NATIONAL LABOR RELATIONS BOARD

29 CFR Part 103

RIN 3142-AA21

Standard for Determining Joint Employer Status

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: The National Labor Relations Board has decided to issue this final rule for the purpose of carrying out the National Labor Relations Act (NLRA or Act) by rescinding and replacing 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 final rule establishes a new standard for determining whether two employers, as defined in the Act, are joint employers of particular employees within the meaning of the Act. The Board believes that this rule will more explicitly ground the joint-employer standard in established common-law agency principles and provide 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. Under the final rule, an entity may be considered a joint employer of another employer’s employees if the two share or codetermine the employees’ essential terms and conditions of employment.

DATES: Effective December 26, 2023. This rule has been classified as a major rule subject to Congressional review. However, at the conclusion of the congressional review, if the effective date has been changed, the National Labor Relations Board will publish a document in the Federal Register to establish the new effective date or to withdraw the rule.

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. Background

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.

Id. 157. Section 9(c) of the Act authorizes the Board to process a representation petition when employees wish to be represented for collective bargaining. Id. 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 its employees. Id. 158(a)(5).

The Act does not specifically address situations in which statutory employers 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 Employment Law Under the National Labor Relations Act

As set forth more fully in the Board’s September 4, 2022 notice of proposed rulemaking (the NPRM), 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. On remand, the Board held that Greyhound and the cleaning contractor were joint employers of the employees at issue because they “share[d], or codetermine[d], those matters governing essential terms and conditions of employment.” Greyhound Corp., 153 NLRB 1488, 1495 (1965), enf’d. 368 F.2d 776 (5th Cir. 1966). For nearly two decades following the Board’s decision in Greyhound, the Board regarded the right to control employees’ work and their terms and conditions of employment as determinative in analyzing whether entities were joint employers of particular employees. Board precedent from this time period generally did not require a showing that both putative joint employers actually or directly exercised control.2

2 See, e.g., Globe Discount City, 209 NLRB 213, 219–221 & fn. 3 (1974) (finding joint employer based on license agreements, without reference to any exercise of authority); Lowery Trucking Co., 177 NLRB 13, 15 (1969) (finding joint employer based in part on unexercised right to reject other employer’s employees), enf’d. sub nom. Ace-Allaire Freight Lines v. NLRB, 431 F.2d 280 (8th Cir. 1970) (observing that “[w]hile [putative joint employer] never rejected a driver hired by [supplier], it had the right to do so”); United Mercantile, Inc., 171 NLRB 830, 831–832 (1968) (finding joint employer based on license agreements, without reference to any exercise of authority); Epperson, 2 NLRB 23, 23 (1973) (finding joint employer based in part on indirect control over wages and discipline), enf’d. 411 F.2d 1096 (5th Cir. 1969); Buckleye Mart, 165 NLRB 87, 88 (1967) (finding Buckleye joint employer of employees of Fire Shoe based solely on contractually reserved authority over, inter alia, discharge decisions and rules and regulations governing employee conduct), enf’d. 405 F.2d 1211 (6th Cir. 1969); Jewel Tea Co., 162 NLRB 508, 510 (1966) (finding joint employer based on contractually reserved, unexercised power to effectively control hire, discharge, wages, hours, terms, “and other conditions of employment” and observing: “That the licensor has not exercised such power is not material, for the authority, legal, or practical, based on reserved rights to dismiss employees and in part on indirect control over wages and discipline, enf’d. 411 F.2d 1096 (5th Cir. 1969); Buckleye Mart, 165 NLRB 87, 88 (1967) (finding Buckleye joint employer of employees of Fire Shoe based solely on contractually reserved authority over, inter alia, discharge decisions and rules and regulations governing employee conduct), enf’d. 405 F.2d 1211 (6th Cir. 1969); Jewel Tea Co., 162 NLRB 508, 510 (1966) (finding joint employer based on contractually reserved, unexercised power to effectively control hire, discharge, wages, terms, “and other conditions of employment” and observing: “That the licensor’s power to control may not in fact have been exercised is immaterial, since the right to control, rather than the actual exercise of that right, is the touchstone of the employer-employee relationship.”); General Motors Corp. (Baltimore, MD), 60 NLRB 81 (1945) (finding joint employer based on contractually reserved authority, despite testimony that entity exercised no control in practice); Anderson Boarding & Supply Co., 56 NLRB 1204, 1206 (1944) (finding joint employer based on unexercised contractual authority); Bethlehem-Fairfield Shipyards, Inc., 53 NLRB 1428, 1431 (1943) (finding joint employer based on reserved rights to dismiss employees and set wage scales, despite crediting testimony entity actually exercised no control).

Our colleague observes that a number of these cases involve department store licensing relationships. He argues that the Board did not purport to apply general common-law agency principles in these cases but instead applied a distinctive analysis focused on “whether the department store was in a position to influence the licensee’s labor relations policies.” We disagree. The cases we cite above, including the department store cases, ultimately rest on early post-Taft-Hartley Board decisions that are consistent with the
Board’s reliance on reserved or indirect control in joint-employer cases during this period was well within the mainstream of both Board and judicial treatment of such control in the independent contractor context, including in non-labor-law settings, and reviewing courts broadly endorsed the Board’s consideration of forms of reserved and indirect control as probative in the joint-employer analysis.  

In NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 891 F.2d 1117, 1123 (3d Cir. 1989), enfg. 259 NLRB 148 (1981), the United States Court of Appeals for the Third Circuit endorsed the Board’s “share or codetermine” formulation of the joint-employer standard. While later Board decisions continued to adhere to this formulation, they also began imposing new requirements that the Board now believes lacked a clear basis in established common-law agency principles or prior Board or judicial decisions. See TLI, Inc., 271 NLRB 798 (1984); Laerco Transportation, 269 NLRB 324 (1984). In particular, these decisions began 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), enf’d. in relevant part sub nom. Service Employees International Union, Local 32BJ v. NLRB, 347 F.3d 435 (2nd Cir. 2001); Airborne Express, 338 NLRB 597, 597 (2002); Flagstaff Medical Center, 357 NLRB 659, 660–667 (2011). 

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 the control-based restrictions that the Board had previously or subsequently imposed 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, a divided 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, on February 26, 2020, the Board promulgated a final rule that again introduced control-based restrictions that narrowed the joint-employer standard. In light of the District of Columbia Circuit’s decision in BFI v. NLRB, the Board modified the proposed rule to “factor in” evidence of indirect and reserved control over essential terms and conditions of employment, but only to the extent 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 their employment. While the final rule also explained that establishing that an entity “shares or codetermines the essential terms and conditions of employment of another employer’s employees” requires showing that the entity “possess[es] and exercise[s] 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

3 The court specifically required that on remand the Board clarify its “articulation and application of the indirect-control element” of the BFI joint-employer standard to the extent that the Board had not “distinguish[ed] 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.” 911 F.3d at 1222–1223. The court further instructed the Board on remand to “more explicitly apply this BFI standard (‘whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining’), and specifically, to clarify ‘which terms and conditions are ‘essential’ to permit ‘meaningful collective bargaining,’ and what such bargaining ‘entails and how it works in this setting.’” Id. at 1221–1222 (quoting 362 NLRB at 1600). After accepting the court’s remand, a newly constituted Board declined to clarify the BFI standard in any respect, instead finding that “retroactive application of any clarified variant of [that standard] in this case would be manifestly unjust.” Browning-Ferris Industries of California, Inc., 369 NLRB No. 139, slip op. 1 (2020), vacated and remanded, 45 F.4th 38 (D.C. Cir. 2022). As discussed below, and contrary to the view of our dissenting colleague, the instant rule fully explicates the indirect-control element in Section IV and V.

4 See Joint Employer Status Under the National Labor Relations Act, 85 FR 11184 (Feb. 26, 2020).  

5 Id. at 11185–11186, 11194–11198 & 11236. The final rule 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.
relationship with those employees.”8 In turn, the final rule defined “substantial direct and immediate control” 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” and “substantial” to exclude control that is “only exercised on a sporadic, isolated, or de minimis basis.”9 The final rule set forth an “exhaustive” list of essential terms and conditions of employment comprised of “wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction” and discussed some examples of conduct that would or would not rise to the level of direct and immediate control of each term or condition on the list.10

C. The Notice of Proposed Rulemaking

On September 7, 2022, the Board issued a new joint-employer NPRM. 87 FR 54641, 54663 (September 7, 2022). In the NPRM, the Board detailed recent developments in its joint-employer law. The Board noted that the Board’s 2020 final rule (2020 rule) marked the first occasion when the Board addressed joint-employer doctrine through rulemaking. The NPRM stated the Board’s preliminary view, subject to comments, that the 2020 rule’s embrace of control-based restrictions unnecessarily narrowed the common law and threatened to undermine the goals of Federal labor law. The NPRM invited comments on these issues and on all aspects of the proposed rule, seeking input from employees, employers, and unions regarding their experience in workplaces where multiple entities have authority over the workplace.

The Board set an initial comment period of 60 days with 14 additional days allotted for reply comments. Thereafter, the Board extended these deadlines to allow interested parties to comment for an additional 30 days.11

D. Relevant Common Law Principles

As discussed in more detail below, the Board has concluded, after careful consideration of relevant comments, that the 2020 rule must be rescinded because it is contrary to the common-law agency principles incorporated into the Act when it was adopted and, accordingly, is not a permissible interpretation of the Act.12 Although we believe that the Board is required to rescind the 2020 rule, we would do so even if that rule were valid because it fails to fully promote the policies of the Act, as explained below.

First, it is well established—and our dissenting colleague agrees—that the statutory terms “employer” and “employee” have their common-law meaning, and that the common-law doctrine rules the Board’s joint-employer analysis. See, e.g., BFI v. NLRB, 911 F.3d at 1207–1208.

In the preamble to the proposed rule, the Board (quoting the District of Columbia Circuit, id. at 1208–1209) acknowledged 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. 87 FR at 54648. 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 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).13

12 Our dissenting colleague suggests that the 2020 rule is defensible, as a discretionary choice, to decline to exert joint-employer jurisdiction over entities who might be statutory employers by virtue of reserved but unexercised control, but who have not actually exercised their authority to control terms and conditions of employment of another entity’s employees. Assuming arguendo that the Board could exercise its discretion to decline jurisdiction in this manner, the 2020 rule nowhere presents that rationale as underlying its actual-exercise requirement. Moreover, any such claim is inconsistent with our dissenting colleague’s additional assertion, discussed further below, that the current final rule goes “beyond the boundaries of the common law” by eliminating the 2020 rule’s actual-exercise requirement.

13 Our dissenting colleague implicitly criticizes us for citing “a plethora of decisions” (including state law cases more than a hundred years old), the majority of which focus on independent contractor, workers’ compensation, and tort liability matters. We find it entirely appropriate, however, to seek guidance on the meaning of common-law terms in the Act in judicial opinions where common-law issues most frequently arise, written by state judges primarily responsible for applying the common law, from time periods that shed light on the meaning of those terms when Congress used them.

14 Contrary to our dissenting colleague, apart from recognizing that the Board must follow common-law agency principles in determining who is an “employer” and an “employee” under Sec. 2 of the Act, we do not conclude that the common law dictates the specific details of the joint-employer standard we articulate herein. Rather, as discussed in more detail above and below, the final rule reflects our policy choices within the bounds of the common law, in furtherance of the policy of the United States, as set forth in Sec. 1 of the Act, to encourage the practice and procedure of collective bargaining, including by providing a mechanism by which an entity’s rights and obligations under the Act may be accurately aligned with its authority to control employees’ essential terms and conditions of employment.

15 87 FR at 54648–54650.

16 As we explained more fully in the NPRM, a “servant” is an employee. 87 FR at 54645 In. 28. See, e.g., 30 C.J.S. Employer—Employee sec. 1 (2022) (“The terms ‘servant’ and ‘employee’ are interchangeable.”); Horace Gray Wood, A Treatise on the Law of Master and Servant: Covering the Relation, Duties and Liabilities of Employers and Employees (1877).
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 referring to any other manner or how that control was exercised.17

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. In contexts involving more than one potential employer. For example, in 1934, the Supreme Court of Missouri examined whether a worker was an "employee" of two companies under a State workers’ 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."18 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."19

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.20

It is 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 to control the manner in which the services are performed is sufficient if he has the right to do so.21

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 there 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 to control the manner in which the services are performed is sufficient if he has the right to do so."22

17 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) ["It 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."] (quoting Bennet v. New Jersey R.R. & Transp. Co., 36 N.J.L. 225 (N.J. 1873)).

18 We are puzzled by our colleague’s suggestion that Singer somehow fails to support the proposition that contractual authority to control can establish a joint-employer relationship because the company engaged the worker and compensated him for his work. As discussed further below, ordinary contract terms providing generally for engaging workers and setting general price terms are common features of any independent-contractor arrangement, and are, accordingly, not relevant to either the joint-employer analysis or the common-law employer-employee analysis.

19 Malza 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

Continued
And, 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.

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 the right of the employer-employee relation is the right of the employer to exercise control of the details and method of performing the work.”

The Board believes, after careful consideration of relevant comments as discussed further below, 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 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.”

As noted above, the Restatement (Second) of Agency relevantly echoes the First Restatement’s emphasis on the right of control.

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 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 that in light of controlling common-law agency principles, it does not have the statutory authority to require 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. We would not choose to do so, as a matter of policy, in any case.

Our dissenting colleague faults us, in turn, both for seeking authority on relevant common-law principles in sources examining the distinction between employees and independent contractors and for failing to pay sufficient attention to judicial decisions examining joint-employer issues under other federal statutes in light of common-law principles derived from independent-contractor authority. In support of the first criticism, our colleague quotes selectively from BFI v. NLRB, in which the court rejected a party’s contention that the joint-employer and independent-contractor tests were “virtually identical.” 911 F.3d at 1213–1215. We recognize, as did the court there, that several of the factors that guide the employee-or-independent-contractor determination, as articulated in primary judicial authority like Darden and Reid and in independent-contractor authority as the common law of agency bearing on independent-contractor determinations will “shed no meaningful light” on joint-employer questions, which involve workers who are clearly some entity’s employees. 911 F.3d at 1214–1215. Nevertheless, we agree with the court that “both tests ultimately probe the existence of a common-law master-servant relationship, [and] central to establishing a master-servant relationship—whether for purposes of the independent-contractor inquiry or the joint-employer inquiry—is the nature and extent of a putative master’s control.” Id. at 1214. The final rule is thus consistent with NLRB v. BFI in seeking guidance from common-law material bearing on the independent-contractor determination to examine, as a threshold matter under Section 103.40(a), whether a common-law employer-employee relationship exists between a putative joint employer and particular employees.30 Once the party seeking to demonstrate joint-employer status establishes the existence of a threshold common-law employment relationship, the final rule appropriately provides for an examination, under Section 103.40(c), of whether the character and objects of such control, i.e., who may exercise it, when, and how, extends to essential terms and conditions of employment that are the central concern of the joint-employer analysis within the specific context of the NLRA.31

Our dissenting colleague faults us for failing to pay sufficient heed to judicial decisions examining joint-employer questions under other statutes, especially Title VII of the Civil Rights Act of 1964,32 that he claims are materially similar to the NLRA.33 As a threshold matter, because many of the decisions our colleague cites take independent-contractor authority as the starting point for their analysis of joint-employer questions, these cases support the Board’s similar examination of articulations of common-law principles in independent-contractor authority for guidance on the joint-employer analysis under the NLRA.34

---

30 Our dissenting colleague argues that judicial precedent distinguishing between independent-contractors and employees is “ill-suited to fully resolve joint-employer issues” in part because, he contends, the principal in an independent-contractor relationship exercises direct control of at least two things that . . . constitute essential terms and conditions,” by engaging the worker and deciding upon the compensation to be paid for the work. This argument proves too much, because an entity that actually determined which particular employees would be hired and actually determined the wage rates of another entity’s employees probably would be a joint employer of those employees for the purposes of the Act under any joint-employer standard, including the 2020 rule. See 85 FR at 11235–11238. Because every contract for the performance of work includes price terms and provides for engaging at least one worker, if such provisions alone were, as our colleague asserts, the equivalent of exercising direct control over hiring and wages—essential terms and conditions of employment under the Act—then no joint-employer standard could distinguish between control sufficient to establish a joint-employer relationship and control insufficient to establish a common-law employment relationship when considering only a single principal and a single worker. Failing to contrast our colleague’s assertion, ordinary contract terms providing generally for engaging workers and setting general price terms do not constitute an exercise of direct control over the essential terms and conditions of employment of hiring and wages. As discussed further below, Sec. 103.40(f) expressly incorporates this distinction by providing that evidence of an entity’s control over matters that are immaterial to the existence of a common-law employment relationship and that do not bear on the employees’ essential terms and conditions of employment is not relevant to the determination of whether an entity is a joint employer. Recognizing this commonsense distinction in no way undermines our examination of independent-contractor authority for guidance on the common-law employment relationship.

31 See BFI v. NLRB, 911 F.3d at 1195 (“[E]mployee-or-independent-contractor cases can . . . be instructive in expressing the extent to 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 workers is found, who is exercising that control, when, and how.”) (emphasis in original).

32 42 U.S.C. 2000e et seq.

33 We need not decide whether the statutes our colleague refers to are “much like” the NLRA, because, as discussed below, courts’ discussion and application of common-law principles in the cases cited by our colleague fully support the Board’s position. We note, however, that these statutes define “employer” and “employee” differently from the Act and examine the relationship in different contexts. For instance, Title VII excludes entities that are statutory employers under the NLRB by defining “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working week in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person,” subject to exclusions that also differ from the exclusions provided under the NLRB. Compare 42 U.S.C. 2000e(b) with 29 U.S.C. 152. Moreover, joint-employer questions under Title VII and similar statutes, primarily arise in the context of assigning liability for workplace discrimination in violation of employees’ individual rights. Under the NLRB, by contrast, such questions arise in an additional forward-looking context: in order to correctly allocate prospective bargaining rights and obligations in support of employees’ collective right to bargain. Assuming that Title VII and similar statutes, like the Act, require reference to the content of the common-law terms “employer” and “employee,” the necessity under the Act of prospectively defining bargaining obligations may tend to focus the common-law inquiry on questions involving reserved or indirect control more frequently than is likely under primarily backward-looking individual-rights-protecting statutes.

34 See, e.g., Felder v. U.S. Tennis Ass’n, 27 F.4th 834, 843 (2d Cir. 2022) (inter alia, on Reid and Restatement (Second) of Agency § 220); Garcia-Celisino v. Ruiz Harvesting, Inc., 843 F.3d 1276, 1286–1287 (11th Cir. 2016) (relying on Darden and Ruiz Harvesting, Inc., 843 F.3d 1276, 1286–1287 (11th Cir. 2016) (relying on Darden and Ruiz Harvesting, Inc., 843 F.3d 1276, 1286–1287 (11th Cir. 2016) (relying on Reid and Restatement (Second) of Agency § 220)); Celestino v. Hotel Coleman, 903 F.3d 671, 676 (7th Cir. 2018) (applying “an economic realities test,” that is, in essence, an application of general principles of agency law to the facts of the case); Al-Saffy v. Vilsack, 827 F.3d at 96 (noting one of two recognized “articulations of the test for identifying joint-employer liability under the Act in terms of the ‘economic realities of the work relationship’”). Of course, as we note elsewhere, the Board is precluded by Supreme Court decisions interpreting the Taft-Hartley amendments from applying an economic-realities test. See, e.g., NLRB v. United Insurance Co. of America, 390 U.S. 254, 256 (1968). Given that our colleague elsewhere
Moreover, far from supporting our colleague’s claim that the Board has “gone beyond the boundaries of the common law” by eliminating the 2020 rule’s actual-exercise requirement, none of the decisions he cites articulates a common-law principle that would preclude finding a joint-employer relationship based on evidence of reserved unexercised control or indirectly exercised control. To the contrary, several of the cited cases affirmatively support the Board’s conclusion that the common law permits the finding of a joint-employer relationship based solely upon reserved, unexercised control or upon control exercised indirectly, such as through an intermediary.  

To begin, several of the cases our colleague cites articulate a version of the joint-employer analysis that provides that an entity is a common-law employer if it “exercises significant control” over certain terms and conditions of workers’ employment. 36 We agree that an entity’s actual exercise of control may be sufficient to establish an employment relationship, but nothing about this formulation entails or supports our colleague’s further contention that the actual exercise of control is necessary. As discussed above, the facts of many cases do not require distinguishing between reserved control and actually exercised control, or between control that is exercised directly or indirectly. Where no question of reserved or indirect control is presented, it is unsurprising that judges articulate the test in a manner that does not make such distinctions, and such articulations, absent a specific claim that actual exercise of control is a necessary component of the analysis, have little to say to the specific disagreement between the Board and our dissenting colleague.  

Relating, our colleague cites Felder v. U.S. Tennis Association for its statement that, under a common-law analysis drawn from the Supreme Court’s decision in Reid, “the exercise of control is the guiding indicator.” But he fails to acknowledge the Felder court’s explanation that sharing significant control under common-law principles “means that an entity other than the employee’s formal employer has power to pay an employee’s salary, hire, fire, or otherwise control the employee’s daily employment activities, such that it concludes that a constructive employer-employee relationship exists.” 27 F.4th 834, 844 (2d Cir. 2022). 37 Our colleague further asserts that Felder “quoted with approval cases from other circuits requiring proof that the putative joint employer ‘exercise[d] significant control.’” However, a closer examination of the cases cited by Felder reveals that they similarly support only the proposition that the exercise of control is sufficient to establish the relationship, not that the exercise of control is necessary to establish the relationship. 38 As we have explained, the final rule is entirely consistent with the proposition that, as these cases hold, a joint-employment relationship exists when two entities exercise significant control over the same employees. 39 Moreover, each of the cases cited in Felder that our colleague relies upon—and many others—also discussed the requisite control in terms of the putative joint-employer’s “right,” “ability,” “power,” or “authority” to control terms and conditions of employment, consistent with the common-law principle consistently articulated in the primary judicial authority discussed appropriate circumstances.  

38 See Adams v. C3 Pipeline Constr. Inc., 30 F.4th 943, 961 (10th Cir. 2021) (quoting Knitter v. Corvis Mt. Living, LLC, 758 F.3d 1214, 1226 (10th Cir. 2014)) (“Both entities are employers if they both exercise significant control over the same employees.”) (internal quotation and citation omitted).  

39 As we have noted above, courts focused on particular factual records that do not turn on the precise role of reserved or indirect control have frequently and reasonably refrained from analyzing versions of the joint-employment standard that expressly address whether such control can suffice alone to establish the relationship. See, e.g., NLRB v. BFI, above, 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 authority, could alone establish a joint-employer relationship.”). In crafting a Final Rule of general prospective applicability, however, our task is quite different. We must, accordingly, distance ourselves from those judicial articulations of common-law standards that have expressly addressed the question of whether or how authority to control must be exercised in order to establish the relevant relationship. No number of cases holding only that the direct exercise of control is sufficient can rationally establish that the direct exercise of control is necessary. We believe a body of general legislative authority expressly stating that the direct exercise of control is not necessary, and, in many cases finding the relevant relationship without any direct exercise of control, strongly supports our conclusion that the Board may not, consistent with controlling common-law agency principles, impose such a requirement as part of a joint-employer standard.
above, that it is the authority to control that matters, without respect to whether or how such control is exercised.40

The single case cited by our colleague that arguably articulates a standard under which the exercise of control would be necessary to find a joint-employer relationship, Whitaker v. Milwaukee County, does not purport to draw this principle from the common law, but rather applies a standard derived from decisions under the NLRA at a time that the Board had, as we have explained above, adopted an actual-exercise requirement that was unsupported by and inapposite under the common law.41 Thus, Whitaker drew its articulation of the standard from G. Heileman Brewing Co. v. NLRB, which enforced a Board Decision and Order that had adopted, without relevant comment, an administrative law judge’s finding that two entities were joint employers under Laerco based on their direct negotiation of a contract that set the overall framework of terms and conditions of employment.42 Because the Board is not a primary source of authority for the common-law of agency, and did not, in any case purport to draw the control-based restrictions imposed by Laerco and related decisions from the common law,

Whitaker’s statement of the joint-employer standard has little to say regarding the common-law principles applicable to the final rule.43 Our dissenting colleague further seeks support from the court’s statement in Butler v. Drive Automotive Industries of America that “‘the [joint-employer] doctrine’s emphasis on determining which entities actually exercise control over an employee is consistent with Supreme Court precedent interpreting Title VII’s definitions.’” 793 F.3d 404, 409 (4th Cir. 2015) (emphasis added). In context, though, it is clear that the Butler court’s discussion of which entity “actually exercised” control meant something entirely different from what our colleague means by the phrase. At issue in Butler was whether a manufacturer was a joint employer of a worker supplied to it by a temporary employment agency. The court found that the agency discharged the employee after the manufacturer requested that she be replaced. An agency manager also testified that he could not recall an instance based on the manufacturer’s request that an agency employee be disciplined or discharged and it was not done. Based primarily on this evidence that the manufacturer thus exercised indirect control over discipline and tenure of employment of the agency’s employees, the court held, as a matter of law, that the manufacturer was a joint-employer of the discharged employee.44 The court’s observation, in this context, that the joint-employer doctrine emphasizes “which entities actually exercise control” had nothing to do with any question involving reserved, unexercised control, but rather with the question of whether, despite the appearance that the agency was responsible for the discharge, the manufacturer had actually, though indirectly, brought it about. The court observed that the joint-employer test “specifically aims to pierce the legal formalities of an employment relationship to determine the loci of effective control over an employee . . . . Otherwise, an employer who exercises actual control could avoid Title VII liability by hiding behind another entity.” 793 F.3d at 415. In other words, far from suggesting that reserved, unexercised control can never suffice to establish a joint-employment relationship under the common law, Butler tends rather to support the final rule’s treatment of indirect control, discussed further below.

Our colleague further claims that “[n]ot a single circuit has held or even suggested that an entity can be found to be the joint employer of another entity’s employees based solely on an unexercised contractual reservation of right to affect essential terms . . . i.e., conduct other than actually determining (alone or in collaboration with the undisputed employer) employees’ essential terms and conditions of employment.” But the Court of Appeals for the Ninth Circuit did just that in EEOC v. Global Horizons, Inc., 915 F.3d 631 (9th Cir. 2019).

Global Horizons involved an EEOC Title VII enforcement action against two agricultural employers of Thai workers alleged to be joint employers of certain foreign workers (the Thai workers) supplied to the Growers by a labor contractor, Global Horizons, under the H–2A guest worker program. Global Horizons and the Growers contracted for Global Horizons to pay the workers and provide certain nonwage benefits required under Department of Labor regulations governing the H–2A program in exchange for the Growers’ agreement to compensate Global Horizons for the workers’ wages and benefits and pay Global Horizons an additional fee for its services. 915 F.3d at 634–635. The workers sought to hold the Growers responsible as joint employers for alleged unlawful discrimination in Global Horizons’ provision of nonwage benefits, including housing, meals, and transportation. Id. at 636.

The court analyzed the joint-employer question under a common-law agency test derived from Darden and


40 See Knitter, 758 F.3d at 1226 (considering “right to terminate” employment, and “ability to promulgate work rules and assignments, and set conditions of employment including compensation, benefits, and hours”) (emphasis added) (quotations and citations omitted); Bristol, 312 F.3d at 1215 (holding employer “backs the power to control the hiring, termination, or supervision of [undisputed employer’s] employees, or otherwise retains the terms and conditions of their employment”) (emphasis added); Plaso, 553 Fed. Appx. at 204 (considering, inter alia, putative joint employer’s “authority to hire and fire employees, to promulgate rules and assignments, and to set conditions of employment, including compensation, benefits and hours”) (emphasis added); Graves, 117 F.3d at 728 (“when an employer has the right to control the means and manner of an individual’s performance . . . an employer-employee relationship is likely to exist.”) (emphasis added) (citation omitted); see also, e.g., Adams, 30 F.4th at 961, (considering “right to terminate” employment relationship, and “ability to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours”) (quoting Knitter, above); Perry, 990 F.3d at 929 (“The right to control the employee’s conduct is the most important component of determining a joint employer. . . . [including a focus on the right to hire and fire, the right to supervise, and the right to set the employees’ work schedule.”) (citations omitted).

41 See Whitaker v. Milwaukee County, 772 F.3d 802, 810 (7th Cir. 2014) (“An entity other than the actual employer may be considered a ‘joint employer’ ‘only where it exerted significant control over the employee.’”) (emphasis added) (quoting G. Heileman Brewing Co. v. NLRB, 879 F.2d 1526, 1530 (7th Cir. 1989), enfg. 290 NLRB 991 (1988)).

42 See G. Heileman Brewing Co., 290 NLRB 991, 999 (1988), enfd. 879 F.2d 1526 (7th Cir. 1989).
concluded that, while most of the factors it would typically consider in applying the common-law agency test under Darden did not apply on the specific facts before it, “the common law’s ‘principal guidepost’—the element of control—[was] determinative.” 915 F.3d at 640–641. Because the Growers were legally obligated, under H–2A regulations, to provide the workers with wages and the nonwage benefits at issue, the court concluded that the Growers “possessed ultimate authority over those matters,” and their “power to control the manner in which housing, meals, transportation, and wages were provided to the Thai workers, even if never exercised, [was] sufficient to render the Growers joint employers” of those workers. Id. at 641 (emphasis added) (citing BFI v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018)).

Global Horizons is thus consistent with the large body of common-law authority discussed above in strongly supporting the Board’s conclusion that the 2020 rule’s actual-exercise requirement is inconsistent with the common law governing the Board’s joint-employer standard.

2. Indirect Control, Including Control Exercised Through an Intermediary

After careful consideration of relevant comments, as discussed in more detail below, the Board has concluded that evidence that an employer has actually exercised control over essential terms and conditions of employment of another employer’s employees, whether directly or indirectly, such as through an intermediary, 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 these 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, can establish 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.48 As the District of Columbia Circuit explained in BFI v. NLRB, “the common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship.” 47 Similarly, as discussed in more detail above, the Fourth Circuit has held that an entity was a joint employer of another employer’s employees based primarily on the entity’s exercise of indirect control over the employees’ discipline and discharge by recommending discipline and discharge decisions which were implemented by the employees’ direct employer. Butler, above, 793 F.3d at 415.

Consistent with these longstanding common-law principles, the Board has concluded, after careful consideration of comments as discussed further below, that evidence showing that a putative joint employer wields indirect control over one or more of the essential terms and conditions of employment of another employer’s employees can establish a joint-employer relationship. 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.” 48 contrary to the teachings of the common law. Under the final rule, for example, evidence that a putative joint employer communicates work assignments and directives to another entity’s managers or exercises detailed ongoing oversight of the specific manner and means of employees’ performance of the individual work tasks may demonstrate the type of indirect control over essential terms and conditions of employment that is sufficient to
establish a joint-employer relationship.50

Our dissenting colleague contends that the final rule fails adequately 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,” as required by the D.C. Circuit in BFI v. NLRB.51 To the contrary, Section 103.40(f) of the final rule expressly provides that evidence of an entity’s control over matters that are immaterial to the existence of an employment relationship under common-law agency principles and that do not bear on the employees’ essential terms and conditions of employment is not relevant to the determination of whether the entity is a joint employer. Pursuant to this provision, the Board will, in individual cases arising under the rule, examine any proffered evidence of indirect control and determine, as necessary, whether that evidence is indicative of a kind of control that is an ordinary incident of company-to-company contracting or is rather indicative of a common-law employment relationship. If the former, the rule provides that the Board will not consider that evidence as probative of the existence of a joint-employer relationship. Specifically, pursuant to Section 103.40(f) and consistent with the court’s instruction in BFI v. NLRB, the Board will not consider any evidence of indirect control that the common law would see as part of an ordinary true independent-contractor relationship as evidence of a common-law employer-employee relationship.52

If, on the other hand, such evidence shows that a putative joint employer is actually exercising (or has reserved to itself) a kind of control that the common law takes to be indicative of an employer-employee relationship, the Board will consider such evidence in the course of its joint-employer analysis.53

Our colleague also criticizes us for failing exhaustively to define, ex ante, what factual circumstances will evidence indirect control that is relevant to the joint-employer analysis. But, as discussed above, the joint employer inquiry is essentially factual and requires examining all of the incidents of a particular relationship on a particular record. Small differences in how control has been indirectly exercised, when, and over what will predictably determine whether the exercise of such control in individual cases counts, under the common law, as an ordinary incident of a company-to-company or true independent-contractor relationship or as evidence of the existence of a company-to-company-employee relationship. Because of the innumerable variations in the ways that companies interact with each other, and with each other’s employees, it would be impossible for the Board to provide a usefully comprehensive and detailed set of examples of when an entity’s exercise of indirect control over another company’s employees will count as evidence of a common-law employment relationship. We decline to try to do so as part of this rulemaking.54 Instead, we expect the courts of appeals and the Board to apply this rule in particular scenarios to be defined through the future application of the final rule to specific factual records.55

Finally, our colleague claims that courts which have examined the common-law employee-employer relationship in a joint-employer context in decisions under Title VII and similar statutes, discussed above, have applied a significantly more demanding standard than the final rule articulates. We disagree. Thus far, our discussion has primarily been concerned with what common-law principles have to say to the role of reserved or indirect control in the joint-employer test. Of course, however, the common-law cases are also concerned with, and provide authority about, the objects of that control. We recognize that “whether [an entity] possess[es] sufficient indicia of control to be an ‘employer’ is essentially a factual issue,”56 that “factors indicating a joint-employer relationship may vary depending on the case,” and that “any relevant factor[] may . . . be considered so long as [it is] drawn from the common law of agency.”57 Where courts articulating relevant common-law principles have identified an entity’s authority to control specific elements of the working relationship as relevant to the analysis, such articulations are primary authority to which the Board will look in deciding, in individual cases, whether “all of the incidents of the relationship”58 indicate that the entity is a common-law employer of particular employees.59 Furthermore, the final rule requires the Board to inquire specifically into whether a putative joint employer possesses the authority to control or exercises the power to control one or more of the employees’ essential terms and conditions of employment implicated by the Act’s protection of employees’ forward-looking collective right to bargain with each other and control their terms and conditions of employment. Thus, the final rule both incorporates the common law’s broad focus on all of the incidents of the relationship in examining whether an entity is a common-law employer of particular employees and narrows the focus of the Board’s inquiry to essential

50 Cf. Cognizant Technology Solutions U.S. Corp. & Google LLC, 372 NLRB No. 108, slip op. at 1 (2023) (finding joint-employer relationship based in part on Google’s exercise of authority over supervision through intermediary employees of Cognizant, treated as direct and immediate control under the terms of the 2020 rule).
51 Id. at 1226. The court’s discussion and its instruction to the Board to draw this distinction on remand suggests, as we conclude, that it will be possible to determine, in future adjudications on specific factual records, that an entity’s exercise of certain kinds of indirect control, such as through an intermediary, would be independently probative of its joint-employer status. See id. at 1219 (“If . . . a company entered into a contract . . . under which that company made all of the decisions about work and working conditions, day in and day out, with [the workers’ direct employer’s] supervisors reduced to ferrying orders from the company’s supervisors to the workers, the Board could sensibly conclude that the company is a joint employer.”).
52 See BFI v. NLRB, above, 911 F.3d at 1221 (The Board’s fleshing out the operation of the joint-employer standard through case-by-case adjudication “depends on the Board’s starting with a correct articulation of the governing common-law test. Here, that legal standard is 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.” (internal quotation and citation omitted)).
53 Cf. Butler, above, 793 F.3d at 415 (considering testimony from temporary employment agency manager that he could not recall an instance when manufacturer requested an agency employee to be disciplined or terminated and it was not done as evidence that manufacturer was joint employer of agency’s employees).
54 Cf. 85 FR at 11187 (2020 rule omitting previously proposed hypothetical scenarios illustrating specific applications of the Board’s joint-employer standard). For similar reasons, we decline to speculate about the application of the final rule to the various hypothetical scenarios proposed by our colleague.
55 See BFI v. NLRB, 911 F.3d at 1221 (“In principle, there is nothing wrong with the Board fleshing out the operation of a legal test that Congress has delegated to the Board to administer through case-by-case adjudication.” (citing Eastex, Inc. v. NLRB, 437 U.S. 556, 574–575 (1978) (“[T]he nature of the problem, as revealed by unfolding variant situations, requires an evolutionary process for its rational response, not a quick definitive formula as a comprehensive answer.”) (internal quotation and citation omitted)).
56 Boise v. Greyhound, 376 U.S. at 481.
57 Felder, above, 27 F.4th at 844 (alternations in original) (internal quotation omitted). See also NLRB v. United Insurance Co., above, 390 U.S. at 258 (“What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.”).
58 NLRB v. United Insurance Co., above, 390 U.S. at 258.
59 See, e.g., Felder, above 27 F.4th at 838 (“[F]actors drawn from the common law of agency, including control over an employee’s hiring, firing, training, promotion, discipline, and supervision . . . are relevant to [the joint-employer inquiry].”)}
terms and conditions of employment in the context of the specific rights and obligations provided by the plain language of Section 8(a)(5) and 8(d) of the Act.60

II. Summary of Changes to the Proposed Rule

In this section, we provide a summary overview of changes to the proposed rule.

A. Overview

The final rule, like the proposed rule, recognizes that common-law agency principles define the statutory employer-employee relationship under the Act and affirms the Board’s traditional definition of joint employers as two or more common-law employers of the same employees who share or codetermine those matters governing those employees’ essential terms and conditions of employment. Consistent with primary judicial statements and secondary authority describing the common-law employer-employee relationship, the final rule, like the proposed rule, provides that a common-law employer of particular employees shares or codetermines those matters governing employees’ essential terms and conditions of employment if the employer possesses the authority to control (whether directly, indirectly, or both) or exercises the power to control (whether directly, indirectly, or both) one or more of the employees’ essential terms and conditions of employment, regardless of whether the employer exercises such control or the manner in which such control is exercised.

However, as described below and in response to comments, the Board has modified the proposed rule (1) to clarify the definition of “essential terms and conditions of employment,” (2) to identify the types of control that are necessary to establish joint-employer status and the types that are irrelevant to the joint-employer inquiry, and (3) to describe the bargaining obligations of joint employers.

B. Definition of “Essential Terms and Conditions of Employment”

The proposed rule provided an illustrative, rather than exclusive, list of essential terms and conditions of employment. The Board has modified this definition, for the reasons discussed below and in response to comments, to provide an exhaustive list of seven categories of terms or conditions of employment that will be considered “essential” for the purposes of the joint-employer inquiry. These are: (1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees.

C. Type of Control Sufficient To Establish Joint-Employer Status

The proposed rule provided that a common-law employer’s possession of unexercised authority to control or exercise of the power to control indirectly, such as through an intermediary, one or more terms or conditions of employment would be sufficient to establish status as a joint employer. For the reasons discussed below and in response to comments, the Board has modified this provision to clarify that, in each instance, the relevant object of control must be an essential term or condition of employment as defined by the rule. The Board has also reformat ted and streamlined this portion of the proposed rule to avoid surplusage.

D. Type of Control Not Relevant to Joint-Employer Status

The proposed rule provided that evidence of an employer’s control over matters that are immaterial to the existence of a common-law employment relationship or control over matters not bearing on employees’ essential terms and conditions of employment is not relevant to the joint-employer inquiry. For the reasons discussed below and in response to comments, the Board has modified this provision to make it clear that the provision excludes only evidence that is immaterial to both the common-law employment relationship and an employer’s control over employees’ essential terms and conditions of employment, and that the Board does not presuppose the “employer” status of an entity—such as the principal in a true independent-contractor relationship—that possesses or exercises only such immaterial forms of control.

E. Bargaining Obligations of Joint Employers

The proposed rule did not specifically address or delineate the bargaining obligations of joint employers in the proposed regulatory text.61 For the reasons discussed below and in response to comments, the Board has modified the final rule to provide that a joint employer of particular employees must bargain collectively with the representative of those employees with respect to any term or condition of employment that it possesses the authority to control or exercises the power to control (regardless of whether that term or condition is deemed to be an essential term or condition of employment under the rule). However, such entity is not required to bargain with respect to any term or condition of employment that it does not possess the authority to control or exercise the power to control.

III. Justification for Using Rulemaking, Rather Than Adjudication, To Revise the Joint-Employer Standard

A. Authority To Engage in 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 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).

In the past, the Board has exercised its discretion to use the authority delegated by Congress to engage in substantive rulemaking. See American Hospital Assn. v. NLRB, 499 U.S. 606 (1991).

Section 6 authorizes the final rule as necessary to carry out Sections 2, 7, 8, 9, and 10 of the Act, 29 U.S.C. 152, 157, 158, 159, and 160, respectively. Specifically, as set forth above, Section 2(2) of the Act defines “employer,” and Section 2(3) defines “employee.” Section 7 sets forth employees’ rights

---

60 See 29 U.S.C. 158(a)(5) (“It shall be an unfair labor practice for an employer—to refuse to bargain collectively with the representatives of his employees.”); 29 U.S.C. 158(d) (“To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”).

61 The NPRM stated the Board’s initial views in supplementary information, subject to comments, that (1) 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, and (2) the Act’s purposes 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. 87 FR at 54645 & fn. 26.
under the Act, including the right to bargain collectively through representatives of employees’ own choosing, the right to engage in concerted activities for the purpose of mutual aid or protection, and the right to refrain from these activities. Section 8 of the Act defines unfair labor practices under the Act, and Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with employees’ bargaining representative. Section 9 of the Act describes the Board’s responsibilities when conducting representation elections. Section 10 of the Act authorizes the Board to investigate, prevent, and remedy unfair labor practices. The Board’s joint-employer doctrine bears on each of these provisions of the Act, and Section 6 permits the Board to promulgate rules carrying out these provisions.

B. The Preference for Rulemaking Over Adjudication

In the NPRM, we expressed our preliminary belief that rulemaking in this area of the law is desirable for several reasons. First, the NPRM set forth the Board’s preliminary view that the 2020 rule departed from common-law agency principles and threatened to undermine the goals of Federal labor law. Second, the NPRM stated that, in the Board’s preliminary view, establishing a definite, readily available standard would assist employers and labor organizations in complying with the Act. Finally, the NPRM expressed the Board’s view that because the joint-employer standard has changed several times in the past decade, there was a heightened need to seek public comment and input from a wide variety of interested stakeholders.

After carefully considering nearly 13,000 comments, the Board believes that it is necessary and appropriate to rescind the 2020 rule, which was contrary to the Act insofar as it was inconsistent with the common law of agency. The 2020 rule’s approach to defining joint-employer status again incorporated the control-based restrictions that deviated from common-law agency principles between the 1980s and the Board’s 2015 decision in Browning-Ferris. Not only was this approach inconsistent with relevant court decisions, including the District of Columbia Circuit’s 2018 decision in Browning-Ferris Industries of California, Inc. v. NLRB (BFI v. NLAB), 911 F.3d 1195 (D.C. Cir. 2018), as many commenters have persuasively argued, it also undermines the goals of Federal labor law. Accordingly, we rescind the 2020 rule in its entirety.

Although we believe that the Board is required to rescind the 2020 rule, we would do so even if that rule were valid because it fails to fully promote the policies of the Act.

The Board also believes that setting forth a revised joint-employer standard through rulemaking is desirable. The NPRM offered a proposal to 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 judicial decisions. The Board received many helpful comments from individuals and entities with considerable legal expertise and relevant experience. Having considered those comments, the Board has refined the proposed rule in several ways, as outlined above in Section II and discussed more fully below in Sections IV and V. We believe the proposed rule, as modified, appropriately defines the essential elements of a joint-employer relationship and will reduce uncertainty and litigation over the basic parameters of joint-employer status.

IV. Response to Comments

The Board received almost 13,000 comments from interested organizations, labor unions, trade associations, business owners, United States Senators and Members of Congress, State Attorneys General, academics, and other individuals. The Board has carefully reviewed and considered these comments, as discussed below.

A. Comments Regarding the Definitions of ‘‘Employer’’ and ‘‘Joint Employer’’ and Basing These Definitions on Common-Law Agency Principles

The Board received numerous comments regarding the role of common-law agency principles in the Board’s joint-employer analysis and on the development of joint-employer doctrine under the Act. In general, the comments acknowledge the accuracy of the Board’s description of the role common-law agency principles have played in determining joint-employer status, as briefly summarized above in Section I. Some commenters criticize the Board’s preliminary view that the common law of agency is the primary guiding principle in its joint-employer analysis. These commenters argue that because the Taft-Hartley amendments did not specify that the common law limits the joint-employer standard, Congress did not intend such a constraint, and the Board may establish a joint-employer standard guided solely by the policies of the Act. Contrary to these comments, authoritative or relevant judicial decisions establish that common-law agency principles must guide the Board’s joint-employer inquiry. See, e.g., NLRB v. Town & Country Electric, Inc., 516 U.S. 85, 92–95 (1995) (where Congress uses the term ‘‘employer’’ 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’’); BFI v. NLRB, 911 F.3d at 1206 (‘‘[U]nder Supreme Court and circuit precedent, the National Labor Relations Act’s test for joint-employer status is determined by the common law of agency.’’).

Most commenters confirm that it is appropriate and desirable for the Board to rely on common-law agency principles in defining the terms ‘‘employer’’ and ‘‘joint employer’’ under the Act. Certain of these commenters note that by acting to overrule the Supreme Court’s decision in NLRB v. Hearst Publishing, 322 U.S. 111 (1944), Congress evinced its intention to make such a change.

63 Comments of Los Angeles County Federation of Labor AFL-CIO & Locals 396 and 848 of the International Brotherhood of Teamsters; Professors Sachin S. Pandya, Andrew Elmore, and Kati Griffith.


65 Comments of American Federation of Labor and Congress of Industrial Organizations (AFL–CIO); Americans for Prosperity Foundation; American Federation of State, County & Municipal Employees (AFSCME); American Hotel & Lodging Association; Center for Law and Social Policy; Communications Workers of America, AFL–CIO (CWA); Congressman Robert C. ‘‘Bobby’’ Scott, Chairman of the House of Representatives Committee on Education and Labor, and 52 other Members of Congress (Congressman Scott et al.); Economic Policy Institute (EPI); General Counsel Abruzzo; Independent Bakers Association; Nicholas Crawford; McGann, Kettering & Rixou; National Federation of Independent Business (NFIB); National Partnership for Women & Families; North Carolina Justice Center; Public Justice Center; Restaurant Law Center and National Restaurant Association; Southern Poverty Law Center (SPLC); TechEquity Collaborative; The Washington Center for Equitable Growth; United States Chamber of Commerce; Washington Legal Foundation; William E. Morris Institute for Justice.
common-law agency principles the cornerstone of the definition of “employee” under the Act. These commenters also emphasized post-Taft-Hartley judicial decisions interpreting the term “employee” in statutes that do not provide more specific definitions using common-law agency principles. Some commenters note that common-law agency principles play an important functional role in the Board’s definition of the terms “employer” and “employee,” observing that making an agency relationship the first step of the joint-employer analysis ensures that the appropriate entities are included while properly excluding entities who neither possess nor exercise sufficient control over employees’ essential terms and conditions of employment. These commenters generally agree with the proposed rule’s view that appropriate sources of common-law agency principles include the Restatement (Second) of Agency and other compendiums, reports, and restatements, along with judicial decisions applying the common law. Some commenters urge the Board to clarify what common-law sources it will consult in the final rule. Others ask the Board to limit its consideration to particular sources, arguing that because the common law is vast, amorphous, or vague, failing to impose such a limitation prevents the rule from functioning as self-contained guidance. Other commenters dispute the enduring relevance of the Restatement (Second) of Agency. In particular, some of these commenters take the position that the common-law agency principles are not appropriate sources of common-law agency principles, arguing that because the common law is vast, amorphous, or vague, failing to impose such a limitation prevents the rule from functioning as self-contained guidance. Some commenters propose instead that the Board solely consult judicial decisions applying common-law principles, or the Restatement of Employment Law. As we preliminarily indicated in the proposed rule, relevant sources of common-law agency principles are not difficult to find. We respond to commenters seeking more definitive guidance that some relevant sources of common-law agency principles include articulations of these principles by common-law judges, compendiums, reports, and restatements of common-law decisions, and early court decisions addressing “master-servant relations.”

Contrary to those commenters who suggest the proposed rule’s definition of “employer” exceeds common-law boundaries. While we address commenters’ arguments regarding the role reserved and indirect control play in the proposed rule’s definition of “employer” at length below, at the outset we simply note our agreement with the District of Columbia Circuit’s view that these forms of control bear on the common-law employer-employee inquiry, BFI v. NLRB, 911 F.3d at 1216. Accordingly, we respectfully disagree with those commenters who suggest the proposed rule’s definition of “employer” exceeds common-law boundaries.

Finally, some of these commenters argue that the proposed rule’s definition of “employer” is inappropriate because direct supervision over an employee is a necessary prerequisite to a finding of an employment relationship for purposes of the Act, citing the Supreme Court’s decision in Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 167–168 (1971). Respectfully, we find Allied Chemical, which concluded that retired workers were not “employees” because the Act’s legislative history and policies.

67 See, e.g., comments of American Hotel & Lodging Association.
68 Comments of NFIB; Washington Legal Foundation.
69 See, e.g., comments of AFSCME.
70 See, e.g., comments of General Counsel Abruzzo; Michigan Regional Council of Carpenters and Millwrights.
71 Comments of Americans for Tax Reform; Coalition for a Dignified Workplace (CDW); Freedom Foundation; International Franchise Association (IFA); McDonald’s USA, LLC; Promotional Products Association International (PPAI); Texas Public Policy Foundation.
72 Comments of Washington Legal Foundation; IFA; U.S. Chamber of Commerce.
73 Comments of IFA; U.S. Chamber of Commerce.
74 Comments of Washington Legal Foundation.
75 Comments of U.S. Chamber of Commerce.

76 As we explained more fully in the NPRM, the employee-employer relationship under the Act is the common-law employer-employee relationship. Beginning in the late 19th century, American legal commentators began using 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 uses both sets of terms synonymously. We therefore refer elsewhere in the NPRM to “employer-employee” relations and the “employer-employee relationship.”
78 See, e.g., Clackamas Gastroenterology Associates, 538 U.S. at 448; Kelley, 419 U.S. at 323–324.
79 See BFI v. NLRB, 911 F.3d at 1213 (“[c]ontrolling precedent makes the Restatement (Second) of Agency a relevant source of traditional common-law agency standards in the National Labor Relations Act context.”).
80 See id.
81 See, e.g., Malta v. Jackoway-Katz Cap Co., 82 SW2d 909, 912, 918 (Mo. 1934).
83 The court also stated that Sec. 2(12) of the Act “textually indicates that the statute looks at all probative indicia of employer status” because it “expressly recognizes that agents acting ‘indirectly’ on behalf of an employer could also count as employers.” 914 F.3d at 1216 (quoting 29 U.S.C. 152(2)).
84 Comments of Restaurant Law Center and National Restaurant Association; Retail Industry Leaders Association (RILA).
contemplate individuals who are currently “active” in the workplace, inapposite. Nothing in the Court’s decision in Allied Chemical or subsequent cases applying it suggests that the Court thereby attempted to modify ordinary common-law agency principles or engraft additional “direct supervision” requirements onto the statutory meaning of “employer.”

B. Comments Regarding the Definition of “Joint Employer”

The proposed rule set forth a definition of “joint employer” that, like the definition provided in the 2020 rule, would apply in all contexts under the Act, including both the representation-case and unfair-labor-practice case context. No commenter has suggested that any joint-employer standard the Board adopts should only apply in one context or the other. We therefore find it appropriate to apply the new standard set forth in the final rule in both the representation-case and unfair-labor-practice case contexts.

Our dissenting colleague and several commenters argue that, although the Board is properly guided by common-law agency principles when determining joint-employer status, the proposed rule’s definition of “joint employer” exceeds the boundaries of the common law of agency.86 These commenters generally contend that defining “joint employer” to include entities who possess but do not exercise direct control over essential terms and conditions of employment or entities who do not exercise direct control over essential terms and conditions of employment is beyond the permissible scope of the common law.86 As these arguments primarily relate to the treatment of reserved and indirect control in proposed paragraphs (c), (e), and (f), we discuss them in greater detail below. However, as noted above, we agree with the District of Columbia Circuit’s view that the common law requires the Board to evaluate “all probative indicia of employer status” in determining whether entities are “employers” or “joint employers” under the Act, including forms of indirect and reserved control.87

A group of United States Senators and Members of Congress suggests that by seeking to define “joint employer” in the manner set forth in the proposed rule, the Board is effectively legislating and thereby usurping the role of Congress.88 This commenter also mentions that the broader definition of “joint employer” set forth in the Protecting the Right to Organize Act of 2021 (PRO Act), H.R. 842, failed to secure Senate approval.89 With respect, the standard set forth in the proposed rule and the final rule we announce today represents a faithful attempt to exercise the authority Congress has delegated to the Board in Section 6 of the Act. Further, as discussed previously, we are guided by Supreme Court decisions instructing the Board to consult the common law of agency when interpreting the term “employer” in Section 2(2) of the Act. We do not see the definition of “joint employer” in the PRO Act as relevant to our task, which is to interpret the term “employer” that appears in the current version of the National Labor Relations Act, consistent with the guidance of relevant judicial decisions.

Some commenters specifically argue that the proposed definition of “joint employer” is insufficiently responsive to the District of Columbia Circuit’s request that the Board “erect some legal scaffolding”90 to remain within the boundaries of the common law.91 Other commenters take the view that the proposed definitions of “employer” and “joint employer” are consistent with the District of Columbia Circuit’s view of common-law agency principles and that the proposed rule establishes adequate guideposts to satisfy the court’s request.92 Again, because commenters espousing both views of this issue anchor their rationale in matters that principally relate to paragraphs (c), (e), and (f) of the proposed rule, we deal with these contentions at greater length below.

Other commenters raise industry-specific concerns regarding the proposed definition of “joint employer.” Some commenters contend that the proposed, generally applicable definition of “joint employer” stands in tension with how other sections of the Act treat building and construction industry employers and unions and how the Supreme Court has interpreted those provisions.93 Specifically, these commenters urge that the Court’s decision in NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 689–690 (1951), stands for the proposition that general contractors and subcontractors in the construction industry have separate status and identities that, from the outset, preclude the Board from treating them as joint employers.94

We do not read Denver Building so broadly. Instead, Denver Building held that a construction industry general contractor’s overall responsibility for a project or worksite does not itself create an employment relationship between the general contractor and the employees of subcontractors working on the jobsite. See id. The proposed definition of “joint employer,” which we include in the final rule, requires not only a showing that the putative joint employer has a common-law employment relationship with particular employees, but also a further showing that a putative joint employer “share or codetermine those matters governing employees’ essential terms and conditions of employment.” As a result, the proposed rule, which focuses on the particular control an entity wields over terms and conditions of employment, is consistent with Denver Building, which cautions the Board not to categorically treat all employees of a subcontractor as the employees of a general contractor without more specific evidence of control. We further note that nothing in the relevant provisions of the Act, including Sections 2(2), 8(a)(5), 8(d), and 9(a), suggests that the Board is required—or permitted—to adopt a joint-employer standard in the construction industry that differs from the generally applicable definition. Nor is there any historical precedent for the Board treating the construction industry differently than other industries for joint-employer purposes.95

86 Comments of Americans for Prosperity Foundation; Associated Builders and Contractors (ABC); Contractor Management Services, LLC; Independent Bakers Association; Independent Lubricant Manufacturers Association; LeadingAge; The Machinists: Center for Public Policy; National Retail Federation; Taxpayers Protection Alliance.

87 See BFI v. NLRB, 911 F.3d at 1216.

88 See comments of Bicameral Congressional Signatories.

89 See id.; see also comments of RILA.

90 BFI v. NLRB, 911 F.3d at 1220.

91 Comments of ABC; Center for Workplace Compliance; IFA; National Association of Convenience Stores; NPB; National Retail Federation.

92 Comments of AFL–CIO; Center for American Progress (CAP); General Counsel Abruzzo; National Employment Law Project (NELP); Professors Pandya, Elmore, and Grannick; United Brotherhood of Carpenters & Joiners of America (UBC); U.S. Senate HELP Committee Chair Patty Murray & 21 of her Senate Democratic colleagues (Senator Murray et al.).

93 Comments of ABC; Associated General Contractors of America (AGC); COLLE; U.S. Chamber of Commerce.

94 Comments of ABC; AGC; American Road & Transportation Builders Association (ARTBA); National Roofing Contractors Association; U.S. Chamber of Commerce.

95 Instead, the Board historically treated employers in the construction industry in the same manner as other employers for joint-employer purposes. See, e.g., Tradesmen International, Inc., 351 NLRB 399, 403 & fn. 11 (2007) (adopting administrative law judge’s finding that two construction-industry entities were joint employers).
Some commentators state that, since the 1974 Health Care amendments extended the coverage of the Act to include nonprofit hospitals, the Board has treated hospitals differently than other employers. They urge the Board to do so again in the final rule. In support of the view that hospitals should be entirely excluded from the ambit of the joint-employer rule, these commentators point to the Board’s 1989 health care rule, which established the definition of “joint employer.” The Board risks authorizing a proliferation of bargaining units, contrary to the stated aims of the health care rule.

While we acknowledge the specific concerns raised by these commenters, we are not persuaded to create a hospital-specific exclusion from the joint-employer standard. First, we note that no pre-2020 Board decision involving the joint-employer standard ever created such an exclusion.

In keeping with the preliminary view we expressed in the NPRM, we are of the mind that the common-law agency principles that we apply in defining “employer” apply uniformly to all entities that otherwise fall within the Board’s jurisdiction. We see no clear basis in the text or structure of the Act for exempting particular groups or types of employers from the final rule, nor do we believe that the Act’s policies are best served by such an exemption. That said, we share these commenters’ general views that the proper application of the final rule in particular cases will require the Board to consider all relevant evidence regarding the surrounding context. Finally, we reject the suggestion, raised by commenters and our dissenting colleague, that the final rule’s definition of “joint employer” will cause the proliferation of bargaining units or disrupt the application of the 1989 health care rule, which deals with the unrelated question of which classifications of employees constitute appropriate bargaining units for purposes of filing a representation petition pursuant to Section 9 of the Act.

We similarly decline other commenters’ invitation to exempt other kinds of businesses, including cooperative businesses, franchise businesses, and firms and independent contractors operating in the insurance and financial advice industry, from the joint-employer standard we adopt in this final rule. As discussed above in Section VI below, we also decline some commenters’ invitation to create an across-the-board exemption for small businesses. One commenter observes that many Federal labor and employment statutes exempt employers who have less than a minimum number of employees and suggests that this provides support for a similar exemption from the final rule. However, we find further support for our view that the Act requires the Board to apply its joint-employer standard uniformly to all entities otherwise covered by the Board’s jurisdiction in the fact that the Act contains no similar minimum-employee threshold to those present in other labor and employment statutes.

Instead, we observe that the Board has statutory jurisdiction over those private-sector employers whose activity in interstate commerce exceeds a minimal level. Finally, one commenter asks the Board to clarify that the proposed rule’s definition of “joint employer” does not preclude the Board from adopting rebuttable presumptions to guide it in applying the joint-employer standard in the future. For example, this commenter suggests, the Board could treat an entity’s possession or exercise of certain forms of control over essential terms and conditions of employment as giving rise to a presumption of joint-employer status. In light of our extensive discussions and guidance below regarding whether particular forms of control are material to the existence of an employment relationship under common-law agency principles, we decline the invitation to make this proposed clarification.

C. Comments About Definition of “Share or Codetermine”

As set forth above, the proposed rule sought to codify the Board’s holding, endorsed by the Third Circuit in NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117, 1124 (3d Cir. 1982), enf. sub nom. Browning-Ferris Industries of Pennsylvania, Inc. v. NLRB, 494 U.S. 134 (1990), that entities are “joint employers” if they “share or codetermine those matters governing essential terms and conditions of employment.” Nearly all commenters

100Our dissenting colleague also forecasts that the final rule will negatively affect hospitals and the healthcare sector. In particular, he anticipates that the final rule will make it more difficult for hospitals to rely on firms that supply travel nurses to fill staff gaps without risking a joint-employer finding. We reject our colleague’s characterization of the final rule and emphasize that in determining whether a joint-employer finding is appropriate in any given context, the Board will consider all relevant evidence regarding whether a putative joint employer possesses or exercises the requisite control over one or more essential terms and conditions of particular employees’ employment.

101Comments of National Grocers Association.

102Comments of American Association of Franchisees and Dealers; IFA; Restaurant Law Center and National Association of Insurance and Financial Advisors.

103Relatively, we also decline the request of one commenter to explicitly state that the final rule covers the relationship between local union and national or international unions. See comments of IFA.

104Comments of Independent Bakers Association; National Association of Home Builders (NAHB).

105Comments of American Hospital Association (AHA). See, e.g., comments of AHA; Federation of American Hospitals; U.S. Chamber of Commerce; Virginia Hospital & Healthcare Association. Certain of these commenters suggest that the Board’s failure to conduct a “hospital-specific analysis” violates the APA and is grounds for withdrawing the proposed rule. They also raise concerns regarding the interaction of the proposed rule with Federal healthcare reimbursement formulas or calculations. See, e.g., comments of AHA. Given our discussion of the distinctive concerns of hospitals above, we respectfully disagree with these commenters’ view that the Board has not sufficiently considered the effect of the proposed rule on hospitals.

106Comments of AHA; U.S. Chamber of Commerce; Virginia Hospital & Healthcare Association (citing 29 CFR 103.30). A few commenters also observe that Sec. 8(d) and 8(g) of the Act set forth employee notice requirements before the termination or modification of collective-bargaining agreements and before work stoppages at hospitals. See comments of AHA; U.S. Chamber of Commerce; 29 U.S.C. 158 (d) & (g). These commenters likewise argue that the Board has at times adapted other generally applicable doctrines for the purposes of applying the NLRA, including solicitation and distribution law. See comments of AHA; U.S. Chamber of Commerce.

107Instead, pre-2020 Board decisions applied the same standard when one putative joint employer of particular employees was a hospital. See, e.g., Flagstaff Medical Center, 357 NLRB 659, 666–667 (2011) (applying the TLI/LaRocco test and finding that a hospital contractor was not a joint employer of a hospital’s housekeeping employees).
agree that the basic “share or codetermine” formulation is the appropriate starting point for the Board’s joint-employer analysis. 109 As discussed at length below, however, commenters’ views regarding what forms of control suffice to establish that entities “share or codetermine” matters governing particular employees’ essential terms and conditions of employment diverge significantly. 110

Paragraph (c) of the proposed rule sought to define the phrase “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.” 111

One commenter suggests that because the Third Circuit’s formulation of the “share or codetermine” standard (and the formulation used in paragraph (c) of the proposed rule) speaks in terms of “matters” governing essential terms and conditions of employment, a putative joint employer must possess the authority to control or exercise control over more than one essential term or condition of employment to meet the standard. 112 We do not find this argument persuasive as an analytical or logical matter. First, we do not construe the word “matters” in the standard to refer to essential terms or conditions of employment themselves, but rather to the workplace issues related to those terms or conditions. Second, we disagree that control over one essential term or condition of employment is necessarily insufficient. For example, as discussed at length below, commenters are unanimous that wages are an essential term or condition of employment. Given the centrality of wages to the employment relationship, it would be difficult to argue that a common-law employer’s control over wages, standing alone, is insufficient to create an employment relationship. A number of commenters challenge the premise that possessing but not exercising the authority to control or exercising indirect control over one or more essential terms and conditions of employment can ever serve as evidence of joint-employer status. 113 Some of these commenters, especially those writing on behalf of small businesses, suggest that forms of reserved control amount to “contractual fine print” that are never put into action should not result in a joint-employer finding. 114 While others appear to concede that there may be circumstances in which indirect or reserved control is probative of joint-employer status, those commenters emphasize that requiring evidence that an entity actually exercises control is preferable. 115

Consistent with the preliminary view set forth in our NPRM, we are unpersuaded by comments suggesting that forms of indirect or reserved control can never serve as evidence of joint-employer status. In our view, this argument is undermined by both the weight of common-law authority and relevant judicial decisions, including the District of Columbia Circuit’s decision in BFI v. NLRB. See 911 F.3d at 1213 & 1216 (“[T]he 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,” and “indirect control can be a relevant factor in the joint-employer inquiry.”). Moreover, “contractual fine print” bearing on the allocation of authority to control the details of the manner and means by which work is performed, and the terms and conditions of employment of those performing the work, has legal force and effect regardless of whether or not contractually reserved authority to control is ever exercised. By incorporating such contractual allocations of control into the Board’s joint-employer analysis, the final rule permits business entities to evaluate and control their potential status as joint employers under the Act, ex ante, based on their freely chosen contractual arrangements. By contrast, a standard that turns on an ex-post analysis of whether and to what extent a party has actually exercised contractually reserved control impedes contracting parties’ ability to reliably determine ahead of time whether or not they will have obligations under the Act related to employees of another employer. This distinction may be particularly important, for example, in successorship situations involving an incumbent union, where questions about bargaining obligations may arise before sufficient time has passed for parties to reliably ascertain whether and to what extent contractually reserved authority to control will be actually exercised. 116

Another group of commenters suggests that while an entity’s indirect or reserved control over essential terms and conditions of employment may be probative, it is not sufficient, standing alone, to confer joint-employer status. 117 These commenters argue that the Board has never held that a single instance of unexercised control was sufficient to create a joint-employer relationship and generally criticize the NPRM’s discussion of the Board’s precedent in the two decades after Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964), issued and before TLI, supra, 271

109 See, e.g., comments of CWA; National Women’s Law Center; North American Meat Institute; Tecumseh; Women Employed. Other commenters implicitly approve the formulation, taking it as the starting point for their analysis of the proposed rule.

110 Comments of American Hotel & Lodging Association; IFIA; Leading Age; National Retail Federation; North American Meat Institute; Society for Human Resource Management (SHRM).

111 87 FR at 54663.

112 Comments of Freedom Foundation.

113 Comments of American Staffing Association; Independent Lubricant Manufacturers Association; QuickChek; RaceTrac, Inc.; Rio Grande Foundation.

114 Comments of Energy Marketers of America; Independent Lubricant Manufacturers Association; M. M. Fowler, Inc.; One Energy Inc.; Ready Training Online; Reid Stores, Inc. d/b/a Crosby’s.

115 Comments of American Trucking Associations; Americas for Prosperity Foundation; ANB Bank; California Policy Center; Competitive Enterprise Institute; Goldwater Institute; Home Care Association of America; Independent Electrical Contractors; National Black McDonald’s Operators Association; RaceTrac, Inc.; Rachel Greszler.

116 For this reason, we reject our dissenting colleague’s suggestion that the final rule will have an adverse effect in successorship situations. In successorship situations where a transaction is structured in such a way that more than one entity in the resulting structure could potentially be considered an employer, the final rule has the distinct advantage of permitting all parties to determine and define their NLRA rights and obligations, ex ante, by contract. Under the 2020 rule, by contrast, the right to and obligations of contracting businesses could not be ascertained at the outset of a business relationship but would instead turn on contingent facts about whether or not one party chose to exercise the rights it had reserved to itself by contract.

117 Comments of ABC; American Hotel & Lodging Association; Center for Workplace Compliance; CDW; COLLE; Competitive Enterprise Institute; Control Transportation Services, Inc.; HR Policy Association; IFIA; International Foodservice Distributors Association (IFDA); NATSO & SIGMA; National Asian/Pacific Islander American Chamber of Commerce and Entrepreneurship (National ACE); National Association of Convenience Stores; National Taxpayers Union; National Waste & Recycling Association; New Civil Liberties Alliance & Institute for the American Worker; NLRB; Restaurant Law Center and National Restaurant Association; SHRM; The Mackinac Center for Public Policy; U.S. Chamber of Commerce.

One of these commenters draws an analogy to the Board’s treatment of primary and secondary indicia of supervisory status in cases involving Sec. 2(11) of the Act, 29 U.S.C. 152(11). Comments of COLLE. The scope of the definition of “supervisor” is an express exception to the definition of “employee” under Sec. 2(3) of the Act. See, e.g., NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 711 (2001). Unlike the definition of “employee,” then, the definition of supervisor turns on questions of statutory interpretation, not common-law agency principles. Accordingly, we find this analogy inapposite.
As set forth more fully in the NPRM, we disagree with these commenters’ view of the Board’s pre-TLI/Laerco precedent. Instead, we view cases from that time period as supportive of the view that the right to control employees’ work and terms and conditions of employment is determinative in the joint-employer analysis. Cases decided during the two decades after Boire issued did not tend to turn on whether both putative joint employers actually or directly exercised control. For example, in Jewel Tea Co., 162 NLRB 508 (1966), the Board found that an entity’s contractually reserved power to set working hours and to reject or terminate workers was sufficient to establish that entity’s status as a joint employer. In addition, in Value Village, 161 NLRB 603, 607 (1966), the Board found a joint-employment relationship where one entity reserved control over “the manner and method of work performance” and to terminate the contract at will in an operating agreement, emphasizing that “the power to control is present by virtue of the operating agreement.”

Some commenters specifically criticize the proposed rule’s treatment of reserved control, suggesting that it might be difficult to assess whether forms of reserved control are sufficient to give rise to liability or a bargaining obligation. One commenter notes that reservations of control are often “boilerplate” inclusions in contracts that should not give rise to a joint-employer finding. Certain of these commenters express concerns that the standard might be susceptible to outcome-driven applications or other unfair results. Many commenters agree with the NPRM’s discussion of how the common law treats forms of reserved control. One of these commenters cites the District of Columbia Circuit’s discussion in BFI v. NLRB, 911 F.3d at 1211, of how “the ‘right to control’ runs like a leitmotiv through the Restatement (Second) of Agency.” In particular, some commenters approvedly have cited the Board’s discussion of common-law judicial decisions that treat reserved control as an especially probative indication of an agency relationship. See, e.g., 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)) (“[t]he right to control, not control or supervision itself, which is most important.”). The final rule also adheres to the view that reserved control is probative and that it is appropriate for the Board to find that joint-employer status is established based on a putative joint employer’s reserved control over an essential term or condition of employment. As set forth more fully in the NPRM, the reservation of authority to control essential terms or conditions of employment is an important consideration under common-law agency principles. We agree with the District of Columbia Circuit that common-law sources treat the right to control as central to the joint-employer inquiry and that forms of reserved control can reveal an entity’s right to control essential terms or conditions of employment. As discussed above, incorporating parties’ contractual allocations of control into the Board’s joint-employer analysis also enhances contracting parties’ ability to evaluate and control their statutory obligations with respect to other employers’ employees at the inception of their business relationships.

Certain commenters specifically take issue with the proposed rule’s view that indirect control can establish joint-employer status. A number of these commenters argue that only direct control can or should be relevant to the joint-employer inquiry. They urge that control exercised through an intermediary should not itself be sufficient to establish status as a joint employer, contending that this aspect of the proposed rule threatens to interfere with parties’ reliance on the use of independent contractors or vendors to perform services. One of these commenters observes that courts interpreting the Fair Labor Standards Act have at times treated routine indirect control as immaterial to the existence of a joint-employer relationship and urges the Board to follow suit.

Other commenters, citing sources of common-law agency principles and judicial decisions applying common-law principles, stress that an entity itself need not actually exercise control over particular employees for the Board to...
find that an agency relationship exists. Many commenters approve of the Board’s discussion of the Restatement (Second) of Agency in the preamble to the proposed rule and cite portions of the Restatement contemplated that an agency relationship can be premised on indirect control. Some of these commenters specifically addressed the “subservant” doctrine. See Restatement (Second) of Agency, section 5(2), cmts. e, f, and illus. 6; section 220(1), cmt. d; section 226, cmt. a (1958). One of these commenters, citing the District of Columbia Circuit’s decision in BFI v. NLRB, 911 F.3d at 1218, argues that the subservant doctrine demonstrates the common law’s recognition of the important role that forms of indirect control can play in an agency relationship. As noted above, because we agree with the commenters who discuss common-law precedent and the District of Columbia Circuit’s statements regarding the role indirect control plays in the joint-employer analysis, we respectfully reject the view of commenters who suggest that evidence of indirect control over essential terms or conditions of employment is insufficient to establish joint-employer status. The final rule adheres to the Board’s preliminary view that forms of indirect control may be evidence of joint-employer status. As set forth in the NPRM, we are persuaded by the District of Columbia Circuit’s view that the common-law standard requires consideration of indirect control. See BFI v. NLRB, 911 F.3d at 1216–1217 (“Common law decisions have repeatedly recognized that indirect control over matters commonly determined by an employer can, at a minimum, be weighed in determining one’s status as an employer of joint employer, especially insofar as indirect control means control exercised through an intermediary.”). We further agree with the views of some commenters that the 2020 rule reintroduced control-based restrictions, notably the requirement of “substantial direct and immediate control,” that are contrary to the common-law view of how agency relationships are created. For this reason, independent of our decision to promulgate a new rule, we rescind the 2020 rule because it is inconsistent with common-law agency principles and therefore inconsistent with the National Labor Relations Act. Moreover, we are further persuaded that there is value in codifying the principle that forms of indirect control over one or more essential terms or conditions of employment are probative of joint-employer status in the final rule text, as discussed below.

D. Comments About the Definition of “Essential Terms and Conditions of Employment”

Paragraph (d) of the proposed rule defined “essential terms and conditions of employment” to “generally include” but not be 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.” As noted above, the phrase “essential terms and conditions of employment” derives from the Third Circuit’s formulation of the joint-employer standard in NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117, 1124 (3d Cir. 1982), enfg. 259 NLRB 148 (1981), where the court stated that entities are “joint employers” if they “share or codetermine those matters governing essential terms and conditions of employment.” Although some commenters approve of the proposed rule’s use of an open-ended, nonexhaustive list of “essential terms and conditions of employment,” many commenters criticize that aspect of the proposed rule. Notably, the United States Small Business Administration Office of Advocacy, along with many individuals and small business owners, express concerns about how parties covered by the Act will successfully comply with their potential obligations as joint employers without more clarity regarding the scope of “essential terms and conditions of employment.”

Another group of commenters propose that the Board modify the proposed rule by explicitly tying the definition of “essential terms and conditions of employment” to the concept of mandatory subjects of bargaining for purposes of Section 8(d) of the Act. These commenters generally also favor a flexible approach to defining the scope of a joint

132 Comments of American Civil Liberties Union (ACLU); AFL–CIO; Congressmen Scott et al.; CWA; General Counsel Abruzzo; IUOE; Lawyers’ Committee for Civil Rights Under Law; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT; NELP; Restaurant Opportunities Centers United; State Attorneys General; The Leadership Conference on Civil and Human Rights; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT.

133 Comments of AFL–CIO; Center for Law and Social Policy; International Brotherhood of Teamsters (IBT); Lawyers’ Committee for Civil Rights Under Law; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT; National Partnership for Women & Families; National Women’s Law Center; NELP; Public Justice Center; Restaurant Opportunities Centers United; SPLC; State Attorneys General; TechEquity Collective; The Leadership Conference on Civil and Human Rights; William E. Morris Institute for Justice; Women Employed.

134 Comments of American Staffing Association; ANR Bank; Asian McDonald’s Operators Association; ABC; California Policy Center; Center for Workplace Compliance; CDW; Energy Marketers of America; Freedom Foundation; Goldwater Institute; Home Care Association of America; HR Policy Association; International Bancshares Corporation; IFDA; IFA; LeadingAge; McDonald’s USA, LLC; NATSO and SIGMA; National Association of Convenience Stores; NAHB; National Association of Insurance and Financial Advisors; NAM; National Association of Realtors; National Black McDonald’s Operators Association; National Retail Federation; National Roofing Contractors Association; New Civil Liberties Alliance & Institute for the American Worker; PPAI; Rachel Greszler; RILA; Subcontracting Concepts, LLC; The Mackinac Center for Public Policy; U.S. Chamber of Commerce.

135 Comments of Luis Acosta; Escalante Organization; Independent Electrical Contractors; M. M. Fowler, Inc.; One Energy Inc.; QuickChek; RaceTrac, Inc.; Ready Training Online; Reid Stores, Inc.; d/b/a Crosby’s; SBA Office of Advocacy.

136 Comments of CDW; IFA; The Mackinac Center for Public Policy.

137 Comments of General Counsel Abruzzo; IBT; IUOE; Jobs with Justice and Governing for Impact; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT.

138 Comments of General Counsel Abruzzo; IBT; IUOE; Jobs with Justice and Governing for Impact; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT.

139 Similarly, as one commenter observed, the Supreme Court’s decision in Boise v. Greyhound, 376 U.S. 473, 481 (1964), made no distinction on the basis of whether an entity wields direct or indirect control. See comments of NELP.

140 Comments of AFL–CIO–CIO; Center for Law and Social Policy; International Brotherhood of Teamsters (IBT); Lawyers’ Committee for Civil Rights Under Law; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT; National Partnership for Women & Families; National Women’s Law Center; NELP; Public Justice Center; Restaurant Opportunities Centers United; SPLC; State Attorneys General; TechEquity Collective; The Leadership Conference on Civil and Human Rights; William E. Morris Institute for Justice; Women Employed.
employer’s bargaining obligation.\textsuperscript{144} Relatedly, some commenters request that the Board consider amending the proposed rule to incorporate a statement regarding the scope of a joint employer’s bargaining obligation that appeared in the NPRM’s preamble,\textsuperscript{145} while others suggest that the Board should clarify how to allocate bargaining responsibilities between two entities that share or codetermine one or more essential terms and conditions of employment.\textsuperscript{146}

One of these commenters observes that the Board should be careful to distinguish control over essential terms and conditions of employment that is material to the existence of a common-law employment relationship from control over matters that the Act requires parties to bargain over.\textsuperscript{147} Another commenter acknowledges that an entity’s control over certain mandatory subjects of bargaining, like cafeteria prices, sees Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1979), may control a term of employment to which a bargaining duty attaches but not possess or exercise control over an essential term or condition of employment so as to be regarded as a common-law employer.\textsuperscript{148}

We have taken these comments into consideration in revising the final rule’s treatment of essential terms and conditions of employment and in adding paragraph (h) to the final rule. The final rule responds to commenters who suggest tying the definition of essential terms and conditions of employment to Section 8(d) of the Act by emphasizing that, once an entity is found to be a joint employer because it possesses the authority to control or exercises the power to control one or more essential terms or conditions of employment identified in the rule, that entity has a statutory duty to bargain over all mandatory subjects of bargaining it possesses the authority to control or exercises the power to control. That duty is common to all employers under the Act. See Management Training, 317 NLRB 1355 (1995). The common-law test is a joint employer’s duty to bargain, however, is distinct from the issue of joint-employer status. As in other cases involving the scope of the duty to bargain, if a joint employer contests its duty to bargain over a particular issue, the Board will assess whether a particular subject of bargaining is mandatory on a case-by-case basis, applying familiar and longstanding precedent. However, the final rule provides the clarity and predictability other commenters sought by specifically enumerating the essential terms and conditions of employment that will, as a threshold matter, give rise to a finding that an entity is a joint employer if that entity possesses the authority to control or exercises the power to control one or more of the listed terms. Moreover, by adding paragraph (h), the final rule likewise responds to those commenters who requested that the Board include a statement of the nature of a joint employer’s bargaining obligation in the text of the rule itself.\textsuperscript{149}

As mentioned above, the final rule incorporates an exhaustive list of essential terms and conditions of employment. These essential terms and condition of employment are: “(1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees.”\textsuperscript{150} Because these essential terms and conditions of employment are substantively the same as those offered as illustrations in the proposed rule, we next address commenters’ particular concerns regarding the proposed rule’s treatment of specific terms and conditions of employment as “essential.”

Commenters who addressed the proposed rule’s treatment of specific “essential terms and conditions of employment” unanimously agree that certain terms and conditions of employment are “essential” for purposes of the joint-employer standard. These include wages and benefits.\textsuperscript{151}

\textsuperscript{144}Comments of Los Angeles County Federation of Labor AFL-CIO & Locals 396 and 848 of the IIB: NELP.

\textsuperscript{145}See 87 FR at 54645 fn. 26. Comments of IBT; IUEC: Service Employees International Union (SEIU); U.S. Chamber of Commerce.

\textsuperscript{146}Comments of RILA; SHRM.

\textsuperscript{147}Comments of UNITE HERE.

\textsuperscript{148}See reply comments of AFL-CIO.

\textsuperscript{149}See comments of American Staffing Association; RILA; SHRM, Texas Public Policy Foundation. One commenter notes that Board precedent already addresses the contours of a joint employer’s bargaining obligation and suggests that this obviates the need for a clearer articulation of the duty in the text of a final rule. Comments of AFL-CIO.

\textsuperscript{150}The list of essential terms and conditions of employment is discussed further in Section V.D., below.

\textsuperscript{151}Comments of Association of Women’s Business Centers; Center for Law and Social Policy; General Counsel Abruzzo; IFA; Lawyers’ Committee for Civil Rights Under Law; NAM; National

\textsuperscript{152}hours of work; \textsuperscript{153}hiring, discipline, and discharge; \textsuperscript{154}assignment; \textsuperscript{155}supervision. Many commenters specifically state that, at a minimum, they approve of the list of essential terms and conditions of employment that was used in the 2020 rule, including scheduling, hiring, termination, discipline, assignment of work, and instruction.\textsuperscript{156} A number of commenters and our dissenting colleague contend that workplace health and safety should not be considered an essential term or condition of employment for purposes of the joint-employer standard.\textsuperscript{157} These commenters emphasize the role that government regulation plays in setting minimum standards for workplace...
health and safety.\textsuperscript{158} especially in certain industries, including the trucking, food and consumer goods, and waste and recycling industries. Other commenters strenuously urge the Board to include workplace health and safety as essential.\textsuperscript{160} In fact, one commenter suggests that, in light of the Covid-19 pandemic, the Board should make explicit that workplace health and safety is an essential condition of all in-person employment.\textsuperscript{161}

A few commenters express the view that scheduling should not be an essential term or condition of employment for joint-employer purposes.\textsuperscript{162} In this regard, some commenters note that determining the hours of operation for a facility should not be treatable or comparable to determining hours of work for all individuals who perform services in that facility,\textsuperscript{163} while others characterize scheduling as related to “routine” contractual provisions that speak to the timing for completion of a project.\textsuperscript{164} Certain commenters note that treating control over scheduling as indicative of a common-law employment relationship may disproportionately affect entities operating in the manufacturing and staffing industries.\textsuperscript{165} Other commenters observe that scheduling practices are intertwined with employees’ hours of work and should therefore be considered essential.\textsuperscript{166}

Some commenters argue that work rules and directions governing the manner, means, or methods of work performance should not be essential for purposes of the joint-employer standard.\textsuperscript{167} These commenters express concern that including work rules and directions potentially sweeps too broadly and risks exposing small business owners to substantial new liability.\textsuperscript{168} Similarly, our dissenting colleague expresses concern that including work rules and directions on the list of essential terms and conditions of employment sweeps too broadly, potentially allowing the Board to make a joint-employer finding on the strength of ambiguous language in work rules.

He also predicts that including work rules and directions as essential will lead to more frequent joint-employer findings in the staffing, healthcare, and franchise industries. Commenters who favor including work rules and directions on the list of essential terms and conditions of employment generally argue that entities reserving or exercising control over work rules and directions thereby exert considerable influence over the manner and means of particular employees’ work.\textsuperscript{169}

Several commenters propose additional terms and conditions of employment that the Board should consider essential. A few commenters propose adding practices related to surveillance and monitoring to the list.\textsuperscript{170} One comment goes further, suggesting that the Board adopt a rebuttable presumption that an entity is a joint employer if it imposes certain requirements on another entity or that entity’s employees (among others, retaining discretion to hire or fire that entity’s employees and requiring that entity’s employees to enter into noncompete agreements or other restraints on operating a business in the same trade or industry during or after the contract).\textsuperscript{171}

As noted above, the Board has determined to include an exhaustive list of essential terms and conditions of employment in the final rule. While commenters broadly agree on the content of the proposed rule’s list, we briefly address commenters’ specific concerns about our decision to include scheduling, workplace health and safety, and work rules and directions governing the manner, means, or methods of work performance.

With respect to scheduling, we begin by noting several commenters’ approval of the 2020 Rule’s inclusion of scheduling along with hours of work as an essential term or condition of employment.\textsuperscript{172} We find that Section 2 of the Restatement (Second) of Agency provides support for including both “hours of work and scheduling” on the list of essential terms and conditions of employment. We further note that Board law has long treated scheduling as probative of joint-employer status.\textsuperscript{173} We are also persuaded by the view set forth by some commenters that scheduling practices are often intertwined with hours of work.

Having carefully considered the valuable input of commenters on the proposed rule’s inclusion of workplace health and safety on our list of essential terms and conditions of employment (and the views of our dissenting colleague), we are persuaded to retain this aspect of the proposed rule. We find common-law support for including workplace health and safety as an essential term or condition of employment in references to the importance of an employer’s control over “the physical conduct” of an employee “in the performance of the service” to the employer.\textsuperscript{174} While many commenters and our dissenting colleague have observed that workplace health and safety is subject to substantive regulation by many federal, state, and local authorities, especially in certain industries, we do not seek to displace or interfere with those regulatory schemes by recognizing that control over workplace health and safety is indicative of a joint-employment relationship. As discussed further below, we do not consider contractual terms that do nothing more than incorporate regulatory requirements, without otherwise reserving authority to control or exercising power to control the performance of work or terms and conditions of employment, indicative of...
joint-employer status.\textsuperscript{175} Finally, as noted above, many commenters confirmed our preliminary view that the experience of the Covid–19 pandemic demonstrated the importance of treating workplace health and safety as essential.

We also adhere to the view set forth in the proposed rule that work rules and directions governing the manner, means, or methods of work performance are properly included as essential terms and conditions of employment. As with our discussion of scheduling above, we note that many commenters found it appropriate to further inform the Board to follow the 2020 rule’s lead in treating work rules and directions as essential. Moreover, we find support for including work rules and directions on the list of essential terms and conditions of employment in Sections 2 and 220 of the Restatement (Second) of Agency.\textsuperscript{176}

In this regard, we agree with the views set forth by some commenters that possessing or exercising control over work rules or directions governing the manner, means, or methods of work performance determines the extent of control an employer exercises over the details of the work to be performed.\textsuperscript{177}

Finally, in light of the clarification we made regarding the content of a joint employer’s bargaining obligation in paragraph (h) of the final rule, we do not find it necessary to add other terms or conditions of employment to the final rule’s list of “essential” terms or conditions of employment. However, we believe the final rule is responsive to commenters’ insights that bargaining over certain of these subjects, like workplace surveillance, may be very important to employees who organize and seek to bargain collectively. As a result, the final rule recognizes that once an entity is found to be a joint employer on the basis of its control of one or more essential terms or conditions of employment, that entity will be subject to a duty to bargain over all mandatory subjects of employment that it controls.\textsuperscript{178}

E. Comments About Forms of Control Sufficient To Establish Status as a Joint Employer

Proposed paragraph (e) of the proposed rule provided 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. 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.\textsuperscript{179}

Some commenters specifically request that the Board modify this paragraph of the proposed rule to clarify what quantum or degree of indirect or reserved control will be sufficient to give rise to a joint-employer finding. Many commenters commended the 2020 rule for returning to TLI/Laerco’s “substantial direct and immediate control” formulation as the threshold that would give rise to a joint-employer finding and treating “limited and routine” instances of control as irrelevant to the joint-employer inquiry, with some noting the practical benefits of that standard for the construction, franchise, retail, restaurant, and staffing industries.\textsuperscript{180}

Our dissenting colleague likewise expresses his preference for the 2020 rule’s treatment of the forms of control that are sufficient to establish status as a joint employer. Some commenters suggest that Congress, in enacting the Taft-Hartley amendments, implicitly contemplated that only substantial direct and immediate control could suffice to establish a joint-employer relationship.\textsuperscript{182} In addition, some of these commenters note that it is especially important for the Board to ascertain whether an entity will possess or exercise control on a prospective basis as a precondition to imposing a bargaining obligation.\textsuperscript{183}

With respect, we disagree with the view of some commenters and our dissenting colleague that only “substantial direct and immediate control” should be relevant to the Board’s joint-employer inquiry. As set forth in the NPRM, once it is shown that an entity possesses or exerts any relevant control over particular employees, the Board is not aware of any common-law authority standing for the proposition that further evidence of the direct and immediate exercise of that control is necessary to establish a common-law employment relationship. While we acknowledge that some commenters found the 2020 rule’s formulation beneficial, because we are bound to apply common-law agency principles, we are not free to maintain a definition of “joint employer” that incorporates the restriction that any relevant control an entity possesses or exercises must be “direct and immediate.”\textsuperscript{184} Finally, we

\textsuperscript{175} Contrary to our dissenting colleague’s suggestion, if an employer’s compliance with health and safety regulations or OSHA standards involves choosing among alternative methods of satisfying its legal obligation, a contract term that merely memorializes the employer’s choice regarding how to comply with the regulation would not indicate joint-employer status. To the extent that an employer reserves further authority or discretion over health and safety matters, however, such reserved control will be sufficient to give rise to a joint-employer finding.

\textsuperscript{177} Contrary to our dissenting colleague’s suggestion, if an employer’s compliance with health and safety regulations or OSHA standards involves choosing among alternative methods of satisfying its legal obligation, a contract term that merely memorializes the employer’s choice regarding how to comply with the regulation would not indicate joint-employer status. To the extent that an employer reserves further authority or discretion over health and safety matters, however, such reserved control will be sufficient to give rise to a joint-employer finding.

\textsuperscript{178} Comments of American Trucking Associations; COLLE; Competitive Enterprise Institute; Escalante Organization; NAHB; SBA Office of Advocacy; SHRM. One commenter likewise suggests that the Board incorporate a de minimis limitation in the final rule. See comments of UNITE HERE.

\textsuperscript{179} Comments of American Hotel & Lodging Association; COLLE; RILA.

\textsuperscript{180} Comments of AGC; American Pizza Community; Americans for Tax Reform; American Staffing Association; California Policy Center; Escalante Organization; Independent Electrical Contractors; IFA; Michael Remick; National Association of Realtors; National Black McDonald’s Operators Association; National Demolition Association; National Retail Federation; National Taxpayers Union; New Civil Liberties Alliance & Institute for the American Worker; North American Meat Institute; Restaurant Law Center and National Restaurant Association; RILA; Mackinac Center for Public Policy; Yum! Brands. One commenter also argues that there must be a showing of regular and continuous control, not merely sporadic and de minimis control. See comments of SHRM. Another commenter likewise suggests that the Board incorporate a de minimis limitation in the final rule. See comments of UNITE HERE.

\textsuperscript{181} Comments of AGC; American Pizza Community; Americans for Tax Reform; American Staffing Association; California Policy Center; Escalante Organization; Independent Electrical Contractors; IFA; Michael Remick; National Association of Realtors; National Black McDonald’s Operators Association; National Demolition Association; National Retail Federation; National Taxpayers Union; New Civil Liberties Alliance & Institute for the American Worker; North American Meat Institute; Restaurant Law Center and National Restaurant Association; RILA; Mackinac Center for Public Policy; Yum! Brands. One commenter also argues that there must be a showing of regular and continuous control, not merely sporadic and de minimis control. See comments of SHRM. Another commenter likewise suggests that the Board incorporate a de minimis limitation in the final rule. See comments of UNITE HERE.
hope to satisfy those commenters seeking guidance regarding the quantum or type of control that is sufficient to establish status as a joint employer in the discussion that follows.

Others approve of the proposed rule’s explicit recognition that control exercised through an intermediary should be sufficient to establish joint-employer status, offering examples of the role intermediaries play in sharing or codetermining essential terms and conditions of employment in certain industries, including the franchise, staffing, and temporary employment industries. One commenter highlights how the proposed rule, which would find indirect control over workplace health and safety sufficient to establish joint-employer status, could benefit employees with disabilities, who it represents are overrepresented in temporary employment and often face distinctive health and safety challenges that may require multiple firms to play a role in addressing.

In addition, these commenters emphasize that taking all relevant forms of control, including indirect control, into account is essential to ensuring that bargaining is effective, especially in industries characterized by the widespread use of contracting, including the property services, staffing, and construction industries. Some commenters observe that making indirect control part of the joint-employer inquiry may foster compliance with labor and employment laws and encourage an appropriate sharing of responsibility among multiple firms that codetermine terms and conditions of employment.

Some of these commenters charge that by imposing a requirement of “substantial direct and immediate control” over essential terms and conditions of employment, the 2020 rule effectively rendered forms of indirect control irrelevant to the joint-employer analysis, in contravention of the common-law agency principles that must guide the Board’s application of its joint-employer standard. As one of these commenters adds, this error is especially pronounced in light of the District of Columbia Circuit’s later statement in Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters v. NLRB, 45 F.4th 38, 46–47 (D.C. Cir. 2022), that the Board was not free to apply an analysis that effectively ignored reserved and indirect control.

Certain commenters who generally agree with the Board’s proposed approach to treating indirect control as probative to the joint-employer analysis argue that certain employer actions should, in general, be regarded as amounting to the exercise of indirect control over particular employees. For example, one commenter proposes that the Board state that using surveillance technology amounts to indirect control over the employees being surveilled. Another commenter suggests that certain forms of control that franchisors or user firms exert over the nonwage cost items in franchisees’ or supplier firms’ budgets are tantamount to indirect control over wages. One commenter offers illustrations of forms of control she regards as material to the existence of a common-law employment relationship. One example includes a contract provision granting a user employer the right to require mandatory overtime by supplied employees. Some suggest that the Board add corresponding examples or hypotheticals to the final rule to clarify that these forms of control are sufficient.

While we appreciate the views set forth by commenters who illustrate why forms of indirect control are frequently relevant to the joint-employer analysis, we decline the invitation to modify the text of the proposed rule to incorporate these insights. By maintaining the general language of the proposed rule, which provides that control is to be determined by reference to common-law agency principles, we aim to permit the application of the final rule to a diverse arrangement of mechanisms that grant third parties or other intermediaries authority to share or codetermine matters governing particular employees’ essential terms and conditions of employment. In this regard, as we apply the final rule to new facts, we will be guided by § 103.40(e)(2) of the final rule, which is consistent with the District of Columbia Circuit’s statement that “the common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship.”

Another group of comments raises concerns about situations where a putative joint employer in fact possesses the authority to control or exercises the power to control essential terms or conditions of employment only because it is required to do so by law or regulation. Some of these commenters state that the Federal Government possesses reserved and indirect control over certain terms and conditions of employment of the employees of companies it contracts with. For example, one commenter...
describes the use of “flow-down” clauses in contracting relationships and how prime contractors are sometimes required to impose obligations under the Service Contract Act, 41 U.S.C. 351 et seq., and similar local and municipal laws setting minimum wage and benefit standards on their subcontractors.200 Similarly, some commenters suggest that control over essential terms or conditions of employment is less probative of joint-employer status if it is possessed or exercised in the service of setting basic expectations or ground rules for a third-party contractor or contracted service.201

In response to these commenters, we note that if a law or regulation actually sets a particular term or condition of employment (like minimum wages, driving time limits for truck drivers, or contractor diversity requirements), an entity that does nothing more than embody or memorialize such legal requirements in its contracts for goods and services, without otherwise reserving the authority to control or exercising the power to control terms or conditions of employment, does not thereby become the employer of particular employees subject to those legal requirements. This is because the embodiment of such legal requirements is not a matter within the entity’s discretion subject to collective bargaining.202 We remind commenters who express concern about the role of entities exempt from the Board’s jurisdiction that, under longstanding Board precedent, if a common-law employer of particular employees lacks control over some of those employees’ terms and conditions of employment because those terms and conditions are controlled by an exempt entity, that common-law employer is not required to bargain about those terms and conditions of employment.203

Consistent with this precedent, the final rule provides that a joint employer will be required to bargain over only those mandatory subjects of bargaining that it possesses or exercises the authority to control. Finally, as discussed in more detail above and below, if an entity possesses or exercises some control over particular employees’ terms and conditions of employment, including indirect control, only by the terms of a third-party contract that sets basic expectations or ground rules for the production or delivery of goods or services, without otherwise reserving the authority or exercising the power to control the details of the manner and methods by which the work is performed, the entity does not thereby become an employer of those employees. This is because such control, as a normal incident of a third-party contract, does not establish the common-law employment relationship that is the threshold requirement for finding a joint-employer relationship.204

Several commenters raise concerns about the possibility that, in contexts where a public entity contracts with a private entity to render a service or perform a contract, the proposed joint-employer standard would be meshing that public entity in the Board’s jurisdiction.205 One commenter, citing the Board’s decision in Management Training Corp., 317 NLRB 1355 (1995), argues that the 2020 rule would better ensure the proper application of the joint-employer standard in contracting situations.206 One commenter expresses particular concern about the implications of a joint-employer relationship between a public charter school and third-party vendors or contractors it uses.207

We reject these commenters’ views that the proposed rule creates any novel risks for public or private entities who contract with one another. The final rule we adopt requires, as a threshold matter, that each putative joint employer meet the definition of “employer” in Section 2(2) of the Act.208 Section 2(2) excludes from the definition of “employer” public entities, including, in relevant part, “the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof.”209 While some commenters suggest that public entities possess or exercise control over essential terms and conditions of employment, we note that these facts are insufficient to establish a joint-employment relationship for purposes of the Act because the public entity is excluded from the statutory definition of “employer.” Finally, we regard the Board’s decision in Management Training Corp., above, as persuasive in addressing some commenters’ concerns that applying the joint-employer standard we adopt might give rise to distinct problems for government contractors. As one commenter suggests, that case permits the Board to find one entity is an employer for purposes of Section 2(2) even if another, exempt entity also possesses or exercises control over particular employees’ essential terms or conditions of employment.210

We note that reviewing courts have broadly approved of the Board’s assertion of jurisdiction over government contractors.211

F. Control Over Matters That Are Inmaterial to the Existence of an Employment Relationship Under Common-Law Agency Principles or That Do Not Bear on Essential Terms and Conditions of Employment

Proposed paragraph (f) provided 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

200 Comments of American Council of Engineering Companies; Comments of AFTBA.
201 Of course, if an employer has discretion over how to comply with a statutory mandate, it must bargain about how to exercise that discretion. See, e.g., Roseburg Forest Products Co., 331 NLRB 999, 1003 (2000) (requiring an employer to bargain with the union over how to satisfy its obligations to keep an employee’s medical information confidential under the Americans with Disabilities Act, 42 U.S.C. 12101, et seq., while meeting its duty to furnish requested information to the union under the NLRA).
203 For these reasons, we also reject the hypotheticals our dissenting colleague puts forward to suggest that the final rule exceeds the boundaries of the common law. Our colleague downplays the probative of joint-employer status if it is possessed or exercised in the service of setting basic expectations or ground rules for a third-party contractor or contracted service.
204 Comments of AFL–CIO (citing Management Training Corp., 317 NLRB at 1358).
205 See Teledyne Economic Development Group v. NLRB, 108 F.3d 56, 59 (4th Cir. 1997) (“By its terms, section 2(2) exempts only government entities or wholly owned government corporations from its coverage—not private entities acting as contractors for the government.”); Aramark Corp. v. NLRB, 179 F.3d 872, 879 (10th Cir. 1999) (“The Board’s consistent view that governmental contractors fall outside section 2(2)’s political subdivision exemption and inside that provision’s definition of an employer ‘is entitled to great respect.’”); Pikeville United Methodist Hospital of Kentucky, Inc. v. United Steelworkers of America, 109 F.3d 1146, 1152–1153 (6th Cir. 1997).
whether the employer is a joint employer.” 212 As set forth more fully above, the preamble to the proposed rule expressed agreement with the District of Columbia Circuit’s view that “routine components of a company-to-company contract” will generally not be material to the existence of an employment relationship under common-law agency principles. 213 The proposed rule cited two examples given by the District of Columbia Circuit as potential kinds of company-to-company contract provisions that will not generally be probative of joint-employer status: “very generalized cap on contract costs”; or “an advance description of the tasks to be performed under the contract.” 214 While noting that the proposed rule did not intend to exhaustively detail the kinds of business arrangements that might bear on the existence of a common-law employment relationship, the Board specifically solicited commenters’ input on other kinds of company-to-company contract provisions that might not be material to the existence of an employment relationship under common-law agency principles. 215 Many commenters accepted the Board’s invitation to provide these examples, and we have carefully considered the helpful insights commenters shared, as discussed below.

First, some commenters specifically addressed the two examples identified by the District of Columbia Circuit and in the proposed rule. A few commenters appeared to suggest that a generalized cap on contract costs might in certain circumstances be probative of a common-law employment relationship, especially if such a cap is coupled with a cost-plus arrangement or other explicit limitations on employee wages and benefits. 216 But many other commenters generally expressed their agreement with the view set forth in the proposed rule and by the District of Columbia Circuit that generalized caps on contract costs typically resemble other ordinary price or quantity terms that do not have any necessary connection to the existence of a common-law employment relationship. 217

No commenter expresses any concerns about treating advance descriptions of the tasks to be performed under the contract (including provisions setting forth objectives, ground rules, or expectations, or providing for oversight) as generally immaterial to the existence of a common-law employment relationship, while several commenters expressly indicate their approval of the proposed rule’s discussion of such provisions. 218 One commenter suggests that it is common practice to include a “statement of work” to define a new project and that the Board should regard these types of contract provisions as akin to advance descriptions of the tasks to be performed (and therefore not material to the existence of a common-law employment relationship). 219 A few of these commenters make the further suggestion that the Board modify the text of proposed paragraph (f) to expressly reflect that descriptions of the tasks to be performed are not material to the existence of a common-law employment relationship. 220

A number of commenters encourage the Board to modify the proposed rule to provide examples of contractual provisions that would not give rise to a finding of joint-employer status or to otherwise illustrate or give examples about how the Board will apply the joint-employer rule. 221 These commenters offer a range of suggested “routine components of a company-to-company contract” 222 to exclude as probative of joint-employer status. These contractual provisions include, among others, those that set forth: the objectives, basic ground rules, and expectations of the relationship; 223 instructions regarding work standards or expectations and about what work to perform, or when and where to perform work; 224 minimum staffing requirements; 225 quality, productivity, timing, and safety terms about providing a service or completing a project; 226 requirements that deliveries be made during limited window of time; 227 requirements about monitoring or maintaining brand standards or the design, décor, logo, or image of a business; 228 uniform requirements; 229 generally applicable rules for individuals visiting a facility; 230 general price terms or terms governed by third-party or customer demand; 231 authority to cancel a contract, including at will; 232 requirements that employees undergo background checks or drug tests, comply with equal employment opportunity, nondiscrimination, and antiharassment policies, and satisfy licensure requirements; 233 authority to bar certain individuals from the premises or reject particular employees; 234 terms related to an entity’s control over its property, premises, or equipment, including training and safety requirements; 235 provisions related to the nondisclosure or confidentiality of trade secrets, proprietary information, or intellectual property; 236 construction project schedule requirements or safety programs or other site-specific requirements for entities visiting marine terminals, railyards, or other supply

216 Comments of Escalante Organization; IFDA; RILA; Tesla, Inc.; The Mackinac Center for Public Policy.
217 Comments of Tesla, Inc.
218 Comments of IFDA; The Mackinac Center for Public Policy.
219 Comments of American Hotel & Lodging Association; American Staffing Association; HR Policy Association; RILA; Tesla, Inc.; U.S. Chamber of Commerce; U.S. Small Business Association; U.S. Black Chambers, Inc.
220 BFI v. NLRA, 911 F.3d at 1220.
221 Comments of American Hotel & Lodging Association; CDW; Contractor Management Services, LLC; International Warehouse Logistics Association; SHRM; Tesla, Inc.; The Mackinac Center for Public Policy.
222 Comments of American Hotel & Lodging Association; CDW; Contractor Management Services, LLC; International Warehouse Logistics Association; SHRM; Tesla, Inc.; The Mackinac Center for Public Policy.
223 Comments of American Hotel & Lodging Association; CDW; Contractor Management Services, LLC; International Warehouse Logistics Association; SHRM; Tesla, Inc.; The Mackinac Center for Public Policy.
224 Comments of American Hotel & Lodging Association (citing Service Employees International Union, Local 32BJ v. NLRA, 647 F.3d 435, 443 (2d Cir. 2011); Local 254, SEIU, 324 NLRB 743, 746–749 (1997)); Independent Lubricant Manufacturers Association; Restaurant Law Center and National Restaurant Association; Telesa, Inc.; U.S. Chamber of Commerce.
225 Comments of American Hotel & Lodging Association.
226 Comments of American Hotel & Lodging Association; ARTBA; CDW; Energy Marketers of America; SHRM; Tesla, Inc.
227 Comments of Control Transportation Services, Inc.; Energy Marketers of America; Michael Remick; M. M. Fowler, Inc.; QuickChek; U.S. Chamber of Commerce. Notably, several of these commenters raise observations regarding the timing of deliveries at retail motor fuel locations, arguing that energy marketers often dictate when fuel can be delivered safely. See, e.g., comments of Energy Marketers of America.
228 Comments of American Hotel & Lodging Association; Home Care Association of America; IFA; Independent Lubricant Manufacturers Association; M. M. Fowler, Inc.; McDonald’s USA, LLC; National Association of Convenience Stores; SHRM; U.S. Chamber of Commerce; Yum! Brands.
229 Comments of American Hotel & Lodging Association; IFA.
230 Comments of American Hotel & Lodging Association; CDW; Contractor Management Services, LLC; Home Care Association of America; National Association of Convenience Stores; Restaurant Law Center and National Restaurant Association; SHRM.
231 Comments of Restaurant Law Center and National Restaurant Association; SHRM.
232 Comments of Center for Workplace Compliance; Home Care Association of America; National Retail Federation; RILA; SHRM; U.S. Chamber of Commerce.
233 Comments of American Hotel & Lodging Association; Energy Marketers of America; Independent Lubricant Manufacturers Association; National Retail Federation; Tesla, Inc.
234 Comments of SHRM; Tesla, Inc.; U.S. Chamber of Commerce.
235 Comments of U.S. Chamber of Commerce.
chain hubs; 237 parties’ obligations under law or regulations; 238 provisions requiring hospitals to superintend contract employees as part of their patient-care mission; 239 goals related to diversity, equity, inclusion, and access (DEIA), corporate social responsibility (CSR), or environmental, social, and governance (ESG); 240 cost-plus arrangements; 241 minimum compensation requirements as determined by public contracting rules or regulations, including the Davis-Bacon Act, 40 U.S.C. 3141 et seq. 242 Some commenters helpfully responded to the Board’s request for comment on this issue by providing sample or actual contractual language that they argue correspond to some of the categories of company-to-company contract provisions listed above. 243 After reviewing the wide range of contract provisions commenters shared with the Board, we are persuaded that the approach taken in the proposed rule, which did not attempt to categorize company-to-company contract provisions extant, is the most prudent path forward. 244 Because the language used in contract provisions that ostensibly address the same subject matter may vary widely, we believe that case-by-case adjudication applying the joint-employer standard is a better approach. To do otherwise might risk problems of both over- and under-inclusion and overlook important context that might be relevant to the Board’s analysis.

In addition to contractual provisions, other commenters suggest that the Board modify the proposed rule to recognize certain business practices as aspects of routine company-to-company dealings that are not material to the existence of a common-law employment relationship. For example, several commenters urge the Board to specify that monitoring a third party’s performance for the purposes of quality assurance or auditing for compliance with contractual obligations will not be viewed as probative of joint-employer status. 245 A few others urge the Board to clarify that the mere communication of work assignments, delivery times, or other details necessary to perform work under a contract is not material to the joint-employer inquiry if it is not accompanied by other evidence showing a common-law employment relationship. 246 We decline to modify the proposed rule as suggested by these commenters for largely the same reasons we decline to offer an ex ante categorization of company-to-company contract provisions. Given the diversity of business practices these commenters describe, we believe that case-by-case adjudication applying the joint-employer standard will be the soundest approach.

Another group of commenters urge the Board not to provide specific examples of contractual provisions that are immaterial to the existence of a common-law employment relationship, emphasizing that it is very difficult to assess the effect of such provisions absent consideration of the surrounding context. 247 Others take issue with particular examples of company-to-company contractual provisions that other commenters suggest should not be considered material to the existence of a common-law employment relationship. 248 For example, one commenter notes that, in its experience, provisions authorizing an entity to remove or reject an employee are sometimes used to retaliate against individuals who engage in union and protected concerted activities. 249 One commenter suggests that the Board modify proposed paragraph (f) to clearly identify that decisions made as an exercise of “entrepreneurial control” are generally not probative of the existence of a common-law employment relationship. 250 For the same reasons set forth above, we are not inclined to adopt these commenters’ suggestions that we specifically categorize contractual provisions or business practices in the final rule. Instead, we are persuaded that it would be most prudent to consider whether certain contractual provisions or business practices are probative of a common-law employment relationship when applying the final rule.

Additionally, some commenters argue that the Board should treat employment relationships in the construction industry in a distinctive manner for purposes of analyzing what forms of control are material to the existence of a common-law employment relationship. 251 While these commenters acknowledge that multiple firms reserve and exercise control over construction jobsites, citing Denver Building, supra, 341 U.S. at 689–690, they explain that this shared control is inherent in the industry and should not be probative of joint-employer status. 252 As discussed above, we agree that the Supreme Court’s decision in Denver Building precludes treating a general contractor as the employer of a subcontractor’s employees solely because the general contractor has overall responsibility for overseeing operations on the jobsite. And, absent evidence that a firm possesses or exercises control over particular employees’ essential terms and conditions of employment, that firm would not qualify as a joint employer under the standard adopted in this final rule. 253
Others seek recognition of industry-specific business practices that warrant special consideration. A number of commenters raise concerns about whether the proposed rule pays adequate heed to franchisors’ need to protect their brands and their trade or service marks.

Some of these commenters note that the 2020 rule acknowledged franchisors’ needs to maintain brand-recognition standards by providing that control over brands or trademarks is not probative of joint-employer status. The commenters urge the Board to include a similar acknowledgment in the final rule. Relatedly, a number of commenters argue that the proposed rule risks a conflict with federal trademark law, including the Lanham Act, 15 U.S.C. 1051 et seq., and cognate state laws inasmuch as they require franchisors to retain control over their franchisees to protect their brand standards.

A bipartisan group of six United States Senators expresses similar concerns regarding the need to protect franchise brands, noting their support for the Trademark Licensing Protection Act of 2022, S.4976.

We are mindful of franchisors’ need to protect their brands and their trade or service marks and of the need to accommodate the NLRA with the Lanham Act and federal trademark law more generally. That said, we view the likelihood of conflict as minimal under the standard adopted in this final rule.

Many common steps franchisors take to protect their brands have no connection to essential terms and conditions of employment and therefore are immaterial to the existence of a common-law employment relationship. While we are not inclined to categorically state that all forms of control aimed at protecting a brand are immaterial to the existence of a common-law employment relationship, we stress that many forms of control that franchisors reserve to protect their brands or trade or service marks (like those dealing with logos, store design or décor, or product uniformity) will typically not be indicative of a common-law employment relationship.

Further, by making the list of “essential terms and conditions of employment” in the final rule exhaustive, we also aim to respond to the substance of these commenters’ concerns by offering clearer guidance to franchisors about the forms of control that the Board will find relevant to a joint-employer inquiry. Another commenter urges the Board to state that making a payment as part of a contract to provide payroll services is not sufficient to demonstrate control over wages sufficient to support a joint-employer finding. One commenter argues that the proposed rule should clarify that, for joint-employer purposes, motor carriers are the customers, not employees or contractors, of marine terminals. As set forth above, we are not inclined to modify the text of the final rule to specifically address these situations. However, we believe that we have satisfied these commenters’ desires for greater clarity regarding their obligations by describing our view of the forms of control that will be relevant to the joint-employer inquiry and by cabining the list of essential terms and conditions of employment that the Board will treat as material to the existence of a common-law employment relationship.

Some commenters argue that because decisions to modify or terminate joint employment relationships are entrepreneurial decisions between businesses, they are not susceptible to decisional bargaining under First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). Other commenters note that a range of other company-to-company contracting practices would not be subject to bargaining under First National Maintenance and its progeny and therefore should not be considered probative of joint-employer status.

As discussed above, the Board has determined to modify the final rule to clarify the nature of joint employers’ bargaining obligations. The final rule explains that, once an entity is found to be a joint employer because it shares or codetermines matters governing one or more of particular employees’ essential terms or conditions of employment, it is obligated to bargain over any mandatory subjects of bargaining it possesses or exercises the authority to control. As some commenters helpfully note, the Supreme Court has held that core entrepreneurial decisions “involving a change in the scope and direction of the enterprise” are not mandatory subjects of bargaining.

Applying the final rule, we will adhere to this binding precedent when determining the scope of joint employers’ bargaining obligation.

G. Comments About the “Meaningful Collective Bargaining” Step of the Board’s 2015 Browning-Ferris Decision

Several commenters urge the Board to modify the text of the proposed rule to incorporate the “meaningful collective bargaining” step of the Board’s 2015 BFI decision or to otherwise embrace that portion of the BFI analysis. Others, including our dissenting colleague, take the position that the Board’s proposal should be withdrawn or modified in some other manner, as the proposed rule fails to cast light on questions the District of Columbia Circuit raised regarding “once control is found, who is exercising that control, when, and how.” Some commenters specifically suggest that using a nonexhaustive list of “essential terms and conditions of terminating its relationship with a subcontractor or other business entity, which is not a violation of Sec. 8(a)(3). Comments of COOLE.

263 Comments of AGC; AHA; American Staffing Association; Americans for Tax Reform; Freedom Foundation; IFA; International Foodservice Distributors Association; NAM; National Retail Federation; National Waste & Recycling Association; Subcontracting Concepts, LLC; Thomas Jefferson Institute for Public Policy; U.S. Chamber of Commerce. 264 911 F.3d at 1215. See comments of Americans for Prosperity Foundation; Independent Bakers Association; Modern Economy Project; National Association of Convenience Stores; National Waste & Recycling Association; North American Meat Institute; SHRM; Subcontracting Concepts, LLC; The Thomas Jefferson Institute for Public Policy; U.S. Chamber of Commerce.
employment” is problematic without a limiting principle akin to the “meaningful collective bargaining” step of BFI or some other “guardrails.”

Similarly, a group of commenters urge the Board to include in the final rule a statement that encapsulates or describes a joint employer’s duty to bargain. Some of these commenters suggest that the Board state that if a putative joint employer does not have at least “co-control” over the range of potential outcomes regarding an essential term or condition of employment, it is not required to bargain over that subject. Some of these commenters encourage the Board to modify the rule text to incorporate a principle that appeared in the preamble to the proposed rule about the scope of a joint employer’s bargaining obligation. A few commenters ask the Board to clarify that a joint employer does not have a bargaining obligation except as to matters that are divisible and limited to those employees represented by the union.

Other commenters believe that, by making a common-law employment relationship the prerequisite to a joint-employer finding, the proposed rule contains adequate limits, as the Board will not find that entities with insufficient control over essential terms and conditions of employment are joint employers. These commenters take the position that there is no need to incorporate the “meaningful collective bargaining” step of BFI in the final rule.

After carefully considering the comments raising concerns about the need for a limiting principle to ensure that the appropriate parties are brought within the ambit of the Board’s joint-employer standard, we have decided to modify the definition of “essential terms and conditions of employment” in the final rule, as described above. As several commenters observe, limiting the list of essential terms and conditions of employment is responsive to the District of Columbia Circuit’s request that the Board incorporate a limiting principle to ensure the joint-employer standard remains within common-law boundaries. By clearly identifying and limiting the list of essential terms and conditions of employment that an entity may be deemed a joint employer if it possesses the authority to control or exercises the power to control, the final rule responds to these criticisms and helps provide clear guidance and a more predictable standard to parties covered by the Act. Moreover, because all of the essential terms and conditions of employment as defined by the final rule involve matters that lie at the core of workplace issues appropriate for collective bargaining, a joint employer’s control over any of these matters ensures that there is a basis for meaningful collective bargaining over at least the essential term or condition that is subject to that employer’s control.

H. Comments About Independent-Contractor Precedent

The proposed rule cites certain common-law agency decisions that apply independent-contractor precedent. Some commenters appear to approve of the Board’s reliance on these cases and cite independent-contractor precedent in support of their own arguments. Other commenters and our dissenting colleague criticize the proposed rule’s reliance on precedent.

I. Burden of Establishing Joint-Employer Status

Proposed paragraph (g) provides that the party asserting joint-employer status has the burden of proving, by a preponderance of the evidence, that a putative joint employer satisfies the requirements of proposed paragraphs (a) through (f).

No commenter argues that the Board should allocate the burden differently than suggested in proposed paragraph (g). And no party argues that the Board should omit proposed paragraph (g) from the final rule. Several commenters state that the proposed rule’s articulation of the burden of proof does
not provide sufficient guidance as to how a party can successfully carry its burden.\textsuperscript{280} Some of them suggest that the Board clarify what kind or amount of evidence a party asserting joint-employer status must put forward to meet its burden.\textsuperscript{281}

The final rule incorporates the assignment of the burden of proof from paragraph (g). While some commenters urge the Board to clarify how a party asserting joint-employer status can successfully carry its burden in the rule text itself, we find it unnecessary to do so in light of the final rule’s statement that the burden must be satisfied on the basis of a preponderance of the evidence. This familiar evidentiary threshold is embodied in the Act itself,\textsuperscript{282} has been endorsed by the Supreme Court in similar administrative proceedings,\textsuperscript{283} and should satisfy the commenters’ desire for guidance regarding the amount of evidence necessary to carry the burden. While these commenters also express a desire for guidance regarding what kinds or types of evidence will be probative of joint-employer status, because we have addressed this question at length in the preceding discussion, we do not find it necessary to modify the proposed rule’s treatment of the burden of proof or otherwise alter the text of the final rule in response to these comments.

\textbf{J. Severability}

Proposed paragraph (h) set forth the Board’s preliminary view that the provisions of the joint-employer rule should be treated as severable.\textsuperscript{284} Proposed paragraph (h) explains that “[[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.” As explained below, while the Board believes that the final rule in its entirety is consistent with the National Labor Relations Act and promotes its policies, the Board would adopt the separate portions of the final rule independently, were some other portion or portions held to be invalid.

We note that some commenters urge the Board to make clear that the rescission of the 2020 rule and the promulgation of the final rule’s joint-employer standard are intended as separate actions and make a specific finding that any of these two actions as severable.\textsuperscript{285} The Board’s intention is that the two actions be treated as separate and severable. In the Board’s view, the 2020 rule is contrary to common-law agency principles and therefore inconsistent with the Act. The Board thus believes it is required to rescind the 2020 rule, as it does today. Even if the 2020 rule were consistent with the Act, the Board would still choose to rescind that rule as failing to fully promote the policies of the Act. The Board’s decision to rescind the 2020 rule is intended to be independent of its promulgation of a new final rule today. If the final rule promulgated here were deemed invalid, the Board would nevertheless adhere to its decision to rescind the 2020 rule. In that event, the Board’s view is that the joint-employer standard would revert to the joint-employer standard established in \textit{Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, 362 NLRB 1599 (2015),} which immediately preceded the 2020 rule, unless and until that standard were revised through adjudication.

\textbf{K. Other Policy and Procedural Arguments}\textsuperscript{293}

The proposed rule set forth the Board’s preliminary view that

\textsuperscript{280} Comments of SHRM; Tesla, Inc. As discussed below, some of these commenters argue that the proposed rule’s failure to more clearly describe how a party can carry its burden means the rule should fail on the basis of the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq. See, e.g., comments of Tesla, Inc. Other commenters approve of the proposed rule’s discussion of the burden of proof, noting that the APA requires the Board to assign the burden of proof in the manner proposed. See, e.g., comments of Freedom Foundation; UNITE HERE. We discuss these contentions separately below.

\textsuperscript{281} Comments of AFL-CIO; CWA; SEIU; State Attorneys General. This commenter further observes that if paragraphs using the term “essential terms and conditions of employment” were stricken, proposed subparagraph (d) would be unnecessary. Id.

\textsuperscript{282} Comments of AFL-CIO; CWA; SEIU. These commenters also suggest that if the Board is inclined to issue the rescission rather than a new standard in one document, the Board should make clear that these are separate actions and intended to be severable. Id.

\textsuperscript{283} Comments of AFL-CIO; CWA; SEIU.

\textsuperscript{284} 73973 Federal Register 74 (2018).

\textsuperscript{285} The Board recognizes that there are certain outstanding issues regarding the standard for determining joint employers under the Act following the District of Columbia Circuit’s remand, as discussed above at fn. 5. The Board will resolve these issues through adjudication as presented in cases not governed by an applicable rule, including cases that arose before the effective date of the 2020 rule.

\textsuperscript{286} Comments of AFL-CIO; General Counsel Abruzzo; CWA; SEIU; State Attorneys General; UNITE HERE.

\textsuperscript{287} Comments of General Counsel Abruzzo.

\textsuperscript{288} Comments of State Attorneys General. This commenter compares the terms of interest. See comments of IFA; U.S. Chamber of Commerce. Members Wilcox and Prouty reject this challenge. Relevant precedent regarding decisionmakers’ participation in rulemaking proceedings confirms that “an individual should be disqualified from rulemaking only when there has been a clear and convincing showing” that the official “has an unalterably closed mind on matters relevant to this proceeding.” Air Transportation Ass’n of America, Inc. v. NMB, 663 F.3d 476, 487 (D.C. Cir. 2011) (quoting \textit{C & W Fish Co. v. Fosr., 901 F.2d 1556, 1564 (D.C. Cir. 1991)).

\textsuperscript{289} Members Wilcox and Prouty find that these commenters’ general and speculative suggestions fall short of the clear and convincing showing that either Members Wilcox or Member Prouty “has an unalterably closed mind on matters relevant to this rulemaking proceeding, as the law requires.” Further, although the commenters do not specifically argue that the participation of Member

Continued
grounding the joint-employer standard in common-law agency principles would serve the policies and purposes of the Act, including the statement in Section 1 of the Act that one of the key purposes of the Act is to “encourage the practice and procedure of collective bargaining.” 29 U.S.C. 151. Several commenters specifically note their approval of the Board’s view that the proposed rule will better serve the policies of the Act than did the 2020 rule, with several specifically cited Section 1 of the Act as providing support for the NPRM. Notably, several commenters writing on behalf of Senators and Members of Congress agree that the proposed rule would further Congressional intent and advance the purposes of the Act. Others argue that the proposed joint-employer standard will advance the Act’s purpose of eliminating disruptions to interstate commerce by increasing the possibility that effective collective bargaining will forestall strikes or other labor disputes. A number of commenters contend that the proposed rule is at odds with the Act because it exceeds the boundaries of the common law. Others argue that the proposed rule threatens to delay employees’ remedies because of the need for extensive litigation over joint-employer issues or to otherwise undermine the effective enforcement of other provisions of the Act. A few commenters argue that adopting a broader joint-employer standard increases the risk of enmeshing entities as primary employers in what would otherwise be secondary labor disputes. Some of these commenters specifically urge that the proposed rule could stand in the way of the effective enforcement of portions of the Act that deal specifically with the building and construction industry. Some commentaries disagree that the Act is intended to encourage the practice and procedure of collective bargaining. Others, including our dissenting colleague, agree that encouraging the practice and procedure of collective bargaining is a central goal of the Act but disagree with the Board’s view that the proposed rule is appropriately tailored to serve that goal or that the proposed rule is likely to “achiev[e] industrial peace by promoting stable collective-bargaining relationships.” Certain of these commenters observe that the proposed joint-employer standard may make it harder for the Board to make appropriate bargaining-unit determinations or protect bargaining-unit boundaries. Other commenters observe that because the joint-employer standard will only be applied to entities that are found to possess or exercise control over employees’ essential terms and conditions of employment, there is no serious risk that the proposed rule would have the effect of enmeshing neutral parties in labor disputes. One commenter adds that employees in industries characterized by pervasive contracting are sometimes hesitant to engage in collective action or exercise their Section 7 rights for fear of inadvertently violating the provisions of Section 8(b)(4) of the Act. 29 U.S.C. 158(d)(4).

As we preliminarily expressed in our NPRM, we are persuaded that rescinding the 2020 Rule is a necessary step toward effectuating the policies of the Act. By unduly narrowing the definition of “joint employer,” the 2020 Rule undermined the Act’s protections for employees who work in settings where multiple firms possess or exercise control over their essential terms or conditions of employment. We believe that, consistent with the common-law agency principles that must guide the Board in this area, it advances the Act’s purposes to ensure that, if they choose, all employees have the opportunity to bargain with those entities that possess the authority to control or exercise the power to control the essential conditions of their working lives. In this regard, we view the joint-employer standard adopted in this final rule as an important effort to ensure the uniform enforcement of the Act in all industries. And, as many commenters represent, our revised standard may particularly benefit vulnerable employees who are overrepresented in workplaces where multiple firms possess or exercise control, including immigrants and migrant guestworkers, disabled employees, and Black employees and other employees of color targeted by those entities that possess the authority to control or exercise the power to control the essential conditions of their working lives.

We also wish to address comments that we received regarding the interaction between the joint-employer standard and the Act’s prohibitions on secondary activity. As one commenter mentions, the 2020 rule may have risked chilling employees’ willingness to exercise their statutory rights for fear of inadvertently running afoul of the prohibitions on secondary activity set out in Section 8(b)(4) of the Act. We hope that the standard adopted in the final rule will provide the necessary clarity to ensure that employees do not fear engaging in protected concerted activity or raising workplace concerns with any entities
that possess or exercise control over their essential terms and conditions of employment. Of course, we will continue to vigorously enforce the Act’s prohibitions on secondary activity in situations where multiple firms do not share or codetermine those matters governing particular employees’ essential terms and conditions of employment.307

Certain commenters raise arguments regarding whether the proposed rule meets the requirements of the Constitution or the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq. Some commenters suggest that, pursuant to the major-questions doctrine, as summarized in West Virginia v. EPA, 597 U.S. __, 2022 U.S. LEXIS 3268 (2022), the Board should “hesitate before concluding that Congress” conferred authority on it to define “joint employer” because of the concept’s “economic and political significance.”308 309

Other commenters argue that the major-questions doctrine does not present an obstacle to the current rulemaking effort.309 One commenter notes that, since the earliest days of the Act, the Board has, with Supreme Court and other reviewing courts’ approval, applied the Act to cover joint-employment relationships, eliminating any doubt that Congress intended for the ambit of the Act to extend to joint employers.310

Based on the Board’s long history of analyzing joint-employment relationships and regulating entities it finds to be joint employers, we find that the major-questions doctrine does not foreclose our decision to put forward a new interpretation of the definition of “employer” in Section 2(2) of the Act. Not only has the Board historically defined “joint employer” through case-by-case adjudication, section 6 of the Act provides clear authority to the Board to promulgate rules to “carry out the provisions of [the] Act.” 29 U.S.C. 156. We therefore see no constitutional impediment to continuing the Board’s decades-long effort to clarify and refine its joint-employer standard. A group of commenters argue that the proposed rule is arbitrary and capricious because it does not sufficiently analyze why the standard set forth in the 2020 rule was inadequate or because it fails to provide adequate guidance.311 Some of these commenters, quoting Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Automobile Insurance Co., 463 U.S. 29, 45 (1983), contend that the Board has either “relied on factors which Congress

307 Contrary to our dissenting colleague, we see little risk of enmeshing neutral employers in labor disputes. When more than one entity jointly employ particular employees, those entities are not neutral, and the prohibitions on secondary activity do not apply, regardless of what joint-employer standard is applied.

308 Comments of ABC; CDW; COLLE; IFA; Independent Bakers Association; International Warehouse Logistics Association; RILA; U.S. Chamber of Commerce.

309 Several of these commenters also advance an argument based on the nondelegation doctrine. See comments of COLLE; IFA. One such commenter specifically argues that Sec. 6 of the Act does not delegate sufficiently clear authority to the Board to define “joint employer” for purposes of the Act. See comments of IFA. As discussed in Section III above, we are confident that the Board has authority to “carry through the provisions of the Act that are affected by how the Board defines “joint employer” through rulemaking. The Supreme Court has never cast doubt on the breadth of the Board’s rulemaking authority. Instead, it has repeatedly endorsed the Board’s use of rulemaking as a policymaking tool, including in contexts involving the scope and nature of bargaining obligations. See, e.g., American Hospital Ass’n v. NLRB, 499 U.S. 606 (1991).

310 Comments of CWA; UNITE HERE; reply comments of AFL–CIO.

311 Comments of ABC; CDW; COLLE; IFA; IFDA; International Bakers Association; National Association of Convenience Stores; North American Meat Institute; Food and Drug Law Institute; National Restaurant Association; U.S. Chamber of Commerce.

Several commenters make the specific observation that the proposed rule is arbitrary because it does not impose an express requirement that joint-employer status be proven by “substantial evidence.” See comments of CDW; RILA; SHRM; Tesla, Inc. As discussed above, we reject the view that the proposed rule failed to impose a “substantial evidence” obligation or was otherwise arbitrary. These commenters, effectively reading into the rule a discrete subparagraph of the proposed rule in isolation, suggest that “any evidence” of control will be sufficient to establish status as a joint employer under the proposed rule. However, as discussed more fully above, this view overlooks the proposed rule’s allocation of the burden of proof and requirement that a party asserting joint-employer status must demonstrate that an entity is a joint employer by a “preponderance of the evidence.”

Another commenter urges that the Board’s statements in the preamble to the proposed rule regarding the importance of workplace health and safety during the Covid-19 pandemic are unsupported and therefore render the inclusion of health and safety as an essential term or condition of employment under the proposed rule as a whole arbitrary and capricious. See comments of North American Meat Institute. As addressed extensively in our discussion of essential terms and conditions of employment above and in our discussion of the final rule below, the Board has benefited from the input of stakeholders and organizations that confirmed the Board’s preliminary views that workplace health and safety should be treated as an essential term or condition of employment and that the Covid-19 pandemic exacerbated certain employees’ health and safety concerns at work. We therefore reject this commenter’s view that it was arbitrary or capricious for the Board to take these significant real-world developments into account when considering how to modify its approach to defining “joint employer.”

has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” 312 Our dissenting colleague similarly criticizes the majority for failing to justify its departure from the 2020 rule and for providing insufficient guidance to regulated parties.

Some commenters suggest that the proposed rule will lead to excessive litigation of joint-employer issues,313 potentially diminishing the value of proceeding through rulemaking and suggesting that case-by-case adjudication might be a better approach. Some commenters who are generally supportive of the proposed rule’s approach to the joint-employer inquiry also express reservations about the proposal to promulgate a new standard through rulemaking.314

Some commenters criticize the Board for abandoning the 2020 rule prematurely, arguing that because the Board had not yet had occasion to apply the rule, the Board cannot find fault with it and should not rescind it.315 A few commenters suggest that the Board should await federal court review of the 2020 rule before rescinding it or consider other alternatives before proceeding further.316 Certain

312 Comments of COLLE; Independent Bakers Association; U.S. Chamber of Commerce.

313 Comments of American Hospital Association; American Staffing Association; National Association of State and Regional Congressional Signatories; Center for Workplace Compliance; HR Policy Association; IFA; International Bakers Association; McDonald’s USA, LLC; Modern Economy Project; North American Meat Institute; The Mackinac Center for Public Policy.

314 Comments of AFL–CIO; IL/DE; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry; United Steelworkers.

315 Comments of COLLE; Elizabeth Boynton; FreedomWorks Foundation; Goldwater Institute; Job Creators Network Foundation; National Association of Convenience Stores; North American Meat Institute; The Thomas Jefferson Institute for Public Policy; U.S. Chamber of Commerce; Wyoming Bankers Association. We note that in the time since the comment period closed, the Board has applied the 2020 rule. See Cognizant Technology Solutions U.S. Corp. & Google LLC, 372 NLRB No. 108 (2023).

316 Comments of Bipartisan Congressional Signatories; Bipartisan Senators; CDW; IFA; Independent Bakers Association; U.S. Chamber of Commerce.

Some commenters suggest that there is no need to promulgate a new joint-employer standard through rulemaking if the Board’s goal is to return to the preexisting common-law standard. See, e.g., comments of CDW; IFA. As described above, while we believe the final rule is firmly grounded in common-law agency principles, we see a

Continued
commenters point to reliance interests related to the 2020 rule, with some suggesting that the Board delay the effective date of the final rule to accommodate these concerns. Some argue that any material legal or factual change has occurred since the 2020 rule was promulgated that would justify the proposed changes to the joint-employer standard or otherwise suggest that the proposed rule failed to offer a reasoned explanation for a policy change. A significant number of these commenters propose that the Board withdraw the proposed rule entirely and leave the 2020 rule intact. Some of these determinate advantage in replacing the 2020 rule with a new standard that, like it, provides a definite and readily ascertainable standard. We note that by modifying the final rule to provide for an exhaustive list of essential terms and conditions of employment, we also introduce a new limiting principle that reflects the nature of the Board’s joint-employer doctrine, which is responsive to one of these commenter’s core concerns regarding the proposed rule. See comments of IFA. Announcing this new limiting principle therefore provides another justification for promulgating a new rule rather than simply rescinding the 2020 rule.

We have done so throughout our discussion of our justifications for rescinding the 2020 rule and promulgating a new standard. In addition, as one commenter points out, the APA does not impose any requirement that an agency apply a rule prior to replacing it, provided that the agency otherwise identifies problems with the rule and explains why it resolves the issue in the manner it does. Another commenter notes that the 2020 rule is likewise vulnerable on APA grounds, as its definition of “joint employer” is “not in accordance with law.”

Next, while some commenters encourage the Board to await judicial review of the 2020 rule before taking further action, the view that the 2020 rule introduced inconsistent restrictions that are inconsistent with common-law agency principles, as reflected in the District of Columbia Circuit’s statements in BFI v. NLRB, 911 F.3d at 1211–1215, and in Sanitary Truck Drivers, 45 F.4th at 46–47. For this reason, we prefer to proactively rescind the 2020 rule and to articulate a new standard that better comports with the requirements of the common law.

Further, while we recognize that some parties may have relied on the 2020 rule in structuring their business practices, we do not find such reliance interests sufficiently substantial to make us reconsider rescinding the 2020 rule and promulgating a new standard. We agree with the view of one commenter that at least as of the date of the NPRM, any such reliance on the 2020 rule cannot be deemed reasonable, as the Board indicated its preliminary view that rescinding or replacing that standard would be desirable as a policy matter. Moreover, because we think that the final rule accurately aligns employers’ statutory obligations with their control of essential terms and conditions of employment of their own common-law employees, we conclude that to the extent that business entities may have structured their contractual relationships under prior, overly restrictive versions of the joint-employer standard, any interest in maintaining such arrangements is not sufficiently substantial or proper as a matter of law.

One commenter charges that the Board is not free to promulgate a standard defining the terms “employer” and “employee,” arguing that both the 2020 rule and the proposed rule trench on the federal courts’ authority to interpret these terms. We respectfully disagree with this commenter’s view of the Board’s role in carrying out the provisions of the Act pursuant to Section 6 of the Act. We further note that, apart from this procedural disagreement, the final rule is consistent with the spirit of this commenter’s argument, as the final rule seeks to ground the Board’s analysis in the common-law agency principles that federal courts have instructed the Board to apply in construing the statutory definitions contained in section 2 of the Act. As explained above, the Board will draw on the Supreme Court’s binding, authoritative statements regarding the common law of agency and look to other judicial common-law precedent as primary sources of authority governing the Board’s interpretation. Of course, the Board’s joint-employer determinations in individual cases are

---

328 See comments of General Counsel Abruzzo.
definition of joint employer, noting that changing workplace conditions will require refinement of the standard as it is applied in new factual situations.335 We have carefully considered the many comments we received seeking modifications to the proposed rule geared toward ensuring greater clarity and predictability in the Board’s joint-employer determinations. As mentioned elsewhere, while we acknowledge some commenters’ position that the 2020 rule fostered greater predictability and certainty in the Board’s joint-employer determinations, we have determined that rule is not in accordance with the common-law agency principles we are bound to apply in analyzing whether entities are joint employers under the Act. As a result, we cannot maintain that standard. However, we believe that the modifications to the text of the proposed rule, along with the comprehensive responses we offer in response to the helpful input we received during the public-comment process, will facilitate parties covered by the Act in understanding and meeting their compliance obligations and reduce uncertainty and litigation. Some commenters argue that the Board’s proposed standard will create inconsistencies with other regulators’ joint-employer standards.336 As discussed in Section I.D. above, our dissenting colleague contends that federal courts have applied different standards when determining joint-employer status under other statutes that define “employer” in common-law terms. Other commenters observe that joint-employer standards similar to the one set forth in the proposed rule are commonplace in the context of other labor and employment statutes.337 One commenter describes the Equal Employment Opportunity Commission (EEOC)’s approach to analyzing whether multiple firms jointly employ particular employees as taking forms of indirect and reserved control into account in much the same manner as does the proposed rule.338 A number of commenters discuss the Department of Labor’s approach to defining “joint employer” for purposes of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203 et seq.339 though several commenters observe that the definition of “employer” under FLSA is broader than the common-law standard used in the NLRA.340 Although we agree with the view of several commenters that certain other Federal agencies’ joint-employer standards are broadly consistent with the Board’s proposed rule, we are guided here by the statutory requirement that the Board’s standard be consistent with common-law agency principles and the policies of the National Labor Relations Act.341 Contrary to our dissenting colleague’s suggestion, our standard is rooted in common-law agency principles, not the economic-realities test used to interpret “employer” for purposes of the Fair Labor Standards Act. Cf. NLRA v. United Insurance Co. of America, 390 U.S. 254, 256 (1968) (discussing limiting impact of Taft-Hartley amendments on the interpretation of the Act).

Other commenters raise concerns regarding the possibility that the proposed joint-employer standard will stand in tension with state-law definitions of “joint employer.” One commenter argues that state authorities with responsibility for administering state-law equivalents of the Act make joint-employer determinations on different grounds than those set forth in the proposed rule.342

State labor and employment law interpretations of “joint employer” also

329 FR 54645.
330 Comments of CDW; California Policy Center; Colorado Bankers Association; Competitive Enterprise Institute; HR Policy Association; IFA; International Bancshares Corporation; National Small Business Administration; PPAI; Reid’s, Inc. db/a Crazy Rents; Restaurant Law Center and National Restaurant Association; Tesla, Inc.; Yum! Brands.
331 See, e.g., comments of Americans for Prosperity Foundation; HR Policy Association; Independent Women’s Forum; International Bancshares Corporation; LeadingAge; Libertas Institute; McDonald’s USA, LLC; NAM; National Crocensored Associations; National Roofing Contractors Association; Restaurant Law Center and National Restaurant Association; The Thomas Jefferson Institute for Public Policy; U.S. Chamber of Commerce. Some of these commenters make the further point that the vagueness of the proposed rule undermines the proposal’s effectiveness and will fail to provide stakeholders with the guidance they need to meet their compliance obligations.333 Other commenters take the contrary view, arguing that the flexibility and adaptability of the proposed rule is one of its greatest strengths.334 Some of these commenters argue that the Board should avoid adopting too rigid a
vary. Some commenters find parallels to the proposed rule in certain state definitions of “joint employer.”343 One commenter in particular observes that Illinois Department of Labor regulations incorporate similar common-law principles to those set out in the proposed rule.344 By contrast, one commenter notes that New York State uses a standard for determining joint-employer status for purposes of public-sector labor relations that more closely corresponds to the 2020 rule.345 We are not persuaded that these commenters’ concerns about the possibility of tension with state-law definitions of “joint employer” provide a sufficient reason to abandon our rulemaking effort. Certain of these commenters appear to suggest the possibility for a state-by-state patchwork of interpretations of the joint-employer standard if state courts apply or interpret the Board’s joint-employer standard. We respectfully note that, under principles of federal labor law preemption, the Board has exclusive jurisdiction to administer the Act. See San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959) (“When an activity is arguably subject to [section 7] or [section 8] of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.”). A group of 18 State Attorneys General argues that it relies on the Board’s enforcement of private-sector labor law to protect employees in their States.346

L. Empirical Arguments

As stated above, one of the goals of the proposed rule is to reduce uncertainty and litigation over questions related to joint-employer status. Some commenters challenge the premise of the proposed rule, predicting that the proposed rule will fuel time-consuming and costly litigation.347 One of these commenters points to data that it represents shows that after the Board’s BFI decision in 2015, petitions and unfair labor practice charges raising joint employer issues increased dramatically at the Board.348 Some respond to this contention by noting that findings of joint-employer status remained constant during this period.349 While we have carefully considered parties’ arguments that the 2020 rule fostered predictability and reduced litigation, we nevertheless conclude that we are foreclosed from maintaining the joint-employer standard set forth in that rule because it is not in accordance with the common-law agency principles the Board is bound to apply in making joint-employer determinations. That said, we note one commenter’s view that findings of joint-employer status did not markedly increase following the Board’s decision in BFI. In addition, we hope to have minimized the risk of uncertainty or increased litigation of joint-employer questions by comprehensively addressing the comments we received in response to the proposed rule and by modifying the proposed rule in several respects to enhance its clarity and predictability.

Some commenters argue that the 2020 rule encouraged business cooperation and led to partnerships that benefit small businesses.350 These commenters take the view that the proposed rule would diminish these beneficial practices or make it harder for companies to communicate or cooperate without risking a finding that they are joint employers.351 Our dissenting colleague also argues that changing the joint-employer standard will make it more difficult for businesses to cooperate and share resources. In particular, some commenters predict that the Board’s proposed joint-employer standard will disincentivize conduct that tends to improve the workplace, like training, safety and health initiatives, and corporate social responsibility programs.352 Others suggest that the proposed rule will lead to uncertainty about obligations, creating a business climate of risk and increasing costs, especially in the third-party logistics industry.353 Some commenters predict that the proposed rule could discourage large companies from entering into contracts with third parties to perform work.354 Others specifically note that the proposed rule could make it more difficult for companies to seek temporary employees to address labor shortages or deal with fluctuating seasonal demand for labor.355

We have seriously considered commenters’ concerns, especially those of individuals and small business owners, regarding how the joint-employer standard we adopt today might influence their business relationships. Insofar as the Act itself requires the Board to conform to common-law agency principles in adopting a joint-employer standard, these concerns seem misdirected. Nevertheless, we hope that the modifications to the proposed rule and clarifications we offer today will alleviate some of these concerns. We also note that the Board’s definition of joint employer, which implements common-law agency principles, does not preclude or intend to preclude any particular kinds of business arrangements or relationships.

A number of commenters, including many individuals, argue that the proposed rule would negatively affect the franchise industry.356 In particular, some individuals express the view that a broader joint-employer standard may inhibit franchisors’ abilities to help them develop the skills necessary to manage successful businesses.357 Others suggest that one benefit of the franchise model is the independence it affords franchisees. They argue that the proposed rule might encourage franchisors to take a more active role in the day-to-day operation of franchise businesses, undermining franchisees’

343 Comments of State Attorneys General.
344 Comments of Empire Center for Public Policy.
345 Comments of State Attorneys General. We note that the signatories of this comment included the Attorneys General of California, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, and Washington.
346 Comments of IFA; McDonald’s USA, LLC; North American Meat Institute. Our dissenting colleague also anticipates that the final rule will lead to more extensive litigation of joint-employer questions.
347 Comments of IFA.
348 See, e.g., comments of AFL-CIO.
349 Comments of CDW; COLLE; International Warehouse Logistics Association; NAHB; National Association of Convenience Stores; NFIB; National Retail Federation.
350 Comments of CDW; COLLE; NAHB; NAM; National Retail Federation; National Small Business Association; Washington Legal Foundation.
352 Comments of International Warehouse Logistics Association.
354 Comments of AHA; National Taxpayers Union. Certain commenters stress that labor shortages have been acute in hospital and healthcare industries since the onset of the Covid-19 pandemic, making reliance on contract labor especially important. See, e.g., comments of AHA.
355 See, e.g., comments of Americans for Tax Reform; Mauro Alvarez; Kermit Begley; Rachel Greszler; Nichole Holles; Illinois Policy Institute; Jean Johns; Job Creators Network Foundation; Neil Kellen; McDonald’s USA, LLC; Daniel Miller; Russell Moss; NATSO & SIGMA; The James Madison Institute; The Mackinac Center; Public Policy; Emily Wiechmann; Yankee Institute for Public Policy. One commenter argues that the franchise business model has expanded access to home care services in the United States and expresses concerns about whether the proposed rule could harm access to home care services. See comments of Home Care Association of America.
356 See, e.g., comments of Costa Enterprizes; Linda Bowin; David Denney; Ali Nekumanesh; Shelley Nilsen.
autonomy and creativity.\textsuperscript{358} A number of groups writing on behalf of Black franchisees, franchisees of color, veteran franchisees, and women and LGBTQ franchisees argue that the franchise model has been especially successful in improving their members’ lives and economic prospects.\textsuperscript{359} They, and other commenters, express concerns about the effect of the proposed rule on franchisees and small business owners of color.\textsuperscript{360} Groups representing franchisors, a bipartisan group of United States Senators and Members of Congress, and the United States Small Business Administration Office of Advocacy echo these concerns.\textsuperscript{361} A number of commenters cite an economic analysis commissioned by the International Franchise Association that sought to demonstrate the cost of the Board’s 2015 \textit{BFI} standard on the franchise business model.\textsuperscript{362} Others, including some individuals and franchisees, make similar arguments, stating that the proposed rule could increase costs for franchise business owners if franchisors engage in “distancing behaviors” and are no longer willing to provide franchisees with training and recruitment materials, employee handbooks, or educational materials on new regulations.\textsuperscript{363} By contrast, other commenters dispute the contention that the proposed rule will negatively affect the franchise business model.\textsuperscript{364} Several commenters specifically address the IFA study regarding the costs associated with the 2015 \textit{BFI} standard.\textsuperscript{365} One of these commenters disputes the methodology used in preparing the analysis, noting that there were “serious concerns about the survey design and statistical analysis.”\textsuperscript{366} Another argues that, in 2015 and 2016, following \textit{BFI} and the Department of Labor’s promulgation of a broader joint-employer standard, franchise employment grew by 3 percent and 3.5 percent, outpacing growth in other private, nonfarm employment, undermining the argument that the proposed rule would slow job growth in franchise businesses.\textsuperscript{367}

We have seriously considered the arguments by commenters advancing different views regarding the accuracy and explanatory force of the IFA study. We do not believe that the study provides an appropriate or sufficient basis to abandon our effort to rescind the 2020 rule and promulgate a new joint-employer standard. There is no suggestion in the Act’s text or legislative history that the Board has the authority to depart from common-law agency principles in adopting and applying a joint-employer standard because of its predicted effect on a particular industry or industries, irrespective of statutory policy or Congressional intent.

Other commenters make qualitative empirical arguments regarding the proposed rule’s potential positive effect on franchise businesses. These commenters argue that the proposed rule might improve operations at franchise businesses and make franchise businesses better and safer workplaces.\textsuperscript{368} Several commenters are employees who work for franchise businesses, and they argue that franchisors exercise significant control over the day-to-day details of their working lives.\textsuperscript{369} These comments arguably illuminate how forms of reserved and indirect control can implicate essential terms and conditions of employment, but the final rule is not based on the Board’s assessment of the new standard’s effect—negative or positive—on franchise businesses, as that consideration has no clear basis in the Act.

A group of commenters argue that the proposed rule will increase compliance and administrative costs for general contractors, subcontractors, and other construction industry employers.\textsuperscript{370} Some of these commenters raise concerns that these increased costs will diminish opportunities for growth for vendors or smaller contractors.\textsuperscript{371} Several commenters also raise concerns about the possibility that the Board will find that individuals who provide services to other entities as independent contractors are joint employers with those entities.\textsuperscript{372} They also argue that the proposed rule risks destabilizing longstanding multiemployer bargaining practices in the construction industry and could potentially create new withdrawal liability in the context of multiemployer defined-benefit pension plans.\textsuperscript{373} Certain of these commenters take the view that the 2020 rule did not adversely affect labor peace and implicitly suggest that the proposed rule might lead to an increase in labor

\textsuperscript{358} Comments of Escalante Organization; National Taxpayer Unite\textsuperscript{y} Institute; Yann Yu. We note in particular that some individuals express concerns that instead of being treated as independent business owners, the joint-employer rule will cause larger firms to treat them as employees or micromanage their work. See, e.g., comments of Amber Niblock; Kerry Stone; Tom Webster.

\textsuperscript{359} Comments of Association of Women’s Business Centers; IFA; National Black McDonald’s Operators Association; U.S. Black Chambers, Inc.

\textsuperscript{360} Comments of COLLE; IFA; U.S. Black Chambers, Inc.

\textsuperscript{361} Comments of Bicameral Congressional Signatories; Bipartisan Senators; IFA; McDonald’s USA, LLC; National ACE; National Retail Federation; SBA Office of Advocacy; Yum! Brands. As some of these commenters note, recent Census data shows that 30.8 percent of franchise businesses are minority owned, compared to 18.8 percent of nonfranchise businesses. See, e.g., comments of R. Higham or industries, irrespective of statutory policy or Congressional intent.

\textsuperscript{362} Comments of Bicameral Congressional Signatories; Bipartisan Senators; IFA; McDonald’s USA, LLC; National ACE; National Retail Federation; SBA Office of Advocacy; Yum! Brands. As some of these commenters note, recent Census data shows that 30.8 percent of franchise businesses are minority owned, compared to 18.8 percent of nonfranchise businesses. See, e.g., comments of R. Higham or industries, irrespective of statutory policy or Congressional intent.

\textsuperscript{363} Comments of Asian McDonald’s Operators Association; Escalante Organization; FreedomWorks Foundations; Goldwater Institute; IFA; Job Creators Network Foundation; McDonald’s USA, LLC; NFIB; National Black McDonald’s Operators Association; National Association of Convenience Stores; National Retail Federation; Restaurant Law Center and National Restaurant Association; SBA Office of Advocacy; The Mackinac Center for Public Policy. See also, e.g., comments of Neil Kellen; Carole Montgomery; Deborah Robart; James Weaver; Yann Yu. Yang.

\textsuperscript{364} Comments of Center for Law and Social Policy; General Counsel’s Office

\textsuperscript{365} Comments of EPI; reply comments of AFL–CIO. These commenters cross-reference a set of reply comments submitted by EPI in response to the Board’s 2018 joint-employer notice of proposed rulemaking, available at https://www.regulations.gov/comment/NLRB-2018-0001-29072.

\textsuperscript{366} Comments of EPI.

\textsuperscript{367} Comments of CAP.
owners of color, express concern that the joint-employer standard will limit opportunities for new business or job creation or otherwise diminish their economic opportunities or harm consumers.376

By contrast, certain commenters suggest that a broad joint-employer standard will ensure that the proper parties are present for bargaining and may help smaller entities bear only their share of the liability for conduct that violates the Act.377 Others note that some commenters’ criticisms of the proposed rule would apply to any joint-employer standard, since they principally relate to the dynamics of bargaining that involves more than one firm.378 In this regard, they contend, the criticisms are not unique to the proposed rule and should not weigh against the Board’s rescission of the 2020 rule or promulgation of a new joint-employer standard.

Other commenters argue that ensuring the appropriate entities are recognized as joint employers is essential to deterring practices in certain industries, including staffing, temporary warehouse work, and food processing, that they represent have led to the underpayment of wages, worker misclassification, and unsafe working conditions.379 Several of these commenters observe that these harmful practices disproportionally affect Black employees, Latinx employees, immigrant employees and migrant guestworkers, women and LGBTQ employees, and employees of color.380 A number of organizations also commented on the use of “labor broker” arrangements in the construction industry and how the proposed joint-employer standard might ensure that all entities who possess the authority to control or exercise control over construction industry employees’ essential terms and conditions of employment fully comply with their obligations under the Act and other labor and employment statutes.381

Specifically, some commenters discuss the “f Maceduring the workplace and note that modern business practices often result in multiple firms sharing control over aspects of employees’ terms and conditions of employment, making it important to define the joint-employer standard in a manner that brings all necessary parties to the bargaining table.382 Certain of these commenters note that an unduly cramped joint-employer standard might hinder the efficacy of the Board’s remedial orders by targeting an entity that cannot, by itself, make employees whole.383

Several individual employees and commenters with experience representing employees in industries characterized by extensive subcontracting represent that a joint-employer standard that brings the proper parties to the bargaining table could help make jobs in those industries safer, especially for Black and immigrant workers and women workers.384

374 Comments of Empire Center for Public Policy.
375 Comments of AHA; ABC; CDW; COLLE; Federation of American Hospitals; HR Policy Association; IFDA; International Banquets Corporation; National Waste & Recycling Association; New Jersey Food Council; Rachel Greszler; Restaurant Law Center and National Restaurant Association; U.S. Chamber of Commerce; Wyoming Bankers Association. Some of these commenters like the proposed rule to government-mandated multiemployer bargaining. Comments of ABC; COLLE; Tesla, Inc. As set forth above, we reject this characterization. Under the final rule, businesses remain free to structure their business operations however they wish. The rule creates no mandate to engage in bargaining on a multifirm basis whatsoever.

376 See, e.g., comments of Americans for Tax Reform; IFA; Independent Women’s Forum; National Grocers Association; North American Meat Institute; Rachel Greszler; Stephen Clark; Yankee Institute for Public Policy.

A few of the commenters express concerns that the proposed rule will adversely affect particular state economies. See, e.g., comments of California Policy Center (California); Goldwater Institute (Arizona); Libertas Institute (Utah); Rio Grande Foundation (New Mexico); The Buckeye Institute (Ohio); Thomas Jefferson Institute for Public Policy (Virginia).

Several commenters, especially individuals and small business owners, argue that the proposed rule is poorly timed in light of larger macroeconomic trends, including inflation, and the lingering effects of the Covid-19 pandemic on supply chains. See, e.g., comments of Daniel Amare; Marlo Anderson; Hugh Blanchard; Jon Clegg; Harold Heller; Justin Hood; Catherine Parker; Larry Verlinden.

377 Comments of American Federation of Musicians Local 47; Congressmen Scott et al.; General Counsel Abruzzo; National Women’s Law Center.

378 Comments of AFL-CIO; General Counsel Abruzzo.

379 Comments of ACLU; Lawyers’ Committee for Civil Rights Under Law; NELP; National Black Worker Center; National Partnership for Women and Families; NELP; SPLC; TechEquity Collaborative.

380 Comments of District Council of New York City & Vicinity of the UBC; McGann, Ketterman & Rioux; Signatory Wall and Ceiling Contractors Alliance; Southern States Millwright Regional Council, UBC and Central South Carpenters Regional Council, UBC; UBC.

381 Comments of American Federation of Musicians Local 47; AFSCME; Asian Pacific American Labor Alliance, AFL-CIO; EPI; Los Angeles County Federation of Labor AFL-CIO & Locals 396 and 848 of the IATF; National Women’s Law Center; SEIU; The Strategic Organizing Center; The Washington Center for Equitable Growth; UE; UNITE HERE.

382 Comments of American Federation of Musicians Local 47; General Counsel Abruzzo; Hawaii Regional Council of Carpenters; Jobs with Justice and Governing for Impact; Los Angeles County Federation of Labor AFL-CIO & Locals 396 and 848 of the IATF; National Women’s Law Center; SEIU; The Strategic Organizing Center; The Washington Center for Equitable Growth; UE; UNITE HERE.

383 Comments of American Federation of Musicians Local 47; General Counsel Abruzzo; William E. Morris Institute for Justice; Women Employed.
Other commenters argue that the proposed rule would lead to positive economic outcomes for employees. For example, one commenter notes that by ensuring that the proper parties are brought to the bargaining table, unions will be able to bargain effectively, creating a positive “spillover” effect that will raise the floor for wages, benefits, and working conditions.387 This commenter estimates that the proposed rule “will result in a boost of pay to workers of $1.06 billion annually or $20.4 million per week.” 386 Several other commenters likewise argue that the benefits of the proposed rule will have a broad effect on the economy given the high concentration of employees in industries marked by extensive contracting practices.387

A number of commenters raise concerns about the specter of litigation and eventual liability if their businesses are deemed joint employers with other entities.388 Others respond that an overbroad joint-employer standard risks exposing other entities, like lead firms or franchisors, solely because those entities are viewed as having the ability to satisfy a judgment.389 Some of these commenters suggest that principles of joint liability might suffice to ensure that the Board’s make-whole remedies are effective, rendering a joint-employer finding unnecessary in such circumstances.390

multifirm bargaining as support for the Board’s preliminary view that the proposed joint-employer rule would facilitate effective bargaining. See comments of UJOE.

385 Comments of EPI.
386 Id. Several other commenters cite approvingly to EPI’s economic analysis. See, e.g., comments of National Women’s Law Center. Based on an assessment that the Bureau of Labor StatisticsContingent Worker Supplement (CWS) to the Current Population Survey likely underestimates

Contrary to these commenters, while the final rule establishes a joint-employer standard that will apply in unfair-labor-practice cases, it does not purport to assign liability or otherwise depart from well-established principles regarding how to apportion responsibility for unlawful conduct among multiple parties. Likewise, we disagree with commenters who argue that principles of joint liability might foreclose the need for a revised joint-employer standard, as the joint-employer standard serves important functions beyond those related to assigning liability. Similarly, principles of joint liability sometimes come into play in circumstances where there is no dispute that entities are joint employers. One commenter, citing Capitol EM’I Music, Inc., 311 NLRB 997, 1000 (1993), notes that the Board imposes certain unfair labor practice liability for the actions of one joint employer on another entity only if that other entity knew of the action and did nothing to protest it.391 We agree that this longstanding Board precedent discussing how to assign liability to joint employers will continue to guide the Board in making these determinations. Additionally, business entities remain free under this joint-employer standard, as before, to structure their contractual relationships according to their chosen allocation of both authority to control and unfair labor practice liability, including by the use of indemnification clauses.

V. The Final Rule

The joint-employer doctrine plays an important role in the administration of the Act. The doctrine determines when an entity that exercises control over particular employees’ essential terms and conditions of employment has a duty to bargain with those employees’ representative. It also determines such an entity’s potential liability for unfair labor practices. The joint-employer analysis set forth in this final rule is based on common-law agency principles as applied in the particular context of the Act. In our considered view, the joint-employer standard that we adopt today removes artificial control-based restrictions with no foundation in the common law that the Board has previously imposed in cases beginning in the mid-1980s discussed above, and in the 2020 rule. By incorporating common-law agency principles, as the Act requires, the final rule appropriately aligns employers’ responsibilities with respect to their employees with their authority to control those employees’ essential terms and conditions of employment and so promotes the policy of the United States, as articulated in Section 1 of the Act, to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

A. Definition of an Employer of Particular Employees

Section 103.40(a) of the final rule provides that an employer, as defined by Section 2(2) of 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. This provision expressly recognizes the Supreme Court’s conclusion that Congress’s use of the terms “employer” and “employee” in the NLRA was intended to describe the conventional employee-employer relationship under the common law.392 Because “Congress has tasked the courts, and not the Board, with defining the common-law scope of ‘employer,’” the Board—in evaluating whether a common-law employment relationship exists—looks for guidance from the judiciary, including primary articulations of relevant principles by judges applying the common law, as well as secondary commentaries, 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.” 393 By explicitly grounding the Board’s joint-employer analysis in common-law agency principles, this provision recognizes that the existence of a common-law employment relationship is a necessary prerequisite to a finding


388 See comments of AFL-CIO.
that an entity is a joint employer of particular employees.

B. Definition of Joint Employers

Section 103.40(b) provides that, 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. The provision thus first recognizes, as did the 2020 rule, that joint-employer issues may arise (and the same test will apply) in various contexts under the Act, including both representation and unfair labor practice case contexts.394 The provision goes on to codify 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.395 By providing that a common-law employer of particular employees must also share or codetermine those matters governing the employees’ essential terms and conditions of employment in order to be considered a joint employer, the provision recognizes and incorporates the principle from BFI that “the existence of a common-law employment relationship is necessary, but not sufficient, to find joint-employer status.” 396

C. Definition of “share or codetermine”

Section 103.40(c) of the final rule provides that 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. This provision incorporates the view of the Board and the District of Columbia Circuit in BFI that evidence of the authority 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. After careful consideration of comments, as reflected above, the Board has concluded that this definition of “share or codetermine” is consistent with common-law agency principles and best serves the policy of the United States, embodied in the Act, to encourage the practice and procedure of collective bargaining by ensuring that employees have the ability to negotiate the terms and conditions of their employment, through representatives of their own choosing, with all of their employers that possess the authority to control or exercise the power to control those terms and conditions.

D. Definition of “essential terms and conditions of employment”

Section 103.40(d) defines “essential terms and conditions of employment” as (1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees. The Board has decided, after careful consideration of comments as reflected above, to modify the proposed rule’s definition of “essential terms and conditions of employment” by setting forth an exclusive, closed list of terms and conditions of employment that may serve as the objects of control necessary to establish joint-employer status.

Terms and conditions of employment falling in these seven categories are not simply common across employment relationships, they represent the core subjects of collective bargaining contemplated by the Act, as illuminated by the Board’s administrative experience. Thus, Section 8(d) of the Act expressly provides that the collective-bargaining obligation encompasses a duty to confer with respect to wages and hours, subjects falling within categories (1) and (2). Categories (3), (4), and (5) similarly include terms thus effectively controlling the assignment, supervision, and detailed control of employees’ performance of work duties—and the grounds for discipline of employees who fail to perform as required—all common across employment relationships and subjects of central concern to employees seeking to improve their terms and conditions of employment through collective bargaining. Terms and conditions in Category (6), addressing the conditions for the formation and dissolution of the employment relationship itself, are clearly essential conditions of employment. Finally, as many commenters have observed, terms setting working conditions related to the safety and health of employees—encompassed in category (7)—are basic to the employment relationship and lie at or near the core of issues about which employees would reasonably seek to bargain. By providing that a common-law employer of particular employees will be considered a joint employer of those employees only if it possesses the authority to control or exercises the power to control one or more terms and conditions of employment falling into one of these seven categories, this provision ensures that such an employer will be in a position to engage in meaningful bargaining over an issue of core concern to the employees involved. This provision thus incorporates the second step of the Board’s joint-employer test set forth in BFI, above, as described by the District of Columbia Circuit in BFI v. NLRB, and addresses that court’s concern that the Board had failed, in BFI, adequately to delineate what terms and conditions are “essential” to make collective bargaining “meaningful.”

E. Control Sufficient To Establish Joint-Employer Status

Section 103.40(e) provides, consistent with § 103.40(a) and (c), that whether an employer possesses the authority to control or exercises the power to control one or more of the employees’ essential terms and conditions of employment is determined under common law-agency principles. Thus, this provision explains that, subject to the terms of the preceding provisions, (1) possessing the authority to control one or more essential terms and conditions of employment is sufficient to establish status as a joint employer regardless of whether the control is exercised; and (2) exercising the power to control indirectly (including through an intermediary) one or more essential terms and conditions of employment is sufficient to establish status as a joint employer.

394 Compare BFI, above, 362 NLRB 1599 (considering whether two entities were joint employers for purposes of petition for representation election), and Browning-Ferris Industries of Pennsylvania, Inc., 259 NLRB 148 (1981) (considering whether two entities were joint employers for purposes of liability for employee discharges in violation of section 8(a)(3) of the Act), enfld. 691 F.2d 1117 (1982).


396 BFI, above, 362 NLRB at 1610.

397 See BFI v. NLRB, above, 911 F.3d at 1221–1222.
employer, regardless of whether the control is exercised directly.

As discussed above, the Board has modified this provision from the version set forth in the NPRM by clarifying that, in every case, the object of a common-law employer’s control that is relevant to the question of whether it is also a joint employer under the Act must be an essential term and condition of employment as defined in § 103.40(d). In combination with the Board’s limitation of “essential” terms and conditions of employment to matters that lie near the core of the collective-bargaining process, this change is intended to address the concerns of commenters (discussed above) that the standard should not require the Board to find a joint-employer relationship based on an entity’s attenuated, insubstantial, or unexercised control over matters that—while they may be mandatory subjects of bargaining—are actually peripheral to the employment relationship or to employees’ terms and conditions of employment. The version of § 103.40(e) that appears in the final rule is reformatted to include two subsections and has been streamlined to avoid surplusage.

F. Control Immaterial to Joint-Employer Status

Section 103.40(f) provides that evidence of an entity’s control over matters that are immaterial to the existence of an employment relationship under common-law agency principles and 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.398 As discussed above, many commenters have expressed a concern that the proposed rule could result in the Board finding joint-employer relationships based on kinds of control that are not indicative of a common-law employment relationship or that do not form a proper foundation for collective bargaining or unfair-labor practice liability. Similarly, the District of Columbia Circuit in 

BFI, v. NLRB criticized the Board’s BFI decision for failing, in its articulation and application of the indirect-control element of the standard, to distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships and indirect control over essential terms and conditions of employment.399 This provision addresses these concerns by expressly recognizing that some kinds of control, including some of those commonly embodied in a contract for the provision of goods or services by a true independent contractor, are not relevant to the determination of whether the entity possessing such control is a common-law employer of the workers producing or delivering the goods or services, and that an entity’s control over matters that do not bear on workers’ essential terms and conditions of employment are not relevant to the determination of whether that entity is a joint employer.

G. Burden of Proof

Section 103.40(g) provides that 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 above. This allocation of the burden of proof is consistent with the 2020 Rule, BFI, and pre-BFI precedent. See 85 FR 11227; BFI, 362 NLRB at 1616.

H. Bargaining Obligations of a Joint Employer

Section 103.40(h) provides that a joint employer of particular employees must bargain collectively with the representative of those employees with respect to any term and condition of employment that it possesses the authority to control or exercises the power to control, regardless of whether that term and condition is deemed to be an essential term and condition of employment under the definition above, but is not required to bargain with respect to any term and condition of employment that it does not possess the authority to control or exercise the power to control.

As discussed above, some commenters have requested that the Board provide a concise statement of joint employers’ bargaining obligations in order to clarify both that a joint employer—like any other employer—must bargain over any mandatory subject of bargaining that is subject to its control, and that a joint employer—again, like any other employer—is not required to bargain about workplace conditions that are not subject to its control. Particularly in light of the Board’s determination, discussed above, to adopt a closed list of “essential terms and conditions of employment,” as objects of control relevant to the joint-employer determination, the Board has concluded, after careful consideration of the comments, that it is desirable to expressly provide that a joint employer’s bargaining obligations are not limited to those “essential terms and conditions” of employment that it controls, but extend to any ordinary mandatory subject of bargaining that is also subject to its control. Clarifying a joint employer’s bargaining obligation in this way further ensures that collective bargaining involving the joint employer will be meaningful, because such bargaining will be able to address not only the core workplace issues the control of which establishes the employer’s status as a joint employer but also any other matters subject to the joint employer’s control that sufficiently affect the terms and conditions of employees’ employment to permit or require collective bargaining under section 8(d) of the Act.400

I. Severability

Section 103.40(i) provides that the provisions and subprovisions of the final rule are intended to be severable, and that if any part of the rule is held to be unlawful, the remainder of the rule is intended to remain in effect to the fullest extent permitted by law. The Board believes, on careful consideration, that the final rule in its entirety flows from and is consistent with common-law principles as we have received them from judicial authority; reflects a permissible exercise of the Board’s congressionally delegated authority to interpret the Act; and best effectuates the Board’s statutory responsibility to prevent unfair labor practices and to encourage the practice

398 See, e.g., Frey Technology Corp., 241 NLRB 676 (1979) (affirming Board’s conclusion that manufacturer was required to bargain over in-plant service contract,’s controversy over prices directly set by a third-party contractor).

399 See, e.g., Management Training Corp., 85-1 NLRB 1355, 1359 (1958) (reaffirming that an entity that controls sufficient matters relating to the employment relationship to make it a statutory employer may be required to bargain over terms and conditions of employment within its control, but certification of representative does not obligate an employer to bargain concerning mandatory subjects of bargaining controlled exclusively by a distinct entity that is exempt from the Board’s jurisdiction).

400 See, e.g., Ford Motor Co., 441 U.S. 488, 501–503 (1979) (holding that an entity that controls sufficient matters relating to the employment relationship to make it a statutory employer may be required to bargain over terms and conditions of employment within its control, but certification of representative does not obligate an employer to bargain concerning mandatory subjects of bargaining controlled exclusively by a distinct entity that is exempt from the Board’s jurisdiction).
and procedure of collective bargaining. However, the Board necessarily acknowledges the possibility that a reviewing body might disagree with our conclusion in some respect, and, in that event, the Board desires to preserve so much of the rule as such a body approves. Separately, as noted above, the Board intends the action of rescinding the 2020 Rule in itself to be severable from any of the terms of the final rule, so that if a reviewing body were to disapprove the final rule in its entirety, the Board’s action in rescinding the 2020 Rule should still be given effect.

VI. Response to Dissent

Our dissenting colleague advances several reasons for declining to join the majority in rescinding and replacing the 2020 Rule. We have addressed some of these arguments above. Here, we offer additional responses to several of our colleague’s contentions.

First, our dissenting colleague contends that common-law agency principles do not compel the Board to rescind the 2020 Rule, and, further, actually preclude the Final Rule’s elimination of the 2020 Rule’s actual-exercise requirement. He also criticizes us for seeking relevant common-law principles in authority relating to the distinction between employees and independent contractors, and for failing to pay sufficient attention to judicial articulations of relevant common-law principles in decisions involving joint-employer questions under other federal statutes, including Title VII of the Civil Rights Act of 1964.

To the contrary, as set forth more fully above, both the District of Columbia Circuit’s discussion of independent-contractor authority in BFI v. NLRB, and the approach taken by many other courts examining joint-employer questions in other contexts, fully support the Board’s reference to independent-contractor authority to shed light on the common-law employer-employee relationship and the joint-employer relationship under the Act. To the extent that the other federal cases relied upon by our colleague articulate joint-employer standards drawn from common-law principles, those cases at best support the proposition that an entity’s actual exercise of control over appropriate terms and conditions of employment of another employer’s employees is sufficient to establish that it is a joint-employer—a proposition with which we agree—but not in the colleague’s further claim that such exercise of control is necessary to find a joint-employer relationship. Rather, numerous federal courts of appeals and state high courts have concluded, in non-NLRB contexts, that entities were common-law employers of other employers’ employees based solely on the entities’ unexercised power or authority to control. These decisions fully support our conclusion that the common law does not require an entity’s actual exercise of a reserved authority to control in order to establish a joint-employer relationship. Judicial decisions and secondary authorities addressing the common-law employer-employee relationship and the joint-employer relationship further confirm that indirect control, including control exercised through an intermediary, can establish the existence of an employment relationship, including a joint-employer relationship.

We note, moreover, that the District of Columbia Circuit not only upheld the Board’s recognition of this point in BFI v. NLRB, but also reprinted the Board that issued the 2020 rule for neglecting it. In International Brotherhood of Teamsters v. NLRB, 45 F.4th 38 (D.C. Cir. 2022), in rejecting the Board’s decision not to apply the BFI standard retroactively, the court reaffirmed its previous holding, noting that it had “held that ‘[t]he Board [in Browning-Ferris I] . . . correctly determined that the common-law inquiry is not woonedly confined to indicia of direct and immediate control,’” and that “‘[In Browning-Ferris II—a decision issued just five months after the Board announced the 2020 Rule—the Board inexplicably overlooked the longstanding role of indirect control in the Board’s joint-employer inquiry . . . .’ Our court’s 2018 decision made clear that ‘the right-to-control element of the Board’s joint-employer standard [discussed in Browning-Ferris I] has deep roots in the common law [citation omitted],’ and that the common law rule is that ‘unexercised control bears on employer status . . . .’ Further, we held that ‘there is no sound reason that the . . . joint-employer inquiry would give [indirect control] a cold shoulder.’” [911 F.3d at 1218] ([The argument that the

403 See Sec. I.D., above, and cases discussed there. See also BFI v. NLRB, 911 F.3d at 1195 ("[E]mployee-or-independent-contractor cases can be instructive to 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.").

404 See, e.g., EEOC v. Global Horizons, 915 F.3d 631, 640–641 (9th Cir. 2019) (two entities were joint employers with a direct employer based on entities’ "power to control the manner in which [benefits] and wages were provided to the workers, even if never exercised." [citations omitted]); Mallory v. Brigham Young University, 332 F.3d 922, 928–929 (Utah 2014) (city employer of university’s employee because "[i]f the principal had exercised control of the employee’s method and manner of performance, the agent is a servant whether or not the right is specifically exercised." [citation omitted]); Roase v. Pitt County Memorial Hosp., Inc., 470 SE 2d 44, 52–53 (N.C. 1996) (attending physicians could be found employing resident physicians employed by hospital absent evidence of actual control because "[w]here the parties have made an explicit agreement regarding the right of control, this agreement will be dispositive." [citation omitted]; Dunn v. Covington & Black Lick RR, 267 P.2d 571 (Wash. 1954) (railroad was employer of manufacturer’s employee based on railroad’s right to command employee’s performance without reference to any instance of exercise of that right because “the person is the servant of him who has the right to control the manner of performance of the work, regardless of whether or not he actually exercises that right.” [citation omitted]; S.A. Gerard Co. v. Inland Transp. Co., 110 P.2d 377, 378 (Cal. 1941) (landowner was joint employer of farmer’s employee based on contract provision that picking should be done according to landowner’s directions to relieve landowner’s dependence on who was doing the work, even though the direction was given because “the right to control, rather than the amount of control which was exercised, is the determinative factor.” [citation omitted].

405 See id. at 1217 ("[T]he common law has never counseled the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship.") (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]"); Butler v. Drive Automotive Industries of America, 793 F.3d 404, 415 (4th Cir. 2015) (the joint-employer standard "specifically aims to pierce the legal formalities of an employment relationship to determine the loci of effective control over an employee . . . . Otherwise, an employer who is working for putative joint employer could avoid Title VII liability by hiding behind another entity."); Al-Saffy v. Vlack, 827 F.3d 85 (D.C. Cir. 2016) (relying in part on evidence that " bystanders and officials working for putative joint employer had recommended employee’s dismissal as evidence supporting reversal of summary judgment on the joint-employer issue). See also discussion and sources cited in Sec. I.D., above.

406 As noted above, we agree with the District of Columbia Circuit’s characterization of control exercised through an intermediary as indirect control, rejecting our colleague and the 2020 Rule’s counterroutine characterization of such control as direct and immediate. See BFI v. NLRB, 911 F.3d at 1216–1217.

407 See id. at 1217 (["T]he common law has never counseled the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship.") (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]"); Butler v. Drive Automotive Industries of America, 793 F.3d 404, 415 (4th Cir. 2015) (the joint-employer standard "specifically aims to pierce the legal formalities of an employment relationship to determine the loci of effective control over an employee . . . . Otherwise, an employer who is working for putative joint employer could avoid Title VII liability by hiding behind another entity."); Al-Saffy v. Vlack, 827 F.3d 85 (D.C. Cir. 2016) (relying in part on evidence that " bystanders and officials working for putative joint employer had recommended employee’s dismissal as evidence supporting reversal of summary judgment on the joint-employer issue). See also discussion and sources cited in Sec. I.D., above.

42 U.S.C. 2000e et seq.
common law of agency closes its mind to evidence of indirect control is unsupported by law or logic.”); see id. at 1216 (a ‘rigid distinction between direct and indirect control has no anchor in the common law’). . . . [W]e took great pains to inform the Board that the failure to consider reserved or indirect control is inconsistent with the common law of agency.” 408

In sum, the Board’s careful examination of relevant common-law principles as articulated in a voluminous body of primary judicial authority and secondary commentaries, reports, and restatements of these common-law decisions has persuaded us that the controlling common-law agency principles do not permit the Board to require that an entity that possesses authority to control also exercise that control, or exercise it in any particular way, in order to be found a joint employer under the Act.409

Next, our colleague contends that the final rule unjustifiably expands the list of essential terms and conditions of employment. Specifically, our colleague takes issue with our inclusion of three specific terms and conditions of employment in the exhaustive list set forth in Section 103.40(d): “work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline”; “the tenure of employment, including hiring and discharge”; and “working conditions related to the safety and health of employees.”

As discussed more extensively above,410 we find our colleague’s concerns regarding the final rule’s treatment of these terms and conditions of employment as essentially unfounded. With respect to “the tenure of employment, including hiring and discharge,” our colleague seems to take issue with the form rather than the substance. Indeed, the 2020 rule treated hiring and discharge as essential, making it even more evident that our colleague’s quarrel with our formulation is principally semantic. As we indicated previously, the phrase we have chosen to include in the final rule is meant to encompass the range of actions that determine an individual’s employment status. We reject the suggestion that our framing of this term of employment is overbroad. Similarly, our colleague does not seriously contend that an entity’s reservation or exercise of control over the manner, means, and methods of the performance of duties or the grounds of discipline are not essential.411 Instead, he focuses on our description of “work rules or directions” that address these aspects of particular employees’ performance of work, arguing that ambiguous language in an employee handbook may be used to justify a joint-employer finding. We find this concern misplaced and emphasize that in applying the final rule, we will take a functional approach to assessing whether a putative joint employer who meets the threshold requirement of having a common-law employment relationship with particular employees possesses or exercises the requisite control over essential terms and conditions of employment.

Lastly, we part company with our colleague when it comes to including workplace health and safety as an essential term or condition of employment. In our view, it is appropriate to regard an entity that possesses or exercises control over workplace health and safety as a joint employer. As set forth above, to the extent an entity solely memorializes its compliance with legal obligations pertaining to health and safety, it will not for that reason alone be regarded as a joint employer. However, and contrary to our colleague, we believe that entities that exercise discretion over particular employees’ workplace health and safety are properly treated as joint employers.

We believe that common-law employers of particular employees that have authority to exercise discretion over those employees’ workplace health and safety are properly treated as joint employers because employees’ ability to bargain with all of the entities that may exercise such control is central to the Act’s protection of employees’ collective rights.

Our colleague argues that setting forth an exhaustive list of essential terms and conditions of employment in the final rule nevertheless fails to address the District of Columbia Circuit’s concerns in BFI about the Board’s treatment of forms of indirect control when applying the joint-employer standard. Our colleague misstates our rationale for closing the list of essential terms and conditions of employment. After carefully considering the views of commenters, we have included an exhaustive list of essential terms and conditions of employment in the final rule to ensure that any required bargaining would be meaningful. By contrast, we incorporate the District of Columbia Circuit’s views regarding the forms of indirect control that bear on the joint-employer inquiry in § 103.40(e) and (f) of the final rule. In this regard, the final rule is faithful to the District of Columbia Circuit’s guidance regarding the need for a limiting principle to ensure the joint-employer standard remains within common-law boundaries.

The dissent next argues that the majority does not set forth a substantial policy justification for rescinding and replacing the 2020 rule. The dissent argues that because the majority focuses on the common-law shortcomings of the 2020 rule, it pays insufficient heed to commenters’ policy-based objections to the final rule.

As noted at the outset, while we are persuaded that the 2020 rule should be rescinded because it is at odds with common-law agency principles, we have stated repeatedly that we would nevertheless rescind the 2020 rule and replace it with the final rule for policy reasons.412 We reiterate that position here. In our view, the joint-employer standard we adopt today is more consistent with Section 1 of the Act and will better facilitate effective collective bargaining than the standard set forth in the 2020 rule. Our colleague’s contention that we have not made a policy-based decision for changing our standard remains within common-law boundaries.

In addition, the dissent contends that the majority does not offer a satisfactory response to those commenters who take the view that the final rule will adversely affect employers in particular industries or sectors, including the building and construction industry, the franchise industry, the staffing industry, and the healthcare sector. As discussed more extensively in Section IV.D., above, we are of the view that the Act—by referring generally to “employers” and “employees” and by effectively incorporating the common-law definition of those terms—requires the Board to apply a uniform joint-employer standard to all entities that fall within
the Board’s jurisdiction. For this reason, we have declined several commenters’ requests for the Board to exempt certain industries from the coverage of the final rule. However, we are mindful that applying the final rule will require sensitivity to industry-specific norms and practices, and we will take any relevant industry-specific context into consideration when considering whether an entity is a joint employer.

Our dissenting colleague also takes the position that the final rule will frustrate bargaining and undermine the policies respecting the Act favoring the resolution of labor disputes and the promotion of stable bargaining relationships. In this regard, he offers several hypotheticals that he suggests illustrate the potential for the final rule to be applied in a manner that will frustrate effective collective bargaining by extending joint-employer obligations to entities whose control over terms and conditions of employment is too attenuated to warrant their participation in bargaining.

We respectfully disagree with our dissenting colleague’s view of how the final rule will operate. In reciting the standard set forth in the final rule, our colleague elides the threshold significance of § 103.40(a), which requires a party seeking to demonstrate the existence of a joint-employment relationship to make an initial showing that the putative joint employer has a common-law employment relationship with particular employees. Because the application of the final rule will be limited to entities who are common-law employers, many of the hypothetical scenarios our colleague suggests will give rise to a joint-employer finding cannot arise. For example, as noted above, an entity may control a term of employment to which a bargaining duty attaches but not possess or exercise the requisite control over the performance of the work to be regarded as a common-law employer. For example, while the Supreme Court has recognized that an employer has a duty to bargain over in-plant food service and prices,413 that fact alone does not support a finding that the third-party contractor who supplies the food, and codetermines pricing, is a joint employer. Instead, § 103.40(a) of the final rule establishes a threshold requirement that a putative joint employer must be the common-law employer of particular employees.

Absent evidence that an entity is the common-law employer of particular employees, then, there is no basis for a joint-employer finding under the final rule. Accordingly, there is no risk that the final rule will be applied broadly to encompass entities whose relationship to the performance of the work is clearly too attenuated to support finding that they are common-law employers, as our dissenting colleague fears.

In addition to these hypotheticals concerning the application of the final rule, our colleague makes several predictions about how the final rule will affect particular businesses. Our colleague repeats the contention raised by several commenters (and addressed more fully above) that the possibility of conflict among joint employers will complicate bargaining and lead to worse outcomes for employees. As an initial matter, we question our colleague’s suggestion that the final rule will make it more difficult for parties to reach agreements. Instead, we are persuaded that a standard that ensures that those entities who possess or exercise control over particular employees’ essential terms and conditions of employment are present for bargaining will help avoid fruitless negotiations. In our view, aligning employers’ responsibilities under the Act with their authority to control terms and conditions of employment will lead to better outcomes overall. Ensuring that the necessary parties may all have a seat at the bargaining table will also empower entities who have chosen to contractually retain or exercise control over particular employees’ essential terms and conditions of employment to formalize their responsibilities and protect their interests in collective-bargaining agreements they also negotiate and sign.414 Further, we observe that, even assuming arguing that our colleague’s concern about the potential difficulties associated with joint-employer bargaining were valid, such difficulties would arise under any joint-employer standard, and accordingly do not support specific criticism of the current final rule.

Finally, our dissenting colleague contends that the final rule is arbitrary and capricious under the Administrative Procedure Act for several reasons. First, he argues that the majority has failed to respond to significant points urged by commenters. We reject this characterization and note our extensive discussion of the points urged by commenters in Section IV.D., above. Not only did we respond to commenters’ significant arguments, we also made adjustments to the text of the final rule in response to commenters’ valuable input. We are confident that the final rule is stronger and will provide better guidance to regulated parties because of the helpful public input we received and the changes we made in light of commenters’ views.

Next, our colleague argues that the final rule “offers no greater certainty or predictability than adjudication, and it will not reduce litigation.” As discussed in Section IV.D. above, we are of the view that the final rule will reduce uncertainty by codifying the general principles that will guide the Board in making joint-employer determinations. While the final rule does not purport to anticipate the myriad arrangements under which entities possess or exercise control over particular employees’ essential terms and conditions of employment, it offers a framework for analyzing such questions that is rooted in common-law agency principles and ensures greater predictability by offering an exhaustive list of the essential terms and conditions of employment that may give rise to a joint-employer finding and detailing the forms of control that the Board will treat as probative of joint-employer status. In this regard, we respectfully disagree with our colleague’s suggestion that “[t]his is precisely how the determinations would be made if there were no rule at all.” Finally, to the extent our colleague’s criticism amounts to an observation that the final rule will need to be applied on a case-by-case basis moving forward, we observe that the same can be said for the 2020 rule, which also required the Board to apply the joint-employer standard in diverse contexts based on the particular evidence put forward by a party seeking to establish joint-employer status. Moreover, as the District of Columbia Circuit has observed, it is appropriate for the Board to “flesh out the operation of a legal test that Congress has delegated to the Board to administer” on an ongoing, case-by-case basis.415 Ultimately, our colleague concludes that the final rule must be arbitrary and capricious because, given his view that common-law agency principles do not compel the Board to rescind and replace the 2020 rule, the final rule is “legally erroneous.” As we have discussed in detail above, the great weight of common-law authority supports our conclusion that the 2020 rule is contrary to common-law agency principles in requiring that an entity actually exercise control over another employer’s employees in order to be found to be a joint employer. In any case, as we have

---

414 In this respect, the final rule will help avoid the scenario our colleague describes where courts bind entities later found to be joint employers to collective-bargaining agreements they “neither negotiated nor signed.”
415 BF v. NLRB, 911 F.3d at 1221.
also explained above, we would rescind and replace the 2020 rule for policy reasons even if we had not concluded that its actual-exercise requirement were precluded by the Act’s incorporation of common-law agency principles. We accordingly respectfully disagree with our colleague’s contention that the final rule is arbitrary and capricious under the Administrative Procedure Act.

VII. Dissenting View of Member Kaplan

My colleagues have accomplished something truly remarkable. They have come up with a standard for determining joint-employer status that is potentially even more catastrophic to the statutory goal of facilitating effective collective bargaining, as well as more potentially harmful to our economy, than the Board’s previous standard in Browning-Ferris Industries.416 As the dissent noted in Browning-Ferris, the joint-employer standard the Board adopted in that decision not only “affect[ed] multiple doctrines central to the Act” but had “potentially massive economic implications.”417 The final rule the majority issues today, concerningly, goes beyond BFI in several ways. BFI went no further than to assert that the “direct and immediate control” standard of pre-BFI precedent is not compelled by the National Labor Relations Act (NLRA or the Act); the majority now claims that it is statutorily impermissible.418 BFI held that contractually reserved but unexercised control and indirect control are probative of joint-employer status;419 the majority now makes them dispositive of that status. BFI recognized that “of course,” the “existence, extent, and object of a putative joint employer’s control . . . all may present material issues” in a joint-employer determination;420 the majority removes the term “extent.” Under their final rule, joint-employer status is established if control exists (even if only potentially or indirectly) and if the object of control is an essential term and condition of employment of another entity’s employees, regardless of the extent of that control. Put differently, the final rule eliminates the second step of the BFI standard, which required the Board to determine whether the extent of a probative joint-employer’s control over the terms and conditions of employment of another business’s employees was sufficient “to permit meaningful collective bargaining.”421

As explained below, the majority’s final rule effects an unprecedented and unwarranted expansion of the Board’s joint-employer doctrine. The majority misapprehends common-law agency principles in holding that those principles compel the Board to rescind its 2020 Rule on Joint Employer Status Under the National Labor Relations Act (the 2020 Rule)422 and replace it with a joint-employer standard not seen anywhere else in the law. My colleagues dispense with any requirement that a company has actually exercised any control whatsoever (much less substantial control) over the essential terms and conditions of another company’s employees. Under the final rule, an entity’s mere possession of a never-exercised contractual reservation of right to control a single essential term and condition of employment of another business’s employees makes that entity a joint employer of those employees. So does its “indirect” control of an essential term and condition, a term my colleagues fail to define or otherwise cabin. As I will show, these standards (in the words of the United States Court of Appeals for the District of Columbia Circuit) “overshoot[ the common-law mark.”423

My colleagues claim that their final rule effectuates “the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining,”424 but in reality it will frustrate national labor policy by placing at the bargaining table a second “employer” that has never exercised any control over the employment terms of another entity’s employees. Indeed, it may place many more than just two such “employers” at the bargaining table. To borrow a hypothetical from the BFI dissent, suppose CleanCo is in the business of supplying maintenance employees to clients to clean their offices. Suppose further that CleanCo supplies employees to one hundred clients, and that each CleanCo-client contract contains a provision that gives the client the right to prohibit, on health and safety grounds, CleanCo’s employees from using particular cleaning supplies. Because the clients possess a contractually reserved authority to control “working conditions related to the safety and health of employees”—an essential employment term newly invented by my colleagues—each of those one hundred clients would be a joint employer of CleanCo’s employees. Now, suppose a union wins an election in an employer-wide unit of CleanCo’s maintenance employees. Because all one hundred clients jointly employ those employees, all one hundred would be compelled to participate in collective bargaining. As the dissenters in BFI put it, “no bargaining table is big enough to seat all of the entities that will be potential joint employers under the majority’s new standards.”425

My colleagues repeatedly insist that their approach—specifically, eliminating the requirement of proof that an entity has actually exercised control over another entity’s employees before it can be deemed their joint employer—is the only permissible one under the common law and the Act. In response to commenters who point out the significant negative effects that an expanded joint-employer standard will have on businesses in wide variety of sectors, they repeatedly say that it cannot be helped because their approach is statutorily compelled. Accordingly, they provide no substantive response to these commenters’ weighty objections. Moreover, because my colleagues insist that their hands are tied and fail to acknowledge that common-law agency principles, and therefore the Act, permit the 2020 Rule, they fail to engage in any real policy-based choice between competing alternatives. Consequently, the final rule must stand or fall on the majority’s assertion that their position is compelled by the common law and hence the only permissible construction of the Act. It falls. Indeed, not only is their position—i.e., that the actual-exercise requirement is impermissible—not compelled by the common law, it results in a final rule that exceeds the limits of the common law, as I will show. In any event, the courts have made clear that the Board may adopt a joint-employer standard under the NLRA that does not extend to the outermost limits of the common law. Even accepting for argument’s sake that

417 Id. at 1647 (Members Miscimarra and Johnson, dissenting).
418 Id. at 1609 (stating the BFI majority’s view that requiring direct and immediate control “is not mandated by the Act”).
419 Id. at 1614 (“The right to control . . . is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.”).
420 Id.
421 Id.
423 Browning-Ferris Industries of California, Inc. v. NLRB, 911 F.3d 1195, 1216 (D.C. Cir. 2018).
424 NLRB Sec. 1.
the majority’s rule does not exceed the common law’s boundaries, compelling policy considerations counsel against its promulgation and in favor of leaving the 2020 Rule in place. Because I would retain that rule, I dissent.

Background

In determining, under the Act, whether an employment relationship exists between an entity and employees directly employed by a second entity, common-law agency principles are controlling. Under those principles, 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.

For many years, the Board, with court approval, held that a determination that two or more entities 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 n.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 n.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 798, 798–799 (1984)); Laerco Transportation, 269 NLRB 324, 325–326 (1984) (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 at 746–751 (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, 362 NLRB at 1599. There, a Board majority retained the “share or codetermine” standard but eliminated the preexisting requirement of proof that a putative joint employer had exercised direct and immediate control over essential terms and conditions of employment. Id. at 1613–1614. The BFI majority created a new two-step standard. At step one, the inquiry was “whether there is a common-law employment relationship with the employees in question.” Id. at 1600. If so, the analysis proceeded to a second step, where the Board was to determine “whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.” Id. In addition, 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 merely potential control over the employees’ essential terms and conditions of employment, even where the business partner has not itself actually established any of 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 employees. The Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) did not uphold that defining feature. It expressly left undecided whether indirect control or contractually-reserved-but-unexercised authority to control could stand, alone establish, joint-employer status. As the court stated, “because 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.” Browning-Ferris Industries of California, Inc. v. NLRB, 911 F.3d at 1213 (internal citation omitted). Similarly, the court said that “whether 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.’” Id. at 1218.

After canvassing common-law agency principles, the D.C. Circuit upheld 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.” Id. at 1222 (emphasis added). Although the court held that contractually reserved control and indirect control can contribute to a joint-employer finding, it declined to reach the question of whether either one could independently establish joint-employer status.

The D.C. Circuit 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 under the Act, without suggesting in any way that the Board’s 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.


427 CNN America, Inc., 361 NLRB 439, 441 (2014) (citing TLI, Inc., 271 NLRB 798, 798 (1984), 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 1117, 1123 (3d Cir. 1982). As the D.C. Circuit observed in its 2018 decision reviewing BFI, “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 1210.”

428 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
Second, the D.C. Circuit made clear that, under the common law, the standard for determining independent-employer status, with its emphasis on the right to control the manner and means of performance, 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; see also Reed v. Summers, 232 F.3d 933, 937–938 (D.C. Cir. 2000) (expressing doubt that independent-contractor precedent is well suited to address issues of joint employment). Accordingly, “the vital second step” of a common-law joint-employer analysis does indeed focus on the exercise of control, including its form, frequency, and extent.

Third, the D.C. Circuit held that the BFI decision’s treatment of the indirect-control factor contravened the common law. Browning-Ferris Industries of California, Inc. v. NLRB, 911 F.3d at 1221. Specifically, the court concluded that the BFI decision 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.

Finally, and importantly, the court held that the Board had erred by failing to 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. The court rebuked the Board for “never delineat[ing] what terms and conditions of employment are ‘essential,’” for adopting an “inclusive” and “non-exhaustive” approach to the meaning of “essential terms,” and for failing to clarify what “meaningful collective bargaining” might require. Id. at 1221–1222. The court remanded the case to the Board for further proceedings consistent with the court’s opinion.429

The 2020 Joint-Employer Rule

Against this background, the Board in 2020 promulgated a joint-employer rule that was clear and consistent with common-law agency principles. The 2020 Rule provided much needed guidance to the regulated community. It adopted the universally accepted general formulation of the joint-employer standard that an entity may be considered a joint employer of a separate entity’s employees only if the two entities share or codetermine the employees’ essential terms and conditions of employment. The 2020 Rule then further defined that standard in a manner that eliminated the unjustified features introduced in BFI. The 2020 Rule 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.” 85 FR at 11186 & 11236. The Board defined “substantial direct and immediate control” 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 & 11236. The 2020 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 2020 Rule recognized that certain other forms of control and authority to control play an appropriately limited role in the joint-employer analysis. It deemed probative of joint-employer status evidence of an 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, and the entity’s control over mandatory subjects of bargaining other than the essential terms and conditions of employment. Id. But those types of control could tend to support a finding of joint-employer status “only to the extent [they] supplement[ed] and reinforce[d] evidence of the entity’s possession or exercise of direct and immediate control over a particular essential term and condition of employment.” Id. They could not, standing alone, establish joint-employer status.

The Board also made clear that the 2020 Rule was not intended to immunize an entity from joint-employer status through use of an intermediary to exercise control, explaining that “direct and immediate control exercised through an intermediary remains direct and immediate.” Id. at 11209 (citing Browning-Ferris Industries of California, Inc. v. NLRB, 911 F.3d at 1217 (“[T]he common law has never censured the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship.”)).

In response to the court’s criticism of the Board’s failure to define what constitutes “essential terms and conditions of employment” in BFI, the 2020 Rule defined a closed set of terms and conditions of employment: wages,
Act’s policies by imposing bargaining obligations only on entities that actually control essential working conditions and by establishing a “discernible and predictable” standard to guide regulated parties, stating as follows:

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 fuzzier 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.

The Majority’s Final Rule

The 2020 Rule was promulgated a mere three-and-a-half years ago, and since it took effect, the Board has applied it exactly once. See Cognizant Technology Solutions U.S. Corp., 372 NLRB No. 108 (2023) (denying Google’s request for review of a regional director’s determination under the 2020 Rule that it is the joint employer of a subcontractor’s employees based on its exercise of substantial direct and immediate control over their supervision, benefits, and hours of work). Nevertheless, my colleagues have plowed ahead with this rulemaking, even though “[i]t is common knowledge that the Board’s limited resources are severely taxed by undertaking a rulemaking process.” And they have done so despite the fact that one member of the current majority sharply criticized a prior Board majority for changing the joint-employer standard under strikingly similar circumstances.

The final rule promulgated today makes extreme and troubling changes to Board law, including but not limited to the following revisions. The rule makes contractually reserved but unexercised control and indirect control not merely probative of joint-employer status (as did BFI), but independently sufficient to establish that status. It scrapes what it characterizes as “artificial control-based restrictions” in the 2020 Rule. And it jettisons the second step of BFI’s joint-employer standard, which required proof that a putative joint employer “possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.” 362 NLRB at 1600.

The final rule starts off mundanely enough, declaring in paragraph (a) of newly revised Section 103.40 of the Board’s Rules & Regulations that an entity is an “employer” of particular employees “if the employer has an employment relationship with those employees under common-law agency principles.” Paragraph (b) provides that two employers of the same employees “are joint employers” if they share or codetermine those matters governing employees’ essential terms and conditions of employment.

Paragraph (c), which defines the “share or codetermine” standard, is where the trouble really starts. It provides 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.”

The effect of this subsection is dramatic. It mandates a finding of joint-employer status based on the mere possession of authority to control, directly or indirectly, a single essential term (e.g., hours of work). The majority has eliminated any need for proof of actual exercise, much less substantial exercise, of control over employees’ essential

today’s exercise.”), vacated 366 NLRB No. 26 (2018).

The majority states that “the joint employer standard that [they] adopt today removes artificial control-based restrictions with no foundation in the common law that the Board has previously imposed in cases beginning in the mid-1980s discussed above, and in the 2020 Final Rule.” In its 2022 Notice of Proposed Rulemaking (NPRM), the majority identified those control-based restrictions as “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.’” 87 FR 54641, 54643.
terms. Moreover, paragraph (c) refers broadly to “authority to control,” without limiting it to contractually reserved authority. A “user” business possesses authority to indirectly control the hours of work of employees supplied to it by a “supplier” employer merely by virtue of the fact that it decides when it is open for business. If that is sufficient to make “user” businesses joint employers of supplied employees, then paragraph (c) of revised § 103.40 makes every “user” business a joint employer.

The final rule’s treatment of indirect control is similar in problematics. Given that possession or exercise of indirect control will establish a joint-employer relationship under § 103.40(b) and (c) of the final rule, it seems critically important for the majority to explain what constitutes “indirect control.” They do not do so. The final rule identifies control exercised through an intermediary as an example of “indirect control,” but this necessarily implies that the exercise of “indirect control” is not limited to control exercised through an intermediary. What else might count as the exercise of indirect control? My colleagues do not say, but they take note of comments contending that certain circumstances should be regarded as demonstrating indirect control, including that franchisors necessarily have indirect control because they “are the parties with meaningful profit margins that could be redistributed to the workforce during bargaining” and because most franchisees’ revenue and cost variables “greatly constrain franchisees’ practical ability to offset concessions to their workers.”

The same commenter suggests that businesses that engage service contractors necessarily have indirect control because “service contractors rarely have room to grant wage increases without renegotiating their own contracts with clients and thus the clients effectively control the economic terms of employment for the contractors’ employees.” Are these the kinds of circumstances that my colleagues have in mind as evidencing “indirect control”? We do not know because they do not say.

Further, the final rule does not adequately “distinguish evidence of indirect control that bears on workers’ essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting.” The Board to elucidate the distinction between indirect control will establish a joint-employer standard remains within common-law boundaries.

436 Comment of Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT (internal citation and quotations omitted).

437 Comment of Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT (internal citation and quotations omitted).

438 In response to my criticism, the majority states that they “decl[ed] not to include an extensive list of examples of forms of indirect control that may be relevant to the joint-employer inquiry.” I am not, however, criticizing my colleagues for failing to provide “an examples.” Rather, I observe that the majority does not identify even one example of such indirect control other than control exercised through an intermediary. Given that the majority makes it sufficient to establish joint-employer status, this lack of guidance is a serious shortcoming. As with much else in the final rule, the majority leaves the fleshing out of “indirect control” to be determined case by case—and this leaves businesses affected by the new rule, and facing the complicated task of planning for its impact, utterly at sea.

Relatively, my colleagues are wrong in asserting that the role I give (and the 2020 Rule gave) to indirect control somehow conflicts with the D.C. Circuit’s opinion in Browning-Ferris Industries of California v. NLRB, 911 F.3d at 1217 (“The common law has never counseled the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship.”). My colleagues and I disagree about whether to characterize control exercised through an intermediary as direct control or indirect control. In my view, an intermediary (e.g., a supervisor employed by the undisputed employer) who operates as a part of the putative joint employer’s commands functions as its agent. The putative joint employer there is exercising control even more directly than when it engages in collaborative decision-making with the undisputed employer, which is direct control. The majority’s reclassification of control exercised through an intermediary as indirect control makes little sense. Moreover, the majority does not limit “indirect control” to that example, they leave the door open to finding other kinds of indirect control. The important question, which my colleagues do not answer, is, what else will count as “indirect control”?

439 My colleagues say that their decision to close the list of essential terms and conditions is not enough because routine components of company-to-company contracts may indirectly impact essential terms. For example, a widely used standard contract in the construction industry includes a provision that makes the general contractor “responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the contract.” That clause—a routine component of company-to-company contracting in the construction industry—evidences the general contractor’s indirect control (at least) of “working conditions related to the safety and health of employees” of each of its subcontractors, an essential term and condition of employment under § 103.40(d)(7) of the final rule. Additionally, my colleagues perform some sleight of hand regarding the final rule’s treatment of what was BFI’s second step: 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. In the 2022 NPRM, my colleagues straightforwardly acknowledged that their proposed rule “[d[id] not incorporate” BFI’s second step, dubiously declaring that “any required bargaining under the new standard will necessarily be meaningful.” 87 FR at 54645 n. 26. Accordingly, they repudiated the BFI majority’s recognition that in some cases, a putative joint employer’s extent of control over the terms and conditions of employment of the employees of an undisputed employer will be

434 Under the 2020 Rule, control exercised through an intermediary could establish joint-employer status if it was otherwise sufficient.

435 Relatedly, my colleagues are wrong in asserting that the exercise of indirect control somehow conflicts with the D.C. Circuit’s directive that the standard remain within common-law boundaries. The D.C. Circuit’s directive that the final rule’s treatment of what was BFI’s second step: 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. But this clarification is at odds with their simultaneous claim that a closed set of terms and conditions heeds the D.C. Circuit’s request for a limiting principle “to ensure the joint-employer standard remains within common-law boundaries.” The D.C. Circuit’s directive that there be “within common-law boundaries” flows directly from its finding that BFI’s “overshot the common-law mark” by failing to distinguish between indirect control that bears on the joint-employer inquiry and the routine components of company-to-company contracting. Accordingly, I do not mischaracterize their position when I point out that closing the set of essential terms and conditions fails to provide the “legal scaffolding” the D.C. Circuit called for. 440 AIA Document A201–2017 (cited in comment of Associated General Contractors of America).

The majority also says that Sec. 103.40(f) of the final rule responds to the District of Columbia Circuit’s instruction that the Board separate indirect control that bears on the joint-employer inquiry from routine components of company-to-company contracting. I address this claim below.
insufficient to warrant placing that entity at the bargaining table, and that in those circumstances, it would be contrary to the policies of the Act to find joint-employer status. 362 NLRB at 1610–1611; id. at 1614 (“The existence, extent, and object of a putative joint employer’s control, of course, all may present material issues.”) (emphasis added). In the final rule, the majority takes a different route than they took in the NPRM, but they arrive at the same destination. The majority says that the final rule “effectively incorporates the second step of the Board’s joint-employer test set forth in BFI” because the final rule (unlike the proposed rule) makes the list of “essential” terms and conditions of employment exhaustive. But BFI’s second step addresses the extent of a putative joint employer’s control over essential terms and conditions. What constitutes essential terms and conditions pertains to what is controlled, i.e., the object of control—and as BFI makes clear, extent of control and object of control present distinct issues in the joint-employer analysis. Plainly, the final rule does not “incorporate[] the second step” of the BFI standard, and this is made all the more apparent by newly revised § 103.40(c), which provides that merely “[p]ossessing the authority to control is sufficient to establish status as a joint employer,” and so is “[e]xercising the power to control,” without any requirement that there be a sufficient amount of control to permit meaningful collective bargaining.

My colleagues dismiss this concern by saying that § 103.40(a) of the final rule will prevent the rule from being applied overbroadly “to encompass entities whose relationship to the performance of the work is clearly too attenuated.” They say that my criticism of their rule “elides the threshold significance of § 103.40(a), which requires a party seeking to demonstrate the existence of a joint-employment relationship to make an initial showing that the putative joint employer has a common-law employment relationship with particular employees.” But it is my colleagues who have failed to explain how § 103.40(a) functions in the joint-employer analysis. They do not explain what, if any, limitations it imposes on joint-employer determinations. They do not convey that it establishes some minimum level of control (in terms of extent of control over a particular term or condition of employment or breadth of control across multiple terms or conditions) that must be reached before joint-employer status is found. But even accepting that some unstated minimum quantum of authority to control is implicit in the threshold requirement of § 103.40(a), nothing in their rule enlightens the regulated community what that minimum quantum might be. Like “indirect control,” that is left to be determined case by case, with the majority here saying, in effect, “trust us, we’ll be reasonable,” even though nothing in the text of the rule constrains the Board from drawing the line unreasonably. And my colleagues certainly do not suggest that § 103.40(a) implicitly sneak an actual-exercise requirement in through the back door. Any hope in that regard is laid to rest by their insistence, in discussing § 103.40(c), that exercise of control is unnecessary under the common law. In short, my colleagues have not blunted my criticism of their abandonment of the actual-exercise requirement by pointing to § 103.40(a) and its nebulous threshold requirement.442

In short, the combined effect of all these features of the final rule results in a dramatic expansion of the Board’s joint-employer doctrine compared with the 2020 Rule and even compared with the Board’s holding in BFI. At least it will do so if the final rule survives one or more of the inevitable court challenges it is destined to face. A betting person might hesitate to put money on its chances because, as demonstrated below, the final rule is wrong as a matter of law and unavailing as a matter of policy.

Common-Law Agency Principles Do Not Compel or Even Support the Final Rule

My colleagues repeatedly and emphatically declare that common-law agency principles, and therefore the Act itself, preclude the 2020 Rule and compel their final rule. Among the statements they make are the following: • “After carefully considering nearly 13,000 comments, the Board believes that it is necessary and appropriate to rescind the 2020 rule, which was contrary to the Act insofar as it was inconsistent with the common law of agency.” • “[W]e believe that the Board is required to rescind the 2020 rule . . . .” • “[W]e rescind the 2020 rule because it is inconsistent with common-law agency principles and therefore inconsistent with the National Labor Relations Act.” • “[B]ecause we are bound to apply common-law agency principles, we are not free to maintain a definition of ‘joint employer’ that incorporates the restriction that any relevant control over an entity possesses or exercises be ‘direct and immediate.’” • “[T]he 2020 rule introduced control-based restrictions that are inconsistent with common-law agency principles.” • “[W]e are foreclosed from maintaining the joint-employer standard set forth in [the 2020 rule] because it is not in accordance with the common-law agency principles the Board is bound to apply in making joint-employer determinations.” • “[T]he Board has concluded that the actual-exercise requirement reflected in the 2020 rule is . . . contrary to the common-law agency principles that must govern the joint-employer standard under the Act and that the Board has no statutory authority to adopt such a requirement.”

A reader might reasonably expect the majority to follow up those assertions with citations to judicial decisions, involving the NLRA and other materially similar statutes, in which the courts have found joint-employer status based exclusively on a never-exercised contractual right to control and/or indirect control of an essential term and condition of employment. Such readers will be sorely disappointed. The majority fails to cite a single judicial decision, much less a body of court precedent rising to the level of establishing the common law, that bases a joint-employer finding solely on a never-exercised contractual reservation of right to control or on indirect control of employees’ essential terms and conditions. As I will show, judicial precedent addressing joint-employer status under both the NLRA and materially similar statutes requires that control be actually exercised. And as the following discussion will demonstrate, so does Board precedent, with narrow exceptions. Accordingly, the majority is mistaken when they claim that requiring the exercise of substantial direct and immediate control to establish joint-employer status is inconsistent with “prior Board and judicial decisions.”

442 As noted above, the majority also denies that their rule fails adequately to distinguish evidence of indirect control that bears on the joint-employer inquiry from evidence that simply documents the routine parameters of company-to-company contracting, as mandated by the D.C. Circuit, by pointing to § 103.40(f) of the final rule. Sec. 103.40(f) provides that evidence of an entity’s control over matters that are immaterial to the existence of an employment relationship under common-law agency principles and that do not bear on the employees’ essential terms and conditions of employment is not relevant to the determination of whether the entity is a joint employer. In other words, § 103.40(f) is mostly just the inverse of Sec. 103.40(a) and, as such, furnishes no more guidance than does § 103.40(a). And to the extent that it is not the inverse of § 103.40(a), it is the inverse of § 103.40(b), which confirms that my colleagues do indeed take the position that by defining a closed set of essential terms and conditions, they have responded to the D.C. Circuit’s mandate.
The 2020 Rule was not inconsistent with the majority of Board precedent addressing joint-employer status under the Act.

A survey of Board decisions addressing the issue of joint-employer status reveals that, with narrow exceptions, the Board has relied, at least in part, on the putative joint-employer’s actual exercise of direct control over terms and conditions of employment. Accordingly, the majority’s decision to make never-exercised authority to control or indirect control independently sufficient to establish joint-employer status represents a sharp break from Board precedent.

Contrary to my colleagues’ suggestion, Greyhound Corp., 153 NLRB 1488 (1965), does not support finding joint-employer status based exclusively on a never-exercised right to control or indirect control. There, 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 contractor’s employees on a day-to-day basis regarding the manner and means of their performance. Id. at 1496. The Board also relied on evidence that Greyhound had actually prompted the discharge of one of the contractor’s employees whom Greyhound deemed unsatisfactory. Id. at 1491 n. 8. To be sure, the Board also gave some weight to provisions in the contract between Greyhound and the contractor, which granted Greyhound the right to specify the “exact manner and means” through which the employees’ work would be accomplished, to control their wages, to set their schedules, and to 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 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 consonant with its status as their employer along with [the cleaning contractor].” Id. at 1495 (emphasis added). In short, Greyhound is consistent with both subsequent Board joint-employer precedent and the 2020 Rule. It does not support the majority’s final rule.443

The majority mischaracterizes Board precedent during the two decades following Greyhound, implying that it reflects a “traditional” approach under which proof that an entity exercised control over the terms and conditions of employment of another employer’s employees was unnecessary to establish joint-employer status.444 The majority asserts that “Board precedent from this time period generally did not require a showing that both putative joint employers actually or directly exercised control.” But they fail to acknowledge that the Board has never based a joint-employer finding solely on “indirect control,” and most of the Board cases my colleagues cite as demonstrating a “traditional” reliance on a contractual reservation of right to control are limited to a single category of cases involving department stores with licensed departments.445 These cases do not bear the weight the majority gives them.446

---

443 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). Although the Court did not rule on the joint-employer issue, it did not rule on the Board’s finding that Greyhound and the cleaning contractor constituted a joint employer “because they had exercised common control over the employees.” Id. at 475 (emphasis added).

444 The issue here is whether an unexercised contractual right of control and/or indirect control is or are relevant considerations in a joint-employer analysis. They are, as the 2002 rule recognized. The issue is whether either one can independently establish joint-employer status.

445 As these department-store cases demonstrate, licensed departments were seamlessly integrated with the department store as a whole, and employees of the licensee were indistinguishable from the department store’s employees. See, e.g., Spartan Department Stores, 140 NLRB 608, 610 (1963) (observing that the agreement between the department store and the licensee was “in furtherance of [the department store]’s intention of creating the appearance of a single, integrated department store”). Indeed, in such a case, the parties’ contract expressly provided that employees in the licensed department shall be the employees of the department store. Taylor’s Oak Ridge Corp., 74 NLRB 930, 932 (1947) (licensee employees “shall be the employees of the department store.”).

446 In the department-store cases, the Board did not purport to apply common-law agency principles, much less cite common-law cases finding joint-employer status based on reserved authority to control alone. When the Board stated any standard at all, it relied on whether the department store was in a position to influence the appearance of a single, integrated department store. See, e.g., United Mercantile, Inc. d/b/a Globe Discount City, 171 NLRB 830 (1968); Buckeye Mart, 165 NLRB 87 (1967), enf’d mem. 405 F.2d 1211 (6th Cir. 1969); Value Village, Inc., 177 NLRB 751 (1968). These cases do not support the majority’s view that the common law compels a conclusion that contractually reserved authority to control is sufficient to make an entity a joint employer of another entity’s employees. Indeed, in Buckeye Mart, it was found that the department store (Buckeye) was not the joint employer of the employees of the licensee (Manley) despite possessing contractually reserved authority to require Manley to discharge employees that Buckeye deemed objectionable. 165 NLRB at 88 (“Although Buckeye may compel the discharge of any Manley employee . . . . Buckeye is not in a position to ‘influence’ Manley’s labor policies and . . . is not a joint employer with Manley . . . .”).

447 Accordingly, the majority’s reliance on Board cases involving licensing relationships in the department-store industry is misplaced. The majority also cites two cases—General Motors Corp. (Baltimore, MD), 60 NLRB 81 (1945), and Anderson Boarding & Supply Co., 56 NLRB 1204 (1944)—where the issue was whether an industrial facility was the joint employer of employees working in its cafeteria. In neither case did the Board mention the common law of agency, and even if it was implicit in its analysis, two cases do not amount to a “traditional” practice. Moreover, as the D.C. Circuit forcefully reminded the Board in Brown-Forman Industries of California, v. NLRB, “Congress has tasked the courts, and not the Board, with defining the common-law scope of ‘employer.’” 911 F.3d at 1208. The Board, as an administrative agency, has no power to do so.

In fact, during the two decades following Greyhound, the Board regularly found no joint-employer status where the putative joint employer possessed some reserved contractual authority to control essential terms, and even where it actually exercised control but to too limited an extent to warrant a joint-employer finding. For example, in Hychem Constructors, Inc., 169 NLRB 274, 276 (1968), the Board found no joint-employer status despite a putative employer’s reserved right to approve wage increases and overtime, its policy of consulting on proposed layoffs, and its “as yet unexercised prerogative to remove an undesirable . . . employee.” Similarly, in S. G. Tilden, Inc., 172 NLRB 752, 753 (1968), the Board found a franchisor was not a joint employer of its franchisees’ employees despite its specification of the franchisees’ hours of operation and its requirement that they adhere to certain pricing and housekeeping standards. The Board recognized that the standard applied in the department-store cases, the Board in S. G. Tilden found “no clear indication . . . that Respondent Tilden intended to, or in fact did, exercise direct control over the labor relations of . . . franchisees.” Id. (emphasis added); see also Furniture Distribution Center, Inc., 234 NLRB 751, 751–752 (1978) (evidence that “user” business and “supplier” business conferred and jointly decided on the number of supplied employees and the number of hours those employees would work each week deemed insufficient to create a joint-employer relationship); Cabot Corp., 223 NLRB 1388, 1389, 1390 n. 10, 1392 (1976) (no joint-employer status despite putative employer reserving the right to inform direct employer of the specific employees).
work to be performed and the equipment and personnel used, maintaining the right to “inspect, test, approve, and disapprove of work and services,” requiring all employees to follow its safety regulations, and retaining the right to remove employees it deemed incompetent, afpd. sub nom. International Chemical Workers Local 483 v. NLRB, 561 F.2d 253 (D.C. Cir. 1977); Westinghouse Electric Corp., 163 NLRB 914, 914–915 (1967) (no joint-employer status despite putative joint employer’s occasional direct supervision of supplier employer’s employees, review of suppliers’ timesheets for auditing purposes, and reservation of the right to request removal of “disorderly, incompetent, or objectionable persons from working at the site . . . . [S]uch conduct is clearly consistent with that of a contractor seeking to police its subcontract.”); Space Services International Corp., 156 NLRB 1227, 1232–1233 (1966) (no joint-employer status where putative joint employer “[reserved] the right to require removal from the work of any employee it deems incompetent, careless, or insubordinate” and exercised this right on at least one occasion with respect to a management official). Accordingly, contrary to the majority’s assertion, Board precedent prior to the 1984 joint-employer decisions in TLI and Laerco Transportation did not make indirect control independently sufficient to establish joint-employer status, and cases relying solely on contractually reserved authority to control do not apply control test and therefore do not support the majority’s claim that TLI and Laerco abandoned a “traditional, common-law based standard” for determining joint-employer status.447

Nor do the last forty years of relevant Board precedent support the majority’s characterization of what is marked as a result of a departure from a prior “traditional” joint-employer standard. To begin, TLI and Laerco Transportation merely clarified the appropriate legal standard by echoing the United States Court of Appeals for the Third Circuit’s articulation in NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d at 1123: “The basis of the [joint-employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the ‘joint employer’ concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment” (internal citations omitted) (emphasis in original). Importantly, the Third Circuit equated this “share or codetermine” standard with the exertion—i.e., exercise—of significant control: “[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. The Third Circuit’s “share or codetermine” standard is consistent (with narrow exceptions) with the Board’s pre-TLI and pre-Laerco joint-employer decisions. As shown below, it is also consistent with TLI, Laerco, and the Board’s subsequent joint-employer decisions—until, of course, BFI took joint-employer doctrine in an entirely unprecedented direction. But it flatly contradicts the definition of that standard that my colleagues adopt today.448

In TLI, Inc., 271 NLRB at 798–799, the Board reversed a judge’s finding of joint-employer status, noting that the putative joint employer did not sufficiently affect the terms and conditions of employment of the supplier employer’s drivers: the “supervision and direction exercised by [the putative joint employer] on a day-to-day basis [was] both limited and routine.” Id. at 799.449 Similarly, in Laerco Transportation, 269 NLRB at 325, the Board found that the putative joint employer did not possess “sufficient indicia of control” over a supplier employer’s drivers to create a joint-employer relationship. The Board found evidence that the putative joint employer gave drivers directions on which routes to follow and attempted to resolve personality conflicts to constitute merely “minimal and routine” supervision, and that most other terms and conditions of employment of the drivers were effectively controlled by their direct employer. Id. at 326. Thus, in TLI and Laerco, the Board faithfully applied the Third Circuit’s standard—requiring “two or more employers to exert significant control over the same employees” in order to satisfy the “share or codetermine” standard and create a joint-employer relationship under the Act—to the facts of those cases, contrary to the majority’s assertion that these decisions lacked “a clear basis in established common-law agency principles or prior . . . judicial decisions.” Subsequent joint-employer decisions were similarly consistent with both the standards that my colleagues adopt today.

447 For example, in Floyd Epperson, cited by the majority, the Board noted anecdotal evidence of the putative joint employer’s indirect control over wages and discipline, but its joint-employer finding was largely based on evidence of direct and immediate supervision of the employees involved. 202 NLRB 21, 23 (1973), enf’d. 491 F.2d 1330 (6th Cir. 1974). In Lowery Trucking Co., also cited by the majority, the Board noted the putative joint employer’s legal right to reject a supplier employer’s driver, but it highlighted the putative joint employer’s actual exercise of detailed supervision, participation in the hiring process, discharge of two drivers, and discipline of a third. 177 NLRB 13, 15 (1969), enf’d. sub nom. Ace-Alkine Freight Lines v. NLRB, 431 F.2d 280 (8th Cir. 1970). Similarly, in Carrier Corp. v. NLRB, 768 F.2d 778 (6th Cir. 1985), the appeals relied in part on the putative joint employer’s reserved authority to reject drivers that did not meet its standards and to direct the primary employer to remove drivers for improper findings of substantial evidence supported the Board’s joint-employer finding, the court primarily relied on evidence that Carrier “exercised substantial day-to-day control over the drivers’ working conditions” and consulted with the undisputed employer over wages and benefits. Id. at 781; see also International Chemical Workers Local 483 v. NLRB, 561 F.2d 293, 257 (D.C. Cir. 1977) (affirming Board’s finding of no joint-employer status in part because the putative joint employer “did not have authority to, and did not actually, direct the primary employer’s employees in the details of their work”) (emphasis added). Moreover, most of the cases my colleagues rely on to support their claim that the Board adhered to a “traditional common-law based” joint-employer standard prior to TLI and Laerco involved department stores with licensed departments, where, as explained above, the Board stated and applied a test that required whether the store was in a position to influence the licensee’s labor policies—and Buckeye Mart reveals the difference between that standard and a common-law based standard as my colleagues construe it.

448 As noted above, the final rule incorporates the “share or codetermine” standard in newly revised Sec. 103.40(b). However, in Sec. 103.40(c), the final rule 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, and it is contrary to the understanding of the very court that announced it, which defined the “share or codetermine” standard as a shared “exert[ion]” of “significant control” over a group of employees. NLRB v. Browning-Ferris Industries of Pennsylvania, 601 F.2d at 1124.

449 The Board in TLI reached this conclusion notwithstanding the language of the applicable contract, which provided that the putative joint employer “will solely and exclusively be responsible for maintaining operational control, direction, and supervision” over the supplier’s drivers. Id. at 796. As explained above, this is consistent with the historical treatment of reserved authority to control as generally being insufficient to support joint-employer status absent evidence of substantial direct control. The Board also noted that the presence of the putative joint employer’s representative at two bargaining sessions did not alter the outcome, as “there [was] no evidence that he demanded specific reductions or that he made particular proposals.” Id. at 799.
Third Circuit’s definition of the “share or codetermine” standard and, in general, the Board’s pre-1984 joint-employer decisions. In AM Property Holding Corp., 350 NLRB 998, 1001 (2007), the Board explained that it has “generally found supervision to be limited and routine where a supervisor’s instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.” It further explained that “[i]n assessing whether a joint employer relationship exists, the Board has not merely on the existence of . . . contractual provisions [governing the right to approve hiring], but rather looks to the actual practice of the parties.” Id. at 1000.

In Airborne Express, 338 NLRB 597 (2002), the Board adopted the judge’s finding that there was no joint-employer relationship, based in part on evidence that the putative joint employer entered into contracts that explicitly afforded the independent contractors full and complete control over hiring, firing, discipline, work assignment, and other terms and conditions of employment. Id. at 605. The Board noted that “the essential element in this analysis is whether a putative joint employer’s control over employment matters is direct and immediate.” Id. at 597 n.1, see also Flagstaff Medical Center, 357 NLRB 659, 667 (2011) (“[T]he evidence regarding Sodexho’s role in hiring, discharging, disciplining, supervising, and evaluating housekeepers does not establish that Sodexho shared or codetermined control over at least one or more essential and determinative terms and conditions of employment.”)

During this time period, no appellate court criticized the Board’s formulation of the joint-employer standard. As the BFI dissents observed, if it were true that TLI, Laerco, and subsequent decisions departed without explanation from the Board’s prior joint-employer precedent, some court of appeals would have taken issue: “It is simply impossible that all the courts of appeals would have missed this train wreck.” BFI, 362 NLRB at 1633 (Members Miscimarra and Johnson, dissenting).

The final rule’s reliance on independent-contractor precedent to support their standard for determining joint-employer status is misplaced. The majority’s legal justification for abandoning the requirement that a putative joint employer actually exercise some control over at least one term or condition of employment of another employer’s employees boils down to a misplaced reliance on broad statements in cases where the issue presented is whether certain individuals are employees or independent contractors. Based on a review of judicial decisions and commentaries of law addressing common-law principles pertinent to deciding that issue, my colleagues say that they are “not aware 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.” They miss my point, however, by conflating separate and distinct points. The issue here is not whether actual exercise of control by a putative employer is required to make a worker an employee of that employer and not an independent contractor. The issue is whether a worker who is undisputedly an employee of one entity is jointly employed by a second entity.

My colleagues acknowledge that these are distinct issues. They must do so, as the D.C. Circuit has emphatically rejected any attempt to equate them. See Browning-Ferris Industries of California, Inc. v. NLRB, 911 F.3d at 1213 (“Browning-Ferris cites no case in which we have applied an employee-or-independent-contractor test to resolve a question of joint employment, and we have found none.”) Yet, immediately following the statement quoted above—which, again, is based on precedent that addresses the employee-or-independent-contractor issue—my colleagues leap to the conclusion that they are statutorily precluded from requiring actual exercise of control to establish that an entity is a joint employer. In other words, the majority acknowledges the distinction between the employee-or-independent-contractor issue and the joint-employer issue and erases the distinction practically in the same breath. To stay within the boundaries of the common law as regards joint-employer status, they should not—indeed, must not—promulgate a rule that permits that status to be predicated solely on a never-exercised reservation of right to control and/or indirect control where judicial decisions in joint-employer cases do not go that far—and as I explain below in the section after this one, they do not.

Moreover, my colleagues’ reliance on independent-contractor precedent to set the standard for determining joint-employer status depends on equating “right to control” for purposes of deciding employee-or-independent-contractor issues with contractually reserved authority to control the terms and conditions of employment of another business’s employees—but the equation does not hold. As the majority emphasizes, courts have explained that workers are employees rather than independent contractors if the putative employer possesses a right to control their manner and means of performance, regardless of whether that right is exercised. However, the independent-contractor cases make clear that in that context, a finding of “right to control” is a legal conclusion based on a totality-of-the-circumstances analysis applying twelve factors culled from the federal common law of agency to the facts of the case. See, e.g., Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751–752 (1989) (listing the relevant factors). And, as the Supreme Court recognized, “no one of these factors is determinative.” Id. at 752. If, on balance, an analysis of the facts of a case in light of these multiple factors supports a finding that the hiring party has the right to control the manner and means of the worker’s performance, then the hiring party is the worker’s employer regardless of whether it exercises its right to control her manner and means of performance, but the details of her work. In short, the “right to control manner and means of performance” under independent-contractor precedent is one thing, and a never-exercised contractual reservation of right to affect one or more essential terms and conditions of employment of another employer’s employees is quite another. The majority simply errs in treating these two distinct legal doctrines as equivalent.

450 In Airborne, the Board said that about twenty years earlier, it had “abandoned its previous test in this area, which had focused on a putative joint employer’s indirect control over matters relating to the employment relationship.” Id. (emphasis in original). Frankly, I believe this statement mischaracterized the Board’s earlier joint-employer precedent. As shown above, that precedent did not focus on indirect control. Those cases ascribed some significance to indirect control, but they did not find indirect control to be outcome-determinative absent evidence of direct control.

451 Those factors are (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 employees; (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. One reason that judicial precedent distinguishing between independent contractors and employees is ill-suited to fully resolve joint-employer issues is that independent-contractor
That entity has engaged the worker (sole putative employer over the putative employee, i.e., exercises direct control of at least two things that two parties. To be sure, the Court’s analysis focused hired) an individual to sell its sewing machines and the company. There, the company engaged (the written terms of a contract between the worker employee, not an independent contractor, based on Rahn, v. independent-contractor context but in the joint-employee context as well. In Singer Mfg. Co. v. Al-Saffy v. Frey v. Horizons, Inc., EEOC VHS San Antonio, LLC, 990 F.3d 918 (5th Cir. 2017); Quality Care Investors, L.P., 843 F.3d 256 (4th Cir. 2016); Al-Saffy v. Tuesday Morning, Inc., v. Felder, v. Berg, 990 F.3d 918 (5th Cir. 2017) (focusing on the extent to which the putative joint employer exercised control over the essential terms and conditions of employment of another company’s employees. Courts have considered a host of factors (e.g., control exercised over hiring, firing, and day-to-day supervision), drawing guidance from Supreme Court precedent distinguishing between independent contractors and employees, but tailoring the analysis to account for the joint-employer context, i.e., workers who are undisputedly an employee of one employer but who may have a second, joint employer. Courts consider the totality of the circumstances, with no one factor being determinative, in ascertaining whether the putative joint employer has exerted a sufficient amount of control over the workers at issue to be deemed their joint employer. Generally speaking, they have emphasized the extent of the putative joint employer’s active role in hiring and firing the workers at issue and in supervising their manner and means of performance.

Applying common-law principles, every circuit court that has decided joint-employer issues under statutes materially similar to the NLRA applies a significantly more demanding joint-employer standard than the one promulgated by my colleagues today.458

My colleagues cite a plethora of decisions (including state law cases more than a hundred years old), the overwhelming majority of which focus on independent contractor, workers’ compensation, and tort liability matters. Although these cases are informative regarding the contours of the master-servant doctrine with respect to individuals allegedly in employment relationship with a single entity, they have limited utility where workers are unquestionably employees of one entity, and the issue is whether a second entity jointly employs them. My view here is fully consistent with that of the D.C. Circuit in Browning-Ferris Industries of California, Inc. v. NLRA. As the court there stated, “Browning-Ferris’s contention that the independent-contractor and independent-contractor tests are virtually identical lacks any precedential grounding. Browning-Ferris cites no case in which we have applied the employee- or contractor test to resolve a question of joint employment, and we have found none.” 911 F.3d at 1213.

See, e.g., Hust v. McDonough, 2022 U.S. App. LEXIS 9725 (10th Cir. Apr. 12, 2022); Felder v. U.S. Tennis Assn., 27 F. 4th 634 (2d Cir. 2022); Perry v. VHS San Antonio, LLC, 990 F.3d 918 (5th Cir. 2021); Nethery v. Quality Care Investors, L.P., 814 Fed. Appx. 97 (6th Cir. 2020); EEOC v. Global Horizons, Inc., 915 F.3d 631 (9th Cir. 2019); Frey v. Hotel Coleman, 903 F.3d 671 (7th Cir. 2018); Garcia-Celestino v. Ruiz Harvesting, Inc., 843 F.3d 123 (1st Cir. 2016); Stump v. United Parcel Service, Inc., 876 F.3d 85 (D.C. Cir. 2016); Faush v. Tuesday Morning, Inc., 808 F.3d 208 (3d Cir. 2015); F.3d at 405 (finding no joint-employer relationship where the putative joint employer “did not exert such control over [the employee’s] performance of her job duties as to establish an employment relationship”). The Second Circuit asks whether two or more entities “share significant control” over the same employees, examining thirteen non-exhaustive factors, with no single factor being decisive, and focusing on the extent to which control was exercised. Felder, 27 F.4th 843–844 (finding no joint-employer relationship despite fact that the putative joint employer exercised control by preventing its subcontractor from referring a particular worker for assignment). The Third Circuit focuses on which entity paid workers’ salaries, hired, fired, and supervised their daily employment activities. Faush, 808 F.3d at 216 (holding that district court erred in granting summary judgment in favor of joint-employer that had given employee assignments, directly supervised him, provided site-specific training, furnished necessary equipment and materials, and verified the number of hours he had worked on a daily basis). The Fifth Circuit applies a “hybrid” test that focuses on the right to hire, fire, supervise, and set work schedules, and on which entity paid the employee’s salary, withheld taxes, provided benefits, and set the terms and conditions of employment. Perry, 990 F.3d at 928–929 (finding that hospital was not joint employer of physician supplied to it by professional association despite fact that hospital had exercised its limited contractual right to ‘fire’ [him] by requesting that the professional association terminate his professional services agreement”). The Sixth Circuit asks whether two entities share or codetermine those matters governing essential terms and conditions of employment, examining a putative joint employer’s exercise of its ability to hire, fire or discipline employees, and measuring this through a combination of information and benefits, and direct and supervise their performance. EEOC v. Skanska USA Building, Inc., 550 Fed. Appx. 253, 256 (6th Cir. 2013) (finding that general contractor was joint employer of

457 29 U.S.C. 794. In contrast, under the Fair Labor Standards Act, 29 U.S.C. 621 et seq., the joint-employer doctrine is not limited by common-law agency principles. See, e.g., Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 137 (4th Cir. 2017) (“We adopt the proposition that a court (or the Board) must or should find that one entity is a joint employer of another entity’s employees based exclusively on a never-exercised contractual reservation of right to control. 458 The First Circuit examines fifteen factors, which “are to be weighed in their totality,” with a stated emphasis on the extent to which the putative joint employer controls the manner and means by which the worker completes the work. 807 F.3d at 405 (finding no joint-employer relationship where the putative joint employer “did not exert such control over [the employee’s] performance of her job duties as to establish an employment relationship”).
Not a single circuit has held or even suggested that an entity can be found to be the joint employer of another entity's employees based solely on a never- exercised contractual reservation of right to affect essential terms or on "indirect control," i.e., conduct other than actually determining (alone or in collaboration with the undisputed employer) employees' essential terms and conditions of employment.\(^{450}\)

Illustrative is Felder v. U.S. Tennis Assn., 27 F.4th at 842–844. In that case, the Second Circuit articulated for the first time its standard for analyzing joint-employer status under Title VII. After surveying the legal landscape, the court explained that it will find a joint-employer relationship "when two or more entities, according to common law principles, share significant control of the same employee." Importantly, the court quoted with approval cases from other circuits requiring proof that the putative joint employer "exercised[d] significant control."\(^{460}\) The court explained that, "[b]ecause the exercise of control is the guiding indicator, . . . any relevant factor may be considered so long as [it is] drawn from the subcontractor's elevator-operator employees because it had "supervised and controlled the operators' day-to-day activities without any oversight from the [subcontractor]," "routinely exercised its ability to direct and supervise the operators' performance," and "set the operators' hours and daily assignments." The Seventh Circuit applies five factors: (1) the extent of the putative joint employer's control and supervision of the worker, including scheduling and manner and means of performance of work; (2) the kind of occupation skill required, including whether skills are obtained in the workplace; (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations; (4) method and form of payment and benefits; and (5) length of job commitment or any expectation. Frey, 903 F.3d at 676. The court explained that in applying its five-factor test, it "looks to see whether the putative employer exercised sufficient control." Id. at 676. The Ninth Circuit focuses on "the extent of control that one may exercise over the details of the work of the other," "with no one factor being decisive." Global Horizons, Inc., 915 F.3d at 638. The Tenth Circuit applies the "share or codetermine" standard and looks to whether both entities "exercise[d] significant control."\(^{461}\) Adams v. C3 Pipeline Constr. Inc., 30 F.4th at 943, 961 (10th Cir. 2021).

The majority dismisses the Seventh Circuit’s decision in Whitaker because, they say, the court "drew its articulation of the joint-employer standard from a Board decision" applying Laerco. What my colleagues fail to acknowledge, however, is that the court adopted that standard as circuit law. Moreover, the Seventh Circuit in Whitaker did not rely on Board precedent for its holding that joint-employer status requires that an entity must exercise control to be deemed a joint employer. See Whitaker, 772 F.3d at 810–811 ("[W]e . . . have held, however, that for a joint-employer relationship to exist, each alleged employer must exercise control over the working conditions of the employee, although the ultimate determination will vary depending on the specific facts of each case.")

The standard promulgated today, which does not require proof of any exercise of control, is strikingly inconsistent with the standards applied by the federal courts of appeals when applying common-law agency principles to determine joint-employer status. As summarized above, federal appellate courts have repeatedly focused on the extent to which a putative joint employer has exercised control. In contrast, the standard my colleagues promulgate resembles the substantially easier-to-satisfy standard applicable under the Fair Labor Standards Act, where "economic reality . . . is to be the test of employment." Goldberg v. Whittaker House Co-op., Inc., 366 U.S. 28, 33 (1961) (internal quotation marks omitted). "Because of the uniqueness of the FLSA, a determination of joint employment [under that statute] 'must be based on a consideration of the total employment situation and the economic realities of the work relationship.'"\(^{462}\) In re Enterprise Rent-A-Car Wage & Employment Practices Litigation, 683 F.3d 462, 469 (3d Cir. 2012) (quoting Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983)). Application of a control-based test "would only find joint employment where an employer had direct control over the employee, but the FLSA designates those entities with sufficient indirect control as well." Id. at 469.

\(^{450}\) The majority disputes this statement, citing EEOC v. Global Horizons, Inc., 915 F.3d at 631. That case does not support my colleagues' position, for reasons explained below.

\(^{460}\) The court in Felder, id. at 843–844, cited Knitter v. Corvis Mat. Living, LLC, 758 F.3d 1214, 1226 (10th Cir. 2014) (quoting Bristol v. Bd. of Caty. Comm'n of Caty. of Clear Creek, 312 F.3d 1213, 1218 (10th Cir. 2002)). Under the joint employer test, two entities are considered joint employer . . . .

\(^{461}\) My colleagues' overly selective reading of the Title VII cases is unpersuasive. Despite their best efforts, my colleagues' parsing of isolated words or phrases does not detract from the primary theme in the Title VII cases that exercise of control is the "guiding indicator." Felder, 27 F.4th at 844; id. at 847 ("Absent further allegations that the USTA would have significantly conditioned the manner and means of Felder's work as a security guard, the complaint does not cross the line from speculative to plausible on the essential Title VII requirement of employment relationship in the terms added.") Additionally, my colleagues say that in some of the Title VII cases I cite above, the courts applied a standard that incorporates an "economic realities" test, and those cases cannot inform the Board's formulation of a joint-employer standard under the NLRA because Congress, in the Taft-Hartley Act, repudiated the "economic realities" test the Supreme Court applied in NLRB v. Hearst Publications, 322 U.S. 111 (1944). Once again, the majority is crossing its wires between independent-contractor law and joint-employer law. In Hearst, the Court applied an "economic realities" standard to determine employee-or-independent-contractor status under the NLRA. In Title VII cases, circuit courts apply an "economic realities" test to discern whether a putative joint employer actually exercised control over essential terms and conditions of employment of another employer's employees. See, e.g., Perry v. VHS San Antonio, Ltd., 490 U.S. 735, 739 (1989); "The 'joint employer' standard comprises the 'hybrid economic realities/common law control test' focuses on who paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment.") Here again, my colleagues' insistence on basing a joint-employer standard on independent-contractor precedent leads them astray.
Notably, in contrasting the breadth of the FLSA’s economic-realities standard with the common-law test, the Third Circuit quoted its earlier—and leading—decision on the joint-employer standard under the NLRA, writing that under the Act, “the alleged [joint] employer must exercise ‘significant control.’ ” Id. at 468 (quoting Browning-Ferris Industries of Pennsylvania, 691 F.2d at 1124).463

As the preceding discussion demonstrates, in eliminating the requirement that a putative joint employer must be shown to have exercised substantial direct and immediate control over the essential terms and conditions of employment of another entity’s employees, my colleagues have gone beyond the boundaries of the common law.464 They fail to support their repeated declarations that common-law agency principles compel the Board to adopt a standard that does not require proof that an entity actually exercised control over the employment terms and conditions of another employer’s employees before it will be found to be their joint employer. This is fatal to the majority’s final rule. In enacting the Taft-Hartley Act, Congress made clear that under the NLRA, the common law of agency is the controlling standard.460 and “’an agency regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it was not based on the [agency’s] own judgment but rather on the unjustified assumption that it was Congress’ judgment that such [a regulation is] desirable or required.” Transitional Hospitals Corp. of La. v. Shalala, 222 F.3d 1019, 1029 (D.C. Cir. 2000) (quoting Prill v. NLRB, 755 F.2d 941, 948 (D.C. Cir. 1985)). Today’s final rule is based on such an unjustified assumption.

The Final Rule Is Unsound as a Matter of Policy

In a couple of paragraphs, my colleagues do very briefly pay lip service to a backup position that, even assuming the 2020 Rule is permissible under the Act, they would rescind it and promulgate their final rule for policy reasons. In this regard, my colleagues assert that the final rule “advances the Act’s purposes to ensure that, if they choose, all employees have the opportunity to bargain with those entities that possess the authority to control or exercise the power to control the essential conditions of their working lives,” and that the final rule “may particularly benefit vulnerable employees who are overrepresented in workplaces where multiple firms possess or exercise control, including immigrants and migrant guestworkers, disabled employees, and Black employees and other employees of color.” But these are mere conclusory remarks. My colleagues do not support their assertions; they dismiss commenters’ weighty policy-based criticisms of the rule as “misdirected”;

463 Even under the economic-realities standard applicable under the FLSA, the Third Circuit in Enterprise Holdings, Inc. was not a joint employer of the employees of its wholly owned subsidiaries (rental-car facilities), despite its potential impact on their essential terms and conditions of employment. Among other significant actions, the parent corporation recommended salary ranges for the corporation recommended salary ranges for the

464 Contrary to my colleagues’ assertion, the final rule’s elimination of the actual-exercise requirement finds no support in EEOC v. Global Horizons. In that case, it was undisputed that two companies operating orchards (the “Growers”) were joint employers of workers from Thailand supplied by Global Horizons. The only issue presented in EEOC v. Global Horizons was “whether the EEOC plausibly alleged that the Growers were also joint employers with respect to non-orchard related matters.” Id. The court’s analysis of that issue was shaped, as it had to be, by federal regulations governing the H–2A guest worker program. First, under those regulations, an “employer” is required to provide H–2A guest workers certain benefits, including housing, meals, and transportation. “The H–2A program thus expands the employment relationship between an H–2A employer and its workers to encompass housing, meals, and transportation, even though those matters would ordinarily fall outside the realm of the employer’s responsibility.” Id. at 640. Second, H–2A regulations define the term “employer” as an entity that, among other things, “has an employer relationship with respect to employees . . . as indicated by the fact that it may hire, pay, supervise or otherwise control the work of any such employee.” Id. (quoting 20 CFR 655.100(b) (emphasis added). In other words, H–2A regulations define employer status with reference to control essential terms and conditions of employment. It was in this unique context that the court stated that “[t]he power to control the manner in which housing, meals, transportation, and wages were provided to the

460 See NLRB v. United Insurance Co. of America, 390 U.S. at 256.
It is difficult to imagine a better recipe than today’s final rule for injecting chaos into the process and procedure of collective bargaining that the majority claims to promote. Accordingly, the final rule is contrary to the national labor policy Congress established, which is 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). Moreover, collective bargaining was intended by Congress to be a process that could codetermine the employees’ wages.

It follows that § 301 of the LMRA, as interpreted by this Court, is the second entity bound by the agreement’s wage terms despite its refusal to agree to them. How will the rules of impasse and implementation upon impasse apply in this scenario? My colleagues fail to consider the implications of their final rule for collective bargaining. 

467 I do not agree that making it more difficult for parties to reach agreement through collective bargaining advances the concept of “meaningful” bargaining.

468 See, e.g., Comments of the National Waste and Recycling Association and the American Hospital Association.

469 Federal courts have indicated that a non-signatory joint employer may be bound by a collective-bargaining agreement signed by the direct employer and the union representing the jointly-employed workers. See Armogida v. Jobs with Justice, Inc., 2022 U.S. Dist. LEXIS 174658 at *13 (S.D. Ind. Sept. 26, 2022) (“[A] party may be bound by a labor contract by virtue of its status as a “joint employer” with a signatory of the contract.”); Mason Tenders Dist. Council v. CAC of N.Y., Inc., 46 F. Supp. 3d 432, 438 n.13 (S.D.N.Y. 2014) (“Since joint employer status functions, in cases like the one at bar, to bind a non-signatory to the terms of an otherwise-operative collective bargaining agreement, a typical scenario would focus on whether that non-signatory . . . could properly be treated as a joint employer.”) [emphasis in original]; Newmark & Lewis, Inc. v. Local 814, Teamsters, 776 F. Supp. 102, 106 (E.D.N.Y. 1991) (federal court jurisdiction under LMRA Sec. 301 includes determining whether a non-signatory to a collective-bargaining agreement is contractually obligated to arbitrate under joint-employer theory); Central States, Southeast & Southwest Areas Pension Fund v. International Comfoart Products, LLC, 787 F. Supp. 2d 696, 702 (M.D. Tenn. 2011) (“[E]ven if it is clear that § 301 of the LMRA binds a joint employer to the terms of a collective bargaining agreement signed by a co-employer, the phrase another way, § 301 creates an ongoing duty for a joint employer to abide by the terms of its employees’ collective bargaining agreement, regardless of whether that employer signed the agreement.”) (citing Metro Detroit Bricklayers District Council v. J.H. Hoetger & Co., 672 F.2d 580, 583 (6th Cir. 1982)) (“We recognize that courts have generally held that [Sec. 301] creates federal jurisdiction only over parties to the contract being sued upon. However, since the primary issue in this case was whether Hoetger was a joint employer such that it could be bound by the collective bargaining agreement, we conclude that the district court had jurisdiction under § 301(a) to decide this claim.”)).

The possibility that a joint employer could be bound to a collective-bargaining agreement to which neither negotiated nor signed strongly counsels against the majority’s decision to permit a joint-employer finding to be made absent any exercise of control whatsoever over the covered employees. Indeed, given that the final rule is to be applied retroactively, it is all but certain that countless employers—that have never been identified as a joint employer nor exercised any control over another employer’s employees—will now be required to adhere to the terms of other parties’ collective-bargaining agreements.

470 See, e.g., Colgate Palmolive-Peet v. NLRB, 338 U.S. 355, 360 (1949) (“To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.”).

471 It is evident that the final rule is likely to create significant delay for parties as they endeavor to reach final collective-bargaining agreements. For example, should a labor union insist on the participation of a joint employer that has never directly exercised any control over any essential term and condition of employment of another employer’s employees, and that entity refuses to bargain based on its conviction that it is not a joint employer, bargaining between the undisputed employer and the union will be delayed while the union files an unfair labor practice charge and the issue is litigated to a final determination, possibly including litigation in the courts. It is self-evident that such delay to the collective-bargaining process could be substantial.

472 See, e.g., Central Taxi Service, 173 NLRB 826, 827 (1968); Checker Cab Co., 141 NLRB 583, 586–587 (1963), enf’d, 367 F.2d 692 (6th Cir. 1966); see also CID—SAM Management Corp., 315 NLRB 1256, 1256 (1995).

473 My colleagues say that they “see little risk of ensnaring neutral employers in labor disputes” because “[w]hen more than one entity jointly employs particular employees, those entities are not neutral, and the prohibitions on secondary activity do not apply, regardless of what joint-employer standard is applied.” Obviously, however, the point I am making and that my colleagues do not dispute is that, by eliminating the actual-exercise requirement, the majority’s relaxed standard will...
The majority’s final rule will also discourage efforts to rescue failing businesses. Suppose a unionized company that supplies employees to “user” businesses is going under and seeks a buyer to acquire its assets. If that supplier is independent of the user businesses it supplies, the usual rules of successorship would apply. A prospective buyer would understand that if a majority of its post-acquisition workforce consists of former employees of the seller, it would have to recognize and bargain with the incumbent union and it would also understand that it cannot discriminate in hiring to avoid that duty, but it would not have to assume the seller’s collective-bargaining agreement, and it would be free to set its own initial terms and conditions of employment unilaterally. See NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987). The Supreme Court created this framework in part on the public policy of facilitating the rescue of “moribund” businesses. Burns, 406 U.S. at 287–288 (“A potential employer may be willing to take over a moribund business only if he can make changes . . . . Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.”).

All this changes, however, if user businesses are deemed joint employers of the supplier’s employees, a scenario the final rule will make far more common. For the sake of simplicity, assume that only one such joint-employer user business exists. (In the real world, there would likely be multiple joint employers, upping the complications.) If a user business is a joint employer of the supplier’s employees, it will likely be a joint employer of the supplier’s successor’s employees, and its ongoing duty to bargain bridging the two supplier employers would prevent the successor from setting initial terms and conditions of employment different from those of the predecessor. See Whitewood Maintenance Co., 292 NLRB 1159, 1168–1169 (1989) (holding that contractor that substituted one subcontractor for another jointly

render many more businesses joint employers despite them never having played any role in actually exercising control over any term or condition of employment of another employer’s employees. By drawing such businesses into labor disputes not their own, the final rule diminishes Sec. 8(b)(4)’s protection against picketing and boycotts.

employed both the old and new subcontractors’ employees, so the new subcontractor could not set its own initial terms), enfld. 928 F.2d 1426 (5th Cir. 1991). Moreover, it is no answer to say that the user business could prevent this “bridging” by subcontracting the work performed by the supplier’s employees to the employees of a different supplier because, as the joint employer of the employees of its existing supplier, it would have a duty to bargain with their union representative over that subcontracting decision and its effects. See Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964). Accordingly, by making scenarios like this far more likely than under the 2020 Rule, the majority’s final rule will discourage attempts to rescue failing businesses.

In short, policy considerations militate against the majority’s radical expansion of the joint-employer doctrine. Any purported benefit of eliminating the requirement that control actually be directly exercised is nominal at best and is outweighed by the detrimental consequences outlined above. In my view, retaining the 2020 Rule would better promote the policies of the Act and public policy generally. But in this section of my dissent, I have barely scratched the surface of the adverse consequences that predictably will flow from the final rule, consequences that commenters have brought to the Board’s attention, to no avail. To these, I turn next.

The Majority Fails Adequately To Respond to Public Comments

My colleagues briefly describe, but proceed to disregard as irrelevant, a variety of public comments regarding the new rule’s likely impact on businesses generally and on those in specific sectors of the economy where the joint-employer issue frequently arises. For example, some commenters predict that the Board’s new joint-employer standard will disincentivize conduct that tends to improve the workplace, like providing training sessions; undertaking safety and health initiatives; and developing corporate social responsibility programs, including diversity, equity, and inclusion initiatives. Others predict that the new rule will discourage larger companies from entering into contracts with smaller third parties to perform work, which would tend to harm business owners from underrepresented communities. Still others say that the new rule will make it more difficult for companies to make labor-related changes to address labor shortages or deal with fluctuating seasonal demand for labor.

What is the majority’s response to these and other legitimate objections to their rule? My colleagues brush them aside, stating that “insofar as the Act itself requires the Board to conform to common-law agency principles in adopting a joint-employer standard, these concerns seem misdirected.”

The majority similarly disregards the effects of the new rule on businesses in specific sectors of the economy. Although my colleagues express an awareness of “commenters’ concerns that the joint-employer standard we adopt in this final rule might have unwanted effects on their businesses,” they conclude that there is “no clear basis in the text or structure of the Act for exempting particular groups or types of employers from the final rule.” More decisively, they believe “that these concerns reflect considerations that, as a statutory matter, may [not] determine the Board’s choice of a joint-employer standard.”

When the majority dismisses commenters’ objections as “misplaced” or says that they may not determine the choice of a joint-employer standard “as a statutory matter,” they mean, of course, that the common law of agency, and therefore the Act itself, precludes the standard the Board implemented in the 2020 Rule and compels the standard they promulgate today. But as I have shown, they are mistaken: the final rule is not compelled by the common law of agency and the Act. Accordingly, the majority has no valid basis for refusing to respond to the substance of the comments and therefore has failed to fulfill its statutory duty under the Administrative Procedure Act to provide a reasoned response to these comments.474

Moreover, the question here is not whether the Board should craft industry-specific joint-employer standards or exceptions.475 Rather, the point is that, in crafting a single, generally applicable joint-employer

474 “[I]n reviewing rules promulgated under the notice and comment rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (‘APA’), courts must assure that the agency has provided a reasoned explanation for its rule. In particular, a reasoned explanation for agency action must be based on a consideration of relevant factors . . . . [A]n agency decision may not be reasoned if the agency ignores vital comments regarding relevant factors, rather than providing an adequate rebuttal.” Western Coal Traffic League v. U.S., 677 F.2d 915, 927 (D.C. Cir. 1982) (citations omitted); see also Alternate Fuels, Inc. v. Lujan, 1992 U.S. Dist. LEXIS 15785 (D. Kan. Sept. 22, 1992) (“An agency should rebut vital relevant comments. The opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”) (citations omitted).

475 Indeed, the 2020 Rule does not include industry-specific carveouts.
standard within the boundaries of the common law, the Board should—indeed, must—consider the substance of vital comments opposing as well as supporting the proposed rule. Having dismissed those comments on the erroneous ground that their hands are tied by the common law, my colleagues have conspicuously failed to do that here. And the legitimate objections to the proposed rule articulated in numerous major comments further persuade me that the final rule, in addition to being statutorily precluded, is unsound as a matter of policy.

One illustrative example is the negative impact of the rule on the construction industry. As several commenters note, due to the particular nature of this industry, multiple employers typically operate on a given project.

Multi-employer worksites are common in the construction industry, where a general contractor coordinates the work of multiple subcontractors, sometimes in multiple tiers. Each of these parties typically remains the sole employer of its own employees. But a general contractor must exert a degree of control over subcontractors and their employees to ensure that work on a given project meets efficiency, quality, and safety benchmarks. In fact, project owners routinely require general contractors to sign standard-form agreements, which obligate the general to reserve and exercise some level of control over their subcontractors’ employees, arguably impacting essential terms and conditions of employment. Illustrative are several provisions in two standard contracts widely used in the construction industry:

- “The Contractor shall enforce strict discipline and good order among the Contractor’s employees and other persons carrying out the work. The Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.”
- “The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the contract.”
- “Unless the Contract Documents instruct otherwise, the general contractor shall be responsible for the supervision and coordination of the work, including the construction

Under the final rule, there is a significant risk that these and similar standard contract provisions will be found to vest in the general contractor reserved authority to control hiring, supervision, discipline, and discharge of its subcontractors’ employees—not to mention authority to control “working conditions related to the safety and health of employees”—making the general contractor a joint employer of every single employee who performs work on the project.

This puts the final rule at odds with the Supreme Court’s decision in NLRB v. Denver Building & Construction Trades Council, 341 U.S. at 689–690. There, the Court stated that “the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor’s work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other.” The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.” (emphasis added). My colleagues address Denver Building Trades by construing it narrowly, but this will not do. The Court held that the general contractor was not the joint employer of its subcontractor’s employees simply because it exercised “some supervision over the subcontractor’s work,” but under the final rule, a general contractor will be the joint employer of its subcontractors’ employees where it exercises no supervision over subcontractors’ work but merely possesses a contractually reserved authority to affect subcontractors’ employees’ terms and conditions of employment. If Denver Building Trades precludes finding a general contractor a joint employer where it exercises some supervision over work performed by employees of the subcontractors, it must also preclude finding a general contractor a joint employer where it exercises no supervision over work performed by employees of the subcontractors. The final rule cannot be reconciled with Denver Building Trades.

The majority has similarly afforded insufficient attention to the impact of the final rule on the franchise industry. As numerous commenters note, the majority’s rule compromises the viability of franchises nationwide in key respects. Unsurprisingly, commenters warn the Board that the rule’s vast reach creates a significant risk that many franchisors will be held liable as joint employers of their franchisees’ employees. For example, McDonald’s LLC informs us that all its franchisees have unfettered discretion to hire, assign work, set wages, benefits, and schedules, and carry out day-to-day supervision. Yet McDonald’s franchise system—typical of countless others—requires franchisees to adhere to strict brand standards. The majority says that “many forms of control that franchisors reserve to protect their brands or trade or service marks . . . will typically not be indicative of a common-law employment relationship.” But they decline to “categorically state that all forms of control aimed at protecting a brand are immaterial to the existence of a common-law employment relationship.” And it is entirely foreseeable that franchisors’ monitoring of franchisees’ cleanliness and hygiene protocols to protect brand standards would make franchisors joint employers of their franchisees’ employees under either or both of two newly adopted essential employment terms: “work rules and directions governing the manner, means, or methods of work performance” and/or “working conditions related to the safety and health of employees.” Commenters predict that franchisors will respond in one of two ways. Some will exert much greater control over their franchisees, effectively turning previously independent owners of franchises into glorified managers; others will distance their franchisees by denying them guidance—particularly with respect to human resources—previously furnished, forcing franchisees to incur the expense of obtaining that guidance from other sources, i.e., labor and employment attorneys. Both outcomes are bad. Many commenters also highlight the disproportionate impact that the final rule will have on members of minority groups.

Several commenters warn the Board that the staffing industry will be
severely impaired by the final rule.\textsuperscript{481} Staffing firms play a significant role in the economy by recruiting and hiring employees and placing them in temporary assignments with a wide range of clients on an as-needed basis.\textsuperscript{482} Under the final rule, virtually every client of a staffing firm predictably will be the joint employer of that firm’s supplied employees. The client will at least reserve authority to control and/or indirectly control at least one essential employment term, and probably more than one (e.g., hours of work and scheduling; tenure of employment; possibly “work rules and directions governing . . . the grounds for discipline”). I have already described the deleterious consequences the final rule predictably will have in the user employer/supplier employer setting, and staffing firms are a subset of the broader “supplier employer” category. Those consequences, particularly the prospect of getting trapped in a contractual relationship from which it cannot readily extricate itself, will incentivize user businesses to avoid contracting with staffing firms altogether, whether or not those firms are unionized. Contracting with a firm whose employees are unrepresented is no guarantee of protection, since there’s always the risk that those employees will choose representation. Rather than run the risk of incurring joint-employer status of a staffing firm’s employees—a risk that the final rule increases dramatically—user businesses might well decide to bring their contracted-out work in-house, to the detriment of staffing firms generally and the broader economy. Moreover, where the costs to the (former) user business of bringing work in-house exceed the costs of contracting out that work, the impact may be felt by the (former) user businesses’ own employees. As one commenter cautions, “[a]s in any case where a business is forced to incur unexpected costs, it will be forced to look for other ways to remain profitable. Often this leads to reduced headcount or other cost-saving measures that could impact workers.”\textsuperscript{483} In addition, the final rule will negatively impact the healthcare sector.

As several commenters point out, the rule’s unprecedented elevation of indirect control and reserved authority to control to dispositive status in the joint-employer analysis risks encroaching on a host of business relationships that hospitals rely on to provide lifesaving patient care.\textsuperscript{484} For instance, since the onset of the Covid–19 pandemic, many hospitals have utilized contracted labor in the form of travel nurses to fill critical staffing gaps.\textsuperscript{485} Travel nurses typically sign a contract with a staffing agency to occupy a temporary position at a hospital that can range in duration from several days to a few months.\textsuperscript{486} Under the final rule, a hospital that maintains (or merely has the authority to maintain) work rules and schedules for travel nurses on its premises will be their joint employer and duty-bound to bargain with the union that represents nurses directly employed by the staffing agency. Moreover, travel nurses are required to comply with the health and safety policies of the hospital where they work, which may impose more stringent requirements than those mandated by law. Again, under the final rule, the maintenance of these policies will make the hospital the joint employer of those nurses. The problematic consequences are not difficult to imagine. Among other things, all the adverse consequences discussed above with respect to businesses in the user employer/supplier employer context apply here as well, and coming to grips with those takes time and costs money. As one commenter accurately observes, “[c]ollective bargaining is difficult enough when just one employer sits across the table and approaches issues and proposals with a unitary perspective. When a union must simultaneously bargain with two, three, or four employers whose interests and priorities do not align, finalizing an agreement will be orders of magnitude more difficult.”\textsuperscript{487} This observation applies to any industry but is particularly troubling in the healthcare space. The potential adverse consequences of the final rule on critical patient care warrant the most serious consideration,\textsuperscript{488} and my colleagues do not give them that attention because, they say, it cannot be helped because the common law and the Act leave them no other choice. For reasons already explained, they are wrong.

\textsuperscript{481} See, e.g., Comments of American Staffing Association; U.S. Chamber of Commerce; American Hospital Association; FMI—Food Industry Association; National Association of Manufacturers; Clark Hill PLC.

\textsuperscript{482} The importance of staffing firms to the health of the economy is difficult to overstate. As one commenter explains, they are crucial to ensuring that food is delivered to consumers in a timely fashion despite the persistence of significant supply chain disruptions. See Comment of FMI—Food Industry Association.

\textsuperscript{483} See Comment of Clark Hill PLC.

\textsuperscript{484} See, e.g., Comments of U.S. Chamber of Commerce; American Hospital Association.


\textsuperscript{487} See Comment of American Hospital Association.

\textsuperscript{488} See the Board’s Second Notice of Proposed Rulemaking on Collective-Bargaining Units in the Health Care Industry, 53 FR 33900, 33909 (1988); “In view of Congressional concern in the health care amendments with the ability of health care institutions to deliver uninterrupted health services, it is relevant to consider whether multiple units increase costs to health care institutions so as to disrupt the stability of the institutions.”

\textsuperscript{489} Comment of American Hospital Association.

\textsuperscript{490} The role of increased work stoppages, which will likely occur as a result of the rule, is easy to glean from recent events. See, e.g., Nurses end nearly 10-month strike at Tenet Healthcare-owned hospital. Dallas Morning News (Jan. 5, 2022), https://www.dallasmorningnews.com/business/local-companies/2022/01/05/nurses-end-nearly-10-month-strike-at-tenet-healthcare-owned-hospital/ (noting that a dozen inpatient behavioral health beds were closed due to staffing challenges presented by the strike).
The Majority Erroneously, and Unreasonably, Expands and Modifies the List of “Essential” Terms and Conditions of Employment

The Board should not make “working conditions related to the safety and health of employees” an essential term and condition of employment. I disagree with several of the changes my colleagues make to the list of essential terms and conditions of employment, but the most problematic of the bunch is their decision to make “working conditions related to the safety and health of employees” an essentially new term and condition of employment. Doing so is not compelled or supported by common-law agency principles, and it is unwise as a matter of policy. The majority fails to cite a single court case identifying working conditions related to employees’ health and safety as an essential term and condition of employment.493 Further, in light of the significant federal regulatory obligations in the area of workplace safety, cited by many commenters, the majority fails to explain why, in their view, an entity’s exercise of control over or reservation of authority to control the workplace safety and health of another entity’s employees should create joint-employer status.

The Occupational Safety and Health Act, 29 U.S.C. 654, obligates employers to protect the safety and health of not only their own employees but also the employees of other entities in the workplace. Under section 654:

(a) Each employer—
(1) 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;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

To be sure, an employer’s duty under subsection (a)(1)—known as the general duty clause—is owed only to its own employees. However, subsection (a)(2) “does not limit its compliance directive to the employer’s own employees, but requires employers to implement the Act’s safety standards for the benefit of all employees in a given workplace, even the employees of another employer.” Universal Construction Co. v. OSHRC, 182 F.3d 726, 728 (10th Cir. 1999). In short, federal law requires employers to exert control over the workplace health and safety of workers employed by other employers—and in complying with its statutory and regulatory obligations, an employer might need to exercise discretion.492 Additionally, an employer/property owner who adopts certain safety rules to satisfy its general-duty obligation to its own employees under section 654(a)(1) is also likely to require others on its premises to abide by these safety rules, and doing so has been found not to create joint-employer status. Knitter v. Corvias Military Living, LLC, 758 F.3d at 1230 (finding no joint-employer status despite company’s exercise of control over workplace safety because company “naturally would be concerned about [vendor’s] safety, even if only for liability purposes, just as they would for any employee or non-employee on premises.”). Businesses are required by law to protect the safety of their own employees, and my colleagues say that measures required by law will not evidence joint-employer status—but the court’s reasoning in Knitter exposes the inadequacy of that argument. As the court points out, a business will apply its workplace safety measures to everyone on its property, for liability purposes if for no other reason, regardless of whether it is compelled to do so by statute or regulation. And by doing so it will become, under the final rule, the joint employer of everyone on its property that is employed by another entity.493

492 For example, a number of OSHA standards establish alternative methods by which an employer can satisfy its duties, which, as explained above, are owed to other employees’ employers on a multi-employer worksite. See, e.g., 29 CFR 1926.55 (“Cases, vapors, fumes, dusts, and mists: To achieve compliance with paragraph (a) of this section, administrative or engineering controls must first be implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section.”); 29 CFR 1926.56(l) (“Design of support systems, shield systems, and other protective systems. Designs of support systems, shield systems, and other protective systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (c)(1); or, in the alternative, paragraph (c)(3); or, in the alternative, paragraphs (c)(3) and (c)(4) as follows: . . . ”). The fact that an employer has discretion in this regard arguably makes the majority’s carveout for measures that are legally required of one company.

493 In support of its position, the majority merely cites the general statement in the Restatement (Second) of Agency, section 2, that a servant is an agent employed by a master to perform service in his affairs whose “physical conduct in the performance of the service” is controlled by the master. That citation is insufficient to justify the majority’s decision. And as numerous commenters point out, a variety of courts have rejected the notion that an entity’s control over workplace safety tends to prove a joint-employer relationship. See, e.g., Comment of New Civil Liberties Alliance and the Institute for the American Worker (citing cases). The majority’s decision to make “working conditions related to the safety and health of employees” an essential term and condition of employment is also at odds with the Occupational Safety and Health Administration’s guidance on the duties owed by employers on multi-employer worksites.494 That guidance does not contemplate that one company is or becomes the joint employer of another company’s employees by virtue of the control it possesses or exercises over workplace safety measures.

OSHCA’s guidance identifies four types of employers on a multi-employer worksite: the creating employer, the exposing employer, the correcting employer, and the controlling employer. Id. The creating employer is an employer that caused a hazardous condition that violates an OSHA standard. The exposing employer is an employer whose own employees have been exposed to the hazard. The correcting employer is an employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting the hazard. And the controlling employer is an employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them. Each type of employer owes duties to employees. The extent of an employer’s duties depends on its proper categorization, and an employer may have multiple roles. Id. In Universal Construction Co. v. OSHRC, 182 F.3d at 726, the court held that a general contractor in the construction industry (Universal) was citable for hazardous conditions created by a subcontractor where only the subcontractor’s employees had been exposed to the danger. The court explained that under 29 U.S.C. 654(a)(2), a general contractor—the controlling employer in the foregoing scheme—is responsible for safety violations that it could reasonably have been expected to prevent or abate by reason of its supervisory capacity, to them that it owes to its own directly employed employees under the Occupational Safety and Health Act and its implementing regulations! However, I doubt that the property owner would be heard to contend that its joint-employer status is negated the very instant it is created by virtue of the final rule’s carveout for workplace safety measures compelled by law. Whether or not such an argument, strictly speaking, would be circular, it would certainly be given to rotation.

regardless of whether it created the hazard or whether its own employees had been exposed to the hazard. Id. at 732. Under the final rule my colleagues promulgate today, which renders “working conditions related to the safety and health of employees” an essential term and condition of employment, a general contractor in Universal’s shoes would become the joint employer of the employees directly employed by the “exposing employer” subcontractor—and possibly employees directly employed by every subcontractor on the project—if it exercised discretion in responding to the hazardous condition or went beyond the minimum required by law. This is not consistent with Supreme Court precedent. See NLRB v. Denver Building & Construction Trades Council, 341 U.S. at 689–690 (“[T]he fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor’s work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other”).

Additionally, a number of commentators point out that treating “working conditions related to the safety and health of employees” as an essential term and condition of employment creates a perverse incentive for companies to avoid protecting the employees of other employers or to avoid maintaining safety standards or applying safety measures that are any more protective than legally-mandated minimums. As stated by one commenter, “[p]lacing the regulated community in a position where they must choose between robust workplace health and safety standards contractually mandated and monitored on the one hand and, on the other hand, a potential joint employer classification over individuals whom all involved considered to be employees of only one employer, is bad public policy.”

These comments, which resonate with me, are not satisfactorily addressed by the majority.

Other changes to the list of essential terms and conditions invite mischief. I also disagree with the majority’s decision to add “work rules and directions governing the manner, means, or methods of the performance of duties and the grounds for discipline” to the list of essential terms and conditions of employment. My concern is with the phrase “work rules . . . governing . . . the grounds for discipline,” which brings to mind the Board’s history of policy oscillation regarding the proper analysis of workplace rules that allegedly interfere with protected activity. See Stericycle, Inc., 372 NLRB No. 113 (2023) (Member Kaplan, dissenting). The final rule’s incorporation of this phrase invites unions to comb through a putative joint employer’s manuals in search of ambiguous language, argue that workers employed by another entity (i.e., supplied employees performing work for a putative-joint-employer user business) “could” reasonably interpret the language to interfere with protected activity, and rely on it to support a joint-employer finding. Such an argument would have legs regardless of whether the user employer actually applied its workplace rules to employees of a supplier employer because even if it did not (which seems unlikely), it would possess the authority to do so.

Finally, I believe that my colleagues’ substitution of “hiring” and “discharge” as essential terms and conditions of employment under the 2020 Rule with “the tenure of employment, including hiring and discharge” (emphasis added) will be used to make general contractors in the construction industry joint employers. I leave it to those more deeply conversant with the workings of the construction industry to flesh out the implications of such a scenario. I will note, however, that under John Deklewa & Sons, 282 NLRB 1375, 1377–1378 (1987), enfd. sub nom. Iron Workers, Local 3 v. NLRB, 843 F.2d 770 (1st Cir. 1988), employers that are party to a Sec. 8(f) collective-bargaining agreement can withdraw recognition from the union and change their employees’ terms and conditions of employment upon the expiration of the 8(f) agreement. But a general contractor that, by virtue of its indirect control over “tenure of employment,” becomes a joint employer of employees of its subcontractors’ employees. I leave it to those more deeply conversant with the workings of the construction industry to flesh out the implications of such a scenario. I will note, however, that under John Deklewa & Sons, 282 NLRB 1375, 1377–1378 (1987), enfd. sub nom. Iron Workers, Local 3 v. NLRB, 843 F.2d 770 (1st Cir. 1988), employers that are party to a Sec. 8(f) collective-bargaining agreement can withdraw recognition from the union and change their employees’ terms and conditions of employment upon the expiration of the 8(f) agreement. But a general contractor that, by virtue of its indirect control over “tenure of employment,” becomes a joint employer of employees of its subcontractors’ employees. I leave it to those more deeply conversant with the workings of the construction industry to flesh out the implications of such a scenario. I will note, however, that under John Deklewa & Sons, 282 NLRB 1375, 1377–1378 (1987), enfd. sub nom. Iron Workers, Local 3 v. NLRB, 843 F.2d 770 (1st Cir. 1988), employers that are party to a Sec. 8(f) collective-bargaining agreement can withdraw recognition from the union and change their employees’ terms and conditions of employment upon the expiration of the 8(f) agreement. But a general contractor that, by virtue of its indirect control over “tenure of employment,” becomes a joint employer of employees of its subcontractors’ employees. I leave it to those more deeply conversant with the workings of the construction industry to flesh out the implications of such a scenario.

497 See Comment of the American Trucking Association and National Association of Manufacturers.

498 Contrary to my colleagues’ assertion, my disagreement here is not “principally semantic.” As I explained, the majority’s inclusion of “the tenure of employment, including hiring and discharge” significantly broadens the potential scope of essential terms and conditions of employment compared to the 2020 Rule’s more clearly defined set. The majority’s statement that it refers to “the range of actions that determine or alter an individual’s employment status” provides no further definition, and does not foreclose the possibility that this essential term could be used to make general contractors in the construction industry joint employers of every single one of its subcontractors’ employees. I leave it to those more deeply conversant with the workings of the construction industry to flesh out the implications of such a scenario. I will note, however, that under John Deklewa & Sons, 282 NLRB 1375, 1377–1378 (1987), enfd. sub nom. Iron Workers, Local 3 v. NLRB, 843 F.2d 770 (1st Cir. 1988), employers that are party to a Sec. 8(f) collective-bargaining agreement can withdraw recognition from the union and change their employees’ terms and conditions of employment upon the expiration of the 8(f) agreement. But a general contractor that, by virtue of its indirect control over “tenure of employment,” becomes a joint employer of employees of its subcontractors’ employees. I leave it to those more deeply conversant with the workings of the construction industry to flesh out the implications of such a scenario.

I genuinely wonder whether a potential joint employer will flag blatant safety violations like this with as much urgency after their final rule takes effect.
therefore the NLRA itself, common-law agency principles, and the majority has taken the position that absent any rule whatsoever, joint-employer status would be determined through case-by-case adjudication applying the common law of agency. Rather than specify how common-law principles will be applied in determining joint-employer status, provides that the final rule simply incorporates the common law of agency by reference in no fewer than three places. Section 103.40(a) of the final 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(e) of the final 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 Section 103.40(f) of the final 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 (which the majority has mischaracterized), since the final rule by its terms provides no other guidance. This is precisely how the determinations would be made if there were no rule at all. The final 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 (and remained within) the boundaries established by the common law. For all these reasons, the 2020 Rule indisputably provided parties with greater certainty and predictability than they would have if joint-employer status were decided by adjudication. The final rule, on the other hand, does not.

Although 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, the majority fails to acknowledge that today’s final rule provides less guidance for the regulated community than did 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 cases, just as if there were no joint-employer rule at all. Most of all, they fail to show that there are good reasons for the final rule because their primary supporting rationale—that the final rule is compelled as a matter of law—is wrong, and their alternative supporting rationale—that the final rule is superior to the 2020 Rule as a matter of policy—is cursory at best and fails to reckon with the substance of vital comments that attack the rule on policy grounds. For all these reasons, the final rule is arbitrary and capricious.

The Majority’s Final Regulatory Flexibility Analysis Is Arbitrary and Capricious

My colleagues err in asserting that their final joint-employer rule will not have a significant economic impact on a substantial number of small entities. In their view, “[t]he only direct compliance cost for any of the 6.1 million American business firms (both large and small) with employees is reading and becoming familiar with the text of the new rule.” They peg that familiarization cost at $227.98, reading and becoming familiar with the rule in all these respects. As
human resources specialist or labor relations specialist and an hour-long consultation between that specialist and an attorney. As the public comments make clear, the majority grossly underestimates the actual costs that small businesses will incur to familiarize themselves with the final rule. It is not clear how a human resources specialist will be able to read the rule, which nearly 63,000 words in length, in an hour, let alone comprehend the full ramifications of its changed legal standard in this complicated area of the law.

More importantly, my colleagues erroneously deem irrelevant (for purposes of a regulatory flexibility analysis) certain direct costs of compliance that the rule imposes on small businesses. The final rule will transform many small businesses that were not joint employers under the 2020 Rule into joint employers, with an entirely new duty to engage in collective bargaining. This will impose direct compliance costs in two ways. First, to determine whether they would be subject to that duty, small businesses will have to review their existing business contracts and practices to determine whether they possess any reserved authority to control or exercise any indirect control over any essential term and condition of employment of another business’s employees, neither of which could alone establish joint-employer status under the 2020 Rule but either of which will make an entity a joint employer of another business’s employees under the majority’s final rule. Second, small businesses whose joint-employer status has been changed by the final rule and that contract with an employer whose employees are unionized will be required to participate in collective bargaining, as mandated by new Section 103.40(h).

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601–612, “obliges federal agencies to assess the impact of their regulations on small businesses.” United States Cellular Corp. v. FCC, 254 F.3d 78, 86 (D.C. Cir. 2001). Among other things, the Regulatory Flexibility Act requires that a federal agency issuing a rule under the Administrative Procedure Act publish an initial regulatory flexibility analysis, consider the comments received in response, and publish a final regulatory flexibility analysis (FRFA) when promulgating its final rule. See 5 U.S.C. 603, 604. An agency’s FRFA must meet certain statutory requirements. It must state the purpose of the final rule and, if possible, the estimated number of small businesses that it will affect. Additionally, each FRFA must summarize comments filed in response to the agency’s initial regulatory flexibility analysis, along with the agency’s assessment of those comments. Finally, each FRFA must include “a description of the steps the agency has taken to minimize the significant economic impact” that its rule will have on small businesses, “including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the alternatives to the rule considered by the agency which affect the impact on small entities was rejected.” 5 U.S.C. 604(a)(6). An agency is excused from conducting a FRFA only if “the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b).

Although the requirements of the Regulatory Flexibility Act are “purely procedural,” National Telephone Cooperative Assn. v. FCC, 563 F.3d 536, 540 (D.C. Cir. 2009), the Administrative Procedure Act, 5 U.S.C. 553, prohibits agency actions that are arbitrary and capricious, and “the APA together with the Regulatory Flexibility Act require that a rule’s impact on small businesses be reasonable and reasonably explained.” Id. A regulatory flexibility analysis is, for APA purposes, part of an agency’s explanation of its rule. Id. (citing Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 519 (D.C. Cir. 1983); so Thompson v. Clark, 741 F.2d 401, 405 (D.C. Cir. 1984) (“[I]f data in the regulatory flexibility analysis—or data anywhere else in the rulemaking record—demonstrates that the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious, the rule cannot stand.”)). Further, the Regulatory Flexibility Act specifically provides for judicial review and authorizes a reviewing court to take corrective action, including remanding the rule to the agency and deferring enforcement of the rule against small entities (unless the court finds that continued enforcement of the rule is in the public interest). 5 U.S.C. 611(a)(4).

According to numerous commenters, the Board’s initial regulatory flexibility analysis ignored significant direct compliance costs and drastically underestimated the costs that small businesses will incur to familiarize themselves with the rule.500 My colleagues fail to correct the defects identified by the commenters, and their assessment of the rule’s costs is so unreasonable as to render their FRFA arbitrary and capricious.

In its FRFA, the majority acknowledges that the Regulatory Flexibility Act requires agencies to consider “direct compliance costs.” But the majority asserts that “the RFA does not require an agency to consider speculative and wholly discretionary responses to the rule, or the indirect impact on every stratum of the economy,” and it treats bargaining expenses as falling into this category. The majority is wrong on this point. The final rule will dramatically increase the number of entities that will be deemed joint employers by changing the status of entities that merely possess an unexercised contractual right to control one or more essential terms and conditions of employment of another company’s employees, as well as entities that have exercised some amorphous “indirect control,” a term that may apply to landlords of cabins. Such entities, which were not joint employers under the 2020 Rule, now will be and, under Section 103.40(h), will be obligated to bargain with unions representing their business partners’ employees. Reviewing existing contracts and practices is not a “discretionary response” to the rule because a business must determine whether it has a duty to bargain. And for those that have that duty, placing an agent at the bargaining table also will not be a “discretionary response” to the rule. They will have to participate in collective bargaining as set forth in Section 103.40(h) of the final rule, on pain of violating Section 8(a)(5) if they fail to do so. Good-faith bargaining for a collective-bargaining agreement can take months, even years, and can entail hundreds of hours of negotiations.501 The cost of paying a representative to be at the table, bargaining in good faith, will be substantial. These compliance costs will be especially difficult to bear for small businesses that do not independently meet the discretionary monetary standards for the Board to assert jurisdiction but will become subject to its jurisdiction by virtue of the Board’s

Bankers Association, National Federation of Independent Business; National Association of Convenience Stores; McDonald USA, LLC, and The Colorado Bankers Association.


500 See comments of the U.S. Small Business Administration Office of Advocacy, Wyoming
practice of combining gross revenues of joint employers for jurisdictional purposes. My colleagues err in ignoring these direct compliance costs for purposes of their FRFA.

In deeming these direct costs of compliance irrelevant, my colleagues cite a quartet of cases: Mid-Tex Electric Cooperative, Inc. v. FERC, 773 F.2d 327 (D.C. Cir. 1985); White Eagle Cooperative Assn. v. Conner, 553 F.3d 467 (7th Cir. 2009); Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855 (D.C. Cir. 2001); and Colorado State Banking Board v. Resolution Trust Corp., 926 F.2d 931 (10th Cir. 1991). These cases do not support the majority’s position. In three of them, the court held that under the Regulatory Flexibility Act, an agency must consider direct compliance costs imposed by the rule on small entities subject to its regulation but need not consider the costs imposed on unregulated entities. See Mid-Tex Electric, 773 F.2d at 342 (holding that FERC need not consider indirect impact of its regulation, which governed electrical utilities, on those utilities’ small wholesale and retail customers because the latter were not subject to the rule); White Eagle Cooperative Assn., 553 F.3d at 478 (holding that USDA need not consider the indirect impact that a rule governing milk handlers would have on small milk producers not subject to the rule); Cement Kiln Recycling Coalition, 255 F.3d at 869 (rule more stringently regulated emissions for hazardous waste combustors; no need to consider indirect impact of the rule on generators of hazardous waste not subject to the rule). In the fourth case, Colorado State Banking Board, the court held that a federal agency had properly certified that the rule at issue, which authorized banks to operate failed savings and loans, imposed no direct compliance costs on regulated parties. 926 F.2d at 948. Here, in contrast, it is beyond dispute that small businesses subject to the Board’s jurisdiction are governed by the final rule, unlike the challengers in Mid-Tex Electric, White Eagle Cooperation, and Cement Kiln Recycling Coalition. And unlike in Colorado State Banking Board, it is equally beyond dispute that the final rule, by converting small businesses that were not joint employers under the 2020 Rule into joint employers and imposing a bargaining obligation on them, will impose direct compliance costs on those entities as described above.

Unlike the inapposite cases on which the majority relies, AFL–CIO v. Chertoff, 552 F. Supp. 2d at 1013–1014 (N.D. Cal. 2007), speaks directly to the issue at hand. In that case, the court issued a preliminary injunction against the Department of Homeland Security (DHS) based on serious concerns that it had violated the Regulatory Flexibility Act by failing to consider certain costs of compliance imposed on small businesses. As shown below, AFL–CIO exposes the inadequacy of my colleagues’ FRFA analysis.

Before the district court was a final rule promulgated by DHS that defined “knowing” for purposes of the statutory prohibition on knowingly hiring or continuing to employ an unauthorized alien under the Immigration Reform and Control Act, 8 U.S.C. 1324a (IRCA). The rule provided that “knowing” includes constructive knowledge and that receipt of a no-match letter from the Social Security Administration could contribute to a finding of constructive knowledge. However, the rule included a safe-harbor provision that precluded DHS from relying on an employer’s receipt of a no-match letter to prove constructive knowledge were the employer had taken certain steps. Specifically, the no-match letter could not be used to establish constructive knowledge if the employer checked its records for error within 30 days of receipt of the letter and, if no error was found, if it asked the employee to confirm her information and advised the employee to resolve the discrepancy with the Social Security Administration within 90 days of receipt of the letter. The Secretary of Homeland Security certified that the rule would not have a significant economic impact on a substantial number of small entities, and therefore DHS did not conduct a FRFA. Id. at 1012.

A consortium of unions and business groups moved for a preliminary injunction, contending among other things that the rule was promulgated in violation of the Regulatory Flexibility Act because DHS had failed to consider significant compliance costs that the rule imposed on small businesses. The court granted the plaintiffs’ motion, finding that small businesses could “expect to incur significant costs associated with complying with the safe harbor rule.” Id. at 1013. Those costs included the cost of dedicating human resources staff to track and resolve mismatches within the 90-day time limit, of hiring “legal and consultancy services” to help employers comply with the safe-harbor provision, and of training in-house counsel and human resources staff. Id. The court rejected DHS’s claim that the safe-harbor provision would impose no costs on small entities because compliance was “voluntary”:

It is true that the safe harbor rule does not mandate compliance. This Court’s “concern, however, is with the practical effect . . . of the rule, not its formal characteristics.” Chamber of Commerce of the United States v. United States DOL, 174 F.3d 206, 209 (D.C. Cir. 1999). Because failure to comply subjects employers to the threat of civil and criminal liability, the regulation is “the practical equivalent of a rule that obliges an employer to comply or to suffer the consequences; the voluntary form of the rule is but a veil for the threat it obscures.” Id at 210. The rule as good as mandates costly compliance with a new 90-day timeframe for resolving mismatches. Accordingly, there are serious questions whether DHS violated the RFA by refusing to conduct a final flexibility analysis.


Here, the compliance costs imposed on small businesses by the majority’s final rule are even more direct than some of the compliance costs imposed by the safe-harbor provision of the final rule at issue in AFL–CIO. Under the DHS rule, an employer would not have to assign human resources staff to deal with no-match letters within safe-harbor time limits until it actually received a no-match letter following the effective date of the rule. Accordingly, the costs of doing so were not imposed by issuance of the DHS rule without more. Under my colleagues’ final rule, in contrast, the compliance costs described above are imposed by issuance of the rule without more. This is so because the final rule immediately makes joint employers of many small businesses that were not joint employers under the 2020 Rule. And these new joint employers include some that immediately incur a duty to bargain and are immediately exposed to unfair labor practice liability if they fail to comply with that duty. The majority is simply wrong in suggesting that the costs of determining whether that duty exists and of complying with it if it does are the result of discretionary choices.502

502My colleagues unpersuasively attempt to distinguish AFL–CIO v. Chertoff on the ground that the agency in that case made a “procedural error” (emphasis added) by certifying the rule as not having a significant impact on a substantial number of small entities instead of conducting an initial or final regulatory flexibility analysis. My colleagues point out that they have performed that analysis. But they concede that, in AFL–CIO v. Chertoff, the agency’s error was its failure to consider certain direct compliance costs imposed by the rule at issue, and my colleagues commit the same error. They fail to acknowledge that their final rule imposes certain direct compliance costs on regulated entities. My colleagues incorrectly treat the costs of evaluating business contracts and the expenses and the knowledge that the bargaining representative at the table as “indirect costs” and deem them irrelevant to a regulatory flexibility analysis. It is immaterial whether one characterizes

Continued
Further, the majority underestimates the final rule’s familiarization costs. In its FRFA, the majority estimates that small businesses will take “at most one hour to read the text of the rule and the supplementary information published in the Federal Register,” and they unjustifiably assume that all small businesses have human resources or labor relations personnel to carry out this task. The majority also estimates that one hour will suffice for a consultation between a small employer and an attorney. Citing hourly wage figures from the Bureau of Labor Statistics (BLS), the majority assesses the total compliance costs to be between $208.60 and $227.98.

In my view, the majority’s estimate is absurdly low. The length of time it would take an employer’s representative to read the rule and its accompanying supplemental information and adequately absorb it, even with the assistance of an attorney, will surely exceed the two hours the majority

that error as “procedural” or “substantive” and equally immaterial whether an agency commits that error when certifying a rule as having no significant impact on a substantial number of small entities or when, as here, it conducts a FRFA and reaches the exact same conclusion. Simply put, by misclassifying direct costs as indirect costs, my colleagues have sidestepped their statutory obligation to thoroughly consider the potential effects of the steps the agency has taken to minimize the significant economic impact on small entities” imposed by their rule. 5 U.S.C. 604(a)(6).

There is also no merit to my colleagues’ position that AFL-CIO v. Chertoff is distinguishable on the ground that the rule there exposed regulated parties to civil and criminal liability where here, they say, their rule does neither. More specifically, they say that “[i]f a joint employer imposes a duty to bargain in good faith, but it is Sec. 8(a)(5) of the Act, and not the joint-employer rule, that imposes civil liability for refusing to bargain.” That may be, but it misses the point, which is that the final rule dramatically expands the universe of entities that are exposed to civil liability under Sec. 8(a)(5). Moreover, even Sec. 8(a)(5) is the ultimate source of potential liability, a statute—the IRCA, which makes it unlawful to knowingly employ an unauthorized alien—was similarly the ultimate source of liability in AFL-CIO v. Chertoff.

Further, my colleagues’ position finds no support in the Board’s statement in the 2020 Rule that “[u]nfair labor practice liability is the cost of not bargaining in good faith, but it is Sec. 8(a)(5) of the Act, and not the joint-employer rule, that imposes civil liability for refusing to bargain.” That may be, but it misses the point, which is that the final rule dramatically expands the universe of entities that are exposed to civil liability under Sec. 8(a)(5). Moreover, even Sec. 8(a)(5) is the ultimate source of potential liability, a statute—the IRCA, which makes it unlawful to knowingly employ an unauthorized alien—was similarly the ultimate source of liability in AFL-CIO v. Chertoff.

For two reasons, I am unpersuaded by my colleagues’ attempt to justify their one-hour reading estimate by pointing to an estimate contained in the 2020 Rule’s FRFA for the reading of that rule. First, the FRFA does not contain such an estimate. The FRFA does not even mention the Laffey Matrix. It states that “the time needed to become familiar with the FRFA…[is] 2018 U.S. Dist. LEXIS 183276, at *2 (W.D. Va. Oct. 25, 2018) (awarding the Agency attorneys’ fees based on a modified version of the Laffey Matrix); Frankl ex rel. NLRB v. HGH Corp., 2012 U.S. Dist. LEXIS 66761, at *18 (D. Haw. Apr. 23, 2012) (considering the Laffey Matrix but declining to apply it to determine rates for out-of-District attorneys). A cursory examination of the Laffey Matrix (and the other sources cited above) shows how out of sync the BLS-identified average wage rate for lawyers is with actual costs a small employer will incur to have an outside lawyer consult on a matter. For the most recent calendar year, the Laffey Matrix lists the hourly rate for an attorney with one to three years of legal experience as $413, and the hourly rate for a paralegal or law clerk as $225. The BLS average wage rate the majority relies on is just over one-third of the Laffey Matrix average wage rate for a paralegal. Even taking into consideration that billable-hour rates for attorneys who practice in the District of Columbia are higher than in many parts of the country, it is all but certain that the BLS wage rate of $78.74 is far less than small businesses will have to pay for an hour of legal

505 Contrary to my colleagues’ assertion, the Maloney article contains an adequate explanation of the methodology used: “ELM [i.e., ELM Solutions, a legal analytics company and source of the data used by the author] uses anonymized legal spend data from law firms’ e-billing and time management software to compile national average billing rates for partners, associates and paralegals, as well as rate data for specific markets, practices and types of matters. ELM said all the data in the report is derived “from the actual rates charged by law firm professionals as recorded on invoices submitted and approved for payment.”

services.\textsuperscript{507} And it is also all but certain that an attorney will need far more than one hour to analyze, and help her client understand, the impact of the final rule on her client’s business.

For these reasons, the majority’s FRFA is arbitrary and capricious.

Conclusion

For all the above reasons, I dissent from the majority’s decision to promulgate the final rule.

VIII. Other Statutory Requirements

A. The Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601–612, requires an agency promulgating a final rule to prepare a Final Regulatory Flexibility Analysis (FRFA) when the regulation will have a significant impact on a substantial number of small entities. An agency is not required to prepare a FRFA if the Agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). Although the Board believed that this rule would not have a significant economic impact on a substantial number of small entities, in the NPRM the Board issued its Initial Regulatory Flexibility Analysis (IRFA) to provide the public the fullest opportunity to comment on the proposed rule. See 87 FR 54659. The Board solicited comments from the public that would shed light on potential compliance costs that may result from the rule that it had not identified or anticipated. The RFA does not define either “significant economic impact” or “substantial number of small entities.”\textsuperscript{508} 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 position to gauge the small entity impacts of its regulations.”\textsuperscript{509} After reviewing the comments, the Board continues to believe that the only cost of compliance with the rule is reviewing and understanding the substantive changes to the joint-employer standard.

Given that low cost, detailed below, the Board finds that this final rule will not have a significant economic impact on any small entity. Nevertheless, the Board publishes this FRFA to acknowledge and respond to the comments received in response to the proposed rule.

1. Statement of the Need for, and Objectives of, the Rule

The final rule establishes the standard for determining, under the NLRA, whether a business is a joint employer of a group of employees directly employed by another employer. This rule is necessary to explicitly ground the joint-employer standard in established common-law agency principles and provide 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 employees’ essential terms and conditions of employment.

The guidance furnished by the final rule will enable regulated parties to determine in advance whether their actions are likely to result in a joint-employer finding, which may result in a duty to bargain collectively, exposure to what would otherwise be unlawful secondary union activity, and unfair labor practice liability. Accordingly, a final rule setting forth a comprehensive and detailed standard is important to businesses covered by the NLRA, employees of those businesses, and labor organizations that represent or seek to represent those employees. The final rule accomplishes these objectives by defining critical elements of the joint-employer standard and by enumerating the factors that will determine whether an entity is a joint employer.

2. Statement of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Statement of the Assessment of the Agency of Such Issues, and a Statement of any Changes Made in the Proposed Rule as a Result of Such Comments

a. Response to Comments Concerning the Direct Cost of Compliance

The only direct compliance cost for any of the 6.1 million American business firms (both large and small) with employees is reading and becoming familiar with the text of the new rule. That cost is too low to be considered “significant” within the meaning of the RFA. NPRM, 87 FR at 54662 (estimating compliance costs of $151.51 to small employers and $99.64 to small labor unions).\textsuperscript{510} Some commenters address the direct compliance costs that the Board estimated in its IRFA. Some of those comments criticize the Board’s assumption that reviewing the rule would only require one hour of reading time for a human resources specialist and that understanding the rule would only require a one-hour consult with an attorney.\textsuperscript{511} One comment argues that the one hour of reading time does not account for reviewing the materials referenced in the proposed rule, such as the Restatement of Agency, which would be necessary to determine whether an entity is a joint employer.\textsuperscript{512} Yet, without any empirical evidence to demonstrate that reading the text of the rule or meeting with an attorney to gain greater understanding of the rule would require more than one hour, the Board declines to change its estimates of the length of time it will take to do so. To the extent that comments are arguing that it will take longer than one hour for an attorney to analyze the application of

507 The LaFey Matrix is a useful but imperfect guide as it primarily focuses on the costs of civil rights and environmental litigation in the Washington, DC metropolitan area, not labor and employment counseling nationwide. Nevertheless, this database and others like it (including the Fitzpatrick Matrix, which the Department of Justice uses to calculate attorneys’ fees and is available at https://www.justice.gov/iso/ads-dc/file/118946/download) provide useful data points illustrating the inadequacy of the majority’s estimates. Relatedly, the majority notes that “[w]hile some commenters asserted that the wage rates for an attorney were at least $300/hour, none of the comments provided any evidence to which the Board could cite.” I believe that by identifying relevant sources of average billable rates nationwide, I have refuted my colleagues’ contention that small businesses will be able to secure a lawyer for about $78.74 per hour.


510 As stated in the Board’s IRFA, this minimal compliance cost does not increase for the small number of businesses that are alleged to be joint employers in Board proceedings. 87 FR 54661. Such allegations are not a consequence of the rule, but a consequence of members of the public filing charges that initiate Board investigations. In any event, they are rare. Between 2018 and 2021, only 0.15% of all 6.1 million American businesses were alleged to be joint employers in Board proceedings.\textsuperscript{511} Comments of Independent Bakers Association; Job Creators Network; Modern Economy Project; National Association of Convenience Stores; U.S. Chamber of Commerce. The U.S. Chamber of Commerce also asserts that large business firms will need even more time to read and review the rule and that a larger number of managers and professionals will be involved in the review, but the comment does not explain why this is so, which additional job classifications would be involved in reviewing the rule, how much more time would be required, or how many additional employees would have to read the rule. See comments of U.S. Chamber of Commerce.

512 Comments of Freedom Foundation.
the rule to an employer’s workforce,\textsuperscript{513} that is an issue of indirect cost, which is not considered under the RFA but will be discussed below.

The dissent also disagrees with our estimate of one hour to read the rule, but it does not support its assertion that such a determination is arbitrary or unreasoned. The estimate is consistent with the familiarization time estimated in prior Board rules. In 2018, the Board’s IRFA estimated that a labor compliance employee at a small employer could review the rule approximately 6,185 words—in “at most one hour.”\textsuperscript{83 FR 46695.} Receiving no evidence contradicting this estimate, the Board’s FRFA contained the same estimate.\textsuperscript{85 FR 11234.} No public comments have provided any empirical basis for an assertion that one hour would be insufficient to read this final rule (including preamble), which is approximately 61,476 words. Moreover, one hour is an average estimated amount of reading time for the approximately 6,119,657 entities the Board assumes would be subject to the rule. As discussed below, the Board has reason to believe that many small employers will not read the rule at all because they do not have any business relationships that would make this rule applicable to them, and others with a history of joint-employment relationships may spend more time reviewing the rule. One hour is simply a reasonable average.

In addition to criticizing the amount of time the Board estimates it will take to read and understand the rule, several commenters assert that the Board’s estimate of the cost of a human resources specialist and an attorney are too low.\textsuperscript{514} These commenters, however, provide no cost estimates for a human resources specialist.\textsuperscript{515} The current rule uses the figure from the Department of Labor’s Bureau of Labor Statistics (BLS) for a labor relations specialist, even though some small businesses may not have such a credentialed and experienced employee, because the national average wage rate for that position is comparable to that of all private sector employees. The average hourly wage for a labor relations specialist was last reported at $42.05; the average hourly wage for a private industry employee was last reported at $41.03.\textsuperscript{516}

Some commenters argue, without any evidence, that the cost of legal counsel is at least $300 per hour.\textsuperscript{517} The dissent attempts to buoy this argument, criticizing the Board for using the most recent data from the BLS. For each of the alternative methods that the dissent suggests, it does not explain why those sources are so superior to the BLS as to render the majority’s analysis arbitrary and capricious. The Bloomberg article claims to have compiled national average billing rates but only cites rates in atypically expensive markets—New York, Washington, DC, Chicago, and San Francisco—and provides little information on its survey subjects and research methodology. The Clio Legal Trends Report claims that the 1,168 consumers surveyed are representative of the U.S. population but does not provide any file or make the same claim for the 1,134 legal professionals who responded to the survey. In fact, in its detailed methodology, it acknowledges that the only customers included were paid subscribers to Clio, not those using a free trial or the Academic Access Program. Further, the report excluded data from customers who opted out of aggregate reporting. Finally, even though the dissent references the Laffey Matrix, which is guided by “the reasonably hourly rate prevailing in the community for similar work,” it also acknowledges that the rate is only applicable to attorneys in the D.C. area.

The remaining comments regarding

b. Response to Comments Concerning Indirect or Speculative Cost of Compliance

The remaining comments regarding the Board’s estimated compliance costs could require hiring a dedicated staffer, who would cost thousands of dollars per year.\textsuperscript{519} Other commenters fault the Board for undervaluing a small business owner’s time at just $151.51 per hour and for not taking into account the “full opportunity cost of lost overhead and profit contribution entailed by the diversion of labor from normal productive activity” to reading the rule.\textsuperscript{520}

None of these comments justify changes to the Board’s initial assumptions regarding the job classifications that would be involved in reading the final rule or the cost of that time. None of the comments provide evidence that the Board could use to reevaluate its estimated costs, which are derived from wage and benefit figures provided by the Department of Labor’s BLS.

Comments regarding the "full opportunity cost of lost overhead and profit contribution entailed by the diversion of labor from normal productive activity" misunderstand the Board’s calculus. The Board does not assume that these job functions are already being performed by a small business’s owner or employees. That is why the Board identifies the time spent reading and consulting about the rule as an additional cost of compliance rather than assuming that keeping abreast of changes in employment and labor law is already a part of a human resources specialist’s or in-house counsel’s job function. However, these comments have persuaded the Board to add to its assessment of direct compliance costs an additional hour of time for a human resources or labor relations specialist to meet with the attorney, rather than assuming that the one-hour consult is already part of that human resources or labor relations specialist’s job function. That addition is reflected in Section VI.A.5 below.

Other comments generally assert that the Board’s estimated compliance costs are inaccurate, and a new assessment of costs is required.\textsuperscript{521} They provide no detail or evidence to support their assertions.
concern indirect or speculative costs that are not direct costs of the rule.

Avoidance Costs. The majority of the remaining comments focus on the cost associated with avoiding a joint-employer relationship. For example, two commenters argue that the proposed rule increases the “price” for an employer to avoid joint-employer status because businesses that structured their relationships to avoid joint-employer liability under the 2020 rule will have to change existing policies, procedures, and contracts to achieve the same end under this final rule. Some commenters fear that the proposed rule will cause larger businesses to cancel contracts with smaller entities to avoid joint-employer status and the liability that comes with it. Other commenters count as compliance costs the cost of regularly hiring legal counsel to ensure that any change in supplier or contracts does not inadvertently create a joint-employer relationship. In the building industry, one commenter notes, there are several potential joint-employment relationships between builders and a multitude of subcontracted businesses that vary by jobsite. The increased number of business relationships at play, the commenter states, will make it more costly to obtain legal counsel to determine which entities will be classified as joint employers under the final rule.

Other comments focus on the possibility that larger companies and franchisors will provide less support to smaller companies, subcontractors, and franchisees to avoid liability for the smaller entities’ labor violations. These commenters predict that the proposed rule will result in a decrease in entrepreneurial opportunities for small businesses and contractors, which would result in economic inefficiencies as larger businesses and general contractors would supplant the work of smaller ones and no longer focus on their core competencies.

Conversely, one commenter notes, the proposed rule could result in a franchisor seeking to exert more control over its franchises. For example, in response to a single franchisee unionizing or engaging in collective bargaining, the franchisor could impose a standardized minimum wage at all its franchise locations.

Potential Legal Expenses. Commenters also assert that the proposed rule will increase an employer’s exposure to allegations of unfair labor practices, which will in turn increase insurance and legal costs for small businesses. Some commenters believe the costs will come from new or increased liability under the new rule. Other comments focus on the supposed vagueness of the proposed rule, arguing that it increases the likelihood of litigation over whether a business is a joint employer. Accordingly, these comments argue that the Board should have included as a compliance cost the cost of participating in a Board case. In support of this position, two comments note that, after Browning-Ferris issued, some franchisors claimed to experience a significant increase in joint-employer claims across all spectrums of the law and some franchisees incurred increased costs because they were compelled to seek outside guidance through attorneys or other consultants on matters in which the franchisor used to assist. Some commenters also note that every contract their companies enter into will need additional legal scrutiny for its possible exposure to a joint-employer finding or to determine whether they are required to be a party to another business’s collective-bargaining process.

Potential Costs If Entities Are Joint Employers Under the New Rule. If a party is determined to be a joint employer, it will have to allocate time and resources to collective bargaining and other costs associated with unionization efforts and elections, some commenters assert. The dissent also contemplates reviewing existing business contracts and participating in collective bargaining as direct compliance costs. Another commenter adds that unions will seek to exploit collective bargaining with franchisors to impose higher wages on small business franchisees. Yet another comment states that the Board failed to consider costs associated with revising or outsourcing training materials, such as training regarding operational best practices, guidance on employee handbooks or other personnel policies, and sample policies or best practices regarding workplace civil rights.

Respectfully, neither the dissent nor the foregoing comments raise direct economic impacts under the RFA. How a small entity structures its business relationships is discretionary. The rule sets forth no requirement that employers embrace or avoid joint-employer status. It merely brings the Board’s test for determining joint-employer status back in line with the common law, as interpreted by the District of Columbia Circuit in Browning-Ferris Industries of California, Inc. v. NLRB, 911 F.3d 1195 (D.C. Cir. 2018). If a regulated entity chooses to reevaluate its contractual or business relationships in light of the rule’s return to the common-law standard, that is a choice within its discretion, but it is not a direct compliance cost of the rule. Similarly, if an entity chooses to accept or dispute an allegation of joint-employer status in litigation or elsewhere, that is a discretionary choice. It is not required to do so under the rule. Moreover, the implications of that choice are entirely speculative. No commenter provided any quantifiable evidence demonstrating that a joint-employer finding inevitably increases costs on small businesses.

Our conclusion that the RFA requires agencies to consider only direct compliance costs finds support in the RFA, its caselaw, and guidance from the SBA’s Office of Advocacy. The RFA does not require an agency to consider speculative and wholly discretionary responses to the rule, or the indirect impact on every stratum of the economy. Section 603(a) of the RFA states that if an IRFA is required, it “shall describe the impact of the
proposed rule on small entities.” 5 U.S.C. 603(a). Although the term “impact” is undefined, its meaning can be gleaned from Section 603(b), which recites the required elements of an IRFA. One such element is “a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.” 5 U.S.C. 603(b)(4) (emphasis added).

Section 604 further corroborates the Board’s conclusion, as it contains an identical list of requirements for a FRFA (if one is required), 5 U.S.C. 604(b)(4).

The courts, too, have recognized that the statute only requires that the regulatory agency consider the direct burden that compliance with a new regulation will likely impose on small entities. See Mid-Tex Electric Cooperative, Inc. v. FERC, 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.”); accord White Eagle Cooperative Assn. v. Conner, 553 F.3d 467, 478 (7th Cir. 2009); Colorado State Banking Board v. Resolution Trust Corp., 926 F.2d 931, 948 (10th Cir. 1991).

Additional support for confining the regulatory analysis to direct compliance costs is found in an authoritative guide published by the SBA Office of Advocacy. The SBA Guide explains that “other compliance requirements” under section 603 include the following examples:

- (a) capital costs for equipment needed to meet the regulatory requirements;
- (b) costs of modifying existing processes and procedures to comply with the proposed rule;
- (c) lost sales and profits resulting from the proposed rule;
- (d) changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities;
- (e) extra costs associated with the payment of taxes or fees associated with the proposed rule; and
- (f) hiring employees dedicated to compliance with regulatory requirements.

SBA Guide at 37. These are all direct, compliance-based costs.

In the IRFA, the Board noted that the only identifiable compliance cost imposed by the proposed rule is reviewing and understanding the substantive changes to the joint-employer standard. 87 FR at 54659. Otherwise, there will be no “reporting, recordkeeping and other compliance requirements” for these small entities. See 5 U.S.C. 603(b)(4), 604(b)(4). The same is true of the final rule. The final rule imposes no mandatory capital costs or mandatory costs of modifying existing processes, results in no lost sales or profits, and creates no appreciable changes in market competition. See SBA Guide at 37. Lastly, there are no costs associated with taxes or fees and no costs for additional employees dedicated to compliance, as no compliance requirements exist. See id.

Consistent with these principles, the Board rejects the view that it must include all direct compliance costs employers’ discretionary responses to the rule, as suggested by the comments discussed above. See Mid-Tex Electric Cooperative, 773 F.2d at 343 (“Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.”). “[R]e[quiring] an agency to assess the impact on all of the nation’s small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.” Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855, 869 (D.C. Cir. 2001) (citing Mid-Tex Electric Cooperative, 773 F.2d at 343). The rule does not require contracting parties to alter their arrangements now or in the future. It therefore cannot be said that actions taken by employers to avoid a joint-employer relationship, or any costs associated with those actions or passed on to other entities because of that attempt at avoidance, is a direct cost of compliance with the rule.

Commenters also ask the Board to count as a direct compliance cost of the rule the cost of actions that other entities might take in response to the rule without any indication that those actions are required for compliance with the rule. These comments about what larger companies or franchisors might do to avoid joint-employer liability are speculative and too attenuated to be incorporated into the Board’s analysis of compliance costs with the rule. Many of these concerns are not even specific to joint-employer relationships. For example, the costs associated with opposing unionization efforts, participating in Board elections, and bargaining with employees’ duly elected representatives can exist even where no joint-employer relationship does.

The dissent takes issue with our citations to four cases, which were also cited in the IRFA of the 2020 rule: Mid-Tex Electric Cooperative Assn., Cement Kiln Recycling Coalition, and Colorado State Banking Board, and instead suggests that AFL–CIO v. Chertoff, 552 F. Supp. 2d 999 (N.D. Cal. 2007) is more instructive. The problem with the dissent’s objection to these cases is twofold. First, it mischaracterizes their use: the rule cites these cases because they hold that the RFA only requires an agency to consider the direct burden that compliance imposes on small entities, not every indirect effect that regulation might have on any other business, regardless of size and whether the entity is directly regulated by the rule. Compare 83 FR 46695 and 85 FR 11229 with 87 FR 54662.

Second, the dissent’s reliance on Chertoff is misplaced because, in that case, the agency made a procedural error by certifying the rule instead of conducting an initial or final regulatory flexibility analysis. 552 F. Supp. 2d at 1013. The agency’s rationale was that the rule did not place any new burdens on the employer or impose any new or additional costs because its new safe harbor procedure was voluntary. Id. But the court took exception with the agency’s refusal to consider the direct compliance costs raised by the plaintiffs. Id. Here, no such procedural errors exist because the Board has conducted an initial and final regulatory flexibility analysis, considered and engaged with all comments regarding the rule’s direct compliance costs, and found no evidence, only unsupported argument, contradicts its findings.

C. Response to Comments Concerning Potential Conflicts With Other Federal Laws

Some comments contend that the Board has failed to identify all relevantconflicts with other federal laws. For example, the comments note that the joint-employer rule might “displace” the NLRA. See, e.g., White Eagle Cooperative Assn., 553 F.3d at 476. The Board’s response is straightforward: the joint-employer rule does not conflict with the NLRA.

The Board also addressed this issue in its IRFA. 85 FR at 11230. The Board’s discussion is more robust than the dissent’s efforts to mischaracterize the Board’s analysis. The dissent’s only reference to this point is a citation to the dissent’s opening argument, which the dissent characterizes as a “broad strike.” Dissent at 50. The dissent’s argument is at best cursory and at worst misleading. The dissent notes that the Board has not addressed “all possible violations” of the NLRA. Id. The dissent’s argument is then limited to only a single possible violation: that the rule might “create an obligation to bargain with a union.” Id. This is misleading because the rule does not “create an obligation” to bargain and the Board’s analysis reflects this.

To the extent the dissent is correct that the Board has failed to identify “all possible violations” of the NLRA, the dissent is not correct. The Board has identified the single possible violation that the dissent has highlighted. The dissent’s response to the dissent is no response at all.}

540 Contrary to the dissent, it is material, if not dispositive, that Chertoff’s holding is limited to finding procedural error in DHS’s failure to conduct a regulatory flexibility analysis. In the context of a motion for a preliminary injunction, the court in Chertoff held only that, “‘there are serious questions whether DHS violated the RFA’ by failing ‘to conduct a final flexibility analysis’ that evaluated possible direct costs. 552 F. Supp. 2d at 1013. The Court never decided whether the proffered costs were actually direct costs under the Regulatory Flexibility Act.

541 Moreover, the agency’s argument in Chertoff that there were no compliance costs because the rule was voluntary is distinct from the voluntary nature of the joint employer rule. In that case, an employer’s failure to voluntarily comply with the regulation’s safe harbor procedure could have exposed the employer to civil and criminal liability. But the Board has no authority to impose criminal liability, and the joint-employer rule imposes no civil liability. Being a joint employer imposes a duty to bargain in good faith, but it is Sec. 8(a)(5) of the Act, and not the joint-employer rule, that imposes civil liability for failure to bargain. As the Board noted in the 2020 joint-employer rule, “[u]nfair labor practice liability is the cost of not complying with the NLRA, not a cost of compliance with the Board’s joint-employer rule.” 85 FR 11230.
rules and regulations that may “conflict with the proposed rule,” as section 603(b)(5) of the RFA requires, but those comments do not specifically identify any potential conflicts. One commenter argues that the proposed rule directly undermines the Lanham Act’s requirements that franchisors maintain control over the use of their marks and would penalize franchisors who maintain that control by labeling them joint employers. Another asserts that businesses will now need to reconcile the differences between how the Board and the Internal Revenue Service view employer relationships. And other comments argue that the proposed rule conflicts with the federal law requiring prime contractors to have indirect and reserved control over their subcontractors’ compliance with federal laws such as the Occupational Safety and Health Act, the Fair Labor Standards Act, the Davis-Bacon Act, and the prohibition of discrimination in hiring administered by the Department of Labor’s Office of Federal Contract Compliance Programs. These comments further argue that these required terms, which are also present in many third-party contracts, should be considered routine and not indicative of a joint-employer relationship.

According to the SBA Guide, at 40, rules are conflicting when they impose two conflicting regulatory requirements on the same classes of industry. None of the comments demonstrate a conflict under this definition. The comments do not cite the purportedly conflicting authorities (such as the Federal Acquisition Regulation or the Internal Revenue Code). In any event, it is axiomatic that the same term may have different meanings in different statutes, based on each law’s text, purpose, and legislative history. As we state above, the rule applies only to the NLRA, and commentators have not shown that, to the extent they exist, any dissimilar requirements would not be workable. Finally, because the final rule does not mandate that employers structure their business relationships in any particular manner, the final rule does not directly expose regulated entities to conflicting obligations. While entities may choose to rearrange their business relationships to avoid joint-employer status, that is distinct from a regulation obligating entities to engage in a particular business relationship.

3. Response of the Agency to any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule, and a Detailed Statement of Any Changes Made to the Proposed Rule in the Final Rule as a Result of the Comments

The SBA Office of Advocacy submitted a comment that expresses four main concerns that the proposed rule is so ambiguous and broad that it does not provide guidance on how to comply or avoid joint-employer liability, and that the Board should resolve purported conflicts with existing federal requirements, reassert the cost of compliance with the proposed rule, and consider significant alternatives that would accomplish the objectives of the NLRA while minimizing the economic impacts to small entities as required by the RFA. As discussed in Section II.B above, the final rule heeds the SBA Office of Advocacy’s request for more specific guidance in three ways: (1) § 103.40(d) of the final rule provides an exhaustive list of the seven categories of terms and conditions of employment that will be considered essential for the joint-employer inquiry; (2) § 103.40(e) of the final rule clarifies that, to establish joint-employer status, the common-law employer must possess exercised or unexercised authority to control, or exercise the power to control indirectly, such as through an intermediary, an essential term or condition of employment; and (3) § 103.40(f) of the final rule clarifies that evidence of an entity’s control over matters that are immaterial to the existence of an employment relationship under common-law agency principles and that do not bear on the employees’ essential terms and conditions of employment is not relevant to the determination of joint-employer status.

Contrary to the SBA Office of Advocacy’s second criticism, the final rule does not contain any conflicts with existing federal requirements. The SBA Office of Advocacy’s first asserted conflict is with federal requirements that require prime contractors to have indirect and reserved control over their subcontractor’s terms and conditions of employment, such as wages, safety, hiring, and firing, which is discussed in Section VI.A.2.c. above. The SBA Office of Advocacy’s second asserted conflict is that the proposed rule may conflict with a recent Presidential initiative to bolster the ranks of underserved small business contractors by discouraging mentorship and guidance from larger prime contractors. The NLRB strongly supports efforts to increase diversity and inclusion in federal contracting. The SBA Office of Advocacy’s comment, however, does not identify any way in which the final rule would prohibit larger contractors from offering mentorship and guidance to smaller contractors from underserved populations. Nor does its comment explain, as it implicitly suggests, how a larger contractor’s provision of mentorship and guidance to a smaller contractor could create a joint-employer relationship under the rule.

The SBA Office of Advocacy’s comment also asserts that the Board has underestimated the compliance costs of the final rule. However, the comment did not identify any direct compliance costs that the Board has overlooked and only mentioned indirect or inconsequential costs, which were raised by other commenters and addressed by the Board in Section VI.A.2.b above.

Finally, the comment twice encourages the Board to consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts on small entities, as required by the RFA, but provides no suggestions to that end. Consistent with the RFA’s mandate, the Board has considered such alternatives in Section VI.6 below.

4. 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 6,140,612 business firms with

542 Comments of Goldwater Institute; IFA; National Association of Insurance and Financial Advisors; SBA Office of Advocacy.
543 Comments of IFA.
544 Comments of Elizabeth Boynton.
545 Comments of Goldwater Institute; SBA Office of Advocacy.
547 Yates v. United States, 574 U.S. 528, 537 (2015) (“Ordinarily, a word’s usage accords with its meanings under the NLRA and the Fair Labor Standards Act. Sometimes mean different things.’’); Environmental Defense v. Duke Energy Corp., 549 U.S. 561, 574 (2007) (“We also understand that [m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.”) (quoting Allied Van Lines v. Dyer, Inc. v. United States, 286 U.S. 427, 433 (1933)). For example, the term “employee” has different meanings under the NLRA and the Fair Labor Standards Act. See supra fn. 318.
employees in 2020.\textsuperscript{550} Of those, the Census Bureau estimates that about 6,119,657 were firms with fewer than 500 employees.\textsuperscript{551} While this final 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 (nor were data or comments received on this particular issue).\textsuperscript{552}

\textsuperscript{550}U.S. Department of Commerce, Bureau of Census, 2020 Businesses (“SUSB”) Annual Data Tables by Enterprise Employment Size, https://www.census.gov/data/tables/2020/econ/susb/2020-susb-annual.html (from downloaded Excel Table entitled “U.S. & States, 6-digit NAICS” found at https://www2.census.gov/programs-surveys/susb/tables/2020/us_state_6digitnaics_2020.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 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 (last visited June 2, 2023).

The proposed rule references the Census Bureau’s 2019 Statistics of U.S. Businesses (“SUSB”) data tables, the most recent data available at the time of publication. Because the 2020 SUSB data tables are now available, the FRFA uses that updated data. However, the changes are not statistically significant, and the previous employer standard will continue to most directly impact the same percentage of businesses large and small.\textsuperscript{553} The Census Bureau does not specifically define small 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, 2020 SUSB Annual Data Tables by Enterprise Employment Size, https://www2.census.gov/programs-surveys/susb/tables/2020/econ/susb/2020-susb-annual.html (from downloaded Excel Table entitled “U.S. & States, 6-digit NAICS” found at https://www2.census.gov/programs-surveys/susb/tables/2020/us_state_6digitnaics_2020.xlsx). Consequently, the 500-employee threshold is commonly used to describe the 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.\textsuperscript{554}

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. \textsuperscript{555} NLRB v. Furnissblatt, 306 U.S. 601, 606–607 [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 has 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). However, the Board has jurisdiction over retailers and retail businesses that sell products or provide services purchased from entities in other states is at least $50,000. Siemons Mailing Service, 122 NLRB 81 (1939). See also supra fn. 104.

The entities that are included 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. 152(3); and employers subject to the Railway Labor Act, such as interstate railroads and airlines, 29 U.S.C. 152(2).

This includes initial representation case petitions (RC petitions) and unfair labor practice charges (CA cases) filed against employers. 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 do not reveal those cases where a joint-employer relationship exists but the parties’ joint-employer status is not in dispute.

555 The Board acknowledges that there are other types of entities and/or relationships between entities that may be affected by this change in the joint-employer rule. Such relationships include but are not limited to lessor/lessee and parent/subsidiary. However, the Board does not believe that entities involved in these relationships would be impacted more than the entities discussed above. Comments received in response to the 2022 IRFA did not reveal any other categories of small businesses that would likely be impacted 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.
joint-employer standard. The Board does not have the means to identify precisely how many businesses are impacted by contracting and subcontracting within the United States or how many contractors and subcontractors would be small businesses as defined by the SBA.\(^{557}\)

(2) Temporary help service suppliers (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  get receipts of less than $34 million annually.\(^{558}\) In 2017, there were 14,343 temporary service supplier firms in the United States.\(^{559}\) Of these temporary service supplier firms, 13,384 had receipts of $29,999,999 or less. Since the Board cannot determine how many of the 117 firms with receipts between $30 million and $34,999,000 fall below the $34 million annual receipt threshold, it assumes that these are all small businesses as defined by the SBA. Therefore, for purposes of this FRFA, the Board assumes that 13,501 temporary help service supplier firms (94.1% of total) are small businesses. (3) Entities that use temporary help services to staff their businesses are widespread throughout many industries. The Census Bureau’s 2020 Annual Business Survey revealed that of the 2,687,205 respondent firms with paid employees, 9,930 of those firms obtained staffing from temporary help services in that calendar year.\(^ {560}\) This survey 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 that reason, and because no other comments were received on this topic, the Board assumes for purposes of this FRFA that all 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.\(^{561}\) 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 explained in the NPRM that it does not have the means to identify precisely how many franchisees operate within the United States 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.\(^{562}\) 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 purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”\(^ {563}\) By defining which employers are joint employers under the NLRA, the final rule impacts labor unions generally, and more directly impacts those labor unions that organize in the specific business sectors discussed above. The SBA’s small business standard for “Labor Unions and Similar Labor Organizations” (NAICS #813930) is $16.5 million in annual receipts.\(^{564}\) In 2017, there were 13,137 labor union firms in the U.S.\(^ {565}\) Of these firms, at least 12,964 labor union firms (98.6% of total) had receipts of under $15 million and are definitely small businesses according to SBA standards. Since the Board cannot determine how many of the 49 labor union firms with receipts between $15 million and $19,999,999 fall below the $16.5 million annual receipt threshold, it assumes that these are all small businesses as defined by the SBA. For the purposes of the IRFA, the Board assumes that 13,013 labor union firms (99% of total) are small businesses.

Based on the foregoing, the Board assumes that 13,501 temporary help supplier firms, 125,989 franchise firms, and 13,013 union firms are small businesses; and it further assumes that all 94,930 temporary help user firms are small businesses. Therefore, among these four categories of employers that are most interested in the final rule, 247,433 business firms are assumed to be small businesses as defined by the SBA. The Board believes that all these small businesses, and also those businesses regularly engaged in contracting/subcontracting, have a general interest in the rule and would be impacted by the compliance costs, discussed below, related to reviewing and understanding the rule. But, as previously noted, employers will only be most directly impacted when they are alleged to be a joint employer in a Board proceeding. Given the Board’s historic filing data, this number is very small relative to the number of small employers in these five categories.

Throughout the IRFA, the Board requested comments or data that might improve its analysis, 87 FR at 54659–61, but no additional data was received regarding the number of small entities to which the rule will apply.\(^ {566}\)

\(^{557}\) Though the Board has previously solicited input on the number of contractors and subcontractors that qualify as small businesses, 83 FR 46604 fn. 56, 85 FR 11334, 87 FR 54660, it has received no responsive comments.\(^ {558}\) 13 CFR 121.201. Between the publication of the NPRM and the final rule, changes in the Small Business Size Regulations increased the total number of potentially affected entities by 166 firms across all five categories. Though that change is statistically insignificant, the Board chose to include the most updated figures in this FRFA.\(^ {559}\) 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_6digitnics_rptsize_2017.xlsx.\(^ {560}\) U.S. Department of Commerce, Bureau of Census, 2020 Annual Business Survey—Characteristics of Businesses, https://www.census.gov/data/tables/2020/12/annual/2020-annual-business-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,” obtained from https://www.census.gov/cedsci/table?q=ab19000&st&ABS_C2019.AB19000CSCB01&hidePreview=true&st=QDESC-B06].\(^ {561}\) See International Franchising Establishments FAQs, found at https://www.franchise.org/faq-about-franchising. \(^ {562}\) U.S. Department of Commerce, Bureau of Census, 2020 Annual Business Survey—Characteristics of Businesses, https://www.census.gov/data/tables/2020/12/annual/2020-annual-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://www.census.gov/cedsci/table?q=ab19000&st&ABS_C2019.AB19000CSCB04&hidePreview=true&st=QDESC-B06].\(^ {563}\) 29 U.S.C. 152(5).\(^ {564}\) See U.S Department of Commerce, Bureau of Census, 2017 SUSB Annual Data Tables by Establishment Industry, NAICS classification #722513, https://www2.census.gov/programs-surveys/susb/tables/2017/us_6digitnics_rptsize_2017.xlsx.\(^ {565}\) Job Creators Network Foundation argues that the proposed rule is so vague and amorphous that the Board could not possibly identify all business that would be impacted. Rachel Gresser objects to the Board’s determination that the issue of whether two entities were joint employers only involved 934 employers, or 0.15% of all business firms, over the four-year period. However, neither commenter provided any concrete data for the Board to consider.
5. Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities That Will be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The RFA requires an agency to consider the direct burden that compliance with a new regulation will likely impose on small entities.567 Thus, the RFA requires the Agency to determine the amount of “reporting, recordkeeping and other compliance requirements” imposed on small entities.568 In providing its FRFA, an agency may provide either a quantifiable or numerical description of the effects of a rule or alternatives to the rule, or “oral or written descriptive statements if quantification is not practicable or reliable.”569

The Board concludes that the final 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 final rule; no lost sales and profits resulting from the final rule; no changes in market competition as a result of the final rule and its impact on small entities or specific submarkets of small entities; no costs associated with the payment of taxes or fees associated with the final rule; and no direct costs of hiring employees dedicated to compliance with regulatory requirements.570 The final rule also does not impose any new information collection or reporting requirements on small entities.

Small entities, with a particular emphasis on those small entities in the five categories with special interest in the final 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.571 It is also possible that a small employer may wish to consult with an attorney, which we estimated to require one hour as well.572 Using the Bureau of Labor Statistics’ estimated wage and benefit costs, we have assessed these labor costs to be between $208.60 and $227.98.573

As to the impact on unions, the Board anticipates they may also incur costs from reviewing the rule. The Board believes a union would consult with an attorney, which is estimated to require no more than one hour of attorney time costing $169.11 because, like labor compliance professionals or employer labor-management attorneys, union counsels would already be familiar with the pre-2020 standard for determining joint-employer status under the Act and common-law principles.574

The Board does not find the estimated $227.98 cost to small employers and the estimated $169.11 cost to unions to review and understand the rule 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.575 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.576

The minimal cost to read and understand the rule, $227.98 for small employers and $169.11 for small unions, will not generate any such significant economic impacts.

In the NPRM, the Board requested comments from the public that would shed light on any potential compliance costs, 87 FR 54659, and considered those responses in the comments section above.

6. Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact of the Rule on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities was Rejected

Pursuant to 5 U.S.C. 604(a)(6), agencies are directed to examine “why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.” In the NPRM, the Board requested comments identifying any other issues and alternatives that it had not considered. See 87 FR 54651, 54658. Several commenters suggest that the Board consider alternatives but do not provide any suggestions.577 Several comments suggest that the Board withdraw the proposed rule and leave in place the 2020 rule, an alternative that the Board

567 See Mid-Tex Electric Cooperative, 773 F.2d at 342 (“It is clear that Congress envisioned that the relevant ‘economic impact’ was the impact of compliance with the proposed rule on regulated small entities.”).
570 See SBA Guide at 37.
571 Data from the BLS 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

572 See SBA Guide at 18.
573 Id. at 19.
574 Comments of McDonald’s USA, LLC; SBA Office of Advocacy.
considered and rejected for reasons stated in the NPRM and reiterated above.\textsuperscript{578} One comment suggests simply modifying the 2020 rule by, for example, broadening the list of terms and conditions of employment that may demonstrate joint-employer status.\textsuperscript{579} Or, in the alternative, the comment suggests that the Board could leave the rule untouched and examine its application through subsequent caselaw, which would reveal any deficiencies in the standard.\textsuperscript{580} As discussed in Section IV.K above, the Board has considered each of these alternatives, and several others, and has provided a detailed rationale for rejecting the status quo and revising the joint-employer standard through the rulemaking process.

In the NPRM, the Board considered exempting certain small entities and explained why such an exemption would be contrary to judicial precedent and impracticable.\textsuperscript{581} Two commenters suggested that the Board reconsider an exemption but did not address the Board’s previously stated concerns with such an exemption or provide any further detail on how such an exemption would function.\textsuperscript{582} Accordingly, the Board again rejects this exemption as impractical because such a large percentage of employers and unions would be exempt under the SBA definitions, thereby substantially undermining the purpose of the final rule. Moreover, 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 direct cost of compliance, it is likely that the burden on a small business of determining whether it fell within a particular exempt category would exceed the burden of compliance. Further, 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.\textsuperscript{583} 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.”\textsuperscript{584} As such, this alternative is contrary to the objectives of this rulemaking and of the NLRA.

The purpose of considering alternatives is to determine whether they could minimize the compliance burdens on small businesses. SBA Guide at 36. But an agency may select a course that is more economically burdensome than a proposed alternative if there is evidence that the proposed alternative would not accomplish the objectives of the statute. See AML International v. Daley, 107 F. Supp. 2d 90, 105 (D. Mass. 2000). None of the alternatives proffered and considered accomplish the objectives of issuing this rule while minimizing the familiarization cost on small businesses. Accordingly, the Board believes that promulgating this final rule is the best regulatory course of action.

B. Paperwork Reduction Act

In the NPRM, the Board explained that the proposed rule would not impose any information collection requirements. Accordingly, the proposed rule is not subject to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521. See 87 FR 54662–63. No substantive comments were received relevant to the Board’s analysis of its obligations under the PRA.

C. Congressional Review Act

The provisions of this rule are substantive. Therefore, the Board will submit this rule and required accompanying information to the Senate, the House of Representatives, and the Comptroller General as required by the Small Business Regulatory Enforcement Fairness Act (Congressional Review Act or CRA), 5 U.S.C. 801–808.\textsuperscript{585}

Pursuant to the CRA, the Office of Information and Regulatory Affairs will designate this rule as a “major rule” because it will have an effect on the economy of more than $100 million during the year it takes effect. 5 U.S.C. 804(2)(A). Accordingly, the rule will become effective no earlier than 60 days after its publication in the Federal Register.

Final Rule

This rule is published as a final rule.

List of Subjects in 29 CFR Part 103

Jurisdictional standards, Election procedures, Appropriate bargaining units, Joint Employers, Remedial Orders.

For the reasons stated in the preamble, the National Labor Relations Board amends 29 CFR part 103 as follows:

PART 103—OTHER RULES

\textbullet{} 1. The authority citation for part 103 continues to read as follows:


Subpart D—[Removed and Reserved]

\textbullet{} 2. Remove and reserve subpart D, consisting of §103.40.

\textbullet{} 3. Add subpart E, consisting of §103.40, to read as follows:

Subpart E—Joint Employers

§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” are:

\textbullet{} (1) Wages, benefits, and other compensation;

\textbullet{} (2) Hours of work and scheduling;

\textbullet{} (3) The assignment of duties to be performed;

\textbullet{} (4) The supervision of the performance of duties;

\textbullet{} (5) Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;

\textbullet{} (6) The tenure of employment, including hiring and discharge; and

\textbullet{} (7) The terms of employment.

\textsuperscript{578} See, e.g., comments of U.S. Chamber of Commerce.

\textsuperscript{579} Comments of U.S. Chamber of Commerce.

\textsuperscript{580} Id.

\textsuperscript{581} 87 FR 54662.

\textsuperscript{582} Comments of IFIA: Rachel Greszler.

\textsuperscript{583} However, as mentioned above, 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 final rule. See 29 CFR 104.204.


\textsuperscript{585} Several comments note that the proposed rule did not include a CRA analysis. See comments of Colorado Bankers Association; Elizabeth Boynton, National Association of Convenience Stores; U.S. Chamber of Commerce. Such an analysis is included in final rules rather than in proposed ones. See 5 U.S.C. 801–808.
(7) Working conditions related to the safety and health of employees.

(e) Whether an employer possesses the authority to control or exercises the power to control one or more of the employees’ essential terms and conditions of employment is determined under common-law agency principles. For the purposes of this section:

(1) Possessing the authority to control one or more essential terms and conditions of employment is sufficient to establish status as a joint employer, regardless of whether control is exercised.

(2) Exercising the power to control indirectly (including through an intermediary) one or more essential terms and conditions of employment is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly.

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

(1) Must bargain collectively with the representative of those employees with respect to any term and condition of employment that it possesses the authority to control or exercises the power to control, regardless of whether that term or condition is deemed to be an essential term and condition of employment under this section for the purposes of establishing joint-employer status; but

(2) Is not required to bargain with respect to any term and condition of employment that it does not possess the authority to control or exercise the power to control.

(i) 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 are intended to remain in effect to the fullest extent permitted by law.

Dated: October 20, 2023.

Roxanne L. Rothschild,
Executive Secretary, National Labor Relations Board.

[FR Doc. 2023–23573 Filed 10–26–23; 8:45 am]

BILLING CODE 7545–01–P