

# REDEFINING EMPLOYER AND THE IMPACT ON ALABAMA'S WORKERS AND SMALL BUSINESS OWNERS

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## FIELD HEARING

BEFORE THE  
SUBCOMMITTEE ON HEALTH,  
EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION  
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN MOBILE, ALABAMA, AUGUST 25, 2015

**Serial No. 114-25**

Printed for the use of the Committee on Education and the Workforce



Available via the World Wide Web: [www.gpo.gov/fdsys/browse/committee.action?chamber=house&committee=education](http://www.gpo.gov/fdsys/browse/committee.action?chamber=house&committee=education)

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U.S. GOVERNMENT PUBLISHING OFFICE

95-829 PDF

WASHINGTON : 2016

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**REDEFINING ‘EMPLOYER’ AND THE IMPACT  
ON ALABAMA’S WORKERS AND  
SMALL BUSINESS OWNERS**

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**Tuesday, August 25, 2015  
House of Representatives  
Subcommittee on  
Health, Employment, Labor, and Pensions  
Committee on Education and the Workforce  
Washington, D.C.**

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The Subcommittee met, pursuant to call, at 10:02 a.m., at the University of South Alabama, Alabama Student Center Ballroom, 350 Campus Drive, Mobile, Alabama, David P. Roe [chairman of the subcommittee] presiding.

Present: Representatives Roe and Byrne.

Staff present: Janelle Belland, Coalitions and Members Services Coordinator; Christie Herman, Professional Staff Member; Tyler Hernandez, Press Secretary; John Martin, Professional Staff Member; and Eunice Ikene, Minority Labor Policy Associate.

Chairman ROE. A quorum being present, the Subcommittee on Health, Employment, Labor, and Pensions will come to order. I first would like to recognize myself for opening remarks, this morning.

Good morning, everyone. We welcome today’s hearing. I first would like to take a moment to thank our witnesses for joining us. I would also like to thank the staff here at the University of South Alabama for their hospitality, and also to our security that is here today. Thank you for being here.

I am happy to be here, and I am thankful for the opportunity to get out of Washington and to hear directly from you about an issue that could have significant consequences for a lot of people in Alabama and across this country. That issue is an effort by a handful of unelected bureaucrats in Washington who are trying to fundamentally change the way franchise businesses operate.

This is a complicated issue, and before I get into what the Board is trying to do, I want to say a little bit about what is at stake. More than 780,000 franchise businesses currently operate in the United States, employing nearly 9 million workers. These small businesses, which are independently owned and operated, have helped create jobs and allowed countless individuals to realize the dream of owning their own business. Franchise businesses are vital to countless communities and working families.

A federal agency known as the National Labor Relations Board is trying to upend the franchise model by changing what it means to be an employer. The NLRB's general counsel is pushing the Agency to blur the lines of responsibility between a franchisee—that is the person who owns and operates the business locally—and the franchisor—the entity that enables a small business owner to use an established brand to sell certain goods or services in a particular area.

This effort would make both “joint employers” and give them equal responsibility for decisions affecting the day-to-day operations of the business: decisions like hiring, training, wages, and work schedules. What will this look like in the real world?

For starters, these small business owners, these franchisees, will have less freedom to operate their own businesses. If a franchisor is suddenly responsible for decisions affecting employees at each individual franchise, they will naturally assert more control over those decisions. That just makes common sense. More control for the franchisor, of course, means less control for the franchisee—the local business owner. And suddenly that small business owner is no longer making decisions about the way his or her business is run. Individuals like Mr. Holmes and Colonel Carey, who have worked hard to start their own businesses, may no longer decide who their employees are, when they work, how they are trained, hours they work.

But the consequences of expanding the joint employer standard are not just operational. Such a move will also lead to higher consumer costs, fewer small businesses, lost jobs, more litigation, fewer opportunities for individuals to pursue the American Dream, just the opposite of what we need to be doing in this country right now.

To make matters worse, the NLRB might extend this flawed approach to businesses outside the franchise industry, like contractors and subcontractors. A change like that would disrupt countless businesses here in Mobile and all along the Gulf Coast and across this country. It is not easy starting a small business, let alone keeping a small business afloat in this economy.

The last thing we need is an unelected and unaccountable board of bureaucrats to make it more difficult to pursue the American Dream. By sharing your stories and concerns today, you are helping us to fight back against this misguided scheme and ensure policies are in place that promote, instead of discourage, economic growth and development.

I want to thank our witnesses again for being here today and sharing their personal experiences with the Committee. I look forward to hearing from each of you.

**Prepared Statement of Hon. David P. Roe, Chairman, Subcommittee on Health, Employment, Labor, and Pensions**

Good morning, everyone, and welcome to today's hearing. I'd first like to take a moment to thank our witnesses for joining us. I would also like to thank the staff here at the University of South Alabama for their hospitality.

I'm happy to be here and thankful for the opportunity to get out of Washington and hear directly from all of you about an issue that could have significant consequences for a lot of people in Alabama and across the country. That issue is an effort by a handful of unelected bureaucrats in Washington that are trying to fundamentally change the way franchise businesses operate.

This is a complicated issue, but before I get into what the board is trying to do, I want to say a little bit about what's at stake. More than 780,000 franchise businesses currently operate in the United States, employing nearly nine million workers. These small businesses, which are independently owned and managed, have helped create jobs and have allowed countless individuals to realize the dream of owning a business. Franchise businesses are vital to countless communities and working families.

A federal agency, known as the National Labor Relations Board, is trying to upend the franchise model by changing what it means to be an employer. The NLRB's general counsel is pushing the agency to blur the lines of responsibility between a franchisee – the person who owns and operates the business locally – and a franchisor – the entity that enables the small business owner to use an established brand to sell certain goods or services in a particular area. This effort would make both “joint employers” and give them equal responsibility for decisions affecting the day-to-day operations of the business – decisions like hiring, training, wages, and work schedules. What would this look like in the real world?

For starters, these small business owners, these franchisees, will have less freedom to operate their own businesses. If a franchisor is suddenly responsible for decisions affecting employees at each individual franchise, they will naturally assert more control over those decisions. More control for the franchisor, of course, means less control for the franchisee, and suddenly, that small business owner is no longer making decisions about the way his or her business is run. Individuals like Colonel Carey and Mr. Holmes who have worked hard to start their own businesses may no longer decide who their employees are, when they work, and how they are trained.

But the consequences of expanding the joint employer standard aren't just operational. Such a move will also lead to higher consumer costs, fewer small businesses, lost jobs, more litigation, and fewer opportunities for individuals to pursue the American Dream. To make matters worse, the NLRB might extend this flawed approach to businesses outside the franchise industry, like contractors and sub-contractors. A change like that would disrupt countless businesses here in Mobile, all along the Gulf Coast, and across the country.

It's not easy starting a small business, let alone keeping a small business afloat in this economy. The last thing we need is for an unelected and unaccountable board of bureaucrats to make it more difficult to pursue the American Dream. By sharing your stories and concerns today, you are helping us to fight back against this misguided scheme and ensure policies are in place that promote – instead of discourage – economic growth and job creation.

I want to thank our witnesses again for being with us today and sharing their personal experiences with the committee. I look forward to hearing from each of you, so I'm going to yield to my distinguished colleague and our host today, Congressman Bradley Byrne, for his opening remarks.

I will now take this opportunity to recognize our host today, Congressman Byrne, for his opening remarks.

Mr. BYRNE. Thank you, Mr. Chairman. I am pleased to welcome you and our witnesses to Alabama's 1st Congressional District to speak about the importance of the NLRB's interpretation of “joint employer,” which will impact, as you said, thousands of business owners and their employees in my district and throughout the country.

I will say, Mr. Chairman, I know that you are a physician by training and background, but as a former labor and employment attorney after watching you the last year and a half on this subcommittee, I think you missed your calling. You could be a labor and employment attorney. You have mastered these issues wonderfully. And I really appreciate the extent to which you have poured yourself into understanding not just the technical application, but the real world experience that we have here.

I also want to welcome and thank the committee staff. I know you all have worked very hard to make this work. You are outside of Washington, so thank you for doing that. And, of course, the

University of South Alabama, I could not be prouder of this university. This is my university. It is in my district, and you all have done a great job today.

I want to thank our witnesses, two of whom I know very well. I appreciate you being here. We have a gentleman who has driven a long way from Tallahassee to be here. I know how long that road is on I-10. Thank you for coming.

Mr. HOLMES. My pleasure.

Mr. BYRNE. And we want to thank all the members of the public for being here.

Committee hearings have always provided transparency and a way for the public to hear their representatives debate important issues. Field hearings, however, provide a much more tangible way for our constituents, like the people of South Alabama, to be directly involved in the process. Issues like the NLRB's definition of a "joint employer" under national labor law affects Main Street businesses in a real way, and it is imperative for Congress to come directly to the people to discuss the impact these decisions will have on their everyday lives.

As Chairman Roe explained, the NLRB is tasked with determining whether two businesses may be considered joint employers under the *National Labor Relations Act*. This definition is then used by the NLRB to mediate labor disputes and to determine the rights and protections afforded to employees under national labor laws.

We, as a committee, have discussed joint employer status before in the *Browning-Ferris v. NLRB* case. It was during that discussion that the franchise-joint employer relationship was brought up. Now, as a former management attorney who has worked in this field for over 30 years, it truly boggles my mind that we are even talking about redefining the joint employer relationship in the franchise industry.

The franchise model's way of doing business has been around for decades, and it represents a win-win for franchisors, franchisees, and, most importantly, franchisee employees. Franchisees get the gratification of charting their own course, owning their own business, while franchisors benefit from the licensing of their product. As a franchise expands, more opportunities are created for both the employees of the franchise and for the franchisee.

During our last hearing, my colleagues on the other side of the aisle could not understand why the franchise industry was worried about their status as independent business owners and why franchisors were worried about what this would do to their business model. The answer is simple: expanding the definition of "joint employer" increases the liability of doing business. It changes the franchisor/franchisee relationship. It disrupts the flow of commerce and puts long-term job growth in jeopardy. These proposed changes will directly impact products and services that people have come to depend on across the United States.

I look forward to hearing from our witnesses about the impacts this change will have for business owners and their employees. Thank you, Mr. Chairman, and once again we welcome everybody to the 1st District of Alabama.



**Prepared Statement of Hon. Bradley Byrne, a Representative in Congress  
from the state of Alabama**

I am pleased to welcome Chairman Roe and our witnesses to Alabama's First Congressional District to speak about the importance of the National Labor Relations Board's interpretation of a "joint employer", which will impact thousands of business owners and their employees in my district and throughout the country.

I would like to thank Chairman Roe, Committee Staff, the University of South Alabama, as well as our witnesses and members of the public here today for being a part of this hearing.

Committee hearings have always provided transparency and a way for the public to hear their Representatives debate important issues. Field hearings, however, provide a much more tangible way for our constituents, like the people of South Alabama, to be directly involved in the process.

Issues like the National Labor Relations Board's definition of a "joint employer" under national labor law affect Main Street businesses in a real way and it is imperative for Congress to come directly to the people to discuss the impact these decisions will have on their everyday lives.

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We as a Committee have discussed joint employer status before in the Browning Ferris v. NLRB case, and it was during that discussion that the franchise joint employer relationship was brought up. Now as a former management attorney who has worked in the field for 30 years, it truly boggles my mind that we are even talking about redefining a joint employer relationship in the franchise industry.

The franchise model, as a way of doing business, has been around for decades and represents a win-win for franchisors, franchisees, and franchise employees. Franchisees get the gratification of charting their own course and owning their own business while franchisors benefit from the licensing of their product. As the franchise expands, more

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These proposed changes will directly impact products and services that people have come to depend on across the United States. I look forward to hearing from our witnesses about the impacts this change will have for business owners and their employees.

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Chairman ROE. Thank you very much for yielding. And pursuant to Committee Rule 7(c), all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous materials referenced during the hearing to be submitted into the official hearing record.

It is now my distinct pleasure to introduce our distinguished witnesses. First, Mr. Marcel Debruge is Chair of the Labor and Employment Practice Group at Burr & Forman LLP in Birmingham, Alabama. He focuses his practice on representing management in all aspects of labor and employment law, including litigation before Federal and State courts and administrative agencies. Welcome, Mr. Debruge.

Colonel Steve Carey owns and operates CertaPro Painters of Mobile and Baldwin Counties in Daphne, Alabama, an interior and exterior house painting contractor, which has won an A-plus rating

from the Better Business Bureau. Colonel Carey, retired, is a Commandant at the College of Aerospace Doctrine Research and Education, and the Vice Commander at Air Force Doctrine Center, Air University, Maxwell Air Force Base, Alabama. Sir, thank you for your service to our great Nation.

And Mr. Chris Holmes is CEO of CLH Development, Inc. of Tallahassee, Florida, since its incorporation in 2001. Mr. Holmes is an area representative for Firehouse Subs in Southeast Alabama, South Georgia, and North Florida. He has sold the rights to five Firehouse Sub restaurants in Southeast Alabama, 15 Firehouse Sub restaurants in South Georgia, and 10 Firehouse Sub restaurants in North Florida. Mr. Holmes also owns and operates one Firehouse Sub restaurant in Tallahassee, Florida.

And I might add for the record that we did invite members from both sides of the aisle to be here, both Democrats and Republicans. Democratic witnesses were also invited, but declined.

Gentlemen, I will now ask you to stand and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

[A chorus of ayes.]

Chairman ROE. Let the record reflect the witnesses answered in the affirmative, and you may take your seat. Before I recognize you for your testimony, let me briefly explain our lighting system. You have five minutes to present your testimony. When you begin, the light in front of you will turn green. With one minute left it will turn amber, and when your time has expired, the light will turn red. And at that point I will ask you to wrap up your remarks. I will not certainly cut you off mid-sentence. Each member will also be given five minutes, and we will probably have more than one round of questioning.

And just before, Mr. Debruge, you are recognized, this is an official hearing of the United States Congress. And one of the things I like about field hearings is it does something I wish we would do more often, which is to bring the Congress to the people, which is what we are doing here, as opposed to the people going to the Congress. This is the people's House, the House of Representatives, and we are here to learn what is on your mind.

And, again, Mr. Debruge, you are recognized for five minutes.

**TESTIMONY OF MARCEL L. DEBRUGE, LABOR ATTORNEY,  
BURR & FORMAN LLP, BIRMINGHAM, ALABAMA**

Mr. DEBRUGE. Thank you, Chairman Roe, Congressman Byrne. My name is Marcel Debruge, and I am a partner at Burr & Forman LLP in Birmingham, Alabama, and have been practicing labor and employment law since 1991. For many years, my practice has focused on representing clients in the manufacturing sector, primarily in the State of Alabama, but also throughout the United States. I represent dozens of manufacturing operations in our State, which employ tens of thousands of Alabamians, and I have personally visited the vast majority of major Alabama manufacturing operations.

Our State has had a resurgence of manufacturing jobs in the past 25 years. By the mid-1990s, Alabama had seen the decline of its older unionized industries, such as steel, textiles, chemicals, and paper. Our State understood that it had to attract new business to create manufacturing jobs for people with a high school education, and limited work experience and job skills.

Our State, like many other States in the Southeast, therefore invested heavily to recruit global automotive, steel, and aerospace companies, among many others. In many cases, these marquee companies have attracted dozens of suppliers who build factories in Alabama as well. The numbers tell the story.

In 1993, not a single automobile was made in Alabama. Today Alabama employs over 35,000 men and women in automotive manufacturing, and has produced more than 8.2 million cars and light trucks. Alabama earns the number two spot on Business Facilities Magazine's Annual State Automotive Manufacturing Strength Ranking. This ranking emphasizes growth potential as well as production figures and industry trends.

Alabama ranks fifth in the U.S. in car and light truck production. Alabama auto makers produced more than 918,000 cars and light trucks in 2013. Ten passenger vehicle models are built by Alabama manufacturers. Alabama's export dollars for vehicles and vehicle parts totaled nearly \$7.1 billion for 2013. And finally, 1/4th of all passenger vehicles built in the South are made in Alabama.

Alabama's political leaders, both Republican and Democratic, recognized that the old way of doing business was not working, so they put the State's resources behind the recruitment of these new manufacturing jobs. Unlike in the old days, these post-1990s manufacturing jobs are primarily, but certainly not exclusively, in plants that are foreign owned, union free, and staffed with a variety of categories of employees, such as regular full-time, regular part-time, temporary, and contract labor.

These new plants are modern, efficient, safe, clean, flexible, and capable of achieving the highest quality in the world. They pay competitive wages based on the nature of the business and the location of each facility. Controlling costs is vital to their survival because they are forced to compete with overseas operations in Mexico, Central America, and China. For example, automotive supplier wages in Mexico are between \$1 and \$2 per hour. These same types of supplier plants in Alabama pay 10 to 20 times more than those Mexican wages.

On March 17, 2015, in the Wall Street Journal, an article appeared titled, "Why Automakers are Building New Factories in Mexico, Not the U.S." And that article states: "It has been more than six years since an automaker picked the U.S. South for a green field plant, meaning one where the company did not already have facilities. Such projects have all gone to Mexico lately." Flexibility is critical to Alabama's manufacturing facilities. It means having the right number of trained workers and being able to classify those workers in a way that makes economic sense.

In my experience, most companies rely on a mix of regular, temporary, and contract labor to operate. It is common to see a facility utilize regular full-time associates, regular part-time associates, temporary associates, and on-site contractors handling tasks such

as shipping and receiving, sorting, quality control, maintenance, and logistics.

A one-size-fits-all approach in which virtually everyone is performing some task on site as either an employee or a joint employee is simply not realistic, and, in my judgment, one, will cause fewer new plants to locate here, two, will put at risk the jobs we currently have, three, will discourage existing companies from expanding in the U.S., and, four, will give foreign manufacturing operations an even bigger cost advantage than they already have.

Expanding the definition of "joint employer" and then forcing these newly-defined joint employers to negotiate together with a bargaining unit comprised of people who work for different employers is not the way to promote flexibility, contain costs, and increase competitiveness. It will result in more litigation, more labor unrest, more strikes, more picketing, more union organizing drives, and ultimately fewer jobs.

Thank you.

[The statement of Mr. Debruge follows:]

**Written Statement of Marcel Debruge<sup>1</sup>  
Labor Attorney, Burr & Forman LLP**

**House Committee on Education and the Workforce  
Subcommittee on Health, Employment, Labor, and Pensions**

**Hearing on "Redefining 'Employer' and the Impact on Alabama's Workers and Small  
Business Owners"**

**August 25, 2015**

I would like to thank the Chairman of the subcommittee, Congressman Roe, Ranking Member, Congressman Polis, and the other members of the subcommittee for this opportunity. My testimony will focus on the potential economic consequences of the NLRB's recent effort to redefine "employer."

United States manufacturing is in the midst of a potential resurgence, and Alabama is a state leading the recovery. Indeed, Alabama manufacturing output has increased almost 40% since 2009.<sup>2</sup> Manufacturing in Alabama now accounts for 17.77 percent of the total output in the state (ranking Alabama 8<sup>th</sup> as a percentage of gross state product) and 13.23 percent of the employment (ranking Alabama 5<sup>th</sup> as a percentage of nonfarm employment).<sup>3</sup>

However, past success does not guarantee continued success, particularly in a competitive global environment. Alabama has created an economic climate conducive to manufacturing investment by supplying talented workers and infrastructure, and demonstrating a strong appreciation of business needs. However, recent actions by the federal government, most notably redefining the definition of "employer", create impediments to the state's

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<sup>1</sup> Mr. Debruge is a partner in the law firm of Burr & Forman, LLP. Mr. Debruge represents management in all aspects of Labor & Employment law, including litigation before the federal and state courts and administrative agencies. Mr. Debruge engages in a significant amount of employment law counseling regarding policies and procedures, hiring decisions, workplace diversity, and reduction in force. He often conducts training seminars for supervisors and human resource managers. Mr. Debruge routinely handles labor organizing campaigns and NLRB issues for clients, and assists clients with all aspects of employee relations and management training matters. Mr. Debruge has lectured extensively throughout the Southeast in the areas of procedure, labor relations, case assessment, employment law, occupational safety and health law, alternative dispute resolution and employment torts, including restrictive covenant issues. He has written several articles in the areas of litigation and employment law.

The author wishes to thank Matthew Scully and Sharonda Childs for their help in preparing this statement. Matt Scully and Sharonda Childs are associates at Burr & Forman, LLP, where they represent management in the area of labor and employment law.

<sup>2</sup> <http://www.nam.org/Data-and-Reports/State-Manufacturing-Data/2014-State-Manufacturing-Data/Manufacturing-Facts--Alabama/>

<sup>3</sup> <http://www.nam.org/Data-and-Reports/State-Manufacturing-Data/2014-State-Manufacturing-Data/2014-State-Manufacturing-Data-Table/>

competitiveness.<sup>4</sup> Specifically, the National Labor Relations Board has taken actions which we anticipate will diminish the distinction between employers and temporary workers and franchisors and franchisees. These actions will result in artificial employment relationships, less flexibility for employers, increased costs and, ultimately, serious consequences for Alabama's economic development and workforce.

### **I. Redefining Joint Employer Status**

It's no secret that the Government has been actively expanding the definition of "employer." The Equal Employment Opportunity Commission has long advocated a fairly broad standard for determining whether two entities are joint employers, looking only to whether two or more employers that are unrelated, or that are not sufficiently related to qualify as an integrated enterprise, each exercise sufficient control of an individual to qualify as his or her employer.<sup>5</sup>

The Department of Labor has also recently clarified its stance on independent contractors, unequivocally stating that "most workers are employees" under the FLSA.<sup>6</sup> Not surprisingly, the National Labor Relations Board followed suit by actively redefining the term "employer" under the National Labor Relations Act. In its recent efforts, the Labor Board has focused on expanding joint employment to include franchisors and employers utilizing temp agencies. The Labor Board's actions are particularly troubling given that numerous American manufacturers incorporate franchising, temporary employees, and/or contractors into their business practices. The practical effect of these changes is clear: employers stand to acquire costs and liability for their participation in franchise relationships or use of temporary employees.

#### **A. The NLRB's Effort to Redefine Joint Employment**

In May 2014, the NLRB took up a case to determine whether the Board's current joint-employer standard should be modified -- most likely, with a view toward making it easier to establish a joint-employer relationship. Of note, in Browning-Ferris, the General Counsel for the NLRB filed an amicus brief arguing that "[t]he term 'employer' in the Act was intended to be construed broadly."<sup>7</sup> In CNN America, Inc. (Sept. 15, 2014), the Board confirmed that the standard it applies to determine joint employment is sufficiently broad to capture a majority of primary employer/temp agency relationships. There, the Board noted that it considers two entities joint employers "if the evidence shows that they share or codetermine those matters governing the essential terms and conditions of employment." The Board advised that the factors to consider in making this determination are the employers' authority over hiring, firing,

<sup>4</sup>[http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Manufacturing/gx\\_2013%20Global%20Manufacturing%20Competitiveness%20Index\\_11\\_15\\_12.pdf](http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Manufacturing/gx_2013%20Global%20Manufacturing%20Competitiveness%20Index_11_15_12.pdf)

<sup>5</sup> Special Issues Regarding Multiple Entities: Joint Employers, 2 EEOC Compliance Manual § 2-III(B)(1)(a)(iii)(b) (2009), 2009 WL 2966755, at text accompanying n.109.

<sup>6</sup> U.S. Department of Labor, Administrator's Interpretation No. 2015-1 (July 15, 2015).

<sup>7</sup> Amicus Brief of the General Counsel, Browning-Ferris Industries, Case 32-RC-109684 (2014).

discipline, supervision, direction, work assignments, compensation, among other factors.<sup>8</sup> In CNN, even though the CNN's contract with its contractor established that the contractors were not employees of CNN, the Board determined that CNN was still a joint employer of the contractors and was bound by the union contract between the contractor and the local union.

Seeking to expand "joint employer" to include even more employment relationships, in December 2014, the NLRB issued charges against McDonald's franchisees and their franchisor, McDonald's USA, LLC, as joint employers. The Labor Board has taken the position that McDonald's USA has utilized its franchise relationship, tools, resources and technology to engage in sufficient control over its franchisees' operations, beyond protection of the brand, to make it a putative joint employer with its franchisees, sharing liability for violations of the National Labor Relations Act.<sup>9</sup>

The practical effect of an expanded joint-employer doctrine is to impose additional legal restrictions on the employers who use contingent workers supplied by a staffing agency or participate in franchises, such as limiting an employer's ability to terminate its contract with the staffing agency or make changes that impact the contingent workers' terms and conditions of employment. The Board's actions have potentially massive consequences for the U.S. economy wherein 770,000 businesses are franchises employing 8.5 million people and temporary staffing agencies place an average of 3.15 million workers per week.<sup>10</sup>

#### **B. The NLRB's Effort to Include Temporary Employees in Bargaining Units**

Refusing to stop at making employers liable for franchisee and temporary employees, the Labor Board also may be poised to require employers to bargain with employees of their temporary staffing agencies. On May 18, 2015, the Board granted a petition for review in Miller & Anderson, Inc., Case 05-RC-079249, threatening to overturn precedent governing the inclusion of temporary employees in bargaining units. Currently, under H.S. Care, LLC (Oakwood Care Center), 343 NLRB 659 (2004), contingent workers are not included in a bargaining unit with regular company employees unless both the regular employer and the staffing agency consent to include both groups in the same unit.

However, prior to deciding Oakwood, the Board followed the test laid out in M.B. Sturgis, 331 N.L.R.B. at 1308, in which it determined that regular employees and temporary employees could legally organize together without employer consent. It is widely anticipated that the Board will soon reverse Oakwood Care Center, and return to its prior precedent in M.B. Sturgis. Reversal of Oakwood Care Center and a return to Sturgis would have drastic consequences for employers that use contingent workers. This action, in addition to the change to

<sup>8</sup> CNN America, Inc., 2014 WL 4545618 (NLRB Sept. 15, 2014).

<sup>9</sup> National Labor Relations Board, McDonald's Fact Sheet, available at <https://www.nlr.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet>.

<sup>10</sup> Aloysius Hogan, "The NLRB Joint Employer Cases: An Attack on American Business," Competitive Enterprise Institute (June 2015).

the joint employment test, will not only overrule Board precedent, but will undoubtedly complicate employment relationships.

## II. The Effect of the Redefinition of "Employer"

President Obama has made clear that reinvigorating our manufacturing sector is a vital path to restoring the American middle class.<sup>11</sup> In a global economy any manufacturing operation must be lean, flexible and competitive, but the NLRB's recent activity has the potential to significantly increase costs while simultaneously reducing flexibility. Such a path will only hinder the recovery of our manufacturing sector.

One natural consequence of the effort to redefine joint employment is that employers will be more hesitant to utilize temporary employees. But, the ability to utilize temporary employees provides significant benefits, without which employers will be restricted. The Board's recent activity has the potential to trigger four serious consequences for Alabama and U.S. employers.

First, the redefinition of "employer" may restrict employers' ability to utilize temporary employees as a source of flexibility during financially-stressed times. Consider the 2008 economic downturn, which signaled the near collapse of several large auto manufacturers as auto sales decreased by 40 percent and the industry lost 400,000 jobs.<sup>12</sup> Not surprisingly, well-prepared auto manufacturers were able to cut back on temporary employees without having to reduce their full-time staff, cost-cutting measures that helped to weather the crisis. For instance, although BMW's U.S. sales decreased 30.5% in the first five months of 2009, that decrease was less than the rest of the industry's 36.5% drop. Moreover, BMW manufacturing did not lay off any of its 5,000 full-time employees in 2009. Josef Kerscher, president of BMW Manufacturing Company in Spartanburg, South Carolina, attributed BMW's success to flexibility allowing BMW to match production to customer demands.<sup>13</sup>

General Motors, however, cut 107,357 jobs in the two years after the recession, cutting 50,000 jobs (almost 20% of its workforce) in February 2008 alone.<sup>14</sup> In the year leading up to the economic downturn, the United Autoworkers persuaded GM to give more than 4,000 temporary workers permanent jobs and implement a two-tier wage and benefits scale for "non-core" production jobs. The inability to remain flexible in its use of temporary employees no-doubt restricted GM's capacity to respond to the 2008 crisis. Moreover, the blurring of the lines between full-time employees and temps also begs the question of if and when contract workers will also be considered joint employees. The CNN case and the DOL's recent Administrator's Interpretation signal that the distinction between contract workers and employees is steadily

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<sup>11</sup> Chris Arnold, "Obama Unveils New Plans to Encourage Manufacturing Jobs," NPR (Jan. 15, 2014).

<sup>12</sup> Whitehouse.gov, "The Resurgence of the American Automotive Industry" (June 2011).

<sup>13</sup> David Barkholz, "Exports, flexibility help BMW's U.S. plant avoid layoffs," Automotive News (June 15, 2009).

<sup>14</sup> Douglas McIntyre, "The Layoff Kings: The 25 Companies Responsible for 700,000 Lost Jobs," Investor Center (Aug. 18, 2010).



fading. This shift could also carry significant consequences given that since 2009 the sector of contract workers has grown by 41 percent, compared with just 6 percent for total employment.<sup>15</sup>

Second, the Board's actions may limit employers' ability to rely on the pool of temporary employees in hiring new full-time employees. Importantly, in this process, employers can outsource recruiting to localized businesses which are in a better position to identify quality local talent. Additionally, temporary employees have received training and have a better understanding of the company's business model and philosophy than employees pulled off the street. Further, time spent as a temporary employee often serves as a sort of probationary period, allowing employers to observe a putative employee's work habits and performance. Thus, being able to hire from the temporary employee pool saves employers untold costs in turnover and retraining. Moreover, many temporary jobs are low-skilled, and employers have little incentive to pay temporary employees the same as full-time employees. But, this would be the likely result of requiring temporary employees and full-time employees to be a part of the same bargaining unit.

Third, designating employers as joint employers of temporary and franchisee employees unwisely seeks to impose a "one-size fits all" model on entities with varying interests. Undoubtedly, full-time employees, temporary employees, temporary agencies, primary employers, franchisors, and franchisees all have different business goals, interests, and needs. Contingent workers are extremely susceptible to union organizing campaigns and union promises - their wages, hours, and other terms of employment are typically substantially different from the employer's regular employees, and they have less job security, less loyalty to the company, often suffer from morale issues, etc. - and unions would immediately target such employees. The new group of voter eligible pro-union supporters could be devastating to an employer opposing unionization. Further, employers are all-but-guaranteed to incur greater legal costs because they would share liability for a temporary employee or franchisee's actions.

Finally, the Board's recent activity threatens our ability to compete globally. As the auto industry continues to globalize, we must ensure that U.S. manufacturers remain competitive. Alabama currently has an environment conducive to manufacturing; we are a right-to-work state with a deep understanding of employers' interests. However, U.S. auto manufacturing jobs are being lost to Mexico at alarming rates. Mexican exports are anticipated to rise to a record 2.9 million in 2015, with more than 70 percent of Mexican-made cars and trucks heading into the U.S.<sup>16</sup> What's more, Mexico is set to increase its output of small cars by 50% through 2019.

Car companies can expect to spend an average of \$8/hour, including wages and benefits, on a Mexican worker, whereas General Motors spends an average of \$58/hour on American workers and Volkswagen spends approximately \$38/hour on workers at its Tennessee factory (the lowest hourly cost in the U.S.).<sup>17</sup> Not surprisingly, car sales in China increased by 6.86% in

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<sup>15</sup> National Employment Law Project, et al. *Browning-Ferris Amicus Brief*, at 9.

<sup>16</sup> Ben Bain, "Mexico auto exports forecast to hit record in 2015," *Automotive News* (Feb. 6, 2015).

<sup>17</sup> CBSNews.com, "Why your next car could be made in Mexico" (Apr. 21, 2015).

2014.<sup>18</sup> President Obama has stated it is his goal to grow manufacturing jobs in America, announcing that he wants "to act, to help make . . . America a magnet for the good high tech manufacturing jobs that a growing middle class requires . . ."<sup>19</sup> It is simply unrealistic to expect manufacturing jobs to grow if costs keep increasing. We must continue to incentivize companies to manufacture here.

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<sup>18</sup> The Statistics Portal

<sup>19</sup> Chris Arnold, "Obama Unveils New Plans to Encourage Manufacturing Jobs," NPR (Jan. 15, 2014).

Chairman ROE. Thank you. Colonel Carey, you are recognized for five minutes.

**TESTIMONY OF COLONEL STEVE CAREY (USAF, RET.), OWNER/  
OPERATOR, CERTAPRO PAINTERS OF MOBILE AND BALDWIN  
COUNTIES, DAPHNE, ALABAMA**

Mr. CAREY. Yes, sir. Chairman Roe, Congressman Byrne, distinguished members, it really is a pleasure to be here and testify before you today. I am the owner of CertaPro Painters of Mobile and Baldwin Counties. We are a licensed, bonded, and insured residential and commercial painting company.

I appear before you on behalf of the Coalition to Save Local Businesses and the International Franchise Association. I, like my fellow witnesses here, am extremely troubled about the National Labor Relations Board's expanded application of "joint employer," and the very real threat to my business that a new joint employer standard brings.

As a small business owner, entrepreneur, and franchisee, I believe that the NLRB is doing Congress' job in making a new law by inventing a new definition. This new standard seems to ignore all the precedent in federal labor law and threatens the livelihoods of small business owners like myself.

As background, the Coalition to Save Local Businesses is a diverse group of locally owned and independent small businesses, associations, and organizations. This group is dedicated to protecting and strengthening all sectors of small business, which are now under attack by the NLRB.

My wife, Charlotte, and my three children, Clark, Camille, and John Charles, and I moved to Mobile seven years ago after I retired from my short 30-year career in the Air Force. I am a combat veteran, flew F-15s and F-16s, squadron commander, instructor pilot, and mission commander. My leadership position was at Maxwell Air Force Base at the College of Doctrine and Research.

When I retired, I wanted to settle near a close-knit community. I had drug my wife around the world for some 15 years, and she said, "We are going back to Alabama." So we settled down here, and I decided to start a career as a small businessman. I transitioned to a successful career in franchising. I want to highlight the fact that the International Franchise Association's VetFran initiative has been very helpful to veterans like myself. In fact, over 75,000 veterans and their spouses have become franchise business owners and employees in various franchise industries.

During my Air Force career, I developed the characteristics and honed the skills necessary to run what I consider a world-class organization. I transferred those skills into my second life as a small businessman and franchisee. The skills include things like leadership, professionalism, integrity, and attention to detail. That is how I could walk away with an A-plus rating from the Better Business Bureau, how I can put my face on the side of my truck and tell people I bring certainty and integrity into your home. I generated a brand for the painting industry in southern Alabama that is unmatched, and I am proud of that. And I can look back at my Air Force career and say a lot of the things I learned in terms of lead-

ing men and women have carried through to me now as a small businessman.

Locally, I serve on the executive board for two chambers, Eastern Shore and Mobile. I am director of the Foundation for Workforce Development, and vice chair of a student group called the Student Training and Exploration Program. I also serve in Mobile as the vice chair for Military Affairs where I help build public awareness and promote veteran issues with local businesses, hosting a military appreciation luncheon at our local USS Alabama battleship. I was recently selected to serve on the Alabama Red Cross Board of Directors, and I now have a state appointment to the Alabama Aviation Hall of Fame Directors Board.

I am a strong supporter of education for our youth, and as president of our South Alabama Air Force Association, we go a long way to improve science, technology, engineering, and math for our young men and women, and that carries right through here to our Air Force ROTC detachments at the University of South Alabama.

I was asked why did my wife and I pursue a career in franchising. When I retired from the Air Force, we spent a lot of time deciding what would be best for my family. I had a business bug. I had an MBA. We explored the idea of purchasing an existing business and considered both independent businesses and franchises themselves. We decided that the franchise opportunity would be the best fit for our family because it allowed me to run an independent business, but still be able to work with a proven brand and a solid business model.

I purchased CertaPro Painters as a franchise in 2008, probably not the best time in the course of business history to buy a franchise. But immediately I was profitable and ran a smart, lean, good business operation. It was a good fit for me because it was a service business based on working with people, and getting out of the office, and spending time with homeowners as well as commercial clients that had a particular need.

CertaPro offers a 10 percent discount to all franchisees that are veterans like myself, and when I decided to buy that franchise, they put out their hand and said we thank you for your service, we want you to be part of our team. And that is exactly what I felt like when I joined and bought my franchise from CertaPro.

The agreement, in my view, is fairly simple. It is pretty thin, but it is very detailed and very precise. What they do is they help me with brand materials, including trademarks and logos, estimating and project management tools, software, and some marketing. But in all other aspects, I operate as an independent stand alone business, just like any non-franchise small business owner. I have the autonomy to run my business as I see fit. I make the decisions every day, and that is what I bought into, not to be told what to do.

Much like my time as a commander in the military when I sent young men out flying F-15s or F-16s in harm's way, I did not expect myself to sit back at the headquarters there and pass to them decisions and make radio calls that they would then have to act on. I wanted them to be independent. That is the way I operate my business. I want to be independent. I want to lead my business,

make decisions, and grow my business so that I have a legacy for myself and for my family.

Small businesses like mine play a valuable role in our community, not only in opportunities, but also in the growth of the local economy. We provide entrepreneurial opportunities for people looking to create new jobs and grow. Small business is bracing for the NLRB's decision for the forthcoming Browning-Ferris case, a decision that some expect may come as early as next week. I am not a lawyer, but there appears to be little suspense about where the NLRB is headed, and I want to be sure that we make the right decisions.

Fortunately, after I retired from the Air Force, the opportunity for small business presented itself with the franchise of CertaPro Painters. I probably would not have signed up to take on the work and the hard dedication it takes to run a business had I been handcuffed with a change in definitions.

Mr. Chairman, I strongly urge this committee to consider the devastating impact on small business owners that this may have. I ask you to do what Congress can to ensure that the NLRB cannot take away the livelihoods of small business owners like myself.

I thank you for this opportunity.

[The statement of Colonel Carey follows:]

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**COLONEL STEVE CAREY, RETIRED  
UNITED STATES AIR FORCE**

**OWNER / OPERATOR  
CERTAPRO PAINTERS OF MOBILE AND  
BALDWIN COUNTIES**

**TESTIMONY BFORE THE U.S. HOUSE  
COMMITTEE ON EDUCATION AND THE  
WORKFORCE**

**SUBCOMMITTEE ON HEALTH,  
EMPLOYMENT, LABOR & PENSIONS**

**“REDEFINING ‘EMPLOYER’ AND THE  
IMPACT ON ALABAMA’S WORKERS AND  
SMALL BUSINESS OWNERS”**

**MOBILE, ALABAMA**

**AUGUST 25, 2015**

Chairman Roe, Congressman Byrne, and distinguished members of the Subcommittee, thank you for the invitation to testify before you today. My name is Steve Carey. I am an owner and operator of CertaPro Painters of Mobile and Baldwin Counties, a fully licensed, bonded and insured residential and commercial painting company. I appear before you on behalf of the Coalition to Save Local Businesses and the International Franchise Association. I am extremely troubled about the National Labor Relations Board's (NLRB) expanded application of "joint employer" and the very real threat to my business that a new joint employer standard brings.

Mr. Chairman, I am a small business owner, an entrepreneur and a franchisee. However, I believe that the NLRB is doing Congress' job making new law by inventing a new definition of "joint employer." This new standard seems to ignore all precedent in federal labor law and threatens the livelihoods of small business owners, entrepreneurs and franchisees like me. Small businesspeople are also concerned that this expanded standard is being applied by other federal agencies, including the Department of Labor and the Occupational Safety and Health Administration, and these regulatory overreaches jeopardize the growth of local businesses.

As background, the Coalition to Save Local Businesses (CSLB) is a diverse group of locally owned, independent small businesses, associations and organizations. The group is dedicated to protecting and strengthening all sectors of small business, which are now under attack by the NLRB, a regulatory body of five unelected Washington bureaucrats. The Coalition's goal is to maintain to the current joint employer legal standard across federal and state statutes.

The International Franchise Association (IFA) works through its government relations and public policy, media relations and educational programs to protect, enhance and promote franchising. Today there are more than 780,000 franchise establishments that support nearly 8.9 million direct jobs, \$890 billion of economic output for the U.S. economy and three percent of Gross Domestic Product (GDP). IFA members include franchise companies in over 300 different business format categories, individual franchisees and companies that support the industry in marketing, law and other areas.

My wife, Mary Charlotte, my three children, Clark, Camille and John Charles, and I live in Daphne, Alabama. My family and I moved to Mobile, Alabama seven years ago after I retired from the United States Air Force. My family moved to Daphne to be closer to my wife's family in Mobile after working at Maxwell Air Force Base. I purchased a CertaPro Painters franchise in 2008 in Mobile and Baldwin counties. Prior to owning the franchise, I served as a Colonel in the U.S. Air Force. I retired as the Commandant of the College of Aerospace Doctrine, Research and Education (CADRE), and the Vice Commander, Air Force Doctrine Center, Air University, at Maxwell Air Force Base, Alabama. I served in the Air Force for 30 years and am a combat veteran, former F-15 and F-16 Fighter Pilot, Instructor and Mission Commander.

As a 30-year Air Force veteran who has transitioned to a successful career in franchising, I want to highlight the International Franchise Association's VetFran initiative. Since 2011, the IFA has more than achieved its original goal of recruiting 75,000 veterans and their spouses to become franchise business owners and employees in the industry, as nearly a quarter of a million veterans have found career opportunities in the franchise industry through the VetFran initiative. The IFA and franchise businesses

are proud to help our nation's veterans find career opportunities here at home. In fact, the VetFran program benefitted me and my family as we opened our franchise operation.

In my Air Force career, I developed the characteristics and honed the skills necessary to run a world class organization. I transferred these skills into my 'second life' as a franchisee. These skills include leadership, professionalism, integrity, attention to detail, conflict resolution, creative problem solving, and excellence in field operations management. As a result, I have earned an A+ rating with the Better Business Bureau, national awards for customer satisfaction and operate the number one referred home painting company in Southern Alabama. I have generated dramatic growth, doubling production in three years and received numerous regional and national awards. In 2009, I was recognized at the Southeast Franchise of the Year and in 2010, I was the number one Development Franchise in North America. I have focused on delivering an unmatched brand of certainty and integrity to his industry and our community.

Locally, I serve on the Executive Board of the Eastern Shore Chamber of Commerce (ESCC) as well as the Mobile Area Chamber of Commerce (MACC). I am also the Director of the ESCC Foundation for Workforce Development and the Vice Chairman of the Student Training and Exploration Program. As the MACC Vice Chair for the Military Affairs, I help build public awareness and promote veteran issues with local businesses by hosting the annual Military Appreciation luncheon at the USS Alabama Battleship. Recently, I was selected to serve on the Alabama Red Cross Board of Directors and received a state appointment to the Alabama Aviation Hall of Fame Board of Directors. A strong supporter of education and youth development, I am also the President of the South Alabama Air Force Association working to improve science, technology, engineering and math skills at local elementary and high schools while promoting the development of aerospace initiatives at the University of South Alabama and West Florida ROTC programs.

Why did my wife and I pursue a career in franchising? After I retired from the Air Force, we spent a lot of time deciding what would be the best local business for our family. We explored the idea of purchasing an existing business, and considered both independent businesses and franchises. We decided that a franchise opportunity would be the best fit for our family because it allowed me to run an independent business, but still be able to work with a proven brand and business model.

In September 2008, I purchased my CertaPro Painters franchise. CertaPro is a residential and commercial full service painting franchise. I knew CertaPro was the right fit for me because it was a service business, with low overhead, in large demand by property owners and management companies in our region, which is still trying to rebuild after the devastation of Hurricane Katrina ten years ago this week. In addition, through the VetFran program, CertaPro offers a ten percent discount on its franchise fee to honorably discharged veterans. The skills I learned over the thirty years spent serving our country certainly made franchise ownership a good fit for me and my family here in Alabama.

The franchise arrangement with CertaPro is fairly simple. I pay CertaPro for the use of brand materials, including the trademarks and logos, estimating and project management tools, and some marketing materials. But, in all other respects, I operate as an independent, stand-alone business, just like any non-franchise small business owner. I have the autonomy to run my business as I see fit, including on matters such as all



staffing, labor costs, subcontractor selection, marketing, and vendor relationships. For example, I determine the staffing levels for my business, I make all of the hiring decisions, and I determine what wage rates to offer. CertaPro has no role in the employment aspects of my business at all. I am solely responsible for determining what to charge for each job. My decision-making on all of these issues must take into account market forces in our local economy such as availability of qualified employees or the cost of similar residential and commercial painting jobs in the area. I am also completely responsible for developing accounts and business. I run my businesses day-to-day, CertaPro corporate does not.

Small businesses like mine play a valuable role in our local economy. We provide entrepreneurial opportunities for people looking to create jobs and grow other local economies. Many small business opportunities exist because these local franchise businesses can provide valuable services and other benefits to larger corporations. However, if large businesses were liable for the employment decisions of their service providers, franchisees, or other contractors, then the opportunities for small businesses are surely going to disappear.

The small business community is bracing for the NLRB's decision in the forthcoming *Browning-Ferris* case, a decision that some expect may come as early as this week. I'm not a lawyer, but there appears to be little suspense about where the NLRB is headed; The NLRB General Counsel believes that "the Board should abandon its existing joint-employer standard." The General Counsel also asserts that companies may effectively control wages by controlling other variables in the business. This is a colossal concern to me, because under the new standard, franchisors would be joint employers whenever the franchisor exercises "indirect control" over the franchisee. Under such a nebulous standard, the NLRB could find joint employment even though the franchisor plays no role in hiring, firing, or directing the franchisee's employees. I am concerned that other federal agencies may adopt this standard, which would further increase franchise business liabilities.

This could be a transformative ruling for small businesses. I believe that if a broader joint employer standard, such as the one NLRB is contemplating, had been in place seven years ago there is a good chance that CertaPro would not have franchised my businesses, instead they would have chosen to open a corporate location. If CertaPro is going to be responsible for the liabilities arising out of the operation of the business, and oversight of the workforce, why would they hand control over to me? Many businesses may feel this way and opportunities for local business ownership will decline dramatically. I know how fortunate I am to own my business after my long service in the military. While CertaPro provides advice and support, I am the decision-maker when it comes to my business. The success or failure of my business is, essentially, all on me -- and that's exactly what I signed up for. It would be a real shame to take these opportunities away from other veterans looking to start their 'second life' as a local franchise business owner as well.

Fortunately, after I retired from the Air Force the opportunity for small business ownership did exist and I am privileged to be a proud local CertaPro owner. However, I am worried that if the NLRB radically changes the joint employer standard, my days as an autonomous small business owner may be numbered. My business may no longer truly be my own. If my liabilities extend back to CertaPro as the franchisor, I have to assume

that they are going to want a role in managing risks and protecting against those liabilities. Now, instead of occasionally providing me with guidance and support, CertaPro will be an active participant in the day-to-day operation of my business. They will probably want a say in we run our business, who we hire, and what we pay. This level of franchisor involvement will be a complete reversal of the way the franchise relationship is, and always has been intended to work. My freedom and autonomy – the entire reason I wanted to own my own business – will vanish.

Mr. Chairman, I strongly urge this committee to consider the devastating impact on all small business owners if the NLRB invents a new definition of joint employer to the potential detriment of local businesses like mine. I ask you to do what Congress can to ensure that the National Labor Relations Board cannot take away the livelihoods of local small business owners now, or in the future.

Thank you again for the invitation today and for considering my views as an Alabama small businessperson.

Chairman ROE. Thank you, Mr. Carey.  
Mr. Holmes, you are recognized for five minutes.

**TESTIMONY OF CHRIS HOLMES, AREA REPRESENTATIVE,  
FIREHOUSE SUBS, AND CEO, CLH DEVELOPMENT HOLD-  
INGS, INC., TALLAHASSEE, FLORIDA**

Mr. HOLMES. Thank you. Chairman Roe, Congressman Byrne, thank you for the opportunity to testify before you today. My name is Chris Holmes. I am the area representative for Firehouse Subs in Northern Florida, South Georgia, and Southeast Alabama. I currently own and operate one Firehouse Subs restaurant in Tallahassee, Florida, and led the development of 30 other Firehouse Subs restaurants in this region of the country.

I am here today to discuss my concerns regarding the National Labor Relations Board's attempt to expand the definition of what constitutes a joint employer, and the very real threat of that effort to not only my business, but thousands of small businesses like mine throughout the country.

Changing the definition will have a significant impact on another definition as well, the definition of the American Dream. As a small business owner and an entrepreneur who started off my career as a 16-year-old kid working at a local McDonald's, I embody that definition every day. From the first job, I pursued a career in the restaurant business, working my way up the ladder of the industry from dishwasher, to manager, to district manager, and now to a business owner, who has the privilege of testifying before the United States Congress. What an amazing journey, but yet at the same time, what a typically American one.

I am here today because I believe that dream may be in jeopardy. Our story is not unlike millions of other small business owners. My wife and I decided that after numerous roles in the industry, we wanted the independence of owning and operating our own small business and the ability to take control of our family's financial future. As we looked for those opportunities, we became associated with Firehouse Subs, and for the first time were exposed to the franchise business model.

For us, this was the perfect scenario. We could run our own independent business, while at the same time participating with an exciting and growing brand that customers clearly loved. The ability to franchise was our entry point into small business ownership. So we did what so many other entrepreneurs have done. We took out second mortgages. We sold everything that was not nailed down. We maxed out credit cards and even borrowed money from our parents. The franchise model opened the door for ourselves and millions of others just like us to pursue small business ownership. Without it, we would never have been able to realize the dream.

Franchising is an often misunderstood, but actually a very simple and effective model. My arrangement with Firehouse of America is very straightforward. They provide the brand materials, including the trademarks and logos, recipes, significant marketing support, and countless other resources to maintain consistency across the brand. But in all other respects, I operate as an independent stand-alone business, just like a non-franchise small business owner would.

I have the autonomy to run my business as I see fit, including on matters such as staffing, labor costs, vendor relationships, among others. I do all the hiring, all the firing, and I set the wage rates for my business. Firehouse of America has no role in this. It is my business.

I believe, however, the new joint employer standard, if allowed to go forward, will irrevocably change that model. If the larger franchisor is now liable for the employment decisions of their service providers, franchisees, or other contractors, then they would have no choice but to be completely involved in those decision making processes. I will have lost my autonomy, my independence, and potentially my investment.

Instead of being a small businessman, I would become virtually overnight a manager for a large company. While I have played that role before and certainly do not begrudge that, it is not what I aspire to. I took the risk to start and run a small business, but now I find myself in the position of potentially having an unelected board in Washington, D.C., just unilaterally determine that my American Dream is over. Could that really be possible?

For us, our business has been the site of a family reunion that has lasted close to 20 years, where our children, our brothers and sisters, our nieces and nephews, and even our parents have all worked in the restaurant, collectively building the security of multiple generations of our household. And it is a place where the careers of hundreds of young people began their own journeys that would have never happened if it were not our business and our opportunity to pursue our dream.

While it is quite clear that the NLRB wants to negatively impact the business model of some of America's largest companies through this action, it is ironic that what they will actually be doing is hurting America's smallest businesses. The real effect will be small franchisee operators essentially losing their business to an often larger franchisor, making the large company larger and the franchisee extinct. If your goal is to push small business operators to the curb and stifle investment into new startup businesses, you could not come up with a more effective tool than this joint employer decision.

Mr. Chairman, Congressman Byrne, it is my hope that you and your committee will do everything in your power to ensure that the NLRB is not able to finalize this decision. My small business and the security of my family are riding on it. Thank you again for the opportunity to share my concerns with you.

[The statement of Mr. Holmes follows:]

***Written Testimony of Chris Holmes, CEO of CLH Development Holdings, Inc. On The Impacts of the NLRB Adopting a New Joint Employer Standard Before the House Education and the Workforce Committee's Subcommittee on Health, Employment, Labor, and Pensions***

Chairman Roe, Congressman Byrne, and distinguished members of the Committee, thank you for the opportunity to testify before you today.

My name is Chris Holmes. I am the Area Representative for Firehouse Subs in Northern Florida, South Georgia and Southeast Alabama. I currently own and operate one Firehouse Subs restaurant in Tallahassee, FL and led the development of 30 other Firehouse Subs restaurants in this region of the country.

I am here today to discuss my concerns regarding an expanded definition of joint employer and the very real threat to my business that a new joint employer standard brings. But before I do that, I want to discuss another definition as well. As a small business owner and an entrepreneur who started off my career as a sixteen-year old kid at my local McDonald's, I am the living definition of the American Dream.

From that first job, I pursued a career in the restaurant and retail business, working my way up the ladder of the industry – from dishwasher to manager to district manager and now to a business owner who has the privilege of testifying before the United States Congress. What an amazing journey. But yet, at the same time, what a typically American one! I am here today because I believe that dream may be in jeopardy.

Our story is not unlike millions of other small business owners. My wife and I decided that after numerous roles in the industry, we wanted the independence of owning and operating our own small

business and the ability to take control of our family's financial future. As we looked for those opportunities, we became associated with Firehouse Subs and for the first time, exposed to the franchise business model. For us, this was the perfect scenario. We could run our own independent business while at the same time, participating with an exciting, growing but proven brand that customers clearly loved. The ability to franchise was our entry point into small business ownership.

So we did what so many other entrepreneurs have done - we took out second mortgages, we sold everything that wasn't nailed down, we maxed out credit cards, and borrowed money from our parents. And we put together enough to take the risk. So at 32 years of age, we opened our first restaurant. Things went well for us and just four months later, we opened our second one. It literally wasn't until we went to open our third restaurant that we were in a position to qualify for a normal bank loan. The franchise model opened the door for ourselves and millions of others just like us to pursue small business ownership. Without it, we would never have been able to realize the dream.

Franchising is often misunderstood but actually a very simple and effective model. My arrangement with Firehouse of America is very straightforward. They provide the brand materials, including the trademarks and logos, recipes, significant marketing support and countless other resources to maintain consistency across the brand. But, in all other respects, I operate as an independent stand-alone business, just like a non-franchise small business owner would. I have the autonomy to run my business as I see fit, including on matters such as staffing, labor costs, and vendor relationships, among others.

I do all the hiring, all the firing, and I set the wage rates for my business. Firehouse of America has no role in this. It's my business. I believe, however, the new joint employer standard, if allowed to go forward, will irrevocably change that model. If the

larger franchisor is now liable for the employment decisions of their service providers, franchisees, or other contractors, then they would have no choice but to be completely involved in those decision-making processes. I will have lost my autonomy, my independence, and potentially my investment. Instead of being a small businessman, I would virtually overnight become a manager for a large company. I have played that role before and while I don't criticize that, it is not what I aspired to. I took the risk to start and run a small business and that is what has sustained our family these many years and hopefully many more to come. But I now find myself in the position that an unelected Board in Washington, DC can just unilaterally determine that my American dream is over.

For me, our business is more than just a restaurant. It's a place where we have raised our family and where we celebrated as all three of our children went off to college. It has been the site of a family reunion that has lasted more than 20 years where our children, our brothers and sisters, our nieces and nephews and even our parents and in-laws have all worked at just about every job in the restaurant, collectively building the security of multiple generations of our household. And it's a place where the careers of hundreds of young people began and where they set out on their own journeys. That would have never happened if it weren't our business and our opportunity to pursue our dreams.

While it is quite clear that the NLRB wants to negatively impact the business model of some of America's largest companies through this action, it is ironic that what they will actually be doing is hurting America's smallest businesses. The real effect will be small franchisee operators essentially losing their business to an often larger franchisor – making the large company larger and the franchisee extinct. If your goal was to push small business operators to the curb and stifle investment into new start-up businesses, you couldn't come up with a more effective tool than

this joint employer decision.

Mr. Chairman, it is my hope that you and your committee will do everything in your power to ensure that the NLRB is not able to finalize this decision. My small business and the security of my family is riding on it.



Chairman ROE. Mr. Holmes, thank you very much. I will now recognize myself for five minutes. And, Mr. Holmes, when I was 16, actually 15, at a scout camp, I washed 350 dishes three times a day, and I determined that I did not want to be in the restaurant business after that summer—

[Laughter.]

Mr. HOLMES. I understand.

Chairman ROE.—for the rest of my life, although I did spend the next six years running the dining hall, but I got that all out of my system as a young person.

I think the three of your testimonies have really made me angry because what I hear is I hear people who went out, took the risk, and invested their life savings into a business now to maybe have it taken away from them by not five, but three unelected bureaucrats in Washington, D.C., who think they know better about how to run your business than you do.

And my question is to you all to start with, what do you all see, and maybe, Mr. Debruge, you could start this. What is the motivation of the NLRB because their purpose, I mean, it is very simply, clearly written what their purpose is. And I always thought, you know, I am an old basketball player, and I thought when I went on the court there were a set of referees out there that gave their best estimate about what the rules are. You knew what they were, and you played by them. This NLRB is not doing that, and they have definitely shifted it in favor of the unions. And I just wonder what you think their motivation is. It cannot be to help these gentlemen right here because they clearly said it is not helping them.

Mr. DEBRUGE. Well, from my perspective, the motivation is pretty obvious: it is to increase the number of people who pay union dues. The current leadership, the current board, is focused almost exclusively on how to expand union membership in the private sector. Today, since World War II, unions have dropped from roughly 40 percent of the private sector workforce to—I think the number is—6.6 percent today. They are almost an afterthought in most industries, especially anything built in the last 25, 30 years.

The Wagner Act was enacted in 1935. It was not really amended in any meaningful way until 1947 with Taft-Hartley, and it has kind of stayed the same since then. It is outdated, it is outmoded, and it adheres to a 1930s model, a New Deal model that collective bargaining is the way to ensure economic stability, a safe, fair workplace for workers, and rights on the shop floor. That model no longer applies in the 21st Century in the global economy. The *National Labor Relations Act* is completely outmoded when it comes to the vast majority of industries today in this country, especially manufacturing.

So the NLRB's focus has become incredibly politicized. It has almost dropped any pretense of being an arbiter or a referee, Mr. Chairman, as you put it. And the goal simply is to find ways to expand union coverage to increase that 6.6 number, and by expanding the definition "joint employer," and then requiring multi-employer bargaining units, which to me is truly disturbing. Everything we have heard is disturbing, but the thought of taking all these newly-created joint employees, cramming them into a single bargaining unit, and requiring bargaining with multiple employers

who do not agree to it, I think is a recipe for disaster and inefficiency, and it is going to kill jobs.

Chairman ROE. I think one of the things in the joint employer model that they are looking at was just rebutted by both Colonel Carey and Mr. Holmes. And I heard Mr. Holmes say very clearly, as clear as I can understand it, I run my own business as I see fit. I think that is what he said. Certainly you have logos, and models, and business models out there to help you promote your business, but you run your business, and what they are saying now—I totally agree.

And the example I use is as a medical office, as a private small business owner, we contracted out our janitorial services. We did not do that, but every day we had certain standards in our office, but they did not work for me. And if they were not doing the job, I asked them to get people who did do the job. Did that mean I was the employer? Well, under this NLRB, the answer would be yes. I would be the employer. It is ridiculous. I was not the employer. We bid that contract out every year or two, and I am sure you do the same thing with many things you do, bid out.

So would you just again for the record talk about, and Colonel Carey, if you would, about how this would affect your business. If you no longer had day-to-day control over the people, because I heard you say you very much prided yourself in going into homes, taking the expertise that you had learned as a military officer for 30 years, and put that in the business world. How would that affect how you run your business?

Mr. CAREY. Sir, before I answer that, just another add-on here from a subtle standpoint with what the situation presents is, in my view this is about control, control at a higher level versus at a lower level, “lower level” meaning the small businessman. My time in the military, and I will use this as kind of an analogy. Our Air Force is the greatest air force in the world. It even is today. The reason it is, is because we have autonomy in the cockpits of the young men and women that fly out and have their missions.

In the Soviet Union that was not the case. The autonomy did not exist. Those young men and women in the Soviet aircraft, they were completely controlled by the senior officers sitting on the ground. That is the same situation just in a business perspective that we face here is that we are moving the power and decision making up to a higher corporate level, which then disables businessmen and even the employees underneath to be independent, to have the initiative that they need to run a good business, and to really create some style and character as a local businessman.

To answer your question, though, when you talk about the impact on me is, you know, I have a great deal of pride when I walk into those homes. I love it when I walk into a store and somebody goes, “Hi, Steve.” And maybe it is a homeowner that I met three or four years ago, but they recognize me not as CertaPro, but as a local businessman. That independence, that sense that I am a small local business owner would disappear if I became just a puppet or somebody that was mimicking a lot of what I was told to do.

And I take a great deal of pride in being able to shape my business because from a franchisee standpoint in the case of CertaPro, there are 350 of us out there. All of us run dramatically different

businesses. How I run my business in Mobile, Alabama, is not the same as Philly, not the same as San Francisco, not the same as the middle of Kansas. I tailor it to my market, and it is the decisions and risks that I take as a business owner because I am at that level, I am in the weeds.

If that is taken away from me, if I am told what to do, how to act, and how to respond, then I am probably going to lose the desire and the initiative to really run my business and work as hard as I do. And that is what I signed up for. I tell many folks now that I work harder now as a small businessman than I did as a colonel commanding hundreds of men.

Chairman ROE. I believe that.

Mr. CAREY. And it is an 8-day-a-week job.

Chairman ROE. My time has expired. Mr. Byrne, you are recognized.

Mr. BYRNE. Thank you, Mr. Chairman. Colonel Carey, how many people do you employ in your business?

Mr. CAREY. I have three employees, but I use mostly subcontractors.

Mr. BYRNE. And how many subcontractors on average?

Mr. CAREY. Seasonally on average I would probably say individually probably in the 30 range.

Mr. BYRNE. Okay. And, Mr. Holmes, how many people do you employ in your restaurant?

Mr. HOLMES. In the one restaurant that I own and operate, we have approximately 20 people.

Mr. BYRNE. Okay. So what we do is we take your small businesses and we multiply that by hundreds of thousands of similar businesses.

Chairman ROE. Mr. Byrne, when you all answer the questions for the questions, could you all speak a little more directly into the microphone, bring them up a little closer to you?

Mr. BYRNE. When you multiply those numbers of employees, subcontractors included, by hundreds of thousands of businesses, you see an enormous impact on the American economy. You are creating millions of jobs, and sometimes we get lost when we look at the big employers, and I am all for employment at whatever level. But you are creating millions of jobs for people that probably would not have them without you.

Not only that, Colonel Carey, I know what you are doing in our community. You get hit up all the time for providing this or that and contributing this or that, and you do it because you want to be a part of your community. Mr. Holmes, I am sure you are doing the same thing in Tallahassee.

Mr. HOLMES. Yes, sir.

Mr. BYRNE. So not only are you providing jobs to all these people, you are an integral part of your local community. We depend upon people like you. Colonel Carey is one of our big leaders in our Chamber of Commerce. I mean, you are the bedrock of our communities, and the idea that we would change the law and take the employment opportunities away from all your employees and the support you give to our communities not only as small business people, but active in your communities, is just beyond me why we would think that is a good idea.

So I want to say I appreciate what you do, and I know you did it because you were trying to do something right for your family. But by doing something right for you and your family, you have benefitted your communities and the Nation. And so, I will pledge for myself, I am going to do everything I can to try to preserve this, not just for you, but for years to come.

Mr. Debruge, your testimony was compelling. I am a native Alabamian, and I am very proud of what we have accomplished in Alabama just since 1993. You mentioned the automotive industry. In 1993, we did not have a single steel plant in Mobile County. We have three now that employ over 4,000 people. Really great jobs, pay great wages, provide wonderful benefits.

But they did not just show up here. We worked as a community hard to get them to come here. We worked hard to get those steel plants. We worked hard to get Austal Shipyard. We have worked like crazy to get Airbus to open up here, which they are going to open up next month, and we hope that there are a whole bunch of suppliers coming with Airbus.

Now, what happens to that economic development model for Alabama, and for southwest Alabama, and for other southern States because a lot of southern States have done it, what happens to that if the NLRB changes the joint employer definition?

Mr. DEBRUGE. I think, and I will try to be succinct, a couple of things. First, it is going to be more expensive to do business here. The labor costs are going to go up, efficiencies are going to go down. And I think the best example I can give you is what happened, the painful memory of 2008 and 2009. And as I listened to CNBC and Fox Business yesterday I had a flashback to what that felt like, lest we forget.

General Motors went bankrupt, Chrysler went bankrupt, and they had to be bailed out. For a variety of reasons they went bankrupt. The root cause is people did not have the money or the credit to buy cars, and they could not adapt. They were not flexible, and they were weighted down by union contracts, so that made it incredibly difficult to respond to the market.

By contrast, all of the plants in Alabama stayed open. Toyota stayed open. BMW stayed open. The transplant operations, as we would call them, were flexible. They had a contingent of temporary workers that they were able to shed in order to keep their regular people employed. Every company approached it in a different way, but the bottom line is these union free diverse workforces with different categories of employees and contractors were able to respond to those market conditions.

We still have those jobs in Alabama, and they have increased exponentially since then. Every one of our major manufacturers has expanded. And so, if all of a sudden their ability to be flexible, to staff their plants in the way they need to staff them is taken away, and this one-size-fits-all approach is imposed on them, and they have to collectively bargain, along with multiple employers, with a diverse workforce, it spells disaster, in my opinion.

Mr. BYRNE. Well, thank you for that. Thank all of you being here. My time is up, and I yield back, Mr. Chairman.

Chairman ROE. Okay. I thank the gentleman for yielding. Being an employer for 30-plus years, I think the person who signs my

paycheck is my employer. In my case it is me, but whoever writes that check to me is who is employing me, I think. Would you all agree with that?

Mr. HOLMES. Yes, sir.

Mr. DEBRUGE. Yes.

Chairman ROE. Mr. Holmes, if somebody is working in your restaurant or, Colonel Carey, you are servicing a home, painting a home, when you sign that check, it is not CertaPro that signs that check. It is you. It is Steve Carey that signs that check and puts it in the mail. That is who those employees work for.

Do you all see this, if this joint employer status, if the NLRB rules that way, do you see this as promoting job growth in this country or stifling job growth in this country?

Mr. CAREY. Well, I think it will stifle it. In my view, small businesses, in particular, at my level of business, and even the independent-owned businesses, we are a fragile entity. A lot of times we kind of just hover on the edge of success and failure tied to the economy, tied to weather. If I can have the flexibility to make critical decisions, to trim employees at the right time, to be more aggressive in a certain marketing venue, and I make those decisions based on my business assessment, I stand a much higher likelihood of being successful, whereas if I am driven to kind of follow a model, to sort of march in line with what a larger company decision above me has enforced upon me, then I am less likely to show that flexibility and to survive, which is what it honestly takes at the lower levels of business.

Chairman ROE. And what I see with the franchise model, as you pointed earlier in your statement, is what is going on in Kansas may not be going on in Mobile, Alabama.

Mr. CAREY. Exactly.

Chairman ROE. It may be very different. And the business conditions and environments there may be different, and that allows you to adapt very quickly. And that is one of the reasons I think the franchise models work so well in the country and why almost 9 million people work for it. It can turn on a dime.

And even though McDonald's, let us say, is a huge corporation, most of them are run by just local people in local communities. And so, they can adapt to the local environment much more quickly than somebody in California, where their headquarters is, can adapt to it.

Mr. CAREY. Here is a great case in point. Four or five years ago, I was pretty new to the franchise business, and I wanted to invest in TV, which is a lot of money for a very small business like mine. The corporate folks at CertaPro, you know, they offer advice, but they said, you know, that is probably not a good idea for you, you know. It will put you at a higher risk. I—as the business owner—made that decision at a risk to myself, and it was a great decision because it catapulted me quicker in terms of branding and my market.

But, again, that was my decision, and I could either be successful or fall on my own decisions, but that is what we want to hold onto. That is what makes us, you know, entrepreneurs and businessmen.

Chairman ROE. Here is another question I have, and this is to Mr. Holmes, basically two questions. One, what are the benefits,

and either one of you can answer this, of buying a franchise instead of opening an independent restaurant? In other words, what is the benefit of the brand to you as a business person?

Mr. HOLMES. Well, just using the sports analogy that you mentioned earlier about basketball, it is sort of like having a great game plan for a coach, whether it be, you know, football or basketball, and they have, you know, the playbook, and this playbook works. And we have seen it. It is Coach Wooten's playbook, and it works. So I would want to take that playbook, and I would want to execute that playbook, and then that would help me be successful. That is the same with franchising. Franchisors have a successful playbook. They have the logos, they have the recipes, and they have the procedures; all those things already in place for you to be successful.

So it removes a lot of the risk. It does not remove all of it as an operator. You still have to go out and secure jobs and get business, and then you have to satisfy those customers, but you already have the big part taken care of. You do not have to create something that causes a lot of risk. You already have that in your playbook.

Chairman ROE. It is a proven business model.

Mr. HOLMES. Yes, sir.

Chairman ROE. That is what it is. As a former employee at a quick service restaurant, quick business, why did you decide to become a franchisee instead of moving up the ranks in the corporate structure? Why did you do that?

Mr. HOLMES. Well, like I said in my testimony, I was actually a dishwasher at 19, and was able to move up with that corporation as a district manager of ten steakhouses. And through different things that happened to our corporation, it was buy-outs. They got bought out several times, which created a lot of debt. It removed a lot of the opportunity, and then we were faced with some bankruptcy in that steakhouse chain.

So I went that route, I tried that ladder, and someone else controlled my destiny. Someone in a board room or on the stock market, I do not really know, but it was not me inside those four walls of that restaurant. So owning my own business was very appealing because I controlled my own destiny. And so, the franchise model, after I was exposed to it, was a great step to that because it removed some of the risk of, you know, going out and creating my own thing.

But now on a daily basis I control my own destiny. And I will add really quickly, when we talk to business owners, it used to be that just finding good people was some of the biggest threat. Finding good people to work with, finding great customers, and just continuing the profitability of your business. Now we say our biggest threat is government regulations. That is our biggest threat.

Chairman ROE. My time has expired. Mr. Byrne, you are recognized.

Mr. BYRNE. Thank you, Mr. Chairman. When I was listening to you talk, Mr. Holmes, I was thinking about a biography of Benjamin Franklin I read a couple of months ago. He was a small business guy.

Mr. HOLMES. Yes, sir.

Mr. BYRNE. He had a print shop, and he organized all the other small business people in his community, and they worked together to try to help one another, and that is what built America. And when he was sitting there in the Constitutional Convention, I know he had in his mind, because that was his background, what is going to help create the environment in which people can do what I did, which is start my own business and make it grow, where I take responsibility, and I employ people?

And I cannot imagine that he and the other people that sat in the Constitutional Convention would have dreamt in a second that the government they were creating would take away from people the opportunity to create that. So I just wanted to offer that.

But also I want to go back to both you and Mr. Carey. What does this do to your employees? I mean, we are concerned about you obviously, but what about your employees, the people you employ? If this definition is changed, what is it going to do to them?

Mr. CAREY. You know, as I created my business, one of the things I have tried to do is to create a culture within my small business. Although most of my painters are subcontractors, I want them to understand that we are delivering something from the standpoint that they have never, ever thought about. I want my painters, my supervisors, my production managers, to look at me, to look at the business with pride. And sometimes you tend to lose that identity of a small business of what you can represent if you become big. The more global you are at the lower levels, it is a lot harder to identify.

So in my case, I think it is easier for my painters, my subcontractors, to identify with a guy or a gal, Steve Carey sitting there, you know, trying to build a culture, and you create loyalty when you do that. And from that loyalty, you create pride, and you can grow the professionalism and the brand at a small local level. But we risk losing that, the identity of that small business if we become, you know, in a position where we are driven by a larger—

Mr. BYRNE. You have got a closer relationship between you and your employees than if they are working for some big company.

Mr. CAREY. Right.

Mr. BYRNE. And that benefits them because they can come and see the owner of the company, just walk in your office to see you.

Mr. CAREY. Right, and they do.

Mr. BYRNE. Mr. Holmes, what about your employees?

Mr. HOLMES. Well, I mean, I agree with Mr. Carey. The upside to this is very limited. The downside to this going into effect is huge. There are already systems in place to represent our employees if they are being mistreated in any way. So I think the result will be they will lose opportunity in the future. It will be removed from them.

We have just in my Firehouse Subs a history, I have an employee that now owns his own Firehouse. He started with us as a college student, got out of college and he and his father-in-law opened their own Firehouse Subs. They own two restaurants. I have a general manager that owns his own Firehouse Subs now. I have another general manager who owns his own Firehouse Subs now. Both of those gentlemen worked for us for eight to ten years. I had an inspector, you know, he would go around helping people

out, that worked with us for years. He now owns his own Firehouse Subs.

And so, you know, with that, this regulation will basically remove all that opportunity, every bit of it. So I look at it as we are removing the opportunity in the future for the employees.

Mr. BYRNE. Mr. Debruge, you and I both have practiced in this field for a long time. How big a change in precedent would this change in definition be?

Mr. DEBRUGE. I think a good way to illustrate this, and I do not want to upset or depress my fellow panelists any more than they already are.

[Laughter.]

Mr. DEBRUGE. But I do not think they really see the train that is coming from the other direction. The focus rightly is on control from the top and the loss of flexibility. The NLRB is about unions and the *National Labor Relations Act*. They are looking at liability for unfair labor practices possibly, the idea of secondary action, them being pulled in as joint employers and no more immunity from secondary boycotts, strikes, or picketing.

But also, and this may be the most chilling thing, they may have labor contracts imposed on them because if they are in a joint employment relationship now, and let us say, for example, the Teamsters can organize, on a nationwide basis, everyone who is an employee or even a subcontractor of these entities. And I cannot think of anymore interference with their direct relationship with their people or the loss of flexibility and control than to have a national labor contract imposed on them through this new definition of joint employment.

It is really difficult even to comprehend that we would go down this road in this 21st Century economy with the sort of workplaces that we have. It makes no sense at all, unless your goal simply is to try to get more people to belong to labor unions.

Mr. BYRNE. Thank you, Mr. Chairman. I yield back.

Chairman ROE. Along that line, the NLRB's job and purpose is to—look, I grew up in a union household. Full disclosure: my dad belonged to a union, worked in a factory, and basically he had a right to belong to that union or not belong to that union. He had a right to vote and so forth, and that is fine. In America you can do that if you want to do that.

This current NLRB, for the record, has pushed ambush elections. Before we had union elections in 38 days. It takes 40 days to take a chicken to where you can eat it, and that is pretty quick I think. 38 days: that is the average time. It would give employees and employers a chance to understand what it means. If they want to vote for a union, fine, they can do it. Now that is 11 days.

As an employer, I could not find you in 11 days to have you represent me to get a labor lawyer. Two micro unions, and not for the small business people, but where you have a business like a Bergdorf Goodman or others where you have the shoe department, the women's department is different than somebody else. You cannot cross-train people. People cannot move up, as Mr. Holmes talked about.

And, Mr. Holmes, I could see the pride in your face when you talked about the people that work for you that now are small busi-



ness owners and succeeding. I mean, we want people to succeed in the workforce. If you get good employees, they will.

Card check. We have a bill out there, the *Secret Ballot Protection Act*. Colonel Carey put on a uniform and for 30 years protected this country so we have a right to vote. And I say this, I have said it publicly, my wife claims she voted for me. Maybe she did, maybe she did not. She had a secret ballot.

[Laughter.]

Chairman ROE. She said she did, and I assume she did, but that is what it is for. Why in the world would we give that up? I was elected by a secret ballot. The President was elected by a secret ballot. Why should anybody not be elected by a secret ballot? And this NLRB is the most activist NLRB in the history since 1935 when it first came into being.

And, Mr. Debruge, I want to ask you a question today. I want this for the record. We have heard a great deal about the joint employment and the franchise system. However, the potential holding in Browning-Ferris will apply beyond the franchise system. Who else will be affected by this decision?

Mr. DEBRUGE. Virtually everyone who is involved in any kind of arrangement whereby they use different categories of labor in their business on their worksite, people who use temporary employees, contractors, subcontractors. You know, I have talked about manufacturing, but really any entity, Mr. Chairman, where today the company, it is clearly defined employees in these other categories, they are going to be impacted.

Chairman ROE. So once you have started down this slippery slope, there is no end to it then.

Mr. DEBRUGE. Yes, sir.

Chairman ROE. Almost any employment arrangement could almost be identified. Am I correct on that?

Mr. DEBRUGE. You are absolutely correct, yes. This new test is nebulous. Looking at the economic or the industrial realities, it is just almost a blank check for the NLRB to create these joint employment relationships whenever it wants to.

Chairman ROE. So as I was telling you before the hearing started, in a large distribution center, I will not mention who they are, but I was in one the other day, which was huge, million square feet. And obviously during holiday times, be it Christmas or, you know, maybe Valentine's Day, when business picks up, they hire temporary employees. Would it affect them also?

Mr. DEBRUGE. They could very well be, yes, sir.

Chairman ROE. Okay. I guess one of the other questions for Colonel Carey and Mr. Holmes is how much involvement does your franchisor have in the daily affairs of your staff in running your business day-to-day. When you get up in the morning, when you leave this hearing, and you guys go back to work tomorrow, today, this afternoon, are you going to call CertaPro and say, Mr. Jones worked eight hours today? How much do they do each day if they affect your business?

Mr. CAREY. None.

Mr. HOLMES. None. The same, none. We do not communicate on employee relationships like that.

Chairman ROE. Both of you are truly independent, meaning no strings, independent business owners.

Mr. CAREY. Very, and that is what I love about it. The good part, though, too, is I do have a hotline. I mean, I have a phone that I can pick up. I can call one of my other franchisees to ask for advice. I can call at the corporate level to say I have got a scenario here, what have you seen occur with other businesses. So that conduit of experience that can help me make the right decisions, I have that open channel.

But beyond that and beyond the normal guidance that they give for branding and standardization, I do not have daily engagement with them. I mean, maybe once a month I reach out to them, but generally I do not.

Chairman ROE. Well, what I have heard today in this testimony from all of you all and Mr. Byrne is that I think it has been fairly clearly laid out what the motivation of the NLRB is, and that it will be deleterious. It certainly will interfere with your business model. It may stop it all together, but it will certainly make it harder for you to grow your business. And you did not go into this, but Mr. Holmes has already been through that experience once. And I think we see what the motivation is.

With that, I yield to Mr. Byrne.

Mr. BYRNE. Thank you, Mr. Chairman. When we were in a hearing on this or perhaps another topic in Washington a few months ago, some of our colleagues from the other side of the aisle were saying, well, you know, we are acting as if we are assuming the NLRB is going to make this type of decision or that type of decision, and we do not know that.

And I said then and I am going to say again, I know exactly what the NLRB is going to do. This Board is going to do whatever the union wants them to do, and that is not the way this was set up. Mr. Debruge, I think the Chairman put it very well: The Labor Board is supposed to be our referee. It is not supposed to come down on the union side, it is not supposed to come down on the management side, but keep the equilibrium that was established under the law.

This Labor Board is trying to definitely weight tilt this equilibrium away from that balance and to one side. And it really does not matter which side it is because the law was set up to maintain the balance. So I think I know what the Labor Board is going to do. They are going to continue to do everything they can to help unionization.

And I really think, Mr. Chairman, that ought to be up to the employees. And to take away from the employees by these sort of backdoor methods the ability to work with their own employers, people that are local to them, people that they know, that they see face-to-face, is just un-American. But the political environment we are in, that is the reality, and this Labor Board is going to continue to do that.

And I would be interested, Mr. Debruge, is there something you think that we could do in statutory law that could rectify this?

Mr. DEBRUGE. Assuming you could ever get it through this Congress, of course. There could be modifications to the *National Labor Relations Act*. There could be language inserted to prohibit multi-

employer bargaining units, for example. There could be clear direction in the statute about who is and who is not an employer, defining these joint employer relationships.

Mr. BYRNE. We would essentially—excuse me—put it into statute what has been the recognized precedent of the Labor Board for decades.

Mr. DEBRUGE. Yes, sir, or if there is a way to limit the ability of the Board to do through regulatory fiat, you know, what they are accomplishing. And, Congressman, you make an excellent point, as does the Chairman. The Board was not intended to be an advocate for one side or the other. It was supposed to enforce the *National Labor Relations Act*.

This Board over the past several years, I think, has done lasting damage to the entity, to the concept. Day in and day out, Board agents, long-timers, 30-plus years people shake their heads and are surprised at what is happening in Washington at the general counsel level in particular and with obviously the Board itself.

And I cannot speak for them, obviously, but the impression I get is they feel like the damage is almost irreparable, that people are going to expect now with every political cycle it to sort of be just whose turn is it to do this, or to fix this in kind of tit for tat. And that is not good for labor. It is not good for employers. It is not good for the country.

And I think in Europe and in Asia, they look at this model and they must just shake their heads in disbelief, that we politically do not have the will to fix this, to put in place a system that actually works, that protects employees, that encourages job growth. But instead we adhere to this fatally flawed system that we have had since 1935, and we are watching it be manipulated.

Mr. BYRNE. You know, there is a reason why all these foreign companies are located here. We provide them a labor and employment environment and quality employees. Let us face it, it is the quality of our people, and they are coming here because they want to take advantage of that. And as a result, if you look at the American economy versus the economy of other countries around the world—I will not pick any—the American economy is where everybody is looking to say there is the bright spot right now. Not a whole lot of bright spots watching the stock market in the last several days. We are the bright spot because we have maintained this sort of freedom of activity by both employers and employees.

And now we want to take it away and remove the one bright spot that we can offer to the worldwide economy? Mr. Chairman, I just do not get it. I do not know why in this environment we would want to do something like this. I understood what Mr. Debruge was saying that we got to get it through the Congress and that there are some hurdles to that, but my mother always taught me you got to start somewhere.

And I just think, Mr. Chairman, we have got to start thinking about legislation and maybe it does not pass this year, maybe it does not pass next year. But we are going to have to pass some legislation to enshrine in statutory law what has been the NLRB precedent for decades to make sure we preserve a system that has worked for decades.

And I yield back.

Chairman ROE. I thank you. I think of the old adage "if it is not broke, do not fix it." When you have got something that has already provided 9 million jobs and billions of dollars to the U.S. economy and is growing, why would you want to stifle that unless you had another motive?

You know, I was standing in Beijing, China, two and a half years ago, with this committee on a trip. And it dawned on me when I was in Beijing, a country of 1.4 billion people, we have 315 or so million people in America, that this country because of our system, unless we do something to stop it, this entrepreneurial free spirit that we have produced more goods and services. One-fourth of the people produced more goods and services than a country with four times as many people, which shows you how productive it is when you turn and allow that entrepreneurial spirit to flourish.

And I want to get on the record one of the reasons I think that this is going on. The General Counsel for the NLRB is a gentleman, Mr. Richard Griffin, who was a recess appointment to the National Labor Relations Board, and his term expired. The way he got to be general counsel, and I want to make sure this is in the record, in return for voting for cloture on the President's nomination to the NLRB and Consumer Financial Protection Bureau, Senate Democrats agreed not to change the Senate filibuster rules to lower the maximum threshold required to approve executive nominees from 60 to 51. That is how he got there. It was a political deal, and this deal, now we are dealing with it.

We should not be wasting our time on this in this committee hearing. We should be spending our time on how to, as Mr. Holmes said, to lower regulations. Just to give you an example, and it pains me to say this, that I have a friend at Vanderbilt University, having two degrees from UT, but he's the chancellor there. He is a friend, Nick Zeppos. Dr. Zeppos analyzed the reporting requirements that he has to do at Vanderbilt University, and this was just not there. Just those requirements added \$11,000 for every student's tuition.

It is ridiculous that we are doing that. Instead of making it more expensive to go to school, we should be making it less expensive. Instead of making it harder to start a business and run it like you are, we should be looking at ways to make it easier as Mr. Byrne just clearly said.

I have no further comments. Mr. Byrne, do you have any closing remarks you would like to make or questions you would like to ask.

Mr. BYRNE. I would just like to thank the panel. I think that you very, very ably clarified and sharpened the understanding of this issue, and help created the record that we can use going forward. And to pledge to each one of you and to the people that I represent down here in the 1st Congressional District, I am going to do everything I can to make sure that we preserve what has been a system that has worked so well, and is not only producing wonderful small businessmen as you see here, but it is producing jobs for individual people that work for you, and creates local people, local businesses that are part of our community, and do so many good things.

So I am going to continue to work with the chairman here and with other people on the staff of the committee to see what we can do try to push back against this. And I yield back, Mr. Chairman.

Chairman ROE. I thank the gentleman for yielding, and I want to, again, take the time to thank the witnesses for taking your time and effort to do this, to come in front of us, and make this part of the congressional record. I want to thank our staff who came down early, and the University of South Alabama. I appreciate all the hospitality you all showed, and certainly our security folks who are here today, thank you for being here.

You now, it is a privilege to live in this great country, and we would not be able to live in this country if it were not for veterans like Colonel Carey that put his family on hold many times. He said he dragged his wife halfway around the world for 15 years to maintain that.

This country did not become great by more and more regulations. This country became great because of the freedom that we have to operate in this great system, and it has made it possible because of Colonel Carey and other veterans have done. And I want to thank you personally for your service.

Also, what has been the backbone of America has been small business. We know that most of the jobs are created in this country by small business people, and they take great pride in it. And I can tell you as a small business person, the single most important thing in my business were the people that worked with me, not for me. They worked with me. And I had many people that worked with me for almost 40 years, loyal employees that got up every day and came to work and gave their best effort.

And that is what has helped make this country great. You see it. I talked to some of the police officers that were here. They take great pride in what they do, and that has been public service. Other Americans do that, and I know Mr. Byrne does. And thank you all here in south Alabama for sending Bradley Byrne to the U.S. Congress. I mean, a breath of fresh air, and he has certainly been terrific to work with on this committee.

Look, I am a doctor, and usually when I see lawyers, you know, my blood pressure goes up and all that.

[Laughter.]

Chairman ROE. But he has brought an expertise to our subcommittee and to our full committee that was very much needed. And I want to thank the people of South Alabama for sending such a skilled citizen servant to the U.S. Congress.

And with that, I thank you once again for being here. No further business, the meeting is adjourned.

[Whereupon, at 11:12 a.m., the Subcommittee was adjourned.]

