



Submitted Electronically

December 7, 2022

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

Re: Proposed Standard for Determining Joint Employer Status (NLRB-2022-0001) (Regulation Identifier Number: 3142-AA21)

Dear Ms. Rothschild:

On behalf of our more than 5,000 members and partners including mission-driven organizations representing the entire field of aging services and 38 state associations, LeadingAge offers the following comments on the National Labor Relations Board's ("NLRB" or "the Board") proposed standard for determining joint employer status under the National Labor Relations Act ("NLRA" or "the Act").

For the reasons set forth below, we oppose the Board's proposal to rescind the current joint employer standard at 29 CFR Part 103, Subpart D (the "2020 rule") and to replace it with a much-expanded standard that we believe will create significant uncertainty and adversely affect employers in the field of aging services.

### **Summary**

The proposed standard is extremely broad, giving rise to the concern that parties to a sweeping range of business relationships could potentially be deemed joint employers, and it is vague to a degree that we believe organizations will be unable to accurately predict the circumstances under which the Board might find a given arrangement to be one of joint employment. As such the standard would unreasonably impose risks on organizations of expanded collective bargaining obligations and of liability for unfair labor practices committed by those organizations' business partners with respect to their own employees.

Under its proposal to revise the standard for determining whether two employers are joint employers of particular employees within the meaning of section 2(3) of the Act, the Board would depart from the 2020 rule in two major respects.

First, the Board believes it is appropriate to give determinative weight to the existence of a putative joint employer's authority to control one or more essential terms and conditions of employment, whether such control is exercised or not exercised and without regard to whether any exercise of such control is direct or indirect. This proposal – that indirect control or a contractually reserved but unexercised right of control can be sufficient to establish joint employer status – contrasts starkly with the 2020 rule, which requires that an entity must “possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with another organization’s employees.” 29 C.F.R. § 103.40(a).

Second, the Board proposes to define “essential terms and conditions of employment” with a lengthy and non-exhaustive list, significantly departing from the definition in the 2020 rule which establishes a shorter, exhaustive list that provides greater clarity and certainty.

The Board’s stated purpose for these and other proposed changes is to “explicitly ground the joint-employer standard in established common-law agency principles and provide relevant guidance to parties covered by the Act regarding their rights and responsibilities when more than one statutory employer possesses the authority to control or exercises the power to control particular employees' essential terms and conditions of employment.” The Board believes that this “definite, readily available” standard will assist employers and labor organizations in complying with the Act and hopes that it will reduce uncertainty and litigation over the basic parameters of a joint-employer relationship.

We do not believe the proposed standard will achieve these goals, but instead will likely have an opposite effect. Based on our review, we support this view expressed by the dissenting Board members: “The proposed rule neither articulates the common-law agency principles that appropriately bear on determining joint-employer status under the NLRA, nor provides any real guidance to the regulated community. It simply purports to expand joint-employer status to the outermost limits of the common law (while actually going beyond those limits) and leaves everything else to case-by-case adjudication.”

## **SPECIFIC COMMENTS**

### Control of Essential Terms and Conditions of Employment

Consistent with the 2020 rule, the proposed standard establishes that two or more employers of the same particular employees are joint employers of those employees if the employers “share or codetermine those matters governing employees' essential terms and conditions of employment.” However, the standard would expansively define “share or codetermine” to mean that an employer either possesses the authority to control (whether directly, indirectly, or both), or exercises the power to control (whether directly, indirectly, or both), one or more of such terms and conditions.

Specifically, proposed §103.40(e) states: “Whether an employer possesses the authority to control or exercises the power to control one or more of the employees' terms and conditions of employment is determined under common-law agency principles. Possessing the authority to control is sufficient to establish status as a joint employer, regardless of whether control is exercised. Exercising the power to control indirectly is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly. Control exercised through an intermediary person or entity is sufficient to establish status as a joint employer.” Notably, proposed §103.40 does not define key terms, such as “control indirectly,”<sup>1</sup> that would be central to an analysis.

A fundamental problem is that organizations working to adapt business models to this proposed standard would lack necessary clarity about its precise meaning and limits, which would create significant challenges in terms of defining arrangements with external service providers in a way that would avoid a joint-employer determination.

As the dissent notes, “[t]he proposed rule would eliminate all the 2020 Rule's detailed guidance regarding conduct that constitutes direct and immediate control of each essential term and condition of employment. In its place, the proposed rule simply incorporates by reference the entire body of common-law agency principles. As a result, unions, employers, and employees would find no guidance in the rule itself. Instead, they would have to go searching for guidance in the common law to determine whether a joint-employer relationship exists.”

The Board states that its proposed new rule incorporates the standard established in the NLRB’s decision in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015) (*BFI*) and that it responds to the United States Court of Appeals for the District of Columbia Circuit’s invitation for the Board to “erect some legal scaffolding” to ensure that the joint-employer standard appropriately focuses on forms of reserved and indirect control that bear on employees' essential terms and conditions of employment.

On this point, the dissenting Board members have noted that the proposed rule actually expands upon *BFI* when it states dispositively that possessing the authority to control is sufficient to establish status as a joint employer, regardless of whether control is exercised, and that exercising the power to control indirectly is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly.

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<sup>1</sup> The 2020 rule does provide a definition (indirect control over essential terms and conditions of employment of another employer's employees but not control or influence over setting the objectives, basic ground rules, or expectations for another entity's performance under a contract) and states that evidence of the entity's indirect control over essential terms and conditions of employment of another employer's employees is probative of joint-employer status, but only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment. 29 C.F.R. §103.40(a), (e).

We are also concerned that the Board’s proposal does not provide the structure called for by the Circuit court. As noted in the dissent: “[T]he District of Columbia Circuit held that the *BFI* Board had “overshot the common-law mark” by failing to distinguish evidence of indirect control that bears on workers' essential terms and conditions of employment from evidence that simply documents the routine parameters of company-to-company contracting.” *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195, 1216 (D.C. Cir. 2018). And as the Dissent further observes, the court did not address whether indirect control or contractually-reserved-but-unexercised authority could, standing alone, establish a joint-employer relationship. *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d at 1216, 1218.

If actual control, reserved control, direct control and indirect control of one or more essential terms and conditions of employment (which are broadly defined as we note below) may all be sufficient to establish status as a joint employer, it will be difficult at best for businesses to define a middle ground between contractual relationships that trigger joint employer status and those that do not.

### Defining Essential Terms and Conditions of Employment

In addition to problems associated with the Board’s approach to matters of control, we are concerned about the breadth of proposed §103.40(d), which states that essential terms and conditions of employment “will generally include, but are not limited to: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance.”

While the Board asserts that this section is not needlessly overinclusive and offers a set of useful benchmarks for identifying essential terms and conditions in most workplaces, we believe it will create notable uncertainty. As written (“will generally include, but are not limited to”), it appears to create only a starting place, as the Board notes that the proposal will leave it with flexibility in future adjudication under a final rule. Further, proposed §103.40(d) uses broad language – such as “work rules and directions governing the manner, means, or methods” of work performance – without the benefit of definitions or examples, such as the 2020 rule provides.

In short, as noted by the dissent, the proposed rule “substitutes an open-ended, non-exclusive list of essential terms and conditions of employment for the closed list set forth in the [current] rule,” which we believe makes the proposal unreasonably vague.

### Impact of the Proposed Standard

Like all business, aging services providers routinely enter into contracts for the delivery of services, whether it be to supplement their existing internal employee capacity, to obtain specialized services or skill sets not available to them internally, to support innovation in

operations and service delivery, to benefit from efficiencies, or for other reasons. These include temporary staffing contracts, contracted therapy, food service, and maintenance agreements, and shared service agreements with hospitals or other providers sharing a facility's campus, to give just a small number of examples. These arrangements are necessary, appropriate and standard approaches to fulfilling organizational missions of service to clients and residents in their communities.

The 2020 rule provides clear detail about when a contracting entity may be considered a joint employer of a second party's employees. Namely, the entity must "possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees." 29 C.F.R. § 103.40(a). It succinctly defines "essential terms and conditions of employment" to mean wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction, and goes on to state what "direct and immediate control" means with respect to each of those eight terms and conditions. 29 C.F.R. § 103.40(b)-(c).

This standard is relatively straightforward for businesses to understand, plan for and apply (as was the common law standard in place prior to the Board's decision in *BFI*). It allows the contracting entity to make judgments about whether and when to reserve some level of authority with respect to such matters as scheduling, workplace safety, and general workplace rules – which is a appropriate course of action in a person centered and strictly regulated environment such as aging services – with reasonable certainty that its arrangement will not lead to a finding of joint-employer status.

If the Board moves forward with its proposed standard, however, organizations that wish not to assume increased regulatory risk associated with joint employer liability will face considerable challenges in determining how to restructure longstanding business models, and to structure new ones, given the standard's breadth and vagueness.

As a thought exercise, contracting entities might consider three options:

They might take on more control over services provided by business partners, in order to have a greater awareness of and opportunities to influence practices that could result in liabilities under the proposed rule. This would lead to increased administrative burden and cost, however, which smaller organizations might not be able to bear.

Alternatively, entities might consider reducing the level of reserved control or coordination with business partners, but this strategy has potential drawbacks of its own. It may have unintended consequences, for example, such as the introduction of unnecessary safety and health risks in settings where contracted services are delivered. Business models that are less supportive of achieving quality outcomes in service delivery would not be a desirable outcome.

Moreover, as a practical matter, it may simply not be possible to revise a contractual relationship in a way that would not leave some potential for an assertion of joint-employer status given the breadth of the Board's proposed standard.

Finally, they might consider simply turning away from certain business models or third-party relationships altogether. In some cases, this would result in the loss of specialized skills, economic efficiencies, or other benefits of contracting, as noted above. In others, this may not be feasible, such as the case of temporary direct care staffing. Aging services providers across the continuum of care are facing a severe workforce shortage, and temporary staffing may be necessary in many cases to preserve access to care for vulnerable individuals in the communities these providers serve.

In sum, under the proposed standard we are concerned that in many cases it will be difficult if not impossible to structure certain arrangements in a way that both supports operational goals and avoids a potential finding of joint employer status under the NLRA.

## **Conclusion**

An essential function of rulemaking is to provide clear notice to affected organizations of requirements that will apply, so they may structure their operations accordingly and understand the potential consequences of not doing so.

However, the Board's proposed standard is broad and vague to a degree that we believe organizations would be unable to accurately predict when the Board might find one or more aspects of given arrangement between business partners as sufficient to support a determination of joint employment. And as such we believe it would unreasonably impose risks on organizations of expanded collective bargaining obligations and of liability for unfair labor practices conducted through those organizations' business partners.

For the reasons set forth above, we oppose the proposed standard and respectfully ask that the Board to retain the 2020 rule.

Sincerely,

Jonathan Lips  
Vice President, Legal Affairs