December 7, 2022

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

RE: Notice of Proposed Rulemaking, Standard for Determining Joint Employer Status, 2022-19181

Dear Ms. Rothschild:

The HR Policy Association ("HRPA" or "Association") welcomes the opportunity to submit the following comments[1] for consideration by the National Labor Relations Board in response to the published Notice of Proposed Rulemaking ("NPRM") and Request for Comments regarding joint employer status under the National Labor Relations Act ("NLRA" or "Act").[2]

HR Policy is a public policy advocacy organization that represents the most senior human resources officers in more than 400 of the largest corporations doing business in the United States and globally. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. The Association's member companies are committed to ensuring that laws and policies affecting the workplace are sound, practical, and responsive to the needs of the modern economy.

Executive Summary

The joint employer doctrine is one of the most expansive and consequential parts of our nation's jurisprudence. This doctrine potentially imposes liability on non-actors and parties that have little or no control or knowledge of actions undertaken by others. Accordingly, any joint employer rule should be carefully drafted to recognize the potential reach and associated liability that can be imposed upon parties found to be joint employers.

Regulations should provide stakeholders with a clear understanding of their legal obligations and promote efficient compliance. The Board itself ostensibly recognizes this goal, stating that the purpose of its proposed rule is to establish a "definite, readily available standard that will assist

[1] The Association is also a signatory to comments filed by the Coalition for a Democratic Workplace. The Association offers these additional comments in its individual capacity to further address specific aspects of the proposed rule on behalf of its member companies.
[2] Notice of Proposed Rulemaking: Standard for Determining Joint Employer Status, 87 Fed. Reg. 54641 (Sept. 7, 2022).

employers and labor organizations in complying with the Act," while also "promoting collective bargaining and stabilizing labor relations."[3]

Unfortunately, the Board's proposed rule fails to achieve these purposes, and in practice would in fact work to undermine the very same. The proposed rule is overly broad and leaves key terms undefined and unlimited, with the result being a standard that is seemingly deliberately vague regarding where joint employer liability begins and ends. Rather than assisting stakeholders in compliance and promoting collective bargaining, the proposed rule instead leaves employers and other parties left to speculate on whether they are a joint employer with collective bargaining obligations.

Further, the proposed rule disincentivizes employers from setting standards for parties with which they do business through corporate social responsibility programs, ESG initiatives, job training programs, safety and health initiatives, and other mechanisms. Such efforts benefit workers and society by establishing minimum standards throughout a company's business and supply chain for worker safety, benefits, sustainability, and many other areas that promote a better economy for all. The proposed rule's overly expansive approach would attach joint employer liability to employers for setting such standards and therefore disincentivize employers from doing so, to the detriment of American workers.

A final rule should provide clear definitions of its key terms accompanied by examples illustrating the limits of the rule's reach so as to provide stakeholders certain understanding of their legal obligations under the rule. Similarly, a series of questions and answers should also be included in a final rule to provide greater clarity as to the scope and meaning of the rule. A final rule should also limit the extent of joint employer liability such that employer efforts to establish certain minimum standards with the parties with which it does business do not establish a joint employer relationship.

- **The proposed rule is overly broad and undefined, and does not provide clearly defined limits or boundaries to joint employer liability.**

The proposed rule would establish that two or more employers of the same particular employees are joint employers of those employees if the employers share or codetermine those matters governing employees' essential terms and conditions of employment.[4] Section 103.40(c) would specifically define "share or codetermine those matters governing employees' essential terms and conditions of employment" to mean "for an employer to posses the authority to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment." More specifically, §103.40(e) states that "possessing the authority to control is sufficient to establish status as a joint employer, regardless of whether control is exercised. Exercising the power to control indirectly is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly."

To put it more succinctly, the proposed rule would establish that a joint employer relationship could exist solely on the basis of one employer's hypothetical indirect or unexercised control over just one essential term or condition of employment of another employer's workers. This is an unprecedentedly broad expansion of what it means to "codetermine" employees' essential

[3] *Id*.
[4] *Id*.

terms and conditions of employment. The Board has never before explicitly held that a joint employer relationship could be established solely on the basis of a single instance of unexercised hypothetical and/or indirect control.

The improper breadth of the proposed rule is further exacerbated by the proposed rules' failure to adequately define its key terms. The proposed rule fails to offer any meaningful definition or explanation of what "possessing the authority to control" means; in fact, it offers no such definition whatsoever. The same holds true for "exercising the power to control indirectly." Under the proposed rule, both of these terms are key indicators of joint employer status, and yet they are left undefined and non-delineated. As a result, employers and stakeholders are left speculating whether their relationships and actions within such relationships constitute "authority to control" or "indirect control," and accordingly are left in a quandary whether they may be a joint employer with collective bargaining obligations.

The proposed rule is similarly unclear regarding "essential terms and conditions of employment." While the proposed rule offers a small list of terms and conditions the Board deems essential, it also explicitly states that such a list is not exclusive. The proposed rule declines to provide a relevant definition of "essential" and accordingly does not offer any clear limits or bounds to what the Board might consider an "essential" term or condition of employment. Under the proposed rule, then, any term or condition of employment could potentially be considered "essential" by the Board and relevant to a joint employer analysis. Indeed, in the Board's explanation for the rule, it vaguely acknowledges that "unforeseen circumstances may arise in the future" that make certain terms and conditions of employment essential (or non-essential), and that the Board should have "some flexibility in future adjudication" to determine whether a term or condition of employment is essential for purposes of its joint employer rule.[5] Such an open-ended and undefined approach once again leaves employers and other stakeholders guessing where joint employer liability may begin and end.

Regulations should offer stakeholders a clear understanding of their legal obligations and potential liability and promote efficient compliance. As articulated above, the proposed rule is overly broad, leaves key terms undefined, and has indefinite limits, and accordingly makes it nearly impossible for an employer to clearly understand their obligations and determine whether their business relationships and actions within such relationships comply with the letter of the law.

The Board's final rule should also provide clear definitions of its key terms, particularly for "indirect control" and "possess the authority to control." Examples illustrating the metes and bounds of these terms should accompany such definitions. Similarly, a series of questions and answers should also be included in a final rule to provide greater clarity as to the scope and meaning of the rule. Further, a final rule should ideally provide a clearly defined and exhaustive list of terms and conditions of employment that the Board deems "essential." In the absence of such an exhaustive list, the final rule should, at minimum, provide clear guideposts and contours of what constitutes an "essential" term and condition of employment.

- **Setting minimum standards or including industry standard contractual terms should not be a basis for establishing joint employer liability.**

[5] *Id*.

The proposed rule disincentivizes corporate social responsibility programs, ESG initiatives, and other standards-setting that benefits American workers. More than ever, American companies, including Association members, are voluntarily adopting corporate social responsibility initiatives that establish standards often exceeding legal obligations. These programs take many shapes and sizes and often impose minimum requirements on third party relationships with which an employer does business. An employer might commit to only working with suppliers with strong records of fair labor practices – user employers often require supply chain vendors to abide by child labor laws, minimum wage standards, and other similar labor and employment statutory and regulatory requirements. Similarly, an employer might only do business with third parties that have certain environmental standards, or with those that provide certain benefits to their own employees such as paid leave, or those that have robust workplace harassment polices, to name only a few examples. Similarly, employers often require third party relationships to agree to adhere to the employer's general code of conduct. These initiatives promote a more robust and sustainable economy for all while also safeguarding worker protections. Beyond CSR or ESG initiatives as described above, employers also set minimum standards with third party relationships for the purposes of quality control, including safety rules and precautions that ensure worker safety and protect employer property. Such minimum standards are often included as contractual provisions in agreements with third parties.

Setting such standards is also becoming increasingly expected or required by institutional investors, federal and state regulators, and globally. Investors such as Blackrock and Vanguard are increasingly factoring in company commitments to sustainability, diversity and inclusion, and labor rights, for example, in making investment decisions.[6] Meanwhile, the SEC is in the process of releasing proposed rules requiring human capital metric disclosures with the goal, among others, of furthering company efforts in these same areas. Further, the European Union recently adopted a directive requiring companies to safeguard human rights and the environment throughout their supply chains. In sum, employers are increasingly expected and required to ensure minimum standards are being met in several workplace policy areas throughout its supply chain and business relationships.

The proposed rule would improperly make such standards-setting indicative of a joint employer relationship. Such a result and the increased legal obligations and liability exposure it creates for employers will naturally disincentivize employers from engaging in these types of initiatives to the detriment of the economy and the American worker. Regulations should promote and facilitate better business practices, not disincentivize the same. At minimum, the Board should carve out CSR or ESG initiatives, routine contractual provisions, and similar minimum standards-setting from joint employer liability under any joint employer rule.

- **The proposed rule would needlessly add uninvolved parties to collective bargaining negotiations.**

As discussed above, one of the stated goals of the Board's proposed rule is to "promote collective bargaining." The expansive scope of its proposed rule, however, would unnecessarily add parties to collective bargaining agreement negotiations, which would only serve to bog down

[6] *See*, *e.g.*, Global Corporate Governance Guidelines and Engagement Principles, BLACKROCK (Jan. 2019), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsibleinvestment-engprinciples-global.pdf.

and complicate an already complex and often lengthy process. Having multiple employers at the bargaining table is inherently difficult – different employers have different costs, objectives, needs, and views on terms and conditions of employment, among other things. Further, because the proposed rule would establish a joint employer relationship on the basis of very little, if any control over employees, an employer could be forced to negotiate terms and conditions of employment for such employees that it has no direct working relationship with and with minimal knowledge of their working conditions. Such a result would undoubtedly protract and complicate the bargaining process, to the particular detriment of workers who benefit the most from swiftly executed collective bargaining agreements. Board policy and regulations should encourage and promote efficient and effective collective bargaining; the proposed rule would have the opposite effect.

Finally, if the Board is committed to overturning the current joint employer rule – which the Association submits is the incorrect course of action – it should postpone the adoption of any new rule until such time that has a full complement of five Board Members with proportionate representation of both Republican and Democrat Members.[7]

Sincerely,

Gregory Hoff
Associate Counsel
HR Policy Association
4201 Wilson Blvd., Ste 110-368
ghoff@hrpolicy.org

G. Roger King
Senior Labor & Employment Counsel
HR Policy Association
4201 Wilson Blvd., Ste 110-368
rking@hrpolicy.org

[7] Member Ring's term expires December 16th, 2022, and it is probable that his seat will remain unfilled for some time.