

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2561 Rayburn House Office Building
Washington, DC 20515-6515

December 7, 2023

The Honorable Lauren M. McFerran
Chairman
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Dear Chairman McFerran:

The House Committee on Small Business (the Committee) writes to inquire about the National Labor Relations Board's (NLRB) recent rule change to the Standard for Determining Joint Employer Status. This change expands the joint-employer definition under the National Labor Relations Act (NLRA) by allowing a joint employer finding based solely on indirect and unexercised control.¹ Removing the current clear and predictable joint employer standards prevents employers from predicting the risks and costs of their contracts with providers, vendors, subcontractors, and franchisees.² Beyond predictability, the rule expands liability to alleged joint employers which will almost certainly increase costs. It appears that the NLRB may not have properly considered small entities during this rulemaking process.

It is important for agencies to examine small businesses interests, which make up 99.9 percent of all businesses in the United States, when passing any new rule. America's small businesses deserve to have their voices heard and considered. We therefore request the following information as soon as possible but no later than December 21, 2023:

1. The NLRB uses data derived from wage and benefit figures provided by the Department of Labor's BLS to estimate costs for a legal counsel.³ Did the NLRB use an average wage for an attorney or an average billable rate to estimate the cost for a small business to hire a legal counsel to examine the new rule?
2. The NLRB uses the same familiarization time estimate than in its previous rule.⁴ However, this is a different rule with vaguer language and broader definition, thus, how did the NLRB reach the conclusion that the familiarization will only take an hour?

¹ Standard for Determining Joint Emp'r Status, 88 FR 73946 (2023) (to be codified at 29 C.F.R. 103).

² Mark G. Kisicki, *et al.*, *NLRB Casts Wider Joint-Employer Net With New Final Rule*, OGLETTREE DEAKINS (Oct 27, 2023).

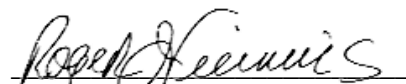
³ Joint Employer Status Under the National Labor Relations Act, 29 C.F.R. § 103 (2020).

⁴ *Id.*

3. The NLRB dismisses commentators' legitimate concern about the compliance costs for small entities if an entity is determined to be a joint employer under this new rule contrary to its previous status. The NLRB concludes that there are no other additional costs besides the familiarization costs. How did the NLRB come to this conclusion?
4. What was the reasoning behind the NLRB's decision to adopt this rule over other alternatives, especially considering its application to relationships involving a small entity (such as a franchisee) and a large enterprise (such as a franchisor) in which cases the small entity is likely to be at disadvantage?⁵
5. Franchise business model is one of the most common ways to achieve American dream—especially for small entities.⁶ Did the NLRB consider alternatives not to disproportionately burden an industry that is dominated by small businesses?
6. The rule states that the NLRB is “mindful that applying the final rule will require sensitivity to industry-specific norms and practices” and that it “will take any relevant industry-specific context into consideration when considering whether an entity is a joint employer.”⁷ What standards are applied by the NLRB when considering the industry-specific context?
7. How does the NLRB define “*indirect*” control of an essential term and condition?
8. This rule significantly increases bargaining responsibilities for small businesses. Considering this significant additional burden for small entities, how does the NLRB reason that this rule change is necessary to facilitate effective collective bargaining?

To schedule the delivery of your response or ask any related follow-up questions, please contact the Committee on Small Business Majority Staff at (202) 225-5821. The Committee on Small Business has broad authority to investigate “problems of all types of small business” under House Rule X. Thank you in advance for your cooperation with this inquiry.

In God We Trust,



Roger Williams
Chairman
Committee on Small Business



Pete Stauber
Member
Committee on Small Business

⁵ *Id.*

⁶ Jarrett Dieterle, *New Labor Rules Will Screw Over Your Local McDonalds*, REASON (Nov. 15, 2023).

⁷ Joint Employer Status Under the National Labor Relations Act, 29 C.F.R. § 103 (2020).

The Honorable Lauren M. McFerran

December 7, 2023

Page 3 of 3



Dan Meuser

Member

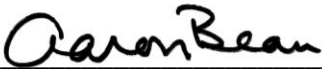
Committee on Small Business



Mark Alford

Member

Committee on Small Business



Aaron Bean

Member

Committee on Small Business

cc: The Honorable Nydia M. Velasquez, Ranking Member
Committee on Small Business