



## Comments of the Regulatory Action Center

Re: Standard for Determining Joint-Employer Status

Document ID: NLRB-2022-0001-0001

December 7, 2022

The Regulatory Action Center at FreedomWorks Foundation is dedicated to educating Americans about the impact of government regulations on economic prosperity and individual liberty. FreedomWorks Foundation is committed to lowering the barrier between millions of FreedomWorks citizen activists and the rule-making process of government agencies to which they are entitled to contribute.

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On behalf of our activists nationwide, FreedomWorks Foundation appreciates the opportunity to offer these comments regarding the notice and request for comments on the standard for determining joint-employer status under the National Labor Relations Act.

This proposed rule, if adopted, would allow consideration of indirect or reserved control when assessing whether a business is in fact a joint employer. It would eliminate the Trump-era NLRB rule from 2020, which provided clear guidance on when a business would be viewed as a joint employer of another business's employees; and return to the Obama rule, which caused great confusion.

Businesses need certainty about rules and regulations in order to be willing to invest. The 2020 rule provided that certainty: it made very clear that an employer would not be viewed as a joint employer unless it exercised direct control over the employment terms/conditions of another business's employees. The 2020 rule has yet to be applied to a single case, so the NLRB cannot possibly have found fault with it.

Franchise businesses are a major target of this proposed rule. A national franchisor does not own the vast majority of individual outlets. They are often owned by local individuals. To display the national brand of, for example, a national restaurant chain, the local franchisee is required to follow certain standards, from food preparation to cleanliness to employee uniforms. Many franchisors also require franchisees' employees to undergo training in important topics such as health and safety, discrimination, and sexual harassment. Would requiring franchisees to adhere to quality standards and training requirements make the franchisors joint employers?

The proposed NLRB rule would also apply to subcontractors—e.g., staffing agencies who provide temporary workers to employers; construction workers who supply specialized services on construction sites; and janitorial companies that provide cleaning services to office buildings. Businesses who subcontract part of their enterprises generally require that subcontractors meet specific quality standards and deadlines. Would this make the businesses joint employers of their subcontractors’ employees?

This proposed rule benefits big unions and plaintiffs’ lawyers at the expense of job-creating businesses. Unions could organize an entire franchise at the national level instead of franchise-by-franchise. Plaintiffs’ lawyers would have deep corporate pockets to sue for alleged labor violations—whether or not the corporation was actually responsible for its franchisee’s or subcontractor’s violations.

Most of those who own franchises and subcontracting agencies are small, local business people who view owning a local franchise restaurant or a small janitorial service as a chance to build wealth for their families. Before the NLRB joint-employer rule was simplified and clarified under President Trump, the old rule from the Obama Administration cost franchise companies alone more \$33 billion a year and cost the economy more than 375,000 jobs, [according](#) to the International Franchise Association.

Returning to the old Obama rule will mean that franchise owners will be simply employees of a large company, not small business people building wealth for their families and providing jobs for their communities.

Large businesses—whether franchisors or companies who hire subcontractors—will be much less likely to take a chance on new potential franchisees or subcontractors who do not have extensive experience, because any training of inexperienced franchisees or subcontractors might make the large business a joint employer. This will deprive would-be small business owners a chance to improve their livelihoods.

Franchisors and businesses who employ subcontractors will be much less likely to provide support, such as training, for their franchisees’ or subcontractors’ employees. Franchisees and subcontractors would have to secure such support from outside sources at additional expense. Government policy should be encouraging such training, not subjecting businesses to legal risks for providing the training.

In conclusion, we urge the NLRB to, at a minimum, narrow and clarify what constitutes joint employment. Particularly in this time of economic uncertainty, businesses need clear guidance as to what will and will not make them joint employers.

Respectfully submitted,

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