

PROVIDING FOR CONGRESSIONAL DISAPPROVAL UNDER CHAPTER 8 OF TITLE 5, UNITED STATES CODE, OF THE RULE SUBMITTED BY THE NATIONAL LABOR RELATIONS BOARD RELATING TO “STANDARD FOR DETERMINING JOINT EMPLOYER STATUS”

JANUARY 3, 2024.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Ms. FOXX, from the Committee on Education and the Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.J. Res. 98]

The Committee on Education and the Workforce, to whom was referred the joint resolution (H.J. Res. 98) providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Labor Relations Board relating to “Standard for Determining Joint Employer Status”, having considered the same, reports favorably thereon without amendment and recommends that the joint resolution do pass.

PURPOSE

The purpose of H.J. Res. 98 is to disapprove of the rule related to “Standard for Determining Joint Employer Status” that was first announced on September 7, 2022, and published as a final rule in the Federal Register on October 27, 2023.

COMMITTEE ACTION

113TH CONGRESS

Second Session—Hearings

On June 24, 2014, the Subcommittee on Health, Employment, Labor, and Pensions (HELP) held a National Labor Relations Board (NLRB or Board) oversight hearing titled “What Should Workers and Employers Expect Next from the National Labor Relations Board?” Witnesses were Mr. Andrew F. Puzder, CEO, CKE Restaurants Holdings, Inc., Carpinteria, CA; Mr. Seth H. Borden,

Partner, McKenna Long & Aldridge, New York, NY; Mr. James B. Coppess, Associate General Counsel, AFL—CIO, Washington, D.C.; and Mr. G. Roger King, Of Counsel, Jones Day, Columbus, OH. Witnesses discussed upcoming NLRB cases and policy and cited changes to the joint employer standard as one of the most significant and controversial issues before the Board at that time.

On September 9, 2014, the HELP Subcommittee held a hearing on potential changes to the NLRB’s joint employer standard titled “Expanding Joint Employer Status: What Does It Mean for Workers and Job Creators?” Witnesses were Mr. Todd Duffield, Shareholder, Ogletree, Deakins, Nash, Smoak and Stewart, Atlanta, GA; Mr. Clint Ehlers, President, FASTSIGNS of Lancaster and Willow Grove, Lancaster and Willow Grove, PA, testifying on behalf of the International Franchise Association; Mr. Harris Freeman, Professor, Western New England University School of Law, Springfield, MA; Ms. Catherine Monson, Chief Executive Officer, FASTSIGNS International, Inc., Carrollton, TX, testifying on behalf of the International Franchise Association; and Mrs. Jagruti Panwala, owner of multiple hotel franchises in the northeastern United States, Bensalem, PA. Witnesses spoke about how an expanded joint employer standard would negatively impact franchises and other small businesses.

114TH CONGRESS

First Session—Hearings

On August 25, 2015, the HELP Subcommittee held a field hearing titled “Redefining ‘Employer’ and the Impact on Alabama’s Workers and Small Business Owners” in Mobile, Alabama, in anticipation of the NLRB creating a new joint employer standard. Witnesses were Mr. Marcel Debruge, Burr and Forman LLP, Birmingham, AL; Mr. Chris Holmes, CEO, CLH Development Holdings, Tallahassee, L; and Col. Steve Carey, USAF, Ret., Owner and Operator, CertaPro Painters of Mobile and Baldwin Counties, Daphne, AL, testifying on behalf of the Coalition to Save Local Businesses and the International Franchise Association. Witnesses testified that the new joint employer standard would threaten the independence of small businesses and deter franchisors from licensing new franchisees.

On August 27, 2015, the HELP Subcommittee held a field hearing titled “Redefining ‘Employer’ and the Impact on Georgia’s Workers and Small Business Owners” in Savannah, Georgia, regarding the NLRB’s joint employer standard. Witnesses were Mr. Jeffrey M. Mintz, Shareholder, Littler Mendelson, P.C., Atlanta, GA; Mr. Kalpesh “Kal” Patel, President and COO, Image Hotels, Inc., Pooler, GA; Mr. Alex Salguero, Savannah Restaurants Corp., Savannah, GA; and Mr. Fred Weir, President, Meadowbrook Restaurant Company Inc., Cumming, GA, testifying on behalf of the Coalition to Save Local Businesses and the International Franchise Association. Witnesses testified the new joint employer standard would hurt small business growth in Georgia and create barriers to entry for potential franchise owners.

On September 29, 2015, the HELP Subcommittee held a legislative hearing on H.R. 3459, the *Protecting Local Business Opportunity Act*. Witnesses at the hearing were Mr. Ed Braddy, Presi-

dent, Winlee Foods, LLC, Timonium, MD, testifying on behalf of himself and the National Franchisee Association; Mr. Kevin Cole, CEO, Enniss Electric Company, Manassas, VA, testifying on behalf of the Independent Electrical Contractors; Mr. Charles Cohen, former Member of the NLRB and Senior Counsel, Morgan, Lewis & Bockius, LLP, Washington, D.C.; Ms. Mara Fortin, President and CEO, Nothing Bundt Cakes, San Diego, CA, testifying on behalf of herself and the Coalition to Save Local Businesses; Mr. Michael Harper, Professor, Boston University School of Law, Boston, MA; and Dr. Anne Lofaso, Professor, West Virginia University College of Law, Morgantown, WV. Witnesses testified that H.R. 3459 would restore the joint employer standard that had worked well for workers and business owners for decades and would protect opportunities for small business growth.

First Session—Legislative Action

On September 9, 2015, then-Committee on Education and the Workforce (Committee) Chairman John Kline (R-MN) introduced the *Protecting Local Business Opportunity Act* (H.R. 3459, 114th Congress). Recognizing the threat to small businesses posed by the NLRB’s August 2015 decision in *Browning-Ferris Industries of California, Inc. (Browning-Ferris)*,¹ the legislation amended the NLRA to restore the long-held standard that two or more employers can only be considered joint employers for purposes of the Act if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct and immediate.

On October 28, 2015, the Committee considered and marked up H.R. 3459, the *Protecting Local Business Opportunity Act*. Representative Buddy Carter (R-GA) offered an amendment in the nature of a substitute, making a technical change to clarify the Act. The Committee voted to adopt the amendment in the nature of a substitute by voice vote. The Committee then favorably reported H.R. 3459, as amended, to the House of Representatives by a vote of 21 to 15.

115TH CONGRESS

First Session—Hearings

On February 14, 2017, the HELP Subcommittee held a hearing titled “Restoring Balance and Fairness to the National Labor Relations Board.” Witnesses decried the extreme, partisan decisions of the NLRB during the Obama administration, including the expanded joint employer standard. Witnesses were Ms. Reem Aloul, BrightStar Care of Arlington, Arlington, VA, testifying on behalf of the Coalition to Save Local Businesses; Ms. Susan Davis, Partner, Cohen, Weiss and Simon, LLP, New York, NY; Mr. Raymond J. LaJeunesse, Jr., Vice President, National Right to Work Legal Defense and Education Foundation, Springfield, VA; and, Mr. Kurt G. Larkin, Partner, Hunton & Williams LLP, Richmond, VA.

On July 12, 2017, the Committee held a hearing titled “Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship” to examine the impact of expanding joint employer standards across federal labor laws, including the NLRA and the

¹ 362 NLRB No. 186 (2015).

Fair Labor Standards Act (FLSA). Witnesses were Mr. Michael Harper, Professor, Boston University School of Law, Boston, MA; Mr. Richard Heiser, Vice President, FedEx Ground Package System, Inc., Chicago, IL; Mr. G. Roger King, Senior Labor and Employment Counsel, HR Policy Association, Washington, D.C.; Mr. Jerry Reese II, Director of Franchise Development, Dat Dog, New Orleans, LA, testifying on behalf of the Coalition to Save Local Businesses; Ms. Catherine K. Ruckelhaus, General Counsel, National Employment Law Project, New York, NY; and Ms. Mary Kennedy Thompson, Chief Operating Officer of Franchise Brands, Dwyer Group, Waco, TX, testifying on behalf of the International Franchise Association. Witnesses testified about the importance of reigning in expanding joint employer standards.

On September 13, 2017, the HELP and Workforce Protections Subcommittees held a joint legislative hearing on H.R. 3441. Witnesses were Mr. Zachary D. Fasman, Partner, Proskauer Rose LLP, New York, NY; Ms. Tamara Kennedy, President, Twin Cities T.J.'s Inc., Roseville, MN, testifying on behalf of the Coalition to Save Local Businesses; Mr. Granger MacDonald, Chief Executive Officer, The MacDonald Companies, Kerrville, TX, testifying on behalf of the National Association of Home Builders; and Mr. Michael Rubin, Partner, Altshuler Berzon LLP, San Francisco, CA. Witnesses testified that H.R. 3441 clarifies the joint employer standard used under both the NLRA and FLSA and benefits workers and business owners.

First Session—Legislative Action

On July 27, 2017, then-Subcommittee on Workforce Protections Chairman Bradley Byrne (R-AL) introduced the *Save Local Business Act* (H.R. 3441, 115th Congress). In response to expanding joint employer standards under the NLRA and FLSA, the bill amends both laws to provide that two or more employers can only be considered joint employers if each shares and exercises control over essential terms and conditions of employment and if such control over those matters is actual, direct, and immediate.

On October 4, 2017, the Committee considered and marked up H.R. 3441. Then-Subcommittee on Workforce Protections Chairman Byrne offered an amendment in the nature of a substitute, making technical changes.² The Committee voted to adopt the amendment in the nature of a substitute by voice vote. The Committee then favorably reported H.R. 3441, as amended, to the House of Representatives by a vote of 23 to 17. On November 7, 2017, H.R. 3441 passed the House by a vote of 242 to 181.

116TH CONGRESS

First Session—Hearings

On May 8, 2019, the HELP Subcommittee held a hearing titled “Protecting the Right to Organize Act: Detering Unfair Labor Practices.” Witnesses were Mr. Roger King, Senior Labor and Employment Counsel, HR Policy Association, Arlington, VA; Mr. Josue

²The amendment in the nature of a substitute clarified that a list of terms and conditions of employment included in the act are examples of what can be considered in a joint employer analysis, but not a comprehensive list, and control of every term and condition is not required for joint employment to be found.

Alvarez, Truck Driver, XPO Logistics, Bell Gardens, CA; Ms. Charlotte Garden, Associate Professor, Seattle University School of Law, Seattle, WA; and Mr. Richard Griffin, Of Counsel, Bredhoff and Kaiser, P.L.L.C, Washington, D.C. Republican Members and Mr. King criticized the *Protecting the Right to Organize Act's* potential harmful impact on workers and businesses, including its expanded joint employer standard.

On July 25, 2019, the HELP Subcommittee held a hearing titled “Protecting the Right to Organize Act: Modernizing America’s Labor Laws.” Witnesses were Mr. Richard Trumka, President, AFL–CIO, Washington, D.C.; Mr. Jim Status, Former University of Pittsburgh Medical Center Employee, Pittsburgh, PA; Mr. Phillip Miscimarra, Senior Fellow, The Wharton School, University of Pennsylvania, Philadelphia, PA; and Mr. Mark Gaston, Former Chairman, NLRB, Washington, D.C. Republican Members and Mr. Miscimarra criticized the *Protecting the Right to Organize Act's* expanded joint employer standard, among other provisions.

118TH CONGRESS

First Session—Hearings

On March 28, 2023, the Committee held a hearing titled “Unleashing America’s Opportunities for Hiring and Employment.” Witnesses were Chris Spear, President, American Trucking Association, Washington, D.C.; Mr. Jerry Akers, Franchisee/Owner, Sharpness, Inc. DBA Great Clips and the Joint Chiropractic, Palo, IA; Dr. Heidi Shirholz, President, Economic Policy Institute, Washington, D.C.; and Mr. Stephen Moore, Senior Fellow in Economics, Heritage Foundation, Washington, D.C. Witnesses discussed how Biden administration policies, including the NLRB’s joint employer proposed rule, were making it harder to create jobs and overcome inflation.

First Session—Legislative Action

On November 9, 2023, Representative John James (R–MI) introduced H.J. Res 98, *Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Labor Relations Board relating to “Standard for Determining Joint Employer Status”* with Chairwoman Virginia Foxx (R–NC) and Representatives Mike Johnson (R–LA), Jim Banks (R–IN), Aaron Bean (R–FL), Earl L. “Buddy” Carter (R–GA), Tom Cole (R–OK), James Comer (R–KY), Eric A. “Rick” Crawford (R–AR), Jeff Duncan (R–SC), Scott Fitzgerald (R–WI), Bob Good (R–VA), Lance Gooden (R–TX), Diana Harshbarger (R–TN), Clay Higgins (R–LA), Ashley Hinson (R–IA), Erin Houchin (R–IN), Jake LaTurner (R–OK), Julia Letlow (R–LA), Lisa McClain (R–MI), John R. Moolenaar (R–MI), Alexander X. Mooney (R–WV), Greg Pence (R–IN), John W. Rose (R–TN), Adrian Smith (R–NE), Michelle Steel (R–CA), Glenn Thompson (R–PA), Tim Walberg (R–MI), Elise Stefanik (R–NY), and David G. Valadao (R–CA). The resolution was referred to the Committee on Education and the Workforce.

On December 12, 2023, the Committee considered H.J. Res. 98 in legislative session and reported it favorably to the House of Representatives by a recorded vote of 25–20.

COMMITTEE VIEWS

INTRODUCTION

Small businesses are still recovering from the pandemic, and owners are not optimistic about the current economic environment.³ Survey after survey finds inflation is the top challenge for small businesses.⁴ “Bidenomics” and the current administration’s policies have led to skyrocketing inflation and high prices for American households and employers. Consumer sentiment is equally pessimistic, falling for the fourth straight month, according to the University of Michigan Survey of Consumers.⁵

Instead of changing course in light of economic conditions, the Biden administration has continued to issue costly regulations that harm workers, small businesses, and consumers. In total, the Biden administration has finalized 724 regulations, costing \$434.8 billion and imposing 223,725,800 paperwork burden hours on the public.⁶ Such rapid accumulation of rules slows economic growth⁷ while imposing more significant costs on small businesses.⁸ The NLRB’s “Standard for Determining Joint Employer Status” significantly adds to existing regulatory burdens and will cause devastating economic consequences for small businesses, workers, consumers, and the economy.⁹

Background on joint employer status under the National Labor Relations Act

Predictability and transparency are crucial to upholding the rule of law. Regulated parties deserve clear rules and standards that make it obvious what is proscribed or permitted by law. Without a clear understanding of the rules, it is extremely difficult for the regulated community to plan for the future or know how to act in order to comply with the rules. H.J. Res. 98 will bring the necessary certainty to the joint employer standard under the *National Labor Relations Act* (NLRA).

From 1984 to August 2015, the NLRB’s joint employer standard provided such certainty and clarity. It examined whether two or more employers shared control over or co-determined the essential terms and conditions of employment to determine whether two separate entities should be considered “joint employers” under the NLRA.¹⁰ Essential terms and conditions of employment included hiring, firing, discipline, supervision, and direction of employees. Under this standard, the joint employers’ control over these employment matters must have been actual, direct, and immediate.¹¹

³ <https://www.nfib.com/content/press-release/economy/nfib-celebrates-50-years-of-small-business-economic-data-with-october-survey/>.

⁴ <https://www.uschamber.com/sbindex/quarterly-spotlight>.

⁵ <http://www.sca.isr.umich.edu/>.

⁶ <https://www.regrodeo.com/>

⁷ <https://www.mercatus.org/research/policy-briefs/regulatory-accumulation-and-its-costs#:~:text=By%20distorting%20the%20investment%20choices,rate%20of%20the%20US%20GDP>.

⁸ <https://ldr.lafayette.edu/concern/publications/6q182k69n>.

⁹ *Standard for Determining Joint-Employer Status*, 88 Fed. Reg. 53,946 (Oct. 27, 2023).

¹⁰ TLL, Inc., 271 NLRB 798 (1984), *overruled by* Browning-Ferris Indus. of Calif., Inc., 362 NLRB No. 186 (2015).

¹¹ See *Airborne Express*, 338 NLRB 597, 597 n.1 (2002) (“[The] essential element in [joint employer] analysis is whether a putative joint employer’s control over employment matters is direct and immediate.”); *AM Prop. Holding Corp.*, 350 NLRB 998, 1000 (2007) (“In assessing whether a joint employer relationship exists, the Board . . . looks to the actual practice of the parties.”).

This predictable and clear standard ensured employers would not be saddled with collective bargaining obligations or with liability of a company they do not control.

In 2015, the Obama NLRB issued a decision in *Browning-Ferris Industries of California (Browning-Ferris)* that upended decades of Board precedent by dramatically expanding the definition of joint employer under the NLRA.¹² Under this standard, two entities were deemed joint employers based on the mere existence of reserved control, indirect control, or control that was limited and routine. As a result, *Browning-Ferris* greatly increased the universe of potential joint employers.

In 2018, the U.S. Court of Appeals for the District of Columbia Circuit upheld portions of *Browning-Ferris*.¹³ While the D.C. Circuit ruled that evidence of reserved or indirect control could be appropriate factors in determining joint employer status, the court also ruled that the Board applied the concept of “indirect control” too broadly.¹⁴ The D.C. Circuit returned the case to the Board, directing that it reevaluate the case by considering “indirect control” of only those factors directly related to the terms and conditions of employment of the relevant employees.¹⁵ The court noted that by “failing to distinguish evidence of indirect control that bears on workers” essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting,” the Board had exceeded its authority and “overshot the common-law mark.”¹⁶ Moreover, the court held, “‘global oversight’ is a routine feature of independent contracts” which should not be a factor relevant to the analysis of a joint-employment relationship.¹⁷

On February 25, 2020, the Trump NLRB issued a final rule restoring the traditional joint employer standard, where joint employer status is found only when a company exercises “substantial direct and immediate control” over the essential terms and conditions of another company’s employees.¹⁸ On October 27, 2023, the Biden NLRB issued a final rule establishing a new standard for determining joint-employer status under the NLRA,¹⁹ largely reviving the Obama NLRB’s joint employer standard from the 2015 decision in the *Browning-Ferris* case.²⁰ The rule rescinds and replaces the Trump NLRB’s joint employer final rule.

Under the new rule, a joint employer relationship is established when employers share and codetermine, whether directly or indirectly, employees’ essential terms and conditions of employment. The Board may also determine that joint employer status exists when two or more employers exercise or possess the power to control, whether directly or indirectly, employees’ essential terms and conditions of employment. Under this standard, what is considered an essential term and condition of employment is greatly expanded.

¹² *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015).

¹³ *Browning-Ferris Indus. of Calif., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

¹⁴ *Id.* at 1216.

¹⁵ *Id.* at 1223–1224.

¹⁶ *Id.* at 1216.

¹⁷ *Id.* at 1220.

¹⁸ Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11,184 (Feb. 26, 2020).

¹⁹ Standard for Determining Joint-Employer Status, 88 Fed. Reg. 53,946 (Oct. 27, 2023).

²⁰ *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015).

CONSEQUENCES OF AN EXPANDED AND VAGUE JOINT EMPLOYER
STANDARD

The damaging consequences of the Biden NLRB’s joint employer standard are well understood because it largely revives the Obama NLRB’s *Browning-Ferris* decision. The Board’s new joint employer rule is similarly broad and vague like the *Browning-Ferris* standard that created immense uncertainty and imposed massive costs on thousands of businesses nationwide.

A report published in 2016 by the franchising industry consultancy FranData when the *Browning-Ferris* decision was in effect found that “40,000 businesses operating in 75,000 franchise locations are at risk of failure because of the NLRB ruling and its resulting egregiously high labor and operating costs.”²¹ In addition, the increased risk of business failures and potential decline in the formation of new franchise businesses could mean that “600,000 jobs may be lost or not created.”

Another economic analysis of the *Browning-Ferris* decision found that it significantly harmed both franchisors and franchisees, stifling the creation of business ownership. According to the study, the *Browning-Ferris* decision cost the “franchising sector as much as \$33.3 billion annually and has resulted in as many as 376,000 lost job opportunities.”²² The losses for small franchisees were significant, with the average franchisee experiencing an annual revenue loss of \$142,000 per year.²³ Furthermore, the *Browning-Ferris* joint employer standard led to a 93 percent increase in NLRB unfair labor practice charges and petitions alleging joint employment in the franchise sector, significantly increasing litigation costs for businesses that contract with other companies.²⁴

Franchisors and franchisee independent local businesses have expressed concerns that harm done by a joint employer standard, including indirect and reserved control, will block entrepreneurs from starting new businesses. In a hearing on joint employment during the 115th Congress, Tamara Kennedy, President of Twin City T.J.’s, Inc., explained how important the franchise business model was in her road to business ownership and how unlimited joint employment liability could have stifled her aspirations:

I am very involved in protecting our life’s work and ensuring that this [franchise] industry, that has provided so much to me, can continue to do the same for every rising entrepreneur. . . . Countless people in the franchise industry start out in administrative roles like mine—or as busboys, line cooks or cashiers—and move up to become multi-unit owners. Stories like ours are celebrated as some of the greatest American success stories there are, and the franchise structure is, in large part, responsible. It has provided each of us with so many opportunities to succeed, and I am hopeful that it will remain intact so that it can continue to afford other hard-working employees similar

²¹FRANDATA KEY FINDINGS AND SURVEY RESULTS: 2015 NATIONAL LABOR RELATIONS BOARD—JOINT EMPLOYER RULING (Feb. 10, 2016), https://www.frandata.com/wp-content/uploads/2016/03/FRANDATA_Joint_Employer_Impact_Study.pdf.

²²RONALD BIRD, STATEMENT REGARDING THE ECONOMIC IMPACT OF THE PROSPECTIVE NLRB PUBLIC POLICY DECISION REGARDING THE DEFINITION OF JOINT EMPLOYER 2 (Jan. 28, 2019), <https://www.franchise.org/sites/default/files/2019-05/JE%20Econ%20Impact%200128.pdf>.

²³*Id.*

²⁴*Id.*

paths to success. . . . After two years operating under the expanded joint employer standard, the impact on my business is clear: joint employer means I must pay more to run my business, and earn less in return, all while worrying if the unclear joint employment liability rules will continue to erode my autonomy to run my business.²⁵

The broad, vague, and confusing standard in the Biden NLRB's joint employer rule mirrors the Obama-era *Browning-Ferris* standard. Jerry Reese, Director of Franchise Development at Dat Dog Franchise, testified before the Committee how the confusion from such unclear standards harms businesses:

The most important part of our business's success rests in the hands of our wonderful and competent people. They are the faces of our restaurants at each location, and we rely on them each day. . . . [T]he most important aspect of my position as the director of franchise development is in training future franchise owners, so that they can hire their own wonderful and competent employees.

But employee training is a great example of the confusion that lies within the very real threat to local businesses from a joint employer standard based on direct, indirect and reserved control. Franchise companies naturally want to pass along their expertise and experience to as many people as possible within their system. But now franchise brands are limited by only being able to train franchise employees if the training is deemed necessary to ensuring brand standards. While no business can afford to have a poorly trained work force, locally owned businesses are now faced with the question of how to train employees in your system to uphold brand standards with the all-too-real threat of joint employment liability looming over all of us.

[T]hanks to the mess created by the National Labor Relations Board, franchising is caught in an unworkable Catch-22. On one hand, franchisors must impose a series of operational standards upon franchisees to maintain brand standards and consistency. But on the other hand, these fundamental operational standards have served as the basis for regulators to name franchisors as joint employers of their franchisees' employees.²⁶

Mary Kennedy Thompson of Dwyer Group service brands testified before the Committee about the widespread consequences of an expanded joint employer standard:

Franchises are not the only business model threatened by the new standards. Research from the American Action Forum in April 2017 projected that the new joint employer standard could result in 1.7 million fewer jobs in the entire private sector and 500,000 fewer jobs in the leisure and

²⁵*The Save Local Business Act: Hearing on H.R. 3441, Save Local Business Act, Before the Subcomm. on Health, Emp't, Lab. & Pensions & the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce, 115th Cong. 25–26 (2017) (statement of Tamra Kennedy, President, Twin City T.J.'s, Inc.).*

²⁶*Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship: Hearing Before the H. Comm. on Educ. & the Workforce, 115th Cong. (2017) (statement of Jerry Reese, II, Dir. of Franchise Development, Dat Dogs Franchise, LLC, at 4–5), https://edworkforce.house.gov/uploadedfiles/reese_-_testimony.pdf.*

hospitality industry alone. It is imperative that the locally-owned businesses created by the franchise system remain open and continue to operate with the full support of their brand. The system gives entrepreneurs a leg up because they can rely on the proven-to-work tools that we as franchisors give them, and that system is currently in jeopardy.²⁷

Further, in a full Committee hearing this Congress, Jerry Akers, a Great Clips franchisee, described the disastrous outcomes for the franchise business model if the *Protecting the Right to Organize Act* (PRO Act) is enacted—legislation that would codify an expansive joint employer standard which mirrors the Biden NLRB’s rule:

This puts franchisors at risk of being sued for things they never did and had no power to stop. Moreover, it risks wiping away the equity that I have spent my life and career building in my businesses and ultimately makes me a middle manager of my brand. . . .

My deep concern about the proposed PRO Act and its consequences cannot be overstated. The legislation threatens to undermine the very foundation upon which franchise businesses are built, potentially devastating the livelihoods of thousands of franchisees, and jeopardizing the future of our workforce. For franchisees like myself, the impact could be catastrophic, not only affecting our businesses but also the communities we serve and the employees who depend on us for their livelihoods.²⁸

Deficient cost analysis

During the Biden administration, the Small Business Administration’s (SBA) Office of Advocacy found significant noncompliance with the *Regulatory Flexibility Act* (RFA), which requires federal agencies to examine and consider the effects of their regulations on small businesses. Under the RFA, when an agency publishes a Notice of Proposed Rulemaking (NPRM), it must also publish an initial regulatory flexibility analysis (IRFA). Furthermore, an agency must also publish a final regulatory flexibility analysis (FRFA) when the rule is final. An agency can avoid conducting an IRFA or FRFA when the agency head certifies that the rule does not “have a significant economic impact on a substantial number of small entities.”²⁹

Like many federal agencies during the Biden administration, the NLRB ignored small businesses’ needs in its joint employer rule-making, both in its proposed and final joint employer rule. On November 29, 2022, the SBA Office of Advocacy submitted public comments on the NLRB’s joint employer proposed rule.³⁰ The letter expressed a number of concerns with the proposed rule, including that the new “joint employer standard is too ambiguous and broad,

²⁷ *Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship: Hearing before the House Comm. on Educ. & the Workforce*, 115th Cong. (2017) (statement of Mary Kennedy Thompson, Chief Operating Officer of Franchise Brands, Dwyer Group, at 5), https://edworkforce.house.gov/uploadedfiles/thompson_-_testimony.pdf.

²⁸ *Unleashing America’s Opportunities for Hiring and Employment: Hearing Before the H. Comm. on Educ. & the Workforce*, 118th Cong. 37–39 (2023) (statement of Jerry Akers, Franchisee/Owner, Sharpness, Inc. DBA Great Clips & the Joint Chiropractic).

²⁹ 5 U.S.C. § 605(b).

³⁰ <https://advocacy.sba.gov/wp-content/uploads/2022/11/Comment-Letter-NLRB-Joint-Employer-Rule-508c.pdf>.

providing no guidance for contracting parties on how to comply or avoid liability.”

Furthermore, the SBA Office of Advocacy encouraged the Board to reassess the compliance costs of the regulation and consider alternatives that would minimize the economic impacts to small entities as required by the RFA because the Board severely underestimated the costs and burden of the rule for small businesses. The SBA Office of Advocacy noted that in the IRFA “the [B]oard only estimates one hour of time for a small employer to read and understand the rule, at a cost of under \$150 per small business.”³¹ The Board also acknowledges that companies may choose to alter their business relationships as a result of the rule but fails to estimate such compliance costs. The SBA Office of Advocacy further noted in its comment letter that franchisees, restaurant owners, a general contractor, and a construction industry representative expressed concerns that the rule would increase compliance and litigation costs, cause large businesses to not contract with small businesses, and require employers to hire dedicated staff to comply with the rule.³²

Rather than reassess the costs to small businesses or incorporate their concerns, the Board majority erroneously asserted that its joint employer final rule will not have a significant economic impact on a substantial number of entities.³³ According to the final rule, the “only direct compliance cost for any of the 6.1 million American business firms (both large and small) with employees is reading and becoming familiar with the text of the new rule”³⁴ with only \$227.98 in familiarization costs to small employers.³⁵

However, Board Member Marvin Kaplan, writing in dissent to the new joint employer rule, stated the following:

As the public comments make clear, the majority grossly underestimates the actual costs that small businesses will incur to familiarize themselves with the final rule. It is not clear how a human resources specialist will be able to read the rule, which is nearly 63,000 words in length, in an hour, let alone comprehend the full ramifications of its changed legal standard in this complicated area of the law.³⁶

Certain direct compliance costs to small businesses were deemed irrelevant by the Board majority for the purposes of the FRFA, such as that many small businesses will be transformed into joint employers as a result of the rule, with new collective bargaining obligations. Member Kaplan argued this would impose direct costs in two ways:

First, to determine whether they would be subject to that duty, small businesses will have to review their existing business contracts and practices to determine whether they possess any reserved authority to control or exercise any indirect control over any essential term and condition of employment of another business’s employees, neither of

³¹*Id.* at 5.

³²*Id.*

³³See Standard for Determining Joint Employer Status, 88 Fed. Reg. 73,946, 74,006 (dissenting view of Member Kaplan).

³⁴*Id.* at 74,009.

³⁵*Id.* at 74,016.

³⁶*Id.* at 74,006 (dissenting view of Member Kaplan).

which could alone establish joint employer status under the 2020 Rule but either of which will make an entity a joint employer of another business's employees under the majority's final rule. Second, small businesses whose joint-employer status has been changed by the final rule and that contract with an employer whose employees are unionized will be required to participate in collective bargaining.³⁷

The Board's refusal to acknowledge the real, substantial costs of its joint employer rule flouts legal requirements regarding cost estimates and is a disservice to the small businesses who will have to comply with it.

CONCLUSION

The consequences of the NLRB's vague and broad joint employer rule cannot be overstated. Far from clarifying employer responsibilities under the NLRA, it creates a confusing joint employer standard that will force companies to alter contractual relationships while imposing excessive costs and burdens on both large and small businesses. As a result, it will harm entrepreneurs and job creation without any perceivable benefit to workers, employers, or consumers.

SUMMARY

H.J. RES. 98 SECTION-BY-SECTION SUMMARY

H.J. Resolution 98 resolves that Congress disapproves of the rule related to "Standard for Determining Joint Employer Status," which was first announced on September 7, 2022, and published as a final rule in the Federal Register on October 27, 2023.

EXPLANATION OF AMENDMENTS

No amendments to the resolution were adopted.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104-1 requires a description of the application of this bill to the legislative branch. H.J. Res. 98 provides for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Labor Relations Board relating to "Standard for Determining Joint Employer Status" and therefore would ensure the standard is not applied for the legislative branch in a manner similar to other employers.

UNFUNDED MANDATE STATEMENT

Pursuant to Section 423 of the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344 (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4), the Committee traditionally adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office (CBO) pursuant to section 402 of the Congressional Budget and Impoundment Control Act of 1974. The Committee reports that because this cost estimate was not timely submitted to

³⁷*Id.*

the Committee before the filing of this report, the Committee is not in a position to make a cost estimate for H.J. Res. 98.

EARMARK STATEMENT

H.J. Res. 98 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House Rule XXI.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: 12/12/23

COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 7 Bill: H.J. Res. 98 Amendment Number:

Disposition: Adopted by a Full Committee Roll Call Vote (25 y - 20 n)

Sponsor/Amendment: Rep. James/ Motion to Report H.J. Res. 98

| Name & State | Aye | No | Not Voting | Name & State | Aye | No | Not Voting |
|-----------------------------|-----|----|------------|--------------------------|-----|----|------------|
| Mrs. FOXX (NC) (Chairwoman) | X | | | Mr. SCOTT (VA) (Ranking) | | X | |
| Mr. WILSON (SC) | X | | | Mr. GRIJALVA (AZ) | | X | |
| Mr. THOMPSON (PA) | X | | | Mr. COURNTEY (CT) | | X | |
| Mr. WALBERG (MI) | X | | | Mr. SABLAN (MP) | | X | |
| Mr. GROTHMAN (WI) | X | | | Ms. WILSON (FL) | | X | |
| Ms. STEFANIK (NY) | X | | | Ms. BONAMICI (OR) | | X | |
| Mr. ALLEN (GA) | X | | | Mr. TAKANO (CA) | | X | |
| Mr. BANKS (IN) | X | | | Ms. ADAMS (NC) | | X | |
| Mr. COMER (KY) | X | | | Mr. DESAULNIER (CA) | | X | |
| Mr. SMUCKER (PA) | X | | | Mr. NORCROSS (NJ) | | X | |
| Mr. OWENS (UT) | X | | | Ms. JAYAPAL (WA) | | X | |
| Mr. GOOD (VA) | X | | | Ms. WILD (PA) | | X | |
| Mrs. MCCLAIN (MI) | X | | | Mrs. MCBATH (GA) | | X | |
| Mrs. MILLER (IL) | X | | | Mrs. HAYES (CT) | | X | |
| Mrs. STEEL (CA) | X | | | Ms. OMAR (MN) | | X | |
| Mr. ESTES (KS) | X | | | Ms. STEVENS (MI) | | X | |
| Ms. LETLOW (LA) | X | | | Ms. LEGER FERNÁNDEZ (NM) | | X | |
| Mr. KILEY (CA) | X | | | Ms. MANNING (NC) | | X | |
| Mr. BEAN (FL) | X | | | Mr. MRVAN (IN) | | X | |
| Mr. BURLISON (MO) | X | | | Mr. BOWMAN (NY) | | X | |
| Mr. MORAN (TX) | X | | | | | | |
| Mr. JAMES (MI) | X | | | | | | |
| Ms. CHAVEZ-DEREMER (OR) | X | | | | | | |
| Mr. WILLIAMS (NY) | X | | | | | | |
| Ms. HOUCHIN (IN) | X | | | | | | |

TOTALS: Ayes: 25

Nos: 20

Not Voting:

Total: 45/ Quorum: 45/ Report:

(25 R - 20 D)

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House Rule XIII, the goal of H.J. Res. 98, is to provide for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Labor Relations Board relating to “Standard for Determining Joint Employer Status.”

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.J. Res. 98 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the committee’s oversight findings and recommendations are reflected in the body of this report.

REQUIRED COMMITTEE HEARING

In compliance with clause 3(c)(6) of rule XIII the following hearing held during the 118th Congress was used to develop or consider H.J. Res. 98: On March 28, 2023, the Committee on Education and the Workforce held a hearing entitled, “Unleashing America’s Opportunities for Hiring and Employment.”

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received a cost estimate for the resolution from the Congressional Budget Office. The Chairwoman of the Committee shall cause such estimate to be printed in the Congressional Record upon its receipt by the Committee.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.J. Res. 98. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when, as with the present report, the Committee has requested a cost estimate for the bill from the Director of the Congressional Budget Office.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

H.J. Res. 98, as reported by the Committee, makes no changes in existing law.

MINORITY VIEWS

INTRODUCTION

H.J. Res. 98, *Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Labor Relations Board relating to “Standard for Determining Joint Employer Status,”* would nullify the National Labor Relations Board’s (NLRB’s or the Board’s) final joint employer rule ensuring that workers, who are hired through subcontractors, temporary staffing agencies, and other intermediaries, can hold all the entities that control their working conditions accountable for their right to bargain collectively for higher pay, better benefits, and safer workplaces. If enacted, H.J. Res. 98 would reinstate the deficient Trump-era rule that weakened workers’ ability to hold their employers accountable by narrowing the joint employer standard to only cover entities that directly exercise control over workers’ terms and conditions of employment. H.J. Res. 98 is opposed by numerous organizations including: A Better Balance, AFL–CIO, American Federation of State, County, and Municipal Employees, Center for Economic and Policy Research, Center for Law and Social Policy, Communications Workers of America, Demos, Economic Policy Institute, International Brotherhood of Teamsters, Jobs With Justice, National Center for Law and Economic Justice, National Domestic Workers Alliance, National Education Association, National Employment Law Project, National Organization for Women, National Partnership for Women and Families, National Women’s Law Center, Restaurant Opportunities Centers United, Leadership Conference on Civil and Human Rights, Legal Aid Society, Transport Workers Union of America, United Auto Workers, United Brotherhood of Carpenters and Joiners of America, United Food and Commercial Workers International Union, and Young Invincibles.

HISTORY OF JOINT EMPLOYMENT & THE NATIONAL LABOR RELATIONS ACT

For most of the time since the 1935 enactment of the *National Labor Relations Act* (NLRA),¹ the NLRB has held that an entity may be liable to bargain with the employees of a contractor as a joint employer even if its control over terms and conditions of employment was indirect, such as exercised through an intermediary, or reserved but not yet exercised.² This traditional standard is con-

¹ 29 U.S.C. §§ 151–169.

² See, e.g., *Greyhound Corp.*, 153 NLRB 1488, 1495 (1965) (the first case in which the Board examined the right to control employees’ work and their terms and conditions of employment as determinative in analyzing whether entities were joint employers of particular employees); *TLI, Inc.*, 271 NLRB 798 (1984) (finding that two separate entities are joint employers of a single work force if the evidence shows that they “share or codetermine those matters governing the essential terms and conditions of employment”); *Floyd Epperson*, 202 NLRB 23, 23 (1973) (finding joint employer status where client employer had “some indirect control over [employees’] wages” and “some control, albeit indirect, over [employee] discipline”), *enforced* 491 F.2d 1390

sistent with the U.S. Supreme Court’s requirement that the NLRB interpret the NLRA’s definition of employer as consistent with the common law³ as well as with the legislative history of the NLRA’s 1947 amendments.⁴

Without providing any explanation, the NLRB departed from this traditional standard in 1984, discounting indirect and reserved control from the joint employer analysis in two decisions.⁵ In another decision in 2002, the NLRB explicitly limited the joint employer standard to only “direct and immediate” control.⁶ In recent decades, temporary and contingent employment arrangements proliferated rapidly, and the NLRB’s departure from the common law enabled corporations to use intermediaries to evade any obligation to bargain collectively with workers.⁷

In the 2015 *Browning-Ferris* decision, the NLRB restored earlier precedent considering an entity’s reserved and indirect control over working conditions.⁸ The NLRB’s previous Republican majority initiated an attempt to overturn *Browning-Ferris* by rulemaking.⁹ While that rulemaking was pending, the D.C. Circuit upheld *Browning-Ferris* “as fully consistent with the common law [because] both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis.”¹⁰ Specifically, the court held that consideration of a company’s right to control “is an established aspect of the common law of agency,” and that *Browning-Ferris* was also correct that “an employer’s indirect control over employees can be a relevant consideration.”¹¹ The D.C. Circuit also warned that, “[t]he Board’s rulemaking . . . must color within the common-law lines identified by the judiciary.”¹²

Rather than adhering to the court’s warning, in 2020, the NLRB’s Republican majority issued a final rule (2020 Rule) that narrowed the joint employer standard to only cover entities that “possess and actually exercise substantial direct and immediate control over employees” essential terms and conditions of employ-

(6th Cir. 1974); *Franklin Stores Corp.*, 199 NLRB 52, 53 (1972) (finding joint employment where one employer, “by virtue of the lease arrangement with” the other employer, “has the right to veto the employment of employees by” the other “and to insist on the discharge of employees by” the other).

³See *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 256 (1968) (requiring the Board to “apply general agency principles in distinguishing between employees and independent contractors under the Act”).

⁴See House Conf. Rep. No. 510 on H.R. 3020 at 32–33 (1947) reprinted in 1 Legislative History of the Labor Management Relations Act, 1947, at 536–37 (1948) (explaining the exclusion of independent contractors from the definition of employee in order to overturn a Supreme Court decision that “held that ordinary tests of the law of agency could be ignored by the Board” in determining the existence of employment relationships).

⁵*TLL, Inc.*, 271 NLRB 798, 803 (1984); *Laerco Transportation*, 269 NLRB 324, 325–26 (1984).

⁶*Airborne Freight Co.*, 338 NLRB 597 (2002) (finding the “essential element” to be “whether a putative joint employer’s control over employment matters is direct and immediate”).

⁷*Testimony of Catherine K. Ruckelshaus*, EDUC. & THE WRKF. COMM. DEMS. (July 12, 2017), <https://democrats-edworkforce.house.gov/hearings/redefining-joint-employer-standards-barriers-to-job-creation-and-entrepreneurship>, at 4 (“Between 2005 and 2015, the number of contract workers grew by more than half, while the overall workforce grew by only five percent.”) (submitted to *Redefining Joint Employer Standards: Hearing Before the H. Comm. on Educ. & the Wrkf.*, 115th Cong. (Jul. 12, 2017)).

⁸362 NLRB 1599, 1600 (2015).

⁹See *The Standard for Determining Joint Employer Status*, 83 Fed. Reg. 46681 (Sept. 14, 2018).

¹⁰*Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195, 1222 (D.C. Cir. 2018).

¹¹*Id.* at 1209.

¹²*Id.*

ment.”¹³ To justify sidelining consideration of indirect and reserved control, which the D.C. Circuit emphasized, the 2020 Rule stated that indirect and reserved control may still be considered but could not, “without more[,] establish a joint-employer relationship.”¹⁴ In a 2022 decision, the D.C. Circuit described this claim as “dubious,” emphasizing that it “took great pains to inform the Board that the failure to consider reserved or indirect control is inconsistent with the common law of agency.”¹⁵

The 2020 Rule eroded workers’ rights significantly. For example, as Committee Democrats observed, the failure to include safety in the list of “essential terms and conditions of employment” meant that “if a hospital controls the workplace safety standards, but refuses to bargain with the temporary agency workers, these workers will lack recourse against the party setting working conditions.”¹⁶ More broadly, the 2020 Rule created what the AFL CIO described as “a roadmap to retain ultimate control over key aspects of workers’ lives—like wages and working conditions—while avoiding their duty to bargain.”¹⁷

Companies are adopting business structures specifically designed to maintain control over the workers who keep their businesses running while simultaneously disclaiming any responsibility for those workers under labor and employment laws. Such businesses often insert second and third-level intermediaries between themselves and their workers. These companies seek to have it both ways—to control the workplace like an employer but dodge the legal responsibilities of an employer. . . .

For example, if employees of a subcontractor were to unionize and bargain only with the subcontractor, it might simply refuse to bargain over certain issues because its contract with the prime contractor governs those aspects of the work (e.g., pay, hours, safety, etc.). This harms workers because the entity that effectively determines workplace policy is not at the bargaining table, placing workers’ desired improvements out of reach.¹⁸

The radical change effected by the 2020 Rule “made it impossible for hundreds of thousands of workers to access the rights guaranteed them under the NLRA to join a union and collectively bargain.”¹⁹

In light of these consequences of the 2020 Rule, the Biden-era NLRB issued a notice and invitation in September 2022 to file briefs for a proposed rule to update the standard for determining

¹³The Standard for Determining Joint Employer Status, 85 Fed. Reg. 11184, 11185 (Feb. 26, 2020) (codified at 29 C.F.R. pt. 103).

¹⁴*Id.* at 11220.

¹⁵*Sanitary Truck Drivers & Helpers Local 350 v. NLRB*, 45 F.4th 38, 47 (D.C. Cir. 2022) (considering issues in *Browning-Ferris* that the Board addressed after the D.C. Circuit remanded in 2018).

¹⁶H. COMM. ON EDUC. & LAB., CORRUPTION, CONFLICTS, AND CRISIS: THE NLRB’S ASSAULT ON WORKERS’ RIGHTS UNDER THE TRUMP ADMINISTRATION 3 (Oct. 2020), [https://democrats-edworkforce.house.gov/imo/media/doc/NLRB%20Report%20\(Final\).pdf](https://democrats-edworkforce.house.gov/imo/media/doc/NLRB%20Report%20(Final).pdf).

¹⁷*House Letter Supporting NLRB Joint-Employer Rule*, AFL-CIO (Nov. 8, 2023), <https://afcio.org/about/advocacy/legislative-alerts/house-letter-supporting-nlrbs-joint-employer-rule>.

¹⁸*Id.*

¹⁹Celine McNicholas *et al.*, *EPI Comments on NLRB’s Proposed Rulemaking on the Standard for Determining Joint-Employer Status*, ECON. POL. INST. (Dec. 7, 2022), <https://www.epi.org/publication/epi-comments-on-nlrbs-proposed-rulemaking-on-the-standard-for-determining-joint-employer-status/>.

joint employer status.²⁰ The NLRB issued its new joint employer rule in October 2023 (2023 Rule),²¹ which will take effect on February 26, 2024.²²

The 2023 Rule rescinded the 2020 Rule and adopted a new standard “grounded in established common-law agency principles.”²³ Specifically, the 2023 Rule restores the NLRB’s ability to consider evidence of an employer’s reserved and/or indirect control, along with direct control, whether it is exercised or not, if employers share or codetermine one or more of the employees’ essential terms and conditions of employment when determining joint-employer status. Such essential terms and conditions are defined as the following:

- (1) Wages, benefits, and other compensation;
- (2) Hours of work and scheduling;
- (3) The assignment of duties to be performed;
- (4) The supervision of the performance of duties;
- (5) Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;
- (6) The tenure of employment, including hiring and discharge; and
- (7) Working conditions related to the safety and health of employees.²⁴

The 2023 Rule aligns with the joint employer provision of the *Protecting the Right to Organize Act of 2023* (PRO Act),²⁵ which would require the Board or a court of competent jurisdiction to consider as relevant direct control, indirect control, reserved authority to control, and control exercised in fact.

THE 2023 RULE AND THE “FISSURED WORKPLACE”

Joint employment is a flashpoint because of the recent trend toward “fissuring,” or the disintegration of the firm using overlapping arrangements of contracting, subcontracting, franchising, and temping.²⁶ The trend appears to be growing, especially in low-wage work. “It seems to be spreading like wildfire,” says Nelson Lichtenstein, a Research Professor in the Department of History at the University of California, Santa Barbara. “All of these companies, wherever they possibly can, want to create a workforce that doesn’t work for them.”²⁷ The most visible fissured relationship is temping: approximately 3.1 million workers in America are employed by a temporary staffing agency on any given day, performing work on behalf of a client company that directs their work

²⁰ Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641 (Sept. 7, 2022).

²¹ Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946 (Oct. 27, 2023) [hereinafter 2023 Rule].

²² *Id.* at 74017.

²³ Press Release, Off. of Pub. Affs. Nat’l Lab. Rel. Bd. Board Issues Final Rule on Joint-Employer Status (Oct. 26, 2023), <https://www.nlr.gov/news-outreach/news-story/board-issues-final-rule-on-joint-employer-status>.

²⁴ 2023 Rule, *supra* note 21, at 74017–74018.

²⁵ Protecting the Right to Organize Act of 2023, H.R. 20, 118th Cong. (2023).

²⁶ See generally DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

²⁷ Dave Jamieson, *Romney Campaign Boxes Itself in on Outsourcing, Offshoring Debate*, HUFFPOST (June 26, 2012), https://www.huffpost.com/entry/romney-campaign-outsourcing-offshore_n_1627761.

but does not write their paycheck.²⁸ Fissured work arrangements are associated with increased incidence of a host of workplace violations.²⁹

The rise of the “fissured workplace” can weaken workers’ bargaining power. Absent an appropriate joint employment doctrine, workers hired by an intermediary firm but laboring for a larger, more powerful firm with actual control over their working conditions and wages will find it difficult to bargain meaningfully. In an age of increased workplace fissuring, it is imperative that companies not be able to point to another entity in order to evade bargaining and liability.

The 2023 Rule’s return to the NLRB’s traditional standard is necessary to mitigate the fissuring of the workplace, which exacerbated in the decades after the NLRB departed from considering indirect and reserved control.³⁰ If a lead business controls any of its subsidiary’s workers’ terms and conditions of employment but is not deemed a joint employer, then those workers cannot engage in collective bargaining with the lead business to improve their terms and conditions of employment that are within the lead business’s control.³¹ This opens workers to retaliation even when they attempt to organize a union with the subsidiary alone.

By holding employers accountable for their bargaining obligations when they exercise control, whether direct or indirect, organized workers can engage in meaningful negotiations and share in the prosperity they have helped create. According to the Economic Policy Institute (EPI), the Biden-era NLRB’s proposed 2023 Rule is estimated to raise workers’ earnings by \$1.06 billion dollars annually.³² Conversely, the Trump-era NLRB’s 2020 Rule would transfer \$1.3 billion each year from workers to their bosses.³³

THE 2023 RULE’S IMPACT ON SMALL BUSINESS

The 2023 Rule’s potential impact on small businesses has been thoroughly reviewed. In accordance with the *Regulatory Flexibility Act of 1980*,³⁴ the NLRB, prior to finalizing the 2023 Rule, conducted an Initial Regulatory Flexibility Analysis of its impact on small businesses. The analysis concluded that “since the only quantifiable impact that [the NLRB] ha[s] identified is the \$151.51 or \$99.64 that may be incurred in reviewing and understanding the rule, [the NLRB] do[es] not believe, subject to comments, that the proposed rule will have a significant economic impact on a substantial number of small entities.”³⁵

To ensure input from small businesses, the NLRB provided a briefing on the proposed rule on October 20, 2022³⁶—organized by

²⁸ *Employees on Nonfarm Payrolls by Industry Sector and Selected Industry Data*, BUR. OF LAB. STATS., <https://www.bls.gov/news.release/empsit.t17.htm> (last visited Oct. 11, 2023).

²⁹ WEIL, *supra* note 26.

³⁰ H. COMM. ON EDUC. & LAB., *THE FUTURE OF WORK: HOW CONGRESS CAN SUPPORT WORKERS IN THE MODERN ECONOMY* 4–5 (2020), [https://democrats-edworkforce.house.gov/imo/media/doc/Future%20of%20Work%20Report%20\(FINAL\).pdf](https://democrats-edworkforce.house.gov/imo/media/doc/Future%20of%20Work%20Report%20(FINAL).pdf) [hereinafter *THE FUTURE OF WORK*]; see also Ruckelshaus Testimony, *supra* note 7, at 4.

³¹ *THE FUTURE OF WORK*, *supra* note 30, at 6.

³² McNicholas *et al.*, *supra* note 19.

³³ *Id.*

³⁴ 5 U.S.C. § 601 *et seq.*

³⁵ Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641, 54662 (Sept. 7, 2022).

³⁶ Off. of Advocacy, *Virtual Labor Roundtable—October 20, 2022*, SM. BUS. ADMIN. (Oct. 17, 2022), <https://advocacy.sba.gov/2022/10/17/virtual-labor-roundtable-october-20-2022/>.

the Small Business Administration’s Office of Advocacy (SBA OA)—and extended the public comment period on the proposed rule from 30 days to three months. After the SBA OA’s review of the proposed rule, the NLRB incorporated its feedback in the final rule by (1) providing “an exhaustive list of the seven categories of terms and conditions of employment that will be considered essential for the joint-employer inquiry;” (2) clarifying that an employer must have “exercised or unexercised authority to control, or exercise the power to control indirectly, such as through an intermediary, an *essential* term or condition of employment”; and (3) establishing that “evidence of an entity’s control over matters that are immaterial to the existence of an employment relationship . . . *and* that do not bear on the employee’s essential terms and conditions of employment is not relevant” to joint-employer status.³⁷

THE 2023 RULE’S IMPACT ON THE FRANCHISE BUSINESS MODEL

There is no credible evidence to show that the 2023 Rule will threaten the franchise business model. The NLRB has never issued a final decision finding a franchisor to be a joint employer of its franchisee’s employees and there is no reason to believe it will do so in the future if the franchisor’s control is limited to the brand and does not extend into the franchisee’s labor relations. In fact, a strong joint employer standard protects franchisees by preventing franchisors from dictating franchisees’ employee relations while leaving franchisees on the hook for liability. For this reason, the American Association of Franchisees and Dealers has written letters in support of both the *PRO Act*’s joint employer standard³⁸ and the Biden-era NLRB’s proposed joint-employer rule.³⁹

CONCLUSION

When workers organize unions, the NLRA guarantees them the right to collectively bargain for better wages and working conditions without fear of retaliation. Where multiple entities control workers’ terms and conditions of employment, this right is rendered futile when workers are unable to bargain with all entities that control their wages and working conditions. The 2023 Rule is therefore necessary for holding entities accountable even if they reserve control, or exercise control indirectly, over employees’ working conditions. Committee Democrats strongly support the 2023 Rule.

If enacted, H.J. Res. 98 would reinstate the deficient 2020 Rule that “offered companies a roadmap to retain *ultimate* control over key aspects of workers’ lives—like wages and working conditions—while avoiding their duty to bargain.”⁴⁰ Additionally, if H.J. Res.

³⁷ 2023 Rule, *supra* note 21, at 74013.

³⁸ Letter from American Association of Franchisees and Dealers to Congress (Feb. 1, 2020), <https://logon.salesnexus.com/miscref/aafd/library/aafd%20comments%20on%20joint%20employer-final.pdf>.

³⁹ Letter from Robert L. Purvin, Jr., *et al.*, Am. Ass’n Franch. & Dealers, to NLRB, *AAFD Comments Regarding Proposed Joint Employer Rule* (Dec. 12, 2022), <https://www.aafd.org/wp-content/uploads/2022/12/AAFD-Comments-on-Joint-Employer-Rule-December-2022-Final.pdf>.

⁴⁰ Letter from the AFL–CIO, Services Employees International Union (SEIU), and International Brotherhood of Teamsters (IBT) letter to Congress (Nov. 8, 2023), <https://afcio.org/sites/default/files/2023-11/House-AFL-CIO%2C%20SEIU%2C%20IBT%20Letter%20re%20NLRB%20Joint%20Employer%20Rule.pdf>

98 is enacted, the NLRB would be prohibited from issuing a new joint employer rule that is “substantially the same” as the disapproved rule unless subsequent law specifically authorizes the re-issued rule.⁴¹

For the reasons stated above, Committee Democrats unanimously opposed H.J. Res. 98 when the Committee considered it on December 12, 2023. We urge the House of Representatives to do the same.

ROBERT C. “BOBBY” SCOTT,
Ranking Member.
JOE COURTNEY.
GREGORIO KILILI CAMACHO
SABLAN.
SUZANNE BONAMICI.
MARK DESAULNIER.
DONALD NORCROSS.
PRAMILA JAYAPAL.
JAHANA HAYES.
JAMAAL BOWMAN.

○

⁴¹5 U.S.C. § 801(b)(2). There is ongoing commentary on what this actually means. *See* MAEVE P. CAREY, CONG. RES. SERV., IN10996, REISSUED LABOR DEPARTMENT RULE TESTS CONGRESSIONAL REVIEW ACT BAN ON PROMULGATING “SUBSTANTIALLY THE SAME” RULES (2019).