



December 7, 2022

Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570-0001

RE: Comments on National Labor Relations Board “Standard for Determining Joint-Employer Status,” RIN 3142-AA21

Dear Ms. Rothschild,

On behalf of the Independent Women’s Forum, I am submitting comments regarding the National Labor Relations Board (NLRB) Notice of Proposed Rulemaking entitled, “Standard for Determining Joint-Employer Standard,” which was published in the Federal Register on September 7.¹ The proposal would impose an unclear, untested new standard for determining joint-employment status of employees on America’s business owners.

Independent Women’s Forum (IWF) is the leading national women’s organization dedicated to developing and advancing policies that are more than just well-intended, but enhance people’s freedom, opportunities, and well-being. As a 501c3 non-profit organization, IWF works every day to engage and inform women about how policy issues impact them and their loved ones.

IWF celebrates women’s accomplishments and fights to expand women’s options and opportunities. We support policies that reduce government red tape and return resources and control to people, so that we have healthy communities and people can pursue their own visions of happiness.

The U.S. has 12.3 million women-owned businesses, representing 40% of all firms and generating generate \$1.8 trillion a year for the economy.² Every day 1,817 new women-owned businesses start up.³

¹ 87 Fed. Reg. 54,641 (Sept. 7, 2022).

² Maddie Shepherd, fundera by nerdwallet, Resources, “Women-Owned Businesses: Statistics and Overview (2021), <https://www.fundera.com/resources/women-owned-business-statistics> (Updated on Dec. 16, 2020)(Last visited on Dec. 5, 2022).

³ Jessica Elliott, the ascent, A Motley Fool Service, “Women in Small Business Statistics in the U.S.,” (Updated Aug. 5, 2022), <https://www.fool.com/the-ascent/small-business/articles/women-in-small-business-statistics-in-the-us/> (Last visited on Dec. 5, 2022).

As a result, there are 11.4% more women entrepreneurs today than there were 20 years ago.⁴ Sixty-two percent of women entrepreneurs cite their business as their primary source of income.⁵ Moreover, a growing number of women are part-time entrepreneurs — a category that increased by 39% between 2014 and 2019.⁶ For these “sidepreneurs,” a part-time business offers them the ability to pay bills and build wealth while pursuing a passion.⁷

Franchising also has experienced a significant increase of women in its ranks. According to the International Franchising Association, 30.6% of franchisee businesses are owned by women.⁸

The NLRB Proposed Rule Would Hurt Women-Owned Businesses

IWF is very concerned that the NLRB’s joint employer rule will undo the great success women entrepreneurs have enjoyed over the last two decades by effectively shrinking the market and/or increasing the liability and compliance costs for the firms they run.

The NLRB Proposed Rule would significantly expand the standard for determining joint-employer status under the National Labor Relations Act. Under the new “standard,” the NLRB would consider two or more employers to be joint employers if they “share or codetermine matters governing employees’ essential terms and conditions of employment.”⁹ “Essential terms and conditions of employment means for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees’ essential terms and conditions of employment.”¹⁰ “‘Essential terms and conditions of employment’ will generally include, but are not limited to: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance.”¹¹

⁴ Shepherd, <https://www.fundera.com/resources/women-owned-business-statistics> (Updated on Dec. 16, 2020) (Last visited on Dec. 5, 2022).

⁵ Id.

⁶ Elliott, <https://www.fool.com/the-ascent/small-business/articles/women-in-small-business-statistics-in-the-us/> (Last visited on Dec. 5, 2022).

⁷ Id.

⁸ Contributing Writer, FranchiseWire, Franchising USA, “It’s the Era of Women – Why the Franchising World is a Great Industry for Women,” <https://www.franchisewire.com/its-era-women-why-franchising-world-great-industry-women/#:~:text=In%20fact%2C%20the%20International%20Franchising,a%20viable%20option%20for%20them> (Aug. 31, 2019) (Last visited, Dec. 5, 2022).

⁹ Proposed §103.40(c).

¹⁰ Id.

¹¹ Proposed §103.40(d).

This new standard is vague and will lead to significant confusion for businesses of all sizes, particularly for smaller firms, who do not have the legal and compliance resources of larger ones. And for many women-owned businesses, at best, this new standard will mean less revenue and ability to grow the business and, at worst, the end of the American dream of being an independent business owner altogether.

Because of the significant restructuring this proposed rule would have on the relationships between contractors and subcontractors and franchisors and franchisees, IWF agrees with the U.S. Small Business Administration's Office of Advocacy assessment that the Board has significantly underestimated the costs for small businesses to comply with this new rule.¹²

Please estimate what the costs of applying the new rule will be for companies and contractors that seek legal review.

1. Women Who Use Subcontractors for Services Would Be Exposed to New Liability

Unless a woman runs a large corporation, the odds that she relies on full-time employees to perform all her marketing and communications, manage all her technology needs, or run all her accounting and payroll programs is highly unlikely and often very inefficient for the business. Under the proposed rule, women entrepreneurs will have to look at each of these contracts with other vendors in a new light: the light of liability. Given the Board's fluid standard of when a joint employer relationship exists, many businesses are going to have to assume, if they contract with another firm for any services, they will be liable for the actions of the subcontracting firm's employees. These businesses will then have to do a cost-benefit assessment to determine: Is it worth it? Would it be better if I just canceled this contract and hired one person to do this job, or can my business survive without this service? In most instances, the answer will result in making the business less productive, which ultimately will mean jobs lost. For women who are older, having to navigate this new standard may just be the straw that broke the camel's back, resulting in another business being shuttered.

Please explain how, if at all, the Department has considered the liability that business owners now face and the impacts on the efficiency of their businesses from this rule.

2. Women Who Are Subcontractors to Businesses Likely Would Lose Contracts

¹² Major L. Clark, III, Deputy Chief Counsel, Office of Advocacy, U.S. Small Business Administration, "Re: Standard for Determining Joint-Employer Status" (Nov. 29, 2022).

Undoubtedly, the many women who own marketing and communications firms, catering companies, and technology service providers will lose business if this proposed rule is adopted. As explained above, the liability that would flow to any service provider of a business often will result in the cancellation of the contract under the proposed rule. The liability won't be worth it. And the niche businesses that women across the country have built to service larger businesses would see a dramatic reduction in the amount of work they receive. These subcontractors would likely be forced to lay off workers and even shut their doors.

Please estimate the costs for those contractors/subcontractors whose contracts are canceled and estimate the impact that will have on the businesses that rely on those contractors/subcontractors.

3. Women Who Are Franchisees Would Lose Their Independence

Finally, the millions of women who own franchises would lose their independence and, for many, their desire to even continue in their new role. When asked why they went into franchising in the first place, many women cite the flexibility of being their own boss coupled with the security of working with a proven business model.¹³ They do not have to worry about building a brand that exists. They can focus their time on running and growing the business.

But it is impossible to imagine a franchisor/franchisee contract that does not give the franchisor reserved or indirect control over a plethora of items from employee uniforms to the procedures employees employ when making or delivering the ultimate product to the consumer to ensure proper quality control and protect the brand. As a result, many of these franchisees likely will see their role relegated to one of "store manager," which is not the dream women franchisees had when they opened their businesses.

Conclusion

IWF strongly urges the NLRB to withdraw this proposed rule. Moreover, IWF encourages the NLRB to allow its 2020 joint employer Final Rule to take effect.¹⁴ That rule, which was developed after significant comment, provides the clarity that all business owners seek when it comes to regulation. The NLRB

¹³ Contributing Writer, FranchiseWire, Franchising USA, "It's the Era of Women – Why the Franchising World Is a Great Industry for Women," <https://www.franchisewire.com/its-era-women-why-franchising-world-great-industry-women/#:~:text=In%20fact%2C%20the%20International%20Franchising,a%20viable%20option%20for%20them>. (Aug. 31, 2019) (Last visited, Dec. 5, 2022)

¹⁴ 85 Fed. Reg., 11184 (Feb. 26, 2020).

should monitor the performance of that rule for a few years. At that point, it can assess what, if any, deficiencies exist, and make proposed adjustments based on that real-life experience.

Thank you for your consideration of these comments. Please reach out if I can provide additional information or answer any questions you might have.

Best regards,

A handwritten signature in black ink, appearing to read 'Patrice Onwuka', with a stylized, sweeping flourish extending to the right.

Patrice Onwuka
Director, Center for Economic Opportunity
Independent Women's Forum