Question for the Record for Jerry Akers

Full Committee Hearing:
"Unleashing America's Opportunities for Hiring and Employment"
March 28, 2023
10:00 a.m.

Representative Lisa McClain (R-MI)

1. **Notice of Proposed Rulemaking: Employee or Independent Contractor Classification Under the Fair Labor Standards Act:** This rule rescinds the independent contractor rule adopted in 2021 by the Trump Administration. It replaces it with an overly restrictive six-factor economic reality test to determine whether a worker is "economically dependent" on a company. A bicameral letter was sent by dozens of congressional members opposing the proposed rule.[1] California passed AB5 in 2019, which implemented a three-part test for independent contractors.[2] California then had to pass AB 2257—the "fix it" bill—which created more than 75 exceptions to the law that fundamentally didn't work in practice. A study by Upwork estimates that 59 million Americans performed freelance work in 2021 and contributed $1.3 trillion to the U.S. economy.[3]

   Mr. Akers: If this rule were finalized, how many of these Americans will lose access to their current employment and either (1) have to move to a less flexible arrangement or (2) lose their job altogether?

   The standard for determining employee or independent contractor classification under the Fair Labor Standards Act is of direct and immediate concern to the franchise community, as an overly broad standard threatens to fundamentally upend the successful franchise business model, particularly in my case of owner-operated franchises. California's AB5 created great uncertainty within the franchise community. Corporate franchise brands are already reacting to the increased risk of AB5 by not franchising in California and taking away opportunities to reduce the risk. Franchisors, concerned about the ambiguity in how AB5 may be applied to franchisors to determine whether they are joint employers with their franchisees, scaled back support services directly provided to franchisees that may be used to classify them as joint employers and instead turned to third party service providers to perform the support services, often at the franchisees' costs. In the current labor market—where workers are very hard to come by and keep—the costs to franchisees of accessing the services of third parties for services (e.g., example employee handbooks, training programs, feedback regarding labor optimization) during months when turnover is high can be substantial. The impact to franchisees of AB5 was not restricted to California as franchisors modified support provided to franchisees uniformly across the franchise systems in all states where they operate. Of significant concern to franchisees is the threat to the equity that small business owners like me have built over years of operating franchise businesses, as the adverse consequences of the proposed changes to the joint employer rule will certainly diminish the value of our businesses and reduce our ability to monetize our investments. We do not need independent contractor tests that rob franchise owners of their investments by wrongly categorizing every franchisee as an employee of their franchise brand.