December 7, 2022

By Electronic Submission (**www.regulations.gov**)

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

RE: RIN 3142–AA21, Comments, *Standard for Determining Joint-Employer Status*, 29 CFR Part 103 (September 7, 2022)

Dear Ms. Rothschild:

On behalf of the International Foodservice Distributors Association ("IFDA") and our members, I appreciate the opportunity to provide our industry's perspective on the Notice of Proposed Rulemaking ("Proposed Rule") issued by the National Labor Relations Board ("Board") regarding the Standard for Determining Joint-Employer Status under 29 CFR Part 103, 87 Fed. Reg. 172 (September 7, 2022), which would revise the standard for determining whether two employers are "joint employers" of an employee under the National Labor Relations Act ("NLRA").

IFDA is the trade association representing foodservice distributors throughout the United States and internationally. IFDA members include broadline, systems, and specialty foodservice distributors who supply food and related products to professional kitchens from restaurants, military bases and other government installations, and colleges and universities, to hospitals and care facilities, hotels and resorts, and other foodservice operations. The foodservice distribution industry operates more than 15,000 distribution facilities that together account for more than $300 billion in annual sales in the United States alone.

Foodservice distributors, like most American businesses, use contracted services as part of their daily business activities. For example, some IFDA members use the services of "lumpers," or contract workers who load and unload trucks to distribute products to customers.

IFDA members may also use the services of contract workers in the transportation, security, sanitation, temporary staffing, and technical support industries. Although IFDA members may contract directly with outside workers, they typically contract with other companies to perform such services.

Given the frequency with which IFDA members contract with other entities to provide routine services, the standard for determining joint-employer status is significant to them. An overbroad and vague joint-employer standard would expose IFDA members to increased litigation risks and costs, bargaining obligations with unions representing other companies' employees, and joint and several liability for another entity's unfair labor practices.

The Proposed Rule provides that "two or more employers of the same particular employees are joint employers of those employees if the employers share or codetermine those matters governing employees' essential terms and conditions of employment."[1] The Proposed Rule further defines the terms "share and codetermine" and "essential terms and conditions of employment" broadly. Ultimately, in providing for joint-employer status based on indirect control or reserved but unexercised control over an unlimited list of activities, the Proposed Rule exceeds the bounds of common law and violates the NLRA. Further, in rejecting the Board's prior 2020 rulemaking ("2020 Rule") with little analysis or guidance for regulated parties, the Proposed Rule violates the Administrative Procedure Act ("APA"). IFDA submits that the Proposed Rule should be rescinded and the 2020 Rule should be left in place. Alternatively, if the Board declines to rescind the Proposed Rule, IFDA submits that the Board should, at the very least, revise and clarify the Proposed Rule.

I. The Proposed Rule Violates the NLRA

Under Section 2(2) of the NLRA, an "employer" is "any person acting as an agent of any employer, directly or indirectly."[2] The NLRA does not define the term "joint employer." However, courts have recognized that the Board "must color within the common-law lines identified by the judiciary" in developing its joint-employer standard.[3] Despite the Proposed

[1] Proposed Rule § 103.40(b), 87 Fed. Reg. at 54663.
[2] *See* 29 U.S.C. § 152(2) (2022).
[3] *See Sanitary Truck Drivers & Helpers Local 350, Int'l Bhd. of Teamsters v. NLRB*, 45 F.4th 38, 48 (D.C. Cir. 2022) (quoting *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1208 (D.C. Cir. 2018)); *see also NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 95 (1995).

Rule's contentions to the contrary, case law does not support the view that reserved control alone is evidence of a joint-employer relationship under the common law.[4] Notably, the Board has not cited any court precedent providing that reserved control alone establishes a joint-employer relationship, and IFDA is not aware of such precedent.

In 2015, the Board adopted a broad joint-employer standard in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*[5] ("*Browning-Ferris*"). The D.C. Circuit reviewed the *Browning-Ferris* decision and only upheld portions of it. Although the D.C. Circuit concluded that an unexercised right to control and indirect control may be probative of joint-employer status, it declined to decide whether an unexercised right to control could alone create a joint-employer relationship.

Further, the D.C. Circuit faulted the Board for approaching the concept of indirect control too broadly. Although the D.C. Circuit agreed that indirect control could be probative of a joint-employer relationship, the D.C. Circuit explained that the Board should consider indirect control in the context of essential terms and conditions of employment. The D.C. Circuit explained that the Board erred by "failing to distinguish evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting," noting that the Board "overshot the common law mark."[6] As the D.C. Circuit recognized, "[s]ome ... supervision is inherent in any joint undertaking, and does not make the contributing contractors employees," and "'global oversight' is a routine feature of independent contracts."[7]

In defining "essential terms and conditions of employment" to encompass an unlimited list of activities, the Proposed Rule ignores the D.C. Circuit's instructions and "oversh[oots] the common law mark" once again.[8] The Proposed Rule further ignores the D.C. Circuit's instructions to the Board to "color within the common-law lines"[9] by abandoning the one major limit that the *Browning-Ferris* standard placed on the joint-employer analysis: that an entity must exercise enough control to render collective bargaining meaningful. In abandoning the inquiry into whether collective bargaining would be meaningful, the Proposed Rule also contravenes the

[4] *See* 87 Fed. Reg. at 54656-57.
[5] 362 NLRB No. 186 (2015).
[6] *Browning-Ferris Indus. of Cal., Inc.*, 911 F.3d at 1216.
[7] *See id*. at 1220.
[8] *Id.* at 1216.
[9] *Id.* at 1208.

NLRA's goal of "promoting stable collective-bargaining relationships."[10] Indeed, the Proposed Rule would likely expose IFDA members to unstable collective bargaining relationships, given the fact that IFDA members routinely contract with various entities across industries.

II. The Proposed Rule Is Arbitrary and Capricious

Under the APA, an agency may not act arbitrarily and capriciously in enacting regulations. *See* 5 U.S.C. § 706(2)(A). Reviewing courts must hold arbitrary and capricious agency action unlawful and set it aside.[11] "The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained."[12]

First, the Proposed Rule is arbitrary and capricious because it replaces the 2020 Rule—and even the *Browning-Fe*rris standard—without meaningful analysis of why the prior standards were inadequate.[13] While the Board contends that the purpose of the Proposed Rule is to tie the joint-employer standard to the common law and provide guidance for regulated parties, the 2020 Rule already did so. Indeed, the Board cannot identify problems with the application of the 2020 Rule, as the Board never applied the 2020 Rule. Further, no intervening case law has altered the joint-employer standard since the Board enacted the 2020 Rule. The Proposed Rule also is arbitrary and capricious in abandoning the *Browning-Ferris* standard's requirement that an entity exercise enough control for collective bargaining to be meaningful without explanation. The Proposed Rule's circular response that bargaining under the Proposed Rule "will necessarily be meaningful"[14] is "quintessentially arbitrary and capricious."[15]

Second, the Proposed Rule is arbitrary and capricious because it fails to provide meaningful guidance to regulated parties[16] and thus does not "consider an important aspect of the problem" at issue in developing a joint-employer test.[17] In promulgating the 2020 Rule, the Board explained that it believed that measure would "foster predictability and consistency." *See*

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[10] *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996).
[11] *Texas v. Biden*, 20 F.4th 928, 988 (5th Cir. 2021) (quoting 5 U.S.C. § 706(2)(A)).
[12] *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).
[13] *California v. Bureau of Land Management*, 286 F. Supp. 3d 1054, 1065 (N.D. Cal. 2018).
[14] *See* 87 Fed. Reg. at 54645.
[15] *New York v. Dep't of Health & Human Servs.,* 414 F. Supp. 3d 475, 555 (S.D.N.Y. 2019).
[16] *Emplr. Solutions Staffing Grp., II, LLC v. Office of the Chief Admin. Hearing Officer*, 833 F.3d 480, 490 (5th Cir. 2016).
[17] *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 43 (1983); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020); *East Bay Sanctuary v. Garland*, 994 F.3d 962, 991 (9th Cir. 2021).

83 Fed. Reg. 46681. Although the Proposed Rule purports also to provide "a definite, readily available standard [that] will assist employers and labor organizations in complying with the [NLRA]" and "reduce uncertainty and litigation,"[18] this assertion is conclusory, as the Proposed Rule provides no illustrative examples (unlike the 2020 Rule), fails to provide an exhaustive list of terms and conditions of employment that are essential, and simply refers parties to the common law.

Finally, the Proposed Rule is arbitrary and capricious because it fails to meaningfully consider alternative approaches "within the ambit of existing [policy]," as the APA requires.[19] The Board admits in the Proposed Rule that it considered only two alternative approaches: taking no action and creating a small business exception.[20] Yet, an agency does not sufficiently consider alternatives by "consider[ing] only the binary choice of whether to retain or rescind a policy."[21] The Board's reasoning regarding the small business exception is similarly deficient. The Board's concerns with the small business exception appear mostly speculative. Moreover, it is unclear why the Board did not consider other alternatives beyond the small business exception, given that the Board appears convinced that a small business exception could not work practically and would not comport with the NLRA. Indeed, although IFDA does not support the *Browning-Ferris* joint-employer standard, an obvious alternative for the Board to consider would have been to codify a joint-employer standard like the *Browning-Ferris* standard with revisions in response to the D.C. Circuit's review.

III. At a Minimum, the Board Should Revise the Proposed Rule to Bring it Within the Bounds of the Common Law and Provide Meaningful Guidance to Regulated Parties

If the Board decides to move forward with the Proposed Rule, the Board, at a minimum, should revise the Proposed Rule to bring it within the bounds of the common law and provide guidance to regulated parties. To do this, we first suggest revising sections 103.40(c) and (e) to indicate that the power to control is not alone sufficient to establish joint-employer status. Next,

[18] *See* 87 Fed. Reg. at 54645
[19] *Regents of the Univ. of Cal.*, 140 S. Ct. at 1913; *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1139 (5th Cir. 2021).
[20] *See* 87 Fed. Reg. at 54662.
[21] *CWI v. Walsh*, 2022 U.S. Dist. LEXIS 68401, at *43 (E.D. Tex. Mar. 14, 2022).

we suggest clarifying section 103.40(d) to define which activities constitute "essential terms and conditions of employment" as an exhaustive list.

Finally, we suggest clarifying section 103.40(f) to include examples of routine company-to-company contract terms that *do not indicate* joint employer status. This list should include (but should not be limited to) complying—and ensuring that vendors, suppliers, and contractors comply—with legal requirements;[22] implementing safety-related policies for vendors, suppliers and contractors; establishing or maintaining product/service quality, branding, timing, reputational or other legitimate business standards; and implementing third-party delivery services.

IV. **Conclusion**

IFDA appreciates the opportunity to provide its views for consideration on this important matter. As indicated above, IFDA and its members strongly oppose the Proposed Rule as it stands. The 2020 Rule provided regulated parties with meaningful guidance as to what arrangements would create a joint-employer relationship and which would not. Given the frequency with which IFDA members contract with other companies to engage in regular business activities, such meaningful guidance is critical for IFDA members. IFDA urges the Board to reconsider and withdraw the Proposed Rule, or, at a minimum, revise and clarify the Proposed Rule.

Respectfully submitted,

Mala Parker

Mala Parker
Vice President, Government Relations

[22] IFDA members (and the companies with whom they contract) may have compliance obligations in areas such as transportation or food safety. *See Food Safet*y, IFDA, IFDA - Food Safety (ifdaonline.org) (last visited Oct. 31, 2022); *Transportation*, IFDA, IFDA - Transportation (ifdaonline.org) (last visited Oct. 31, 2022).