

# Small Business Notes

Minnesota Department of Employment and  
Economic Development (DEED)

## Congress Takes Testimony on Joint Employer Standards

On July 12<sup>th</sup> the U.S. House Committee on Education and the Workforce took testimony at a full committee hearing on “Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship.” The hearing was in response to growing concerns among businesses that an expanded definition of joint employment under federal law creates barriers to both business entry and business growth.

In 2015 the National Labor Relations Board issued its decision in *Browning-Ferris Industries of California, Inc. (BFI)*. That decision expanded the scope of joint employer liability under federal labor laws making a broad range of businesses to workplace liability for another businesses’ actions in terms of worker terms and conditions of employment; for example making a contracting business liable for the labor law actions of an unrelated contractor, or a franchisor liable for the actions of a franchisee. The previous standard for determining joint employer status has, for more than thirty years, been one of “direct and immediate control” by one business over another’s actions. BFI replaced that standard with a more diffuse test of “indirect” or “potential” control. Other federal agencies like the Occupational Safety and Health Administration (OSHA) and the Wage and Hour Division of the Department of Labor have followed BFI with their own expansion of the definition of a joint employer with resulting expansion of liability.

In his testimony, Richard Hester, Vice President of FedEx Ground package system spoke not only to the BFI situation but to the problems caused by the fact that “...there are at least fifteen different joint employment tests when you count the circuit courts, regulations, and agency interpretations. And, they change from time to time.” Quoting from the U.S. Court of Appeals for the Fourth Circuit’s 2017 decision in *Salinas v. Commercial Interiors* that “courts have failed to develop a coherent test for determining whether entities constitute joint employers,” Mr. Hester’s testimony proposed a federal joint employment standards providing for joint employment only when two employers directly determine statutorily identified terms and conditions. Such legislation would, he said, incent businesses to “promote and ensure legal compliance.”

**Continued...**

***In this issue:***  
▪ **Congress Takes  
Testimony on  
Joint Employer  
Standards**

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Joining in testifying in support of a new federal standard was Mary Kennedy Thompson, Chief Operating Officer of Franchise Brands, who noted the adverse effect of multiple, confusing standards of liability on the growth of franchised businesses which “have faced more operational and legal costs, decreased business valuations, less employment assistance from franchisors, less growth and fewer jobs as consequences of the new joint employer policy.” Notably, Ms. Thompson noted that her own organization had cut back on providing traditional support to franchisees out of fear of being considered a joint employer.

Opposing new federal legislation were Professor Michael Hardy of Boston University School of Law and Catherine Ruckelshaus, General Counsel of the National Employment Law Project.

Saying that he regarded the call for new legislation as a “lobbyist manufactured tempest in a teapot,” Professor Harper stated that BFI was a good following of the common law on employment liability and that “The enactment of any legislation directed at an isolated executive decision can only create confusion and inconsistency, and thereby aggravate the judicial challenge in interpreting our employment statutes.” Some of the tenor of Ms. Ruckelshaus remarks can be seen in her contention that employers engage in “wage theft” and seek “to exculpate themselves from liability by inserting additional layers of management between themselves and their workers in order to disclaim responsibility for what occurs on the workplace floor.”

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