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October __, 2022

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

Re: RIN 3142-AA21; Notice of Proposed Rulemaking (NPRM), The Standard for Determining Joint-Employer Status

Dear Ms. Rothschild:

The American Staffing Association (ASA) is a national trade association comprised of member staffing firms that recruit, screen, and hire employees and place them on temporary and contract assignments with clients on an as-needed basis. ASA submits the following comments regarding the above-referenced NPRM.

Staffing is one of America's largest service industries, employing more than 15 million temporary and contract employees annually. Staffing firms play a vital role in the U.S. economy by providing employment flexibility for workers and just-in-time labor for businesses. They provide workers with jobs, training, choice of assignments and work, flexibility, and a bridge to permanent employment for those who are just starting out, changing jobs, or out of work. Temporary and contract employees work in virtually every job category, including industrial labor, office support, health care, engineering, science and information technology, and various professional and managerial positions.

Summary of ASA Comments

On September 7, 2022, the National Labor Relations Board (Board) proposed a new standard for determining joint employer status. The proposed standard, however, is undefined and nebulous and therefore would create uncertainty rather than stability. Further, the proposed rule extends beyond the Board's ruling in *Browning-Ferris* and unreasonably imputes joint employer status based merely on an unexercised right to control a term or condition of employment. For these reasons, ASA strongly supports the current rule, adopted in 2020, which provides clearer guidance to regulated parties and thus facilitates compliance. However, if the proposed rule is ultimately adopted by the Board, ASA respectfully requests that the scope of a putative joint employer's bargaining responsibilities be clarified in the text of the rule.

The Proposed Rule's Vagueness Would Cause Labor Relations Uncertainty

The Board notes that one of the goals of the proposed rule is to provide a "definite, readily available standard [that] will assist employers and labor organizations in complying with the Act." As currently framed, the proposed rule does the opposite. By not defining or elaborating on operative terms such as "common law agency principles" or "essential terms and conditions of employment," the rule fails to provide a stable, well-developed framework that would allow putative joint employers to reliably structure their relationships with each other. This would cause unnecessary litigation and waste time and resources. Accordingly, the Board should maintain the current joint employer rule, which facilitates compliance and more closely aligns with the stated goals of the proposed rule.

The vagueness and fundamental unworkability of the proposed rule lies in its reliance on "common law agency principles"—which the rule does not define or explain. Employers would have to apply those broad, fact-based principles to determine whether their control over one or more terms and conditions of employment is sufficient to establish joint employment. To do this, employers, at great cost, would have to consult with legal counsel, who may differ widely on how the principles apply in any given case.[1] Thus, instead of providing clear guidance, the proposed rule would result in inconsistent, case-by-case, joint employment determinations, which the Board ultimately would have to adjudicate. This is a recipe for ongoing confusion and litigation, directly contravening the Board's professed goal of fostering compliance rather than conflict.

The proposed rule is similarly vague on the essential terms and conditions of employment that are relevant to the joint employer inquiry. The rule suggests an inconclusive, open-ended list of such terms and conditions, and even permits the Board to deem that an item unmentioned in the rule is in fact an essential term or condition of employment. The Board rationalizes this position as necessary to accommodate changing workplace conditions. But without meaningful guidance, staffing agencies and their clients could never be sure that they have considered *all* of the potential terms and conditions of employment that may be deemed "essential" in the joint employment inquiry. The Board's goal of accommodating changing workplace conditions could be better achieved by amending the existing list of essential terms and conditions of employment as needed.

The Current Rule Provides a Clear and Workable Standard

In contrast to the ambiguity of the proposed rule, the current rule's "substantial direct and immediate control" standard and exhaustive list of essential terms and conditions of employment is well-defined and provides meaningful guidance within the rule itself, without a need to analyze nebulous common law agency principles or guess at what might be considered essential, as yet unmentioned, terms and conditions of employment. The current rule also fosters compliance by delineating the specific *actions* that do or do not constitute direct and immediate control for each term or condition. For example, the rule states that requesting changes to staffing levels does not constitute direct and immediate control over hiring. Such specific guidance is particularly useful in the staffing context, where staffing agencies make final hiring decisions, but clients may increase or decrease their use of temporary staff depending on business needs. Thus, under the current rule, staffing firms and their clients clearly understand the consequences of their business decisions; both know that if they exercise direct and immediate control of certain aspects of the employment relationship – as prescribed in the rule – they will be considered joint employers under the law.

Control Must be Exercised to Establish Joint Employment

Finally, the proposed rule's insistence on imputing joint employer status based merely on an *unexercised right* to control (direct or indirect) is misguided. Such a proposition extends beyond the legal standard established by the Board itself in its 2015 *Browning-Ferris* decision, where joint employer status was imputed based on an unexercised right to control only when the putative joint employer possessed sufficient control over essential terms and conditions to *permit meaningful bargaining*. In other words, imputing joint employer status is defensible only if doing so would promote the purposes of collective bargaining. There simply can be no meaningful bargaining by parties with respect to matters in which they have never been involved and have never exercised control. Nor is it enough to exercise "indirect" control, a term the proposed rule nowhere defines. Such a vague, undefined control test would force to the bargaining table parties whose connection to the issues at hand is tenuous at best and whose interests may in fact be wholly divergent, thereby complicating and ultimately frustrating the bargaining process.

[1] For example, in the preamble to the proposed rule, even Board members disagree on whether common law principles support the proposition that a contractually reserved but never-exercised *right* to control employees may serve as the basis for imputing employer status.

The Proposed Rule Should Explicitly State the Scope of a Putative Joint Employer's Bargaining Responsibilities

The proposed rule establishes only that a putative joint employer must bargain with its employees when it has the authority to control or actually controls one or more of the employees' terms and conditions of employment. Nowhere does the rule expressly define the *extent* of a joint employer's bargaining responsibility—that is, the specific terms and conditions over which it must bargain. The Board majority addresses this in footnotes in the preamble to the proposed rule, but it should be explicitly stated in the rule itself. This is essential to ensure that employers clearly understand the scope of their obligations and to effectuate the goal of the National Labor Relations Act in effective and meaningful bargaining.

In footnote 69 of the preamble, the Board majority states, "Contrary to our dissenting colleague's suggestion, the proposed rule would only require a putative joint employer to bargain over those terms and conditions of employment which it possess the authority to control or over which it exercises the power to control." Footnote 69 appears to elaborate on its statement in footnote 26 that where "a putative joint employer possesses the authority to control or exercises the power to control employees' essential terms and conditions of employment, any required bargaining under the new standard will necessarily be meaningful." These statements confirm that meaningful bargaining over a particular term or condition of employment can occur only if the employer's authority or control extends to such term or condition; otherwise, bargaining ceases to be meaningful. This principle is clearly supported in recent Board holdings. *See, e.g., Miller & Anderson, Inc.* 364 NLRB 39 (July 11, 2016) ("Our case law makes clear that each employer is obligated to bargain only over the employees with whom it has an employment relationship and *only with respect to such terms and conditions that it possesses the authority to control*") (emphasis added).

Accordingly, ASA urges the Board to adopt the limitation referenced in footnote 69 into its final rule. This could be accomplished by amending Section 103.40(c) of the proposed rule as follows:

> (c) To "share or codetermine those matters governing employees' essential terms and conditions of employment" means for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment. An employer's duty to bargain shall extend only to those terms and conditions that it has the authority to control or exercises the power to control.

Thank you for your consideration.

Very truly yours,

Stephen C. Dwyer
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