

November 2, 2023

Dear Senator:

On behalf of the 12.5 million workers represented by the AFL-CIO, the 2 million workers represented by SEIU, and the 1.2 million workers represented by the International Brotherhood of Teamsters, we write to urge you to support the National Labor Relations Board's ("NLRB" or "the Board") recent final rule addressing joint-employer status under the National Labor Relations Act ("NLRA" or "the Act"). This important rule will ensure that workers have a real voice at the bargaining table when multiple companies control their working conditions.

**Accordingly, the undersigned unions strongly oppose any effort to nullify or weaken the rule, whether by legislation or resolution under the Congressional Review Act.**

The rule, published on October 27, 2023, rescinds the Trump NLRB's 2020 joint-employer rule and replaces it with an updated standard that is based on well-established common-law principles and consistent with recent D.C. Circuit decisions identifying critical flaws in the Trump NLRB's approach to this issue.<sup>1</sup> The Board's updated rule is welcome and necessary because the Trump rule was harmful to workers' organizing efforts, inconsistent with the governing legal principles, and against the policies of the Act.

The crux of this issue is simple - when workers seek to bargain collectively over their wages, hours and working conditions, every entity with control over those issues must be at the bargaining table. The Act protects and encourages collective bargaining as a means of resolving labor disputes.<sup>2</sup> Collective bargaining cannot serve that purpose if companies with control over the issues in dispute are absent from the bargaining table. The Trump rule offered companies a roadmap to retain *ultimate* control over key aspects of workers' lives - like wages and working conditions - while avoiding their duty to bargain. This standard left workers stranded at the bargaining table and unable to negotiate with the people who could actually implement proposed improvements.

Companies are adopting business structures specifically designed to maintain control over the workers who keep their businesses running while simultaneously disclaiming any responsibility for those workers under labor and employment laws. Such businesses often insert second and third-level intermediaries between themselves and their workers. These companies seek to have it both ways – to control the workplace like an employer but dodge the legal responsibilities of an employer. This phenomenon is often called workplace “fissuring.”

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<sup>1</sup> See *Sanitary Truck Drivers & Helpers Loc. 350, Int'l Bhd. of Teamsters v. NLRB*, 45 F.4th 38, 47 (D.C. Cir. 2022) (finding that reserved and indirect control must be considered in joint-employer analysis); *Browning-Ferris Indus. of California, Inc. v. NLRB*, 911 F.3d 1195, 1209 (D.C. Cir. 2018) (finding that joint employer analysis is not limited to direct and immediate control).

<sup>2</sup> 29 U.S.C. § 151.

Fissured workplaces, sometimes involving staffing firms, temp agencies, or subcontractors, often leave workers unable to raise concerns, or collectively bargain with, the entity that actually controls their workplace. In such arrangements, multiple entities may share control over a worker's terms of employment. For example, if employees of a subcontractor were to unionize and bargain only with the subcontractor, it might simply refuse to bargain over certain issues because its contract with the prime contractor governs those aspects of the work (e.g., pay, hours, safety, etc.). This harms workers because the entity that effectively determines workplace policy is not at the bargaining table, placing workers' desired improvements out of reach.

The way to ensure that workers can actually bargain with each entity that controls their work is to readily identify such entities as "joint employers." The Act requires joint employers to collectively bargain with employees over working conditions that they control. But the Trump NLRB's joint employer rule was designed to help companies with such control escape bargaining. The rule's standard for finding a joint employment relationship was unrealistic and overly narrow. It conditioned a company's joint employer status on proof that it actually *exercised substantial direct and immediate control*, discounting its *reserved or indirect* power to control a small list of working conditions. This conflicts with the governing common law principles, which make clear that a company's power to control working conditions must bear on its employer status (and thus its bargaining responsibilities under the Act) regardless of whether it has formally exercised that power.<sup>3</sup> The new final rule correctly rescinded the Trump rule.

Critics of the new rule claim that its joint employer standard will outright destroy certain business models or dramatically change operations. Opponents claim, for example, that companies will be required to bargain over issues they have no control over, or will be automatically liable for another entity's unfair labor practices. This is simply untrue and a further attempt to leave workers with no opportunity to bargain with controlling entities. The final rule makes it clear that a joint employer's bargaining obligations extend *only* to those terms and conditions within its control. And current Board law - unchanged by the rule - only extends unfair labor practice liability to a joint employer if it knew or should have known of another employer's illegal action, had the power to stop it, and chose not to.<sup>4</sup>

Similarly, critics claim that the new standard imposes blanket joint employer status on parties to certain business models like franchises, temp agencies, subcontractors, or staffing firms. This is also untrue. The rule does not proclaim that all franchisors are now joint employers with their franchisees, or that any company using workers from a temp agency is automatically their employer. The particular business model used by parties in any case is not determinative. Instead, the Board looks at every case individually, and grants companies a full and fair opportunity to explain the underlying business relationship and dispute whether they control the relevant workers' essential terms and conditions of employment. The Board conducts a fact-specific, case-by-case analysis that considers whether the putative joint employer controls essential terms and conditions of employment.

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<sup>3</sup> See *supra* note 1.

<sup>4</sup> See *Capitol EMI Music*, 311 NLRB 997, 1000 (1993).

Make no mistake, the Board's rule may well result in the employees of a staffing firm, for example, being treated also as employees of the firm's client, but *only if the client controls the employees' terms and conditions of employment*. That is the only way workers can meaningfully bargain at work. But even in that situation, the workers are deemed employees *only for purposes of the NLRA and collective bargaining, and the client would be obligated to bargain only about the terms it controls*. It would still be up to workers to choose whether they want to organize a union and collectively bargain with their employer or employers. Nothing in the NLRB's rule alters employers' responsibilities under any other state or federal law (*e.g.*, tax laws, wage and hour laws, or workplace safety laws) or requires any changes to business structures. But it does make clear their responsibility under the NLRA to show up at the bargaining table.

The new rule is clear and commonsense: there is no bargaining obligation for an entity that cannot control workplace policies or working conditions. And for good reason - their presence at the bargaining table would be pointless. Workers have no interest in bargaining with a company that lacks the power to implement the workplace improvements they seek.

This rule simply invokes a more realistic joint employer standard on par with the standard enforced during the Obama administration, allowing a company's indirect or reserved control over working conditions to be sufficient for finding joint employer status. Workers' right to collectively bargain cannot be realized if the entity that has the power to change terms and conditions of employment is absent from the bargaining table.

For the reasons explained above, the undersigned unions oppose any effort to nullify the Board's rule. In particular, we urge Congress to oppose efforts to nullify the rule under the Congressional Review Act ("CRA"). Here, a successful CRA disapproval resolution would be particularly harmful: it would revert the NLRB's joint employer standard to the Trump Board's 2020 rule, which stymies workers at the bargaining table. And further, as explained above, at least one federal appeals court has strongly suggested that provisions of the 2020 rule are inconsistent with the NLRA, so litigation would likely invalidate that rule as well. This would create confusion for the workers, unions, and employers regulated by the NLRB. Not only could the two standards be nullified, leaving the Board's joint employer analysis in limbo, but the NLRB's ability to address that limbo would be unclear due to CRA limitations.

The CRA provides that once a disapproval resolution is passed, the underlying agency cannot issue a subsequent rule in "substantially the same form" as the disapproved rule unless it is specifically authorized by a subsequent law. Thus, if the Board's new rule is nullified under the CRA, and the prior Trump rule is invalidated by federal courts, the NLRB would be limited in issuing a clarifying rule. To avoid confusion and ensure stability for workers, unions, and employers, Congress must steer clear of using the CRA to address the joint employer standard.

For these reasons, we ask that you support the NLRB's joint employer rule and oppose any effort to weaken or nullify the clarified standard.

Sincerely,

