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

Dear Ms. Rothschild,

The HR Policy Association ("HRPA" or "Association") is a public policy advocacy organization representing the chief human resource officers of major employers. HRPA consists of more than 375 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce. Since its founding, one of HRPA's principle missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

The Association previously submitted comments during the initial comment period for consideration by the National Labor Relations Board ("NLRB" or "Board") in connection with the Notice of Proposed Rulemaking and Request for Comments, published in the Federal Register on September 24, 2018, related to the joint employer standard applicable under the National Labor Relations Act ("NLRA" or "Act"), hereafter "Notice".[1]

HRPA now submits these reply comments to address arguments and concepts presented by certain individuals and organizations during the initial comment period. Specifically, the Association's rebuttal responses focus on (1) the comments submitted by the SEIU National Fast

[1] The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46681 (proposed Sept. 14, 2018) (to be codified at 29 C.F.R. ch. 1).

Food Workers Union ("NFFWU"), and other organizations related to the requested recusal of NLRB Chairman John Ring and NLRB Member William Emanuel; (2) arguments that the proposed rule should be stayed pending resolution of the current *BFI* litigation, and (3) the assertion, as set forth in comments submitted by the AFL-CIO, that the rulemaking violates the Administrative Procedures Act ("APA") because it relied on arguments or evidence that were not made part of the record. The Association also has included brief rebuttal responses to other issues raised during the initial comment period. These rebuttal comments are outlined below in Section IV and conclude with a suggested analytical approach that the Board should consider incorporating into its final joint employer rule.

I. THE D.C. CIRCUIT'S REMAND OF THE *BFI* CASE TO THE BOARD DOES NOT PRECLUDE THE BOARD FROM PROCEEDING WITH RULEMAKING

NFFWU and other commenters have argued that the Board should halt the rulemaking process until the Browning-Ferris Litigation is resolved. As a preliminary matter, such litigation could take years to be fully resolved – an unacceptable delay for thousands of employers continuing to grapple with the vagaries of the 2015 *BFI* joint employer standard, and any such delay should be avoided. Most importantly, however, the D.C. Circuit's appellate decision in *BFI*, far from precluding the Board from proceeding with the rulemaking process, represents an authorization of such, both tacitly and explicitly.

The D.C. Circuit's decision specifically recognized the uncertainty associated with the current standard as put forth in the 2015 *BFI* decision. Although the Court concluded that indirect control is a factor of joint employer status rooted in the common law, it provided no meaningful guidance on what analytical standards should be utilized in determining joint employer status under the NLRA, and instead, specifically, noted:

> In applying the indirect-control factor in this case, however, the Board failed to confine it to indirect control over the essential terms and conditions of the workers' employment. We accordingly remand that aspect of the decision to the Board for it to explain and apply its test in a manner that hews to the common law of agency.[2]

Further, the D.C. Circuit also implicitly agreed that the Board could proceed in joint employer rulemaking by stating that "the Board's rulemaking…must color within the common-law lines identified by the judiciary."[3]

Thus, in its remand the D.C. Circuit recognized and indeed directed the Board to further clarify its joint employer standard, particularly as it relates to indirect control, the most contentious aspect of the joint employer doctrine (and thus in the most need of uniform clarification). Rulemaking certainly represents an excellent opportunity to undertake such clarification and indeed may be the most appropriate manifestation of such an effort. To claim that the D.C. Circuit's decision precludes the Board from proceeding with rulemaking to clarify its joint employer standard therefore is to simply ignore that part of the D.C. Circuit's opinion that explicitly asks for such clarification.

II. THE RULEMAKING PROCESS HAS NOT VIOLATED THE ADMINISTRATIVE PROCEDURE ACT

Comments submitted by the AFL-CIO assert that the rulemaking procedure has violated the APA because "various employer organizations had extensive input into the formulation of the NPRM," and "the filing of these petitions had not previously been disclosed and [were] not

[2] *Browning-Ferris Indus. v. NLRB*, 911 F.3d 1195, 1209 (D.C. Cir. 2018).
[3] *Id*. at 1208.

disclosed in the NPRM."[4] The AFL-CIO argues that this failure to cite the petitions is "a departure from prior Board practice" that has been unexplained by the Board.[5]

The Board, however, on its face did not rely on the petitions for rulemaking in its Notice, and thus there is no reason why the Board was required to included it in the record. The AFL-CIO fails to cite any evidence, in caselaw or otherwise, holding to the contrary, making it quite literally a baseless assertion. Further, because the petitions for rulemaking have now been made part of the record by the AFL-CIO itself in its comments, any individual or entity wishing to comment on such petitions and the issues raised therein can now do so during the reply comment period. Thus, the AFL-CIO's APA argument is both baseless and irrelevant.

The AFL-CIO also asserts that it "learned for the first time on December 6, 2018, when the NLRB produced documents pursuant to a FOIA request, that various employer organizations had extensive input into the formulation of the NPRM."[6] Their comments attempt to characterize the petitions as having hidden, undisclosed influence on the formulation of the NRPM. Apart from the Board, as mentioned above, on its face not relying on such petitions, the "various employer organizations" cited by the AFL-CIO as being involved in the petitions made no secret of such involvement, nor were the petitions' submissions shrouded in secrecy.[7] On the contrary, upon submission, many of the organizations involved issued press releases detailing their involvement, and such initiatives were picked up by various news outlets.[8] These submissions, accompanied by

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[4] American Federation of Labor & Congress of Industrial Organizations, Comment Letter on Proposed Standard for Determining Joint Employer Status (Jan. 28, 2019), file:///C:/Users/ghoff/Downloads/AFL-CIO_Comments_on_RIN_3142-AA13%20(2).pdf.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *See, e.g.*, Callie Harman, *NAM Joins Business Groups to Petition NLRB on Joint-Employer Rulemaking*, NATIONAL ASSOCIATION OF MANUFACTURERS (Jun. 18, 2018), https://www.shopfloor.org/2018/06/nam-joins-business-groups-petition-nlrb-joint-employer-rulemaking/; Sean P. Redmond, *Coalition Files Petition for Joint Employer Rulemaking*, U.S. Chamber of Commerce (Jun. 19, 2018), https://www.uschamber.com/article/coalition-

press releases and news stories, occurred in June of 2018. The AFL-CIO was, no doubt, fully aware of these petitions as early as June 2018 and the desired objectives sought by such petitions. The AFL-CIO and other individuals and organizations, therefore, have had ample time to review the petitions, and the issues raised therein, long before the initial NPRM comment period commenced.

III. COMMENTS TO PROPOSED RULE STATING THAT OF CHAIRMAN RING AND MEMBER EMANUEL SHOULD BE RECUSED ARE WITHOUT LEGAL OR FACTUAL MERIT

NFFWU further argues, as part of a general opposition to the proposed rule, that "ethics violations are tainting the process."[9] Specifically, NFFWU argues that "neither Chairman Ring nor Member Emanuel can approach this issue with an open mind."

The argument for recusal is without factual or legal merit, and any assertion that Chairman Ring and Member Emanuel cannot be impartial is similarly baseless. In sum, NFFWU contends that because Chairman Ring and Member Emanuel have participated in joint employer cases at the Board, they may not participate in rulemaking. That is not the law. All current Board members – including Member McFerran who participated in *Hy-Brand* and wrote a strongly worded dissent – have participated in joint employer cases. But such involvement is not evidence that an unalterably closed mind should disqualify them from participating in rulemaking on the same subject. To the contrary, if NFFWU's "issue preclusion" argument was correct, all current Board

files-petition-joint-employer-rulemaking; Joyce Hanson, *Restaurant Group Pushes NLRB on Joint Employer Issue*, Law360 (Jun. 20, 2018), https://www.law360.com/articles/1055108/restaurant-group-pushes-nlrb-on-joint-employer-issue; *CDW Seeks Rulemaking to Remedy BFI*, Coalition for a Democratic Workplace (Jun. 13, 2018), https://myprivateballot.com/2018/06/13/cdw-seeks-rulemaking-remedy-bfi/; *Industry Petitions NLRB for Joint-Employer Rulemaking* (Jun. 18, 2018), https://www.ilma.org/ILMA/ILMA/ILMA-News/June/Industry_Petitions_NLRB_for_Joint-Employer_Rulemaking.aspx.

[9] SEIU National Fast Food Workers Union, Comment Letter on Proposed Standard for Determining Joint Employer Status (Jan. 28, 2019), file:///C:/Users/ghoff/Downloads/2019_1_28_Final_SEIU_NFFWU_Jt_Er_Comment_pdf%20(3).pdf.

members would be precluded from rulemaking on virtually any subject that the agency had ever addressed in case adjudication.

Further, the assertion that either Chairman Ring or Member Emanuel would fail to remain impartial throughout the rulemaking process is factually baseless. For example, as recently as November 2018, Member Emanuel participated in a Board decision in which the Board unanimously ruled that two entities were joint employers under the NLRA.[10] The case involved a manufacturer of paper products that utilized labor supplied by a nationwide staffing company.[11] In a unanimous decision, the Board affirmed the findings of the Administrative Law Judge that the manufacturer and the staffing company were joint employers of the temporary employees supplied by the staffing company.[12] Specifically, Member Emanuel noted that joint employer status would be found either under the standard set forth in the 2015 *BFI* decision or the traditional standard which was overruled by such a decision.[13] It is clear from this Board decision that Member Emanuel is entirely capable of rendering impartial judgment in cases involving joint employer status, and there is no evidence that such impartiality would be affected in any way during the current rulemaking process.

NFFWU's invocation of the McDonald's litigation – still pending – is particularly misplaced. The union's position that Chairman Ring and Member Emanuel should be recused from that case mirrors arguments that the SEIU made[14] in that matter – and such an argument remains as incorrect now as it was then.[15] The NWFFU and SEIU cite Executive Order 13770

[10] *Orchids Paper Products Co.*, 367 NLRB No. 33 at *3 (2018).
[11] *Id*. at *1.
[12] *Id*. at *3.
[13] *Id*. at n. 14.
[14] *See* Charging Parties' Motion for Recusal of Chairman Ring and Member Emanuel at 7, *McDonald's USA, LLC, et al.,* Case Nos. 02-CA-093893, *et al.* (2018).
[15] Brief for HR Policy Association as Amicus Curiae Supporting Employer, *McDonald's USA, LLC, et al.,* Case Nos. 02-CA-093893, et al. (2018).

and 5 C.F.R. §2635.502. But as the SEIU conceded in the McDonald's case, neither Chairman Ring's nor Member Emanuel's former firms, Morgan Lewis and Littler Mendelson, have ever been parties to the that litigation. Further, neither Morgan Lewis nor Littler Mendelson ever filed any pleadings or briefs, appeared in the case, or participated in any argument in the case. Finally, SEIU also conceded that neither Chairman Ring nor Member Emanuel ever personally participated in the instant matter prior to being confirmed for their present positions. Thus, the argument for recusal in that matter lacks merit.

In any event, regardless of whether Chairman Ring or Member Emanuel are barred from participating in any particular case – although there is certainly no bar with respect to the McDonald's matter – it is immaterial to rulemaking. The ethics rules noted above cover a narrow specific matters relating to particular parties, not rules of general applicability. The proposed pule, however, is a rule of *general applicability* that will govern relationships between all private sector employees and employers across all industries. Simply put, "rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability, are *not particular matters involving specific parties*." 5 C.F.R. Sec. 2641.201(h)(2) (emphasis added). In other words, the ethics rules that NWFFU invokes do not bar Chairman Ring, Member Emanuel or any other Board member's participation in rulemaking, and NFFWU's attempt to invoke them here is yet another unfortunate example of an attempt to weaponize recusal rules for political ends.

Moreover, any alleged appearance of conflict – either in rulemaking or the McDonald's case – pales in comparison to that which existed when former NLRB Member Craig Becker

participated in cases involving SEIU entities. Former Member Becker had served as a counsel to the SEIU International Union prior to being recess appointed to the Board. A number of arguments were raised that sought to recuse him from participating in cases involving SEIU local unions. Such recusal requests were based, in large part, on the fact that the SEIU International Union could exercise considerable control over their locals, pursuant to the International's Constitution and By-laws. Accordingly, there was, at a minimum, an appearance of conflict if former Member Becker participated in cases involving SEIU locals. Former Member Becker refused, however, to recuse himself from such cases stating that while the SEIU International Union and its locals may have technically been the same entities, they were, in his opinion, separate enough for him to participate. This assertion was directly contradicted in the letter by the National Right to Work Legal Defense Foundation, which stated that "…by explicit SEIU constitutional provision and in practice, SEIU exerts near total control over and is financially tied to its locals."[16] Notwithstanding such clear appearance of conflict of interest, former Member Becker continued to participate in multiple cases involving SEIU locals.

Further, former NLRB Member Kent Hirozawa was also faced with appearance of conflict arguments during his tenure on the Board but refused to recuse himself in response to such challenges. In *McKenzie-Willamette Reg'l Med. Cetr.*, a Board case decided in 2014, appearance of conflict argument was directed at former Member Hirozawa. Such arguments were based, in large part, on his participation in a previous matter in which he was retained as legal counsel for the Communications Workers of America. In such case, former Member Hirozawa was defending against a lawsuit brought by an attorney representing a specific party to the NLRB case before

[16] Raymond J. LaJeunesse, *Does the NLRB's Inspector General Have a Double Standard for When Board Members Must Recuse?*, THE FEDERALIST SOC'Y Feb. 22, 2018, https://fedsoc.org/commentary/blog-posts/does-the-nlrb-s-inspector-general-have-a-double-standard-for-when-board-members-must-recuse.

him.[17] Member Hirozawa denied the motion for his recusal, concluding that "no reasonable person would conclude that my participation in this case violated ethical guidelines," and noting that the previous matter had occurred nearly two decades prior.[18]

Member Hirozawa again faced a motion for recusal in *New Vista Nursing*, a Board case that eventually went before the United States Court of Appeals for the Third Circuit on appeal. The recusal motion was based on the fact that Member Hirozawa had been previously employed by a law firm that had served as counsel for the union (SEIU) in the instant matter.[19] Member Hirozawa again refused to recuse himself on the grounds that "he had not personally" provided legal services to the union or represented the union in the instant matter while employed by his former firm. The Third Circuit subsequently affirmed former Member Hirozawa's decision and held that he had not abused his discretion by choosing not to recuse himself.[20] Specifically, the Third Circuit noted that "it was not unreasonable for Member Hirozawa to conclude that he did not need to recuse himself because he had not personally represented the Union in this matter…"[21] This case is directly analogous to the recusal motions in the *McDonald's* litigation. Indeed, similar to the arguments made regarding Member Hirozawa, there have been no allegations that Chairman Ring or Member Emanuel personally provided legal services to any party in the *McDonald's* litigation, only that their respective previous employers had provided limited legal assistance in the past to McDonald's franchisees on unrelated matters. Similar to the cases involving former

[17] *McKenzie-Willamette Reg'l. Med. Ctr.*, 361 N.L.R.B. 54, 56-57 (2014).
[18] *Id*.
[19] *NLRB v. New Vista Nursing and Rehabilitation*, 870 F.3d 113, 124-25 (3rd Cir. 2017).
[20] *Id*. at 125.
[21] *Id*.

Members Becker and Hirozawa, neither Chairman Ring nor Member Emanuel is required to be recused from this rulemaking process.[22]

IV. ADDITIONAL ISSUES

A. The Board in its Final Rule Should Reaffirm Existing Board Case Law that Non-Acting Joint Employers Should, as a General Rule, not be Liable for the Actions - Unfair Labor Practices - of Acting Joint Employer Entities

Service Employees International Union Local 32BJ ("SEIU 32BJ"), in its comments at pages 14 and 15, noted that existing Board case law holds that "a joint employer is not automatically jointly and severally liable for the acts of its co-employer. Instead,…the non-acting joint employer can avoid liability by showing that it neither knew or should have known of the reason for the other employer's action, or that if it knew, it took all measures within its power to resist the unlawful action." SEIU 32BJ cited the following Board cases for that proposition of law: *Capitol EMI Music,* 311 NLRB 997 (1993), *Tradesmen Intl.*, 351 NLRB 579 (2007), and *America's Best Quality Coatings Corp.*, 313 NLRB 470 (1993). The Association agrees with SEIU 32BJ's legal analysis and the cases cited to support such legal principle. Indeed, in the Association's initial comments to the proposed rule we included a similar analysis.[23] General Counsel Peter Robb made the same point in his comments to the NPRM.[24]

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[22] The Third Circuit dealt with Board recusal issues most recently in 2016 in *1621 Route 22 West Operating Co. v. NLRB*, affirming a decision that Board Chairman Mark Pearce was not required to recuse himself in an appearance of conflict issue matter involving his Chief Counsel Ellen Dichner. *1621 Route 22 West Operating Co. v. NLRB*, 825 F.3d. 128,143 (3d Cir. 2016). Even though Dichner had previously represented the union involved in the matter before an administrative law judge, the Court found that there was no appearance of conflict because Dichner had not participated in the Board's consideration of the case, and that "there [was] no evidence that Dichner played any role in the consideration of the case" before the Board. *Id.* at 144.

[23] HR Policy Association, Comment Letter on Proposed Standard for Determining Joint Employer Status (Jan. 28, 2019). https://www.regulations.gov/document?D=NLRB-2018-0001-26913.

[24]General Counsel Peter Robb, Comment Letter on Proposed Standard for Determining Joint Employer Status (Dec. 10, 2019). https://www.regulations.gov/document?D=NLRB-2018-0001-8476.

The Board, therefore, in its final role should reaffirm its prior caselaw in this area that establishes that non-acting joint employers should not, as a general rule, be held liable for actions – unfair labor practices - committed by other joint employer entities.

B. Joint Employer Hearings Before The House Education and Workforce Committee On July 12, 2017

U.S. Senator Patty Murray, ranking member of the United States Senate Health, Education, Labor and Pension Committee and U.S. Congressman Robert "Bobby" Scott, Chairman of the House, Education and Labor Committee, submitted comments to the NPRM. In such comments, they cited certain statements made during a July 12, 2017 hearing by the House, Education and Workforce Committee on joint employer issues. The comments by Senator Murray and Chairman Scott are apparently intended to stand for the proposition that employers do not believe that the common law is an important source of authority for the Board to consider in its rulemaking process. Specifically, Senator Murray and Chairman Scott included the following in their comments:

> G. Roger King, Senior Labor and Employment Counsel at the HR Policy Association, which represents employer interests, argued against relying on the common law standard, contending that "common law doesn't help us here at all' and that the Committee should introduce legislation that departs from the common law.

Such citation is out of context and was not directed toward NLRB rulemaking. The testimony was presented in context of potential legislation to be enacted by Congress to clarify the law in the joint employer area under numerous labor and employment statutes. Indeed, the state of the law regarding the joint employer definition under the NLRA continues to be in a state of considerable

confusion and disagreement as evidenced by the thousands of comments submitted in response to the NLRB's joint employer rulemaking. The state of the law in the federal courts is equally confusing. The point that the Association was making in its testimony was that Congress was not bound by such contradictory and confusing jurisprudence and could exercise its legislative authority as it deemed appropriate. Specifically, the Association's testimony on the common law issue was as follows:

> Legislative [sic] relief in this area is needed. Such legislation should include a uniform, simple, and concise definition of joint employer status under various federal labor and employment statutes, and include, at a minimum, the NLRA, FLSA, OSH Act, and federal employment discrimination statutes. Additionally, such legislation should require, before a finding of joint employer status could be made, that the entity or entities in question have the authority to (1) hire and fire; (2) determine rates of pay and methods of payment; (3) manage payroll and leave polices; and (4) supervise on a day-to-day basis the workers in question, including determining work schedules, assignment of positions and tasks, and administration of employee discipline; and (5) maintain employee records required by law.
>
> The above basic principles track the common law in this area, and also incorporate the basic principles set forth in the *Bonnette* case, which as previously noted is the lead circuit case authority in the joint employer area.

> In addition, before a finding of joint employer status could be found, a court and administrative agency should be required to find that the above authority is exercised directly, actually, and immediately.
>
> Correspondingly, however, entities should not be considered a joint employer if they only exercise indirect supervision of the individuals in question to ensure compliance with the contractually mandated brand standards, performance measurement, product requirements, quality requirements, safety requirements, customer or other service obligations, or federal, state, and local statutory and regulatory obligations. Additionally, any entity that provides basic training to potential employees to ensure statutory and regulatory compliance, and an ability to participate in basic benefit plans such as retirement, health, dental, and life insurance, should not be deemed to be a joint employer.[25]

Finally, it is not the position of the Association that the Board should ignore common law in the joint employer area in its rulemaking. Indeed, it is required to consider the common law.

Attached as Exhibit A is a complete copy of the Association's testimony submitted at the July 12, 2017 hearing to ensure the record is accurate with respect to the Association's position in the joint employer area.

C. Arguments that the Joint Employer Area of the Law is too Fact Specific and Therefore Does not Lend Itself to Rulemaking Should be Rejected

[25] *Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship Before the Educ. & Labor Comm.,* 115th Cong. (2017) (statement of G. Roger King, HR Policy Association).

A number of organizations argued that since joint employer cases are fact sensitive, this area of the law does not lend itself to rulemaking. This argument is not persuasive and misses one of the most important points as to why it is critical that the Board develop a joint employer rule. Simply stated, the extremely uneven jurisprudence in the joint employer area, including under the NLRA, contains varying standards and rules that are hard to reconcile, including particularly after the Board's *Browning-Ferris* decision. Indeed, as can be readily seen in the voluminous comments filed to date in response to the Board's NPRM, there are sharply differing opinions and views as to what standards or tests have been used in the past and what is a correct interpretation of the common law in this area.

The often confusing and contradictory joint employer jurisprudence is not confined to the National Labor Relations Act. For example, the joint employer analysis under the Fair Labor Standards Act ("FLSA") varies widely. Indeed, there are almost as many versions of the legal test to determine joint employer status as there are circuit courts of appeal in the United States. For example, the First Circuit[26] (ME, NH, MA, RI) applies a four factor economic realities test (a.k.a. the *Bonnette* test), while the Second Circuit[27] (NY, VT, CT) uses the *Bonnette* test but adds six functional control factors. On the other hand, the Third Circuit[28] (PA, NJ, DE) uses the *Bonnette* test but also considers whether an employer can impose discipline on an employee, while the Fourth Circuit (MD, VA, WV, NC, SC) recently created a novel "completely disassociated" test that looks at the relationship between the employers.[29] In yet another approach, the Eleventh Circuit (AL, GA, FL) uses a distinct eight-factor test that is related to the economic realities test.[30]

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[26] *See Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668 (1st Cir. 1998).
[27] *See Zheng v. Liberty Apparel Co.* 355 F.3d 61 (2d Cir. 2003).
[28] *See In Re Enterprise Rent-A-Car Wage & Hour Emp. Practices Litig.*, 683 F.3d 462 (3rd Cir. 2012).
[29] *See Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017).
[30] *See, e.g.*, *Layton v. DHL Express*, 686 F.3d 1172, 1176-77 (11th Cir. 2012);

To further complicate the joint employment issue, the Equal Employment Opportunity Commission (EEOC) submitted an *amicus* brief in the *Browning-Ferris* case and argued that the Board should adopt the EEOC's 15 factor standard. The Commission described its test as "more flexible, more readily adaptable to evolving workplace relationships and realities."[31]

The Association submits that notwithstanding the fact intensive analysis that is required in joint employer cases, there is a compelling need for a rule to establish how such facts are to be applied – there is absolutely a need for greater clarity in the law in this area. The Board's rulemaking initiative in this area is long overdue.

D. The Argument that the Board Does not Have Significant Experience Since the 2015 *BFI* Decision to Engage in Rulemaking is not Persuasive

A number of commentators, including the AFL-CIO, devote numerous pages of their comments making arguments that the Board does not have sufficient experience in case law development since the Board's 2015 *Browning-Ferris* decision to engage in rulemaking. While it is accurate that there have not been a great number of cases decided in the joint employer area after *BFI*, such an argument misses the point. The Board's rulemaking initiative has literally decades of case law to draw upon. In addition to a substantial number of Board decision pre and post *BFI*, there is also a substantial body of law developed by the federal courts of appeal and in the restatements of the law. The Board also has the benefit of substantial briefing in the *Hy-Brand* case and the still pending *McDonald's* joint employer litigation. Additionally, the Board will have the benefit of substantial comments and analysis in the instance NPRM process. Accordingly, there is absolutely no need for the Board to wait further to address the joint employer issue.

E. The Emphasis on Indirect and Reserved Control by Certain Commentators is Overstated – The Rule the Board Should Adopt is a Multi-Step Analysis with Actual

[31] Brief of the EEOC as Amicus Curiae, *Browning-Ferris,* 3C-RC-109684 (filed June 15, 2014).

Control – Whether Exercised Directly or Indirectly – Weighted on a 90% Basis, and Reserved Control, to the Extent to Which it Exists, on a 10% Basis

1. Actual Control

Actual control, for abundantly clear reasons, is the most obvious type of control in any joint employer analysis. It can be observed, measured, and objectively established. It is "hard evidence" and either exists or does not exist pursuant to a factual review of the record in question.

2. Indirect Control

By any definition, this phrase requires some type of "control" by one entity over the terms and conditions of employment of employees of other entities. For such type of "control" to be a helpful analytical tool, however, in any type of joint employer analysis, it also must be actual and measurable – i.e. some type of control is being exercised that can be readily identified and objectively measured. The type of indirect control suggested by the comments submitted by certain law school professors, while intellectually interesting, is not helpful and only serves to further confuse any meaningful joint employer analysis. Stated alternatively, the type of indirect control suggested by such professors is entirely too theoretical, and best shifted over to government entities that regulate in the antitrust space.

3. Reserved Control

This type of potential – and perhaps hypothetical – control is of the least assistance in any meaningful joint employer analysis. It is difficult to measure objectively, if it exists at all. If it does exist, it should have a substantial and potential direct impact on terms and conditions of employment of the employees in question. Correspondingly, some type of reserved control is contained in virtually any type of contractual arrangement and should not on its own be the basis for a joint employer finding. As noted in the Association testimony before the House Education

and Labor Committee, there are varying types of routine and reserved control that should not be the basis for a joint employer finding. Such examples include safety requirements, quality requirements, timeliness of completion requirements, and federal state and local statutory and regulatory compliance.

For the above reasons Association submits that actual control and indirect control that results in some type of "actual control" should be given a 90% weight factor by the Board in its final rule, subject to more exacting definitions being included in such rule as outlined in our initial comments and those of General Counsel Robb. Reserved control, if it exists at all, should be subject to no more than a 10% weight factor and should not be the basis, alone, to find joint employer status.

Respectfully Submitted,

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HR POLICY ASSOCIATION®
The Association of Chief Human Resource Officers

EXHIBIT A

Testimony of

G. Roger King*
Senior Labor and Employment Counsel
HR POLICY ASSOCIATION

For the

House Education and Workforce Committee

Hearing on

Joint Employer Policy and Legal Issues

July 12, 2017

* Mr. King acknowledges the assistance of his colleagues at the HR Policy Association in preparing this testimony including Mark Wilson, Chief Economist and Vice President, Health and Employment Policy; and Daniel Chasen, Director of Research and Publications. Portions of this testimony are based on the Association's recent report *Workplace 2020: Making the Workplace Work*[1]

[1] *Workplace 2020: Making the Workplace Work*. HR Policy Association, Apr. 2017. Web. http://hrpolicy.org/Content/documents/Workplace_2020_Report_WEB_06-07-17.pdf.

Chairwoman Foxx, Ranking Member Scott, and distinguished members of the Committee:

Thank you for this opportunity to again appear before the Committee. I am testifying today on behalf of HR Policy Association where I serve as Senior Labor and Employment Counsel. My biographical information is attached to my written testimony. I request that my written testimony and the exhibits thereto, in their entirety, be entered into the record of this hearing.

HR Policy Association is a public policy advocacy organization representing chief human resource officers of major employers. The Association consists of more than 380 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, these companies employ more than 10 million people in the United States, and their chief human resource officers are generally responsible for employee and labor relations for their respective companies. Recently, the HR Policy Association published *Workplace 2020: Making the Workplace Work*, a report representing the general views and experiences of the Association's membership on the trends shaping the workforce, the outdated policies that govern it, and the way forward.

❖ Overview

Policy and legal questions as to whether separate and distinct entities are "joint employers" and correspondingly whether a worker is an "employee" or an "independent contractor" are perhaps the two most important labor and employment questions facing the country today.[2] As you no doubt have heard from a number of your constituents, including particularly franchisees and other small and independent business owners, the regulatory and legal issues associated with the questions of joint employer and independent contractor status are becoming increasingly difficult and expensive to answer. These questions, however, are not solely issues and problems for small employers and franchisees. Our member companies, which constitute some of the largest employers in the country, view joint employer and independent contractor issues as some of the most important challenges they face today in the labor and employment area.

The reasons for these concerns by small, medium, and large size businesses are many and varied, but eventually all relate to the increasingly difficult regulatory and litigation climate that

[2] The joint employer doctrine, which includes situations where separate legal entities have chosen to handle aspects of their employer-employee relationship jointly, should not be confused with the "single employer doctrine." The single employer doctrine (a/k/a "integrated enterprise" doctrine) involves situations where multiple legal entities are found to: (1) have common ownership or financial control, (2) have common management, (3) have centralized control of labor relations, and (4) interrelations of operations. These indicia have been utilized by the courts in various fashions. The one common thread in most of the single employer findings, however, has been common ownership of the entities in question. *See Baker v. Stuart Broadcasting Co*., 560 F.2d. 389 (8th Cir. 1977) and *Wells v. Firestone Tire & Rubber, Co*., 421 Mich. 641, 364 N.W.2d. 670 (Mich. 1984). Further, as discussed later in the testimony, it is important to understand the differences between vertical joint employer relationships and horizontal joint employer relationships.

has developed in this area. At the base of this discussion is the potential for application of the legal doctrine of joint employer status, and its potential far reaching effects on all entities found to be a joint employer. This is a very powerful legal doctrine where unrelated entities can be jointly and severally liable for statutory violations, even if the other entity or entities that are found to be part of the joint relationship are wholly responsible for the violation, and the entity that is additionally being held jointly liable had no involvement in such matter or any practical means to prevent the alleged violation. Indeed, the non-actor joint employer may not even have any knowledge of the event(s) or circumstances that were involved until being served with a complaint in an administrative or judicial proceeding. This potential for unforeseen liability can result in considerable financial exposure in many different situations under an ever-expanding number of labor and employment regulations and statutes.

Although employer exposure to increased liability as a result of the National Labor Relation Board's (NLRB) recent decision in the *Browning-Ferris* case has received considerable attention—as it should—the potential for litigation risk is arguably even greater under other federal labor statutes such as the Fair Labor Standards Act (FLSA), the Occupations Safety and Health Act (OSH Act), and various federal employer discrimination statutes. The potential for broad legal exposure is particularly present in supply chain relationships that many large employers have with hundreds of unrelated business entities. In such relationships, if the user employer requires even minimum employment standards be met by suppliers in the labor relations area, the user employer may be found to be a joint employer. The social pressure, indeed, can be great in this area on large employers. For example, it is easy to recall numerous recent media stories where employers are being asked to assume social responsibility for the employment actions for all of their suppliers even if they have no ability to directly supervise such off-site workers or, as a practical matter, to oversee the day-to-day working conditions that are present in many remote areas of the world. Our member companies have and will continue to accept on a voluntary basis their corporate social responsibility in this area, but they do not want to be saddled with overreaching rules and regulations, and be exposed to onerous and expensive litigation. Finally, franchisors have experienced similar considerable legal exposure in their relationship with franchisees with whom they have, as a practical matter, little ability to oversee on a daily basis.

Employees are also increasingly left in a quandary as to their status in this joint employer discussion. Predictability and certainty as to their relationship with one or more employers has become increasingly problematic. Indeed, as outlined further in this testimony, workers in certain instances may be penalized by not being provided certain workplace benefits due to an employer's concern that the extension of such benefits to supplier employed individuals would make it a joint employer.

There is a great need for common sense to be brought into this area. Regulatory agencies and the courts need to do a "reality check." Further, the joint employer area merits thorough and serious attention by this Committee—this is an area that needs an immediate legislative solution. Specifically, the HR Policy Association recommends the following outline for joint employer legislation:

- ➢ A simple and concise definition of the term "joint employer" for federal labor and employment statutes. The National Labor Relations Act (NLRA), FLSA, OSH Act, and various federal employer discrimination statutes, at a minimum, should be subject to this uniform definition.
- ➢ Before a regulatory agency or court could reach a legal conclusion of joint employer status, factual findings would have to be made that the entity or entities in question had the authority to: (1) hire and fire; (2) determine rates of pay and methods of payment; (3) manage payroll and leave policies; (4) directly supervise on a day-to-day basis the workers in questions, including determination of work schedules, assignment of positions and tasks, and administration of discipline; and (5) maintain employee records required by law.
- ➢ Authority in the above areas would have to be found to be direct, actual, and immediate.
- ➢ Federal preemption and safe harbors should be provided to any employer who meets the above criteria to preclude such employers from being subjected to increasingly onerous state and local labor and employment legislation and litigation. This approach would help to address the increasing phenomena of "reverse preemption" where certain state legislation and municipal ordinances have unduly influenced national labor and employment policy.

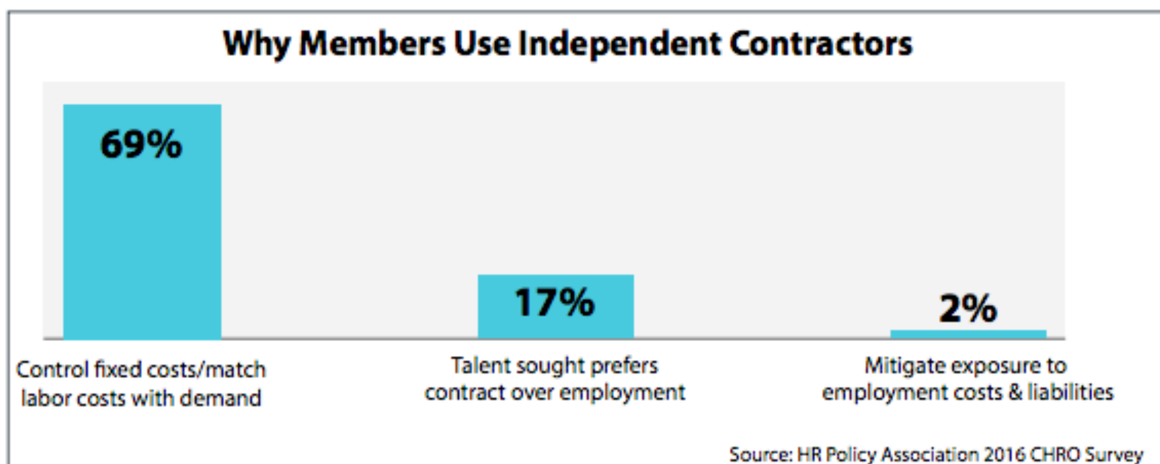
The Association also urges the Committee to do a long-range study regarding the potential to establish a new worker classification definition—the independent worker. This classification of a worker is discussed in a thoughtful and comprehensive study entitled "A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent Worker'" by Seth D. Harris and Alan Krueger. While there remain issues regarding this proposal and how this new classification system would work, the concept of permitting workers to remain independent while receiving certain benefits from employers and also being covered by certain federal employment statutes certainly merits consideration given the continuing litigation and controversy regarding independent contractor status and joint employer classification.

Finally, discussions of legislative solutions in this area, like in many areas in the labor and employment field, have the potential to result in highly partisan positions being taken by various stakeholders. Hopefully, such an approach can be avoided. While it is true that plaintiff-oriented attorneys and their clients on occasion hit the "legal jackpot" and win a case involving FLSA issues or prevail in an employee misclassification status case, such "victories" are few and far between. The vast majority of your constituents never see the fruits of such so-called victories, and even the successful workers in such litigation often only receive small payments while their attorneys receive large payouts in fees. Contrasted with these so-called victories is the harsh reality that employers are increasingly faced with additional regulatory compliance costs and litigation defense expenses that curtail job development and limit wage and benefit growth. The only real winners in the current status quo of ambiguity and excessive litigation in the joint employer area are lawyers, and perhaps law professors, who can write interesting academic articles about this subject.

❖ **Joint Employer Workplace Discussions Frequently Have Proceeded from Misinformation and Incorrect Assumptions**

The discussion of joint employer issues has often started in academic and regulatory settings from the premise that employers outsource and subcontract work and enter into relationships with various business entities to affirmatively avoid coverage of federal and state employment statutes such as the NLRA, FLSA, OSH Act, and various anti-discrimination statutes. The "thinking" that flows from this premise is that employers who are engaging in such activities should be closely scrutinized, and subject to various penalties and regulation to discourage them from entering into such business relationships. Further, this type of analysis then concludes that the definition of "joint employer" should be considerably broadened to include a multitude of workplace relationships that traditionally have not been found to constitute a joint employment situation. This line of thinking is not only unfortunate, but incorrect.

An objective and thoughtful analysis in the joint employer area should begin with an entirely different premise—the reason that virtually all business entities outsource work is to maximize efficiency, productivity, and quality. Most functions that employers assign or contract out to other entities or to independent contractors are jobs or services that are not part of their core business function, and that they cannot perform in a cost efficient or quality efficient manner. Indeed, as illustrated by the following chart, virtually all outsourcing, subcontracting, or independent contractor relationships are not initiated by a desire to avoid "employee status" under various federal and state employment laws.



❖ **Increased Joint Employer Litigation Expenses and Conflicting Joint Employer Definitions**

As the HR Policy Association highlighted in the *amicus* brief it filed last week along with the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Retail Federation, and the Retail Litigation Center, with the U.S. Supreme Court supporting DirecTV's

petition for certiorari in the case *Hall v. DirecTV,* 846 F.3d 757 (4th Cir. 2017)—and which is attached to the testimony as Exhibit 1—FLSA cases alone are at record levels in the federal courts. During the 12-month period ending on March 31, 2016, plaintiffs filed 9,063 FLSA cases in federal district courts, compared with 5,507 patent cases, 1,070 anti-trust cases, and 1,053 securities cases.[3] Further, a Westlaw search of federal district court decisions in 2016 revealed over 100 decision addressing claims of joint employer status under the FLSA alone. Franchisors and franchisees have been particularly hard hit in this legal area with litigation involving such entities increasing from only 3 in 2007, to 15 in 2012, and to 38 in 2016. Additionally, the General Counsel of the NLRB has initiated one of the most expansive proceedings in the Board's history by issuing dozens of complaints against McDonald's USA, LLC and independently owned and operated McDonald's franchisees located in New York, Philadelphia, Chicago, Indianapolis, Sacramento, and Los Angeles.

Currently, there are almost as many different versions of the legal test for who is a joint employer under the FLSA as there are Circuit Courts of Appeal in the United States. For example, the First Circuit (ME, NH, MA, RI) applies a four factor economic realities test (a.k.a. the *Bonnette* test), while the Second Circuit (NY, VT, CT) uses the *Bonnette* test but adds six functional control factors. On the other hand, the Third Circuit (PA, NJ, DE) uses the *Bonnette* test but also considers whether an employer can impose discipline on an employee, while the Fourth Circuit (MD, VA, WV, NC, SC) just created a novel "completely disassociated" test that looks at the relationship between the employers. In yet another approach, the Eleventh Circuit (AL, GA, FL) uses a distinct eight-factor test that is related to the economic realities test.

Moreover, the new joint employer test that the NLRB developed in the *Browning-Ferris* case[4] is exceedingly broad and ambiguous, and arguably permits a finding of joint employer status even if the entities in question possess unexercised and indirect authority to control terms and conditions of employment.[5] Remarkably, to further complicate the joint employment issue, the Equal Employment Opportunity Commission (EEOC) submitted an *amicus* brief in the *Browning-Ferris* case and argued that the Board should adopt the EEOC's 15 factor standard, which it described as "more flexible, more readily adaptable to evolving workplace relationships and realities."[6]

Policymakers need to enact legislation to clarify and simplify these widely varying joint employer tests for a number of reasons:

- **Decrease Regulatory Compliance and Litigation Expenses**

As noted in the above section, there has been a significant increase in joint employer litigation with regulatory agencies and courts applying differing and conflicting standards.

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[3] See Administrative Office of the United States Courts, Federal Judicial Caseload Statistics Table C-2 (June 2017).

[4] *Browning-Ferris Indus. Of Cal., Inc., D/B/A BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015).

[5] "Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to joint employer inquiries". *Browning-Ferris Industries of Calif., Inc*., 362 NLRB No. 186 (2015).

[6] Brief of the EEOC as Amicus Curiae, *Browning-Ferris,* 3C-RC-109684 (filed June 15, 2014).

There is no positive return on investment to employees, businesses, and indeed the nation as a whole for these types of expenditures. The resources currently being expended in this area could and should be expended to achieve other objectives, including investment for job creation, employee training, and for increased worker wages and benefits.

➢ **Importance of National Consistency**

Geographic consistency is particularly important for large multistate employers and franchisors. A uniform and consistent approach in the joint employer area will significantly reduce unnecessary and costly regulatory compliance and litigation expense. Many businesses operate across multiple circuit court jurisdictions, and are subject to multiple competing standards for determining compliance with federal labor laws. Surely, Congress did not intend this to be the case when it enacted these statutes. To simplify compliance and reduce unnecessary administrative costs, a uniform definition for joint employer status should apply to federal employment laws.

➢ **Need for Stability and Predictability in Business Arrangements**

As the Supreme Court noted in its decision in *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010), "predictability is valuable to corporations making business and investment decisions." Novel and disparate legal decisions are threatening to penalize and deter longstanding economically sensible business arrangements, including but not limited to employers and subcontractors and franchisors and franchisees. The United States Court of Appeals for Fourth Circuit recent decisions in *Hall v. DirecTV* and *Salinas v. Commercial Interiors*, 848 F.3d 125 (4th Cir. 2017) and the NLRB's *Browning-Ferris* decision threaten to deter companies from entering into business relationships that promote meaningful commerce and are good for both employees and shareholders alike.

➢ **Employer Good Deeds Should Not Be Punished**

Many companies have, and many more would like to have, the freedom to establish corporate social responsibility (CSR) standards for their contractors, franchisees or others—be it pay, benefits, training, drug testing, background checks, etc.—without having to be drawn into a joint employment relationship and perhaps expensive and protracted litigation.

For example, in 2015, one company announced a new CSR initiative where it would only do business with suppliers that provided certain employees with at least 15 days of paid leave annually. The NLRB argued that this request by the user company made it a joint employer with the supplier company in question even though it did not exercise any type of direct control over the terms and conditions of employment of the employees of the supplier employer. Ironically, the user company in question had, shortly before this unfortunate regulatory action occurred, been praised by President Obama's White House as being an example of a leading employer in the country that was promoting socially responsible terms and conditions of employment.

The HR Policy Association has brought this unfortunate regulatory overreach to the attention of the United States Court of Appeals for the D.C. Circuit in an *amicus* brief in the pending *Browning-Ferris* case. Attached as Exhibit 2 to this testimony is a copy of the Association's *amicus* brief in the *Browning-Ferris* case. If the NLRB's broad new joint employer decision is not overturned by the courts, such standard no doubt will deter other companies from adopting such policies. Indeed, some law firms that represent employers have issued alerts cautioning companies to limit requirements that they impose on their business partners affecting those partners' employees to avoid inadvertently creating joint-employment relationships.

➢ **Need to Shield Employers from Secondary Boycott Activity and Bargaining Obligations with Unrelated Business Entities**

Certain joint employer recent decisions, including the NLRB's decision in the *Browning-Ferris* case, have the potential to permit secondary boycott activity and related corporate campaign initiatives against an entity that historically has not been found to be a joint employer. Indeed, such conduct without a joint employer finding would, in many instances, be prohibited as illegal secondary conduct under section 8(b)(4) of the NLRA. Stated alternatively, if an entity is a neutral in a labor dispute it cannot be lawfully the target of secondary boycott activities and otherwise immersed in a dispute with the labor organization that has initiated such activities against another entity. If the previously neutral employer in question, however, is found to be a joint employer with the primary target of the dispute, a labor union could proceed to engage in boycott and other secondary activates against the neutral joint employer entity without being in violation of the NLRA.

Additionally, under the NLRA, a joint employer finding could require an otherwise unrelated and separate business entity to have bargaining obligations with a union that successfully organized another entity in the joint employer relationship.

❖ **Certain Joint Employer Definitions, Including the NLRB's Definition, Deter and Interfere with New Employer-Worker Relationships**

There is a significant danger that the current overbroad definition of joint employer status will create new barriers to the movement of work at a time when flexibility is critical to ensuring that workers find work arrangements best suited to their skills, career development, income and family responsibilities. The reality is that in many instances, workers who possess skills in critical demand seek to be tied to the market, not to individual employers. Recognizing this reality is not just essential to ensuring that businesses can be at their competitive best but also to empower the workers themselves to ensure that their skills are put to maximum use in a way that serves their own needs and desire for job security.

The benefits to workers of non-traditional work relationships are often overlooked. These benefits can derive from a wide variety of motivations on the part of those workers, including:

- ➢ Flexibility, which fixed employment with a single employer may for certain workers impede through obligations and a commitment of time to the needs of that employer; and

- ➢ Marketability, combined with entrepreneurship that provides workers with a special set of skills in high demand that bolster the ability to make more money on their own (or as an employee of a firm specializing in those skills) and be more selective of jobs that match their interest as a "free agent."

Meanwhile, employers may be motivated by a variety of factors that have nothing to do with avoiding liability under federal labor laws, including:

- ➢ Managing the ebb and flow of staffing needs, which is necessitated by fluctuating market demands;

- ➢ A lack of availability of certain specialized skills, in which case an employer can only acquire those skills from entrepreneurial individuals or companies specializing in providing those skills; and

- ➢ Focusing on core competencies of the company, and thereby relying on other individuals or companies who may provide better service through its own core competency (*e.g.*, security).

Finally, if the current state of the law is permitted to continue in this area, it may have a disruptive and expensive impact on the federal procurement process. As the Committee is well aware, the government, on a daily basis, contracts with thousands of entities for essential products and services. If the approach taken by the Fourth Circuit Court of Appeals in the *DirecTV* case prevails, the government may be found in numerous instances, to be a joint employer with various contractors, and subject to considerable litigation under joint employer theories. *See* 29 U.S.C. § 203(d) which defines "employer" to include a public agency. *See also Murphy v. Volt Information Sciences, Inc*., 203 Westlaw 5372787 at 2 (D.OR. September 24, 2013) (holding that federal government's waiver of sovereign immunity in family medical leave act case extends to joint employment).

❖ The Current Legal Regime, with Its Extensive Regulatory and Litigation Outcomes, Will Impede Positive Developments for Workers

Ultimately, the application of any definition of "employer" or "joint employer" depends on various "indicia [i.e., indicators] of employment." Being on a company's payroll is probably the clearest indicator but regulators look at a variety of other factors, such as control over schedule, work directions, the work performed, and whether a claimed "independent contractor" performs work for other companies. An overly rigorous enforcement of these factors forces companies to minimize these "indicia" in ways that are often harmful not only to those contingent workers but also to their own employees.

Thus, a company that has an on-site day care center or physical fitness program that is part of its wellness program may exclude from those benefits anyone who is not an employee of the company. In addition, a host company that contracts with an outside firm to provide physical security to its premises may believe that its employees' protection will be best served by certain hiring standards for the security personnel used by that firm. This may include drug testing and background checks, a minimum level of training, pay and/or benefits and so forth. Yet, if the host company seeks to impose those standards on the security firm, it increases the likelihood of being considered a "joint employer" of such individuals.

- **Certain of the Recent Joint Employer Decisions Have Ignored Congressional Intent and Misapplied the Law in this Area**

Certain decisions by regulatory agencies and courts in the joint employer area appear to be result-oriented with objectives to add a deeper pocket defendant or defendants. Such decisions appear to have little, if any, relationship with the substantial body of common law developed in the agency area. Further, some decisions have seemingly adopted a very liberal and self-imposed "humanitarian" mission of expanding the reach of the joint employer definition beyond what was intended by the Congress. For example, the Fourth Circuit's recent decision in the *Salinas* case stated that one of the rationales for the Court's holding was the premise that the FLSA has a "remedial and humanitarian…purpose [and therefore]…should be broadly interpreted and applied to effectuate its goals," *Salinas* 848 F.3d at 140. Such an approach is erroneous for a number of reasons including the fact that many, if not most, legislative enactments are remedial in nature. The Congress, not the courts, should be the decider of the reach of a statute. Social engineering, whether it be under the FLSA or other statutes, is not the function of the courts. As the Supreme Court stated in the *Rodriguez v. United States* case, 480 U.S. 522, 525-26 (1987), "no legislation pursues its purpose at all costs," and that the correct statutory interpretation approach is that when a court analyzes the balance struck by Congress in a remedial statute, its goal should be to "neither liberally to expand nor strictly to constrict its meaning but rather to get the meaning precisely right," *Rodriguez* at 582.

The NLRB's holding in its *Browning-Ferris* decision is also a prime example of the will of Congress being ignored in the joint employer area. In 1947, the Congress expressly directed in the Taft-Hartley amendments to the NLRA that the Board utilize common law principles of agency when determining the questions of employee and employer status. The Congress specifically overruled an earlier Supreme Court decision in *NLRB v. Hearst Publications, Inc.*, 322, U.S. 111 (1944), which had disregarded common law principles of agency, and held that "independent contractors" could be considered "employees" under the NLRA. The legislative history to the 1947 Amendments is quite instructive on this question. For example, the House Committee Report accompanying the 1947 Amendments was quite critical of the Board and noted that the term "employee:"

> According to all standard dictionaries, according the law as the courts have stated it, and according to the understandings of almost everyone, with the exception to members of the National Labor Relations Board, means someone who works for another for hire…[and who] worked for wages or salaries under direct supervision…It must be presumed that when Congress passed the Labor Act, it intended words it used [such as "employee"] to have the meanings they had when Congress passed the Act, not new meanings that, nine years later, the Labor Board might think up…it is inconceivable that Congress, when it passed the Act, authorized the Board to give to every word in the Act whatever meaning it wished. H.R. Rep. No. 245 at 18, 80th Cong., 1st Sess. (1947). *See also Allied Chem. & Alkali Workers, Local Union No.1 v. Pittsburg Plate Glass Co.*, 404 U.S. 157 (1971).

It is clear that what Congress did in 1947 was designed to reinforce the applicability of common law agency principles to determine who is an employer and who is an employee under the NLRA. Thereafter, the Supreme Court has consistently utilized common law agency principles to determine who is an employee and who is an employer, *Town & Country, Elec., Inc.*, 516 U.S. 85 (1995).

As noted above, the Fourth Circuit Court of Appeals decision in the *Hall v. DirecTV* case also is a substantial deviation from not only joint employer tests utilized in other circuit courts of appeal, but also is a substantial misinterpretation of the United States Department of Labor regulations in the joint employer area. Indeed, the Fourth Circuit's decision in the *Hall* case fails to understand the difference between vertical joint employer and horizontal joint employer relationships. In a vertical joint employer relationship, a worker has a relationship with an entity that supplies services to another entity, and allegations in this area generally state that both entities are the worker's employer. A horizontal joint employer relationship by contrast is a situation where an employee initially has a direct employment relationship with two or more entities, and the contention in these types of cases is that the entities in question should be treated as a joint employer for purposes of the FLSA. The Fourth Circuit, unfortunately, rejected the joint employer test that has been almost universally followed, at least in part, by other United States Courts of Appeal and as set forth in *Bonnette v. California Health & Welfare Agency*, 704 F.2d. 1465 (9th Cir. 1983), abrogated on other grounds by *Garcia v. San Antonio Metro Transit Auth*., 469 U.S. 528 (1985). The substantial legal deficiency in the Fourth Circuit reason is set forth in Exhibit 1, the Association's *amicus* brief in support of DirecTV's petition for certiorari.

- **Solutions to Joint Employer Issues**

  - **United States Department of Labor (USDOL) Action**

The USDOL recently took thoughtful and immediate action in withdrawing two interpretation letters that had been previously issued by the Department. These previous interpretation letters broadened the definition of instances when joint employer status could be found and also narrowed definitional approach with respect to independent contractor issues. Although such AI's have minimal legal significance, they do reflect a significant policy change from the Department in joint employer and independent contractor area. Department of Labor—Administrative Interpretation No. 2016-1: Joint Employment Under the Fair Labor Standards Act and Migrant Seasonal Agricultural Workers Protection Act (January, 20, 2016) and Administrative Interpretation No. 2015-1: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors (July 15, 2015).

The Department should further examine a number of outdated regulations in the FLSA area as they relate to joint employer status. Specifically, the Department should reexamine the present regulation that discusses horizontal joint employer relationships and remove the phrase "completely disassociated" as such requirement is virtually impossible for employers to meet and is subject to incorrect interpretation as recently evidenced in the Fourth Circuit Court of Appeal's holding in the *DirecTV* case.[7]

➢ **Legislative Action**

Legislation relief in this area is needed. Such legislation should include a uniform, simple, and concise definition of joint employer status under various federal labor and employment statutes, and include, at a minimum, the NLRA, FLSA, OSH Act, and federal employment discrimination statutes. Additionally, such legislation should require, before a finding of joint employer status could be made, that the entity or entities in question have the authority to (1) hire and fire; (2) determine rates of pay and methods of payment; (3) manage payroll and leave polices; and (4) supervise on a day-to-day basis the workers in question, including determining work schedules, assignment of positions and tasks, and administration of employee discipline; and (5) maintain employee records required by law.

The above basic principles track the common law in this area, and also incorporate the basic principles set forth in the *Bonnette* case, which as previously noted is the lead circuit case authority in the joint employer area.

In addition, before a finding of joint employer status could be found, a court and administrative agency should be required to find that the above authority is exercised directly, actually, and immediately.

Correspondingly, however, entities should not be considered a joint employer if they only exercise indirect supervision of the individuals in question to ensure compliance with the contractually mandated brand standards, performance measurement, product requirements,

[7] 29 C.F.R. 791.2

quality requirements, safety requirements, customer or other service obligations, or federal, state, and local statutory and regulatory obligations. Additionally, any entity that provides basic training to potential employees to ensure statutory and regulatory compliance, and an ability to participate in basic benefit plans such as retirement, health, dental, and life insurance, should not be deemed to be a joint employer.

➢ **Need for Preemption and Safe Harbor Status**

As the Committee is well aware, there continues to be a proliferation of state and local labor and employment statutes and ordinances. While some cost of living-geographical considerations arguably might support such a local diversified approach with respect to the minimum wage standards, no such justification exists in the joint employer area. Employers and employees should not be subject to different and conflicting outcomes with respect to the definition of joint employer status based upon the jurisdiction in which they live and do business. As outlined above, consistency and predictability in this area is very important, especially for the planning and implementation of productive business relationships. Further, the added cost of having to adjust compliance approaches in different jurisdictions, and the exposure litigation due to varying and conflicting standards, should be eliminated. A national uniform definition of joint employer status with corresponding "ERISA type" preemption should be included in any legislation in the joint employer area.

Additionally, taking a uniform approach to the definition of joint employer status would be a needed check against the increasing "reverse preemption" phenomena that has started to develop in this country. This phenomenon has developed due to certain states implementing very far reaching local labor and employment statutes forcing large employers, including franchises that operate in multistate areas, to essentially adopt the most liberal policy or statute in question for all of it operations throughout the country to ensure consistency and minimize regulatory and court litigation exposure. Federal labor and employment law policy should be set by the Congress, not by various state legislative bodies and local municipalities. Stated alternatively, what is enacted in Sacramento should not unduly influence employer practices in Alabama, North Carolina, Michigan, Virginia, or any other part of the country.

❖ **Closing Thoughts**

As noted above, a broad and overreaching definition of joint employer status could also harm workers. Clearly, any employer seeking to affirmatively avoid liability by constructing sham arrangements with workers should be prosecuted. However, those seeking to provide certain benefits to contingent workers in addition to their own employees should be protected through the creation of specific safe harbors such as:

➢ Allowing employers to include contingent workers in certain events with employees, such as team-building exercises, thus removing barriers to optimal productivity by maximizing communications and chemistry between employees and non-employees working toward common objectives;

- ➢ Allowing participation—at the contingent workers' option—in the company's health care or defined contribution retirement plan;
- ➢ Allowing contributions to government insurance programs, such as unemployment insurance, workers' compensation, and paid family and medical leave insurance;
- ➢ Requiring drug testing and minimum levels of training for those involved in sensitive areas, such as security, that affect the safety and wellbeing of the employers' own employees;
- ➢ Requiring its contractors to provide to their own employees certain minimum pay and/or benefits; or
- ➢ Establishing methods to facilitate compliance by their franchisees or contractors with various employment laws.

Finally, the Association urges the Committee to undertake a long-range study on the potential benefit of developing a new statutory category for employees—an independent worker classification wherein workers could receive certain benefit from employers, be covered by certain federal labor and employment statutes, but would retain their independent worker status.[8]

Ms. Chairwoman, this concludes my testimony. I would be happy to answer any questions Committee members may have.

[8] See "A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent Worker'", by Seth Harris and Allan Krueger, The Hamilton Project (December 7, 2015).