



COALITION FOR A **DEMOCRATIC WORKPLACE**

December 13, 2023

The Honorable Bob Good
Chair
House Subcommittee on Health, Employment, Labor and Pensions

The Honorable Mark DeSaulnier
Ranking Member
House Subcommittee on Health, Employment, Labor and Pensions

Dear Chair Good and Ranking Member DeSaulnier:

The Coalition for a Democratic Workplace (CDW) and the 72 undersigned organizations thank the Subcommittee for holding today's hearing, which will examine the Employee Rights Act (ERA) ([H.R. 2700](#)), Modern Worker Empowerment Act ([H.R. 5513](#)), and Save Local Business Act ([H.R. 2826](#)). We write in support of these bills, which are designed to protect workers, entrepreneurs, small businesses, and the economy from a rogue National Labor Relations Board (NLRB or Board), whose blatant bias and mishandling of its duties recently resulted in the Office of Inspector General chastising the agency for gross mismanagement and lack of candor.¹ This bias has resulted in Board decisions that prioritize union interests at the expense of working Americans, such as recent decisions stripping employees of their right to secret ballot elections and individuals of their right to work as independent contractors. At the same time, the Board's final rule on joint employer status threatens to deprive small businesses of autonomy and opportunity. The Board's current approach threatens workers and small businesses alike, and we urge the Subcommittee and the full House of Representatives to pass these bills and rein in the NLRB as soon as possible.

CDW is a broad-based coalition of hundreds of organizations representing hundreds of thousands of employers and millions of employees in various industries across the country concerned with a longstanding effort by some in the labor movement to make radical changes to the National Labor Relations Act (NLRA) without regard to the severely negative impact they would have on employees, employers, and the economy. CDW was formed in 2005.

On August 25, 2023, the Board majority issued its decision in *Cemex*,² imposing a new framework that greatly expands the Board's ability to force unions on employees without a secret ballot

¹ Office of Inspector General, Memorandum, Report of Investigation – OIG-I-569 (July 8, 2023), available at https://edworkforce.house.gov/uploadedfiles/second_corrected_oig_i_569_report.pdf (“*That Regional personnel worked closely with one party to remedy the situation, while withholding information from the other party, further exasperated the issues in the election and reasonably called into question the Region’s neutrality in the process. Because the mismanagement was so closely related to one of the primary statutory missions of the Agency, it created the risk of great reputational harm that could negatively impact the ability of the Agency to carry out that mission*”).

² *Cemex Construction Materials Pacific*, Cases 28–CA–230115, et al.



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election and instead relies on controversial and notoriously flawed³ card check where employees are forced to vote for or against the union in front of coworkers and union organizers by signing or not signing authorization cards. The Board’s decision reverses a half-century of NLRB precedent and is at odds with long-standing Supreme Court and federal court rulings that have routinely criticized card check for being “admittedly inferior” and an “unreliable method.” The Board made this major policy change without soliciting input from the public via comment or amicus briefs, despite CDW’s request.⁴

The ERA, on the other hand, would guarantee workers will use secret ballots to choose whether or not to unionize. This ensures workers can vote their conscience without being harassed, retaliated against, or threatened by union organizers, colleagues, or employers looking to pressure them to vote a certain way.

On June 13, 2023, the Board majority issued its decision in *The Atlanta Opera*,⁵ which reinstates the Obama-era *FedEx Home Delivery*⁶ independent contractor standard, despite the D.C. Circuit’s rebuke of that decision. The D.C. Circuit said the Board overstepped its authority by creating a standard that did not align with the common law, as required by the NLRA. The Board in *The Atlanta Opera* completely ignored the D.C. Circuit’s ruling and has opened itself up to judicial reproach and legal challenges. The standard established in this case will make it extremely difficult for individuals to qualify as independent contractors, forcing them into traditional employee roles that they do not want.

The Modern Worker Empowerment Act would instead protect independent contractors by requiring the use of the longstanding common law test to determine a worker’s appropriate classification as either an independent contractor or a traditional employee. This test is built on decades of legal precedent, which the business community and workers have already grown to understand and successfully implement. The Modern Worker Empowerment Act would also harmonize the independent contractor standard across federal laws, providing significant and much-needed clarity across workplace labor and employment policy. It would protect employees in employment relationships from abuse while ensuring entrepreneurs of the ability to earn a living in the manner they choose.

Lastly, the NLRB issued its final rule⁷ implementing a dramatically expanded joint employer standard on October 26, 2023. The final rule makes *indirect* or even *unexercised, reserved control* over workers’ terms and conditions of employment sufficient to trigger joint employer status. This

³ CDW White Paper, “How Neutrality and Card Check Agreements Harm the American Worker” (May 2023), available at https://myprivateballot.com/wp-content/uploads/2023/05/CDW-White-Paper_Neutrality-and-CardCheck-Agreements_May-2023-FINAL.pdf.

⁴ CDW Motion requesting the Board to Solicit Amicus Briefs in *Cemex Construction Materials Pacific* (May 3, 2022), available at https://myprivateballot.com/wp-content/uploads/2022/05/CDW_Motion-for-Amici-Invitation-in-Cemex-.pdf.

⁵ *The Atlanta Opera*, 372 NLRB No. 95 (2023)

⁶ *FedEx Home Delivery*, 361 NLRB No. 610 (2014)

⁷ *Standard for Determining Joint Employer Status*, 88 FR 73946, (2023) available at <https://www.federalregister.gov/documents/2023/10/27/2023-23573/standard-for-determining-joint-employer-status>



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standard – which expands upon the damaging policy adopted in the Obama-era *Browning-Ferris Industries* decision – will put every contractual relationship across the economy in jeopardy, needlessly exposing employers to significant liability under the law when they do not have a meaningful role in setting workplace conditions. The standard also puts at serious risk the franchise model that has been used by millions of entrepreneurs to achieve the American Dream of owning their own small business and being their own boss.

The Save Local Business Act would codify into law the traditional joint employer standard that requires employers have “actual, direct, and immediate” control over employees to be considered joint employers. This is a common-sense standard that provides certainty and stability to both workers and employers. It would protect the ability of employers to contract with small businesses and protect workers’ right to have their true employer at the table to engage in meaningful bargaining.

Thank for you again for holding this important hearing. CDW and the undersigned organizations urge the Subcommittee and the House of Representatives to pass these vital bills and block the NLRB’s misguided policies from taking effect.

Sincerely,

60 Plus Association
Air Conditioning Contractors of America
American Bakers Association
American Car Rental Association
American Foundry Society
American Hotel & Lodging Association
American Pipeline Contractors Association
American Seniors Housing Association (ASHA)
American Supply Association
American Trucking Associations
AMT - The Association For Manufacturing Technology
Associated Builders and Contractors
Associated Equipment Distributors
Association of Bi-State Motor Carriers
CAWA - Representing the Automotive Parts Industry
Center for Individual Freedom (CFIF)
Center for the Defense of Free Enterprise
Coalition of Franchisee Associations
Construction Industry Roundtable
Consumer Technology Association
Foodservice Equipment Distributors Association
Franchise Business Services
Freedomworks
Global Cold Chain Alliance



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Heating, Air-conditioning, & Refrigeration Distributors International
HR Policy Association
ICSC
Independent Bakers Association
Independent Electrical Contractors
Industrial Fasteners Institute
International Franchise Association
International Warehouse Logistics Association (IWLA)
Manufactured Housing Institute
MEMA, The Vehicle Suppliers Association
Metals Service Center Institute
Metals Service Center Institute
National Association of Electrical Distributors
National Association of Wholesaler-Distributors
National Club Association
National Cotton Ginners Association
National Council of Chain Restaurants
National Federation of Independent Business
National Franchisee Association
National Grocers Association
National Industrial Transportation League (NITL)
National Lumber & Building Material Dealers Association
National Marine Distributors Associations
National Public Employer Labor Relations Association
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
National Small Business Association (NSBA)
National Tooling and Machining Association
Nevada Manufacturers Association
Outdoor Power Equipment and Engine Service Association
Pennsylvania Food Merchants Association
Pet Industrt Distributors Association
Power & Communication Contractors Association
Precision Machined Products Association
Precision Metalforming Association
Small Business & Entrepreneurship Council
Tea Association of the U.S.A., Inc.
Technology & Manufacturing Association
The Transportation Alliance
Tile Roofing Industry Alliance
Tire Industry Association
TRSA - The Linen, Uniform and Facility Services Association
Truck Renting and Leasing Association



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U.S. Chamber of Commerce
Western Electrical Contractors Association
Workforce Fairness Institute
Workplace Solutions Association