



November 29, 2022

VIA ELECTRONIC SUBMISSION

Lauren McFerran
Chairman
National Labor Relations Board
1015 Half Street SE
Washington DC 20570-0001

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

Re: Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641 (Sept. 7, 2022).

Dear Chairman McFerran and Ms. Rothchild:

On September 7, 2022, the National Labor Relations Board (the Board) proposed a rule that would expand the joint-employer definition under the National Labor Relations Act.¹ The rule would extend liability to employers that have indirect and reserved control over one or more employees' essential terms and conditions of employment. This letter constitutes the Office of Advocacy's (Advocacy) public comments on the proposed rule.

Advocacy is concerned that the Board's new joint employer standard is too ambiguous and broad, providing no guidance for contracting parties on how to comply or avoid liability. Advocacy recommends that the Board clarify and limit the types and degrees of indirect and reserved control that would now trigger joint-employment liability. Additionally, the Board should resolve any conflicts with existing Federal requirements. Advocacy encourages the Board to reassess the compliance costs from this regulation. Additionally, the Board should consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts to small entities as required by the Regulatory Flexibility Act (RFA).

¹ Standard for Determining Joint Employer Status, 87 Fed. Reg. 54641(Sept. 7, 2022). (hereinafter "2022 Proposed Rule").

I. Background

The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA,² as amended by the Small Business Regulatory Enforcement Fairness Act,³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁵

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁶

The Proposed Rule

The Board is expanding the standard for determining joint employer status under the National Labor Relations Act. Under this proposal, two or more employers are joint employers if they share or codetermine those matters governing the essential terms and conditions of employment. The Board proposes to consider both direct evidence of control and evidence of reserved and/or indirect control over these essential terms and conditions of employment when analyzing joint employer status.⁷ Reserved control can include control that is contractually reserved but not exercised. Indirect control can be control through an intermediary. The proposed rule rescinds a 2020 final rule on the joint-employer standard. To find joint employer liability, an employer was required to have substantial direct and immediate control over one of more essential terms and conditions of employment.⁸ These terms and conditions must meaningfully affect the

² 5 U.S.C. §601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL. 111-240) §1601.

⁵ *Id.*

⁶ *Id.*

⁷ See 2022 Proposed Rule, page 54641.

⁸ Joint Employer Status Under the National Labor Relations Act, Final Rule, 85 Fed. Reg. 11184 (Feb. 26, 2020). (hereinafter "2020 Final Rule").

employment relationship. The Board and the courts have revisited the joint employer standard multiple times in the last few years.⁹

II. Advocacy's Small Business Concerns

The Board's Initial Regulatory Flexibility Analysis identified small contractors and subcontractors, temporary help service providers and users, franchisees, and labor unions as small entities that would be affected by this rule.¹⁰ On October 20, 2022, Advocacy held a small business roundtable with NLRB officials and over 115 small businesses and their representatives. These small businesses represented a variety of industries including construction, finance, hospitality, and transportation. The following comments are reflective of issues raised during this roundtable and other conversations with small businesses.

1. NLRB's Expanded Joint Employer Definition is too Broad and Confusing and Provides No Guidance for Small Businesses

Small businesses at Advocacy's roundtable expressed concern that the Board's expanded joint employer standard is too broad. The expanded standard can potentially target any third-party contractual relationship that involves indirect or reserved control from an inexhaustive list of terms and conditions. For example, this proposal may significantly affect franchisor and franchisee relationships. Franchise agreements often contain many terms and conditions with reserved control over the business operations of a brand, such as provisions regarding management, operations, and human resources.

Federal contractors and subcontractors also expressed concern that the proposed rule would hamper their contracting process. Construction businesses noted that the industry is composed of specialized separate contractors, such as general contractors, subcontractors, and staffing agencies, who all come together on specific construction projects. These arrangements are even more important due to recent labor shortages. A small construction company commented that prime contractors have reserved and indirect control over many terms in their subcontractors' contracts to get a project completed on time, such as requirements over schedules and performance. Other small businesses in retail, restaurants, and hotels commented that this proposed rule may impact their third-party contracts with temporary staffing agencies, vendors, catering, cleaning crews, and many other businesses.

⁹ For a thirty-year period, the Board limited joint-employer status to employers that exercised direct and immediate control over the terms and conditions of employment. *TLI, Inc.*, 271 NLRB 798 (1984); *Laerco Transportation*, 269 NLRB 324 (1984). See also *AM Property Holding Corp.*, 350 NLRB 998 (2007), *Service Employees International Union, Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011); *Airborne Express*, 338 NLRB 597 (2002); *Flagstaff Medical Center*, 357 NLRB 659 (2011). This standard changed significantly with the 2015 *Browning-Ferris* decision, where the Board found that the reserved and indirect control are probative of joint employer status. *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015). On December 28, 2018, the U.S. Court of Appeals for the District of Columbia upheld this determination that both reserved and indirect control can be relevant factors in the joint-employment analysis. However, the court reversed and remanded the Board's application of the indirect-control element in this case. *BFI Browning-Ferris of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

¹⁰ See 2022 Proposed Rule, Initial Regulatory Flexibility Analysis, at 54660.

Advocacy recommends that the Board limit and clarify what degree of indirect or reserved control on one or more terms and conditions of employment is sufficient to trigger joint-employment status. The Board should provide guidance to contracting parties regarding which terms are routine contracting terms and which terms are essential to permit meaningful collective bargaining.¹¹ For example, terms like scheduling and timing requirements should be considered routine contracting terms. Additionally, the Board should remove the provision that allows any other contract term to be included in the list of terms and conditions subject to liability.¹²

2. NLRB's Proposed Rule Conflicts with Federal Requirements

The Board does not identify any federal rules that conflict with the proposed rule in the IRFA. At Advocacy's Roundtable, however, small businesses identified two areas of the proposed rule that conflict with Federal rules and mandates.

First, roundtable participants noted that many federal requirements require prime contractors to have indirect and reserved control over their subcontractors' terms and conditions of employment, such as wages, safety, and hiring and firing.¹³ Many other third-party contracts have similar requirements to follow federal mandates. The Board should clarify that contract terms to abide by federal requirements should be considered routine components of a company-to-company contract, and not essential terms and conditions subject to joint employer liability.

Second, this proposed rule may conflict with a recent presidential announcement on reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners.¹⁴ Advocacy is concerned that this proposed rule would violate a new federal mandate to bolster the ranks of underserved small business federal contractors, including women-owned, Black-owned, Latino-owned, and other minority owned small businesses. Roundtable participants commented that this proposal may create a barrier to entry for small businesses new to federal contracting. These businesses need more mentorship and guidance from larger prime contractors and

¹¹ *Browning-Ferris of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018). The Court of Appeals reversed and remanded the Board's application of the indirect-control element in the *Browning v. Ferris*, because the Board never delineated which terms are "essential" to make collective bargaining meaningful and those that are "intrinsic to ordinary third-party contractual relationships."

¹² See 2022 Proposed Rule, page 54663 § 103.40 Joint Employers, and page 54647. The definition of joint employment lists the terms and conditions of employment that may trigger liability, but notes that this list "will generally include, but are not limited to" these terms. The Board states that this provision "leaves some flexibility for the Board in future adjudication under a final rule."

¹³ Small federal contractors at the Roundtable commented that they must comply with Dep't of Labor requirements for safety under 29 U.S.C. §§ 651-678 (1976) [OSHA], as well as for wages under Dep't of Labor Wage and Hour Division, (such as the Fair Labor Standards Act and the Davis Bacon Act) and for hiring under the Office of Federal Contract Compliance Programs (Pub. L. No. 101-336, § 503, (1990) [ADA]).

¹⁴ Press Release, The White House, Statements and Releases, FACT SHEET: Biden-Harris Administration Announces Reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners, (Dec. 2, 2021), FACT SHEET: Biden-Harris Administration Announces Reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners | The White House.

subcontractors. The Board should analyze the impact of the proposed rule on these underserved small business owners.

3. NLRB’s Initial Regulatory Flexibility Analysis Underestimates the Compliance Cost of this Rule for Small Businesses

Advocacy is concerned that the Board has underestimated the compliance costs and burden of this rule for small businesses. In the IRFA, the Board only estimates one hour of time for a small employer to read and understand the rule, at a cost of under \$150 per small business.¹⁵ The Board acknowledges that employers may choose to rearrange their business relationships “to minimize risk of joint employer status” but does not estimate any employer compliance costs.¹⁶

Small businesses commented that franchisors may pull back involvement with their franchisees to indemnify themselves from liability. Franchisors may also provide less legal and human resources advice, which will result in hiring outside professionals to provide guidance, documents, and compliance training. Franchisees reported that this proposal may add costs of thousands of dollars a year and may require hiring a dedicated staffer. A restaurant franchisee owner stated that these costs will prohibit small business expansion, as restaurants are currently facing increased food prices and labor shortages. A general contractor commented that the compliance costs of this rule are hard to estimate because the rule makes them liable for every subcontractor, making it impossible to perform work and produce deliverables. A construction industry representative worried that this rule would create increased litigation exposure. Roundtable participants also commented that this proposal may dissuade larger companies from subcontracting with smaller businesses or utilizing small staffing firms.

III. Conclusion

Advocacy is concerned that the Board’s new joint employer standard is too ambiguous and broad, providing no guidance for contracting parties on how to comply or how to avoid liability. Advocacy recommends that the Board clarify and limit the types and degrees of indirect and reserved control that would now trigger joint-employment liability. In addition, the Board should resolve any conflicts with existing Federal requirements. Advocacy encourages the Board to reassess the compliance costs of this regulation and consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts on small entities as required by the RFA. Advocacy recommends that the Board publish a supplemental IRFA, allowing additional time for public comment.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Janis C. Reyes at (202) 798-5798 or by email at Janis.Reyes@sba.gov.

¹⁵ See 2022 Proposed Rule, page 54662.

¹⁶ *Id.* at 54662.

Sincerely,

/s/

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/s/

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