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Issued on August 31, 2022.

**Christina Underwood,**

*Acting Director, Compliance & Airworthiness Division, Aircraft Certification Service.*

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## COMMODITY FUTURES TRADING COMMISSION

RIN 3038-AF31

## SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

[Release No. IA-6083; File No. S7-22-22]

RIN 3235-AN13

### Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers

#### Correction

In proposed rule document 2022-17724 appearing on pages 53832-53985 in the issue of Thursday, September 1, 2022, make the following correction:

#### § 279.9 [Corrected]

On page 53900, in the second column, amendatory instruction 4 is corrected to read as set forth below:

#### § 279.9 Form PF, reporting by investment advisers to private funds.

4. Form PF [referenced in § 279.9] is revised to read as follows. The revised version of Form PF is attached as Appendix A.

**Note:** The text of Form PF does not, and the amendments will not, appear in the Code of Federal Regulations.

[FR Doc. C1-2022-17724 Filed 9-6-22; 8:45 am]

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## NATIONAL LABOR RELATIONS BOARD

29 CFR Part 103

RIN 3142-AA21

### Standard for Determining Joint-Employer Status

**AGENCY:** National Labor Relations Board.

**ACTION:** Notice of proposed rulemaking; request for comments.

**SUMMARY:** This notice of proposed rulemaking (NPRM) proposes to rescind and replace the final rule entitled “Joint Employer Status Under the National Labor Relations Act,” which was published on February 26, 2020 and took effect on April 27, 2020. The proposed rule would revise the standard for determining whether two employers, as defined in section 2(2) of the National Labor Relations Act (NLRA or Act), are joint employers of particular employees within the meaning of section 2(3) of the Act. The proposed changes are designed to explicitly ground the joint-employer standard in established common-law agency principles and provide relevant guidance to parties covered by the Act regarding their rights and responsibilities when more than one statutory employer possesses the authority to control or exercises the power to control particular employees’ essential terms and conditions of employment.

**DATES:** Comments regarding this proposed rule must be received by the National Labor Relations Board (NLRB or Board) on or before November 7, 2022. Comments replying to comments submitted during the initial comment period must be received by the Board on or before November 21, 2022. Reply comments should be limited to replying to comments previously filed by other parties. No late comments will be accepted. Requests for extensions of time will be granted only for good cause shown.

#### ADDRESSES:

**Internet**—Federal eRulemaking Portal. Electronic comments may be submitted through <http://www.regulations.gov>. Follow the instructions for submitting comments.

**Delivery**—Comments may be submitted by mail or hand delivery to: Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001.

For important information concerning the submission of comments and their treatment, see **SUPPLEMENTARY INFORMATION**.

#### FOR FURTHER INFORMATION CONTACT:

Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, (202) 273-1940 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

#### SUPPLEMENTARY INFORMATION:

##### I. Submission of Comments

Because of security precautions, the Board continues to experience delays in U.S. mail delivery. You should take this

into consideration when preparing to meet the deadline for submitting comments. It is not necessary to mail comments if they have been filed electronically with [regulations.gov](http://www.regulations.gov). If you mail comments, the Board recommends that you confirm receipt of your delivered comments by contacting (202) 273-1940 (this is not a toll-free number). Individuals with hearing impairments may call 1-866-315-6572 (TTY/TDD). Because of precautions in place due to COVID-19, the Board recommends that comments be submitted electronically or by mail rather than by hand delivery. If you feel you must hand deliver comments to the Board, hand delivery will be accepted by appointment only. Please call (202) 273-1940 to arrange for hand delivery of comments. Please note that there may be a delay in the electronic posting of hand-delivered and mail comments due to the needs for safe handling and manual scanning of the comments. The Board strongly encourages electronic filing over mail or hand delivery of comments.

Only comments submitted through <http://www.regulations.gov>, mailed or hand delivered per the procedure described above will be accepted; ex parte communications received by the Board will be made part of the rulemaking record and will be treated as comments only insofar as appropriate. Comments will be available for public inspection at <http://www.regulations.gov> and during normal business hours (8:30 a.m. to 5 p.m. EST) at the above address.

As soon as practicable, the Board will post all comments received on <http://www.regulations.gov>. The website <http://www.regulations.gov> is the Federal eRulemaking portal, and all comments posted there are available and accessible to the public. The Board requests that comments include full citations or internet links to any authority relied upon. If a comment cites a source that is not publicly available, the Board requests that the commenter submit a copy of that source along with its comment.

The Board will not make any changes to the comments, including any personal information provided therein. The Board cautions commenters not to include personal information such as Social Security numbers, personal addresses, telephone numbers, and email addresses in their comments, as such submitted information will become viewable by the public via the <http://www.regulations.gov> website. It is a commenter’s responsibility to safeguard their information. Comments submitted through <http://www.regulations.gov> will

not include the commenter's email address unless the commenter chooses to include that information as part of their comment.

## II. Background

As described more fully below, in 2015, the Board restored and clarified its traditional, common-law based standard for determining whether two employers, as defined in section 2(2) of the Act, are joint employers of particular employees within the meaning of section 2(3) of the Act. See *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015) (*BFI*). Consistent with established common-law agency principles, and rejecting prior limitations established without explanation, the Board announced that it would consider evidence of reserved and indirect control over employees' essential terms and conditions of employment when analyzing joint-employer status.

While *BFI* was pending on review before the United States Court of Appeals for the District of Columbia Circuit, and following a change in the Board's composition, the Board issued a notice of proposed rulemaking with the goal of establishing a joint-employer standard that departed in significant respects from *BFI*. During the comment period, the District of Columbia Circuit issued its decision in *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195, 1222 (D.C. Cir. 2018), upholding "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," and remanding the case to the Board to refine the new standard. Thereafter, the Board issued a final rule that again constrained the joint-employer standard. Because the Board believes, contrary to our dissenting colleagues and subject to comments, that the 2020 final rule (2020 Rule) repeats the errors that the Board corrected in *BFI*, it proposes to rescind that standard and replace it with a new rule that incorporates the *BFI* standard and responds to the District of Columbia Circuit's invitation for the Board to refine that standard in its 2018 decision on review.

### A. Statutory Background

Section 2(2) of the National Labor Relations Act defines an "employer" to include "any person acting as an agent of an employer, directly or indirectly." 29 U.S.C. 152(2) (emphasis added). In turn, the Act provides that the "term 'employee' shall include any employee,

and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise . . . ." Id. 152(3).

Section 7 of the Act provides that employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all such activities. 29 U.S.C. 157. Section 9(c) of the Act authorizes the Board to process a representation petition when employees wish to be represented for collective bargaining and their employer declines to recognize their representative. 29 U.S.C. 159(c). And section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. 29 U.S.C. 158(a)(5).

The Act does not specifically address situations in which statutory employees are employed jointly by two or more statutory employers (*i.e.*, it is silent as to the definition of "joint employer"), but, as discussed below, the Board, with court approval, has long applied common-law agency principles to determine when one or more entities share or codetermine the essential terms and conditions of employment of a particular group of employees.

### B. The Development of Joint-Employer Law Under the National Labor Relations Act

In *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964), a representation case involving the relationship between a company operating a bus terminal and its cleaning contractor, the Supreme Court explained that the question of whether Greyhound "possessed sufficient control over the work of the employees to qualify as a joint employer" was "essentially a factual question" for the Board to determine.<sup>1</sup> The Board's subsequent decision in *Greyhound Corp.*, 153 NLRB 1488 (1965), *enfd.* 368 F.2d 776 (5th Cir. 1966), completed that task. Specifically, the Board found, and the Fifth Circuit affirmed, that Greyhound and the cleaning contractor were joint employers of the employees at issue

<sup>1</sup> *Boire v. Greyhound Corp.* did not directly pass upon the test for joint-employer status. The Supreme Court's primary holding in that case was that the courts lacked subject-matter jurisdiction to enjoin the Board from making a joint-employer determination under *Leedom v. Kyne*, 358 U.S. 154 (1958). Thus, following the Supreme Court's decision, the Board was able to resolve the merits of the joint-employer question, subject to the statutory judicial review process.

because they "share[d], or codetermine[d], those matters governing essential terms and conditions of employment." *Greyhound Corp.*, 153 NLRB at 1495.

For nearly two decades after *Greyhound*, the Board treated the right to control employees' work and their terms and conditions of employment as determinative in the joint-employer analysis. During this period, the Board's joint-employer analysis generally did not turn on whether both putative joint employers actually or directly exercised control. In cases involving reserved control, the Board found it probative when a putative joint employer retained the contractual power to reject or terminate workers,<sup>2</sup> establish or approve wage rates,<sup>3</sup> set working hours and schedules,<sup>4</sup> approve overtime,<sup>5</sup> dictate the number of workers to be supplied,<sup>6</sup> determine "the manner and method of work performance,"<sup>7</sup> "inspect and approve work,"<sup>8</sup> and terminate the contractual agreement itself at will.<sup>9</sup> Reviewing courts endorsed the Board's consideration of reserved control as probative in the joint-employer analysis.<sup>10</sup>

Similarly, the Board found a putative joint employer's indirect exercise of control over employees' essential terms and conditions of employment probative in the joint-employer analysis during this period.<sup>11</sup> The Board found evidence of joint-employer status where a putative joint employer inspected another firm's employees' work, communicated work directives through the other firm's supervisors, and exercised the power to open and close the facility based on production

<sup>2</sup> See *Lowery Trucking Co.*, 177 NLRB 13, 15 (1969), *enfd.* sub nom. *Ace-Alkire Freight Lines v. NLRB*, 431 F.2d 280 (8th Cir. 1970) (observing that "[w]hile [putative employer] never rejected a driver hired by [supplier], it had the right to do so"); *Ref-Chem Co.*, 169 NLRB 376, 379 (1968), *enf. denied* on other grounds 418 F.2d 127 (5th Cir. 1969); *Jewel Tea Co.*, 162 NLRB 508, 510 (1966).

<sup>3</sup> See *Ref-Chem Co.*, *supra*, 169 NLRB at 379; *Harvey Aluminum*, 147 NLRB 1287, 1289 (1964).

<sup>4</sup> See *Jewel Tea*, *supra*, 162 NLRB at 510; *Mobil Oil Corp.*, 219 NLRB 511, 516 (1975), *enf. denied* on other grounds sub nom. *Alaska Roughnecks and Drillers Assn. v. NLRB*, 555 F.2d 732 (9th Cir. 1977).

<sup>5</sup> *Ref-Chem Co. v. NLRB*, *supra*, 418 F.2d at 129.

<sup>6</sup> *Harvey Aluminum*, *supra*, 147 NLRB at 1289; *Mobil Oil*, *supra*, 219 NLRB at 516.

<sup>7</sup> *Value Village*, 161 NLRB 603, 607 (1966).

<sup>8</sup> *Ref-Chem Co. v. NLRB*, *supra*, 418 F.2d at 129.

<sup>9</sup> *Value Village*, *supra*, 161 NLRB at 607; *Mobil Oil*, *supra*, 219 NLRB at 516.

<sup>10</sup> See *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985); *International Chemical Workers Union Local 483 v. NLRB*, 561 F.2d 253, 255 (D.C. Cir. 1977); *Ace-Alkire Freight Lines v. NLRB*, *supra*, 431 F.2d at 282; *Ref-Chem Co. v. NLRB*, *supra*, 418 F.2d at 129.

<sup>11</sup> See *Floyd Epperson*, 202 NLRB 23, 23 (1973), *enfd.* 491 F.2d 1390 (6th Cir. 1974).

needs.<sup>12</sup> The Board also found evidence of joint-employer status where a putative joint employer held “day-to-day responsibility for the overall operations” at a facility and determined the nature of work assignments, even though that entity “did not exercise direct supervisory authority” over the employees.<sup>13</sup> And, the Board assigned weight to evidence showing that a putative joint employer wielded indirect control over wages through a variety of contractual arrangements.<sup>14</sup>

In 1981, the Third Circuit endorsed the Board’s “share or codetermine” formulation of the joint-employer standard. *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982), enfg. 259 NLRB 148 (1981). Although subsequent Board decisions cited the Third Circuit’s decision as a correct statement of law, those decisions also began imposing additional requirements that, the Board now believes, lacked a clear basis in established common-law agency principles or prior Board or court decisions. See *TLL, Inc.*, 271 NLRB 798 (1984), and *Laerco Transportation*, 269 NLRB 324 (1984). Specifically, subsequent Board decisions introduced three control-related restrictions requiring (1) that a putative joint employer “actually” exercise control, (2) that such control be “direct and immediate,” and (3) that such control not be “limited and routine.” See, e.g., *AM Property Holding Corp.*, 350 NLRB 998, 999–1003 (2007), enfd. in relevant part sub nom. *Service Employees International Union, Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011); *Airborne Express*, 338 NLRB 597, 597 (2002); *Flagstaff Medical Center*, 357 NLRB 659, 666–667 (2011).<sup>15</sup> By introducing these additional requirements, *TLL/Laerco* and their progeny departed, without explanation, from the Board’s longstanding approach,

which the Board is inclined to believe was consistent with the common law.

In 2015, the Board clarified its joint-employer standard in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015) (*BFI*), a representation case, and applied that standard retroactively to find that two employers jointly employed the employees in the petitioned-for unit. Consistent with Supreme Court decisions and pre-1984 Board precedent, *BFI* sought to firmly ground the joint-employer standard in established common-law agency principles.<sup>16</sup> As the *BFI* Board explained, under the new joint-employer standard:

[T]he Board may find that two or more statutory employers are joint employers of the same statutory employees if they “share or codetermine those matters governing the essential terms and conditions of employment.” In determining whether a putative joint employer meets this standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question.

362 NLRB at 1600 (emphasis added) (quoting *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982), enfg. 259 NLRB 148 (1981)).<sup>17</sup>

The *BFI* Board also addressed an important element of the “share or codetermine” test: the definition of “the essential terms and conditions of employment” that a joint employer must control. The *BFI* Board, in keeping with the Board’s longstanding practice, took “an inclusive approach in defining ‘essential terms and conditions of employment.’” 362 NLRB at 1613. Citing prior Board and judicial decisions, the Board identified a “non-exhaustive list of bargaining subjects,” which included: hiring, firing, discipline, supervision, direction, wages, hours, dictating the number of workers to be supplied, scheduling, seniority, overtime, assigning work, and determining the manner and method of work performance. *Id.*

The *BFI* Board also eliminated the restrictive requirements that had been introduced into Board law after the Third Circuit’s 1982 *Browning-Ferris* decision. *BFI* explained that these control-related restrictions were contrary to common-law agency principles and that the Board 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.” *Id.* at 1600, 1613–1614. Instead, it held that the “right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.” *Id.* at 1614. The Board overruled contrary precedent.<sup>18</sup>

On September 14, 2018, while *BFI* was pending before the U.S. Court of Appeals for the District of Columbia Circuit on review,<sup>19</sup> a divided Board issued a notice of proposed rulemaking to establish a new joint-employer standard.<sup>20</sup> The 2018 NPRM proposed to return to the more restrictive pre-*BFI* approach to determining joint-employer status. Specifically, the proposed rule provided that a “putative joint employer must possess and actually exercise substantial direct and immediate control over the employees’ terms and conditions of employment in a manner that is not limited and routine.” *Id.* at 46696–46697.

On December 28, 2018, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in *BFI, Browning-Ferris Industries of California, Inc. v. NLRB (BFI)*, 911 F.3d 1195 (D.C. Cir. 2018). The District of Columbia Circuit “up[h]eld as fully consistent with the common law the Board’s

<sup>18</sup> See 362 NLRB at 1614 (overruling *AM Property Holding Corp.*, 350 NLRB 998 (2007), enfd. in relevant part sub nom. *Service Employees Int’l Union, Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011); *Airborne Express*, 338 NLRB 597 (2002), *TLL, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985); and *Laerco Transportation*, 269 NLRB 324 (1984)).

<sup>19</sup> After the Board certified the petitioning union, *BFI* refused to bargain. The Board found that *BFI*’s refusal to bargain violated Sec. 8(a)(5) and (1) of the Act. See *Browning-Ferris Industries of California, Inc.*, 363 NLRB No. 95 (2016). *BFI* sought review of the *BFI* decision by the District of Columbia Circuit.

While *BFI* was pending before the District of Columbia Circuit, the Board overruled *BFI* in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017). Thereafter, *Hy-Brand* was vacated, and the Board explained that because the decision was vacated, the “overruling of the *Browning-Ferris* decision is of no force or effect.” *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 26, slip op. at 1 (2018).

<sup>20</sup> See *The Standard for Determining Joint-Employer Status*, 83 FR 46681 (Sept. 14, 2018). Then-Member McFerran dissented.

<sup>12</sup> See *Hamburg Industries*, 193 NLRB 67, 67 (1971); *International Trailer Co.*, 133 NLRB 1527, 1529 (1961), enfd. sub nom. *NLRB v. Gibraltar Industries*, 307 F.2d 428 (1962), cert. denied 372 U.S. 911 (1963).

<sup>13</sup> *Clayton B. Metcalf*, 223 NLRB 642, 643 (1976).

<sup>14</sup> *Hamburg Industries*, supra, 193 NLRB at 67–68 (assigning weight to putative employer’s “indirect control over wages” via cost-plus arrangement); *Hoskins Ready-Mix*, 161 NLRB 1492, 1493 (1966) (same, noting that user employer would be the “ultimate source of any wage increases” for workers); *Ref-Chem Co.*, supra, 169 NLRB at 379 (supplier could not make any wage modification without securing approval of the user). See also *Industrial Personnel Corp. v. NLRB*, 657 F.2d 226, 229 (8th Cir. 1981) (relying on the Board’s finding that user employer reimbursed supplier for employees’ wages).

<sup>15</sup> See also *Southern California Gas Co.*, 302 NLRB 456, 461–462 (1991); *Goodyear Tire and Rubber Co.*, 312 NLRB 674, 677–678 (1993).

<sup>16</sup> See, e.g., *NLRB v. United Insurance Co. of America* 390 U.S. 254, 256–258 (1968) (applying common-law test to determine whether insurance agents were statutory employees or independent contractors).

<sup>17</sup> See also 362 NLRB at 1613–1614 (articulating restated standard and explaining that “[t]he common-law definition of an employment relationship establishes the outer limits of a permissible joint-employer standard under the Act”). The *BFI* Board further explained that “[i]f this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.” *Id.* at 1600.

determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis.” Id. at 1222. The court affirmed that “under Supreme Court and circuit precedent, the National Labor Relations Act’s test for joint-employer status is determined by the common law of agency.” Id. at 1206. In addition, the court agreed that the “Board’s conclusion that an employer’s authorized or reserved right to control is relevant evidence of a joint-employer relationship wholly accords with traditional common-law principles of agency.” Id. at 1213. The court found that the Board “correctly discerned” that under the common law, “indirect control can be a relevant factor in the joint-employer inquiry.” Id. at 1216.

Despite broadly upholding the Board’s *BFI* joint-employer standard, the District of Columbia Circuit reversed the Board’s “articulation and application of the indirect-control element” to the extent that the Board did not “distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment.” Id. at 1222–1223. In remanding the case to the Board, the court identified as key the “common-law principle that a joint employer’s control—whether direct or indirect, exercised or reserved—must bear on the ‘essential terms and conditions of employment’ . . . and not on the routine components of a company-to-company contract.” Id. at 1221 (citation omitted).<sup>21</sup>

On February 26, 2020, the Board promulgated its final joint-employer rule.<sup>22</sup> Although the Board acknowledged the District of Columbia Circuit’s approval of the *BFI* Board’s use

<sup>21</sup> On remand, the Board declined the District of Columbia Circuit’s invitation to clarify and refine the joint-employer standard. Instead, the Board found that any retroactive application of a refined standard would be manifestly unjust. The Board therefore dismissed the complaint and amended the certification of representative to remove *BFI* as a joint employer. *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 369 NLRB No. 139, slip op. at 1 (2020). Thereafter, a divided Board denied the union’s motion for reconsideration. *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 370 NLRB No. 86 (2021).

On July 29, 2022, the District of Columbia Circuit found the Board’s retroactivity analysis erroneous and granted the union’s petition for review and vacated the Board’s order dismissing the complaint and amending the certification of representative. *Sanitary Truck Drivers & Helpers Local 350, International Brotherhood of Teamsters v. NLRB*, \_\_\_ F.4th \_\_\_, 2022 WL 3008026 (D.C. Cir. 2022).

<sup>22</sup> *Joint Employer Status Under the National Labor Relations Act*, 85 FR 11184 (Feb. 26, 2020). Then-Member McFerran’s term had ended on December 16, 2019.

of common-law agency principles in fashioning its joint-employer standard, the Board emphasized that “the court recognized that [*BFI*] did not present the issue of whether either indirect control or a contractually reserved but unexercised right to control can be dispositive of joint-employer status absent evidence of exercised direct and immediate control.” Id. at 11185. As a result, the Board explained that it modified the proposed rule to “factor in” an entity’s indirect and reserved control over essential terms and conditions of employment or mandatory subjects of bargaining, but only to the extent that such indirect and/or reserved control “supplements and reinforces” evidence that the entity also possesses or exercises direct and immediate control over essential terms and conditions of employment. Id. at 11185–11186, 11194–11198, and 11236.

The Board also included several additional definitions in the final rule. Id. at 11192–11193. The final rule specifically explained that to show that an entity “shares or codetermines” the essential terms and conditions of another employer’s employees, “the entity must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees.” Id. at 11186 and 11236. The Board also retained the requirement that a joint employer exercise “substantial direct and immediate control” and defined that term to mean “direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer’s employees.” Id. at 11203–11205 and 11236. The final rule also specified that control is not “substantial” if it is “only exercised on a sporadic, isolated, or de minimis basis.” Id. at 11236. The final rule also defined “indirect control” as “indirect control over essential terms and conditions of employment of another employer’s employees but not control or influence over setting the objectives, basic ground rules, or expectations for another entity’s performance under a contract.” Id. at 11236. The Board provided an “exhaustive” list of essential terms and conditions of employment that included “wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction” and which the Board noted

was “expanded and made exclusive.” Id. at 11186, 11205 and 11235–11236.<sup>23</sup>

### III. Validity and Desirability of Rulemaking

Section 6 of the Act provides that “[t]he Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.” 29 U.S.C. 156. See also *American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (“[T]he choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.”); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

For nearly the entirety of the Act’s history, the Board has developed its joint-employer jurisprudence through case-by-case adjudication. The Board’s 2020 Rule represented a significant departure from this precedent, for the first time formulating a joint-employer standard through the Board’s rulemaking authority. In comparison to rulemaking, adjudication possesses a number of benefits when determining joint-employer relationships. The issue of common-law joint-employer status is a highly fact-specific one, which may be better suited to individualized determination on a case-by-case basis.<sup>24</sup> Further, an exhaustive, “one-size-fits-all” rule may be an inappropriate mechanism to address the complex and fact-specific scenarios presented by sophisticated contracting arrangements in the modern workplace.

Subject to comments, the Board nevertheless believes that rescinding the 2020 Rule and setting forth a revised joint-employer standard through rulemaking is desirable for several reasons. First, the Board believes, subject to comments, that the 2020 Rule’s approach to defining joint-

<sup>23</sup> On September 17, 2021, the Service Employees International Union (SEIU) filed a complaint in the U.S. District Court for the District of Columbia, Case No. 21–cv–2443, challenging the final joint-employer rule and seeking declaratory judgment and injunctive relief. SEIU’s lawsuit alleged, inter alia, that the Board’s final rule “arbitrarily and capriciously” excluded health and safety matters from the rule’s exhaustive list of essential terms and conditions of employment. On December 10, the Office of Information and Regulatory Affairs (OIRA) published the fall unified regulatory agenda, which contained an entry for the Board’s planned joint-employer rulemaking. Thereafter, on December 22, 2021, SEIU and the Board filed a joint motion to stay the proceeding, which the court granted on January 6, 2022.

<sup>24</sup> See 362 NLRB at 1614 (noting that “issues [of joint-employer status] are best examined and resolved in the context of specific factual circumstances.”).

employer status wrongly departs from common-law agency principles, which the National Labor Relations Act makes applicable in this context. In the Board's view, the 2020 Rule again incorporates control-based restrictions that unnecessarily narrow the common law and which threaten to undermine the goals of Federal labor law. By expressly grounding the joint-employer standard in the common law, the proposed rule would avoid repeating the errors the Board made beginning in the mid-1980s and incorporated again in the 2020 Rule. Instead, the proposed rule would restore the Board's focus on whether a putative joint employer possesses the authority to control or exercises the power to control particular employees' essential terms and conditions of employment, consistent with the common law and relevant court decisions. Finally, the proposed rule responds to the District of Columbia Circuit's invitation for the Board to "erect some legal scaffolding" to ensure that the joint-employer standard appropriately focuses on forms of reserved and indirect control that bear on employees' essential terms and conditions of employment.<sup>25</sup>

Moreover, the Board believes that establishing a definite, readily available standard will assist employers and labor organizations in complying with the Act. In addition, because the joint-employer standard has changed several times in the past decade, the Board sees a heightened need to seek public comment on this important area of labor law. The Board also seeks to establish a rule regarding joint employers' bargaining obligations and potential unfair labor practice liability that correctly reflects both background legal principles and the National Labor Relations Act's public policy of "encouraging the practice and procedure of collective bargaining" and maximizing employees' "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 or other mutual aid or protection." 29 U.S.C. 151. While no rule can eliminate the prospect of all litigation in this fact-intensive area of law, it is the Board's hope that the proposed rule, codifying what we view as the essential elements of a joint employer relationship, will reduce uncertainty and litigation over the basic parameters of joint-employer status. The Board therefore tentatively believes rulemaking to have determinate advantages over addressing joint-

employer issues purely through adjudication.

#### IV. The Proposed Rule

The proposed rule would codify the Board's longstanding joint-employer standard, approved by the Third Circuit and the District of Columbia Circuit Court of Appeals, which provides that an employer is a joint employer of particular employees if the employer has an employment relationship with those employees under established common-law agency principles and the employer shares or codetermines those matters governing at least one of the employees' essential terms and conditions of employment. Consistent with common-law agency principles and the District of Columbia Circuit's decision in *BFI*, the Board believes, subject to comments, that a party asserting a joint-employment relationship may establish joint-employer status with evidence of indirect and reserved forms of control, so long as those forms of control bear on employees' essential terms and conditions of employment. The proposed rule reflects the Board's preliminary view, subject to comments, that the Act's purposes of promoting collective bargaining and stabilizing labor relations are best served when two or more statutory employers that each possess some authority to control or exercise the power to control employees' essential terms and conditions of employment are parties to bargaining over those employees' working conditions.<sup>26</sup>

##### A. Proposal To Clarify That an Employer Is an Employer of Particular Employees if the Employer Has an Employment Relationship With Those Employees Under Common-Law Agency Principles

Proposed § 103.40(a) provides that an employer, as defined by section 2(2) of the National Labor Relations Act, is an employer of particular employees, as defined by section 2(3) of the Act, if the employer has an employment

<sup>26</sup> The proposed rule does not incorporate *BFI*'s requirement that a "putative joint employer possess[] sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." 362 NLRB at 1600. However, the Board's initial view, subject to comments, is that by focusing on whether a putative joint employer possesses the authority to control or exercises the power to control employees' essential terms and conditions of employment, any required bargaining under the new standard will necessarily be meaningful. We emphasize that, consistent with *BFI*, the proposed rule would only require a putative joint employer to bargain over those essential terms and conditions of employment it possesses the authority to control or over which it exercises the power to control.

relationship with those employees under common-law agency principles. Proposed § 103.40(a) would explicitly ground the Board's joint-employer analysis in common-law agency principles, consistent with the Board and District of Columbia Circuit decisions in *BFI*. As the Supreme Court has explained, common-law agency principles apply when construing Federal statutes whose terms are interpreted under the common law.<sup>27</sup> Relevant sources of common-law agency principles are not hard to find. Subject to comments and as set forth further below, the Board believes that such sources 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."<sup>28</sup>

As the District of Columbia Circuit has recognized, both the first *Restatement of Agency* and the *Restatement (Third) of Agency* "identify the 'right to control' as a relevant factor in establishing [an] . . . employment relationship." *BFI*, 911 F.3d at 1213. Going farther, the *Restatement (Second) of Agency* (1958) makes clear that the right to control is the touchstone of the common-law employment relationship. Thus, as the District of Columbia Circuit explained in *BFI*, "the 'right to control'

<sup>27</sup> See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 92–95 (1995) (where Congress has used the term "employee" in a statute without clearly defining it, the Court assumes that Congress "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine"). See also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 448–449 (2003); *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 322–324 (1992); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 752 fn. 31 (1989); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 323–324 (1974); *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256–258 (1968).

<sup>28</sup> As described above, the employer-employee relationship under the Act is the common-law employer-employee relationship, which is also described (particularly in older sources) using the term "master-servant relations." Beginning in the late 19th century, American legal commentators began to use the terms "master-servant" and "employer-employee" interchangeably. See, e.g., Horace Gray Wood, *A Treatise on the Law of Master and Servant; Covering the Relation, Duties and Liabilities of Employers and Employees* (1877). The *Restatement (Second) of Agency* and other secondary sources from the early to mid-20th century similarly treat these sets of terms as synonymous. See *Restatement (Second of Agency)*, sec. 2 cmt. d ("The word 'employee' is commonly used in current statutes to indicate the type of person herein described as servant."); 35 Am. Jur. Master and Servant sec. 2 (1st ed. 1941) ("The relationship of employer and employee is the same as that of master and servant."). Accordingly, we refer elsewhere in the NPRM to the "employer-employee" relations and the "employer-employee relationship."

<sup>25</sup> See *BFI*, 911 F.3d at 1220.

runs like a *leitmotif* through the *Restatement (Second) of Agency*.<sup>911</sup> F.3d at 1211. The *Restatement's* definitions of “master” and “servant” confirm that the right to control is sufficient to establish an employment relationship. The *Restatement* defines “master” as “a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.” *Restatement (Second) of Agency*, sec. 2(1). In turn, the *Restatement* defines “servant” as “a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.” *Id.* sec. 220(1).

The Board believes, subject to comments, that making the common-law employer-employee relationship foundational to the joint-employer analysis is consistent with the District of Columbia Circuit’s statement that the Board must apply the NLRA in a manner that “is bounded by the common-law’s definition of a joint employer” and “color within the common-law lines identified by the judiciary.” 911 F.3d at 1208.

*B. Proposal To Establish That Two or More Employers of the Same Particular Employees Are Joint Employers of Those Employees if the Employers Share or Codetermine Those Matters Governing Employees’ Essential Terms and Conditions of Employment*

Proposed § 103.40(b) first recognizes, as did the 2020 Rule, that the joint-employer issue arises (and the same test applies) in all contexts under the Act, including both representation and unfair labor practice case contexts. Cf. *BFI of Pennsylvania*, 691 F.2d at 1119, 1125 (enforcing a Board order holding joint employers jointly responsible for remedying discharges that violated section 8(a)(3) and (1) of the Act).

Proposed § 103.40(b) also incorporates the principle from *BFI* that “the existence of a common-law employment relationship is necessary, but not sufficient, to find joint-employer status.” 362 NLRB at 1610. The proposed rule states that “two or more employers of the same particular employees are joint employers of those employees if the employers share or codetermine those matters governing employees’ essential terms and conditions of employment.” By including this language, proposed § 103.40(b) codifies the longstanding core of the joint-employer test, consistent with the formulation of the standard that several Courts of Appeals

(notably, the Third Circuit and the District of Columbia Circuit) have endorsed. See *BFI*, 911 F.3d at 1209 (citing *Dunkin’ Donuts Mid-Atlantic Distribution Center v. NLRB*, 363 F.3d 437, 440 (D.C. Cir. 2004)); *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982). See also *3750 Orange Place Limited Partnership v. NLRB*, 333 F.3d 646, 660 (6th Cir. 2003); *Holyoke Visiting Nurses Assn. v. NLRB*, 11 F.3d 302, 306 (1st Cir. 1993).

*C. Proposal To Define “Share or Codetermine Those Matters Governing Employees’ Essential Terms and Conditions of Employment” to Mean for an Employer To Possess the Authority To Control (Whether Directly, Indirectly, or Both), or To Exercise the Power To Control (Whether Directly, Indirectly, or Both), One or More of the Employees’ Essential Terms and Conditions of Employment*

Proposed § 103.40(c) seeks to define the terms “share or codetermine those matters governing employees’ essential terms and conditions of employment” that appear in proposed § 103.40(b). The proposed rule would define “share or codetermine” to mean “for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees’ essential terms and conditions of employment.” Proposed § 103.40(c) incorporates the view of the *BFI* Board and the District of Columbia Circuit that evidence of the authorized or reserved right to control, as well as evidence of the exercise of control (whether direct or indirect, including control through an intermediary, as discussed further below) is probative evidence of the type of control over employees’ essential terms and conditions of employment that is necessary to establish joint-employer status.

The Board believes, subject to comments, that this definition of “share or codetermine” is consistent with common-law agency principles and avoids one of the key errors of the 2020 Rule. Thus, proposed § 103.40(c) clarifies that evidence that a putative joint employer possesses the authority or exercises the power to control one or more of the employees’ essential terms and conditions of employment is relevant to the joint-employer inquiry, regardless of whether such control is direct or indirect. By contrast, § 103.40(a) of the 2020 Rule required a putative joint employer to “possess and exercise substantial direct and immediate control over essential terms

and conditions of employment,” and, in turn, § 103.40(d) defined “substantial direct and immediate control” as “direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer’s employees.”<sup>29</sup> Like the additional control-related restrictions the Board began introducing in the mid-1980’s in *TLI/Laerco* and their progeny,<sup>30</sup> these definitions in the 2020 Rule wrongly depart from the common law, in the Board’s preliminary view subject to comments, as set forth in greater detail below.

*D. Proposal To Define “Essential Terms and Conditions of Employment” To Generally Include 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*

Pursuant to proposed § 103.40(d), “essential terms and conditions of employment” will “generally include, but are not 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.” The Board believes, subject to comments, that this definition is consistent with the broad, inclusive approach to defining the set of essential terms and conditions of employment the Board took prior to the 2020 Rule, with court approval. See, e.g., *Aldworth Co.*, 338 NLRB 137, 139 (2002) (“The relevant facts involved in th[e] determination [of shared or co-determined essential terms and conditions of employment] extend to nearly every aspect of employees’ terms and conditions of employment and must be given weight commensurate with their significance to employees’ work life.”), *enfd.* sub nom. *Dunkin’ Donuts Mid-Atlantic Distribution Center v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004).

The Board believes, subject to comments, that in most workplaces, the proposed rule offers a set of useful

<sup>29</sup> See *Joint Employer Status Under the National Labor Relations Act*, 85 FR 11184, 11235 (Feb. 26, 2020).

<sup>30</sup> *TLI, Inc.*, 271 NLRB 798 (1984); *Laerco Transportation*, 269 NLRB 324 (1984). See also *AM Property Holding Corp.*, 350 NLRB 998 (2007), *enfd.* in relevant part sub nom. *Service Employees International Union, Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011); *Airborne Express*, 338 NLRB 597 (2002); *Flagstaff Medical Center*, 357 NLRB 659 (2011).

benchmarks for identifying essential terms and conditions of employment. In addition, both the Act and the common law offer support for generally treating these terms and conditions of employment as essential. Proposed § 103.40(d) includes “wages, benefits, and other compensation” and “hours of work and scheduling.”<sup>31</sup> The structure and text of the Act provide significant support for anticipating that in most employment relationships these terms and conditions of employment will be considered “essential.” Section 8(d), defining the duty to bargain, refers to “wages, hours, and other terms and conditions of employment.” 29 U.S.C. 158(d). And, section 9(a) refers to a chosen union as the exclusive representative of employees “for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.” 29 U.S.C. 159(a).

Section 2 and section 220 of the *Restatement (Second) of Agency*—which the courts have acknowledged as persuasive authority for construing the common-law definition of “employer”—provide further guidance that the Board believes, subject to comments, warrants treating additional terms and conditions of employment as essential. As set forth above, section 2 of the *Restatement* emphasizes the importance of a putative employer’s control of the “physical conduct” of an employee “in the performance of the service” to the employer. It is the Board’s view, subject to comments, that section 2 justifies in most cases treating discipline, workplace health and safety, supervision, assignment, and certain work rules and directions as essential terms and conditions of employment.<sup>32</sup> Section 220 of the *Restatement* likewise supports the usual inclusion of other work rules and directions related to determining the manner, means, or methods of work performance as essential terms and conditions of employment, as it emphasizes the “extent of control” an employer “may exercise over the details of the work” in identifying what distinguishes an employee from an independent

contractor. And, section 220 supports including hiring and discharge as essential terms and conditions of employment, as that section treats employment tenure and the “length of time for which the person is employed” as relevant.

The Board proposes an inclusive approach to defining the set of essential terms and conditions of employment to ensure that the joint-employer standard can encompass changing circumstances in the workplace over time, as well as the particularities of certain industries or occupations. Thus, while the proposed rule identifies terms and conditions that would generally be considered essential, the Board anticipates that comments will permit it to refine the list of essential terms and conditions of employment. The Board observes that, over time and through its adjudicatory processes, the Board’s case law has developed a non-exhaustive list of “mandatory subjects” of collective bargaining, *i.e.* subjects that implicate wages, hours and other terms and conditions of employment as delineated by sections 9(a), 8(a)(5) and 8(d) of the Act.<sup>33</sup> The Board has found mandatory subjects of bargaining to include, *inter alia*: overtime pay;<sup>34</sup> paid vacations;<sup>35</sup> the provision of group health insurance plans;<sup>36</sup> the scheduling of employee breaks;<sup>37</sup> paid lunch periods;<sup>38</sup> employee parking;<sup>39</sup> grievance<sup>40</sup> and arbitration<sup>41</sup> procedures; work rules;<sup>42</sup> employee dress codes;<sup>43</sup> health and safety issues;<sup>44</sup> and workplace meal prices.<sup>45</sup>

<sup>33</sup> *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

<sup>34</sup> *Am. Ambulance*, 255 NLRB 417, 418–19 (1981), *enfd.* without opinion 692 F.2d 762 (9th Cir. 1982).

<sup>35</sup> *Jimmy-Richard Co.*, 210 NLRB 802, 808 (1974), *enfd.* 527 F.2d 803 (D.C. Cir. 1975).

<sup>36</sup> *W.W. Cross & Co.*, 77 NLRB 1162, 1163 (1948), *enfd.* 174 F.2d 875 (1st Cir. 1949).

<sup>37</sup> *El Paso Elec. Co.*, 355 NLRB 428, 451 (2010), *enfd.* 681 F.3d 651 (5th Cir. 2012).

<sup>38</sup> *Van Dorn Mach. Co.*, 286 NLRB 1233, 1233–1234, 1234 *fn.* 5 (1987), *enfd.* 881 F.2d 302 (6th Cir. 1989).

<sup>39</sup> *United Parcel Serv.*, 336 NLRB 1134, 1134 (2001).

<sup>40</sup> *Healthcare Workers Union, Loc. 250 (Alta Bates Med. Ctr.)*, 321 NLRB 382, 384 (1996).

<sup>41</sup> *NLRB v. Ind. Stave Co., Diversified Indus. Div.*, 591 F.2d 443, 446 (8th Cir. 1979), *enfg.* as modified 233 NLRB 1202 (1977).

<sup>42</sup> *The Toledo Blade Co., Inc.*, 343 NLRB 385, 387 (2004).

<sup>43</sup> *Medco Health Sols. of Las Vegas, Inc.*, 357 NLRB 170, 172 (2011), *enfd.* in rel. part 701 F.3d 710 (D.C. Cir. 2012).

<sup>44</sup> *NLRB v. Am. Nat. Can Co., Foster-Forbes Glass Div.*, 924 F.2d 518, 524 (4th Cir. 1991), *enfg.* 293 NLRB 901, 904 (1989).

<sup>45</sup> *Ford Motor Co.*, 230 NLRB 716, 718 (1977), *enfd.* 571 F.2d 993 (7th Cir. 1978), *affd.* 441 U.S. 488 (1979).

The shortcomings of the 2020 Rule’s exhaustive list of essential terms and conditions of employment (which did not include workplace health and safety) were revealed during the COVID–19 pandemic. This experience has persuaded the Board, subject to comments, that other similarly unforeseen circumstances may arise in the future and so the joint-employer standard should not adopt an exhaustive list of essential terms and conditions of employment in given workplaces, but instead leave some flexibility for the Board in future adjudication under a final rule. Proposed § 103.40(d) likewise aims to ensure that the Board’s approach to defining essential terms and conditions of employment is not needlessly overinclusive. For example, the Board is inclined to believe that, while workplace health and safety likely constitutes an essential condition of employment in healthcare, mining, and construction industry workplaces, there may be other workplaces in which health and safety concerns are less acute. We note, as well, that because the proposed rule requires the existence of a common-law employment relationship between a joint employer and particular employees, a joint employer necessarily will control those terms and conditions of employment sufficient to establish an employment relationship, regardless of which terms and conditions it does *not* control. The Board invites comment on all aspects of its approach to essential terms and conditions of employment, including the specific terms and conditions of employment it should (or should not) generally consider “essential.”<sup>46</sup>

<sup>46</sup> In particular, the Board seeks comment on the following questions. As mentioned above, the starting point for the proposed rule is the Act, which specifically references wages, hours, and other terms and conditions of employment. Should the proposed list of essential terms and conditions of employment solely include those terms and conditions of employment that are referenced in the statute? What terms and conditions of employment are essential to the existence of a common-law employment relationship? Is the Board’s proposed inclusive approach to defining essential terms and conditions of employment appropriate? If so, how should the Board generally approach the task of identifying the essential terms and conditions?

We disagree with our dissenting colleagues’ contention that the pending litigation challenging the 2020 Rule’s exclusion of health and safety matters from the rule’s exhaustive list of essential terms and conditions of employment in any way forecloses our preliminary view that, moving forward, an inclusive approach to defining essential terms and conditions of employment would better serve the policies of the Act.

<sup>31</sup> We note that § 103.40(b) of the 2020 Rule also included “wages, benefits, [and] hours of work” as essential terms and conditions of employment. See 85 FR 11235.

<sup>32</sup> Sec. 2 of the *Restatement (Second of Agency)* provides further support for proposed Sec. 103.40(d)’s inclusion of “hours of work and scheduling” as typically included on the list of essential terms and conditions of employment.

We note that § 103.40(b) of the 2020 Rule also treated several of these terms and conditions of employment as essential, including “hiring, discharge, discipline, supervision, and direction.” See 85 FR 11235.

*E. Proposal to Specify That Whether an Employer Possesses the Authority To Control or Exercises the Power To Control One or More of the Employees' Terms and Conditions of Employment Is Determined Under Common-Law Agency Principles and That Evidence of Reserved or Indirect Control Is Sufficient To Establish Status as a Joint Employer*

Proposed § 103.40(e) provides that common-law agency principles govern the determination of whether an employer possesses the authority to control or exercises the power to control one or more of the essential terms and conditions of employment of the employees at issue. As discussed above, the Board acknowledges that “Congress has tasked the courts, and not the Board, with defining the common-law scope of ‘employer’” and that “the common-law lines identified by the judiciary” thus delineate the boundaries of the “policy expertise that the Board brings to bear” on the question of whether a business entity is a joint employer of another employer’s employees under the Act. *BFI v. NLRB*, 911 F.3d at 1208–1209. Accordingly, in defining the types of control that will be sufficient to establish joint-employer status under the Act, the Board looks for guidance from the judiciary, including primary articulations of relevant principles by judges applying the common law, as well as secondary compendiums, reports, and restatements of these common law decisions, focusing “first and foremost [on] the ‘established’ common-law definitions at the time Congress enacted the National Labor Relations Act in 1935 and the Taft-Hartley Amendments in 1947.” *Id.* at 1209 (citations omitted).

Subject to comments, the Board believes that the policies of the Act, together with the expansive common-law employer-employee relationship defined by the judiciary, make it appropriate for the Board to give determinative weight to the existence of a putative joint employer’s authority to control the essential terms and conditions of employment, whether or not such control is exercised, and without regard to whether any exercise of such control is direct or indirect, such as through an intermediary.

### 1. Reserved Control

First, long before the 1935 enactment of the Act, the Supreme Court recognized and applied a common-law rule that “the 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 accomplished, or, in other words, ‘not only what shall be done, but how it shall be done.’” *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889) (emphasis added) (quoting *Railroad Co. v. Hanning*, 82 U.S. 649, 657 (1872)). The Court in *Singer* affirmed the holding below that a worker was an employee<sup>47</sup> of a company because the Court concluded that the company had contractually reserved such control over the performance of the work that it “might, if it saw fit, instruct [the worker] what route to take, or even what speed to drive.” *Id.* at 523. In reaching this conclusion, the Court relied solely on the parties’ contract, and did not discuss whether or in what manner the company had ever actually exercised any control over the terms and conditions under which the worker performed his work. In other words, the Court found a common-law employer-employee relationship based on contractually reserved control without reference to whether or how that control was exercised.<sup>48</sup>

Between the Court’s decision in *Singer* and the relevant congressional enactments of the NLRA in 1935 and the Taft-Hartley amendments in 1947, Federal courts of appeals and State high courts consistently followed the Supreme Court in emphasizing the primacy of the right of control over whether or how it was exercised in decisions that turned on the existence of a common-law employer-employee relationship. For example, in 1934, the Supreme Court of Missouri examined whether a worker was an “employee” of two companies under a State workmen’s compensation statute—the terms of which the court construed “in the sense in which they were understood at common law”—and affirmed that “the essential question is not what the companies did when the work was being done, but whether they had a right

to assert or exercise control.”<sup>49</sup> And, in 1945, the Court of Appeals for the District of Columbia Circuit explained that, in distinguishing employees from independent contractors, “it is the right to control, not control or supervision itself, which is most important.”<sup>50</sup>

<sup>49</sup> *Maltz v. Jackoway-Katz Cap Co.*, 82 SW2d 909, 912, 918 (Mo. 1934). See also *McDermott’s Case*, 186 NE 231, 232–233 (Mass. 1933) (“One may be a servant though far away from the master, or so much more skilled than the master that actual direction and control would be folly, for it is the right to control, rather than the exercise of it that is the test.”); *Larson v. Independent School Dist No. 11 of King Hill*, 22 P.2d 299, 301 (Idaho 1933) (“It is not necessary that control be exercised, if the right of control exists.”); *Gordon v. S.M. Byers Motor Car Co.*, 164 A. 334, 335–336 (Pa. 1932) (“The control of the work reserved in the employer which makes the employee a mere servant . . . means a power of control, not necessarily the exercise of the power.”) (internal quotation and citation omitted); *Brothers v. State Industrial Accident Commission*, 12 P.2d 302, 304 (Or. 1932) (“[T]he true test of the relationship of employer and employee is not the actual exercise of control, but the right to exercise control.”) (internal quotation and citation omitted); *Murrays Case*, 154 A. 352, 354 (Me. 1931) (“Authorities are numerous and uniform that the vital test is to be found in the fact that the employer has or not retained power of control or superintendence over the employee or contractor. The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere that makes the difference between an independent contractor and a servant or agent. There is no conflict as to this general rule”) (internal quotation and citation omitted); *Van Watermeullen v. Industrial Commission*, 174 NE 846, 847–848 (Ill. 1931) (“One of the principal factors which determine whether a worker is an employee or an independent worker is the matter of the right to control the manner of doing the work, not the actual exercise of that right.”); *Norwood Hospital v. Brown*, 122 So. 411, 413 (Ala. 1929) (“[T]he ultimate question . . . is not whether the employer actually exercised control, but whether it had a right to control.”).

<sup>50</sup> *Grace v. Magruder*, 148 F.2d 679, 681 (D.C. Cir. 1945). See also *Industrial Commission v. Meddock*, 180 P.2d 580, 584 (Ariz. 1947) (“It is the right to control rather than the fact that the employer does control that determines the status of the parties, and this right to control is, in turn, tested by those standards applicable to the facts at hand.”); *D.M. Rose & Co. v. Snyder*, 206 SW 2d 897, 904 (Tenn. 1947) (internal quotations and citations omitted) (“[t]he right of control is the distinguishing mark which differentiates the relation of master and servant from that of employer and independent contractor. . . . Wherever the defendant has had such right of control, irrespective of whether he exercised it or not, he has been held to be the responsible principal or master.”); *Green Valley Coop. Dairy Co. v. Industrial Comm’n*, 27 NW 2d 454, 457 (Wis. 1947) (citation omitted) (“It is quite immaterial whether the right to control is exercised by the master so long as he has the right to exercise such control.”); *Bobik v. Industrial Commission*, 64 NE 2d, 829, (Ohio 1946) (“[I]t is not, however, the actual exercise of the right by interfering with the work but rather the right to control which constitutes the test.”); *Cimorelli v. New York Cent. R. Co.*, 148 F.2d 575, 578 (6th Cir. 1945) (“The fact of actual interference or exercise of control by the employer is not material. If the existence of the right or authority to interfere or control appears, the contractor cannot be independent.”); *Dunnire v. Fitzgerald*, 37 A.2d 596, 599 (Pa. 1944) (in determining “who was the controlling master of the

<sup>47</sup> As discussed above, a “servant” is an employee. See, e.g., 30 C.J.S. *Employer—Employee* sec. 1 (2022) (“The terms ‘servant’ and ‘employee’ are interchangeable.”).

<sup>48</sup> See also *Chicago Rock Island & Pac. Ry. Co. v. Bond*, 240 U.S. 449, 456 (1916) (worker was not employee of railroad company where contract provided “company reserves and holds no control over [worker] in the doing of such work other than as to the results to be accomplished,” and Court found company “did not retain the right to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words, did not retain control not only of what should be done, but how it should be done.”) (emphasis added); *Little v. Hackett*, 116 U.S. 366, 376 (1886) (“[I]t is this right to control the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant.”) (emphasis added) (quoting *Bennet v. New Jersey R.R. & Transp. Co.*, 36 N.J.L. 225 (N.J. 1873)).



Unsurprisingly, early twentieth century secondary authority similarly distills from the cases a common-law rule under which the right of control establishes the existence of the common-law employer-employee relationship, without regard to whether or how such control is exercised. For example, in 1922, an American Law Report (A.L.R.) annotation states as black-letter law that:

*In every case which turns upon the nature of the relationship between the employer and the person employed, the essential question to be determined is not whether the former actually exercised control over the details of the work, but whether he had a right to exercise that control.*<sup>51</sup>

borrowed employe[e]. . . . The criterion is not whether the borrowing employer in fact exercised control, but whether he had the right to exercise it.”); *Bush v. Wilson & Co.*, 138 P.2d 457, 461 (Kan. 1943) (“[W]hether a person is an employee of another depends upon whether the person who is claimed to be an employer had a right to control the manner in which the work was done. It has been pointed out many times that this means not actually the exercise of control, but does mean the right to control.”); *Ross v. Schneider*, 27 SE 2d 154, 157 (Va. 1943) (quoting *Murray’s Case*, 154 A. 352, 354 (Me. 1931)) (“Authorities are numerous and uniform that the vital test is to be found in the fact that the employer has or not retained power of control or superintendence over the employee or contractor. ‘The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere that makes the difference between an independent contractor and a servant or agent.’ *Tuttle v. Embury-Martin Lumber Co.*, [158 NW 875, 879 (Mich. 1916)].”); *Jones v. Goodson*, 121 F.2d 176, 179 (10th Cir. 1941) (“the legal relationship of employer and employee . . . exists when the person for whom services are performed has the right to control and direct . . . the details and means by which [the service] is accomplished. . . . it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.”); *S.A. Gerrard Co. v. Industrial Accident Commission*, 110 P.2d 377 (Cal. 1941) (“the right to control, rather than the amount of control which was exercised, is the determinative factor.”).

<sup>51</sup> *General discussion of the nature of the relationship of employer and independent contractor*, 19 A.L.R. 226 at sec. 7 & fn. 1 (1922) (emphasis added) (citations omitted). A 1931 A.L.R. annotation similarly reports that “[i]t is not the fact of actual interference or exercise of control by the employer which renders one a servant rather than an independent contractor, but the existence of the right or authority to interfere or control.” *Tests in determining whether one is an independent contractor*, 75 A.L.R. 725 (1931).

Other, earlier secondary authority was also consistent with this view. For example, the second edition of *The American & English Encyclopedia of Law*, published over several years spanning the turn of the century, explains that “[t]he relation of master and servant exists where the employer has the right to select the employee; the power to remove and discharge him; and the right to direct both what work shall be done and the way and manner in which it shall be done.”<sup>20</sup> The American & English Encyclopedia of Law 12 *Master and Servant* (2d ed. 1902) (emphasis added) (citations omitted). Likewise, in 1907, the *Cyclopedia of Law and Procedure* defines “master,” inter alia, as “[o]ne who not only prescribes the end, but directs, or at any time may direct, the

And, as stated above, the first Restatement of Agency, published in 1933, defines “master,” and “servant,” thus:

(1) A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.

(2) A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right of control by the master.<sup>52</sup>

Finally, the first edition of *American Jurisprudence*, published between 1936 and 1948, states that “the really essential element of the [employer-employee] relationship is the right of control—the right of one person, the master, to order and control another, the servant, in the performance of work by the latter, and the right to direct the manner in which the work shall be done,” and “[t]he test of the employer-employee relation is the right of the employer to exercise control of the details and method of performing the work.”<sup>53</sup>

The Board believes, subject to comments and based on consultation of this and other judicial authority, that when Congress enacted the NLRA in 1935 and the Taft-Hartley Amendments in 1947, the existence of a putative employer’s reserved authority to control the details of the terms and conditions under which work was performed sufficed to establish a common-law employer-employee relationship without regard to whether or in what manner such control was exercised.

From 1947 to today, innumerable judicial decisions and secondary authorities examining the common-law employer-employee relationship have

means and methods of doing the work.”<sup>26</sup> *Cyclopedia of Law and Procedure* 966 fn. 2 *Master and Servant* (1907) (emphasis added) (citations omitted). The 1925 first edition of *Corpus Juris* echoes the same definitions set forth in the *Cyclopedia*, and additionally notes state high court common-law authority holding that “where the master has the right of control, it is not necessary that he actually exercise such control.”<sup>39</sup> C.J. *Master and Servant* sec. 1 Definitions 33 fn. 8 (1st ed. 1925) (emphasis added) (quoting *Tucker v. Cooper*, 158 P. 181 (Cal. 1916)).

<sup>52</sup> Restatement (First) of Agency sec. 2 (Am. Law Inst. 1933) (emphasis added). See also id. at sec. 220 (“A servant is a person employed to perform a service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other’s control or right to control.”) (emphasis added). As noted above, the District of Columbia Circuit observed in *BFI v. NLRB*, 911 F.3d at 1211, that “the ‘right to control’ runs like a leitmotif through the Restatement (Second) of Agency,” which, though published in 1958, is relevantly similar to the first restatement.

<sup>53</sup> 35 Am. Jur. *Master and Servant* sec. 3 (1st ed. 1941) (emphasis added).

continued to emphasize the primacy of the putative employer’s authority to control, without regard to whether or in what manner that control has been exercised. For example, in 2014, the Supreme Court of California affirmed that “what matters under the common law is not how much control a hirer exercises, but how much control the hirer retains the right to exercise.”<sup>54</sup> As

<sup>54</sup> *Ayala v. Antelope Valley Newspapers, Inc.*, 327 P.3d 165, 169, 172 (Cal. 2014); see also, e.g., *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 898 F.3d 1110, 1121 (11th Cir. 2018) (“We emphasize that ‘it is the right to control, not the actual exercise of control that is significant.’”); *Mallory v. Brigham Young Univ.*, 332 P.3d 922, 928–929 (Utah 2014) (“If the principal has the right to control the agent’s method and manner of performance, that agent is a servant whether or not the right is specifically exercised.”); *Shatto v. McLeod Regional Medical Center*, 753 SE2d 416, 419, 420 (S.C. 2013) (“While evidence of actual control exerted by a putative employer is evidence of an employment relationship, the critical inquiry is whether there exists the right and authority to control and direct the particular work or undertaking.”); *Anthony v. Okie Dokie Inc.*, 976 A.2d 901, 906 (DC 2009) (quoting *Safeway Stores Inc. v. Kelly*, 448 A.2d 856, 860 (DC 1982)) (“The determinative factor ‘is whether the employer has the right to control and direct the servant in the performance of his work and the manner in which the work is to be done . . . and not the actual exercise of control or supervision.’”); *Universal Am-Can Ltd. v. WCAB*, 762 A.2d 328, 332–333 (Pa. 2000) (“[I]t is the existence of the right to control that is significant, irrespective of whether the control is actually exercised.”); *Reed v. Glyn*, 724 A.2d 464, 466 (Vt. 1998) (“It is to be observed that actual interference with the work is unnecessary—it is the right to interfere that determines.”); *JFC Temps, Inc. v. W.C.A.B. (Lindsay)*, 620 A.2d 862, 864–865 (Pa. 1996) (“The law governing the ‘borrowed’ employee is well-established. . . . The entity possessing the right to control the manner of the performance of the servant’s work is the employer, irrespective of whether the control is actually exercised.”); *Harris v. Miller*, 438 SE 2d 731, 735 (N.C. 1994) (“The traditional test of liability under the borrowed servant rule [provides that] a servant is the employe (sic) of the person who has the right of controlling the manner of his performance of the work, irrespective of whether he actually exercises that control or not.”) (internal quotation and citation omitted); *Beddia v. Goodin*, 957 F.2d 254, 257 (6th Cir. 1992) (“The test is whether the employer retained control, or the right to control, the modes and manner of doing the work contracted for. It is not necessary that the control ever be exercised.”); *Ex parte Curry*, 607 S.2d 230, 232 (Ala. 1992) (“In the last analysis, it is the reserved right of control rather than its actual exercise that provides the answer.”); *ARA Leisure Services, Inc. v. NLRB*, 782 F.2d 456, 460 (4th Cir. 1986) (“It is the right to control, rather than the actual exercise of control, that is significant.”); *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 920 (11th Cir. 1983) (“[I]t is the right to control, not the actual exercise of control, that is significant.”); *Glenmar Cinestate Inc. v. Farrell*, 292 SE2d 366, 369 (Va. 1982) (“It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent.”); *Baird v. Sickler*, 433 NE 2d 593, 594–595 (Ohio 1982) (“For the relationship to exist, it is unnecessary that such right of control be exercised; it is sufficient that the right merely exists.”); *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862, 874 (D.C. Cir. 1978) (quoting *Williams v. U.S.*, 126 F.2d 129, 132 (7th Cir. 1942)) (“[I]t is the right

Continued

noted above, the *Restatement (Second) of Agency* relevantly echoes the First Restatement's emphasis on the right of control.<sup>55</sup> *Corpus Juris Secundum* provides that “[a]n employee/servant is a type of agent whose physical conduct is controlled or is subject to the right to control by the master; the servant’s principal, who controls or has the right to control the physical conduct of the servant, is called the master.”<sup>56</sup> And, the second edition of *American Jurisprudence* provides that “the principal test of an employment relationship is whether the alleged employer has the right to control the manner and means of accomplishing the result desired.”<sup>57</sup> Based on its examination of this and other judicial and secondary authority, the Board agrees with the District of Columbia Circuit that “for what it is worth [the common-law rule in 1935 and 1947] is still the common-law rule today.”<sup>58</sup> The Board also notes that, as set forth in greater detail above, this view is in keeping with the Board’s prior treatment of reserved control in the period following the *Greyhound* decision and before the Board began imposing additional control-related restrictions in *TLI/Laerco* and their progeny.

Finally, because the facts of many cases do not require distinguishing between contractually reserved and actually exercised control, many judicial decisions and other authorities spanning the last century have articulated versions of the common-law test that do not expressly include this distinction. But the Board is not aware

and not the exercise of control which is the determining element.”); *Combined Insurance Co. of America v. Sinclair*, 584 P.2d 1034, 1042 (Wyo. 1978) (“The base determining factor is whether [putative employer] retained [the right of control of the manner that [putative employee] operated his vehicle and not whether such control was in fact exercised.”); *NLRB v. Deaton Inc.*, 502 F.2d 1221, 1225 (5th Cir. 1974) (“It is the right and not the exercise of control which is the determining element”); *Dovell v. Arundel Supply Corp.*, 361 F.2d 543, 545 (D.C. Cir. 1966) (quoting *Grace v. Magruder*, 148 F.2d 679, 681 (D.C. Cir. 1945)) (“[I]t is the right to control, not control or supervision itself, which is most important.”); *United Ins. Co. of America v. NLRB*, 304 F.2d 86, 89 (7th Cir. 1962) (“[I]t is the right and not the exercise of control which is the determining element.”); *Cohen v. Best Made Mfg. Co.*, 169 A.2d 10, 11–12 (R.I. 1961) (“The final test is the right of the employer to exercise power of control rather than the actual exercise of such power.”); *Fardig v. Reynolds*, 348 P.2d 661, 663 (Wash. 1960) (“It is well settled in this state that . . . [it] is not the actual exercise of the right of interference with the work, but the right to control, which constitutes the test.”).

<sup>55</sup> See *Restatement (Second) of Agency* secs. 2, 220 (Am. Law Inst. 1958).

<sup>56</sup> 30 C.J.S. *Employer—Employee* sec. 1 (2022) (emphasis added) (citations omitted).

<sup>57</sup> 27 Am. Jur. 2d. *Employment Relationship* sec. 1 (2022) (emphasis added) (citations omitted).

<sup>58</sup> *BFI v. NLRB*, 911 F.3d at 1210 & fn. 6.

of any common-law judicial decision or other common-law authority directly supporting the proposition that, given the existence of a putative employer’s contractually reserved authority to control, further evidence of direct and immediate exercise of that control is necessary to establish a common-law employer-employee relationship. For these reasons, the Board believes, subject to comments, that the judicially defined common-law boundaries on the Board’s exercise of its policy expertise cannot justify the adoption of a joint-employer standard that requires a showing of actual exercise of direct and immediate control in order to establish that an entity is a joint employer of another entity’s employees, as current § 103.40 improperly requires.

## 2. Indirect Control or Control Exercised Through an Intermediary

The Board believes, subject to comments, that evidence that an employer has actually exercised such control over essential terms and conditions, whether directly or indirectly, such as through an intermediary, necessarily also suffices to establish the existence of a joint-employer relationship. As the District of Columbia Circuit has recognized, “[t]he common law . . . permits consideration of those forms of indirect control that play a relevant part in determining the essential terms and conditions of employment.” *BFI v. NLRB*, 911 F.3d at 1199–1200. In addition, the District of Columbia Circuit has explained that the definition of “employer” set forth in section 2(2) of the Act “textually indicates that the statute looks at all probative indicia of employer status, whether exercised ‘directly or indirectly’” and therefore that the Act “expressly recognizes that agents acting ‘indirectly’ on behalf of an employer could also count as employers.” *Id.* at 1216.

Judicial decisions and secondary authorities addressing the common-law employer-employee relationship confirm that indirect control, including control exercised through an intermediary, is relevant to the existence of an employment relationship. The *Restatement (Second) of Agency* explicitly recognized the significance of indirect control, both in providing that “the control or right to control needed to establish the relation of master and servant may be very attenuated” and in discussing the subservant doctrine, which deals with cases in which one employer’s control may be exercised indirectly, while a second entity directly controls

employees.<sup>59</sup> As the District of Columbia Circuit explained in *BFI*, “the common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship.”<sup>60</sup>

Consistent with these longstanding common-law principles, the Board believes, subject to comments, that evidence showing that a putative joint employer wields indirect control over the essential terms and conditions of employment of another employer’s employees is relevant to the joint-employer inquiry. Ignoring relevant evidence of indirect control over essential terms and conditions of employment would, in the words of the District of Columbia Circuit, “allow manipulated form to flout reality,”<sup>61</sup> contrary to the teachings of the common law. Under the proposed rule, for example, evidence that a putative joint employer communicates work assignments and directives to another entity’s managers or exercises ongoing oversight to ensure that job tasks are performed properly may demonstrate the type of indirect control over essential terms and conditions of employment that is necessary to establish a joint-employer relationship. The Board welcomes comment on this and other forms of indirect control that should be considered probative (or not probative) of joint-employer status.

## F. Proposal To Clarify That Evidence of Control Over Matters That Are Immaterial to the Existence of an Employment Relationship or That Do Not Bear on Employees’ Essential Terms and Conditions of Employment Is Not Relevant to the Joint-Employer Inquiry

Proposed § 103.40(f) incorporates the District of Columbia Circuit’s teaching in *BFI* that an employer’s control over matters that are immaterial to the existence of an employment relationship under established common-law agency principles, or that otherwise do not bear on the employees’ essential terms and conditions of employment, is not relevant to the joint-employer inquiry.<sup>62</sup> In addition, the proposed rule responds to the District of Columbia Circuit’s criticism that the *BFI* Board did not sufficiently “distinguish between indirect control that the common law of

<sup>59</sup> *Restatement (Second) of Agency* sections 5(2), comments e, f, and illustration 6; 220(1), comment d; 226, comment a (1958).

<sup>60</sup> 911 F.3d at 1217 (citing *Nicholson v. Atchison, T. & S. F. Ry. Co.*, 147 P. 1123, 1126 (Kan. 1915) (use of a “branch company” as a “mere instrumentality” “did not break the relation of master and servant existing between the plaintiff and the [putative master]”).

<sup>61</sup> *Id.* at 1219.

<sup>62</sup> *BFI*, 911 F.3d at 1222–1223.

agency considers intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment.” *BFI*, 911 F.3d at 1222–1223. In remanding the case to the Board, the court identified as key the “common-law principle that a joint employer’s control—whether direct or indirect, exercised or reserved—must bear on the ‘essential terms and conditions of employment’ . . . and not on the routine components of a company-to-company contract.” *Id.* at 1221 (citation omitted).

The Board’s proposed rule does not purport to exhaustively detail the universe of business arrangements that bear on the existence of a common-law employer-employee relationship. However, the Board agrees with the *BFI* Board and the District of Columbia Circuit that contractual terms limited to “dictat[ing] the results of a contracted service,” that aim “to control or protect [the employer’s] own property,”<sup>63</sup> or to “set the objective, basic ground rules, and expectations for a third-party contractor”<sup>64</sup> will generally not be relevant to the inquiry (assuming those terms do not otherwise affect the employees’ essential terms and conditions of employment). In addition, the Board agrees that “routine components of a company-to-company contract,” like a “very generalized cap on contract costs,” or an “advance description of the tasks to be performed under the contract,” will generally not be material to the existence of an employment relationship under common-law agency principles.<sup>65</sup> The Board specifically seeks public comment regarding this portion of its proposed rule and invites commenters to address which “routine components of a company-to-company contract” the

Board should not consider relevant to the joint-employer analysis. In addition, the Board invites comment regarding which contractual controls reserved by a putative joint employer over another entity’s employees should establish that the putative joint employer is also a common-law employer of the other entity’s employees.

*G. Proposal To Clarify That a Party Asserting Joint-Employer Status Has the Burden of Establishing That Relationship by a Preponderance of the Evidence*

Proposed § 103.40(g) confirms, in keeping with *BFI*, 362 NLRB at 1616, that the party asserting that an employer is a joint employer of particular employees has the burden of establishing that relationship by a preponderance of the evidence.

*H. Proposal To Explain That the Provisions of the Rule Are Intended To Be Severable*

Proposed § 103.40(h) explains that the Board intends the provisions of the rule to be severable in the event any provision of the rule is held to be unlawful. The Board’s preliminary view is that proposed § 103.40(a), (b), and (c), which address the common-law employment relationship, may be severable from the other provisions of the proposed rule, which address statutory issues that are informed by the common law. The Board specifically invites public comment on its preliminary view regarding the severability of the provisions of the rule.

## V. Conclusion

The Board welcomes public comment on all aspects of its proposed rule. In particular, the Board seeks input from employees, unions, and employers with experience in workplaces in which multiple entities possess or exercise some control over a particular group of employees’ working conditions.

Although the Board has offered proposed rule text that would rescind the 2020 Rule and replace it with a new rule setting forth the joint-employer standard, the Board is also specifically interested in commenters’ responses to the following questions. Should the Board solely rescind the 2020 joint-employer rule and not replace it with a new rule? If so, how could the Board address the issue that the prior legal standard (*BFI* 2015) was denied enforcement in part by the District of Columbia Circuit? In the alternative, should the Board amend the 2020 Rule, and if so, should the rule be amended in the manner set forth in this NPRM? Are there any reliance interests related

to the 2020 Rule, and if so, how should the Board assess those interests?

As stated above, comments regarding this proposed rule must be received by the Board on or before November 7, 2022. Comments replying to comments submitted during the initial comment period must be received by the Board on or before November 21, 2022.

Our dissenting colleagues were part of the Board that issued the 2020 Rule at a time when the Board consisted of a three-member quorum without any dissenting views.<sup>66</sup> As discussed above, the 2020 Rule displaced *BFI*, which had returned to the Board’s traditional joint-employer analysis after a period during which the Board applied a more restrictive standard that we preliminarily believe was not supported by the text or purposes of the Act, by earlier Board or court precedent, or by the common law. Our dissenting colleagues express many of the same criticisms of the Board’s traditional standard, as embodied in *BFI* and the proposed rule, that they expressed in the now-vacated decision in *Hy-Brand Industrial Contractors*,<sup>67</sup> and in the 2020 Rule.<sup>68</sup> We have expressed our preliminary view that the Act’s purpose of promoting effective collective bargaining is better served by the Board’s traditional standard than by the overly restrictive standard embodied in the 2020 Rule.<sup>69</sup> We look forward to receiving and reviewing the public’s comments and, afterward, considering these issues afresh with the good-faith participation of all members of the Board.

## VI. Dissenting View of Members Kaplan and Ring

Two-and-a-half years ago, the Board issued a final rule (“the 2020 Rule”) setting forth the standard for determining, under the National Labor Relations Act (“NLRA” or “the Act”), whether two entities constitute a joint employer of employees directly

<sup>66</sup> As mentioned above, then-Member McFerran dissented from the 2018 NPRM that resulted in the 2020 Rule before her prior term expired on December 19, 2019. She was reappointed August 10, 2020, after the publication of the 2020 Rule.

<sup>67</sup> 365 NLRB No. 156 (2017), vacated by 366 NLRB No. 26 (2018).

<sup>68</sup> Member Kaplan was a member of the panel majority that reversed *BFI* in *Hy-Brand* before a different Board panel vacated that decision.

<sup>69</sup> Contrary to our dissenting colleague’s suggestion, the proposed rule would only require a putative joint employer to bargain over those terms and conditions of employment which it possesses the authority to control or over which it exercises the power to control.

<sup>63</sup> *BFI*, supra, 362 NLRB at 1614.

<sup>64</sup> *BFI*, supra, 911 F.3d at 1220.

<sup>65</sup> *Id.* The Board believes, subject to comments, that certain forms of so-called “cost-plus” contracting arrangements bear on employees’ essential terms and conditions of employment. See, e.g., *Dunkin’ Donuts Mid-Atlantic Distribution Center v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (one entity “determined [another entity’s] employee wage and benefit rates” by “specifying, in the parties’ ‘cost-plus’ lease agreement, the rates it would reimburse [that entity].”). However, because such contractual arrangements may reveal varying degrees of indirect control over the wages of another entity’s employees, “[a] characterization of the transaction as a ‘cost plus’ contract is not necessarily determinative of the question as to the relationship of the parties thereto.” 35 Am. Jur. *Master and Servant* sec. 5 (1st ed. 1941). As a result, the proper categorization of such arrangements may be a matter best left to development through case-by-case adjudication. See *id.* (where parties have entered into a cost-plus contract, “some of the authorities have held the parties to be employer and contractor, and others have held them to be master and servant.”).

employed by only one of them.<sup>70</sup> There, after thoroughly considering tens of thousands of public comments and carefully analyzing the legal landscape, the Board adopted a comprehensive joint-employer standard that is consistent with common-law agency principles and provides clear guidance to regulated parties. The 2020 Rule was an immense undertaking, requiring thousands of personnel hours to complete. Today, however, with their Notice of Proposed Rulemaking (“NPRM”), the majority sets in motion a project to do it all over again. Worse, the rule they propose would be clearly inferior to the 2020 Rule, it would be contrary to the very common-law principles they so insistently emphasize, and it would fail to pass muster under the Administrative Procedure Act.

Our colleagues offer no valid justification for launching a second resource-intensive joint-employer rulemaking. They do not purport to rely on any experience under the 2020 Rule. Indeed, they cannot do so, since the Board has yet to apply it in a single case. Nor do they rely on any court precedent postdating the 2020 Rule’s publication or on any factual developments, much less any seismic shift in American workplaces. The majority’s stated purpose for this new rulemaking is to “explicitly ground the joint-employer standard in common-law agency principles and provide relevant guidance to parties covered by the Act regarding their rights and responsibilities under the Act.” But the 2020 Rule already achieves both these objectives and does so far better than the rule the majority proposes. Indeed, the proposed rule fails to achieve either of its stated aims. It neither articulates the common-law agency principles that appropriately bear on determining joint-employer status under the NLRA nor provides any real guidance to the regulated community. Instead, it simply purports to expand joint-employer status to the outermost limits of the common law (while actually going beyond those limits) and leaves everything else to case-by-case adjudication.

The universally accepted general formulation of the joint-employer standard—embodied in the 2020 Rule—is that an employer may be considered a joint employer of a separate employer’s employees only if the two employers “share or codetermine the employees’ essential terms and

conditions of employment.” See § 103.40 of the Board’s Rules and Regulations; see also *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195, 1201 (D.C. Cir. 2018); *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982), enfg. 259 NLRB 148 (1981). To establish that this “share or codetermine” standard has been met, the Board’s longstanding rule was that a putative joint employer’s control over employment matters must be direct and immediate. See, e.g., *TLI, Inc.*, 271 NLRB 798, 798–799 (1984), enfd. mem. sub nom. *General Teamsters Local Union No. 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985); *Laerco Transportation*, 269 NLRB 324 (1984). Indirect control, or an unexercised contractual reservation of a right to control, was insufficient.

This standard, which had been applied for at least 30 years, was eliminated by a divided Board in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015) (*BFI*).<sup>71</sup> Under *BFI*, one company could be deemed a joint employer of another company’s employees based *exclusively* on either a *never-exercised* contractual reservation of right to control one or more essential terms and conditions of employment or on its *indirect* control of or influence over such terms and conditions, provided the evidence satisfied a second analytical step, namely, that “the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful bargaining.” *BFI*, 362 NLRB at 1600.

The United States Court of Appeals for the District of Columbia Circuit denied enforcement of the Board’s decision in *BFI*. The D.C. Circuit held that while the common law supported the Board’s holding that indirect control and a contractually reserved right to control are relevant to the joint-employer inquiry, 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. *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d at 1216. The court also faulted the Board for failing to “meaningfully apply” the second step of its standard. *Id.* at 1221–1222. Finally, and importantly, the court did not affirm *BFI*’s holding that indirect

control, or a contractually reserved right to control, can establish joint-employer status absent direct and immediate control. It left those issues undecided. *Id.* at 1213, 1218.

In formulating the 2020 Rule, the Board heeded the D.C. Circuit’s guidance. It announced a joint-employer standard that is firmly grounded in common-law agency principles. It recognized that indirect control and a contractually reserved right to control are probative of joint-employer status. But, addressing the issues the D.C. Circuit left unaddressed, it also recognized that making either one *dispositive* of joint-employer status, absent evidence of direct and immediate control over one or more essential terms and conditions of employment, would contravene the common law and ill serve the purposes and policies of the Act. Accordingly, the 2020 Rule specified that to establish that an entity shares or codetermines the essential terms and conditions of another employer’s employees, the entity must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees. Evidence of the entity’s indirect control over essential terms and conditions of employment of another employer’s employees, the entity’s contractually reserved but never exercised authority over the essential terms and conditions of employment of another employer’s employees, or the entity’s control over mandatory subjects of bargaining other than the essential terms and conditions of employment 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 over a particular essential term and condition of employment. 29 CFR 103.40(a). The 2020 rule also specified in detail how a joint-employer determination is to be made, enumerating the specific factors that would be considered and how those factors would be applied. This included defining a closed set of “essential terms and conditions of employment,” specifying how “direct and immediate control” would be determined with respect to each of them, and defining all other key terms used in the rule. See 29 CFR 103.40(b)–(f). Thus, the 2020 Rule aligns with the common law and the D.C. Circuit’s 2018 decision and provides a self-contained, comprehensive standard for

<sup>70</sup> Joint Employer Status Under the National Labor Relations Act, 85 FR 11184 (Feb. 26, 2020) (codified at 29 CFR 103.40).

<sup>71</sup> Review granted in part and remanded 911 F.3d 1195 (D.C. Cir. 2018).

determining whether a joint-employer relationship exists.

The proposed rule would eliminate all the 2020 Rule's detailed guidance regarding conduct that constitutes direct and immediate control of each essential term and condition of employment. In its place, the proposed rule simply incorporates by reference the entire body of common-law agency principles. As a result, unions, employers, and employees would find no guidance in the rule itself. Instead, they would have to go searching for guidance in the common law to determine whether a joint-employer relationship exists.

Worse, the proposed rule also radically expands the circumstances in which joint-employer status can be found, going well beyond common-law limits and anything contemplated by the Board's decision in *BFI*. As discussed below, the proposed rule makes a never-exercised contractual reservation of right to control, or indirect control or influence over a single term or condition of employment deemed "essential," determinative of joint-employer status. *BFI* did not.<sup>72</sup> In addition, rather than respond to the D.C. Circuit's criticism of the *BFI* Board's failure to meaningfully apply the second step of its announced standard, the proposed rule simply abandons that step altogether, embracing the unsupported and wholly unreasonable assumption that where an entity possesses nothing more than a never-exercised right of control, any bargaining by that entity "will necessarily be meaningful." In addition, the proposed rule substitutes an open-ended, non-exclusive list of essential terms and conditions of employment for the closed list set forth in the 2020 Rule. As explained below, this open-ended list renders the proposed rule impermissibly vague and therefore arbitrary and capricious. For all these reasons, we respectfully dissent.

### Background and the 2020 Rule

Section 2(2) of the National Labor Relations Act defines an "employer" to include "any person acting as an agent of an employer, directly or indirectly." 29 U.S.C. 152(2). In determining whether an employment relationship exists between an entity and employees directly employed by a separate employer, common-law agency principles are controlling.<sup>73</sup> The Board will find that two separate entities are

joint employers of employees directly employed by only one of them if the evidence shows that they share or codetermine those matters governing the employees' essential terms and conditions of employment.<sup>74</sup>

The Board, with court approval, long held that a determination that two or more entities do share or codetermine such matters requires proof that a putative joint employer has actually exercised substantial direct and immediate control over one or more essential terms and conditions of employment of another entity's employees. See *Summit Express, Inc.*, 350 NLRB 592, 592 fn. 3 (2007) (finding that the General Counsel failed to prove direct and immediate control and therefore dismissing joint-employer allegation); *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002) (holding that "the essential element" in a joint-employer analysis "is whether a putative joint employer's control over employment matters is direct and immediate") (citing *TLI, Inc.*, 271 NLRB at 798–799); *Laerco Transportation*, 269 NLRB at 324 (dismissing joint-employer allegation where user employer's supervision of supplied employees was limited and routine); see also *NLRB v. CNN America, Inc.*, 865 F.3d 740, 748–751 (D.C. Cir. 2017) (finding that the Board erred by failing to adhere to its "direct and immediate control" standard); *SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 442–443 (2d Cir. 2011) ("An essential element of any joint employer determination is 'sufficient evidence of immediate control over the employees.'") (quoting *Clinton's Ditch Co-op Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985)). Under this precedent, an entity's unexercised contractual reservation of a right to control or indirect control/influence was insufficient to establish joint-employer status.

In 2015, a divided Board significantly lowered the bar for proving a joint-employer relationship in *BFI*, supra, 362 NLRB at 1599. There, a Board majority eliminated the requirement of proof that a putative joint employer had actually exercised direct and immediate control over essential terms and conditions of

employment. Id. at 1613–1614. The *BFI* majority held that a joint-employer relationship could be based solely on an unexercised contractual reservation of right to control and/or indirect control. In other words, the *BFI* majority expanded the joint-employer doctrine to potentially include in the collective-bargaining process an employer's independent business partner that has an indirect or potential impact on the employees' essential terms and conditions of employment, even where the business partner has not itself actually established those essential employment terms or collaborated with the undisputed employer in setting them.

The defining feature of the Board's *BFI* standard was its elimination of the preexisting requirement of proof that a putative joint employer actually exercised substantial direct and immediate control over the essential terms and conditions of another company's workers. Contrary to our colleagues' claims that the D.C. Circuit "broadly uph[e]ld[] the Board's *BFI* joint-employer standard," the court did not uphold its defining feature. It expressly left unaddressed whether indirect control or contractually-reserved-but-unexercised authority could, standing alone, establish a joint-employer relationship.<sup>75</sup>

After canvassing common-law agency principles, including those identified in the Restatements of Agency, the D.C. Circuit did "uphold as fully consistent with the common law the [*BFI*] Board's determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis." 911 F.3d at 1222 (emphasis added). In short, the court held that contractually reserved control and indirect control can contribute to a joint-employer finding without addressing whether those factors could independently establish a joint-employer relationship.

The court in *Browning-Ferris Industries of California v. NLRB* made several other important points that subsequently informed the 2020 Rule. First, the court made clear that the common law sets the outer limit of a permissible joint-employer standard

<sup>72</sup> See *BFI*, 362 NLRB at 1614 ("The right to control . . . is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect" (emphasis added)).

<sup>73</sup> *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968).

<sup>74</sup> *CNN America, Inc.*, 361 NLRB 439, 441 (2014) (quoting *TLI, Inc.*, 271 NLRB at 798), enf. denied in part 865 F.3d 740 (D.C. Cir. 2017). The "share or codetermine" standard was first stated by the United States Court of Appeals for the Third Circuit in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d at 1123. As the D.C. Circuit observed in its 2018 decision, after the Third Circuit formulated the "share or codetermine" standard, the Board and the courts began coalescing around it. *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d at 1201.

<sup>75</sup> 911 F.3d at 1213 ("[B]ecause the Board relied on evidence that Browning-Ferris both had a 'right to control' and had 'exercised that control,' this case does not present the question whether the reserved right to control, divorced from any actual exercise of that authority, could alone establish a joint-employer relationship.") (internal citation omitted); 911 F.3d at 1218 ("[W]hether indirect control can be 'dispositive' is not at issue in this case because the Board's decision turned on its finding that Browning-Ferris exercised control 'both directly and indirectly.'")

under the Act, without suggesting in any way that the standard must or should be coextensive with that outer limit.

The policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer. The Board's rulemaking, in other words, *must color within the common-law lines* identified by the judiciary.

Id. at 1208 (emphasis added). Hence, while it is clear that the Board is precluded from adopting a more expansive joint-employer doctrine than the common law permits, it may adopt a narrower standard that promotes the Act's policies. This is a point that was recognized by the Board majority in *BFI* itself. *BFI*, 362 NLRB at 1613 (“The common-law definition of an employment relationship establishes the outer limits of a permissible joint-employer standard under the Act.”). Indeed, the Board, with court approval, has long made policy choices not to exercise the full extent of its jurisdiction, including as to particular classes of employment relationships.<sup>76</sup>

Second, the D.C. Circuit made clear that, under the common law, the independent-contractor standard, with its emphasis on the right to control, is different from the joint-employer standard:

[T]he independent-contractor and joint-employer tests ask different questions. The independent-contractor test considers who, if anyone, controls the worker other than the worker herself. The joint-employer test, by contrast, asks how many employers control individuals who are unquestionably superintendent.

911 F.3d at 1214. In this regard, the court explained that “a rigid focus on independent-contractor analysis omits the vital second step in joint-employer cases, which asks, once control over the workers is found, *who* is exercising that control, *when*, and *how*.” Id. at 1215

<sup>76</sup> See *Northwestern University*, 362 NLRB 1350, 1352 (2015) (declining to assert jurisdiction over Northwestern University football players who receive grant-in-aid scholarships, even assuming they are statutory employees, due to the nature and structure of the NCAA Division I Football Bowl Subdivision); *Brevard Achievement Center*, 342 NLRB 982, 983–985 (2004) (declining to exercise jurisdiction over disabled workers whose relationship with an employer is “primarily rehabilitative” as opposed to “typically industrial” because “Congress did not intend that the Act govern” the former); *Brown University*, 342 NLRB 483, 493 (2004) (dismissing representation petition based on the “belief that the imposition of collective bargaining on graduate students would improperly intrude into the educational process and would be inconsistent with the purposes and policies of the Act”), overruled on policy grounds by *Columbia University*, 364 NLRB No. 90 (2016); *Siemons Mailing Service*, 122 NLRB 81 (1959) (describing Board's discretionary commerce standard).

(emphasis in original). To rephrase, the vital second step of a common-law joint-employer analysis does indeed focus on the exercise of control.

Third, the D.C. Circuit held that the *BFI* Board's treatment of the indirect-control factor contravened the common law. Id. at 1221. Specifically, the court concluded 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. Id. at 1216. The court explained that, for example, it would be inappropriate to give any weight in a joint-employer analysis to the fact that Browning-Ferris had controlled the basic contours of a contracted-for service, such as by requiring four lines' worth of employee sorters plus supporting screen cleaners and housekeepers. Id. at 1220–2221.

Fourth, the court held that the Board had erred by failing to meaningfully apply the second step of its two-step standard: “whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.” On this point, the court rebuked the Board for “never delineat[ing] what terms and conditions of employment are ‘essential’” and for adopting an “inclusive” and “non-exhaustive” approach to the meaning of “essential terms.” Id. at 1221–1222. The court also faulted the Board for failing to clarify what “meaningful collective bargaining” might require in the parties' arrangement. The court remanded the case to the Board for further proceedings consistent with the court's opinion.<sup>77</sup>

The Board's 2020 Rule is within the boundaries set by common-law agency principles as defined by the D.C. Circuit's 2018 *BFI* decision and furthers the Act's policy of promoting

<sup>77</sup> On remand, the Board found that any retroactive application of a refined standard would be manifestly unjust. The Board therefore dismissed the complaint and amended the certification of representative to remove BFI as a joint employer. *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 369 NLRB No. 139, slip op. at 1 (2020). Thereafter, a divided Board denied the union's motion for reconsideration. *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 370 NLRB No. 86 (2021).

On further review, the D.C. Circuit found the Board's retroactivity analysis erroneous, granted the union's petition for review, and vacated the Board's order dismissing the complaint and amending the certification of representative. *Sanitary Truck Drivers & Helpers Local 350, International Brotherhood of Teamsters v. NLRB*, --- F.4th ---, 2022 WL 3008026 (D.C. Cir. July 29, 2022).

meaningful collective bargaining. The 2020 Rule appropriately accounts for the “vital second step in joint-employer cases” identified by the court in *BFI*: once control over the workers is found, determining “*who* is exercising that control, *when*, and *how*.” Id. at 1215. Under the 2020 Rule, an entity can be deemed a joint employer of another company's employees only if it possesses and actually exercises substantial direct and immediate control over a broad-but-exhaustive list of essential terms and conditions of employment.

The 2020 Rule does not turn a blind eye to reserved control or indirect control. It expressly provides that those forms of control are “probative of joint-employer status.” See § 103.40(a) of the Board's Rules and Regulations. Specifically, each may serve to supplement and reinforce evidence the putative joint employer either possesses or has exercised substantial direct and immediate control over workers' essential terms. Plainly, the fact that an entity has a contractual reservation of a right to control is relevant to establishing possession of control. Further, both reserved control and indirect control are relevant to whether the control possessed and exercised is substantial. 85 FR 11186. However, standing alone, reserved and indirect control cannot establish that one company is the joint employer of another's employees. See § 103.40(a) of the Board's Rules and Regulations. The 2020 Rule requires proof that a putative joint employer played an active role, either alone or in collaboration with an undisputed employer, in setting employees' essential terms. The D.C. Circuit left this issue open for the Board to resolve, and the Board appropriately did so in the 2020 Rule.

In promulgating the 2020 Rule, the Board also made clear that it did not intend to permit an entity to immunize itself from joint-employer status by implementing its control through an intermediary. “Direct and immediate control exercised through an intermediary remains direct and immediate.” 85 FR 11209. This, too, is consistent with the D.C. Circuit's guidance. See *Browning-Ferris v. NLRB*, 911 F.3d at 1217 (“[T]he common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship.”).

The 2020 Rule, unlike our colleagues' proposed rule, appropriately recognizes that the determination of joint-employer status cannot be divorced from the practical consequences of finding that an entity *is* a joint employer. The Board

explained that the 2020 Rule promoted the Act's policies by imposing bargaining obligations only on those employer entities that actually control essential working conditions and by establishing a fairly bright-line rule to guide regulated parties. In that rule, it was stated that the Board believes a standard that requires an entity to possess and exercise substantial direct and immediate control over essential terms and conditions of employment is consistent with the purposes and policies of the Act. . . . The Act's purpose of promoting collective bargaining is best served by a joint-employer standard that places at the bargaining table only those entities that control terms and conditions that are most material to collective bargaining. Moreover, a less demanding standard would unjustly subject innocent parties to liability for others' unfair labor practices and coercion in others' labor disputes. A fuzziier standard with no bright lines would make it difficult for the Board to distinguish between arm's-length contracting parties and genuine joint employers. Accordingly, preserving the element of direct and immediate control over essential terms and conditions draws a discernible and predictable line, providing "certainty beforehand" for the regulated community. 85 FR 11205.

A primary benefit of the 2020 Rule is the clear guidance that it provides to regulated parties. Not only does it clearly identify the general types of control that will render one company the joint employer of another's workers, it also provides specific examples with respect to each essential employment term. For example, with respect to "wages," the 2020 Rule provides that an employer exercises direct and immediate control if it determines the wage rate paid to another employer's individual employees or job classifications, but not if it enters into a cost-plus contract with another company. Further, with respect to the essential term of "direction," the 2020 Rule provides that an entity exercises direct and immediate control by assigning particular employees their individual work schedules, positions, and tasks, but not if it merely sets the schedule for completing a project or describes the work to be accomplished on a project. The 2020 Rule provides similar examples for each of the other six "essential" terms. And the 2020 Rule makes clear that like reserved and indirect control over essential terms, control over non-essential mandatory subjects of bargaining can be probative of joint-employer status but is

insufficient, standing alone, to establish a joint-employer relationship.

### Reasons for Our Dissent

We dissent from the majority's decision to engage in rulemaking in this area at this time because, for the reasons stated above, there is no valid justification for doing so, particularly a mere two-and-a-half years after the 2020 Rule was promulgated. We further dissent from the majority's NPRM because the proposed rule is fundamentally flawed and inconsistent with the common law and the policies of the Act for the reasons stated below. The proposed rule is sufficiently flawed that a decision to adopt it would be arbitrary and capricious. For the same reasons, any revised rule that could be permissibly based on it would be arbitrary and capricious as well.

#### *A. The Proposed Rule Is Arbitrary and Capricious Because It Fails To Provide Meaningful Guidance*

The choice between rulemaking and adjudication is left to the Agency's informed discretion in the first instance.<sup>78</sup> In either circumstance, however, the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, establishes standards that Federal agencies must follow. Specifically, the APA prohibits administrative agencies from acting arbitrarily and capriciously. In this regard, the Supreme Court has explained that the APA requires the agency to "provide reasoned explanation for its action . . . . An agency may not, for example, depart from a prior policy *sub silentio* . . . . And of course the agency must show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (internal citation omitted). More recently, the Supreme Court succinctly held that "[t]he APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 1150, 1158 (2021). The proposed rule fails this test.

The majority justifies their decision to engage in rulemaking here by claiming that the proposed rule will, among other things, establish "a definite, readily available standard [that] will assist employers and labor organizations in complying with the Act" and "reduce

uncertainty and litigation over the basic parameters of joint-employer status" compared to determining joint-employer status through adjudication. But the proposed rule fails to achieve these goals. It offers no greater certainty or predictability than adjudication because it expressly contemplates that joint-employer status will be determined through adjudication under the common law, not under the provisions of the proposed rule, in most if not all cases. In this respect, it will also provide markedly less guidance to parties than does the 2020 Rule.

Absent any rule whatsoever, joint-employer status would be determined through case-by-case adjudication applying the common law of agency.<sup>79</sup> Rather than specify how the common-law standard will be applied in determining joint-employer status, however, the proposed rule simply incorporates it by reference in no fewer than three places. Section 103.40(a) of the proposed rule provides that "an employer, as defined by section 2(2) of the National Labor Relations Act (the Act), is an employer of particular employees, as defined by section 2(3) of the Act, if the employer has an employment relationship with those employees under common-law agency principles." Section 103.40(b) of the proposed rule provides that "[w]hether an employer possesses the authority to control or exercises the power to control one or more of the employees' terms and conditions of employment is determined under common-law agency principles." And § 103.40(f) of the proposed rule provides that "[e]vidence of an employer's control over matters that are immaterial to the existence of an employment relationship under common-law agency principles or control over matters that do not bear on the employees' essential terms and conditions of employment is not relevant to the determination of whether the employer is a joint employer." Determinations of joint-employer status under each of these provisions will require adjudication under the common law, since the proposed rule by its terms

<sup>78</sup> *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion."); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

<sup>79</sup> See *NLRB v. United Insurance Co. of America*, 390 U.S. at 256 (holding that the Board must "apply general agency principles in distinguishing between employees and independent contractors under the Act"); *Browning-Ferris Industries of California v. NLRB*, 911 F.3d at 1214–1215 ("[E]mployee-or-independent-contractor cases can still be instructive in the joint-employer inquiry to the extent that they elaborate on the nature and extent of control necessary to establish a common-law employment relationship. Beyond that, a rigid focus on independent-contractor analysis omits the vital second step in joint-employer cases, which asks, once control over the workers is found, *who* is exercising that control, *when*, and *how*." (emphasis in original)).

provides no other guidance. This is precisely how the determinations would be made if there were no rule at all.<sup>80</sup>

Moreover, the proposed rule incorporates “common-law agency principles” but offers no guidance whatsoever as to the meaning of that term. Does the proposed rule incorporate the Restatement of Agency? If so, which of the three Restatements is being incorporated? Do “common-law agency principles” include court decisions applying the common law? If so, which ones? Does a decision by a single court count, even if most other courts disagree? The proposed rule does not answer or even acknowledge any of these questions, much less provide a reasonable explanation for failing to do so. See *FCC v. Prometheus Radio Project*, 141 S. Ct. at 1158 (“The APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.”).

Another weakness in the proposed rule is the uncertainty it would inject into the identification of “essential” terms and conditions of employment. Where the 2020 Rule provided an exhaustive list, the proposed rule takes a “broad, inclusive” (*i.e.*, vague) approach. The text of the proposed regulation provides a non-exhaustive list of “essential” subjects without providing any guidance on how regulated parties (or the Board) could determine whether an unlisted subject is “essential.” The proposed rule compounds that uncertainty by suggesting that whether a particular subject is “essential” may depend on the particular industry involved, and further, that the category of “essential” terms may change over the course of time.

In *Browning-Ferris Industries of California, Inc. v. NLRB*, the D.C. Circuit faulted the *BFI* Board for failing to delineate what terms and conditions are “essential” to make collective bargaining “meaningful” and instead simply declaring that it would adhere to an “‘inclusive’ and ‘non-exhaustive’ approach.” 911 F.3d at 1221–1222 (citation omitted). In remanding the case to the Board, the D.C. Circuit articulated its trust that, before finding a joint-employer relationship, the Board “would not neglect to . . . explain which terms and conditions are ‘essential’ to permit ‘meaningful collective bargaining.’” *id.* at 1222—

referring, in that last phrase, to the second step of the *BFI* standard.<sup>81</sup> Our colleagues’ response? They keep *BFI*’s “inclusive” and “non-exhaustive” approach to “essential” terms and conditions, but they evade—for the time being—the task of furnishing the explanation the D.C. Circuit requires by tossing out the second step of the *BFI* standard altogether and declaring that “any required bargaining under the new standard will necessarily be meaningful.” Whether this solution has legs remains to be seen. Although the D.C. Circuit did not expressly endorse *BFI*’s second step, presumably the court would not have instructed the Board to explain that step more fully on remand if it deemed it superfluous to begin with.

The proposed rule is a step backward from the 2020 Rule in all these respects. As noted above, the 2020 Rule specified the factors to be considered in making a joint-employer determination and explained how they relate to each other. This permitted parties to determine whether a joint-employer relationship would be found based on the text of the rule itself, without any need to resort to Restatements of Agency, precedent applying the common law, or any other source to make that determination because the 2020 Rule itself reflected the boundaries established by the common law. It also specified the terms or conditions of employment that would be considered essential in determining joint-employer status. For all these reasons, the 2020 Rule indisputably provides parties with greater certainty and predictability than they would have if joint-employer status were decided by adjudication. The proposed rule, on the other hand, does not.

While administrative agencies have the authority to revise or amend previously promulgated rules, the APA requires the agency to “provide reasoned explanation for its action . . . [and] show that there are good reasons for the new policy.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515 (internal citation omitted). Here, our colleagues fail to acknowledge that their proposed rule provides less guidance for the regulated community than the 2020 Rule. Nor have they shown that there are “good reasons” for replacing a clear, well-defined, and comprehensive rule with one that simply sets employers, employees, and unions adrift in a sea of common-law agency precedent, just as if

there were no joint-employer rule at all. For this reason as well, the proposed rule is arbitrary and capricious. *Id.*

#### *B. The Proposed Rule Is Contrary to the Common Law*

The drastic changes our colleagues propose making to existing law also do not find support in the common-law standards they claim to endorse. They assert that the Act’s policies “make it appropriate for the Board to give determinative weight to the existence of a putative joint employer’s authority to control the essential terms and conditions of employment, whether or not such control is exercised, and without regard to whether any exercise of such control is direct or indirect.” However, they fail to cite a body of court precedent holding that a joint-employer relationship—whether under the common law or in the specific context of the National Labor Relations Act—may be based solely on a never-exercised contractual reservation of right to control or on indirect control or impact on employees’ essential working conditions.

Contrary to our colleagues’ suggestion, *Greyhound Corp.*, 153 NLRB 1488 (1965), does not support their view that a joint-employer relationship may be based exclusively on a never-exercised contractual reservation of a right to control and/or indirect control. In that case, the Board found that Greyhound was a joint employer of its cleaning contractor’s employees based in part on Greyhound’s actual exercise of substantial direct and immediate control over the employees’ essential terms and conditions of employment. Specifically, the Board relied on the fact that Greyhound had actually engaged in “detailed supervision” of the employees on a day-to-day basis regarding the manner and means of their performance. *Id.* at 1496. Also, the Board relied on the fact that Greyhound had actually prompted the discharge of one of the contractor’s employees whom Greyhound had felt was unsatisfactory. *Id.* at 1491 fn. 8. To be sure, the Board also gave some weight to provisions in the business contract between Greyhound and the contractor. That contract granted Greyhound the right to specify the “exact manner and means” through which the employees’ work would be accomplished, control their wages, set their schedules, and assign employees to perform the work. *Id.* at 1495–1496. But the Board specifically stated that “[t]he joint employer finding herein is premised on the common control exercised by Greyhound and [the cleaning contractor] over the employees.” *Id.* at 1492 (emphasis

<sup>80</sup>This naturally invites the question, why is the majority proposing a new rule to replace the 2020 Rule rather than simply rescinding the 2020 Rule? We suspect the answer is that rescinding the 2020 Rule without replacing it with a new rule would effectively reinstate *BFI*, which the majority departs from in key respects.

<sup>81</sup>See *BFI*, 362 NLRB at 1600 (“If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.”).



added). And the Board explained that Greyhound had “reserved to itself, both as a matter of express contractual agreement and in actual practice, rights over these employees which are consistent with its status as their employer along with [the cleaning contractor].” Id. at 1495 (emphasis added). In short, *Greyhound* supports the 2020 Rule, not the proposed rule.<sup>82</sup>

In an earlier case related to *Greyhound*, the Supreme Court held that a Federal district court lacked subject-matter jurisdiction to enjoin the Board from conducting a representation election based on the plaintiff’s challenge to the Board’s joint-employer determination in the representation proceeding. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). While the Court there did not rule directly on the joint-employer standard, it observed that the Board had found Greyhound and the cleaning contractor constituted a joint employer “because they had exercised common control over the employees.” Id. at 475. The Court further stated that “whether Greyhound possessed sufficient indicia of control to be an ‘employer’ is essentially a factual issue.” Id. at 481. Accordingly, *Boire v. Greyhound* offers no support for the proposed rule.

The majority’s proposed rule also finds no support in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d at 1117. There, the Third

Circuit set forth the “correct standard” as follows: “[W]here two or more employers exert significant control over the same employees—where 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.” Id. at 1124 (emphasis added).<sup>83</sup> Applying that standard, the court found that the operator of a refuse site (BFI) was a joint employer of drivers directly employed and supplied by its trucking contractors. The court relied on BFI’s actual exercise of substantial direct and immediate control over the drivers’ essential terms and conditions of employment. Specifically, BFI possessed and exercised the right to hire and fire the drivers at issue. Id. at 1120, 1124. Also, BFI and the trucking contractors “together determined the drivers’ compensation and shared in the day to day supervision of the drivers.” Id. at 1125. On that record, the Third Circuit found that substantial evidence “support[ed] the Board’s finding that BFI exerted significant control over the work of the drivers,” and it therefore affirmed the Board’s joint-employer conclusion. Id. at 1125 (emphasis added). The Third Circuit did not hint, much less hold, that an entity shares or codetermines matters governing essential terms and conditions of employment of a separate employer’s employees without having actually exercised control over those terms and conditions—on its own or in collaboration with the undisputed employer—by hiring, discharging, disciplining, supervising, or directing them or by setting their wages, benefits, or hours of work.

Our colleagues also mistakenly rely on independent-contractor-or-employee cases to support their proposed drastic

changes to the Board’s joint-employer standard. To be sure, the courts have stated that a worker is an employee, not an independent contractor, if an employer possesses a “right to control” her manner and means of performance, regardless of whether that right is exercised. In determining whether an employer possesses a “right to control” in that context, courts consider a variety of factors, which the Supreme Court summarized in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).<sup>84</sup> But, as referenced above, the D.C. Circuit explained in *Browning-Ferris v. NLRB* that the common-law independent-contractor standard and joint-employer standard are different because the joint-employer standard has a crucial second step, which asks, who is exercising control, when, and how. 911 F.3d at 1215. As the court explained, “using the independent-contractor test exclusively to answer the joint-employer question would be rather like using a hammer to drive in a screw: it only roughly assists the task because the hammer is designed for a different purpose.” Id. Our colleagues’ proposed rule simply disregards the second step of the common-law joint-employer standard identified by the D.C. Circuit. It would eliminate any requirement of actual exercise of control and thus render immaterial “how” any control is exercised (directly or indirectly). Therefore, the proposed rule is inconsistent with the common law for this reason as well.

### C. The Proposed Rule Misleadingly Claims To Return to the BFI Standard

Our colleagues say that they are proposing “to rescind [the 2020 Rule] and replace it with a new rule that incorporates the *BFI* standard.” This is not so. The majority’s proposed rule ventures into territory the *BFI* Board steered clear of. It would not merely return the Board to the *BFI* standard but would implement a standard considerably more extreme than *BFI*. As shown below, the proposed rule’s expansions of joint-employer status are contrary to the common law and the policies of the Act.

<sup>82</sup> The majority misleadingly claims that “[f]or nearly two decades after *Greyhound*, the Board treated the right to control employees’ work and their terms and conditions of employment as determinative in the joint-employer analysis.” To support that assertion, the majority cites a number of decisions in which the Board and reviewing courts found “probative” (*i.e.*, relevant) a company’s unexercised contractual reservation of right to control and/or its indirect control over essential terms and conditions of employment. But, in nearly every one of those cases, the Board also relied in part on an entity’s actual exercise of direct and immediate control and did not state or imply that a joint-employer finding would have been appropriate absent that exercise of control. See, *e.g.*, *Lowery Trucking Co.*, 177 NLRB 13, 15 (1969) (finding that freight company was joint employer of drivers supplied by trucking company based in part on actual exercise of detailed supervision, participation in the hiring process, discharge of two drivers, and discipline of a third), *enfd.* sub nom. *Ace-Alkire Freight Lines v. NLRB*, 431 F.2d 280 (8th Cir. 1970). Our research revealed only two cases in which the Board apparently based a joint-employer finding exclusively on an unexercised contractual reservation of right to control essential employment terms: *Jewel Tea Co.*, 162 NLRB 508 (1966), and *Value Village*, 161 NLRB 603 (1966). However, in each case, the Board failed to offer any rationale for why an unexercised reservation of right, standing alone, could establish joint-employer status under the Act. In that regard, those two opinions were conclusory. Two conclusory decisions do not establish a traditional approach. Moreover, our research uncovered no cases in which the Board or a court based a joint-employer finding solely on indirect control.

<sup>83</sup> To be sure, the proposed rule incorporates the “share or codetermine” standard in proposed § 103.40(b). However, in § 103.40(c), it defines the “share or codetermine” standard to include indirect control of, and possession of a never-exercised authority to control, any essential term or condition of employment. This is not how the standard has been understood or applied historically. Indeed, it is contrary to the understanding of the court that first formulated the “share or codetermine” standard, the Third Circuit, which equated it with a shared “exercit[ion]” of “significant control” over a group of employees. *NLRB v. Browning-Ferris Industries of Pennsylvania*, 691 F.2d at 1194. Our colleagues’ definition of the “share or codetermine” standard, so at variance with how that standard has been understood, reminds us of a dialogue between Humpty Dumpty and Alice in chapter 6 of Lewis Carroll’s *Through the Looking Glass*: “When I use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean—neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

<sup>84</sup> The so-called “*Reid* factors,” which are culled from the Federal common law of agency, include (1) the skill required; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party’s discretion over when and how long to work; (7) the method of payment; (8) the hired party’s role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party. Id. at 751–752.

First, although the *BFI* majority opened the door to finding joint-employer status, on the facts of a particular case, based solely on indirect control or a never-exercised reserved right to control,<sup>85</sup> they stopped short of declaring these *dispositive* of joint-employer status as a matter of law.<sup>86</sup> Our colleagues' proposed rule does not. Section 103.40(b) of the proposed rule provides that employers are joint employers if they "share or codetermine those matters governing employees' essential terms and conditions of employment," and § 103.40(c) states that "[t]o 'share or codetermine those matters governing employees' essential terms and conditions of employment' means for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment" (emphasis added). And if that isn't clear enough, § 103.40(e) of the proposed rule states: "Possessing the authority to control *is sufficient* to establish status as a joint employer, regardless of whether control is exercised. Exercising the power to control indirectly *is sufficient* to establish status as a joint employer, regardless of whether the power is exercised directly" (emphasis added).

The proposed rule also abandons *BFI*'s second step, which required proof that "the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." 362 NLRB at 1600. Our colleagues thus repudiate the *BFI* Board's view that in some cases, a putative joint employer's degree of control over the terms and conditions of employment of another employer's employees will be insufficient to warrant placing the putative joint employer at the bargaining table, and accordingly that it would be contrary to the policies of the Act to find a joint-employer relationship in those circumstances. 362 NLRB at 1610–1611, 1614. Instead, our colleagues simply assert that where "a putative joint employer possesses the authority to control or exercises the power to control employees' essential

terms and conditions of employment, any required bargaining under the new standard will necessarily be meaningful." The majority offers no support whatsoever for this step. They simply declare that it must be so.

The majority's omission of *BFI*'s "meaningful collective bargaining" inquiry contradicts the D.C. Circuit's decision in *Browning-Ferris Industries of California, Inc. v. NLRB*, supra. There, the D.C. Circuit faulted the Board for failing to apply the second step of the *BFI* standard and declared that the Board must explain how a putative joint-employer's control would result in "meaningful collective bargaining" before it could find a joint-employer relationship. Presumably, the court would not have remanded for that purpose if the inquiry were unnecessary to the joint-employer determination.

In our view, the majority's assumption that any bargaining required under their newly-fashioned standard will necessarily be meaningful is also patently unreasonable. It bears emphasis that joint-employer bargaining requires separate entities to bargain together. Such bargaining will be unworkable unless those entities' interests are sufficiently aligned to permit them to bargain together, rather than against, each other. Moreover, it makes no sense to force an entity to participate in collective bargaining where its influence over the terms and conditions of employment of another employer's employees is too attenuated to make its participation meaningful, and it is unfair to impose unfair labor practice liability on that entity if it fails or refuses to do so. Nevertheless, the proposed rule would require just that, even where a putative joint employer has never exercised a reserved right to control any one term or condition of employment our colleagues would deem essential—including where that employment term has never before been so deemed but is discovered to be essential in the case itself.<sup>87</sup> It is

unlikely, to say the least, that bargaining on the basis of so tenuous a relationship will be either meaningful or productive.

It is difficult to imagine a better recipe for injecting chaos into the practice and procedure of collective bargaining that the majority claims to promote. This is contrary to the national labor policy that Congress established, which aims to "achiev[e] industrial peace by promoting *stable* collective-bargaining relationships." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (emphasis added).<sup>88</sup> Moreover, collective bargaining was intended by Congress to be a process that could conceivably produce agreements. See, e.g., *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485 (1960) (Congress intended collective bargaining to be "a process that look[s] to the ordering of the parties' industrial relationship through the formation of a contract."); *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523 (1941) (The object of collective bargaining under the Act is "an agreement between employer and employees as to wages, hours and working conditions."). There is nothing stable about the collective-bargaining relationships the proposed rule would create, nor is there any likelihood that those relationships would result in an agreement.

#### D. The Proposed Rule Is Not Required To Address Health and Safety Matters

Contrary to the majority's wholly unsupported suggestion, the 2020 Rule does not turn a blind eye to a putative joint employer's control over health and safety matters. To be sure, the 2020 Rule does require that an entity possess and exercise direct and immediate control over one or more essential terms or conditions of employment, as defined by the Rule, before joint-employer status may be found, and health and safety matters are not one of those essential terms and conditions of employment. As noted above, however, the 2020 Rule also specifically states that "the entity's control over mandatory subjects of bargaining other than the essential terms and conditions of employment 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

might not be limited to an order to bargain. See *ArrMaz Products, Inc.*, 12–CA–294086 (arguing that the Board should order the employer to "make the bargaining-unit employees whole for the lost opportunity to engage in collective bargaining," overruling *Ex-Cell-O Corp.*, 185 NLRB 107 (1970)).

<sup>88</sup> See also *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.")

<sup>85</sup> See *BFI*, 362 NLRB at 1613–1614 ("We will 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.")

<sup>86</sup> See *BFI*, 362 NLRB at 1614 ("The right to control . . . is *probative* of joint-employer status, as is the actual exercise of control, whether direct or indirect" (emphasis added)).

<sup>87</sup> See § 103.40(d) of the proposed rule: "'Essential terms and conditions of employment' will generally include, *but are not 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" (emphasis added). Holding a party liable under sec. 8(a)(5) of the Act for failing to bargain, where the violation is premised on a finding that the party is a joint employer based on a contractually reserved right to control an employment term *never before deemed essential* would surely abrogate that party's due process rights. Yet that is an outcome the proposed rule evidently countenances. And if the Board were to adopt a recent position advocated by the General Counsel, the affirmative remedy for that violation

immediate control over a particular essential term and condition of employment.” As such, control over health and safety matters is relevant to joint-employer status under the 2020 Rule.

We therefore emphatically reject the majority’s unsupported assertion that “[t]he shortcomings of the 2020 Rule’s exhaustive list of essential terms and conditions of employment (which did not include workplace health and safety) were revealed during the COVID–19 pandemic.” While the proposed rule cites no source for this claim, it is a matter of public record that this is one of the allegations in the complaint filed by the Service Employees International Union in their pending lawsuit to invalidate the 2020 Rule.<sup>89</sup> It is the obligation of the Board to defend against that lawsuit, not to effectively support it by publicly endorsing the plaintiff’s allegations.

There is, moreover, no merit to this reckless charge. Not one example has been cited in which a union’s inability to bargain with a putative joint employer of employees it represents has adversely affected any employee’s health or safety for any reason, much less because of the COVID–19 pandemic. Nor is it at all evident why a union would be unable to secure needed health and safety measures, including protections against COVID–19, through bargaining with the entity that is the undisputed employer of the employees it represents without also including a putative joint employer, much less that the differences between the 2020 Rule and the proposed rule would make any difference in this regard.

Among other things, the unlikely scenario posited by the majority would involve an undisputed employer that contracted away its control over its employees’ health and safety despite its established legal obligation to provide a safe workplace and the liability that it would incur if it breached that duty.<sup>90</sup>

<sup>89</sup> See *Service Employees International Union v. NLRB*, Case No. 21–cv–2443 (D.D.C.). The complaint in that case, like the NPRM here, alleges that the 2020 Rule “arbitrarily and capriciously excludes health and safety matters from the set of employment conditions over which an entity that exercises control must bargain. The latter error is particularly egregious in the context of the global COVID–19 pandemic.” (On January 6, 2022, the court granted a joint motion filed by the SEIU and the Board to stay Case No. 21–cv–2443 in light of the Board’s stated intent to engage in a second rulemaking on the joint-employer standard.)

<sup>90</sup> See, e.g., 29 U.S.C. 654, which states that each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees and shall comply with occupational

Even in that implausible scenario, the differences between the 2020 Rule and the proposed rule would be material only if the putative joint employer controlled health and safety but none of the essential terms and conditions of employment specified in the 2020 Rule. Our colleagues offer no reason to believe that this situation has ever occurred.

### Conclusion

For all these reasons, we dissent from this Notice of Proposed Rulemaking to rescind and replace the 2020 Rule. We would leave the 2020 Rule in place and move the U.S. District Court for the District of Columbia to lift the stay on the SEIU’s challenge to it. We would defend the 2020 Rule, and we are confident that it would be upheld by the courts as within the boundaries set by common-law agency principles. Of course, given that a second round of rulemaking will proceed, we shall consider with open minds all public comments, any developments brought to our attention, and the considered views of our colleagues.

## VI. Regulatory Procedures

### Regulatory Flexibility Act

#### A. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (“RFA”), 5 U.S.C. 601, *et seq.*, requires agencies to “review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].”<sup>91</sup>

It requires agencies promulgating proposed rules to prepare an Initial Regulatory Flexibility Analysis (“IRFA”) and to develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. However, an agency is not required to prepare an IRFA for a proposed rule if the agency head certifies that, if promulgated, the rule will not have a significant economic impact on a substantial number of small entities.<sup>92</sup> The RFA does not define either “significant economic impact” or “substantial number of small entities.”<sup>93</sup> Additionally, “[i]n the absence of statutory specificity, what is ‘significant’ will vary depending on the economics of the industry or sector to be regulated. The agency is in the best

safety and health standards promulgated under this chapter.

<sup>91</sup> E.O. 13272, sec. 1, 67 FR 53461 (“Proper Consideration of Small Entities in Agency Rulemaking”).

<sup>92</sup> 5 U.S.C. 605(b).

<sup>93</sup> 5 U.S.C. 601.

position to gauge the small entity impacts of its regulations.”<sup>94</sup>

Although the Board believes that it is unlikely that the proposed rule will have a significant economic impact on a substantial number of small entities, it seeks public input on this hypothesis and has prepared an IRFA to provide the public the fullest opportunity to comment on the proposed rule. An IRFA describes why an action is being proposed; the objectives and legal basis for the proposed rule; the number of small entities to which the proposed rule would apply; any projected reporting, recordkeeping, or other compliance requirements of the proposed rule; any overlapping, duplicative, or conflicting Federal rules; and any significant alternatives to the proposed rule that would accomplish the stated objectives, consistent with applicable statutes, and that would minimize any significant adverse economic impacts of the proposed rule on small entities.<sup>95</sup> Descriptions of this proposed rule, its purpose, objectives, and legal basis are contained earlier in the Summary and Supplemental Information sections and are not repeated here.

As with the Board’s 2020 Rule on Joint Employer Status under the Act, we assume that the costs of compliance for most small entities will be minimal. We assume for purposes of this analysis all small employers and small entity labor unions will incur a low cost of compliance with the rule, related to reviewing and understanding the substantive changes to the joint-employer standard. The Board welcomes comments from the public that will shed light on potential compliance costs unknown to the Board or on any other part of this IRFA.

#### B. Description and Estimate of Number of Small Entities to Which the Rule Applies

In order to evaluate the impact of the proposed rule, the Board first identified the entire universe of businesses that could be impacted by a change in the joint-employer standard. According to the United States Census Bureau, there were 6,102,412 business firms with employees in 2019.<sup>96</sup> Of those, the

<sup>94</sup> Small Business Administration Office of Advocacy, “A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act” (“SBA Guide”) at 18, <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf>.

<sup>95</sup> 5 U.S.C. 603(b).

<sup>96</sup> U.S. Department of Commerce, Bureau of Census, 2019 Statistics of U.S. Businesses (“SUSB”) Annual Data Tables by Enterprise Employment Size, <https://www.census.gov/data/tables/2019/>

Census Bureau estimates that about 6,081,544 were firms with fewer than 500 employees.<sup>97</sup> While this proposed rule does not apply to employers that do not meet the Board's jurisdictional requirements, the Board does not have the data to determine the number of excluded entities.<sup>98</sup> Accordingly, the Board assumes for purposes of this analysis that all of the 6,081,544 small business firms could be impacted by the proposed rule and will incur the one-time compliance cost of reading and familiarizing themselves with the text of the new rule.<sup>99</sup>

*econ/susb/2019-susb-annual.html* (from downloaded Excel Table entitled "U.S. & States, 6-digit NAICS" found at [https://www2.census.gov/programs-surveys/susb/tables/2019/us\\_state\\_6digitnaics\\_2019.xlsx](https://www2.census.gov/programs-surveys/susb/tables/2019/us_state_6digitnaics_2019.xlsx). "Establishments" refer to single location entities—an individual "firm" can have one or more establishments in its network. The Board has used firm level data for this IRFA because establishment data is not available for certain types of employers discussed below. Census Bureau definitions of "establishment" and "firm" can be found at <https://www.census.gov/programs-surveys/susb/about/glossary.html>.

<sup>97</sup> The Census Bureau does not specifically define small business, but does break down its data into firms with 500 or more employees and those with fewer than 500 employees. See U.S. Department of Commerce, Bureau of Census, 2019 SUSB Annual Data Tables by Enterprise Employment Size, <https://www.census.gov/data/tables/2019/econ/susb/2019-susb-annual.html> (from downloaded Excel Table entitled "U.S. & States, 6-digit NAICS") found at [https://www2.census.gov/programs-surveys/susb/tables/2019/us\\_state\\_6digitnaics\\_2019.xlsx](https://www2.census.gov/programs-surveys/susb/tables/2019/us_state_6digitnaics_2019.xlsx). Consequently, the 500-employee threshold is commonly used to describe the universe of small employers. For defining small businesses among specific industries, the standards are defined by the North American Industry Classification System (NAICS), which we set forth below.

<sup>98</sup> Pursuant to 29 U.S.C. 152(6) and (7), the Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level. *NLRB v. Fainblatt*, 306 U.S. 601, 606–07 (1939). To this end, the Board has adopted monetary standards for the assertion of jurisdiction that are based on the volume and character of the business of the employer. In general, the Board asserts jurisdiction over employers in the retail business industry if they have a gross annual volume of business of \$500,000 or more. *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1959). But shopping center and office building retailers have a lower threshold of \$100,000 per year. *Carol Management Corp.*, 133 NLRB 1126 (1961). The Board asserts jurisdiction over non-retailers generally where the value of goods and services purchased from entities in other states is at least \$50,000. *Siemons Mailing Service*, 122 NLRB 81 (1959).

The following employers are excluded from the NLRB's jurisdiction by statute: Federal, State and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations, 29 U.S.C. 152(2); employers that employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities, or prepare commodities for delivery, 29 U.S.C. 153(3); and employers subject to the Railway Labor Act, such as interstate railroads and airlines, 29 U.S.C. 152(2).

<sup>99</sup> The Board welcomes comments from the public regarding particularized direct costs that exist in these or any other sector.

The Board also recognizes that businesses that are involved in the exchange of employees or operational control, or labor unions that represent employees at such businesses, may have a particular interest in the rule and are most likely to incur the compliance costs discussed herein. Therefore, as it did in its 2018 IRFA, the Board is emphasizing the relevance of the rule to entities in the following five categories: (1) contractors/subcontractors; (2) temporary help service suppliers; (3) temporary help service users; (4) franchisees; and (5) labor unions.<sup>100</sup>

(1) Businesses that enter contracts or subcontracts to receive a wide range of services that may satisfy primary business objectives or solve discrete problems that they are not qualified to address often share workspaces and control over workers, rendering their relationships potentially subject to application of the Board's joint-employer standard. The Board does not have the means to identify precisely how many businesses are impacted by contracting and subcontracting within the U.S. or how many contractors and subcontractors would be small businesses as defined by the SBA. In its 2018 IRFA, the Board solicited input on the number of contractors and subcontractors that qualify as small businesses but received no responsive comments.<sup>101</sup>

(2) Temporary help service providers (NAICS #561320) are primarily engaged in supplying workers to supplement a client-employer's workforce. To be defined as a small business temporary help service supplier by the SBA, the entity must generate receipts of less than \$30 million annually.<sup>102</sup> In 2017, there were 14,343 temporary service supplier firms in the U.S.<sup>103</sup> Of these temporary service supplier firms, 13,384 had receipts of \$29,999,999 or less. Therefore, according to SBA standards, 93.3% of all temporary help service supplier firms are small businesses.

(3) Entities that use temporary help services in order to staff their businesses

<sup>100</sup> Comments received in response to the 2018 IRFA did not reveal any other categories of small entities that would likely take special interest in a change in the standard for determining joint-employer status under the Act or indicate that there is a unique burden for entities in these categories. 85 FR 11234.

<sup>101</sup> 83 FR 46694 fn. 56; 85 FR 11234.

<sup>102</sup> 13 CFR 121.201.

<sup>103</sup> The Census Bureau only provides data about receipts in years ending in 2 or 7, so the 2017 data is the most recent available information regarding receipts. See U.S. Department of Commerce, Bureau of Census, 2017 SUSB Annual Data Tables by Establishment Industry, NAICS classification #561320, [https://www2.census.gov/programs-surveys/susb/tables/2017/us\\_6digitnaics\\_rcptsiz\\_2017.xlsx](https://www2.census.gov/programs-surveys/susb/tables/2017/us_6digitnaics_rcptsiz_2017.xlsx).

are widespread throughout many types of industries. The Census Bureau's 2020 Annual Business Survey revealed that of the 2,687,205 respondent firms with paid employees, 94,930 of those firms obtained staffing from temporary help services in that calendar year.<sup>104</sup> This survey provides the only gauge of employers that obtain staffing from temporary help services and the Board is without the means to estimate what portion of those are small businesses as defined by the NAICS. For purposes of this IRFA, the Board assumes that all 94,930 users of temporary services are small businesses.

(4) Franchising is a method of distributing products or services in which a franchisor lends its trademark or trade name and a business system to a franchisee, which pays a royalty and often an initial fee for the right to conduct business under the franchisor's name and system.<sup>105</sup> Franchisors generally exercise some operational control over their franchisees, which potentially renders the relationship subject to application of the Board's joint-employer standard. The Board does not have the means to identify precisely how many franchisees operate within the U.S., or how many are small businesses as defined by the SBA. The Census Bureau's 2020 Annual Business Survey revealed that, of the 130,492 firms that operated a portion of their business as a franchise, 125,989 had fewer than 500 paid employees.<sup>106</sup> Based on this available data and the fact that the 500-employee threshold is commonly used to describe the universe of small employers, we assume that 125,989 (96.5% of total) are small businesses.

(5) Labor unions, as defined by the NLRA, are entities "in which employees participate and which exist for the

<sup>104</sup> U.S. Department of Commerce, Bureau of Census, 2020 Annual Business Survey—Characteristics of Businesses, <https://www.census.gov/data/tables/2020/econ/abs/2020-abs-characteristics-of-businesses.html> (from downloaded Excel Table entitled "Type(s) of Workers Employed by Sector, Sex, Ethnicity, Race, and Veteran Status," found at <https://data.census.gov/cedsci/table?q=ab1900%2a&tid=ABSCB2019.AB1900CSCB01&hidePreview=true&nkd=QDESC-B20>).

<sup>105</sup> See International Franchising Establishments FAQs, found at <https://www.franchise.org/faqs-about-franchising>.

<sup>106</sup> U.S. Department of Commerce, Bureau of Census, 2020 Annual Business Survey—Characteristics of Businesses, <https://www.census.gov/data/tables/2020/econ/abs/2020-abs-characteristics-of-businesses.html> (from downloaded Excel Table entitled "Businesses Operated as a Franchise by Sex, Ethnicity, Race, Veteran Status, and Employment Size of Firm," found at <https://data.census.gov/cedsci/table?q=ab1900%2a&tid=ABSCB2019.AB1900CSCB04&hidePreview=true&nkd=QDESC-B06>).

purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”<sup>107</sup> By defining which employers are joint employers under the NLRA, the proposed rule impacts labor unions generally, and more directly may affect those labor unions that organize the specific business sectors discussed above. The SBA’s “small business” standard for “Labor Unions and Similar Labor Organizations” (NAICS #813930) is \$14.5 million in annual receipts.<sup>108</sup> In 2017, there were 13,137 labor union firms in the U.S.<sup>109</sup> Of these firms, at least 12,875 labor union firms (98% of total) had receipts of under \$10 million and are definitely small businesses according to SBA standards. Since the Board cannot determine how many of the 89 labor union firms with receipts between \$10,000,000 and \$14,999,999 fall below the \$14.5 million annual receipt threshold, it will assume that these are all small businesses as defined by the SBA. For the purposes of the IRFA, the Board assumes that 12,964 labor union firms (98.7% of total) are small businesses.

Based on the foregoing, the Board assumes there are 13,384 temporary help supplier firms, 94,930 temporary help user firms, 125,989 franchise firms, and 12,964 union firms that are small businesses. Therefore, among these four categories of employers that are likely most interested in the proposed rule, 247,267 business firms are assumed to be small businesses as defined by the SBA.<sup>110</sup> We believe that these small businesses, and small businesses regularly engaged in contracting/subcontracting, have a general interest in the rule and would be most likely impacted by the one-time compliance cost of reviewing and understanding the rule, as described below. But employers will only be significantly impacted when they are alleged to be a joint employer in a Board proceeding. Given our historic filing data, this number is very small relative to the number of small entities in these five categories.

<sup>107</sup> 29 U.S.C. 152(5).

<sup>108</sup> 13 CFR 121.201.

<sup>109</sup> See U.S. Department of Commerce, Bureau of Economic Analysis, 2017 SUSB Annual Data Tables by Establishment Industry, NAICS classification #722513, [https://www2.census.gov/programs-surveys/susb/tables/2017/us\\_6digitnaics\\_rcptsize\\_2017.xlsx](https://www2.census.gov/programs-surveys/susb/tables/2017/us_6digitnaics_rcptsize_2017.xlsx).

<sup>110</sup> Comments received in response to the 2018 IRFA did not reveal any other categories of small entities that would likely take special interest in a change in the standard for determining joint-employer status under the Act or that there was a unique burden for entities in these subcategories. 85 FR 11234.

A review of the Board’s representation petitions and unfair labor practice (ULP) charges provides a basis for estimating the frequency that the joint-employer issue comes before the NLRB. During the four-year period between January 1, 2018 and December 31, 2021, 75,343 representation and unfair labor practice cases were initiated with the Agency. In 772 of those filings, the representation petition or ULP charge asserted a joint-employer relationship between at least two employers.<sup>111</sup> Accounting for repetitively alleged joint-employer relationships in these filings, we identified 467 separate joint-employer relationships involving an estimated 934 employers.<sup>112</sup> Accordingly, the joint-employer standard most directly impacted approximately .015% of all 6,102,412 business firms (including both large and small businesses) over the four-year period.

### C. Recordkeeping, Reporting, and Other Compliance Costs

The RFA requires the Agency to determine the amount of “reporting, recordkeeping and other compliance requirements” imposed on small entities.<sup>113</sup> The United States Court of Appeals for the District of Columbia Circuit has explained that this provision requires an agency to consider direct burdens that compliance with a new regulation will likely impose on small entities.<sup>114</sup>

At the outset, it is critical to understand that entities may lawfully choose to associate as joint employers under Federal law. Joint-employer status under the NLRA is relevant only to apportioning liability and bargaining obligations as a result of NLRB unfair labor practice and representation cases, not to whether such liabilities and obligations exist in the first instance. While entities may choose to rearrange their business relationships to minimize risk of joint-employer status, they may also choose not to. Accordingly, because

<sup>111</sup> This includes initial representation case petitions (RC petitions) and unfair labor practice charges (CA cases) filed against employers.

<sup>112</sup> Since a joint-employer relationship requires at least two employers, we have estimated the number of employers by multiplying the number of asserted joint-employer relationships by two. Some of these filings assert more than two joint employers; but, on the other hand, some of the same employers are named multiple times in these filings. Additionally, this number is certainly inflated because the data does not reveal those cases where a joint-employer relationship exists but the parties’ joint-employer status is not in dispute.

<sup>113</sup> See 5 U.S.C. 603(b)(4), 604(a)(4).

<sup>114</sup> See *Mid-Tex Elec. Co-op v. FEC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (“[I]t is clear that Congress envisioned that the relevant ‘economic impact’ was the impact of compliance with the proposed rule on regulated small entities.”).

the proposed rule would not make any form of business arrangement unlawful, it appears to impose no direct compliance costs other than those for reading and understanding the rule.

We therefore believe that the proposed rule imposes no capital costs for equipment needed to meet the regulatory requirements; no direct costs of modifying existing processes and procedures to comply with the proposed rule; no lost sales and profits directly resulting from the proposed rule; no changes in market competition as a direct result of the proposed rule and its impact on small entities or specific submarkets of small entities; no extra costs associated with the payment of taxes or fees associated with the proposed rule; and no direct costs of hiring employees dedicated to compliance with regulatory requirements.<sup>115</sup> And, like the current rule, the proposed rule does not impose any new information collection or reporting requirements on small entities.

For the purposes of this IRFA, the Board assumes that small entities, with particular emphasis on those small entities in the five categories with special interest in the proposed rule, will be interested in reviewing the rule to understand the restored common-law joint-employer standard. We estimate that a human resources or labor relations specialist at a small employer who undertook to become generally familiar with the proposed changes may take at most one hour to read the text of the rule and the supplementary information published in the **Federal Register**.<sup>116</sup> It is also possible that a small employer may wish to consult with an attorney, which we estimated to require one hour as well.<sup>117</sup> Using the Bureau of Labor Statistics’ estimated wage and benefit costs, we have

<sup>115</sup> See SBA Guide at 37.

<sup>116</sup> Data from the Bureau of Labor Statistics indicates that employers are more likely to have a human resources specialist (BLS #13-1071) than to have a labor relations specialist (BLS #13-1075). Compare Occupational Employment and Wages, May 2021, 13-1075 Labor Relations Specialists, found at <https://www.bls.gov/oes/current/oes131075.htm>, with Occupational Employment and Wages, May 2021, 13-1071 Human Resources Specialists, found at <https://www.bls.gov/oes/current/oes131071.htm>.

<sup>117</sup> The Board believes that an experienced labor relations specialist or labor relations attorney would not expend more than an hour to read and understand the rule. The proposed rule returns to the pre-2020 Rule standard and incorporates the common-law definition of “employer” that already applies in most jurisdictions throughout the nation. We believe most employers are already knowledgeable with these standards if relevant to their businesses, as are labor relations attorneys.

assessed these labor costs to be between \$147.24 and \$151.51.<sup>118</sup>

Labor unions would also review the rule, similarly incurring an hour of legal fees. (\$99.64, see fn. 118.) Like labor compliance professionals or employer labor-management attorneys, union counsels would only require one hour of legal time because they would already be familiar with the pre-2020 standard for determining joint-employer status under the Act and common-law principles.

The Board is not inclined to find the estimated \$151.51 cost to small employers and the estimated \$99.64 cost to small labor unions for review to be significant within the meaning of the RFA. In making this finding, one important indicator is the cost of compliance in relation to the revenue of the entity or the percentage of profits affected.<sup>119</sup> Other criteria to be considered are the following:

- Whether the rule will cause long-term insolvency, *i.e.*, regulatory costs that may reduce the ability of the firm to make future capital investment, thereby severely harming its competitive ability, particularly against larger firms;
- Whether the cost of the proposed regulation will (a) eliminate more than 10 percent of the businesses' profits; (b) exceed one percent of the gross revenues of the entities in a particular sector, or (c) exceed five percent of the labor costs of the entities in the sector.<sup>120</sup>

The minimal cost to read and understand the rule will not generate any such significant economic impacts.

Since the only quantifiable impact that we have identified is the \$151.51 or \$99.64 that may be incurred in reviewing and understanding the rule, we do not believe, subject to comments, that the proposed rule will have a significant economic impact on a substantial number of small entities.

#### *D. Duplicate, Overlapping, or Conflicting Federal Rules*

The Board has not identified any Federal rules that conflict with the proposed rule. It welcomes comments that suggest any potential conflicts not noted in this section.

<sup>118</sup> For wage figures, see May 2021 National Occupancy Employment and Wage Estimates, found at [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm). The Board has been administratively informed that BLS estimates that fringe benefits are approximately equal to 40 percent of hourly wages. Thus, to calculate total average hourly earnings, BLS multiplies average hourly wages by 1.4. In May 2021, average hourly wages for labor relations specialists (BLS #13–1075) were \$37.05. The same figure for a lawyer (BLS #23–1011) is \$71.17. Accordingly, the Board multiplied each of those wage figures by 1.4 and added them to arrive at its estimate.

<sup>119</sup> See SBA Guide at 18.

<sup>120</sup> *Id.* at 19.

#### *E. Alternatives Considered*

Pursuant to 5 U.S.C. 603(c), agencies are directed to look at “any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.” The SBA has described this step as “[t]he keystone of the IRFA,” because “[a]nalyzing alternatives establishes a process for the agency to evaluate proposals that achieve the regulatory goals efficiently and effectively without unduly burdening small entities, erecting barriers to competition, or stifling innovation.”<sup>121</sup> The Board considered two primary alternatives to the proposed rules.

First, the Board considered taking no action. As explained in section II above, the Board believes, subject to comments, that the 2020 Rule wrongly departs from the common-law definition of employer. The Board is additionally concerned that the 2020 Rule does not adequately reflect important background legal principles and the Act’s public policy of “encouraging the practice and procedure of collective bargaining” and maximizing employees’ “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 or other mutual aid or protection.”<sup>122</sup> Thus, for the reasons stated in Sections II and III above, the Board believes it necessary to revisit the 2020 Rule. Consequently, we reject maintaining the status quo.

Second, the Board considered creating exemptions for certain small entities, but is inclined to believe, subject to comments, that doing so would be both contrary to judicial precedent and impracticable. As noted previously, the Supreme Court and District of Columbia Circuit have explained that common-law agency principles apply when construing statutes, like the Act, whose terms are otherwise undefined in statute.<sup>123</sup> The Board is therefore bound to assess the employment relationship under common-law rules and is inclined to believe that the Act and judicial precedent would not provide strong support for the development of exceptions to longstanding common-law principles solely for small entities.<sup>124</sup>

<sup>121</sup> *Id.* at 37.

<sup>122</sup> 29 U.S.C. 151.

<sup>123</sup> See fn. 27, *supra*, and accompanying text (citing *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 92–95 (1995)); *BFI*, 911 F.3d at 1206.

<sup>124</sup> Although it does not have the ability to quantify a specific number, the Board notes again that it has declined jurisdiction over employers

Moreover, even if the Act would permit such an exemption, the Board believes that exception would swallow the rule, given that such a large percentage of employers and unions would be exempt under the SBA definitions. We further agree with the observations regarding a small-entity exemption that the Board made in the 2020 Rule, which are equally applicable now, that as this rule often applies to relationships involving a small entity (such as a franchisee) and a large enterprise (such as a franchisor), exemptions for small businesses would decrease the application of the rule to larger businesses as well, potentially undermining the policy behind this rule. Additionally, given the very small quantifiable cost of compliance, it is possible that the burden on a small business of determining whether it fell within a particular exempt category might exceed the burden of compliance. Congress gave the Board very broad jurisdiction, with no suggestion that it wanted to limit coverage of any part of the Act to only larger employers.<sup>125</sup> As the Supreme Court has noted, “[t]he [NLRA] is federal legislation, administered by a national agency, intended to solve a national problem on a national scale.”<sup>126</sup>

85 FR 11235. We therefore rejected a small entity exemption as an effective alternative to the proposed rule. The Board welcomes comments on other alternatives to consider that would reduce the regulatory burden on small entities while carrying out the mission of the Act in conformance with the statutory language and judicial precedent.

#### **Paperwork Reduction Act**

The NLRB is an agency within the meaning of the Paperwork Reduction Act (PRA). 44 U.S.C. 3502(1) and (5). This Act creates rules for agencies when they solicit a “collection of information,” 44 U.S.C. 3507, which is defined as “the obtaining, causing to be obtained, soliciting, or requiring the

whose activity in commerce does not exceed a minimal level. See fn. 98, *supra*. That declination of jurisdiction should exclude many small employers from the reach of the proposed rule. Many other small entities are excluded by the NLRA’s terms, which protect only concerted activities engaged in between two or more statutory employees; thus, businesses with zero or one statutory employee are unaffected by the proposed rule.

<sup>125</sup> However, there are standards that prevent the Board from asserting authority over entities that fall below certain jurisdictional thresholds. This means that extremely small entities outside of the Board’s jurisdiction will not be affected by the proposed rule. See 29 CFR 104.204.

<sup>126</sup> *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty., Tenn.*, 402 U.S. 600, 603–04 (1971) (quotation omitted).

disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format.” 44 U.S.C. 3502(3)(A). The PRA only applies when such collections are “conducted or sponsored by those agencies.” 5 CFR 1320.4(a).

The proposed rule does not involve a collection of information within the meaning of the PRA; rather, it adopts a judicially approved standard for determining joint-employer status under the Act. Outside of administrative proceedings (discussed below), the proposed rule does not require any entity to disclose information to the NLRB, other government agencies, third parties, or the public.

The only circumstance in which the proposed rule could be construed to involve disclosures of information to the Agency, third parties, or the public is when an entity’s status as a joint employer has been alleged in the course of the Board’s administrative proceedings. However, the PRA provides that collections of information related to “an administrative action or investigation involving an agency against specific individuals or entities” are exempt from coverage. 44 U.S.C. 3518(c)(1)(B)(ii). A representation proceeding under section 9 of the Act, as well as an investigation into an unfair labor practice under section 10 of the Act, are administrative actions covered by this exemption.<sup>127</sup> The Board’s decisions in these proceedings are binding on and thereby alter the legal rights of the parties to the proceedings and thus are sufficiently “against” the specific parties to trigger this exemption.<sup>128</sup>

For the foregoing reasons, the proposed rule does not contain information collection requirements that require approval by the Office of Management and Budget under the PRA.

#### List of Subjects in 29 CFR Part 103

Colleges and universities, Election procedures, Health facilities, Jurisdictional standards, Labor management relations, Music, Remedial orders, Sports.

<sup>127</sup> See Representation—Case Procedures, 79 FR 74307, 74468–74469 (Dec. 15, 2014).

<sup>128</sup> Legislative history indicates Congress wrote this exception to broadly cover many types of administrative action, not just those involving “agency proceedings of a prosecutorial nature.” See S. REP. 96–930 at 56, as reprinted in 1980 U.S.C.C.A.N. 6241, 6296. For the reasons more fully explained by the Board in prior rulemaking, 79 FR 74307, 74468–69 (2015), representation proceedings, although not qualifying as adjudications governed by the Administrative Procedure Act, 5 U.S.C. 552b(c)(1), are nonetheless exempt from the PRA under 44 U.S.C. 3518(c)(1)(B)(ii).

#### The Proposed Rule

For the reasons discussed in the preamble, the Board proposes to amend 29 CFR part 103 as follows:

#### PART 103—OTHER RULES

- 1. The authority citation for part 103 continues to read as follows:

**Authority:** 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

#### Subpart D—Joint Employers

- 2. Revise § 103.40 to read as follows:

#### § 103.40 Joint Employers.

(a) An employer, as defined by section 2(2) of the National Labor Relations Act (the Act), is an employer of particular employees, as defined by section 2(3) of the Act, if the employer has an employment relationship with those employees under common-law agency principles.

(b) For all purposes under the Act, two or more employers of the same particular employees are joint employers of those employees if the employers share or codetermine those matters governing employees’ essential terms and conditions of employment.

(c) To “share or codetermine those matters governing employees’ essential terms and conditions of employment” means for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees’ essential terms and conditions of employment.

(d) “Essential terms and conditions of employment” will generally include, but are not 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.

(e) Whether an employer possesses the authority to control or exercises the power to control one or more of the employees’ terms and conditions of employment is determined under common-law agency principles. Possessing the authority to control is sufficient to establish status as a joint employer, regardless of whether control is exercised. Exercising the power to control indirectly is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly. Control exercised through an intermediary person or entity is sufficient to establish status as a joint employer.

(f) Evidence of an employer’s control over matters that are immaterial to the existence of an employment relationship under common-law agency principles or control over matters that do not bear on the employees’ essential terms and conditions of employment is not relevant to the determination of whether the employer is a joint employer.

(g) A party asserting that an employer is a joint employer of particular employees has the burden of establishing, by a preponderance of the evidence, that the entity meets the requirements set forth in paragraphs (a) through (f) of this section.

(h) The provisions of this section are intended to be severable. If any paragraph of this section is held to be unlawful, the remaining paragraphs of this section not deemed unlawful shall remain in effect to the fullest extent permitted by law.

Dated: August 31, 2022.

**Roxanne L. Rothschild,**

*Executive Secretary.*

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#### DEPARTMENT OF HOMELAND SECURITY

#### 48 CFR Parts 3049 and 3052

[Docket No. DHS–2022–0046]

RIN 1601–AB08

#### Homeland Security Acquisition Regulation (HSAR); United States Coast Guard Contract Termination Policy (HSAR Case 2020–001)

**AGENCY:** Office of the Chief Procurement Officer, Department of Homeland Security (DHS).

**ACTION:** Proposed rule.

**SUMMARY:** DHS is proposing to amend the Homeland Security Acquisition Regulation (HSAR) to add a new subpart and new contract clause to establish contract termination policy for the United States Coast Guard (USCG) and amend a clause to address the applicability of USCG’s contract termination policy to commercial items.

**DATES:** Interested parties should submit written comments to one of the addresses shown below on or before November 7, 2022, to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments identified by HSAR Case 2020–001, Contract Termination Policy for the United States Coast Guard, using any of the following methods: