs and a loss of entrepreneurial business opportunities which fuel the economy, including many minority business opportunities. Why would we change a bright-line standard and well-established black letter law, where there is no evidence of widespread abuse? Some have suggested that the change is intended to create negotiated leverage for labor unions, or to open new platforms for the plaintiff's bar.

To date, the Service Employees International Union, SEIU, has been unable to organize franchise operations, so some have suggested that the board is looking to rewrite the law to make it easier. Proponents of the change to the board's standard argue that the change is necessary because there cannot be meaningful bargaining when the primary employer's business partners are not at the bargaining table—there is no evidence for this thesis.

Congress should understand that these are not small technical legal changes to labor law. The consequences of changing the current joint employer standard threatens established business relationships and will cause significant economic upheaval.

It is well that Congress examines the effects of the board's proposed actions on national economic and labor policy through oversight hearings. Should the board move forward with this new standard, I would urge Congress to consider corrective legislative amendments.

Thank you very much.

[The statement of Mr. Duffield follows:]

Written Testimony of Todd Duffield[1]
Before the U.S. House of Representatives Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor & Pension

September 9, 2014

I. EXECUTIVE SUMMARY

For the past 3 decades, the National Labor Relations Board (the "NLRB" or "Board") has adhered to the same standard for determining if two separate businesses should be treated as joint employers under the National Labor Relations Act (the "NLRA" or "Act"). The test is clear, it makes sense, and it's worked for over 30 years. The standard provides a bright line that everyone – employers, employees, unions, the Board and the courts – can all apply.

Under the current standard, two separate entities are treated as joint employers if they "share or codetermine those matters governing the essential terms and conditions of employment" of the employees. *TLI, Inc.*, 271 NLRB 798, 798 (1984). In making this determination, the Board evaluates whether the putative joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction" and looks at whether the putative joint employer's control over these matters is direct and immediate. *Id.* (citing *Laerco Transp.*, 269 NLRB 324 (1984)).

By tying joint employer status to direct and immediate control over fundamental aspects of the employment relationship – hiring, firing, discipline, supervision and direction – the Board's current standard ensures that the joint employer is actually involved in matters material to the scope of the National Labor Relations Act, and that the business is not merely engaged in a market relationship that may have an indirect impact upon employees. Additionally, by requiring that the control be direct and immediate, the standard assigns joint employer status to only to those entities that have actual authority to impact the employment relationship.

The Board's General Counsel's proposed rewrite of the joint employment standard ignores the common law agency principles that Congress directed the Board to apply when the Taft-Hartley Act was passed. Instead of focusing on the scope of the relationship between the employees and the putative joint employer and whether the putative joint employer actually has authority to impact the employees' terms and conditions of employment, the proposed standard turns on whether one company exercises financial control over another in a way that "implicate[s] terms and conditions" of the other's employees. Simply because one company has a contractual relationship with another sufficient to "implicate" the terms and conditions of employment of the other company's workers does not demonstrate that either company has been authorized to act as the agent of the other. Yet, the General Counsel would find both companies

[1] Mr. Duffield is a shareholder in the law firm Ogletree, Deakins, Nash, Smoak & Stewart, P.C. ("Ogletree Deakins"). Ogletree Deakins is one of the largest labor and employment law firms representing management in all types of employment-related legal matters. The firm has more than 700 lawyers located in 45 offices across the United States and in Europe. Ogletree Deakins is the "Law Firm of the Year" in both the Employment Law - Management and Labor Law - Management categories in the 2014 edition of the *U.S. News – Best Lawyers®* "Best Law Firms" list. The statements and opinions contained in this testimony are those of Mr. Duffield personally and are not being presented as views or positions of Ogletree Deakins or any of the firm's clients.

to be a joint employer, equally liable for the unfair labor practices of the other and equally obligated to bargain with the employees who are purportedly jointly employed.

Indeed, the proposed changes would overturn policies which control joint liability for unfair labor practices, but also union organizing and collective bargaining. The proposed changes would overturn Congressional policies similar to those Congress itself refused to overturn, where union efforts failed on a recorded vote to amend the Act by providing for "common situs picketing." That bill would have treated a single primary employer as being engaged in common efforts with secondary employers and, therefore, make each subject to the other's labor disputes. The defeat of the common situs picketing legislation in the mid-1970s reflected the desire of Congress not to enmesh employers in each other's disputes.

In fact, the proposed standard would virtually eviscerate secondary boycott protections enacted by Congress in the Taft-Hartley Act. Secondary boycotts are designed to protect secondary or "neutral" employers from being enmeshed in the labor disputes of the primary employer. The proposed standard would blur the concept of "neutrality", and any economic dependency or relationship between the two entities might trigger a joint employer finding.

Even more fundamentally for the Nation's economy, the proposed changes to the Board's joint employer standard would destroy, or at the least create the massive upheaval of, established, highly successful business models involving franchisors and franchisees throughout the United States. But it is bigger than that. Beyond destroying franchise relationships, which are the basis for fast food chains and other franchise operations in every community in the United States, the Board's proposed standard would disrupt many other established contractual business relationships like staffing operations, for example. The result would be loss of jobs and loss of entrepreneurial business opportunities which fuel the economy (including minority business opportunities which the franchisor - franchisee business model currently provides).

Proponents of the proposed change in the Board's joint employer standard argue that the change is necessary because there cannot be meaningful bargaining when the primary employer's business partners are not at the bargaining table. The proponents offer no evidence, empirical or otherwise, for this thesis.

Congress should understand that these are not small, technical legal changes to labor law. The consequences of the General Counsel's re-interpretation of joint employer status threaten established business relationships which will cause significant economic upheaval.

II. ANALYSIS

A. The Board's Current Joint Employer Standard.

For the past three decades the Board has determined whether two separate entities are joint employers under the Act by assessing whether they exert such direct and significant control over the same employees such that they "share or codetermine those matters governing the essential terms and conditions of employment . . . ." *TLI, Inc.*, 271 NLRB 798, 798 (1984). To make the joint employer determination the Board evaluates whether the putative joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction" and whether that entity's control over such matters is direct and immediate. *Id.* (citing *Laerco Transp.*, 269 NLRB 324 (1984)).

By tying joint employer status to direct and immediate control over fundamental aspects of the employment relationship – hiring, firing, discipline, supervision and direction – the Board's current standard ensures that the joint employer is actually involved in matters material to the scope of the Act, and is not merely engaged in a market relationship that may have an indirect impact upon employees. Additionally, by requiring that the control be direct and immediate, the standard assigns joint employer status only to those entities with actual authority to impact the employment relationship – the subject of the Act – and avoids overreaching.

The Board's previous joint employer standards were not at all clear. The Board itself noted that "[p]rior to 1982 when the United States Court of Appeals for the Third Circuit decided *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), the Board's analysis of what constituted a joint employer relationship was somewhat amorphous." *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 676 (1993). In one case the Board found joint employer status where the joint employer exerted only "indirect control" over the discipline and wages of another entity's employees, *Floyd Epperson*, 202 NLRB 23 (1973), whereas in another the Board agreed with the ALJ that "indirect control over wages and hours" is "insufficient to establish a joint-employer relationship," *Walter B. Cooke, Inc.*, 262 NLRB 626, 641 n.70 (1982). Other cases conflated the joint employer doctrine with the separate "single employer" or "common enterprise" theory, and looked to "industrial realities" even where the entity found to be the joint employer played no role in hiring, firing or directing the employees. *Jewell Smokeless Coal Corp.*, 170 NLRB 392 (1968). The Board's varying standards made it impossible for businesses to determine how to approach their relationships in order to comply with governing legal standards.

The standard set forth in *Laerco* and *TLI* was a welcome improvement. *Laerco Transportation & Warehouse* involved a group of drivers that CTL supplied to Laerco under a cost-plus contract. 269 NLRB 324, 325 (1984). CTL made all decisions regarding hiring, discipline and discharge. *Id.* at 324-25. CTL also made all legally-required contributions and deductions from the drivers' paychecks and provided them with benefits. *Id.* at 325. Once a driver was assigned to a Laerco facility, CTL representatives sometimes provided the driver with his or her initial job duty instructions; however, other times Laerco provided those initial instructions alone or with CTL representatives. *Id.*

Beyond occasionally providing CTL's drivers with their initial instructions, Laerco supplied the drivers' vehicles and required them to comply with Laerco's safety regulations. *Id.* at 324. Under Laerco's contract with CTL, Laerco was permitted to establish driver qualifications and refuse to accept any drivers provided by CTL. *Id.* On occasion, Laerco pointed out issues regarding the drivers' performance to CTL, which CTL then resolved. *Id.* at 325. CTL supervisors were seldom at the Laerco facilities to which CTL assigned its drivers, so Laerco provided what little supervision the CTL drivers needed, such as directing them where to go for a pick-up or delivery and setting the drivers' priorities. *Id.* Laerco would attempt to resolve minor problems that arose for the drivers in the workplace, but CTL handled any significant issues. *Id.* at 326.

In reviewing the facts of the case, the Board noted:

> The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment. [*Citing Biore v. Greyhound Corp.*, 376 U.S. 473 (1964) and *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982)] Whether an employer possesses sufficient indicia of control over petitioned-for employees employed by another employer is essentially a factual issue. To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.

Id. at 325.

Examining the facts before it in *Laerco*, the Board held that the level of control exercised by Laerco was inadequate to establish that Laerco and CTL functioned as a joint employer. *Id.* Although Laerco provided some supervision of the CTL drivers, it was "of an extremely routine nature" and "the degree and nature of Laerco's supervision" failed to render it a joint employer. *Id.* at 326. Moreover, while Laerco exercised some control in resolving minor issues raised by CTL's drivers, "[a]ll major problems relating to the employment relationship" were handled by CTL. *Id.* Consequently, the Board concluded that Laerco was not a joint employer because its control of the CTL employees' terms and conditions of employment was not meaningful, given "the minimal and routine nature of Laerco's supervision, the limited dispute resolution attempted by Laerco, [and] the routine nature of the work assignments." *Id.*

TLI, Inc. also involved a situation where one company, TLI, provided drivers to another company, Crown. 271 NLRB 798 (1984). Each day, Crown directed the drivers as a group about which deliveries to make, but the drivers selected their specific assignments based on seniority. *Id.* at 799. The drivers reported their accidents to Crown; however, TLI investigated the accidents and determined whether discipline was warranted. *Id.* When a driver engaged in conduct that concerned Crown, Crown would give an incident report to TLI and TLI conducted its own investigation. *Id.* Crown did not hire, fire or discipline TLI's employees. *Id.*

The Board analyzed these facts under the standard set forth *Laerco* and the Third Circuit's decision in *Browning-Ferris* and determined that, "[a]lthough Crown may have exercised some control over the drivers, Crown did not affect their terms and conditions of employment to such a degree that it may be deemed a joint employer." *Id.* The Board found that Crown's daily supervision was not "meaningful": "the supervision and direction exercised by Crown on a day-to-day basis is both limited and routine, and considered with [Crown's] lack of hiring, firing, and disciplinary authority, does not constitute sufficient control to support a joint employer finding." *Id.* (emphasis added). Furthermore, even though a Crown representative actually attended bargaining sessions between TLI and the union and discussed cost savings, the Board found his involvement did not amount to sharing or co-determining terms and conditions of employment because the Crown representative left the actual savings determinations to TLI and the union. *Id.*

The standard articulated by the Board in *Laerco* and *TLI* is clear, rational and has withstood the test of time. Indeed, the Board's direct control standard has been "settled law" since 1984. *See Airborne Express*, 338 NLRB 597, n.1 (2002). Over the past 30 years, the Board has developed a coherent body of law from *Laerco* and *TLI* that elucidates the facts, circumstances and scenarios under which an entity becomes a joint employer.[2] Reviewing courts likewise have adhered to the Board's bright-line test for decades.[3]

The stability and predictability provided by the Board's current standard has allowed thousands of businesses, large and small, to structure their business relationships in a sensible

[2] *See e.g., Aldworth Co.*, 338 N.L.R.B. 137, 139-40 (2002) (affirming ALJ's finding of joint employer relationship because "[b]ased upon a thorough review of the record, the judge determined that Respondents Aldworth and Dunkin' Donuts together share control over the hiring, firing, wages, benefits, discipline, supervision, direction and oversight of the truck drivers and warehouse employees and thereby meet the standard for joint employer status."); *Mar-Jam Supply Co.*, 337 N.L.R.B. 337, 342 (2001) (affirming finding of joint employment after analyzing all terms and conditions of employment and finding that putative employer directly hired and fired employees, solely supervised and directed the employees with regard to work assignments, time, attendance and leave, and disciplined the employees); *C.T. Taylor Co.*, 342 N.L.R.B. 997, 998 (2004) (affirming finding of no joint employment where none of essential terms and conditions of employment were controlled by putative employer); *Mingo Logan Coal Co.*, 336 N.L.R.B. 83, 95 (2001) (stating that the putative joint employer meaningfully affected all five essential terms and conditions of employment); *Villa Maria Nursing and Rehab. Center, Inc.*, 335 N.L.R.B. 1345, 1350 (2001) (affirming finding of no joint employer relationship where "Villa Maria does not have any authority to hire, fire, suspend or otherwise discipline, transfer, promote or reward, or lay off or recall from layoff ServiceMaster's employees. Villa Maria does not evaluate them or address their grievances."); *Windemuller Elec., Inc.*, 306 N.L.R.B. 664, 666 (1992) (affirming ALJ's finding of joint employment based on facts that putative joint employer shared or co-determined hiring, firing, discipline, supervision and direction); *Quantum Resources Corp.*, 305 N.L.R.B. 759, 761 (1991) (affirming joint employer finding and specifically adding to Regional Director's decision that FP&L's control over hiring, discipline, discharge and direction "[t]ogether with the close supervisory relationship between FP&L and [contract] employees . . . illustrate[s] FP&L's joint employer status"); *D&S Leasing, Inc.*, 299 N.L.R.B. 658, 659 (1990) (finding joint employment based on facts that putative joint employer shared or co-determined the hiring, firing, discipline, supervision and direction of contract employees); *G. Heileman Brewing Co.*, 290 N.L.R.B. 991, 1000 (1988) (affirming joint employer finding based on fact that G. Heileman shared or co-determined all five essential terms and conditions of its contract employees' employment, and in addition negotiated directly with the union); *Island Creek Coal*, 279 NLRB 858, 864 (1986) (no joint employer status because there was "absolutely no evidence in this record to indicate that the normal functions of an employer, the hiring, firing, the processing of grievances, the negotiations of contracts, the administration of contracts, the granting of vacations or leaves of absences, were in any way ever performed by [the putative joint employer]).

[3] *See, e.g., SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 443 (2d Cir. 2011) (finding that supervision which is "limited and routine" in nature does not support a joint employer finding, and that supervision is generally considered "limited and routine" where a "supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.") (citation omitted); *AT&T v. NLRB*, 67 F.3d 446, 451 (2d Cir. 1995) (finding no joint employment where only one indicium of control (participating in the collective bargaining process) existed and there was no direct and immediate control over hiring and firing, discipline, supervision or records of hours, payroll, or insurance); *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993) (finding joint employer status where the putative joint employer had "unfettered" power to refuse to hire certain employees, monitored the performance of referred employees, assumed day-to-day supervisory control over such employees, gave such employees their daily assignments, reports, supplies, and directions, and held itself out as the party whom employees could contact if they encountered a problem during the work day); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985) (finding joint employer status where the putative joint employer "exercised substantial day-to-day control over the drivers' working conditions," was consulted "over wages and fringe benefits for the drivers," and "had the authority to reject any driver that did not meet its standards" and to direct the actual employer to "remove any driver whose conduct was not in [the putative joint employer's] best interests.").

and optimal fashion, subcontracting discrete tasks to other companies with specialized expertise to provide services that would otherwise be far more difficult or costly. At the same time, the current joint employer standard has not denied any employee the right to union representation granted by the Act, nor has it prevented any union from bargaining with the employer directly involved in setting the terms and conditions of employment in a workplace.

B. The Proposed Standard.

The Board's General Counsel proposes to abandon the current standard and revert back to the vague and amorphous standards applied prior to 1984. Under the Board's prior standards an entity could be considered a joint employer if it exercised direct *or indirect* control over the significant terms and conditions of employment of another entity's employees, *see Floyd Epperson*, 202 NLRB 23 (1973), OR if it possessed the *unexercised potential* to control such terms and conditions of employment, *see Hoskins Ready-Mix Concrete*, 161 NLRB 1492 (1966), OR if "industrial realities" made the entity an essential party to meaningful collective bargaining, *see Jewell Smokeless Coal Corp.*, 170 NLRB 392 (1968).

1. The Proposed Standard Is No Standard At All.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317-18 (2012). Inherent in the notion of due process is the requirement that the obligation be clear enough that citizens can reasonably ascertain to whom it applies. The proposed standard fails to provide the notice required by due process. It provides no guidance for businesses about how they can structure their operations to provide certainty that they are, or are not, joint employers.

The proposed test contrasts sharply with the Board's three-decade old standard for determining joint-employer status. Under *TLI* and *Laerco*, one company can structure its operations utilizing third parties without the risk of being held responsible for the third parties' actions or having to jointly bargain with those parties' employees, provided it does not exercise direct control over the third parties' employees. *TLI, Inc.*, 271 NLRB at 798; *Laerco Transp.*, 269 NLRB at 325. That standard provides a bright line that everyone – employers, employees, unions, the Board and the courts – can apply. The Board's proposed test, however, provides no line at all, other than what a regional director or administrative law judge might draw well after the parties have established the parameters of their relationship.

The proposed standard is incapable of clear definition because business relationships typically involve an agreement that necessarily but indirectly impacts the terms and conditions of employment for the other's employees. Service contracts, in particular, often involve significant control by the customer over the service provider and, when services are performed on the customer's property, the amount of control is even greater. That control, in turn, can indirectly impact the service provider's employees' terms and conditions of employment. Hours the services are performed, the skills of the individuals who will perform them and conduct requirements to ensure the customer's employees, property and its own customers are reasonably protected – not to mention the amount the customer is willing to pay for the services – all necessarily impact the service provider's employees' terms and conditions of employment.

Under the General Counsel's proposed test, the customers in such cases would be deemed to jointly employ the service providers' employees. Yet, it would be absurd to treat a homeowner as the joint employer of the workers a contractor hires to remodel her home simply because she and the contractor have agreed to a specified amount she will pay for the services and terms that prohibit the services from being performed before or after certain hours or on weekends and require the contractor's employees to leave her home clean and free of hazards at the end of every day.

2. The Proposed Standard Is Inconsistent With The Fundamental Policies Of The Act.

The Supreme Court has made clear that an employment relationship does not exist unless the worker is directly supervised by the putative employer. *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 167-68 (1971). In *Allied Chemical,* the Court rejected the Board's attempt to expand the definition of the term "employee" beyond its ordinary meaning, observing that:

> It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. . . . *"Employees" work for wages or salaries under direct supervision.* . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings, but ordinary meanings.

Id. at 167-68 (quoting H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947) (emphasis in original)). More recently, in *NLRB v. Town & Country Electric,* the Supreme Court again turned to the dictionary definition of the term, defining employee as a "person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed." 516 U.S. 85, 90 (1995) (quoting Black's Law Dictionary 525 (6th ed. 1990)).

Just as the Board cannot define the term "employee" in a manner inconsistent with its ordinary meaning, it cannot adopt a "far-fetched" definition of "employer" that dramatically expands it by eliminating the fundamental touchstone of an employer-employee relationship; namely, direct control of the employee. Indeed, if Congress meant "employee" to be defined by the fact that she is directly controlled by her employer, it is axiomatic that Congress meant "employer" to be the person who directly controls the employee.

Apart from the problem that the proposed joint-employer standard is inconsistent with the Act's language and the ordinary meaning of the terms "employee" and "employer," it also is contrary to the mandate Congress gave the Board when it adopted the Taft-Hartley Act in 1947. In particular, Congress intended Taft-Hartley, in part, as a directive to the Board that it apply common law agency principles when interpreting the Act's provisions.

The significance of the dramatic changes Congress made to the Act in 1947 – in the face of massive opposition by organized labor and over the veto of the President – cannot be overlooked, particularly with respect to defining what constitutes an employment relationship. Congress has unequivocally directed the Board to apply common law agency principles in defining the employer-employee relationship. The proposed joint-employer standard would ignore those principles, basing the determination of an employer relationship on the control that one company has over another merely because that control "implicate[s] terms and conditions" of the other's employees. Simply because one company has a contractual relationship with another sufficient to "implicate" the terms and conditions of employment of the other company's workers does not demonstrate that either company has been authorized to act as the agent of the other. Yet, the General Counsel would find both companies to be a joint employer, equally liable for the unfair labor practices of the other and equally obligated to bargain with the employees who are purportedly jointly employed.

Saddling a putative joint employer with all of the duties and responsibilities required of direct employers under the Act could have enormous financial and time-consuming consequences. For example, large-scale franchisors who retain only the control required to protect their brand, trade name and trademark could be drawn into hundreds of collective bargaining relationships where they have little or no involvement with the workplace. Additionally, joint employers with limited involvement in the workplace would be required by Section 8(a)(5) to execute bargaining agreements and subject themselves to contractual and unfair labor practice liabilities without having any control over day to day operations at myriad locations throughout the country. Rather than accept such liabilities with no control over the workplace, or engage in endless bargaining across the country, many companies undoubtedly will opt to cancel subcontracts or franchise arrangements, or subcontract overseas, thus displacing small businesses and the millions of jobs that small businesses create. The impact upon the economy could be enormous.

Where the putative joint employer has only limited involvement in the material terms and conditions of employment of the employees, it is unreasonable and unfair to saddle it with these contractual and legal responsibilities.

3. The Proposed Standard Would Eviscerate The Protections Afforded In Section 8(b)(4) of the Act.

Section 8(b)(4) was added to the NLRA in the 1947 Taft-Hartley amendments. Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947). The amendments added a list of prohibited actions, or unfair labor practices, on the part of unions to the NLRA, which had previously only prohibited unfair labor practices committed by employers. One of the primary prohibitions added by the amendments was the prohibition against secondary activity. 29 U.S.C. § 158.

Employees and unions engage in various activities - handbilling, picketing and striking - to exert economic pressure upon employers. When the immediate target of that economic pressure is an employer with whom the employees have a direct employment relationship and a labor dispute, the employer is considered the primary employer and the handbilling, picketing and striking is considered primary activity. When, however, the handbilling, picketing and striking is aimed at some other entity with which the primary employer has a business relationship, a "secondary" or "neutral" employer, the object of such pressure usually is to alter that business relationship to the detriment of the primary employer and thereby to raise the cost to the primary employer of continuing the labor dispute. The prohibitions against secondary activity in Section 8(b)(4) are designed to protect secondary or neutral employers from being enmeshed in the labor disputes of the primary employer.

The General Counsel's proposed standard would blur the concept of "neutrality" by finding the secondary employer to be a joint employer whenever the primary employer is economically dependent on the secondary employer. That would be so even though the secondary employer has no ability or authority to control the employees' terms and conditions of employment or to remedy the union's labor dispute. Under the proposed standard, the secondary employer would become a joint employer with the primary employer and the protections of Section 8(b)(4) would be meaningless.

4. The Proposed Standard Will Unnecessarily Complicate Collective Bargaining.

The proponents of the General Counsel's proposed rewrite of the joint employer standard argue that the test is limited because it will apply only to those businesses necessary for "meaningful bargaining." That criterion, however, is merely a post-hoc assessment without standards, as the proponents fail to provide any guidance as to what constitutes "meaningful bargaining." Moreover, the proponents fail to show how primary employers are incapable of engaging in meaningful bargaining without the presence of their business partners. Contrary to the proponents' argument, the proposed joint employer test would actually undermine the Act's purpose of encouraging effective bargaining.

When Congress adopted the Act, it made clear its primary purpose was to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151. As noted above, however, a series of cases that had expanded the Act's reach beyond what Congress intended caused Congress to revisit and substantially revise the Act in ways that directly or practically limited the process of collective bargaining. For example, Congress amended the Act to protect employee rights to *not* engage in collective bargaining or otherwise support unions and it made clear that the Act's reach was not as extensive as the Board and Court seemed to believe. 29 U.S.C. § 157. Another limiting change Congress made through the Taft-Hartley Act was to preclude the Board from certifying a unit based solely on the extent to which a union had been successful in organizing; instead, the unit must be appropriate for bargaining. 29 U.S.C. § 159(c). Clearly, the purpose of the Act today is not merely to encourage collective bargaining for its own sake but, rather, to encourage collective bargaining that can *meaningfully* address the workplace concerns of a group of an employer's employees that shares a community of interest.

No doubt, a business might be reluctant to negotiate employment terms for its workers that would cause it to lose money on its operations, such as a higher wage rate than the user would agree to pay under its cost-plus contract. But an employer might be willing to pay a higher wage than its customer will reimburse if that loss is offset at another of its operations. Moreover, if the financial limitations a customer imposes on an employer are sufficient to demonstrate that "meaningful bargaining" regarding the employer's workers cannot occur without the customer, then there truly is no limit on what entities can be found to be joint employers.

Absent direct and immediate control over terms and conditions of employment, a putative joint employer is nothing more than a third party business associate whose business relationship may impose some limits on the terms and conditions of employment. The Board and the courts have consistently found that free and fair collective bargaining is not inconsistent with a situation where business relationships impose outside limits on the outcome of bargaining. Indeed, bargaining always takes place within an economic framework, whether that framework is supplied by state law, contractual arrangements or the competitive marketplace.

Surely the Board would not hold, under the rubric of "industrial reality", that the United States government is a necessary party to collective bargaining for every defense contractor throughout the United States, even though the government's reimbursement level for goods or services provides the backdrop for the wages, hours and working conditions for employees throughout the defense industries. In like fashion, a contractor that enters into a fixed fee or cost-plus subcontract for services merely establishes a business relationship that reflects market forces and the competitive business background. Significantly, subcontractors are generally not forbidden from paying wages or benefits in excess of reimbursement levels. Unions can thus bargain for any wages they wish, and subcontractors who choose to pay more than reimbursable levels in the contract can always seek contractual amendments to cover the cost of such increases.

Although the proponents argue that the proposed test is calculated to advance meaningful collective bargaining by having all relevant "employers" at the table, they fail to recognize the obstacles created by forcing two different businesses to bargain over the terms of a group of employees only one of them directly controls. Proposed contract terms that might be crucial to one of the joint employers, and for which it might be willing to make significant concessions, might be irrelevant to, or contrary to the interests of, the other. Moreover, some issues that might be significant to the union, and which might be acceptable to the direct employer if negotiating alone, likely will be barriers to any agreement in a joint-employer situation because the direct employer will not agree to be bound to certain terms when its contract with the other joint employer can be terminated on short notice. It belies logic to assume that, simply because unions want to have both businesses at the bargaining table, more effective bargaining will result.

C. Relationship To Definition Of "Employer" Under Other Federal Laws.

Various union proponents have urged the Board to adopt a joint-employer standard comparable to that provided by federal labor and employment laws other than the Act. The Equal Employment Opportunity Commission (EEOC), for example, has argued that the Board should adopt the EEOC's approach, which treats staffing firms and their clients as joint employers under the laws the EEOC enforces. The assertion is certainly accurate under most federal anti-discrimination statutes – and, for the very reasons identified by the EEOC, it is generally true under the Act – because a joint employer finding is appropriate in such cases because the client usually exercises significant supervisory control over the worker. Concededly, if a customer exercises significant supervisory control over a supplier's employees, the customer will be a joint employer under current Board law. Courts, likewise, refuse to find joint employer status for purposes of liability under federal employment laws when the user company does not exert significant direct control over the worker. *See, e.g.*, *Jenkins v. Jewell*, 2014 WL 683706, at *4 (D. Idaho Feb. 20, 2014) (customer not a joint employer under Title VII, even though it retained the right to refuse workers assigned under the contract, when provider company retained "primary control" over worker).

Apart from failing to demonstrate that the Board's standard is different from their cited laws, these proponents fail to appreciate two crucial differences between the Act and other labor and employment laws. First, Congress has provided clear directions to the Board and the courts regarding how the employment relationship needed to be defined. Although each statute has its own legislative history, the Board cannot ignore the unique history of the statute it oversees – including the Taft-Hartley amendments that were driven, in part, by the Board's early attempt to expand the definition of the employment relationship beyond the ordinary one that existed when the Act was adopted in 1935 and amended in 1947.

Second, the other laws to which the proponents point – from Title VII of the Civil Rights Act of 1964 to state workers' compensation laws – are all designed to provide and protect *individual* employee rights. The Act, on the other hand, provides and protects employees' rights to act *collectively*. To the extent the Board has discretion to interpret the term "employer" under the Act, appreciating this distinction is of fundamental importance. For example, it furthers Title VII's purpose to deem a prime contractor the joint employer of a sub-contractor's employee when the prime contractor affects that worker's individual rights, such as terminating access to the property because of gender. However, to then treat the prime contractor as the joint employer of all the subcontractor's employees for bargaining purposes as a result of that individual incident would be inimical to the Act if it has no control over the *collective* terms and conditions of the subcontractor's employees. Drawing upon the practice of other agencies is not rational where, as here, there are fundamentally different policies animating particular words in the statutes that Congress has entrusted different agencies to interpret and enforce.

III. CONCLUSION

The rationale that led the Board, three decades ago, to adopt a direct control standard remains fully applicable today. No new facts or industrial developments require that the Board or Congress abandon thirty years of established law and depart from an approach the Board has developed and implemented for the past three decades. The current approach provides ample flexibility to allow the Board to police any improper attempts to evade the requirements of the Act. A return to the "indirect control" standard advocated by the General Counsel and others, by contrast, sweeps too broadly and would enmesh separate businesses in bargaining relationships over which they have no significant control without any materially greater protection of employee rights under the Act. It would create massive uncertainty throughout large segments of American industry and would cause significant economic upheaval. There simply is no reason to fix a standard that is not broken.

Chairman ROE. Thank you.

Mr. Byrne, you are recognized for five minutes.

Mr. BYRNE. Thank you, Mr. Chairman. And thank you, everybody, that gave your testimony today. That was really good. I know that when the ranking member was speaking, he was talking about whether we should be having hearings on employment. And I can't think of anything that gets more to the issue of employment than your testimony. You create jobs. Congress doesn't create jobs. The NLRB doesn't create jobs. You do. And we should be listening to you, so thank you for being here today.

Ms. Monson, I have got a question for you. I am a former management attorney with over 30 years' experience, and it truly boggles my mind that we are even talking about a joint employer relationship in the franchise industry. We were here three months ago to discuss the joint employer status as a result of the Browning-Ferris case, which we are all so familiar with, and the discussion of franchise joint employer relationship was brought up.

My colleagues on the other side of the aisle couldn't understand why the franchise industry was worried about their status as independent contractors. That was three months ago. Just one month later, the general counsel of the NLRB has defined McDonald's joint employer before the board, and it has had a chance to make a decision of its own in the Browning-Ferris case. So this is a directly relevant issue for our committee.

Ms. Monson, as a franchisor, how much control do you have over who your franchisees hire? How do you think a joint employer relationship will change your ability to grow as a business? And do you think this will help the employees of the franchisees when all is said and done?

Ms. MONSON. Thank you, Mr. Byrne, for that question.

First, I have zero - FASTSIGNS International has absolutely no control over who our franchisees hire. We establish brand standards for customer service, for response time, and quality of product, and the franchisee handles everything else.

If this new definition of joint employer becomes law, I am concerned that it is absolutely going to destroy the franchise model. I don't even understand how to protect my company from that kind of a slippery slope. As I struggle to maintain FASTSIGNS International with those kinds of increased costs and expenses and risks, I am going to have to put more and more controls on my franchisees. It is going to make it more difficult for them to run their business. It is probably going to increase their costs, and as costs increase, something has to give, and that could very well be pay raises and it could be headcount cuts.

I don't see any—

Mr. BYRNE. Headcount cuts means people lose their jobs?

Ms. MONSON. Exactly right, people losing jobs. If Clint has to maintain his profitability because I have put a new layer of cost on him because I have got to protect myself, he is not going to be able to necessarily raise his prices. His independent sign company competitors are going to be paying different wages or having different costs of doing business. And I think it is going to hurt employees.

I think it is also going to hurt future job growth, because franchising creates jobs, and good jobs. And even entry-level jobs lead to the next job, the next job, and the next job.

Mr. BYRNE. Mr. Duffield, let me ask you a question. I was fascinated by what you were saying. We heard when the ranking member was speaking that this somehow detracts from the reputation of the NLRB. Do you think the NLRB, taking 30 years of precedent and ripping it up and throwing it away, do you think that helps its own reputation?

Mr. DUFFIELD. Certainly not. Certainly not. Businesses, employers, employees, everyone depends on knowing what their rights are and how to conduct themselves. And when the law has been in place for 30 years, people can rely on that. It is predictable. It is a bright line test. And reverting back to an amorphous standard that is vague and hard to understand does not help anyone, and especially not the reputation of the National Labor Relations Board.

Mr. BYRNE. Right. You and me and other people that are practitioners in this field, we have developed an understanding over a very long period of time as to what the law is. And we may fuss and fight with one another over exactly how it applies in a given case. We know what the law is. Now we are going to change the law, and it is going to directly affect franchise contracts, thousands and thousands of them in America. What will that do legally to people in this industry and other industries?

Mr. DUFFIELD. Well, it is going to create more litigation. There are going to be lots of fights and lots of uncertainty. And the ultimate downside could be the loss of business.

Mr. BYRNE. Thank you, Mr. Chairman. I yield back.

Chairman ROE. Thank the gentleman for yielding.

Mr. Pocan, you are recognized.

Mr. POCAN. Sure. Thank you, Mr. Chairman. And, again, thank you to the witnesses.

First off, you know, we are just so far ahead of ourselves. We don't even know what the specific cases are they are looking at within the McDonald's sample. And I think, again, this committee having 17 hearings on this is, I think, looking at perhaps a different mission, specifically trying to undermine the NLRB across the board.

Let me just say this. I have spent 27 years of my life running a small printing—a sign shop, screen printing—couldn't be any more understanding of—especially on the FASTSIGNS industry than someone who has done what I have done and my dad did before me as a small-business owner and my mom as a small-business owner.

So I certainly understand the concerns that you have. However, I think what is happening here is some are trying to build a base to help against the folks who aren't doing a good job in the employment area. They are trying to fan the fire, use the scrupulous to defend the unscrupulous, and I think that is what is really happening here, is you are finding that some people are trying to exaggerate—first of all, go after the NLRB, second, try to exaggerate the extent of this.

And I think there are new labor landscapes that we have in the 30 years. And very specifically, when you think about the use of temp hiring, the issue of wage theft, the low-wage workers, the chronically low-wage workers, the other shady employment practices, I doubt any of your franchises would tell you that you are paying an employee too much. That is just not how the franchise model works.

And we—actually, we almost went to a franchise model in the sign business, so I actually have researched this, because we were a step—a hair away from doing it ourselves. So if I could ask Mr. Freeman a question specifically, one of the other witnesses mentioned, if it is not broke, don't fix it. And from the little example of the changing labor landscape that I have mentioned, it seems to me that the joint employer standard is broken in many areas.

Could you expand on some of the ways that workers are not served well by that standard, especially around the temporary workers?

Mr. FREEMAN. Yes, certainly, Congressman. The broken character of the joint employer standard is entirely related to major shifts in the demographics of the workforce now. We now have businesses that are routinely contracting out core business functions to temp agencies or franchisors are contracting out all of the work to franchisees while maintaining—through contractual relationships—very tight control over the terms and conditions of the franchisee employees.

This means that if you want to sit down and bargain over the terms and conditions of employment, whether it be grooming standards, whether it be the hours of work, you do not have everybody at the bargaining table unless you have both the temporary staffing agency and the user employer.

You have a triangulated employment relationship now that is routine in our economy. Unless you have all the players talking to each other, you can't have a meaningful conversation that gives voice in the workplace and that can raise living standards and improve conditions, especially when you have this kind of triangulation that is really making it difficult to understand the lines of legal responsibility for workplace problems.

That is what has occurred with some forms of franchising, particularly in fast food and, of course, with temping, which is now taking place in manufacturing, logistics, food processing, recycling. It is even taking place among lawyers. We now have temping as a normative way of pursuing core business opportunities. Unless we have the temp agency and the user employer at the table, we are going to have a problem.

The joint employer test the board is discussing putting in place is merely a revival of a test that has been in place since the Supreme Court addressed it in *Boise v. Greyhound,* which requires the board to look at what is actually going on, on the ground, including the contract rights that are given to both parties and how those rights play out in practice?

What you really have here is a number of employers who are calling the shots, but have no responsibility. That, I think, is what the board is looking at. And it is doing so on a fact-specific basis.

This is not rulemaking by the board, where the board will say all franchisors are joint employers. That, frankly, is ridiculous. That is not what the board does. It is not their function. They really adjudicate on a factual basis. And that is all the board wants to do, is look and see where these problems arise, whether you need to have everybody at the table to resolve a workplace problem.

Mr. POCAN. And real briefly, so what you are saying essentially is all franchises are not the same?

Mr. FREEMAN. No, certainly not. All franchises are not the same. And if you run a franchise where the franchisor basically says, I will take 6 percent because you use my name and my brand, I don't think you have a problem with joint employment.

Mr. POCAN. Great. Thank you, Mr. Chairman.

Chairman ROE. Thank the gentleman for yielding.

Dr. Heck, you are recognized.

Mr. HECK. Thanks, Mr. Chairman. Thank you all for taking the time to be here.

And I spent a fair amount of time over the August work period visiting with a lot of businesses in my district, many of which are franchises, in part preparing for this hearing to get—to understand what their concerns were. Several of them were hoteliers.

So, Mrs. Panwala, what effect would joint employment have on the efficiency, productivity, and morale of your employees?

Mrs. PANWALA. As an independent business owner, I have a great relationship with my employees. I have employees that have been with me for last 15 years. I know their family. I know about their kids. I know where they go to school. And bringing a third partner into this relationship, I think it would diminish the morale. It would definitely hurt the worker-relationship that we have between myself and employees.

We also—you know, a few of our employees who started with us 15 years ago, now they are business partners. So there is an opportunity for them to be in the hospitality industry. Having a franchisor as a partner and now they are getting involved in daily operations would definitely hurt our relationship with franchisor and the employee. And I certainly would not feel like I own my business anymore.

Mr. HECK. You mentioned the term third-party in reference to the franchisor. In your opinion, is there any value to forcing the franchisor to the bargaining table with the franchisee and union in the event of some type of organizing activity? And what would be the costs or problems associated with that to you?

Mrs. PANWALA. Like Ms. Monson mentioned, there would definitely feel like now they have more liability on their hands, so they would charge us probably more of a fee, but even more than that, I think they would have to be involved in a daily operations, just like setting wages, saying who I can hire, who I can fire, schedules.

Pretty much I am the one who is taking a financial risk when I started by business, and now 10, 15 years later, I have a partner who did not take any financial risk and now is my partner without a choice.

Mr. HECK. All right. Thank you. Thank you, Mr. Chair. I yield back.

Chairman ROE. I thank the gentleman for yielding.

I believe our next is Ms. Bonamici. You are recognized.

Ms. BONAMICI. Thank you very much, Mr. Chairman.

I wanted to start—well, first of all, by thanking all of our witnesses today for being here. Many years ago in one of my other lives and when I was in the private practice of law, I actually had a practice in franchise law, and I represented franchisees, typically in disputes with franchisors. So I was particularly interested in this hearing today.

And I wanted to start by saying that, you know, the NLRB general counsel—he has authorized a complaint. That action doesn't say or even imply in my opinion that every franchisor is a joint employer or would be a joint employer. There are likely hundreds, if not thousands of franchisors in dozens of sectors across the country. In fact, the chairman said something about 557,000 franchisees across the country. And even though their basic business model is similar, we know that they operate differently.

We have heard that so much this morning. A tax service franchise isn't necessarily going to be the same as a vending machine franchise. And a sign franchise is not necessarily going to be the same as a fast food franchise. So as this case moves forward, and procedurally, if the general counsel's position is upheld through many procedural steps and appeals, and whether or not there is a joint employer status would depend on the totality of the circumstances.

That would include, of course, how the relationship is structured and how much influence or control there is over the franchisees' employment practices.

So, Mr. Duffield, you said that large-scale franchisors who retain only the control required to protect their brand, trade name, and trademark could be drawn into hundreds of collective bargaining relationships where they have little or no involvement in the workplace. So my question is, if they have little or no involvement in the workplace, and they only retain the control needed to protect their brand and trademark, wouldn't the totality of the circumstances show that they are not a joint employer?

Mr. DUFFIELD. Well, it should. And under the current standard, it does. However, the general counsel's proposed standard not only focuses on this potential control, but also on an economic dependence. And all franchisees economically depend on the franchisor. Therefore, they could be brought into collective bargaining under that standard.

Ms. BONAMICI. Well, I am going to ask Mr. Freeman in just a minute to follow up on that, but I wanted to really follow up on Mr. Ehlers' and Ms. Monson's testimony, because, Mr. Ehlers, you said that your franchisor in response to the potential change in the joint employer standard—and here is what you said in your testimony—"will take measures to protect itself that will end up reducing your autonomy as a franchise owner."

Now, I am a little bit baffled by Ms. Monson's testimony that she would be ramping up control if this were the standard. So it seems that if franchisees and franchisors are both so concerned about the prospect of joint employer status, wouldn't it be more likely that the franchisor would take measures to increase your autonomy so that it would be less likely that you would be a joint employer?

Both of you. I was baffled by what your testimony said. It seems to me contrary to what common sense would be.

Ms. MONSON. Do you want me to try first?

Mr. EHLERS. You go ahead.

Ms. BONAMICI. Go ahead.

Ms. MONSON. First off, we are at a little bit of a disadvantage in that we don't know all of what the general counsel's opinion is based on. We can only infer from the Browning-Ferris amicus brief. But in the Browning-Ferris amicus brief, it tends to indicate operational control, system-wide control, brand standard control.

So as a franchisor, I need to make a decision, and I think every franchisor will have to make that decision on their own. Whether I go for more control over my franchisees to protect myself from increased risk, vicarious liability, all kinds of issues like that, or whether I scale back my control, in which case my brand may be hurt. If I can't maintain good brand standards, high customer service, high-quality product, high-quality production within the centers, then the FASTSIGNS brand-name will be deteriorated over time.

So each franchisor will make their own decisions. Either we will give less support so that we won't be seen as joint employers, which could hurt the brand, leading to declining sales, or we give more.

Ms. BONAMICI. And I am going to have to ask you to—I want to ask Mr. Freeman to follow up on this, because it seems like the franchisors want to have it both ways. They want to have—your testimony said that fast food workers, they referred to a high level of control over the workers and conditions of employment. You laid out specifics. They control their—every one of the contract provisions, dictated by the franchisor, directly impacts terms and conditions of employment that are the core of collective bargaining issues.

So I wondered if you could say, do you agree with the general counsel's directive that does not indicate that every franchisor will be a joint employer? It would be—

Chairman ROE. Mr. Freeman, you have to hold up on that and someone else is going to have to follow up. Time is expired.

Ms. BONAMICI. And I will follow up on that and ask you to respond in writing.

Chairman ROE. Mr. Kelly, you are recognized.

Mr. KELLY. Thank you, Chairman, and thank you all for being here. I am a franchisee. I am a Chevrolet, Cadillac, Hyundai, and Kia dealer. And as such, I have watched this evolve over the years. My father actually started our business in 1953 after being a parts picker before the war in a Chevrolet warehouse, then coming back and being able to start with a little one-car show, with about five service bays, and building into something we are very proud of.

So, Mr. Ehlers, Mrs. Panwala, thank you so much for what you do, because it is the American Dream you are talking about. And I have got to tell you, I have never had one month at the end of the month, when everything is over and done with, that Chevrolet, Cadillac, Hyundai, or Kia have ever called me and said, "You know what, Kelly? Tough month. You didn't make any money. What can we do to help keep you open?" Just doesn't happen.

Mr. EHLERS. Not at all.

Mr. KELLY. And this idea that somehow we have this joint relationship is absolutely ridiculous. Now, Chevrolet, Cadillac, Hyundai and Kia determined for me, because of our market size, what we have to do to serve our customer base. I think that makes sense. We do rely on collective information, on collective experience over the years in how we would run a successful business model.

Professor, you made a statement that franchises equally profitable as evidenced by the fast food sector of the restaurant industry, where in 2010 the largest franchises employed over 2.25 million workers, earning more than $7.4 million—or billion in profits, and distributed another $7.7 billion in buybacks and dividends to shareholders.

Would it be your assumption that these profits—there was a tax paid on those and that these shareholders paid a tax on these? Because here is the problem. Where does the money come from to run this wonderful organization we call the U.S. government? Where does the money come from that supplies the safety net for all these people, if it were not for profitable businesses and people making money?

I think sometimes we forget, it is not the government that provides one single penny to run this machine. It is hardworking taxpayers. Mrs. Panwala, you described what you went through to start your business. Mr. Ehlers, you described what you went through to start your business. Thousands upon thousands of Americans have been able to live the American Dream and been able to employ thousands upon thousands and millions of American workers and allowed them that first step into getting to be an entrepreneur, your own entity. Why in the world would we try to upset the apple cart?

Mr. Duffield, you really make a great statement: if it ain't broke, don't fix it. We should have started this decades ago in this entity here, in government. Keep in mind, this is a process that is working at $18 trillion in the red and is going to go out and tell you how to run your business. Doesn't that make sense? Anybody hiring them as business consultants?

So my question to you, Mr. Ehlers—and I know, Mrs. Panwala, you already said it, would you ever put yourself out the way you have put yourself out to go into business for yourself if you knew you were going to have the heavy hand of the government come down, put its heavy boot on your throat, make it harder for you to breathe? Would you still do it? Would you still go out and move from California to Pennsylvania?

Mr. EHLERS. Well, one of the main reasons I actually moved from California to Pennsylvania was several local regulations that the state was trying to implement having to do with my business, state income tax, all sorts of other things. It is—to your question, no, I wouldn't.

I would do something else. I am an entrepreneur, and I am out there doing things, but I wouldn't—I certainly probably would not sign up for the franchise model because when I wanted to go into business for myself, I wanted to go into business for myself. I wanted the value of what FASTSIGNS brings to the table with a proven business plan and also the network of other independent businessmen that own FASTSIGNS, that have done and been through the trenches and have come out successful and others not so successful to learn from that.

What is great about FASTSIGNS is that they collect best practices from our franchise system. They pull all that together, and they disseminate that back to us. It is one of the benefits of not being an independent sign shop like you, Mr. Pocan, is that we have a collective knowledge that they offer us.

It does not make us joint employers. It does not make them tell me what I have to do for my employees.

Mr. KELLY. And just excuse me, because we are running out of time, but the reality of it is, you moved from California to Pennsylvania because of an opportunity.

Mr. EHLERS. Yes, sir.

Mr. KELLY. All right. And we really say about America, there is equal opportunity, not equal outcome, but there is equal opportunity, and that is all we are looking for.

Mr. EHLERS. Yep.

Mr. KELLY. But you are always looking for a place that you can do business more successfully, because the true value of a business is being able to be profitable and stay in business. Otherwise, you go by the wayside.

Mrs. Panwala, I really admire what you have been able to do, you and your husband, to come here and start with what you started and to continue to grow it. That is America.

Mrs. PANWALA. Just to say a couple of things, you know, it is an American Dream to own your own business. Somebody like me, who came from India at age 15 with a family, with my dad having $6 in his pocket and working hours and hours, while going to school and to get our first hotel at age 22, it was an American Dream.

If I knew at that point that the government or somebody is going to come to me and say, nope, this is not your business anymore, now you have somebody else as a partner, even though I took all the risk at age 22, I probably would have been very hesitant to enter into the hotel business.

So, yes, to answer your questions, I would not have, and I would not have been a person who created, personally, many jobs and reinvesting back into my business.

Mr. KELLY. Thank you so much for being here. My time is expired.

Chairman ROE. Gentleman's time is expired.

Mr. Scott, you are recognized.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Freeman, as I understand your testimony, the new joint—the new standard would not require all franchisees and franchisors to be considered joint employers. Is that right?

Mr. FREEMAN. That is completely correct. This is not a rule that is being discussed by the board to apply to every franchisor/ franchisee relationship. It is a fact-specific inquiry that will include looking at the contractual relationship both in writing and in practice between a franchisor and a franchisee to see whether there is the level of extensive control such that it affects core terms and conditions of employment that require all three parties to be at a bargaining table or to hold them liable for an unfair labor practice.

Mr. SCOTT. If the total control is exercised by the franchisee, there would be no joint status. Is that right?

Mr. FREEMAN. That is completely correct. But in other circumstances, you have terms and conditions that are being imposed by franchisees that are really undermining—

Mr. SCOTT. Franchisors.

Mr. FREEMAN.—the American Dream.

Mr. SCOTT. Imposed by?

Mr. FREEMAN. Imposed by franchisors—I am sorry, I misspoke—that are really undermining the American Dream. When you have a fast food franchisor that encourages its employees to go apply for food stamps or to go on welfare in order to make ends meet, that is not the American Dream. When a temp worker has no future or long-term job and no opportunity for vacations or any forms of benefits, that is not the American Dream.

And every employer who has a say in that person's terms and conditions of employment should be at the bargaining table to give these workers the opportunity to bargain, to rectify those sorts of problems. That is where the joint employer test that the board, in my view, is looking to apply to look at situations where you have co-determination of the terms and conditions of employment.

I don't agree with Mr. Duffield and I don't think that this is about a question of the board determining economic dependence. It is really about co-determination of terms and conditions of employment on the ground, in the workforce.

Mr. SCOTT. And I think you said in practice, if that franchisor technically has the right to intrude and make—impose standards, but in practice doesn't, would that—how would that play out?

Mr. FREEMAN. Well, I think, Mr. Scott, what you are asking is, what would the fact-finding actually be like at the board? And I don't want to venture an opinion on any particular set of facts. I think those kinds of questions is what the inquiry is actually about.

How does the relationship on paper shake out in practice? And I think that the totality of circumstances, analysis that the board has engaged in, in its traditional test—and I think that is what the board is looking to do again. Right now, the test has been interpreted in a ridiculously narrow way such that the only time you have joint employment is if you are the business that actually tells the worker to turn the screw or fill the drink.

That is not the way the modern workplace works. Direct control over terms and conditions of employment are exercised by contractual relationships, by monitoring, by checking, by all sorts of high-tech devices that allow franchisors and user employers to control the terms and conditions, even though they may not be the party that is actually handing out the paycheck.

Mr. SCOTT. Now, everybody has talked about protecting the brand. What kind of conditions of employment can be imposed under the auspices of protecting the brand?

Mr. FREEMAN. Well, I think it is rather extensive in certain industries. In order to protect the brand, a fast food franchisor may want the food to taste exactly the same, the uniforms to look exactly alike, the hours of work to be the same. They may want workers to only work certain shifts at certain times. All of those questions are things that workers have a right to bargain about with the employer who controls those terms and conditions.

When you have those sorts of circumstances, joint employment may certainly arise. Merely telling someone what size the letters should be on their sign outside the door isn't what we are talking about. We are talking about things that affect workers, and particularly workers, many of whom are in very low-wage occupations who cannot alter the circumstances of their life, unless they really talk to the user employers in the temping industry or to the franchisor in the franchising sectors.

Mr. SCOTT. The gentlelady from Oregon asked a question that you didn't have time to respond to. It says about the doomsday predictions that would change if we changed the standard. Do you want to respond to that?

Mr. FREEMAN. I don't think it would lead to the downfall of Western civilization or the free enterprise system in any way at all. In fact, it has been the case in recent years that other government agencies have been much more aggressive in applying the joint employment standard—

Chairman ROE. Mr. Freeman, could you hold up for the next—

Mr. FREEMAN. This is true—

Chairman ROE. Mr. Scott's time is expired.

Mr. FREEMAN. I am sorry, Chairman.

Mr. SCOTT. Could he finish that sentence? Just that sentence? Okay.

Mr. FREEMAN. I will do it. It is just one sentence. We now have the *Fair Labor Standards Act* in the Department of Labor enforcing joint employment. It is enforced under Title 7. It is enforced in many states in areas of unemployment insurance. This is nothing extraordinary, except bringing up the standard with respect to the modern workplace.

Mr. SCOTT. Thank you, Mr. Chairman.

Chairman ROE. Thank you.

Mr. Wilson, you are recognized.

Mr. WILSON of South Carolina. Thank you, Mr. Chairman. And thank you for this very important hearing. What we are talking about is economic freedom, the ability to operate your own business successfully. And, Mrs. Panwala, I have had the opportunity to live your dream, and that is my dad served in the Flying Tigers during World War II. And so as the little guy, as I was growing up, he told me how entrepreneurial and capable the people are of India, South Asia, and it exciting to me when the Desai family came to our community to start a tiny little motel.

I said, "I know who you are." And then I worked with the Patels, the Shahs, the Shevastavahs, Sindhas, and I saw the success. And in my home state of South Carolina, it is just extraordinary the economic opportunity that has been provided due to the success of Asian-Americans creating entry-level jobs. It has just been a marvel.

So I want to thank you. And it seems we have had a good success, Mr. Chairman, we are very thankful to the Mondello family; we have had Benny Cayetano here—the second Asian-American governor in the United States; Also, very significant, in the United States, the first female governor in 340 years—

But in the Asian-American community, it makes such a differnce, because you can run your hotel on the family members—they did everything, they didn't just start out as a high income community in the United States. They didn't start out having the highest-percentage of millionaires. It was because you could run your business—and then you made that clear, and I want to thank you.

In your testimony, you said you paid particular attention to what you expect from your franchisor—after reading the contract, what were your expectations from the franchisor? You didn't expect the relationship to change—

Mrs. PANWALA. Thanks so much. You know, basically what I just said is that it is not just for me, it is for hotel owners who have gone through the same situation—gone through the same thing as myself—corporations have different motives as an individual hotel owner, from one hotel to the next. I want to make sure I am involved in that—involved in that business. And that is—I think that is what the issue is, that if franchisors are all of a sudden a joint employer with the franchisee, they will feel that they have more liability and they will want to be involved in day-to-day operations, plus making sure that who you are hiring, who you have at your hotel, in pretty much daily activity, which for me as an independent business owner, I would lose that independence.

Thank you.

Mr. WILSON of South Carolina. It is independence. It is opportunity, entry-level jobs, it is so meaningful in the communities I represent. And also, the International Franchise Association, Ms. Monson, I want to thank you, Mr. Ehlers. You all make a difference.

Is there any—and, Ms. Monson—in your opinion, is there any value in forcing the franchisor to the bargaining table with the franchisee and union? What are the costs and problems?

Ms. MONSON. Well, first, I understand that unions are challenged these days to grow membership. And I know that is part of what is trying to be accomplished here.

But I go back to what has worked for FASTSIGNS and what has worked for the prior franchisors that I have been involved with and what has worked for so many different franchise companies. If FASTSIGNS International was required to come to the bargaining table, it would certainly increase our costs, it would increase—it would be a drain on our resources. And it would limit my ability to service and support our franchisees, to help our franchisees be more successful.

I see no positive outcome at all. I see it as a slippery slope, a dark abyss, and I have no idea where it would end.

Mr. WILSON of South Carolina. Well, I share your concern. And—because running your own business, that is the key, and being a franchisee, that is so beneficial. But you have got to run your business, and we should surely understand that every community is different and things change.

So thank you, again, for being here. And I am just so proud of you all's success. And appreciate the chairman's leadership.

Chairman ROE. I thank the gentleman for yielding.

Mr. Hinojosa, you are recognized for five minutes.

Mr. HINOJOSA. Thank you, Chairman Roe.

The focus of today's hearing is a real disappointment to me. Unfortunately, my colleagues on the other side of the aisle have once again chosen to use this subcommittee's time to undermine the NLRB. It is worth noting that Republicans have held no less than 17 hearings or markups aimed at undermining the NLRB's decisions and policies and procedures while ignoring the key issues affecting the lives of American workers.

As a senior member of this committee, I believe that we should spend more of the committee's time on helping to strengthen the middle class.

Is it not on?

[Hearing suspended while Mr. Hinojosa moves to a working mic.]

Mr. HINOJOSA. Mr. Chairman, can you hear me?

Chairman ROE. Yes.

[Laughter.]

Mr. HINOJOSA. Well, I certainly wanted to be on the record, and I was concerned. At this time, I have questions for some of our distinguished panelists. Professor Freeman, in your expert testimony, you indicate that the NLRB's decision to take a hard look at its joint employer standard is both reasonable and practical as a means of considering how millions of low-wage workers can meaningfully exercise their fundamental right to collectively bargain with their employers.

Can you describe for me how employers using temporary staffing firms co-determine the terms and conditions of employment for those workers?

Mr. FREEMAN. Certainly. Today, temporary staffing is no longer structured to simply have a temporary worker come in and fill in for an administrative assistant who is out of work for a week or a few days. What we now have is large concentrations of temporary staffing workers that many people call perma-temps, because they are employed regularly and routinely doing the core business functions of a user employer.

What this means on the ground is that the supervisory and management staff of the user employer is directing on a day-to-day basis the work conditions of these temporary workers. They are responsible for health and safety. They set the line speed in a manufacturing setting. They may require certain forms of equipment and training of this temporary workforce.

Yet under current board standards, there is no obligation to have that user employer at the table when discussing any of the wages or working conditions of those temp workers. It makes absolutely no sense when you disaggregate employer functions not to require everybody to come together to actually talk about how to fix problems.

All we are doing here is putting everybody at the table who actually has a say and a role in the production or services that are being rendered. The reason the joint employment standard has become controversial is not because the board is seeking to employ a standard that is in any way radical or new. Rather, it is simply wanting to revert a standard that was long in existence to address rapidly shifting demographics in the workplace. That is the board's obligation under the powers granted to it by this Congress and approved by the Supreme Court of the United States.

Mr. HINOJOSA. Professor, I understand that contingent or, as we call them, temporary workers are, on balance, paid less, have inferior access to benefits, and oftentimes suffer health and safety violations at a greater rate than other workers in the private sector, but by the same token cannot bargain for better conditions due to the current joint employer standard.

So can you also discuss how the current narrow standard prevents the workers from engaging in meaningful collective bargaining?

Mr. FREEMAN. The narrow standard is preventing having the user employers at the bargaining table because the standard requires that there be this form of direct and immediate supervision. The standard—when you look at the temporary staffing industry and how it functions—makes little sense given that the temporary staffing industry is often not on the job site at all. They don't really have any role, except administerially, administering payroll, workers' compensation benefits, and the like.

In that regard, you have actual control being exercised completely by an employer who under current board standards plays no role in the process of collective bargaining. I don't see where that makes sense in the modern workplace.

You have right now major manufacturing centers of the United States—in auto and other sectors—where you have half the workforce being sent there by a temp agency. They make less than the workers who are direct hires. They are doing exactly the same things. Yet the user employer has to bargain with respect to the direct hires, but not the temps.

Mr. HINOJOSA. My time—

Mr. FREEMAN. Now that is pretty irrational.

Mr. HINOJOSA. My time has expired. And I thank you for responding to my questions.

Mr. FREEMAN. Thank you.

Chairman ROE. Thank you the gentleman for getting through his testimony today. It—

Mr. HINOJOSA. Thank you for helping me.

Chairman ROE. Dr. Price, you are recognized.

Mr. PRICE. Thank you, Mr. Chairman. And I want to thank you for holding this hearing. I want to thank the witnesses. I apologize for not being here for the entire portion of the hearing. I was able to read some of the testimony before.

My friends on the other side talk about the NLRB and say, well, why are we having all these hearings? Seventeen hearings on the NLRB, why—why on Earth would we be doing that? Well, to quote my good friend, these are actually, "key issues" that affect workers. What we are trying to do is to build the middle class, is to make certain that jobs are being created out there across the economy.

And so when we see activities and rulings and decisions by the NLRB that actually harm job creation and decrease economic vitality in this country, then it is incumbent upon us to have hearings and talk about it and educate our colleagues and the American people about what is going on in this administration.

Mr. Duffield, I have been really impressed with the remarkable success of the franchisee business. Each and every day, hard-working entrepreneurs across this country go to work, they provide for their families, they offer jobs to the community, and they create, again, that much-needed economic growth in our communities.

For years, franchisee owners have had a degree of regulatory certainty that they could rely upon in building their business. However, as many of us believe, this joint employer ruling will throw all that to the wind.

I want to ask you, how does this ruling affect the value of a franchisee business? And could this ruling effectively end the franchisee business model?

Mr. DUFFIELD. I think that is a serious risk. As we have heard already from Ms. Monson and Mrs. Panwala and Mr. Ehlers, if the franchisor is going to be held responsible for the unfair labor practices in a workforce where they are not involved, they are going to have to get involved. They are going to want to be there and provide some oversight. That is going to increase their costs and it is going to affect their business model.

On the franchisee side, Mrs. Panwala has testified several times today that the reason she got into this business is because she has got an entrepreneurial spirit about her. And if that gets taken away from her because somebody else is coming in and looking over her shoulder, I think fewer and fewer minority business owners are going to want to embark on that endeavor.

Mr. PRICE. Mr. Freeman just told us that nothing about this ruling is, “radical or new.” Your opinion?

Mr. DUFFIELD. I disagree. I think this could radically change the economic landscape for not only just franchisors, but lots of other industries. You know, we focused a lot today on the franchisor/franchisee context and industry, but I think the implications here expand much broader than just that. We are looking at staffing agencies. He has talked about the temp services situation. We are looking at, you know, the contractor/subcontractor situations, you know, lots of other industries other than just franchisors and franchisees.

Mr. PRICE. Yes, we would agree. And goodness knows the economy needs to be helped, not harmed, and so many of us believe that this is actually harmful. If McDonald’s is a joint employer, is anybody not a joint employer?

Mr. DUFFIELD. Right.

Mr. PRICE. Ms. Monson, I appreciate your comments. You also said that there was no positive outcome that you could see coming from this joint employer ruling. Why do you think they are moving forward with this?

Ms. MONSON. I believe that this is an attempt to help build union membership.

Mr. PRICE. Pretty stark, isn’t it?

Ms. MONSON. Yes.

Mr. PRICE. I have a gentleman in my district, in the Sixth District of Georgia, who owns 23 franchise restaurants—he communicated with our office. He doesn’t want his name to be divulged, because of some other concerns we have had about the administration punishing folks that step up and express their concerns.

He has been extremely concerned and petrified with what this joint employer ruling would do to his business. He started with one franchise and grew it into 23 stores. Why do you think so many franchise owners from my district, and across this country, are concerned about the potential fallout from the decisions that the NLRB general counsel has made as it relates to McDonald's and the franchisee joint employers?

Ms. MONSON. Franchisees around the country are fearful of losing their independence, having the value of their franchise decrease. Every person who owns a business today plans to sell it at some point in the future or pass it on to their family, and they don't want to see valuations decline because of this increased risk and change in the law.

Mr. PRICE. Mr. Chairman, what we have here is a red flag being waived in front of the country that says, "This is going to harm job creation." It is going to harm businesses across this country. It is time to stop this ruling. Thank you.

Chairman ROE. Thank the gentleman for yielding.

I am going to ask a few questions. And, you know, we asked why we had 17 hearings on the NLRB. This NLRB is the most activist NLRB in anybody's memory. We look at the Boeing situation. In the great state of South Carolina, where a billion-dollar investment was almost snuffed, and there was no job loss in Everette, Washington. Now there are thousands of people with good-paying jobs taking care of their families. They would have done away with—I found that absolutely astonishing to me.

Ambush elections, where you can have—look, we have a system that has worked for a long time, where both sides get a chance to put their testimony out there and make their case. We had that election in Volkswagen in Chattanooga in my state not six months ago. And the people decided what they wanted to have, after they were fully informed. But it didn't happen in 10 days, I can tell you that.

Micro-unions. And, you know, I—we have 30 years, as Mr. Duffield has pointed out, of bipartisan agreement with the NLRB about this. And yet now there is some big emergency that is going on. We should be looking in this country about how we create jobs for people.

As I stated when I opened up, nine million people don't have health insurance that did since 2009 during this, quotes—"recovery." And we are having a hearing today that I hear right now may stifle job creation. I am just a simple doctor from East Tennessee. But I tell you how I knew who my employer was: who wrote my check. That is who I worked for.

And I heard Mr. Ehlers say that basically he had to go out and borrow the money. His banker didn't call Ms. Monson for the payment at the end of the month. It called you for that. Am I right about that?

Mr. EHLERS. Yes, sir.

Chairman ROE. And you very clearly stated it, did they help you fill out your taxes at the end of the year to find out what your tax liability is? You were able with the—and I was an employer for over 30 years. And you are absolutely right. When you describe this family was having some issues about, how do I help that—it is a good employee, obviously.

Mr. EHLERS. Yes, sir.

Chairman ROE. A great employee. And with 14 people, you know all the—you know when they get married, when they go to the hospital, whatever happens to them. I guarantee you do.

And so you work with this good employee to make sure that their son could get to what they needed. Maybe it was a single parent. I don't know. Would you just comment on those things?

Mr. EHLERS. Yes. I mean, I am very involved—as much as a friend/owner/boss can be—in my employees' lives. I fully understand, especially with this employee, he is a very valued employee of mine. He has a 12-year-old son who he did not want to leave at home by himself with a computer during the summertime. His wife makes more money than him. She has a great job, so she obviously couldn't take off.

And they had to make arrangements, albeit late in the season, to find daycare. And we worked it out to where he could bring his son in to work and work for me. I grew up in a—my dad owns a roofing company, started in 1960, independent. I have been working since I was probably eight years old, slinging shingles and whatever else. I have been—

Chairman ROE. Be careful. The Department of Labor might be—

Mr. EHLERS. Yes, absolutely.

[Laughter.]

So I have—I know the value of hard work. I have made minimum wage. And it was an entry-level job for me. But it fueled me to do more. We talk about the American Dream. The American Dream is to do more, to take opportunities as they come along, entry-level positions, entry-level pay, and do more with that and learn and move on.

It was not something—the American Dream is not something for the government to control. The government should not set the American Dream for employees and give—they don't create jobs.

So I have another quick example. I have an employee—I bought the Lancaster store. It was a struggling store. I bought it because it was struggling and I could turn it around. Fairly overstaffed. I had to make some very hard decisions. I had an employee who was married, young, both of them making not a lot of money. She needed a job, but her job was not necessary in my company anymore.

I worked with her. I gave her six—I am sorry, 60 days to go find another job. Right? She knew she was going to be—her position was eliminated, but I gave her 60 days to go find another job, because I did not want her and her husband to be without a paycheck.

If they controlled that, that would not have happened, and she would have been out on unemployment. Now, she found a job—and I even gave her a financial incentive to do it in 45 days. She found it in 50 days, and she found a job making more money than what I was paying her, and it is actually in a career that she actually went to school for.

So that is a typical situation in a responsible business owner that I would not have been able to make, had I been jointly controlled by FASTSIGNS Corporate.

Chairman ROE. Well, I am going to have to gavel myself down, but there is one other question that, Mr. Duffield, I would like to have you answer otherwise, about—afterwards, is indirect control and potential control. That is a slippery slope that I can't imagine how you would ever get by potential control. And that is what these folks are talking about.

Once again, I would like to thank our witnesses for taking time to testify. It has been great testimony, been a lively discussion. I know you have spent a lot of time preparing. We appreciate you doing that. And I will now yield to Mr. Pocan, our ranking member, for any closing comments.

Mr. POCAN. Sure. And, again, thank you, Mr. Chairman.

You know, in listening to the hearing, I think what we said in the beginning really hasn't changed much as far as the focus. You know, I think one of the things that is very clear—and I know a little bit about, again, this model—Ms. Monson, you don't have any direct relationship on the employees at the FASTSIGNS in Mr. Ehlers' community. And you are not going to be in the same case as the employers we are talking about.

The problem is, as we have talked about the American Dream—and I agree. Both my parents are small-business owners. I am a small-business owner. I really know nothing other than being in small business. That is in my entire life.

But I do know that a lot of people are not getting access to the American Dream. Millions of people who are negatively affected by the unscrupulous players that we are trying to go after, and that means the folks who use the temp industry. I have got a constituent, four years she is a temp as an electrician. They lay her off when there is no business. She gets no benefits whatsoever. And she is making less than she would if she was in the field at another area.

There is wage theft. There is the chronically low-wage workers that we are dealing with throughout the problems that NLRB is trying to address. So we do want access to the American Dream for each and every American. And I want it just as much for the small-business owner, which I am as well, but I want it for that worker. And for those businesses that aren't participating, like you all are, we need to make sure that those folks are protected and that the NLRB is looking at direct violations by what is happening either through this contingent or temp worker, people who aren't getting the same access to the benefits and the pay, or through some of the bigger franchisers, especially in the fast food industry, who are abusing that relationship. That is what has to happen. Everyone deserves that American Dream, and I appreciate you sharing your stories and, like I said, your stories in many ways are my stories.

As a kid, I was working at my parents' business, go in there and—you know, in fact, one of the early, early sign franchises was Budget One Hour Sign. How is that for knowing way, way back, the old inking the wooden type? That is what my dad first had.

So I appreciate everything that you are doing and saying, but I think what we are trying to do is go after the folks who are doing unscrupulous practices. That is what it is going to be directed towards. And we need to make sure that every single person, including those who are working as temps and contingent workers, have access to have that opportunity for their families, as well.

Chairman ROE. I thank the gentleman for yielding, first of all.

Secondly, thank you all for being here today. And I want to close by saying that the way I had understood the NLRB to work was it was to be a fair arbiter. It is like a referee in a ballgame. When you go on the road and play basketball, which I did, you expected to get a fair call. And that is exactly what we expect NLRB to do, not to tilt it one way or the other.

You have a right to organize in this country. And I think that labor laws also apply to temporary agencies and OSHA requirements apply to those same things. I don't think they can avoid those. So all those things, I think, that you bring up, they are already laws out there to protect workers from those things.

I think the franchisee model, we have seen across the country, and two unbelievable examples today that you all brought here about how you have been successes, but you started—and, Mrs. Panwala, I wanted to ask you, just—you sound like an intern at a hospital. I wanted to ask you what you did in your spare time. You worked. You were the plumber. You were the electrician. You cleaned. You were at the front desk. I am sure you felt like you were never going to be successful.

It is an amazing, amazing story. And it is repeated across this country hundreds and thousands of times each day. And you take a—I mean, there are stories in this very room—and I have one sitting right here to my right—that has been successful as a small-business owner. And we need to encourage that and make it easier for small-business owners.

We have 43 jobs bills we have passed in the House, 43, that are sitting in the U.S. Senate right now with no action, 43, that would help increase wages, would help increase employment in this country, and we are under-employed right now. There are jobs out there that people don't have the skills to meet.

I, as many others, went to 20 or had 20 manufacturing plants I visited this summer during the recess and met with them. And there are jobs open that we have—we just passed a *Workforce Investment Opportunity Act* that will help hopefully fill those jobs.

So I think this would be a terrible, terrible decision by the NLRB that would stop one of the very successful parts of our economy. I want to thank you all for being here. We will continue our very close observation of the NLRB. And with no further comments, this meeting is adjourned.

[Additional submissions for the record by Chairman Roe follows:]

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AHLA
AMERICAN HOTEL & LODGING ASSOCIATION

Statement for the Record

Submitted by the American Hotel & Lodging Association

Before the

House Education and Workforce Committee

Subcommittee on Health, Employment, Labor and Pensions

"Expanding Joint Employer Status: What does it mean for Workers and Job Creators?"

September 9, 2014

On behalf of the American Hotel & Lodging Association (AH&LA), the sole national association representing all sectors and stakeholders in the U.S. lodging industry, including owners, REITs, chains, franchisees, management companies, independent properties, suppliers, and state associations, we thank Chairman Roe and Ranking Member Tierney for the opportunity to submit a statement for the record for the House Education and Workforce Committee Subcommittee on Health, Employment, Labor and Pensions hearing, "Expanding Joint Employer Status: What does it mean for Workers and Job Creators?" We appreciate the Committee's attention to this critical issue facing small businesses across the country, including in the lodging industry.

The lodging industry is one of the nation's largest employers. With 1.8 million employees in cities and towns across the country, the hotel industry generates $155.5 billion in annual sales from 4.9 million guestrooms at 52,529 properties. It's particularly important to note that this industry is comprised largely of small businesses, with more than 55% of hotels made up of 75 rooms or less.

Our industry's strong growth, sales, and employment base are key reasons that lodging has led the nation's economic recovery, one of the few bright spots, with 52 steady months of growth. The lodging industry is a valuable contributor to the local and national economy, creating well-paying jobs and career opportunities for millions of people. Just last week, AH&LA and Wage Watch, Inc. released a wage and benefit survey which shows that, overwhelmingly, most job titles in the lodging industry pay above minimum wage and offer comprehensive benefits packages. More than half of respondents have starting rates above the minimum wage for eight out of 10 job titles surveyed. These hourly-positions offer a fast-track to upward mobility and serve as a gateway for new workers to enter the lodging industry. Hoteliers strive each day to make sure those opportunities continue to grow. We are concerned, however, that recent and pending decisions from the National Labor Relations Board (NLRB) could jeopardize growth within the lodging sector, particularly in the franchised segment of the industry which makes up upwards of 80 percent of the more than 52,000 lodging properties across the country.

We appreciate the Committee's interest in addressing the recent announcement by the NLRB's General Counsel to recommend changes to the joint employer definition. Franchisors and franchisees have never been considered a joint employer, as the definition of joint employer has been that both must exercise a significant degree of control over the same employee's responsibilities and conditions of employment. This decision could overturn the long established joint-employer standard which has been the foundation for the franchisor/franchisee relationship for over 30 years.

AH&LA commends hotelier Jugruti Panwala, a small business entrepreneur, for taking time away from her businesses to come testify before the Committee on this issue, which could have a profound impact on her business and thousands of other franchised hoteliers. As Ms. Panwala succinctly points out in her testimony, the recent decision by the NLRB pertaining to the joint employer standard fails to recognize that the day-to-day business decisions rest with her. This means that, like many other independent hotel owner-operators, she does the hiring and firing, setting the schedule and conducting employee reviews all the while trying to turn a profit and hopefully create more jobs. Ms. Panwala has a contractual licensing agreement with the four separate franchisors but she is not "an agent of the franchisor" nor is she "an employee of the franchisor".

Moreover, changes to the joint-employer standard could drastically alter thousands of contractual agreements already in affect between franchisors and franchisees. If a franchisor were to be held liable for the actions taken by one of their franchisees, then the business relationship and the contracts that govern that relationship would have to be wholly reconstituted.

As illustrated by testimony of both Ms. Panwala and of Ms. Catherine Monson, CEO of FASTSIGNS ®, the announcement of the General Counsel of the NLRB to recommend changes to the joint employer standard would serve only to disincentivize small business entrepreneurs from starting businesses and creating jobs. It would negate thousands of contractual relationships, putting many more thousands of jobs at risk. AH&LA strongly urges the Committee to protect the current joint employer standard and reject efforts by the NLRB and its General Counsel to drastically alter the franchisor/franchisee relationship as currently constituted

COALITION FOR A
DEMOCRATIC WORKPLACE

September 9, 2014

Dear Chairman Roe and Ranking Member Tierney:

On behalf of the Coalition for a Democratic Workplace (CDW), I write to thank you for holding today's hearing titled, "Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?" We applaud the Committee for exploring the National Labor Relations Board's (Board or NLRB) efforts to alter its joint employer standard and the potential impact of the Board's actions on workers and job creators.

CDW is a broad-based coalition of over 600 organizations representing millions of businesses, which employ hundreds of millions of employees nationwide in nearly every industry. CDW members are joined by their mutual concern over recent actions by the NLRB, which threaten entrepreneurs, other employers, employees and economic growth.

On May 12, 2014, the NLRB issued an invitation to the public to file amicus briefs in *Browning-Ferris Industries* on whether the Board should revisit its 30 year-old joint employer standards, and on June 29 the NLRB's general counsel announced that it will move forward with 43 cases where McDonald's USA has been named a joint employer with franchisees. The changes the Board is considering making to the joint employer standard threaten to disrupt decades of established law that has paved the way for franchisors, franchisees, contractors, and subcontractors to create millions of jobs and allowed hundreds of thousands to achieve the American dream of owning their own small business. The Board's actions could severely and negatively impact entrepreneurial opportunities and job creation, and threaten our already fragile economy.

CDW urges the Committee and the House of Representatives to explore this issue and, where appropriate, take action to protect the jobs and business models reliant on the joint employer standard for the last 30 years. We look forward to working with you on this important matter.

Sincerely,

Geoffrey Burr
Chair, the Coalition for a Democratic Workplace

IFA INTERNATIONAL FRANCHISE ASSOCIATION | FRANCHISING Building local businesses, one opportunity at a time.

September 9, 2014

The Honorable Phil Roe
Chairman, Subcommittee on Health, Employment, Labor, and Pensions
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515

The Honorable John Tierney
Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions
U.S. House of Representatives
2101 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Roe and Ranking Member Tierney,

On behalf of the International Franchise Association, I want to thank you for holding the subcommittee hearing today entitled, "Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?" We believe that this hearing is essential to examine the impact a revised joint employer standard will have on employers, in particular the 770,000 franchise establishments in the United States that employ over 8.5 million Americans.

In July, the National Labor Relations Board's (NLRB) Division of Advice announced that it would consider McDonald's Corporation a joint employer of its franchisees' employees in complaints alleging unfair labor practices by franchise owners. This announcement demonstrates a fundamental and intentional misunderstanding of the basic elements of the franchise relationship, and also sets aside decades of precedent relating to joint employer status.

Every franchise has brand standards that benefit all franchisees, but those controls do not extend to the day-to-day management of franchise locations. While franchisors do institute some controls to maintain quality and continuity, it is the individual franchisees that perform the essential employer functions, including hiring, setting wages and benefits, and creating work schedules and conditions.

The NLRB has consistently and unambiguously ruled that the controls exerted by franchisors to maintain brand standards do not sustain a finding of joint employment. In cases dating back over 40 years, the Board has never treated franchisees and franchisors as joint employers. In a 1968 case, *The Southland Corporation*, the Board carefully analyzed whether a 7-Eleven franchisee's use of the trade name and operational system made Southland a joint employer. As the Board noted, the critical factor in determining whether joint employment exists is the control the franchisor exercised over the labor relations policy of the franchisee. In another 1968 case involving automobile franchises, *Tilden, S.G., Inc.*, the Board found that standardized operational requirements merely kept the quality of the brand from being eroded and again did not indicate joint employment under the National Labor Relations Act.

Similarly, in the 1979 case *Love's Barbeque*, the Board found that a franchise agreement requiring "strict compliance" with standard operating procedures and policies was not enough to sustain a joint employer finding. Those procedures and policies were necessary to achieve uniformity throughout the chain.

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The need for operational uniformity is not enough to establish a joint employer relationship. A joint employer finding is only justified when the franchisor is in a position to control the franchisee's labor relations. However, the NLRB's General Counsel attempt to use operational control as the main factor for finding joint employment in its brief in the current *Browning-Ferris* case changes decades of precedent for franchisors and franchisees.

It is important to note that the fundamentals of franchising have not changed in the decades since these decisions. Franchisors and franchisees still maintain the same separation of responsibilities that they did when the Board first addressed joint employer status in franchise relationships in 1968. Instead, it seems that the NLRB is working backwards from a desired conclusion that allows unions to add to their membership rolls and allows plaintiffs to reach into deeper pockets in for damages in lawsuits.

If franchisors are considered joint employers of franchisees' employees, it will have a disastrous impact on franchising. Franchisors will necessarily take measures to protect against increased liability for franchisee actions, reducing the independence of franchise owners. Fewer new franchise locations will open, as entrepreneurs will see a reduced value in a business that is no longer considered independent. Franchisees, and all the workers they employ, will be put at risk by such a radical change to established employment policy. Franchisors will also take on enormous costs to ensure compliance, putting them in serious jeopardy, because the will have all of the risk without any of the rights to alter them.

Thank you for your attention to this critical issue.

Sincerely,

Robert C. Cresanti

The Honorable Robert C. Cresanti, Esq.
Executive Vice President, Government Relations & Public Policy
International Franchise Association

NATIONAL
RESTAURANT
ASSOCIATION

September 8, 2014

Phil Roe, Chairman
Health, Employment, Labor, and Pensions Subcommittee
Education and the Workforce Committee
U.S. House of Representatives

Re: Hearing on "Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?"

Dear Chairman Roe:

On behalf of the National Restaurant Association, we want to thank you for the oversight your Subcommittee is providing through today's hearing on "Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?" We would also like to ask you to introduce our comments for the record.

The National Restaurant Association is the leading business association for the restaurant and foodservice industry. The Association's mission is to help members build customer loyalty, rewarding careers and financial success. Nationally, the industry is made up of 990,000 restaurant and foodservice outlets employing 13.5 million people—about ten percent of the American workforce. Despite being an industry of mostly small businesses, the restaurant industry is the nation's second-largest private-sector employer.

We endorse the testimony of Catherine Monson, Chief Executive Officer of FASTSIGNS® International, Inc., particularly as she highlights the threat the potential changes to the joint-employer relationship being considered by the National Labor Relations Board (NLRB) would pose to franchisees and franchisors alike. Her concerns are shared by those in the restaurant and hospitality industry that we represent. The ongoing attempts by the NLRB to change the joint-employer standard would be bad for workers, employers, franchises, and the economy.

At the hearing on June 24, 2014, on "What Should Workers and Employers Expect Next From the National Labor Relations Board?" witnesses were told that there was nothing to fear and that the NLRB would be impartial. In fact, Ranking Member John Tierney stated, "I'm a little baffled…I don't think this will be a problem for [CKE Restaurants]…I haven't heard any evidence that indicates to me that there is any reason to believe that this board won't be fair minded."

However, the concerns raised by the witnesses were both real and well founded. Not long after the hearing, in an undisclosed opinion from the General Counsel of the NLRB, he authorized dozens of complaints against McDonald's Franchisees and McDonald's USA, LLC, to proceed, as alleged joint employers on pending unfair labor practice charges—even though, McDonald's USA, LLC, does not control labor relations at its franchised stores.

This is significant because the joint-employer standard has not been changed. The NLRB's General Counsel's opinion provides further proof that the NLRB is getting ready to assail the joint-employer standard that has been the bedrock of the franchisor/franchisee model for the last three decades. In May of this year, in the *Browning-Ferris* case (32-RC-109684), the NLRB issued a notice calling for briefs from interested parties to address whether the NLRB should obey the legally established joint-employer standard or create a new one.

Briefs from interested parties were due a few weeks before the NLRB's General Counsel issued his opinion in the cases involving the McDonald's franchisees. In fact, the NLRB's General Counsel submitted its own brief asking for a change in the joint-employer standard. We joined others in the business community in submitting our own comments to implore the NLRB not to change settled law as it pertains to the joint-employer standard.

It is a troubling precedent for the NLRB's General Counsel to make his determinations BEFORE the law was even changed given that the NLRB has yet to reach a decision in the *Browning-Ferris* case.

On June 24, 2014, Ranking Member Tierney could have argued that he did not see "any evidence that indicates to me that there is any reason to believe that this board won't be fair minded." But, the press statement of July 29, 2014, from the NLRB's Office of the General Counsel announcing that it determined McDonald's USA, LLC, is a joint-employer in complaints against McDonald's franchisees is a clear smoking gun that anyone still questioning the board's motives should be able to see.

Once again, we thank you for your leadership on this issue and would like to offer our help to protect the current joint-employer standard. As stated, the changes envisioned by the NLRB and its General Counsel would be detrimental not only to the franchise model, but to the economy as a whole.

Sincerely,

Angelo I. Amador, Esq.
Vice President
Labor & Workforce Policy

Ryan P. Kearney
Manager
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September 23, 2014

Hon. David P. Roe, Chairman
Subcommittee on Health, Employment, Labor & Pensions
Committee on Education and the Workforce
United States House of Representatives
Washington, DC 20515

Dear Chairman Roe:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, appreciates this opportunity to provide a statement for the record as part of the Subcommittee's September 9, 2014 hearing entitled "Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?" The purpose of this letter is to provide you with a summary of our members' concerns regarding the National Labor Relations Board's efforts to overturn its long-standing "joint employer" standard.

The National Labor Relations Act is a vital law which is designed to strike a balance between the rights of workers, employers and unions. Unfortunately, over the last few years, the Board has upset this delicate balance by overturning decades of precedent and pursuing one-sided regulatory initiatives. As detailed below, the Board's recent efforts to overturn its joint employer standard is simply the latest example of this radical policy shift. Consequently, we wish to thank you for holding a hearing on this important subject in particular and making NLRB oversight a priority. We look forward to working with you and other members of the Subcommittee on these issues in the coming months.

I. Summary

The National Labor Relations Board ("NLRB" or "Board") is attempting to redefine what it means to be an employer. Through two separate vehicles, the Board and its General Counsel are attempting to upend the Board's longstanding "joint employer" standard. This is a complicated but important issue that will have a significant impact on Chamber members and the business community in general.

While the Board's recent joint employer allegations involving McDonald's have received much of the attention, a change in the joint employer standard would have the potential to extend far beyond the circumstances of those cases, and threatens to impact any business which uses non-traditional workplace arrangements (e.g., franchise arrangements, temporary workers, subcontractors, etc.). Countless industries would be impacted by the

Board's actions. They include, but are not limited to, restaurants and other franchises, construction, healthcare, hospitality, employment services companies and logistics companies.

As explained more thoroughly below, if the Board is successful in changing the joint employer standard, businesses that franchise or use subcontractors or temporary workers will be susceptible to increased liability and litigation. Worse, a bad ruling by the Board could permeate other areas of employment law such as wage and hour and workplace discrimination law.

II. The Board's Current "Joint Employer" Standard

Under the National Labor Relations Act, two separate and independent business entities are considered "joint employers" when they "share or codetermine those matters governing the essential terms and conditions of employment." *Laerco Transportation*, 269 NLRB 324, 325 (1987). For example, a factory owner may be considered the "joint employer" of janitorial workers who perform services in the factory but who are directly employed by a separate outside vendor if the factory owner participates in the hiring, firing and discipline of the workers, sets their work schedules, and directs and supervises the work to be performed.[1]

For over 30 years, the Board has maintained a clear test for determining whether two separate companies are joint employers.[2] The test is whether the putative joint employer[3] exercises direct and immediate control over the employees at issue. This direct control is generally understood to include the ability to hire, fire, discipline, supervise and direct.[4] The test is very fact-intensive and no one factor is particularly more compelling or persuasive than another.

Over the years, employers, employees and unions have come to rely upon the predictable application of the standard, and the Board has rejected several efforts to upend this consistent standard. The result is 30 years of unbroken NLRB jurisprudence which holds that <u>two entities are "joint employers" only when they share direct and immediate control over the same employees</u>. For example, even where there is evidence of integration of certain operations between a putative joint employer and a direct employer, the Board and federal courts have found that two entities were *not* joint employers in the following situations:

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[1] In this way, the phrase "joint employer" should not be confused with "single employer" – a similar but different labor law term of art – which addresses the question of whether two supposedly separate employers are actually one employer. The test for determining whether two entities are actually the same, "single employer" involves an analysis of the following factors: (1) inter-relation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. *See, e.g., NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982).

[2] "Prior to 1982 when the United States Court of Appeals for the Third Circuit decided NLRB v. Browning-Ferris Industries, 691 F.2d 1117 (3d Cir. 1982), the Board's analysis of what constituted a joint employer relationship was somewhat more amorphous." *The Goodyear Tire & Rubber Co.*, 312 NLRB 674, 676 (1993).

[3] For purposes of this document, the phrase "putative joint employer" shall refer to the employer which is alleged to meet the legal standards of constituting a joint employer.

[4] The test adheres to the agency principles that Congress instilled in the Taft-Hartley Act in 1947, which changed the definition of "employer" from "any person acting in the *interest* of the employer," to "any person acting as an *agent* of the employer." 29 U.S.C. § 152(2)(emphasis added).

- Where the putative joint employer owned the facility used by the direct employer, placed its logo on the uniforms and trucks of the workers, and provided equipment necessary for the work. *Airborne Express*, 338 NLRB 597 (2002).

- Where the putative joint employer engaged in "limited and routine" supervision of work and retained the contractual right to approve hires by the direct employer. *AM Property Holding Corp.*, 350 NLRB 998, 1000 (2007).

- Where the putative joint employer engaged in "limited supervision" of the direct employer's employees and also participated in collective bargaining. *AT&T v. NLRB*, 67 F.3d 446, 451-452 (2d Cir. 1995).

In each of these cases, there was no finding of joint employer status because the two companies did not share direct and immediate control over the terms and conditions of employment. On the other hand, where two entities share a sufficient degree of control and direction over the employees at issue, the Board has found that the joint employer standard was met in the following cases:

- Where the putative joint employer disciplined, terminated, and set work assignments of the direct employer's employees and also participated in decisions involving employee incentive awards. *Aldworth Co.*, 338 NLRB 137, 140 (2002).

- Where the putative joint employer hired the direct employer's employees, authorized their overtime and "conducted an informal grievance meeting concerning one of the employees." *Computer Assoc. Int'l, Inc.*, 332 NLRB 1166, 1167 (2000).

- Where the putative joint employer, in addition to other indicia of control, "through the constant presence of the site superintendents and a high degree of detailed awareness and control of unit employees' daily activities, exercise[d] substantial supervisory authority over unit employees." *Quantum Resources Corp.*, 305 NLRB 759, 760 (1991).

There are good policy reasons why the current standard has been in place for over 30 years. The current standard ensures that the putative joint employer is actually involved in matters that fall within the Board's purview, to wit, the employment relationship. Accordingly, the putative joint employer is required to come to the bargaining table only when it actually controls terms and conditions of employment – the very issues that will be the subject of bargaining.

As explained more fully below, depending on the circumstances, a large company may have contractual relationships with hundreds or thousands of franchisees, vendors and contractors. The current direct control test ensures that such companies will not be embroiled in labor negotiations or disputes involving employees and workplaces over which they have little or no control. Indeed, it makes senses to impute liability – as the current standard does – only in those cases in which an employer is in a position to investigate and remedy unlawful actions.

III. Current Board Efforts to Upend the Joint Employer Test

A. The McDonald's *and* Browning-Ferris *Cases.*

Since the establishment of the current well-defined standard, labor unions and their allies on the Board have advocated a return to a looser, ambiguous joint employer test which would make it easier to enmesh multiple employers in labor disputes and organizing campaigns. *See Airborne Express*, 338 NLRB at 597 n. 1 (rejecting then-Member Liebman's suggestion to revisit joint employer standard). Now, however, with the rise of worker centers[5] and a locked-in Democrat majority at the Board, there is a new concerted effort by the NLRB to topple the existing standard. The Board is trying to change the current standard through two different cases:

- McDonald's. On July 29, 2014, the Board's Division of Advice recommended that the General Counsel issue complaints against McDonald's USA LLC for the employment decisions of individually owned-and-operated franchised restaurants. The pending complaints stem from charges filed by employees who claim that their rights were violated when they were disciplined for walking off the job to support minimum wage protests orchestrated by the Service Employees International Union (SEIU). In filing the charges against the individually-owned McDonald's franchisees, these charges also named McDonald's USA LLC as a joint employer. The recommendation upends decades of established Board law governing joint employers and has applications beyond both the franchise model and the NLRA.

- Browning-Ferris. At the same time that the decision to issue complaints against McDonald's USA LLC was likely being formulated in the General Counsel's office, the Board took its own steps to reconsider the current joint employer standard. In *Browning-Ferris*, Leadpoint Business Services provided workers to perform recycling and cleaning duties at a facility operated by Browning-Ferris. The Teamsters filed a representation petition, asking the Board to hold an election of employees of *both* Leadpoint and BFI, claiming that the two entities were joint employers. The NLRB Acting Regional Director applied the existing joint employer test and determined that Leadpoint was the sole employer of the employees at issue. The union appealed the Acting Regional Director's ruling to the Board, claiming that BFI and Leadpoint were joint employers under the current standard, and that if they were not, the Board

[5] *See*, THE NEW MODEL OF REPRESENTATION: AN OVERVIEW OF LEADING WORKER CENTERS, http://www.workforcefreedom.com/sites/default/files/WFI%20Worker%20Center%20Study%20-%20New%20Model%20of%20Representation.%20Final%20version%20downloaded%202.20.14.pdf; THE EMERGING ROLE OF WORKER CENTERS IN UNION ORGANIZING, http://www.workforcefreedom.com/sites/default/files/WFI%20Manheim%20Study%2011-21-2013.pdf; LABOR ORGANIZATIONS BY ANOTHER NAME, http://www.fed-soc.org/publications/detail/labor-organizations-by-another-name-the-worker-center-movement-and-its-evolution-into-coverage-under-the-nlra-and-lmrda;

should reconsider the standard. The Board has invited stakeholders to submit comments on whether a change in the standard is appropriate.[6]

Both the *McDonald's* and *Browning Ferris* cases indicate the Board's clear intention to overturn its current joint employer test in favor of a looser test that will have a negative impact on employers. Such a standard will result in instability and uncertainty.

B. The Board's Likely New Standard

As noted above, the Board has not actually decided anything yet or articulated a new standard. However, the *amicus* brief submitted by the Board's General Counsel in the *Browning-Ferris* case likely foreshadows what the new joint employer standard may be. In the brief, the General Counsel proposes the following test for establishing joint employer status:

> "[W]here, under the totality of the circumstances, including the way the separate entities have structured their commercial relationship, the putative joint employer wields sufficient influence over the working conditions of the other entitity's employees such that meaningful bargaining could not occur in its absence"

See General Counsel brief at page 17.

The brief advocates "a return to the Board's traditional approach" which, in the past, the Board itself has described as "amorphous."[7] Rather than the existing standard which focuses on the direct and immediate control of the employees, the General Counsel proposes finding joint employers even when there is only *indirect* control of employees.

This "indirect control" standard means that joint employer status could be found simply through the existence of a contractual agreement between a company and its contractor or vendor. For example, the structure of certain contracts may result in the putative joint employer influencing the direct employers' operations by setting certain production or safety standards or wage reimbursement rates. In such a situation, the General Counsel's argument goes, "meaningful" collective bargaining cannot occur absent the participation of the putative joint employer.[8] Essentially, almost any economic or contractual relationship could trigger a finding of joint employer status under the proposed new standard.

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[6] The Chamber submitted an *amicus* brief here: http://www.chamberlitigation.com/sites/default/files/cases/files/2014/U.S.%20Chamber%20Amicus%20Brief%20--%20Browning%20Ferris%20Industries%20of%20California%20%28NLRB%29.pdf. Additionally, the Chamber signed on to the brief submitted by the Coalition for a Democratic Workplace here: http://myprivateballot.com/wp-content/uploads/2012/10/Brown-Ferris-Brief-Amici-Curiae.pdf

[7] *See* Footnote 2, supra.

[8] Proponents of the indirect control standard continue to advance this line of reasoning despite the fact that the Board has ruled that vendors, suppliers and contractors are free to pay wage rates that are higher than the reimbursement rates provided for in their agreements with the putative joint employer. *See Management Training Corp.*, 317 NLRB 1355, 1356 (1995). In fact, the Regional Director in *Browning-Ferris* noted that the direct employer was not prohibited from paying its employees over and above the reimbursement levels in its contract with Browning-Ferris. *See* Decision and Direction of Election, 32-RC-109684, pg. 15.

IV. Impact of a Change in the Joint Employer Standard on Employers

The NLRB's actions in both *McDonald's* and *Browning-Ferris* will have direct impacts in the labor law context. Some potential direct negative impacts of a joint employer standard which focuses on "indirect control" include the following:

1. Corporate Campaigns. Being able to characterize large, well-known businesses as the "employer" of a targeted group of workers who are employed by smaller, lesser-known businesses, will encourage unions to launch very public organizing campaigns in hopes that the larger employer will bend to public pressure and recognize the union. A national card check/neutrality agreement extracted from a nationally-recognized brand could be used to quickly organize smaller local affiliates or franchisees.

2. Liability under the National Labor Relations Act. The putative joint employer would be liable for labor violations committed by the direct employer, even though the putative joint employer exerts no control over the employees of the direct employer or how the direct employer manages its labor relations.

3. Collective Bargaining. If the direct employer is organized, the putative joint employer would have to participate in collective bargaining. Depending on the circumstances, the putative joint employer could be dragged into bargaining relationships with hundreds of entities over whose day-to-day operations they have no control. The union could require the putative joint employer to supply information relevant to bargaining, including wage and benefit data for its employees.

4. Secondary boycotts. The NLRA's prohibition on secondary boycotts means that if a union has a dispute with one employer (e.g., a janitorial services company), it cannot entangle other employers in the dispute (e.g., the factory owner that contracts with the janitorial services company). This distinction would likely be eviscerated under the potential new standard, and unions could picket and demonstrate against both entities.

5. Effects Bargaining. Under the NLRA, unionized employers retain the inherent managerial right to unilaterally determine whether to downsize or shutdown its business. However, the law requires the employer to bargain about the decision's effects on unit employees. Accordingly, an employer must provide the union with notice of such a decision, as well as an opportunity to bargain about issues such as severance pay, or health coverage for displaced workers. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). Under a new joint employer standard, should an entity wish to terminate an existing services contract for whatever reason – such as poor performance or to reduce costs – it could be required to engage in effects bargaining with the union who represents the workers who are employed by that particular service provider. *See W.W. Grainger*, 286 NLRB 94, 97 (1987). This will erode both economic competition and employers' flexibility.

V. Potential Ramifications Under Other Employment Statues

Furthermore, although a new test established by the NLRB would not be binding on other agencies, it will likely be persuasive, and the new expansive standard could be applied by the Department of Labor, the Equal Employment Opportunity Commission and other agencies' enforcement efforts. Plaintiffs' attorneys will also be eager to explore how they may exploit a new standard. If the current joint employer standard is relaxed, some negative effects beyond the NLRA include the following:

1. Threshold employer coverage. Many statutes, such as the Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act have small business exceptions and only apply if an employer has a certain number of employees. By loosening the joint employer standard, employer coverage under such statutes will explode.[9] This would essentially eliminate carefully-negotiated small business exceptions in these federal statutes.

2. Discrimination law. In its amicus brief submitted in the *Browning-Ferris* case, the EEOC notes that "the Board's joint employer standard influences judicial interpretation of Title VII." If the Board adopts a new, looser joint employer standard, this might encourage both the EEOC and the plaintiffs' bar to stretch the bounds of the law in an effort to entangle more employers in discrimination lawsuits.[10] Importantly, compensatory damages are capped under Title VII, and the caps generally increase as the number of employees increases. Thus, the plaintiff's bar will be encouraged to establish joint employer status because doing so could increase the number of employees, thereby increasing the amount of available damages.

3. Wage and Hour issues. Employers who use subcontractors may be liable for the subcontractor's wage-and-hour violations if it is determined they are a joint employer of the employee. Because of the broad definitions in both the Fair Labor Standards Act and its implementing regulations, most federal courts already use a more expansive "economic realities" test in wage and hour cases.[11] However, some circuits' tests are more restrictive than others and all tests focus on the element of control. Accordingly, both the Wage & Hour Division and the plaintiffs' bar will likely look to see how they may exploit any new joint employer standard adopted by the Board. It is

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[9] *See* EEOC COMPLIANCE MANUAL, SECTION 2: THRESHOLD ISSUES ("To determine whether a respondent is covered, count the number of individuals employed by the respondent alone *and* the employees jointly employed by the respondent and other entities. If an individual is jointly employed by two or more employers, then s/he is counted for coverage purposes for *each* employer with which s/he has an employment relationship.")

[10] By now, it has been well-documented that the EEOC is more than willing to pursue questionable litigation theories. *See "Part II: EEOC's Unsuccessful 2013 Amicus Program"* in U.S. Chamber, *"A Review of EEOC Enforcement and Litigation Strategy During the Obama Administration – A Misuse of Authority."* June 2014, https://www.uschamber.com/sites/default/files/documents/files/021449_LABR%20EEOC%20Enforcement%20Paper.pdf .

[11] A similar test is used with regard to Family and Medical Leave Act cases. *See Moreau v. Air France*, 356 F.3d 942 (9th Cir. 2004)(applying FLSA joint employer factors in an FMLA case to conclude that Air France was not a joint employer with various ground handling service companies and therefore exempt from scope of FMLA). However, "only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits." 29 CFR 825.106(c).

no secret that the current Wage and Hour Administrator, David Weil, has a strong distaste for alternative workplace arrangements.[12]

4. Occupational Safety and Health Administration (OSHA) issues. An expansion of the joint employer standard may also provide an opportunity for OSHA to ratchet up fines against a parent company for repeated violations. For example, the same safety violation occurring at several different franchisees could be considered repeat violations if the franchisor is considered to be a joint employer with each of the franchisees. Also, OSHA has recently launched an effort to target workplaces that use outside sources for their workers such as temporary staffing agencies or services. If the new joint employer model advances, OSHA's ability to cite the host employer would be enhanced which could be used by unions as leverage against employers who have been targeted for organizing.

5. Affordable Care Act Issues. Under the health care law's employer mandate, any employer with 50 or more "full-time equivalent employees" (FTEs) must provide a certain mandated level of health care coverage to all full-time employees and their dependents, or potentially face a penalty. The employer mandate takes effect in 2015 for businesses with 100 or more FTEs, and in 2016 for businesses with 50 to 99 FTEs. If the current joint employer standard is changed, individual franchises falling well below the employer mandate threshold and small businesses that depend on independent contractors or temporary workers could soon have to comply with the employer mandate's requirements. They would not only be on the hook for providing coverage to all of their full-time employees (and dependents), but would also have to ensure that the coverage meets the new affordability and minimum value standards of the ACA. Since the formula for determining FTEs includes full-time employees and hours worked by part-time employees, figuring out if these new "joint employer" entities are subject to the employer mandate will be an extreme burden because the requisite record keeping by each organization involved may not be complete. The franchise and temporary worker/subcontractor communities will be particularly hit hard since they use high numbers of part-time workers that might now be considered "full-time" under the new definition of full-time work in the ACA as 30 hours per week.

6. Blacklisting in Federal Contracting. On July 31 President Obama signed Executive Order 13673, "Fair Pay and Safe Workplaces," which seeks to use the federal procurement process as a vehicle to create additional remedies for labor and employment law violations.[13] The Order would require federal contractors and subcontractors seeking to obtain federal contracts or subcontracts worth $500,000 or

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[12] *See* David Weil, *Enforcing Labor Standards in Fissured Workplaces: The U.S. Experience*, 22 THE ECON. & L. REL. REV. 33, 44 (2011)("Strategic enforcement should therefore focus on higher-level, seemingly more removed business entities that affect the compliance behaviour 'on the ground' where vulnerable workers are actually found").

[13] The Chamber has been steadfast in its opposition to federal contracting blacklisting proposals. *See, e.g.*, Randel K. Johnson, U.S. Chamber of Commerce, *Comments on U.S. Department of Agriculture Direct Final Rule (DFR)(76Fed. Reg. 74,722) and Notice of Proposed Rulemaking (NPRM)(76 Fed. Reg. 74,755) covering "Labor Law Violations" (RIN 0599-AA19)* (January 24, 2012). Available at: https://www.uschamber.com/sites/default/files/documents/files/120124usdablistcommentsDFR.pdf

more to disclose violations that occurred within the last 3 years. The reportable violations include "administrative merits determinations," "arbitral awards or decisions," and "civil judgments" issued under the following 14 federal labor employment laws and their state equivalents:

a. Fair Labor Standards Act
b. Occupational Safety and Health Act of 1970
c. Migrant and Seasonal Agricultural Worker Protection Act
d. National Labor Relations Act
e. Davis-Bacon Act
f. Service Contract Act
g. Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity)
h. Section 503 of the Rehabilitation Act of 1973
i. Vietnam Era Veterans' Readjustment Assistance Act of 1974
j. Family and Medical Leave Act
k. Title VII of the Civil Rights Act of 1964
l. Americans with Disabilities Act of 1990
m. Age Discrimination in Employment Act of 1967
n. The President's February 12, 2014 federal contractor minimum wage Executive Order (No. 13658)

During the bidding process, the contracting officer will then take these violations more closely into account when evaluating whether the company satisfies the requirement for having a satisfactory record of integrity and business ethics. The phrase "administrative merits determinations" could include NLRB General Counsel complaints, EEOC cause determinations and other non-final agency actions. This amorphous reporting requirement is bad enough on its own, but becomes worse when contemplating the Board's current actions. For example, an expansion of the joint employer concept could require a contractor to report, as part of the federal contract bidding process, on labor or wage and hour violations committed by the vendors with whom it contracts to supply cleaning or security services. Considering that federal contractors likely have hundreds or thousands of relationships with subcontractors and vendors, a change in the joint employer standard will exacerbate the bad policy results of the Executive Order.

VI. Economic Impacts

In an increasingly competitive economy, companies make decisions on a daily basis to adapt, change and find unique advantages over their competitors. As part of this decision-making, companies often find that certain functions of the workplace – such as logistics, information technology, human resources, etc. – can be more efficiently performed by an outside vendor. The Board's current joint employer test strikes the right balance in these situations by allowing the putative joint employer the ability to monitor and oversee the performance of its subcontractors and vendors, while ensuring that employees have a right to bargain with the employer that actually controls the terms and conditions of employment.

Unfortunately, these contractual relationships would become less attractive under a new joint employer standard, as a company could be considered a joint employer simply for setting operational or performance standards in an agreement with a vendor or supplier. Because myriad liabilities and obligations – including the duty to bargain – attach to a finding of joint employer liability, employers could respond in very different ways.

First, some employers may determine that, as long as they are going to be held liable for the actions of their subcontractor or vendor, they must exert more control over the day-to-day operations of the vendor. The *McDonald's* case illustrates how this could be particularly devastating to both franchisors and franchisees. Franchisors would have to exert themselves into the decision-making process regarding issues such as hiring/firing, compensation, training, and labor costs. Even if this were possible for certain franchisors, the costs of exerting this control would be astronomical. For the franchisees, they would be relegated to partners or employees of a business over which they worked so hard to build.[14] Ultimately, this would discourage both existing companies and entrepreneurs from participating in the franchise business model.

Conversely, employers could try to avoid a finding of joint employer liability altogether by further distancing themselves from their subcontractors. This could have unintended negative consequences as employers might choose to remove certain labor, safety or environmental standards from the agreements with subcontractors in order to avoid a joint employer finding.

Finally, employers could choose to cancel or eliminate these relationships which will most directly impact small businesses and independently-owned operations. Ultimately, the "indirect control" test as advanced by the General Counsel and union in the *Browning-Ferris* case would limit employer flexibility and competition at a time when the economy continues to experience anemic economic growth.

VII. Changing the Joint Employer Standard is the Latest Example of the Board's Overreach

Of course, the Board's efforts to upend its joint employer standard do not occur in a vacuum. Rather, this is just the latest attempt by the Board and the Administration to dramatically overhaul labor law in favor of their union allies. Set forth below are several examples of such actions taken by the Board and the Administration.

- Unconstitutional Appointments to the Board. In June of this year, the Supreme Court in *Noel Canning* unanimously ruled that President Obama exceeded his constitutional authority when he appointed Sharon Block and Dick Griffin to the NLRB while the Senate was in session.[15] During their time as unconstitutionally appointed members of the Board, Griffin and Block participated in numerous decisions which departed

[14] *See* testimony of Jagruti Panwala, Hotel Owner and Operator. "*Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?*" HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE; HEALTH, EDUCATION, LABOR & PENSIONS SUBCOMMITTEE, September 9, 2014.

[15] The U.S. Chamber Litigation Center represented Noel Canning, a member of the Chamber, in the Supreme Court, and served as co-counsel to Noel Canning alongside the law firm Jones Day.

radically from Board precedent and which were harmful to the employer community. Making matters worse, Griffin in now the Board's General Counsel and Block has been re-nominated to serve as a member of the Board.

- Ambush Elections. The Board has again proposed changes to its election procedures which will dramatically shorten the time period between the filing of a representation petition and the actual election. It will also require employers to hand over to union officials and the NLRB personal contact information about employees, even if the employees wish to keep such information private. Like the Employee Free Choice Act, the goal of the proposal is to limit an employer's ability to communicate with its employees about the pros and cons of unionization. Given that the Board's own statistics demonstrate that 94% of elections are held within 56 days, this endeavor is nothing more than a sop to the labor unions whose membership numbers continue to crater.[16]

- Fractured Workplaces. The Board has overturned it long-standing criteria for determining an appropriate bargaining unit under the NLRA. Under *Specialty Healthcare* and its progeny, unions can now gerrymander bargaining units into very small micro-units of known union adherents. This has already lead to a Balkanizaton of the workforce,[17] and will potentially saddle an employer with multiple unions, multiple bargaining agreements (with potentially different pay scales, benefits, work rules, bargaining schedules, and grievance processes for similarly situated employees) and increased chances of work stoppages.[18]

- Mandatory, Biased Posters. In an ill-advised rulemaking, the Board attempted to promulgate a regulation which would have required employers to post a biased notice of labor rights in their workplaces. The regulation created a new unfair labor practice out of whole cloth for an employer's failure to post the notice. Fortunately, the federal courts prevented the Board's power grab, as one federal court of appeals – in a case filed by the Chamber – ruled that the Board had no statutory authority to issue the regulation,[19] and another court of appeals ruled that the regulation violated the First Amendment.

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[16] The Chamber's comments to the Board's ambush election proposal are here: https://www.uschamber.com/sites/default/files/documents/files/NLRB%202011%200002%20US%20Chamber%20of%20Commerce.pdf

[17] *See Macy's*, 361 NLRB No. 4 (2014)(finding appropriate the union's petitioned-for unit of only the cosmetics and fragrance employees at a Macy's department store).

[18] The Chamber's amicus brief which urged the U.S. Circuit Court of Appeals for the 6th Circuit to overturn *Specialty Healthcare* is here: http://www.chamberlitigation.com/sites/default/files/cases/files/2012/Kindred%20Nursing%20Centers%20East%2C%20LLC%2C%20fka%20Specialty%20Healthcare%20v.%20NLRB%2C%20et%20al.%20%28NCLC%20Amicus%20Brief%29.pdf

[19] The opinion of the U.S. Circuit Court of Appeals for the 4th Circuit is here: http://www.chamberlitigation.com/sites/default/files/cases/files/2011/Opinion%20--%20Chamber%20of%20Commerce%20et%20al%20%20v%20%20NLRB%20%28Posting%20Rule%29%20%28Fourth%20Circuit%29.pdf

- Union Access to Employer Email. Through the *Purple Communications* case, the Board is considering overturning another longstanding, bright-line test regarding employee use of employer emails systems for non-work purposes.[20] Currently, employers retain a property interest in their email systems and are permitted to limit employee use of such systems for work purposes only. The Board is expected to overturn this rule and prohibit employers from maintaining a rule which limits email use. Such a ruling would infringe on employers' property interests to prohibit personal use of its email system in order to maintain production, ensure protection from computer viruses, and limit its exposure to legal liability.

- Expansive Application of Section 7. The Board has undertaken a specific agenda which is intended to severely limit employers' abilities to effectuate rules and policies in their workplaces. The Board has accomplished this by expanding its interpretation of "protected activity" under Section 7 of the National Labor Relations Act (NLRA or Act). In this way, the Board has dramatically expanded its role beyond being a neutral arbiter of labor disputes to become an agency which now concerns itself with second-guessing employers' HR policies. For example, in *Karl Knauz Motors, Inc.*,[21] the Board invalidated an employer's common sense rule which encouraged courteous behavior on the sales floor of a car dealership. Additionally, in *Plaza Auto,*[22] an employee berated the owner of the car company for which he worked, calling him a "f*****g crook" an "a***hole" and telling him he would regret it if he was fired. The Board determined that the termination was unlawful and violated the employee's Section 7 rights because it occurred during a discussion over working conditions.

VIII. Conclusion

While a new joint employer standard will have significant implications in the labor-management realm, a new standard has the potential to extend beyond just the *Browning-Ferris* and *McDonald's* cases and the NLRB. Clever agency enforcement officials and plaintiffs' attorneys will undoubtedly explore any avenue to expand and apply a relaxed joint employer standard to their own particular circumstances, resulting in devastating consequences for both employers and employees. Unfortunately, discarding a doctrine that has worked consistently well for over 30 years in order to increase union organizing opportunities and plaintiffs' attorneys' prospects has become *de rigueur* for an agency that is supposed to be a neutral arbiter of labor disputes.

We wish to thank you for taking the time to hold this important hearing on NLRB oversight. These comments only begin to summarize the very great concern that we have with the NLRB's policy agenda. We look forward to working with you as you continue to examine these important issues. Please do not hesitate to contact us if we may be of assistance in this matter.

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[20] The Chamber's *amicus* brief in the *Purple Communications* case is here: http://www.chamberlitigation.com/sites/default/files/cases/files/2014/Chamber%20Amicus%20Brief%20--%20Purple%20Communications%2C%20Inc.%20%28NLRB%29.pdf

[21] 358 NLRB No. 164 (Sept. 28, 2012).

[22] 360 NLRB No. 117 (May 28, 2014)

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits

James Plunkett
Director
Labor Law Policy

[Whereupon, at 11:42 a.m., the subcommittee was adjourned.]