

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of)	
	)	Petition of The Coalition for a Democratic
Proposed Rule to Establish the	)	Workplace; Coalition to Save Local Business;
Standard for Determining	)	Associated Builders and Contractors;
Joint-Employer Status Under the	)	American Hotel & Lodging Association;
National Labor Relations Act	)	Chamber of Commerce of the United States of
	)	America; HR Policy Association; Independent
	)	Electrical Contractors; International
	)	Foodservice Distributors Association;
	)	International Franchise Association; National
	)	Federation of Independent Business; National
	)	Association of Manufacturers; National
	)	Association of Wholesaler-Distributors;
	)	National Council of Chain Restaurants;
		National Restaurant Association; National
		Retail Federation; Restaurant Law Center;
		Retail Industry Leaders Association

RULEMAKING PETITION

Primary Contact: Kristen Swearengin
Chair, The Coalition for a Democratic Workplace
Vice President of Legislative & Political Affairs
Associated Builders and Contractors
440 1st Street, NW, Suite 200
Washington, DC 20001
(202) 595-1505

Counsel to Petitioners

Kurt G. Larkin
Hunton Andrews Kurth, LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8776

Ronald Meisburg
Hunton Andrews Kurth, LLP
2200 Pennsylvania Avenue, N.W.
Washington, DC 20037
(202) 955-1539

TO THE HONORABLE MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD:

Petitioners respectfully submit this rulemaking petition for the National Labor Relations Board's ("Board") consideration.

I. PETITIONERS AND THEIR STANDING

The **Coalition for a Democratic Workplace** ("CDW") is a collection of hundreds of members representing the interests of millions of employers nationwide. CDW was formed to give its members a meaningful voice on labor law reform. CDW has advocated for its members on numerous issues of significance relating to the Board's policies, procedures and interpretations and applications of the National Labor Relations Act ("Act" or "NLRA").

The **Coalition to Save Local Business** ("Coalition") is a diverse group of locally owned, independent small businesses, associations and organizations seeking fairness and clarity on the Board's joint employer doctrine. The Coalition is dedicated to strengthening small businesses in the United States and is interested in establishing a more durable and lasting joint employer standard that is fair to American business.

Associated Builders and Contractors ("ABC") is a national construction industry trade association representing nearly 21,000 members. Founded on the merit shop philosophy, ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically, and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

The **American Hotel and Lodging Association** ("AHLA"), founded in 1910, is the sole national association representing all segments of the lodging industry, including hotel owners, REITs, chains, franchisees, management companies, independent properties, bed and breakfasts,

state hotel associations, and industry suppliers. Supporting 8 million jobs and with over 24,000 properties in membership nationwide, the AHLA represents more than half of all the hotel rooms in the United States. The mission of AHLA is to be the voice of the lodging industry, its primary advocate, and an indispensable resource. AHLA serves the lodging industry by providing representation at the federal, state and local level in government affairs, education, research, and communications. AHLA also represents the interests of its members in litigation that raises issues of widespread concern to the lodging industry.

The **Chamber of Commerce of the United States of America** (“Chamber”) is the world’s largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly participates in agency rulemakings involving issues of concern to the nation’s business community.

HR Policy Association represents the most senior human resources executives in more than 380 of the largest corporations doing business in the United States. Collectively, these companies employ more than ten million employees in the United States, nearly nine percent of the private sector workforce. As America’s largest employers, HR Policy Association member companies have employees and business relationships with entities in all 50 states.

The **Independent Electrical Contractors, Inc.** (“IEC”) is the nation’s premier trade association representing America’s independent electrical and systems contractors with over 50 chapters, representing 3,400 member companies that employ more than 80,000 electrical and systems workers throughout the United States. IEC aggressively works with the industry to

establish a competitive environment for the merit shop – a philosophy that promotes the concept of free enterprise, open competition and economic opportunity for all. IEC advocates on behalf of its members on a wide array of legislative and regulatory issues, to include those under the Act.

The **International Foodservice Distributors Association** (“IFDA”) is the nonprofit trade association that represents more than 161 companies in the foodservice distribution industry. Its members are found across North America and internationally and include leading broadline, system, and specialty distributors who operate more than 800 distribution facilities and represent annual sales of more than \$162 billion. These companies help make the food-away-from-home industry possible, delivering food and other related products to restaurants and institutions, ranging from casual to formal dining local restaurants to foodservice in nursing homes and hospitals to military mess halls and school cafeterias. IFDA provides research, educational opportunities, and business forums to its members that make them more competitive. In the United States, IFDA also provides important representation on Capitol Hill and before government agencies, sharing the perspective of leading foodservice distributors with lawmakers and federal officials to shape the legislative and regulatory process.

The **International Franchise Association** (“IFA”) is the world's oldest and largest trade association devoted to representing the interests of franchising. The IFA’s membership includes more than 1,400 franchisors, 20,000 franchisees, and 800 suppliers nationwide. The IFA’s overall mission is to protect, promote and enhance all aspects of the franchising business model, which includes more than 733,000 franchise establishments that support nearly 7.6 million direct jobs, \$674.3 billion of economic output for the U.S. economy and 2.5 percent of the Gross Domestic Product (GDP). This includes addressing a broad range of legislative, regulatory, and

legal issues that affect franchisors and franchisees, including in the area of the National Labor Relations Act.

The **National Association of Manufacturers** (“NAM”) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes \$2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The **National Association of Wholesaler-Distributors** (“NAW”) is a non-profit trade association that represents the wholesale distribution industry, the link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is comprised of direct member companies and a federation of national, regional, state and local associations which together include approximately 40,000 companies operating at more than 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small to medium size, closely held businesses. The wholesale distribution industry generates \$5.6 trillion in annual sales volume and provides stable and good-paying jobs to more than 5.9 million workers.

The **National Council of Chain Restaurants** (“NCCR”), a division of the National Retail Federation, is the leading organization exclusively representing chain restaurant companies. For more than 40 years, NCCR has worked to advance sound public policy that

serves restaurant businesses and the millions of people they employ. NCCR members include the country's most respected quick-service and table-service chain restaurants.

The **National Federation of Independent Business** (“NFIB”) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees.

The **National Restaurant Association** (“NRA”) is the leading business association for the restaurant and food service industry. The industry is comprised of over one million restaurant and food service outlets employing about 15 million people. The food service industry is the nation's second largest private-sector employer, employing approximately 10 percent of the U.S. workforce.

The **National Retail Federation** (“NRF”) is the world's largest retail trade association, representing all aspects of the retail industry. NRF's membership includes discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—42 million working Americans. Contributing \$2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF regularly advocates for the interests of retailers, large and small, in a variety of forums, including before the legislative, executive, and judicial branches of government.

The **Restaurant Law Center** (“RLC”) is an independent public policy organization affiliated with NRA, the largest food service trade association in the world. The RLC seeks to

provide courts as well as state and federal agencies with the industry’s perspective on legal issues and regulations significantly affecting the industry. As the nation’s second largest private-sector employer, our industry has a profound interest in national labor policy in general and interpretation of the National Labor Relations Act, including the joint employer doctrine, specifically.

The **Retail Industry Leaders Association** (“RILA”) is a membership association consisting of the largest and fastest growing companies in the retail industry—retailers, product manufacturers, and service suppliers—which together account for more than \$1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities, and distribution centers located both domestically and abroad. RILA promotes consumer choice and economic freedom through public policy discussions on issues of importance to its members, including labor issues.

Each of the Petitioners is an interested “person” within the meaning of Section 2(1) of the Act, Section 551(2) of the Administrative Procedure Act (“APA”),¹ Section 553(e) of the APA,² and Section 102.124 of the National Labor Relations Board Rules and Regulations, Part 102 (“NLRB Rules”). This petition is submitted pursuant to those rules and, in particular, pursuant to Sections 124 and 125 of the NLRB Rules, which provide:

Sec. 102.124 *Petitions for issuance, amendment, or repeal of rules.* Any interested person may petition the Board, in writing, for the issuance, amendment or repeal of a rule or regulation. An original and seven copies of such petition shall be filed with the Board in Washington, D.C., and shall state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.

¹ See 5 U.S.C. §551(2): “[P]erson’ includes an individual, partnership, corporation, association or public or private organization other than an agency.”

² See 5 U.S.C. §553(e): “Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”

Sec. 102.125 Action on petition. Upon the filing of such petition, the Board will consider the same and may either grant or deny the petition in whole or in part, conduct an appropriate hearing thereon, or make other disposition of the petition. Should the petition be denied in whole or in part, prompt notice will be given of the denial, accompanied by a simple statement of the grounds unless the denial is self-explanatory.

II. INTRODUCTION AND OVERVIEW

On May 9, 2018, the Board and the Office of Information and Regulatory Affairs published a submission at the request of the Chairman stating that the Board is considering using the rulemaking process to address the standard for determining joint-employer status under the Act.³ In that announcement, Chairman Ring acknowledged that: “uncertainty over the standard to be applied in determining joint-employer status under the Act undermines employers’ willingness to create jobs and expand business opportunities.”⁴ He further noted: “I am committed to working with my colleagues to issue a proposed rule as soon as possible, and I look forward to hearing from all interested parties on this important issue that affects millions of Americans in virtually every sector of the economy.”⁵ Chairman Ring subsequently noted in a letter to members of Congress that a “majority of the Board is committed to engage in rulemaking, and the NLRB will do so.”⁶ Petitioners fully support rulemaking on this important issue, in order to realign the Board’s joint-employer test with Congress’s intent under the Act.

³ See Board announcement at <https://www.nlr.gov/news-outreach/news-story/nlr-considering-rulemaking-address-joint-employer-standard> and <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=3142-AA13>

⁴ *Id.*

⁵ *Id.*

⁶ Letter from National Labor Relations Board Chairman John Ring to Senators Elizabeth Warren, Kirsten Gillibrand, Bernard Sanders, June 5, 2018, available here: https://www.nlr.gov/sites/default/files/attachments/news-story/node-6695/nlr_chairman_provides_response_to_senators_regarding_joint_employer_inquiry.pdf

Petitioners agree with Chairman Ring’s observation regarding the uncertainty facing the regulated community in light of the Board’s recent decisions in this area of the law.

For many decades, the Board employed a straightforward standard, consistent with congressional intent, for determining whether separate companies should be treated as joint-employers under the Act. Under this precedent, the Board’s determination turned on whether a firm actually exercised direct and immediate control over the hiring, firing, discipline, pay and other key aspects of the terms of employment of another firm’s employees. This standard, known colloquially as the “direct and immediate control test,” was faithful to the language, legislative history and intent behind the Taft-Hartley amendments to the Act. It was also an easy, bright line test that employers could understand and apply to their businesses and business relationships.

That all changed in 2015, when the Board unjustifiably jettisoned its decades-old standard in *Browning-Ferris Industries*, 362 NLRB No. 186 (Aug. 27, 2015)(“*BFI*”). In *BFI*, the Board abandoned the “direct and immediate control” test and instead established a vague and sweeping new test that drastically expands the scope of the joint-employer standard and threatens to redefine the employer-employee relationship across myriad businesses and industries in the United States. Under the *BFI* test, an entity can be found to be a joint-employer even if it exercises only indirect control over another firm’s employees or—even worse—if it simply possesses the ability to control, but does not exercise any control.

The *BFI* majority premised its controversial holding on a claimed need to return the joint-employer standard to the state in which it existed before the Board supposedly narrowed the test decades ago. But a survey of the Board’s pre-*BFI* precedent, as well as the history underlying passage of Taft-Hartley, reveals no support for the Board’s purported premise. The

BFI standard is inconsistent with a long line of the Board’s prior decisions and drastically departs from the common law principles of agency enshrined in the Act’s definitions of “employer” and “employee.”

In addition, the *BFI* decision turns a blind eye to the realities of American workplaces and threatens to undermine innovative new business models and the very business relationships that are the engine of our nation’s economy. *BFI*’s “reserved control” and “indirect control” standards are so vague and broad that it is often impossible for businesses to determine which relationships will trigger joint employment and which will not. The scant guidance from the Board on how to apply this unprecedented and amorphous standard has left the regulated community in the dark as to how to structure business to business relationships in a manner that predicts liability or other joint employer obligations.

While the uncertainty created by the *BFI* standard negatively impacts companies of all sizes across many industries, it is particularly damaging for small and local businesses. The standard encourages larger companies to limit the number of entities with whom they contract, which stifles opportunities for small businesses and startups. Quite simply, managing one joint employer relationship is preferable to managing a dozen or more.

Many companies also may conclude that if they are going to be held responsible for the violations and liabilities of their suppliers, subcontractors, franchisees, or other business relationships, they must exert *more* control over their day-to-day operations so that they can be more aware of, and seek to mitigate, these liabilities. For example, franchisors would become responsible for matters such as who to hire, when to fire, and how much to pay, driving up administrative costs and relegating the small business franchisee to a middle manager that ultimately is no longer in control of their business success. These franchisees are entrepreneurs,

seeking to own and run their own business—not to be a middle manager. This increase of control by franchisors would undermine the franchise business model and result in a severe constriction of business opportunities for many entrepreneurs, including many minority business people.

Ironically, BFI’s expansive and unpredictable standard also discourages company policies that lawmakers and supporters of the *BFI* standard have applauded.⁷ Many companies maintain corporate social responsibility and responsible contractor policies, not only for their own employees, but for those of their suppliers and business partners. *BFI* discourages such policies. If, for example, a large company wishes to require that its contractors pay above a specific wage, or provide specific levels of paid leave, the “indirect” and “potential” control concepts of *BFI* greatly increase the likelihood those companies would be considered joint employers. This new liability would in many cases cause the contracting company to reconsider having their contractors meet these requirements.

The concern regarding *BFI*’s unworkable joint-employer standard has galvanized business owners in every industry. Since 2014, when the Board first announced it would consider the *BFI* case on review and invited amicus briefs on the question of whether to change the Board’s joint-employer standard, business owners have engaged their elected representatives to raise awareness of the problems associated with an expanded joint-employer standard:

- **28 business owners and executives representing the business community have testified** before Congress in at least 11 hearings, telling their business stories and explaining how the Board’s BFI test threatens their businesses and employees;
- **100+ in-state meetings** have been held with members of Congress and their local business communities to share concerns regarding the BFI standard and the threat it poses to job creation and American business;

⁷ See, e.g., <https://obamawhitehouse.archives.gov/champions/working-family-champions-of-change/satya-nadella>.

- Over **150,000 letters have been sent to Congress** expressing confusion about the standard, asking for clarity, and urging congressional action on legislation;
- **Thousands of meetings** have been held between business owners and members of Congress in Capitol Hill offices, and
- **Numerous** businesses and coalitions, including many of the petitioners, have weighed in as concerned amici in briefs both to the Board and the U.S. Court of Appeals for the D.C. Circuit, in which the *BFI* appeal is pending.

Petitioners are greatly concerned that if left in place, the test promulgated in *BFI* will undermine longstanding business models and jeopardize job creation. The Board’s pre-*BFI* precedent worked well for decades, provided the regulated community with clarity and predictability, and best effectuated the well-established principles of common law agency that underlie the Act. Petitioners advocate for the return to a rule which follows the Board’s pre-*BFI* precedent and adheres to the congressional language and intent underlying Taft-Hartley.

III. SUGGESTED PROPOSED RULE

Petitioners respectfully petition the Board to promulgate and issue the following rule, pursuant to its authority granted by Sections 6 and 9 of the Act⁸:

“The Board may consider a person to be an employer in relation to an employee within the meaning of Section 2(2) of the National Labor Relations Act only if such person actually exercises direct and immediate control over the essential

⁸ As part of the rulemaking, it would be important for the Board to clarify that potential joint employer status is relevant only when two entities are each a separate “employer.” Joint employer status should not be examined when it is alleged that two entities are insufficiently distinct for each entity to be a separate “employer.” Rather, when such an allegation arises, it should be resolved exclusively by reference to the Board’s “single employer” or “alter ego” doctrines. Likewise, when it is alleged that one “employer” entity has been replaced by another “employer” entity in circumstances where the predecessor employer’s employment obligations apply (in whole or in part) to the successor employer, and where both entities are each a separate “employer,” this does not implicate joint employer status. Rather, when this type of allegation arises, it should be resolved exclusively by reference to the Board’s “successorship” doctrines. This joint employer rule deals only with joint employer status; it does not affect or modify the Board’s existing doctrines regarding single employer, alter ego or successorship status.

Also as part of the rulemaking, Board should clarify that, contrary to the holding of *Miller & Anderson, Inc.*, 364 NLRB No. 39 (2016), no bargaining unit shall be deemed appropriate as to any employer unless the employer has an employer relationship as to all bargaining unit employees.

terms and conditions of the employment of such employee, and if the exercise of such control is more than limited and routine in nature.

“Essential terms and conditions of employment” shall mean the hiring, promotion, discipline and discharge of employees; determination of individual employee rates of pay and benefits; engaging in the day-to-day supervision of employees, and assigning to employees their individual work schedules, positions and tasks.

Essential terms and conditions of employment shall not include any of the following: actions, policies or programs intended (1) by any franchisor to maintain or enforce the brand protection standards required of persons who enter into franchising arrangements with such franchisor; (2) by any entity to implement or administer any social responsibility code or policy, including safety policies, with respect to suppliers, vendors or other entities with whom it has a business relationship; (3) by any entity to require compliance by its suppliers, vendors or other entity with whom it has a business relationship with any federal, state or local law, regulation or other legal requirement; (4) by any entity to establish time parameters when the activity or work in question is to be performed; (5) by any entity to establish quality or outcome standards for any activity or work performed for such entity; (6) by any entity to require an individual to wear any type of uniform or any other type of identification that mentions in any manner the entity for which the activity or work is being performed; (7) by any entity to maintain or enforce product, brand, or reputational protection standards for its products, goods or services; and (8) to implement third party delivery and courier services, or technology-based shared staffing applications (including, but not limited to, insurance, training, financing and leasing services).

In no event shall retained or reserved but unexercised control over essential terms and conditions of employment, or the exercise of indirect control over essential terms and conditions of employment, constitute or be evidence of joint employer status under the Act.”

IV. STATEMENT OF GROUNDS IN SUPPORT OF PETITION

A. The Act (and the Common Law) Limits the Board’s Authority To Define Who is the “Employer”

A new rule is necessary to realign the Board’s joint-employer test with the Act. The history underlying passage of the Taft-Hartley amendments to the Act make clear that Congress restricted the Board to well-established principles of common law agency in determining who is

an employer and who is an employee under the Act. Those principles do not support the Board's sweeping decision in *BFI*.

Prior to Taft-Hartley, the U.S. Supreme Court had held in *NLRB v. Hearst Publications* that the Act's definition of "employee" included independent contractors. The Court based this holding on the belief that anyone having an "economic relationship" with a firm should be deemed its "employee," and that the employment relationship should be determined based on "economic facts rather than technically and exclusively by previously established legal classifications."⁹

In response to the Supreme Court's decision in *Hearst*, Congress passed Taft-Hartley, which included two amendments to the Act that limited the scope of the employment relationship. Specifically, Congress expressly excluded "independent contractors" from the definition of "employee,"¹⁰ and added the phrase "acting as an *agent* of an employer,"¹¹ to limit the Act's definition of employer. Taft-Hartley's legislative history illustrates that Congress' intention in making these changes to the Act was to limit the employer-employee concept to instances in which the putative employer exercised direct control over the putative employee:

[The concept of "employee"], according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire . . . [and who] work for wages or salaries under *direct supervision*.¹²

⁹ *NLRB v. Hearst Publications*, 322 U.S. 111, 128-28 (1944).

¹⁰ 29 U.S.C. §153(3).

¹¹ 29 U.S.C. §152(2) (emphasis supplied).

¹² H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947)(emphasis supplied); *see also id.* at 11 (revised definition of "employer" "makes employers responsible for what people say or do only when it is within the actual or apparent scope of their authority, and thereby makes the ordinary rules of the law of agency equally applicable to employers and unions"); and *id.* at 68 ("before the employer can be held responsible for a wrong . . . the man who does the wrong must be specifically an agent or come within the technical definition of an agent").

Taft-Hartley thus reflects Congress' rejection of more expansive views of the employment relationship, such as the "economic realities" noted in *Hearst*, in favor of the principles of common-law agency. Courts have long recognized that those principles require more than the indirect or retained or reserved but unexercised control to establish joint-employer liability. For instance, the Supreme Court has held for over 100 years that "under the common law loaned servant doctrine, immediate control and supervision is critical in determining for whom the servants are performing services."¹³ More recent judicial decisions have repeatedly emphasized that the common law test for employer status requires evidence of direct and immediate control.¹⁴

The lessons to be drawn from this history are simple: (1) Congress intended that the Board be limited to traditional common law principles when deciding who is an "employer" and who is an "employee" under the Act; and (2) those principles have always been understood by interpreting courts as requiring more than mere indirect, or reserved but unexercised, control by the putative employer over the day-to-day work of the putative employees.

¹³ *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 6 (1963), citing *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909).

¹⁴ See, e.g., *Cnty. For Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)(because Copyright Act of 1976 does not define "employer" or "employee," Court must look to common law to determine whether work of artist hired by petitioner was "work for hire" under statute; common law focuses on "the hiring party's right to control the manner and means by which the product is accomplished"); *Gulino v. N.Y. State Education Department*, 460 F.3d 361, 379 (2d Cir. 2006)(interpreting *Reid* in Title VII case as "countenanc[ing] a relationship where the level of control is direct, obvious and concrete, not merely indirect or abstract")(emphasis supplied); *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009)(Wal-Mart not joint-employer of the employees of its suppliers where it had no right to "immediate level of day-to-day control")(emphasis supplied); *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723 (Cal. 2014)(franchisor not liable for franchisee's harassment of its employee under California Fair Employment and Housing Act, because traditional agency principles "require[] a comprehensive and immediate level of day-to-day authority over matters such as hiring, firing, direction, supervision, and discipline of the employee")(emphasis supplied).

B. The Board’s Prior Joint-Employer Standard Was Consistent With the Common Law Concepts Enshrined in the Act

Contrary to the claims of the *BFI* majority, the Board’s joint-employer standard had always been consistent with Congress’s clear intent in the Taft-Hartley amendments until the dramatic departure in *BFI*. The *BFI* majority traced the “core” of the Board’s joint-employer jurisprudence to a 1965 decision, *Greyhound Corp.*,¹⁵ which the *BFI* majority claimed represented the Board’s “traditional” joint-employer standard. The standard applied in *Greyhound Corp.* was fully consistent with the common law and with the Board’s more recent pre-*BFI* precedent.

In its *Greyhound* decision, the Board considered whether Greyhound was a joint-employer of janitors and maids provided by an outside maintenance company. The Board found joint-employer status because Greyhound and the maintenance company “share[d], or codetermine[d], those matters governing essential terms and conditions of employment” and because Greyhound “possessed sufficient control over the work of the employees” to qualify as a joint-employer.¹⁶ Specifically, the Board found it probative that Greyhound provided the janitors with detailed daily and weekly instructions, set their pay rates and retained or reserve the right to recapture profits if employees were hired below these rates, and mandated the maintenance company follow all of its “suggestions.” Thus, the evidence established that Greyhound directly controlled the wages earned by the maintenance company’s employees.

In the years following the *Greyhound* decision, the Board continued to address joint employer issues by focusing primarily on whether two or more entities “share or codetermine”

¹⁵ 153 NLRB 1488 (1965).

¹⁶ *Id.*

essential employment terms based on the exercise of joint control that directly affects such matters in a manner that is not limited or routine.

1. The Board Never Found Joint-Employer Status Based on the Exercise of Indirect Control Alone

The *BFI* majority also claimed that in several post-*Greyhound* cases, the Board found joint-employer status based on the exercise of indirect control alone. But again, close review of those cases reveals that the Board has no established history of finding joint-employer status solely on the basis of indirect control.

In fact, the Board's post-*Greyhound* decisions were faithful to common law agency principles in that they typically required at least some evidence of direct control over a material term or condition of employment. For example, in *Sun-Maid Growers*, the Board found joint-employer status when contract electrical workers were assigned work by and supervised directly by Sun-Maid supervisors instead of by a supervisor from their employer-contracting company.¹⁷ While the Board noted that a putative employer need not "hover over the maintenance electricians, directing each turn of their screwdrivers and each connection that they made," the control exercised by Sun-Maid in this case was nonetheless significant and only loosely defined as "indirect." Similarly, in *Hamburg Industries, Inc.*, a company was considered a joint-employer because it "constantly check[ed] the performance of the [contract] workers and the quality of the work."¹⁸ It is difficult to construe "constant" supervision as anything other than direct control.

¹⁷ 239 NLRB 346 (1978). Importantly, the Board held that it would recognize Sun-Maid as a joint-employer so long as it "*exercised effective control over the working conditions.*" (emphasis added).

¹⁸ 193 NLRB 67 (1971).

In *Clayton B. Metcalf*, “the Board found significant indicia of control where a putative employer [a mine operator], although it ‘did not exercise direct supervisory authority over’ the workers [subcontractors] at issue, nonetheless” held “day-to-day responsibility for the overall operations” of the worksite and gave the subcontractors assignments in addition to those defined in the contract.¹⁹ In other words, the Board did not appear to consider indirect supervisory control sufficient and instead looked to other indicia of control to find joint-employer status.

Other cases that addressed the potential probative value of indirect control also included evidence of direct control as well. For example, in *Floyd Epperson*, the Board considered the fact that a putative joint-employer had indirect control over drivers’ wages and direct supervisory control over the drivers’ assignments.²⁰

In short, it is clear from these decisions the Board never espoused a “traditional” joint-employer test that is anything close to the sweeping test adopted in *BFI*.

2. The Board Never “Narrowed” The *Greyhound* Standard

The *BFI* majority is also inaccurate in stating that recent, post-1980 decisions by the Board “narrowed” the *Greyhound* standard. A review of those more recent Board decisions, which were expressly overruled by *BFI*, shows that the Board had not “narrowed” the *Greyhound* standard in any meaningful way, but instead simply expressed more clearly principles that were already reflected in *Greyhound* and its progeny.

The Board’s efforts to clarify its joint-employer standard began with the Reagan Board in the early 1980’s. In 1982, the U.S. Court of Appeals for the Third Circuit endorsed the *Greyhound* “codetermine or share” standard for determining if two or more statutory employers

¹⁹ 233 NLRB 642 (1976).

²⁰ 220 NLRB 23 (1973), *enfd.* 491 F.2d 1390 (6th Cir.1974).

are joint-employers.²¹ The Court noted that some Board decisions had confused the joint-employer test with the separate “single employer” doctrine used to determine whether nominally separate entities were in fact a single, integrated enterprise such that they were for labor law purposes truly one entity. The Court merely clarified that the single employer doctrine was not applicable in joint employer cases, where two *admittedly* separate firms contracting for services share some level of control over the employees of one of the firms. The Court noted that “the joint employer concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment.”²² In adopting the Board’s *Greyhound* standard as the correct standard in joint-employer cases, the Court stated:

We hold therefore that . . . where two or more employers *exert significant control* over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute ‘joint employers’ within the meaning of the NLRA.²³

Shortly after the Third Circuit’s 1984 ruling in *Browning-Ferris*, the Board issued a pair of decisions that clarified its existing standard. In *Lareco Transportation and Warehouse*, the Board restated its joint-employer rule as follows:

The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment . . . To establish joint employer status there must be a showing that the employer *meaningfully affects* matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction.²⁴

²¹ *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d. Cir. 1982), enfg. 259 NLRB 148 (1981).

²² *Id.* at 1123.

²³ *Id.* at 1124 (emphasis supplied).

²⁴ 269 NLRB 324, 325 (1984)(emphasis supplied).

The Board applied the standard to the facts before it to rule that Lareco was not the joint-employer of truck drivers supplied under a leasing contract with another company. The Board noted that while Lareco provided some supervision of the drivers, it was “of an extremely routine nature,” and that “[a]ll major problems relating to the employment relationship” were handled by the drivers’ employer. Although Lareco provided the drivers with vehicles, occasionally provided direction regarding driver performance, and established driver qualifications and safety regulations, the Board held these factors were inadequate to establish the level of control required to find joint-employer status.

The Board reached a similar decision in *TLI, Inc.*, another case involving the provision of leased truck drivers to another company. The Board ruled that the customer was not a joint-employer of TLI’s drivers because “the supervision and direction exercised by [the customer] on a day-to-day basis is both limited and routine, and considered with [its] lack of hiring, firing, and disciplinary authority, does not constitute sufficient control to support a joint-employer finding.”²⁵

The Board thereafter consistently applied the clarified standard articulated in *Lareco* and *TLI* for over thirty years. Those decisions established several clear-cut and easy to understand principles:

- (1) the “essential element” in the joint-employer analysis is whether a putative joint-employer’s control over employment matters is “direct and immediate;”²⁶

²⁵ *TLI, Inc.*, 271 NLRB 798 (1984).

²⁶ *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002); see also *Southern California Gas*, 302 NLRB 456 (1991) (building management company was not the joint-employer of workers supplied by a janitorial company—regardless of the fact that the building management company dictated the number of workers to be employed, communicated specific work assignments to the workers’ manager, and ultimately determined whether the cleaning tasks had been completed properly—because manager exercised no direct control besides communicating the job to the contractor and making sure contracted work was completed as requested).

(2) control, to be sufficiently indicative of joint-employer status, cannot merely be “limited and routine,”²⁷ and

(3) the Board should not “merely” rely on the existence of contractual provisions, but rather must look “to the actual practice of the parties;” in other words, retained or reserved but unexercised control is insufficient by itself to create joint-employer status.²⁸

The *BFI* majority describes these cases as a narrowing departure from the clearly-established *Greyhound* line of precedent. A close examination reveals, however, that these cases do not depart from *Greyhound*, but rather provide a more complete explanation as to how the Board had been applying *Greyhound* all along and, in doing so, define the kinds of control that would qualify as “sufficient” to support a finding of joint-employer status. The Board’s pre-*BFI* precedent, while not always as well-explained, remained consistent for decades and was faithful to Congress’ command that employer status under the Act must be established based on common law agency principles.

3. Prior to *BFI*, the Board Never Found Joint-Employer Status Based on Retained or Reserved Control Over Routine or Minor Matters

Relying on a number of cases following the *Greyhound* decision through the early 1980s, the *BFI* majority asserted that the Board had found joint-employer status based solely on retained or reserved control over routine or minor matters. But a close review of those cases shows that the Board never found retained or reserved control over routine or minor matters to be probative of joint-employer status. In *Mobil Oil Corp.*, the Board looked to the parties’ actual practice in

²⁷ *AM Property Holding Corp.*, 350 NLRB 998 (2007) (noting the Board generally has found supervision to be limited and routine where a supervisor’s instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work).

²⁸ *Id.* (“[T]he contractual provision giving AM the right to approve [contractor] hires, standing alone, is insufficient to show the existence of a joint-employer relationship”).

finding an oil platform operator the joint-employer of workers supplied by a contractor.²⁹ The Board considered the fact that the contractor's lead men were merely "conduits" between the operator and the laborers, and the contractors could not give their laborers any direction without "being given the say-so" of the operator. The operator often bypassed the lead men altogether and gave direct work instruction to the contract laborers. The operator also: regularly interviewed potential laborers and made hiring decisions; determined the classifications of those hired; prepared and posted work schedules; authorized overtime; approved promotions and vacations; and verified time slips. In view of the operator's actual exercise of direct control over its contract laborers, the Board found joint-employer status.

In *Ref. Chem. Co.*, the Board found that a company engaged in the manufacture, sale, and distribution of petrochemical products was the joint-employer of insulation maintenance service technicians supplied by a corporate contractor.³⁰ Record evidence established the manufacturing company had a practice of approving prospective maintenance service technicians' applications, determining the number of employees needed, and deciding who (if anyone) would be permitted to work overtime. In addition, the manufacturing company maintained "virtually complete control" over the maintenance service technicians as reflected in the day-to-day operations. In fact, the contractor had no authority to exercise discretion in the manner its employees' work was carried out under the contract. All work was performed on the manufacturing company's premises with its own equipment and machinery, and the maintenance service technicians' supervisor could not undertake any project without receiving a work order and specifications

²⁹ 219 NLRB 511 (1975). Interestingly, the Board claimed it "did not know" whether the operator was the joint-employer of a different group of employees because "no evidence was introduced regarding the manner in which [this other services contract] was actually implemented."

³⁰ 169 NLRB 376 (1968).

from the manufacturing company's central maintenance. The Board also found it probative that the manufacturing company owned nearly 50% of the contracting company's stock. As a result of these close financial ties and the "complete control" *exercised* by the manufacturing company, the NLRB found joint-employer status.

In another post-*Greyhound* case, *Harvey Aluminum, Inc.*, the Board determined that a plant owner was the joint-employer of the employees of the plant operator.³¹ The plant owner retained (and seemingly utilized) control over virtually every element of operation.³²

C. The Board's Prior Joint-Employer Standard Provided Businesses With Predictability and Stability in Their Business Relations and Petitioners' Proposed Rule Would Do The Same

In addition to being consistent with Congressional intent, the Board's long-standing pre-*BFI* requirement that control must be "direct and immediate" to establish joint-employer status, and that retained or reserved but unexercised control alone is not probative of such status, are concepts that were easy to comprehend and apply in practice. These benchmarks allowed businesses of all sizes to structure and enter into myriad business relationships – contractor-subcontractor; lessor-lessee; franchisor-franchisee; employer-staffing agency; and parent-subsubsidiary, to name a few – with confidence that they could operate free from the fear of being found a joint-employer, provided they followed the Board's guidance.

The "direct and immediate" requirement ensured that a putative employer must *actually be involved* in those matters most critical to the employment relationship, such as hiring, firing,

³¹ 147 NLRB 1287 (1964).

³² No Board case, prior to *Browning-Ferris Industries*, found that two or more entities were joint employers based exclusively on reserved or retained control over routine or minor matters. In fact, the only instances in which reserved or retained control supported a finding of joint employer status have been cases where extensive joint control was actually exercised (see the cases described in the text) or where the amount of control was absolute with the putative joint employer having near-complete power over the other entity or entities. See, e.g., *Jewel Tea Co.*, 162 NLRB 508 (1966); *Value Village*, 161 NLRB 603 (1966).

establishing wages, and directly and immediately supervising the workers and their work. In a practical sense, employers who do not exercise this level of control over the employees of a staffing firm, subcontractor or franchisee are not “meaningfully” affecting the terms and conditions of their employment. The Board’s prior precedent recognized this fact and did not subject companies to disputes or liability involving employees over which they exercised indirect or little control.

The Petitioners’ suggested proposed rule would reinstitute the Board’s “direct and immediate” control test as the benchmark of joint-employer status, and would prevent the Board from finding joint-employer status in situations involving retained or reserved control, or the exercise of indirect control alone – neither of which, on their own or jointly, square with the requirements of the Act.

At the same time, the Board’s recognition that the exercise of control that is merely “limited and routine” does not give rise to joint-employer status allowed businesses to maintain a reasonable degree of commercial oversight over issues such as brand integrity, corporate social responsibility, reputational protection, contractor efficiency, and overall product and service quality without risking liability for doing so. It is not unreasonable for a major franchisor, for example, to expect that its franchisees adhere to certain standards that preserve and maintain the status of the franchised brand. Preservation of such standards are what enable the franchised brand to succeed in the first place.

Further, it is reasonable and necessary for a business entity to require individuals performing work for it, especially on the entity’s property, to observe basic safety standards. Likewise, many large companies require that their supply chain partners adhere to certain corporate social responsibility principles such as fair and safe treatment of their employees,

compliance with labor laws, and the like. Additionally, it is reasonable and necessary for a healthcare facility to require individuals performing patient care functions to observe basic medical quality and safety. The Board's pre-*BFI* precedent recognized that maintenance of such standards alone should not turn a franchisor, or an entity with many third-party suppliers and contractors, into a joint-employer.

The Petitioners' proposed rule would eliminate the possibility that certain business models, such as the franchisor-franchisee relationship, would alone be indicative of joint-employer status without some additional evidence that the franchisor is actually exercising direct and immediate control over the essential terms and conditions of employment of the franchisee's employees. Virtually all franchises must exercise some level of control over the consistency and integrity of the franchised brand so that both parties – franchisor and franchisee – can reap the benefits of the brand. Indeed, the franchisor is legally required to maintain control over its brand in order to maintain the trademarks it has licensed to franchisees.³³ Prior to *BFI*, the Board avoided finding joint-employer status in most franchisor-franchisee relationships absent evidence of direct control.³⁴ But under *BFI*, if a franchisor retains and/or exercises control over the manner in which the franchisee sets up a store, how it prepares and markets its products, what tools or equipment it uses in the performance of the franchised business, and how the franchisee's employees operate the business, the Board may find it has retained or reserved sufficient indirect control over the employment terms of the franchisee's employees to be their joint-employer. Thus, franchisors may be exposing themselves to joint-employer liability simply

³³ See, e.g., *Barcamerica International USA Trust v. Tyfiled Importers, Inc.*, 289 F.3d 589, 596 (9th Cir. 2002)(“A trademark owner may grant a license and remain protected provided quality control of the goods and services maintained under the trademark by the licensee is maintained”).

³⁴ See, e.g., *Tilden, S.G., Inc.*, 172 NLRB 752 (1968)(franchisor not a joint-employer, despite franchise agreement dictating “many elements of the business relationship,” because franchisor did not exercise “direct control” over franchisee's labor relations).

by maintaining controls that are legally required in order to preserve the status of their trademarks under federal law. The proposed rule sensibly eliminates this possibility.

Additionally, numerous businesses maintain corporate social responsibility policies that promote a wide range of policy goals, including corporate accountability, environmental stewardship and human rights standards. Oftentimes, corporate social responsibility policies require business partners to adhere to a higher standard than the law requires (e.g., procuring food products from sustainable sources, or paying higher than the minimum wage, or providing a minimum number of sick and leave days to its employees). The maintenance of such policies alone, which clearly help to further the social good, should not subject such businesses to joint-employer liability. The proposed rule would eliminate the possibility that the existence of a corporate social responsibility will turn businesses into joint-employers.

D. Rulemaking Would Provide a More Participatory Process Than Adjudication For Addressing the Board’s Joint-Employer Standard

Although the Board does most of its policymaking through case adjudication, there is ample justification for the use of notice-and-comment rulemaking to define joint-employer status. For one thing, the rulemaking process will provide the regulated community with a broader opportunity to participate. The *BFI* decision brought substantial attention to the issue of joint-employer status and the impact it could have in a variety of settings. Inviting interested parties to file amicus briefs on these issues, while useful, does not provide nearly the volume and depth of feedback as the Board will receive during a rulemaking, particularly on an issue as important to the business community as this one. As noted in NLRB Chairman John Ring’s June 5, 2018 letter to Senators Warren, Gillibrand and Sanders, notice-and-comment rulemaking will

allow more businesses in these industries to weigh in and provide the Board with more comprehensive feedback on how its standards impact different business models.³⁵

A rulemaking process would also allow the Board fine-tune a rule within existing legal frameworks that would also permit the maintenance of publicly beneficial contracting standards. Instead of being constrained by the facts and issues presented in a specific case, a rulemaking will allow the Board to explain in detail the full scope of the rule and how it is to be followed. These are details that are not included in case decisions.

Additionally, as Chairman Ring's letter makes clear, regulations apply only prospectively, while case decisions can be applied retrospectively as well. The clarity of prospective-only application makes regulations a highly valuable tool for setting policy, and will also eliminate any conflicts of interest questions or suggestions of recusal as any new regulation will not benefit parties with currently existing cases.

In summary, a rulemaking on joint employer status would provide the regulated community with more predictability. The Board is often criticized for its frequent policy reversals, most of which tend to track the changes in its political composition. Almost all of these shifts have played out through case adjudications, which are naturally easier and quicker to implement. Agency rules, on the other hand, are the product of a much more exhaustive—and democratic—process, and they tend to yield more predictable results. This is precisely what the regulated business community enjoyed for decades under the Board's pre-*BFI* precedent, as well as what it has been calling on Congress to provide through actual legislation.³⁶ Short of

³⁵ Letter from National Labor Relations Board Chairman John Ring to Senators Elizabeth Warren, Kirsten Gillibrand, Bernard Sanders, June 5, 2018, available here: https://www.nlr.gov/sites/default/files/attachments/news-story/node-6695/nlr_chairman_provides_response_to_senators_regarding_joint_employer_inquiry.pdf

³⁶ See, e.g., H.R. 3441, 115th Cong. (2017-18) (“Save Local Business Act”); S. 2015, 114th Cong. (2015-16) (“Protecting Local Business Opportunity Act”).

Congressional action, rulemaking is the Board's best option for returning a measure of predictability to its precedent.

E. Notwithstanding a Rulemaking on Defining Joint Employer, the Board Can and Should Continue to Adjudicate Cases Involving Joint-Employer Issues

Petitioners also urge the Board to continue to decide pending cases involving joint-employer issues while any notice-and-comment rulemaking process is pending. Nothing prevents the Board from continuing to adjudicate cases even when those cases involve issues similar to those that may be addressed in a pending rulemaking.

It is a key function of the Board to resolve cases between specific parties as expeditiously as possible, in accordance with its traditional procedures. The parties to such cases are entitled to expeditious adjudications. Rulemaking is of an entirely different character, wherein the Board looks beyond the confines of a particular factual pattern in discrete cases involving particular parties, and instead involves the general public in a process that considers input on a much broader scale.

The rule eventually developed in a joint-employer rulemaking may, but need not, duplicate or be similar to what has been decided in case adjudications. That depends on the result of the public's input and the Board's analysis, guided by the requirements of law and sound policy choices.³⁷

³⁷ During the pendency of prior rulemakings involving representation case acute care hospital units and general representation case election processes, the Board continued to apply its existing rules pending the development of the new rules. See, e.g., *Tekweld Solutions, Inc.*, 361 NLRB No. 18, *3 n. 15 (Aug. 15, 2014); *St. Vincent Hospital and Health Center*, 285 NLRB 365, 366 (1987). However, these cases do not demand that the Board follow extant joint-employer law pending development of a joint-employer rule. In neither the Board's 1989 rulemaking on acute-care bargaining units, nor its more comprehensive rewrite of the representation case rules in 2014, was anyone suggesting that any of then-extant procedures were unlawful. Here, on the other hand, the Board is considering a rulemaking to replace a joint-employer standard precisely because, as demonstrated above, the extant standard is a radical departure from prior precedent and strays well beyond the congressional intent expressed in Taft-Hartley. The Board's obligation is to continue to apply the law *correctly* to the parties before it. If that obligation means overturning *BFI* through appropriate case adjudication during the pendency of any rulemaking on this issue, the Board can and should do so.

V. CONCLUSION

The proposed rule described above would return the determination of joint employer status to a standard that closely tracks the pre-*BFI* rule the Board followed for decades, re-establish a precedent that is faithful to the original intent of Congress in drafting the Taft-Hartley Act, and restore a measure of predictability and fairness to the Board's joint-employer precedent. Petitioners respectfully urge the Board to adopt the proposed rule and relieve the substantial regulatory burden created by *BFI*.

Respectfully submitted this 13th day of June, 2018.



Kristen Swearengin
Chair, The Coalition for a Democratic Workplace
c/o Associated Builders and Contractors
440 1st Street, NW, Suite 200
Washington, DC 20001
(202) 595-1505 – phone

Coalition to Save Local Business
c/o International Franchise Association
1900 K Street, NW, Suite 700
Washington, DC 20006
(202) 628-8000 – phone
(202) 628-0812 – fax

Associated Builders and Contractors
440 1st Street, NW, Suite 200
Washington, DC 20001
(202) 595-1505 – phone

American Hotel & Lodging Association
1250 Eye Street, NW, Suite 1100
Washington, DC 20005

(202) 289-3100 – phone
(202) 289-3199 – fax

Chamber of Commerce of the United States of America
1615 H Street, NW
Washington, DC 20062
(202) 659-6000 – phone

HR Policy Association
1100 Thirteenth Street, NW, Suite 850
Washington, DC 20005
(202) 789-8670 – phone

Independent Electrical Contractors
4401 Ford Avenue, Suite 1100
Alexandria, VA 22302
(703) 549-7351 – phone
(703) 549-7448 – fax

International Foodservice Distributors Association
1410 Spring Hill Road, Suite 210
McLean, VA 22102
(703) 532-9400 - phone

National Federation of Independent Business
1201 F St NW #200
Washington, DC 20004
(202) 554-9000

International Franchise Association
1900 K Street, NW, Suite 700
Washington, DC 20006
(202) 628-8000 – phone
(202) 628-0812 – fax

National Association of Manufacturers
733 10th Street NW, Suite 700
Washington, DC 20001
(202) 637-3000 – phone
(202) 637-3182 – fax

National Association of Wholesaler-Distributors
1325 G Street, NW, Suite 1000
Washington, DC 20005
(202)872-0885 – phone
(202) 785-0586 – fax

National Council of Chain Restaurants
1101 New York Avenue, NW
Washington, DC 20005
(202) 783-7971 – phone
(202) 737-2849 – fax

National Restaurant Association
2055 L Street, NW, Suite 700
Washington, DC 20036
(202) 331-5900 – phone

National Retail Federation
1101 New York Avenue, NW
Washington, DC 20005
(202) 783-7971 – phone
(202) 737-2849 – fax

Restaurant Law Center
2055 L Street, NW, Suite 700
Washington, DC 20036
(202) 331-5900 – phone

Retail Industry Leaders Association
1700 N. Moore Street, Suite 2250
Arlington, VA 22209
(703) 841-2300 – phone
(703) 841-1184 – fax