December 7, 2022

Submitted Via Regulations.gov

Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570–0001

Re: Comments on Notice of Proposed Rulemaking, Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54,641 (Sept. 7, 2022), RIN 3142–AA21.

Dear Ms. Rothschild:

We write on behalf of Americans for Prosperity Foundation.[1] We appreciate this opportunity to comment on the Notice of Proposed Rulemaking regarding the Standard for Determining Joint-Employer Status (RIN 3142-AA21), as published at 87 Fed. Reg. 54,641 (the "NPRM").

I. Introductory comments.

The NPRM proposes "to rescind and replace the final rule entitled 'Joint Employer Status Under the National Labor Relations Act,' which was published on February 26, 2020 and took effect on April 27, 2020." 87 Fed. Reg. at 54,641. More particularly, the "proposed rule would revise the standard for determining whether two employers, as defined in section 2(2) of the National Labor Relations Act (NLRA or Act), are joint employers of particular employees within the meaning of section 2(3) of the Act." *Id.*

The existing standard has been in place for almost four decades. The 2020 Final Rule sought to codify that standard so as to "foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby enhancing labor-management stability." 85 Fed. Reg. at 11,184. To be considered a joint employer under the existing rule, an "entity must

[1] *See* AMERICANS FOR PROSPERITY FOUNDATION, https://americansforprosperityfoundation.org/.

possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees." 29 C.F. R. § 103.40(a). Absent actual exercise of control, the entity will not be considered a joint employer even if, for example, it possesses a contractual right to impact the essential terms and conditions of employment but does not exercise that right. The existing rule also exclusively defines "essential terms and conditions of employment" as "wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction." 29 C.F.R. § 103.40(b).

Under the proposed new rule, however, a putative employer will no longer be required to exercise actual control over an employee's essential terms and conditions of employment; rather, simply having the "right to control," whether directly or indirectly, will be sufficient, even if that right is never exercised. As proposed new 29 C.F.R. § 103.40(e) states, "Possessing the authority to control is sufficient to establish status as a joint employer, regardless of whether control is exercised." 87 Fed. Reg. at 54,663. The proposed rule also expands the number of indicia the Board may consider in determining the nature of a putative employer's control by expanding on the existing list of essential terms and conditions of employment and stating that these categories on non-exhaustive. *Id.* (proposed new 29 C.F.R. § 103.40(d)).

We support genuine efforts to bring clarity and transparency to the standards applied by federal agencies in their oversight and regulatory functions. In this instance, however, the proposed changes to the existing standard are neither needed nor conducive to the proper function of the NLRA or the NLRB's regulatory activities. For the reasons set forth in greater detail below, implementation of the proposed new rule will destroy a longstanding, stable, and well-understood standard, introduce unnecessary complexity and uncertainty in the employer-employee relationship, and give rise to the increased likelihood of arbitrary decision-making by the NLRB, higher transaction and compliance costs for both new and established business entities, and fewer employment opportunities for American workers.

More particularly, the proposed new rule gives essentially unlimited discretion to the Board in making its joint-employer determinations and will make it all but impossible for businesses to know with certainty whether or not they will be considered a joint employer under the NLRA. Such freewheeling discretion will inevitably skew the Board's decision-making, whether deliberately or otherwise, away from the objective facts of the matter and toward favored political ends. By making the reserved right of control, even if never exercised, a dispositive factor in

determining joint-employer status, the proposed rule also violates the common law of agency principles within which the NLRB is obligated to act in this matter.

For these reasons, the NLRB should abandon its efforts to formulate a new regulation and retain the existing standard embodied in the 2020 Final Rule.

II. The proposed rule will introduce unnecessary uncertainty, drive up compliance costs, and arrogate arbitrary power to the NLRB.

The NPRM proposes a new rule that, if enacted, will significantly expand the number of business entities likely to be declared a joint employer under the NLRA, introduce greater uncertainty in business relationships, and grant arbitrary power to the NLRB in its decision making.

The number of rules and regulations governing employers in the Unites States has multiplied exponentially over the last 100 years to the point that significant barriers now exist to the entry of new businesses into the economy and the successful operation of existing businesses, especially the small and medium businesses that, in the aggregate, employ the greatest number of employees in the United States. This new rule will add to that compliance burden without providing any benefit over the existing rule. Indeed, the new rule will likely harm the workers the NLRB exists to protect by reducing the number of potential new employers and hindering the ability of existing employers to expand and grow their businesses. As one study showed, for the brief period of time when the NLRB expanded the joint employer standard through its 2015 *Browning-Ferris* case (which, in essence, the NPRM now seeks to resurrect), the cost to the American economy reached $33.3 billion per year, led to 376,000 fewer job opportunities, and resulted in a 93 percent increase in lawsuits against franchise businesses.[2]

One of the reasons the NPRM's expanded joint employer standard will be so costly, and thus ultimately harmful to American workers, is that it will increase uncertainty in business relationships. Entities that do not actually exercise control over employees might nevertheless be held to be a joint employer, thereby opening them up to potential liability for labor violations in situations outside their control and for which they have no expectations. They might even be required to recognize and collectively bargain with employees over whom they have no direct interaction or control. And given the new rule's essentially limitless criteria upon which the NLRB

[2] *See* Coalition to Save Local Businesses, *IFA: Expanded Joint Employer Standard Cost $33.3 Billion Annually*, http://savelocalbusinesses.com/2019/01/28/ifa-expanded-joint-employer-standard-cost-33-3-billion-annually/.

could rely in making its determinations, it will be almost impossible for many businesses to know ahead of time whether they will be found to be a joint employer.

In short, the proposed expanded joint-employer standard will subject hundreds of thousands of businesses to hitherto unrequired and unknown joint-bargaining obligations and give rise to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements that those businesses may not even be aware of, while at the same time giving greater arbitrary power to the NLRB over those entities subject to its regulatory oversight.

By contrast, the existing standard is a stable, well-understood rule under which American businesses have operated for decades. The existing rule provides employers with levels of certainty and flexibility that allow them to lower compliance costs and forge fruitful business relationships, which benefit themselves, the local communities they serve, and the workers they employ. The existing rule, by implementing long-standing common law agency principles, also restrains the arbitrary decision-making power of the NLRB in its joint-employer determinations.

For all of the above reasons, therefore, the NLRB should retain the existing formulation of the joint employer standard as set forth in the 2020 Final Rule.

III. The proposed new rule undermines the applicable principles articulated by the federal courts and previous NLRB caselaw for determining joint employment status under the NLRA.

The Supreme Court has held that, under the NLRA, common-law agency principles control the question of whether an employment relationship exists between a putative employer and employee. In *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968), the Court found Congress's purpose in amending the NLRA to expressly exclude independent contractors from the definition of "employee" under the Act "was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." The Court noted further that, in making determinations about whether an employer-employee relationship exists, "[w]hat is important is that the total factual context is assessed in light of the pertinent common law agency principles." *Id.* at 258.

The D.C. Circuit has made this point explicit in the joint-employer context: "Under Supreme Court and circuit precedent, the National Labor Relations Act's test for joint-employer status is determined by the common law of agency." *Browning-Ferris Indus. of California v. NLRB*, 911 F.3d 1195, 1206 (D.C. Cir. 2018); *see also id.* at 1207 ("Congress delegated to the Board the authority to make tough calls on

matters concerning labor relations, but not the power to recast traditional common-law principles of agency in identifying covered employees and employers."). Even the NLRB itself has acknowledged this incontrovertible fact. In *St. Joseph News Press*, 345 NLRB 474, 478 (2005), the Board explained its decisions have noted "particularly '*United Insurance's* observations about the appropriateness of using the common law of agency as the test for determining employee status' and found that Supreme Court precedent 'teach[es] us not only that the common law of agency is the standard to measure employee status *but also that we have no authority to change it*" (emphasis in original) (quoting *Roadway Package System*, 326 NLRB 842, 849 (1998)).

The "pertinent common law agency principles," in turn, center on the control exercised by the putative employer over the worker in question. As the Supreme Court stated in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989), "[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished" (refencing *Hilton Int'l Co. v. NLRB*, 690 F.2d 318, 320 (2d Cir. 1982) and *NLRB v. Maine Caterers, Inc.*, 654 F.2d 131, 133 (1st Cir. 1981)). The Court identified a list of various factors that may be relevant in determining a worker's status in a particular case, *Reid* 490 U.S. at 751–52, but each of these factors is designed to determine employment status based on whether the hiring party in fact controls the manner and means by which the work in question is accomplished. The D.C. Circuit made this point clear when it explained that, under the common law, the central question in "establishing a master-servant relationship—whether for purposes of the independent-contractor inquiry or the joint-employer inquiry—is the nature and extent of a putative master's control." *Browning-Ferris*, 911 F.3d at 1214.

The NLRA neither defines nor even uses the term "joint employer." Instead, the NLRB and the courts have developed the concept to address the situation where two or more separate entities meet the common law definition of an employer of the same individual or group of workers. In such cases, the same common law principles applicable to single employers applies. Joint-employer determinations, in other words, require a determination of the extent to which separate entities exercise control over the individual workers in question. *See, e.g.*, *Indianapolis Newspapers, Inc.*, 83 NLRB 407, 409 (1949) ("Despite the degree of integration established by the record, as set forth above, there is no indication that Star, by virtue of such integration, takes an active part in the formulation or application of the labor policy, or exercises any immediate control over the operation, of INI.").

The Supreme Court tangentially weighed in on this question in *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). There the Court held that, to qualify as a joint employer, an entity must "possess[ ] *sufficient* control over the work of the employees." 376 U.S. at 481 (emphasis added).

Consistent with the above caselaw, as the NLRB explained in its 2020 Final Rule, "[t]he general formulation of the Board's joint-employer standard is firmly established. The Board will find that two separate entities are joint employers of a single work force if the evidence shows that they share or codetermine those matters governing the essential terms and conditions of employment" (cleaned up), 85 Fed. Reg. at 11184; *see also Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 440 (D.C. Cir. 2004).

In 1982, the Third Circuit articulated a more specific formulation of that standard, holding that separate entities may be considered joint employers if they each "exert *significant* control over the same employees" because they "share or co-determine those matters governing essential terms and conditions of employment." *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982) (emphasis added). The Board adopted that same understanding of the standard in *TLI, Inc.*, 271 N.L.R.B. 798, 798 (1984) and *Laerco Transportation & Warehouse*, 269 N.L.R.B. 324, 325 (1984), as have other Circuits who have taken up the issue. *See, e.g.*, *3750 Orange Place Ltd. P'ship v. NLRB*, 333 F.3d 646, 660 (6th Cir. 2003); *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 306 (1st Cir. 1993)).

Thus, the level of control must be both *sufficient* and *significant* in light of the facts of the case. To that end, the 2020 Final Rule, consistent with long-standing NLRB caselaw and the common law, requires a joint employer to exercise direct and immediate control of the essential terms and conditions of employment. Actual control of those terms and conditions, as opposed to an unexercised or undifferentiated right to control, is necessary to meet the applicable common law of agency standards.

This long-standing framework was significantly disrupted by the NLRB in its 2015 decision in the *Browning-Ferris Industries* case, as already mentioned above and which the NLRB now seeks to resurrect in the NPRM. In *Browning-Ferris*, the Board rejected applicable common law principles of agency and arbitrarily expanded its power by holding for the first time in its history that actual exercise of control was an unnecessary condition of joint employer status and that a putative employer only needed to possess the "right to control," whether directly or indirectly. 362 NLRB 1599, 1613–14 (2015). Indeed, the Board showed it was aware of its intent to depart

from the settled caselaw, a fact noted by the D.C. Circuit in *NLRB v. CNN America, Inc*, 865 F.3d 740 (2017): "In *Browning-Ferris*, the full Board canvassed a 30-year history of its joint-employer cases—a period beginning with *TLI* and *Laerco Transportation* and running through *Browning-Ferris* itself—and concluded that the prevailing standard during that period required an employer's exercise of 'direct [and] immediate' control.'" *Id.* at 749; *see also id.* (the Board's previous caselaw had "focused exclusively on [a putative employer's] actual exercise of that control—and required its exercise to be direct, immediate, and not limited and routine.").

Notably, no previous case, whether before the NLRB or the federal courts, and no subsequent case up until the present, had or has held that the mere "right to control" without the actual exercise of control is enough to establish an employer-employee relationship. That includes the D.C. Circuit's *Browning-Ferris* case, upon which the NLRB now seeks to rely in the NPRM. As the court in that case stated, "this case does not present the question whether the reserved right to control, divorced from any actual exercise of that authority, could alone establish a joint-employer relationship." 911 F.3d at 1213.

The D.C. Circuit's *Browning-Ferris* case thus does not support the rule the NLRB now seeks to implement. Indeed, the D.C. Circuit ultimately rejected the Board's underlying decision in *Browning-Ferris* because the Board overreached its understanding and application of the applicable common law principles. Although the court did find the right to control an employee, whether directly or indirectly, is a proper factor to consider in the joint-employer determination, the ultimate question for purposes of the proposed rule under the NPRM is whether that, in and of itself, is sufficient to establish the level of control necessary to establish joint-employer status. The D.C. Circuit held that it was not, for two reasons.

First, as already noted, the case did not present the question of whether the right to control without actual control was sufficient. *Second*, the court held that indirect control, of itself, is not sufficient. That is, whereas indirect control might be a relevant factor in establishing the employer relationship, to be sufficient, that indirect control needed at the very least to be over the employee's essential terms and conditions of employment. As the court explained, "indirect control can be a relevant factor in the joint-employer inquiry. But in failing to distinguish evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting, the Board overshot the common-law mark." *Browning Ferris*, 911 3.d at 1216. The court also explained the failure of the Board's approach in these terms:

> The problem with the Board's decision is not its recognition that indirect control (and certainly control exercised through an intermediary) can be a relevant consideration in the joint-employer analysis. It is the Board's failure when applying that factor in this case to hew to the relevant common-law boundaries that prevent the Board from trenching on the common and routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts. To inform the joint-employer analysis, the relevant forms of indirect control must be those that share or co-determine those matters governing essential terms and conditions of employment. By contrast, those types of employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor cast no meaningful light on joint-employer status.

Id. at 1219–20 (cleaned up); *see also id.* at 1220 ("[N]ot every aspect of control counts. The critical question is what is being controlled.").

Consistent with this D.C. Circuit decision, the 2020 Final Rule defines the essential terms and conditions of employment that are relevant to the joint-employer inquiry and the extent of control necessary for two or more entities to be found to share or codetermine essential terms and condition. Its requirement of direct and immediate control is designed to ensure that the necessary level of control—the significant and sufficient levels identified as necessary by the federal courts—is met. As explained by the NLRB in enacting its Final Rule, the existing standard also includes the indirect and reserved right to control factors identified by the D.C. Circuit in *Browning-Ferris* as relevant to the joint-employer inquiry, "but only to the extent that it supplements and reinforces evidence of direct and immediate control over essential terms and conditions." 85 Fed. Reg. at 11186. The reason for this limitation is straightforward:

> [E]vidence of contractually reserved control over an essential term or condition of employment is probative for the purpose of determining whether an entity possesses or exercises direct and immediate control over that essential term or condition. Plainly, the fact that an entity has a contractually reserved right to control an essential term or condition is probative of whether it possesses control over that term. Such evidence may also be probative of whether the control possessed and exercised is "substantial," as that term is defined in the final rule. . . .. Similarly, evidence of indirect control over an essential term or condition of employment may be probative of whether the control possessed and exercised is substantial.

85 Fed. Reg. at 11186.

By contrast, by directing the Board to find joint-employer status even in situations where the business entity never exercises actual control over the employees in question, the NPRM will create a rule that is unsupported by caselaw or the common law understanding of employer-employee relationships. Further, by making items considered to be essential terms and conditions of employment essentially unlimited, the NPRM directs the Board to consider those types of control that "cast no meaningful light on joint-employer status." *Browning Ferris*, 911 3.d at 1220. The NPRM thus proposes a standard that is beyond the authority of the NLRB to enact because that standard exceeds the applicable common law boundaries. The proposed new standard should therefore be rejected and the 2020 Final Rule retained.

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Thank you for your time and attention. If we can provide any additional information or otherwise be of further assistance, please do not hesitate to contact us.

Respectfully submitted,

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