COALITION FOR A
DEMOCRATIC WORKPLACE

Ms. Roxanne Rothschild
Acting Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570-0001

By electronic submission: http://www.regulations.gov

RE: RIN 3142-AA13; The Standard for Determining Joint-Employer Status; Notice of Proposed Rulemaking

Dear Ms. Rothschild:

These comments are submitted on behalf of the Coalition for a Democratic Workplace ("CDW") and the undersigned organizations[1] ("the Commenters"), pursuant to the National Labor Relations Board's ("the NLRB" or "the Board") Notice of Proposed Rulemaking and Request for Comments regarding The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46681 (Sept. 14, 2018) ("Proposed Rule"). For the reasons outlined below, the Commenters urge the Board to adopt the Proposed Rule but with the addition of clarifying definitions, which the Commenters respectfully submit will enhance predictability and stability of the rule's application and outline essential terms and conditions of employment that allow for meaningful collective bargaining.

CDW is a collection of nearly 500 organizations[2] representing the interests of millions of employers nationwide. All of CDW's members are or represent the interests of "employers" as defined by the National Labor Relations Act ("the NLRA" or "the Act") and are consequently affected by the Proposed Rule. CDW advocates for its members on numerous issues of significance related to Board policy and interpretations and applications of the Act.

The undersigned organizations represent employers operating in nearly every conceivable industry in all 50 states and many territories.

Comments

The Proposed Rule adopts the long-accepted, practical requirement that the Board will find a joint employment relationship under the NLRA where a business or other entity (the "Retaining Company") actually exercises control over the essential terms and conditions of another

[1] See Appendix A.

[2] A full list of CDW's Members is available at https://myprivateballot.com/about/.

employer's (the "Retained Company") employees.[3] The Commenters are uniquely positioned to provide insight on this proposal as they represent businesses of all types that depend on complex contractual relationships to meet customer and consumer demands, including agreements between licensors and licensees, franchisees and franchisors, and employer entities, such as construction companies, manufacturers, hospitals, wholesalers, retailers, and hotels, and their vendors, suppliers and/or subcontractors.

1. The Proposed Rule Would Foster Consistency, Stability and Predictability in the Application of the Board's Joint Employer Doctrine

The Proposed Rule reinstates a process for determining joint employer status that provided clear, understandable and easy to apply rules for the Board, courts, employers, employees and unions for over thirty years. In doing so, the Proposed Rule provides greater certainty to parties regarding when joint employer status is triggered under the NLRA and helps businesses avoid the unintended liabilities and obligations that can accompany joint employer status, such as having to bargain with a union representing the employees of another employer and the potential of having to defend against unfair labor practices alleged to have been committed by the other entity. Such predictability and stability in the law promotes investment and economic growth. It is also consistent with the Act's mandate, if union representation is chosen, to encourage efficient and meaningful collective bargaining.[4]

Under the Proposed Rule the Board would only find joint employer status when a Retaining Company actually exercises control over essential terms and conditions of employment of the employees of the Retained Company, such as hiring, firing and determining rates of pay. This clear rule provides predictability for companies and encourages economically fruitful business-to-business relationships, which are particularly beneficial to small businesses. It also ensures meaningful collective bargaining between a union and the party or parties that exercise *actual* control over terms of employment. Mere contractual reservations of control, or the types of indirect control that are inherent in business-to-business contracting, will not alone create a joint employment relationship.

[3] The comment will use the term "Retaining Company" for businesses that contract with other companies to perform services. The term "Retained Company" will refer to businesses that perform services for their partners. Because so many businesses fit within this model, the use of these two terms will allow consistency throughout the comments. Although franchisees and franchisors do not actually fit the "retaining" and "retained" model, they are included in the terms, because the general principles are the same.

[4] In its decision in *Browning Ferris Indus. of Cal., Inc. v. NLRB*, No. 16-1028 (D.C. Cir. Dec. 28, 2018), the U.S. Court of Appeals for the District of Columbia Circuit noted that the Board's current test includes a prong related to meaningful collective bargaining but that the Board had not addressed it in any decision, so its scope was unclear. The Proposed Rule properly considers meaningful collective bargaining in its rule, and reflects the Board's policy expertise regarding the types of control an employer can exercise that will result in meaningful bargaining.

The Proposed Rule's exclusion for types of control that are merely "limited and routine" ensures companies can reserve control over common branding issues like uniforms, hours of operation and customer service standards without rendering them joint employers under the Act. These branding issues are important to the success of various business models, including franchising, which is a powerful engine of economic growth in numerous business sectors.[5]

The members of the business community rely on clear, predictable and stable rules and regulations to structure the many different forms of relationships that are common to commerce and support a strong, vibrant economy. The Proposed Rule recognizes the importance of clarity and stability in the joint employment space and would significantly benefit the regulated community.

2. The Proposed Rule Addresses Practical Business Problems Experienced by the Regulated Community

Over the last few years businesses have repeatedly articulated through congressional hearings, letters to lawmakers, and many other means that in the absence of a clear and easy to apply rule, larger, established businesses will avoid the risk of possible unintended joint employer liability by either: (i) ceasing or limiting business-to-business agreements altogether, particularly with smaller entities, or (ii) exercising excessive control over contractors, franchisees, etc. and consequently reducing entrepreneurial opportunity. Indeed, small businesses of various types have consistently noted in congressional testimony that their franchisors and larger business partners will take the following detrimental actions in order to avoid risks associated with a vague joint employment standard:[6]

- Increase corporate ownership among franchises while limiting opportunities for smaller companies to partner with larger, more established businesses; and/or

- Exercise more control over franchisees and smaller contractors through:

[5] The number of franchise establishments in the United States was projected to have reached almost 760,000 in 2018. These businesses will employ over 7.8 million people and account for nearly 3% of the U.S. GDP in nominal dollars ($451 billion). See *Franchise Business Economic Outlook for 2018 (January Forecast)*, IHS Markit (January 2018).

[6] Testimony of Clint Ehlers, President, FASTSIGNS, testimony of Catherine Monson, CEO, FASTSIGNS, and testimony of Jagruti Panwala, hotel owner and operator (*Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators,* H. Comm. on Education and the Workforce, Subcomm. on Health, Employment, Labor and Pensions, 113th Cong. 16-18; 24-26, (Sept. 9, 2014)); Testimony of John Sims IV, Owner/Operator Rainbow Station at the Boulders (*Who's the Boss? The "Joint Employer" Standard and Business Ownership*, S. Comm. on Health, Education, Labor and Pensions, 114th Cong. (Feb. 5, 2015)); Testimony of Vinay Patel, President and CEO, Fairbrook Hotels, and written statement of Stuart Hershman, Esq. on behalf of International Franchise Association (*Risky Business: Effects of New Joint Employer Standards for Small Firms*, H. Small Business Comm., Subcomm. on Investigations, Oversight and Regulations 114th Cong. (March 17, 2016).

- Limiting entrepreneurial opportunities;
- Limiting revenues and profits as a result of the expenses associated with the increased control by the larger business partner or franchisor; and
- Demoting business owners to "middle managers."

In addition to these testimonial accounts from business owners, a detailed study of the effect of the Board's current joint employer standard on the business community found 40,000 franchise businesses and 600,000 jobs were at risk, because the business community lacked clear guidance on the joint employer standard.[7] In just a small snapshot of the effect on the overall regulated community, the *Wall Street Journal* reported franchisees faced increased recruiting costs, decreased worker training resources and reversals of planned expansions because of uncertainty over the state of joint employment. [8]

Both franchisors and franchisees reported negative economic effects because of uncertainty regarding joint employer status. In response to surveys conducted by the International Franchise Association, franchisors said they cut back significantly on assistance provided to franchisees.[9] More than 90 percent of franchisors surveyed said they implemented defensive distancing behaviors to avoid potential liability, including reducing training resources, providing fewer or less detailed sample documents for franchisees, decreasing supervision of operations and performance standards and refusing to provide legal advice. Franchisees reported feelings of isolation and lack of support from their franchisor partners and said they missed out on many of the benefits that encouraged them to enter into a franchise relationship in the first place.

The effect of reduced interactions between franchisees and franchisors resulted in slowed growth, reduced expansion and fewer entrepreneurial opportunities for both franchisees and franchisors. For example, in response to the IFA's survey, franchisees reported revenue suppression rates between two and ten percent because of the additional expenses they needed to incur on seeking advice from outside counsel or third-party groups rather than their franchisor partners. Franchisors commented that they were less likely to enter into franchise agreements with less experienced or new franchisee-owners, because they could not provide the type of assistance and oversight they traditionally provided to help new partners get off the ground and succeed. Franchisees also reported problems with talent acquisition because of the lack of

[7] Crews, A. et al. *FRANdata Key Findings and Survey Results: 2015 National Labor Relations Board Joint-Employer Ruling*, FRANdata (2015).

[8] Trottman, Melanie, "Some Small-Business Owners Trim Expansion Plans, Cite New Labor Law," *Wall Street Journal* (Aug. 5, 2016) (https://www.wsj.com/articles/some-small-business-owners-trim-expansion-plans-cite-new-labor-law-1470389403).

[9] The IFA surveyed franchisees and franchisors from various sectors of the industry, including hospitality, healthcare, quick-service restaurants and salons.

collaboration with franchisors, resulting in staffing shortages in key positions that prevented the franchises from reaching their full revenue potential.[10]

Supply chain businesses also face marginalization and reduced opportunity under a broad and ambiguous joint employer standard. A study by the American Action Forum estimated the Board's joint employer rule affects more than 54 million workers, including more than 46 million in supply chain businesses that provide goods or services to business partners, rather than directly to consumers.[11] A vague joint employer rule discourages businesses from entering into relationships with supply chain companies because of the increased risk, and in turn increased potential cost, of those relationships. A reduction in supply chain business would harm American workers, because supply chain jobs represent some of the higher paying jobs in the economy.[12] It would also harm American businesses that rely on supply chain companies to provide expertise in discrete, specialized areas to ensure product and service quality.

A broad and ambiguous joint employer standard also leaves more businesses exposed to harmful secondary picketing activity. Under Section 8(b)(4) of the Act, a union may not boycott neutral businesses uninvolved in disputes between the union and the employer of a group of employees the union represents. A vague and potentially limitless joint employer standard, however, makes it much easier to blur the lines between the primary employer with whom the union may have a dispute, and a neutral employer doing business with the primary employer. If the neutral employer (which in this context could be the primary employer's supply chain partner, franchisor, or beneficiary of contracted services) is deemed a joint employer, it loses its protection against secondary boycotts. The potentially harmful impacts such a standard could have on the business community are as numerous as they are obvious. Under the current joint employer standard, the neutral could find itself the target of customer or product boycotts and/or appeals to its own employees to withhold their services merely because the neutral has retained unexercised control over the employment terms of the primary employer's employees. This is not the type of labor policy outcome Congress had in mind when it enshrined secondary boycott protections into the Act.

The Proposed Rule addresses the problems businesses face in the current climate of uncertainty surrounding joint employment under the NLRA by ensuring a company will not be considered a joint employer for the employment decisions of its franchisees, vendors, or subcontractors unless it exercises meaningful control over essential terms and conditions of employment. Business

[10] For example, one franchise reported it could employ about six additional stylists for its salon business if it had recruiting assistance from its franchisor and that each stylist could create $50,000 in annual revenue. Other businesses made similar reports. Many franchisors had previously provided assistance or recommendations to franchisees regarding talent acquisition but refrain from doing so because of joint employer liability risks.

[11] Gitis, Ben, *The Joint Employer Standard and the Supply Chain*, American Action Forum (Nov. 26, 2018) (https://www.americanactionforum.org/research/joint-employer-standard-and-supply-chain/).

[12] *Id*. (finding supply chain workers make, on average, up to 50 percent more than workers in non-supply chain jobs).

owners and executives from a host of different industries have expressed their support for language similar to what is contained in the Proposed Rule in sworn testimony in multiple congressional hearings and through letters to lawmakers.

With clear, understandable, and easy to apply rules, businesses will be free to provide reasonable, arms-length guidelines and assistance to their franchisees, supply chain partners, vendors and subcontractors to ensure brand protection and quality control without risking unforeseen and unwanted joint employer liability. At the same time employees and unions will be guaranteed that any entity that actually has direct and immediate control over essential terms and conditions of employment will be at the bargaining table and held accountable for any violations of the Act.

3. The Proposed Rule is Consistent with the Intent of Taft-Hartley

The Proposed Rule reflects a reasonable and lawful application of common law agency principles to the context of joint employment under the NLRA.[13] The dissent to the Proposed Rule misses the mark when it essentially argues that the common law of agency would compel a joint employer finding based on retained but unexercised control alone. This view is both at odds with Congress' aim in passing the Taft-Hartley Act ("Taft-Hartley") and unsupported by the subsequent decisional law addressing the joint employer question.

While the historical context of Taft-Hartley and the decisional law since its passage make clear that Congress incorporated principles of common law agency in defining who is an employee under the Act, the Board and the courts have since recognized a difference between, on the one hand, the common law of agency as applied to distinguish between a statutory employee and an independent contractor and, on the other, the determination of whether an entity is a joint employer. There is no indication in Taft-Hartley's legislative history that Congress intended these distinct analyses to be treated identically under the Act, and subsequent interpretation of the Act shows this two-track approach is consistent with both the common law and Congressional intent. It follows that the Proposed Rule's requirement that an employer exercise actual control in a direct fashion to qualify as a joint employer is consistent with the Act's intent and does not stray impermissibly outside the bounds of the common law.

i. Taft-Hartley focused on distinguishing employees and independent contractors, not joint employers

Congress enacted Taft-Hartley to, among other things, exclude independent contractors from the definition of "employee" under Section 2 of the NLRA.[14] Specifically, Congress determined the

[13] Federal Register, *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681, 46688-89 (Sept. 14, 2018) (to be codified at 29 C.F.R. 103).

[14] 61 Stat. 136, 73 Stat. 519, 29 U.S.C. s 151 et seq.

Supreme Court had misinterpreted Congressional intent when it decided *NLRB v. Hearst Publications*.[15] In *Hearst Publications*, the Court concluded that independent contractor newspaper deliverers were covered as employees under the Act.

In making its decision the Court determined that "the assumed simplicity and uniformity, resulting from application of 'common law standards,'[16] [did] not exist." Instead, the Court considered the history and purpose of the Act to apply it in the context of newspaper deliverers who served in an independent contractor capacity. In doing so, the Court held that "Congress…was not thinking solely of the immediate technical relation of employer and employee" when it passed the original Wagner Act and reasoned "Congress had in mind a wider field than the narrow technical legal relation of 'master and servant.'"[17]

Thus, instead of applying that common law, the Court based its decision on the premise that "economic facts of the relation" with the employer should figure into determining who is an employee under the Act.[18] Because the independent contractor newspaper deliverers were highly dependent on Hearst Publications for their work and livelihood, the Court found that they should be covered as employees under the Act based on that economic reality.

Congress disagreed. In response it adopted Taft-Hartley and made clear its intent was only to regulate the dealings between traditional common law masters and servants – and that Congress did not intend workers outside of that traditional relationship, such as independent contractors, to be employees covered by the Act. The legislative history shows Congress intended to codify elements of the common law master-servant relationship as a fundamental requirement for employee status under the Act.[19]

At the time Taft-Hartley passed, Congress could not have intended or foreseen whether, or how, common law agency principles might apply in the context of joint employment. Instead, the amendment was very particularly focused on legislatively overruling *Hearst Publications* and clarifying the Act's definition of "employee" to expressly exclude independent contractors.

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[15] *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).

[16] The common law of master and servant (the archaic term for employer and employee) was grounded in the common law of agency, because it was originally developed for determining whether a master could be held liable for the actions of its servant. This in turn was based on whether the servant was acting as an "agent" of the master at the time the servant committed the conduct for which a third party sought to hold the master liable. Restatement (First) of Agency § 2, cmt. a (1933).

[17] *Id.* at 124.

[18] *Id.* at 127-28.

[19] H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947)("[Employee], according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire…[and who] work for wages or salaries under *direct supervision*.") (emphasis added).

Indeed, the narrow intent of Taft-Hartley reflected the simple reality of the time – joint employer conflicts did not frequently arise, and when they did, it was not in the context of federal statutory interpretation.[20] This historical context undermines the dissent's suggestion that Congress intended common law agency principles to apply in the joint employer context in exactly the same way as they applied in the independent contractor-employee context.[21]

ii. After Taft-Hartley, Board and case law established common law agency's proper role in joint employer analysis

The Board's decision in *Greyhound Corp.* is the widely-acknowledged proper standard for joint employer analysis under the Act.[22] In *Greyhound*, the Board found a joint employment relationship, because Greyhound and its maintenance company "share[d], or codetermine[d], those matters governing the essential terms and conditions of employment." The Board found contractual reservations of control *relevant* to its decision but not dispositive. Instead, the Board explicitly relied on evidence of actual, exercised control to reach its holding. For example, the Board found "porters [were] given detailed supervision" by Greyhound personnel, Greyhound's managers conferred with the contractor to set work schedules and fix the number of employees required to work, Greyhound terminal managers provided work instruction directly to the contactor's employees and, on at least one occasion, Greyhound made its contractor fire a porter for unsatisfactory performance.[23] Thus, though a contractually reserved "right to control" over the work of another might make that person an "employee" and not an independent contractor and hold some relevance to the joint employer analysis, the *Greyhound* Board did not find that such reserved but unexercised control alone was sufficient to create a joint employment relationship. The Board recognized actual, direct control was central to whether a Retaining Company was the joint employer of a Retained Company's employees.

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[20] Loewenstein, Mark J., "Agency Law and the New Economy," *The Business Lawyer*, 72 Bus. Law. 1009, 1027 (2017) (noting the term "joint employer" appeared in only 60 opinions published between 1892 and 1950 and available on Westlaw, including only ten federal opinions).

[21] The Court of Appeals for the D.C. Circuit agreed, finding the "contention that the joint-employer and independent contractor tests are virtually identical lacks any precedential grounding" and that while worker classification cases can be "instructive" in the joint employer context, the joint-employer inquiry adds the key questions of *who* controls the workers, *when* they exercise that control, and *how* they exercise it. As the court wrote: "In short, using the independent-contractor test exclusively to answer the joint-employer question would be rather like using a hammer to drive in a screw: it only roughly assists the task because the hammer is designed for a different purpose." *Browning Ferris Indus. of Cal., Inc. v. NLRB*, No. 16-1028 (D.C. Cir. Dec. 28, 2018).

[22] The dissent argues the Board "narrowed" its joint employment standard in 1984, suggesting the standard before 1984 reflected the proper approach. While this is an over-simplification of the development of the Board's decisional law since *Greyhound Corp*., it is nevertheless widely accepted that the Board traces its historical joint employer standard to that decision.

[23] *Greyhound Corp.*, 153 NLRB 1488, 1496 and n.8 (1965).

The Board's subsequent decisions considered the same basic elements: whether two or more entities "share[d] or codetermine[d]" essential employment terms based on the actual exercise of joint control that directly affected such matters.[24] The Third and Fifth Circuits also expressed approval of the *Greyhound* standard and its reliance on actual control.[25] The Third Circuit determined the requirement that joint employers "exert significant control" over the same employees represented a reasonable interpretation of the Act.[26]

The dissent to the Proposed Rule argues Supreme Court precedent would reject any interpretation of the Act that fails to duly consider common law agency principles when determining who qualifies as a statutory employee, including retained but unexercised control. While it is true that the D.C. Circuit recently found that the Board is required to "color within the common-law lines" with respect to its joint employer rule, the Proposed Rule's requirement of direct, exercised control does not fall outside the boundary of a reasonable application of common law principles.[27] The Commenters are aware of no court that has found that reserved, unexercised control alone was sufficient to create a joint employment relationship in the context of the NLRA, and the D.C. Circuit specifically declined to address that question.[28] The Proposed Rule more clearly articulates the types of control that have always been required for a joint employment finding under the common law, but it does not exclude consideration of reserved or unexercised control altogether. Instead, it makes clear that reserved or unexercised control, such as contractual performance requirements, general work standards or other routine aspects of business-to-business contracting, cannot create a joint employment relationship without some other indicia that an employer is actually exerting active, hands-on control over the essential terms and conditions of the employees in question. Therefore, while it is true that the Proposed Rule imposes a higher standard of proof to show a joint employment relationship than the

[24] See, e.g., *Hamburg Industries, Inc.*, 193 NLRB 67 (1971) (Board found significant that the putative joint employer "constantly checked the performance of the [contract] workers and the quality of work"); *Clayton B. Metcalf*, 233 NLRB 642 (1976) (finding significant indicia of control where the mine operator held 'day-to-day responsibility for the overall operations of the worksite, including the assignments of the subcontractors); *Sun-Maid Growers*, 239 NLRB 346 (1978) (Board found joint employer status when contract workers were assigned work and supervised directly by Sun-Maid supervisors rather than the contracting company).

[25] *NLRB v. Greyhound Corp. (S. Greyhound Lines Div.)*, 368 F.2d 778, 781 (5th Cir. 1966) (approving Board's holding in *Greyhound. Corp.*, 153 NLRB 1488); *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982) ("We hold therefore that in the context of this case, the Board chose the correct standard-the 'joint employer' standard-to apply to its analysis of the facts of this case: where two or more employers ***exert significant control*** over the same employees-where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment-they constitute 'joint employers' within the meaning of the NLRA.") (emphasis added).

[26] *Id*.

[27] *Browning Ferris Indus. of Cal., Inc. v. NLRB*, No. 16-1028 (D.C. Cir. Dec. 28, 2018).

[28] *Id*.

common law requires to show a worker is a statutory employee (rather than an independent contractor), it is consistent with common law agency principles as applied within this context.[29]

In short, by enacting Taft-Hartley Congress expressed an intent for common law agency principles to inform the interpretation of the word "employee" under the NLRA, but it did not foreclose a greater level of control to establish a joint employment relationship. The Board is explicitly permitted to consider how its rule can encourage meaningful collective bargaining, so long as its rule does not stray outside the bounds of the common law. The established and approved precedent of the Board – to apply elements of agency law within the unique context of joint employment – better represents the intent of Congress, furthers the purposes of the Act to enable meaningful collective bargaining, and reflects a permissible application of the common law in joint employment analysis. Over time the Board and the courts have recognized that active and direct control of essential terms and conditions of employment is necessary for a joint employer finding, notwithstanding whether retained or indirect control has some relevance to the analysis or would have been sufficient for determining who is an employee versus an independent contractor under the Act.

4. The Proposed Rule Can Be Strengthened Through the Use of Clear Definitions

The Commenters support the Proposed Rule but believe the Board can improve the proposal and its future application by codifying definitions of key terms. The primary benefit of the Proposed Rule involves its bright line requirement for meaningful, actual control over essential terms and conditions of employment. To provide clear guidance and "scaffolding" around the rule, the terms "substantial control" and "essential terms and conditions of employment" should be defined.[30] If the Board adopts clear definitions of the terms, it can better achieve the certainty that employers need to operate predictably and efficiently and that the Board needs to adjudicate fairly and consistently.

As written the Proposed Rule includes examples to guide employers and the Board with respect to essential terms and conditions and includes the "such as" list of hiring, firing, discipline, supervision and direction.[31] While helpful, even some of those terms, like "direction," leave too

[29] As the D.C. Circuit noted, "[t]he independent-contractor test considers who, *if anyone*, controls the worker other than the worker herself. The joint-employer test, by contrast, asks how many employers control the individuals who are unquestionably superintended." *Id*. (emphasis added).

[30] The term "direct and immediate" control, as used in contrast with "indirect" control, has been the subject of some debate. As the definitions below will outline, "direct and immediate" control means the exercise of hands-on decision-making over the day-to-day functions of an employee. The use of the word "direct" is not intended to rigidly exclude actions taken through a third-party intermediary if they are specifically directed by an employer. *See Browning Ferris Indus. of Cal., Inc. v. NLRB*, No. 16-1028, 44 (D.C. Cir. Dec. 28, 2018) (discussing how the joint employer test should not "allow manipulated form to flout reality" in considering which employer actually controls the day-to-day work of employees).

[31] Federal Register, *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681, 46696 (Sept. 14, 2018) (to be codified at 29 C.F.R. 103).

much room for interpretation and manipulation. To improve the Proposed Rule, the Commenters suggest the inclusion of the definitions set forth below to outline explicitly those terms and conditions the Board considers central to an employment relationship and to provide employers certainty and greater clarity in application.[32]

i. The Commenters propose the following definition of "essential terms and conditions of employment."

"Essential terms and conditions of employment" shall mean the hiring, promotion, discipline and discharge of employees; determination of individual employee rates of pay and benefits; engaging in day-to-day supervision of employees; and directly assigning particular employees their individual work schedules, positions and tasks.

The clear limits of this definition benefit employers by providing certainty about the types of decisions each can undertake without sacrificing independence and unknowingly triggering a joint employer relationship. Further, they will allow the Act to operate consonant with other federal laws that may require a Retaining Company to exercise some limited forms of control over a Retained Company.[33] From a day-to-day operations perspective, however, Retained Companies still control the essential terms and conditions that meaningfully affect the work of their employees. Retaining Companies might direct the hours a store or construction site can operate or the uniforms workers wear, but they do not generally dictate when individual employees work, how much they earn or whether they progress in their job. As written, the Proposed Rule likely allows Retaining Companies to operate with the kind of attenuated supervision most use, but a clearer definition of essential terms and conditions would create clearer boundaries for them to navigate.

Of course, in many contexts a Retaining Company will need to impose routine contractual requirements for the completion of the Retained Company's work to ensure it meets the contracted-for standards, but that supervision is not akin to providing direct, day-to-day instructions to a Retained Company's employees or assigning them particular tasks. Again, from an employee's perspective, the party in charge of their particular work schedules and specific assignments controls the essential terms and conditions of their employment. It is not sound policy to require a secondary business to engage in bargaining merely because it maintains – as it must – the right to determine whether the Retained Company and its employees have fulfilled their contractual duties to provide a defined product or service. Such routine control is inherent

[32] Many of the Commenters submitted a Petition to the Board earlier this summer advocating for a new joint employer rule. See *In the Matter of Proposed Rule to Establish the Standard for Determining Joint-Employer Status under the National Labor Relations Act*, Rulemaking Petition (June 13, 2018). The definitions proposed in this Comment are the same as those set forth in the Rulemaking Petition.

[33] See, e.g., 15 U.S.C.A. § 1127 (defining standards for trademark abandonment and requiring businesses to exercise sufficient control over their brands to maintain trademark protection).

in the business relationship and does not constitute control over essential terms and conditions of employment.[34]

ii. ***The Commenters further suggest an explicit, non-exhaustive list of types of control arising from routine contractual requirements that should not qualify as "substantial control affecting essential terms and conditions of employment." The addition to the rule would state:***

"Substantial control affecting essential terms and conditions of employment" shall not include any of the following: actions, policies, training or programs intended (1) by any entity to require compliance by its suppliers, vendors, subcontractors or other entities with whom it has a business relationship with any federal, state or local law, regulation or other legal requirement; (2) by any franchisor to require, maintain or enforce the standardized services, products, processes or product delivery of the business system to which the franchisee has agreed to participate; (3) by any entity to require, implement or administer any social responsibility code or policy, including safety and security policies, with respect to suppliers, vendors, subcontractors or other entities with whom it has a business relationship; (4) by any franchisor to require, maintain or enforce the brand protection standards required of persons who enter into franchising agreements with such franchisor; (5) by any entity to require and establish time parameters when the activity or work in question is to be performed; (6) by any entity to require and establish quality service or outcome standards for any activity or work to be performed; (7) by any entity to require an individual to wear any type of uniform or any other type of identification that mentions in any manner the entity's brand; (8) by any entity to require, maintain or enforce product, brand or reputational protection standards for its products, goods or services; (9) to implement third-party delivery and courier services, or technology-based shared staffing applications (including, but not limited to, insurance, training, financing and leasing services); and (10) by any association whose primary purpose is to negotiate and administer multi-employer collective bargaining agreements on behalf of its employer-members. This list is non-exhaustive.

Substantial control shall not include optional training programs or optional management and operational tools, including, but not limited to, business consulting and data analysis, that a franchisor or other entity offers to franchisees or other contracting entities.

[34] *Browning Ferris Indus. of Cal., Inc. v. NLRB*, No. 16-1028 (D.C. Cir. Dec. 28, 2018) (finding "[w]hether [an employer] influences or controls the basic contours of a contracted-for service…would not count under the common law.").

Retained or reserved but unexercised control over essential terms and conditions of employment, and/or the exercise of routine, arms-length, indirect control over essential terms and conditions of employment, shall not alone be dispositive of joint employer status.

These proposed exceptions cover common forms of routine, attenuated control Retaining Companies often exercise over Retained Companies that do not affect the essential terms and conditions of employment. For example, Retaining Companies need to enforce brand protection requirements and social responsibility programs included in their contracts with Retained Companies and make sure projects are completed on time and up to standards.[35] They also have an interest in ensuring their Retained Companies comply with federal laws, including federal Wage and Hour laws and the Occupational Safety and Health Act. These types of attenuated control do not affect the promotional opportunities, particular work schedules or other essential terms and conditions of Retained Companies' employees.

These exceptions will further clarify the definition of "essential terms and conditions" and create the necessary scaffolding to separate routine, everyday aspects of business-to-business contracting from types of control that directly and substantially affect essential terms and conditions of employment. The Board may be unable to list every possible type of control a Retaining Company may exercise or reserve over a Retained Company without affecting the essential terms and conditions of the Retained Company's employees, but this extensive list of common forms of routine control will help businesses structure their affairs and prevent factfinders from expanding the rule to cover areas not intended by the Act or the Proposed Rule.

Because these definitions provide clear limits for the application of the Proposed Rule, the Commenters suggest including them in addition to the examples currently provided.[36] While the examples are helpful, they are subject to manipulation. The addition of a single variable in any of the examples could lead to incongruous results outside the intent of the Proposed Rule.[37] No

[35] Brand protection and social responsibility programs can have significant economic impacts on Retaining Companies or franchisors because of their effect on consumer trust in the business. See Sun, Mengqi, "What Loss of Trust Costs Companies in Dollars and Cents," *Wall Street Journal* (Oct. 31, 2018) (https://blogs.wsj.com/riskandcompliance/2018/10/31/what-loss-of-trust-costs-companies-in-dollars-and-cents/) (finding businesses lose as much as $180 billion in revenue based on lost consumer trust, including as it relates to brand value).

[36] See Federal Register, *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681, 46696 (Sept. 14, 2018) (to be codified at 29 C.F.R. 103).

[37] The Commenters urge the Board to clarify that the 12 examples in the Proposed Rule serve a limited purpose and are not intended to be dispositive of joint employer status in isolation. Each example provides a sample fact pattern that either does, or does not, illustrate what the Board indicates would constitute an instance of actual exercise of direct and immediate control by a putative employer. But a single instance of the exercise of such control is just one factor in what could in practice be a more expansive fact pattern, with many additional indicia of the exercise (or lack thereof) of control over employment terms not covered in each example. In that regard, the

approach is foolproof, but codified definitions will make it easier for the Board and courts to apply the Proposed Rule consistently in future cases.

5. Conclusion

The Commenters support the Board's Proposed Rule and encourage the Board to move forward with the rulemaking process. The Proposed Rule furthers the policy aims of the Act, guarantees the employers that meaningfully affect the essential terms and conditions of particular employees are required at the bargaining table and allows businesses to structure their relationships with the kind of certainty and predictability necessary to ensure their continued viability and avoid the imposition of unintended, unknown or even unknowable liabilities. The Commenters also urge the Board to strongly consider strengthening its Proposed Rule by clearly defining "essential terms and conditions" to further protect the rule from manipulation or misinterpretation.

Ultimately, the stability and predictability provided by the Proposed Rule will benefit employers and employees alike by allowing traditional American business models to flourish without fear of unforeseen obligations. The Proposed Rule is loyal to the policy of the Act to further meaningful collective bargaining without clogging the bargaining table with unnecessary parties who do not control essential terms and conditions of employment. It also ensures the continued viability of routine business-to-business contracting and enables small businesses to maintain the entrepreneurial control that allows them to forge their own paths to success. As such, the Board should adopt the Proposed Rule, including the definitions suggested by the Commenters herein.

Agricultural Retailers Association
Air Conditioning Contractors of America
American Apparel & Footwear Association
American Foundry Society
American Fuel & Petrochemical Manufacturers
American Hotel & Lodging Association
American Pipeline Contractors Association
American Seniors Housing Association
American Staffing Association
American Supply Association
American Trucking Associations
Arkansas Hospitality Association

Proposed Rule requires the actual exercise of "substantial direct and immediate control…that is not limited and routine," indicating that a single incidence of exercised control is not, in the ordinary case, dispositive. Thus, the current phrasing of the examples suggests they are included for the limited purpose of determining whether direct and immediate control occurred, and are not intended to be dispositive of the more extensive overall joint employer inquiry. The Board should make this clarification in any Final Rule.

Asian American Hotel Owners Association
Associated Builders and Contractors
Associated Equipment Distributors
Associated General Contractors of America
Auto Care Association
Building Service Contractors Association International
California Delivery Association
California Hotel & Lodging Association
CAWA – Representing the Automotive Parts Industry
Center for the Defense of Free Enterprise
Chambers of Commerce Alliance of Ventura & Santa Barbara Counties
College and University Professional Association for Human Resources
Consumer Technology Association
Farm Equipment Manufacturers Association
Food Marketing Institute
Global Cold Chain Alliance
HR Policy Association
Independent Electrical Contractors
Independent Office Products & Furniture Dealers Alliance
Industrial Fasteners Institute
International Council of Shopping Centers
International Foodservice Distributors Association
International Franchise Association
International Sign Association
Iowa Association and Business and Industry
Kentucky-Indiana Automotive Wholesalers
Manufacturer & Business Association
Minnesota Grocers Association
National Apartment Association
National Association of Home Builders
National Association of Manufacturers
National Association of Theatre Owners
National Association of Wholesaler-Distributors
National Automobile Dealers Association
National Club Association
National Council of Chain Restaurants
National Grocers Association
National Lumber & Building Material Dealers Association
National Marine Distributors Association
National Multifamily Housing Council
National Office Products Alliance

National Pest Management Association
National Precast Concrete Association
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
National Roofing Contractors Association
National Small Business Association
National Tooling and Machining Association
Nevada Manufacturers Association
North American Die Casting Association
Office Furniture Dealers Alliance
Ohio Equipment Distributors Association
Outdoor Power Equipment and Engine Service Association
Oxnard Chamber of Commerce
Power and Communication Contractors Association
Precious Metals Association of North America
Precision Machined Products Association
Precision Metalforming Association
Printing Industries of America
Restaurant Law Center
Retail Industry Leaders Association
SNAC International
Society for Human Resource Management
Textile Care Allied Trades Association
Tile Roofing Institute
TRSA – The Linen, Uniform and Facility Services Association
Truck Renting and Leasing Association
Tucson Metro Chamber
U.S. Chamber of Commerce
United Equipment Dealers Association
Virginia Small Business Partnership
Western Electrical Contractors Association
Western Growers Association
World Millwork Alliance