



THE BUCKEYE INSTITUTE

December 5, 2022

Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Submitted Via: www.regulations.gov/commenton/NLRB-2022-0001-0001

RE: REIN3142-AA21, 87 Fed. Reg. 54641 (Sept. 7, 2022), National Labor Relation's Board Proposed Rule, "Standard for Determining Joint-Employer Status"

Dear Ms. Rothschild:

The Buckeye Institute submits this comment on the National Labor Relations Board (NLRB) proposed rule, "Standard for Determining Joint-Employer Status."

Founded in 1989, The Buckeye Institute is an independent research and education institution—a think tank—based in Columbus, Ohio, whose mission is to advance free-market public policy in the states. Our chief concern is that proposed rule to "revise the standard for determining whether 2(2) of the National Labor Relations Act (NLRA or ACT), are joint employers of particular employees" will impede Ohio's economic opportunity and prosperity by creating regulatory uncertainty and disincentives for franchisees that will affect thousands of small businesses and millions of workers across the state.¹

The Rule Will Hurt Ohio's Economy

Ohio has roughly 30,000 franchise establishments that employ almost 360,000 employees.² The NLRB's revised rule will dramatically change the current franchise model by making local Ohio franchisees and franchisors responsible for bargaining decisions made and labor conditions experienced in other states. Such a change will do a disservice to Ohio franchise owners who rely upon local knowledge and conditions to do right by their employees and customers.

The new rule shifting responsibility for worker bonuses and weekly work schedules from local franchise owners and store managers to remote franchisors misunderstands the franchise business model. Franchisors do not typically determine individual bonuses or work schedules, but by making them responsible for such rudimentary decisions, the new rule creates incentives for

¹ National Labor Relations Board, 29 CFR Part 103, RIN 3142-AA21, Standard for Determining Joint-Employer Status, *The Federal Register*, Volume 87, Number 172 (September 7, 2022), p. 54,641-54,663.

² Christina Niu, *2022 Franchising Economic Outlook*, International Franchising Association, February 2022.

franchisors to exert more authority over their franchisees to the detriment of employees and local communities. If, under the revised rule, a franchisor risks liability for employment practices at every independent franchise across the country, the franchise model is in peril. Franchisees will have less autonomy and will soon resemble branch managers for large international corporations, which is not the business model most franchisees envisioned.

Losing small business franchises will have negative consequences for Ohio. Small businesses make up a disproportionate share of jobs,³ with nearly a million small businesses employing almost half of all Ohio workers last year.⁴ And Ohio has been adding franchises faster than the national average,⁵ which means that small business franchises are vital to Ohio's economy. Regulatory rule changes that threaten the success of small businesses and franchises will endanger millions of Ohio jobs and jeopardize a labor market that already suffers from a higher unemployment rate and lower labor force participation than the national average.⁶

The Rule is Unclear

The rule as drafted is unclear, which will create uncertainty for Ohio businesses. It is unclear, for example, what constitutes “indirect control of employees” under the proposed rule. Companies that use contracted employees to perform certain services might be considered a joint employer under the rule insofar as the companies establish some working conditions and requirements for the contracted employees. Hospitals that dictate when contracted cleaners may be on premises, or retail merchants that insist upon certain delivery times, for example, may or may not qualify as joint employers under the revised rule. And that ambiguity is a problem—especially for smaller firms. Larger employers have staff and capital dedicated to interpreting complex and ambiguous regulations, but small businesses do not and will bear the brunt of the burden imposed by unclear rulemaking that may or may not subject them to new regulatory requirements.⁷

Recommendation:

- 1) The NLRB should withdraw the proposed rule due to its negative impact on Ohio small businesses and franchises.

Thank you for your time and attention.

Sincerely,
Rea S. Hederman Jr.
Executive Director of the Economic Research Center and Vice President of Policy
The Buckeye Institute

³ David Neumark, Brandon Wall, Junfu Zhang, “Do Small Businesses Create More Jobs? New Evidence for the United States from the National Establishment Time Series,” *The Review of Economics and Statistics*, Volume 93, Issue 1 (2011) p. 16–29.

⁴ U. S. Small Business Administration, **2021 Small Business Profile Ohio**.

⁵ Christina Niu, **2022 Franchising Economic Outlook**, International Franchising Association, February 2022.

⁶ **Ohio's Trick and Treat Jobs Report**, The Buckeye Institute press release, November 18, 2022.

⁷ Vivek Ghosal and Yang Ye, **Uncertainty and the Employment Dynamics of Small and Large Businesses**, working paper, International Monetary Fund, January 2015.