

December 7, 2022

Ms. Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Re: National Labor Relations Board Proposed Rule: Standard for Determining Joint-Employer Status [RIN 3142-AA21]

Submitted via www.regulations.gov.

Dear Ms. Rothschild:

We appreciate this opportunity to provide comment on the proposed rule, “Standard for Determining Joint-Employer Status.”¹

Proposed Rule Summary

The proposed rule imposes an alternative standard for determining whether two employers are considered joint employers under the National Labor Relations Act (NLRA). The proposed standard is based on a more expansive standard than currently exists, and more expansive than has ever existed.

Typically, the level of control an entity possesses and exercises over an employee has been the foundation of determining joint employer status. Under the proposed rule, an entity is considered a joint employer if the entity possesses “the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees’ essential terms and conditions of employment.”²

The rule specifies an expansive and uncertain definition of essential terms and conditions, stating that, “‘essential terms and conditions of employment’ will generally include, but are not limited to: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance.” Compared to the current National Labor Relations Board (NLRB) rule,³ the proposed rule adds “workplace health and safety” to the list of essential terms and conditions but, much more importantly, it eliminates all eight paragraphs in the current rule providing guidance as to what these terms do and do not

¹ National Labor Relations Board, “Notice of Proposed Rulemaking; Request for Comments,” *Federal Register*, Vol. 87, No. 172, September 7, 2022, pp. 54641-54663 <https://www.govinfo.gov/content/pkg/FR-2022-09-07/pdf/2022-19181.pdf> (hereinafter ‘proposing release’). See also National Labor Relations Board, “Notice of Proposed Rulemaking; Extension of Comment Periods,” *Federal Register*, Vol. 87, No. 201, October 19, 2022, p. 63465 <https://www.govinfo.gov/content/pkg/FR-2022-10-19/pdf/2022-22690.pdf>.

² Proposed rule § 103.40(c) at proposing release p. 54663.

³ See 29 CFR § 103.40

mean.⁴ The elimination of this guidance without any substitute introduces a high degree of uncertainty and ambiguity which will lead to a great deal of unnecessary litigation and countless

⁴ Proposed rule §103.40(d) at proposing release p. 54663.

Current 29 CFR § 103.40(c) reads as follows:

“Direct and Immediate Control” means the following with respect to each respective essential employment term or condition:

- (1) Wages. An entity exercises direct and immediate control over wages if it actually determines the wage rates, salary or other rate of pay that is paid to another employer's individual employees or job classifications. An entity does not exercise direct and immediate control over wages by entering into a cost-plus contract (with or without a maximum reimbursable wage rate).
- (2) Benefits. An entity exercises direct and immediate control over benefits if it actually determines the fringe benefits to be provided or offered to another employer's employees. This would include selecting the benefit plans (such as health insurance plans and pension plans) and/or level of benefits provided to another employer's employees. An entity does not exercise direct and immediate control over benefits by permitting another employer, under an arm's-length contract, to participate in its benefit plans.
- (3) Hours of work. An entity exercises direct and immediate control over hours of work if it actually determines work schedules or the work hours, including overtime, of another employer's employees. An entity does not exercise direct and immediate control over hours of work by establishing an enterprise's operating hours or when it needs the services provided by another employer.
- (4) Hiring. An entity exercises direct and immediate control over hiring if it actually determines which particular employees will be hired and which employees will not. An entity does not exercise direct and immediate control over hiring by requesting changes in staffing levels to accomplish tasks or by setting minimal hiring standards such as those required by government regulation.
- (5) Discharge. An entity exercises direct and immediate control over discharge if it actually decides to terminate the employment of another employer's employee. An entity does not exercise direct and immediate control over discharge by bringing misconduct or poor performance to the attention of another employer that makes the actual discharge decision, by expressing a negative opinion of another employer's employee, by refusing to allow another employer's employee to continue performing work under a contract, or by setting minimal standards of performance or conduct, such as those required by government regulation.
- (6) Discipline. An entity exercises direct and immediate control over discipline if it actually decides to suspend or otherwise discipline another employer's employee. An entity does not exercise direct and immediate control over discipline by bringing misconduct or poor performance to the attention of another employer that makes the actual disciplinary decision, by expressing a negative opinion of another employer's employee, or by refusing to allow another employer's employee to access its premises or perform work under a contract.
- (7) Supervision. An entity exercises direct and immediate control over supervision by actually instructing another employer's employees how to perform their work or by actually issuing employee performance appraisals. An entity does not exercise direct and immediate control over supervision when its instructions are limited and routine and consist primarily of telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it.
- (8) Direction. An entity exercises direct and immediate control over direction by assigning particular employees their individual work schedules, positions, and tasks. An entity does not exercise direct and immediate control over direction by setting schedules for completion of a project or by describing the work to be accomplished on a project.

enforcement actions. Only after years of litigation will employers be able to establish what the terms in proposed § 103.40(d) actually mean. A responsible NLRB would define these terms in the rule or, at least, provide meaningful guidance in the rule as to their meaning rather than simply withdraw the definitions and provide no substitute.

This proposed rule would impose joint-employer status on entities that have only the right to exercise indirect control over some few aspects of individuals' work, even when they do not exercise that right of control.

There are, notably, no exceptions provided to the standard.

The Rule Is So Expansive That Federal Government Would Meet the Definition of Joint Employer for Millions of Federal Contractors and Millions of Private Employees

The proposed rule says that entities are joint employers if they have the ability to directly or indirectly control the essential terms and conditions of employment, which include but are not limited to “wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance.”⁵ The federal government has exercised direct control over essential terms and conditions of employment through various regulations and executive orders affecting federal contractors and providers of federal services.

For example:

President Biden issued Executive Order 14026, which established a minimum wage for all workers performing work on or in connection with covered federal contracts.⁶ The initial minimum wage was set at \$15 per hour for 2022 and was recently raised to \$16.20 beginning in 2023. requiring that all employees on federal contracts receive a \$15 minimum wage. Under the proposed rule, the federal government acted as a joint employer by exercising direct control over the wages of roughly 5 million workers on federal contracts.

The Centers for Medicare and Medicaid Services (CMS) imposed a COVID-19 vaccine mandate on all workers that provide Medicare and Medicaid services.⁷ Under the proposed rule, CMS acted as a joint employer by exercising direct control over “hiring and discharge; discipline; [and] workplace health and safety” for roughly 14 million private sector workers at Medicare- and Medicaid-certified providers and suppliers.

All of the forgoing guidance is removed by the proposed rule and no guidance or definition with respect to any term is offered instead.

⁵ Proposed rule §103.40(d) at proposing release p. 54663.

⁶ Executive Order 14026, “Increasing the Minimum Wage for Federal Contractors,” April 27, 2021, *Federal Register*, Vol. 86, No. 82, April 30, 2021 <https://www.federalregister.gov/documents/2021/04/30/2021-09263/increasing-the-minimum-wage-for-federal-contractors>

⁷ Centers for Medicare & Medicaid Services, “Medicare and Medicaid Programs; Omnibus COVID–19 Health Care Staff Vaccination, Interim Final Rule with Comment Period,” *Federal Register*, Vol. 86, No. 212, November 5, 2021, pp. 61555-61627 <https://www.federalregister.gov/documents/2021/11/05/2021-23831/medicare-and-medicaid-programs-omnibus-covid-19-health-care-staff-vaccination>.

Were it not for the convenient fact that the National Labor Relations Act (NLRA), to which the proposed change in definition applies, states that “The term ‘employer’...shall not include the United States or any wholly owned Government corporation,”⁸ the current Administration’s actions would clearly make the federal government a joint employer of roughly 20 million private sector workers.

Meaningful Collective Bargaining Would be Impractical Across Many Newly-Defined Joint Employers

One of the largest groups affected by the proposed rule will be roughly 775,00 independently owned franchise operations across the U.S. These individuals employ about 8.2 million workers across all 50 states and dozens of diverse industries.⁹

The proposed rule seeks to make it easier to organize workers by franchisors as opposed to individual franchisee operations. The rule argues that the previous 2020 definition did not promote collective bargaining and maximizing employees’ representation of their choosing:

“The Board is additionally concerned that the 2020 Rule does not adequately reflect important background legal principles and the Act’s public policy of “encouraging the practice and procedure of collective bargaining’ and maximizing employees ‘full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.’”

The rule further spells out its purpose, citing the National Labor Relations Act:

“The Act’s purposes of promoting collective bargaining and stabilizing labor relations are best served when two or more statutory employers that each possess some authority to control or exercise the power to control employees’ essential terms and conditions of employment are parties to bargaining over those employees’ working conditions.”¹⁰

The rule provides these explanations, but does not describe how expanding the definition of a joint employer to make millions more employees’ subject to multiple employers will help expand collective bargaining or promote workers’ freedom of representation. Expanding the number of people at the negotiations table—especially including entities that have only indirect and non-exercised control over workers—is more likely to dramatically complicate labor negotiations than to improve them. While the proposed rule is unlikely to help ordinary workers or small businesses, it will certainly enrich the legal profession and transfer power and authority to large corporations. Requiring large corporations to participate in bargaining for individuals whom they did not hire, do not know, and have no role in the day-to-day management of could tip the scales against workers’ interests by introducing a potentially powerful negotiating force that may have a financial interest in minimizing employees’ compensation in order to increase their own profits.

⁸ 29 U.S. Code § 152(2).

⁹ “National Economic Impact of Franchising,” International Franchise Association <https://franchiseeconomy.com/>.

¹⁰ Proposing release at p. 54645.

If attempts were made to bargain collectively across an entire franchise, this could significantly harm certain franchisee owners and franchisee workers. Franchises operate across diverse areas and costs-of-living. The market rate for Mosquito Squad technicians in Lafayette, LA may be \$15 per hour while the market rate for technicians in the Hamptons, NY may be \$25 per hour. The heat safety practices necessary for workers in Louisiana are more extensive than those necessary for workers in the Hamptons. Requiring employers from diverse locations to bargain collectively would be impractical and detrimental.

Unions could address the impracticality of collective bargaining with hundreds of different franchisee owners and irreconcilable economic differences by establishing individual contracts with each franchisee, but that would render the rule meaningless, and ultimately harmful with respect to collective bargaining. Individual unionization and individual collective bargaining—with negotiations taking place between the union and franchisee employer—is already possible. The proposed rule would impose joint employer status upon franchisor companies and require their representation at each individual franchisee’s negotiations.

Adding a third party with distinct interests into the negotiations process would almost certainly complicate bargaining and reduce the chances of reaching a contract agreement. This would also add significant costs for franchisors who would need to employ attorneys to engage in often lengthy contract negotiations across many different independent franchise locations. Those costs would be passed on directly to franchisee owners in the form of higher franchise fees, and indirectly to franchise employees and customers in the form of lower compensation or fewer jobs for employees and higher consumer prices. Under the existing definition of a joint employer, franchise worker experienced significantly above-average wage growth of 9.2 percent in 2021.¹¹ The proposed rule’s failure to show that it would achieve the benefits it sets out to obtain renders it arbitrary and capricious.

Proposed Definition Adds Uncertainty and Confusion

The proposed rule replaces clarity in what constitutes direct and immediate control with direct or indirect control including reserved but not exercised control.¹² Whereas exercised control is clear-cut because it includes action actually taken, reserved control is imprecise and can evolve, as needed, to changing times. For example, the COVID-19 pandemic brought about unforeseen circumstances, such as workplace decisions about health and safety that most entities had never previously considered as components of their control, but which could—or could not—have been considered reserved rights. For example, a franchise may have provided guidance to franchisees about improved workplace safety measures and that would have represented indirect control that need not trigger a joint employer relationship and thus a legal liability. But under the proposed rule, providing guidance would constitute exercising indirect and reserved control, making the franchisor legally liable as a joint employer. Incongruously, an entity that issued no guidance and made no decisions regarding COVID-19 safety policies (whether it made that

¹¹ “National Economic Impact of Franchising,” International Franchise Association <https://franchiseeconomy.com/>.

¹² Proposing release at p. 54663 and proposed rule §103.40(e).

decision by choice or because it did not believe it had the authority to exercise such control), could still be considered a joint employer and legally liable depending on whether or not the NLRB believed the entity had a reserved right to issue such guidance.

Moreover, the proposed rule replaces clarity in the essential terms and conditions of employment with an expansive and open-ended definition of control that “generally include, but are not limited to” approximately nine terms and conditions of employment.¹³ Those terms themselves are open-ended, leaving the public with no way to know whether a particular clause in a franchising agreement creates a joint-employment relationship.

For example, a franchisor’s ability to specify the color and font of the business logo on franchisee employees’ polo shirts could be considered either an unspecified (“not limited to”) essential term or condition of employment; a specified “work rule...governing the manner...of work performance”; or it could equally be determined a nonessential condition of employment.

The proposed rule’s expansive and open-ended definition fails to provide adequate guidance to the public or the courts, which will come to diverse decisions based on possible determinations of what constitutes “indirect control” and what terms and conditions of employment are considered “essential.” The NLRB needs to provide clarity and meaningful guidance in the rule as to the meaning of the various elements of “essential terms and conditions of employment”. To replace the existing rule, which does provide actual guidance, without providing any replacement guidance is irresponsible. The expansiveness and vagueness of the proposed standard redound to no one’s benefit and retaining them would be arbitrary and capricious.

Proposed Rule Fails to Provide Sufficient Costs Estimates and Likely Violates Multiple Required Cost Considerations

The board assumes that the proposed rule will have minimal costs, limited to regulated parties’ reading of the rule. The board estimates that it “may take at most one hour [for a human resources or labor relations specialist] to read the text of the rule and the supplementary information published in the Federal Register” and potentially an additional one hour of labor for an attorney to review the changes.¹⁴

Consequently, the rule concludes that it will impose insignificant costs—equal to \$151.51 for small employers and \$99.64 for small labor unions—on affected entities.

But this conclusion fails to account for the potentially massive costs associated with the rearrangement of business relationships that the rule would prompt. That the rule does not *mandate* such a rearrangement is insufficient to assume that no rearrangements and no compliance costs will occur. The proposed rule very likely would cause franchisors to rearrange their business relationships with franchisee owners. This could include the franchisor charging the franchisee higher fees, the franchisor distancing itself in terms of the guidance and support it provides or alternatively imposing greater control over franchisees, and the franchisor altering its

¹³ Proposing release at p. 54663; proposed rule at §103.40(d).

¹⁴ Proposing release at p. 54661.

business model to convert the independent franchise owner option into an employee manager position that would provide a salary as opposed to ownership.

The board assumes that because the rule does not mandate rearrangement of the business relationship, there will be no costs from potential rearrangements. The rule states:

“While entities may choose to rearrange their business relationships to minimize risk of joint-employer status, they may also choose not to. Accordingly, because the proposed rule would not make any form of business arrangement unlawful, it appears to impose no direct compliance costs other than those for reading and understanding the rule.”¹⁵

This is counter to the evidence of the likely impact of the proposed rule, based on the experience of franchises in response to the *Browning-Ferris* definition of a joint employer.

A 2019 survey of 77 franchisors and franchisees on the impact of the *Browning-Ferris* joint employer standard conducted by the International Franchise Association (IFA) found that the standard significantly affected business practices far beyond simply reading the rule, and in ways that imposed harm on workers and employers, and costs on franchisors and franchisees. The IFA survey found:¹⁶

- 92% of respondents reported that franchisors implemented defensive distancing behaviors in the wake of the *Browning-Ferris* decision, such as curtailing guidance regarding compliance with labor and employment laws, limiting training programs, withdrawing assistance with marketing and cost control practices, and eliminating other services that previously were provided and crucially impacted the businesses' operations and profitability.
- 100% of franchisor executives interviewed (28 in total) reported that they had constrained guidance, support services, and interactions with franchisees that had previously been routine before the *Browning-Ferris* decision.
- 83% of franchisee business owners (30 of the 36 interviewed) reported significant curtailment of guidance, support services, and interactions that had been routine before the *Browning-Ferris* decision. Of the six franchisees who reported no notable curtailment (their output loss estimates were recorded as zero percent), three were long-experienced business owners who stated that they had never relied on franchisor assistance either before or since the decision. Two of these, however, stated that less experienced new franchisees would benefit from franchisor guidance that has been curtailed since the *Browning-Ferris* decision.

It is arbitrary and capricious to assume there will be no compliance costs from business rearrangements when the rule acknowledges that business rearrangements could occur and considering historical evidence that such business rearrangements did occur under the less expansive *Browning-Ferris* joint employer definition. Given the high likelihood of such costs, the NLRB is obligated under governing case law to attempt to understand the magnitude of the

¹⁵ Proposing release at p. 54661.

¹⁶ Survey findings provided by the International Franchise Association.

costs and to determine whether the rule is justified in light of them. *See, e.g., Michigan v. EPA*, 576 U.S. 743 (2015).

The NLRB's assertion that this proposed rule will affect only 934 employers and that the joint-employer standard will affect "approximately .015% of all 6,102,412 business firms"¹⁷ is absurd. By adopting the most expansive definition of joint employment imaginable, the proposed rule is likely to affect most franchisees – about three quarters of a million establishments – not a small fraction of them.

Similarly absurd is the Board's assertion that the only costs that will be imposed on small firms is one hour of attorney time:

Since the only quantifiable impact that we have identified is the \$151.51 or \$99.64 that may be incurred in reviewing and understanding the rule, we do not believe, subject to comments, that the proposed rule will have a significant economic impact on a substantial number of small entities.¹⁸

No attorney, even the most talented speed reader, is going to be able to read the rule and the proposing release, compare it to existing rules, consider the implications for the client in light of its franchise agreement and communicate to the client his opinion in one hour. This is a purposeful misrepresentation by the Board and its staff.

Actual costs imposed on small entities (i.e. franchisees) will include four major factors (1) familiarization of the firm with the rule; (2) renegotiation of franchise and other contracts; (3) the cost of dealing with labor unionization efforts and elections and (4) the cost of enforcement actions.

Accepting, *arguendo*, the NLRB estimate that there are 125,989 franchisee firms. Assuming, probably heroically, that an attorney could review the rule, the proposing release, the relevant contracts and employment practices and communicate with the client in 10 hours at \$300 per hour, then the total cost for franchisee firms alone for just the legal costs of the familiarization prong of the cost would be \$378 million.¹⁹ Management time would be comparable, doubling the cost for familiarization to about \$750 million. Adding employee leasing firms and other firms subject to the rule is likely to put just the familiarization costs at well over \$1 billion.

Contracts throughout the economy will have to be renegotiated because franchisors and other contractors will not want to become employers of employees with whom they have no economic relationship. These negotiations and contract revisions will cost hundreds of millions of dollars.

The Board does not even consider the cost by the many small businesses around the country of dealing with unionization efforts and union elections. This too is likely to run in the hundreds of millions of dollars.

¹⁷ Proposing release at p. 54661 (col. 2).

¹⁸ Proposing release at p. 54662 (col. 1).

¹⁹ 125,989 firms times 10 hours times \$300.

Lastly, the Board does not even consider the cost of dealing with Board enforcement efforts that will be launched if the proposed rule is promulgated.

There is little doubt that the cost of the proposed rule will be in excess of a billion dollars. It could well be several times that once affected non franchise businesses are considered. There is no doubt that the Board's cost estimate is absurdly low and constitutes a violation of its duty to make good faith estimates under the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act.

The Rule Refutes Itself: An Action Cannot Meaningfully Impact Collective Bargaining and Have No Impact on Costs

A stated purpose of the proposed rule is to enable meaningful collective bargaining.

The purpose of collective bargaining is to make employers and employees—as a whole—better off. From workers' and unions' perspective, the goal is for workers to garner a larger share of the firm's revenues in the form of wages, benefits, hours, and workplace conditions.

By nature, collective bargaining rearranges existing resources between employers and employees. It also commonly results in a change in output. Parties would not engage in collective bargaining simply to maintain the status quo.

The rule claims that the only costs associated with it will be to read the rule (a cost of \$151.51 for small employers). That can only be true if the rule results in zero changes, including not achieving the rule's stated goal to impact "meaningful collective bargaining." To have no cost, any collective bargaining that results from the rule must have no impact no impact on employer and employee relations, no impact on workplace conditions, no impact on compensation, no impact on employer costs, and no impact on company output. As such, it must be meaningless—as opposed to "meaningful" collective bargaining. Either the rule has no cost and no impact on collective bargaining (rendering it useless), or it has an impact on collective bargaining and a cost that the board failed to include in its required costs estimates.

It is arbitrary and capricious for the board to include cost analyses that directly refutes the stated purpose of the rule.

The Proposed Rule Assumes Away Probable Costs. Under the assumption that, because the rule does not outlaw existing business arrangements, it will not result in any changes, the board waives away a barrage of likely costs stemming from business rearrangements:

“We therefore believe that the proposed rule imposes no capital costs for equipment needed to meet the regulatory requirements; no direct costs of modifying existing processes and procedures to comply with the proposed rule; no lost sales and profits directly resulting from the proposed rule; no changes in market competition as a direct result of the proposed rule and its impact on small entities or specific submarkets of small entities; no extra costs associated with the payment of taxes or fees associated with the

proposed rule; and no direct costs of hiring employees dedicated to compliance with regulatory requirements.”²⁰

Moreover, instead of addressing other required cost criteria to be evaluated in the course of the small business analysis, the board reverts to its unjustified assumption that the only costs of the rule will be the time spent reading it. The rule states:

“Other criteria to be considered are the following:

- Whether the rule will cause long-term insolvency, i.e., regulatory costs that may reduce the ability of the firm to make future capital investments, thereby severely harming its competitive ability, particularly against larger firms;
- Whether the cost of the proposed regulation will (a) eliminate more than 10 percent of the businesses’ profits; (b) exceed one percent of the gross revenues of the entities in a particular sector, or (c) exceed five percent of the labor costs of the entities in the sector.”²¹

In response to those stated criteria, the board concludes: “The minimal cost to read and understand the rule will not generate any such significant economic impacts.”

This conclusion is counter to the purpose of the rule—to meaningfully impact collective bargaining—counter to economic evidence and to the experience of entities affected by the less expansive *Browning-Ferris* definition of a joint employer. In addition to the survey evidence of franchises, a sampling of other cost considerations of the proposed definition and its probable affects that the board does not consider include:

1. Economic analysis commissioned by the International Franchise Association estimated that the *Browning-Ferris* decision cost franchise businesses \$33.3 billion per year, led to a 93% increase in lawsuits, and resulted in 376,000 lost job opportunities.²²
2. Higher costs and increased unionization resulting from the proposed rule will undoubtedly impact affected firms’ ability grow, to employ workers, and to make future capital investments, particularly against larger firms. According to a Fraser Institute study by Barry T. Hirsch:

“There has been extensive study in recent years, particularly in the United States, of the relationship of unionization to productivity, profitability, investment, and employment growth. The broad pattern that emerges from these studies is that unions significantly increase compensation for their members but do not increase productivity sufficiently to offset the cost increases from higher compensation. As a result, unions are associated

²⁰ Proposing release at p. 54661.

²¹ Proposing release at p. 54662.

²² “The Economic Impact of an Expanded Joint Employer Standard,” January 28, 2019 Letter to the NLRB from the International Franchise Association <https://www.franchise.org/sites/default/files/2019-05/JE%20Econ%20Impact%200128.pdf>.

with lower profitability, decreased investment in physical capital and research and development (R&D), and lower rates of employment and sales growth.”²³

It is arbitrary and capricious for the board to wave away the significant costs its rule would impose, to fail to determine whether its proposal is justified in light of those costs, and to conduct its small business analysis on the basis of this failure.

This is not a problem that the board can cure at the final rule stage. Even if the board decides, upon review of the comments, that its rule would have substantial costs, it must make its estimate of the rule’s actual effects available to the public for comment before finalizing. That is because the public has the right under the Administrative Procedure Act to comment on all aspects of the rationale for the board’s proposed rule—and at present, the public cannot comment intelligently on the rule’s costs, given the NLRB’s refusal to acknowledge meaningful costs. If the board mistakenly continues to wish to finalize this rule, it must first offer a supplemental notice of proposed rulemaking giving a more accurate and complete assessment of costs on which the public can comment.

Meet Clement Troutman

Clement Troutman is a 23-year Navy veteran and spent 16 years as an information systems security engineer contractor with the Department of Defense (DoD). When having lunch one day with a colleague at a Tropical Smoothie Café, Clement decided that he wanted to own his own Tropical Smoothie Café. He opened his first Tropical Smoothie Café in Capitol Heights, MD in 2017. The café soared to the number one ranking in annual sales revenue in its first year of operation and maintained the position for four consecutive years. A second café is under construction in Vista Gardens West, Bowie, Maryland, with a third location also on the horizon for 2023. He serves on the Board of Directors as Treasurer for Mission of Love Charities, Inc. a non-profit organization dedicated to the needs of low-income Capitol Heights residents, and is the author of the self-help book, “Dreams Never Die.”²⁴ Clement’s daughter now works with him and plans to take over the family business when he retires.

Clement has a sparkle in his eyes when he talks, with pride, about his Tropical Smoothie Cafés and his employees. He described to me how he meets regularly with each of his employees who he does not refer to as employees, but rather team members—his “dream team.” Whether a single mom supporting her family or a high schooler saving for college, Clement wants to know his team and help them work towards their goals. As someone who has worked in multiple restaurants, I would love to have Clement as my boss.

Under the proposed definition of a joint employer, Clement could lose the ability to manage his employees as he believes best, including the flexibility to help members of his “dream team” meet their unique goals; he could lose access to important information from the franchisor that

²³ Barry T. Hirsch, "Unionization and Economic Performance: Evidence on Productivity, Profits, Investment, and Growth," in Fazil Mihar, ed. *Unions and Right-to-Work Laws*, Vancouver, B.C.: The Fraser Institute, 1997, pp. 35-70

²⁴ Much of Clement Troutman’s description comes from his resume, which he provided to Rachel Greszler in April, 2022.

could improve workplace safety and wellbeing; he could have to sacrifice a higher portion of his revenues to pay increased franchise fees, and he and his daughter could lose the ability to open new Cafés if Tropical Smoothie Café were to change their business model or replace independent ownership with paid manager positions.

Moreover, other individuals like Clement, who want to own their own business but don't want to or are unable to take the risks of building a company from scratch, will miss out on the opportunity to pursue their American dreams. Franchise ownership has been a particularly popular way for women and minorities to become small business owners. While the Census Bureau's Annual Business Survey shows that 19.9% of all firms that employed people in 2019 were female-owned,²⁵ women's share of franchise ownership has increased from 24% in 2009 to 35% in 2019.²⁶ Without the franchise model, 39% of female franchise owners said they would not have been able to own their own business.²⁷ Minority ownership is also more common among franchises. The Census data shows that 18.3% of firms that employed people in 2019 were minority owned,²⁸ compared to 26% ownership by people of color among franchises.²⁹ And Black-owned franchises earn 2.2 times as much as Black-owned independent businesses.³⁰

Conclusion

The board should withdraw the proposed rule and leave in place the existing rule that has functioned well to respect workers' rights, enable strong wage and compensation gains, allow small businesses to grow and thrive, and to provide clarity to employers and employees alike.

Absent withdrawing the proposed rule and before finalizing it, the board must provide an adequate economic analysis of the costs (including the small business analysis) of the proposed rule, taking into account actual experiences of affected entities under the *Browning-Ferris* definition of a joint employer among other sources of data. Since a sound economic analysis will almost certainly reveal significant costs and consequences, the board must consider other alternatives, such as small business exemptions, that would limit those costs.

The board should also consider eliminating the qualification of non-exercised control so that the power and influence—imposed via the inherent liabilities of a joint employer relationship—of an entity that has not exercised any control over a group of workers, likely knows little or nothing

²⁵ Andrew W. Hait, "Number of Women-Owned Employer Firms Increased 0.6% From 2017 to 2018," U.S. Census Bureau, March 29, 2021, <https://www.census.gov/library/stories/2021/03/women-business-ownership-in-america-on-rise.html> (accessed December 1, 2023).

²⁶ Anne Stych, "Women Increasingly Turn to Franchises to Own Their Own Business," Bizwomen, December 3, 2019, <https://www.bizjournals.com/bizwomen/news/latest-news/2019/12/women-increasingly-turn-to-franchises-to-own-their.html?page=all> (accessed December 1, 2022).

²⁷ Raghav Patel, "IFA Publishes 'The Value of Franchising Report' from Oxford Economics," September 20, 2021, <https://www.global-franchise.com/insight/ifa-publishes-the-value-of-franchising-report-from-oxford-economics> (accessed December 1, 2022).

²⁸ Andrew W. Hait, "Number of Women-Owned Employer Firms Increased 0.6% From 2017 to 2018."

²⁹ International Franchise Association, "The Value of Franchising, Executive Summary," 2021, https://openforopportunity.com/wp-content/uploads/2021/09/IFA-Franchising-Report-Executive-Summary_092121.pdf (accessed December 1, 2023).

³⁰ Ibid.

about those workers, and may have conflicting financial interests from those workers does not hinder employer-employee relationships and potential collective bargaining.

Respectfully submitted,

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³¹This comment is submitted in my personal capacity, with my title provided for informational purposes only.

³²This comment is submitted in my personal capacity, with my title provided for informational purposes only.