UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel
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Washington, DC 20570

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Members of the Board:

This comment is submitted by the General Counsel of the National Labor Relations Board in response to the National Labor Relations Board's Notice of Proposed Rulemaking, Request for Comments dated September 14, 2018.

I. Introduction.

The General Counsel of the National Labor Relations Board (NLRB) believes that the joint employer standard enunciated in *Browning-Ferris Industries of California d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (Aug. 27, 2015), *petition for review docketed*, No. 16-1028 (D.C. Cir. filed Jan. 20, 2016) (hereinafter "*BFI*") should be overturned and that the proposed rule should be adopted to replace it. The joint employer standard articulated in the *BFI* decision both departs from decades of Board law and conflicts with federal and state statutory and common law. The General Counsel also believes that rulemaking is the appropriate vehicle, rather than decisional law, to address this important issue that has ramifications for numerous businesses throughout the United States.

As discussed below, while the proposed rule goes a long way to ameliorate the problems created by the *BFI* standard, it does not go far enough in providing clarity concerning the appropriate application of the new joint employer standard. For instance, the proposed rule does not provide sufficient guidance to entities or factfinders concerning the combination of factors that determine joint employer status. The proposed rule seems to create a "one size fits all" standard without addressing how this approach will affect specific industry concerns or business realities. Equally important, the proposed rule does not address the circumstances in which a joint employer analysis is necessary or permissible, nor the legal or practical consequences to an entity that is found to be a joint employer. Thus, the proposed rule should also clarify that application of the joint employer analysis should be limited to situations where the alleged joint employer has committed an unfair labor practice itself or a joint-employer finding is necessary to effectuate a

remedial order of the Board. In the sections below, we address these concerns and issues. Given the far-reaching ramifications of a joint employer definition, we suggest that the Board in its final rule provide further guidance as outlined in this comment.

II. The Board's Proposed Rule is Necessary to Overturn the Ill-Considered Decision of the Board Majority in *BFI*.

We fully support the adoption of this much-needed proposed rule. Put simply, the decision of the majority in *BFI* was mistaken as a matter of labor law and misguided as a matter of labor policy. That decision abandoned a longstanding test that had provided a significant measure of certainty and predictability and replaced it with a vague and ambiguous standard that allows the possibility of imposing unworkable bargaining obligations on multiple entities in a wide variety of business relationships. This change has subjected countless entities to previously unknown joint bargaining obligations, to potential joint liability for discriminatory actions of their putative joint employers or for breaches of collective-bargaining agreements to which they do not know they are bound, and to primary strikes, boycotts, and picketing that would previously have been unlawful secondary activity.

Indeed, under the rule of *BFI*, virtually all user employers, franchisors, subsidiaries, etc., would meet the joint employer test simply because their contracts with the entities that actually employ the employees at issue almost always have the *potential* to control the employees' working conditions -- even if only because the user employer or franchisor can always simply cancel the contract if it is not satisfied with the supplier employer's or franchisee's terms and conditions of employment. Thus, the Board's proposed rule is much needed to avoid the almost limitless indirect control/right-to-control standard in *BFI* that creates joint employer relationships in nearly every contractual business relationship. Under the current standard, parties to such contracts can never know if they will ultimately be considered joint employers at some time in the future. Therefore, a more rational standard based on actual "substantial direct and immediate control" is critically necessary.

A. The Board's proposed rule would promote industrial stability.

For decades, the long-standing pre-*BFI* Board criteria for determining joint employer status that would be re-established by the proposed rule provided employers with substantial stability and predictability in entering into labor supply arrangements in response to fluctuating market needs, served to reduce the scope of labor disputes, and limited the circumstances in which non-employing entities could be responsible for participating in bargaining. In this regard, we emphasize that, while the Act encourages collective bargaining, it does so only as to an actual

"employer" in direct relation to its employees. The Board majority in *BFI* expanded the objective of collective bargaining far beyond what Congress intended, and far beyond what promotes industrial stability. Rather, the *BFI* test fosters substantial bargaining *instability* by requiring the nonconsensual inclusion of entities with diverse and conflicting interests on the "employer" side of the bargaining table. Indeed, the very commencement of good faith bargaining may often be delayed by disputes over whether the correct "employer" parties are present, the respective legal and bargaining obligations of the various "employer" parties, and the bargaining proposals to be offered at the table. The outcome of this unpredictability is irreconcilable with the Act's overriding policy to "eliminate the causes of certain substantial obstructions to the free flow of commerce." 29 U.S.C. § 151.

BFI greatly expanded who can be found to be a joint-employer without adequately considering the practical implications for real-world business and collective-bargaining relationships. This is contrary to the Act's goal of "achieving industrial peace by promoting *stable* collective-bargaining relationships." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (emphasis added). *See also Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.").

The decision in *BFI* has had the effect of disrupting thousands, if not hundreds of thousands, of business relationships, contractual relationships, and, ultimately, bargaining relationships because the new joint employer standard now extends its reach to decades-old business relationships, as well as business partners that have never before been thrust into their customers' or vendors' labor disputes and whose presence in them can only serve to impede the likelihood of their resolution. The majority in *BFI* purported to revisit the Board's joint employer standard because of the supposed great expansion in use of temporary help services agencies starting in the 1990s and the increasing number of individuals who work for such agencies, even though the majority could point to no pressing labor problem in need of correction that had arisen from either the supposed expansion of this type of workforce or the application of the traditional joint employer standard to this workforce situation. 362 NLRB No. 186, slip op. at 11. Nevertheless, the resulting *BFI* joint employer standard is now being applied expansively well beyond the claimed increased temporary help services agencies and their clients to multiple well-settled business and contractual relationships with stable labor relationships -- such relationships are now being destabilized by these new legal obligations that did not exist when the relationships were established.

Further, the current legal standard, by extending joint employer status to entities with "indirect" or "potential" control, not only expands the scope of putative joint employer entities in the NLRA context but potentially creates conflicts with other federal and state statutory schemes. To the extent that the *BFI* joint

employer standard diverges from such other schemes, such divergence will inevitably create inconsistencies and conflicts for businesses in their attempts to comply with the various federal and state employment and related laws. This is especially true here where courts in fashioning standards for analysis under Title VII and other federal employment laws have looked to the NLRA for guidance. *In re Enterprise Rent–A–Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 469-70 (3d Cir. 2012) (discussing the standards used in FLSA, ADEA, and Title VII cases).

Thus, as the dissent in *BFI* predicted, the number of contractual relationships now encompassed within the new standard is "virtually unlimited" and includes, among others, franchisors, any company that negotiates specific quality or product requirements, any company that has provisions in its contracts concerning the quality of contracted services, any company that has input on who provides services to it, or that monitors performance, and any "consumers or small businesses who dictate times, manner, and some methods of performance of contractors." 362 NLRB No. 186, slip op. at 37 (Members Miscimarra and Johnson, dissenting). The need to return to a reasonable joint employer legal standard that more closely conforms to extant federal, state, and common law is thus pressing.

B. The Board's proposed rule would resolve other problems presented by the Board majority's decision in *BFI*.

The Board's proposed rule would resolve other problems presented by the Board majority's decision in *BFI*, including unwarranted vagueness and uncertainty, unworkable collective-bargaining requirements, and allowing the spread of economic coercion to additional business entities not otherwise involved in labor disputes. The *BFI* rule imposes no meaningful limit on who can be deemed a joint employer of another's workers. It eliminated the appropriate emphasis on whether a putative joint employer has actual direct and immediate control of essential terms of employment, which establishes a discernible and rational line between what does and does not constitute an employer-employee relationship under the Act. The Agency discretion afforded by this change means that no contracting business entity can ever be certain that it will not be faced with some future Board determination that it is a joint employer based on the incomprehensible view that bargaining would somehow be more effective if more parties are forced to be at the table.

The vague and ambiguous *BFI* standard lacks clarity and provides minimal, if any, guidance as to what factors are significant for evaluating joint-employer status. For example, a user employer receiving employees from a supplier employer always exercises ultimate control over the supplier's employees at its facility, if only to retain the potential to take action to prevent disruption of its own operations, to prevent unlawful conduct, or to ensure that it is obtaining the level and quality of services it has contracted for, at the cost for which it contracted. *See, e.g., Southern*

California Gas, 302 NLRB 456, 461 (1991). Efforts by a user employer to monitor, evaluate, and improve the performance of supplied employees, as opposed to controlling the manner and means of their performance (and especially the details of that performance), are typical of the relationship between a company and its supplier and should not make the supplier's workers employees of the user employer. The existence of this kind of oversight, therefore, cannot be an appropriate basis for finding that the user employer is a joint employer of its supplier's employees.

Nevertheless, under the *BFI* standard, countless entities are potentially subject to significant financial liabilities for merely ensuring that they are receiving the services for which they contracted. Under *BFI*, collective bargaining also appears to be required wherever there is some modicum of interdependence between or among employers. This requirement is much more likely to obstruct the free flow of commerce, rather than promote it. Such outcomes are likely because of the virtually limitless discretion to make decisions in this area given by *BFI* to after-the-fact factfinders, even though the factfinders may have no grounding in the realities of business contracting or the logistical necessities of efficient, effective, and productive collective bargaining.

The *BFI* majority decision required that the Board would look at every aspect of a business relationship on a case-by-case basis and then decide the joint employer question after the fact. Because of this, the uncertainty created by *BFI*'s vague standard created an unreasonable risk that parties may only discover subsequently, following years of costly litigation, that they have been unlawfully absent from negotiations in which they were legally required to participate, or conversely that they unlawfully injected themselves into collective bargaining between another employer and its union(s) based on a relationship that ultimately turned out to be insufficient to result in a joint-employer finding. As the dissenters in *BFI* put it, the Board owed a "greater duty to the public than to launch some massive ship of new design into unsettled waters and tell the nervous passengers only that 'we'll see how it floats.'" *BFI*, 362 NLRB No. 186, slip op. at 48 (Members Miscimarra and Johnson, dissenting). The lack of concern for the real-world consequences of the changes set forth in *BFI* does a disservice to the parties that have to function under the Board's decisions in the real world.

Moreover, collective bargaining was intended by Congress to be a process that could conceivably produce labor agreements. One of the key analytical problems in widening the net of who must bargain is that, at some point, agreements will *not* be achievable because the different parties involuntarily thrown together as negotiators under the *BFI* test predictably have widely divergent interests. For example, under the *BFI* joint employer test, a company that contracts with another to supply labor at a fixed price per hour may be considered a joint employer and have an obligation to bargain over wages, even

though the supplier employer is the actual employer of the employees and payer of the wages. Should the user company be compelled to bargain over wages of the supplier's employees, the joint employers may have irreconcilable differences over wage rates since any wage increase will not affect the user employer but will affect the supplier's costs of performing the contract. Injecting an additional party into the collective bargaining process with interests that do not align with the co-employer's concerning a critical element of collective bargaining, such as wages, will make achieving agreement much less likely. Thus, *BFI's* expansion of bargaining obligations to additional business entities will have the effect of destabilizing existing bargaining relationships and complicate new ones.

Further, this expansion of a joint employer finding to require additional business entities to be at the bargaining table, or potentially face liability for violation of Section 8(a)(5) and 8(d) of the Act, conflicts with 80 years of Board precedent. By requiring a joint employer to be at the bargaining table along with the co-employer, the NLRB for the first time is, in effect, dictating who must sit at the bargaining table. The Board has never previously required entities that are not the employer or certified labor representative to be a party to collective bargaining, even if that party has control over certain terms and conditions of employment. The Board has not required this of international unions that control their locals' bargaining authority; nor should the Board require bargaining by a joint employer that may control certain terms and conditions of employment. Such applications of the current joint employer standard yield legal obligations that are a gross departure from Board precedent and practicality.

Not only did the *BFI* test impermissibly expand and confuse bargaining obligations under Section 8(a)(5) and 8(d), it also did violence to other provisions of the Act that depend on a determination of who is, and who is not, the "employer." Chief among them is Section 8(b)(4)(ii)(B), which prohibits secondary economic protest activity, such as strikes, boycotts, and picketing. That section of the Act "prohibits labor organizations from threatening, coercing, or restraining a neutral employer with the object of forcing a cessation of business between the neutral employer and the employer with whom a union has a dispute," *Teamsters Local 560 (County Concrete Corp.)*, 360 NLRB 1067, 1067 (2014), but does not prohibit striking or picketing the primary employer, i.e., the employer with whom the union does have a dispute, *Steelworkers v. NLRB (Carrier Corp.)*, 376 U.S. 492, 499 (1964). An entity that is a joint employer with the employer involved in a labor dispute is equally subject to union economic protest activities. *See, e.g., Teamsters Local 688 (Fair Mercantile)*, 211 NLRB 496, 496-97 (1974) (union's picketing of a retailer did not violate Section 8(b)(4)(ii)(B) because retailer was the joint employer of employees of a delivery contractor with which the union had a labor dispute). To put this in practical terms, before *BFI*, a union in a labor dispute with a supplier employer typically could not picket a user entity to urge that entity's customers to cease doing business with the user, with the object of forcing the user employer to

cease doing business with the supplier employer. *BFI*s expansion of the joint-employer doctrine swept many more entities into primary-employer status as to labor disputes that are not directly their own. As a result, unions may be permitted to lawfully picket or apply other coercive pressure to either or both joint employers as they chose, even though the targeted joint employer may not have direct control or even *any* control over the particular terms or conditions of employment that are the subject of the labor dispute. This result is clearly contrary to the Act's object of limiting the spread of economic coercion beyond the entities actually involved in a labor dispute.

II. The Board's Proposed Rule is an Important Step in the Right Direction, But More Clarity and Predictability are Needed.

We agree that the proposed rule is decidedly a positive and constructive step towards establishing a sensible, workable, comprehensive definition of a joint employer, although more explanation and elucidation are needed. Thus, as noted above, the broad strokes of the rule, particularly requiring a finding that a joint employer's substantial actual control of employees' terms and conditions of employment be direct and immediate, and not limited and routine, are an important step towards re-establishing predictability, stability, and appropriate statutory labor policy as to this definition. The proposed rule certainly takes great strides towards eliminating the chance that a business entity will be erroneously determined to be a joint employer based solely on indirect and potential control, such as merely based on an unexercised contractual reservation of control. The proposed rule also clearly decreases uncertainty about who will be a joint employer, thus promoting industrial stability and allowing business entities to better anticipate their legal and operational obligations.

However, without additional comments, explanation, rulemaking, and/or adjudication from the Board clarifying several related aspects of the Board's joint-employer doctrine, the proposed rule necessarily fails to resolve many of the extant issues in joint employer jurisprudence, and thereby fails to provide sufficient clarity for employers, employees, unions, and business partners as well as the factfinders adjudicating this issue. In this regard, we particularly emphasize that: (1) the proposed rule still leaves questions as to which employment terms are "essential," which of those "essential" terms are critical in determining whether an entity is a joint employer, and how many (and to what extent) terms must actually be subject to the putative joint employer's direct and immediate control in order to establish joint employer status; (2) the critical terms in the joint employer standard -- "substantial," "limited," and "routine" remain insufficiently defined in the proposed rule; and (3) the examples the Board has given provide insufficient guidance in delineating joint employer status. The final rule should therefore clarify and answer these open issues. Below are some suggested changes to the proposed rule to provide greater guidance in all of these areas.

A. Defining essential employment terms.

As to further clarifying what employment terms are essential in determining joint employer status, and the appropriate weight to be given such terms, we note that the Board stated in its seminal *Laerco* and *TLI* decisions that the focus of "essential" terms is whether an alleged joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." *Laerco*, 269 NLRB 324, 325 (1984); *TLI*, 271 NLRB 798, 798 (1984), *enforced sub nom., Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985). Notably, employees' wages and benefits are not expressly on this list, even though these particular terms are seen as the most significant and essential subjects of employees' terms and conditions of employment and, typically, the most central subjects of collective bargaining. Indeed, the Board looks primarily at who provides wages and benefits in determining employer status in other contexts. *See, e.g., Management Training Corp.*, 317 NLRB 1355, 1360 (1995) (in determining whether to assert jurisdiction over a private employer who is arguably controlled by an exempt entity, the Board looks to whether the employer "lacks control over essential terms and conditions of employment, e.g., wages and benefits"), *reconsideration denied*, 320 NLRB 131 (1995). The seeming limitation of consideration of "essential" terms and conditions of employment in the proposed rule to "hiring, firing, discipline, supervision and direction," without including compensation and benefits is inconsistent with prior Board law. *See, e.g.*, *TLI,* 271 NLRB at 799 (finding no joint employer status because, among other reasons, the putative joint employer had input in, but did not control, the "economics of the relationship" such as wages and other economic benefits). Under other federal statutes, factors normally used in determining whether an entity is a joint employer include (1) authority to hire and fire employee, (2) authority to promulgate work rules and assignments and set conditions of employment such as compensation and benefits, and (3) possession of day-to-day supervision of employees, including employee discipline. *In re Enterprise Rent–A–Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 469-70 (3d Cir. 2012) (discussing the standards used in FLSA, ADEA, and Title VII cases).

In the final rule, the Board should list the "essential terms and conditions of employment" factors necessary to determine whether a joint employer relationship exists. These factors should include control over (1) the determination of wages and benefits, (2) hiring and firing of employees, and (3) discipline, supervision and direction of employees. Such a list will better guide all parties as to what their obligations are.

The Board should also clarify whether the factors enumerated are or are not an exhaustive list of all potentially relevant employment conditions that may determine joint employer status. Further, the Board should also provide additional

guidance on how the factors should be analyzed and the weight to be given to particular factors individually or in combination.

In the final rule, the General Counsel suggests that, for an entity to be deemed a joint employer subject to a bargaining obligation or for vicarious liability for a co-employer's violation of a bargaining obligation, that entity must control *all* listed essential terms and conditions of employment factors. Given the grave concerns about subjecting an arm's-length business partner to a bargaining obligation with another employer's employees' bargaining representative, the threshold for a finding of a joint employer relationship in this context should be high and such findings of joint employer status should be rare. Indeed, it makes no sense for an entity that may control all terms of employment other than wages and benefits to be compelled to appear at the bargaining table. For the reasons discussed in Section II.A. above, requiring such entity to bargain would be an exercise in futility with respect to achieving, let alone quickly achieving, a collective-bargaining agreement.

On the other hand, for possible liability with respect to different types of unfair labor practice allegations engaged in by a co-employer such as unlawful discipline or discharge for protected activity, control of less than *all* of these employment terms may be sufficient to establish joint employer liability. In these types of circumstances, the Board and courts generally do not impose liability on a joint employer, unless the joint employer was the bad actor or knew or should have known about the unlawful activity and did nothing to prevent or mitigate it. *See Capitol EMI Music*, 311 NLRB 997, 1000 (1993), *enforced*, 23 F.3d 399 (4th Cir. 1994); *America's Best Quality Coatings Corp.*, 313 NLRB 470, 471 (1993), *enforced,* 44 F.3d 516 (7th Cir. 1995).

In any event, the final rule should enumerate the employment terms and conditions that should be factored into the joint employer determination, state the weight to be accorded to different factors, and address the number of factors necessary to make such a determination with respect to the context in which such determination is being made.

B. Clarifying the requisite level of control.

The Board should also provide greater guidance as to what constitutes "substantial actual control" of employees' terms and conditions of employment that is direct and immediate and not "limited and routine." Is direct control over just any one term enough? Does it matter what term, or how substantial or significant the putative joint employer's control is over that term? If extremely limited control is not sufficient, more elaboration is needed to indicate how much direct control is necessary, and over how many and what terms.

Similarly, while the Board's proposed rule certainly is based on key common law principles such as "the extent of actual *supervision* exercised by a putative employer over the 'means and manner' of the workers' performance," *Aurora Packing Co. v. NLRB*, 904 F.2d 73, 76 (D.C. Cir. 1990) (emphasis in original), the Board should clarify the parameters of what kinds of actual supervision and direction of employees is only "limited and routine" and insufficient to establish joint employer status. *See, e.g., Laerco*, 269 NLRB at 326; *TLI*, 271 NLRB at 799; *Flagstaff Medical Center, Inc.,* 357 NLRB 659, 667 (2011) (daily supervision of housekeeping employees was "limited and routine"), *enforcement denied on other grounds*, 715 F.3d 928 (D.C. Cir. 2013); *Teamsters Local 776 (Pennsylvania Supply)*, 313 NLRB 1148, 1154 (1994) (assignment of drivers' loads and destinations and, in some instances, requiring drivers to follow specified routes and dealing with permit problems was "limited and routine"). The Board should also clarify whether "limited and routine" supervision merely means that "a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work," *AM Property Holding Corp.*, 350 NLRB 998, 1001 (2007), *enforced in pertinent part*, 647 F.3d 435 (2d Cir. 2011), or whether the term has wider application. In this context, more explanation is surely needed to provide the clarity and predictability that is at the heart of this rulemaking effort.

To guide the public, the final rule should explicitly state what "limited and routine" control is or is not. Further, with respect to "control" over other terms and conditions of employment, the Board should explicitly state in the body of the final rule, as it has done in the explanatory commentary to the proposed rule, that provisions in a contractual agreement between two business entities that provide for employment terms of one of the entities employees do not in and of themselves indicate the joint possession of control over such terms and conditions of employment. As discussed in Section III.C. below, the examples contained in the proposed rule seem inconsistent with this premise, which is a critical element of the new joint employer rule -- that control must be "possess[ed] and actually exercise[d]" -- for an entity to be a joint employer. The General Counsel therefore suggests an explicit provision in the final rule clarifying that the exercise of control of a term and condition of employment is not met merely because a contract between two entities dictates a particular employment term for the individuals performing services under that contract.

C. The hypothetical examples accompanying the proposed rule.

As to the hypothetical examples set forth in the proposed rule, we recognize that they offer some guidance by setting forth simple illustrative contrasts that shed light on the Board's intent. Providing simple examples with only one or two contrasting differences in the terms of a business relationship, however, perhaps unintentionally suggests that the exercise of control over a single term of

employment, without regard to the significance of that particular term, could create a joint employer relationship. We believe that this suggestion is unintentional given the Board's indication in its introduction to the proposed rule that "it will be insufficient to establish joint-employer status where the degree of a putative joint employer's control is too limited in scope (perhaps affecting a single essential working condition)."[1] In any case, the Board should clarify that control of a single term of employment or a combination of terms of employment is not sufficient for a joint employer finding, and that a joint employer must have direct and immediate control over each essential term of employment. See discussion in Section III.A. above.

While the proposed rule does not include wages and benefits and other economic terms in the list of "essential terms" of employment, as noted above, Examples 1 and 2 contain contrasting examples of control or lack of control of wage rates and benefits. As discussed above, the rule should therefore be modified to list such terms as wage rates and benefits as examples of "essential" employment terms under the NLRA.

In addition, there are other problems with these two examples that seem to contradict rather than support the stated meaning of the proposed rule. First, the conclusion in Example 2 that Company B possesses control over Company A's employees' wage rate simply because the contract between Company A and Company B establishes a wage rate contradicts the proposed rule's import that a contractual relationship that lacks any actual exercise of "direct and immediate control" does not establish a joint employer relationship. Second, these examples do not provide guidance as to the impact of a finding of control of the wage rate.

As to Examples 3 and 4, the only difference between them is that, in Example 4, Company B supervisors tell Company A supervisors how Company A's employees are to perform the work on Company B's work site, rather than just complaining to Company A about product deficiencies and letting Company A figure out how to fix the quality of their employees' work. This appears to be a wholly artificial distinction that ignores the realities of work places and working relationships among contracting parties. Here, as well, the examples give no guidance on the consequences to Company B of the exercise of such supervisory control with respect to any potential obligations it may have under the NLRA.

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[1] Basing a determination of joint employer on control of a single term and condition of employment would be inconsistent with the weight of authority and prior Board law. *See, e.g.*, *NLRB v. Browning-Ferris Indus. of Pa.,* 691 F.2d 1117, 1123 (3d Cir. 1982); *TLI,* 271 NLRB at 799 (no joint employer finding based on lack of sufficient control over a combination of terms and conditions of employment).

Similarly, in Example 8, the Hospital is deemed to have exercised "direct and immediate control over temporary nurses' essential terms and conditions of employment" merely because the Hospital manager participated in reviewing the nurse applicants' resumes and selected the proposed candidates for placement at the Hospital. A client/user company's selection of individuals for placement at a work site is commonplace and, in certain industries, may even be required by law. Such decisions by a client company of which temporary staffing agency employee works on its premises should not in and of itself create any joint employer relationship or bargaining obligation with respect to the staffing agency's employees.

To provide better guidance and more consistency in analyzing these relationships, the Board will certainly need to provide more granular, nuanced, and useful indications of the exact parameters of the joint employer definition in the final rule itself, in comments or explanation attendant to the rule, or in future adjudication or rulemaking. We support the Board's determination to attempt to provide useful guidance, and we strongly urge the Board to expand such guidance beyond these examples. Indeed, we urge the Board to refine its final rule, as suggested in this comment, to achieve the goal of the rulemaking process, which is to provide comprehensive guidance concerning joint employer status so as to prevent, given the various configurations in which this issue may emerge, the endless litigation and piecemeal decisions necessary to achieve something approaching equivalent guidance.

IV. The Board Needs to Address the Differing Concerns of Different Industries and Employment Settings.

In its Notice of Proposed Rulemaking, the Board wisely sought input from employees, unions, and employers regarding their experience in different workplaces where multiple employers might have some authority. Notably, if commenters raise the need for the proposed rule to more adequately consider, or explicitly deal with, different concerns in different industries, the Board should attempt to fully and comprehensively address those concerns. Without adequately addressing these industry specific requirements or concerns, the application of these rules may conflict with other federal laws and will put businesses in unstable labor or impossible compliance situations. A company's steps taken to comply with industry regulations or to monitor its own contracts should not be deemed to be the type of control of essential employment terms as to create a joint employer relationship. The mere attempt by a regulated company to police its own compliance and the compliance of its suppliers with third party regulations should not be sufficient to form a joint employer relationship with a service provider's employees. As discussed in the examples below, the Board should thus consider the needs and compliance obligations of businesses in particular industries in fashioning its final rule.

A. Franchise relationships.

In the application of the joint employer definition to franchising industries, the Board may need to expressly address the myriad legal and everyday realities of franchising, or at least consider the issue of how to assess the "control" a franchisor exerts as part of its attempts to protect its trademark, service mark, or "brand," but which also may have some tangential effect on the franchisee's labor relations.

In this regard, we note that, under the Lanham Act, 15 U.S.C. §§ 1051-1141, the owner of a trademark who licenses a mark's use to a "related company" can be deemed to have "abandoned" the trademark by engaging in "any course of conduct . . . including acts or omissions" that "causes the mark to lose its significance." 15 U.S.C § 1127 (2006). *See also, e.g., Drexel v. Union Prescription Ctrs., Inc.*, 582 F.2d 781, 786 (3d Cir. 1978) (under the Lanham Act, a holder of a trademark must take steps to preserve its value or risk abandonment).

Similarly, the Federal Trade Commission Franchise Rule includes in its definition of "franchise" that "[t]he franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation . . ." FTC Franchise Rule, 16 C.F.R. Part 436, §§ 436.1(h). FTC staff elaborated upon this definition by stating, "to be deemed 'significant,' the control or assistance must relate to the franchisee's overall method of operation -- not a small part of the franchisee's business . . . Significant types of control [or assistance] include: . . . [h]ours of operation; [p]roduction techniques; . . . [p]ersonnel policy; . . . [f]urnishing management, marketing, or personnel advice; . . . and [f]urnishing a detailed operating manual." FTC Franchise Rule Compliance Guide, at 2-3.

Thus, federal law clearly expresses an intent to foster "brand" uniformity, and requires trademark and/or service mark licensors -- which includes every franchisor -- to impose standards and controls upon their licensees -- which includes every franchisee -- to ensure that the licensed mark serves the purpose of the mark: goods or services provided uniformly, at a certain type and level of quality, with a uniformity of appearance, and supported by a uniformity of operations. If a franchisor/licensor does not impose upon franchisees/licensees such standards, that franchisor's or licensor's trademark/service mark may be deemed abandoned, as it could be viewed as standing for nothing. *See, e.g., Oberlin v. Marlin Am. Corp.*, 596 F.2d 1322, 1327 (7th Cir. 1979); *Barcamerica Int'l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589 (9th Cir. 2002) ("where the licensor fails to exercise adequate quality control over the licensee, 'a court may find that the trademark owner has abandoned the trademark, in which case the owner would be estopped from asserting rights to the trademark'"). The proposed rule does not adequately address the concern that a licensor's direct and immediate control of another employer's operations in this manner may not be for the purpose of inserting itself in the

licensee's labor relations, or even have that effect, but may just be for the necessary purpose of ensuring the protection of its most valuable asset -- its trademark or service mark. *See, e.g., Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358 (2d Cir. 1959) ("[t]he only effective way to protect the public where a trademark is used by licensees is to place on the licensor the affirmative duty of policing in a reasonable manner the activities of his licensees." Otherwise, "the public will be deprived of its most effective protection against misleading uses of a trademark," and "the risk that the public will be unwittingly deceived will be increased.") The Board should make clear that the operational control required by other federal law is not sufficient to establish joint employer status in the absence of evidence that the franchisor or licensor has actively attempted to further control employees' terms and conditions beyond such legal requirements.

B. Hospitals.

Similarly, a more nuanced and different approach is likely necessary for hospitals, which are subject to extensive regulation and potential liability, and necessarily involve a unique exercise of professional expertise. All of these characteristics raise significant issues in determining joint employer status, as the Board has long recognized. Thus, for example, in *Lee Hospital*, 300 NLRB 947, 950 (1990), the Board found that a professional corporation/independent contractor operating one department of a hospital was not a joint employer with the hospital, in part, because its day-to-day supervision and direction of hospital employees was "related to the physician-nurse relationship and patient care issues," rather than to generally-applicable employment matters. The unique setting of hospitals can also be seen in other areas of Board law, including the express statutory protections regarding picketing set forth in Section 8(g) of the Act, 29 U.S.C. § 158(g), the special rules concerning health care bargaining units, 29 C.F.R. § 103.30; 284 NLRB 1580 (1987), and the Board's recognition of the special circumstances that permit hospitals to limit otherwise-protected conduct in patient care areas, *see, e.g.*, *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 785-86 (1979) (special circumstances validated the applicability of a hospital's no-solicitation rule to immediate patient care areas, patient ward corridors, and waiting areas). Similarly, in this context, the Board should clarify how the joint employer standard applies to hospitals, in order to avoid the possibility of interfering with the provision and oversight of important patient care services, entangling unnecessary parties in inefficient bargaining, and subjecting additional business entities providing medical services to disruptive picketing in labor disputes that are not their own.

V. The Board Should Make Clear that the Rule Is Only a Definitional Standard.

The Board should make clear that a joint employer analysis is unnecessary and should not be reached unless the putative joint employer was involved in the

alleged unfair labor practice or an alleged unfair labor practice cannot be adequately remedied without the participation of the joint employer or to comply with a remedial order. A joint employer finding should rarely, if ever, be used to create a bargaining obligation with the labor representative of its co-employer's employees.

Current Board law specifies that a supplier-joint employer, who merely provides employees to a user-joint employer and takes no part in the daily direction or oversight of the relevant employees, should not be found liable for acts of employment discrimination that violate Section 8(a)(3) of the Act committed by the user-joint employer, unless: (1) the non-acting supplier-joint employer knew or should have known that the user-joint employer acted against the employee for unlawful reasons, and (2) the non-acting supplier-joint employer acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it may have possessed to resist the action. *See Capitol EMI Music*, 311 NLRB 997, 1000 (1993), *enforced*, 23 F.3d 399 (4th Cir. 1994); *America's Best Quality Coatings Corp*., 313 NLRB 470, 471 (1993), *enforced,* 44 F.3d 516 (7th Cir. 1995).

In cases brought under other federal anti-discrimination statutes, the courts similarly have "'held explicitly that establishing a 'joint employer' relationship does not create liability in the co-employer for actions taken by the other employer.'" *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 228-29 (5th Cir. 2015) (Americans with Disabilities Act) (quoting *Whitaker v. Milwaukee County,* 772 F.3d 802, 811 (7th Cir. 2014) (same), citing *Torres-Negron v. Merck & Co.,* 488 F.3d 34, 41 n.6 (1st Cir. 2007) (Title VII)); *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 935-40 (D.S.C. 1997) (no liability under Title VII for lack of knowledge of discriminatory conduct of co-employer). In addition to such circuit court approval, the EEOC also agrees that a joint employer must bear some responsibility for the discriminatory act to be liable for a violation of the law:

> The [staffing] firm is liable if it participates in the client's discrimination. For example, if the firm honors its client's request to remove a worker from a job assignment for a discriminatory reason and replace him or her with an individual outside the worker's protected class, the firm is liable for the discriminatory discharge. The firm also is liable if it knew or should have known about the client's discrimination and failed to undertake prompt corrective measures within its control.[2]

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[2] EEOC, No. 915.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, at 2260 (1997), *available at* https://www.eeoc.gov/policy/docs/conting.html.

The Board should expand this analysis beyond solely Section 8(a)(3) discrimination cases or otherwise alter the standard to match the circumstances of the actual business relationship between joint employers.

Moreover, where the issue is whether an otherwise neutral business entity is a primary employer or a neutral entity for the purposes of determining whether a union's picketing or other coercion violated Section 8(b)(4) of the Act, a finding of joint employer status should not make an otherwise neutral entity a "primary" employer lawfully subject to picketing, unless the entity is directly and substantially involved in controlling the issue in dispute. A mere finding of joint employer status should not be sufficient to enmesh a truly neutral business entity in a labor dispute in which it is not otherwise involved. Such limitation of the joint employer analysis would be more consistent with the Act's clear purpose to shield unoffending employers and others from pressures in controversies not their own. *See, e.g., NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951).

Similarly, a joint employer should not be required to participate in bargaining or have a bargaining obligation. Bargaining with two or more employers at the table may simply be unworkable even under the Board's proposed rule, because joint employers necessarily have different business interests. The Board should not be dictating to employers, even where there is a joint employer relationship, which entity must be sitting at the bargaining table with a union. The Board has never dictated who should be the actual bargaining representatives for employers or unions, and it should not do so now under the guise of joint employment. As discussed above, even where international unions have had control over the bargaining strategy of local unions and dictated the terms to which the local unions can agree, the Board has never required that the international union sit at the bargaining table or otherwise act as a bargaining representative in a collective bargaining negotiation. In such situations, the international union is in the same position as a corporate parent company or other alleged joint employer that can control some of the terms and conditions of employment of bargaining unit employees. If the Board does not require an international union to be a party to collective bargaining because of control of certain terms of employment, neither should it force a putative joint employer to collectively bargain. Thus, to promote productive and effective collective bargaining, it is to the advantage of unions as well as employers to focus bargaining by limiting the parties at the table to one of the joint employers, even where a joint employer finding may be warranted. Under such circumstances, the joint employer entity that is involved in bargaining is nonetheless unavoidably responsible for working with the other joint employer entity on issues raised in bargaining that the other entity is primarily responsible for establishing.

That is not to say that a joint employer finding should be meaningless as to collective bargaining. Each of the joint employers is fully responsible for employees'

terms and conditions of employment. Thus, for example, both joint employers are prohibited from unilaterally changing terms and conditions for bargaining unit employees in the absence of an impasse or on some other lawful basis. That is, the only way bargaining can be effective is for there to be *one* employer at the table bargaining over *all* terms and conditions. The concept, set out for the first time in the majority opinion in *BFI*, that each employer must somehow bargain over only the terms it directly controls is simply unworkable and doesn't practically fit with the kind of give-and-take and trade-offs among employment terms that are an essential element of actual collective bargaining. *Compare Central Transport*, 306 NLRB 166, 166 (1992) ("[t]he parties having stipulated that [user] is a joint employer with [supplier], it follows under well-established Board law that [user's] bargaining duty is equal to that of [supplier]"), *enforcement denied on other grounds*, 997 F.2d 1180 (7th Cir. 1993), *with BFI*, 362 NLRB No. 186, slip op. at 2 n.7, 16 ("a joint employer will be required to bargain only with respect to those terms and conditions over which it possesses sufficient control for bargaining to be meaningful"). We of course recognize that, even under current law, one joint employer can (and likely will) designate the other as its representative in bargaining. *See, e.g., General Electric Co. v. NLRB*, 412 F.2d 512, 516-17 (2d Cir. 1969) (noting that the "right of employees and the corresponding right of employers . . . to choose whomever they wish to represent them in formal labor negotiations is fundamental to the statutory scheme"). For this reason, the statement in *BFI* that both employers are subject to a "bargaining obligation" makes no sense both as a practical matter and under Board law. Therefore, the Board should expressly recognize that a joint employer does not have a formal "bargaining obligation" even though it can be held "jointly responsible" for conduct violative of Section 8(a)(5).

Similarly, in the representation petition context, the petition must name the employer that is being organized. The entity that is the proper employer for certification purposes should be the entity that directly controls the essential terms and conditions of employment such as wages, benefits, and other economic terms of employment. Once a bargaining unit of workers of a single entity is certified, there is no need for a finding of joint employer status with respect to another entity for the purpose of collective bargaining, even if the other entity directly controls some of the essential terms of employment. Thus, if a representation petition is filed naming two employer entities for the same bargaining unit, the Board should determine which *one* of the putative joint employers should be required to bargain (i.e., the entity most in charge of employees' terms and conditions of employment). *See, e.g., Interstate Warehousing of Ohio*, 333 NLRB 682, 683 (2001); *Professional Facilities Management*, 332 NLRB 345, 345-46 & n.4 (2000). *Cf. Management Training Corp.*, 317 NLRB at 1358-59. In such cases, the Board should designate one employer as the organized entity and should not complicate the representation process to include multiple employers with differing interests who are, at least to some extent, in a form of competition or tension with each other.

VI. Conclusion.

Given the scope and complexities of the issue and the need for clear guidance, it is appropriate to define the joint employer standard and the scope of its application in the NLRA context through rulemaking rather than by decisional law. We support and applaud the Board's recognition of the unworkability of the *BFI* standard, and its proposal to revert to a joint employer standard in greater conformity with long standing Board precedent and federal, state, and common law. The proposed rule nevertheless needs more refinement to guide the public and factfinders on how to evaluate the standards articulated in the proposed rule, and in the legal and practical consequences of a joint employer finding. We strongly urge the Board to articulate explicitly in its final rule that a joint employer finding in and of itself does not create legal liability for the unfair labor practices of its co-employer business partner and does not create a bargaining obligation or an obligation to sit at the bargaining table with its co-employer's employees' labor representative. The Board should make clear that a joint employer analysis and finding is only necessary where the alleged joint employer participated in the claimed unlawful conduct or is necessary to effectuate a remedial Board order.

Respectfully submitted,

/s/ Peter B. Robb
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