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December 6, 2022

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 the Retail Industry Leaders Association)

Dear Ms. Rothschild:

These comments are submitted on behalf of the Retail Industry Leaders Association ("RILA"), in accordance with the National Labor Relations Board's ("NLRB" or "Board") notice of proposed rulemaking 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.* ("proposed rule").

RILA is a trade association of retail companies. Our members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, more than 42 million American jobs and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad. They are concerned that the Board's proposed formulation of its joint-employer rule does not reflect the text of Section 8(d) of the Act and congressional intent regarding joint employment.

Further, RILA believes that any joint-employer rule should: (i) expressly delineate the boundaries of relevant common law control, as reflected in the common law; (ii) clarify that corporate social responsibility initiatives do not

constitute relevant control; and (iii) clarify key concepts regarding the administration of any new rule, *e.g.*, how to exit or change joint-employer relationships.

BACKGROUND

In preparing these comments, RILA consulted its Labor and Employment Committee, which includes representatives from RILA members who are professionals in the labor and employment field, and further discussed the issues at length with select member companies. We also conducted a survey of RILA members to obtain detailed information regarding the impact of the changes in NLRB's proposed new joint-employer rule.

Our research illuminated significant member company concern about the vague and expansive reach of the proposed new rule. Most notably, 43% of these retailers indicated that they expected to utilize fewer third-party providers or independent contractors if the proposed rule becomes law, thereby resulting in a substantial loss of jobs, damage to supply chains and a negative impact on the U.S. economy. These retailers indicated that they would be discouraged them from entering into contractor relationships for fear that such arrangements would be determined to constitute joint employment, despite the mutual intent of the provider and client.

COMMENTS

I. The Board's Proposed Joint Employer Rule Is Inconsistent With The Act's Statutory Language And Structure, Congressional Intent, Judicial Case Law, And The Common Law

As discussed below, the Board's proposed joint employer rule is inconsistent with the National Labor Relations Act's ("NLRA" or "Act") statutory language and structure, Congressional intent in enacting the Taft-Hartley amendments to the Act, judicial case law interpreting the Act, and the common law.

A. Fundamental Principles Of Statutory Construction Require That Joint Employment Be Defined Consistently Throughout The Act

The NLRA does not define the term "joint employer." Nor does it provide much guidance regarding the term "employer" since the statutory definition only seeks to explain that the word includes parties "acting as an agent of an employer, directly or indirectly," while excluding certain other parties not relevant here. 29 U.S.C. § 152(2).

As the Act provides only a single, unitary "employer" definition to cover all of its purposes, the Board's joint employer concepts must not contradict other provisions of the Act. The same definition must apply throughout the Act. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme.") (citations and internal quotations omitted).

The Board's proposed joint employer rule is inappropriate because it does not comport with all of the Act's designs, *e.g.*, including the protections against secondary boycotts Congress intended, and Congress' delineation in the Act's coverage between supervisor and non-supervisory employees.

Thus, for example, the need for a sufficient exercise of direct control beyond limited and routine activity is embodied in the "supervisor" definition which Taft-Hartley enacted in Section 2(11) of the NLRA: "any individual having the authority . . . to hire, transfer, [etc.] <u>if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature</u>, but requires the use of independent judgment." 29 U.S.C. § 152(11) (emphasis supplied).

Further, the potentially boundless scope of the proposed rule would wreak havoc with the NLRA's secondary boycott provisions in Section 8(b)(4)(ii)(B) [29 U.S.C. § 158(b)(4)(ii)(B)]. The Board cannot have a joint employer test which is premised upon a looser control formula than that underlying Section 8(b)(4)'s understanding of "an autonomous and unoffending" employer. Section 8(b)(4) also was enacted by Taft-Hartley (and enhanced by 1959's Landrum-Griffin amendments, Pub. L. 86-257), and its very purpose was to narrow those enterprises that would be found to possess the same primary employer status.

Accordingly, in *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 689–690 (1951), the Supreme Court recognized that "limited and routine"-type oversight emblematic of a contractor arrangement does not create a joint-employer relationship and thereby remove Section 8(b)(4)'s protections:

> [T]he fact that the contractor and subcontractor were engaged on the same construction project, and that 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. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.

(emphasis supplied).

Indeed, the D.C. Circuit in *Browning-Ferris* recognized that "limited and routine"-type oversight of a contractor is irrelevant to joint employer analysis under the Act. *See Browning-Ferris Industries of California v. NLRB*, 911 F.3d 1195, 1220 (D.C. Cir. 2018) (*quoting Denver Building Trades Council*). Nowhere in its opinion did the Court affirm or support the proposition that even "limited and routine" control -- of whatever type -- could establish a joint employer relationship.

For the Board in its proposed rule to "overrid[e]" the "well established" boundaries between businesses contracting over services "without clear language" in the NLRA is patently contrary to the statutory scheme.

We note further that the House passage of the PRO Act (*i.e.*, H.R.842 - Protecting the Right to Organize Act of 2021) underscores Congress' desire that it -- and not the Board -- be the arbiter of key concepts in the Act such as the definition of joint employment, and the scope of secondary boycott protection.

The PRO Act's text, *i.e.*, Section 101(a) would explicitly include a definition of "joint employer" in the Act where one never has existed. It also would eliminate the 75-year old protections against secondary boycotts contained in Section 8(b)(4) of

the Act. *See* Section 104(1)-(2). Significantly, the PRO Act has not been enacted into law.

Consistent with the Supreme Court's admonitions in *West Virginia, et al. v. EPA, et al.*, 597 US ____ (2022), the "economic and political significance" of the ambit of joint employment and secondary boycott doctrine compels the Board to "hesitate before concluding that Congress" meant to confer the authority for it to act where Congress itself has not done so. Indeed, recent actions by Congress confirm that it intends to be the decision maker on this issues. Unless and until there is any action by Congress on the definition of joint employer or a specific delegation of authority by Congress to the NLRB to establish such a definition, the current law remains unchanged. Any final joint employer rule must not undermine the direct control concepts understood by the Taft-Hartley Congress, and the broad protections against secondary boycotts which have been a central component of the Act since 1947.

B. Any Joint Employer Rule Cannot Impose Bargaining Obligations That Are Inconsistent With Sections 7, 8(a)(1), 8(a)(2), 8(b)(1), And 9(a) Of The Act

Likewise, any joint employer rule may not be inconsistent with Sections 7, 8(a)(1), 8(a)(2), 8(b)(1), and 9(a) of the Act by having employment terms imposed upon unrepresented statutory employees.

For example, in *Browning-Ferris*, while BFI's hours of operation were recognized as one of the "routine decisions that employers make when hiring third-party contractors and defining the terms of those contracts," 911 F.3d at 1219, and so not a cognizable control factor, it similarly cannot be an employment term for

which bargaining is required. Given the nature of the work BFI contracted for, *i.e.,* in support of its integrated operations, the hours during which the work is to be performed are not separable from when BFI has decided those operations will be conducted. Further, collective bargaining consistent with the Act only can be conducted in relation to those employees within the "unit appropriate for such purposes," and those terms 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).

Accordingly, to avoid a union from unlawfully binding the interests of any non-unit employees -- even more so if the union represents only a minority of any party's statutory employees at a workplace -- any final rule should provide that a joint employer cannot be required to bargain over any subject that is not divisible and limited to only the employees the union represents.

C. Consistent With The Act, An Alleged Joint Employer Must At Least Co-Control Wages And Hours To Be Required To Engage In Collective Bargaining

Further, any final rule should clarify that, consistent with Section 8(d) of the Act, a putative joint employer cannot be required to bargain where it does not, at least, co-control and have the capacity to negotiate "wages [and] hours" — the essential mandatory subjects explicitly referenced in the Act. 29 U.S.C. § 158(d). Absent that ability, any alleged control or co-control is too attenuated to support a bargaining obligation as Congress understood it.

Joint employer considerations address what, if any, entity other than an employee's primary employer -- which has plenary authority to establish (and

potentially negotiate over) all employment terms, unless co-control is ceded -- also should be deemed an employer with a bargaining duty.

As collective bargaining is described by the Act's text, a party must be capable of negotiating as to wages and hours "and" other terms and conditions — not "or." *Id.* ("For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment[.]") (emphasis supplied). Such a textual analysis reflects the Supreme Court's approach to interpreting the Act in *Epic Systems v. Lewis*, 584 U.S. ____, 138 S.Ct. 1612 (2018), which focuses on what Congress actually enumerated as the essential core of a legal obligation. *See also West Virginia, et al. v. EPA, et al.*, *supra* (cautioning as to the need for an agency to have "clear congressional authorization" for the authority it claims).

D. The Board's Proposed Joint Employer Definition Is Contrary To The Taft-Hartley Congress' Understanding Of The Common Law Which Undergirds The Act And Requires Employment Relationships To Be Grounded In Substantial Direct Control

In addressing the definition of an "employer" under the Wagner Act, the Supreme Court in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) observed that "traditional" common law employer status entails "[c]ontrol over 'physical conduct in the performance of the service'" and necessitates a "proximate legal relation of employee to the particular employer involved in the labor dispute[.]" 322 U.S. at 124, 128 (emphasis supplied).

Nonetheless, the *Hearst* Court declined to apply this common law test, and instead found that "newsboys" were employees rather than independent contractors under the Act because the Court believed the Act's definitions were given force "by underlying economic facts rather than technically and exclusively by previously established legal classifications." *Id.* at 129. Such "economic facts" [or "realities"] included a putative employer's economic "influences" over an independent contractor or its agents. *Id.* at 131.

Congress subsequently disagreed with the *Hearst* Court and repudiated *Hearst*'s "economic realities" analysis of the Act when Congress passed the Taft-Hartley Act amendments to the NLRA in 1947. Indeed, the House Committee Report accompanying Taft-Hartley emphasized:

> An '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 . . . . 'Employees' work for wages or salaries under direct supervision. . . . It must be presumed that when Congress passed the Labor Act, it intended words it used [such as 'employee'] to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. . . . It is inconceivable that Congress, when it passed the act, authorized the board to give to every word in the act whatever meaning it wished.

H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947) (emphasis supplied). *See also 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); *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167 (1971).

In RILA's view, the Board's current joint-employer rule appropriately reflects the statutory standard that Congress intended; the proposed rule clearly does not.

E. Consistent With The Taft-Hartley Amendments To The Act, Neither "Indirect" Nor "Reserved" Control Are Sufficient To Establish A Joint Employer Relationship

The Board's proposed rule would permit joint employer determinations based upon "indirect" and/or "reserved" control over key employment terms -- without the need for any substantial, direct, and immediate control over such terms. As noted, the Taft-Hartley Congress understood the Act's employer definition to require a sufficient quantum of direct control.

Moreover, the common law embodies the consensus of judge-made law. Nowhere in the Board majority's commentary to the proposed rule nor in the *Browning-Ferris* litigation has any judicial decision been identified in which "indirect" and/or "reserved" control were found sufficient themselves to establish a joint-employer relationship, or to do so in the absence of substantial direct control. In the absence of judicial consensus, such formulations cannot purport to control sufficient to establish a joint employer relationship.

Further, the Board should make clear that to the extent "indirect" or "reserved" control even are capable of being recognized as relevant but insufficient control factors, they must be understood as embodying a specific right to displace the contractor and directly control its employees -- not presumed economic influence over a business which retains actual and ultimate day-to-day control over its own agents. *See, e.g., Joint Council of Teamsters No. 42 v. NLRB*, 450 F.2d 1322, 1327

(D.C. Cir. 1971) (finding "reserved" control means that the putative employer has the right to displace the primary employer, *i.e.*, "may intervene in the control of an employee's performance").

II. Any Final Rule Must Reflect Judicial Constructions Of Common Law "Control" That Are Consistent With The Intent Of The Taft-Hartley Congress

Any final joint employer rule should reflect those judicial distillations of the common law of agency and employment that accord with the intent of the Taft-Hartley Congress.

A. Any Final Rule Should Explicitly Delineate Those Forms Of Control That Are Irrelevant To An NLRA Joint Employer Determination Under The Common Law

Thus, any final rule should be consistent with applicable case law and make clear that:

- regulating work flow because of business conditions, market forces, or customer demand is not "control" for purposes of establishing a joint employment relationship. *See, e.g., Aurora Packing Co. v. NLRB*, 904 F.2d 73, 75-76 (D.C. Cir. 1990) (finding if "the primary operator must slow down, curtail, or fundamentally change its own operation, that is actually no control at all.")

- maintenance of quality control and brand standards is not "control". *See e.g., Salazar v. McDonald's Corp.*, 944 F.3d 1024, 1032 (9th Cir. 2019).

- "[C]onstraints imposed by customer demands," including monitoring and assessment of whether the contractor's agents are satisfying service goals or agreed-upon performance criteria, is not "control." *See, e.g., FedEx Home Delivery v. NLRB*, 563 F.3d 492, 501 (D.C. Cir. 2009) ("'[W]here a company's control over an aspect of the workers' performance is motivated by a concern for customer service, that control does not suggest an employment relationship.' Employer efforts to monitor, evaluate, and improve the results of ends of the worker's performance do not make the worker an employee.'")(citation omitted). *See also Hychem Constructors, Inc.*, 169 NLRB 274, 276 n. 4 (1968) ("While a determination by the client to continue the business arrangement, because the price is favorable to him, might remotely

benefit the supplier's work force, the exercise of this right by the client would not establish an employment relationship between the client and the supplier's employees.").

- policing a service arrangement to ensure the client is appropriately charged, cost control initiatives, tracking contractor worker productivity, reviewing contractor records, and auditing contractor expenses -- including headcount and overtime -- is not "control." *See 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."); *Aurora Packing Co.*, 904 F.2d at 75 (concluding no employment relationship where butchers presented tally to putative employer indicating animals slaughtered); *FedEx*, 563 F.3d at 501; *N. Am. Van Lines, Inc. v. NLRB*, 896 F.2d 596, 598-599 (D.C. Cir. 1989); *Local 777,* 603 F.2d 862 at 873, 891, 899, 904.

- establishing minimum qualifications for a contractor's employees prior to their performance, including employment eligibility verification, drug screens, background checks, clean driving records and other forms of safety compliance, and other basic competencies is not "control." *See, e.g.*, *N. Am. Van Lines* and *Aurora Packing*, *supra; Lodge 1858, Am. Fed'n of Gov't Emps. v. Webb*, 580 F.2d 496, 505 (D.C. Cir. 1978).

- satisfying government regulations, legal standards, recognized standards of care, and efforts to otherwise avoid liability risk, is not "control." *See, e.g., FedEx*, 563 F.3d at 501 (finding "constrains 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.)"

- the ability to cancel a service contract, including at will, is not cognizable "control" over the contractor's employees. That a party might become displeased with performance cannot be a distinguishing feature of employment. *See N. Am. Van Lines, Inc.*, 896 F.2d at 598-599; *Local 777,* 603 F.2d 862, 873, 899, 904.[1]

[1] In contrast, in *Retro Environmental, Inc./Green Jobworks, LLC*, 365 NLRB No. 133 (2017), the Board erred in finding the following facts probative of joint employer status: conditions consistent with reducing premises liability ("safety training"); certifications compliant with government standards ("EPA AHERA certification"); that the contractor may "consult" with the client; that the client had the unexercised

Along similar lines, in its 2018 *Browning-Ferris* decision, the D.C. Circuit identified the following as examples of factors not constituting evidence of joint employer status. These factors likewise should be delineated in any final rule as irrelevant to such a finding:

- "those types of employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor" 911 F.3d at 1220
- "Browning-Ferris's and Leadpoint's use of a 'cost-plus contract,' a frequent feature of third-party contracting and sub-contracting relationships" *Id.*
- "routine contractual terms, such as a very generalized cap on contract costs, or an advance description of the tasks to be performed under the contract" *Id. See also Goodyear Tire & Rubber Co.*, 312 NLRB 674, 678 (1993) (finding cost-plus contract incorporating wage reimbursement not evidence of joint employment).
- "'[s]ome such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees'" *Id.* (citation omitted)
- "'global oversight' is a routine feature of independent contracts" *Id.* (citation omitted)
- "'co-operation and co-ordination,' [between a service recipient and a contractor's employees] without more" *Id.* at 1217 n. 12 (citation omitted)
- "the basic contours of a contracted-for service—such as requiring four lines' worth of sorters plus supporting screen cleaners and housekeepers—would not count under the common law" *Id.* at 1221.

The D.C. Circuit in *Browning-Ferris* charged the Board with providing concrete legal "scaffolding" regarding the boundaries and operation of any joint employer rule in real-world situations. 911 F.3d at 1220. Certainty and

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right to "request" a worker's removal; that the client "tracks employees' hours;" that the client "dictate[s] the number of workers to be supplied" [i.e., controls costs in a cost-plus arrangement]; and that the client "ensure[s prior to performance] that the workers supplied are adequately trained and qualified." *Id.* at *3-4, n.7.

predictability are virtues. Accordingly, any final rule must move beyond generalities and describe with particularity not only what may give rise to a joint employer relationship, but the type of evidence that patently does not.[2] And the common law contains numerous references to specific factors that the Taft-Hartley Congress understood to be irrelevant, and which otherwise have been found not to be probative.

B. For An Alleged Joint Employer To Have A Bargaining Obligation Over An Employment Term, There Must Be Sufficient Relevant Control Evidence In Relation To An Appropriate Bargaining Unit

The D.C. Circuit emphasized in its *Browning-Ferris* decision that a "vital" step in defining a joint employer's obligations under the Act is properly assessing "once control over the workers is found, who is exercising that control, when and how." 911 F.3d 1215 (emphasis supplied). Moreover, in its *Browning-Ferris* test, the Board asked "whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." 362 NLRB at 1600 (emphasis supplied). Although the Board majority in the NPRM proposes to depart from its earlier concept of "meaningful collective bargaining," it asserts 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

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[2] In the NPRM, the Board majority "agree[d]" with the D.C. Circuit that, at least, many of the factors we reference in our comments are not probative of joint employment. It is time for the Board to make that clear.

to control or over which it exercises the power to control." Federal Register, Vol. 87, No. 172 at 54645 n. 26 (September 7, 2022).

At bottom, under any valid joint employment test -- and however the key concepts are defined -- an alleged joint employer must have sufficient relevant common law control over each term to which the Board proposes to impose a bargaining obligation. Further, such control must be of a type and quantum to allow a putative joint employer to undertake what Sections 8(d) and 9(a) of the Act defines as "bargain[ing] collectively … in a unit appropriate for such purposes[.]" 29 U.S.C. §§ 158(d), 159(a). And for the Board to have engaged in "reasoned decisionmaking," *Allentown Mack Sales & Service, Inc. v. NLRB,* 522 U. S. 359, 374 (1998) (internal quotation marks omitted), in its present rulemaking exercise, the Board's construction of these concepts must be consistent with the statutory text, judicial commands regarding the text's interpretation, and its own policies, or a reasoned departure therefrom within the boundaries imposed upon it.

As the Supreme Court found in *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 64 (1975), "[i]n vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests. First, it 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. *See Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 171 (1971)."

Likewise, "'[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 serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent 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)." *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172-173 (1971). *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.") (citation omitted).

So the foregoing can be evaluated properly, in any application of any final rule, the Board must specify -- based upon substantial evidence -- precisely which terms the putative joint employer has sufficient relevant control over such that a bargaining obligation may be imposed. *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 discern "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 (APA), 5 U.S.C. §§ 551 *et seq* (prohibiting administrative agencies from acting arbitrarily and capriciously). *See also Browning-Ferris*, *supra*, 911 F.3d at 1222 (requiring Board to clarify "what 'meaningful collective bargaining" entails and how it works in this setting.'").

Further, if a putative joint employer does not have at least co-control over the full range of potential outcomes regarding an alleged "essential" subject, then it cannot have a bargaining obligation as to that subject. Consistent with 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).

Thus, a "subject" of bargaining for a putative joint employer must be coterminous with its extent of its sufficient relevant control over the matter. For example, if a putative joint employer only has control over a certain kind of bonus, it does not have control over the essential "subject" of "wages." Likewise, if the putative joint employer only has control over wages within a limited range, or only if wages are below a defined ceiling. In any order to bargain, the Board must define the "subjects" of bargaining with precision, and those subjects cannot exceed the established scope of the putative joint employer's control. If such control does not allow for completely flexible negotiating outcomes, then the "subject" has been improperly and overbroadly defined.

Additionally, the sufficient relevant control evidence must be future directed, *i.e.*, must show control that would exist at the time of any bargaining. For example,

if a putative joint employer had control over a discrete matter (*e.g.*, a particular directive as to an individual employee, the resolution of a discrete wage issue), but there is insufficient evidence that such control is ongoing, then it cannot supply the basis for a bargaining obligation.

Accordingly, summarizing the foregoing:

1. A proponent of a joint bargaining obligation must proffer sufficient relevant control evidence as to each employment term for which a bargaining obligation may be imposed.

2. Such evidence must establish that the putative joint employer has the requisite control over a proposed bargaining term as to a sufficient quantum of the bargaining unit so that the community of interest supporting the unit's appropriateness is not undermined.

3. Unit appropriateness must comport with Congress' intent regarding the Act's fostering of stable collective bargaining. For example, evidence of joint control over wages as to only a minority of the bargaining unit employees would undermine the unit's community of interest and bargaining stability.

4. Consistent with, the admonitions of the APA, *First National Maintenance*, and the D.C. Circuit's *Browning-Ferris* decision, the Board must specify precisely those subjects as to which a joint bargaining obligation is being imposed.

5. If a putative joint employer does not have at least co-control over the full range of potential outcomes regarding an alleged "essential" subject, then it cannot have a bargaining obligation as to that subject. A "subject" of joint employer bargaining *ipso facto* must be coterminous with the ambit of control or co-control.

6. Sufficient relevant control evidence must be future directed, *i.e.*, must show control that would exist at the time of any bargaining, and did not simply exist at some point prior to when negotiations would commence.

C. Any Final Rule Should Clarify That Corporate Social Responsibility ("CSR") and Environment, Social and Governance ("ESG") Initiatives Do Not Give Rise To A Joint Employer Finding

CSR and ESG initiatives, which typically include adopting ethical standards and business practices to be adhered to by suppliers and service

vendors, do not constitute "control" in a manner sufficient to give rise to a joint employer finding. Fostering CSR/ESG policies such as requiring vendor human rights compliance and fair labor practices, anticorruption, environmental compliance, other ethical business practices or supply chain transparency, should not be discouraged by putting a concerned customer/client at risk of joint employer status.

CSR/ESG initiatives should not create joint employer relationships under the Board's proposed rule because they do not involve the exercise of substantial relevant control over a vendor's employees. This is especially so where CSR/ESG initiatives overlap with applicable legal obligations, which the common law plainly excludes from the range of control relevant to a joint employer determination. *See, e.g.* Uyghur Forced Labor Prevention Act (2021), amending (19 U.S.C. § 1307), which potentially imposes strict liability on, *e.g.*, retailers whose supply chains utilize prohibited forced labor. In order to meets its legal obligations, a retailer will contractually impose requirements on suppliers and service providers not to use force labor. In doing so, retailers do not exercise substantial control reaching to the level of a joint employer relationship.

The issue for the vendor is whether it chooses to satisfy the customer/client's eligibility criteria to maintain a voluntary business relationship. But establishing basic standards is "fully compatible with the relationship between a company and an independent contractor." *N. Am. Van*

Lines, 869 F.2d at 599; *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 682 (9th Cir. 2009) (citation omitted) (finding code of conduct for suppliers did not establish "comprehensive and immediate level of 'day-to-day' authority over employment decisions").

Further, if a vendor changes its employment practices because it decides to conform to its customer/client's expectations, such adjustments at most are "[e]vidence of unequal bargaining power" at the business-to-business level which "d[oes] not establish control" over the vendor's employees. *FedEx*, 563 F.3d at 497. *See also id.* at 501 ("customer demands" do not constitute control).

Therefore, the final rule should reflect that imposing CSR/ESG requirements on third parties do not create a joint employer relationship with the third parties' employees.

D. The Board Should Adopt Interpretive Examples Consistent With The Clarifications Described Above

RILA supports the inclusion of interpretive examples as part of any final joint employer rule. Such examples provide stakeholders with practical guidance regarding the rule's application to real-world scenarios. The following examples are based upon the actual experiences of our retailer members.

1. As part of its process for determining which service providers are qualified to be considered for an engagement, Company requires interested contractors to certify that they are in compliance with wage standards developed by a non-governmental third-party organization. These standards provide for employee wages higher than local government requirements. Company has not exercised relevant control over putative contractors' terms and conditions of employment because contractors retain exclusive discretion to decide whether to seek Company's business and what to pay its own employees.

2. As part of a service contract between Company and Contractor, Company requires Contractor to certify that those of its employees who will be performing services for Company have passed drug tests and background checks meeting certain standards defined by Company. Company has not exercised relevant control over Contractor's employees' terms and conditions of employment because Contractor retains its discretion to decide whether to enter into the service contract. Further, any alleged control over Contractor's employees would be limited and routine; and, in certain circumstances, also may involve pre-employment considerations in relation to Contractor, and verifications occurring prior to Company's engagement of Contractor.

3. Company requires that Contractor's employees newly assigned to Company's premises undergo training conducted by Company regarding safe on-site operations, in an effort to ensure Contractor's legal compliance, reduce safety risks, and thereby reduce potential Company liability. Such training is similar to training given to similarly situated Company employees. Company has not exercised relevant control over Contractor's employees' terms and conditions of employment because such training: (1) is limited and routine; (2) is designed to satisfy Company's compliance with its own legal requirements or standards of care; and (3) does not turn on the distinction between employment and contractor relationships (*i.e.*, relates to premises liability, regardless of the employment status of the individual on the premises).

4. Company requires that Contractor's employees newly assigned to Company's premises undergo training conducted by Company regarding avoiding and reporting sexual harassment, in an effort to ensure Contractor's legal compliance, and thereby reduce potential Company liability. Such training is similar to training given to similarly situated Company employees. Company has not exercised relevant control over Contractor's employees' terms and conditions of employment because such training: (1) is limited and routine; (2) satisfies the Company's compliance with its own legal requirements or standards of care; and (3) does not turn on the distinction between employment and contractor relationships (*i.e.*, relates to workplace liability, regardless of the employment status of the individual on the premises).

5. Company requires that Contractor's employees newly assigned to Company's premises undergo orientation conducted by Company addressing the premises' workplace "culture" (*e.g.*, treating others with respect, being a desirable place to work, upholding high ethical standards, etc.) Such orientation is similar to that given to similarly situated Company employees. Company has not exercised relevant control over Contractor's employees' terms and conditions of employment because such orientation is limited and routine.

6. Company owns a retail store and leases a portion of its premises to Specialty Retailer/Service Provider which operates its own store or business

operations within Company's own retail location. Company decides what dates and times the premises will be open, as well as safety rules applicable to anyone working at the location. Company does not exercise relevant control over Specialty Retailer's/Service Provisor's employees' employment terms and conditions. Company does not determine the work schedules of individual Specialty Retailer or Service Provider employees, and the application of the safety rules does not turn on the employment status of a particular worker on the premises.

7. Retailer leases a portion of its store premises to Specialty Retailer/Service Provider. As part of the lease, Retailer requires Specialty Retailer/Service Provider to ensure that its employees maintain certain attire standards -- similar to that which Retailer requires its own employees to maintain -- consistent with what Retailer has established as desirable for attracting customers to the entire premises. Retailer does not exercise relevant control over Specialty Retailer's/Service Provider's employees because: (1) Specialty Retailer/Service Provider is exclusively responsible for enforcing the standards with regard to its own employees; (2) any purported control over employment terms is limited and routine; and (3) the working conditions at issue are sufficiently related to customer preferences.

8. Company audits records of Contractor's wage payments to its employees. Company is concerned about the risk of joint employer liability and wants to ensure Contractor's legal compliance. Company does not exercise relevant control over Contractor's employees. A client's monitoring and verifying a contractor's compliance with the law to reduce the client's own liability risk is not evidence of an employment relationship.

9. Company is concerned that Contractor's employees are not satisfying agreed-upon productivity standards. Company monitors Contractor's employees to ensure that such standards are met and requests that Contractor remove unproductive employees from the workplace. Company does not exercise relevant control over Contractor's employees. Monitoring contractor performance to ensure adherence to a service contract does not constitute such control. Requesting Contractor to remove an unsatisfactory performer from a contract does not reflect such control.

10. Company engages Contractor to perform services on its premises. In the course of walking through the facility, Company's supervisor notices Contractor's employee yelling at one of Company's employees. The supervisor tells Contractor's employee to stop, and later informs Contractor of what she witnessed. Later, Company's supervisor observes Contractor's employee undertaking an unsafe practice which puts both the worker and Company's property at risk. Company's supervisor tells Contractor's employee to stop and counsels him on the correct procedure. Company does not exercise relevant of Contractor's employee. Its

supervisor's counseling was limited and routine, and also did not affect employment terms. Moreover, Company's administration of its generally applicable workplace conduct standards to protect its own employees from immediate harm, and well as protection of its own property, does not establish a joint employer relationship.

11. Contractor's employee engage in conduct towards Company's undisputed employee that arguably constitutes sexual harassment or another violation of fair employment practices law. After investigating its employee's complaint, Company directs Contractor to remove its employee from Company's premises. Company's following its legal obligation to protect its employees from unlawful conduct does not constitute evidence of control relevant to a joint employer finding.

12. After evaluating the productivity of Contractor's employees, Company decides to make a bonus payment to Contractor for the agreed-upon purpose of permitting Contractor to reward its own high-performing employees. After reviewing the productivity data with Company, Contractor decides upon the bonus criteria and individual employee amounts. Company does not exercise relevant control over Contractor's employees.

13. Company requires Contractor's employees who work on its premises to wear unique colored vests so they can be identified as non-Company employees to distinguish them for supervision, safety and compensation purposes. Company does not exercise relevant control over Contractor's employees. Further, the vest requirement is a form of acceptable performance monitoring of a Contractor's employees.

14. Company has a policy prohibiting political or other messaging on uniforms or clothing worn on its premises -- either by its own employees, Contractor's employees, or others who come onto the Company's premises. (The prohibition excludes messaging protected by Section 7 of the Act). Because enforcement of this policy does not depend upon the employment status of Contractor's employees, it is not relevant evidence of joint employment.

15. Retailer contracts with drivers participating in third-party ride sharing technology platforms to deliver packages to customers ordering through those same technology platforms. Retailer's customers who are receiving the packages choose a range of times during which deliveries will be made. In its service agreements with the drivers, Retailer reserves the right to terminate the contract of any driver who does not satisfy Retailer's reliability standards. Company does not exercise relevant control over drivers. Company is monitoring and enforcing service goals and performance criteria that were agreed upon in the contract.

16. A single customer of a service provider constitutes a substantial portion of the provider's business. The fact of such economic dependency does not constitute evidence of control relevant to a joint employer finding.

III. Any Final Rule Should Explain Critical Aspects Of Its Operation

In addition to addressing the joint employer standard itself, any final rule should clarify basic aspects of how the rule operates and the bargaining implications of a joint employer finding including:

- Any Board joint employer bargaining order should expressly identify those subjects over which the putative joint employer must negotiate or co-negotiate. In the absence of a specific bargaining order, joint employers would be left to guess the boundaries of their respective responsibilities, leaving them unacceptably and unnecessarily at risk of an unfair labor practice.

- Any final rule should state that a joint employer is not required to bargain with the union over a decision to end an entire business-to-business service arrangement, and that any effects bargaining can be undertaken or completed following the cessation of the arrangement. Any final rule should recognize that an enterprise's decision to exit joint employer status is a "change in the scope and direction of the enterprise" for which decision bargaining is not required. *See First National Maintenance*, 452 U.S. at 677. Further, such decisions constitute routine aspects of a contractual relationship that are not relevant to joint employer considerations. Alternatively, if the Board were to conclude that decision bargaining is warranted in such circumstances, the Board should develop expedited bargaining principles in the spirit of *Total Security Management Illinois*, 364 NLRB 1532 (2016), *i.e.*, simply providing notice and a reasonable opportunity to bargain, but not being required to negotiate to agreement or impasse pre-implementation.

- Similarly, if a service provider and client found to be joint employers want to change <u>any aspect</u> of their ongoing business arrangement which has an effect on their respective control over employment terms (and therefore the scope of their respective bargaining responsibilities), they should not have to bargain with the union over the decision to do so. Rather, at most only effects bargaining should be required; and, if so, on an expedited basis. Such modifications of the contours of a service relationship are entrepreneurial in nature within the meaning of *First National Maintenance*. And as dealings between businesses, they should

not be the proper subject of a Section 8(a)(3) violation. *See Computer Associates*, 324 NLRB 285 (1997).

CONCLUSION

Thank you for the opportunity to submit comments on the NLRB's proposed rule. Please do not hesitate to contact me if RILA may of assistance as the Board considers this important matter.

Sincerely,

Evan Armstrong
Vice President, Government Affairs