



Ms. Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570-0001

By electronic submission: <http://www.regulations.gov>

**RE: RIN 3142-AA21; Standard for Determining Joint-Employer Status
Notice of Proposed Rulemaking Comments of SHRM, the Society for Human Resources
Management**

Dear Ms. Rothschild:

[SHRM](#), the Society for Human Resource Management, is the foremost expert, convener, and thought leader on issues impacting today's evolving workplaces. With 318,000+ HR and business executive members in 165 countries, SHRM impacts the lives of more than 115 million workers and families globally. SHRM advocates for uniform and clear policies that ensure businesses and workers have clear guidance to comply with laws and regulations.

Clear standards for the employee-employer relationship are critical, as understanding the joint employment arrangement is at the core of human resource management. Our members utilize and administer a range of flexible staffing solutions, independent contractor arrangements, and other service contracts that raise complex questions about the responsibilities and liabilities of suppliers and users of these services. In today's evolving global and domestic economies, businesses require an array of practices to attract and retain the right talent to remain competitive. Our members urge that any final joint employer rule provides clarity for employers to predictably enter into and manage service arrangements without creating a joint employer relationship unbeknownst to employers and HR professionals, where such a relationship is not necessary for the scope of work.

Further, any final rule should expressly incorporate factors that are well established in the common law as not constituting forms of control relevant to a joint employer determination. SHRM supports a more uniform, clear, and certain standard which is readily identifiable and consistently applied, thereby limiting litigation and confusion for workers and employers alike.

With the contours of joint employment having been developed through recent litigation and rulemaking, the National Labor Relations Board ("NLRB" or "Board") should consider codifying those areas that should not be in serious dispute among stakeholders. In its *Browning-Ferris* decision, the D.C. Circuit directed the Board to erect the "legal scaffolding" to appropriately delineate relevant forms of common law control from control or influence over matters that have no bearing on whether a joint employer relationship exists. Indeed, without such "scaffolding," any final rule or its application presumably will not survive the scrutiny of the D.C. Circuit and other courts, and, therefore, may be vulnerable to legal challenges.

The following comments are submitted in accordance with the NLRB’s Notice of Proposed Rulemaking (NPRM) and request for comments regarding the Standard for Determining Joint-Employer Status. Fed. Reg. Vol 87, No. 172 (September 7, 2022) at 54641 et seq.

I. To establish any joint employer relationship, the quantum of relevant control must be substantial and significant.

The sufficient relevant evidence must show regular and continuous control -- not sporadic, isolated, or de minimis control. It is imperative for employers and workers that the creation of joint employment reflects the intentionality of the co-employers. Given the bargaining implications of other responsibilities and liabilities resulting from joint employment, the Board should not impose such an important relationship on the basis of inconsistent or minimal evidence. Indeed, such an evidentiary record would be categorically insufficient to establish a common-law employment relationship. Broadly, the factors that indicate the existence of an employer-employee relationship examine the level of control an employer exerts over a worker, whether an employer paid salaries, hired, fired, and had control over their daily employment activities. *Cf. Felder v. USTA*, 27 F.4th 834, 847(2d Cir. 2022) (“The joint employer doctrine does not require that an entity exert no control over who may or may not work at its facilities, only that it may not exert significant control without being subject to Title VII.”) (emphasis in original).

II. The following factors are well established in the common law as not constituting forms of control relevant to a joint employer determination.

In the *Browning-Ferris* litigation, the Board’s prior rulemaking exercise, and the common law make clear that there are various factors that are recognized as not constituting relevant evidence of joint employer status. Indeed, in the NPRM, the Board “invites commenters to address which ‘routine components of a company-to-company contract’ the Board should not consider relevant to the joint-employer analysis.” Federal Register, Vol. 87, No. 172 at 54651(September 7, 2022).

Along those lines, the Board should synthesize and incorporate into any final rule those considerations which the common law holds are not part of joint employer analysis, for example:

a. requirements going to the “objectives, basic ground rules, and expectations” of the service relationship, *e.g.*, ends, service goals, productivity standards, quality standards, timing of performance, location of performance, and deadlines. *See, e.g., Browning-Ferris v. NLRB*, 911 F.3d 1195, 1219-1220 (D.C. Cir. 2018).

b. compliance with colorable government standards, regulations, or legal requirements. *See, e.g., FedEx Home Delivery v. NLRB*, 563 F.3d 492, 501 (D.C. Cir. 2009) (finding “constraints imposed by ... government regulations do not determine the employment relationship”); *N. Am. Van Lines, Inc.*, 896 F.2d at 599 (“[E]mployer efforts to ensure the worker’s compliance with government regulations, even when those efforts restrict the means and manner of performance, do not weigh in favor of employee status.”)

c. monitoring and maintenance of brand standards. *See, e.g., Salazar v. McDonald's Corp.*, 944 F.3d 1024, 1032 (9th Cir. 2019).

d. monitoring service contract performance to ensure the contractor's employees are satisfying performance criteria. *See, e.g., FedEx Home Delivery*, 563 F.3d at 501 (D.C. Cir. 2009) (“Employer efforts to monitor, evaluate, and improve the results of ends of the worker’s performance do not make the worker an employee.”).

e. cost-plus service provider compensation arrangements. *See, e.g., Browning-Ferris*, 911 F.3d at 1220; *ICWU Local 483 v. NLRB*, 561 F.2d 253, 256-257 (D.C. Cir. 1977) (finding cost-plus arrangement did not embody “the type of control which would establish a joint employer relationship.”).

f. the ability to cancel a service contract, including at will. *See, e.g., N. Am. Van Lines, Inc. v. NLRB*, 896 F.2d 596, 598-599 (D.C. Cir. 1989); *Computer Associates Int’l, Inc.*, 324 NLRB 285, 286 (1987) (noting “legislative policies underlying Section 8(b) of the Act aimed at protecting the autonomy of employers in their selection of independent contractors with whom to do business.”).

g. establishing minimum qualifications, skill levels, backgrounds, and competencies for the contractor’s employees prior to their performance, *e.g.*, the contractor warranting employment eligibility verification, anti-harassment training, drug screens, background checks, safe driving records, and other forms of safety compliance. *See, e.g., N. Am. Van Lines, supra; Am. Fed’n of Gov’t Emps. v. Webb*, 580 F.2d 496, 505 (D.C. Cir. 1978).

h. the user and the service provider having an exclusive economic relationship. *See, e.g., Local 777, Democratic Union Org. Comm., Seafarers Int’l Union of N. Am. v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978), *reh’g denied*, 603 F.2d 898, 903 (D.C. Cir. 1979) (observing that in enacting the Taft-Hartley Act, Congress rejected the Supreme Court’s earlier approach of ignoring common law control concepts; but, instead, focusing on “economic forces,” *i.e.*, economic realities).

i. introductory orientation and training regarding the user’s premises and equipment. *See, e.g., NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 689-690 (1951) (“[T]hat the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other.”).

j. working conditions imposed by third-party requirements. *See, e.g., FedEx Home Delivery*, 563 F.2d at 501 (finding “constraints imposed by customer demands” not indicative of employer status).

k. bringing requests and problems to the service provider’s attention where the user does not control the final outcome. *See, e.g., Aurora Packing Co. v. NLRB*, 904 F.2d 73, 76 (D.C. Cir. 1990) (complaining to a service provider about its employee is not evidence of employment relationship).

l. control over the user’s own property, including adherence to safety standards and avoiding disruption of other operations, especially where the existence of an employment relationship is irrelevant to compliance. *See, e.g., Browning-Ferris Industries of California, Inc.*, 362 NLRB 1599, 1614 (2015)(finding irrelevant to joint employer analysis contract terms that aim “to control or protect [the employer’s] own property”).

m. the user is protecting its employees or visitors to the premises, *e.g.*, enforcing anti-harassment and safety protocols. (Some of these obligations overlap with the user’s general duties to adhere to legal/governmental standards. Others, while not mandated in such a manner, do not turn on a determination of employment status and so, are not probative. Rather, they are made equally applicable regardless of whether one is an employee, contractor, visitor, etc.).

III. A putative joint employer’s bargaining obligation cannot exceed the scope and extent of its sufficient relevant control.

Under any common law formulation and consistent with the Act, a putative joint employer’s bargaining obligation cannot exceed the scope and extent of its sufficient relevant control.

Thus:

a. Pursuant to the Act, collective bargaining only may be undertaken as to those employees within a “unit appropriate for such purposes.” 29 U.S.C. § 158(d). *See also Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 64 (1975) (finding Congress “confined the exercise of these powers to the context of a ‘unit appropriate for the purposes of collective bargaining,’ *i.e.*, a group of employees with a sufficient commonality of circumstances to ensure against the submergence of a minority with distinctively different interests in the terms and conditions of their employment.”). Thus, the process and outcome of collective bargaining cannot lawfully be imposed upon employees who have not chosen unionization. *See* 29 U.S.C. §§ 157, 158(a)(1)-(2), 158(b)(1), 159(a).

Consequently, any final rule should clarify that a joint employer does not have a bargaining obligation over any matter that is not capable of being divisible and limited to only those employees represented by the union. For example, in a functionally integrated operation where a union only represents some employees, the union cannot purport to bind other employees by proposing that the entire facility only operates during certain hours.

b. As the D.C. Circuit made clear in its *Browning-Ferris* decision, a “vital” step in assessing a joint employer’s obligations under the Act is properly determining “once control over the workers is found, who is exercising that control, when and how.” 911 F.3d 1195, 1215 (D.C. Cir. 2018). Along those lines, the NPRM correctly states that to be “consistent with [*Browning-Ferris*,]” the proposed rule would only require a putative joint employer to bargain over those essential terms and conditions of employment it possesses the authority to control or over which it exercises the power to control.” *See* Notice of Proposed Rulemaking, n. 26. It is important for the Board to recognize, however, that such control -- regardless of how it is delineated -- must be

consistent with the full text of the Act, judicial commands regarding its interpretation, as well as existing coherently with all of the Board’s other rules, policies, and protocols.

As the Supreme Court found in *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172-173 (1971):

‘[A]s a standard, the Board must comply . . . with the requirement that the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining.’ . . . The Board must also exercise care that the rights of employees under § 7 of the Act ‘to self-organization . . . [and] to bargain collectively through representatives of their own choosing’ are duly respected. In line with these standards, the Board regards as its primary concern in resolving unit issues ‘to group together only employees who have substantial mutual interests in wages, hours, and other conditions of employment.’ 15 NLRB Ann. Rep. 39 (1950). Such a mutuality of interest assures the coherence among employees necessary for efficient collective bargaining while preventing a functionally distinct minority group of employees from being submerged in an overly large unit. *See Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).’

See also NLRB v. Action Automotive, Inc., 469 U.S. 490, 494 (1985) (finding that “[a] cohesive [bargaining] unit -- one relatively free of conflicts of interest -- serves the Act's purpose of effective collective bargaining”) (*quoting Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165 (1941)); *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (finding the Act aims to “achiev[e] industrial peace by promoting stable collective-bargaining relationships”); *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) (“To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.”); NLRB Outline of Law and Procedure In Representation Cases (Section 12-210, Community of Interest), p. 142 (“When the interests of one group of petitioned-for employees are dissimilar from those of another group, a single unit is inappropriate.”).

Consistent with the foregoing and the Board’s due process obligations as an agency, in applying any final rule, the NLRB must make clear, based on substantial evidence findings, exactly which terms the joint employer has sufficient relevant control over such that a bargaining obligation is appropriate. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679, 684–686 (1981) (finding that employers must have the ability, consistent with the Act’s administration, to “reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice,” and a union likewise must be able to understand “the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board.”); Administrative Procedures Act, 5 U.S.C. §§ 551 *et seq* (prohibiting administrative agencies from acting arbitrarily and capriciously).

Accordingly:

(i) A proponent of a joint bargaining obligation must introduce sufficient relevant control evidence regarding each specific term for which it seeks such an obligation to allow the

Board -- on the basis of substantial evidence regarding relevance/sufficiency -- to impose such an obligation.

(ii) There must be sufficient relevant evidence of control over a proposed term in relation to a critical quantum of the bargaining unit to avoid undermining an appropriate community of interest. For example, if a putative joint employer only has co-control over benefits as to a few employees in a 1000-person bargaining unit, there is an insufficient community of interest to require the other enterprise to bargain over benefits. At all times, unit appropriateness must be consistent with the Act's requirement -- as reflected in Congressional intent -- that the Board foster stable collective bargaining. The introduction of a putative joint employer into a bargaining relationship requires a determination of unit appropriateness in relation to the subjects for which the Board seeks to find a bargaining obligation.

c. Consistent with the proposed rule's recognition that a putative joint employer only can be required to bargain over those matters as to which it has sufficient relevant control if the putative joint employer does not have at least co-control over all possible bargaining outcomes regarding an alleged "essential" subject -- as a single, primary employer would -- then it cannot have a bargaining obligation as to that subject. Under Section 8(d) of the Act, the Board is not empowered to directly or indirectly impose substantive outcomes upon collective bargaining. *See, e.g., PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 371 NLRB No. 141 *20-21 (2022) ("The system of collective bargaining that Congress has established 'is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. . . . And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.' *NLRB v. American National Insurance Co.*, 343 U.S. 395, 401-404 (1952) (internal footnotes omitted).") (emphasis supplied).

Put another way, an alleged "subject" of bargaining for a putative joint employer cannot exceed the scope of its control. For example, if a putative joint employer only has co-control over wages within a particular range, then it does not have control over the essential "subject" of "wages." Rather, it has control over something less than that. Accordingly, in this example, the Board cannot find joint employer status on the basis of alleged control over the essential subject of wages -- nor, if such status were found through other evidence, could it purport to impose a general bargaining obligation over "wages." That would be unsupported.

Moreover, the sufficient relevant evidence must show the type of control that aligns with future bargaining. In other words, if a putative joint employer exercised control in the past, but there is insufficient relevant evidence that it has such control at the time it would be required to bargain, *i.e.*, ongoing control over a subject, then *ipso facto* it cannot be ordered to bargain.

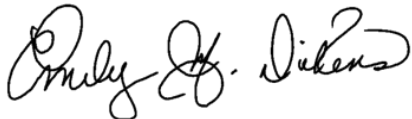
IV. Ending or modifying a joint employment relationship is entrepreneurial and not subject to decision bargaining

It is incumbent upon the Board to clarify how a joint employment relationship -- once found -- may be lawfully ended or modified. As businesses typically desire flexible and efficient services, changes in such a relationship should be capable of being made expeditiously.

The final rule should clarify that a decision to terminate or modify a joint employment relationship is an entrepreneurial decision between businesses; and, thus, not subject to decision bargaining. Further, any required effects of bargaining should be made capable of being undertaken on an expedited basis. If bargaining has not led to an agreement or a lawful impasse prior to the termination/modification decision being implemented, it should be appropriate to continue negotiations following the change. *See, e.g., First National Maintenance, supra* (holding entrepreneurial decisions not subject to decision bargaining); *Total Security Management Illinois*, 364 NLRB 1532 (2016) (giving notice and a reasonable opportunity to bargain, but not being required to reach an agreement or a lawful impasse prior to decision implementation, consistent with the Act).

SHRM appreciates the opportunity to comment on the Board's proposed joint employer rule. Clarifying the standard for joint employment status under the NLRA in the manner described above will provide greater predictability for HR professionals and business executives seeking to enter and administer contractor or service relationships, reduce litigation, and encourage innovation in the workplace and broader economy.

Sincerely,

A handwritten signature in cursive script that reads "Emily M. Dickens". The signature is written in black ink and is positioned above the typed name and title.

Emily M. Dickens
*Chief of Staff, Head of Public Affairs
& Corporate Secretary*