ROGER W. MARSHALL
KANSAS

United States Senate

COMMITTEES:
AGRICULTURE, NUTRITION, AND FORESTRY
ENERGY AND NATURAL RESOURCES
HEALTH, EDUCATION, LABOR AND PENSIONS
SMALL BUSINESS AND ENTREPRENEURSHIP

August 25, 2022

The Honorable Lauren McFerran
Chair
National Labor Relations Board
1015 Half Street, SW
Washington, DC 20570

Dear Chair McFerran:

I write to you today in regard to the Board's intent to revisit its current regulation setting forth the standards for 'joint-employer status' under the National Labor Relations Act ("NLRA" or "the Act"). As the Board considers proposed changes to the rule, I urge the Board to abandon this effort that will deeply harm the small business economic recovery.

According to the Small Business Administration, there are over 250,000 small businesses – including 7,500 franchise locations which employ 75,596 people – in Kansas, and nearly all are subject to the NLRA.[1] In 2020, the Board, via notice and comment rulemaking, published a final rule adopting a standard for joint-employer status under the Act. This rule, which is in effect today, provides a clear, understandable and stable standard for determining whether two businesses have established a joint employer relationship with respect to the employees of one of those businesses. The rule's fundamental requirement that to be a joint employer, a business must actually exercise control over the essential terms and conditions of employment, is consistent with decades of Board precedent and represents a reasonable application of the common law of agency within the context of joint employment.

For over 30 years, the Board has required direct and immediate control over key employment terms for a joint employer relationship. Under the long-standing test, businesses are joint employers only when they share actual, direct and immediate control over the essential terms and conditions of employment. This standard does not allow responsible employers to escape responsibility for labor law violations. Instead, it ensures that employers remain responsible when they are directly involved in an employee's day-to-day working conditions. I urge the Board to maintain this standard.

In contrast, the Board's previous standard, as established under Browning-Ferris Industries ("BFI") in 2015, was an unpredictable, fact-based test that must be decided on case-by-case basis to determine whether a company directly, indirectly or potentially controls the means or manner of another entity's employees' terms of employment. The Board's test shifted focus away from the businesses' control over employees' terms and conditions of employment to a focus on the relationship between the two businesses. As such, the Board's previous standard led to confusion and unpredictability for America's 733,000 franchise businesses, the franchise agreements these independent owners sign with franchisors and other third-party business relationships by taking away their predictability. The "potential control" and "indirect control" standards are broad

[1] https://cdn.advocacy.sba.gov/wp-content/uploads/2021/08/30143128/Small-Business-Economic-Profile-OK.pdf

enough to cover virtually any business relationship, and the murky guidance provided in the BFI opinion makes it virtually impossible for businesses to apply the new standard with any confidence.

Additionally, an expanded joint employment liability has proven to have had a negative impact on entrepreneurship, small business growth, and wealth accumulation for families. Businesses need to know with certainty that they can offer these crucial benefits and utilize the power of the franchise business model without running afoul of liability laws.

Last year, I introduced the Save Local Business Act (S. 1636), which clarifies the joint employer standard to provide clarity and certainty for small business owners and workers. The dramatic expansion in the definition of a "joint employer," has created confusing regulations for small businesses across the country. At a time when we are facing near-record inflation, and the very real possibility of an economic recession, to revert to such ill-advised policy would savage workers and American families. America's small businesses – franchise or otherwise – have borne a heavy burden during this pandemic. These businesses, which are part of the fabric of so many communities, have worked diligently to serve their customers, employees, and communities. Now they deserve some clarity in the law.

For all of these reasons, I urge that the Board to reconsider this unwanted effort to deeply harm the small business recovery in Kansas and throughout the U.S.

Sincerely,

Roger Marshall, M.D.
United States Senator