



# **COALITION TO SAVE LOCAL BUSINESSES**

**CIARA STOCKELAND**

**OWNER/FOUNDER, MODE  
GRAND FORKS, NORTH DAKOTA**

**TESTIMONY BEFORE THE U.S. SENATE COMMITTEE ON  
HEALTH, EDUCATION, LABOR AND PENSIONS**

**HEARING ON “STEALING THE AMERICAN DREAM OF  
BUSINESS OWNERSHIP: THE NLRB’S JOINT EMPLOYER  
DECISION”**

**OCTOBER 6, 2015**

Good morning Chairman Alexander, Ranking Member Murray, and members of the Committee. My name is Ciara Stockeland, the owner and operator of MODE designer outlet stores, which I founded in Fargo, North Dakota. I currently live in Grand Forks, North Dakota with my husband and our two amazing children, Harrison and Isabella. Thank you very much for the invitation to appear before this Committee to share my story of small business ownership and discuss the concerns of local business owners everywhere regarding the National Labor Relations Board's (NLRB) recent decision to change the "joint employer" standard.

It is an honor to be in Washington before the distinguished members of this Committee today. Likewise, it will be an honor to attend the "White House Summit On Worker Voice" tomorrow. This is an issue of great importance to franchise businesses like mine, and it is important that small business perspectives are heard by our nation's leaders.

I am here to speak on behalf of the hundreds of small business owners like myself who are members of the Coalition to Save Local Businesses. I joined the Coalition because I believe saving local businesses is what's at stake in this so-called joint employer issue.

Today I will share why it's so critical for the future viability of millions of small businesses and the 780,000 franchise businesses in America that this Committee and Congress reinstate the very successful joint employer standard by passing S. 2015. This simple, one-sentence legislation will restore certainty to small businesses and our employees. I urge every member to support the bill.

### **My North Dakota small business story**

Mr. Chairman, I am a franchisor. By working extremely hard and expending immeasurable time and energy, I founded a successful brand that has grown into a franchise. While some people may hear the term "franchise" or "franchisor" and think only of major corporations, they can also think of me, my story, and the story of hundreds of thousands of both franchisors and franchisees who are small business owners.

Nine years ago, I opened my first retail store, Mama Mia, a high-end maternity store, in Fargo, North Dakota. Shortly after, I developed the concept for MODE, and we opened our

first location right next door to Mama Mia. In 2008, I chose to merge the two stores into what was our first MODE location, as you would see it today. We wanted to build a brand. We began offering franchise opportunities in 2011, and we have successfully expanded to twelve locations across the Midwest and South Carolina. And, we hope to continue growing. Our goal is to have 75 stores by 2024.

I am here today because my goal is to grow our business and continue creating opportunities for future franchisees and their employees. The uncertainty introduced by the NLRB's BFI decision jeopardizes the expansion of my business. As a small business owner who meets countless public and private demands and competes against massive corporations each day, I find it terribly frustrating to have regulators harming my business and the careers of so many others in our system.

To understand my frustration, you must understand how franchising actually works. When our franchisees enter into an agreement to run a MODE franchise store, they sign up to own and operate their own business. I simply provide franchisees with a foundation from which to launch their business: our recognized brand and trademark, a set of business practices to ensure consistency and quality across all locations, and support for marketing and advertising. From there, our franchisees are responsible for operating their own stores and enacting their own employment practices, including hiring and training their own employees, setting their wages, and offering benefits based on their own competitive local markets. Franchisees obtain 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, labor and otherwise. They are truly an independent business. I want to see each and every one of my franchisees succeed, and I try to support them however I can, but I am not a joint employer of their employees. I don't need to be. I would not lend my trademark, business model, and reputation to any of my franchisees if I had any reservations about their ability to handle the operations of the business themselves. In fact, the very reason I started a franchise instead of opening stores under the "company owned" business model, was to ensure that every MODE location is run by a local business women who had "skin in the game." I wanted these women to be able to have the full responsibility of owning and

operating their own MODE store versus being a mere manager with constant oversight from hundreds of miles away in Fargo.

I am extremely proud of my success, and the success of our franchisees. From the very beginning, I believed that each franchisee gave me the opportunity to help foster a leader. Together with my team in North Dakota, we mentor, train, and work with our franchisees to create a successful business that strengthens its community. We want each of these talented individuals to grow in their leadership skills so that they too can pay it forward to what some may refer to as employees, but whom I call rising entrepreneurs.

One of our primary goals as a franchisor is to motivate women to dream big and take risks in all areas of their lives. Last week during our industry's annual meeting here in Washington, D.C., I was thrilled to celebrate the success of one of my entrepreneurs, Heather Pitsiladis, as she was recognized by her peers as the recipient of the "Franchisee of the Year Award" Heather has worked incredibly hard and is truly a leader in her community. I could not be happier to see her recognized for her hard work and determination. As part of the "Lean In" generation, I am overwhelmed by the extent to which MODE is contributing to the success of women in business. These are successes that we should all be celebrating, especially the strong women on this Committee, rather than watching while the NLRB takes actions that have the intended or unintended effect of upending their businesses. Because that is what is happening.

Mr. Chairman, franchising works. There are more than 780,000 franchise establishments employing nearly 9 million professionals in America today. Franchise businesses generate \$890 billion of economic output for the U.S. economy, representing 3 percent of the Gross Domestic Product. And, they have grown faster than the U.S. economy for five consecutive years. Franchising is perhaps the most successful business model in American history. It has been a successful model for myself, allowing me to take my concept and vision and allow other business women to realize their own success through its principals. Franchises are small businesses. Franchising jobs cannot be outsourced. Franchising means economic opportunity for people from any background. Why is this not precisely the business model that every regulator and member of Congress supports?

Our businesses are threatened because the NLRB's new, "indirect" standard may make employers liable for employees, even if they are not in their direct control. No longer can businesses be sure they will be safe from liability simply because they do not control the hiring, wages, or supervision of another business's employees. No one can safely assure me or any other small business that we are safe from joint employer liability with our franchisees or contractors.

### **Scope of the Browning-Ferris Industries decision**

On August 27, 2015, the NLRB issued its *Browning-Ferris Industries* (BFI) decision and invented a new joint employer standard based on one company having "indirect control" and "reserved contractual authority" over another company's employees. The Board's ruling is troublesome for numerous reasons.

First, the majority of NLRB members made clear that this is a significant, not a minor, change in federal labor law. The Board members write that "we have decided to revisit and to revise" the joint employer standard after being urged by the NLRB General Counsel "to abandon (the) existing joint-employer standard."

Second, the BFI decision was not an isolated one. The Board writes "we have decided to restate the Board's legal standard for joint-employer determinations and make clear how that standard is to be applied going forward." Furthermore, small and growing franchise businesses like mine are not the only ones jeopardized by this ruling. As the dissenting NLRB members write, "(t)he number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited." All businesses covered by the National Labor Relations Act and their business partners may face liability under the Board's new joint employer doctrine.

Third, the expansion of joint employer liability from "direct" control to both direct and "indirect" leaves small businesses facing serious uncertainty. As the Board majority states, "(w)e will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority." In other words, under the Board's new doctrine, an entity need not actually commit a crime to be found guilty; it need only to possess the ability to commit it. That alone creates the

uncertainty and risk that will directly affect my willingness to continue moving forward and growing my business.

Mr. Chairman, we need some common sense. The joint employer standard that has existed for decades works and protects small businesses from liability. Why change it? Because of issues pertaining to control? Let's address that. I do not have direct control over my system's employees. Do I have indirect control over my franchisees? Of course I do. And so does any franchise system with its local franchisees. While I have nothing to do with their employment decisions, I have a lot to do with their brand. Our brand was my idea, and it is in my best interest to protect it. Some other people thought our store concept was a good idea, so we gave them the permission to use it. That is the spirit of franchising. And now it needs the protection of Congress. The NLRB has now prepared such a nebulous, unpredictable joint employer test that practically allows them to target any business relationship.

### **Consequences of BFI decision on locally owned businesses**

How will the new joint employer standard impact local businesses throughout the country? Under the new indirect control test, prime companies may be held liable for the employment and labor actions of third-party vendors, suppliers, staffing firms, franchisees, or subcontractors, over which they have no direct control. Consequently, local business owners may forfeit operational control of their stores, clubs, inns or restaurants to their franchisors, or their contractual business may dry up because no one wants to partner with a business for which they could be held liable. The enterprise value of thousands of franchises and small businesses may be reduced due to their decreased operational control. Future franchise development is jeopardized as brands expand using a corporate ownership model.

Another real world effect of the new joint employer standard relates to small business insurance coverage. Employment practices liability insurance, known as EPLI, provides coverage to employers against claims made by employees alleging discrimination, wrongful termination, harassment or other issues. Insurers determine EPLI coverage based on the number of a company's employees; the more employees a business has, the higher the

premium. All businesses carry management liability insurance, which insures directors and officers from employment practices liability, fiduciary liability, and fidelity coverage, which is crime coverage related to employee dishonesty. In the eyes of any carrier, the more employees you have, the higher their risk. Under this new joint employer definition, if a franchisor takes responsibility for the total number of employees on the payroll of all franchisees – which you can be sure is how insurance companies will perceive that ruling, and not on a "case-by-case" basis – our premiums will either skyrocket or we may be unable to secure coverage at all. The risk to the carrier is much greater, in terms of class action lawsuits, so insurance companies will have no choice but to charge more. Inevitably, that cost will trickle down from the franchisor to the franchisee. And the only people who win in that scenario are class action lawyers.

As a franchisor who is now potentially facing new indirect control liability over my franchisees, I am faced with countless questions. Should I be compelled to start meddling in my franchisees employment decisions, such as their hiring, direction, supervision, and training practices? Should I distance myself from my franchisees or allow existing franchise agreements to expire? As I think about myself, my husband, and my two children, the bigger question becomes: Should I stop franchising altogether? I cannot afford the risk this would bring to our family.

Under the expanded joint employer standard, Main Street will see small businesses replaced by big businesses. There will be fewer local businesses because franchises will consolidate or choose to open corporate locations instead of franchises. Large companies will be less likely to expose themselves to unpredictable liability by contracting with small businesses for their products and services. Local entrepreneurs will not open new businesses in their local areas as small business opportunities decrease. As a result, America's Main Street will lose small businesses created by independent owners in their local communities.

Employees will lose too. They will have reduced opportunity to learn and advance in a massive corporation than in a locally owned business. There will be fewer mentoring opportunities because owners will be in distant corporate headquarters. They will earn

lower wages because they are not advancing. And they will enjoy less workplace flexibility because they will no longer be managed by small business owners in their hometown, but rather by corporate management in a faraway headquarters.

This issue is undoubtedly confusing. As we heard at last week's House hearing, labor law scholars and even NLRB members cannot agree what the impact of this ruling will be on my business. The Board who implemented this new ruling didn't bother clarifying it. My concerns are many, but they boil down to this: Why are businesses like mine not being given a fair shake by our government? Why can't we have a government that supports small businesses? Why are small business owners facing the artificial threat of losing our businesses because of unelected bureaucrats? All we want is a commonsense solution so we can continue to grow our businesses in the communities we care about, and in so doing, contribute something to our world. Certainly, we can find more clarity in a one sentence piece of legislation than in an arcane regulatory body's fifty-page decision.

In response to our concerns about our livelihoods, some academics and legal scholars have practically patted small business owners like me on the head and said "Don't worry, the NLRB will make its decisions on a 'case-by-case basis.'" Case-by-case inconsistency based on an unpredictable "indirect" control joint employer standard makes small business owners fear when we might be in the crosshairs of regulators. Small business leaders deserve more certainty and protection from Senators than the NLRB and its apologists provide.

### **Freshii memorandum offers no comfort to small businesses**

While the NLRB's BFI decision has created tremendous uncertainty and fear within the small business community, we heard from some advocates at the U.S. House subcommittee hearing on September 29, 2015 that there is no reason for franchise business people to be concerned. Certain witnesses told the U.S. House subcommittee that the BFI decision does not involve franchising, but they contended that the more important recent NLRB opinion to franchising involved a franchisee called Freshii.

The Freshii advice memorandum is simply a distraction. While I am not an attorney, I do understand that the Freshii advice memorandum was issued in May 2015 not by the NLRB,



but rather by the Division of Advice, which is part of the General Counsel's office of the NLRB. The distinction is that the General Counsel is the prosecutor and the Board members are the judges. The General Counsel's office wrote the Freshii advice memo, and the Board members decided the BFI case.

Mr. Chairman, importantly, the Freshii memorandum does not have the force of law. The BFI decision does. Freshii deals with one specific case, which is not being prosecuted, while BFI has been litigated and applies to all industries and all kinds of contracts held by businesses, small and large. And importantly, while the BFI decision was a contracting case, every franchisor-franchisee relationship is based on a contractual franchise agreement. Franchising is contracting.

As I've previously mentioned, this issue may seem confusing to members of the Committee, and it is also confusing to small business owners. And that is the point: confusion produces uncertainty and more litigation and less growth. Hard-working local business owners need the common sense clarity of S. 2015.

### **Need for this legislation cannot be overstated**

All senators will soon have an opportunity to stand up for small businesses in their states and support S. 2015. There is no time to lose. Prior to the BFI decision, some elected leaders told concerned small business owners not to worry and, effectively, "Let's wait for BFI to come out." Now, too many Members of Congress are saying, "It's too soon after BFI came out to rush to judgment." I cannot overstate the urgency needed in responding to a dangerous, unpredictable "indirect" control standard. What the NLRB has done is establish a nebulous joint employer doctrine that allows it to target any business relationship it wants. Which one of our small businesses will be their next target?

Mr. Chairman, as I've outlined in this testimony, there are real-world consequences to this ruling. Senators who refuse to support the one-sentence "Protecting Local Business Opportunity Act" will have to explain to their constituents why companies like mine may be liable for workers I don't even employ; why franchisees can no longer get Employment Practices Liability Insurance; why franchisees may lose operational control of the stores they established and built; why franchisees find that their franchise agreements are not

being renewed; and why small business livelihoods are being taken away. The fact is, this legislation means everything to us and our futures. We need your help. I need your help.

My grandfather was an entrepreneur. My father was an entrepreneur. I have created jobs in my own state through the growth of my company, and I now give the opportunity to countless business women to also own their own business through franchising. I want this freedom and opportunity for my son and daughter should they choose to pursue the American Dream by starting their own business.

Thank you Mr. Chairman, for recognizing and responding to an overreach by another branch of the Federal government by authoring S. 2015. I urge all members of this Committee to support locally-owned businesses in your states by working to enact the "Protecting Local Business Opportunity Act." I look forward to answering any questions you may have.