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December 7, 2022

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

Dear Ms. Rothschild:

The Coalition for a Democratic Workplace (“Coalition”) responds to the National Labor Relations Board’s (“Board”) Notice of Proposed Rulemaking (“NPRM”) on “Standard for Determining Joint-Employer Status.” This proposed rule has problems – a lot of problems. Respectfully, the Board should start over or leave the current standard in place.

The proposed rule purports to be grounded in common law agency principles but instead presents an ill-defined standard for joint employer liability that sinks to the level of an arbitrary and capricious agency action. One example among several is the rule’s broad-brush treatment of the requisite level of evidence necessary for an entity to become a joint employer. Under the proposed rule as stated, one instance of exercise of control – whether direct or indirect – would create a joint employer relationship. So, too, would one contract clause reserving control. Even considered alone, this sweeping evidentiary standard makes the proposed rule arbitrary and capricious. If Congress had wanted to create a system where the quantum of evidence for becoming an employer was “any evidence more than zero,” Congress would have clearly said so in the National Labor Relations Act (“NLRA”).

Besides the standard-of-evidence problem, the proposed rule also suffers from ill-defined terms, conflicts with the common law standard it ostensibly imposes, and lacks Congressional authorization. Overall, the proposed rule is inconsistent with the Board’s stated objective of furthering “the [NLRA]’s purpose of promoting collective bargaining and stabilizing labor relations.” If every entity in a business-to-business relationship is likely an “employer” of all the entities’ employees, the rule will only undermine collective bargaining and destabilize labor relations, creating *de facto* multiemployer “associations” without the employers’ consent – or even knowledge. Entities with a negligible attachment to the working conditions of employees have no incentive to meaningfully bargain over those employees, and they won’t. The proposed standard, riddled with uncertainty, will move labor relations further from the goals of the NLRA, not closer.

As representatives of millions of businesses that employ hundreds of millions of employees, the Coalition seeks to protect those employees and employers, as well as economic growth. For the reasons detailed in this

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comment, the Board's proposed rule runs afoul of the interests of all parties the Coalition represents.<sup>1</sup> For these reasons stated in this comment, the Board should withdraw its proposed rule, leave in place the existing joint employer rule (85 Fed. Reg. 11184 (2022)), and allow well-established common law agency principles determine whether a joint employer relationship exists. Accordingly, the Coalition opposes the proposed rule.

I. **The Board's Proposed Rule is Arbitrary and Capricious under the Administrative Procedure Act.**

A. **The Proposed Rule's "Authority to Control" and "Exercising the Power to Control Indirectly," As Sparsely Defined in the Proposed Rule, Are Too Underdeveloped to Be Dispositive Factors Providing Any Collective Bargaining Guidance to Entities Operating in the Complex 2022 Economy.**

The Board expressly states that the main purpose of the rule is promoting collective bargaining and stabilizing labor relations: "The proposed rule reflects the Board's preliminary view, subject to comments, that the Act's purposes of promoting collective bargaining and stabilizing labor relations are best served by" the proposed rule, 87 Fed. Reg. 54645 (Sept. 7, 2022); "We have expressed our preliminary view that the Act's purpose of promoting effective collective bargaining is better served by" the proposed rule. 87 Fed. Reg. 54651. The proposed rule also purportedly aims to "provide relevant guidance to parties covered by the Act," based on the Board's "belie[f] that establishing a definite, readily available standard will assist employers and labor organizations in complying with the Act." 87 Fed. Reg. 54653, 54645.

However, the text of the proposed rule undermines the Board's stated aims of a "stabilizing labor relations" and "promoting collective bargaining" through a "definite, readily available standard." The proposed rule supplies no textual definition for either of its key terms, "[p]ossessing the authority to control" and "[e]xercising the power to control indirectly," which it merely repeats without explaining. It does make clear that direct exercise of control is not needed in either case. § 103.40(e). The proposed rule cites "common law agency principles" twice in making this determination. Yet it provides *no further textual guidance or definiteness* for regulated parties on what control is supposed to be.

A party potentially a joint employer could not reasonably be expected to consider these concepts, as presented in the proposed rule, and know whether or not it was required to bargain. This is especially true of modern employers, which are engaged in many business-to-business relationships with other employers that could conceivably contain "authority" to control third party employees or business-to-business communications that could "exercise the power to control indirectly" over such employees.

The Board's internal inconsistencies between its proposed rule and the stated purpose illustrate why it is arbitrary and capricious. An "unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."<sup>2</sup> Simply put, the Board cannot promote stable labor relations through a rule that does not inform regulated parties on the level of control required to establish a joint employer relationship. For employers to operate in such an unguided manner, without the appropriate notice of the consequence of certain business relationships, is quintessentially unstable. Likewise, the proposed rule would produce equivalent uncertainty and instability for unions and employees. Moreover, by providing a mere blanket statement that "common law agency principles" apply to determine authority to control, yet in its commentary stating, "the existence of a common-law employment

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<sup>1</sup> A list of organizations that are Coalition members and separately join this letter is Attachment A.

<sup>2</sup> *City and County of San Francisco, et al. v. U.S. Citizenship and Immigration Svcs., et al.*, 408 F.Supp.3d 1057, 1105 (N.D.Cal. Oct. 11, 2019), quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016).

relationship is necessary, but not sufficient, to find joint-employer status,” the Board leaves the door open for additional, unidentified factors to determine whether a party is a joint employer. *See* 87 Fed. Reg. 54646.

Thus, the concepts are too ill-defined to serve as the core of a new rule and are not reasonably connected to the Board’s own stated aims. No employer – or, for that matter, employees or labor organizations – can reasonably interpret the meaning of these overly broad concepts.

**B. The Proposed Rule Ostensibly Follows “The Common Law” While Minimally Defining the Sources of “The Common Law” And Thus Offers No Useful Standard.**

The Board proposes to add merely two lines to its regulation that address common law principles: Section 103.40(a) referring to “an employment relationship with those employees under common-law agency principles” and Section 103.40(e) stating that “[w]hether an employer possesses the authority to control or exercises the power to control one or more of the employees’ terms and conditions of employment is determined under common-law agency principles.” The NPRM’s commentary then expands rather than defines these bare references to common law principles. The Board simply notes that “[r]elevant sources of common-law agency principles are not hard to find. Subject to comments and as set forth further below, the Board believes that such sources include primary articulations of these principles by common-law judges as well compendiums, reports, and restatements of common law decisions such as the Restatement (Second) of Agency (1958), and early court decisions addressing ‘master-servant relations.’” 87 Fed. Reg. 54645. The Board points to several Restatements, including the Restatement (Second) from 64 years ago, but provides no more guidance. Moreover, the Board relies on a non-exhaustive list of terms and conditions of employment, *see* §103.40(d), so that provides no limitation.

The proposed rule lacks reasonableness, again, because it fails to define the applicable standard. Here, it fails to delineate what is in the universe of the common law that regulated parties are supposed to consult, to interpret the rule and/or litigate the rule. It fails the Board’s own declared objective to provide “a definite, readily available standard.” The determination turns into a wide-open analysis looking apparently to any legal authority on the “common law,” and an open list of terms and conditions of employment. The proposed rule is not reasonable because it specifies and elucidates nothing. Simply put, referring back to “common law” for supposedly key portions of a regulation is not a rule at all.

**C. The Proposed Rule Does Not Specify “Essential Terms and Conditions of Employment” and Thus Offers No Useful Standard.**

The proposed rule lacks reasonableness, again, because it fails to define relevant terms and conditions of employment in §103.40(d). Here, it expressly fails to delineate what additional terms and conditions of employment that regulated parties are supposed to consult, in order to interpret the rule and/or litigate the rule. And, while the proposed regulation opens the door to considering a universe of non-specified terms and conditions of employment as essential, the case law itself does nothing to limit that universe either. While the current joint employer rule does limit “essential terms and conditions of employment,” there is no Board case precedent that purports to define this concept. It would seem sensible that the concept of “essential terms and conditions” would actually have a definite limit, because not everything is essential by logical definition. Yet, the Board purposefully leaves this open ended. 87 Fed. Reg. 54646–48. Significantly, the Board’s failure to appropriately limit its joint employer standard to control relating to “essential terms and conditions of employment” is what prompted the Court of Appeals for the D.C. Circuit to reject and remand the Board’s treatment of joint employer status in *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195, 1219–20 (D.C. Cir. 2018) (“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*’”) (citations omitted; emphasis added).

Nor do the common law principles that the Board’s proposed rule purports to rely upon define or specify the relevant “essential terms and conditions of employment.” As the Board knows, essential terms and

conditions of employment are not derived from a common-law doctrine. The Second Restatement of Agency requires control or a right to control “with respect to the [employee’s] physical conduct in the performance of the services.” Restatement (Second) of Agency § 220(1) (1958). The Board is improperly conflating common law principles with NLRA-specific principles in an attempt to create justifications for the proposed rule. The Board cannot mix and match doctrines under the Act that it has created with common law principles and then label all of this “the common law.”

Under the Board’s proposed rule, regulated parties would have no guidance – either from the rule itself or externally – on which essential terms and conditions of employment are relevant to the joint employer determination. Without such a standard, the proposed rule is arbitrary.

**D. The Proposed Rule Offers No Good Reason for Replacing the Existing Rule Rather Than Repealing It, and the Agency’s Path Cannot Reasonably Be Discerned.**

Because the proposed rule fails to implement anything other than the “common law,” according to the proposed rule, it fails to offer a good reason for rulemaking beyond a simple repeal of the existing regulation. The Board says that the proposed rule accomplishes two things: (1) rescinding the allegedly incorrect existing standard, and (2) reimplementing the pre-2020 common-law standard. But even if we accept the first point – that the existing standard was incorrect – the Board could fix the issue by simply rescinding the 2020 rule. It doesn’t need to also impose a new standard by regulation. If, in fact, it is simply reverting to what is supposed to be the pre-existing common law standard, no rule is necessary. If the Board were to repeal its existing rule, the baseline common-law standard would snap back into place. The Agency fails to explain its path here, other than the illogical statement that the background common law somehow requires a new rule. This makes no sense and opens the proposed rule to a charge of being arbitrary and capricious, due to the Board’s failure to explain why a rewrite rather than a repeal is warranted. *See Encino Motorcars*, 579 U.S. at 221–22 (agencies must “provide a reasoned explanation for the change” in existing policies and the failure to do so “is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.”)(internal quotations omitted). If the Board reconsiders the existing joint employer rule, the Board should go in the opposite direction and consider the adoption of further limitations on the extent to which “reserved” and/or “indirect” control, especially when such control has never been exercised, should be deemed probative of joint employer status.

**II. The Proposed Rule Diverges from the Common Law (and the 2015 NLRB *Browning Ferris* decision) and Requires an Extremely Low Quantum of Evidence for a Finding of Joint Employer Which Demonstrates that the Board is Not Engaged in Reasoned Decision Making.**

The proposed regulation is not supported by the ruling in *Browning-Ferris Industries of California*, 911 F.3d 1195. *Browning-Ferris* does not authorize a regulation wholly resting on the self-contained notion of “authority to control” *Id.* at 1213 (“...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”). Nor does it authorize a regulation wholly resting on the undefined notion of “exercising the power to control indirectly.” *Id.* at 1218 (“Accordingly, the Board’s conclusion that it need not avert its eyes from indicia of indirect control-including control that is filtered through an intermediary-is consonant with established common law. *And that is the only question before this court.*”)(emphasis added). *Browning Ferris* merely answered the question of whether the NLRB could consider the authority to control as a “relevant factor” (“yes”; *id.* at 1210) and whether the NLRB was required to “avert its eyes” from looking to indirect control (“no;” *id.* at 1218).

The Board’s commentary also states that it is merely returning to a longstanding common-law approach. But in fact, it is expanding joint-employment liability well beyond the common law standard, even if *Browning*

*Ferris* had correctly defined the common law standard.<sup>3</sup> Thus, the proposed rule is legally unsupported – both under the common law and under its own precedent. Such a standard cannot be enforced.

III. **The Proposed Rule Violates the APA By Permitting Joint Employer Findings Without Substantial Evidence of Joint Employer Status.**

Under the APA, courts review agency decisions and actions. The APA standard mandates that agency action cannot be lawful if it is “unsupported by substantial evidence in a case. . .” 5 U.S.C.S. 706(2)(E). Courts have recognized the overlap in these standards – arbitrary and capricious and lack of substantial evidence – for setting aside agency action.<sup>4</sup> The Board’s proposed rule is arbitrary and capricious because it adopts a standard, in the text of the regulation itself, that permits *any evidence of any type of control* to establish a joint employer relationship. “Any evidence” is not “substantial evidence.” Accordingly, the proposed rule fails under this standard.

A. **The Proposed Rule Essentially Adopts an “Any Evidence” Standard, Finding Joint Employment When There is Any Evidence, However Insubstantial, Of Authority to Control or Exercise of Control, Which Is at Odds with the Common Law That it Purports to Incorporate.**

The Board states in Section 103.40(e) of the proposed regulation that “[p]ossessing the authority to control is sufficient to establish status as a joint employer, regardless of whether control is exercised. Exercising the power to control indirectly is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly.” Even if reserved and indirect control are probative of joint employer status, there is nothing in the common law that indicates a **single instance** of the possession of authority to control or exercise of indirect control is enough to create an employment relationship under the common law. This is compounded now that the Board has abandoned the prior 2015 *Browning-Ferris* limitation that the degree of control would need to result in “meaningful” bargaining.<sup>5</sup> The Board has failed to identify the basis for its proposed expanded liability and has failed to explain why it is consistent with the NLRA or the Board’s regulatory mission. Thus, the proposed rule is arbitrary and capricious.

Courts have found similar rules that fail to sufficiently define the standard for incurring liability under the rule to be arbitrary and capricious under the APA. *See, e.g., Water Quality Insurance Syndicate v. United States*, 225 F.Supp.3d 41, 76, 79 (D.C. Cir. 2016) (decisions by the National Pollution Funds Center of the United States Coast Guard regarding reimbursement to insurer for “gross negligence” related to oil spills found arbitrary and capricious because “[t]he NPFC fails to explain how the definition. . . adopted and applied . . . is the appropriate standard under the OPA, particularly in the face of a stator definition for this term in a sister statute that is more stringent in its requirement of wrongdoing”).

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<sup>3</sup> *See, e.g., Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (“It is hard to imagine a more violent breach of that [reasoned decisionmaking] requirement than applying a rule of primary conduct or a standard of proof *which is in fact different from the rule or standard formally announced.*”) (emphasis added).

<sup>4</sup> *See Orchard Hill Building Co. v. U.S. Army Corps of Engineers*, 893 F.3d 1017, 1024 (7th Cir. 2018); *see also Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007) (an agency decision “would be arbitrary and capricious” if it is not “supported by substantial evidence” because “it is impossible to discern of a ‘nonarbitrary’ factual judgment supported only by evidence that is not substantial in the APA sense.”); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) (“In reviewing the administrative record for factual support, we adopt the analysis articulated by then-Judge Scalia in *Ass’n of Data Processing v. Bd. of Governors*, 645 F.2d 677, 683 (D.C. Cir. 1984), and rule informal agency action will be set aside as arbitrary if it is unsupported by ‘substantial evidence.’”).

<sup>5</sup> *See, e.g., Allentown Mack*, 522 U.S. at 374.

Nor is the proposed rule saved by its “preponderance of evidence” recitation. In Section 103.40(g), the proposed rule provides that “[a] party asserting that an employer is a joint employer of particular employees has the burden of establishing, by a preponderance of the evidence, that the entity meets the requirements set forth in paragraphs (a) through (f) of this section.” That merely establishes that the asserting party has the burden and *not* what the burden is. Here, specifically, Section 103.40(e) results in any “possessing” or “exercising” control will be sufficient to satisfy the burden and “establish” a joint employer. As explained above, that evidentiary standard would sweep in too many business relationships to be consistent with the common law, the NLRA’s policies of promoting collective bargaining and stabilizing labor relations, and the Board’s ostensible goal of providing a “definite, readily available standard” for determining a joint employer.

**B. The Proposed Rule’s “Any Evidence” Standard is Inherently Arbitrary, Violating The “Substantial Evidence” Standard Required for Agency Action.**

The Board cannot violate its own statute and the APA by creating a standard of proof that will allow determinations to be made on a standard lesser than substantial evidence. A substantial evidence standard requires at least enough evidence that would enable a “reasonable jury” to reach a conclusion of joint employer status, not allowing “any evidence” to establish joint employer status. *See Allentown Mack*, 522 U.S. at 366–67 (“Put differently, we must decide whether on this record it would have been possible for a reasonable jury to reach the Board’s conclusion.”).

The Court instructs that “[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 229 (1938). Under Section 103.40(e) of the Board’s proposed rule, either “[p]ossessing the authority to control” or “[e]xercising the power to control indirectly” are sufficient to establish a joint employer relationship – whether or not that control or power is exercised directly. This standard effectively allows for any evidence of any type of control, whether direct or indirect, exercised or not, to establish a regulated party as a joint employer. As such, this standard is inconsistent with “[t]he rule of substantial evidence [which] is one of fundamental importance *and is the dividing line between law and arbitrary power.*” *National Labor Relations Board v. Thompson Products, Inc.*, 97 F.2d 13, 15 (6<sup>th</sup> Cir. 1938) (emphasis added). With the proposed rule’s abandonment of a substantial evidence requirement, the Board has crossed this line and now finds itself on the side of arbitrary power.

**C. The Proposed Rule’s Evidentiary Standard Supplies No Measurable Quantum of Evidence to Determine Joint Employer Status, Thus the Proposed Rule is Arbitrary.**

Even assuming the proposed rule incorporates some undisclosed brake on allowing a single piece of evidence to determine joint employer status, it still supplies no realistic, readily discernible measure of how much control creates a joint employer, making it impossible for parties to know how to engage in a business-to-business contractual relationship without becoming a full-fledged employer under the NLRA. As stated, the Board’s proposed rule simply refers back to common law agency principles that will determine whether the requisite level of control exists. *See* Section 103.40(e). However, based on the proposed rule’s inconsistencies with actual common law principles, it is impossible to discern whether those standards do, in fact, govern. Thus, the proposed rule’s adoption of an evidence standard is arbitrary and capricious. Even assuming that the evidentiary standard is not intended to be an invalid “any evidence” standard (see III.B.), the Board’s failure to define the evidentiary standard for joint employer status warrants rescission of the proposed rule.

**IV. The Proposed Rule Will Disrupt and Destroy Existing Economic Relationships, Upending Reliance Interests and Putting a Brake on Future Relationships.**

More practically, the proposed rule will disrupt and destroy many normal contracting relationships and prevent new ones. Businesses often contract for services, and the terms of those contracts often affect some conditions of employment for the service provider’s employees. A manager-to-manager comment about

suitable safety practices, a contract term setting hours of access covering when the work is to be performed, and reserving the right to change those hours, and a change-work order with new specifications for a new project all have the potential to lead to a joint employer finding under this new rulemaking. It is logical that many businesses will depress their contracting activity with unionized employers, or just other employers generally, in order to avoid the potential risk that they be considered a joint employer under the NLRA.

V. **The Board Does Not Have “Clear Congressional Authorization” Under the “Major Questions Doctrine” To So Broadly Expand the Definition of a Joint Employer.**

When it comes to the requirement that the federal government “act consistently with the Constitution’s separation of powers,” the Supreme Court “has established at least one firm rule: ‘We expect Congress to speak clearly’ if it wishes to assign to an executive agency decisions ‘of vast economic and political significance.’” *Nat’l Federation of Indep. Bus. V. Dept. of Labor, Occupational Safety & Health Admin.*, 142 S.Ct. 661, 667 (2022) (Gorsuch, concurring).<sup>6</sup> Congress has not clearly authorized the Board to promulgate and enforce a rule that would have such vast economic impact on regulated parties seeking to engage in run-of-the-mill business-to-business contractual relationships.

The expanded standard, which could establish NLRA joint employer status based on *any evidence of any type of control*, would have a sweeping impact on almost all businesses, creating vast economic impact and significance. The Board lacks the necessary express congressional authorization for a rule of such significance.

VI. **Under the Board’s Proposed Rule, Routine Contractual Terms Would Improperly Establish a Joint Employer Relationship.**

The NPRM wisely invites employers to identify “routine components of a company-to-company contracts” that set forth, among other things, “the objective, basic ground rules, and expectations for a third-party contractor” that should not create a joint employer relationship. *See* 87 Fed. Reg. 54651. This issue has particular importance because the Court of Appeals for the D.C. Circuit in *Browning-Ferris* – when remanding the Board majority’s treatment of joint employer status – held that “routine contractual terms, such as a very generalized cap on contract costs, or an advance description of the tasks to be performed under the contract, would seem far too close to the routine aspects of company-to-company contracting to carry weight in the joint-employer analysis.” *Browning-Ferris*, 911 F.3d at 1220 (citation omitted).

One example involves contract provisions that monitor for quality of performance and service levels, aspects that are important to business operations. *See, e.g., Godlewski v. HDA*, 916 F.Supp.2d 246, 259 (E.D.N.Y. 2013) (“Exercising quality control by having strict standards and monitoring compliance with those standards does not constitute supervising and controlling employees’ work conditions . . . This is especially true where the quality control’s purpose is to ensure compliance with the law or protect clients’ safety.”). New assignments causing impacts on a provider workforce are an unavoidable feature in statement-of-work-type contracts. Employers should not be considered joint employers based on their quality control of their product or operations. The Board’s proposed rule, however, would have such far-reaching effect.

A second example involves general corporate social responsibility/ESG terms. These are simply minimum standards separate and apart from the collective bargaining process, just as has been recognized if a legislature had put them into place as a minimum standard. *Cf. Fort Halifax Packing v. Coyne*, 482 U.S. 1, 19-22 (1987) (discussing “that a State’s establishment of minimum substantive labor standards” does not undercut collective bargaining). They should not be included as part of a joint employer analysis, for the same reason that minimum standards of quality or quantity are irrelevant – they are just part of the basis of two parties’ bargain. Moreover, from a policy perspective, the risk of a joint employer determination would

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<sup>6</sup> *See also King v. Burwell*, 135 S.Ct. 2480, 2489 (2015) (“had Congress wished to assign that question of deep “economic and political significance”] to an agency, it surely would have done so expressly.”).

discourage larger employers from featuring such terms in supplier agreements, an outcome that the Board should not favor.

A third example involves standard contract terms and actions by franchisors – in the context of franchisor-franchisee relationships – which are integral to product uniformity and consistency, goodwill, and the integrity of the brand and relevant operational issues. The Board has held that control exercised for these purposes should be considered immaterial when evaluating joint employer status. *See, e.g., S. G. Tilden, Inc.*, 172 NLRB 752, 753 (1968) (no joint employer status where the control was no greater than necessary “to keep the quality and goodwill of the Tilden name from being eroded”); *Love’s Barbeque Restaurant No. 62*, 245 NLRB 78, 93 (1979), *enfd. in rel. part sub nom. Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981) (joint control should be considered immaterial where joint control “is related to [the] legitimate interest in protecting the quality of their product or brand”).

## VII. Specific Argument on Contract Terms.

This comment also submits an actual contractor/vendor agreement from a Coalition member to show the basic terms of this type of contract for its industry in response to the Board’s request for “commenters to address which ‘routine components of a company-to-company contract’ the Board should not consider relevant to the joint-employer analysis.” 87 Fed. Reg. 54651.

Sample:

“When Supplier, including its Personnel or Independent Contractors, provides any Services or Independent Contractor Services on Company’s premises, Supplier will (a) abide by all Company’s rules, policies, practices, and procedures regarding such matters as safety, security, health, environmental and hazardous material management, misconduct, workplace violence, harassment, discrimination, and theft that generally apply to Company’s customers and vendors (collectively, “Rules”); (b) at Company’s request and based on specific facts regarding an Independent Contractor’s behavior that is unlawful or inconsistent with the Rules or any Supplier policy or practice, Supplier will take appropriate action in its judgment and discretion to resolve the behavior issues, including but not limited, to removing the Personnel or Independent Contractor and promptly replacing any Personnel or Independent Contractor performing Services and (c) otherwise comply with and ensure that Independent Contractors or Personnel comply with Company’s Requirements set forth on Exhibit F attached to this Agreement (the “Company Requirements”). Nothing in this paragraph will prohibit Company from removing an Independent Contractor or Supplier Personnel whose unsafe or unlawful conduct would lead to the removal of any customer or vendor who engaged in similar behavior.”

### Discussion:

This example is a typical anti-injury and legal compliance provision that notably applies to *customers* with the same force it applies to third party contractor employers. This provision cannot serve as evidence of a joint employer relationship. Primarily, it would be hard to imagine the ability to operate a business in 2022 without ground rules to ensure minimal safety and legal compliance standards, especially under many laws like OSHA and anti-harassment laws, where the contracting company here will be liable for any issues, regardless of separate employer status. This type of clause is a basic feature of many contracts designed to encourage and require compliance with the law, which is not an interest that the Board should interfere with by now regulating these kinds of provisions under a joint employer standard, essentially banning them if an entity does not want to be considered an employer. In 2022, this type of clause is a basic contract feature and no different than a price or quantity term. Such a provision also allows the employer to prevent activity that creates liability and/or exercise control over its brand, and this is not the type of control the proposed regulation should be concerned about.

In addition, as discussed in the public comment of the Office of Advocacy of the U.S. Small Business Administration, federal, state, or local laws requiring certain levels of control over a contractor such as the

Roxanne L. Rothschild  
December 7, 2022  
Page 9

above are simply legal mandates. Legal mandates are not indicative that there is any employer discretion to bargain over those subjects; rather, the employer is simply required to have these clauses in its contracts. Accordingly, they cannot serve as evidence of a joint employer relationship.

The Coalition also agrees with the Office of Advocacy's argument that the NLRB would need to resolve the conflict between the proposed rule's expansion of joint employer liability and the Biden Administration's reforms to bolster disadvantaged, minority-owned small businesses.<sup>7</sup> An obvious way to mitigate this conflict is to find that any law or regulation requiring control over another entity is irrelevant to a joint employer analysis.

The Coalition respectfully submits these comments and hopes that the Board rescinds the proposed rule in consideration of the various problems identified above.

Sincerely,

A handwritten signature in black ink, appearing to read "Harry I. Johnson III". The signature is fluid and cursive, with the name "Johnson" being the most prominent part, followed by "III" at the end.

Harry I. Johnson III  
Phillip A. Miscimarra  
Kelcey J. Phillips

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<sup>7</sup> 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.

**ATTACHMENT A**

The following organizations have also signed on to the Coalition's public comment in their separate capacities:<sup>8</sup>

ARGENTUM

AAHOA - Asian American Hotel Owners Association  
American Bakers Association  
American Foundry Society  
American Hotel and Lodging Association  
American Pipeline Contractors Association  
American Seniors Housing Association  
American Staffing Association  
American Trucking Associations  
Americans for Tax Reform  
Associated Builders and Contractors  
Associated Equipment Distributors  
Associated General Contractors of America  
CAWA – Representing the Automotive Parts Industry  
Center for the Defense of Free Enterprise  
FMI – The Food Industry Association  
Forging Industry Association  
Franchise Business Services  
Global Cold Chain Alliance  
Heating, Air-conditioning, & Refrigeration Distributors International  
HR Policy Association  
ICSC  
Independent Bakers Association  
Independent Electrical Contractors  
Independent Office Products & Furniture Dealers Association  
International Foodservice Distributors Association  
International Franchise Association  
International Sign Association  
IPSE The Association of Independent Workers  
Leading Builders of America  
Manufactured Housing Institute  
Maryland Motor Truck Association  
Motor & Equipment Manufacturers 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 on Chain Restaurants  
National Franchisee Association  
National Grocers Association  
National Lumber & Building Material Dealers Association

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<sup>8</sup> Several of the undersigned groups have also filed their own separate comments providing more detail on their concerns with the Board's proposed joint employer regulation. Those groups nonetheless join and agree with the broader points made herein.

Roxanne L. Rothschild

December 7, 2022

Page 11

National Mining Association  
National Multifamily Housing Council  
National Public Employer Labor Relations Association  
National Ready Mixed Concrete Association  
National Restaurant Association  
National Retail Federation  
National Roofing Contractors Association  
National Stone, Sand & Gravel Association  
National Tooling and Machining Association  
New Jersey Motor Truck Association  
North American Die Casting Association  
PCCA, Power and Communication Contractors Association  
Power and Communication Contractors Association  
Precision Machined Products Association  
Precision Metalforming Association  
Printing United Alliance  
Promotional Products Association International  
Restaurant Law Center  
SNAC International  
Tile Roofing Industry Alliance  
Towing and Recovery Association of America, Inc.  
TRSA – The Linen, Uniform and Facility Services Association  
Truck Renting and Leasing Association  
United Motorcoach Association  
Western Electrical Contractors Association