Congress of the United States
Washington, DC 20515

January 28, 2019

SUBMITTED VIA REGULATIONS.GOV

The Honorable John F. Ring
Chairman
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Re: Supplemental Comments Regarding RIN 3142-AA13: The Standard for Determining Joint-Employer Status

Dear Chairman Ring:

I write in response to the National Labor Relations Board's (NLRB or Board) September 14, 2018, notice of proposed rulemaking (NPRM) (RIN 3142-AA13) updating the standard for determining joint-employer status.[1] These comments supplement a letter I submitted with Rep. Tim Walberg (R-MI) on December 21, 2018.[2] The contents of this supplemental letter respond to a comment letter submitted by Committee on Education and Labor Chairman Bobby Scott (D-VA)[3] and a comment letter submitted by Rep. Mark Pocan (D-WI).[4]

On December 28, 2018, the U.S. Court of Appeals for the D.C. Circuit in *Browning-Ferris Industries of California v. NLRB* by a 2-1 vote denied enforcement of the 2015 Obama NLRB's *Browning-Ferris* decision and remanded the case to the Board for further proceedings.[5] The D.C. Circuit held an employer's reserved or potential right to control employees and an employer's indirect control over employees' essential terms and conditions of employment can be relevant in determining joint employment. However, the court also held that the Board's delineation of indirect control went beyond common-law limitations by failing to confine it to indirect control over the essential terms and conditions of employment, and failing to distinguish it from evidence of indirect control merely relating to routine policies of contracting.

Opponents of the Board's proposed rule have suggested that the D.C. Circuit ruling prevents the Board from promulgating any standard that would require substantial direct and immediate control over the essential terms and conditions of employment to confirm a joint employer relationship, and thus forecloses the substance of the proposed rule. In their January 8, 2019, letter to the Board,

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[1] The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46681 (proposed Sept. 14, 2018).
[2] Letter from Virginia Foxx, Chairwoman, Comm. on Educ. and the Workforce, and Tim Walberg, Chairman, Subcomm. on Health, Emp't, Labor, and Pensions, to John F. Ring, Chairman, NLRB (Dec. 21, 2018) (attached).
[3] Letter from Robert C. "Bobby" Scott, Chairman, Comm. on Educ. and Labor, and Rosa DeLauro, Chairwoman, Subcomm. on Labor, Health and Human Serv., Educ., and Related Agencies, to John Ring, Chairman, NLRB (Jan. 8, 2019).
[4] Letter from Mark Pocan, Progressive Caucus Co-Chair, et al. to John Ring, Chairman, NLRB (Jan. 11, 2019).
[5] *Browning Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

Chairman Scott and Rep. Rosa DeLauro (D-CT) cited the decision as sufficient justification for the Board to discard the proposed rule:

> "The court's decision forecloses the NPRM by concluding that "the common-law inquiry is not woodenly confined to indicia of direct and immediate control." The proposed rule, or any rule that refuses to consider reserved or indirect control as relevant evidence of a joint employer relationship, would thus fail to comply with the common law."[6]

Rep. Pocan's letter drew the same conclusion, also citing the D.C. Circuit decision as one of the reasons the Board should not move forward with the proposed rule.

A conclusion that the D.C. Circuit opinion invalidated the proposed rule is incorrect. A requirement of substantial direct and immediate control of the essential terms and conditions of employment is not in conflict with the court's interpretation of the common law. In fact, the proposed rule in no way excludes consideration of reserved or unexercised control in making a joint-employer assessment, and the recent court opinion specifically declined to answer whether reserved or unexercised control alone are sufficient to prove a joint-employer relationship.

In fact, the proposed rule addresses the court's concern that the NLRB's consideration of indirect control in *Browning-Ferris* was too broad and vague because it was not specifically confined to the essential terms and conditions of employment. The proposed rule clarifies that reserved or unexercised control alone is insufficient to prove a joint employer relationship and clearly affirms the manner of control—substantial direct and immediate control over the essential terms and conditions of employment—necessary to prove joint-employer status. Thus, it remains consistent with common-law principles.

Finally, opponents of the proposed rule have charged that pursuing joint-employer rulemaking creates ethical concerns. Rep. Pocan's letter cited a prior ethics issue involving a case adjudication as a reason the Board should not move forward with the rulemaking.

While the proposed rule also addresses the joint-employer standards that were established in *Browning-Ferris* and the vacated *Hy-Brand* decision,[7] the pending rulemaking does not create a conflict of interest or even the appearance thereof, and thus is not a violation of ethical standards. Rep. Pocan's letter draws a false equivalence. Despite dealing with the same policy issue, the rulemaking is a different procedure than adjudication and thus not subject to the same ethical assessment according to the Office of Government Ethics. Specifically, rulemaking on the joint-employer standard does not present any conflict of interest concerns because it is a "particular matter of general applicability," as opposed to a "particular matter involving specific parties."[8]

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[6] Letter from Robert C. "Bobby" Scott and Rosa DeLauro, *supra* note 3.
[7] *Hy-Brand Indus. Contractors, Ltd.,* 366 NLRB No. 26 (Feb. 26, 2018) (order vacating decision and order granting motion for reconsideration in part).
[8] OFFICE OF GOV'T ETHICS, THE NETTLESOME QUESTION OF PARTICULAR MATTERS OF GENERAL APPLICABILITY (Sept. 19, 2014), https://www.oge.gov/web/OGE.nsf/0/66EBD18E2C02446B8525815A00591F2C/$FILE/HO_Eisner_Nettlesome.pdf.

Furthermore, Board Member William Emanuel, who was the subject of the disputed ethics concern regarding *Hy-Brand*, was not asked to recuse himself from that case because of any conflict of interest inherent between Hy-Brand and his former employer's work on the *Browning-Ferris* case. Rather, the NLRB Inspector General concluded Emanuel should have recused himself because of the manner in which *Hy-Brand* was adjudicated: specifically, the "wholesale incorporation" of the *Browning-Ferris* dissent into the *Hy-Brand* decision.[9] There is no standard or doctrine preventing a Board member from participating in a case that may overturn the standard articulated in a preexisting case from which that member was recused. The NLRB's ethics rules do not require issue preclusion.

However, the resulting order to vacate *Hy-Brand* was based on flawed logic: not only is "wholesale incorporation" a vague standard for a supposed ethics violation that lacks any legal precedent, the NLRB Inspector General confirmed that his conclusion that Emanuel should not have participated in the *Hy-Brand* deliberations was based on "what actually occurred in the deliberative process of *Hy-Brand*" itself, creating an impossible ethical standard for Emanuel to comply with.[10] Specifically, it would not have been possible for Mr. Emanuel to know prior to the deliberations that the manner in which the deliberations would be conducted—which included a so-called "wholesale incorporation" of a prior dissent—might retroactively create an alleged, perceived conflict of interest.

Regardless, there is no ethical concern inherent in William Emanuel participating in joint-employer cases nor joint-employer rulemaking. Otherwise, the ethics standard would demand issue preclusion, which would be an absurd roadblock to a properly functioning Board.

Efforts to undermine or delay the pending joint-employer rulemaking with presentations of faulty legal interpretations and expansive charges of ethics violations are merely attempts to undercut the authority of the NLRB to fulfill its mission. The Board is fully justified in creating a rule requiring substantial direct and immediate control of the essential terms and conditions of employment to prove joint-employer status, and I urge the Board to complete this process expeditiously.

Respectfully submitted,

Virginia Foxx

Virginia Foxx
Ranking Member
Committee on Education and Labor

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[9] DAVID P. BERRY, INSPECTOR GENERAL, NLRB, NOTIFICATION OF A SERIOUS AND FLAGRANT PROBLEM AND/OR DEFICIENCY IN THE BOARD'S ADMINISTRATION OF ITS DELIBERATIVE PROCESS AND THE NATIONAL LABOR RELATIONS ACT WITH RESPECT TO THE DELIBERATION OF A PARTICULAR MATTER (Feb. 9, 2018).
[10] *Id.*