



July 12, 2017

The Honorable Virginia Foxx  
Chairwoman  
Committee on Education and  
the Workforce  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Bobby Scott  
Ranking Member  
Committee on Education and  
the Workforce  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairwoman Foxx and Ranking Member Scott:

On behalf of the National Retail Federation (NRF), I want to thank you for convening this important hearing and for the opportunity to provide comments on the real-world consequences associated with limitless joint employer liability.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing \$2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy.

Retailers of all sizes and in every portion of the country continue to have significant concerns with the National Labor Relations Board's (NLRB) controversial decision in *Browning-Ferris Industries* (32-RC-109684), which upended decades of precedent and fundamentally redefined who an employer is. For more than 30 years, the NLRB had used a clear test for determining joint employer status, considering an entity to be a joint employer if it exercised direct and immediate control over another business' employees. Direct control was generally understood to include the ability to hire, fire, discipline, supervise, or direct those employees. This long-held standard provided clarity under the law and enabled small businesses to flourish under franchise agreements and contracts to provide their services and products to a variety of companies.

However, in *Browning-Ferris*, the Board majority abandoned the bright-line test and expanded the joint employer definition to include employers with indirect or even unexercised potential control over working conditions. Under the broader standard, the NLRB created the impossible scenario in which one business can be held liable for the actions of another entirely independent business, such as a subcontractor or franchisee. As the Board's dissenting members aptly noted in the decision, this radical new joint employer standard would "subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential liability for unfair labor practices and breaches of collective bargaining agreements, and to economic protest activity." These

harmful and unnecessary changes have resulted in seemingly limitless liability in business-to-business relationships and a significant lack of certainty for millions of retailers nationwide.

To make matters worse, the Department of Labor (DOL) followed in the Board's footsteps and issued its own sweeping guidance on joint employer relationships in 2016. DOL's guidance compounded the uncertainty created by the NLRB and has led to a dramatic increase in growth-chilling litigation in industries across the country. NRF welcomed Secretary of Labor Acosta's recent announcement withdrawing the problematic guidance as an important first step in addressing the joint employer jeopardy employers face. However, job creators need longer-term stability in labor relations that Congress can best provide through legislative solutions.

Until the issue is addressed in a wholesale fashion by Congress, retailers will continue to face unlimited and unpredictable joint employer threats that slow job creation and entrepreneurship. NRF looks forward to working with this Committee to advance legislation that establishes a commonsense standard of joint employer liability under federal labor laws and provides employers with lasting certainty in labor relations. Innovation, job creation, and a thriving small business economy depend on it, and we thank you again for holding this important hearing.

Sincerely,

A handwritten signature in black ink, appearing to read "David French". The signature is stylized with a large, sweeping initial "D" and a cursive "French".

David French  
Senior Vice President  
Government Relations