February 14, 2017

The Honorable Virginia Foxx
Chairwoman, Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Robert C. "Bobby" Scott
Ranking Member, Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Tim Walberg
Chairman, Subcommittee on Health, Employment, Labor, and Pensions
U.S. House of Representatives
Washington, DC 20515

The Honorable Gregorio K. C. Sablan
Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions
U.S. House of Representatives
Washington, DC 20515

The Honorable Bradley Byrne
Chairman, Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

The Honorable Mark Takano
Ranking Member, Subcommittee on Workforce Protections
U.S. House of Representatives
Washington, DC 20515

Dear Chairs Foxx, Walberg and Byrne and Ranking Members Scott, Sablan and Takano:

The undersigned employer and business trade associations represent millions of employers that operate in every industry and sector of our nation's economy, and we are writing to express our continued serious concerns about the growing harm to businesses caused by the National Labor Relations Board's (NLRB) August 2015 "joint employer" standard. Businesses of all sizes are now perpetually exposed to unlimited and unpredictable joint employment liability that is disrupting many business formats. While the change in Administration has generated a corresponding hope that the NLRB will eventually restore the traditional, common sense standard of joint employment liability based on "direct control," we are calling on Congress to enact a permanent legislative solution to joint employer that provides certainty to small and large businesses and promotes economic growth and job creation.

In 2015, the NLRB issued *Browning-Ferris Industries of California, Inc (BFI).* The decision overruled more than thirty years of bipartisan precedent. The Board replaced the predictable and clear "direct and immediate control" standard for determining joint employer status with a vague test based on "indirect" and "potential" control over workers' terms and conditions of employment. The decision exposed a broad range of businesses, from contractors and subcontractors, to franchisors and franchisees, to workplace liability for another employer's actions and for workers they do not employ. Specifically, franchise and contract businesses are facing more operational and legal costs, decreased business values, less compliance assistance from franchisors, less growth and fewer jobs as consequences of the new joint employer policy.

Making matters worse, other agencies have sought to take advantage of the expanded joint employment definition. Last year, the Occupational Safety and Health Administration and the Wage and Hour Division at the U.S. Department of Labor released administrative directives expanding joint employer liability. The Equal Employment Opportunity Commission also filed a brief in support of the NLRB's new standard in the federal court appeal of *BFI.*

Legislation is needed because the new joint employer standard will not be reversed by the NLRB soon. The President can nominate two new Board members, but those nominees will require

Senate approval, which takes time. After new members are confirmed to the Board, it will take more time for an appropriate case to develop so the Board can restore the "direct control" joint employer standard. Importantly, even if a new Board and general counsel return to the traditional standard through a future case decision, future administrations may overturn the standard again.

Meanwhile, joint employer litigation has swelled and more companies are targeted with joint employment claims each passing week. Below are a few of the highest profile joint employment developments beyond the *BFI* decision:

- **Commercial Interiors Inc.** – The Fourth Circuit Court of Appeals in January 2017 adopted a new expansive test for joint employment under the FLSA. The Court's decision was consistent with the overly broad Department of Labor Administrator's Interpretation issued last year, and it specifically rejected a long-standing joint employment test applied by the Ninth Circuit.
- **Amazon.com, LLC** – In November 2016, Amazon's Illinois contract delivery drivers filed a complaint in a Chicago federal court against their two contractor employers ***and*** Amazon for overtime pay under the Fair Labor Standards Act (FLSA).
- **McDonald's** – Beyond the pivotal NLRB joint employment case against McDonald's and its franchisees, the company settled a quasi-joint employment wage class action suit for unpaid wages and overtime in November 2016 because employees of locally owned franchise businesses wrongly believed they were employed by McDonald's USA.
- **Microsoft Corp.** – Temporary workers of a Microsoft contractor signed their first union contract in August 2016. In exchange for the contract, the union agreed to drop pending unfair labor practice charges at the NLRB, which involved voluminous agency investigative subpoenas regarding whether Microsoft and the contractor were joint employers.
- **Miller & Anderson, Inc.** – In July 2016, the NLRB reversed another existing precedent that required employers to agree to bargaining in multi-employer units. The Board found that a union could organize workers employed by one business and temporary workers employed by a staffing agency into one incoherent bargaining unit.
- **Papa John's** – In May 2016, a nationwide class action complaint was filed in the Southern District of New York under the FLSA against Papa John's as an alleged joint employer for all delivery drivers employed by franchisees.
- **Domino's Pizza** – In May 2016, the New York Attorney General filed a wage-based lawsuit against Domino's as a joint employer with 10 locally owned franchise businesses.
- **CNN –** In a case that was pending before the NLRB for over 10 years, the Board found that CNN was a joint employer with its unionized contractor based on new indirect control and "additional" factors. Review of this case is pending in federal court.
- **Retro Environmental, Inc. and Green Jobs Works, LLC –** The NLRB expanded its new joint employer standard to the contingent worker industry and found a construction company and a temporary staffing agency joint employers for purposes of a union petition to represent a combined unit of employees, even though the companies had no current projects together and no bids for future projects.

Until Congress repeals the NLRB's doctrine of unlimited joint employer liability, the doctrine will continue to be used against employers in litigation under numerous statutes. In the months since August 2015, joint employer lawsuits have been brought primarily under the FLSA, but also under the Migrant and Seasonal Agricultural Workers Protection Act, Title VII of the Civil Rights Act, the Uniformed Services Employment and Reemployment Rights Act, the False Claims Act, the Equal Pay Act, and the Age Discrimination in Employment Act. In addition, at

the state level, plaintiffs' lawyers have filed joint employment-based lawsuits under state workers' compensation laws, state wage and hour laws and state and local human rights laws.

The joint employment jeopardy created by the NLRB is reaching all levels of business from franchise employers to construction companies to service providers and their business partners. The unlimited joint employer liability standard will continue to harm businesses in numerous industries under multiple federal and state statutes until Congress enacts a permanent, legislative solution that promotes economic growth and job creation in every state and congressional district.

Sincerely,

AKFCF (Association for Kentucky Fried Chicken Franchisees)
Aeronautical Repair Station Association
American Fire Sprinkler Association
American Home Furnishings Alliance
American Hotel & Lodging Association
American Moving & Storage Association
American Staffing Association
American Supply Association
Asian American Hotel Owners Association
Associated General Contractors
Associated Builders & Contractors, Inc.
Association for Corporate Growth
CAWA – Representing the Automotive Parts Industry
California Delivery Association
Equipment Dealers Association
The Fertilizer Institute
Franchise Business Services
Global Cold Chain Alliance
HR Policy Association
Heating, Air-conditioning & Refrigeration Distributors International (HARDI)
Home Care Association of America
Independent Electrical Contractors
Independent Office Products & Furniture Dealers Association
International Council of Shopping Centers
International Foodservice Distributors Association
International Franchise Association
International Warehouse Logistics Association
KFC Montana, LTD
NATSO, Representing America's Travel Plazas and Truckstops
National Association of Home Builders
National Association for Home Care and Hospice
National Association of Professional Employer Organizations
National Council of Chain Restaurants
National Federation of Independent Business
National Franchisee Association
National Lumber and Building Material Dealers Association
National Multifamily Housing Council
National Office Products Alliance
National Pest Management Association
National Restaurant Association

National Retail Federation
Northeastern Retail Lumber Association
Retail Industry Leaders Association
Office Furniture Dealers Alliance
Plumbing-Heating-Cooling Contractors Association of California
Precious Metals Association of North America
Small Business & Entrepreneurship Council
TRSA – The Linen, Uniform and Facility Services Association
Truck Renting and Leasing Association
U.S. Chamber of Commerce
Western Electrical Contractors Association

CC: Members of the U.S. House of Representatives and U.S. Senate