

Oral Statement of Todd Duffield

Chairman Roe and Members of the Subcommittee, thank you for the opportunity to speak to you today. My name is Todd Duffield. I am a shareholder in the national labor and employment law firm Ogletree Deakins, where my practice focuses on advising and representing employers of all sizes in labor and employment matters.

We've all heard the phrase "If it ain't broke, don't fix it." For the past 3 decades, the Board has adhered to the same standard for determining if two separate businesses are joint employers over a group of employees. The test is clear, it makes sense, and it's worked for over 30 years. The standard provides a bright line that everyone – employers, employees, unions, the Board and the courts – can all apply.

Under the current standard, two separate entities are treated as joint employers if they "share or codetermine . . . the essential terms and conditions of employment" of the employees. In making this determination, the Board evaluates whether the putative joint employer "meaningfully affects matters . . . such as hiring, firing, discipline, supervision, and direction" and whether the putative joint employer's control over these matters is direct and immediate. By tying joint employer status to direct and immediate control over fundamental aspects of the employment relationship, the Board's current standard ensures that the joint employer is actually involved in and has actual authority over matters within the scope of the National Labor Relations Act.

The NLRB's General Counsel has taken the position that the Board should abandon the current test and replace it with the following:

- Whether one entity exercise direct *or indirect* control over significant terms and conditions of employment of the employees;
- Whether one entity has *the potential* to exercise such control, *even though it has never exercised that control*; and
- Whether *industrial realities* otherwise make that business an essential party to meaningful collective bargaining.

The General Counsel claims this was the prior standard, but in fact, prior to 1984, the Board itself called its approach amorphous and appeals courts routinely could not find a clear principle underlying the Board's decisions. It was a mess that the Board wisely cleaned up 30 years ago.

The General Counsel's proposed standard ignores the common law agency principles that Congress directed the Board to apply in passing the Taft-Hartley Act in 1947. Instead of focusing on the relationship between the employees and the putative joint employer, the proposed standard focuses on the business relationship of two separate companies. Simply because one company has a contractual relationship that may "implicate" the terms and conditions of employment of another company's workers does not demonstrate that either

company has been authorized to act as the agent of the other in its relationship with its employees. Besides, where a second company does directly affect the employees' terms and conditions of employment, the current standard already holds that company accountable as a joint employer.

The General Counsel's proposed standard also would overturn long-standing Congressional policies not to enmesh employers in each other's labor disputes. Congress rejected a similar attempt in the mid-1970s, when legislation was proposed to amend the Act to allow "common situs picketing." The proposed standard would virtually eviscerate secondary boycott protections in the Taft-Hartley Act. Secondary boycotts are designed to protect secondary or "neutral" employers from being enmeshed in the labor disputes of the primary employer. The proposed standard would blur the concept of "neutrality."

Even more fundamentally for the Nation's economy, the proposed standard would destroy, or at the least create the massive upheaval of, established, highly successful business models involving franchisors and franchisees throughout the United States. Large-scale franchisors who retain only the control required to protect their brand, trade name and trademark could be drawn into hundreds of collective bargaining relationships where they have little or no involvement with the workplace. Additionally, joint employers would be required by Section 8(a)(5) to execute bargaining agreements and subject themselves to contractual and unfair labor practice liabilities without having any control over day to day operations at myriad locations throughout the country. Rather than accept such liabilities, many companies undoubtedly will opt to cancel franchise arrangements, thus displacing small businesses and the millions of jobs they create. As the California Supreme Court recently stated, to use control in business matters to infer control in personnel matters would stand the franchise relationship "on its head."

But it's bigger than that. Beyond destroying franchise relationships, the proposed standard would disrupt many other established contractual business relationships like staffing operations, contractor/subcontractor relationships and a host of possible supply chain relationships. The result would be loss of jobs and loss of entrepreneurial business opportunities which fuel the economy (including many minority business opportunities).

Why would we change bright-line standards and well-established, black letter law, especially where there is no evidence of widespread abuse? Some have suggested that the change is intended to create negotiating leverage for labor unions and open new platforms for the plaintiffs bar. To date, the Service Employees International Union (SEIU) has been unable to organize franchise operations so some have suggested that the Board is looking to rewrite the law to make organizing easier.

Proponents of the change to the Board's standard argue that the change is necessary because there cannot be meaningful bargaining when the primary employer's business partners are not at the bargaining table. There is no evidence for this thesis.

Congress should understand that these are not small, technical legal changes to labor law. The consequences of changing the Board's current joint employer standard threatens established business relationships and will cause significant economic upheaval. Additionally, the proposed standard would go well beyond any other labor and employment statute in finding wholly

separate business entities to be joint employers. It also would implicate many other areas of the law such as wage and hour and workplace safety, just to name a few.

It is well that Congress examines the effects of the Board's proposed actions on national economic and labor policy through oversight hearings. Should the Board move forward, I would urge Congress to consider corrective legislative amendments.