

Congress of the United States  
U.S. House of Representatives  
Committee on Small Business  
2361 Rayburn House Office Building  
Washington, DC 20515-6515

September 12, 2017

The Honorable Bradley Byrne  
Chairman, Subcommittee on Workforce Protections  
House Committee on Education and the Workforce  
2176 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Tim Walberg  
Chairman, Subcommittee on Health, Employment, Labor and Pensions  
House Committee on Education and the Workforce  
2176 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Byrne and Chairman Walberg:

As Chairman of the House Committee on Small Business and as an original co-sponsor of H.R. 3441, "Save Local Businesses Act," I commend you on holding a hearing on this vital legislation. The Obama-era joint employer scheme threatens small businesses—the engines of American economic growth. They create the majority of our nation's jobs and spur innovation. Enacting this legislation would help ensure continued freedom for America's job creators.

For over 30 years, the National Labor Relations Board (NLRB) used one standard to determine whether two separate businesses were joint employers. A joint employer relationship existed if two separate businesses "share[d] or co-determine[d] those matters governing the essential terms and conditions of employment." Crucially, whether the potential joint employer had "direct and immediate" control over employment matters "such as hiring, firing, discipline, supervision, and direction," determined a joint employer relationship. In 2015, the NLRB abandoned this standard when it issued a decision finding that merely possessing the potential for control, even if unexercised, was sufficient to find that two businesses are joint employers. This interpretation unfairly makes employers responsible for actions by employees they do not employ.

Other federal agencies and activist judges quickly promulgated this new standard. An appeal of the NLRB's 2015 decision is still pending before the courts, but it is unlikely that the decision will resolve this issue in a manner that provides any certainty to small businesses. While Secretary of Labor Alexander Acosta withdrew the Department of Labor's 2016 informal guidance

in June, NLRB will continue to use the new standard going forward. The expanded definition of the joint employer standard has become so entrenched into both federal and state statutes that only Congressional action rolling back this scheme and restoring a common sense definition of an employer can restore certainty to America's job creators.

Small businesses and entrepreneurs are threatened by this new definition of the joint employer standard. The ambiguity of the new standard makes it difficult to determine whether a current or prospective relationship would be classified as a joint employer, thus increasing the risk of continuing or entering into the relationship.

In particular, potential small business owners may avoid buying a franchise because of the risk of being punished for actions of a franchiser. Franchisers would likely take more active roles in day to day operations which could lead them to stop franchising altogether and to consider ending current franchise agreements. Locally owned franchises would then be owned and operated by corporate employees located outside of the community. At the very least, companies must spend additional time and money seeking legal advice. Like so many other one-size-fits-all policies, again small businesses, with fewer resources and access to expertise needed to navigate these complicated matters, will be disproportionately affected.

Franchises generally have lower start-up costs than other small businesses and thus are an attractive business model for nascent entrepreneurs. Reduced franchise expansion would limit the number of avenues available to Americans desiring to become small business owners and job creators. The American Action Forum projects that a reduction in franchise activity due to concerns about the new joint employer standard could result in 1.7 million fewer private sector jobs.

Additionally, this new joint employer standard threatens small businesses seeking work as subcontractors. In order to more actively oversee employment matters to mitigate risk, companies may choose to keep work in house and thus deny small businesses subcontracting opportunities. Consolidation of operations will have a chilling effect on small businesses of all sorts including suppliers, subcontractors, and franchisees.

As Chairman of the Small Business Committee, I have heard firsthand how the NLRB's new joint employer standard threatens the ability of small business owners to remain independent and responsible for their own employees. At a 2015 roundtable, the Committee heard from eight small business owners from different industries about the devastating impact uncertainty about the standard was already having on their bottom lines.<sup>1</sup> At a 2016 Small Business Committee hearing, one small business owner testified that if the new standard continues and businesses consolidate operations, "local business owners may effectively be demoted from entrepreneur to middle manager, as they are gradually forced to forfeit operational control of the stores, clubs, inns or restaurants they built."<sup>2</sup> At the same hearing, another small business owner testified that because of

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<sup>1</sup> Roundtable on Potential Joint Employer Standard, H.Comm. on Small Business, 114<sup>th</sup> Cong. (2015), *available at* <https://smallbusiness.house.gov/news/documentsingle.aspx?DocumentID=398109>.

<sup>2</sup> *Risky Business: Effects of New Joint Employer Standards for Small Firms: Hearing before the Subcomm. on Investigations, Oversight and Regulations of the H.Comm. on Small Business*, 114<sup>th</sup> Cong. (2016) (statement of Danny Farrar, CEO and Founder, SoldierFit), *available at* <https://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=398913>.



the increased control franchisers would likely exert over franchisees, that “I would cease to be an independent small business owner ... ultimately, I would become a de facto employee of the corporate brand.”<sup>3</sup> These are merely a few examples of the consequences real American small business owners face because of the decisions of Washington regulators and activist judges.

I commend the House Committee on Education and the Workforce in taking the first steps to advance this legislation that is necessary to restore certainty to America’s small business owners and their employees so that they can continue to operate their businesses locally and independently.

Sincerely,



Steve Chabot  
Chairman  
Committee on Small Business

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<sup>3</sup> *Risky Business: Effects of New Joint Employer Standards for Small Firms: Hearing before the Subcomm. on Investigations, Oversight and Regulations of the H.Comm. on Small Business, 114<sup>th</sup> Cong. (2016)* (statement of Vinay Patel, President and CEO, Fairbrook Hotels).