

83 FR 46681-01, 2018 WL 4359212(F.R.)
PROPOSED RULES
NATIONAL LABOR RELATIONS BOARD
29 CFR Chapter I
RIN 3142-AA13

The Standard for Determining Joint-Employer Status

Friday, September 14, 2018

AGENCY: National Labor Relations Board.

***46681** ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: In order to more effectively enforce the National Labor Relations Act (the Act or the NLRA) and to further the purposes of the Act, the National Labor Relations Board (the Board) proposes a regulation establishing the standard for determining whether two employers, as defined in Section 2(2) of the Act, are a joint employer of a group of employees under the NLRA. The Board believes that this rulemaking will foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby promoting labor-management stability, one of the principal purposes of the Act. Under the proposed regulation, an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. More specifically, to be deemed a joint employer under the proposed regulation, an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine.

DATES: Comments regarding this proposed rule must be received by the Board on or before November 13, 2018. Comments replying to comments submitted during the initial comment period must be received by the Board on or before November 20, 2018. Reply comments should be limited to replying to comments previously filed by other parties. No late comments will be accepted.

ADDRESSES:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through <http://www.regulations.gov>.

Delivery—Comments should be sent by mail or hand delivery to: Roxanne Rothschild, Associate Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. Because of security ***46682** precautions, the Board continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments. The Board encourages electronic filing. It is not necessary to send comments if they have been filed electronically with [regulations.gov](http://www.regulations.gov). If you send comments, the Board recommends that you confirm receipt of your delivered comments by contacting (202) 273-2917 (this is not a toll-free number). Individuals with hearing impairments may call 1-866-315-6572 (TTY/TDD).

Only comments submitted through <http://www.regulations.gov>, hand delivered, or mailed will be accepted; ex parte communications received by the Board will be made part of the rulemaking record and will be treated as comments only insofar as appropriate. Comments will be available for public inspection at <http://www.regulations.gov> and during normal business hours (8:30 a.m. to 5 p.m. EST) at the above address.

The Board will post, as soon as practicable, all comments received on <http://www.regulations.gov> without making any changes to the comments, including any personal information provided. The website <http://www.regulations.gov> is the Federal

eRulemaking portal, and all comments posted there are available and accessible to the public. The Board requests that comments include full citations or internet links to any authority relied upon. The Board cautions commenters not to include personal information such as Social Security numbers, personal addresses, telephone numbers, and email addresses in their comments, as such submitted information will become viewable by the public via the <http://www.regulations.gov> website. It is the commenter's responsibility to safeguard his or her information. Comments submitted through <http://www.regulations.gov> will not include the commenter's email address unless the commenter chooses to include that information as part of his or her comment.

FOR FURTHER INFORMATION CONTACT: Roxanne Rothschild, Associate Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, (202) 273-2917 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: Whether one business is the joint employer of another business's employees is one of the most important issues in labor law today. There are myriad relationships between employers and their business partners, and the degree to which particular business relationships impact employees' essential terms and conditions of employment varies widely.

A determination by the Board regarding whether two separate businesses constitute a “joint employer” as to a group of employees has significant consequences for the businesses, unions, and employees alike. When the Board finds a joint-employer relationship, it may compel the joint employer to bargain in good faith with a Board-certified or voluntarily recognized bargaining representative of the jointly-employed workers. Additionally, each joint employer may be found jointly and severally liable for unfair labor practices committed by the other. And a finding of joint-employer status may determine whether picketing directed at a particular business is primary and lawful, or secondary and unlawful.

The last three years have seen much volatility in the Board's law governing joint-employer relationships. As detailed below, in August 2015, a divided Board overruled longstanding precedent and substantially relaxed the evidentiary requirements for finding a joint-employer relationship. *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (*Browning-Ferris*), petition for review docketed *Browning-Ferris Indus. of Cal. v. NLRB*, No. 16-1028 (D.C. Cir. filed Jan. 20, 2016). Then, in December 2017, a different Board majority restored the prior, more stringent standard. In February 2018, the Board vacated its December 2017 decision, effectively changing the law back again to the relaxed standard of *Browning-Ferris*. A petition for review challenging *Browning-Ferris*'s adoption of the relaxed standard as beyond the Board's statutory authority is currently pending in the United States Court of Appeals for the District of Columbia Circuit. In light of the continuing uncertainty in the labor-management community created by these adjudicatory variations in defining the appropriate joint-employer standard under the Act, and for the reasons explained below, the Board proposes to address the issue through the rulemaking procedure.

I. Background

Under Section 2(2) of the Act, “the term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.” Under Section 2(3) of the Act, “the term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter [of the Act] explicitly states otherwise”

Section 7 of the Act grants employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7],” and Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees” (emphasis added).

The Act does not contain the term “joint employer,” much less define it, but the Board and reviewing courts have over the years addressed situations where the working conditions of a group of employees are affected by two separate companies engaged in a business relationship. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964) (holding that Board's determination that bus company possessed “sufficient control over the work” of its cleaning contractor's employees to be considered a joint employer was not reviewable in federal district court); *Indianapolis Newspapers, Inc.*, 83 NLRB 407, 408-409 (1949) (finding that two newspaper businesses, *Star* and *INI*, were not joint employers, despite their integration, because “there [wa]s no indication that *Star*, by virtue of such integration, t[ook] an active part in the formulation or application of the labor policy, or exercise[d] any immediate control over the operation, of *INI*”).

When distinguishing between an “employee” under Section 2(3) of the Act and an “independent contractor” excluded from the Act's protection, the Supreme Court has explained that the Board is bound by common-law principles, focusing on the control exercised by one employer over a person performing work for it. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968); see also *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322-323 (1992) *46683 (“[W]hen Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine.”) (citations omitted). Similarly, it is clear that the Board's joint-employer standard, which necessarily implicates the same focus on employer control, must be consistent with the common law agency doctrine.

The Development of the Joint-Employment Doctrine Under the NLRA

Under the Act, there has been a longstanding consensus regarding the general formulation of the Board's joint-employer standard: Two employers are a joint employer if they share or codetermine those matters governing the employees' essential terms and conditions of employment. See *CNN America, Inc.*, 361 NLRB 439, 441, 469 (2014), enf. denied in part 865 F.3d 740 (D.C. Cir. 2017); *Southern California Gas Co.*, 302 NLRB 456, 461 (1991). The general formulation derives from language in *Greyhound Corp.*, 153 NLRB 1488, 1495 (1965), enf'd. 368 F.2d 778 (1966), and was endorsed in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122-1123 (3d Cir. 1982), where the United States Court of Appeals for the Third Circuit carefully explained the differences between the Board's joint-employer and single-employer doctrines, which had sometimes been confused.[FN1]

¹ As the Third Circuit explained, a “single employer” relationship exists where two nominally separate employers are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a “single employer.” The question in the “single employer” situation, then, is whether two nominally independent enterprises constitute, in reality, only one integrated enterprise. In answering that question, the Board examines four factors: (1) Functional integration of the operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. In contrast, the “joint employer” concept assumes that the two companies are indeed independent employers, and the four-factor standard is inapposite. Rather, as stated above, the Board has analyzed whether the two separate employers share or codetermine essential terms and conditions of employment.

At certain points in its history, the Board has discussed the relevance of an employer's direct control over the essential employment conditions of another company's employees, as compared with its indirect control or influence, in determining whether joint-employer status has been established. For example, in *Floyd Epperson*, 202 NLRB 23, 23 (1973), enf'd. 491 F.2d 1390 (6th Cir. 1974), the Board found that a dairy company (*United*) was the joint employer of truck drivers supplied to it by an independent trucking firm (*Floyd Epperson*) based on evidence of both *United*'s direct control and indirect control over the working conditions of *Epperson*'s drivers. The Board relied on “all the circumstances” of the case, including the fact that *United* dictated the specific routes that *Epperson*'s drivers were required to take when transporting its goods, “generally supervise[d]” *Epperson*'s drivers, and had authority to modify their work schedules. *Id.* at 23. The Board also relied in part on *United*'s “indirect control” over the drivers' wages and discipline.[FN2] *Id.* Importantly, in *Floyd Epperson* and like cases, the Board was not called upon to decide, and did not assert, that a business's indirect influence over another company's workers' essential working conditions, standing alone, could establish a joint-employer relationship.[FN3]

- 2 In *Floyd Epperson*, the Board found that United had indirect control over the drivers' wages because wage increases to Epperson's drivers came from raises given by United to Epperson, a sole proprietor. The Board found that United had indirect influence over discipline because Epperson replaced a certain driver on a route after United complained that the driver had been constantly late. 202 NLRB at 23.
- 3 See also *Sun-Maid Growers of California*, 239 NLRB 346 (1978) (finding that food-processing company was joint employer of maintenance electricians supplied by a subcontractor where company actually directed electricians by making specific assignments to individual electricians and determined which of those assignments took precedence when all could not be timely completed; the Board also relied on indirect impact on other terms), *enfd.* 618 F.2d 56 (9th Cir. 1980); *Hamburg Industries, Inc.*, 193 NLRB 67, 67 (1971) (finding remanufacturer of railroad cars was a joint employer of labor force supplied by subcontractor where remanufacturer used subcontractor's supervisors as conduit to convey work instructions while "constantly check[ing] the performance of the workers and the quality of the work" and where remanufacturer also indirectly affected employees' other terms) (emphasis added). The Board's decision in *Clayton B. Metcalf*, 223 NLRB 642 (1976), appears to be the closest the Board has come to finding a joint-employment relationship in the absence of some exercise of direct and immediate control over essential terms. There, the Board found that a mine operator did not exercise direct supervisory authority over the employees of a subcontractor engaged to remove "overburden" atop coal seams. However, the Board found that the subcontractor's entire operation in removing the overburden, as well as other collateral duties performed by it, depended entirely on the mine operator's site plan, and, "[a]s a result, [the mine operator] exercised considerable control over the manner and means by which [the subcontractor] performed its operations." *Id.* at 644 (emphasis added).

In fact, more recently, the Board, with court approval, has made clear that "the essential element" in a joint-employer analysis "is whether a putative joint employer's control over employment matters is direct and immediate." *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002) (citing *TLI, Inc.*, 271 NLRB 798, 798-799 (1984), *enfd.* mem. sub nom. *General Teamsters Local Union No. 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985)); see also *NLRB v. CNN America, Inc.*, 865 F.3d 740, 748-751 (D.C. Cir. 2017) (finding that Board erred by failing to adhere to the Board's "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.' ") (quoting *Clinton's Ditch Co-op Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985)); *Summit Express, Inc.*, 350 NLRB 592, 592 fn. 3 (2007) (finding that the General Counsel failed to prove direct and immediate control and therefore dismissing joint-employer allegation); *Laerco Transportation*, 269 NLRB 324 (1984) (dismissing joint-employer allegation where user employer's supervision of supplied employees was limited and routine).

Accordingly, for at least 30 years (from no later than 1984 to 2015), evidence of indirect control was typically insufficient to prove that one company was the joint employer of another business's workers. Even direct and immediate supervision of another's employees was insufficient to establish joint-employer status where such supervision was "limited and routine." *Flagstaff Medical Center, Inc.*, 357 NLRB 659, 667 (2011); *AM Property Holding Corp.*, 350 NLRB 998, 1001 (2007), *enfd.* in relevant part sub nom. *SEIU, Local 32 BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011); *G. Wes Ltd. Co.*, 309 NLRB 225, 226 (1992). The Board generally found supervision to be limited and routine where a supervisor's instructions consisted mostly of directing another business's employees what work to perform, or where and when to perform the work, but not how to perform it. *Flagstaff Medical Center*, 357 NLRB at 667.

The Board's treatment of a company's contractually reserved authority over an independent company's employees also evolved over the years. In the 1960s, the Board found that a contractual reservation of authority, standing alone, could establish a joint-employer relationship even where that reserved authority had never been exercised. For example, in *Jewel Tea Co.*, 162 NLRB 508, 510 (1966), the Board found that a department store (the licensor) was a joint employer of the employees of two independent companies licensed to operate specific departments of its store. The text of the license agreements between the store and the departments provided, *inter alia*, that "employees shall be subject to the general *46684 supervision of the licensor," that the licensee "shall at all times conform to a uniform store policy with reference to wages, hours and terms, and conditions of employment for all sales and stock personnel," that the licensor shall approve employees hired by the licensee, and that the licensor "may request discharge and the licensee will immediately comply with such request." The Board found it "clear beyond doubt" that the license agreements gave the store the "power to control effectively the hire, discharge, wages, hours, terms, and other conditions of employment" of the other two companies' employees. According to the Board, "[t]hat the licensor has

not exercised such power is not material, for an operative legal predicate for establishing a joint-employer relationship is a reserved right in the licensor to exercise such control, and we find such right of control adequately established by the facts set out above.” *Id.*; see also *Thriftown, Inc.*, 161 NLRB 603, 607 (1966) (“Since the power to control is present by virtue of the operating agreement, whether or not exercised, we find it unnecessary to consider the actual practice of the parties regarding these matters as evidenced by the record.”).

However, even during the same period, not all contractual reservations of authority were found sufficient to establish a joint-employer relationship. For example, in *Hy-Chem Constructors, Inc.*, 169 NLRB 274 (1968), the Board found that a petrochemical manufacturer was not a joint employer of its construction subcontractor's employees even though their cost-plus agreement reserved to the manufacturer a right to approve wage increases and overtime hours and the right to require the subcontractor to remove any employee whom the manufacturer deemed undesirable. The Board found that the first two reservations of authority “are consistent with the [manufacturer's] right to police reimbursable expenses under its cost-plus contract and do not warrant the conclusion that [the manufacturer] has thereby forged an employment relationship, joint or otherwise, with the [subcontractor's] employees.” *Id.* at 276. Additionally, the Board found the manufacturer's “yet unexercised prerogative to remove an undesirable . . . employee” did not establish a joint-employment relationship. *Id.*

Over time, the Board shifted position, without expressly overruling precedent, and held that joint-employer status could not be established by the mere existence of a clause in a business contract reserving to one company authority over its business partner's employees absent evidence that such authority had ever been exercised. For example, in *AM Property Holding Corp.*, the Board found that a “contractual provision giving [a property owner] the right to approve [its cleaning contractor's] hires, standing alone, is insufficient to show the existence of a joint employer relationship.” 350 NLRB at 1000. The Board explained that “[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties.” *Id.* (citing *TLI*, 271 NLRB at 798-799). Because the record in *AM Property* failed to show that the property owner had ever actually participated in the cleaning contractor's hiring decisions, the Board rejected the General Counsel's contention that the two employers constituted a joint employer. See also *Flagstaff Medical Center*, 357 NLRB at 667 (finding that business contract's reservation of hospital's right to require its subcontractor to “hire, discharge, or discipline” any of the subcontractor's employees did not establish a joint-employer relationship absent evidence that the hospital had ever actually exercised such authority); *TLI*, 271 NLRB at 798-799 (finding that paper company's actual practice of only limited and routine supervision of leased drivers did not establish a joint-employer relationship despite broad contractual reservation of authority that paper company “will solely and exclusively be responsible for maintaining operational control, direction and supervision” over the leased drivers).

The law governing joint-employer relationships changed significantly in August 2015. At that time, a divided Board overruled the then-extant precedent described above and substantially relaxed the requirements for proving a joint-employer relationship. Specifically, a Board majority explained that it would no longer require proof that a putative joint employer has exercised any “direct and immediate” control over the essential working conditions of another company's workers. *Browning-Ferris*, 362 NLRB No. 186, slip op. at 2, 13-16. The majority in *Browning-Ferris* explained that, under its new standard, a company could be deemed a joint employer even if its “control” over the essential working conditions of another business's employees was indirect, limited and routine, or contractually reserved but never exercised. *Id.*, slip op. at 15-16.

The *Browning-Ferris* majority agreed with the core of the Board's long-recognized joint-employer standard: whether two separate employers “share” or “codetermine” those matters governing the essential terms and conditions of employment. Elaborating on the core “share” or “codetermine” standard, the *Browning-Ferris* majority noted that, in some cases, two companies may engage in genuinely shared decision-making by conferring or collaborating directly to set an essential term or condition of employment. Alternatively, each of the two companies “may exercise comprehensive authority over different terms and conditions of employment.” *Id.*, slip op. at 15 fn. 80.

While agreeing with the core standard, the *Browning-Ferris* majority believed that the Board's joint-employer precedents had become “increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent

employment relationships.” *Id.*, slip op. at 1. The Browning-Ferris majority’s expressed aim was “to put the Board’s joint-employer standard on a clearer and stronger analytical foundation, and, within the limits set out by the Act, to best serve the Federal policy of ‘encouraging the practice and procedure of collective-bargaining.’ ” *Id.*, slip op. at 2 (quoting 29 U.S.C. 151).

According to the Browning-Ferris majority, during the period before *Laerco* and *TLI* were decided in 1984, the Board had “typically treated the right to control the work of employees and their terms of employment as probative of joint-employer status.” *Id.*, slip op. at 9 (emphasis in original). Also during that time, “the Board gave weight to a putative joint employer’s ‘indirect’ exercise of control over workers’ terms and conditions of employment.” *Id.* (citing *Floyd Epperson*, 202 NLRB at 23).

The Browning-Ferris majority viewed Board precedent, starting with *Laerco* and *TLI*, that expressly required proof of some exercise of direct and immediate control as having unjustifiably and without explanation departed from the Board’s pre-1984 precedent. Specifically, the Browning-Ferris majority asserted that, in cases such as *Laerco*, *TLI*, *AM Property*, and *Airborne Express*, the Board had “implicitly repudiated its earlier reliance on reserved control and indirect control as indicia of joint-employer status.” *Id.*, slip op. at 10. Further, the Browning-Ferris majority viewed those decisions as “refus[ing] to assign any significance to contractual language expressly giving a putative employer the power to dictate *46685 workers’ terms and conditions of employment.” *Id.* (emphasis added).

In short, the Browning-Ferris majority viewed Board precedent between 1984 and 2015 as having unreasonably “narrowed” the Board’s joint-employer standard precisely when temporary and contingent employment relationships were on the rise. *Id.*, slip op. at 11. In its view, under changing patterns of industrial life, a proper joint-employer standard should not be any “narrower than statutorily required.” *Id.* According to the Browning-Ferris majority, the requirement of exercise of direct and immediate control that is not limited and routine “is not, in fact, compelled by the common law—and, indeed, seems inconsistent with common-law principles.” *Id.*, slip op. at 13. The Browning-Ferris majority viewed the common-law concept of the “right to control” the manner and means of a worker’s job performance—used to distinguish a servant (i.e., employee) from an independent contractor—as precluding, or at least counseling against, any requirement of exercise of direct and immediate control in the joint-employment context. *Id.*

Browning-Ferris reflects a belief that it is wise, and consistent with the common law, to include in the collective-bargaining process an employer’s independent business partner that has an indirect or potential impact on the employees’ essential terms and conditions of employment, even where the business partner has not itself actually established those essential employment terms or collaborated with the undisputed employer in setting them. The Browning-Ferris majority believed that requiring such a business partner to take a seat at the negotiating table and to bargain over the terms that it indirectly impacts (or could, in the future, impact under a contractual reservation) best implements the right of employees under Section 7 of the Act to bargain collectively through representatives of their own choosing. The Browning-Ferris majority conceded that deciding joint-employer allegations under its stated standard would not always be an easy task, *id.*, slip op. at 12, but implicitly concluded that the benefit of bringing all possible employer parties to the bargaining table justified its new standard.

In dissent, two members argued that the majority’s new relaxed joint-employer standard was contrary to the common law and unwise as a matter of policy. In particular, the Browning-Ferris dissenters argued that by permitting a joint-employer finding based solely on indirect impact, the majority had effectively resurrected intertwined theories of “economic realities” and “statutory purpose” endorsed by the Supreme Court in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), but rejected by Congress soon thereafter. In *Hearst*, the Supreme Court went beyond common-law principles and broadly interpreted the Act’s definition of “employee” with reference to workers’ economic dependency on a putative employer in light of the Act’s goal of minimizing industrial strife. In response, Congress enacted the Taft-Hartley Amendments of 1947, excluding “independent contractors” from the Act’s definition of “employee” and making clear that common-law principles control.

Additionally, the Browning-Ferris dissenters disagreed with the majority’s understanding of the common law of joint-employment relationships. The dissenters argued that the “right to control” in the joint-employment context requires some exercise of direct and immediate control.

Then, accepting for argument's sake that the common law does not preclude the relaxed standard of Browning-Ferris, the dissenters found that practical considerations counseled against its adoption. They found the relaxed standard to be impermissibly vague and asserted that the majority had failed to provide adequate guidance regarding how much indirect or reserved authority might be sufficient to establish a joint-employment relationship. Additionally, the dissenters believed that the majority's test would “actually foster substantial bargaining instability by requiring the nonconsensual presence of too many entities with diverse and conflicting interests on the ‘employer’ side.” *Id.*, slip op. at 23.

The Browning-Ferris dissenters also complained that the relaxed standard made it difficult not only to correctly identify joint-employer relationships but also to determine the bargaining obligations of each employer within such relationships. Under the relaxed standard, an employer is only required to bargain over subjects that it controls (even if the control is merely indirect). The dissenters expressed concern that disputes would arise between unions and joint employers, and even between the two employers comprising the joint employer, over which subjects each employer-party must bargain. Further, the dissenters found such fragmented bargaining to be impractical because subjects of bargaining are not easily severable, and the give-and-take of bargaining frequently requires reciprocal movement on multiple proposals to ultimately reach a comprehensive bargaining agreement. Finally, the dissenters were suspicious about the implications of Browning-Ferris for identifying an appropriate bargaining unit in cases involving a single supplier employer that contracts with multiple user employers and with potential subversion of the Act's protection of neutral employers from secondary economic pressure exerted by labor unions. Accordingly, the dissenters would have adhered to Board precedent as reflected in cases such as *Laerco*, *TLI*, and *Airborne Express*.

Recent Developments

In December 2017, after a change in the Board's composition and while Browning-Ferris was pending on appeal in the D.C. Circuit, a new Board majority overruled Browning-Ferris and restored the preexisting standard that required proof that a joint employer actually exercised direct and immediate control in a manner that was neither limited nor routine. *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017). Soon thereafter, the charging parties in *Hy-Brand* filed a motion for reconsideration. The Board granted that motion and vacated its earlier decision for reasons unrelated to the substance of the joint-employer issue, effectively returning the law to the relaxed joint-employer standard adopted in Browning-Ferris. *Hy-Brand*, 366 NLRB No. 26 (2018). Subsequently, the Board in *Hy-Brand* denied the respondents' motion for reconsideration and issued a decision finding it unnecessary to address the joint-employer issue in that case because, in any event, the two respondents constituted a single employer under Board precedent and were therefore jointly and severally liable for each other's unfair labor practices. 366 NLRB No. 93 (2018); 366 NLRB No. 94 (2018). As stated above, a petition for review of the Board's Browning-Ferris decision remains pending in the court of appeals.

II. Validity and Desirability of Rulemaking; Impact Upon Pending Cases

Section 6 of the Act, 29 U.S.C. 156, provides, “The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5 [the Administrative Procedure Act, 5 U.S.C. 553], such rules and regulations as may be necessary to carry out the provisions of this Act.” The Board interprets Section 6 as ***46686** authorizing the proposed rule and invites comments on this issue.[FN4]

⁴ As previously stated, Secs. 2(2) and 2(3) of the Act define, respectively, “employer” and “employee,” but neither these provisions nor any others in the Act define “joint employer.”

Although the Board historically has made most substantive policy determinations through case adjudication, the Board has, with Supreme Court approval, engaged in substantive rulemaking. *American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991) (upholding Board's rulemaking on appropriate bargaining units in the healthcare industry); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (“[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion.”).

The Board finds that establishing the joint-employer standard in rulemaking is desirable for several reasons. First, given the recent oscillation on the joint-employer standard, the wide variety of business relationships that it may affect (e.g., user-supplier, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, lessor-lessee, parent-subsidiary, and contractor-consumer), and the wide-ranging import of a joint-employer determination for the affected parties, the Board finds that it would be well served by public comment on the issue. Interested persons with knowledge of these widely varying relationships can have input on our proposed change through the convenient comment process; participation is not limited, as in the adjudicatory setting, to legal briefs filed by the parties and amici. Second, using the rulemaking procedure enables the Board to clarify what constitutes the actual exercise of substantial direct and immediate control by use of hypothetical scenarios, some examples of which are set forth below, apart from the facts of a particular case that might come before the Board for adjudication. In this way, rulemaking will provide unions and employers greater “certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labeling [their] conduct an unfair labor practice,” as the Supreme Court has instructed the Board to do. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981). Third, by establishing the joint-employer standard in the Board's Rules & Regulations, employers, unions, and employees will be able to plan their affairs free of the uncertainty that the legal regime may change on a moment's notice (and possibly retroactively) through the adjudication process. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777 (1969) (“The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming.”) (Douglas, J., dissenting).

III. The Proposed Rule

Under the proposed rule, an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

The proposed rule reflects the Board's preliminary view, subject to potential revision in response to comments, that the Act's purposes of promoting collective bargaining and minimizing industrial strife are best served by a joint-employer doctrine that imposes bargaining obligations on putative joint employers that have actually played an active role in establishing essential terms and conditions of employment. Stated alternatively, the Board's initial view is that the Act's purposes would not be furthered by drawing into an employer's collective-bargaining relationship, or exposing to joint-and-several liability, a business partner of the employer that does not actively participate in decisions setting unit employees' wages, benefits, and other essential terms and conditions of employment. The Board's preliminary belief is that, absent a requirement of proof of some “direct and immediate” control to find a joint-employment relationship, it will be extremely difficult for the Board to accurately police the line between independent commercial contractors and genuine joint employers. The Board is inclined toward the conclusion that the proposed rule will provide greater clarity to joint-employer determinations without leaving out parties necessary to meaningful collective bargaining.

The proposed rule is consistent with the common law of joint-employer relationships. The Board's requirement of exercise of direct and immediate control, as reflected in cases such as *Airborne Express*, *supra*, has been met with judicial approval. See, e.g., *SEIU Local 32BJ v. NLRB*, 647 F.3d at 442-443.

The Board believes that the proposed rule is likewise consistent with Supreme Court precedent and that of lower courts, which have recognized that contracting enterprises often have some influence over the work performed by each other's workers without destroying their status as independent employers. For example, in *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689-690 (1951), the Supreme Court held that a contractor's exercise of supervision over a subcontractor's work “did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other,” emphasizing that “[t]he business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.”

The requirement of “direct and immediate” control seems to reflect a commonsense understanding that two contracting enterprises will, of necessity, have some impact on each other's operations and respective employees. As explained in *Southern California Gas Co.*, 302 NLRB at 461:

An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees. Generally a joint employer finding is justified where it has been demonstrated that the employer-customer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.

Notably, the Board is presently inclined to find, consistent with prior Board cases, that even a putative joint employer's “direct and immediate” control over employment terms may not give rise to a joint-employer relationship where that control is too limited in scope. See, e.g., *Flagstaff Medical Center*, 357 NLRB at 667 (dismissing joint-employer allegation even though putative joint employer interviewed applicants and made hiring recommendations, evaluated employees consistent with criteria established by its supplier employer, and disciplined supplied employees for unscheduled absences); *Lee Hospital*, 300 NLRB 947, 948-950 (1990) (putative joint employer's “limited hiring and disciplinary authority” found insufficient to establish that it “shares or codetermines those matters governing the essential terms and conditions of employment to an extent that it may be found to be a joint employer”) (emphasis added). Cases like *Flagstaff Medical Center* and *Lee Hospital* are ***46687** consistent with the Board's present inclination to find that a putative joint employer must exercise substantial direct and immediate control before it is appropriate to impose joint and several liability on the putative joint employer and to compel it to sit at the bargaining table and bargain in good faith with the bargaining representative of its business partner's employees.[FN5]

⁵ Even the *Browning-Ferris* majority acknowledged that “it is certainly possible that in a particular case, a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining.” 362 NLRB No. 186, slip op. at 16.

Accordingly, under the proposed rule, there must exist evidence of direct and immediate control before a joint-employer relationship can be found. Moreover, it will be insufficient to establish joint-employer status where the degree of a putative joint employer's control is too limited in scope (perhaps affecting a single essential working condition and/or exercised rarely during the putative joint employer's relationship with the undisputed employer).

The proposed rule contains several examples, set forth below, to help clarify what constitutes direct and immediate control over essential terms and conditions of employment. These examples are intended to be illustrative and not as setting the outer parameters of the joint-employer doctrine established in the proposed rule.

The Board seeks comment on all aspects of its proposed rule. In particular, the Board seeks input from employees, unions, and employers regarding their experience in workplaces where multiple employers have some authority over the workplace. This may include (1) experiences with labor disputes and how the extent of control possessed or exercised by the employers affected those disputes and their resolution; (2) experiences organizing and representing such workplaces for the purpose of collective bargaining and how the extent of control possessed or exercised by the employers affected organizing and representational activities; and (3) experiences managing such workplaces, including how legal requirements affect business practices and contractual arrangements. What benefits to business practices and collective bargaining do interested parties believe might result from finalization of the proposed rule? What, if any, harms? Additionally, the Board seeks comments regarding the current state of the common law on joint-employment relationships. Does the common law dictate the approach of the proposed rule or of *Browning-Ferris*? Does the common law leave room for either approach? Do the examples set forth in the proposed rule provide useful guidance and suggest proper outcomes? What further examples, if any, would furnish additional useful guidance? As stated above, comments regarding this proposed rule must be received by the Board on or before November 13,

2018. Comments replying to comments submitted during the initial comment period must be received by the Board on or before November 20, 2018.

Our dissenting colleague, who was in the majority in *Browning-Ferris* and in the dissent in the first *Hy-Brand* decision, would adhere to the relaxed standard of *Browning-Ferris* and refrain from rulemaking. She expresses many of the same points made in furtherance of her position in those cases. We have stated our preliminary view that the Act's policy of promoting collective bargaining to avoid labor strife and its impact on commerce is not best effectuated by inserting into a collective-bargaining relationship a third party that does not actively participate in decisions establishing unit employees' wages, benefits, and other essential terms and conditions of employment. We look forward to receiving and reviewing the public's comments and, afterward, considering these issues afresh with the good-faith participation of all members of the Board.

VI. Dissenting View of Member Lauren McFerran

Today, the majority resumes the effort to overrule the Board's 2015 joint-employer decision in *Browning-Ferris*, which remains pending on review in the United States Court of Appeals for the District of Columbia Circuit.[FN6] An initial attempt to overrule *Browning-Ferris* via adjudication—in a case where the issue was neither raised nor briefed by the parties [FN7]—failed when the participation of a Board member who was disqualified required that the decision be vacated.[FN8] Now, the Board majority, expressing new support for the value of public participation, proposes to codify the same standard endorsed in *Hy-Brand I* [FN9] via a different route: rulemaking rather than adjudication. The majority tacitly acknowledges that the predictable result of the proposed rule would be fewer joint employer findings.[FN10]

⁶ *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015), petition for review docketed *Browning-Ferris Indus. of Cal. v. NLRB*, No. 16-1028 (D.C. Cir filed Jan. 20, 2016).

⁷ See *Hy-Brand Industrial Contractors, Ltd (Hy-Brand I)*, 365 NLRB No. 156 (2017). In a departure from what had become established practice, the majority there also declined to issue a public notice seeking amicus briefing before attempting to reverse precedent. See *id.* at 38-40 (dissenting opinion).

⁸ See *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 26 (2018) (*Hy-Brand II*), granting reconsideration in part and vacating order reported at 365 NLRB No. 156 (2017) (*Hy-Brand I*). See also *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 63 (2018) (*Hy-Brand III*) (order denying motion for reconsideration of order vacating).

⁹ *Hy-Brand I* was decided by a majority comprising then-Chairman Miscimarra, Member Kaplan, and Member Emanuel (who was later determined to have been disqualified). The majority today, proposing what is essentially an identical standard in rulemaking, comprises Chairman Ring, Member Kaplan, and Member Emanuel. Thus, a majority of today's majority has considered and endorsed the proposed outcome of this rulemaking process before.

¹⁰ The majority observes that under the proposed rule, “fewer employers may be alleged as joint employers, resulting in lower costs to some small entities.”

The Board has recently made or proposed sweeping changes to labor law in adjudications going well beyond the facts of the cases at hand and addressing issues that might arguably have been better suited to consideration via rulemaking.[FN11] Here, in contrast, the majority has chosen to proceed by rulemaking, if belatedly.[FN12] Reasonable minds might question why the majority is pursuing rulemaking here and now.[FN13] *46688 It is common knowledge that the Board's limited resources are severely taxed by undertaking a rulemaking process.[FN14] But whatever the rationale, and whatever process the Board may use, the fact remains that there is no good reason to revisit *Browning-Ferris*, much less to propose replacing its joint-employer standard with a test that fails the threshold test of consistency with the common law and that defies the stated goal of the National Labor Relations Act: “encouraging the practice and procedure of collective bargaining.” [FN15]

- 11 See The Boeing Company, 365 NLRB No.154, slip op. at 33-34 (2017) (dissenting opinion); Caesars Entertainment Corp. d/b/a Rio All-Suites Hotel & Casino, Case 28-CA-060841, Notice & Invitation to File Briefs (Aug. 1, 2018) (dissenting opinion), available at www.nlr.gov.
- 12 After Hy-Brand I was vacated (in Hy-Brand II) and after reconsideration of the order vacating was denied (in Hy-Brand III), the Chairman announced that the Board was contemplating rulemaking on the joint-employer standard, as reflected in a submission to the Unified Agenda of Federal Regulatory and Deregulatory Actions. See NLRB Press Release, NLRB Considering Rulemaking to Address Joint-Employer Standard (May 9, 2018), available at www.nlr.gov. That step did not reflect my participation or that of then-Member Pearce, as the press release discloses.
- 13 See, e.g., May 29, 2018 Letter from Senators Warren, Gillibrand, and Sanders to Chairman Ring, available at <https://www.warren.senate.gov/imo/media/doc/2018.05.29LettertoNLRBOnJointEmployerRulemaking.pdf> (expressing concern that the rulemaking effort could be an attempt “to evade the ethical restrictions that apply to adjudications”). Chairman Ring has provided assurances “that any notice-and-comment rulemaking undertaken by the NLRB will never be for the purpose of evading ethical restrictions.” See June 5, 2018 Letter from Chairman Ring to Senators Warren, Gillibrand, and Sanders at 1, available at <https://www.nlr.gov/news-outreach/news-story/nlr-chairman-provides-response-senators-regarding-joint-employer-inquiry>. Notably, under the Standards of Ethical Conduct for Executive Branch Employees, rulemaking implicates different recusal considerations than does case adjudication, because a rulemaking of general scope is not regarded as a “particular matter” for purposes of determining disqualifying financial interests. See 5 CFR 2635.402. By pursuing rulemaking rather than adjudication with respect to the joint-employer standard, the Board is perhaps able to avoid what might otherwise be difficult ethical issues, as the Hy-Brand case illustrates. See generally Peter L. Strauss, Disqualifications of Decisional Officials in Rulemaking, 80 Columbia L. Rev. 990 (1980); Administrative Conference of the United States, Decisional Officials’ Participation in Rulemaking Proceedings, Recommendation 80-4 (1980).
- 14 See Jeffrey M. Hirsch, Defending the NLRB: Improving the Agency’s Success in the Federal Courts of Appeals, 5 FIU L. Rev. 437, 457 (2010) (explaining that rulemaking at the Board would consume significant resources, especially “given that the NLRB is banned from hiring economic analysts”).
What is striking here is that the Board majority has opted to use this resource-intensive process to address an issue that has never been addressed through rulemaking before, and that the majority observes is implicated in fewer than one percent of Board filings and (by the majority’s own analysis) directly affects only “.028% of all 5.9 million business firms.” The majority observes that the number of employers affected is “very small.” In contrast for example, consider the standards governing employer rules and handbooks at issue in Boeing, supra, which presumably affect the overwhelming number of private-sector employers in the country, but which the Board majority chose to establish by adjudication and without public participation.
- 15 National Labor Relations Act, Sec. 1, 29 U.S.C. 151.

A. The Majority’s Justification for Revisiting Browning-Ferris Is Inadequate.

Since August 2015, the joint-employer standard announced in Browning-Ferris has been controlling Board law. It remains so today, and the majority properly acknowledges as much.[FN16] After laying out the checkered history of the effort to overrule Browning-Ferris, the majority points to the “continuing uncertainty in the labor-management community created by these adjudicatory variations in defining the appropriate joint-employer standard” as the principal reason for proposing to codify not Browning-Ferris (existing Board law) but the pre-Browning-Ferris standard resurrected in Hy-Brand I. The majority cites no evidence of “continuing uncertainty in the labor-management community,” [FN17] and to the extent such uncertainty exists, it has only itself to blame for the series of missteps undertaken in seeking to hurriedly reverse BFI.

- 16 As the Board recently observed in Hy-Brand II, because the original Hy-Brand decision and order was vacated, the “overruling of the Browning-Ferris decision is of no force or effect.” 366 NLRB No. 26, slip op. at 1. The majority here states that “[i]n February 2018, the Board vacated its December 2017 decision [in Hy-Brand], effectively changing the law back again to the relaxed standard of Browning-Ferris.”
- 17 To the extent that the majority is relying on anything other than anecdotal evidence of this alleged uncertainty, it is required to let the public know the evidentiary basis of its conclusion. “It is not consonant with the purpose of a rule-making proceeding to promulgate

rules on the basis of inadequate data, or on data that, to a critical degree, is known only to the agency.” *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973).

More to the point, the best way to end uncertainty over the Board’s joint-employer standard would be to adhere to existing law, not to upend it. The majority’s decision to pursue rulemaking ensures the Board’s standard will remain in flux as the Board develops a final rule and as that rule, in all likelihood, is challenged in the federal courts. And, of course, any final rule could not be given retroactive effect, a point that distinguishes rulemaking from adjudication.[FN18] Thus, cases arising before a final rule is issued will nonetheless have to be decided under the *Browning-Ferris* standard.

18 See generally *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). There is no indication in Sec. 6 of the National Labor Relations Act that Congress intended to give the Board authority to promulgate retroactive rules. Sec. 6 authorizes the Board “to make . . . in the manner prescribed by [the Administrative Procedure Act] . . . such rules and regulations as may be necessary to carry out the provisions of” the National Labor Relations Act. 29 U.S.C. 156. The Administrative Procedure Act defines a “rule” as an “agency statement of general or particular applicability and future effect. . . .” 5 U.S.C. 551(4) (emphasis added). See also See June 5, 2018 Letter from Chairman Ring to Senators Warren, Gillibrand, and Sanders at 2, available at <https://www.nlr.gov/news-outreach/news-story/nlr-chairman-provides-response-senators-regarding-joint-employer-inquiry> (acknowledging that “final rules issued through notice-and-comment rulemaking are required by law to apply prospectively only”).

The majority’s choice here is especially puzzling given that *Browning-Ferris* remains under review in the District of Columbia Circuit. When the court’s decision issues, it will give the Board relevant judicial guidance on the contours of a permissible joint-employer standard under the Act. The Board would no doubt benefit from that guidance, even if it was not required to follow it. Of course, if the majority’s final rule could not be reconciled with the District of Columbia Circuit’s *Browning-Ferris* decision, it presumably would not survive judicial review in that court.[FN19] The Board majority thus proceeds at its own risk in essentially treating *Browning-Ferris* as a dead letter.

19 If the District of Columbia Circuit were to uphold the Board’s *Browning-Ferris* standard (in whole or in part) as compelled by—or at least consistent with—the Act, but the Board, through rulemaking, rejected *Browning-Ferris* (in whole or in part) as not permitted by the Act, then the Board’s final rule would be premised on a legal error. Moreover, insofar as the court might hold the *Browning-Ferris* standard to be permitted by the Act, then the reasons the Board gave for not adopting that standard would have to be consistent with the court’s understanding of statutory policy and common-law agency doctrine insofar as they govern the joint-employer standard.

B. The Proposed Rule Is Inconsistent With Both the Common Law and the Goals of the NLRA

No court has held that *Browning-Ferris* does not reflect a reasonable interpretation of the National Labor Relations Act. Nor does the majority today assert that its own, proposed joint-employer standard is somehow compelled by the Act. As the majority acknowledges, the “Act does not contain the term ‘joint employer,’ much less define it.” The majority also acknowledges, as it must, that “it is clear that the Board’s joint-employer standard . . . must be consistent with common law agency doctrine.” The joint-employer standard adopted in *Browning-Ferris*, of course, is predicated on common-law agency doctrine, as the decision explains in careful detail.[FN20] As the *Browning-Ferris* Board observed:

20 362 NLRB No. 186, slip op. at 12-17. Notably, the *Browning-Ferris* Board rejected a broader revision of the joint-employer standard advocated by the General Counsel because it might have suggested “that the applicable inquiry is based on ‘industrial realities’ rather than the common law.” 362 NLRB No. 186, slip op. at 13 fn. 68. The General Counsel had urged the Board to find joint-employer status:
where, under the totality of the circumstances, including the way the separate entities have structured their commercial relationships, the putative joint employer wields sufficient influence over the working conditions of the other entity’s employees such that meaningful collective bargaining could not occur in its absence.
Id.

In determining whether a putative joint employer meets [the] standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then

turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.

362 NLRB No. 186, slip op. at 2 (emphasis added).[FN21]

21 This approach, as the Browning-Ferris Board explained, was consistent with the Board's traditional joint-employer doctrine, as it existed before 1984. 362 NLRB No. 186, slip op. at 8-11. In tracing the evolution of the Board's joint-employer standard, the Browning-Ferris Board observed that:

Three aspects of that development seem clear. First, the Board's approach has been consistent with the common-law concept of control, within the framework of the National Labor Relations Act. Second, before the current joint-employer standard was adopted, the Board (with judicial approval) generally took a broader approach to the concept of control. Third, the Board has never offered a clear and comprehensive explanation for its joint-employer standard, either when it adopted the current restrictive test or in the decades before. *Id.* at 8.

***46689** In contrast, the Board's prior standard (which the majority revives today) had never been justified in terms of common-law agency doctrine. For the 31 years between 1984 (when the Board, in two decisions, narrowed the traditional joint-employer standard) [FN22] and 2015 (when Browning-Ferris was decided), the Board's approach to joint-employer cases was not only unexplained, but also inexplicable with reference to the principles that must inform the Board's decision-making. Common-law agency doctrine simply does not require the narrow, pre-Browning-Ferris standard to which the majority now seeks to return. Nor is the “practice and procedure of collective bargaining” encouraged by adopting a standard that reduces opportunities for collective bargaining and effectively shortens the reach of the Act.

22 TLI, Inc., 271 NLRB 798 (1984), *enfd.* mem. 772 F.2d 894 (3d Cir. 1985), and Laerco Transportation, 269 NLRB 324 (1984).

Thus, it is not surprising that two labor-law scholars have endorsed Browning-Ferris as “the better approach,” “predicated on common law principles” and “consistent with the goals of employment law, especially in the context of a changing economy.” [FN23] Browning-Ferris, the scholars observe, “was not a radical departure from past precedent;” rather, despite “reject[ing] limitations added to the joint employer concept from a few cases decided in the 1980s,” it was “consistent with earlier precedents.” [FN24] The crux of the Browning-Ferris decision, and the current majority's disagreement with it, is whether the joint-employer standard should require: (1) That a joint employer “not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority;” (2) that the employer's control “must be exercised directly and immediately;” and (3) that control not be “limited and routine.” [FN25] The Browning-Ferris Board carefully explained that none of these limiting requirements is consistent with common-law agency doctrine, as the Restatement (Second) of Agency makes clear.[FN26] It is the Restatement on which the Supreme Court has relied in determining the existence of a common-law employment relationship for purposes of the National Labor Relations Act.[FN27] The Court, in turn, has observed that the “Board's departure from the common law of agency with respect to particular questions and in a particular statutory context, [may] render[] its interpretation [of the Act] unreasonable.” [FN28]

23 Charlotte Garden & Joseph E. Slater, Comments on Restatement of Employment Law (Third), Chapter 1, 21 Employee Rights & Employment Policy Journal 265, 276 (2017).

24 *Id.* at 276-277.
Id.

25 Browning-Ferris, *supra*, 362 NLRB No. 186, slip op. at 2 (emphasis in original).

26 *Id.* at 13-14. See also Hy-Brand I, *supra*, 365 NLRB No. 156, slip op. at 42-45 (dissenting opinion). As to whether authority must be exercised, Section 220(1) of the Restatement (Second) of Agency defines a “servant” as a “person employed to perform services . . . who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control” (emphasis added). Section 220(2), in turn, identifies as a relevant factor in determining the existence

of an employment relationship “the extent of control which, by the agreement, the master may exercise over the details of the work” (emphasis added). See, e.g., *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989) (“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished.”); *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889) (observing that the “relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done”).

As to whether control must be direct and immediate, the Restatement observes that the “control needed to establish the relation of master and servant may be very attenuated.” Restatement (Second) of Agency Section 220(1), comment d. The Restatement specifically recognizes the common-law “subservant” doctrine, addressing cases in which one employer’s control is or may be exercised indirectly, while a second employer directly controls the employee. Restatement (Second) of Agency Sections 5, 5(2), comment e. See, e.g., *Kelley v. Southern Pacific Co.*, 419 U.S. 3218, 325 (1974) (recognizing subservant doctrine for purposes of Federal Employers’ Liability Act); *Allbritton Communications Co. v. NLRB*, 766 F.2d 812, 818-819 (3d Cir. 1985) (applying subservant doctrine under National Labor Relations Act), cert. denied, 474 U.S. 1081 (1986).

As to the issue of control that is limited and routine, the Restatement makes clear that if an entity routinely exercises control “over the details of the work,” it is more likely to be a common-law employer. See Restatement (Second) of Agency Section 220(2)(a). That control might be routine, in the sense of not requiring special skill, does not suggest the absence of an employment relationship; to the contrary, an unskilled worker is more likely to be an employee, rather than an independent contractor. See *id.*, Section 220(2)(d) and comment i.

27 See, e.g., *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256-258 (1968) (interpreting Act’s exclusion of independent contractors from coverage).

28 *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 94 (1995), citing *United Insurance*, *supra*, 390 U.S. at 256.

Hy-Brand I impermissibly departed from the common law of agency as the dissent there demonstrated,[FN29] and the majority’s proposed rule does so again. Remarkably, the majority makes no serious effort here to refute the detailed analysis of common-law agency doctrine advanced in *Browning-Ferris* and in the Hy-Brand I dissent. The majority fails to confront the Restatement (Second) of Agency, for example, or the many decisions cited in *Browning-Ferris* (and then in the Hy-Brand I dissent) that reveal that at common law, the existence of an employment relationship does not require that the putative employer’s control be (1) exercised (rather than reserved); (2) direct and immediate (rather than indirect, as through an intermediary); and not (3) limited and routine (rather than involving routine supervision of at least some details of the work). None of these restrictions, much less all three imposed together, is consistent with common-law agency doctrine.[FN30]

29 See Hy-Brand I, *supra*, 365 NLRB No. 156, slip op. at 42-47 (dissenting opinion).

30 The majority observes that in some cases, courts have upheld the Board’s application of the “direct and immediate”-control restriction. But as the Hy-Brand I dissent explained, no federal appellate court has addressed the argument that this restriction is inconsistent with common-law agency principles. 365 NLRB No. 156, slip op. at 46.

Nor, as the majority suggests, is the restriction supported by the Supreme Court’s decision in *NLRB v. Denver Building & Construction Trades Council*, 341 NLRB 675 (1951). As the Hy-Brand I dissent explained:

The issue in . . . *Denver Building & Construction Trades Council* . . . was whether (as the Board had found) a labor union violated Sec. 8(b)(4)(A) of the Act “by engaging in a strike, an object of which was to force the general contractor on a construction project to terminate its contract with a certain subcontractor on the project.” *Id.* at 677. The relevant statutory language prohibits a strike “where an object thereof is . . . forcing or requiring . . . any employer or other person . . . to cease doing business with any other person.” *Id.* at 677 fn. 1 (citing 29 U.S.C. 158(b)(4)(A), current version at 29 U.S.C. 158(b)(4)(i)(B)). The Court agreed with the Board’s conclusion that the general contractor and the subcontractor were “doing business” with each other. *Id.* at 690.

It was in that context that the Court observed that “the fact that the contractor and the subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor’s work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other,” such that the “doing business” element could not be satisfied. *Id.* at 689-690. The Court’s decision in no way implicated the common-law test for an employment relationship or the Board’s joint-employer standard. As a general matter, to say that a general contractor and a subcontractor are independent entities (e.g., not a “single employer”) is not to say that they can never be joint employers, if it is proven that the general contractor retains or exercises a sufficient degree of control over the subcontractor’s workers to satisfy the common-law test of an employment relationship.

Hy-Brand I, *supra*, 365 NLRB No. 156, slip op. at 46 fn. 63 (dissenting opinion).

***46690** Instead of demonstrating that its proposed rule is consistent with the common law (an impossible task), the majority simply asserts that it is—and then invites public comment on the “current state of the common law on joint-employment relationships” and whether the “common law dictate[s] the approach of the proposed rule or of Browning-Ferris” or instead “leave[s] room for either approach.” The answers to these questions have been clear for quite some time: The restrictive conditions for finding joint-employer status proposed by the majority simply restore the pre-Browning Ferris standard, which the Board had never presented as consistent with, much less compelled by, common-law agency doctrine.[FN31] The majority, in short, seeks help in finding a new justification for an old (and unsupportable) standard. But the proper course is for the Board to start with first principles, as the Browning-Ferris decision did, and then to derive the joint-employer standard from them.

31 With respect to the issue of reserved control, the majority acknowledges that “[o]ver time, the Board shifted position, without expressly overruling precedent, and held that joint-employer status could not be established by the mere existence of a clause in a business contract reserving to one company authority over its business partner’s employees absent evidence that such authority had ever been exercised.” The Board, however, is required to adhere to its precedent or to explain why it chooses to deviate from it. See, e.g., *ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137, 1146 (D.C. Cir. 2017). Here, too, the Board’s pre-Browning-Ferris approach fell short of the standard for reasoned decision-making.

Just as the majority fails to reconcile the proposed rule with common-law agency doctrine—a prerequisite for any viable joint-employer standard under the National Labor Relations Act—so the majority fails to explain how its proposed standard is consistent with the actual policies of the Act. There should be no dispute about what those policies are. Congress has told us. Section 1 of the Act states plainly that:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. 151 (emphasis added). The Supreme Court has explained that:

Congress’ goal in enacting federal labor legislation was to create a framework within which labor and management can establish the mutual rights and obligations that govern the employment relationship. “The theory of the act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act in itself does not attempt to compel.”

NLRB v. J. Weingarten, Inc., 420 U.S. 251, 271 (1975) (emphasis added), quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

The Browning-Ferris standard—current Board law—clearly “encourage[s] the practice and procedure of collective bargaining” (in the words of the Act) by eliminating barriers to finding joint-employer relationships that have no basis in the common-law agency doctrine that Congress requires the Board to apply. The predictable result is that more employees will be able to engage in “free opportunities for negotiation” (in the Supreme Court’s phrase) with the employers who actually control the terms and conditions of their employment—as Congress intended—and that orderly collective bargaining, not strikes, slowdowns, boycotts, or other “obstructions to the free flow of commerce” will prevail in joint-employer settings.

The question for the majority is why it would preliminarily choose to abandon Browning-Ferris for a standard that, by its own candid admission, is intended to—and will—result in fewer joint employer findings and thus in a greater likelihood of economically disruptive labor disputes. Where collective bargaining under the law is not an option, workers have no choice but to use other means to improve their terms and conditions of employment. Economic pressure predictably will be directed at the business entities that control a workplace, whether or not the Board recognizes them as employers. History shows that

when employees' right to have effective union representation is obstructed, they engage in alternative and more disruptive means of improving their terms of employment.[FN32] Resort to such economic weapons is hardly a relic of the past. Recent examples include nationwide strikes by employees unable to gain representation in fast food, transportation, retail, and other low-pay industries, often directed at parent companies, franchisors, investors, or other entities perceived by the workers as having influence over decisions that ultimately impact the workers' well-being.[FN33] Congress enacted the NLRA in order to minimize the disruption of commerce and to provide employees with a structured, non-disruptive alternative to such action. In blocking effective representation by unreasonably narrowing the definition of joint employer, the majority thwarts that goal and invites disruptive economic activity.

32 Between 1936 and 1939, when the NLRA was in its infancy and still meeting massive resistance from employers, American employees engaged in 583 sit-down strikes of at least one day's duration. Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935—1938*, *Law and History Review*, Vol. 24, No. 1 at 45, 46 (Spring 2006). See also *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). For many years after plant occupations were found illegal by the Supreme Court, employees resorted to wildcat, “quickie,” “stop-and-go,” and partial strikes; slowdowns; and mass picketing. *Id.* at 108-111.

33 E.g., Michael M. Oswalt, *The Right to Improvise in Low-Wage Work*, 38 *Cardozo L. Rev.* 959, 961-986 (2017); Steven Greenhouse and Jana Kasperkevic, *Fight For \$15 Swells Into Largest Protest By Low-wage Workers in US History*, *The Guardian/U.S. News* (April 15, 2015); Dominic Rushe, *Fast Food Workers Plan Biggest US Strike to Date Over Minimum Wage*, *The Guardian/U.S. News* (September 1, 2014). Strikes, walkouts, and other demonstrations of labor unrest have also been seen in recent years in the college and university setting among graduate teaching assistants and similar workers responding to their academic employers' refusal to recognize unions and engage in collective bargaining. See, e.g., Danielle Douglas-Gabrielle, *Columbia Graduate Students Strike Over Refusal to Negotiate a Contract*, *The Washington Post* (April 24, 2018); David Epstein, *On Strike: In a showdown over TA unions at private universities, NYU grad students walk off the job*, *Inside Higher Ed* (November 10, 2005). Here, again, the common thread is workers resort to more disruptive channels when they are denied the ability to negotiate directly about decisions impacting their employment.

The majority does not explain its choice in any persuasive way. It asserts that codifying the *Hy-Brand I*, pre-Browning-Ferris standard “will foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby promoting labor-management stability, one of the principal purposes of the Act.” But, as already suggested, “predictability and consistency” with respect to the Board's joint-employer standard could be achieved just as well by codifying the Browning-Ferris standard—which, crucially, is both consistent with common-law agency doctrine and promotes the policy of the Act (in contrast to the *Hy-Brand I* standard).

As for “labor-management stability,” that notion does not mean the perpetuation of a state in which workers in joint-employer situations remain *46691 unrepresented, despite their desire to unionize, because Board doctrine prevents it. “The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employe[r]s.” [FN34] Congress explained in Section 1 of the Act that it is the “denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining” that “lead to strikes and other forms of industrial strife or unrest.” [FN35] A joint-employer standard that predictably and consistently frustrates the desire of workers for union representation is a recipe for workplace instability—for just the sort of conflict that Congress wanted to eliminate. Whether it proceeds by adjudication or by rulemaking, the Board is not free to substitute its own idea of proper labor policy for the Congressional policy embodied in the statute.

34 *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996) (emphasis added).

35 29 U.S.C. 151.

The majority expresses the “preliminary belief . . . that absent a requirement of proof of some ‘direct and immediate’ control to find a joint-employment relationship, it will be extremely difficult for the Board to accurately police the line between independent commercial contractors and genuine joint employers.” But any such difficulty is a function of applying common-

law agency doctrine, which the Board is not free to discard, whether in the interests of administrative convenience or a so-called predictability that insulates employers from labor-law obligations. In holding that Congress had made common-law agency doctrine controlling under the Act, the Supreme Court itself has noted the “innumerable situations which arise in the context of the common law where it is difficult to say whether a particular individual is an employee or an independent contractor.” [FN36] To quote the Hy-Brand I majority, “[t]he Board is not Congress.” [FN37] It is not free to decide that the common law is simply too difficult to apply, despite the Congressional instruction to do so.

36 United Insurance, *supra*, 390 U.S. at 258. See also Restatement (Second) of Agency Section 220, comment c (“The relation of master and servant is one not capable of exact definition. . . . [I]t is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation.”).

37 Hy-Brand I, *supra*, 365 NLRB No. 156, slip op. at 33.

Notably, the majority's proposed inclusion of a “direct and immediate” control requirement in the joint-employer standard would hardly result in an easy-to-apply test. The majority takes pains to say that while the exercise of “direct and immediate” control is necessary to establish a joint-employer relationship, it is not sufficient.[FN38] As for the “examples” set forth in the proposed rule, they are “intended to be illustrative and not as setting the outer parameters of the joint-employer doctrine established in the proposed rule.” [FN39] Even with respect to those examples that illustrate the exercise of “direct and immediate” control, the proposed rule does not actually state that a joint-employer relationship is demonstrated. Here, too, the majority's ostensible goal of predictability is elusive. The proposed rule, if ultimately adopted by the Board, will reveal its true parameters only over time, as it is applied case-by-case through adjudication. What purpose, then, does codifying the Hy-Brand I standard via rulemaking actually serve?

38 “Direct and immediate” control “will be insufficient,” the majority observes, “where the degree of a putative employer's control is too limited in scope (perhaps affecting a single essential working condition and/or exercised rarely during the putative joint employer's relationship with the undisputed employer).” In comparison, Browning-Ferris explained that a joint employer “will be required to bargain only with respect to those terms and conditions over which it possesses sufficient control for bargaining to be meaningful.” 362 NLRB No. 186, slip op. at 2 fn. 7. The decision acknowledged that a “putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining.” *Id.* at 16. The difference between the proposed rule and Browning-Ferris is that the former treats joint employment as an all-or-nothing proposition, while the latter permits joint-employer determinations that are tailored to particular working arrangements, allowing collective bargaining to the extent that it can be effective.

39 Of course, illustrating a legal standard is not the same as explaining it: In this case, demonstrating that the proposed joint-employer standard, as illustrated by a particular example, is consistent with common-law agency doctrine and promotes statutory policies.

The majority's examples, rather than helping “clarify” what constitutes “direct and immediate control,” confirm that joint employment cannot be determined by any simplistic formulation, let alone the majority's artificially restrictive one. This is because additional circumstances in each of the provided examples could change the result. In example 1(a), the majority declares that under its proposed rule a “cost-plus” service contract between two businesses that merely establishes a maximum reimbursable labor expense does not, by itself, justify finding that the user business exercises direct control. But if, under that contract, the user also imposes hiring standards; prohibits individual pay to exceed that of the user's own employees; determines the provider's working hours and overtime; daily adjusts the numbers of employees to be assigned to respective production areas; determines the speed of the worksite's assembly or production lines; conveys productivity instructions to employees through the provider's supervisors; or restricts the period that provided employees are permitted to work for the user—all as in Browning-Ferris—does the result change? Would some but not all of these additional features change the result? If not, under common-law principles, why not?

In example 2(a), the majority declares that under its proposed rule, a user business does not exercise direct control over the provider's employees simply by complaining that the product coming off its assembly line worked by those employees is

defective. Does the result change if the user also indicates that it believes certain individual employees are partly responsible for the defects? Or if it also demands those employees' reassignment, discipline, or removal? Or if it demands that provided employees be allocated differently to different sections of the line?

And in example 6(a), the majority declares that where a service contract reserves the user's right to discipline provided employees, but the user has never exercised that authority, the user has not exercised direct control. Again, does the result change if the user indicates to the supplier which employees deserve discipline, and/or how employees should be disciplined? And, assuming that the actual exercise of control is necessary, when is it sufficient to establish a joint-employer relationship? How many times must control be exercised, and with respect to how many employees and which terms and conditions of employment?

The majority's simplified examples, meanwhile, neither address issues of current concern implicating joint employment—such as, for example—the recent revelation that national fast-food chains have imposed “no poaching” restrictions on their franchisees that limit the earnings and mobility of franchise employees [FN40]—nor accurately *46692 reflect the complicated circumstances that the Board typically confronts in joint-employer cases, where the issue of control is raised with respect to a range of employment terms and conditions and a variety of forms of control.[FN41]

40 “AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide,” Press Release, Office of the Attorney General, Washington State (July 12, 2018) (explaining that “seven large corporate fast-foods chains will immediately end a nationwide practice that restricts worker mobility and decreases competition for labor by preventing workers from moving among the chains' franchise locations”), available at www.atg.wa.gov/news/news-releases; “AG Ferguson: Eight More Restaurant Chains Will End No-Poach Practices Nationwide,” Press Release, Office of the Attorney General, Washington State (Aug. 20, 2018), available at www.atg.wa.gov/news/news-releases. See also generally Rachel Abrams, “Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue,” *The New York Times* (Sept. 27, 2017); Alan B. Krueger & Orley C. Ashenfelter, “Theory and Evidence on Employer Collusion in the Franchise Sector,” Princeton University Working Paper No. 614 (Sept. 28, 2017), available at <http://arks.princeton.edu/ark:/88435/dsp014f16c547g>.

41 In *Browning-Ferris*, for example, the Board found that BFI Newby Island Recyclery (BFI) was a joint employer with Leadpoint Business Services (Leadpoint) of sorters, screen cleaners, and housekeepers at a recycling facility. That finding was based on a range of evidence reflecting both direct and indirect control, both reserved and exercised, over various terms and conditions of employment. First, the Board found that under its agreement with Leadpoint, BFI “possesse[d] significant control over who Leadpoint can hire to work at its facility,” with respect to both hiring and discipline, and at least occasionally exercised that authority in connection with discipline. 362 NLRB No. 16, slip op. at 18.

Second, BFI “exercised control over the processes that shape the day-to-day work” of the employees, particularly with respect to the “speed of the [recycling] streams and specific productivity standards for sorting,” but also by assigning specific tasks that need to be completed, specifying where Leadpoint workers were to be positioned, and exercising oversight of employees' work performance.” *Id.* at 18-19. (footnote omitted).

Third, BFI “played a significant role in determining employees' wages” by (1) “prevent[ing] Leadpoint from paying employees more than BFI employees performing comparable work; and (2) entering into a cost-plus contract with Leadpoint coupled with an “apparent requirement of BFI approval over employee pay raises.” *Id.* at 19.

Example 1(a) of the proposed rule suggests that the majority would give no weight to BFI's cost-plus contract, but it is not clear how the majority would analyze BFI's veto power over pay raises. Example 1(b) suggests that this power might be material. Example 2(b), meanwhile, suggests that BFI's control over day-to-day work processes supports a joint-employer finding. Finally, Example 6(b), apparently would support finding that BFI exercised direct and immediate disciplinary control over Leadpoint employees. Ironically, then, it is far from clear that adoption of the majority's proposed rule would lead to a different result in *Browning-Ferris*.

The majority's examples and their possible variations therefore illustrate why the issue of joint employment is particularly suited to individual adjudication under common-law principles. As the majority acknowledges, “[t]here are myriad relationships between employers and their business partners, and the degree to which particular business relationships impact employees' essential terms and conditions of employment varies widely.” This being true, the majority's simplistic examples are of limited utility in providing guidance, and merely serve to illustrate the impossibility of predetermining with “clarity” all of the situations in which a joint employment relationship does or does not exist. This is why the Board's best course of action

may well be to continue to define the contours of the correct standard, re-established in *Browning-Ferris*, through the usual process of adjudication. This process will provide a more nuanced understanding of the contours of potential joint employment relationships that is difficult to achieve in the abstract via rulemaking.

C. The Majority's Proposed Rulemaking Process Is Flawed

For all of these reasons, I dissent from the majority's decision to issue the notice of proposed rulemaking (NPRM). To be sure, if the majority is determined to revisit *Browning-Ferris*, then permitting public participation in the process is preferable to the approach taken in the now-vacated *Hy-Brand I*, where the majority overruled *Browning-Ferris* sua sponte and without providing the parties or the public with notice and an opportunity to file briefs on that question. Having chosen to proceed, however, the majority should at the very least encourage greater public participation in the rulemaking process, by holding one or more public hearings.

There is no indication that the Board intends to hold a public hearing on the proposed rule, in addition to soliciting written comments. In the past, the Board has held such hearings to enhance public participation in the rulemaking process,^[FN42] and there is no good reason why it should not do so again. Despite the Chairman's publicly professed desire to hear from “thousands of commentators . . . including individuals and small businesses that may not be able to afford to hire a law firm to write a brief for them, yet have valuable insight to share from hard-won experience,”^[FN43] the process outlined by the majority—with limited time for public comment and no public hearings—seems ill-designed to provide the broad range of public input the majority purportedly seeks.

⁴² See Representation-Case Procedures, 79 FR 74308 (2014) (the Board held four days of oral hearings with live questioning by Board members that resulted in over 1,000 pages of testimony); Union Dues Regulations, 57 FR 43635 (1992) (the Board held one hearing); Collective-Bargaining Units in the Health Care Industry, 53 FR 33900 (1988), (the Board held four hearings—two in Washington, DC, one in Chicago, IL, and one in San Francisco, CA—that over the course of 14 days resulted in the appearance of 144 witnesses and 3,545 pages of testimony).

⁴³ See June 5, 2018 Letter from Chairman Ring to Senators Warren, Gillibrand, and Sanders, available at <https://www.nlrb.gov/news-outreach/news-story/nlrb-chairman-provides-response-senators-regarding-joint-employer-inquiry>.

Regardless of my views on the desirability of rulemaking on the joint-employer standard in the wake of *Hy-Brand I*, I will give careful consideration to the public comments that the Board receives and to the views of my colleagues. It is worth recalling that the *Hy-Brand I* majority, in overruling *Browning-Ferris*, asserted that the decision “destabilized bargaining relationships and created unresolvable legal uncertainty,” “dramatically changed labor law sales and successorship principles and discouraged efforts to rescue failing companies and preserve employment,” “threatened existing franchising arrangements,” and “undermined parent-subsidary relationships.”^[FN44] The *Hy-Brand I* majority cited no actual examples from the Board's case law applying BFI, or empirical evidence of any sort, to support its hyperbolic claims, instead recycling Member Miscimarra's dissent in *Browning-Ferris* practically verbatim.^[FN45] *Browning-Ferris* was issued more than 3 years ago, on August 27, 2015. Today's notice specifically solicits empirical evidence from the public: information about real-world experiences, not desk-chair hypothesizing. And so the question now is whether the record in this rulemaking ultimately will support the assertions made about *Browning-Ferris* and its supposed consequences—or, instead, will reveal them to be empty rhetoric.

⁴⁴ *Hy-Brand I*, supra, 365 NLRB No.156, slip op. at 20, 26, 27, and 29.

⁴⁵ The relationship between Member Miscimarra's dissent in *Browning-Ferris* and the majority opinion in *Hy-Brand* is examined in a February 9, 2018 report issued by the Board's Inspector General, which is posted on the Board's website (“OIG Report Regarding *Hy-Brand* Deliberations” available at www.nlrb.gov).

V. Regulatory Procedures

The Regulatory Flexibility Act

A. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (“RFA”), 5 U.S.C. 601, et seq. ensures that agencies “review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].” [FN46] It requires agencies promulgating proposed rules to prepare an Initial Regulatory Flexibility Analysis (“IRFA”) and to develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial *46693 number of small entities. However, an agency is not required to prepare an IRFA for a proposed rule if the agency head certifies that, if promulgated, the rule will not have a significant economic impact on a substantial number of small entities.[FN47] The RFA does not define either “significant economic impact” or “substantial number of small entities.” [FN48] Additionally, “[i]n the absence of statutory specificity, what is ‘significant’ will vary depending on the economics of the industry or sector to be regulated. The agency is in the best position to gauge the small entity impacts of its regulations.” [FN49]

46 E.O. 13272, Sec. 1, 67 FR 53461 (“Proper Consideration of Small Entities in Agency Rulemaking”).

47 5 U.S.C. 605(b).

48 5 U.S.C. 601.

49 Small Business Administration Office of Advocacy, “A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act” (“SBA Guide”) at 18, <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf>.

The Board has elected to prepare an IRFA to provide the public the fullest opportunity to comment on the proposed rule. An IRFA describes why an action is being proposed; the objectives and legal basis for the proposed rule; the number of small entities to which the proposed rule would apply; any projected reporting, recordkeeping, or other compliance requirements of the proposed rule; any overlapping, duplicative, or conflicting Federal rules; and any significant alternatives to the proposed rule that would accomplish the stated objectives, consistent with applicable statutes, and that would minimize any significant adverse economic impacts of the proposed rule on small entities. Descriptions of this proposed rule, its purpose, objectives, and the legal basis are contained earlier in the Summary and Supplemental Information sections and are not repeated here.

The Board believes that this rule will likely not have a significant economic impact on a substantial number of small entities. While we assume for purposes of this analysis that a substantial number of small employers and small entity labor unions will be impacted by this rule, we anticipate low costs of compliance with the rule, related to reviewing and understanding the substantive changes to the joint-employer standard. There may be compliance costs that are unknown to the Board; perhaps, for example, employers may incur potential increases in liability insurance costs. The Board welcomes comments from the public that will shed light on potential compliance costs or any other part of this IRFA.

B. Description and Estimate of Number of Small Entities to Which the Rule Applies

In order to evaluate the impact of the proposed rule, the Board first identified the entire universe of businesses that could be impacted by a change in the joint-employer standard. According to the United States Census Bureau, there were approximately 5.9 million business firms with employees in 2015.[FN50] Of those, the Census Bureau estimates that about 5,881,267 million were firms with fewer than 500 employees.[FN51] While this proposed rule does not apply to employers that do not meet the Board's jurisdictional requirements, the Board does not have the data to determine the number of excluded entities.[FN52] Accordingly, the Board assumes for purposes of this analysis that the great majority of the 5,881,267 million small business firms could be impacted by the proposed rule.

50 “Establishments” refer to single location entities—an individual “firm” can have one or more establishments in its network. The Board has used firm level data for this IRFA because establishment data is not available for certain types of employers discussed

below. Census Bureau definitions of “establishment” and “firm” can be found at <https://www.census.gov/programs-surveys/susb/about/glossary.html>.

51 The Census Bureau does not specifically define small business, but does break down its data into firms with 500 or more employees and those with fewer than 500 employees. See U.S. Department of Commerce, Bureau of Census, 2015 Statistics of U.S. Businesses (“SUSB”) Annual Data Tables by Establishment Industry, <https://www.census.gov/data/tables/2015/econ/susb/2015-susb-annual.html> (from downloaded Excel Table entitled “U.S., 6-digit NAICS”). Consequently, the 500-employee threshold is commonly used to describe the universe of small employers. For defining small businesses among specific industries, the standards are defined by the North American Industry Classification System (NAICS), which we set forth below.

52 Pursuant to 29 U.S.C. 152(6) and (7), the Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level. *NLRB v. Fainblatt*, 306 U.S. 601, 606-07 (1939). To this end, the Board has adopted monetary standards for the assertion of jurisdiction that are based on the volume and character of the business of the employer. In general, the Board asserts jurisdiction over employers in the retail business industry if they have a gross annual volume of business of \$500,000 or more. *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1959). But shopping center and office building retailers have a lower threshold of \$100,000 per year. *Carol Management Corp.*, 133 NLRB 1126 (1961). The Board asserts jurisdiction over non-retailers generally where the value of goods and services purchased from entities in other states is at least \$50,000. *Siemons Mailing Service*, 122 NLRB 81 (1959).

The following employers are excluded from the NLRB's jurisdiction by statute:

- Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations. 29 U.S.C. 152(2).
- Employers that employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities, or prepare commodities for delivery. 29 U.S.C. 153(3).
- Employers subject to the Railway Labor Act, such as interstate railroads and airlines. 29 U.S.C. 152(2).

The proposed rule will only be applied as a matter of law when small businesses are alleged to be joint employers in a Board proceeding. Therefore, the frequency that the issue comes before the Board is indicative of the number of small entities most directly impacted by the proposed rule. A review of the Board's representation petitions and unfair labor practice (ULP) charges provides a basis for estimating the frequency that the joint-employer issue comes before the Agency. During the five-year period between January 1, 2013 and December 31, 2017, a total of 114,577 representation and unfair labor practice cases were initiated with the Agency. In 1,598 of those filings, the representation petition or ULP charge filed with the Agency asserted a joint-employer relationship between at least two employers.[FN53] Accounting for repetitively alleged joint-employer relationships in these filings, we identified 823 separate joint-employer relationships involving an estimated 1,646 employers.[FN54] Accordingly, the joint-employer standard most directly impacted approximately .028% of all 5.9 million business firms (including both large and small businesses) over the five-year period. Since a large share of our joint-employer cases involves large employers, we expect an even lower percentage of small businesses to be most directly impacted by the Board's application of the rule.

53 This includes initial representation case petitions (RC petitions) and unfair labor practice charges (CA cases) filed against employers.

54 Since a joint-employer relationship requires at least two employers, we have estimated the number of employers by multiplying the number of asserted joint-employer relationships by two. Some of these filings assert more than two joint employers; but, on the other hand, some of the same employers are named multiple times in these filings. Additionally, this number is certainly inflated because the data does not reveal those cases where joint-employer status is not in dispute.

Irrespective of an Agency proceeding, we believe the proposed rule may be more relevant to certain types of small employers because their business relationships involve the exchange of employees or operational control.[FN55] In addition, labor unions, as organizations representing or seeking to represent employees, will be impacted by the *46694 Board's change in its joint-employer standard. Thus, the Board has identified the following five types of small businesses or entities as those most likely to be impacted by the rule: Contractors/subcontractors, temporary help service suppliers, temporary help service users, franchisees, and labor unions.

55 The Board acknowledges that there are other types of entities and/or relationships between entities that may be affected by a change in the joint-employer rule. Such relationships include but are not limited to: Lessor/lessee, and parent/subsidiary. However, the Board does not believe that entities involved in these relationships would be impacted more than the entities discussed below.

(1) Businesses commonly enter into contracts with vendors to receive a wide range of services that may satisfy their primary business objectives or solve discrete problems that they are not qualified to address. And there are seemingly unlimited types of vendors who provide these types of contract services. Businesses may also subcontract work to vendors to satisfy their own contractual obligations—an arrangement common to the construction industry. Businesses that contract to receive or provide services often share workspaces and sometimes share control over workers, rendering their relationships subject to application of the Board's joint-employer standard. The Board does not have the means to identify precisely how many businesses are impacted by contracting and subcontracting within the U.S., or how many contractors and subcontractors would be small businesses as defined by the SBA.[FN56]

56 The only data known to the Board relating to contractor business relationships involve businesses that contract with the Federal Government. In 2014, the Department of Labor reported that approximately 500,000 federal contractor firms were registered with the General Services Administration. Establishing a Minimum Wage for Contractors, 79 FR 60634, 60697. However, the Board is without the means to identify the precise number of firms that actually receive federal contracts or to determine what portion of those are small businesses as defined by the SBA. Even if these data were available, given that the Board does not have jurisdiction over government entities, business relationships between federal contractors and the federal agencies will not be impacted by the Board's joint-employer rule. The business relationships between federal contractors and their subcontractors could be subject to the Board's joint-employer rule. However, we also lack the means for estimating the number of businesses that subcontract with federal contractors or determine what portion of those would be defined as small businesses. Input from the public in this regard is welcome.

(2) Temporary help service suppliers (North American Industry Classification System (“NAICS”) #561320), are primarily engaged in supplying workers to supplement a client employer's workforce. To be defined as a small business temporary help service supplier by the SBA, the entity must generate receipts of less than \$27.5 million annually.[FN57] In 2012, there were 13,202 temporary service supplier firms in the U.S.[FN58] Of these business firms, 6,372 had receipts of less than \$1,000,000; 3,947 had receipts between \$1,000,000 and \$4,999,999; 1,639 had receipts between \$5,000,000 and \$14,999,999; and 444 had receipts between \$15,000,000 and \$24,999,999. In aggregate, at least 12,402 temporary help service supplier firms (93.9% of total) are definitely small businesses according to SBA standards. Since the Board cannot determine how many of the 130 business firms with receipts between \$25,000,000-\$29,999,999 fall below the \$27.5 million annual receipt threshold, it will assume that these are small businesses as defined by the SBA. For purposes of this IRFA, the Board assumes that 12,532 temporary help service suppliers firms (94.9% of total) are small businesses.

57 13 CFR 121.201.

58 The Census Bureau only provides data about receipts in years ending in 2 or 7. The 2017 data has not been published, so the 2012 data is the most recent available information regarding receipts. See U.S. Department of Commerce, Bureau of Census, 2012 SUBS Annual Data Tables by Establishment Industry, NAICS classification #561320, https://www2.census.gov/programs-surveys/susb/tables/2012/us_6digitnaics_r_2012.xlsx.

(3) Entities that use temporary help services in order to staff their businesses are widespread throughout many types of industries, and include both large and small employers. A 2012 survey of business owners by the Census Bureau revealed that at least 266,006 firms obtained staffing from temporary help services in that calendar year.[FN59] This survey provides the only gauge of employers that obtain staffing from temporary help services and the Board is without the means to estimate what portion of those are small businesses as defined by the NAICS. For purposes of this IRFA, the Board assumes that all users of temporary services are small businesses.

59 See U.S. Department of Commerce, Bureau of Census, 2012 Survey of Business Owners, <https://factfinder.census.gov/bkmk/table/1.0/en/SBO/2012/00CSCB46>.

(4) Franchising is a method of distributing products or services, in which a franchisor lends its trademark or trade name and a business system to a franchisee, which pays a royalty and often an initial fee for the right to conduct business under the franchisor's name and system.[FN60] Franchisors generally exercise some operational control over their franchisees, which renders the relationship subject to application of the Board's joint-employer standard. The Board does not have the means to identify precisely how many franchisees operate within the U.S., or how many are small businesses as defined by the SBA. A 2012 survey of business owners by the Census Bureau revealed that at least 507,834 firms operated a portion of their business as a franchise. But, only 197,204 of these firms had paid employees.[FN61] In our view, only franchisees with paid employees are potentially impacted by the joint-employer standard. Of the franchisees with employees, 126,858 (64.3%) had sales receipts totaling less than \$1 million. Based on this available data and the SBA's definitions of small businesses, which generally define small businesses as having receipts well over \$1 million, we assume that almost two-thirds of franchisees would be defined as small businesses.[FN62]

60 See International Franchising Establishments FAQs, found at <https://www.franchise.org/faqs-about-franchising>.

61 See U.S. Department of Commerce, Bureau of Census, 2012 Survey of Business Owners, <https://factfinder.census.gov/bkmk/table/1.0/en/SBO/2012/00CSCB67>.

62 See 13 CFR 121.201.

(5) Labor unions, as defined by the NLRA, are entities “in which employees participate and which exist for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” [FN63] By defining which employers are joint employers under the NLRA, the proposed rule impacts labor unions generally, and more directly impacts those labor unions that organize the specific business sectors discussed above. The SBA's “small business” standard for “Labor Unions and Similar Labor Organizations” (NAICS #813930) is \$7.5 million in annual receipts.[FN64] In 2012, there were 13,740 labor union firms in the U.S.[FN65] Of these firms, 11,245 had receipts of less than \$1,000,000; 2,022 labor unions had receipts between \$1,000,000 and \$4,999,999, and 141 had receipts between \$5,000,000 and \$7,499,999. In aggregate, 13,408 labor union firms (97.6% of total) are small businesses according to SBA standards.

63 29 U.S.C. 152(5).

64 13 CFR 121.201.

65 See U.S. Department of Commerce, Bureau of Census, 2012 SUSB Annual Data Tables by Establishment Industry, NAICS classification #722513, https://www2.census.gov/programs-surveys/susb/tables/2012/us_6digitnaics_r_2012.xlsx.

Based on the foregoing, the Board assumes there are 12,532 temporary help supplier firms, 197,204 franchise firms, and 13,408 union firms that are small businesses; and further that all 266,006 temporary help user firms are small businesses. Therefore, among these four categories of employers that are most interested in the proposed rule, 489,150 business firms are assumed to be small businesses as defined by the ***46695** SBA. We believe that all of these small businesses, and also those businesses regularly engaged in contracting/subcontracting, have a general interest in the rule and would be impacted by the compliance costs discussed below, related to reviewing and understanding the rule. But, as previously noted, employers will only be directly impacted when they are alleged to be a joint employer in a Board proceeding. Given our historic filing data, this number is very small relative to the number of small employers in these five categories.

C. Recordkeeping, Reporting, and Other Compliance Costs

The RFA requires an agency to consider the direct burden that compliance with a new regulation will likely impose on small entities.[FN66] Thus, the RFA requires the Agency to determine the amount of “reporting, recordkeeping and other compliance requirements” imposed on small entities.[FN67]

66 See *Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (“[I]t is clear that Congress envisioned that the relevant ‘economic impact’ was the impact of compliance with the proposed rule on regulated small entities.”).

67 See 5 U.S.C. 603(b)(4), 604(a)(4).

We conclude that the proposed rule imposes no capital costs for equipment needed to meet the regulatory requirements; no costs of modifying existing processes and procedures to comply with the proposed rule; no lost sales and profits resulting from the proposed rule; no changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; and no costs of hiring employees dedicated to compliance with regulatory requirements.[FN68] The proposed rule also does not impose any new information collection or reporting requirements on small entities.

68 See SBA Guide at 37.

Small entities may incur some costs from reviewing the rule in order to understand the substantive changes to the joint-employer standard. We estimate that a labor compliance employee at a small employer who undertook to become generally familiar with the proposed changes may take at most one hour to read the summary of the rule in the introductory section of the preamble. It is also possible that a small employer may wish to consult with an attorney which we estimated to require one hour as well.[FN69] Using the Bureau of Labor Statistics' estimated wage and benefit costs, we have assessed these labor costs to be \$124.37.[FN70]

69 We do not believe that more than one hour of time by each would be necessary to read and understand the rule. This is because the new standard constitutes a return to the pre-Browning-Ferris standard with which most employers are already knowledgeable if relevant to their businesses, and with which we believe labor-management attorneys are also familiar.

70 For wage figures, see May 2017 National Occupancy Employment and Wage Estimates, found at https://www.bls.gov/oes/current/oes_nat.htm. The Board has been administratively informed that BLS estimates that fringe benefits are approximately equal to 40 percent of hourly wages. Thus, to calculate total average hourly earnings, BLS multiplies average hourly wages by 1.4. In May 2017, average hourly wages for labor relations specialists (BLS #13-1075) were \$31.51. The same figure for a lawyer (BLS #23-1011) is \$57.33. Accordingly, the Board multiplied each of those wage figures by 1.4 and added them to arrive at its estimate.

As for other potential impacts, it is possible that liability and liability insurance costs may increase for small entities because they may no longer have larger entities with which to share the cost of any NLRA backpay remedies ordered in unfair labor practice proceedings. Such a cost may arguably fall within the SBA Guide's category of “extra costs associated with the payment of taxes or fees associated with the proposed rule.” Conversely, fewer employers may be alleged as joint employers, resulting in lower costs to some small entities. The Board is without the means to quantify such costs and welcomes any comment or data on this topic.[FN71] Nevertheless, we believe such costs are limited to very few employers, considering the limited number of Board proceedings where joint-employer status is alleged, as compared with the number of employers subject to the Board's jurisdiction. Moreover, the proposed rule may make it easier for employers to collectively bargain without the complications of tri-partite bargaining, and further provide greater certainty as to their bargaining responsibilities. We consider such positive impacts as either indirect, or impractical to quantify, or both.

71 The RFA explains that in providing initial and final regulatory flexibility analyses, “an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.” 5 U.S.C. 607 (emphasis added).

As to the impact on unions, we anticipate they may also incur costs from reviewing the rule. We believe a union would consult with an attorney, which we estimate to require no more than one hour of time (\$80.26, see n.45) because union counsel should

already be familiar with the pre-Browning-Ferris standard. Additionally, the Board expects that the additional clarity of the proposed rule will serve to reduce litigation expenses for unions and other small entities. Again, the Board welcomes any data on any of these topics.

The Board does not find the estimated \$124.37 cost to small employers and the estimated \$80.26 cost to unions in order to review and understand the rule to be significant within the meaning of the RFA. In making this finding, one important indicator is the cost of compliance in relation to the revenue of the entity or the percentage of profits affected.[FN72] Other criteria to be considered are the following:

72 See SBA Guide at 18.

—Whether the rule will cause long-term insolvency, i.e., regulatory costs that may reduce the ability of the firm to make future capital investment, thereby severely harming its competitive ability, particularly against larger firms;

—Whether the cost of the proposed regulation will (a) eliminate more than 10 percent of the businesses' profits; (b) exceed one percent of the gross revenues of the entities in a particular sector, or (c) exceed five percent of the labor costs of the entities in the sector.[FN73]

73 Id. at 19.

The minimal cost to read and understand the rule will not generate any such significant economic impacts. Since the only quantifiable impact that we have identified is the \$124.37 or \$80.26 that may be incurred in reviewing and understanding the rule, we do not believe there will be a significant economic impact on a substantial number of small entities associated with this proposed rule.

D. Duplicate, Overlapping, or Conflicting Federal Rules

The Board has not identified any federal rules that conflict with the proposed rule. It welcomes comments that suggest any potential conflicts not noted in this section.

E. Alternatives Considered

Pursuant to 5 U.S.C. 603(c), agencies are directed to look at “any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.” The Board considered two primary alternatives to the proposed rules.

First, the Board considered taking no action. Inaction would leave in place the Browning-Ferris joint-employer standard to be applied in Board decisions. However, for the reasons *46696 stated in Sections II and III above, the Board finds it desirable to revisit the Browning-Ferris standard and to do so through the rulemaking process. Consequently, we reject maintaining the status quo.

Second, the Board considered creating exemptions for certain small entities. This was rejected as impractical, considering that an exemption for small entities would substantially undermine the purpose of the proposed rule because such a large percentage of employers and unions would be exempt under the SBA definitions. Moreover, as this rule often applies to relationships involving a small entity (such as a franchisee) and a large enterprise (such as a franchisor), exemptions for small businesses would decrease the application of the rule to larger businesses as well, potentially undermining the policy behind this rule. Additionally, given the very small quantifiable cost of compliance, it is possible that the burden on a small business of determining whether it fell within a particular exempt category might exceed the burden of compliance. Congress gave the Board very broad jurisdiction, with no suggestion that it wanted to limit coverage of any part of the Act to only larger employers.[FN74] As the Supreme

Court has noted, “[t]he [NLRA] is federal legislation, administered by a national agency, intended to solve a national problem on a national scale.” [FN75] As such, this alternative is contrary to the objectives of this rulemaking and of the NLRA.

74 However, there are standards that prevent the Board from asserting authority over entities that fall below certain jurisdictional thresholds. This means that extremely small entities outside of the Board's jurisdiction will not be affected by the proposed rule. See CFR 104.204.

75 NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn., 402 U.S. 600, 603-04 (1971) (quotation omitted).

Neither of the alternatives considered accomplished the objectives of proposing this rule while minimizing costs on small businesses. Accordingly, the Board believes that proceeding with this rulemaking is the best regulatory course of action. The Board welcomes public comment on any facet of this IRFA, including issues that we have failed to consider.

Paperwork Reduction Act

The NLRB is an agency within the meaning of the Paperwork Reduction Act (PRA). 44 U.S.C. 3502(1) and (5). This Act creates rules for agencies when they solicit a “collection of information.” 44 U.S.C. 3507. The PRA defines “collection of information” as “the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format.” 44 U.S.C. 3502(3)(A). The PRA only applies when such collections are “conducted or sponsored by those agencies.” 5 CFR 1320.4(a).

The proposed rule does not involve a collection of information within the meaning of the PRA; it instead clarifies the standard for determining joint-employer status. Outside of administrative proceedings (discussed below), the proposed rule does not require any entity to disclose information to the NLRB, other government agencies, third parties, or the public.

The only circumstance in which the proposed rule could be construed to involve disclosures of information to the Agency, third parties, or the public is when an entity's status as a joint employer has been alleged in the course of Board administrative proceedings. However, the PRA provides that collections of information related to “an administrative action or investigation involving an agency against specific individuals or entities” are exempt from coverage. 44 U.S.C. 3518(c)(1)(B)(ii). A representation proceeding under section 9 of the NLRA as well as an investigation into an unfair labor practice under section 10 of the NLRA are administrative actions covered by this exemption. The Board's decisions in these proceedings are binding on and thereby alter the legal rights of the parties to the proceedings and thus are sufficiently “against” the specific parties to trigger this exemption.[FN76]

76 Legislative history indicates Congress wrote this exception to broadly cover many types of administrative action, not just those involving “agency proceedings of a prosecutorial nature.” See S. REP. 96-930 at 56, as reprinted in 1980 U.S.C.C.A.N. 6241, 6296. For the reasons more fully explained by the Board in prior rulemaking, 79 FR 74307, 74468-69 (2015), representation proceedings, although not qualifying as adjudications governed by the Administrative Procedure Act, 5 U.S.C. 552b(c)(1), are nonetheless exempt from the PRA under 44 U.S.C. 3518(c)(1)(B)(ii).

For the foregoing reasons, the proposed rule does not contain information collection requirements that require approval by the Office of Management and Budget under the PRA.

Congressional Review Act

The provisions of this rule are substantive. Therefore, the Board will submit this rule and required accompanying information to the Senate, the House of Representatives, and the Comptroller General as required by the Small Business Regulatory Enforcement Fairness Act (Congressional Review Act or CRA), 5 U.S.C. 801-808.

This rule is a “major rule” as defined by Section 804(2) of the CRA because it will have an effect on the economy of more than \$100 million, at least during the year it takes effect. 5 U.S.C. 804(2)(A).[FN77] Accordingly, the rule will become effective no earlier than 60 days after publication of the final rule in the Federal Register.

77 A rule is a “major rule” for CRA purposes if it will (A) have an annual effect on the economy of \$100 million or more; (B) cause a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or (C) result in significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. 804. The proposed rule is a “major rule” because, as explained in the discussion of the Regulatory Flexibility Act above, the Board has estimated that the average cost of compliance with the rule would be approximately \$124.37 per affected employer and approximately \$80.26 per union. Because there are some 5.9 million employers and 13,740 unions that could potentially be affected by the rule, the total cost to the economy of compliance with the rule will exceed \$100 million ($\$733,783,000 + \$1,102,772.4 = \$734,885,772.4$) in the first year after it is adopted. Since the costs of compliance are incurred in becoming familiar with the legal standard adopted in the proposed rule, the rule would impose no additional costs in subsequent years. Additionally, the Board is confident that the rule will have none of the effects enumerated in 5 U.S.C. 804(2)(B) and (C), above.

List of Subjects in 29 CFR Part 103

Colleges and universities, Health facilities, Joint-employer standard, Labor management relations, Military personnel, Music, Sports.

Text of the Proposed Rule

For the reasons discussed in the preamble, the Board proposes to amend 29 CFR part 103 as follows:

PART 103—OTHER RULES

1. The authority citation for part 103 continues to read as follows:

Authority: 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

29 CFR § 103.40

2. Add § 103.40 to read as follows:

29 CFR § 103.40

§ 103.40: Joint employers.

An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the *46697 employees' essential terms and conditions of employment in a manner that is not limited and routine.

Example 1 to § 103.40. Company A supplies labor to Company B. The business contract between Company A and Company B is a “cost plus” arrangement that establishes a maximum reimbursable labor expense while leaving Company A free to set the wages and benefits of its employees as it sees fit. Company B does not possess and has not exercised direct and immediate control over the employees' wage rates and benefits.

Example 2 to § 103.40. Company A supplies labor to Company B. The business contract between Company A and Company B establishes the wage rate that Company A must pay to its employees, leaving A without discretion to depart from the contractual rate. Company B has possessed and exercised direct and immediate control over the employees' wage rates.

Example 3 to § 103.40. Company A supplies line workers and first-line supervisors to Company B at B's manufacturing plant. On-site managers employed by Company B regularly complain to A's supervisors about defective products coming off the assembly line. In response to those complaints and to remedy the deficiencies, Company A's supervisors decide to reassign employees and switch the order in which several tasks are performed. Company B has not exercised direct and immediate control over Company A's lineworkers' essential terms and conditions of employment.

Example 4 to § 103.40. Company A supplies line workers and first-line supervisors to Company B at B's manufacturing plant. Company B also employs supervisors on site who regularly require the Company A supervisors to relay detailed supervisory instructions regarding how employees are to perform their work. As required, Company A supervisors relay those instructions to the line workers. Company B possesses and exercises direct and immediate control over Company A's line workers. The fact that Company B conveys its supervisory commands through Company A's supervisors rather than directly to Company A's line workers fails to negate the direct and immediate supervisory control.

Example 5 to § 103.40. Under the terms of a franchise agreement, Franchisor requires Franchisee to operate Franchisee's store between the hours of 6:00 a.m. and 11:00 p.m. Franchisor does not participate in individual scheduling assignments or preclude Franchisee from selecting shift durations. Franchisor has not exercised direct and immediate control over essential terms and conditions of employment of Franchisee's employees.

Example 6 to § 103.40. Under the terms of a franchise agreement, Franchisor and Franchisee agree to the particular health insurance plan and 401(k) plan that the Franchisee must make available to its workers. Franchisor has exercised direct and immediate control over essential employment terms and conditions of Franchisee's employees.

Example 7 to § 103.40. Temporary Staffing Agency supplies 8 nurses to Hospital to cover during temporary shortfall in staffing. Over time, Hospital hires other nurses as its own permanent employees. Each time Hospital hires its own permanent employee, it correspondingly requests fewer Agency-supplied temporary nurses. Hospital has not exercised direct and immediate control over temporary nurses' essential terms and conditions of employment.

Example 8 to § 103.40. Temporary Staffing Agency supplies 8 nurses to Hospital to cover for temporary shortfall in staffing. Hospital manager reviewed resumes submitted by 12 candidates identified by Agency, participated in interviews of those candidates, and together with Agency manager selected for hire the best 8 candidates based on their experience and skills. Hospital has exercised direct and immediate control over temporary nurses' essential terms and conditions of employment.

Example 9 to § 103.40. Manufacturing Company contracts with Independent Trucking Company ("ITC") to haul products from its assembly plants to distribution facilities. Manufacturing Company is the only customer of ITC. Unionized drivers—who are employees of ITC—seek increased wages during collective bargaining with ITC. In response, ITC asserts that it is unable to increase drivers' wages based on its current contract with Manufacturing Company. Manufacturing Company refuses ITC's request to increase its contract payments. Manufacturing Company has not exercised direct and immediate control over the drivers' terms and conditions of employment.

Example 10 to § 103.40. Business contract between Company and a Contractor reserves a right to Company to discipline the Contractor's employees for misconduct or poor performance. Company has never actually exercised its authority under this provision. Company has not exercised direct and immediate control over the Contractor's employees' terms and conditions of employment.

Example 11 to § 103.40. Business contract between Company and Contractor reserves a right to Company to discipline the Contractor's employees for misconduct or poor performance. The business contract also permits either party to terminate the business contract at any time without cause. Company has never directly disciplined Contractor's employees. However, Company has with some frequency informed Contractor that particular employees have engaged in misconduct or performed poorly while suggesting that a prudent employer would certainly discipline those employees and remarking upon its rights

under the business contract. The record indicates that, but for Company's input, Contractor would not have imposed discipline or would have imposed lesser discipline. Company has exercised direct and immediate control over Contractor's employees' essential terms and conditions.

Example 12 to § 103.40. Business contract between Company and Contractor reserves a right to Company to discipline Contractor's employees for misconduct or poor performance. User has not exercised this authority with the following exception. Contractor's employee engages in serious misconduct on Company's property, committing severe sexual harassment of a coworker. Company informs Contractor that offending employee will no longer be permitted on its premises. Company has not exercised direct and immediate control over offending employee's terms and conditions of employment in a manner that is not limited and routine.

Dated: September 10, 2018.

Roxanne Rothschild,

Deputy Executive Secretary.

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