October 3, 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 International Franchise Association (IFA), the world's oldest and largest organization representing franchising worldwide, I write in strong support of H.R. 3441, the *Save Local Business Act.* This bipartisan, common-sense legislation will clarify the legal definition of "joint employer" under both the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA). IFA believes this legislation provides a fair, workable definition of "joint employer" that helps employers understand the rules of the game, but also provides flexibility so that bad actors are held accountable.

First, the *Save Local Business Act* returns the status of the law to the long-standing interpretation of "joint employer" under the National Labor Relations Act. See *Lareco Transportation*, 269 NLRB 324 (1984); *TLI, Inc*. 271 NLRB 798 (1984) *enforced* 772 F.2d 894 (3d Cir. 1985); *Airborne Express*, 338 NLRB 597 (2002) (control over employment matters must be direct and immediate). For over 30 years, the National Labor Relations Board (NLRB) has required direct and immediate control over key employment terms for a joint employer relationship. Under the long-standing test, businesses are joint employers only when they share actual, direct and immediate control over the essential terms and conditions of employment. This standard does not allow responsible employers to escape responsibility for labor law violations. Instead, it ensures that employers remain responsible when they are directly involved in an employee's day-to-day working conditions.

The Board's new standard, as established under *Browning-Ferris Industries*, is an unpredictable, fact-based test that must be decided on case-by-case basis to determine whether a company directly, *indirectly or potentially* controls the means or manner of another entity's employees' terms of employment. The Board's test shifts focus away from the businesses' control over employees' terms and conditions of employment to a focus on the relationship between the two businesses. As such, the NLRB's new standard has led to confusion and unpredictability for America's 733,000 franchise businesses, the franchise agreements these independent owners sign with franchisors and other third-party business relationships by taking away their predictability. The "potential control" and "indirect control" standards are broad enough to cover virtually any business relationship, and the murky guidance provided in the *BFI* opinion makes it virtually impossible for businesses to apply the new standard with any confidence.

Second, the *Save Local Business Act* creates a consistent definition of "joint employer" under the FLSA. The definition of joint employment relies on the Ninth Circuit's decision in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), which forms the foundation of the common law joint employer test under the FLSA. In *Bonnette*, the court looked at whether the alleged employer: (1) maintained

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the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. Applying these factors, an entity is an "employer" under the FLSA if it exercised "considerable control" over the employment relationship.

Many federal circuit courts already adhere to this basic framework for determining joint employer liability. See *Baystate Alt. Staffing, Inc. v. Herman*, 163, F.3d 668, 675 (1st Cir. 1998) (finding that the plaintiffs' complaint does not allege any facts that trigger any of the *Bonnette* factors); *Gray v. Powers*, 673 F.3d 352 (5th Cir. 2012); *Orozco v. Plackis*, 757 F.3d 445 (5th Cir. 2014); *Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, 683 F.3d 462, 469–70 (3d Cir. 2012); *Thompson v. Real Estate Mortgage Network*, 748 F.3d 142 (3d Cir. 2014); *E.E.O.C. v. Skanska USA Bldg., Inc.*, 550 F. App'x 253, 256 (6th Cir. 2013) ("To determine whether an entity is the plaintiff's joint employer, we look to an entity's ability to hire, fire or discipline employees, affect their compensation and benefits, and direct and supervise their performance.").

The return to the standards underlying *Bonnette* is necessary because other circuit courts have created a confusing web of factors that are incredibly challenging for small businesses, including franchises, to follow. The current expansive joint employer standard was recently adopted by the Fourth Circuit. See *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017). The Fourth Circuit's decision moves the analysis away from actual, direct and immediate control on employees' essential terms and conditions of employment to focus extensively on the relationship between the two businesses. The court found that a joint employment relationship exists when "two or more persons or entities are 'not completely disassociated' with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine – formally or informally, directly or indirectly – the essential terms and conditions of the worker's employment." Under this standard, the courts have complete discretion in deciding whether a joint employer relationship exists. The *Salinas* case requires an examination of the indirect business relationship in every case, even if one of the businesses exercises absolutely no direct control over the employees of the other business.

Over the past three years, twenty-four franchise business leaders have testified before Congress to the disruption that the unlimited joint employment liability doctrine has caused within franchisor-franchisee relationships. As IFA's members have testified, the legal uncertainty created under both the NLRA and FLSA has needlessly forced our members to seek expensive counsel to determine if simple decisions – like compiling a brand-wide employee handbook or offering franchisees software to track job applications – might put them in legal jeopardy. Notably, the new joint employer rules also put at risk workforce development and apprenticeship training programs that make franchise-companies attractive to entrepreneurs. Many businesses will step away from offering these crucial benefits rather than take the risk of such an action triggering a joint employer lawsuit.

Finally, and perhaps most importantly, expanded joint employment liability has proven to have had a negative impact on entrepreneurship, small business growth, and wealth accumulation for families. Businesses need to know with certainty that they can offer these crucial benefits and utilize the power of the franchise business model without running afoul of liability laws.

To address these concerns, H.R. 3441 would update the NLRA and FLSA to provide clarity for local businesses on what it means to be a "joint employer." Under this legislation, an employer may be considered a joint employer of a worker only if it "directly, actually, and immediately" exercises significant control over the primary elements of employment, such as hiring, firing, determining pay, or supervising employees on a

routine basis. This totality of the circumstances test will provide much-needed clarity for small businesses, but also flexibility so that bad actors are accountable.

For these reasons, IFA strongly supports the *Save Local Business Act*, which provides a bipartisan, common-sense solution to address the uncertainty experienced by local franchise businesses under the vague and overly broad joint employer standards that have developed recently. We urge the U.S. House Education and Workforce Committee to report this legislation to the full House in short order. Thank you for your consideration.

Sincerely,

Matt Haller
Senior Vice President of Government Relations & Public Affairs
International Franchise Association

cc: Members of the House Education and Workforce Committee