March 17, 2016

Crescent Hardy, Chairman
U.S. House Small Business Subcommittee on
Investigations, Oversight and Regulations
Washington, D.C. 20515

Re: Hearing on "Risky Business: Effects of New Joint Employer Standards for Small Firms"

Dear Chairman Hardy:

On behalf of the National Restaurant Association, I want to thank you for the oversight your Committee is providing through today's hearing on "Risky Business: Effects of New Joint Employer Standards for Small Firms." I would also like to ask you to introduce these comments for the record.

The National Restaurant Association is the leading business association for the restaurant and foodservice industry. The Association's mission is to help members build customer loyalty, rewarding careers and financial success. Nationally, the industry is made up of one million restaurant and foodservice outlets employing 14 million people—about ten percent of the American workforce. Despite being an industry of mostly small businesses, the restaurant industry is the nation's second-largest private-sector employer.

I appreciate the attention this Committee is placing on the impact that the changes the National Labor Relations Board ("NLRB") is making to the "joint-employer" standard is having on the franchise business model in particular. Nevertheless, I am submitting this statement for the record to emphasize that the negative consequences of those changes go much deeper than that.

The ongoing attempts by the NLRB to change the joint-employer standard are bad for workers, employers, franchises, and the economy. In May of 2014, in the *Browning-Ferris* case, the NLRB issued a notice calling for briefs from interested parties to address whether the NLRB should obey the legally established joint-employer standard or create a new one.

The National Restaurant Association filed comments arguing that the historic standard should be maintained because any deviation from the, then, existing standard would seriously and adversely affect the nation's restaurant and food service industries. In addition, no new circumstances had arisen since the standard was clarified thirty years ago to justify modifying or overturning prior decisions. Meanwhile, the NLRB's General Counsel's filed his own brief seeking to assail the joint-employer standard that has been the bedrock of American business relationships for the last three decades.

Prior to the decision in *Browning-Ferris* coming out, during several Congressional hearings, some of my Association's members highlighted the threat the changes to the joint-employer relationship envisioned by the NLRB posed to our industry. Witnesses were told that there was nothing to fear and that the NLRB would be impartial. In fact, the U.S. House Education & Workforce Committee Ranking Member stated, "I'm a little baffled…I don't think this will be a problem for [Restaurants]…I haven't heard any evidence that indicates to me that there is any reason to believe that this board won't be fair minded."

However, the concerns raised by the witnesses were both real and well founded. On August 27, 2015, in a split 3-2 vote, the NLRB issued its decision in *Browning-Ferris*. In it, the NLRB changed the application of the joint-employer standard to allow for an entity to be considered to be a joint employer even if it does not actually exercise any control over the terms and conditions of employment of another entity's employees.

Instead, the joint-employer status under *Browning-Ferris* can be found under a new "reserved authority" theory if an entity could, by contractual relationship or otherwise, at some point in the future control the terms and conditions of employment of the other entity. Furthermore, the NLRB also held in *Browning-Ferris* that joint-employer status could also exist if one entity exercised "indirect control" through a third party. In its decision, the majority disregarded the decades old joint-employer standard in favor of these new unclear "reserved authority" and "indirect control" theories, making employers potentially liable for employees they do not employ—jeopardizing business partnerships in all industries.

The NLRB's proposed changes, if *Browning-Ferris* is allowed to stand, to the existing joint-employer standard could have profound negative effects on a company's ability to use temporary employees, staffing agencies, leased employees or other contingent workers. This is particularly so for companies in our industries, which rely on these contingent workers to supplement their own workforces.

If the standard is allowed to change, as proposed by the NLRB, companies could begin to find themselves held vicariously liable for violations of Section 7 of the National Labor Relations Act ("NLRA") for depriving a temporary employee's right to form a union and for violations of Section 8(a)(3) of the NLRA for unlawful discipline or discharge of a temporary employee that are committed by entities completely outside of their control.

Additionally, if the staffing agency's employees are represented by a union, these companies may be unwittingly subjected to the staffing agency's collective bargaining obligations under Section 8(a)(5) of the NLRA. As a result, companies may be compelled to change their business models and terminate their contracts with staffing agencies because of their potential harmful and/or unpredictable ramifications.

For the last thirty years, companies have comported themselves and organized their businesses on the basis of a clear joint-employer standard. They did so based on the reasonable assumption that a standard that has been consistently applied for three decades without controversy would continue to be applied in the same manner going forward. The proposed changes by the NLRB

through its decision in *Browning-Ferris* are jeopardizing these companies and the stable environment in which contingent employees, unions and companies have operated.

Finally, I would like to offer our help to protect the long settled joint-employer standard that existed prior to the controversial decision in *Browning-Ferris*. As stated, the changes proposed by the NLRB and its General Counsel are detrimental not only to the franchise model, but to the economy as a whole.

Sincerely,

Angelo I. Amador, Esq.
Senior Vice President & Regulatory Counsel