[Due Date Dec. 13, 2018]

Roxanne Rothschild

Associate Executive Secretary

National Labor Relations Board

1015 Half Street SE

Washington, D.C. 20570-0001

Comments on RIN 3142-AA13: The Standard for Determining Joint-Employer Status

Submitted at: <https://www.federalregister.gov/documents/2018/09/14/2018-19930/the-standard-for-determining-joint-employer-status>

Dear Ms. Rothschild,

The [insert name or organization] opposes the National Labor Relations Board (“the Board” or “the NLRB”) proposed rulemaking that severely limits the responsibilities of contracting employers under the National Labor Relations Act (NLRA), in contravention of the Act’s purposes and its statutory requirements. The Board’s proposed rule ignores Supreme Court authority and decades of precedent with a test that would include almost no subcontracted workplaces, and would especially hurt those low-wage workers who need the protections of the NLRA the most: those who are placed in jobs via temp or staffing agencies, and those who work in heavily contracted janitorial, construction, manufacturing, and warehousing jobs, to name a few.

**Importance of joint employer responsibility to** [insert name or organization]

The [explain organization, where located, and whether you represent or are in contact with and know of job challenges of subcontracted workers, including temp and staffing, janitorial, construction, warehouse, some home care agency workers, for example.]

In today’s economy, more corporations in lower-wage industries subcontract and use labor intermediaries such as staffing firms, and this can result in degraded working conditions and diminished worker access to collective action and bargaining.[[1]](#footnote-1) Companies that share control over working conditions at a job should share the responsibility for complying with basic worker protections and for bargaining over job conditions. When operating correctly, joint employment results in better overall protections for workers, and promotes worker voice on the job.

## The number of workers employed by temporary staffing agencies has increased dramatically in recent years, especially in low-wage, “blue-collar” occupations. There are currently 3.1 million workers employed through temporary staffing agencies, and the aggregate number of hours and total number of jobs (part-time and full-time)—has grown faster than work overall.[[2]](#footnote-2) Temporary and staffing work has increased in low-wage, “blue-collar” occupations in particular, reflecting a shift in companies using temp and staffing placements in clerical work to more hazardous industries, such as construction, manufacturing and logistics.

Workers employed through intermediaries like temporary and staffing agencies earn less money and endure worse working conditions than permanent, direct-hires. Full-time staffing and temporary help agency workers earn 41 percent less than do workers in standard work arrangements.[[3]](#footnote-3) They also experience large benefit penalties relative to their counterparts in standard work arrangements.[[4]](#footnote-4) In addition, staffing and temporary agency workers typically work in more hazardous jobs than permanent workers, and yet they often receive insufficient safety training and are more vulnerable to retaliation for reporting injuries than workers in traditional employment relationships.[[5]](#footnote-5)

If workers don’t know who their employer is, work conditions are more likely to deteriorate: pay declines, wage theft increases, and workplace injuries rise. And outsourced jobs pay less—sometimes as much as 40 percent less than in-house jobs. In today’s economy, we should be looking for ways to increase workers’ pay and economic security, not laying the groundwork for more sweatshops.

[insert any specific stories you or your members or clients have encountered raising joint employer needs – e.g., temp and staffing company and worksite employer aren’t taking responsibility; workers don’t know who their employer is; subcontracted workers suffer health and safety or wage theft]

Joint employment improves compliance by ensuring that corporations cannot skirt the law simply by outsourcing responsibility for their workers.

**The proposed rule is contrary to the common-law standard and the statutory intent of the National Labor Relations Act.**

Labor and employment laws have long held that, where more than one employer has the right to control the terms and conditions of a job, they may be liable as joint employers. More than one employer can be found responsible, jointly with another, so that companies provide better oversight of working conditions, and so that the right parties are around the bargaining table. Most of these laws have had their employer definitions since their enactment, and companies have been operating under the rules for over 75 years.

The proposed rule’s narrow definition of joint employer is contrary to the intent of the National Labor Relations Act because it will make collective bargaining among staffing agency and other subcontracted workers nearly impossible, which will further degrade workplace standards in these industries. It also unduly narrows the factors to be considered when determining the existence of an employer relationship: it fails to consider the *right to* control, a cornerstone of common-law employment determinations under long-standing Supreme Court and NLRB law; it fails to account for indirect control, a common way that companies exert control over terms and conditions of a workers’ job, via supervisors and other lower-level direct overseers. It fails to consider instances where two companies share control over important terms and conditions of work, and it also states that it would only consider control that it not limited and routine – a confusing description that lacks a rationale and could permit employers of low-income workers with relatively simple tasks to control the work and still skirt responsibility.

The incredibly narrow proposed test leaves out many, many work relationships that are well within the long-understood scope of the common-law employment relationship, and for that reason is impermissibly contrary to law and the National Labor Relations Act.

Corporations that engage low-road contractors and then look the other way or actively seek to avoid bargaining with their workers gain an unfair advantage over companies that play by the rules, resulting in a race to the bottom that rewards cheaters. It’s one reason why the job quality of what were formerly middle-class jobs in America is suffering today.

For these reasons, we oppose the proposed rule.

Sincerely,

1. *America’s Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data*, NELP, June 7, 2018, available at <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties> according-us-data/. [↑](#footnote-ref-1)
2. NELP analysis of Current Employment Statistics, NAICS 561320, available at <https://www.bls.gov/ces/data.htm>. [↑](#footnote-ref-2)
3. *America’s Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S.* Data, National Employment Law Project, June 7, 2018, available at https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/. [↑](#footnote-ref-3)
4. *Id.* [↑](#footnote-ref-4)
5. Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America’s Workers*, June 10, 2014, at 11, available at https://www.nelp.org/wp-content/uploads/2015/02/Temped-Out.pdf. [↑](#footnote-ref-5)