



## 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; Rebuttal Comments to The Standard for Determining Joint-Employer Status; Notice of Proposed Rulemaking**

Dear Ms. Rothschild:

These rebuttal comments are submitted on behalf of the Coalition for a Democratic Workplace ("CDW"), 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"). CDW appreciates the opportunity to respond to several arguments raised in comments submitted by opponents of the Proposed Rule.

### **Comments**

#### **1. The Proposed Rule Will Not Leave Employees without Adequate Remedies.**

Several opponents of the Proposed Rule argued that it would leave employees without an adequate remedy for addressing violations of the Act, and that the absence of certain putative joint employers from the bargaining table would prevent effective negotiation.<sup>1</sup> The gist of their argument is that because a Retaining Company may affect the economic relationship between a Retained Company and its employees, it must be included in bargaining.

This argument essentially is an attempt to revive the "economic realities" approach to defining employers and employees under the Act. But Congress roundly rejected this approach when it enacted Taft-Hartley and legislatively overruled the Supreme Court's decision in *Hearst Publications*, which purported to include independent contractors within the scope of the Act. Just as Hearst did not control the essential terms and conditions of work for independent contractor newspaper deliverers, many Retaining Companies do not control the essential terms and conditions of work of their Retained Companies' employees. It is not the "economic facts of the relation" that matter, but the common law elements of control.<sup>2</sup> The Proposed Rule properly

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<sup>1</sup> See National Women's Law Center Comment, at 4; SEIU Comment at 7.

<sup>2</sup> *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) (overruled by Taft-Hartley).



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considers those elements, and it is not unduly narrow for refusing to expand upon them by considering attenuated economic factors, either in addition to or in place of control factors.

In this regard, court decisions since Taft-Hartley have acknowledged the distinction between general “economic controls” that do not establish a common law employment relationship, and control over the manner and means of an employee’s work, which holds relevance in common law and does evidence an employment relationship.<sup>3</sup> The Proposed Rule properly accounts for this distinction and does not allow economic influence, like the type of influence that arises in cost-plus contracting arrangements, to compel a joint employment relationship under the Act.<sup>4</sup> The D.C. Circuit noted in *Browning-Ferris* that the current joint employer standard fails to draw an effective line between relevant common law factors and “quotidian aspects of common-law third-party contract relationships” like generalized caps on contract costs.<sup>5</sup>

Opponents desire an expanded joint employer standard so they can exercise pressure against additional parties, including through what has heretofore been considered unlawful secondary activity,<sup>6</sup> presumably to extract enhanced bargaining concessions. Incidentally, this is not a realistic prediction of what would happen if multiple employers, each with attenuated influence over a Retained Company’s employees, were forced to the bargaining table. Requiring additional companies to participate in labor contract negotiations with the actual employer would not advance the bargaining process; rather, it would protract and impede negotiations to interject independent interests of independent companies into collective bargaining. Regardless, the common law and the Act do not permit the addition of such parties based on the “economic realities” theory advanced by opponents of the Proposed Rule.

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<sup>3</sup> See *Local 777, Democratic Union Organizing Committee, Seafarers International Union of North America v. N.L.R.B.*, 603 F.2d 862 (D.C. Cir. 1978); *N.L.R.B. v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 920 (11th Cir. 1983).

<sup>4</sup> See, e.g., The Standard for Determining Joint Employer Status, 83 Fed. Reg. 46,681 at Example 2.

<sup>5</sup> *Browning Ferris Indus. of Cal., Inc. v. NLRB*, No. 16-1028, 45 (D.C. Cir. Dec. 28, 2018).

<sup>6</sup> As CDW noted in its comments: “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.”



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**2. Challenges Regarding the Participation of Particular Board Members in the Rulemaking Process are Unavailing.**

Opponents of the Proposed Rule argue that Board members' previous participation in joint employer litigation and/or adjudication compromises their ability to participate in the rulemaking process. In essence, the opponents posit three strained ethics arguments that would effectively disqualify every single current Board member from participating in this rulemaking proceeding, paralyzing the NLRB from fulfilling its statutory functions. The opponents' efforts to weaponize ethics rules to thwart the Board's legitimate rulemaking have no basis in fact or law.

First, the opponents claim the Board's decision to engage in rulemaking on this generally applicable topic represents an attempt to recreate the outcome of its earlier *Hy-Brand* decision.<sup>7</sup> Because Members Emanuel and Kaplan voted there to overrule the Board's *Browning-Ferris* decision, the opponents assert they have "unalterably closed minds" on this subject and cannot fairly engage in rulemaking.<sup>8</sup> These arguments are inconsistent with the law, longstanding practice by the Board and other agencies, and common sense.

The involvement of Board members in prior adjudicatory proceedings on a particular legal issue does not evidence an unalterably closed mind that should disqualify them from participating in rulemaking on the same subject. Were this the case, *all* current Board members – including Member McFerran who participated in *Hy-Brand* and wrote a strongly worded dissent – would be foreclosed from engaging in rulemaking not simply on joint employment matters, but on virtually any topic they had previously addressed in case adjudications. The opponents' argument essentially advocates for "issue preclusion" among Board members – that if they have expressed a strong view on a legal issue in a prior adjudication, they are incapable of engaging objectively in rulemaking on the same topic.

This is simply not the relevant or applicable standard. For one thing, rulemaking and adjudication are fundamentally different. Adjudication requires Board members to act in a quasi-judicial capacity, deciding on particular facts involving particular parties in a discrete relationship. Rulemaking, on the other hand, requires Board members to apply broad-based, industry-specific knowledge and expertise to forecast potential outcomes, evaluate public comments, and assess the need for a particular rule that in this case will be applicable to the entire regulated community.<sup>9</sup> Thus, the standard for disqualification in a rulemaking proceeding

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<sup>7</sup> See State Attorney Generals Comment at 12; see also Congressional Progressive Caucus Comment at 2-3.

<sup>8</sup> See SEIU Comment at 22 (citing *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979)).

<sup>9</sup> See *Hortonville Joint School District No. 1 v. Hortonville Ed. Assn.*, 426 U.S. 482, 493 (1976); *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1168 (D.C. Cir. 1979) (finding "we must not impose judicial roles upon administrators when they perform functions very different from those of judges"); *C & W Fish Co. v. Fox*, 745 F. Supp. 6, 9 (D.D.C. 1990), *aff'd sub nom. C & W Fish Co. v. Fox, Jr.*, 931 F.2d 1556 (D.C. Cir. 1991).



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– that an opponent show *clear and convincing evidence* of an unalterably closed mind – is significantly higher than the standard for recusal in an adjudicatory proceeding.<sup>10</sup> The mere involvement of Members Emanuel and Kaplan in the *Hy-Brand* decision does not meet this threshold, any more than Member McFerran’s involvement in that same case would.<sup>11</sup>

While former Member Becker advocates for a different standard now, when he was on the Board he participated in adjudication and rulemaking, despite his own concession that he made numerous prior public statements and writings on similar topics.<sup>12</sup> If, as Member Becker asserted, recusal was not required in adjudication that “revisit[ed] the same legal question addressed” in the case Member Becker participated in before appointment to the Board, then it certainly would not be required for generally applicable rulemaking.<sup>13</sup>

Second, the opponents also argue the Presidential ethics pledge separately disqualifies Member Emanuel because the Proposed Rule is “nearly identical” to the standard articulated in *Hy-Brand*.<sup>14</sup> This contention stretches to new and untenable lengths the already unprecedented assertion that the *Hy-Brand* and *Browning-Ferris* decisions were “the same particular matter” for purposes of Member Emmanuel’s obligations under the pledge. If the ethics pledge were to be enforced as the opponents contend here, Board members with virtually any private sector advocacy experience would be forced to recuse themselves from any matter involving legal issues that arose in cases in which the members (or their firms) participated prior to their appointment. That is not a viable—or workable—interpretation of Board members’ ethical obligations under the pledge.

Third, the SEIU and National Fast Food Workers Union additionally contend Chairman Ring and Member Emanuel should not participate in rulemaking because of a pending motion to recuse them from consideration of a special appeal in a consolidated unfair labor practice case involving parties that they did not personally represent and in which their former firms are not parties and do not represent any party.<sup>15</sup> But the issues regarding the pending recusal motions and the current rulemaking are unique and different. The pending special appeal in the consolidated unfair labor practice case involves the standards applicable to settlement agreements in NLRB proceedings, and whether the administrative law judge properly applied those standards. The

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<sup>10</sup> *Id.*

<sup>11</sup> Tellingly, while arguing that Members Emanuel and Kaplan are tainted by their involvement in *Hy-Brand*, opponents make no similar argument regarding Member McFerran, who also participated in *Hy-Brand* and wrote a strongly worded dissent.

<sup>12</sup> See *Serv. Employees Int’l Union, Nurses All., Local 121rn (Pomona Valley Hosp. Med. Ctr.) & Carole Jean Badertscher*, 355 NLRB 234, 240 n. 3 (2010) (refusing to recuse from adjudicatory proceeding despite signing a brief as an amicus curiae in a related case that addressed the same legal issue as the adjudication).

<sup>13</sup> *Id.*

<sup>14</sup> See SEIU Comment at 19-20.

<sup>15</sup> See SEIU Comment at 21-22; NFFWE Letter at 3.



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Proposed Rule does not remotely address those standards. The unfair labor practice appeal also involves a particular case or controversy, not a rule of general applicability. Thus, the outcome of the SEIU’s recusal motion in the consolidated case has no bearing on Chairman Ring’s or Member Emanuel’s ability to participate in the rulemaking process.<sup>16</sup>

In sum, it is apparent that opponents of the Proposed Rule are attempting to weaponize the ethics rules by stretching them to untenable lengths, all to prevent the Board from engaging in a rulemaking that proposes policy changes they do not like. No rule of general application such as the Proposed Rule has ever been invalidated based on the standards opponents advance, and no agency decisionmaker has been disqualified from rulemaking based merely on their prior involvement in adjudication of similar issues. The purpose of the ethics regulations is not to allow parties to use them offensively, as a means of reaching particular substantive ends. Instead, they exist to ensure public confidence in state action and to *avoid* politically tainted administrative action. The Board should reject opponents’ attempts to misapply these standards to prevent lawful rulemaking.

### **3. The Proposed Rule is Not Deficient under the Administrative Procedure Act.**

The Proposed Rule was conceived and advanced by the Board on legally sound footing. The Board has cogently explained the need for rulemaking in this area, crafted a Proposed Rule consistent with common law and decades of Board precedent and provided stakeholders ample time to comment. Despite opponents’ claims, the Proposed Rule represents a reasoned solution to a persistent uncertainty in labor law and is a proper exercise of the Board’s rulemaking authority.<sup>17</sup>

The Board’s primary justification for rulemaking in this area is the “recent oscillation” of the joint employer standard.<sup>18</sup> The NPRM explains the recent and repeated changes in the Board’s joint employer standard and the uncertainty they have caused in the business and legal community. Indeed, the D.C. Circuit’s *Browning-Ferris* decision recognized this confusion

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<sup>16</sup> CDW does not believe these members should be forced to recuse themselves in the case referenced above, and the organization submitted an amicus letter to the Board in that case presenting its views. *See* Letter to ES Office, *McDonald’s USA, LLC, a joint employer, et al. and Fast Food Workers Committee and Service Employees International Union, CTW, CLC et al.*, Cases 02-CA-093893, et al.; 04-CA-125567, et al.; (N.L.R.B. Aug. 28, 2018) available at <https://www.nlr.gov/case/02-CA-093893>.

<sup>17</sup> AFL-CIO previously complained the Board improperly failed to disclose a rulemaking petition filed by several regulated entities, including CDW. The union’s claim that the rulemaking petition somehow represented improper secret advocacy by employer-side groups is off the mark. Any interested person may petition a federal agency to engage in rulemaking. *See* 5 U.S.C §553(e). CDW submitted its rulemaking petition *after* the Chairman indicated the Board may engage in rulemaking on the issue of joint employment, as a means of urging the Board to follow through. There was nothing “improper” about the rulemaking petition or the fact the agency did not include the petition in the record as the Board did not rely upon it in the NPRM.

<sup>18</sup> 83 Fed. Reg. at 46682, 46686.





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when it remanded the case to the Board to clarify its current (ambiguous) rule. The NPRM’s expressed purpose—to eliminate this uncertainty and codify a joint employer standard that will be generally applicable and easier to apply in a variety of factual contexts—makes perfect sense given the legal and factual background underlying the Board’s efforts.

None of the opponents’ arguments to the contrary carry any weight. For example, the AFL-CIO argues the Board’s eventual final rule will not be a “logical outgrowth” of the Proposed Rule, as required by the APA.<sup>19</sup> The union contends the D.C. Circuit’s *Browning-Ferris* decision renders the Board’s justification for the Proposed Rule invalid and requires the Board to “address matters that are not addressed in any manner in the NPRM,” inasmuch as the Proposed Rule supposedly eliminates consideration of reserved control and indirect control as part of a joint employer standard. Therefore, the AFL-CIO claims, if the Board were to reverse course and heed the D.C. Circuit’s guidance by including consideration of indirect and/or reserved control in its final rule, that would not be a logical outgrowth of the Proposed Rule.

This argument relies on the false premise that the Proposed Rule requires the Board to *ignore* evidence of indirect or reserved control. It does not. The NPRM specifically calls for consideration of the types of indirect control that the D.C. Circuit deemed relevant in its *Browning-Ferris* decision. Examples 4 and 11 of the NPRM illustrate the type of indirect control exercised through a third-party intermediary that can result in a joint employer finding under the Proposed Rule. Example 4 states “[t]he fact that Company B conveys its supervisory commands *through Company A’s supervisors rather than directly* to Company A’s line workers fails to negate the direct and immediate supervisory control.” Example 11 reaches a similar conclusion. These examples prove the Board is not “avert[ing] its eyes from indicia of indirect control – including control that is filtered through an intermediary.”<sup>20</sup> As such, because the Proposed Rule never required “clos[ing] its mind to evidence of indirect control,” a final rule that considers indirect control plainly would meet the logical outgrowth requirements of the APA.

Opponents also argue the Proposed Rule is an improper attempt to reinstate the standard announced in *Hy-Brand* decision, which they claim was rejected by the D.C. Circuit’s *Browning-Ferris* decision. This claim is equally unavailing. In *Hy-Brand*, the Board acknowledged the relevance of indirect or reserved control in the joint employer analysis, but simply declined to hold that indirect or reserved control *alone* could result in a joint employer finding.<sup>21</sup> The Board also expressed concern that contractual reservations of some control, though never exercised, could result in a joint employer finding.<sup>22</sup> The D.C. Circuit’s recent *Browning-Ferris* opinion

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<sup>19</sup> See AFL-CIO Comment at 61.

<sup>20</sup> *Browning Ferris Indus. of Cal., Inc. v. NLRB*, No. 16-1028, 41 (D.C. Cir. Dec. 28, 2018)

<sup>21</sup> *Hy-Brand Indus. Contractors Ltd. and Brandt Const. Co.*, 365 NLRB No. 156, 4 (2017) (“Our fundamental disagreement with the *Browning-Ferris* test is not that it treats indicia of indirect, and even potential, control to be probative of joint-employer status, but that it makes such indicia potentially dispositive without any evidence of direct control in even a single area.”)

<sup>22</sup> *Id.* at n. 17.



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did not invalidate the *Hy-Brand* majority’s view. If anything, the Court arguably determined the Board in *Hy-Brand* more accurately captured the proper role of indirect control than it did in *Browning-Ferris*.<sup>23</sup>

The D.C. Circuit expressly refused to decide whether indirect or reserved control alone could result in a joint employer finding. Instead, the Court limited its holding to the premise that common law required those facts to be treated as *probative*, not dispositive. It further expressed a distinction between indirect control filtered through intermediaries, like the type of indirect control referenced in the Examples to the Proposed Rule, and indirect control arising from routine contractual provisions, which the Court did not view as influential to the joint employer calculus.<sup>24</sup> Thus, far from rendering the Proposed Rule invalid, the D.C. Circuit’s *Browning-Ferris* decision supports the Board’s proposal inasmuch it relates to the proper role of reserved or indirect control in a joint employer analysis. There is no reason that the final rule cannot be a logical outgrowth of the Proposed Rule and remain consistent with the D.C. Circuit’s ruling.<sup>25</sup>

#### 4. Conclusion

CDW reiterates its support for the Board’s Proposed Rule, with the addition of the definitions proposed in its initial comment. The Board followed proper procedures in publishing its NPRM, allowed ample time (and multiple extensions) for commenters to weigh in, and received thousands of comments for its consideration. The Proposed Rule represents a lawful application of common law principles to the question of joint employment under the Act and reflects the Board’s policy expertise in ensuring that the parties necessary for meaningful collective bargaining will be at the table. Although reasonable minds may differ as to the proper standard, the substance and process of the Board’s rulemaking efforts to date have been sound, and the opponents’ attempts to stymie the rulemaking process should be rejected.

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<sup>23</sup> *Browning Ferris Indus. of Cal., Inc. v. NLRB*, No. 16-1028, 23 (D.C. Cir. Dec. 28, 2018) (noting “[t]he Board in *Hy-Brand*, in fact, **agreed that both reserved and indirect control are relevant considerations** recognized in the common law” before finding the Board failed to properly identify the relevant forms of indirect control in *Browning-Ferris*) (emphasis added).

<sup>24</sup> *Browning Ferris Indus. of Cal., Inc. v. NLRB*, No. 16-1028, 45 (D.C. Cir. Dec. 28, 2018) (noting the difference between “relevant forms of indirect control” that share or co-determine matters governing essential terms and conditions of employer and “those types of employer decisions that set the objectives, basic ground rules, and expectations for a third-contract” but “cast no meaningful light on joint-employer status”).

<sup>25</sup> On a more fundamental level, the Board specifically sought feedback in its NPRM regarding whether the Proposed Rule complied with common law standards. Nearly every substantive commenter addressed the role of common law in some fashion. Thus, to suggest that the final rule will not be a logical outgrowth of the NPRM ignores the fact that the Board specifically left the rule open to adjustment based on additional information gathered in comments about the proper incorporation of common law in the analysis.