



December 7, 2022

Roxanne Rothschild  
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-AA21; Standard for Determining Joint-Employer Status; Notice of Proposed Rulemaking

Dear Ms. Rothschild:

The National Retail Federation (NRF) and the National Council of Chain Restaurants (NCCR) submit these comments in response to the National Labor Relations Board's (NLRB or "Board") Notice of Proposed Rulemaking and Request for Comments regarding the Standard for Determining Joint-Employer Status, 87 Fed. Reg. 172 (August 31, 2022) (hereinafter "Proposed Rule"). NRF/NCCR oppose the Proposed Rule because of the detrimental impacts the changes would have on the retail community. For the reasons outlined below, NRF/NCCR encourage the Board to withdraw the Proposed Rule in its entirety and leave in place the existing Rule, which the agency promulgated less than three years ago.

NRF, the world's largest retail trade association, passionately advocates for the people, brands, policies and ideas that help retail thrive. NRF empowers the industry that powers the economy. Retail is the nation's largest private-sector employer, contributing \$3.9 trillion to annual GDP and supporting one in four U.S. jobs — 52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating, inspiring and communicating the powerful impact retail has on local communities and global economies. NRF regularly advocates for the interests of retailers, large and small, in a variety of forums, including before the legislative, executive and judicial branches of government. Nearly all of NRF's members qualify as "employers" under the National Labor Relations Act (the "Act") and therefore stand to be affected by the Proposed Rule.

NCCR, a division of the National Retail Federation, is the leading organization exclusively representing chain restaurant companies. For more than 40 years, NCCR has worked to advance sound public policy that serves restaurant businesses and the millions of people they employ. NCCR members include the country's most respected quick-service and table-service chain restaurants.

The Proposed Rule is overbroad, unnecessary and harmful. The changes contained therein will disrupt both existing and potential business relationships between retailers and their supply chain partners and contractors. The Board promulgated a Final Rule (the “Current Rule”) less than three years ago after a robust comment period. The Current Rule requires that the Board find a business actually exercises control over the essential terms and conditions of employment of a putative employee before concluding it is a joint employer. This is consistent with decades of Board precedent and accord with the common law within the context of joint employment. It provides a predictable standard that allows retailers and restaurants to structure their business relationships to avoid interference with the employer-employee relationship and unintended joint employer liability.

The Proposed Rule, on the other hand, will discourage business-to-business cooperation, because common, arms-length contracts between employers may saddle each party with bargaining and unfair labor practice liability related to employees they do not control. This arrangement does not benefit employers, employees or consumers and is not required by and is in fact contrary to the Act, the common law and recent court decisions. NRF/NCCR are well-positioned to comment on the Proposed Rule, as they have unique insight into how the Proposed Rule will harm retailers and restaurants, their employees and the economy as a whole.

## **I. The Board’s Current Rule Is Working for Employers and Employees**

Less than four years ago, NRF/NCCR submitted a detailed comment in support of the Board’s then-proposed Standard for Determining Joint Employer Status. In February 2020, in response to overwhelming support, the Board published its Current Rule to provide a clear standard for determining whether more than one company could qualify as the employer of an employee for purposes of the Act. 29 C.F.R. Part 103.40. The Current Rule has worked as expected and allowed businesses to enter into arms-length relationships with partners, contractors or supply chain providers without assuming liabilities for the employees of those business partners. It did not deprive workers of any of their rights under the Act or depress union organizing. Indeed, the Board’s own statistics show that union organizing activity increased by more than 50 percent from 2021 to 2022 while the Current Rule remained in place.<sup>1</sup>

The Current Rule has had a meaningful, positive impact on retailers and restaurants, which commonly partner with other companies to provide specialty services or expertise. Based on NRF/NCCR member survey responses:

- More than 70 percent of respondents use temporary personnel supply services;
- More than 35 percent of respondents use transportation or shipping contractors;
- More than 35 percent of respondents use facilities or equipment maintenance and service contractors;
- 50 percent of respondents use contractors at their distribution centers and warehouses;

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<sup>1</sup> <https://www.nlr.gov/news-outreach/news-story/union-election-petitions-increase-57-in-first-half-of-fiscal-year-2022>

- More than 70 percent of respondents use information technology network, website or help desk contractors; and
- More than 35 percent of respondents use customer service call center or online customer assistance contractors.

The partnerships between retailers and these specialty service providers are vital to the industry's success. The Current Rule allows retailers and their partners to structure their contractual relationships in a manner that allows each to perform their unique roles without assuming labor law liability for the employees of the other.

Under the Current Rule, a business partner may impose reasonable requirements on contract partners without creating a joint-employment relationship. For example, a retailer may ask a delivery contractor to instruct its employees to wear the retailer's logo to provide home delivery services, or a contractor's customer service employees may work an overnight shift to answer questions on behalf of a retailer. These agreements between businesses benefit everyone involved. They provide job opportunities for employees, efficiency for businesses and improved service for customers. The Current Rule creates an environment where these common business-to-business transactions can take place without parties fearing they may inadvertently create a joint employer relationship merely because aspects of the transaction may indirectly impact employees.

The Current Rule's recognition that routine, indirect control over a business partner cannot form the basis for a joint employer relationship is also consistent with court decisions applying other laws. For example, in *Singh v. 7-Eleven Inc.*, the federal district court for the Northern District of California found no joint employer relationship under the Fair Labor Standards Act where 7-Eleven controlled store hours, uniforms, food service and deliveries for its franchisees. 2007 WL 715488, at \*5 (N.D. Cal. Mar. 8, 2007). Similarly, in *Wright v. Mountain View Lawn Care, LLC*, the federal district court for the Western District of Virginia found no joint employer relationship under Title VII of the Civil Rights Act where an employee wore a uniform and drove a truck bearing the logo of the putative joint employer and received communications on the putative joint employer's letterhead, saying such aspects of his employment were merely the product of a standard franchise agreement. 2016 WL 1060341, at \*2 (W.D. Va. Mar. 11, 2016). These are just two of many brand standards cases that illustrate the Current Rule has it right.<sup>2</sup>

The Current Rule's threshold requirement for direct, exercised control provides affected parties with a clear understanding of what types of actions will trigger joint employer liability. It provides businesses with certainty that reasonable provisions, such as requiring contractors to

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<sup>2</sup> See also *Reese v. Coastal Restoration and Cleaning Services, Inc.*, 2010 U.S. Dist. LEXIS 132858, at \*3-5 (S.D. Miss. Dec. 15, 2010) (under the economic reality test, franchisor did not have the power to fire and hire employees or supervise and control them to the extent that franchisor could be considered an employer under FLSA); *In re Jimmy John's Overtime Litigation*, 2018 WL 3231273 at \*20 (N.D. Ill. June 14, 2018) ("Jimmy John's control over the systems, operations, and dress code at franchise stores, as pervasive as it may seem, does not amount to joint employment.")

comply with anti-discrimination laws or franchisees to meet brand standards, will not create a joint employment relationship. As a result, the Current Rule encourages business-to-business cooperation, supports expansion of small businesses and franchise owners, and encourages partnerships that an overly broad joint employer standard will likely scuttle.

The regulated community benefits from clear, easy-to-apply standards like the Current Rule. It also benefits from consistency from the Board. The Proposed Rule offers neither. It represents a complete reversal of a standard passed into law less than three years ago. The Board's rulemaking process exists as an alternative to rule-by-adjudication because rulemaking supposedly provides more predictability. But if the Board is willing to flip-flop on a core standard like this one so drastically and in such a short timeframe, then why bother with rulemaking at all? The Proposed Rule lacks the clarity of the Current Rule, dilutes employer confidence in the Board's rulemaking process and provides little benefit to employees. All interested parties would be better served by keeping the Current Rule in place.

## **II. The Proposed Rule Is Overbroad and Unnecessary**

At the outset, the Proposed Rule is overbroad. The Board states that businesses that “share or codetermine those matters governing the employees’ essential terms and conditions of employment” will be joint employers. Rather than provide guidance on how stakeholders, the Board and courts might reasonably and consistently apply this core premise, the agency defines each of the key terms in an unreasonable and overly broad manner leaving the standard arbitrary, capricious and unworkable. For example, the Proposed Rule would find that an employer “shares or codetermines” essential terms of employment even when an employer exercises no control over the terms of employment. §103.40(c). Additionally, the Board places no limits on the term “essential terms and conditions of employment.” §103.40(d). Despite its professed desire to provide the regulated community with a “definite, readily available standard,” the Board includes the legally dubious phrase “include, but are not limited to” in defining the scope of essential terms of employment. Not only that, but the Proposed Rule would find a joint employer relationship if a business has any indirect or unexercised control over *any single essential term* of employment – which, again, remain undefined. §103.40(b). Taken together, these two definitions mean that a business with any type of contractual relationship with an employer that affects any term of employment for the partner-employer’s employees risks a Board finding that it is a joint employer.

The hypothetical reach of the Proposed Rule is virtually unlimited within the context of business-to-business contracting – a problem that has also been noted by the U.S. Small Business Administration’s Office of Advocacy (SBA).<sup>3</sup> Specifically, SBA said, “[t]he expanded standard can potentially target any third-party contractual relationship that involves indirect or

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<sup>3</sup> Comments dated November 29, 2022 by the Small Business Administration’s Office of Advocacy to RIN 3142-AA21, Standard for Determining Joint-Employer Status, Notice of Proposed Rulemaking, at 3, accessed on December 3, 2022 at [https://cdn.advocacy.sba.gov/wp-content/uploads/2022/11/29104056/Comment-Letter-NLRB-Joint-Employer-Rule-508c.pdf?utm\\_medium=email&utm\\_source=govdelivery](https://cdn.advocacy.sba.gov/wp-content/uploads/2022/11/29104056/Comment-Letter-NLRB-Joint-Employer-Rule-508c.pdf?utm_medium=email&utm_source=govdelivery).

reserved control from an inexhaustive list of terms and conditions.”<sup>4</sup> The SBA went on to recommend the Board significantly amend the Proposed Rule to “limit and clarify what degree of indirect or reserved control on one or more terms and conditions of employment is sufficient to trigger joint-employment status ... [and] provide guidance to contracting parties regarding which terms are routine contracting terms and which terms are essential to permit meaningful collective bargaining ... [, such as] scheduling and timing requirements, [which] should be considered routine contracting terms.” (References omitted).<sup>5</sup> SBA also said, “the Board should remove the provision that allows any other contract term to be included in the list of terms and conditions subject to liability.”<sup>6</sup> NRF/NCCR agree with the SBA and a failure by the Board to make such clarifications as request by stakeholders – including its own sister agency – will render any final rule arbitrary and capricious.

For example, if finalized as drafted, the ill-defined and overly broad terms in the Proposed Rule will significantly interfere with existing retail and restaurant business relationships. NRF/NCCR members reported that they regularly maintain business-to-business contracts with the following types of requirements:

- Contract provisions that require the other party to comply with all applicable employment laws;
- Contract provisions that allow businesses to bar contractor employees from their property or premises, including when contractor employees pose a threat to person or property;
- Contract provisions that require a contractor to conduct background checks on its employees before providing access to a business’ premises or information systems;
- Contract provisions that require business partners to maintain an alcohol- and drug-free workplace; and
- Contract provisions that require the contractor’s employees to be fully qualified to perform the contracted work (*i.e.*, maintain a CDL license, forklift certifications or other applicable licenses or certifications).

These common contract provisions demonstrate the risks associated with the breadth of the Proposed Rule. Given the Board’s failure to provide any reasonable contours for its proposed standard, stakeholders may fear that any of these provisions could arguably reflect attenuated, indirect control over terms and conditions of employment. The Board needs to clarify application of the standard to these common provisions or risk chilling activity that: 1) is not and should not be regarded as indicia of a joint employer relationship under any circumstance; and 2) is a matter of good policy, something government should support. A failure to do so would create a final rule that is undoubtedly arbitrary and capricious, particularly in light of comments requesting clarity by NRF/NCCR, the SBA and dozens, if not hundreds or thousands, of other stakeholders.

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<sup>4</sup> Id.

<sup>5</sup> Id. at 3-4.

<sup>6</sup> Id. at 4.

As a substantive matter, a contract that requires a business partner to comply with law or ensure its employees maintain relevant licenses and certifications does not change the terms and conditions of an employee's work. A contractor should already be complying with law and maintaining relevant licenses. Provisions like these simply provide retailers with some comfort that their business partners will, as a prerequisite to entering a business relationship, commit to be a law-abiding partner.

Under the vagaries of the Proposed Rule, however, such provisions could be seen to arguably reserve a right to control the employees of another employer. Even if they are never acted on, some may be concerned such provisions could trigger liability. In these circumstances, a retailer or restaurant concerned with triggering joint employer liability would face a difficult choice – include these standard contract provisions and risk joint employer liability under the Act or exclude them and risk liability under other applicable laws. A rule that requires an entity to choose compliance with one law over potential liability under another is bad policy, and the natural outcome of such a rule is clear – businesses will be more likely to end their contractual relationships with third parties, particularly smaller third parties with fewer resources, than accept the elevated legal risks caused by such relationships.

Again, this is bad policy, which will disproportionately impact small business and entrepreneurs and one of the many reasons why SBA has said the Proposed Rule provides “no guidance for contracting parties on how to comply or avoid liability” and “recommends that the Board clarify and limit the types and degrees of indirect and reserved control that would now trigger joint-employment liability.”<sup>7</sup> In particular, the SBA noted that “[t]he Board should clarify that contract terms to abide by federal requirements should be considered routine components of a company-to-company contract, and not essential terms and conditions subject to joint employer liability.”<sup>8</sup> The SBA also said it is concerned “that this proposed rule would violate a new federal mandate to bolster the ranks of underserved small business federal contractors, including women-owned, Black-owned, Latino-owned, and other minority-owned small businesses.”<sup>9</sup> Finally, the SBA encouraged “the Board to reassess the compliance costs from this regulation.”<sup>10</sup> NRF/NCCR could not agree more.

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<sup>7</sup> Id. at 1.

<sup>8</sup> Id. at 4.

<sup>9</sup> Id.

<sup>10</sup> Id., the SBA specifically states at 5:

Small businesses commented that franchisors may pull back involvement with their franchisees to indemnify themselves from liability. Franchisors may also provide less legal and human resources advice, which will result in hiring outside professionals to provide guidance, documents, and compliance training. Franchisees reported that this proposal may add costs of thousands of dollars a year and may require hiring a dedicated staffer. A restaurant franchisee owner stated that these costs will prohibit small business expansion, as restaurants are currently facing increased food prices and labor shortages. A general contractor commented that the compliance costs of this rule are hard to estimate because the rule makes them liable for every subcontractor, making it impossible to perform work and produce deliverables. A construction industry representative worried that this rule would create increased litigation exposure.

The expansive breadth of the Proposed Rule renders it unnecessary, unhelpful and arbitrary and capricious. The Act seeks to provide employees with a meaningful opportunity to bargain over their terms and conditions of employment. The Proposed Rule is far too broad to serve that aim. Instead, it would sweep in business relationships so detached from the day-to-day terms and conditions of work that bargaining would serve no legitimate purpose. If the evidence shows that a putative joint employer exercised no control over the employment relationship, and has only indirect, contractually reserved control over a single term of employment, there is no reason to force that party to the bargaining table.

### **III. The Proposed Rule Misinterprets Common Law and Ignores D.C. Circuit Law**

The Board attempts to insulate the Proposed Rule from judicial scrutiny by claiming that it is based on traditional agency principles. It is not. Neither past Board cases purporting to apply common law principles, nor the language of the various restatements of agency, support the broad definition of joint employment found in the Proposed Rule. The D.C. Circuit recognized as much when it determined the Board’s previous broad joint employer standard needed “legal scaffolding” around it to prevent reserved or indirect control from holding too much weight in the analysis. *Browning-Ferris Indus. of California, Inc. v. Nat’l Lab. Rels. Bd.*, 911 F.3d 1195 (D.C. Cir. 2018). The Proposed Rule provides no such scaffolding, fails to identify its alleged common law sources and does not accord with relevant precedent.

In its preamble to the Proposed Rule, the Board repeatedly notes that the common law and the courts have found a reserved but unexercised right to control *probative* of a joint employer relationship. *See* NPRM at 54642-43; 54646. As the dissent notes, this statement is not controversial nor an attack on the Current Rule. The Current Rule specifically contemplates that reserved but unexercised control may serve to supplement or support a determination that a putative joint employer’s control over the employees of another employer is substantial. *See* 85 FR 11186. In that sense, the Current Rule directly addressed the D.C. Circuit’s concerns about the Board’s previous joint employer standard, which, like the Proposed Rule, allowed for finding a joint employer relationship based on “routine components of a company-to-company contract.” *Browning-Ferris Indus. of California, Inc. v. Nat’l Lab. Rels. Bd.*, 911 F.3d 1195, 1221 (D.C. Cir. 2018) (hereinafter “*BFI*”).

The Proposed Rule not only fails to heed the D.C. Circuit’s instructions to rein in the reach of the Board’s joint employer rule but goes much farther and makes clear that unexercised control should be treated by the Board as *dispositive* of the joint employer question. It provides that companies are joint employers if they share or co-determine essential terms and conditions of employment and then defines that term as follows: “to ‘share or codetermine those matters governing employees’ essential terms and condition of employment’ means for an employer ***to possess the authority to control (whether directly, indirectly or both), or to exercise the power***

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Roundtable participants also commented that this proposal may dissuade larger companies from subcontracting with smaller businesses or utilizing small staffing firms.

*to control (whether directly, indirectly or both), one or more of the employees' essential terms and conditions of employment.* See Proposed Rule § 103.40(c) (emphasis added). The Board dresses up the Proposed Rule in the common law's "share or co-determine" language but then expands its definition of that term beyond its common law application and far past the limits the D.C. Circuit instructed it to heed in the *BFI* decision.

The Proposed Rule principally relies on *Greyhound Corp.*, 153 NLRB 1488 (1965), as setting out the appropriate early Board precedent but omits any discussion of the facts of the case. In *Greyhound Corp.*, the Board relied on evidence of actual, exercised control to reach its holding that the putative joint employers shared and codetermined the essential terms and conditions of employment. 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 determine the number of employees required to meet those schedules, the contractor's employees received work instructions directly from Greyhound's terminal officials, and, on at least one occasion, Greyhound made its contractor fire a porter it deemed an unsatisfactory worker."<sup>11</sup> There is no indication from the case that reserved control alone would have resulted in a joint employer finding.

After *Greyhound*, the Board considered the same key factors in subsequent decisions to determine whether a joint employment relationship existed: whether two or more entities "share[d] or codetermine[d]" essential employment terms through the actual exercise of joint control that directly affected such matters.<sup>12</sup> Federal courts expressed approval of the *Greyhound* standard and its reliance on actual control.<sup>13</sup>

Even the cases cited by the Board in support of the Proposed Rule demonstrate that the Board has rarely considered mere contractual reservation of control, without any actual exercise of control, sufficient to establish a joint employer relationship. For example, in *Lowery Trucking Co.*, 177 NLRB 13 (1969), the Board found evidence of actual exercised control, including co-employer Ace Trucking instructing Lowery to terminate drivers, reviewing all applicants suggested by Lowery, and Ace's safety managers providing direct instructions to Lowery

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<sup>11</sup> *Greyhound Corp.*, 153 NLRB 1488, 1496 and n.8 (1965).

<sup>12</sup> 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)

<sup>13</sup> *N. L. R. B. 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); *N.L.R.B. 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).



drivers. *Id.* The Board found “[t]he Lowery drivers performed virtually all their duties pursuant to detailed instructions from Ace, not Lowery Trucking.” *Id.* at 15. There is no indication in that case that the Board would have found a joint employer relationship absent direct control exercised by Ace over Lowery’s truck drivers.

Similarly, in *Ref-Chem Co.*, 169 NLRB 376 (1968), the Board treated contractual reservations of control as probative but not dispositive. In that case, a chemical manufacturer and its insulation and maintenance contractor were deemed to be joint employers, both subject to bargaining obligations with the contractor’s employees. The Board considered the services contract between the manufacturer and contractor relevant to its analysis but also explicitly found “a high degree of control *exercised by* [the manufacturer] over the operations of [the contractor].” *Id.* at 377 (emphasis added). The evidence showed that the manufacturer had to approve all hiring for contractor employees and interviewed contractor employees before hire. A foreman for the contractor testified plainly that “although he had been a construction superintendent all his life, he had never been so closely supervised by a customer’s representative.” *Id.*

The facts of *Lowery Trucking* and *Ref-Chem* show that common law and Board precedent do not support joint employer findings without evidence of actual, exercised control. The Board’s use of case law that relies on evidence of actual, exercised control over terms and conditions of employment to attempt to support the Proposed Rule shows that it cannot base its proposal on historic Board decisions or the common law. Instead, the Proposed Rule represents a significant overreach because it allows for, and arguably requires, a joint employer finding even when the practices of the parties do not demonstrate shared control over the relevant employees.<sup>14</sup>

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<sup>14</sup> NRF/NCCR also agree with the SBA that the Proposed Rule could conflict with other federal laws and the Board must specifically address this possible conflict in a final rule or the rule will definitely fail as arbitrary and capricious. The SBA notes in its comments at 4-5, “small businesses identified two areas of the proposed rule that conflict with Federal rules and mandates[;]”

First, roundtable participants noted that many federal requirements require prime contractors to have indirect and reserved control over their subcontractors’ terms and conditions of employment, such as wages, safety, and hiring and firing. Many other third-party contracts have similar requirements to follow federal mandates. The Board should clarify that contract terms to abide by federal requirements should be considered routine components of a company-to-company contract, and not essential terms and conditions subject to joint employer liability.

Second, this proposed rule may conflict with a recent presidential announcement on reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners. Advocacy is concerned that this proposed rule would violate a new federal mandate to bolster the ranks of underserved small business federal contractors, including women-owned, Black-owned, Latino-owned, and other minority-owned small businesses. Roundtable participants commented that this proposal may create a barrier to entry for small businesses new to federal contracting. These businesses need more mentorship and guidance from larger prime contractors and subcontractors

#### **IV. The Proposed Rule Is Arbitrary and Capricious**

The flaws in the Proposed Rule are exacerbated by the circumstances surrounding its publication. The Board enacted the Current Rule less than three years ago. It has yet to be cited in a reported Board decision.<sup>15</sup> There is zero track record that it is somehow not working for employees or the regulated community. Given these realities, the Proposed Rule represents a particularly egregious and aggressive misuse of the Board’s rulemaking procedures. *See* Zev J. Eigen, Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 Minn. L. Rev. 1879, 1887 (2014) (discussing the Board’s “flip flop problem”). Even though the Board has a long history of flip-flopping in its adjudicatory process based on its political make-up, its actions in this case – to reverse and re-enact a polar opposite rule on a major jurisdictional aspect of the Act so quickly and without support – appears unprecedented.

Congress granted the Board authority to enact rules necessary to implement the Act consistent with its purpose and within the limits of the Administrative Procedure Act, but the Board’s discretion to engage in rulemaking is subject to limits, and those limits are tightening. Courts have restricted the Board’s authority to enact policy that extends beyond the proper scope of the Act. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978) (holding judicial review of Board decisions limited to consistency with the Act and rationality). More recently, the Supreme Court has expressed increasing skepticism about agencies stretching the limits of their authority. *See, e.g., Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor, Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (“The question, then, is whether the Act plainly authorizes the Secretary’s mandate. It does not. The [OSH] Act empowers the Secretary to set *workplace* safety standards, not broad public health measures.”). Even the ability of agencies to change positions has come under closer review. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (examining authority of Department of Homeland Security to change interpretations of Deferred Action for Childhood Arrivals (DACA) program). The trend of the courts clearly demonstrates that agencies cannot engage in legislation-by-rulemaking and that certain, major decisions must be made by Congress.

Rather than acknowledging the clear message sent by the courts regarding administrative deference and overreach, the Board is moving further afield from its statutory mandates and Supreme Court precedent. *See NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (explaining the Board has the “delicate task” of “weighing the interests of employees ... against the interest of the employer”). The Proposed Rule not only upends the business relations of employers rightfully relying on the Current Rule but, as noted throughout these comments, also fails to outline any cognizable limits to its reach that could inform an employer about how to avoid future liability. Moreover, it all but ignores the instructions of the D.C. Circuit from its 2018 *BFI* decision to distinguish between control that develops as part of routine business-to-business contracts and control that meaningfully impacts an employment relationship. Changing a rule enacted less than three years ago in order to expand the jurisdictional reach of the Act and

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<sup>15</sup> Based on a Westlaw search for any citations to 29 CFR §103.40 conducted on Nov. 23, 2022.

usher in the broadest joint employer definition in Board history endangers the continuing legitimacy of the Board. The simple fact is that the Proposed Rule is unlikely to withstand judicial scrutiny and more likely to result in a judgment imposing broader restraints on the Board's rulemaking authority going forward.

#### **V. The Proposed Rule Must Limit the Universe of Essential Terms and Conditions of Employment**

NRF/NCCR oppose the Proposed Rule in its entirety. Nevertheless, if the Board elects to follow through on its Notice of Proposed Rulemaking, it must resolve ambiguities in the Proposed Rule. NRF/NCCR support the Current Rule in large part because it provides bright line requirements about exercising control over workers that employers could understand and implement. The Proposed Rule fails to provide any of the same guidance, particularly with respect to its open-ended definition of "essential terms and conditions of employment."

The Proposed Rule includes "hours of work" as an essential term and condition of employment, separate and apart from scheduling. NRF/NCCR strongly oppose inclusion of "hours of work" as an essential term of employment that can create a joint employer relationship merely through indirect or attenuated control. Consider the following common retail business relationship: small business enters into a contract with a department store to operate a make-up counter. The small business retains complete control over the hiring, pay and discipline of its employees who work at the make-up counter in the department store, but the small business can only operate during hours when the department store is open. Under the Proposed Rule, an employee or union could argue that the department store indirectly controls the hours of work, because the small business can only operate during department store hours. No reasonable observer could conclude such a relationship should result in joint employer liability. The Current Rule explicitly carves out this factual scenario from its definition of joint employer and so too should Proposed Rule.

A similar problem exists with the inclusion of a broad "workplace health and safety" provision in the Proposed Rule, which the Board is apparently including in response to the COVID-19 pandemic. In the same scenario, imagine the department store conducts mandatory fire drills for all personnel and customers in the building at a given time. Necessarily, this includes personnel from the make-up counter who happen to be in the building at the same time. In some sense, by meeting its workplace safety obligations for its own employees, the department store has now involved itself – indirectly and insubstantially – with the safety practices of the contractor's employees. Under the Proposed Rule, it has exercised some control over an essential term and condition of employment and would qualify as a joint employer.

These hypotheticals illustrate a fundamental problem with the Proposed Rule – the absence of any meaningful materiality requirement. As written, any aspect of a business-to-business relationship that touches on what the Board deems an "essential term and condition of employment" will trigger a joint employer relationship. The plain text of the rule statements in §103.40(b)-(d) swallow up the exception the Board attempts to include in §103.40(f). Section

103.40(f) declares “evidence of an employer’s control over matters that are immaterial to the existence of an employment relationship under common-law agency principles ... is not relevant” to the joint employer. This represents the Board’s obvious attempt to address the D.C. Circuit’s *BFI* instruction that routine aspects of business-to-business contracts could not form the basis for a joint employer relationship under common law, but the exception itself is rendered irrelevant by its context. It stands in direct contradiction to the rule statement in Section 103.40(b) that “*for all purposes*” businesses are joint employers if they “share or codetermine matters governing essential terms and conditions of employment.” The result is a form of circular logic – if a matter affects an essential term and condition of employment under §103.40(b) and (d), then how can it also be “immaterial” to the existence of an employment relationship under §103.40(f)? And if a matter does not affect an essential term and condition of employment under §103.40(b) and (d), then there is no reason to apply the §103.40(f) exception in the first place. In practice, this logical inconsistency will render the materiality exception in §103.40(f) subject to arbitrary application and chill business activity. The Proposed Rule requires a narrow list of “essential terms and conditions of employment,” or it will certainly overstep the D.C. Circuit’s instruction not to create a rule that results in joint employer findings based on attenuated aspects of business-to-business contracts.

## VI. Conclusion

NRF/NCCR and its members strongly oppose the Proposed Rule. Substantively, it will discourage business-to-business cooperation, stunt small business growth and encourage retailers to bring more operations in-house, reducing opportunities for specialization. Those detrimental effects will not be offset by benefits to employees who already have the ability to organize and bargain with the employers that affect their day-to-day terms and conditions of employment. Procedurally, the Proposed Rule represents the worst illustration of the Board’s flip-flopping problem by completely reversing the Current Rule in less than three years without any objective or data-based justification. NRF/NCCR urge the Board to reconsider its Proposed Rule and instead keep the Current Rule in place or draft a rule that recognizes direct and immediate control over terms and conditions of employment has always been a threshold requirement to finding a joint employer relationship.

NRF/NCCR thank the NLRB for the opportunity to provide the above information.<sup>16</sup>

Sincerely,



David French  
Senior Vice President  
Government Relations

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<sup>16</sup> The law firm of Hunton Andrews Kurth LLP assisted NRF in drafting these comments.