



**COALITION TO SAVE
LOCAL BUSINESSES**

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**TESTIMONY BEFORE THE U.S. SENATE COMMITTEE ON
SMALL BUSINESS AND ENTREPRENEURSHIP**

LEGISLATIVE HEARING

**“KEEPING THE AMERICAN DREAM ALIVE:
THE CHALLENGE TO CREATE JOBS UNDER THE
NLRB’S NEW JOINT EMPLOYER STANDARD”**

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Good morning Chairman Vitter, Ranking Member Shaheen, and distinguished members of the Committee. My name is Ciara Stockeland, I am a North Dakota entrepreneur and business owner. I am the founder of MODE, a retail franchise based in Fargo, North Dakota. I live in Grand Forks, North Dakota with my wonderful husband and business partner, Jim, and our two children, Harrison and Isabella.

Thank you very much for the invitation to appear before this Committee on behalf of the Coalition to Save Local Businesses. The Coalition is a diverse group of locally owned, independent small businesses devoted to maintaining the common sense, traditional joint employer legal standard based on “direct control” across federal and state statutes. Today I will share my small business story and discuss the concerns of small business owners everywhere regarding the National Labor Relations Board’s (NLRB) new “joint employer” standard.

In 2006, I launched my small business, Mama Mia, which provided maternity wear in our community. Shortly after, I developed the MODE concept, and we opened our first location right next door to Mama Mia. In 2008, I merged the two stores and created MODE as it operates today. In our first three years, we personally observed the positive impact our store had on the community and we saw no reason why we couldn’t provide this service elsewhere. After carefully considering our options for growth, we chose to expand using the proven franchise business model. In franchising, we not only found a trusted strategy for growing our small business, but also an opportunity to provide a local option for rising entrepreneurs to achieve their dreams of business ownership as well. Since making our growth strategy decision in 2011, our MODE brand has successfully expanded to 11 locations across the Midwest and South Carolina, and we hope to continue growing. Our goal is to have 75 stores by 2024.

I truly appreciate the opportunity to speak on behalf of the hundreds of thousands of small business owners like myself. While I am a franchisor, I hope that my story demonstrates that not all franchisors are high-powered, multinational corporations. The vast majority are like me, working exhaustively to grow a brand and create opportunities. We are not the so-called “one percent.” In fact, I am a tried and true small business owner – the kind that all elected officials praise in press releases and speeches. I simply had an idea, succeeded in building a small business, and then decided to share my idea and experience with other aspiring entrepreneurs through franchising. But now my franchisees, my team and I need the Senate’s help, because changes to the joint employer standard now have me questioning the future growth of my business.

For more than three decades, the joint employer standard effectively protected small businesses from liability arising from actions over which they have no actual or direct control. But this is no longer the case; the NLRB’s new standard based on “indirect” and even “reserved” but unexercised control is increasingly making employers liable for another company’s employees, even if they are not in their direct control. Beyond the Washington legalese, you must understand how absurd this new policy sounds to people outside the Beltway. No longer can a business like mine be assured it will be safe from federal labor and

employment law liability simply because it does not control the hiring, wages, or supervision of another business's employees.

With this major change in policy, small business owners are faced with increased uncertainty. It throws the whole franchise model into peril, because franchising is based on contractual relationships between two distinct employers: franchisor and franchisee. Let me describe further how and why franchising works.

When a franchisee enters into an agreement to run a MODE franchise in their community, they sign up to own and operate their business. While the MODE brand was my idea and my concept, the growth of our brand to new locations is based on the desire and tremendous effort of our franchisees and future franchisees in taking that concept and opening stores in their communities. MODE simply provides them with a foundation from which to launch their business, and that includes our recognized brand and trademark, a set of business practices to ensure consistency and quality, and support for marketing and advertising. The rest is up to them. After all, our franchisees are responsible for hiring and training their own workers and setting wages and benefits based on their own competitive local market. Our franchisees receive their own tax ID number and pay their own taxes. And as part of their contract, they are required to abide by and operate under all existing laws, employment and otherwise. And that's the way entrepreneurs want it; they want to run their own independent businesses. I want to see each and every one of my franchisees succeed, and I try to support them however I can.

But the new joint employer standard has the greatest negative impact on these franchise businesses in each of your neighborhoods and states. That's because franchisors and other prime companies – in order to limit their new joint employer liability – may be compelled to exercise more control over the small businesses with which they hold contracts. Franchisees may lose operational control of their business, or at least lose the resources they are used to receiving from their brand company as part of their franchise agreement. Consider this: Under current law, my contract with my franchisee provides that individual owner the right to conduct business under the trademark of my brand company – MODE – in exchange for an initial fee and ongoing royalties paid by the franchisee. It is then the franchisee's responsibility to follow my prescribed operating methods and I, in turn, am obligated to provide training, advertising, start-up assistance, and sometimes financing. As an example, we require our new franchisees to attend one week of management and operations training at the launch of their business. Through this training we ensure they understand how to properly execute the MODE brand and its systems. It is then the franchise owner's responsibility to take the knowledge and tools received to the fullest extent both in their business and with their teams.

Furthermore, the Federal Trade Commission's Franchise Rule requires that I, as the franchisor, exert *significant* control over my franchisees in order to qualify as a franchise and to ensure brand quality. Moreover, the Franchise Rule operates in tandem with the federal Lanham Act (also known as the Trademark Act), which requires persons holding a trademark to police and control third party licenses who are operating under the trademark (or brand name)

to ensure brand consistency. As federal courts have established, one of the underlying reasons for this trademark law is to ensure that all products offered pursuant to a particular trademark are of uniform *quality* (See *Carris v. Marriott Int'l, Inc.*, 466 F.3d 558, 562 (7th Cir. 2006)). Further, the “right to control the quality” of the goods associated with a trademark is “[o]ne of the most valuable and important protections afforded by the Lanham Act (See *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 618 (9th Cir. 1993)).”

Under these rulings, an action by a federal agency – such as the new joint employer standard – that prevents a franchise business from protecting its brand standards not only undermines the value of the owner’s trademark, it may also interfere with the small business owner’s ability to comply with the FTC’s Franchise Rule. Thus, on one hand, federal trademark law *requires* franchisors to protect their brand standards; but due to expanded joint employer policy, now federal labor law effectively *prohibits* franchisors from protecting their brand standards through any action or even potential action. What an extremely frustrating Catch-22 for small business job creators across the country.

The joint employer challenge is merely one example of the confusion and inconsistencies in the laws and rules regulating small businesses today – an incoherent system that small business owners are expected to understand and navigate. I am an educated woman, I retain experienced legal and business counsel, and I operate in earnest; yet I still fail to have confidence that I am navigating – without a compass – the right course in this sea of conflicting regulations. Senators, we’re doing our best, but we need help and support from Congress and the Administration.

The new joint employer doctrine has raised so many questions that, so far, no one has helped answer. Since the NLRB’s August 2015 *Browning-Ferris Industries* decision that effectively changed the joint employer standard, the NLRB has failed to provide guidance about the new joint employer standard and where the line can be drawn for a franchisor to protect its brand without crossing the indirect or potential control standard, despite repeated requests by the franchise industry to ensure compliance with the new standard for joint employment.

Countless small business leaders and I are still weighing these questions how to respond as a franchisor to this increased liability. Should I manage the risk by extending even greater control over my fully capable franchisees or pull back on services provided to them? Should I stop offering new franchises altogether? Should I cancel existing franchise contracts and bring those stores back under our operation, if I could even afford to do that? And what would be the impact of that? In addition to my franchisees losing their livelihoods and dreams, we run the risk of eliminating family-owned franchise business in your neighborhood. Importantly, MODE grants franchises to entrepreneurs who live in their communities and who want to provide a service to their friends and neighbors. In the end, whether we have five franchise locations or 200, it is imperative that these businesses remain under local control.

Since I last testified before the Senate Health, Education, Labor and Pensions Committee in October 2015, I am no closer to answering these questions. But in the interim, our Coalition

has gathered anecdotal evidence and cautionary tales from numerous business owners related to the negative fallout from the NLRB's actions. Here are a few examples of what the unpredictably broad joint employer standard now means for small businesses:

- **Increased operational costs.** Some franchisors have decided that they must roll back the non-employment-related products and services they offer franchisees due to the Federal government's unpredictably broad joint employer policy. That means franchisees are now being required to pay for employment-related products that they used to receive from the franchisor. Thus, franchisees are given less guidance and less help, but at greater expense.
- **Increased litigation costs.** There has been a spike in litigation naming the brand name as a joint employer with franchisees, even in non-employment cases. And even when the outcome finds no evidence of wrongdoing by the franchisor, these cases are very expensive and harmful for everyone involved. In effect, the new joint employer doctrine is needlessly increasing litigation and increasing revenue to lawyers, while decreasing the bottom line for small businesses owners.
- **Stagnant growth.** Franchisors and franchisees are simply deciding to hold off on opening new locations. Fewer locations mean fewer jobs and decreased or eliminated economic benefit to the community.

The implications of this major policy change around the will of Congress are plentiful, and what we risk is this critical pathway to entrepreneurship. Senators, why would we want to tamper with the ultra-successful franchise business model that has provided this pathway to people who in many cases would never have been able to be entrepreneurs without it? Why are we compromising the businesses in our communities that help create economic activity and good jobs? Why are we leaving so many important questions unanswered? I urge you to consider what I have discussed today and help small, locally-owned businesses chart a path forward.

In closing, I would be remiss if I did not acknowledge the hard work of Committee member and North Dakota's own Senator Heidi Heitkamp, who has always opened her door to my colleagues and me. While we are still discussing many of these specifics I've shared with the Committee today, she always strives to find common ground and ensure that North Dakota businesses are operating in a supportive environment and have the resources they need to succeed. Thank you, Senator Heitkamp, for your service to our state.

And thank you Chairman Vitter, and all members of the Committee, for supporting locally owned businesses, both franchise and non-franchise. We need your help on this harmful joint employer policy. I would be happy to answer any questions you may have.