January 24, 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.

Dear Ms. Rothschild,

On behalf of the Restaurant Law Center (the "RLC"), we are pleased to submit these comments[1] in response to the National Labor Relations Board's (the "Board" or "NLRB") Notice of Proposed Rule Making ("NPRM") published at 83 FR 46681 (September 14, 2018).

I. INTRODUCTION

The proposed rule would establish a standard for determining joint employer status in a variety of business relationships with the goal of stabilizing labor-management relations, a principle purpose of the National Labor Relations Act (the "Act"). RLC fully supports the Board's proposed rule and encourages the Board to adopt the proposed rule for the reasons set forth in detail below.

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

Members of the restaurant industry, under the leadership of the National Restaurant Association ("the Association"),[2] joined together to form RLC in 2015 to enhance the restaurant industry's legal advocacy capabilities as well as to provide protection and advancement for the industry. Nationally, the foodservice industry consists of over one million restaurant and foodservice outlets employing fourteen million people—about ten percent of the American workforce. Despite being mostly small businesses, the foodservice industry is the nation's second-largest private-sector employer.

RLC has a significant interest in the development and application of the Board's joint employer doctrine.[3] After BFI sought review of the Board's decision in *Browning-Ferris Industries*, 362 NLRB No. 186 (August 27, 2015) ("*BFI*"), by the U.S. Court of Appeals for the District of Columbia Circuit, RLC filed an *amicus* brief in June 2016 in support of the long-standing "direct and immediate" joint employer standard. RLC intends its advocacy on this issue, including these comments, to create a stable and beneficial environment for management and labor alike.

Foodservice industry employers, including many in the franchise context, face unique legal challenges in the context of the joint employer rule. As explained further below, RLC supports the Board's joint employer rule because it would create a clear and responsible way to determine joint employer status and lead to greater stability and predictability for both management and labor, especially in light of the distinct challenges faced by the foodservice industry in this context.

[2] The Association is the largest foodservice trade association in the world representing over 500,000 businesses.

[3] *See also*, Petition of the RLC, In the Matter of Proposed Rule to Establish the Standard for Determining Joint-Employer Status Under the National Labor Relations Act.

II. SUMMARY OF COMMENTS

The following points summarize RLC's comments on the proposed rule:

1. *RLC agrees with the Board's proposed rule to return to the "direct and immediate" joint employer standard the Board used for more than 30 years.* The Board's 30-year standard, as articulated under *TLI, Inc.*, 271 NLRB 798 (1984) and *Laerco Transp.*, 269 NLRB 324 (1984), provided a clear and stable method for all stakeholders, management and labor alike, to know with a reasonable degree of confidence who employed any particular group of employees. In its *BFI* decision, the Board reversed that 30-year precedent and created an amorphous joint employer standard that expanded the definition of joint employer status substantially, but provided no guidance to employers, unions or even its own regional directors about where to draw the line. RLC supported the Board's decision to engage in rulemaking to clarify this doctrine,[4] and now supports the Board's proposed solution: a return to the long-standing "direct and immediate" standard.

2. *The* BFI *standard for determining joint employer status was amorphous, unstable and failed in its essential function.* The standard for determining joint employer status should allow an interested party to reliably determine whether or not a given business arrangement would result in joint employer status. The *BFI* standard does not. It merely provides for the Board to make post-hoc conclusions drawn after result-oriented inquiries. Employers attempting to apply the *BFI* standard have no way of guessing whether they are joint employers and the Board offered no guidance to aid the application of the standard. This has undermined the Act's purpose of encouraging effective bargaining.

[4] *See* n. 3, *supra*.

3. *The D.C. Circuit's decision further muddies the waters and provides no clear test or guidance for employers, underscoring the need for a clear, bright-line rule.* The December 28, 2018 D.C. Circuit decision reviewing *BFI*, 2018 WL 6816542 (D.C. Cir. Dec. 28, 2018), did nothing to clarify the issue. To the contrary, the court held that the *BFI* joint-employer standard appropriately recognized that indirect and potential control are "relevant" factors in determining joint-employer status under the Act. Yet, the court then went on to hold that the Board had not applied those relevant factors appropriately under common law and remanded the case to the Board to "erect some legal scaffolding"—despite the fact that the Board had already issued the NPRM to address this issue more broadly with the assistance of public comments.

4. *The Board's proposed rule comports with the common law test and the language, legislative intent and fundamental policies of the Act.* The Board's and the D.C. Circuit's purported reliance on the common law test for agency, and the NPRM dissent's criticism of the Board's proposed rule on the ground that it is inconsistent with that common law, are based on a patently flawed misunderstanding of that test and most significantly, its history, which is the source of the common law test they claim to champion. The Supreme Court made it abundantly clear that direct supervision of the putative employee defines the employment relationship governed by the Act. The Supreme Court firmly rejected the Board's attempt to expand the definition of the term "employee" beyond its ordinary meaning. Nevertheless, in *BFI*, the Board adopted a far-fetched definition of "employer" that dramatically expanded the meaning of the word by eliminating the fundamental touchstone of an employer-employee relationship—direct control of the employee.

5. *The "direct and immediate" standard fits the traditional business relationships in the foodservice industry and would benefit industry stakeholders.* A significant portion of the restaurant industry operates on the franchise model. That model thrived under the Board's "direct

and immediate" standard because franchisees and franchisors could maintain an arms-length business relationship that allowed both franchisees and franchisors to be confident of their obligations to their employees. The *BFI* standard's use of indirect influence to determine joint employer status has created massive uncertainty, leading to a dramatic rise in operational and risk management costs at many franchise restaurants.

6. *The NPRM examples provide helpful guidance to address concerns regarding various common business arrangements raised by the* BFI *decision*. The examples provided in the NPRM provide helpful guidance in addressing current concerns created by the expansive test established in *BFI*. The D.C. Circuit's *BFI* decision did not hold that the "direct and immediate" joint employer standard under pre-*BFI* precedent was inappropriate, nor did it determine whether evidence of indirect or reserved control in and of itself could be enough to establish a joint employer relationship. Even if the Board does tweak its proposal to include indicia of indirect or reserved control, it should draw clear lines between what counts (co-determining essential terms and conditions of employment) and what does not count (*e.g.*, brand standards in franchise agreements).

7. *The NPRM Can Be Strengthened Through the Use of Clear Definitions.*[5] RLC believes the Board can enhance the proposed rule by codifying definitions of key terms. The main benefit of the proposed rule is its bright line requirement for meaningful, actual control over essential terms and conditions of employment. To provide clear guidance and "scaffolding" around the final rule, the terms "direct and immediate control" and "essential terms and conditions of employment" ought to be defined. If the Board adopts clear definitions of the terms, it can better

[5] The Restaurant Law Center is a Management Committee member of the Coalition for a Democratic Workforce ("CDW"). A very similar version of this recommendation is also included in CDW's comments, but added here as well for emphasis.

achieve the certainty that employers need to operate predictably and efficiently and that the Board needs to adjudicate fairly and consistently.

8. *This matter is particularly well suited for resolution through the rulemaking process*. Frequent oscillation of policies that affect long-term planning creates needless transition and risk management costs to the detriment of all stakeholders. Unfortunately, the recent D.C. Circuit *BFI* decision only created more uncertainty without whether and how evidence of indirect and reserved control may factor into the joint employer analysis. Rulemaking, as opposed to adjudication, has the advantage of prospective application; stakeholders can understand ahead of time what conduct will or will not violate the Act or trigger joint employer status. For restaurants making long-term planning decisions, predictability is highly beneficial. Furthermore, individuals and small business owners are often members of or associated with larger groups, such as RLC and the Association, that can submit briefs expressing their experiences and interests in different circumstances and scenarios spanning well beyond the particular facts at issue in the *BFI* case.

III. COMMENTS TO THE JOINT EMPLOYER NPRM

1. RLC Fully Supports the NPRM's Proposal to Return to the "Direct and Immediate" Joint Employer Standard Used by the Board for More Than 30 Years.

RLC fully supports the language proposed by the Board's NPRM. Throughout the course of its advocacy on this issue, RLC has consistently supported the "direct and immediate" standard for joint employer status and does so again in these comments. RLC believes that employers—including those in the restaurant industry—deserve a clear standard that comports with sound jurisprudence and good business sense, and that fosters stability in the labor-management relationship. The "direct and immediate" standard used by the Board for over 30 years met these

requirements admirably; RLC urges the Board to follow through with its own proposal and adopt that standard as a rule.

For more than three decades before *BFI*, the Board provided stability in labor relations for all parties by applying a clear and appropriate standard for determining when two separate entities were joint employers under the Act. That standard required each entity to exert direct and significant control over the same employees such that they "share or codetermine those matters governing the essential terms and conditions of employment . . ." *TLI, Inc*., 271 NLRB 798, 798 (1984). The Board applied that test by evaluating whether the putative joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction" and whether that entity's control over such matters is direct and immediate. *Id.* (citing *Laerco Transp.*, 269 NLRB 324 (1984)).

By linking joint employer status to direct and immediate control over the fundamental aspects of the employment relationship—hiring, firing, discipline, supervision and direction—the Board's pre-*BFI* joint employer standard ensured that both employers were actually involved in matters material to the scope of the Act, rather than merely engaged in a market relationship that may have a coincidental, dispersed, or attenuated impact on employees. Additionally, by requiring that the control be direct and immediate, the old standard assigned joint employer status only to those entities who actually affected the employment relationship—the singular focus and subject matter of the Act—and, thus, had the ability to actually engage in effective collective bargaining.

The standard articulated by the Board in *Laerco* and *TLI* was clear, rational, and withstood the test of time for 30 years. Indeed, the Board's direct control standard was "settled law" from 1984 until August 27, 2015. *See Airborne Express*, 338 NLRB 597, n.1 (2002). While the dissent to the NPRM is concerned that "the majority's proposed inclusion of a 'direct and immediate'

control requirement in the joint-employer standard would hardly result in an easy-to-apply test" because "the proposed rule, if ultimately adopted by the Board, will reveal its true parameters only over time, as it is applied case-by-case through adjudication," joint employer issues are always resolved on a case-by-case basis analyzing the particular facts in each case. Indeed, even the dissent goes on to recognize that "the usual process of adjudication . . . provide[s] a more nuanced understanding of the contours of potential joint employment relationships." That applies regardless of which standard is used. And for the "direct and immediate" standard, the Board and the courts have already developed a coherent body of law over the span of several decades that elucidated the facts, circumstances, and scenarios under which an entity becomes a joint employer.[6] Reviewing courts likewise have adhered to the Board's bright-line test for decades.[7]

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[6] *See, e.g., Aldworth Co*., 338 N.L.R.B. 137, 139-40 (2002) (affirming ALJ's finding of joint employer relationship because "[biased upon a thorough review of the record, the judge determined that Respondents Aldworth and Dunkin' Donuts together share control over the hiring, firing, wages, benefits, discipline, supervision, direction and oversight of the truck drivers and warehouse employees and thereby meet the standard for joint employer status"); *Mar-Jam Supply Co.*, 337 N.L.R.B. 337, 342 (2001) (affirming finding of joint employment after analyzing all terms and conditions of employment and finding that putative employer directly hired and fired employees, solely supervised and directed the employees with regard to work assignments, time, attendance and leave, and disciplined the employees); *C. T Taylor Co*., 342 N.L.R.B. 997, 998 (2004) (affirming finding of no joint employment where none of essential terms and conditions of employment were controlled by putative employer); *Mingo Logan Coal Co.*, 336 N.L.R.B. 83, 95 (2001) (stating that the putative joint employer meaningfully affected all five essential terms and conditions of employment); *Villa Maria Nursing & Rehab. Ctr., Inc.*, 335 N.L.R.B. 1345, 1350 (2001) (affirming finding of no joint employer relationship where "Villa Maria does not have any authority to hire, fire, suspend or otherwise discipline, transfer, promote or reward, or lay off or recall from layoff ServiceMaster's employees. Villa Maria does not evaluate them or address their grievances."); *Windemuller Elec., Inc.*, 306 N.L.R.B. 664, 666 (1992) (affirming ALJ's finding of joint employment based on facts that putative joint employer shared or co-determined hiring, firing, discipline, supervision and direction); *Quantum Resources Corp*., 305 N.L.R.B. 759, 761 (1991) (affirming joint employer finding and specifically adding to Regional Director's decision that FP&L's control over hiring, discipline, discharge and direction "[t]ogether with the close supervisory relationship between FP&L and [contract] employees ... illustrate[s] FP&L's joint employer status"); *D&S Leasing, Inc.*, 299 N.L.R.B. 658, 659 (1990) (finding joint employment based on facts that putative joint employer shared or co-determined the hiring, firing, discipline, supervision and direction of contract employees); *G. Heileman Brewing Co.*, 290 N.L.R.B. 991, 1000 (1988) (affirming joint employer finding based on fact that G. Heileman shared or co-determined all five essential terms and conditions of its contract employees' employment, and in addition negotiated directly with the union); *Island Creek Coal*, 279 NLRB 858, 864 (1986) (no joint employer status because there was "absolutely no evidence in this record to indicate that the normal functions of an employer, the hiring, firing, the processing of grievances, the negotiations of contracts, the administration of contracts, the granting of vacations or leaves of absences, were in any way ever performed by [the putative joint employer])."

[7] *See, e.g., SEIU Local 32BI v. NLRB*, 647 F.3d 435, 443 (2d Cir. 2011) (finding that supervision which is "limited and routine" in nature does not support a joint employer finding, and that supervision is generally considered "limited and routine" where a "supervisor's instructions consist primarily of telling employees what work to perform, or where

The stability and predictability provided by the Board's pre-*BFI* "direct and immediate" standard allowed thousands of businesses, large and small, to structure their business relationships in a sensible and optimal fashion, including subcontracting discrete tasks to other companies with specialized expertise to provide services that would otherwise be far more difficult or costly. At the same time, that "direct and immediate" standard did not deny any employee the right to union representation as granted by the Act, nor did it prevent any union from bargaining with the employer directly involved in setting essential terms and conditions of employment in a workplace. Therefore, RLC fully supports the "direct and immediate" standard for determining joint employer status and urges the Board to adopt its proposed language as a rule.

2. <u>The *BFI* Standard for Determining Joint Employer Status is Amorphous, Unstable and Failed in its Essential Function</u>.

As the Supreme Court has opined, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 569 U.S. 239, 253 (2012) (holding due process required fair notice even when regulations imposed no criminal penalty or monetary liability). Inherent in the notion of due process is the requirement that the obligation be clear enough that citizens can reasonably ascertain to whom it applies.

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and when to perform the work, but not how to perform the work.") (citation omitted); *AT&T v. NLRB*, 67 F.3d 446, 451 (2d Cir. 1995) (finding no joint employment where only one indicium of control (participating in the collective bargaining process) existed and there was no direct and immediate control over hiring and firing, discipline, supervision or records of hours, payroll, or insurance); *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993) (finding joint employer status where the putative joint employer had "unfettered" power to refuse to hire certain employees, monitored the performance of referred employees, assumed day-to-day supervisory control over such employees, gave such employees their daily assignments, reports, supplies, and directions, and held itself out as the party whom employees could contact if they encountered a problem during the work day); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985) (finding joint employer status where the putative joint employer "exercised substantial day-to-day control over the drivers' working conditions," was consulted "over wages and fringe benefits for the drivers," and "had the authority to reject any driver that did not meet its standards" and to direct the actual employer to "remove any driver whose conduct was not in [the putative joint employer's] best interests.")

The "standard" the Board adopted in *BFI*, however, cannot meet the basic requirements of fair notice and due process; rather, it merely allows the Board to make post-hoc conclusions drawn after result-oriented inquiries. If the Board wishes to find joint employer status, it can, because *BFI* is a standard without clear limits and without predictive guidance. *BFI* asserted that the required element of a common law employment relationship would limit the applicability of the new standard. *BFI*, 362 NLRB No. 186, at *13. However, the Board then failed to explain how the common law test—which was never developed to resolve disputes over which entity was an individual's employer—should be applied to any of the numerous business arrangements that pervade our economy, or how any particular factor is to be weighed and the scales balanced.

The common law test was designed to distinguish between employee and independent contractor, not to distinguish among potential employers of a given employee.[8] When there is no dispute that the workers in a group are, in fact, employees of some entity, many of the factors of the common law test are already satisfied and provide no meaningful guidance to help determine whether a joint employer exists. Further, as the dissent in the D.C. Circuit's *BFI* decision points out, "employees of a true independent contractor cannot be considered employees of the company who hired the contractor . . . ." *Id.* at *26 (citing 39 C.J. *Master and Servant* § 8 (1925) ("The relation of master and servant does not exist between an employer and the servants of an independent contractor"); Restatement (Second) of Agency, § 5 (Am. Law. Inst. 1958) ("In no case are the servants of a nonservant agent the servants of the principal."). Finally, as explained further below, the Act grants and protects the rights of employees as a group, not as individuals,

[8] *Cf. Clackamus Gastroenterology Associates v. Wells*, 538 U.S. 440, n.5 (in coming as close as the Court ever has to defining the term "employer" under a labor or employment law, the Supreme Court concluded that the common law factors for determining whether an individual is an employee [the factors the *BFI* standard expressly adopted] were "not directly applicable to this case [under the Americans with Disabilities Act] because we are not faced with drawing a line between independent contractors and employees. Rather, our inquiry is whether a shareholder-director is an employee or, alternatively, the kind of person that the common law would consider an employer").

making the application of the common law test ill-suited to the purposes of the Act and yielding results antithetical to the Act's goals.

Furthermore, the Board's assertion that its indirect control test is limited because it applies only to common law employees is simply incorrect given that the multi-factor test it adopted provides no basis for determining who an employee's employer is. The Board's application of the common law test to the facts of *BFI* demonstrates that the test can be manipulated to find almost any company is a joint employer if it contracts with another for services to be rendered on its property. Leadpoint, the actual employer in *BFI*, hired, fired, disciplined, paid, and supervised its employees. Nevertheless, because Leadpoint provided services that were part of BFI's business operation on BFI's property during operational hours set by BFI as property owner, the Board had no difficulty concluding that BFI was a joint employer of Leadpoint's workers. *BFI*, 362 NLRB No. 186, at *18.

There is simply no clear delineation in the *BFI* standard regarding where the concept of indirect control ends. Such a vague standard must inevitably lead to unpredictable, absurd, post-hoc determinations of joint employer status. Business relationships today typically involve an agreement or physical realities that necessarily but indirectly result in one entity impacting the terms and conditions of employment for the other's employees.

Service contracts, in particular, often involve significant control by the customer over the service provider and, where a provider performs services on the customer's property, the amount of control is even greater. That control, in turn, can indirectly impact the service provider's employees' terms and conditions of employment. The hours that the services are performed, the skills of the individuals who will perform them and the relevant conduct requirements to ensure the customer's employees, property and its own customers are reasonably protected—not to

mention the amount the customer is willing to pay for the services—all necessarily impact the service provider's employees' terms and conditions of employment.

Under the *BFI* standard, the customers in such cases could be deemed to jointly employ the service providers' employees. Yet, it would be absurd to treat a homeowner as the joint employer of the workers a contractor hires to remodel her home simply because she and the contractor have agreed to a specified amount she will pay for the services, she controls the location and environment where the work is done, she dictates the hours that services will be performed, and she dictates what the workers must do to leave her home clean and free of hazards at the end of every day.

While the dissent to the NPRM feels there either is no uncertainty created by *BFI* or, "to the extent such uncertainty exists, [the majority] has only itself to blame for the series of missteps undertaken in seeking to hurriedly reverse *BFI*," that simply is not true. The Board's sudden effort to *sua sponte* reverse thirty years of settled precedent that produced detailed, varied factual scenarios analyzed in Board cases over the years and replace it with an entirely new standard with no clear delineation and an increased risk of being found to be a joint employer when the company has no direct and immediate control over terms and conditions of employment is what created the uncertainty.

In addition to leading to absurd results in its application, the *BFI* standard led to confusion among employers, who simply cannot tell what degree of indirect or reserved control and what type of business relationships will prompt a joint employer finding. The lack of clear guidance on the essential question of what behaviors and relationships can trigger employer status has left employers and unions in the dark and led to a great deal of unnecessary and expensive uncertainty

and instability. For these reasons, RLC opposes the *BFI* standard and encourages the Board to return to the "direct and immediate" standard through this rulemaking.

3. <u>The D.C. Circuit's Decision Further Muddies the Waters and Provides No Clear Test or Guidance for Employers, Underscoring the Need for a Clear, Bright-Line Rule</u>.

In its recent review of the *BFI* Board decision, the D.C. Circuit majority only further confused the matter. 2018 WL 6816542 (D.C. Cir. Dec. 28, 2018). Indeed, various news publications ran conflicting headlines discussing the decision, with one reporting the court had "upheld" the NLRB's *BFI* standard while many others reported that the court had "nixe[d]" it. Based on its (flawed) reading and application of the common law, the D.C. Circuit majority claimed that it was "affirm[ing] the Board's articulation of the joint-employer test as including consideration of both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment." *Id.* at *1.

However, the court then held that, "in failing to 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 overshot the common-law mark." *Id.* at *15. The court went on to identify a number of facts demonstrating indirect or potential, but unexercised, control that the Board had relied upon in *BFI*, but which would not provide meaningful help when conducting a common law analysis because they did not show joint control over "the essential terms and conditions of employment."

Specifically, the court observed that setting "the objectives, basic ground rules, and expectations for a third-party contractor" would not provide meaningful guidance for a common law joint-employer analysis. *Id.* at *18. Consequently, the court remanded the case to the Board for further consideration to "erect some legal scaffolding" to address, first, when a company is a common law joint employer and, second, when the putative joint employer possesses sufficient

control over essential terms and conditions of employment to permit meaningful collective bargaining. *Id.* at *19.

However, in attempting to distinguish allegedly indirect control over essential terms and conditions of employment from indirect control over "quotidian aspects of common-law third-party contract relationships" such as "'global oversight' [that] is a routine feature of independent contracts," the court's examples of the former really amounted to *direct* control over essential terms and conditions of employment. For example, the court distinguished between "an advance description of the tasks to be performed under the contract" as "too close to the routine aspects of company-to-company contracting to carry weight in the joint-employer analysis" versus the "use of an intermediary . . . to transmit Browning-Ferris directions to a Leadpoint sorter . . . [that] may well be found to implicate the essential terms and conditions of work." *Id.* at *18. In reality, both define the workers' job duties—the only question is how often and in what detail.

Ultimately, the court found the former to be simply a routine function of third-party business contracts in setting the general expectations, which can include the general services or products to be provided, the amount of time it should take to provide such products or services, and the general hours of operations. The latter, on the other hand, appears more akin to *direct* control by the putative employer through detailed, day-to-day work directions—even if conveyed to the workers through their direct employer as an intermediary—that would have supported a joint employer finding under the pre-*BFI* standard. *See TLI, Inc.*, 271 NLRB 798, 798 (1984) (joint employer test evaluated whether the putative joint employer "meaningfully affects matters relating to the employment relationship such as . . . direction" and whether that entity's control over such matters is direct and immediate) (citing *Laerco Transp.*, 269 NLRB 324 (1984)).

Other examples relied on by the majority in the D.C. Circuit's *BFI* decision similarly detail what is more akin *direct* control by the putative joint employer, such as "preventing hiring of [driver] applicants of which he did not approve," *Dunkin' Donuts*, 363 F.3d 437,440 (D.C. Cir. 2004), and a hypothetical example where, "for example, a company entered into a contract with Leadpoint under which that company *made all of the decisions* about work and working conditions, *day in and day out*, with Leadpoint 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," *BFI*, 2018 WL 6816542, at *18 (emphases added).

Nothing in any of those examples suggests that truly indirect or reserved control can establish a joint employer relationship. Furthermore, even the D.C. Circuit majority opinion recognized that "this case does not present the question of whether the reserved right to control, divorced from any actual exercise of that authority, could alone establish a joint-employer relationship." *BFI*, 2018 WL 6816542, at *13. If the Board is so inclined to tweak its current proposed standard to include "indirect" control of essential terms and conditions of employment, it should be limited to those decisions that are directly made by the putative joint employer and only conveyed indirectly using the employer as the intermediary.

4. <u>The Board's Proposed Rule Comports with the Common Law Test and the Language, Legislative Intent and Fundamental Policies of the Act</u>.

The Board's *BFI* decision inflated the definition of "employer" beyond any cognizable meaning of that word. Although the Supreme Court has never defined the term "employer" under the Act, it has made it abundantly clear that direct supervision of the putative employee defines the employment relationship. *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167-68 (1971). In *Allied Chemical*, the Court rejected

the Board's attempt to expand the definition of the term "employee" beyond its ordinary meaning, observing that:

> It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. . . . "Employees" work for wages or salaries under direct supervision. . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings, but ordinary meanings.

Id. at 167-68 (quoting H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947) (emphasis in original)). Just as the Board cannot define the term "employee" in a manner inconsistent with its ordinary meaning, it cannot adopt a far-fetched definition of "employer" that dramatically expands it by eliminating the fundamental touchstone of an employer-employee relationship: substantial direct control of the employee. *Cf. NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (6th Cir. 1995) ("The deference owed the Board . . . will not extend, however, to the point where the boundaries of the Act are plainly breached."). If Congress meant "employee" to be defined by the fact that she is directly controlled by her employer, it is axiomatic that Congress meant "employer" to be the entity that is exercising that direct control. Moreover, the Act clearly limits the certification of any bargaining unit to employees of a single employer. Although the Board has developed the fiction of a single, joint employer, to be consistent with the dictates of the Act, its approach in *BFI* is utterly inconsistent with the common law, the clear language of the Act, and the Act's fundamental policies and purposes.

The Board's and court's purported reliance on the common law test for agency, and the dissent's criticism of the Board's proposed rule on the ground that it is inconsistent with that common law, are based on a patently flawed misunderstanding of that test and most significantly, its history, which is the source of the common law test they claim to champion. The basic problem

with the attempt to rely on the common law's multi-factor test is that it is a test developed for particular purposes, none of which were to resolve whether an entity is a joint employer of another's employees.[9]

Rather, the multi-factor test was largely developed to guide the resolution of whether defendant-entities were liable to third parties for the wrongs of one person (its servant) as distinguished from the wrongs of another (independent contractor) for which it was not liable. Accordingly, many of the test's factors provide no guidance in determining whether individuals who are concededly one entity's employees are also some other entity's employees, including:

1) whether the individual is engaged in a distinct occupation or business;

2) whether the work is usually done under the direction of the employer or by a specialist without supervision;

3) the skill required in the particular occupation;

4) the length of time for which the person is employed;

5) whether the parties believe they are creating the relation of master and servant;

6) whether the principal is in business; and

7) the method payment, whether by the time or by the job.

By the time a question of joint employment status arises, each of those factors is already going to have been answered in a manner that establishes the individuals at issue are employees, not independent contractors. Consequently, those factors are largely irrelevant to determining whether an entity other than their employer should be deemed to jointly employ them. *BFI* utterly

[9] Although the common law was later restated (in 1958) as a multi-factor test applicable beyond questions of respondeat superior liability, it was not a restatement of court decisions interpreting federal labor and employment laws. At the time, there simply were too few federal labor and employment laws to interpret and the one with the longest history, the Fair Labor Standards Act ("FLSA"), 29 U.S.C.A. § 201 et seq., came with a unique and expansive definition of "employer" provided by Congress (i.e., "any person acting directly or indirectly in the interest of an employer in relation to an employee"). Id. at § 203(d).

failed to explain how those factors would help in any way to resolve the issue of joint employer status under the Act.

Indeed, the Board's early attempts to ignore the distinction the common law had established to separate independent contractors and employees were met with resoundingly hostile Congressional reaction, resulting in the Labor Management Relations Act (more commonly called the Taft-Hartley Act), 29 U.S.C. § 141-197. The Taft-Hartley Act sought to curtail the Board's expansion of liability under the Act to entities that were not common law employers of individuals because those individuals were independent contractors, not employees (because the putative employers did not directly supervise them).

Another limiting change Congress made through the Taft-Hartley Act was to preclude the Board from certifying a unit based solely on the extent to which a union had been successful in organizing; instead, the unit must be appropriate for bargaining. 29 U.S.C. § 159(c). Clearly, the purpose of the Act today is not merely to encourage collective bargaining for its own sake but, rather, to encourage collective bargaining that can meaningfully address the workplace concerns of a group of an employer's employees that shares a community of interest.

The attempts to anchor the analysis in the common law agency test ignores not only the purpose for which the common law test was developed to serve, but the unique nature of the statute Congress has entrusted the Board to interpret and administer. The NLRA is unique among the many labor and employment laws Congress has adopted because it focuses on the rights of groups of employees. Congress did not generally provide individual employees protections under the Act unless they were acting in concert with or on the behalf of others.

Moreover, the Act's purpose of encouraging collective bargaining is a process that requires individual employees to be part of an "appropriate unit" (*i.e.*, group) to participate. Simply put, the

common law test, developed to determine whether an individual is an employee of anyone (or an independent contractor), improperly ignores the Act's purpose and focus on groups rather than individual employees.

The Board's proposed rule makes clear that such an occasional, individual exercise of direct control would not make an entity a joint employer under the Act. The proposed rule recognizes that deeming such an entity to be a joint employer of the other's employees based on an atypical exercise of direct control toward a single employee of the other entity would undermine the purpose of the Act by creating and imposing unworkable bargaining relationships. The Act is concerned with fostering effective collective bargaining and stable labor relations, not with searching for any opportunity to impose bargaining obligations and liability on entities that do not exercise substantial direct and immediate control over a group (*i.e.*, appropriate unit) of employees.

The "direct and immediate control" test the Board had consistently applied for decades before *BFI*, which is enshrined in the currently proposed rule, focuses on the relevant inquiry: whether one entity actually exercises substantial direct and immediate control over meaningful employment terms and conditions of another's group of employees sufficient to deem it a joint employer under the Act. The Board's historical standard and proposed rule fosters the Act's purposes while remaining fully consistent with the common law. It is a standard better suited to the purpose for which it was developed and comports with the language, legislative intent, and fundamental policy of the Act. Therefore, RLC continues to oppose the *BFI* standard and encourages the Board to return to the substantial direct and immediate control standard through this rulemaking.

RLC also disputes the NPRM dissent's assertions that the proposed joint employer standard would mean "a greater likelihood of economically disruptive labor disputes." While the dissent

points to "recent examples includ[ing] nationwide strikes by employees unable to gain representation in fast food, transportation, retail, and other low-pay industries," those examples fail to demonstrate that the Board's historical joint employer standard somehow limits those employees' ability to organize or otherwise prevents them in their alleged "desire to unionize."

In reality, the proposed rule simply limits collective bargaining obligations and potential unfair labor practice liability to those entities who directly exercise substantial control over significant terms and conditions of employment. There is no anecdotal evidence suggesting such strikes—which have occurred both before and after the *BFI* decision—were somehow the result of how the Board defines a joint employer.

Further, the Board in *BFI* failed to recognize the obstacles created by forcing two different businesses to bargain over the terms of employment for a group of employees over which only one of them exercises substantial direct control. Proposed contract terms that might be crucial to one of the joint employers, and for which it might be willing to make significant concessions, might be irrelevant to, or contrary to the interests of, the other—leading to less effective bargaining. Moreover, some issues that might be significant to the union, and which might be acceptable to the direct employer if negotiating alone, likely will be barriers to any agreement in a joint-employer situation because the direct employer will not agree to be bound to certain terms when its contract with the other joint employer can be terminated on short notice. It belies logic to assume that, simply because unions want to have both businesses at the bargaining table, more effective bargaining will result. Indeed, precisely the opposite is true.

Viewed in practical terms, the Board's *BFI* standard—made only more unclear by the D.C. Circuit's recent review of the Board's decision—is plainly intended to change the way businesses negotiate with one another and structure their relationship, and that standard will inevitably cause

that result to a far greater extent than it will facilitate how an employer and its employees negotiate and order their employment relationship. Congress has made the latter the focus of the Act and its regulation the proper function of the Board. Congress, however, in no way has authorized the Board to unnecessarily interfere with, impair, or invalidate business-to-business relationships.

5. <u>The "Direct and Immediate" Standard Fits the Traditional Business Relationships in the Restaurant Industry and Would Benefit Restaurant Industry Stakeholders</u>.

In contrast to the problem of limitless expansion of joint employer status promised by the *BFI* standard—which has only been made even more unclear by the D.C. Circuit's decision—the Board's proposed return to the "direct and immediate" standard suits the distinct challenges facing the restaurant industry. The restaurant industry relies heavily on the franchise model. Prior to *BFI*, the franchise model functioned as an arms-length business relationship that benefited both franchisors and franchisees.

The franchisor set standards to maintain brand uniformity, such as what food the restaurant serves and how it is prepared. On the other hand, the day-to-day operations of the restaurant—whom to hire or fire, business hours, setting wages and schedules—was entirely within the control of the franchisee restaurant.[10] The Board's traditional "direct and immediate" joint employer standard allowed this business model to thrive, and has therefore "helped this economy create millions of restaurant jobs through the franchisor/franchisee model."[11]

[10] *See* Jerry Reese, *Testimony on Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship, before the U.S. House Committee on Education and the Workforce*. (July 12, 2017) ("At Dat Dog, we provide our franchisees a certain level of independence with which they can operate their business, allowing them to offer flexible concepts for their restaurants, like indoor/outdoor dining, areas for live music, beer gardens or art markets."), *available at* https://edworkforce.house.gov/UploadedFiles/Reese_-_Testimony.pdf.

[11] *See* letter from Angelo I. Amador, Vice President of Labor & Workforce Policy, National Restaurant Association, to David P. Roe, Chairman, Health, Employment, Labor, and Pensions Subcommittee, Committee on Education and the Workforce, U.S. House of Representatives (June 24, 2014), *available at* http://www.restaurant.org/Downloads/PDFs/advocacy/20140624Statement_on_NLRB_Joint-Employer.

As the dissenting opinion in the Board opinion recognized, "in many if not most instances, franchisor operational control has nothing to do with labor policy but rather compliance with federal statutory requirements to maintain trademark protections…Federal franchise law recognizes this benefit and requires that the franchisor maintain the mark by maintaining enough control over the franchisee to protect consumers. However, even while franchise law requires some degree of oversight and interaction, it was never the intent of Congress, by that interaction, to make a franchisee the agent of its franchisor for any purpose." *BFI*, 362 NLRB No. 186, at **45-47 (Members Miscimarra and Johnson, dissenting). Accordingly, "[f]or many years, the Board has generally not held franchisors to be joint employers with franchisees, regardless of the degree of indirect control retained." *Id.*

Unfortunately, the franchise model in the restaurant industry has become much more uncertain under the *BFI* joint employer standard, as businesses agonize over how much reserved or potential control could trigger a finding of joint employer status. This uncertainty and increased risk of liability has led to a dramatic rise in operational costs at certain franchise restaurants. For example, prior to *BFI*, it was common for franchisors to deliver free employment-related education or assistance to franchisees—such as providing training, recruitment materials, employee handbooks, or educational materials on new pertinent regulations.[12]

Now, because some franchisors are concerned that providing these materials could trigger joint employer status, some franchisees are forced to pay out of pocket for these services. That is money that a franchisee cannot reinvest in his restaurant, use to hire new workers, or use to grant wage increases. Yet to forgo education, training, or other such assistance creates a risk of liability

[12] *See* Tamra Kennedy, *Testimony on H.R. 3441, the Save Local Business Act, before the Subcommittees on Workforce Protections and Health, Employment, Labor and Pensions.* (September 13, 2017).

on the part of the franchisee that is detrimental to the franchisee and franchisor alike. In this way, the *BFI* standard harms restaurant owners and employees alike.

The Board's proposed return to the "direct and immediate" joint employer standard strikes the right balance by allowing the franchisor restaurant the ability to monitor and oversee the performance of its franchisees for reasons such as brand control and consistency, while ensuring that the franchisor would not be held liable for workplaces over which they have little or no control. It will provide certainty and predictability for restaurant owners, and provide them with the confidence to reinvest capital back in their businesses and their employees.[13]

Even the General Counsel's brief in *BFI* recognized that "[t]he Board should continue to exempt franchisors from joint employer status to the extent that their indirect control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand." *Id.* (Members Miscimarra and Johnson, dissenting, and discussing the General Counsel's memo as it related to franchises). Accordingly, any standard adopted by the Board should make expressly clear that it does not apply to franchise agreements or other provisions relating to legitimate business reasons such as brand control and product quality.

6. <u>The NPRM Examples Provide Helpful Guidance to Address Concerns Regarding Various Common Business Arrangements Raised by the *BFI* Decision</u>.

The examples provided in the NPRM certainly assist in addressing current concerns raised by the expansive test established in *BFI*. As the dissent noted in that case, the *BFI* decision established "an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships" even on just indirect control or reserved, but never exercised, control. 362 NLRB No. 186, at *25. That "new test leaves

[13] As noted in the RLC Rulemaking Petition, *supra* n.3, a predictable and easily-understood joint employer standard will help to encourage apprenticeship programs in the hospitality industry.

employees, unions, and employers in a position where there can be no certainty or predictability regarding the identity of the 'employer,' . . . threatens to cause substantial instability in bargaining relationships, and will result in substantial burdens, expense, and liability for innumerable parties." *Id.* The NPRM examples serve to address multiple common business relationships that, while the putative employer does not exercise direct and immediate control over essential terms and conditions of employment, they would nonetheless be held a joint employer under the *BFI* expanded standard due to indirect or unexercised control that are simply a function of business decisions, not an exercise of employer control.

The dissent to the NPRM complains the examples are too "simplistic" because additional circumstances in each of the provided examples could change the result, but that is true regardless of which standard is applied. Indeed, the majority in *BFI* recognized that exact point: "But we do not and cannot attempt today to articulate every fact and circumstance that could define the contours of a joint employment relationship. Issues related to the nature and extent of a putative joint-employer's control over particular terms and conditions of employment will undoubtedly arise in future cases—just as they do under the current test—and those issues are best examined and resolved in the context of specific factual circumstances. In this area of labor law, as in others, the '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.'" *Id.* at *20.

Ultimately, the dissent's argument misses the point. The examples do not—and cannot—address every factual situation that may arise in a given joint employer case. Rather, they identify common business relationships and contracts that, while they may indirectly relate to terms and conditions of employment, should not create a joint employer relationship unless the putative

employer goes above and beyond in actually exercising direct and immediate control over essential terms and conditions of employment.

For example, a cost-plus contract allowing the employer discretion to set wages and benefits is very common in current subcontracting relationships. Obviously, cost-plus provisions can have an indirect effect on wages—while the customer or other putative joint employer is not directly setting particular employees' wage rates, the direct employer rationally would not set wage rates above what it can recover through the cost-plus contract. However, even the D.C. Circuit majority in *BFI* recognized that a cost-plus contract, "a frequent feature of third-party contracting and sub-contracting relationships," should not in and of itself establish a joint employer relationship. *BFI*, 2018 WL 6816542 at *19.

Similarly, it is important to recognize that the putative employer can raise concerns to the employer regarding the product or services being provided without becoming a joint employer unless it also exercises actual control over any resulting disciplinary action for the other company's employees. In the same vein, it should be recognized that a franchisor may set general expectations—such as product quality and production, uniforms with the company trademark and general hours of operation—without becoming a joint employer, absent evidence that the franchisor directly controlled essential terms and conditions of employment, such as setting specific employees' schedules, granting or denying leave requests, or making hiring and disciplinary decisions. Furthermore, recognizing the property owner has the legal obligation to address serious misconduct by another company's employee on its premises, such as sexual harassment and property damage, and meeting those legal obligations should not inappropriately convert the property owner into a joint employer.

In reality, indirect and reserved control, while it may relate to essential terms and conditions of employment, is a function of such ordinary third-party contracting relationships—not evidence of "significant control" over another company's employees that constitutes "shar[ing] or co-determin[ing] those matters governing essential terms and conditions of employment." *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117 (3d Cir. 1982). Indeed, the D.C. Circuit majority held that "employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor cast no meaningful light on joint-employer status," despite the fact indirect and reserved control in a subcontractor, franchise or other third-party business agreement that may relate to essential terms and conditions of employment exist—the exact reason why the *BFI* standard does not work in defining who is a joint employer under the Act for purposes of effective collective bargaining.

Indeed, as Senior Circuit Judge Randolph pointed out in his dissent, evidence of indirect control is actually relevant to show that the company is *not* a joint employer. *BFI*, 2018 WL 6816542 at *28 (Randolph, J., dissenting). As Judge Randolph's dissent points out, the Regional Director agreed the evidence that a BFI supervisor once informed Leadpoint about two Leadpoint workers potentially consuming alcohol on BFI's property, but did not exercise direct control in actually disciplining, removing or firing the Leadpoint workers, showed that BFI was *not* the joint employer: "Surely if BFI had authority to terminate Leadpoint employees, [BFI's manager] would have done this without having to email Leadpoint's President, located in Arizona, to do so." *Id.* at * 29 (quoting *Browning-Ferris Indus. of Cal., Inc.*, Case 32-RC-109684, 2013 WL 8480748, at *9 (N.L.R.B. Aug. 16, 2013)). Instead, BFI did what any property owner would do if another company's employees engaged in misconduct on its property—especially misconduct that could result in liability for the property owner—it simply reported its customer concerns to Leadpoint.

However, BFI did not take it further in exerting direct and immediate control over any resulting essential term and condition of employment. Rather, Leadpoint, as the sole employer, independently investigated the issue and made its own disciplinary decisions to terminate one Leadpoint worker and transfer the other one to a different facility. *Id.* at *4. BFI was not involved with the investigation or resulting disciplinary decisions and admittedly did not know what happened to either Leadpoint worker. *Id.* at **4-5. Nor does an isolated situation of a customer complaint somehow mean that BFI suddenly co-determined essential terms and conditions of employment for the entire group of Leadpoint workers in general, such that it must be deemed a joint employer in order to ensure effective collective bargaining over issues such as disciplinary actions.

7. <u>The Proposed Rule Can Be Strengthened Through the Use of Clear Definitions</u>.[14]

While, as noted above, the examples in the NPRM provide helpful guidance, particularly given the current concerns raised by the *BFI* decision, RLC believes the Board can improve the proposal and its future application by codifying definitions of key terms. The primary benefit of the NPRM involves its bright line requirement for meaningful, actual control over essential terms and conditions of employment.

To provide clear guidance and "scaffolding" around a final rule, the terms "direct and immediate control" and "essential terms and conditions of employment" should be defined. If the Board adopts clear definitions of these terms, it will help achieve the certainty that employers need to operate predictably and efficiently and that the Board needs to adjudicate fairly and consistently. Thus, RLC suggests the inclusion of the definitions set forth below to outline explicitly those terms

[14] As stated in footnote no. 5, RLC is a Management Committee member of CDW and a very similar version of this recommendation is also included in CDW's comments, but added here as well for emphasis.

and conditions the Board considers central to an employment relationship and to provide employers certainty and greater clarity in application.

i. RLC proposes the following definition of "essential terms and conditions of employment":

> **"Essential terms and conditions of employment" shall mean the hiring, promotion, discipline and discharge of employees; determination of individual employee rates of pay and benefits; engaging in day-to-day supervision of employees; and directly assigning particular employees their individual work schedules, positions and tasks."**

The clear limits of this definition benefit employers by providing certainty about the types of decisions each can undertake without sacrificing independence and unknowingly triggering a joint employer relationship. Further, they will allow the Act to operate consonant with other federal laws that may require a Retaining Company[15] to exercise some limited forms of control over a Retained Company.

From a day-to-day operations perspective, however, Retained Companies still control the essential terms and conditions that meaningfully affect the work of their employees. Retaining Companies might direct the hours a store or construction site can operate or the uniforms workers wear, but they do not generally dictate when individual employees work, how much they earn or whether they progress in their job. As written, the NPRM likely allows Retaining Companies to operate with the kind of attenuated supervision most use, but a clearer definition of essential terms and conditions would create clearer boundaries for them to navigate.

[15] The term "Retaining Company" is used in this section to refer to businesses that contract with other companies to perform services. The term "Retained Company" will refer to businesses that perform services for their partners. Because so many businesses fit within this model, the use of these two terms will allow consistency throughout this section. Although franchisees and franchisors do not actually fit the "retaining" and "retained" model, they are included in the terms, because the general principles are the same.

Of course, in many contexts, a Retaining Company will need to impose routine contractual requirements for the completion of the Retained Company's work to ensure it meets the contracted-for standards, but that supervision is not akin to providing direct, day-to-day instructions to a Retained Company's employees or assigning them particular tasks. Again, from an employee's perspective, the party in charge of their particular work schedules and specific assignments controls the essential terms and conditions of their employment.

It is not sound policy to require a secondary business to engage in bargaining merely because it maintains—as it must—the right to determine whether the retained company and its employees have fulfilled their contractual duties to provide a defined product or service. Such routine control is inherent in the business relationship and does not constitute control over essential terms and conditions of employment.

ii. RLC further suggests an explicit list of the types of routine contractual requirements that control that should not qualify as substantial control affecting "essential terms and conditions of employment." The addition to the rule would state:

> **"Substantial control affecting essential terms and conditions of employment" shall not include any of the following: actions, policies, training or programs intended (1) by any entity to require compliance by its suppliers, vendors, subcontractors or other entities with whom it has a business relationship with any federal, state or local law, regulation or other legal requirement; (2) by any franchisor to require, maintain or enforce the standardized services, products, processes or product delivery of the business system to which the franchisee has agreed to participate; (3) by any entity to require, implement or administer any social responsibility code or policy, including safety and security policies, with respect to suppliers, vendors, subcontractors or other entities with whom it has a business relationship; (4) by any franchisor to require, maintain or enforce the brand protection standards required of persons who enter into franchising agreements with such franchisor; (5) by any entity to require and establish time parameters when the activity or work in question is to be performed; (6) by any entity to require and establish quality service or outcome standards for any activity or work to be performed; (7) by any entity to require an individual to wear any type of uniform or any other type**

> **of identification that mentions in any manner the entity's brand; (8) by any entity to require, maintain or enforce product, brand or reputational protection standards for its products, goods or services; and (9) to implement third party delivery and courier services, or technology-based shared staffing applications (including, but not limited to, insurance, training, financing and leasing services); (10) by any association whose primary purpose is to negotiate and administer multi-employer collective bargaining agreements on behalf of its employer-members.**
>
> **Substantial control shall not include optional training programs or optional management and operational tools, including but not limited to business consulting and data analysis, that a franchisor or other entity offers to franchisees or other contracting entities.**
>
> **Retained or reserved but unexercised control over essential terms and conditions of employment, and/or the exercise of routine, arms-length, indirect control over essential terms and conditions of employment, shall not alone be dispositive of joint employer status."**

These proposed exceptions cover common forms of routine, attenuated control Retaining Companies often exercise over Retained Companies that do not affect the essential terms and conditions of employment. For example, Retaining Companies need to enforce brand protection requirements and social responsibility programs included in their contracts with Retained Companies and make sure projects are completed on time and up to standards. They also have an interest in ensuring their Retained Companies comply with federal laws like OSHA. These types of attenuated control do not affect the promotional opportunities, rates of pay, or other essential terms and conditions of Retained Companies' employees.

These exceptions will further clarify the definition of "essential terms and conditions" and create the necessary scaffolding to separate routine, everyday aspects of business-to-business contracting from types of control that directly affect essential terms and conditions of employment. The Board may be unable to list every possible type of control a Retaining Company may exercise or reserve over a Retained Company without affecting the essential terms and conditions of the

Retained Company's employees, but this extensive list of common forms of routine control will help businesses structure their affairs and prevent factfinders from expanding the rule to cover areas not intended by the Act or the NPRM.

Because these definitions provide clear limits for the application of the proposed rule, RLC suggests including them in addition to the examples currently provided. No approach is foolproof, but codified definitions together with the examples will make it easier for the Board and courts to apply the final rule consistently in future cases.

8. <u>This Issue is Particularly Well Suited for Resolution Through the Rulemaking Process</u>.

The policy oscillation that accompanies the Board's shifts in political control is a common criticism of the Board's jurisprudence; it also has eroded the deference to which the Board should be entitled. Adjudication is susceptible to trending political currents, allowing "new" Boards to reverse decisions made by "old" Boards, as Board majorities change with presidential administrations. Reversals and re-reversals on issues of fundamental importance under the Act have become commonplace despite their pervasive impact and consequent controversy. Lack of deference to long-established precedent inevitably undermines the Board's credibility with the federal judiciary and the public.

It creates uncertainty that undermines the rule of law, leaving those impacted with questions but lacking meaningful guidance. Such uncertainty is particularly damaging to the Board's constituents—businesses, labor unions, and employees—because they cannot understand their rights and obligations at any given time, rendering it impossible for long-term planning with any reasonable expectation that a current Board decision will be the same rule four years from now.

Unpredictability and chaos in the law harms more than the Act's stakeholders; it damages the rule of law that depends upon citizens knowing their rights and obligations before they are required to follow them, or be punished for violating them. Moreover, one of the Board's primary purposes is to ensure stability in labor relations, but the uncertainty the Board has created by reversing long-standing precedent without clear evidence of compelling justification undermines the stability the Board is charged to provide.

For many years, the Board's preference for adjudication to the near exclusion of rulemaking has been criticized repeatedly and with near unanimity by those who have commented on the subject. Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Adjudication vs. Rulemaking*, 64 Emory L. J. 1469, 1473 (2015), *available at* http://law.emory.edu/elj/content/volume-64/issue-special/panel-i/rulemaking-vs-adjudication.html. As the Supreme Court emphasized, APA rulemaking provides significant benefits over adjudication, as it ensures "fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 777-79 (1969). The Court's perspective has been frequently echoed by other courts and academics alike.

APA rulemaking has an advantage over adjudication because it applies rules prospectively; in defining what constitutes a joint employer under the Act, that prospectivity allows stakeholders time to understand what conduct will trigger joint employer status and its resulting obligations. Rulemaking has the advantage of affording the Board time to involve, prepare, and educate the public through webinars, FAQs or compliance toolkits, and providing clarity that fact-specific adjudication cannot.

Indeed, even the dissent to the NPRM recognizes that rulemaking with public participation is important when the Board is making rules regarding fundamental aspects of the Act that broadly

affect stakeholders and may often be preferred over case adjudication. The dissent expresses concern the Board is not holding oral argument on the NPRM—although citing only two examples where it has done so in the past—because of a belief that individuals and small businesses with valuable insight may not be able to afford legal assistance to write a brief.

However, that fails to recognize that many groups purporting to represent employees, and trade groups that represent small businesses, are filing comments to express their views, experiences, and interests. Such is the case with these comments: RLC on behalf of its member-based affiliate, the National Restaurant Association, represents the interests of thousands in the restaurant industry, most of which are small businesses.

Finally, the Board's proposed rule provides an advantage over adjudication that is unique in rulemaking generally, as it would adopt a standard that immediately includes 30-plus years of Board and court development and explanation. The Board's proposed rule would essentially codify the "direct and immediate" standard that, until *BFI*, had been settled law for decades. To ensure the broadest participation on such a fundamental question under the Act, rulemaking is the most appropriate method for the Board to define what is necessary for an entity to be deemed a "joint employer" under the Act.

Such transparency and clarity is crucial to the restaurant industry members, many of which are small businesses and franchisees that operate on small profit margins. Those margins can quickly evaporate when businesses must re-evaluate and repeatedly change long-term plans due to ambiguous and changing Board decisions on far-reaching issues that significantly impact their business models and operations. Defining what constitutes a joint employer under the Act by the Board's proposed rule furthers the Board's purpose of fostering stability in labor relations.

While the D.C. Circuit recently issued its opinion in *BFI*, as explained above, it only muddied the waters by finding that indirect and potential control can be "relevant" to the joint employer analysis, but going on to hold that the Board had not applied those relevant factors within the parameters of the common law and remanding it for the Board to somehow construct "legal scaffolding" on the specific facts of the *BFI* case, even while recognizing that the case cannot address certain issues and concerns created by the *BFI* joint employer standard. For example, "this case does not present the question of whether the reserved right to control, divorced from any actual exercise of that authority, could alone establish a joint-employer relationship." *BFI*, 2018 WL 6816542 at *13.

Rulemaking, on the other hand, will allow the Board to more fully articulate the proper standard relying on public comments from across the country in different industries dealing with a variety of issues under the current *BFI* joint employer standard, rather than being narrowly confined to the facts in a specific case. Furthermore, the Board issued the NPRM prior to the D.C. Circuit's decision in *BFI.* As Judge Randolph pointed out in his dissent, the United States Supreme Court "requires federal courts to respect the Board's determination to proceed by rulemaking" and should have remanded the case pending the rulemaking rather than attempting "to short-circuit the Board's choice, to control and confine the scope of rulemaking, and to influence the outcome of that proceeding." *Id.* at *24 (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974)).

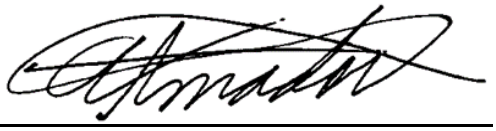
IV. CONCLUSION

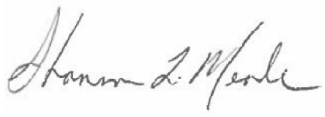
The rationale that led the Board to adopt a "direct and immediate" control standard three decades ago remains fully applicable today. The Board, recognizing that fact and acting to correct its error, has proposed a return to the "direct and immediate" standard that prevailed prior to BFI.

RLC commends the Board for its willingness to participate in the rulemaking process and urges it to quickly and decisively adopt the "direct and immediate" standard proposed in the NPRM.

We thank you for the opportunity to submit these comments and look forward to working with the Board moving forward to bring clarity to this issue that affects so many business relationships in our industry.

Sincerely,





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