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ATTORNEY GENERAL

DISTRICT OF COLUMBIA
KARL RACINE
ATTORNEY GENERAL

STATE OF NEW YORK
LETITIA JAMES
ATTORNEY GENERAL

COMMONWEALTH OF
PENNSYLVANIA
JOSH SHAPIRO
ATTORNEY GENERAL

December 7, 2022

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John F. Ring, Chairman
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

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

Re: Comment Supporting Notice of Proposed Rulemaking, *Standard for Determining Joint-Employer Status*, 87 Fed. Reg. 54,641 (Sep. 7, 2022) RIN 3142-AA21.

Dear Chairman Ring and Executive Secretary Rothschild:

We write on behalf of New York, the District of Columbia, California, Pennsylvania, Colorado, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, and Washington to support the proposed rulemaking by the National Labor Relations Board ("Board") relating to the determination of joint-employer status under the National Labor Relations Act ("NLRA"). The Board proposes to rescind the final rule entitled "Joint Employer Status Under the [NLRA]," which became effective on April 27, 2020 ("2020 Rule"). In its place, the Proposed Rule returns to the common law standard for determining joint-employer status within the meaning of the NLRA. *Standard for Determining Joint-Employer Status*, 87 Fed. Reg. 54,641 (Sept. 7, 2022) ("Proposed Rule").[1]

The enforcement experiences of the undersigned state Attorneys General ("State AGs") in protecting workers favor adoption of the Proposed Rule. The State AGs strongly support

[1] The State AGs submit this Comment specifically in support of the Proposed Rule's definition of joint-employment status *under the NLRA*. As joint-employment tests may differ by statute and state, the State AGs expressly are not commenting on any other joint-employment test under any other statute.

rescission of the 2020 Rule, and we request that the Board consider our prior comment opposing it.[2] We support adoption of the Proposed Rule because it returns the joint-employer standard to one based in the common law; it reaffirms that reserved control and indirect control over essential terms and conditions of employment must be considered in the joint-employer analysis.

In addition to being rooted in the common law, the Proposed Rule reflects contemporary employment relationships and is necessary to effectuate the purposes of the NLRA. The Proposed Rule ensures accountability. Companies that share responsibility and oversight for employment matters cannot evade responsibility by using an intermediary. The Proposed Rule also comports with the statutory purpose of the NLRA. It provides important clarification for enforcement; facilitates collective bargaining when chosen by workers; and provides clear standards for employees, employers, and labor organizations.

Accordingly, the State AGs urge the Board to move expeditiously to finalize the Proposed Rule.

I. The Undersigned State AGs Are Interested Parties with Expertise in Labor and Employment Issues

The State AGs have robust experience enforcing federal, state, and local laws that govern employment relationships in our states. We have worked to hold joint employers accountable for violations of numerous labor and employment laws on a range of issues, such as minimum wage, overtime, worker misclassification, and anti-discrimination. Thus, our enforcement expertise should meaningfully inform the Board's proposed rulemaking.

In today's economy, joint-employer relationships are common. Joint employment frequently involves workers who, while directly employed by a downstream subcontractor, ultimately perform work for the benefit of a larger upstream company. For example, corporations have trended toward outsourcing large subsets of their workforce, such as janitorial and security services.[3] In addition, the COVID-19 pandemic has resulted in staffing shortages in many sectors such as healthcare and logistics.[4] This in turn may increase demand for temporary workers, who are typically hired by downstream temporary staffing agencies (or similar "gig" economy platforms) and assigned to an upstream company.[5] Upstream companies may outsource whole

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[2] https://downloads.regulations.gov/NLRB-2018-0001-27519/attachment_1.pdf.

[3] *See generally* David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press 2014); *see also* Heidi Shierholz, *Strengthening Labor Standards and Institutions to Promote Wage Growth*, Policy Proposal, p.13 (Feb. 2018), http://www.hamiltonproject.org/assets/files/strengthening_labor_standards_shierholz_pp.pdf.

[4] *See, e.g.*, Steven Ross Johnson, *Staff Shortages Choking U.S. Health Care System*, U.S. News, July 28, 2022, https://www.usnews.com/news/health-news/articles/2022-07-28/staff-shortages-choking-u-s-health-care-system (noting that "health care employment remains below pre-pandemic levels, with the number of workers down by 1.1%, or 176,000, compared to February 2020, per the U.S. Bureau of Labor Statistics."); Madeleine Ngo & Ana Swanson, *The Biggest Kink in America's Supply Chain: Not Enough Truckers*, The New York Times, Nov. 9, 2021, https://www.nytimes.com/2021/11/09/us/politics/trucker-shortage-supply-chain.html ("A report released last month by the American Trucking Associations estimated that the industry is short 80,000 drivers, a record number, and one the association said could double by 2030 as more retire.").

[5] *See, e.g.*, Y. Tony Yang & Diane J. Mason, *Covid-19's Impact on Nursing Shortages, the Rise of Travel Nurses, and Price Gouging,* Health Affairs, Jan. 28, 2022, https://www.healthaffairs.org/do/10.1377/forefront.20220125.695159/ (discussing the shortage of nurses at hospitals

functions of their businesses to downstream companies in an attempt to cut costs. But these upstream companies often still reserve or exercise control over the downstream company's employees, whether directly or indirectly, and thus, must share liability for violations of those employees' rights under labor and employment laws.

In our enforcement work, we have found that joint-employer liability is critical to driving compliance with employment laws. Upstream companies generally exercise greater power to effect broader compliance, either through subcontractors or as a result of their influence and stature in the industry. Thus, holding upstream companies accountable as joint employers has pronounced compliance effects that reverberate throughout an industry.

The State AGs have applied this approach in bringing joint-employer enforcement actions across sectors, such as construction, the "gig" economy, janitorial, and temporary staffing industries. For example, the District of Columbia has applied this approach to enforcement of wage-and-hour laws in the construction sector, where subcontracting practices often create joint-employer relationships. By holding upstream construction companies responsible for downstream subcontractors' wage and hour violations, the District has secured compliance improvements across multiple entities in a contracting chain, creating an industry-wide compliance effect.[6] Joint-employer liability has also enabled the District to recover millions of dollars in worker restitution and civil penalties. These dollars are more readily and appropriately collectible against upstream entities, which possess more resources and influence; downstream subcontractors frequently operate on thin margins and present bankruptcy and solvency risks.[7]

Illinois' standard for identifying joint employers incorporates the common law principles promoted by the Proposed Rule. Under Illinois Department of Labor regulations, direct and indirect control, as well as the right to control, are probative of the existence of a joint employment relationship.[8] This rule allows Illinois to hold upstream companies accountable for wage violations that affect workers formally employed by subcontractors. Illinois has used joint-employer liability to hold upstream companies liable for violations of wage-and-hour and antidiscrimination laws, particularly in the construction and temporary staffing industries. The Office of the Illinois Attorney General ("ILOAG") has recovered unpaid overtime from an upstream contractor for construction workers who were formally employed by a downstream

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during the pandemic and the rise of travel nurses who are independent contractors placed by a staffing agency at hospitals).

[6] *E.g.*, Consent Order, *D.C. v. Dynamic Contracting, Inc.*, No. 2021 CA 003768 B (D.C. Super. Ct. Apr. 25, 2022) (recovering over $1M in worker restitution and penalties and requiring putative joint employers to implement compliance improvements relating to payroll certification, auditing, and reporting); Consent Order, *D.C. v. Power Design, Inc.*, No. 2018 CA 005598 B (D.C. Super. Ct. Jan. 22, 2022) (recovering over $2.75M in worker restitution and penalties and requiring putative joint employer to implement compliance improvements relating to compliance certification and reporting).

[7] *E.g., D.C. v. Arise Virtual Solutions, et al.*, No. 2022 CA 000247 B (D.C. Super. Ct.) (active wage-and-hour litigation against putative joint employers on behalf of gig workers hired to perform customer support services); *D.C. v. Jan-Pro Franchising Int'l, Inc.*, No. 2022 CA 003128 B (D.C. Super. Ct.) (active wage-and-hour litigation against putative joint employers on behalf of janitorial workers).

[8] The inquiry should consist of looking at the actual relationship between the employee and the employers, including the employers' ability to exercise control over the employee either directly or indirectly. Ill. Admin. Code tit. 56, § 210.115.

subcontractor,[9] and has recently filed a complaint against a construction company that used sham subcontractors to conceal numerous wage violations.[10] The ILOAG has also applied joint employment principles to obtain civil penalties from a manufacturer and its staffing company that engaged in systemic race discrimination.[11]

The Massachusetts Attorney General's Office ("MA AGO"), in recent years, has effectively resolved multiple large wage and hour matters by holding accountable an upstream company for violations occurring through a temporary employment agency.[12] For example, in 2017, the MA AGO, working jointly with the United States Department of Labor, settled a matter based in joint employer liability with Shield Packaging, Inc. of Dudley, MA.[13] As part of the settlement, the company admitted to hindering the MA AGO's investigation, and agreed to pay restitution and penalties totaling nearly $1 million, impacting 480 temporary workers in their warehouse packaging facility.

The Minnesota Attorney General has also applied this approach in cases where employers use multiple entities to pay employees and evade overtime laws. For example, Minnesota was able to recover approximately $132,000 in unpaid overtime wages and an equal amount in liquidated damages when a group of commonly-owned restaurants shared workers between the restaurants.[14] The Minnesota Attorney General has also used the joint-employer doctrine as a basis to investigate potential violations of law by multiple related entities and had that approach upheld by the Minnesota Supreme Court. *See Madison Equities v. Office of Attorney General*, 967 N.W.2d 667 (Minn. 2021).

We have learned from our enforcement work that the legal definition of a joint employer has a significant impact on States' abilities to protect employees. As the NLRA has federal preemptive effect, *see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959), the State AGs rely on the Board to protect the rights of private-sector workers in our states to unionize and engage in concerted activity. The State AGs thus have an interest in the Proposed Rule due to our concern for the organizing rights of our states' workers, as well as our expertise enforcing joint-employer standards under other employment laws.

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[9] Consent Decree, *Illinois v. Mino Automation USA, Inc.*, *et. al*, No. 2022CH08271 (Cir. Ct. Cook Cty. IL, Aug. 30 2022) (Contractor and subcontractor agreed to pay $170,000 and $145,000 respectively in unpaid overtime and penalties).

[10] Complaint, *Illinois v. Drive Construction, Inc., et al,* No. 2022CH08722 (Cir. Ct. Cook Cty. IL, Sept. 1 2022).

[11] Consent Decree, *Illinois v. Mistica Foods, Inc. et al,* No. 2021CH5258 (Cir. Ct. Cook Cty. IL, Oct. 25, 2021) (Staffing Company and client agreed to pay $180,000 and $270,000 in penalties as well as accept monitoring of their practices).

[12] *E.g.*, *In re Coliseum Companies, Inc.*, https://www.mass.gov/news/temp-company-owners-plead-guilty-to-wage-theft-intimidation-and-retaliation-against-warehouse-workers (settlement obtained by Massachusetts Attorney General requiring putative joint employer laundry company to pay $900,000 in restitution to workers procured through temporary staffing agency).

[13] *In re Shield Packaging, Inc.* (settlement obtained by Massachusetts Attorney General securing nearly $1 million in restitution and penalties to be paid by putative joint employer packaging company for minimum wage and overtime violations taking place through temporary employment agency).

[14] *E.g.*, Assurance of Discontinuance, *In the Matter of Biltwell Restaurant, LLC and related companies*, 62-cv-21-4154 (Minn. Dist. Ct.) (assurance of discontinuance summarizing Minnesota AGO investigation and resolution of overtime violations and nonpayment of final wages).

II. The State AGs Support the Board's Rescission of the 2020 Rule and Promulgation of the Proposed Rule

The 2020 Rule should be rescinded because it is not in accordance with law as required by the Administrative Procedure Act (APA).[15] The "Supreme Court and circuit precedent" dictate that the "test for joint-employer status [under the NLRA] is determined by the common law of agency." *Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195, 1206-07 (D.C. Cir. 2018) (citing *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968)); *see also NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 93-94 (1995) ("[W]hen Congress uses the term 'employee' in a statute that does not define the term, courts interpreting the statute…have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."). Under the common law of agency, the right-to-control a worker is a probative factor in determining joint-employer status—regardless of whether the right is exercised. *Browning-Ferris*, 911 F.3d at 1210-11 (citing precedents from the United States Supreme Court, state supreme courts, and the Second Restatement of Agency). As the D.C. Circuit observed in *Browning-Ferris*, "precedent is so clear on this point that Browning-Ferris [the appellant and putative joint employer] admitted at oral argument that the [NLRB] 'can consider' unexercised control as a relevant factor in the joint-employer determination." *Id.* at 1211.

However, the 2020 Rule contravenes this settled precedent. For example, the 2020 Rule provides that an entity's right-to-control a worker is irrelevant unless it reinforces the entity's "direct and immediate control." 29 C.F.R. § 103.40(a) ("Evidence of the entity's indirect control…[or] contractually reserved but never exercised authority…is probative of joint-employer status, *but only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control*.") (emphasis added). This is contrary to the common law of agency, which provides that right-to-control is an independently probative factor. Indeed, by cabining the right-to-control's relevance to only supplementing evidence of direct and immediate control, the 2020 Rule directly conflicts with *Browning-Ferris's* holding that the joint-employer test "is not woodenly confined to indicia of direct and immediate control." *Browning-Ferris*, 911 F.3d at 1209. The 2020 Rule is therefore contrary to law and improperly constrains the Board's ability to enforce the rights conferred by the NLRA against joint employers.

The State AGs therefore support the Board's rescission of the 2020 Rule and promulgation of the Proposed Rule. As discussed below, the Proposed Rule is consistent with the law and properly defines joint employment under the NLRA in accord with the common law of agency. The Proposed Rule will also provide clarity for workers, employers, and the public regarding the Board's test for joint-employment status.

III. The Proposed Rule Complies with the Administrative Procedure Act

The Proposed Rule satisfies the requirements of the APA, which allows a reviewing court to "hold unlawful and set aside" rulemaking that is "arbitrary, capricious…or otherwise not in

[15] Rulemaking under the APA is unlawful where it is "arbitrary, capricious…or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

accordance with law." 5 U.S.C. § 706(2)(A). The Board's Proposed Rule is "in accordance with law" as it is consistent with the NLRA, Supreme Court and circuit precedent, and the common law. And the Proposed Rule is neither arbitrary nor capricious because the Board "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

A. The Proposed Rule Is in Accordance with Law

The Proposed Rule is consistent with the statutory purposes of the NLRA and common-law principles of agency, which the Board must follow pursuant to Supreme Court precedent.

1. The Proposed Rule Is Consistent with the Statutory Purpose of the NLRA

In the nineteenth and early twentieth centuries, the American legal system displayed outright hostility toward the collective actions of labor.[16] Workers organizing for better wages and reduced working hours were viewed as engaging in a criminal conspiracy.[17] Despite the criminalization of collective action, workers continued organizing for better wages and working conditions in defiance of this legal framework, often facing repressive backlash from both business and the legal system.[18]

The view of collective action as being *per se* illegal softened over time, giving way to a jurisprudence that examined whether a union's objectives and means were lawful.[19] So long as the objectives of the association were lawful, courts would only examine whether the means employed to achieve them violated the law.[20] But this failed to establish clear, fair standards, and ultimately, it did little to improve workers' ability to form unions and collectively bargain.[21] Over time, sentiment continued to shift in favor of worker organizing, particularly in light of the widespread destitution wrought by the Great Depression.

In passing the NLRA in 1935 during the Great Depression, Congress declared it to be the "policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce…by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment." 29 U.S.C. § 151. The NLRA enshrined a set of rights for employees under Section 7, which includes the right to join or support labor organizations as well as the right "to engage in other concerted activities for the purpose of…mutual aid or

[16] Marion Crane & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. Irvine L. Rev. 561, 565-71 (2014).
[17] Morris D. Forkosch, *The Doctrine of Criminal Conspiracy and its Modern Application to Labor*, 40 Tex. L. Rev. 303, 316-20 (1962).
[18] William E. Forbath, *The Shaping of the American Labor Movement*, 102 Harv. L. Rev. 1109, 1214-15 (1989).
[19] Crane & Matheny, *supra* at 567-69.
[20] *Id*.
[21] *Id*. at 566.

protection." 29 U.S.C. § 157. Although Congress has since amended the NLRA, its fundamental policy commitment to protecting workers' right to bargain collectively remains unchanged.[22]

Congress delegated responsibility for administering the NLRA to the NLRB, intending for the NLRB's expertise to guide it in effectuating its purpose in an ever-changing economy. "[T]he primary function and responsibility of the Board…is that of applying the general provisions of the [NLRA] to the complexities of industrial life." *Browning-Ferris Indus. of Cal., Inc., d/b/a BFI Newby Island Recyclery* ("*BFI*"), 362 NLRB 1599, 1609 (2015) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979)) (internal quotations omitted).

As discussed above, today's economy has ushered in an age of new and complex business arrangements. Many companies attempt to shield themselves from liability while still maintaining control over operational standards. This maze of contracting relationships "creates an environment that is ripe for the violation of labor standards as the lines of responsibility for complying with standards become murkier."[23] The Board in *BFI* astutely observed, "[i]f the current joint-employer standard is narrower than statutorily necessary, and if joint-employment arrangements are increasing, the risk is increased that the Board is failing in what the Supreme Court has described as the Board's 'responsibility to adapt the [NLRA] to the changing patterns of industrial life.'" 362 NLRB at 1609 (quoting *NLRB v. J. Weingarten, Inc*., 420 U.S. 251, 266 (1975)).

The Proposed Rule creates a joint-employer standard that is consistent with the NLRA's purpose of protecting the right to engage in concerted activity.

2. The Proposed Rule Is Supported by Common-Law Agency Principles

The Proposed Rule restores fidelity to the common-law agency principles that the Supreme Court has determined are applicable in discerning whether an employment relationship exists under the NLRA. *See United Ins. Co. of Am.*, 390 U.S. at 256 (applying common-law agency test to distinguish between employee and independent contractor); *see also Town & Country Elec., Inc.*, 516 U.S. at 93-94 (stating that "when Congress uses the term 'employee' in a statute that does not define the term, courts interpreting the statute…have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine").

Under common-law principles, an employee is a worker who is "subject to the [employer's] control or *right to control*." Restatement (Second) of Agency § 220(1) (1958) (emphasis added). The notion that a putative employer's right to control a worker may give rise to an employment relationship has deep roots in the common law and has consistently underpinned all three Restatements of Agency. *See id*.; *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889) ("[T]he relation of master and servant exists whenever the employer *retains the right to direct* the manner in which the business shall be done, as well as the result to be

[22] Congress amended the NLRA in 1947 to acknowledge that "some labor organizations" as well as "some employers" engage in unfair practices and employees "also have the right to refrain from" collective bargaining. 29 U.S.C. §§ 151, 157. However, the amendments did not alter the NLRA's statutory purpose to protect the right to collectively bargain for workers who choose to do so.

[23] Shierholz, *supra* at 13.

accomplished.") (emphasis added) (citing *New Orleans, M & CR Co. v. Hanning*, 82 U.S. 649, 656-67 (1872)); Restatement of Agency § 2(1) (1933) ("A master…employs another to perform service in his affairs and who controls *or has the right to control*…the other in the performance of the service.") (emphasis added); Restatement (Third) of Agency § 7.07(3)(a) (2006) ("[A]n employee is an agent whose principal controls *or has the right to control* the manner and means of the agent's performance of work[.]") (emphasis added).[24] The right to control being a hallmark of an employment relationship is sensible; it recognizes the reality that most employers do not insist on micromanaging employees, but ultimately retain the right to control how those duties are carried out.

The common law also recognizes that a joint employer's control may be indirect, as illustrated by the "subservant" doctrine. Under the subservant doctrine, a principal is liable for the conduct of an agent's subagent where the principal retains general supervisory or disciplinary powers—even when the agent is primarily responsible for the subagent. Restatement (Second) of Agency § 5(2), cmts. e, f, and illus. 6; § 220(1), cmt. d; § 226, cmt. a (1958). As the D.C. Circuit said of the subservant doctrine, "there is no sound reason that the related joint-employer inquiry would give [indirect control] a cold shoulder" because "the subservant doctrine analogously governs arrangements in which an employee has, as simultaneous masters, both 'his immediate employer and [his immediate employer's] master.'" *Browning-Ferris*, 911 F.3d at 1218 (internal citation omitted). The subservant doctrine underscores that the common law does not examine the minutiae of day-to-day operations in determining employee status; rather, it looks to the level of control a putative employer has the *right* to exercise and whose bidding an agent ultimately does.

The Board's joint-employer standard for much of its history was widely approved of by federal courts and properly incorporates common-law agency principles. In *Boire v. Greyhound Corp.*, the Supreme Court upheld the Board's approach to the joint-employer inquiry. 376 U.S. 473, 476 (1964). The Court noted that the relevant question was "[w]hether Greyhound…possessed sufficient control over the work of the employees to qualify as a joint employer" which "is essentially a factual issue" for the Board to decide. *Id.* at 481. The Board had held that Greyhound was a joint employer even though the direct employer hired, paid, disciplined, transferred, promoted, and discharged the employees because Greyhound played a role in setting up work schedules, determining the number of employees needed to meet those schedules, and directing the employees' work. *Id.* at 475.

Later, the United States Court of Appeals for the Third Circuit agreed that "the Board chose the correct standard" to determine whether two employers were joint employers: "[W]here from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute 'joint employers' within the meaning of the NLRA." *NLRB v. Browning-Ferris Indus. of Pa., Inc.* ("*Browning-Ferris* (1982)"), 691 F.2d 1117, 1124 (3d Cir. 1982) (internal citations omitted). Notably, in affirming the Board's holding that a joint-employer relationship existed, the Third Circuit identified "the right to hire and fire" employees among evidence supporting the Board's holding, confirming the

[24] The State AGs agree with the Board that relevant sources of common-law agency principles include "primary articulations of these principles by common-law judges as well compendiums, reports, and restatements of common law decisions such as the *Restatement (Second) of Agency* (1958), and early court decisions addressing 'master-servant relations.'" 87 Fed. Reg. at 54,645.

relevance of the reserved right to control. *Id.* The court cited cases from six sister circuits and a long string of NLRB cases which had approved and applied this joint-employer standard. *Id.*

Just two years later in 1984, without acknowledging or explaining its departure from precedent, the Board stated a new and different joint-employer standard. In *Laerco Transportation*, the Board cited *Greyhound* and *Browning-Ferris* (1982) but added this additional requirement: "To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." 269 NLRB 324, 325 (1984). The Board referenced the "minimal and routine nature of Laerco supervision" and "the routine nature of the work assignments," and concluded that Laerco was not a joint employer. *Id*. at 326. In *TLI, Inc.*, the Board cited *Laerco* to find that "supervision and direction exercised by [the company] on a day-to-day basis is both limited and routine," supporting a finding that the company was not a joint employer. 271 NLRB 798, 799 (1984).

The Board's test was further distorted—and divorced from the common law—when the Board added a requirement that the control be "*direct and immediate*," noting that this was "[t]he essential element in this analysis." *Airborne Freight Co*., 338 NLRB 597, 597 n.1 (2002) (emphasis added). As the Board later observed in *BFI*, *Airborne Freight* cited only *TLI* for this proposition, "[b]ut the *TLI* Board did not use the phrase 'direct and immediate control,' let alone identify that concept as the 'essential element' in the Board's test." *BFI*, 362 NLRB at 1608 n.43. In fact, the Restatement explains that "the control or right to control needed to establish the relation of master and servant may be very attenuated." Restatement (Second) of Agency § 220 at cmt. d. That is, the Restatement specifically rejects the "direct and immediate" requirement manufactured by the Board in *Airborne Freight*.

In 2015, the Board overruled *TLI*, *Laerco*, and their progeny and restored the traditional common-law based standard for joint employment. *BFI*, 362 NLRB at 1613-14. In *BFI*, the Board rejected the additional requirements it had imposed in *TLI*, *Laerco*, and their progeny, holding that it would "no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a 'limited and routine' manner" to establish joint employment under the NLRA. *Id.* (internal citation omitted). The Board reaffirmed the common-law principle that reserved authority to control directly or indirectly the essential terms and conditions of employment would be relevant to the joint-employment inquiry.

The United States Court of Appeals for the D.C. Circuit's decision, affirming *BFI* in relevant part, provides further support for this position. *Browning-Ferris*, 911 F.3d 1195. There, the court held that "the right-to-control element of the Board's joint-employer standard has deep roots in the common law." *Id*. at 1199. The court also endorsed "indirect control" as being consistent with the common law. *Id*. at 1200. While it remanded due to the Board's application of the indirect control analysis, the court found that "the Board's right-to-control standard is an established aspect of the common law of agency." The Board had "correctly determined that the common-law inquiry is not woodenly confined to indicia of direct and immediate control; an employer's indirect control over employees can be a relevant consideration." *Id*. at 1209. Significantly, consideration of unexercised control to determine employer status was the common law rule at the time the NLRA was enacted, as well as when Taft-Hartley was enacted;

it remains the common law rule today. *Id.* at 1210. The court also noted that the common law has "never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship" and highlighted that the NLRA "itself expressly recognizes that agents acting 'indirectly' on behalf of an employer could also count as employers." *Id.* at 1216-17; 29 U.S.C. § 152(2) (providing that the term "employer" "includes any person acting as an agent of an employer, directly or indirectly"). Ultimately, the court concluded, "we uphold as fully consistent with the common law the Board's determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis." *Browning-Ferris*, 911 F.3d at 1222.

Abandoning the common-law agency principles adopted by the Board and affirmed by the D.C. Circuit, the 2020 Rule improperly followed *TLI* and *Laerco*'s lead in eschewing indirect and reserved control as indicia of a joint-employment relationship. *Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11,184, 11,235-36 (Feb. 26, 2020). Conversely, the Proposed Rule restores fidelity to the common-law agency principles applicable to the joint-employer analysis; it correctly permits consideration of indirect or reserved control over essential terms and conditions of employment.

The dissent claims that the Proposed Rule does not "articulate[] the common-law agency principles that appropriately bear on determining joint-employer status under the NLRA." 87 Fed. Reg. at 54,652. But these principles are repeated multiple times throughout the preamble; namely, the preamble highlights that (1) an entity or person is an employer when it controls or has the right to control the worker in the performance of the work, and (2) an employer cannot avoid liability through the use of an intermediary. The Board may wish to state even more explicitly in the final rule that these are the principles they mean to incorporate. Additionally, to provide further guidance, the State AGs suggest that the Board include real-world examples of reserved and indirect control over essential terms and conditions of employment in the preamble to the final rule.

3. The Dissent's View of the Common Law Is Unsupported

The dissent's characterization of the common law surrounding the joint-employer standard relies upon cases issued prior to *BFI* that drastically departed from the common law. As discussed above, the Board's 1984 decisions in *TLI* and *Laerco*—and their progeny—marked a radical departure from the longstanding joint-employer standard. Those decisions distorted the Board's test by adding the "direct and immediate" control requirement to the joint-employer analysis. These cases, to the extent they included these additional requirements, were overruled by *BFI* as contrary to the common law. *BFI*, 362 NLRB at 1613-14 (no longer requiring "that a joint employer not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority, and do so directly, immediately…."). The dissent concedes this point. However, the dissent's assertion that the D.C. Circuit "did not uphold [this] defining feature" of the *BFI* decision—namely, that indirect or reserved control can be sufficient to find a joint-employer relationship exists—is a misstatement. 87 Fed. Reg. at 54,653.

The dissent contends that the D.C. Circuit held that "the *BFI* Board had 'overshot the common-law mark' by failing to distinguish evidence of indirect control that bears on workers' essential terms and conditions of employment from evidence that simply documents the routine

parameters of company-to-company contracting." 87 Fed. Reg. at 54,652.[25] The dissent mischaracterizes this statement from *Browning-Ferris*; the court simply directed the Board to specify that the evidence considered must bear on the essential terms and conditions of employment. *Browning-Ferris*, 911 F.3d at 1216; 1219-20. In fact, the D.C. Circuit discussed, at length, how the common law consistently and broadly supported the Board's treatment of "unexercised control." *Id.* at 1209-11. Quite contrary to the dissent's mischaracterization, "[t]he Supreme Court has held that the reserved right to control certain aspects of the work underpins the common-law master-servant dynamic." *Id*. at 1210 (citing *Chicago, Rock Island & Pac. Ry. Co. v. Bond*, 240 U.S. 449 (1916)). The common law simply does not distinguish between exercised control and a reserved right to control essential terms and conditions of employment in determining whether an employment relationship exists.

The dissent also asserts that the majority improperly relies on "independent-contractor-or-employee" cases to support their proposed changes to the joint-employer standard. 87 Fed. Reg. at 54,657. As the D.C. Circuit explained, independent contractor cases "can still be instructive in the joint-employer inquiry" to the extent that they are demonstrative of the common law's view of employment relationships. *Browning-Ferris*, 911 F.3d at 1214-15. The dissent asserts that the court's discussion translates into support for a test requiring the actual exercise of control. This is a dizzying leap of logic. The court was simply discussing how the two inquiries are not precisely the same—one examines whether the worker exercises entrepreneurial control whereas the other takes as a given the worker is an employee of at least one employer and determines whether a second entity also employs the employee. The fundamental question that the common law asks in order to determine whether an employment relationship exists—which is also the fundamental question in a joint-employment inquiry—is whether the putative employer controls or has the *right* to control an employee's work. *See New Orleans, M & CR Co.*, 82 U.S. at 657; *Singer Mfg. Co.,*132 U.S. at 523; Restatement of Agency § 2 (1933); Restatement (Second) of Agency (1958) § 220(1); Restatement (Second) of Agency § 226 cmt. a; Restatement (Third) of Agency § 7.07(3)(a) (2006). Imposing a requirement that control must be direct and immediate in order to establish joint employment contravenes the common law, inhibits workers' ability to organize and collectively bargain, and is contrary to the NLRA's legislative purpose.[26]

Ultimately, the dissent's objections to the Proposed Rule are without foundation. The Proposed Rule is firmly grounded in the common law; it establishes the importance of reserved and indirect control over workers' essential terms and conditions of employment in determining whether a joint-employer relationship exists.

[25] The Board has invited comment on "which routine components of a company-to-company contract the Board should not consider relevant to the joint-employer analysis." 87 Fed. Reg. at 54,651 (internal quotes omitted). The State AGs acknowledge that there may be certain components appropriately deemed irrelevant but urge the Board to narrowly define such components and consider the NLRA's purposes and the increased fissuring of the workplace in determining which ones to deem irrelevant to joint-employer status.

[26] In light of the dissent's criticism, the Board may wish to more explicitly justify its reliance on cases addressing independent-contractor status in the preamble to the final rule.

B. The Board Has Provided a Sufficient Explanation for the Proposed Rule

1. The Proposed Rule Provides Certainty to the Public about the Joint-Employer Standard by Making It Consistent with The Common Law

By codifying a joint-employer standard based on the common law, the Proposed Rule will assist employers and labor organizations in understanding joint employers' bargaining obligations and potential unfair labor practice liability.

As discussed above, the 2020 Rule's formulation of the joint-employer standard was out of step with the common law. *See* 87 Fed. Reg. 54,645. Without citing any support, the Board's justification for the 2020 Rule was that "absent a requirement of proof of some 'direct and immediate' control to find a joint-employment relationship, it will be extremely difficult for the Board to accurately police the line between independent commercial contractors and genuine joint employers." 83 Fed. Reg. 46,681, 46,686. Yet, this formulation imposes requirements for establishing joint employment that find no support in the common law or its interpretation by reviewing courts. *See Browning-Ferris*, 911 F.3d at 1209; *see also Sanitary Truck Drivers & Helpers Local 350 v. NLRB*, 45 F.4th 38, 46-47 (D.C. Cir. 2022). Rescinding and replacing the 2020 Rule brings the Board's position back in harmony with the NLRA and restores the common-law joint-employer standard, which will in turn prevent confusion and unnecessary litigation to clarify competing standards.

The dissent argues that rather than providing certainty, the Proposed Rule will cause chaos by creating the need for case-by-case adjudication and eliminating detailed guidance. *See* 87 Fed. Reg. at 54,653, 54,655-58. However, whether or not the 2020 Rule provided "detailed guidance" is irrelevant because it was "out of step with the common law." *Sanitary Truck Drivers & Helpers Loc. 350*, 45 F.4th at 47. By contrast, the Proposed Rule delivers employers and labor organizations certainty that common law agency principles—which require consideration of reserved and indirect control in assessing joint-employer status—govern. Certainly, the Board acknowledges that the Proposed Rule will not do away with all litigation, as the joint-employer analysis is fact-intensive by nature. 87 Fed. Reg. at 54,645. But the State AGs agree with the Board that it will reduce uncertainty and litigation over the basic parameters of joint-employer status.

2. The Proposed Rule Provides Guidance Regarding the Relevance of Indirect Control

In *Browning-Ferris*, the D.C. Circuit agreed with the Board that indirect control was properly considered relevant to status as an employer but directed a reexamination of the analysis. 911 F.3d at 1219-20. The court noted that the Board needed to "erect some legal scaffolding that keeps the inquiry within traditional common-law bounds and recognizes that '[s]ome such supervision is inherent in any joint undertaking.'" *Id.* at 1220 (quoting *Radio City Music Hall Corp. v. United States*, 135 F.2d 715, 718 (2d Cir. 1943)).

The Proposed Rule responds to the D.C. Circuit's concerns by better defining the parameters of indirect control that are relevant to employer status. Specifically, it responds to the court's concerns that the Board had failed to differentiate between forms of indirect control that

were and were not relevant, and that there was no "blueprint" for what constituted indirect control. *Id.* The Proposed Rule requires that any control must be over "essential terms and conditions of employment." 87 Fed. Reg. at 54,663. "Essential terms and conditions of employment" expressly include, without being limited to, "wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance." *Id.* Any control falling outside of the common law or over a non-essential term and condition of employment is irrelevant. *Id.* The Proposed Rule is also explicit that control by an intermediary is sufficient. *Id.* Taken together, the Proposed Rule is clear: evidence of indirect control over a term and condition that is key to the employment relationship is part of the joint-employer analysis.

The dissent, however, views the Proposed Rule as akin to having no rule at all. In the dissent's understanding, the Board's non-exhaustive approach fails to define essential terms and conditions and skirts the second step of the *BFI* standard, which requires sufficient control. *Id.* at 54,655-58. On the contrary, the Proposed Rule accurately captures the common law and answers the D.C. Circuit's questions. *See id.* at 54,663. It fashions a flexible scheme that recognizes there will be cases on the fringes. *See id.* That by itself does not make the definition vague or unknowable. As recommended above, the State AGs believe that for further clarity and guidance, it would be helpful for the Board to include real-world examples of indirect control over essential terms and conditions of employment in the final rule's preamble.

3. Contrary to the Dissent's Assertion, a New Joint-Employer Rulemaking Is Warranted

The dissent faults the Board for issuing the Proposed Rule when no Board decisions applying the 2020 Rule have issued, and there is no new court precedent, no factual developments, or shifts in American workplaces postdating the 2020 Rule. 87 Fed. Reg. at 54,652. Yet, an agency only needs to demonstrate good reasons for its new policy. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Only in limited circumstances, such as when a policy change subverts reasonable reliance on the displaced regulation or the new policy relies on facts contradicting the prior policy, may a more detailed justification be required. *Id.* at 515-16. The dissent neither identifies examples of reliance upon the 2020 Rule nor contradictory facts.

The Board's proffered reasons fully establish a need for the Proposed Rule. The 2020 Rule was a significant departure from the common law and undermined the goals of the NLRA; it radically narrowed the scope of joint employment, rigidly requiring a joint employer to exercise substantial direct and immediate control over a worker's wages, benefits, hours of work, hiring, discharge, discipline, supervision, or direction. *See* 83 Fed. Reg. at 46,696-97. As the Board notes, the Proposed Rule restores the flexible common-law approach historically relied on by the Board and courts. *See* 87 Fed. Reg. at 54,644-45. It returns the focus of the joint-employer standard to both actual and the reserved right to control, either directly or indirectly, over "essential terms and conditions of employment," as long understood under the common law. *See id.* at 54,663.

IV. The State AGs' Response to Request for Comments Regarding "Essential Terms and Conditions of Employment" and Severability

Lastly, the State AGs comment on two additional topics—defining "essential terms and conditions of employment" and severability.

As noted above, the Board has proposed an inclusive approach to defining "essential terms and conditions of employment." The State AGs support this non-exhaustive approach. Given our collective labor enforcement experience, we agree that this flexibility is needed to ensure the joint-employer standard can encompass changing circumstances over time. The Board specifically seeks comment on whether the "proposed list of essential terms and conditions of employment [should] solely include those terms and conditions of employment that are referenced in the statute?" *Id.* at 54,647 n.46. The State AGs believe that it should not be so limited. Indeed, the statute itself refers to "other terms and conditions." 29 U.S.C. § 158(d).

The Board also invites comment on which specific terms and conditions of employment should generally be considered "essential." As noted in the Proposed Rule, "[t]he Board has found mandatory subjects of bargaining to include, *inter alia*, overtime pay; paid vacations; the provision of group health insurance plans; the scheduling of employee breaks; paid lunch periods; employee parking; grievance and arbitration procedures; work rules; employee dress codes; health and safety issues; and workplace meal prices." 87 Fed. Reg. at 54,647. The State AGs believe that it would be appropriate to include these subjects as essential terms and conditions of employment as well; if a putative employer controls or has the right to control (whether directly or indirectly or both) a mandatory subject of bargaining, that putative employer should be at the negotiating table to promote effective collective bargaining.

While the State AGs largely agree with the approach to "essential terms and conditions of employment" in the Proposed Rule, they diverge from the Board's preliminary view on one matter. The Board notes that "workplace health and safety likely constitutes an essential condition of employment in healthcare, mining, and construction industry workplaces" but "there may be other workplaces in which health and safety concerns are less acute." *Id.* at 54,647. The State AGs disagree. The COVID-19 pandemic has shown that workplace health and safety is an essential condition of all in-person employment.

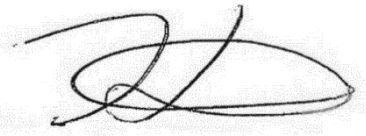
The Board has also specifically invited comment on its preliminary view regarding the severability of the provisions of the rule. *Id.* at 54,651. The State AGs generally support that the provisions be severable and agree that paragraphs (a), (b), and (c) could be severed as a group from the remaining provisions. However, paragraph (d) defining essential terms and conditions would be unnecessary if the other paragraphs using that term are stricken. Accordingly, the State AGs suggest further delineating which paragraphs are severable in the final rule.

V. Conclusion

We thank the Board for the opportunity to comment. The Proposed Rule accords with well-established common-law principles, better protects employees than the 2020 Rule does, and provides clear expectations to employers. For the foregoing reasons, the signatory State AGs urge the Board to swiftly adopt the Proposed Rule.

Sincerely,

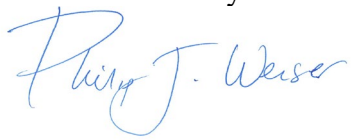
Letitia James
New York Attorney General



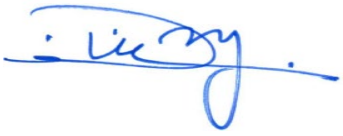
Karl A. Racine
Attorney General for the District of Columbia

Rob Bonta
California Attorney General

Josh Shapiro
Pennsylvania Attorney General



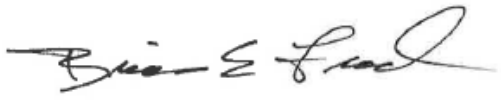
Philip J. Weiser
Colorado Attorney General



William Tong
Connecticut Attorney General

Kathleen Jennings
Delaware Attorney General

Kwame Raoul
Illinois Attorney General

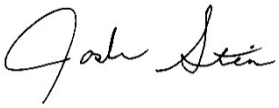


Brian E. Frosh
Maryland Attorney General

Maura Healy
Massachusetts Attorney General

Dana Nessel
Michigan Attorney General

Aaron D. Ford
Nevada Attorney General

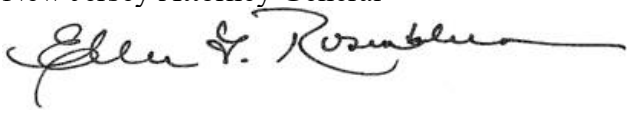


Joshua H. Stein
North Carolina Attorney General

Peter F. Neronha
Rhode Island Attorney General

Keith Ellison
Minnesota Attorney General

Matthew J. Platkin
New Jersey Attorney General



Ellen F. Rosenblum
Oregon Attorney General

Bob Ferguson
Washington State Attorney General