Congress of the United States

Washington, DC 20510

December 7, 2022

NLRB-2022-0001

The Honorable Lauren M. McFerran
Chairman
National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570-0001

Dear Chairman McFerran:

On September 7, 2022, the National Labor Relations Board (NLRB or "Board") published its Notice of Proposed Rulemaking entitled "*Standard for Determining Joint-Employer Status*" ("proposed rule"), which would rescind and replace the Board's 2020 joint-employer rule ("2020 rule") with an expanded joint-employer standard. The proposed rule would restore the "indirect, reserved" control standard in place of the 2020 rule's focus on "direct and immediate control." We write in opposition to the proposed rule because the rule is inconsistent with the common law, circumvents Congressional authority, and will negatively impact the nation's economy and our constituents.

In 2020, the Board issued a final rule under the *National Labor Relations Act* (NLRA) that provided clarity on when a business is considered a joint employer. Under the 2020 rule, "a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees" to be considered a joint employer.[1] The rule included definitions of key terms to create additional stability and certainty. This standard was celebrated by much of the business community for being straightforward and clear.[2]

The 2020 rule was in large part a return to the standard that was in place for several decades before being eliminated in 2015 by the Board in *Browning-Ferris Industries*, 362 NLRB 1599 (2015) ("BFI"). Prior to BFI, the Board's focus on "direct and immediate control" was reinforced by court approval and was to a great extent settled.[3] BFI significantly expanded the joint-employer standard by holding that a joint-employer relationship could be solely based on

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[1] NLRB, "NLRB Issues Joint-Employer Final Rule," Feb. 25, 2020, https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-joint-employer-final-rule.

[2] Sean Redmond, "NLRB Announces Joint Employer Final Rule," U.S. Chamber of Commerce, Feb. 25, 2020, https://www.uschamber.com/employment-law/unions/nlrb-announces-joint-employer-final-rule.

[3] See *NLRB* v. *CNN America, Inc.*, 865 F.3d 740, 748-751 (D.C. Cir. 2017) (finding that the Board erred by failing to adhere to its "direct and immediate control" standard); *SEIU Local 32BJ* v. *NLRB*, 647 F.3d 435, 442-443 (2d Cir. 2011) ("An essential element of any joint employer determination is sufficient evidence of immediate control over the employees.") (internal quotation marks omitted).

"indirect control." This resulted in a huge increase in potential joint employers, litigation, and Congressional scrutiny.[4] Given this significant shift in 2015, the Board decided to issue the 2020 rule under the *Administrative Procedure Act.* Rulemaking, as opposed to an adjudication, enabled the Board to address the joint employer issue in a comprehensive manner that created greater clarity and predictability for the regulated community.[5] The proposed rule fails to demonstrate good reason for rescinding the 2020 rule and in its place adopting a more extreme and unclear standard based on BFI.

The Board's proposed rule comes before application of the 2020 rule in any court decisions. In your dissent to the 2020 rule, you argued that since the BFI standard had only been in place for a short period, the Board should not alter the standard through rulemaking.[6] While your dissent was without merit—given BFI's significant shift from precedent and the lack of justification for the change—it is applicable to the present rulemaking that would rescind the 2020 rule. The Board should allow the 2020 rule to be applied in a variety of settings in order to determine its effectiveness based on the Board's and courts' review before any significant changes are made.

The Board asserts in the proposed rule that the "changes are designed to explicitly ground the joint-employer standard in established common-law agency principles," but the rule is inconsistent with the common law. While the D.C. Circuit Court in 2018 found that the BFI standard's use of indirect control could be an appropriate factor in determining joint-employer status, it also found that the standard "overshot the common-law mark" and applied the concept of "indirect control" too broadly.[7] Like the BFI standard, the proposed rule also overshoots the "common-law mark." Congress has made clear that the Board should rely on the common law when determining joint-employer status.

By proposing a rule that goes far beyond the common law, the Board is overstepping its legal authority. Such an authority is reserved to Congress. Only the legislative process can be used to amend the NLRA and expand the joint-employer standard. While some Members of Congress have attempted to expand the joint-employer standard in the past, no attempts have been successful. Even the most recent example—H.R. 842, the *Protecting the Right to Organize Act of 2021*, which would expand the joint-employer standard to ensure that "indirect or reserved control" alone can be sufficient to determine joint-employer status—has failed to be approved by Congress.[8] This demonstrates that Congress is not willing to expand the standard. One reason for this is because many Members believe the 2020 rule established a bright-line standard clarifying and limiting the circumstances in which a business entity may be a joint employer, a standard which is best suited for the current economy.

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[4] Jim Paretti, Michael Lotito, Maury Baskin, "NLRB Proposes New Joint-Employer Standard That Would Dramatically Expand Scope of "Joint Employment" Under the National Labor Relations Act," Littler, Sept. 6, 2022, https://www.littler.com/publication-press/publication/nlrb-proposes-new-joint-employer-standard-would-dramatically-expand.

[5] NLRB, "Fact Sheet – Joint Employer Final Rule," https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-7581/fact-sheet-joint-employer-final-rule.pdf. (Sept. 26, 2022),

[6] NLRB, "The Standard for Determining Joint-Employer Status," 83 FR 46681 (proposed Sept. 14, 2018) (codified at 29 CFR Part 103), https://www.federalregister.gov/documents/2018/09/14/2018-19930/the-standard-for-determining-joint-employer-status.

[7] *Browning-Ferris Industries of California, Inc.* v. *NLRB,* 911 F.3d 1195, 1222 (D.C. Cir. 2018).

[8] H.R. 842, 117th Cong. § 101(b) (2021).

Further, the Board's joint-employer proposed rule would have immediate and long-term negative effects on millions of workers and thousands of businesses at a time when the economy is already facing the highest inflation rates in four decades. Franchises in particular would be negatively impacted should the proposed rule go into effect. In the United States, there are approximately 775,000 franchises that employ 8.2 million workers and provide nearly $800 billion in economic output.[9] Prior to the proposed rule, this was projected to grow in 2022 to nearly 800,000 franchises employing 8.5 million workers, and outputting $827 billion to the economy.[10] These franchises cover over 300 different business lines, including restaurants, child care, hair care, fitness, tutoring, amusement parks, automotive repair, lodging, and senior care.[11] The International Franchise Association (IFA) found that the previous BFI joint-employer standard, nearly identical to the proposed rule, "cost franchise businesses $33.3 billion per year, resulting in 376,000 lost job opportunities, and led to a ninety-three percent increase in lawsuits."[12] Additionally, the proposed rule would cost franchise job opportunities that provide up to nearly four percent higher wages for their employees when compared to non-franchise counterparts.[13]

By moving forward with this misguided proposed rule, the Board would overwhelmingly hurt entrepreneurs who are utilizing the franchise model to own their own business. Many of these entrepreneurs are women, minorities, and veterans, thirty-two percent of whom say that they would not own a business without franchising.[14] The most recent Census data shows that 30.8 percent of franchise businesses are minority owned, compared to just 18.8 percent of non-franchised businesses.[15] This data shows franchising is a pathway to prosperity for women and minorities.

But franchises are not the only businesses negatively impacted by the proposed rule. The American Action Forum found that the previous BFI joint-employer standard would impact "54.6 million workers or 44 percent of private sector employees," a large number of which are employed by supply chain companies.[16] The U.S. Chamber of Commerce found there was "evidence that the [BFI] definition of joint employment [had] similar adverse impacts on non-franchise businesses that use supply chain management contracts and support services

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[9] "2022 Franchising Economic Outlook," International Franchise Association, Feb. 15, 2022, https://www.franchise.org/franchise-information/franchise-business-outlook/2022franchising-economic-outlook.
[10] Ibid.
[11] "The Value of Franchising," Oxford Economics, Sept. 21, 2021, https://www.oxfordeconomics.com/resource/The-value-of-franchising/.
[12] "The Economic Impact of an Expanded Joint Employer Standard," International Franchise Association, Jan. 28, 2019, https://www.franchise.org/sites/default/files/2019-05/JE%20Econ%20Impact%200128.pdf.
[13] "The Value of Franchising," Oxford Economics, Sept. 21, 2021, https://www.oxfordeconomics.com/resource/The-value-of-franchising/.
[14] Ibid.
[15] "IFA Commends Officials' Call for Additional Census Research Data to Spur Business Ownership," International Franchise Association, February 28, 2019, https://www.franchise.org/media-center/press-releases/bipartisan-members-of-congress-promote-minority-franchise-ownership.
[16] Ben Gitis, "The Joint Employer Standard and the Supply Chain," American Action Forum, November 26, 2018, https://www.americanactionforum.org/research/joint-employer-standard-and-supply-chain/.

contracts."[17] Businesses such as universities, hospitals, home healthcare, agriculture, cleaning services, security services, hospitality, waste management, delivery services, home builders, retailers, and others that contract or subcontract would be negatively affected.

Due to this negative economic impact, the proposed rule's inconsistency with common law, and the NLRB's attempt to use powers reserved to Congress, we urge the Board not to move forward with its proposed rule for determining joint-employer status. Instead, the Board should maintain the 2020 rule, which brought clarity and certainty to the business community.

Sincerely,

Mike Braun
U.S. Senator

Virginia Foxx
Member of Congress

Richard Burr
U.S. Senator

Glenn "GT" Thompson
Member of Congress

Mitch McConnell
U.S. Senator

Tim Walberg
Member of Congress

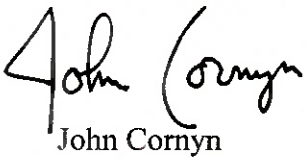
John Thune
U.S. Senator

Glenn Grothman
Member of Congress

John Barrasso, M.D.
U.S. Senator

Elise M. Stefanik
Member of Congress

[17] Comments On Behalf Of The United States Chamber Of Commerce To The National Labor Relations Board Proposed Rulemaking, "The Standard For Determining Joint-Employer Status", 83 Fr 46681, RIN 3142-AA13, January 28, 2019, https://www.uschamber.com/assets/archived/images/uscc_comments_to_nlrb_on_joint_employer_rulemaking.pdf.



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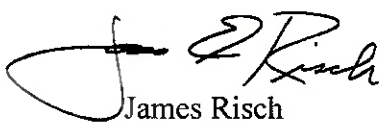

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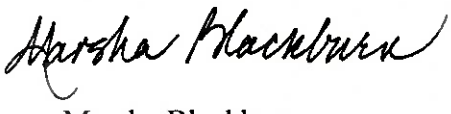

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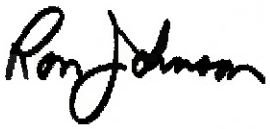

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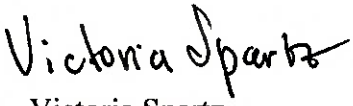

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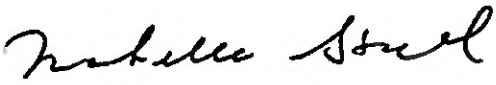

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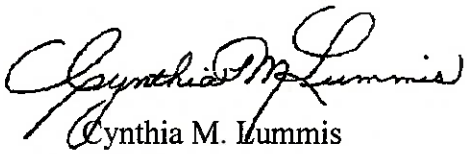

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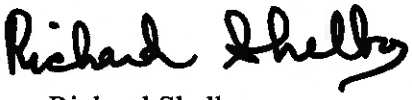

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