

New “Joint Employer” Standard Threatens Businesses Everywhere

“Small businesses are the backbone of our economy. They are central to our identity as a nation.”

– President Barack Obama, July 2010

In August, the National Labor Relations Board (NLRB) issued its highly anticipated decision in *Browning-Ferris Industries* (BFI) and created a new “joint employer” standard in federal labor law. The question before the NLRB was whether BFI was a joint employer with a staffing services company, Leadpoint, of employees that worked at one of BFI’s facilities. The NLRB said the two companies were joint employers, based on BFI’s “indirect” and “potential” contractual control of the Leadpoint employees.

The new joint employer standard threatens practically every private sector business in America, small and large. The impact is *“(t)he number of contractual relationships now potentially encompassed within the majority’s new standard appears to be virtually unlimited,”* as the dissenting NLRB members wrote in the BFI decision. For over thirty years, the joint employer standard has protected businesses from liability for employees over which they do not have actual or direct control. But now, in adopting this new ambiguous **indirect control** standard, the NLRB has made employers potentially liable for employees they do not even employ and jeopardizes countless business partnerships in numerous industries. Moving forward, almost any contractual relationship between multiple employers may trigger a finding of joint employer status.

How will the new joint employer standard impact local businesses throughout the country?

- Prime companies may be held liable for the employment and labor actions of third-party vendors, suppliers, staffing firms, franchisees, or subcontractors, over which they have no direct control.
- Due to this new liability, prime companies may be compelled to exercise more control over small businesses with which they contract to limit their NLRA liability.
- Consequently, local business owners may forfeit operational control of the stores, clubs, inns or restaurants they built.
- Enterprise value of thousands of franchises and small businesses may decrease because of the decreased operational control. Future franchise development is jeopardized as brands expand using a corporate ownership model.
- Employees will experience less workplace flexibility, because they may no longer be managed by small business owners in their hometown, but rather by corporate management in a faraway headquarters.

Under the expanded joint employer standard, here's what we will see on Main Street, USA:

- Fewer local businesses: Large companies will be less likely to contract with local businesses for their products and services. Large brands will open corporate locations instead of franchises. Local entrepreneurs will not open new businesses in their local areas as small business opportunities decrease. As a result, America's Main Street will lose small businesses created by independent owners in their local communities.
- Fewer jobs: According to the Small Business Administration, local businesses with 20-499 employees created 60 percent of the net new jobs since the end of the recession (from mid-2009 to mid-2013). If entrepreneurs are not investing in local businesses, then those jobs will disappear.

Bottom line: The joint employer changes adopted by the NLRB threaten the livelihoods of nearly every small business. The NLRB has made it far more difficult for independent business owners to build sustainable, profitable local businesses, and the BFI decision will lead to large corporations dominating Main Street. Small businesses need a statutory definition of "joint employer" in federal labor law that protects them and their employees. It is critical that President Obama and Congressional leaders respond to the potentially transformative BFI ruling and stop this government overreach into local businesses.