

January 28, 2019

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

Submitted via www.regulations.gov

Re: Comments on National Labor Relations Board Proposed Rule, The Standard for Determining Joint-Employer Status (RIN 3142-AA13)

Dear Ms. Rothschild:

The National Women’s Law Center strongly opposes the proposed rulemaking by the National Labor Relations Board (“the Board” or “the NLRB”) 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 joint employer test that would include almost no subcontracted workplaces, and would especially hurt those workers who need the protections of the NLRA the most: workers who are placed in jobs via temp or staffing agencies and those who work in heavily contracted jobs—and women, especially women of color, for whom collective bargaining is particularly vital to ensure that workplaces are fair, safe, and free from discrimination.

The National Women’s Law Center (the Center) has worked for over 45 years to advance and protect women’s equality and opportunity—with a focus on women’s employment, education, income security, health, and reproductive rights—and has long worked to remove barriers to equal treatment of women in the workplace, particularly those barriers that make it more difficult for women to gain access to justice when they have suffered from illegal and abusive treatment at work.

The Center works with and on behalf of women in commonly subcontracted workforces—both workforces where women make up a disproportionate number of employees, like home care, and those where women are still struggling to break into the sector, like construction work. Whether women predominate or are still gaining a foothold, the ability to improve their working lives through collective action protected by the NLRA—and to hold a joint employer responsible for violations of their labor rights—is paramount to the ability of women to work safely and succeed at work.

In today’s economy, more companies subcontract and use labor intermediaries such as staffing firms, which can result in degraded working conditions and diminished worker access to collective action and bargaining.¹ Companies that share control over working conditions at a job

¹ See National Employment Law Project (NELP), *America’s Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data* (June 7, 2018), <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/> [hereinafter NELP, *America’s Nonstandard Workforce*].

should share the responsibility for complying with basic worker protections and for bargaining over job conditions. Yet under the proposed rule, an employer may be found to be a joint employer only where the employer possesses and exercises “substantial direct and immediate control over the employees’ essential terms and conditions of employment in a manner that is not limited and routine”²; a joint-employer relationship would no longer be found where a firm exerts indirect control over the terms and conditions of employment, or reserves control through the terms of a contract.

This proposed change would result in fewer joint-employer findings under the NLRA, leaving more workers unable to hold the firms that play a role in determining the terms and conditions of their employment accountable for violations of labor law. Further, the proposed rule advances a joint-employer standard narrowed to the point at which many workers would find it nearly impossible to bring all firms with the power to influence their wages and working conditions to the bargaining table—frustrating workers’ fundamental right under the NLRA to engage in collective bargaining. The proposed rule is thus a betrayal of the express goal of the statute the agency is obligated to administer: “encouraging the practice and procedure of collective bargaining.”³

The proposed rule threatens to further undermine the quality of temporary and contracted jobs, especially for women.

The number of workers employed by temporary staffing agencies has increased in recent years. There are currently more than 3 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.⁴ Women make up close to half of temporary help services workers.⁵

Workers employed through intermediaries like temporary and staffing agencies earn less money and endure worse working conditions than permanent, direct-hires. The most recent Contingent Worker Supplement (CWS) data from the Bureau of Labor Statistics show, for example, that

² 83 Fed. Reg. 46696-97.

³ 29 U.S.C. §151.

⁴ NELP analysis of U.S. Dep’t of Labor, Bureau of Labor Statistics (BLS), Current Employment Statistics (CES), NAICS 561320, available at <https://www.bls.gov/ces/data.htm>.

⁵ According to the CES, as of August 2018, 1.43 million of the approximately 3.04 million workers employed by temporary staffing agencies were women. Nat’l Women’s Law Center (NWLC) calculations based on *id.* See also U.S. Dep’t of Labor, BLS, Contingent and Alternative Employment Arrangements—May 2017 (June 2018), Table 5: Employed workers with alternative and traditional work arrangements by selected characteristics, May 2017, <https://www.bls.gov/news.release/conemp.t05.htm> (showing women are 48 percent of an estimated 1.4 million temporary help agency workers). Note that the Contingent Worker Supplement (CWS) almost certainly undercounts the number of people who work for contract firms and temporary help agencies, in part because workers self-report what kind of firm they work for and may erroneously report that they work for the company where they are doing their work instead of for the contract firm or temporary help agency that placed them at that site—in contrast to establishment surveys like the CES, where the firm, not the worker, does the reporting. The higher total numbers reported in the CES are thus likely to be more accurate, but gender patterns are similar across the two surveys—and for the workforce in contract firms, the CWS is the only available data source. See Econ. Policy Inst. (EPI), EPI Comments Regarding the Standard for Determining Joint-Employer Status, at 4 (Dec. 10, 2018), <https://www.epi.org/files/pdf/158948.pdf>.

full-time staffing and temporary help agency workers earn 41 percent less than do workers in standard work arrangements.⁶ Women—who are broadly overrepresented in low-wage jobs⁷ and experience a significant gender wage gap across occupations⁸—typically earn even less than men in temporary staff positions.⁹ Women workers provided by contract firms in full-time jobs typically earn 17 percent less than women in traditional employment arrangements and 42 percent less than full-time male workers provided by contract firms.¹⁰

Workers employed through intermediaries like temporary and staffing agencies also experience large benefit penalties relative to their counterparts in standard work arrangements.¹¹ 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.¹² And across industries where subcontracting is prevalent, workers experience problems that have outsized effects for women. For example, in female-dominated industries like home care, women are subjected to low wages and a lack of benefits, making it hard for them to care for their own families. In traditionally male-dominated industries like construction and trades work, women continue to struggle to gain equal access to jobs—and when a woman is able to get work on a construction site, she is often the only woman on the jobsite and is acutely vulnerable to discrimination and abuse, as well as retaliation for reporting.

When jobs are subcontracted and employers no longer feel responsible for the people working on their behalf, work conditions are more likely to deteriorate: pay declines, wage theft increases, and workplace injuries rise.¹³ Joint employment improves compliance by ensuring that corporations cannot skirt the law simply by outsourcing responsibility for their workers. In

⁶ NELP, *America's Nonstandard Workforce*, *supra* note 1.

⁷ In 2016, women made up nearly two-thirds of the nearly 24 million workers in low-wage jobs (defined as jobs that typically pay \$11.50 per hour or less), though they make up slightly less than half (47 percent) of the workforce as a whole. Women of color are particularly overrepresented in these jobs. Median hourly wages for occupations were determined using U.S. Dep't of Labor, Bureau of Labor Statistics (BLS), May 2017 National Occupational Employment and Wage Estimates (OES), https://www.bls.gov/oes/current/oes_nat.htm (last visited May 25, 2018). Workforce and other occupational data are NWLC calculations based on 2016 American Community Survey, one-year estimates using Steven Ruggles et al., Integrated Public Use Microdata Series: Version 7.0 [dataset], Minneapolis: University of Minnesota (2017). Figures are for employed workers.

⁸ In 2017, a woman working full time, year-round was typically paid just 80 cents for every dollar paid to a man working full time, year-round. NWLC calculations based on U.S. Census Bureau, Current Population Survey, 2018 Annual Social and Economic Supplement [hereinafter CPS, 2018 ASEC], Table PINC-05, <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-05.html> (last visited Sept. 21, 2018). Women working full time, year-round had median annual earnings of \$41,997 in 2017. Men working full time, year-round had median annual earnings of \$52,146 in 2017. *See also* NWLC, *The Wage Gap: The Who, How, Why, and What to Do* (Oct. 2018), <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do-2/>.

⁹ U.S. Dep't of Labor, BLS, Contingent and Alternative Employment Arrangements—May 2017 (June 2018), Table 13: Median usual weekly earnings of full and part-time contingent and noncontingent wage and salary workers and those with alternative work arrangements by sex, race, and Hispanic or Latino ethnicity, May 2017, <https://www.bls.gov/news.release/conemp.t13.htm>.

¹⁰ *Id.*

¹¹ NELP, *America's Nonstandard Workforce*, *supra* note 1.

¹² Rebecca Smith & Claire McKenna, NELP, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America's Workers*, at 11 (June 2014), <https://www.nelp.org/wp-content/uploads/2015/02/Temped-Out.pdf>.

¹³ *See, e.g.*, David Weil, *How to Make Employment Fair in an Age of Contracting and Temp Work*, Harvard Business Review (Mar. 24, 2017), <https://hbr.org/2017/03/making-employment-a-fair-deal-in-the-age-of-contracting-subcontracting-and-temp-work>.

today's economy, we should be looking for ways to increase workers' pay and economic security—including by improving access to collective bargaining. The proposed rule would do the opposite.

The labor rights protected by the NLRA—and weakened by the proposed rule—are essential to ensure fair treatment for women on the job.

The Board Majority's advancement of a standard that fails to consider shared control in the assessment of a joint-employment relationship is particularly devastating to workers' ability to access their NLRA rights. In order for the NLRA to provide workers with the fundamental right to engage in meaningful collective bargaining in today's increasingly fissured workplaces, the law must provide a means to bring large corporations that reserve contractual control and/or indirectly control the terms and conditions of employment, as well as subcontractors, to the bargaining table.

Under the proposed joint-employer standard, however, a subcontractor would be solely responsible for violations of labor law. Subcontractors would also be left alone at the bargaining table—even though they may be bound by contractual obligations that limit their ability to address workers' demands for higher wages and improved working conditions. This narrow joint-employer standard serves only the interests of large corporations, enabling them to escape responsibility under the very law the Board is bound to effectuate.

Indeed, the Board Majority's proposed joint-employer standard will make it impossible for hundreds of thousands of workers to access the rights guaranteed them by the NLRA to join a union and collectively bargain. This will particularly affect workers employed in industries in which there is high reliance on subcontracting, temporary work, and other alternative work arrangements. The proposed standard will severely limit the ability of these workers to engage in protected concerted activity, win workplace representation, and collectively bargain—and will further degrade workplace standards in these industries.

Women especially lose out if they are unable to effectively organize a union and collectively bargain. Collective bargaining increases women's equality at work. Women in unions are more likely than their non-union counterparts to receive higher and more equal pay, better health care and pension benefits, and greater protections against discrimination on the job, including sexual harassment.¹⁴ The overall gender wage gap for union members is about half the size of the wage gap for those not represented by a union, and female union members typically earn about \$224 more per week than women who are not represented by unions, a larger wage advantage than

¹⁴ Kayla Patrick & Sarah David Heydemann, NWLC, *Union Membership is Critical for Equal Pay* (March 2018), <https://nwlc.org/resources/union-membership-critical-womens-wage-equality/>; Brief of the National Women's Law Center, The Leadership Conference on Civil and Human Rights and 85 Additional Organizations Committed to Civil Rights and Economic Opportunity as Amici Curiae in Support of Respondents, AFSCME Council 31, et al. (Jan. 19, 2018), <https://nwlc.org/press-releases/nwlc-and-the-leadership-conference-submit-amicus-brief-in-supreme-court-case-seeking-to-undermine-public-sector-unions/>.

men receive.¹⁵ Among women, Latina workers experience particularly large financial benefits from union membership.¹⁶

The proposed rule will harm women by limiting their ability to unionize and thereby limiting their pay. The Economic Policy Institute estimates that \$1.3 billion ultimately will be transferred from workers to employers on an annual basis if the rule is finalized—a conservative estimate based on the pool of unionized workers who work for either contract firms or temporary help agencies as defined by the CWS, which does not capture the full scope of workers who are likely to be affected by the proposed rule.¹⁷

The proposed rule will harm women, too, by limiting their access to the additional benefits and protections that unions provide. For example, unions increase access to health and leave benefits that allow them to weather changing family responsibilities or unexpected health crises, which often disproportionately affect women workers.¹⁸ And unions can help prevent and address discrimination, including sexual harassment at work.¹⁹ Workers who work through temp or staffing agencies or as contractors report experiencing discrimination, including sexual harassment and pregnancy discrimination²⁰—stories that we at the National Women’s Law Center have heard firsthand. Among thousands of intakes through our TIME’S UP Legal Defense Fund, we have heard from hundreds of workers in industries rife with subcontracting like health care, hospitality, and construction.²¹ Contractors and subcontractors have shared their stories of workplace misconduct and discrimination, often from people employed by the contracting employer. These intakes expressed a common theme: that as contracted and subcontracted workers, they felt particularly vulnerable to retaliation and abuse. But working people with a union are better able to raise and address harassment concerns because collective bargaining agreements provide more avenues for reporting and increased protection from firing and retaliation than are available to most non-union workers—and if harassment or retaliation does occur, individuals have more mechanisms to challenge unjust employer actions.²²

¹⁵ Kayla Patrick & Sarah David Heydemann, NWLC, *Union Membership is Critical for Equal Pay* (March 2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/02/Union-Membership-is-Critical-for-Equal-Pay-2018.pdf>.

¹⁶ Among full-time workers, Latina union members typically make 36 percent more per week (\$227 more) than Latina non-union workers. *Id.*

¹⁷ See EPI, *supra* note 5, at 4-5.

¹⁸ For example, unionized workplaces are 22 percent more likely than non-union workplaces to provide parental leave and are 12 percent more likely to allow women to take leave during pregnancy; when women in unions do take parental leave, their leave is 13 percent more likely to be paid than leave taken by non-union women workers. See Brief of the National Women’s Law Center et al., *supra* note 14, at 23.

¹⁹ NWLC & AFL-CIO, *Six Ways Unions Can Help Prevent and Address Sexual Harassment at Work* (April 2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/04/AFL-CIO-and-NWLC-SH-Factsheet-Final.pdf>.

²⁰ Smith & McKenna, *supra* note 12.

²¹ NWLC, *Time’s Up Legal Defense Fund – Stats and Numbers* (Oct. 2018), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/10/2018.10.29-Final_nwlc_TimesUpOneSheet.pdf. Of the 3,756 who have contacted us as of October 29, 2018, 2.64% self-identify as working in accommodations/hospitality, 7.99% self-identify as working in health care, and 2.36% self-identify as working in construction.

²² NWLC & AFL-CIO, *supra* note 19. For instance, the collective bargaining agreements negotiated by workers and their unions with employers typically contain language calling for dignity and respect at work and often include

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

On December 28, 2018 the District of Columbia Circuit Court of Appeals issued its opinion in the *Browning-Ferris* case, affirming the Board’s articulation of the joint-employer test in *Browning-Ferris*, and stating explicitly that the test includes “consideration of both the employer’s reserved right to control and its indirect control over employees’ terms and conditions of employment.”²³ This holding runs counter to the proposed rule.

The Board now has the benefit of relevant judicial guidance on the joint-employer standard under the NLRA—and, as Board Member McFerran points out in her dissent, should the Board Majority’s final rule be inconsistent with the D.C. Circuit’s decision, it would be unlikely to survive judicial review in that court.²⁴ In fact, the D.C. Circuit opinion instructs that the Board’s rulemaking be “bounded” by common law definitions, as interpreted by the Court. “In other words,” the Board’s rulemaking “must color within the common-law lines identified by the judiciary.”²⁵ The Court further characterizes the Board’s rulemaking on this common-law question a “bite of an apple that is outside of its orchard.”²⁶

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 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 is 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 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. Moreover, while the Board

additional anti-discrimination language. These contractual provisions are enforced through a grievance and arbitration process at the worksite, a process typically far quicker and less expensive than outside legal proceedings.

²³ *Browning-Ferris Indus. of California, Inc. v. Nat’l Labor Relations Bd.*, No. 16-1028, 2018 WL 6816542, at *1 (D.C. Cir. Dec. 28, 2018)(affirming the NLRB’s previous articulation of the joint-employer test including both the employer’s reserved right to control and indirect control over employees’ terms and conditions of employment, but finding that the Board improperly applied its consideration of indirect control and thus remanding for further proceedings consistent with the opinion).

²⁴ Dissent 46688.

²⁵ *Browning-Ferris Indus.*, 2018 WL 6816542, at *9.

²⁶ *Id.*

Majority asserts “uncertainty” surrounding the standard as a reason for the standard advanced in the rulemaking, it is this very process that is generating uncertainty for employers. And this uncertainty is underscored by the unusual move of engaging in rulemaking at all—particularly after the NLRB’s Designated Agency Ethics Official determined that the Board’s previous attempt at changing the *Browning-Ferris* joint-employer standard had to be vacated.²⁷

The Board Majority does not provide any evidence of harm to employers generated by the *Browning-Ferris* standard; by its own admission, the joint-employer issue is implicated in fewer than one percent of Board filings.²⁸ But by making it nearly impossible for some workers to organize and collectively bargain, the impact of the Board Majority’s proposed rule on working people will be significant—costing them upwards of \$1.3 billion per year.²⁹

Rather than making our workplaces safer and more secure for all workers—and especially for women workers—this proposed rule will let employers hide behind a subcontract to allow abuse to go unchecked. And it will make it more difficult for workers to challenge that behavior or secure improvements in working conditions by engaging in collective bargaining with the contracting employer, which is a critical tool for women’s equality and economic security.

For these reasons, the National Women’s Law Center opposes the proposed rule. We urge the Board to maintain the current joint-employer standard, as articulated in *Browning-Ferris*, and to strongly oppose any attempt to institute a standard that deprives working people of their rights under the NLRA.

Sincerely,



Julie Vogtman, Director of Job Quality and Senior Counsel
National Women’s Law Center



Sarah David Heydemann, Legal Fellow, Workplace Justice
National Women’s Law Center

²⁷ See National Labor Relations Board, Board Vacates Hy-Brand Decision (Feb. 26, 2018), <https://www.nlr.gov/news-outreach/news-story/board-vacates-hy-brand-decision>.

²⁸ 83 Fed. Reg. 46693.

²⁹ See EPI, *supra* note 5.