RIN 3142-AA21: Standard for Determining Joint-Employer Status

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

Washington Center for Equitable Growth Comments on NLRB Proposed Rulemaking on Standard for Determining Joint-Employer Status under the National Labor Relations Act

Dear Ms. Rothschild,

The Washington Center for Equitable Growth supports the National Labor Relations Board's (the Board, or the NLRB) proposed rulemaking that revises and clarifies the responsibilities of contracting employers under the National Labor Relations Act (NLRA, or the Act), bringing coverage in line with the longstanding scope of common-law definitions of employer and the intent of the Act. The Board's proposed rule is especially important to workers earning low wages and in dangerous jobs—workers who need the protections of the NLRA the most, among them those who are placed in jobs via temp or staffing agencies and those who work in heavily contracted janitorial, construction, delivery, manufacturing, home care, and warehousing jobs, to name just a few.

Insufficient joint-employer standards exacerbate workplace fissuring, which reduces worker power and limits the potential of collective bargaining, contributing to high levels of income inequality and poor job quality and obstructing economic growth

Workplace fissuring is a phenomenon in which companies outsource components of their business model to subcontractors, independent contractors, and other business-to-business relationship structures. Workplace fissuring absolves those companies of the responsibility of providing workplace protections and maintaining labor standards. Fissuring also delinks norms of workplace fairness among workers and is a driver of wage inequality. Indeed, research finds that pay varies less between workers in the same firm than among workers with otherwise-similar characteristics who work in separate firms, since employers tend to set narrower wage structures based on equity.

The term "fissured workplace," coined by David Weil at Brandeis University, captures a break in traditional employment relationships that makes it easier for firms to fail in meeting labor standards and regulations. Fissuring also disrupts career ladders, makes employer-sponsored benefits more difficult to access, and leads to a drop in earnings for outsourced jobs. One critical implication of fissuring is that "lead" firms keep an important degree of control over the work of contractors and subsidiary organizations without the legal obligations embedded in traditional

employment relationships. In addition, through workplace fissuring, workers can see a deterioration of their rights and legal protections such as those established under the NLRA. Economics research finds that fissuring via domestic outsourcing is a driver of income inequality and declining job quality since lead firms can exercise a significant amount of control over working conditions and wages.

Fissuring picked up in the 1980s, when major companies started directly employing only workers who performed tasks that were within the firm's core competencies, while outsourcing and contracting out services, such as payroll, accounting, cleaning and maintenance, and human resources. More recently, companies started relying on contractors and outside suppliers even for operations and services that are central to firms' core business. Indeed, one estimate finds that in 2017, about 19 percent of the U.S. workforce was in industries in which fissured arrangements are the norm.

While not a new phenomenon, franchising is another example of workplace fissuring, where a lead company absolves itself of its responsibility to workers who are critical to its business. Franchisors, for example, can reduce workers' and franchisees' bargaining power by imposing contracts, such as noncompete agreements, and are generally free of legal responsibility for labor standards. Delinking workers from corporate decision-makers holds back workers' ability to engage in collective bargaining, further exacerbating the trend of declining worker power.

The responsibility of lead firms to workers in their production processes is made clear by the example of franchising. Research by Brian Callaci of the Open Markets Institute finds that franchisors have a great deal of control over the workplace practices of their franchisees. In essence, they are creating a hidden monopsony, in which multiple establishments are controlled by the same corporation. Workers' outside options within their occupation are limited in the presence of dominant franchises.

While the NLRA protects workers' rights to organize and engage in collective action, fissuring, alongside the NLRA's prohibition of secondary activities, currently present an important challenge for many workers wanting to exercise their rights, highlighting the importance of the NLRB's proposed rulemaking to make more "lead" firms come to the bargaining table as joint employers. For more workers to be able to bargain collectively, it is essential that the companies that exercise control over their core working conditions be considered joint employers under the law.

Joint-employer standards reinforce robust workplace protections, and NLRA collective bargaining rights improve workers' outcomes and make workplaces safer

Empirical evidence shows that when workers have the ability to bargain collectively, working conditions improve and workplace safety standards increase, with positive effects that spill over beyond the employment outcomes of those who enjoy union coverage. Recent research published in *Health Affairs* shows, for example, that unionized workforces in nursing homes were associated

with almost 11 percent lower resident COVID-19 mortality rates and nearly 7 percent lower worker COVID-19 infection rates changed to worker and infection per the research paper than nonunion nursing homes. Likewise, evidence finds that unionized establishments are more likely to enforce the Occupational Safety and Health Act than otherwise-similar nonunion workplaces.

As such, evidence suggests that the benefits of safer unionized workplaces have ripple effects that benefit broader society. For instance, a study analyzing patient outcomes in unionized and nonunionized hospitals in California between 1996 and 2005 finds that the quality of service was substantially better in hospitals that went through a successful union election.

For workers, unions boost pay, foster norms of fairness and pay equity, and narrow racial and gender wage gaps. Further, the ability to negotiate and hold accountable their employers is essential for the temp and subcontracted workers who stand to benefit from the Board's rule. An analysis by the National Employment Law Project shows that Black and Latino workers are highly overrepresented in temporary agency jobs. These jobs tend to have more dangerous conditions, pay lower wages, and are ones where collective bargaining is complex and benefits are more difficult to access than comparable jobs with standard employee-employer relationships.

In contrast, jobs and working conditions are much more likely to be positive when workers are able to bargain with the stakeholder parties that have power over workplace practices, including joint employers.

The proposed joint-employer rule would boost worker power and protect workers against unfair labor practices

The Board's proposed rule would allow more workers to bargain with both of their joint employers. The current rule leaves it to workers to prove that an alleged joint-employer exercises "direct and immediate control" over them and their work, making it easier for companies to exercise control at the same time that they keep wages down and do not assume responsibility for maintaining labor standards for outsourced and temp workers.

Thank you for the opportunity to submit comments on the Notice of Proposed Rulemaking. Please do not hesitate to contact us if you have questions about how to apply the economic record to this rulemaking.

Sincerely,

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