AMERICANS for TAX REFORM

December 7, 2022

National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

On behalf of Americans for Tax Reform, we greatly appreciate the opportunity to provide input on the National Labor Relations Board's (NLRB) proposed rule on the joint employer standard.

Americans for Tax Reform (ATR) is a taxpayer advocacy group that believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today. The government's power to control one's life derives from its power to tax. We believe that power should be minimized.

The NLRB's decision to replace the 2017 joint employer standard with a new standard which would greatly expand joint employer liability would be detrimental not only to the businesses that rely on franchising and contracting arrangements, but also to the vast majority of workers employed by such firms. Moreover, the establishment of such a standard would harm consumers by preventing certain businesses from engaging in practices that allow them to lower prices, expand output, make new innovations, and invest in the broader American economy.

The 2017 joint employer standard allowed the franchising business model and other contracting arrangements to flourish in the United States. As of 2021, there were nearly 775,000 establishments classified as franchises in the United States.[1] By the end of 2022, it is estimated that this number will rise to approximately 792,000 franchise establishments across more than 230 sectors.[2] Owners of these establishments may control one or more businesses. For example, currently it is estimated that there are 237,458 franchisees who own one or more establishments in active business-format franchises, totaling 422,381 franchised establishments.[3]

Data shows that the franchising model is most important to the success of small businesses. The chart below shows the large percentage of single-unit franchisee owners (SUO) compared to the much smaller number of multi-unit owners (MUO) in the franchise sector. Among those who own multiple locations, more than 80 percent own five or fewer locations.

[1] Niu, Christina. "2022 Franchising Economic Outlook." Accessed December 2, 2022. https://www.polarisfranchiseconsulting.com/files/2022-Franchising-Economic-Outlook.pdf.
[2] Ibid.
[3] Ibid.

Number of Single-Unit Owners (SUO)	194,198
Number of Multi-Unit Owners (MUO)	43,260
MUO with 2-4 Locations	34,086
MUO with 5-10 Locations	6,238
MUO with 11-25 Locations	2,067
MUO with 26-100 Locations	735
MUO with >100 Locations	134

Source: [FRANdata]

In 2021, franchises employed 8.2 million Americans and contributed almost $788 billion to U.S. gross domestic product (GDP).[4] By the end of 2022, these statistics are expected to rise to 8.5 million jobs and $827 billion in contributions to the U.S. economy.[5] Franchises also pay as much as 3.4 percent higher wages than their non-franchised counterparts and are more likely to provide health insurance to their employees as compared to other small establishments.[6]

For decades, the franchising sector followed a standard which defined joint employers as only those businesses which exert direct and immediate control over the employees of another business, as established in *TLI, Inc., 271 NLRB 798 (1984)*[7] and *Laerco Transportation, 269 NLRB 324 (1984)*[8] and reiterated in *Airborne Express, 338 NLRB No. 72 (2002)*.[9]

In 2015, the Obama-era NLRB overturned this longstanding precedent, establishing a new joint employer standard wherein both direct and "indirect" control allowed for the designation of a

[4] "Franchise Economy." Franchise Economy. International Franchise Association. Accessed December 2, 2022. https://franchiseeconomy.com/.
[5] Ibid.
[6] "The Value of Franchising Executive Summary - Open For Opportunity." International Franchise Association. Accessed December 2, 2022. https://openforopportunity.com/wp-content/uploads/2021/09/IFA-Franchising-Report-Executive-Summary_092121.pdf.
[7] Decision and Order by Chairman Dotson and Members Hunter and Dennis, TLI, Incorporated and Crown Zellerbach Corporation and General Teamsters Local Union No. 326 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Case 4-CA-13033 (1984), http://apps.nlrb.gov/link/document.aspx/09031d45800b8945.
[8] Decision and Order by Members Zimmerman, Hunter and Dennis, Laerco Transportation and Warehouse; California Transportation Labor, Inc,; American Management Carriers, Inc,; Cal-American Transport, Inc. and International Longshoremen's and Warehousemen's Union, Petitioner, Case 21-RC-17087 (1984), http://apps.nlrb.gov/link/document.aspx/09031d45800b8820.
[9] Decision and Order by Members Liebman, Cowen, and Bartlet, Airborne Freight Company d/b/a Airborne Express, and its Joint Employers, Current Carrier Corporation, Agents Transportation Service and Expressman Courier Service Inc. and Teamsters, Chauffeurs, Warehousemen & Helpers, Local 251, a/w International Brotherhood of Teamsters, AFL–CIO; and Airborne Freight Company d/b/a Airborne Express, and its Joint Employer Enterprise Express, Inc. a/k/a NFW, Inc. d/b/a Enterprise Express, Inc. and Teamsters Local 344, affiliated with the International Brotherhood of Teamsters, AFL– CIO. Cases 1–CA–32742 and 1–CA–32767 (2002), https://apps.nlrb.gov/link/document.aspx/09031d45800c0f8c.

business as a joint employer.[10] This 2015 joint employer standard cost franchise businesses more than $33 billion per year, resulting in 376,000 fewer job opportunities.[11] The standard also led to 93 percent more lawsuits, creating steep new costs and market inefficiencies.[12] These negative effects on the U.S. economy are likely to be repeated under the proposed standard, which seeks to recreate many of the damaging provisions of the 2015 standard.

In 2017, the NLRB reversed the rule change from two years earlier, reinstating longstanding precedent and clarifying that "indirect control" is insufficient grounds for regulating a business as a joint employer.[13]

With this year's proposed changes to the joint employer standard, the NLRB is once again attempting to disrupt precedential standards and significantly expand the nature of joint employment regulation.

In addition to the franchising industry, the proposed changes to the joint employer standard would damage other contractual relationships such as temporary work arrangements and partnerships with staffing agencies. The new provisions would force such businesses to either adopt less efficient arrangements to avoid the overly broad definition of a joint employer, or else face increased legal liability and targeting by hostile joint-unionization efforts.

Providing firms with protections against predatory union bargaining is imperative for ensuring that the franchising business model can function appropriately and that smaller firms can effectively compete against massive, politically connected, and vertically integrated ones. The 2017 Trump-era joint employer standard, which is set to be replaced by this new joint employer standard, did just that. If this new joint employer standard is adopted, many smaller firms currently engaging in franchising across the US may be forced to cease their operations. In doing so, hundreds of thousands of American employees with no union affiliation may lose job opportunities, as was seen after the NLRB's 2015 *Browning-Ferris* decision.[14] Consumer access to a wide assortment of goods which are only available through franchising may also be eliminated and the competitive dynamos of an array of American industries will likely be paralyzed.

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[10] "Board Issues Decision in Browning-Ferris Industries." National Labor Relations Board. National Labor Relations Board, August 27, 2015. https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-in-browning-ferris-industries.
[11] "IFA Statement on NLRB Proposed Joint Employer Rule." IFA. International Franchise Association, September 6, 2022. https://www.franchise.org/media-center/press-releases/ifa-statement-on-nlrb-proposed-joint-employer-rule.
[12] "NLRB Overrules Browning-Ferris Industries and Reinstates Prior Joint-Employer Standard." National Labor Relations Board, December 14, 2017. https://www.nlrb.gov/news-outreach/news-story/nlrb-overrules-browning-ferris-industries-and-reinstates-prior-joint.
[13] "IFA Statement on NLRB Proposed Joint Employer Rule."
[14] Ibid.

Many experts in the field of labor economics have rightfully drawn parallels between the anticompetitive repercussions of this new standard and the NLRB's 2015 *Browning-Ferris* decision, which led to $33 billion in annual costs and nearly 400,000 lost jobs.[15] One major difference between them, however, is that the NLRB's newly proposed standard would not just prevent economic gains from being attained, but also jeopardize the economic gains that were already generated under the 2017 Trump-era joint employer standard.

Further, as the new proposal is even broader than the 2015 *Browning-Ferris* decision, the negative economic consequences could be even more disastrous today if NLRB chooses to implement it. Thousands more small businesses and employees may be affected, potentially leading to even greater economic losses than the annual $33 billion felt after *Browning-Ferris*.

By redefining "essential terms and conditions of employment" to include "work rules and directions governing the manner, means, or methods of work performance," the proposal could be interpreted to cover an extremely broad swath of business relationships that traditionally have not been considered conditions of joint employment. The proposed rule similarly broadens the scope by eliminating the condition maintained in *Browning-Ferris* specifying that assertions of "control" must show that it leads to meaningful collective bargaining. Additionally, the proposal's vague references to "common-law" principles not only leaves implementation of the standard open to interpretation by regulators, but also increases potential liabilities for businesses—particularly those small businesses with fewer legal resources to expend.

Lastly, the instability surrounding the standard with which the joint employer rule is enforced may provide firms engaging in franchising with an implicit disincentive from utilizing franchising, temporary work contracts, and similar legitimate contracting arrangements. A key consideration for firms when choosing whether to invest in long-term contracting arrangements is the risk that regulations on such arrangements may be significantly altered in the foreseeable future. If firms expect standards surrounding such regulations to change, they may be dissuaded from using new contractual arrangements to expand, stifling investment and job creation.

The dramatic oscillation of regulatory approaches toward the joint employer standard over the last three presidential administrations has already led to instability in the market. When the NLRB in 2015 overturned long-standing precedent, the American economy felt the ramifications of this initial instability. In 2017, the NLRB made the right decision in returning the joint employer standard to its historical precedent, restoring stability to the market. Today's NLRB should not make the mistake of injecting instability by once again shifting the standard just five years later.

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[15] "IFA Statement on NLRB Proposed Joint Employer Rule." IFA. International Franchise Association, September 6, 2022. https://www.franchise.org/media-center/press-releases/ifa-statement-on-nlrb-proposed-joint-employer-rule.

The NLRB's proposed changes to the joint employer rule raise many concerns regarding the impact of the standard on the effectiveness of the franchising model, the competitive nature of the American economy, and the perceived stability of the franchising model.

Given the crucial role that franchising and similar contracting arrangements play in today's economy, the NLRB's new standard with which the joint employer rule would be interpreted must be opposed. The NLRB should instead maintain the clearer, fairer interpretation whereby joint employers are only those businesses with "direct" and "immediate" control of key employment decisions.

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