December 7, 2022

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

RE: Comments on National Labor Relations Board "Standard for Determining Joint-Employer Status," RIN 3142-AA21

Dear Ms. Rothschild:

I am an attorney with the Freedom Foundation, a former senior policy advisor at the U.S. Department of Labor, and a former attorney-advisor at the District of Columbia Public Employee Relations Board. The Freedom Foundation is a 501(c)(3) nonprofit organization founded in 1991 and based in Olympia, Washington, with offices in Texas, Oregon, California, Ohio, and Pennsylvania and staff around the country. The Freedom Foundation works to promote individual liberty, free enterprise, and limited, accountable government through public policy advocacy, public interest litigation, and public education. On behalf of the Freedom Foundation, I submit to the National Labor Relations Board (Board) the following comments regarding its proposed Standard for Determining Joint-Employer Status, 87 Fed. Reg. 57,641 (proposed Sept. 7, 2022) (to be codified at 29 C.F.R. pt. 103).

The Board states that it proposes to rescind the current rule on this subject, which it adopted in 2020, and replace it with a new rule that incorporates the standard it articulated in *Browning-Ferris Industries of California, Inc.*, 362 N.L.R.B. 1599 (2015) (*BFI*), and responds to the invitation to refine that standard that the U.S. Court of Appeals for the District of Columbia Circuit made in *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018), when the court remanded the case to the Board. 87 Fed. Reg. at 54,642. More specifically, the Board claims that proposed section 103.40(b) "incorporates the principle from *BFI* that 'the existence of a common-law employment relationship is necessary, but not sufficient, to find joint-employer status.'" 87 Fed. Reg. at 54,646 (quoting *BFI*, 362 N.L.R.B. at 1610). However, the Board has failed to incorporate that principle. The reason *BFI* said a common-law employment relationship is not sufficient to find joint-employer status is because that relationship was merely "the initial inquiry." 362 N.L.R.B. at 1600. "If this common-law employment relationship exists," the Board went on to say, "the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." *Id.*

But when it came to applying those two steps to the facts of *BFI*, the Board skipped the second step, 362 N.L.R.B. at 1616-18, and the court of appeals noticed. 911 F.3d at 1222. In remanding, the court advised, "We trust that, if the Board were again to find that Browning-Ferris is a joint employer . . . under the common law, it would not neglect to (i) apply the second half of

its announced test, (ii) explain which terms and conditions are 'essential' to permit 'meaningful collective bargaining,' and (iii) clarify what 'meaningful collective bargaining' entails and how it works in this setting." *Id.* at 1223. The proposed rule does none of those things. The Board drops "the second half of its announced test" entirely from proposed section 103.40, which provides only one step, as the Board acknowledges in a footnote. 87 Fed. Reg. at 54,645 n.26. Thus, contrary to its assertion, the Board has failed to respond to the court's invitation to refine its standard.

If the Board proceeds with the proposed rule, it should revise it to include the second step and, as the court instructed, explain which terms and conditions are "essential" to permit "meaningful collective bargaining," and clarify what "meaningful collective bargaining" entails and how it works. The excuse the Board gives for failing to do so is "that by focusing on whether a putative joint employer possesses the authority to control or exercises the power to control employees' essential terms and conditions of employment, any required bargaining under the new standard will necessarily be meaningful." *Id.* There is no reason to assume that is necessarily so as the Board has devised an unbounded definition of essential terms and conditions of employment, as will be discussed below.

The single step of the proposed joint-employer standard is set forth in proposed section 103.40(b), which provides, "For all purposes under the Act, two or more employers of the same particular employees are joint employers of those employees if the employers share or codetermine those matters governing employees' essential terms and conditions of employment." Proposed section 103.40(c) through (f) define and elaborate upon the terms of that standard.

Section 103.40(c) defines to "share or codetermine those matters governing employees' essential terms and conditions of employment" as "to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment." This definition conflicts with the terms of the standard it purports to define. It misstates what an employer shares or codetermines. The phrase in the standard is "share or codetermine *those matters governing* employees' essential terms and conditions of employment" rather than share or codetermine employees' essential terms and conditions of employment. "Matters" is plural; so is "terms and conditions." Yet the definition would deem the element of "matters governing employees' essential terms and conditions of employment" to be met by only one essential term or condition of employment. In so doing, the definition discards *BFI*'s holding that the extent of a putative joint employer's control is central to the inquiry. 362 N.L.R.B. at 1600.

Such a low standard is especially dangerous because the definition of essential terms and conditions of employment in section 103.40(d) is indeterminate and easily manipulable or, as the Board euphemistically describes it, broad and inclusive. *Id.* at 54,646-47 passim. The current rule says, "'Essential terms and conditions of employment' means wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction." 29 C.F.R. § 103.40(b). In contrast, proposed section 103.40(d) does not say what "essential terms and conditions" means; instead it says they "will generally include, but are not limited to" a somewhat longer list of terms and conditions. Combined with section 103.40(c), this means that a business could be held to be the employer of an independent contractor's employees if it possesses, but does not exercise, indirect

control over one unlisted term or condition of their employment. That is unjust, as an example given by the Board illustrates:

> Under the proposed rule, for example, evidence that a putative joint employer communicates work assignments and directives to another entity's managers or exercises ongoing oversight to ensure that job tasks are performed properly may demonstrate the type of indirect control over essential terms and conditions of employment that is necessary to establish a joint-employer relationship.

87 Fed. Reg. at 54,650. Evidence of that nature would almost always be present. Why would a business be indifferent to whether its independent contractor's job tasks are performed properly?

Proposed section 103.40(e) stresses that merely possessing control is sufficient. With little further guidance, that section and proposed section 103.40(f) incorporate "common-law agency principles" into the determinations of whether an employer possesses or exercises control over terms and conditions of employment and whether the control is material to the existence of an employment relationship. The Board asserts that "[b]y expressly grounding the joint-employer standard in the common law, the proposed rule would avoid repeating the errors the Board made beginning in the mid-1980s and incorporated again in the 2020 Rule" (*id.* at 54,645), a rule that it claims "wrongly depart[s] from the common law" (*id.* at 54,646) and is "contrary to the teachings of the common law." *Id.* at 54,650. In these and other appeals to "the common law," the Board indulges in the fiction that in these United States there is such a thing as "the common law." Justice Holmes's rejoinder to that fiction is often quoted but seldom quoted in full: "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact. It always is the law of some state. . . ." *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). A state court can identify the voice of the highest court of its state to have spoken on a question of common law. No such clarity would be available to the administrative law judges, board members, and reviewing courts deciding cases under proposed rule 103.40(a), (e), and (f). As the dissenting members point out, the proposed rule does not say which courts' decisions should be consulted. "Does a decision by a single court count," they ask, "even if most other courts disagree?" 87 Fed. Reg. at 54,656.

The problem is even larger than that. In addition to judicial decisions applying the common law, the Board looks for guidance on the issue of control from "secondary compendiums, reports, and restatements of these common law decisions, focusing 'first and foremost [on] the 'established' common-law definitions at the time Congress enacted the National Labor Relations Act in 1935 and the Taft-Hartley Amendments in 1947.'" *Id.* at 54,648 (quoting *Browning-Ferris v. NLRB*, 911 F.3d at 1209). Elsewhere the Board indicates that the ultimate authority is to be found in one or more of the Restatements of Agency. Parties, administrative law judges, the Board, and reviewing courts would have to scour all of these in any given case. The preamble's discussion of compliance costs does not account for this. Merely referring regulated parties to the common law and its sources adds nothing that is not already apparent from the caselaw and is far less helpful than the well-thought-out guidance regarding control found in section 103.40(c)(1)-(8) of the current rule. If the Board proceeds with the proposed rule, it should revise the proposed rule to incorporate section 103.40(c)(1)-(8) of the current rule.

Finally, I wish to add that proposed section 103.40(g) should be maintained in any final rule promulgated by the Board. Its assignment of the burden of proof is required by the Administrative Procedure Act. 5 U.S.C. § 556(d).

Cordially yours,

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