



December 7, 2022

Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570-0001

RE: Comments on National Labor Relations Board “Standard for Determining Joint-Employer Status,” RIN 3142-AA21

Dear Ms. Rothschild,

On behalf of the Goldwater Institute, I am submitting comments regarding the National Labor Relations Board (NLRB) Notice of Proposed Rulemaking entitled, “Standard for Determining Joint-Employer Standard,” which was published in the Federal Register on September 7.¹ The proposal would significantly constrain the ability of American and Arizona businesses alike to contract with each other for the goods and services that businesses need to operate as efficiently and productively as possible.

Founded in 1988 in Arizona with Senator Barry Goldwater’s blessing, the Institute is a free-market public policy, research, and public interest litigation organization dedicated to advancing the principles of limited government, economic freedom, and individual liberty. We’re committed to empowering all Americans to live freer, happier lives, and we accomplish tangible results for liberty by working in state courts, legislatures, and communities nationwide to advance, defend, and strengthen the freedom guaranteed by the constitutions of the United States and the fifty states.

The NLRB Proposed Rule Unnecessarily Creates an Unworkable Test for Determining Joint Employer Status

As the Board acknowledges, the “joint-employer standard has changed several times in the past decade.”² On this one and only point, we agree. Small and large businesses alike have watched as the line of who is and is not a joint employer has moved back and forth, particularly over the last decade. Responding to this confusion, the NLRB previously went through a rulemaking process, taking

¹ 87 Fed. Reg. 54,641-02 (Sept. 7, 2022).

² Id. at 54,645.

thousands of comments, and developing a Final Rule that provided great clarity.³ It found that a joint employer relationship exists if a business exercises “direct and immediate” control over the employees of another on essential terms and conditions of employment: wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.⁴ Direct and immediate control over a specified list of activities employers and workers alike would consider to make up an employer/employee relationship introduced much-needed commonsense and clarity into the regulations governing joint-employment status.

Yet, without any substantive justification and no practical experience under the 2020 Final Rule, the Board decides to start over. And worse, the Board develops a new standard that, despite its assertions otherwise, is not grounded in established law. The new standard is also not intuitive to employers or employees, unless you determine that the employees of any business that contracts with another are employed jointly by both.

Revising the Board’s 2020 Final Rule is premature and cannot be justified under the Administrative Procedure Act (APA). In *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016), the Supreme Court stated that to change existing policy an agency must “provide a reasoned explanation for the change” and “show that there are good reasons for the new policy.” (citation omitted). With its proposed rule, the NLRB has failed both of those tests.

The Board’s “reasoned explanation for the change” is based on two fictions. First, the Board contends that it is simply codifying its longstanding joint-employer standard based on common-law agency principles. Second, the Board argues that the proposed rule establishes a “definite, readily available standard” that will assist employers and labor organizations trying to comply with the National Labor Relations Act.

But, as dissenting Members Kaplan and Ring rightly point out, the proposed rule does not codify existing legal precedent; instead, the proposed rule breaks new legal ground. It envisions a joint-employer relationship for exercised and unexercised direct and indirect control over an open-ended set of essential terms and conditions of employment. The proposal exceeds even the Board’s expansive definition of joint employer status in *Browning Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery (BFI)*.⁵

Additionally, because the proposed rule establishes a completely new standard that is based on direct and indirect or reserved control over an open-ended list of terms and conditions, it is an indefinite and unworkable standard—the opposite of what the Board claims. The Board has utterly failed to show that the proposed rule will produce a more cogent standard that businesses can readily identify and follow.

³ 85 Fed. Reg. 11,184 (Feb. 26, 2020).

⁴ *Id.*

⁵ 362 N.L.R.B. 1599 (2015).

Furthermore, the NLRB provides no good reason for the new policy. It cannot because it has yet to try the old one. After going through the rigorous rulemaking process, NLRB must at least give the 2020 Final Rule a chance to work or not. The Board cannot claim it does not work because regulators, employers, employees, and labor organizations alike have not lived under it. No one knows whether it provides the clarity that interested stakeholders need or protects their interests. At a minimum, the Board should let the 2020 Final Rule take effect. After a few years of experience under it, then, if the Board thinks changes are warranted, it can move forward with a new rulemaking. But abandoning a well-developed rule before even letting it take effect and replacing it with a nebulous one surely does not meet the *Encino* test.

Arizonans and Their Economy Would be Harmed by the Proposed Rule

Arizona employers of all sizes would be hurt by the Board's unclear, unworkable, and unstable standard.

Arizona is home to industries including aerospace, electronics and semiconductor manufacturing, bioscience and healthcare, business and financial services, media, hospitality, and technology and innovation, among many others.⁶

Aerospace firms contract regularly with the federal government. Yet, as the U.S. Small Business Administration's Office of Advocacy rightly points out, the proposed rule conflicts with federal requirements in those contracts. Pushing back against the Board's assertion in its Initial Regulatory Flexibility Analysis that its proposal does not conflict with Federal rules and mandates, Advocacy references comments it received at its regulatory roundtable. Under federal law, prime contractors must have "indirect and reserved control over their subcontractors; terms and conditions of employment, such as wages, safety, and hiring and firing."⁷ Under this proposed rule, all prime federal contractors will be liable for the work of their subcontractors, which will likely result in the canceling of many of those subcontracts.

But aerospace is not alone when it comes to the negative effects of this rule. Manufacturing firms, healthcare, and the other industries important to Arizona will be negatively impacted by it. Larger firms will reconsider existing contracts and be disincentivized from entering new ones with smaller firms so that they do not open themselves up to liability. Small businesses will spend countless hours and thousands of dollars trying to navigate this confusing proposed rule, as business owners struggle to understand what it means for their business.

Conclusion

For the reasons set forth above, the Goldwater Institute respectfully requests that the NLRB drop this proposed rule and reinstate the 2020 Final Rule.

⁶ Arizona Commerce Authority, *Changing the Game: Arizona Industries*, <https://www.azcommerce.com/industries>, (Last visited Dec. 7, 2022).

⁷ Major L. Clark, III, Deputy Chief Counsel, Office of Advocacy, U.S. Small Business Administration, Comment Re: Standard for Determining Joint-Employer Status (Nov. 29, 2022), at 4.

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Thank you for your consideration of these comments. Please contact me if you have any questions or I can provide you with additional information.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'J. Riches', is written over a light gray rectangular background.

Jonathan Riches

Vice President for Litigation

Goldwater Institute