February 11, 2019

By electronic submission: http://www.regulations.gov

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

RE: RIN 3142-AA13: Notice of Proposed Rulemaking: The Standard for Determining Joint-Employer Status – Reply Comments

Dear Ms. Rothschild,

On behalf of the Restaurant Law Center (the "RLC"), we are pleased to submit these reply comments[1] in response to several comments submitted by groups that oppose the National Labor Relations Board's (the "Board" or "NLRB") joint employer rule published in its Notice of Proposed Rule Making ("NPRM") at 83 FR 46681 (September 14, 2018).[2]

I. RESPONSE COMMENTS TO THE JOINT EMPLOYER NPRM

The theme, and in some cases the foundation, of comments submitted by many groups opposing the proposed rule ("Opposition Comments") is that the NPRM "violates" or is

[1] These comments represent the views of RLC and its affiliate, the National Restaurant Association (the "Association").

[2] As noted in our initial comments, members of the restaurant industry, under the leadership of the Association, formed the RLC to advocate for the interest of the Association. The Association is the largest foodservice trade association in the world representing over 500,000 businesses.

"inconsistent" with the common law. *See, e.g.*, Comments of the Service Employees International Union ("SEIU"), at 1; and Comments of the American Federation of Labor & Congress of Industrial Organizations ("AFL-CIO"), at 38. Those claims are, quite obviously, wrong. In the eighty-four years since Congress adopted the National Labor Relations Act ("NLRA" or "Act"), no court or Board decision has suggested – much less held – that the Board's joint-employer determinations must be co-extensive with the common law of agency. Indeed, for more than 30 years before *Browning-Ferris Industries*, 362 NLRB No. 186 (August 27, 2015) ("*BFI*"), the Board repeatedly applied – with circuit court approval— a joint-employer standard that is more limited and essentially mirrors that of the proposed rule. *See, e.g.*, *TLI, Inc.*, 271 NLRB 798 (1984); *Laerco Transp.*, 269 NLRB 324 (1984). At no point during that span of decades did any circuit court hold the Board's joint employer standard violated, or was inconsistent, with the common law.

Indeed, the standard adopted in *BFI*, which the Opposition Comments enthusiastically support, would itself violate the Act if, as the Opposition Comments contend, joint employment determinations under the Act must be co-extensive with the common law standard. What the Opposition Comments fail to recognize is that even the D.C. Circuit's majority opinion in *Browning-Ferris Industries*, 2018 WL 6816542, at *2 (Dec. 28, 2018), does not hold that the joint employer test under the Act must be at least co-extensive – let alone more extensive – than the common law of agency. Rather, the *BFI* majority's understanding of the common law provides the answer to only the first step of *BFI*'s two-part test. The second step – determining when a common law employer actually "possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining" – mandates that the results generated

by the common law analysis be further limited to protect the Act's fundamental purposes. *Id.* at *2 (quoting *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964)).

The Opposing Comments' premise that the Act requires the Board to apply a joint employer standard that is co-extensive with the common law of agency lacks any support in the language of the Act or its legislative history. Indeed, in adopting the Act, Congress obviously assumed it was adopting a law that would apply to bargaining units of a single employer, as it referred to "the employer" as a singular entity. Certainly, Congress quite easily could have made clear an intent to cover joint employers by simply adding, "or employers," when referring to the employment relationship with an appropriate unit of employees. As it demonstrated throughout the Act, Congress understood how to use plural noun forms when it intended to do so. Yet nothing in the Act's language suggests that Congress intended the Board to create the fiction of a joint-employer unit. Rather, there are many indications to the contrary, such as the obvious havoc that is wrecked by extending the definition of "employer" to a fictional joint employer entity on the Act's prohibitions of secondary boycotts under Section 8(b)(4)(B). 29 U.S.C. § 158(b)(4)(B).

There may be legitimate reasons to bend the clear language Congress used in the Act so as to expand the Act's definition of "employer" when more than one entity controls the essential terms and conditions of employment of an appropriate unit. In any event, too much established law has approved of the Board having done so to now attempt to return to Congress's original intent. However, it is nonsense to contend that Congress *mandated* that the Board accept the fiction of a joint employer unit, much less, that it mandated the Board to adopt a joint employer standard that is co-extensive with the result the common law of agency might suggest.

Not even *BFI*'s flawed standard accepts the Opposition Comments' assertion that the Act's joint employer determinations can be made by reliance on the common law alone because the

common law was created to resolve questions pertaining to individuals, not to foster the Act's purpose of promoting collective bargaining. Hence, the second part of the *BFI* test requires the Board to determine "whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." *See Browning-Ferris Indus.*, 362 NLRB No. 186, at *2. "In other words, the existence of a common-law employment relationship is necessary, ***but not sufficient***, to find joint-employer status [under the Act]." *Id.* at 12 (emphasis added). The D.C. Circuit did not disagree or criticize the Board's conclusion that a showing of a common law agency relationship was not sufficient, in and of itself, for the Act's joint employer standard. However, the D.C. Circuit criticized the Board for failing to provide any explanation or guidance as to how the courts, employers, unions or employees should analyze and apply the second half of the *BFI* test. On remand, the court opined, the Board would be expected to: "(i) apply the second half of its announced test, (ii) explain which terms and conditions are "essential" to permit "meaningful collective bargaining," and (iii) clarify what "meaningful collective bargaining" entails and how it works in this setting." *Browning-Ferris Indus.*, 2018 WL 6816542, at *20.

Of course, the proposed rule addresses all the shortcomings the D.C. Circuit identified in the *BFI* test. It eliminates the need to distinguish between relevant types of indirect control indicative of common law employer status "and those quotidian aspects of common-law third-party contract relationships." It eliminates the need for "scaffolding" to provide meaning to its amorphous terms. It eliminates the need to have a two-step standard. By re-adopting the "direct and immediate" standard, the Board returns to a clear standard, further explained and developed by 30 years of Board jurisprudence. Moreover, in adopting a final rule, the Board has the opportunity to provide even greater clarity through clear definitions, such as those we urged in our

initial comments, which are similar – if not identical – to those urged by other groups and organizations that submitted comments supporting the proposed rule.

The Opposing Comments also generally argue that the Board should not address the joint employer standard through the rulemaking process, and some challenge the Board's compliance with the Administrative Procedures Act, but with no legitimate support for such arguments. Moreover, in challenging the use of rulemaking for setting a joint employer standard, the Opposing Comments fail to recognize the practical implications of their argument. At this point, the D.C. Circuit has made clear the *BFI* standard is inadequate and cannot be relied upon without further clarification. As Chairman Ring noted in his June 25, 2018 letter to Senators Warren, Gillibrand and Sanders, rulemaking provides the best method for the Board to bring clarity to the joint employer utter confusion the Board created in *BFI*, and to correct its many shortcomings, including those identified by the D.C. Circuit.

II. CONCLUSION

We repeat our support for the Board's proposed return and clarification of the "direct and immediate" control standard it adopted more than three decades ago. We again thank you for the opportunity to submit these responsive comments.

Sincerely,

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We would like to thank outside counsel for their assistance in drafting these comments:

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