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November 21, 2022

Hon. Lauren M. McFerran, Chairman
c/o Roxanne L. Rothschild, Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Dear Madam Chairman:

RE: Comments on NLRB Notice of Proposed Rulemaking titled "Standard for Determining Joint-Employer Status," RIN 3142-AA21, 87 *Fed. Reg.* 54641 (September 7, 2022), 87 *Fed. Reg.* 63465 (October 19, 2022)

The National Federation of Independent Business (NFIB)[1] submits these comments in response to the notice of proposed rulemaking titled "Standard for Determining Joint-Employer Status" (NPRM) published by the National Labor Relations Board (NLRB or Board) in the *Federal Register* of September 7, 2022. The proposed rule would revise the standard for determining whether two employers, as defined in section 2(2) of the National Labor Relations Act (NLRA or Act),[2] are joint employers of particular employees within the meaning of section 2(3) of the NLRA. NFIB recommends and requests that the Board withdraw the notice and leave in place the Joint Employer Status Rule (or the Rule) promulgated by the Board in 2020.[3]

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[1] NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty States hear the voice of small business as they formulate public policies. Because the NLRA applies to small businesses, including those involved in franchisor-franchisee, labor supplier-labor user, contractor-subcontractor, lessor-lessee, and similar relationships that the joint-employer doctrine may affect, NFIB and its members have a substantial interest in the proposed rule.

[2] National Labor Relations Act, 29 U.S.C. §§ 151-169.

[3] Final Rule, "Joint Employer Status Under the National Labor Relations Act," 85 *Fed. Reg.* 11184 (February 26, 2020).

1. The Board-Proposed Rule Has Substantial Adverse Effects on the American Economy

The Board's joint-employer standard is significant. Businesses that are joint employers may be held jointly responsible for, among other things, any unfair labor practices or collective bargaining obligations, with respect to jointly employed workers. The NPRM would rescind the Joint Employer Status Rule that set the definition of joint employer as an employer that exercises with respect to employees "substantial direct and immediate control over one or more essential terms or conditions of their employment[.]"[4] It would then expand the standard for determining joint-employer status under the NLRA to include those that have *indirect control* over employees, and "shares or codetermines those matters governing at least one of the employees' essential terms and conditions of employment."[5]

The NPRM's broadened joint-employer standard would directly harm America's small businesses that, according to the White House, account for 44 percent of U.S. GDP, create two-thirds of net new jobs, and employ nearly half of America's workers.[6] Instead of helping small businesses "grow and compete,"[7] as President Biden has directed his Administration, the proposal would incentivize companies to avoid doing business with America's small businesses. If a company is going to be held responsible for alleged labor violations of a subcontractor or vendor, the company is less likely to outsource. Similarly, under the NPRM's broadened standard, a franchisor would be more likely to be held responsible for a franchisee's alleged labor violations. This would lead franchisors to adopt more stringent and expensive franchise licensing requirements. The result would be fewer franchises.

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[4] 29 C.F.R. § 103.40(a).

[5] Notice of proposed rulemaking; request for comments, "Standard for Determining Joint-Employer Status," 87 *Fed. Reg.* 54645, col. 2 (September 7, 2022).

[6] President Biden has said: "Small businesses are critical to our success as a Nation. They make up 90 percent of businesses in the United States, employ nearly half of America's private sector workers, and create two-thirds of new jobs, and bring opportunity to every corner of our Nation." Presidential Proclamation No. 10187, 86 *Fed. Reg.* 22339 (April 23, 2021) (World Intellectual Property Day). The White House has also noted that small businesses "account for 44 percent of U.S. GDP." White House Fact Sheet: Biden-Harris Administration Increases Lending to Small Businesses in Need, Announces Changes to PPP to Further Promote Equitable Access to Relief (February 22, 2021) (available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/22/fact-sheet-biden-harris-administration-increases-lending-to-small-businesses-in-need-announces-changes-to-ppp-to-further-promote-equitable-access-to-relief/?msclkid=935daf0ad12a11ecb8023b2209d859a3).

[7] White House, "A Proclamation on National Small Business Week, 2022" (April 29, 2022) (available at https://www.whitehouse.gov/briefing-room/presidential-actions/2022/04/29/a-proclamation-on-national-small-business-week-2022/).

With the evidence pointing to a negative impact on the economy, and with little discernable benefit, it is hard to see why the Board would proceed with a rule that undermines growth and competition. As President Biden proclaimed in 2021:

> Small businesses are the engines of our economic progress; they're the glue and the heart and soul of our communities. But they're getting crushed. Since the beginning of this pandemic, 400,000 small businesses have closed – 400,000 – and millions more are hanging by a thread. . . .These small businesses – not the ones with 500 employees, but these small businesses that, with a handful of folks, they are 90 percent of the businesses in America.[8]

To help small businesses that are crucial to the growth and job creation of America's economy, the Board should withdraw its notice of proposed rulemaking and leave in place the Joint Employer Status Rule.

2. The Current Joint Employer Status Rule Serves the American Economy Well

NFIB generally supported the Joint Employer Status Rule, which adopted a common-sense standard for determining joint-employer status under the NLRA.[9] Small businesses cannot afford the lawyers, accountants, and clerks that larger companies use to decipher complex regulations with ever-changing workplace rules. Instead, most small businesses engage in do-it-yourself compliance. The Joint Employer Status Rule helps the small businesses of America by providing a standard for determining joint-employer status that is easier to understand, simpler, and less expensive to administer. The Rule does so by imposing joint-employer status on an employer only if the employer exercises substantial direct and immediate control "as would warrant finding that the entity meaningfully affects matters relating to the employment relationship[.]"[10] The Rule considers indirect or reserved control as probative of joint-employer status but "only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control[.]"[11] This means that, while indirect or reserved control can be used to help

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[8] White House, "Remarks by President Biden on Helping Small Businesses" (February 22, 2021) (available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/22/remarks-by-president-biden-on-helping-small-businesses/).

[9] See NFIB letter of September 19, 2018, commenting on the NLRB notice of proposed rulemaking titled "The Standard for Determining Joint Employer Status," RIN 3142-AA13, 83 *Fed. Reg.* 46681 (September 14, 2018).

[10] 29 C.F.R. § 103.40(a).

[11] 85 *Fed. Reg.* 11205, col. 3.

determine if an entity is a joint employer, reserved and indirect control cannot, without more, establish that an entity is a joint employer.

The Rule's defined list of eight essential terms and conditions of employment is helpful in deciding whether joint-employer status exists.[12] In addition, the Rule's emphasis on substantial direct and immediate control over the essential terms and conditions of employment as a prerequisite to a joint employer finding encourages cooperation between businesses without exposing entities to potential liability under an uncertain standard. The Board should welcome collaboration between businesses, including in contractor-subcontractor relationships, and particularly in areas that would benefit employees such as workplace health and safety programs. The Rule also clarifies that certain business arrangements, such as franchise models, will not necessarily be deemed joint employers per se.[13] Overall, the Rule provides small business employers and employees clarity on when joint-employer status will attach to a business for labor violations. This helps minimize additional liability for companies that subcontract out services and for franchisees, thereby encouraging small business expansion, new business formation, and creation of jobs.

Unfortunately, the Board now wishes to abandon the Rule, which provides predictability and stability, and offers instead the NPRM, which would result in increased uncertainty, greater compliance costs, and more litigation. Such a reversal would be an unfortunate blow to small business owners and the American economy. Under the NPRM, an employee of one company may be found to be the joint-employee of a second, independent company, if "the employer shares or codetermines those matters governing at least one of the employees' essential terms and conditions of employment."[14] The NPRM states that to "share or codetermine" means an employer possesses the authority to control (whether directly, indirectly, or both) or exercises the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment.[15] Further, the proposal says that the existence of an employer's indirect or reserved authority to control the terms and conditions of employment is sufficient to establish a joint-employer relationship, even without considering whether or in what manner that

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[12] 29 C.F.R. § 103.40(b).

[13] 85 *Fed. Reg.* 11221, col. 2 ("[T]he Board has decided not to include in the final rule any provisions that are tailored to particular industries or business models. Instead, the final rule establishes a single, generally applicable standard that assesses the 'totality of the relevant facts in each particular employment setting.' As appropriate, the Board will take the nature of the particular business or industry into consideration in applying the standard articulated in the final rule to the facts of the specific case.").

[14] 87 *Fed. Reg.* 54645, col. 2.

[15] 87 *Fed. Reg.* 54646, col. 2.

control is exercised.[16] In other words, the NPRM proposes that a joint employment relationship exists if an employer has indirect or reserved forms of control over at least one of the essential terms and conditions of employment. This is a substantial expansion of joint-employer status and disregards well-established principles of common law agency used to determine who is an employer and who is an employee under the Act.[17]

Expansion of joint-employer liability would result in fewer entrepreneurial opportunities for small businesses. It would also increase costs for franchise owners as their franchisors, seeking to avoid joint employer liability, offer less support to franchisees. The NPRM ignores the realities of the modern workplace and threatens to undermine business models and contractual relationships that are the engine of our nation's economy.

The NPRM would result in increased scrutiny and liability for many small businesses, including those in franchising relationships that have long been recognized as falling outside joint employment status. The franchise model has allowed many entrepreneurs an entry to small business ownership and the American dream, with many going on to own multiple (even dozens) of franchises. But success in the franchise model depends on the support and guidance of franchisors. All franchisors must exercise some level of control over the consistency and integrity of the brand so that both franchisor and franchisees have commercial success with the brand. And with technological advances in franchise industries rapidly increasing, franchisees need to be able to take advantage of new developments offered by franchisors, without fear that acceptance of a service or new innovation means joint-employer liability will attach.

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[16] 87 *Fed. Reg.* 54648, col. 1.

[17] In the NPRM, the Board indicates that a rule reversal is necessary to return the Board's joint-employer standard to the state in which it existed before the Board allegedly narrowed the test in recent decades. *See* 87 *Fed. Reg.* 54642-54645. But the history of the Board's joint-employer standard shows this assertion is inaccurate. The Board's joint-employer standard had until recently been consistent with Congress's clear intent for a less expansive view of employment as reflected in the 1947 Taft-Hartley amendments to the Act. Congress passed the amendments, limiting the scope of the employment relationship under the Act, in response to the U.S. Supreme Court's decision in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), which held that the NLRA's definition of "employee" included independent contractors. In Taft-Hartley, Pub. L. 80–101 (1947), Congress expressly excluded "independent contractors" from the definition of "employee," and added the phrase "acting as an agent of an employer," to further limit the Act's definition of employer. Taft-Hartley reflects Congress' rejection of more expansive views of the employment relationship for purposes of the NLRA and Congress' intent to rely on the principles of common-law agency. In a break with precedent, the Board in *Browning-Ferris Industries of California Inc. d/b/a Newby Island Recyclery*, 362 NLRB No. 186 (2015) (*BFI*), departed from a more limited scope of joint employment and established that the Board would consider evidence of indirect or reserved control over essential terms and conditions of employment when analyzing joint-employer status. *BFI* set off protracted litigation and the vacillating joint-employer status rulemaking.

The NPRM's broader and more uncertain joint-employer standard would result in more cost-shifting to small businesses, as franchisors that are concerned about potential joint-employer status take a hands-off approach and offer fewer resources and less assistance to franchisees. A franchisor that exercises control over common branding issues, such as the manner in which the franchisee sets up a store, how a franchisee markets its products, what supplier a franchisee uses, what tools or equipment a franchisee purchases, policies on uniforms, and standards for customer service could lead the Board to find the franchisor has retained or reserved sufficient indirect control over employment terms of the franchisee's employees to be a joint employer. In fact, the NPRM's broad standard lends itself to the misconstruction that every franchise relationship constitutes a per se joint-employment relationship.

Alternatively, some franchisors may conclude that if they are going to be held responsible for liabilities of their franchisees, they need to exert more control over the franchisees' day-to-day operations in order to mitigate liabilities. This would lead franchisors to assert control over matters like pay, benefits, and hiring decisions, leaving franchisees in a de facto managerial role as opposed their rightful role as a business owner.

The NPRM also would discourage many larger companies from contracting with small businesses for a wide range of services that should not generally be treated as creating joint-employment status. These types of outsourced services include marketing, technology, transportation, cleaning, security, and landscaping, among others. The NPRM would create a real dilemma for businesses of every size and across many industries. But it would be particularly damaging for small businesses, as larger and publicly traded companies would look to minimize liability by limiting the number of small businesses with which they contract. If a national building management firm is potentially liable for labor violations alleged by employees of its office cleaning subcontractors, the firm begins to question whether it should continue to subcontract out the work or instead directly hire employees to perform the services. Discouraging subcontracting creates economic inefficiencies, as businesses no longer focus on their core competencies.

3. The Board Proposal Discourages Betterment of Employee Working Conditions

The NPRM would discourage cooperation among businesses that benefits employees. It is reasonable for a business to require individuals performing work for it, and especially if they are on the business's property, to observe legally required employment, safety, and health standards. Maintenance of such standards should not turn a franchisor or contractor into a joint employer. Under the NPRM, franchisors would be less likely to offer model handbooks, policies, or training programs to their franchisees, and larger companies would curtail training for

contractors because offering such resources could lead to a finding of joint-employer status. The Board should not discourage collaboration among businesses that betters employees' work conditions. The NPRM would actively discourage cooperation, as larger businesses look to distance themselves from small employers in order to reduce joint-employer risk.[18] This is a disservice to employees at small businesses, as those employees would benefit most from shared resources, such as human resource training, standardized employment applications and handbooks, and operational support. Small businesses operate on thin margins and should be allowed to receive assistance from an entity with which it contracts without fear that asking for help means joint liability attaches to the entity providing the help.

4. The Board Should Issue a Supplemental Regulatory Flexibility Analysis To Take Proper Account of Costs the Proposed Rule Would Impose on Small Businesses

NFIB encourages the Board to conduct and publish for comment, before it proceeds to a final rule, a thorough, supplemental initial Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. 601-612) to take proper account of the potential impact of the rule proposed by the NPRM on small businesses. The initial analysis published in the NPRM did not take full account of the costs the proposed rule would impose on small businesses, and, in particular, did not take account of two sets of increased costs to small businesses. First, small businesses likely would incur greater insurance and legal costs as a result of increased exposure under the proposed rule to allegations of unfair labor practices by employees for whom the proposed rule makes the small businesses joint employers. Secondly, to the extent that franchisors under the proposed rule become joint employers of franchisee employees, unions likely would seek to exploit collective bargaining with the franchisors in the joint employee relationship in an effort to impose the collectively bargained higher wages on the franchisee small business joint employers, which would impose higher costs on those franchisee small businesses. The Board should ensure that it discloses to the public for comment, and that it fully considers in the rulemaking process, all costs its proposed rule would impose on small businesses.

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NFIB recommends and requests that the Board withdraw its notice of proposed rulemaking "Standard for Determining Joint Employer Status" published in the *Federal Register* of September 7, 2022. The success of the American economy depends on the success of America's small businesses. And the success of

[18] The preamble to the 2020 Joint Employer Status Rule included discussion about the negative economic consequences of the Board's *BFI* decision, which caused "franchisors to `distance' themselves from franchisees so that franchisors will not be found joint employers. One commenter cites as an example a franchisee who stopped receiving employee handbooks, job application materials, and recruitment assistance from the franchisor." 85 *Fed. Reg.* 11214, col. 1.

America's small businesses depends in part upon clearer and less burdensome federal regulations. The current Joint Employer Status Rule provides a standard that is predictable and workable for America's small businesses.

Sincerely,

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