The NLRB Joint Employer Rule Creates New Challenges in the Complex Relationship between Employers and Unions

Statement for the Record

Pamela Villarreal

Senior Fellow
National Center for Policy Analysis

"Keeping the American Dream Alive: The Challenge to Create Jobs Under the NLRB's New Joint Employer Standard"

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Dallas Headquarters: 14180 Dallas Parkway, Suite 350 ▪ Dallas, Texas 75254 ▪ 972-386-6272
Washington Office: 202-830-0177 ▪ governmentrelations@ncpa.org ▪ www.ncpa.org

Chairman Vitter and members of the committee, thank you for the opportunity to submit written comments about the NLRB joint employer rule and the implications on employers and unions. I am Pamela Villarreal, a senior fellow at the National Center for Policy Analysis. We are a nonprofit, nonpartisan public policy research organization dedicated to developing and promoting private alternatives to government regulation and control, solving problems by relying on the strength of the competitive, entrepreneurial private sector.

Two significant rulings by the National Labor Relations Board in 2015 expanded the interpretation of the "joint employer" rule. Joint employer is a designation given when two firms are involved in the employment practices of an employee.

In a case involving Browning Ferris Industries, the NRLB ruled that Browning Ferris was not only responsible for those it employed directly, but also contractors and those "indirectly" employed by the firm. Thus, they would be liable for labor violations committed by contractors even when they have only indirect or unexercised control over employment conditions.

In another case involving McDonald's, the NLRB denied an appeal by McDonald's last year, ruling 3-2 that McDonald's is considered a joint employer and therefore could be responsible for alleged labor violations at its franchises at 30 locations across five states. McDonald's has about 2,700 restaurants, 80 percent which are privately owned franchises. This consolidated case goes before an administrative law judge to determine whether McDonald's corporation will be responsible for the alleged violations as a joint employer, but the real fight here has nothing to do with righting alleged wrongs. The ultimate goal is a unionized fast food work force. How will this affect the nation's 780,000 franchises that provide 9 million jobs?

Fast food restaurants and retail stores are known for their narrow profit margins. While profit margins vary according to chain brand, franchisor William Johnson notes that McDonald's profit margin is about 6 percent, not the lowest among franchises, but not the highest either. According to Janney Capital Markets, McDonald's spends an average of 26 percent of its net of sales on labor costs.

Unions and productivity. Unions claim that union members are more productive and therefore, benefit employers. However, there have been a number of studies over decades of the effect of labor unions on a firm's financial performance. The results have been mixed, but mainly because researchers have focused on various countries with different degrees of union influence. But to highlight a U.S. study, researchers Paula Voos and Lawrence Mishel at the University of Wisconsin-Madison analyzed used data collected by the Joint Economic Committee in 1974 on average pre-tax profits/sales ratios for individual supermarket chains in large metropolitan (union and non-union) areas from 1970 to 1974. They found:[1]

- Unions lower profitability, particularly of supermarkets with a greater local market share.
- When controlling for other variables that affect profitability, such as market size, market growth, firm size, expenditures on entry and others, unionized supermarket profits were 76 percent lower compared to non-union supermarkets.

[1] Paula R. Voos and Lawrence Mishel, "The Union Impact on Profits in the Supermarket Industry." *Review of Economics and Statistics*, 1986b, Vol. 68, no. 3, pages 513–17.

- This effect was most pronounced in concentrated markets rather than more competitive markets.

Unions and innovation. Innovation drives economic growth, and indeed, many innovations have taken place at the franchise level. There is disagreement, however, on whether unionization drives innovation or stifles innovation. One hypothesis is that laws that protect employees from bad faith dismissal help to foster innovation through increased employee effort, since unlike routine tasks, innovation has a high risk of short-term failure.[2] This is the employee protectionism hypothesis. The other hypothesis is that unions may distort incentives of workers to the extent they demand higher wages during the innovation stages and shirk their duties due to the reduction in negative consequences of applying less effort.

Researchers at the University of South Florida, University of New Orleans and Indiana University used union result elections data for 8,809 firms from the NLRB from 1980 to 2002 and merging it with the firms' patent data from 1976 to 2002 from the United States Patent and Trademark Office. Firm innovativeness was measured by the total number of patent applications filed in a given year that were eventually granted and the total number of non-self citations each patent received in subsequent years to measure impact. The results:

- Passing a union election leads to an 8.7 percent decline in patent counts three years after the election.
- Patent citations fall 12.5 percent three years after an election.
- However, the results were statistically insignificant in right-to-work states, where unions have less bargaining power.
- Finally, the study noted that firms move innovation activities *away* from states where unions win elections.

Bargaining units and the costs to small business. There is no minimum firm size required for unionization, thus a "bargaining unit" could be one franchise store in one city or it could be an entire chain. If the entire McDonald's franchise is unionized nationwide under the joint employer rule, employees in one state that vote overwhelmingly against unionization would be overruled by a majority that is in other states. Small businesses — particularly those with less than 20 employees — already face regulatory costs of nearly $11,000 per employee.[3] The added costs of bargaining and compliance, potential strikes and potential lost productivity and profit will sink franchise owners. The franchise sector generates more than $2 trillion in economic activity and employs 20 million people. It would be a mistake to hamstring them with the costs and responsibilities of a poorly interpreted and overreaching rule.

Thank you for the opportunity to submit these written comments.

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[2] Daniel Bradley et al., "Do Unions Affect Innovation?" Management Science, 2015. http://124.205.79.123/upload/file/20140919/20140919125538483848.pdf

[3] Nicole V. Crain and W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," Small Business Administration Office of Advocacy, September 2010.