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The War on Small Business

A new ruling from the NLRB would hurt millions of American workers.

By Lee Habeeb & Mike Leven

Few Americans know his name — not even most staffers or reporters on Capitol Hill. But hundreds of thousands of small-business owners are afraid the government agency he works at will do irreparable harm to their companies.

He has served on the board of directors of the AFL-CIO Lawyers Coordinating Committee and as general counsel to the International Union of Operating Engineers. And he's now representing those same unions with a new and more powerful title: general counsel of the National Labor Relations Board.

His name is Richard Griffin, and he was appointed by President Obama in the fall of 2013 to be the nation's top labor-law prosecutor. It is the five-member board that actually rules on cases, but Griffin decides which companies to investigate and prosecute for alleged unfair labor practices.

Griffin wasted no time flexing his legal muscles: Last summer, he ruled that McDonald's could be held jointly liable for labor and wage violations by its franchise operators. In December, he doubled down, issuing complaints naming McDonald's Corp. as a "joint employer" of workers at its franchisees, overturning decades of settled law and disrupting a business model that has been the engine of job and wealth creation for the American working class for decades.

To say that franchising has been a good way to own a piece of the American Dream would be an understatement. The number of small-business owners using the model exceeds 770,000. Franchising touches not just fast food but every walk of American

life: AAMCO and Anytime Fitness, Century 21 Real Estate and Curves for Women, H&R Block and Hilton Hotels, Merry Maids and Molly Maids, Supercuts and Snap-on tools, U-Haul, The UPS Store, and Visiting Angels — all are franchises.

Why the change of heart at the NLRB? Had the legal relationship between franchisees and franchisers suddenly changed? The answer to the second of those questions is no. What changed was the legal leadership at the NLRB — and Griffin, it seems, is determined to change franchising.

We can't know for certain, because the NLRB won't let the public know the legal reasoning behind his ruling. Diana Furchtgott-Roth, a former chief economist of the U.S. Department of Labor who now works at the Manhattan Institute, called the NLRB to ask whether she could see the advice memorandum discussing the legal foundation for the change. She was told that "the memorandum is not available publicly because it's part of the litigation process."

This much we do know about Griffin's ruling: He came to his conclusion despite three decades of legal precedent under which a franchiser is a joint employer only if it "meaningfully affect[s] matters relating to the employment relationship such as hiring, firing, discipline, and direction." And he came to his conclusion knowing that the franchising business model is predicated on the idea that franchisers do not involve themselves in any of those aspects of the franchisees' operations.

He must have also known that franchisers and franchisees across America would be

terrified.

"The franchising business model has succeeded because it allows franchisees to control costs, such as labor, and reap the benefits of running their businesses profitably," Andy Puzder, the chief executive of CKE Restaurants, wrote in a recent *Wall Street Journal* editorial. "The owner of your local McDonald's decides who mops the floors; the decision doesn't come out of headquarters in Oak Brook, Illinois."

What's worse, Puzder explained, Griffin's ruling all but upends hundreds of thousands of legal agreements between franchisers and franchisees across the country. "At CKE Restaurants," Puzder wrote, "even if we wanted to manage our franchisees' employees, we lack the contractual authority to do so for the simple reason that neither party contemplated that we would manage them."

But contracts don't seem to matter to the NLRB's top legal cop any more than longstanding legal precedent.

The NLRB's decision also upends the business calculus involved in franchising. Time and again, franchisees and franchisers have explained to anyone who will listen that making franchisers joint employers kills all incentives to franchise. Why would entrepreneurs assume a 100 percent equity stake in a business that they don't really control? And why would a corporation choose to franchise if the legal liabilities are the same as in owning?

To be fair, not everyone is unhappy with Griffin's legal gymnastics. This past month, ten former restaurant workers

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sued McDonald's Corp. along with one of its franchisees for alleged wrongful termination, in a move that tests Griffin's new legal standard. We can be sure that many more suits are coming, because trial lawyers work on commission, and the thought of punishing a deep-pocketed corporate parent for the actions of a not-so-well-heeled individual franchisee is chum to these legal sharks.

Kendall Fells — director of Fast Food Forward, a coalition seeking to unionize fast-food restaurant workers in New York City — was also thrilled. "Today's decision by the NLRB's general counsel shows that McDonald's can no longer hide behind franchisees for illegal treatment of workers," he told reporters.

Why is he so excited? Up until now, workers have had to petition individual franchisees to form a union. Under Mr. Griffin's new reading, they can leapfrog their direct managers and petition corporate headquarters, which are more vulnerable to political pressure and less sensitive to local markets.

And who's behind Fast Food Forward? The Service Employees International Union — the group that has been staging demonstrations against McDonald's and other fast-food franchises, demanding higher wages and the right to organize their workers.

And that — we can safely assume — is what the latest missive from Richard Griffin is all about: making it easier for labor unions to turn hundreds of thousands of small businesses into union halls, and making it easier for trial lawyers to sue the parent company for the mistakes of individual owners.

But good news for union bosses and trial lawyers is bad news for franchisers, franchisees, their employees, their customers, and a big chunk of the American economy; franchising supports more than 18 million jobs and adds \$2 trillion to the national economy.

Who will suffer the most? The little guy and gal, including over 200,000 minority-owned franchises that put members of minority communities to work.

Daljit Hundal is one example. His family moved from India to England when he was seven. A family friend in California

recommended that he move there, and he did, starting at a junior college and eventually transferring to Fresno State. To help pay his bills, Daljit took one of those "dead-end," minimum-wage jobs we always hear derided in the media.

Only that dead-end job turned into a career. He started as a part-time cook at Carl's Jr. when he was 19, and was soon selected for a training program for a management position.

"I worked my way up from shift manager to sole general manager, two years later was promoted to district manager, and three years later became regional vice president at age 26," he explains.

When the corporation started to struggle, Carl's Jr. sold the stores Daljit was overseeing to franchisees. He was out of a job, but not for long. He cobbled together the cash — including money from his in-laws — to purchase his first franchise from the corporation that only months before had laid him off. He now owns more than a dozen Carl's Jr. restaurants, and a bunch of Jamba Juice stores, too.

"With the NLRB's ruling, I don't see the point of someone becoming a franchisee," Daljit says.

He talked about the impact on his business if his workers were unionized. "The amount you would have to raise prices to meet the increased costs is staggering, and if you have the store on the threshold of being barely profitable, higher prices will definitely lead it to lose customers and money, forcing the franchise to shut down."

Daljit saved for last his most cutting observation about the NLRB, unions, and trial lawyers: "You'll be hurting the very people you say you want to help."

Heidi Ganahl agrees. As the founder and CEO of Camp Bow Wow, a day-care franchise for dogs, she understands the power of the franchise model firsthand. She wrote an op-ed for a local Colorado paper that started with a story about her own franchising experience:

Widowed and broke in my late 20s, I had a simple business idea: a day care for dogs. The idea took off, but it was soon clear that I would neither have the funds nor the time to expand it on a significant scale. So like

thousands of other business owners, I decided to franchise. It was a win-win for me, who got to see my business idea flourish, and the franchisees, who received a ready-made business model for a reasonable price. Hundreds of thousands of pet owners in 40 states are happy I did. Not to mention the dogs!

Ganahl noted in her column that one in three franchises of Camp Bow Wow are solely owned by women, and 75 percent have at least one female owner.

Members of Congress have taken notice. "This is an assault on the American Dream," said Representative Carlos Curbelo (R., Fla.). "We need to limit the NLRB's ability to arbitrarily inflict harm on low-income and working-class families that need jobs the most."

Republican senators Mitch McConnell (Ky.) and Lamar Alexander (Tenn.) introduced a bill last fall that would restructure the NLRB. Under the current arrangement, three board members were chosen by Democrats and two by Republicans. The new bill, called the NLRB Reform Act, would add a sixth board member and require a balanced board consisting of three Republicans and three Democrats, just like the Federal Election Commission. "Our legislation is simple," Alexander explained. "It will change the NLRB from an advocate to an umpire."

This week, the U.S. Senate's Health, Education, Labor, and Pensions Committee (HELP) is holding a hearing on this issue called "Who's the Boss — The Joint Employer Standard and Business Ownership." We may hope it will resolve two questions that hundreds of thousands of small-business owners across America are asking that go beyond the definition of a joint employer.

Who is the NLRB's boss? And Richard Griffin's?

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