

Congress of the United States

Washington, DC 20510

December 7, 2022

[NLRB-2022-0001](#)

The Honorable Lauren M. McFerran
Chairman
National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570-0001

Dear Chairman McFerran:

We write to raise concerns regarding your recent proposed rule and its impact on our nation's economy. On September 7, 2022, the National Labor Relations Board ("NLRB" or the "Board") published its Notice of Proposed Rulemaking (NPRM) entitled: "*Standard for Determining Joint-Employer Status*" ("proposed rule"), which would replace the 2020 Joint-Employer Rule that focused on "direct and immediate control" and replace it with the "indirect, reserved" control standard. The joint employer rule has caused confusion for franchise owners for years. At a time when we're still recovering from a global pandemic we need to support our small businesses, like franchises, not put them at risk.

The Board's joint employer proposed rule could have negative effects workers and businesses in our states during a time that many are already struggling following the COVID-19 pandemic. An estimated 32,700 franchise businesses closed during the first 6 months of the pandemic. The proposed rule is nearly identical to the standard created by the Board in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015) ("BFI"), which expanded the standard by asserting that a joint-employer relation could be based on "indirect control." This decision resulted in an increase in potential joint employers and litigation. The International Franchise Association (IFA) found that the BFI joint employer standard "cost franchise businesses \$33.3 billion per year, resulting in 376,000 lost job opportunities, and led to a 93% increase in lawsuits."¹

In the United States, there are nearly 775,000 franchises that employ 8.2 million workers and provide \$800 billion of economic output. This is projected to grow in 2022 to nearly 800,000 franchises employing 8.5 million workers, and outputting \$827 billion to the economy.² These franchises include over 300 different business categories, such as restaurants, hair care, fitness,

¹ "The Economic Impact of an Expanded Joint Employer Standard", International Franchise Association, January 28, 2019, <https://www.franchise.org/sites/default/files/2019-05/JE%20Econ%20Impact%200128.pdf>.

² "2022 Franchising Economic Outlook", International Franchise Association, February 15, 2022, <https://www.franchise.org/franchise-information/franchise-business-outlook/2022franchising-economic-outlook>.

tutoring, amusement parks, automotive repair, lodging, childcare, and senior care.³ By moving forward with this proposed rule, the Board could hurt entrepreneurs that are utilizing the franchise model to own their own business. Many of these entrepreneurs are women, minorities, and veterans, with thirty-two percent saying that they would not own a business without franchising.⁴

As Members of Congress, we have sought to protect the franchise model through legislation due to the opportunity franchises provide workers and entrepreneurs. For example, we have introduced the *Trademark Licensing Protection Act*, which would establish that licensing a trademark or trademark registration for use by a related company does not contribute to establishing an employment relationship between the licensor and the licensee, nor does a licensor's exercise of control over how the licensed trademark is used.⁵ This would help prevent litigation over employment controls and protect the franchisor-franchisee relationship. We fear that the proposed rule would do the opposite, leading to an increase litigation and therefore putting the franchise model at risk. Businesses should not be liable for entities they do not control.

Due to our concern with the potential impact that the proposed rule will have on the franchise model, we request that the Board reconsider moving forward with its proposed rule for determining joint-employer status. At a time when small businesses have been struggling to stay afloat, we should at the very least provide clarity so that labor and employment law does not come into unnecessary conflict.

We look forward to working with you on addressing our concerns.

Sincerely,



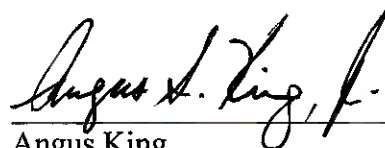
Mike Braun
U.S. Senator



Joe Manchin III
U.S. Senator



James Lankford
U.S. Senator



Angus King
U.S. Senator

³ "The Value of Franchising", Oxford Economics, September 21, 2021, <https://www.oxfordeconomics.com/resource/The-value-of-franchising/>.

⁴ Ibid.

⁵ S. 4976, 117th Cong. (2022).

Susan M. Collins

Susan Collins
U.S. Senator

Kyrsten Si

Kyrsten Sinema
U.S. Senator