

POTENTIAL CONSEQUENCES OF THE NLRB JOINT EMPLOYER RULE

**A REPORT FOR THE INTERNATIONAL
FRANCHISE ASSOCIATION**



SEPTEMBER 2023



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EXECUTIVE SUMMARY

The International Franchise Association (IFA) is the world's largest organization for franchisors, franchisees, and franchise suppliers. In 2022, the franchise sector encompassed more than 790,000 franchise establishments creating nearly 8.4 million direct jobs and \$825 billion of economic output for the US economy.¹

The IFA commissioned Oxford Economics to assess the potential impacts of the National Labor Relations Board (NLRB)'s proposed revisions to the joint employer rule² on franchising if implemented. Survey questions distributed by the IFA as part of their annual member survey allowed us to gain insight into potential consequences of the rule for franchisors and franchisees and their possible responses. Our report sets out those potential consequences and impacts on franchisors, franchisees, consumers, and workers.

INTERSECTION OF JOINT EMPLOYER AND FRANCHISING

- For decades following its formation in 1935, the NLRB did not seek to regulate who can be deemed a “joint employer” under the National Labor Relations Act (NLRA).³
- In 1984, the NLRB created the joint employer standard through two regulatory decisions under which two distinct entities could be deemed “joint employers” if an entity exercised actual control over another entity’s employee (for example, in hiring and firing workers).⁴
- This standard remained in place until 2015, when the NLRB issued a regulatory decision that allowed two entities to be deemed joint employers if one entity retained indirect control or reserved the right to control (even if that right was never exercised) over another entity’s employee. This shift in the joint employer standard had implications for the franchise model, where franchisors routinely reserve the right in franchise agreements to establish standards for training, customer service, and operations with which franchisees must comply to ensure a consistent experience in the products and services offered to consumers under the franchisor’s trademarks.⁵
- In 2020, the NLRB issued an amended joint employer standard that reinstated the pre-2015 joint employer standard requiring an entity to possess and exercise direct control over another entity’s employee to be deemed a joint employer.⁶
- In 2022, the NLRB sought to amend the joint employer standard again—this time through a formal rulemaking—to reinstate the 2015 joint employer standard that requires only indirect control or a reservation of rights to control another entity’s employee to be deemed a joint employer.

¹ FRANData, “International Franchise Association Franchising Economic Outlook,” 2023.

² *Standard for Determining Joint-Employer Status: A Proposed Rule by the National Labor Relations Board*, 87 Fed. Reg. 54641 (September 7, 2022) (29 CFR 103).

³ David J. Kaufman and Michelle Murray-Bertrand, *Franchising Faces Existential Threats*, 238–39, 42(3) FRANCHISE L. J. (Spring 2023).

⁴ *Ibid.* p. 239.

⁵ *Ibid.*

⁶ *Ibid.* p. 240.

CONSEQUENCES OF THE RULE TO FRANCHISING

- **Increased uncertainty.** We found that the rule may contribute to uncertainty around the business models used by franchisors and franchisees throughout the country. Overall, 43% of franchisees expected some change in the franchisor/franchisee relationship, although the direction of change remains uncertain for franchisees: 22% of respondents expected franchisors to increase control over their operations, whereas 21% expected franchisors to distance and reduce operations and compliance support, and 38% did not know what to expect. Only 20% expected no change.
- **Disrupts franchise relationships.** In addition, this uncertainty presented franchisees with concerns about the future of the relationship with their franchisors: 74% of franchisees expressed a high level of concern at the prospect of increased franchisor control, and 55% a high level of concern with reduced franchisor support.
- **Increased costs.** An important implication of the rule was likely to be increased costs for both franchisees and franchisors. These include the heightened risk of litigation as plaintiffs seek access to perceived “deep pockets” of franchisors through joint employer liability (70% of franchisees expected increased litigation, which is consistent with the litigation increases following the 2015 change in the joint employer standard). Other costs could include increases in legal and advisory fees as franchisees and franchisors navigate compliance under the new rule, in addition to greater insurance and operations costs for franchisees.
- **Decreased access to business ownership through franchising.** Meanwhile, the new rule may reduce the attractiveness to being a franchisee with respect to operating an independent business and lead to fewer franchises (66% of franchisee respondents expected the new standard to raise barriers to entry into franchising). Underrepresented groups may be hardest hit. Our analysis found women and minority ownership of franchises was higher than for other business models, suggesting that, to the extent this rule impacts franchising more than other business models, women and minority owners may be disproportionately impacted.

1. INTRODUCTION

The International Franchise Association (IFA) commissioned Oxford Economics to assess the potential impacts of the new National Labor Relations Board (NLRB) joint employer rule on franchising. Specifically, we were asked to consider potential implications for franchisees, but we also touch on some considerations with respect to franchisors, consumers, and workers.

As part of our work, we completed a review of relevant literature and spoke with a limited number of franchisor and franchisee representatives to better grasp their views with the aim of understanding the most pressing aspects of the rule and its potential impacts to the franchise business model.

This research informed the development of survey questions for franchisees that would allow us to better assess the consequences of the ruling. The survey questions were distributed by the IFA as part of its annual member survey.⁷ The relevant survey questions (related to the NLRB joint employer rule) are included in the Appendix to this report.

1.1 THE FRANCHISE BUSINESS MODEL AND ITS BENEFITS TO THE US ECONOMY

The franchise business model is a significant part of the US economy. In total, in 2022, the economic output of franchise establishments was approximately \$825 billion in the US, and they employed approximately 8.4 million workers across the country (around 5% of all workers).⁸ In September 2021, Oxford Economics released a report setting out some broad findings related to the state of franchising in the US.⁹ The study highlighted that, in general, franchising might be adopted as a strategy to help solve principal-agent problems,¹⁰ help to realize economies of scale, and better adapt to diverse environments.¹¹ The franchising business model is applicable to a number of industries, the largest of which (by number of establishments) is quick-service restaurants (QSRs). However, QSRs comprise only 25% of franchise establishments, with other significant sectors including: retail food, products, and services; commercial, residential, and real estate services; personal services; business services; and full-service restaurants and lodging.¹²

\$825 bn

**Economic output
of US franchises
in 2022**



⁷ Thus, the figures in this report represent the views of franchisees choosing to participate in the 2023 IFA/FRANData Annual Franchisee Survey process.

⁸ FRANData, "International Franchise Association Franchising Economic Outlook," 2023.

⁹ Oxford Economics, "The Value of Franchising: A Report for the International Franchise Association," September 2021.

¹⁰ The idea is that franchising may better ensure effective management by better aligning interests between the franchisor and franchisee than would employing local managers.

¹¹ *Ibid.* p. 8.

¹² *Ibid.* p. 10.

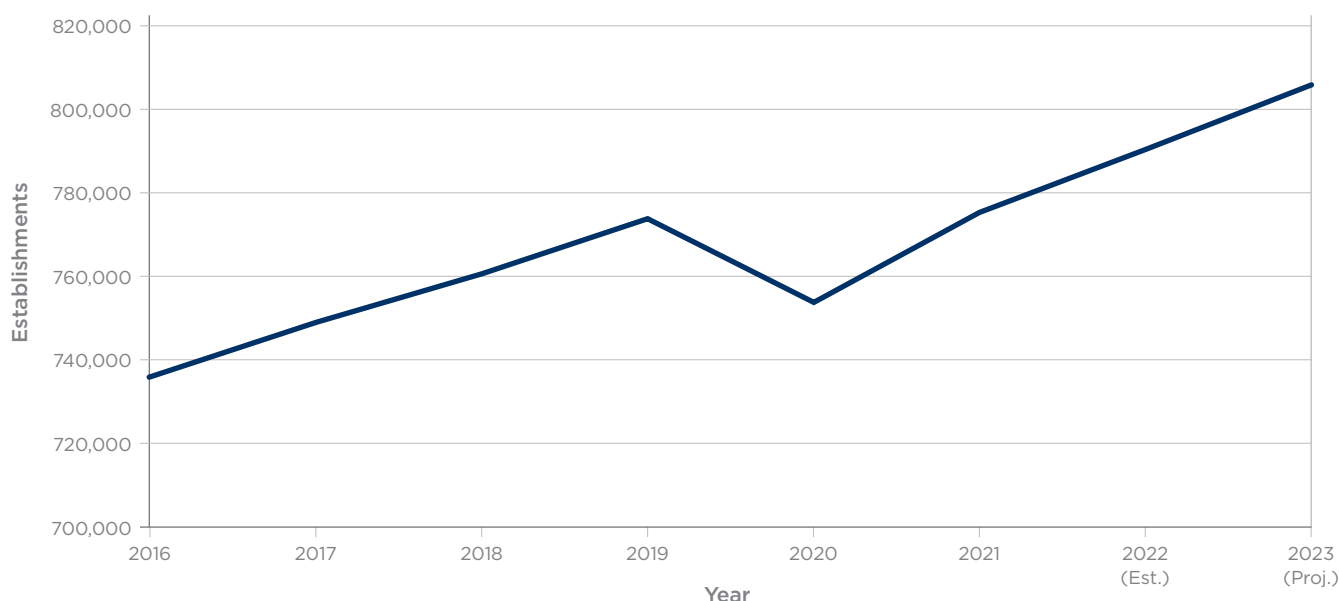
Our report's findings were wide-ranging, but established the following three headline facts:

- Franchises offer pay, benefits, and training on par with comparable non-franchise small businesses.
- Franchising offers a path to entrepreneurship to all Americans, but especially to new entrepreneurs and women.
- Franchises are locally embedded, purchasing substantial shares of their inputs from local suppliers and giving to local charities.

Franchise businesses play an important role in the economic landscape, providing opportunities for entrepreneurs to start and own their own business. In our 2021 analysis, we referenced some of the numerous obstacles faced by women and people of color to starting their own businesses, including challenges in accessing start-up capital and influential social networks. It is noteworthy, therefore, that franchisees with owners that are women or people of color are represented at a higher rate than other businesses, suggesting the potentially important role of the franchise ecosystem in providing paths to entrepreneurship among these groups.

While franchising is already widespread across the US, franchising opportunities are projected to grow further, as described in the *2023 Franchising Economic Outlook*.¹³ Overall growth in establishments is expected to be 1.9% in 2023, to 805,000, with a projected employment growth of 3.0%, to a total of 8.7 million workers (see Fig. 1).¹⁴ In the QSR sector alone, franchise establishment numbers are projected to increase by 2.5% to 197,000 and employment by 3.5% to a total of 3.9 million workers in 2023.¹⁵

Fig. 1. Number of franchise establishments 2016–2023¹⁶



¹³ FRANdata, "International Franchise Association Franchising Economic Outlook," 2023.

¹⁴ *Ibid.* p. 2.

¹⁵ *Ibid.* pp. 3–4.

¹⁶ Note: Preliminary estimates for 2022 and projections for 2023.

In this context, proposed changes to the nature of franchising relationships should be carefully considered, given the importance of franchised industries to hundreds of thousands of small businesses, and to millions of workers and consumers.

1.2 THE RECENT HISTORY OF JOINT EMPLOYER STATUS

The NLRB standard for determining joint employer status under the National Labor Relations Act has changed multiple times in recent history. For decades following its formation in 1935, the NLRB did not seek to regulate who can be deemed a “joint employer” under the National Labor Relations Act (NLRA).¹⁷

We understand that in 1984, the NLRB created the joint employer standard through two regulatory decisions and that the standard required direct and immediate control for a putative employer to be considered a joint employer.¹⁸ While this standard was refined over the following couple of decades, the ruling remained consistent until 2015.¹⁹

In 2015, the Board’s decision on a case involving ***Browning-Ferris Industries (BFI)*** expanded the criteria for determining joint employment.²⁰ Specifically, we understand that the ruling expanded the joint employer standard to include employers that exercise control over employment not only directly but also indirectly or through an intermediary.²¹ Additionally, it found that if the employer had reserved the authority to control the terms and conditions of employment, it might also be considered a joint employer.²² As set out in Section 2.3, an important consequence of the *Browning-Ferris* decision appears to have been to increase the number of joint employer related lawsuits filed.

The 2020 NLRB rule: Direct and immediate control. In 2020, the NLRB ruling was updated again and reverted to requiring only direct and immediate control.²³ Similar to the period prior to the 2015 *Browning-Ferris* decision, this ruling enforced a narrower version of joint employment.²⁴ The 2020 revision outlined a four-factor test to determine joint employment. Under this test, a franchisor would only be considered an employer if exercising “significant” control over employment.²⁵

¹⁷ David J. Kaufman and Michelle Murray-Bertrand, *Franchising Faces Existential Threats*, 238–39, 42(3) FRANCHISE L. J. (Spring 2023).

¹⁸ Kaufman and Murray-Bertrand, p. 239.

¹⁹ *Ibid.*

²⁰ The Board motivated this in part by referring to an expanded “diversity of workplace arrangements” such as “staffing and subcontracting arrangements... contingent employment... temporary employment...” *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (August 27, 2015); see also Kaufman and Murray-Bertrand, pp. 239–240.

²¹ Kaufman and Murray-Bertrand, p. 240.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ The four components included whether the franchisor: “(1) hires or fires the employee; (2) supervises and controls the employee’s work schedule or conditions of employment to a substantial degree; (3) determines the employee’s rate and method of payment; and (4) maintains the employee’s employment records.” Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (Jan. 16, 2020) (29 CFR791); see also Kaufman and Murray-Bertrand p. 240.

A new NLRB joint employer rule. In September 2022, the NLRB proposed rescinding and replacing the 2020 joint employer standard, again expanding the criteria for joint employment.²⁶ The revision of the standard involves redefining the criteria used to determine whether two employers are joint employers and have the shared legal responsibility of managing the terms and conditions of employment.²⁷ Under the new rule, “essential” terms and conditions of employment include not only the terms included under the *Browning-Ferris* decision (such as wages and other forms of compensation, worker scheduling, and the hiring and supervising of employees), but also workplace health and safety and “work rules and directions governing the manner, means or methods of work performance.”²⁸ As in *Browning-Ferris*, the criteria used to determine joint employment includes entities that have both direct and indirect control over conditions related to the worker experience, including where an entity reserves the right to exercise control (even if that right is never exercised).²⁹

To the extent that the new rule returns towards the joint employer interpretation of the period following *Browning-Ferris*, we might expect a similar increase in litigation and regulatory uncertainty. Given this, we expect franchisors may respond to reduce this risk. The rest of the report is divided into the following sections:

- Section 2—Describes how the rule may introduce new sources of uncertainty into franchise relationships all around the country.
- Section 3—Identifies potential responses to the new rule and discusses likely implications for franchisors, franchisees, consumers, and workers.
- Section 4—Concludes by summarizing key findings.
- Appendix—Provides more detail about our methodology in designing the survey and other components of our analysis.

²⁶ NLRB, “NLRB Issues Notice of Proposed Rulemaking on Joint-Employer Standard,” September 6, 2022.

²⁷ Standard for Determining Joint-Employer Status: A Proposed Rule by the National Labor Relations Board, 87 Fed. Reg. 54641 (September 7, 2022) (29 CFR 103).

²⁸ Kaufman and Murray-Bertrand, p. 245.

²⁹ NLRB, “NLRB Issues Notice of Proposed Rulemaking on Joint-Employer Standard,” September 6, 2022; see also Kaufman and Murray-Bertrand, pp. 245–465.

2. THE NEW STANDARD ADDS REGULATORY UNCERTAINTY

2.1 INCREASED UNCERTAINTY

The new joint employer rule is expected to introduce substantial uncertainty around the business models that franchisors and franchisees use around the country (Fig. 2).³⁰ Such uncertainty comes with potential impacts on the franchisor/franchisee relationship. To the extent that the working relationship is impaired, there may be an important transition period as parties determine how best to respond and adjust to new working relationships. These changes may come about as a result of increased distancing between the franchisor and franchisee (“defensive distancing”), as the franchisor pulls back from offering training and oversight to its franchisees, or as a result of greater oversight from the franchisor of the franchisee. The exact response is likely to vary by franchisor, depending on such factors as their size, industry sector, and the geographic distribution of their stores.

Research shows that greater uncertainty can reduce company investment and hiring.



Fig. 2. Sample responses to the 2022 joint employer rule consultation

Commenter (year)	Comment
U.S. Small Business Administration, Office of Advocacy ³¹	“Advocacy is concerned that the Board’s new joint employer standard is too ambiguous and broad, providing no guidance for contracting parties on how to comply or avoid liability...”
Job Creators Network Foundation (2022) ³²	“The proposal would create tremendous legal uncertainty for millions of businesses across the country. And... would disproportionately hurt America’s small business owners.”
National Restaurant Association (2022) ³³	“The lack of clear guidance on the essential question of what behaviors and relationships can trigger joint employer status would leave employers and unions in the dark and lead to a great deal of unnecessary and expensive uncertainty and instability... a Proposed Rule that rescinds a rule finalized less than three years ago...”

³⁰ See, for example, the submission of the National Restaurant Association and Restaurant Law Center, 2022, “the Proposed Rule... provides less certainty and predictability than the current rule, and amplifies that uncertainty and unpredictability going forward as it explicitly envisions joint employer status to be determined through adjudication under the common law, not under the conditions of the Proposed Rule...” See <https://restaurant.org/NRA/media/Downloads/PDFs/advocacy/2022/RLC-NRA-Joint-Employer-Comments.pdf>.

³¹ US SBA, Office of Advocacy, “Re: Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641 (Sept. 7, 2022),” November 29, 2022. See <https://advocacy.sba.gov/2022/11/29/advocacy-recommends-that-the-nlr-reassess-the-compliance-costs-of-joint-employer-rule-for-small-business>.

³² Job Creators Network Foundation, “Comments on National Labor Relations Board “Standard for Determining Joint-Employer Status,” RIN 3142-AA21.” December 7, 2022.

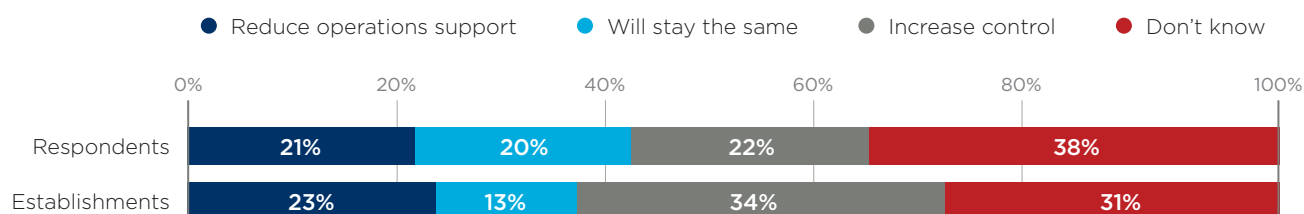
³³ National Restaurant Association, “RE: RIN 3142-AA21: Notice of Proposed Rulemaking: Joint Employer Status Under the National Labor Relations Act,” <https://restaurant.org/NRA/media/Downloads/PDFs/advocacy/2022/RLC-NRA-Joint-Employer-Comments.pdf>, December 6, 2022.

The fact that uncertainty can carry costs is well understood in the economic literature.³⁴ Bloom (2014) surveys potential implications of increased uncertainty. First, increased uncertainty is expected to reduce company investment and hiring. In such circumstances, firms may prefer to hire part-time workers, as they provide greater flexibility in the presence of uncertainty. Greater uncertainty can also raise the costs of financing by increasing risk premiums. This may reduce hiring and investment further.³⁵

The IFA asked franchisees how they expected franchisors to respond to the new joint employer rule. Responses were divided, suggesting both considerable uncertainty over potential impact, and responses that may vary across franchisors. Overall, 43% expected a change, including a fifth (22%) of respondents who expected franchisors to increase control over their operations, and 21% who expected franchisors to distance themselves by reducing operations and compliance support. Only 20% expected no change, and 38% did not know what to expect (See Fig. 3).

Fig. 3. Franchisees' views of impact on franchisor/franchisee relationship³⁶

Q. Do you expect the new joint employer standard will change your relationship with your franchisor?



Source: FRANData (2023)

Note: Percentages may not sum to 100% due to rounding.

Further, segmenting franchisees by the number of establishments they own, we found that smaller respondents expressed more uncertainty than respondents owning several establishments. 31% of respondent franchisees that own five or more establishments expect increased control.

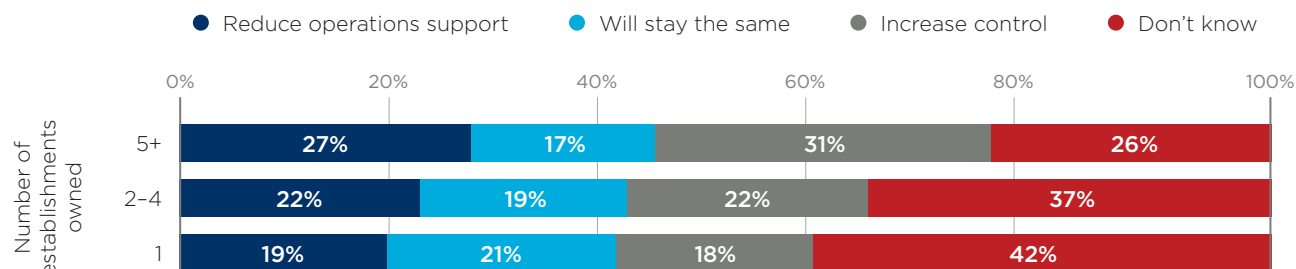
³⁴ Nicholas Bloom. "Fluctuations in Uncertainty." *Journal of Economic Perspectives*, 28 (2): 153–76 (2014).

³⁵ The empirical literature on uncertainty impacts is not well developed, due primarily to difficulties in measuring and isolating the causal impact of "uncertainty." Bloom states "My overall view is that this literature provides suggestive but not conclusive evidence that uncertainty damages short-run... growth, by reducing output, investment, hiring, consumption, and trade..." (Bloom 2014).

³⁶ Our figures present results both by respondent ("Respondents") where each respondent is equally weighted, and results weighted by the number of establishments each respondent operates ("Establishments").

Fig. 4. Franchisees' views of impact on franchisor/franchisee relationship by the number of establishments owned

Q. Do you expect the new joint employer standard will change your relationship with your franchisor?



Source: FRANData (2023)

Note: Percentages may not sum to 100% due to rounding.

2.2 POTENTIAL RESPONSES TO THE RULE

As noted above, there are two primary potential responses to the new joint employer rule, assuming franchisors do not leave current practices unchanged. Firstly, there is “defensive distancing.” This reflects a withdrawal of various types of support and guidance provided by the franchisor to its franchise system. This may help ensure sufficient “non-control” and minimize potential liability. A second possible response is more active oversight by the franchisor and the elimination of franchisee independence (alternatively, or in addition, the elimination of franchising and their replacement by corporate stores, or reduced scope of service).³⁷

These potential responses are identified in a variety of comment letters to the proposed rules, both in the context of the 2022 draft rule and in comments on the 2019 draft rule. Fig. 5 sets out some example comments.

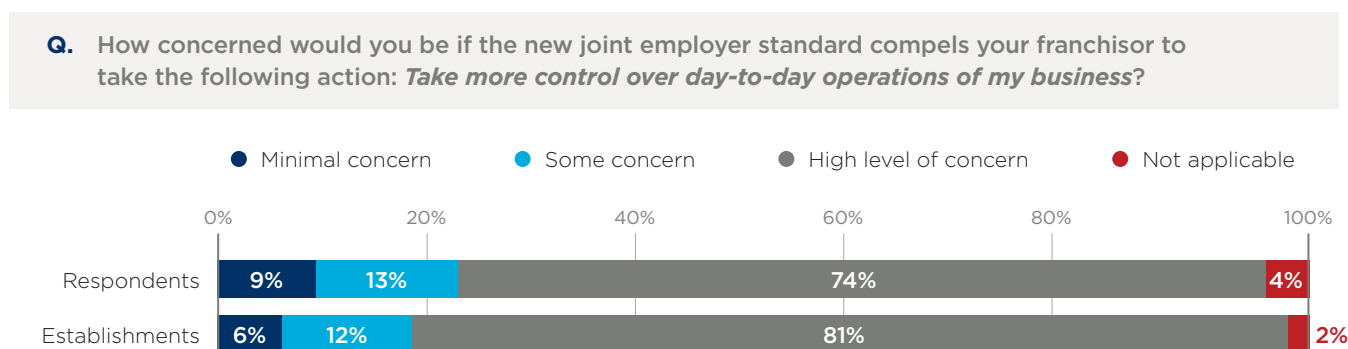
The IFA asked franchisees about how concerned they would be both in the event the franchisor chose to take more control over day-to-day operations, or alternatively reduced operations and compliance support. In both cases they expressed high degrees of concern, though this was higher (74% reporting a high level of concern) in the case of taking on more control, than in the case of reduced support (55% reporting a high level of concern).

³⁷ IFA comments on NLRB proposal, 2022, “the intent of the proposed rule appears to be to put franchisors in the position of choosing between (1) taking away from franchisees the support they thought they would receive by joining a franchise system; or (2) taking away the independence of franchisees and making them effectively managers of corporate stores.”

Fig. 5. Sample responses to the 2022 and 2019 joint employer rule consultations

Commenter (year)	Comment
U.S. Small Business Administration, Office of Advocacy (2022) ³⁸	“Small businesses commented that franchisors may pull back involvement with their franchisees to indemnify themselves from liability. Franchisors may also provide less legal and human resources advice, which will result in hiring outside professionals to provide guidance, documents, and compliance training. Franchisees reported that this proposal may add costs of thousands of dollars a year...”
Job Creators Network Foundation (2022) ³⁹	“...[E]xisting franchisees would feel consequences as franchisors are forced to become more hands on in an effort to prevent lawsuits. Franchise owners would turn from small business owners into managers under a micromanaging corporate parent. Not exactly what they signed up for.”
Coalition for a Democratic Workplace (2019) ⁴⁰	<p>“[S]mall businesses of various types have consistently noted... that their franchisors and larger business partners will take the following detrimental actions in order to avoid risks associated with a vague joint employment standard:</p> <ul style="list-style-type: none"> ■ Increase corporate ownership among franchises while limiting opportunities for smaller companies to partner with larger, more established businesses; and/or ■ Exercise more control over franchisees and smaller contractors through: <ul style="list-style-type: none"> ▪ limiting entrepreneurial opportunities; ▪ limiting revenues and profits as a result of the expenses associated with the increased control by the larger business partner or franchisor; and ▪ demoting business owners to “middle managers.”

Fig. 6. Franchisees’ views of greater franchisor control



Source: FRANData (2023)

Note: Percentages may not sum to 100% due to rounding.

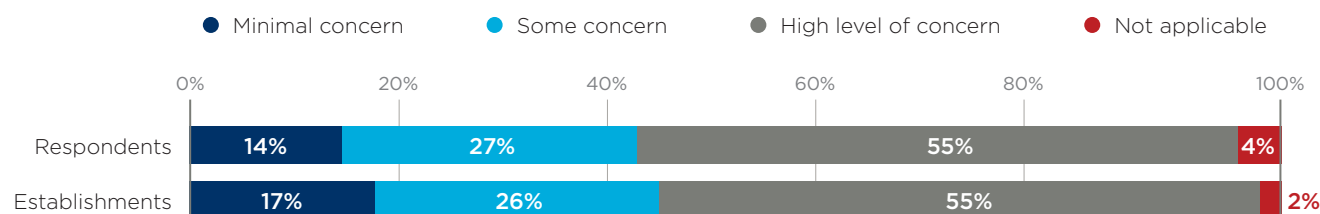
³⁸ US SBA, Office of Advocacy, “Re: Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641 (Sept. 7, 2022),” November 29, 2022. See <https://advocacy.sba.gov/2022/11/29/advocacy-recommends-that-the-nlrb-reassess-the-compliance-costs-of-joint-employer-rule-for-small-business>.

³⁹ Job Creators Network Foundation, “Comments on National Labor Relations Board “Standard for Determining Joint-Employer Status,” RIN 3142-AA21. December 7, 2022.

⁴⁰ Coalition for a Democratic Workplace, “RE: RIN 1235-AA26; Joint Employer Status Under the Fair Labor Standards Act; Notice of Proposed Rulemaking,” 2019, <https://www.cupahr.org/wp-content/uploads/advocacy/2019-06-25-DOL-Joint-Employer-Comment-FINAL-06.25.19.pdf>.

Fig. 7. Franchisees' views of reduced franchisor operations and compliance support

Q. How concerned would you be if the new joint employer standard compels your franchisor to take the following action: **Reduce operations and compliance support** (via the provision of services such as training and development, HR services, technical guidance, etc.)?



Source: FRANData (2023)

Note: Percentages may not sum to 100% due to rounding.

2.3 THE LIKELIHOOD OF INCREASED LITIGATION

The new rule may lead to increased litigation and litigation-related costs. In addition to the direct cost this imposes on franchisors and franchisees, this is also costly in terms of managerial attention and greater uncertainty. Earlier work has suggested that the 2015 *Browning-Ferris* decision led to an increase in the number of joint employer related lawsuits filed. In a 2019 report, the IFA found 57% more petitions related to joint employer allegations in the period after the *Browning-Ferris* decision.⁴¹ The IFA attributed this to factors including targeting of “deeper pocketed” franchisors, and less inclination on the parts of courts and agencies to dismiss joint employer allegations.

We expanded on IFA’s analysis using case data from the NLRB to identify litigation involving joint employer related allegations.⁴² The timeline of our findings—separated into three periods by the *BFI* ruling in 2014 and initial proposal of the prior NLRB rule in 2018—is illustrated in Fig. 8. Joint employer cases started increasing steeply after 2012 and remained elevated in the period around the *BFI* ruling,⁴³ before dropping following the 2018 proposed rulemaking.⁴⁴

⁴¹ IFA, 2019, “The Economic Impact of an Expanded Joint Employer Standard,” at p.12 available at <https://www.franchise.org/sites/default/files/2019-05/JE%20Econ%20Impact%200128.pdf>.

⁴² The analysis used data from the NLRB website using their Advance Search Tool: <https://www.nlrb.gov/advanced-search>. The search criteria were cases that included the word “joint employer” in the case name, in the date range 1984 to 2023 (the first located case was in 1992). The query returned 3,273 cases. The case name was processed using parsing and splitting algorithms to identify the parties involved in the case. This information was compared with a list of franchised brands using a fuzzy string matching library and identifying cases which involved franchisors as those who showed a Levenshtein distance score greater than 80.

⁴³ IFA, “The Economic Impact of an Expanded Joint Employer Standard,” on July 29, 2014—the General Counsel announced that he had authorized the filing of 43 complaints alleging that franchisor McDonald’s USA was a joint employer of its franchisees.

⁴⁴ In contrast, the total number of unfair labor practice and representation cases filed per fiscal year declined each year between 2013 and 2021, from 24,046 to 16,719, before rising to 20,509 in 2022. See NLRB, “Unfair Labor Practice and Representation Cases Filed per Fiscal Year,” available at <https://www.nlrb.gov/reports/nlrb-case-activity-reports/annual-case-intake/unfair-labor-practice-and-representation>.

Fig. 8. Annual filed joint employer cases 1993–2022

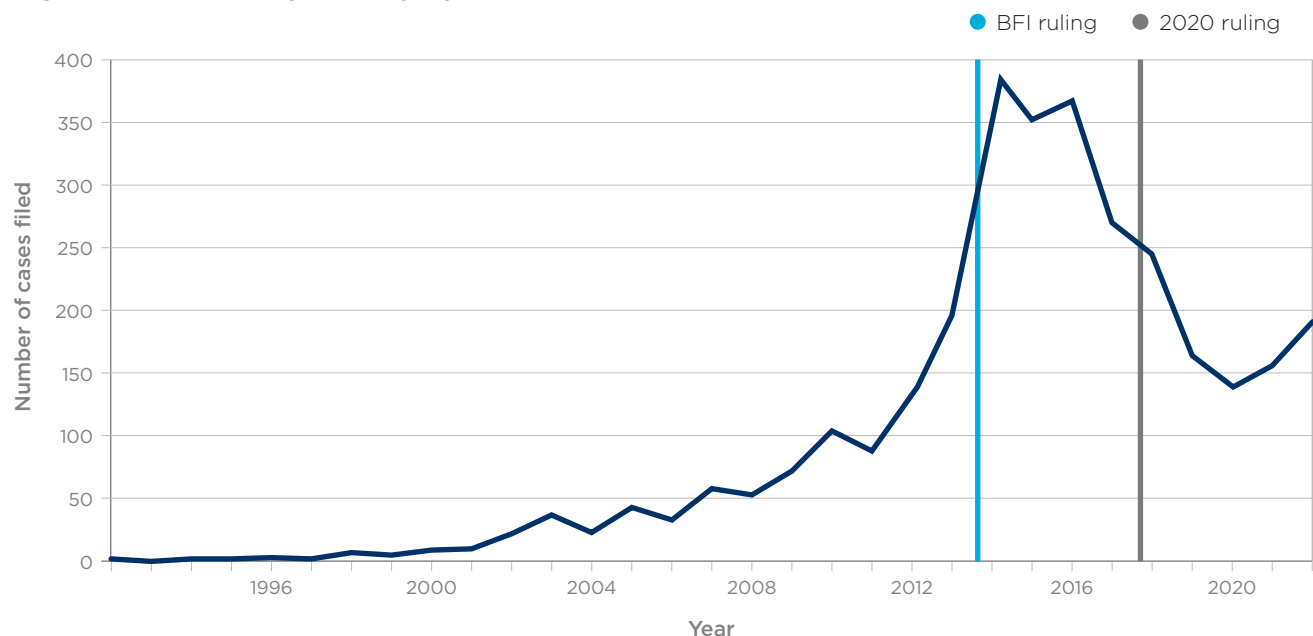


Fig. 9 shows the average monthly filed cases with the NLRB. In the 10 years before the *BFI* ruling there were an average of 8.5 monthly filed cases invoking joint employer status. This increased more than three times in the period following the *BFI* decision (to 27.0), and the increase in cases involving franchisors in particular was even greater (from 1.4 to 7.0, or a five-fold growth). After the announcement of the proposed rulemaking in September 2018, the average monthly filed cases fell by almost half for all businesses and around three quarters for franchisors.

Fig. 9. Monthly average joint employer petition cases filed with the NLRB

NLRB average monthly filed cases with joint employer petition	Pre-BFI ruling ⁴⁵ 2004/07/29 – 2014/07/29	BFI ruling ⁴⁶ 2014/07/29 – 2018/09/14	2020 ruling 2018/09/14 – 2023/07/29
Cases involving franchises (charged or respondents)	1.4	7.0	1.6
Cases not involving franchises (charged or respondents)	7.1	20.0	12.2
Total cases	8.5	27.0	13.8

The data above suggest that a more extensive joint employer standard may be expected to increase litigation and litigation-related expenses. These potential costs, which will be borne by some combination of franchisees, franchisors, and end consumers, are discussed in Chapter 3.

⁴⁵ IFA, “The Economic Impact of an Expanded Joint Employer Standard” uses July 29, 2014, as threshold—the date the NLRB General Counsel filed a joint employer complaint against McDonald’s USA, which followed June 26, 2014, when the NLRB General Counsel expounded the need to revisit the joint employer standard. The range covers 10 years before the threshold.

⁴⁶ On September 14, 2018, the NLRB Board issued a notice of proposed rulemaking to establish a new joint employer standard. The final joint employer rule was promulgated on February 26, 2020.

The IFA asked franchisees about whether they anticipated increased litigation against franchisors and franchisees under the new standard: 70% said “yes,” 4% “no,” and 26% that they “don’t know.”

Fig. 10. Franchisees’ expectation on increased litigation



Source: FRANData (2023)

Note: Percentages may not sum to 100% due to rounding.

2.4 COST IMPACTS—THE PRECEDENT OF BROWNING-FERRIS

Earlier work attempted to quantify the economic impact of the *Browning-Ferris* decision on franchising.⁴⁷ According to this 2018 analysis based on 77 interviews with franchise business entrepreneurs and observers who had experience in the franchise industry before and after the 2015 decision, the costs of increased franchisor distancing to franchisees from the decision (in lost sales or increased costs/lost services), amounted to between 2.6% and 4.9% in output.

⁴⁷ See Ronald Bird, “Statement Regarding the Economic Impact of the Prospective NLRB Public Policy Decision Regarding the Definition of Joint Employer.” 2018.

3. POTENTIAL IMPACTS OF THE NEW RULE

Under the new rule, we understand that it is possible that franchisors who exert indirect influence over employees might be subject to joint employer liability.⁴⁸ If a franchisor wishes to minimize litigation risk, and chooses to respond to the new rule, this suggests one of two primary potential responses:

- They might distance themselves from the franchisee, reducing or eliminating indirect control through limiting training and support, and no longer mediating disputes between franchisees and their employees that might impact the brand.
- They might choose to exercise more direct control over the day-to-day operational management of franchisees in an attempt to avoid labor violations, fines, and potential lawsuits.⁴⁹

Case (i), greater distancing, may harm franchisees and their employees by reducing many of the services franchisors typically provide (often at low or no cost to the franchisees). Some franchisors might fear that typical mechanisms used to protect their brand's reputation and to ensure quality could make them subject to the joint employer standard. Franchisors' involvement in training, setting uniforms, choosing tools and equipment, setting customer service standards, and other assistance may be reduced or eliminated, transferring costs to franchisees.⁵⁰ In a 77-person survey—including franchisors and franchisees—the IFA (2019) said 71 reported defensive distancing behaviors in the wake of the *Browning-Ferris* decision.⁵¹

Case (ii), which involves increased franchisor operational involvement, will likely increase the franchisor's management expenses, as enforceability could require more audits, new departments, additional technologies, and the presence of a franchisor's employee on site. Some of these expenses are likely to be passed through to the franchisees, reducing returns on investment for their owners. Some of the costs could also be passed on to final consumers in the form of higher prices for food, goods, and services.

The decision made by franchisors will depend on their interpretation of the ruling, their business model, and degree of risk aversion. We have seen (Fig. 3) that around 43% of respondents expect one of these two changes in the relationship between franchisor and franchisee, and another 38% are uncertain of the rule's impact. A smaller share (around 20%) expect no change.

⁴⁸ The relationship of the franchisor with franchisees' employees is indirect, as the contractual relationship and main job interactions are at the discretion of the franchisee. Nevertheless, franchisors provide things such as training materials. In the direct relationship that franchisees and employees have, franchisors can and are often support actors that help safeguard labor laws and ensure safe worker's conditions. See Kaufman and Murray-Bertrand pp. 262–66.

⁴⁹ Kaufman and Murray-Bertrand pp. 262–266.

⁵⁰ During the Covid-19 pandemic franchisors went beyond the federal requirements to provide tools to keep the workforce safe. These included compiling and providing information on the ever-changing regulations, sharing best practices, and facilitating vaccination drives. National Restaurant Association. "NRA Comments on Notice of Proposed Rulemaking: Joint Employer Status Under the National Labor Relations Act," 2022, p. 26. In our 2021 franchise census, 90% of survey respondents reported franchisor support for worker training. Oxford Economics, 2021 "The Value of Franchising," at pp. 25, 30.

⁵¹ See IFA, 2019, "The Economic Impact of an Expanded Joint Employer Standard."

3.1 IMPACTS ON FRANCHISORS

In the next subsections we will elaborate on some of the potential economic implications for franchisors under the new standard, as well as their potential responses to the rule.

3.1.1 Increased costs

Transaction costs. The new standard will increase transaction costs, adding extra “rigidities” to the process of delivering goods and services through the franchise model. Strained relationships with other parties (whether franchisees or third-party vendors) will raise contract negotiation lengths and associated fees.

Legal expenses. The increased probability that franchisors will be found to be joint employers makes them more exposed to litigation risk and associated expenses. In earlier research, it was reported that an impact of *Browning-Ferris* was an increase in costs to franchisors in both internal and outside counsel.⁵² These costs will arise both in the context of litigation, but also in respect of prelitigation compliance and advisory services.⁵³

Insurance costs. Our interviews raised the point that both franchisors and franchisees could be required to carry increased insurance against employment-related claims. It is our understanding that at present no insurance product exists to cover wage and hour related claims, and that such a product would need to be created. In the case where insurers do not have existing data to price a new product of this nature, risk mitigation suggests elevated premiums.

Compliance expenses. We expect that one impact of the new rule may be a need for franchisors to retain management consultants to advise on the structure of their relationships with franchisees. In addition, legal counsel may be needed to help redraft aspects of new franchise agreements. For example, franchisors may be interested in redrafting franchise agreements to permit shorter contract durations with new franchisees or to allow for more flexibility in terminating relationships with poor performing franchisees. The uncertainty created during the *BFI* standard led to “confusion and a dramatic rise in in operational and risk management costs at many franchise restaurants.”⁵⁴ Furthermore, companies may decide to review all aspects of their contractual relationships with both franchisees and third-party vendors with a view to limit joint employer liability risk.

Increased oversight and control. To the extent that franchisors respond to the rule change by increasing oversight of franchisees, this will raise monitoring costs. Additional operational oversight may require investments in technology with associated costs (such as additional servers to store data) and raise other potential concerns (such as privacy-related issues associated with stored data).

⁵² See Ronald Bird. “Statement Regarding the Economic Impact of the Prospective NLRB Public Policy Decision Regarding the Definition of Joint Employer.” 2018.

⁵³ *Ibid.*

⁵⁴ See National Restaurant Association. “NRA Comments on Notice of Proposed Rulemaking: Joint Employer Status Under the National Labor Relations Act,” 2022, p. 5.

Increased franchisee turnover. A significant cost for franchisors is finding and training new franchisees. To the extent that the rule increases franchisee turnover, these costs may be increased. Earlier work has found that a primary reason people open their own franchise is to be their own boss.⁵⁵ To the extent that the new rule increases monitoring and reduces franchisee flexibility, franchisees may choose to stop operating. Furthermore, franchisors may choose to shorten the duration of franchising contracts or terminate existing contracts with poor performers, which would also lead to higher turnover. This may increase the fixed costs for franchisors of acquiring new franchisees.

Increased franchisee turnover could also lead to lower investment in the actual business, as franchisees would be less committed to the success of the franchise in the longer term. The maintenance and upkeep costs associated with ongoing franchisee investment would then likely be passed onto the franchisor who would still have a stake in preserving the quality and consistency of the brand name.

3.2 IMPACTS ON FRANCHISEES

3.2.1 Increased costs

In our interviews it was consistently suggested that an implication of expanded joint employer liability is likely to be increased costs for the franchisee.

Legal costs. Important costs identified were those related to legal advisory services as well as the heightened risk for increased litigation. In the years under the *Browning-Ferris* standard, litigation involving franchises increased around five times (see Fig. 9). Moreover, franchisees might not be able to afford legal counsel and consultants to determine how best to comply with a now more complex and ambiguous joint employer definition.⁵⁶

In addition to lawsuit costs, prior research found that franchisors and franchisees reported increases in legal and advisory fees related to the liability environment created by *Browning-Ferris*. Beyond litigation, costs may include pre-litigation expenditures on management and human resources consultants. In addition, franchisees may have to bear some costs for services that may previously have been provided by franchisors.

Insurance costs. Linked to expectations of increased litigation was an expectation that there would be increased insurance premiums (and potentially new forms of insurance to cover heightened liability risk). It was suggested to us that escrow accounts may be required in order for franchisees to demonstrate that they can cover any imminent costs. In addition, beyond expected litigation costs, there would likely be pre-litigation costs related to advisory services around the potential impacts of the changed rule.

⁵⁵ See Oxford Economics, 2021, “The Value of Franchising,” at p. 20. “29% of franchise owners reported choosing to start/buy a franchise because they were ready to be their own boss, according to a survey by Guidant Financial (Fig. 7).”

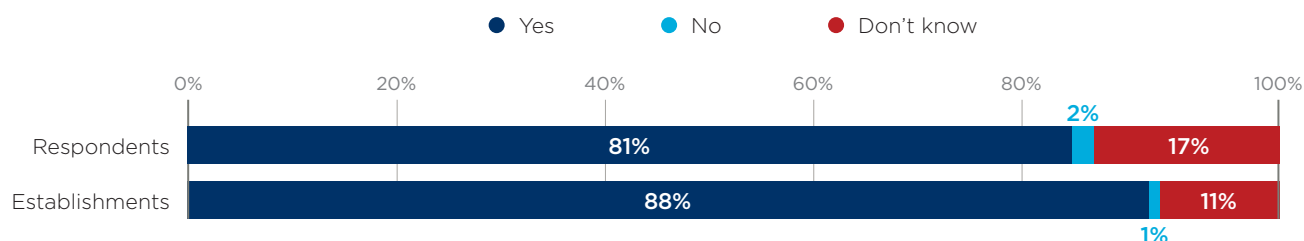
⁵⁶ The NFIB in “Comments on NLRB Notice of Proposed Rulemaking titled “Standard for Determining Joint-Employer Status” (2022), argues that currently the 2020 NLRB standard is simple and allows SMBs to determine joint employer status, without extra counselling costs.

It is likely that the costs of at least some of these heightened liability risks will be passed by franchisors on to franchisees. The added risk of litigation might be especially grave for smaller franchisees, operating only one or a handful of stores who may not be able to spread the fixed insurance and litigation/attorney costs over a large number of locations.

Some 70% of franchisees anticipated increased litigation under the new standard (Fig. 10). In addition, the IFA asked franchisees about whether they anticipated that franchisors would pass the costs of heightened liability risk from the new joint employer rule on to franchisees (See Fig. 11).

Fig. 11. Franchisees' views on incidence of heightened liability risk

Q. Do you expect that franchisors will pass the costs of heightened liability risk from the new joint employer standard on to franchisees?



Source: FRANdata (2023)

Note: Percentages may not sum to 100% due to rounding.

Operations costs. If franchisors decide to reduce their level of support to avoid joint employer status, franchisees will be hurt by fewer resources and less assistance. As an example, uncertainty created by *BFI* led to some franchisors to reduce employment-related education and assistance to franchisees, which forced franchisees to cover those costs out of pocket⁵⁷ In addition, to the extent that franchisors want to limit any legal liability, they may increase or impose new requirements on franchisees to:

- use certain payroll services providers;
- purchase certain timekeeping software;
- complete certain HR training courses;
- have lawyers on retainer;
- maintain a certain level of HR support; and
- increase frequency and scope of franchisee audits.

⁵⁷ See National Restaurant Association. "NRA Comments on Notice of Proposed Rulemaking: Joint Employer Status Under the National Labor Relations Act," 2022, p. 25–26.

In our 2021 franchise census, we documented important areas of support received by franchisees which might enable them to reach a larger scale. Specifically, the majority of franchisees identified the following types of support received as very important: technology platforms (for example, to monitor KPIs), franchisee training (such as in sales), and employee training.⁵⁸ The loss of this support would be costly to franchisees.

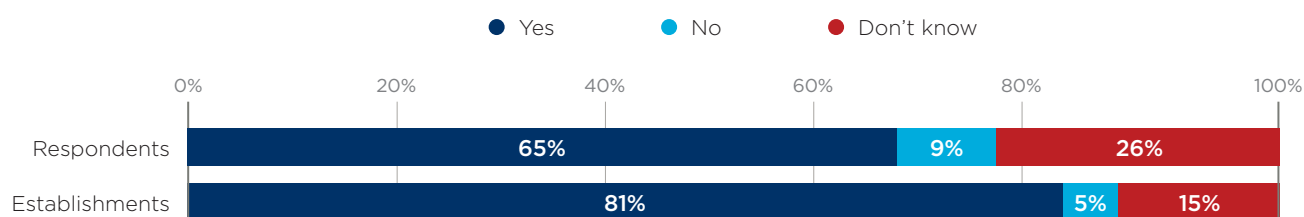
3.2.2 The possibility of increased franchisor control

The effect of the new rule identified in section 3.1.1—that some franchisors might choose to exercise more direct control—might result in both greater legal compliance costs and interference with franchisees’ ability to run their business independently, which reduces the attractiveness of running a franchise business. This lack of freedom might also lower franchise values and make it harder for franchisees to sell their businesses. In sum, as the costs associated with owning/operating a franchise increase, this will lower the desirability of owning a franchise, reduce resale opportunities, and decrease the value of businesses already owned by franchisees. The cumulative impact of these effects may be to lower investment into the sector.

The IFA asked franchisees about whether an impact of the new rule would be to lower the value of their businesses. 65% of franchisees (representing 81% of franchise establishments) thought that it would (see Fig. 12).

Fig. 12. Franchisees’ views on impact of ruling on franchise value

Q. Do you expect that an impact of the new joint employer standard would be to lower the value of your franchise?



Source: FRANdata (2023)

Note: Percentages may not sum to 100% due to rounding.

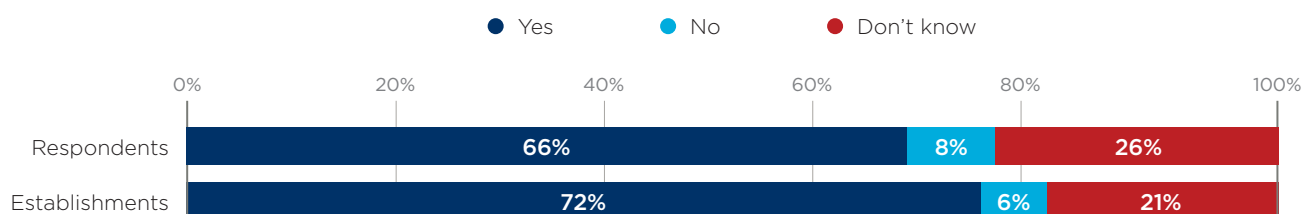
⁵⁸ Oxford Economics, “The Value of Franchising,” pp. 24–25.

Fewer new franchisees. The new rule adds uncertainty into the franchising model and may deter new investment and reduce the attractiveness to franchisees with respect to operating an independent business. According to our 2021 franchise census, 21% of franchisees reported being capital constrained when starting their first franchise business and that being a franchisee provided them with access to capital.⁵⁹ In addition, in response to our 2021 franchise census, 32% of respondents reported that if they were not franchisees, they would not own a business. Among female owners, that share was 39%.⁶⁰ Thus, if the new standard were to raise the costs of starting a franchise business, it is not clear that founders would otherwise start a new business.

The IFA asked franchisees about whether the new standard would raise the barrier to entry for new franchisees. Two thirds of respondents, representing nearly three quarters of franchise establishments thought that it would.

Fig. 13. Franchisees' views on increased barriers to entry

Q. In your opinion, will the new joint employer standard raise the barrier to entry into the franchise business model for new franchisees?



Source: FRANData (2023)

Note: Percentages may not sum to 100% due to rounding.

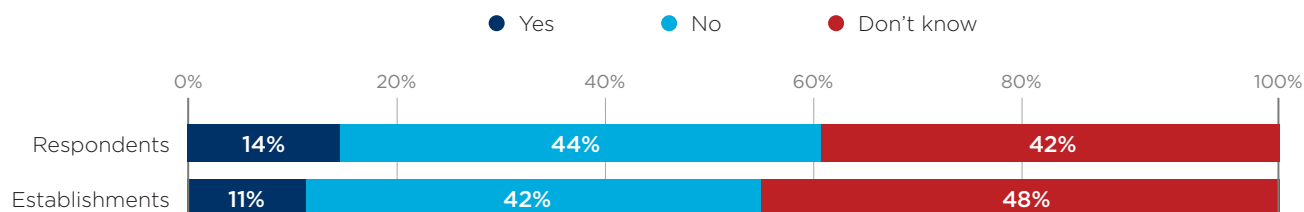
Even more starkly, 44% of respondents (representing 42% of establishments) expressed that they would not have become franchises had the NLRB joint employer rule been in place (see Fig. 14). When extrapolated to the total number of franchise firms from the 2021 ABS, this is equivalent to 52,000 businesses.

⁵⁹ Oxford Economics, "The Value of Franchising," p. 25.

⁶⁰ *Ibid.*

Fig. 14. Franchisees' views on entering franchise business if joint employer standard had been in effect

Q. In your opinion, if the new joint employer standard had been law when you were choosing to enter the franchise business would you still have moved ahead?

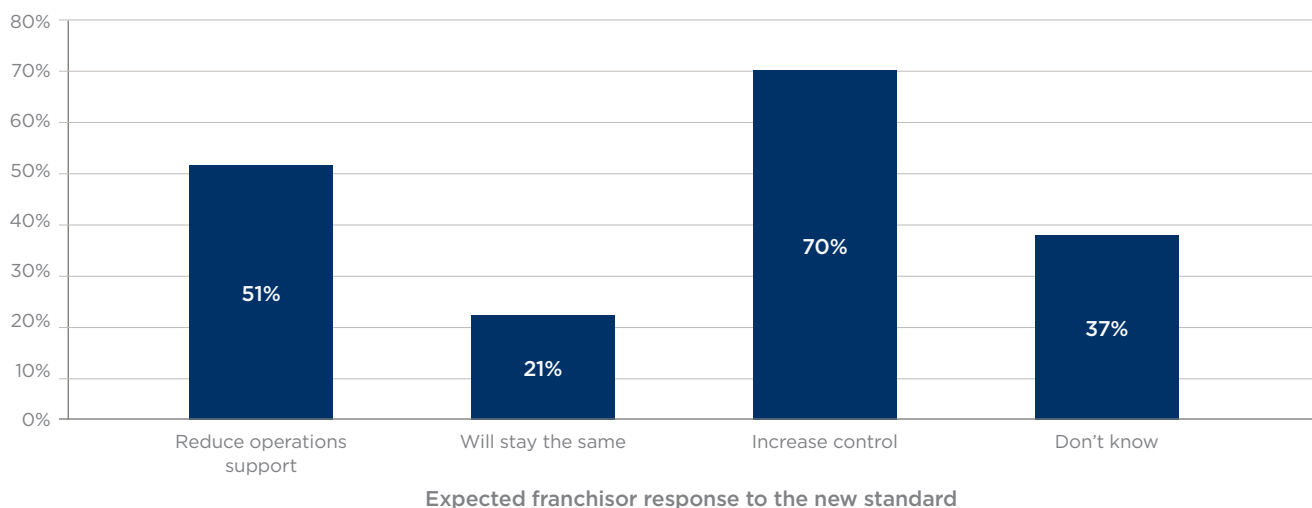


Source: FRANData (2023)

Note: Percentages may not sum to 100% due to rounding.

We noted above that an important reason people open their own franchise is to be their own boss.⁶¹ Fig. 15 shows that 70% of franchisees who expect increased control also stated that they would not have entered the franchise business, while 51% who expect reduced support stated the same. These results indicate that shifting the relationship between franchisor and franchisee—in either direction—may deter potential new franchisees.

Fig. 15. Share of franchisees who would not have opened a franchised business under the new joint employer standard, by their expectation of how their relationship with their franchisor will change



Source: FRANData (2023)

Note: Percentages may not sum to 100% due to rounding.

⁶¹ See Oxford Economics, 2021, "The Value of Franchising," at p. 20. "29% of franchise owners reported choosing to start/buy a franchise because they were ready to be their own boss, according to a survey by Guidant Financial (Fig. 7)."

A potential shift to larger, multi-unit franchisees. In our interviews, we heard that as a result of changes in joint liability standards, there would possibly be changes to the franchise application process and increased and more stringent candidate requirements.⁶² It is possible that, to mitigate risk, franchisors would choose to partner with better resourced and established franchisee applicants, thereby reducing the pathway for new entrepreneurs and smaller firms.

An additional possibility is that, in order to more closely exercise control, franchisors would replace (or fail to renew) franchisees and move to more corporate-owned stores, undermining the very nature of the franchise business model.

Underrepresented groups may be hardest hit. In the United States, franchise operators are mostly comprised of small and medium sized businesses (SMBs). The Census Bureau's 2021 Annual Business Survey revealed that 99.6% of firms that operated a portion of their business as a franchise had fewer than 500 paid employees.⁶³

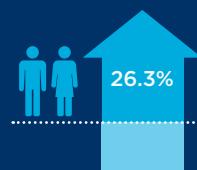
Our earlier research has also established that franchising offers a path to entrepreneurship to all Americans, but especially to new entrepreneurs, minority groups, and women. Among small businesses, franchisees have disproportionately higher rates of female and minority ownership.⁶⁴

Fig. 16 shows that in 2020, 26.3% of franchise businesses were owned by racial or ethnic minority groups, compared to 17.9% of non-franchise businesses.⁶⁵

Thus, to the extent that the impact of the new joint employer rule is to cause franchisors to pull back from contracting with new and smaller franchisees, and instead contract with multi-unit franchisees or operate more corporate stores, this may disproportionately impact access to entrepreneurship opportunities for women and minorities.⁶⁶

26.3%

The rate of minority ownership among franchised businesses in 2020 was 26.3%, 8 percentage points higher than for non-franchises.



⁶² NFIB in "Comments on NLRB Notice of Proposed Rulemaking titled 'Standard for Determining Joint-Employer Status' (2022)," argues this in respect to franchises, in addition to harming small businesses, who will not be subcontracted by bigger firms due to the new standard.

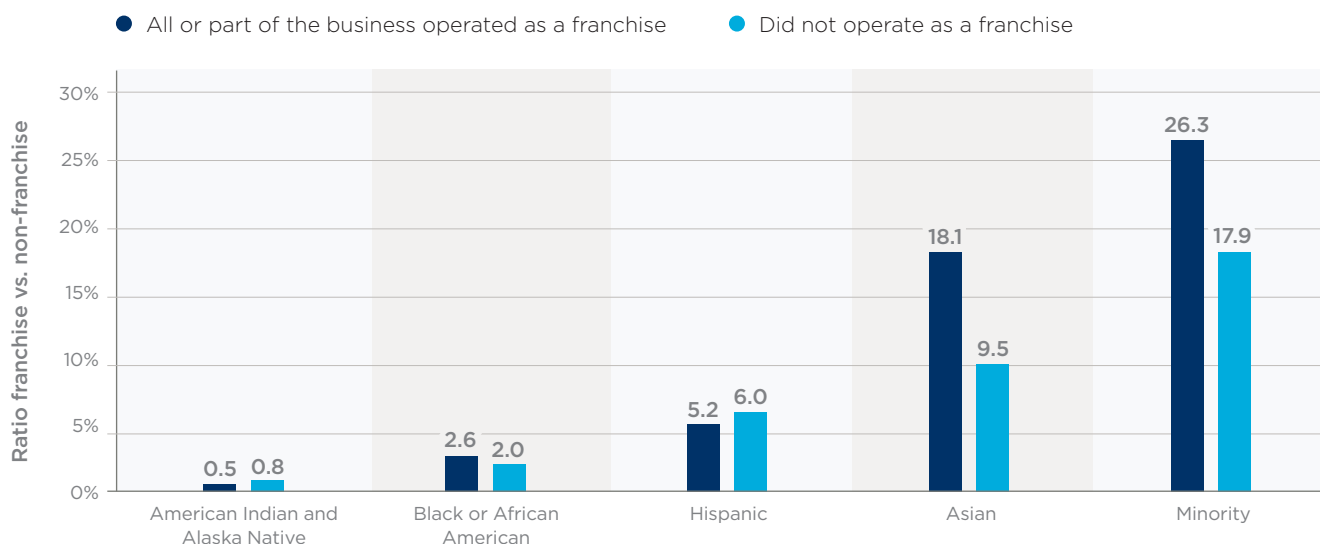
⁶³ U.S. Census. "Annual Business Survey." 2021.

⁶⁴ Oxford Economics, "The Value of Franchising," p. 21 citing Rebecca Rast, Aaron Gleibermann and Juliana White, "The Hidden Power of Franchising Curriculum: Delivering Value to Underrepresented Groups," *Journal of Entrepreneurship Education*, 23(2) (2020).

⁶⁵ U.S. Census. "Annual Business Survey." 2021.

⁶⁶ In a Congressional hearing of the Committee on Small Business there was detailed testimony provided by a minority owner of a small hotel franchise who expressed concern around the potential impacts of a broader joint employer standard on their businesses. The testimony addressed the hurdles faced by minorities in pursuing their entrepreneurial ambitions in the US due to lack of resources. Franchising offered a clear path to entrepreneurship, but the witness expressed concern that a broad joint employer standard might lead to increased oversight by the franchisor, diminishing their control over the organizations they've invested in: "I would cease to be an independent small business owner and would be subject to the directives of a large corporation... [as a] de facto employee of a corporate brand." Statement of Mr. Vinay Patel, President and CEO, Fairbrook Hotels, Chantilly, VA, testifying on behalf of the Asian American Hotel Owners Association. Hearing Before the Subcommittee on Investigations, Oversight and Regulations of the Committee on Small Business United States, March 17, 2016.

Fig. 16. Percentage of minority-owned businesses by franchise status and owner's race/ethnicity, 2020



Source: ABS (2021), US Census Bureau

3.3 IMPACTS ON CONSUMERS

Higher quality-adjusted prices. Some of the additional costs identified above are likely to be passed on to consumers in the form of higher prices. The extent to which franchisees are able to pass on costs will depend on such factors as local market power and demand elasticity.

One of the determinants of the quality of products and services experienced in franchised businesses is the intensity of control exerted by franchisors. This includes audits, procurement specifications, and employee training and guidelines. In response to a franchisor distancing, the quality of products and services may be affected.

In sum, increased costs on the franchisee front could lower the quality of goods and services provided and/or increase the price for consumers.

3.4 IMPACTS ON WORKERS

To the extent that litigation and other costs are increased for franchisees, they may take steps to maintain margins by cutting costs, including reducing jobs or lowering wage or non-wage compensation of workers.

In September 2021 we published work completed at the request of the IFA which in part analyzed pay, benefits, and training at franchised firms against smaller non-franchise employers.⁶⁷ In that work we found that the pay, benefits, and training offered by franchises were on par with those of comparable non-franchise small businesses. In fact, in our empirical analysis we found that, conditioning on a variety of factors, “workers at franchise firms earn slightly higher wages (2.2–3.4%, corresponding to \$0.24–\$0.37 per hour at the sample mean wage of \$11 an hour) than workers at non-franchise firms, although this difference is only statistically significant in some specifications.”⁶⁸ We found also evidence suggesting that franchise workers receive promotions to manager status at slightly higher rates than at non-franchise small businesses, and similar shares of workers receive benefits at small, franchised firms, and other small establishments.

Thus, to the extent that the change in the joint employer rule reduces the number of workers at small, franchised establishments, and increases the number at small non-franchise employers, we do not expect any improvements on the dimensions of pay, benefits, or promotions.⁶⁹ In addition, in the case of increased defensive distancing by the franchisor, workers might lose some of the benefits that they previously received, such as training, the loss of which may be to decrease their lifelong earning potential.

Finally, given the experience of *BFI*, it is not clear whether or not the joint employer rule changes will increase the rate of unionization—over the last decade the rate of private sector union membership has continued its secular decline.⁷⁰

⁶⁷ See Oxford Economics, “The Value of Franchising,” pp. 13–18.

⁶⁸ *Ibid.*

⁶⁹ Another strand of the literature considers the difference between the wage rates of franchised and company-owned stores. See Oxford Economics, “The Value of Franchising,” at p. 13 “Krueger found a very small difference in the wage rates for nonmanagement workers at franchised versus company-owned stores. ‘Full-time workers earn 1.7% greater wages at company-owned restaurants... for part-time workers the company-ownership differential is just 0.5%. Although these coefficients are precisely estimated, they are trivial by most economic standards.’” Alan B. Krueger, “Ownership, Agency, and Wages: An Examination of Franchising in the Fast Food,” *The Quarterly Journal of Economics*, 106(1) (1991): 75–101.

⁷⁰ The rate of private-sector union membership was 6.7% in 2015, 6.5% in 2017, and 6.0% in 2022. See <https://www.bls.gov/news.release/pdf/union2.pdf>.

4. CONCLUSION

Our analysis of the views of franchisees has revealed uncertainty over the potential impacts of the new joint employer rule. Franchisee survey respondents are divided over how they expect franchisors to react, but the majority express high concern both about the possibility that it may lead to greater franchisor involvement in their day-to-day operations, as well as to the possibility that franchisors may withdraw operations and compliance support.

Franchisees believe that the rule is likely to lead to increased litigation and related costs, and a lowered value of their businesses. In addition, franchisees believe that the rule will reduce entry into the franchisee business, and express doubts around whether they would have chosen to become a franchisee themselves under the new standard.

In addition, we have documented how minority ownership of franchises is higher than for other forms of business (26.3% against 17.9%), suggesting an additional consideration around the impact of this rule. To the extent this rule impacts franchising more than other business forms, minority business owners may be disproportionately impacted.



APPENDIX

IFA ADMINISTERED SURVEY, JOINT EMPLOYER QUESTIONS

To generate the results outlined in this report, Oxford Economics, in consultation with IFA, prepared a series of survey questions to gauge the potential impacts of the joint employer rule. The survey questions were developed following a process of literature review, interviews with franchisor and franchisee organizations, and discussions with the IFA. The survey questions were distributed as part of the FRANdata/IFA annual franchisee survey, and thus the figures in this report represent the views of franchisees choosing to participate in the IFA/FRANdata survey process.

The survey was in the field from July 12, 2023, to August 7, 2023, and was administered electronically. Responses were limited to US-based franchisee organizations. In total, 1,258 complete responses were received from franchisees in the United States, covering 6,498 establishments employing 134,107 people; however, the sample does not necessarily represent the views of all franchisees.

The FRANdata/IFA administered survey included a short description of the upcoming NLRB rule, followed by 7 questions specific to the joint employer standard. The characterization of the joint employer rule was as follows:

The National Labor Relations Board (NLRB) will introduce joint employer rule which states that an employer would be considered a joint employer if the employer shares or codetermines those matters governing employees' essential terms and conditions of employment. The new definition essentially permits franchisor and franchisee to be joint employers, and hence mutually liable for licensees' employment practices and policies, if the brand owner has even indirect influence on the employment practices of its affiliated field-level operators.

The questions (and answer choices) are included below:

Do you expect the new joint employer standard will change your relationship with your franchisor?

- ☐ The franchisor will take more control over day-to-day operations of my business
- ☐ The franchisor will reduce operations and compliance support (for example, the provision of services such as training and development, HR services, technical guidance, etc.)
- ☐ The relationship will stay the same
- ☐ Don't know

How concerned would you be if the new joint employer standard compels your franchisor to take the following action?

Take more control over day-to-day operations of my business

- ☐ Minimal concern
☐ Some concern

- ☐ High level of concern
☐ Not applicable

Reduce operations and compliance support (via the provision of services such as training and development, HR services, technical guidance, etc.)

- ☐ Minimal concern
☐ Some concern

- ☐ High level of concern
☐ Not applicable

In your opinion, will the new joint employer standard raise the barrier to entry into the franchise business model for new franchisees?

- ☐ Yes
☐ No
☐ Don't know

In your opinion, if the new joint employer standard had been law when you were choosing to enter the franchise business would you still have moved ahead?

- ☐ Yes
☐ No
☐ Don't know

Do you anticipate the new joint employer standard will increase litigation against franchisors and franchisees?

- ☐ Yes
☐ No
☐ Don't know

Do you expect that franchisors will pass the costs of heightened liability risk from the new joint employer standard on to franchisees?

- ☐ Yes
☐ No
☐ Don't know

Do you expect that an impact of the new joint employer standard would be to lower the value of your franchise?

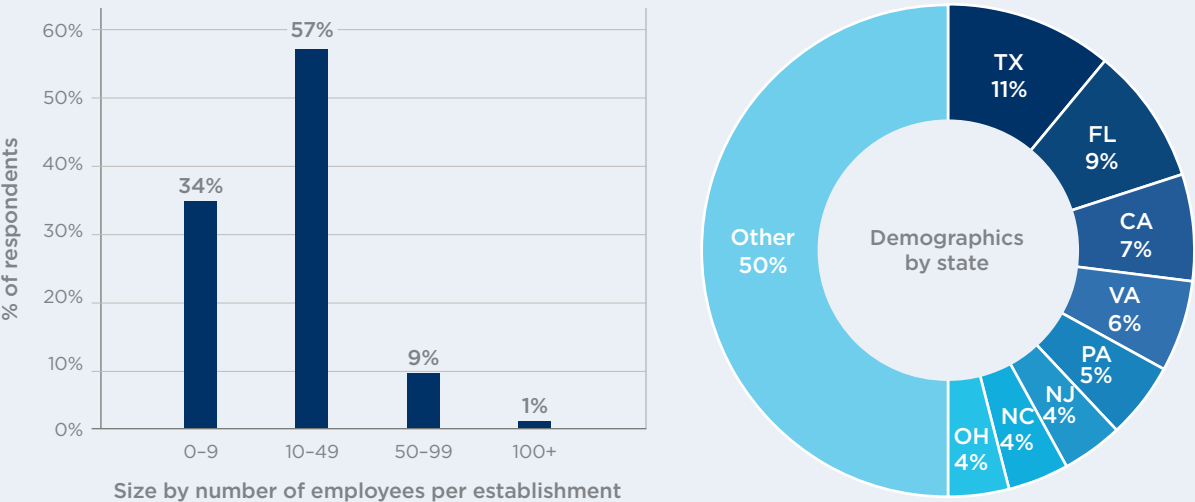
- ☐ Yes
☐ No
☐ Don't know

Demographics of respondents

FRANCHISEE SIZES AND GEOGRAPHIC DISTRIBUTION

The sample comprised mainly of small franchisees measured both by number of establishments that they owned (56 % of respondents owned only one franchise), and by the number of employees per establishment (Fig. 17). The respondents had representation across 49 states, the largest being Texas (11% of respondents), Florida, and California (Fig. 17).

Fig. 17. Demographics of the sample by size of establishment and state

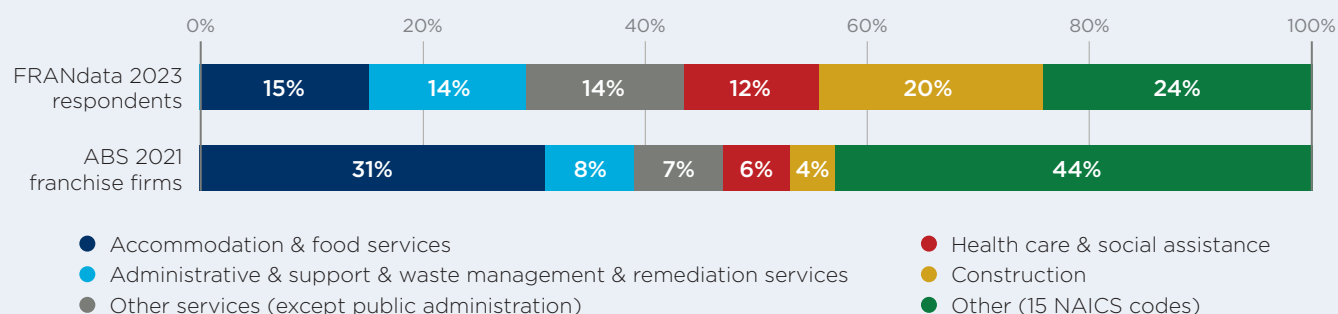


Source: FRANdata (2023)
Percentages may not sum to 100% due to rounding.

INDUSTRY COMPOSITION OF SURVEY SAMPLE

We benchmarked FRANdata survey sample against the Census Bureau's 2021 Annual Business Survey on the 2-digit NAICS industry classification. Fig. 18 shows, how the sample underrepresented accommodation and food services and industries classified as "Other." The rest of the selected industries were overrepresented in the survey.

Fig. 18. Industry breakdown: sample by respondents and ABS 2021 franchise firms



Source: FRANdata (2023) and ABS (2021)

Note: Percentages may not sum to 100% due to rounding.

We weighted FRANdata survey responses to construct our estimate of the number of establishments that say they would not have opened a franchise under the new rule. We selected five sectors and grouped the other 15 sectors to apply the weights. The criteria used to choose which sectors to group was based on:

- Sectors with 5% or less of total firms in the ABS were grouped into an "Other" group—with the exception of industries that satisfy the following condition:
 - Overrepresented sectors with more than 10% responses in the sample were excluded from the "Other" group even if they had less than 5% representation in the ABS.
 - If an industry made up less than 10% of the survey sample, we added the sector to the "Other" group, even if they had more than 5% representation in the ABS.

We then estimated frequency weights for each industry, so the weighted responses exactly match firm counts by industry in the 2021 ABS.

ANALYSIS OF NLRB LITIGATION DATA

We collected litigation case counts from the NLRB, using their website's *Advance Search Tool*.⁷¹ The search criteria were cases that included the word “joint employer” in the case name, in the date range January 1, 1984, to July 25, 2023 (the first located case was on December 31, 1992). The query returned 3,273 cases including both Unfair Labor Cases (C) and Representation Cases (R). The case name was processed using parsing and splitting algorithms to eliminate legal terms and other unnecessary characters and identify all the businesses involved in the case.

The business names were then matched with a list of franchise brand names provided by FRANdata using a fuzzy string-matching library. The business name match that had the highest Levenshtein distance score was assigned to each case. Cases with scores greater than 80 were assigned as cases involving franchises. The number 80 was chosen to match as closely as possible to the results of the manual analysis previously presented by the IFA.⁷² There are still likely to be some false positives and false negatives in our identified list of cases.

Segmenting case numbers into time periods

We segmented the cases into three time periods to understand the broad patterns of litigation before and after *BFI* and before and after the previous joint employer rule. July 29, 2014, was used to delineate the pre-*BFI* period following the IFA's example in their earlier analysis.⁷³ On that date the NLRB General Counsel filed a joint employer complaint against McDonald's USA, which followed an earlier statement on June 26, 2014, by the NLRB General Counsel on the need to revisit the joint employer standard.

Our second date of delineation is September 14, 2018. On that date, the NLRB Board issued a notice of proposed rulemaking for a new joint employer standard.

ANALYSIS OF ANNUAL BUSINESS SURVEY DATA

The 2021 and 2020 Annual Business Survey (ABS): Characteristic of Businesses (CB) Datasets were used to compare the demographics of franchised and non-franchised businesses. To identify if a business was a franchise, we used the variable “OPFRAN,” corresponding to the question: “In 2020, did all or part of this business operate as a franchise?” Information about the owner's sex, ethnic group, veteran status and race are also available in the ABS.

⁷¹ <https://www.nlr.gov/advanced-search>.

⁷² IFA, 2019, “The Economic Impact of an Expanded Joint Employer Standard,” at p. 12 available at <https://www.franchise.org/sites/default/files/2019-05/JE%20Econ%20Impact%200128.pdf>.

⁷³ IFA, 2019, “The Economic Impact of an Expanded Joint Employer Standard,” at p. 12 available at <https://www.franchise.org/sites/default/files/2019-05/JE%20Econ%20Impact%200128.pdf>.

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