December 6, 2022

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

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

RE: RIN 3142-AA21; Standard for Determining Joint-Employer Status; Notice of Proposed Rulemaking (Comments of the American Hotel & Lodging Association)

Dear Ms. Rothschild:

On behalf of the American Hotel & Lodging Association ("AHLA"), the national association representing all sectors and stakeholders in the U.S. lodging industry, including owners, REITs, chains, franchisees, management companies, independent properties, suppliers and state associations, we thank you for the opportunity to comment on the National Labor Relations Board's ("the NLRB" or "the Board") notice of proposed rulemaking and request for comments regarding the Standard for Determining Joint-Employer Status. Fed. Reg. Vol 87, No. 172 (September 7, 2022) at 54641 *et seq.* (the "Proposed Rule"). AHLA respectfully submits these comments to bring attention to the importance of the proposed changes to the tens of thousands of small businesses and millions of employees that work in the hospitality industry.

I. INTRODUCTION AND STATEMENT OF INTEREST

The hospitality industry is one of the nation's largest job providers. With nearly eight (8) million employees across the country, the hotel industry provides $75 billion in wages and salaries to our employees and generates $600 billion in economic activity from five (5) million guestrooms at more than 52,000 lodging properties nationwide. The industry is largely comprised of small businesses; nearly 60 percent of all hotels fall under the Small Business Administration's definition of what constitutes a small business in the lodging sector.

Additionally, our industry is largely built upon the franchising model, under which every franchisee owns and operates its own business and is independently responsible for its own employment decisions.[1]

[1] The number of franchise establishments in the United States is projected to reach almost 800,000 in 2022. These businesses will employ over eight (8) million people and produce an economic output of about $790 billion. account for nearly 3% of the U.S. GDP in nominal dollars ($451 billion). See *Number of Franchise*

This predominant and well-established industry model of franchising and reliance on outside contractors and vendors -- which has provided millions of jobs, allowed tens of thousands of entrepreneurs to achieve the American dream through small business ownership, and is essential to a strong and functioning national economy -- is dependent on clear rules delineating joint employment liability under the National Labor Relations Act ("NLRA" or "Act") and other federal, state and local laws. Joint employer status under the NLRA is accompanied by significant responsibility and liability; joint employers must bargain with a union representing the employees of the other enterprise and may have potential joint liability for the other entity's alleged unfair labor practices.

As with all business-to-business contracts, parties to those relationships include in their vendor and franchise agreements provisions on objectives, basic ground rules, and expectations -- as well as qualification requirements for the contractor/franchisee and their personnel. Such contracts also frequently include protections for the public, a party's own employees, and its property -- which the common law recognizes as consistent with a contractor or franchise relationship. Similarly, in franchise relationships, maintenance of brand standards (*e.g.*, uniforms and appearance, hours of facility operation, quality standards) are part of the goals and ends of the relationship, and are irrelevant to a joint employer determination.

It also is common in our industry to have owners engage independent operating companies to manage properties. Additionally, at a number of our members' properties, they may have business relationships with specialty providers (*e.g.*, renowned chefs) who operate separate enterprises on hotel grounds. Further, to efficiently and successfully run their businesses, hotel owners of all sizes must be able to rely on a host of vendors and contractors -- some of whom provide services on site -- to meet customer demands and business needs.

For these reasons, AHLA is concerned that the Proposed Rule would improperly expand the definition of "joint employer" beyond Congress' intent with the Taft-Hartley amendments to the Act and beyond the common law to include entities that possess irrelevant forms of "indirect" or "reserved" control over another entity's employees' terms and conditions of employment. Such an expansion would place substantial and unwarranted burdens on our members' ability to enter into routine contracts for needed services with third-party vendors, such as to provide cleaning and landscaping services, among other things, and would inject uncertainty into the economy when it teeters on the edge of a recession.

Given the critical role that the ability to contract with vendors and service providers plays in our members' economic viability, and given the prevalence of franchise, lease, and operating relationships in their businesses, the Board must provide specific determinative guidance on the types of provisions or actions that it considers relevant and what qualifies as sufficient evidence of shared or co-determined control over terms and conditions of employment (*i.e.*, those elements

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Establishments in the United States, Statista (https://www.statista.com/statistics/190313/estimated-number-of-us-franchise-establishments-since-2007) (last accessed November 17, 2022).

of a relationship that might trigger joint employer liability) and which cast "no meaningful light on joint-employer status."[2]

Failure to appropriately delineate the outer bounds of any joint employment rules that ultimately are promulgated would place employers at risk of being tagged with joint employer liability for engaging in or administering typical business-to-business relationships. Our members especially are concerned with the Board explicitly recognizing the boundaries of franchisor/ franchisee, lessor/lessee, and owner/operator relationships that are well established in the common law, and for which clarity is essential.

II. THE BOARD'S CURRENT RULE PROVIDES CLARITY AND CERTAINTY TO EMPLOYERS THAT ENTER INTO ARMS-LENGTH CONTRACTS WITH VENDORS AND FRANCHISEES

The current joint employer standard styled "Joint Employer Status Under the National Labor Relations Act" ("Current Rule") has the virtue of providing guidance to our members that is clear and understandable, and includes easy-to-apply guideposts for the Board, courts, employers, employees and unions.

To that end, under the Current Rule -- which effectively re-adopted more than 30 years of precedent that the Board's *Browning-Ferris* decision summarily discarded -- the Board will only find joint employer status when a company actually and directly exercises control over terms and conditions of employment in a manner that is essential for meaningful collective bargaining, such as hiring, firing and determining rates of pay of the employees of another enterprise. Evidence of appropriate forms of indirect or reserved control -- while relevant -- is not sufficient to establish a join employer relationship in the absence of significant direct control. This approach, which is rooted in Congress' understanding of the common law at the time of Taft-Hartley's adoption, provides greater certainty to all parties as to when joint employer status is triggered under the Act.

The Current Rule's explicit exclusion of types of control that are merely "limited and routine" also ensures companies can reserve control over common branding issues, such as uniforms, hours of operation and customer service standards, without rendering them joint employers under the Act. These branding issues are important to the success of franchising and various other business models that are powerful engines of economic growth in numerous business sectors. In short, the Current Rule protects our members' ability to work with outside vendors and contractors; and, just as importantly, provides all parties with predictability in arranging their relationships.

A return to *Browning-Ferris*' amorphous "indirect" or "reserved control" tests for determining a joint employment relationship, which is essentially what the Proposed Rule seeks to accomplish, would negatively impact our members' ability to succeed economically by discouraging businesses from entering into routine contracts with third-party vendors, franchisors or franchisees, or to reasonably manage those relationships.

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[2] *See Browning Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1214, 1220 (D.C. Cir. 2018).

III. ANY PROPOSED RULE MUST BE CONSISTENT WITH CONGRESSIONAL INTENT

Congressional intent is clear from the plain text of the Act, the 1947 Taft-Hartley amendments, and the accompanying Congressional Record. Congress referenced but did not meaningfully define the term "employee" in the Act. In the absence of such explicit definition, the Supreme Court has explained that "Congress intends to describe the conventional master-servant relationship as understood by the common-law agency doctrine." *NLRB v. Town & Country, Inc.*, 516 NLRB U.S. 85, 94 (1995) (citing *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992); *Cmty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)).

In the Act's 1947 Taft-Hartley Amendments, Congress included an amended definition of "employee" to expressly overrule the Supreme Court's decision in *NLRB v. Hearst Publishing*, 322 U.S. 111 (1944), a decision that disregarded common law principles of agency to find that "independent contractors" were employees. Thus, shortly after the decision, Congress amended the Act to mandate the application of the "ordinary rules [of the] common law of agency." H.R. Rep. No. 510, 80th Congress, 1st Sess. (1947). To ensure the further application of common law agency principles, the 1947 Taft-Hartley amendments also redefined an "employer" to encompass only individuals who are "acting as an *agent* of an employer," a narrower test than the NLRA's prior definition of any individual "acting *in the interest* of any employer." *See e.g.*, H.R. No. 245.

The Board, as it must, has tipped its cap to this common law agency standard. For example, in *Roadway Package System, Inc.*, 326 NLRB 842 (1998), the Board noted that Supreme Court decisions "teach us not only that the common law of agency is the standard to measure employee status *but also that we have no authority to change it.*" *Id.* at 849 (emphasis added) (citing *NLRB v. Town & Country, Inc.*, *supra*; *Nationwide Mutual Ins. Co. v. Darden*, *supra*; *Cmty. For Creative Non-Violence v. Reid, supra*). Given the great weight of authority from the Supreme Court on down undergirding the Board's Current Rule, any final rule must follow suit and continue to hold to these longstanding common law agency principles.

IV. THE BOARD'S PROPOSAL THAT EVIDENCE OF INDIRECT OR RESERVED CONTROL MAY ESTABLISH A JOINT EMPLOYER RELATIONSHIP IS UNMOORED FROM THE COMMON LAW

The Proposed Rule stands in contravention to Congress' intent. The Congress that enacted Taft-Hartley understood plainly that substantial and direct control over wages and hours, at a minimum, were required to establish a joint employer relationship.

Under the Proposed Rule, however, the Board would find an entity to be a joint employer where it possesses or exercises "indirect" control over another entity's employees' terms and conditions of employment, or where an entity has "reserved" control over key employment terms. This iteration of the joint employer test is unsupported by the case law and ignores the Taft-Hartley Congress' understanding of the Act's employer definition, which required a sufficient quantum of *direct* control.

A review of the Board majority's commentary to the Proposed Rule demonstrates that the Proposed Rule has abandoned common law agency principles. Indeed, the majority's commentary

lacks a single citation to a judicial decision holding that either indirect or reserved control, standing alone, could establish a joint employer relationship. This is not surprising, given no such rulings have surfaced during the more than seven years that the *Browning-Ferris* litigation has been ongoing. The lack of judicial authority supporting the Proposed Rule only further confirms its impropriety: these amorphous concepts of "indirect" or "reserved" control are not rooted in the common law. For that reason, they cannot be sufficient in themselves to establish a joint employer relationship.

Ultimately, any iteration of the joint employer test that the Board adopts must clarify that "indirect" or "reserved" control, either in combination or standing alone, are not sufficient to establish a joint employment relationship. To be useful to our members, moreover, any rule the Board adopts must expressly outline what factors the Board will not consider when analyzing whether two (2) or more entities are joint employers.

V. THE BOARD'S STANDARD MUST EXPRESSLY DELINEATE THE BOUNDARIES OF CONTROL RELEVANT TO A JOINT EMPLOYER DETERMINATION

Any standard the Board ultimately adopts must clearly identify which components of employer control are relevant to a joint employer determination. Certainty and predictability are critical to our members' ability to enter into contracts for services with third parties. While AHLA believes "routine components of a company-to-company contract" should not be considered in the joint employer analysis, the Board should at least expressly identify and delineate the outer bounds of what it considers such "routine components" that will not be considered part of the joint employer analysis in order to provide assurances to the regulated community. *See* Federal Register, Vol. 87, No. 172 at 54651(September 7, 2022)

Likewise, any standard the Board ultimately adopts must clearly identify which components of employer control <u>are</u> relevant to a joint employer determination. Certainty and predictability are critical to our members' ability to enter into contracts for services with third parties.

More specifically, our members respectfully request that the Board incorporate into any final rule the following non-exhaustive considerations, which the common law holds are not part of the joint employer calculus:

- Requirements going to the "objectives, basic ground rules, and expectations" of the service relationship, *e.g.*, ends, service goals, productivity standards, quality standards, timing of performance, location of performance, deadlines. *See, e.g., Browning-Ferris v. NLRB*, 911 F.3d at 1219-1220.

- Providing instruction regarding "what work to perform, or where and when to perform the work." *Serv. Emps. Int'l Union, Loc. 32BJ v. NLR.*, 647 F.3d 435, 443 (2d Cir. 2011); *see also Local 254, Serv. Emps. Intern. Union, AFL–CIO,* 324 NLRB 743, 746–749 (1997) (finding no joint employment where employer regularly directed maintenance employees to perform specific tasks at particular times but did not instruct employees how to

perform their work); *S. Cal. Gas Co.,* 302 N.L.R.B. 456, 461–62 (1991) (employer's direction of porters and janitors insufficient to establish joint employer relationship where employer did not, *inter alia,* affect wages or benefits, or hire or fire employees).

- Ensuring "that a contractor's services meet contractual standards of quality and timeliness," as well as monitoring customer service metrics. *Ochoa v. McDonald's Corp.*, 133 F. Supp. 3d 1228, 1236 (N.D. Cal. 2015); *Elsayed v. Fam. Fare LLC*, No. 1:18-CV-1045, 2020 WL 4586788, at *5 (M.D.N.C. Aug. 10, 2020); *Zheng v. Liberty Apparel Co.,* 355 F.3d 61, 72 (2d Cir. 2003) ("By contrast, supervision with respect to contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry, as such supervision is perfectly consistent with a typical, legitimate subcontracting arrangement."); *Moreau v. Air France,* 356 F.3d 942 (9th Cir. 2004) (finding that a general contractor was not a joint employer of a subcontractor's employees when the instructions given to the employees concerned performance of the subcontract).

- Requirements regarding the "design, decoration and décor" of franchisees, or that "relate to the image of the [franchisor's] chain. *See, e.g., Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 120 (1978), *enforced in rel. part*, 640 F.2d 1094 (9th Cir. 1981).

- Requirements regarding uniforms, initial training of employees, hours of facility operation, generally applicable rules for persons visiting the premises, and minimum staffing requirements. *Ochoa v. McDonald's Corp.*, 133 F. Supp. 3d 1228, 1236 (N.D. Cal. 2015); *see also S. G. Tilden, Inc.*, 172 NLRB 752, 753 (1968) (requirement that franchisees' employees wear prescribed uniforms "amounts to nothing more than an implementation of [the franchisor's] advertising policy"; "offer to train prospective employees" was " not the exercise of any authority over [franchisees'] hiring policies;" and requirement that franchisees' shops be open certain hours and days of the week " in no way prescribes the hours that a particular employee must work" and was designed to "eliminate unfair competition among franchisees"); *DiFlavis v. Choice Hotels Int'l, Inc.*, No. CV 18-3914, 2020 WL 610778, at *7 (E.D. Pa. Feb. 6, 2020) ("familiar hospitality facilities standards" are not indicia of a joint employer relationship).

- Performance of audits and review of guest satisfaction surveys, review of compliance with the franchise agreement, and provision of consultation services, including providing optional, non-mandatory employment-related resources for a franchisee's consideration, often at cost (*e.g.*, access to hiring and training sites, recruiting videos. *DiFlavis v. Choice Hotels Int'l, Inc.*, No. CV 18-3914, 2020 WL 610778, at *7 (E.D. Pa. Feb. 6, 2020); *Ochoa v. McDonald's Corp.*, 133 F. Supp. 3d 1228, 1238 (N.D. Cal. 2015)

(no joint employment relationship despite franchisor engaging business consultants to discuss best practices with franchisee's managers).

- Monitoring and maintenance of brand standards, brand image, general store operations, and other quality control measures. *See e.g., Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474, 478, 333 P.3d 723, 726 (2014); *Salazar v. McDonald's Corp.*, 944 F.3d 1024, 1032 (9th Cir. 2019) ("[franchisor's] exercise of control over the means and manner of work performed at its franchises is geared specifically toward quality control and maintenance of brand standards. Thus, [franchisor] cannot be classified as an employer of its franchisees' workers under the common law definition."); *see also In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, No. 20-17327, 2021 WL 5768466, at *1 (9th Cir. Dec. 6, 2021) (finding requirement that salespersons complete various certifications and trainings did not establish a joint employment relationship).

- Maintenance of records of complaints, contact information, and sales transactions. *In re Domino's Pizza Inc.*, No. 16CV2492AJNKNF, 2018 WL 4757944, at *7 (S.D.N.Y. Sept. 30, 2018); *see also Vasto v. Credico (USA) LLC*, No. 15 Civ. 9298, 2017 WL 4877424 at *12 (S.D.N.Y. Oct. 27, 2017) (joint employer status did not exist even where a putative joint employer kept a database of contact information and sales records but no records of hours worked).

- Requirements relating to minimum standards for background checks and hiring. *See Godlewska v. HDA*, 916 F. Supp. 2d 246, 254 (E.D.N.Y. 2013) (holding that the power to hire rests with the entity that chooses who to hire, even if another entity "dictates the minimum criteria for persons who fill these positions and reviews applicants' resumes to ensure the applicants are qualified"); *Jean-Louis v. Metro. Cable Communications, Inc.*, 838 F. Supp. 2d 111, 123 (S.D.N.Y. 2011) (finding no power to hire despite putative third party employer's requiring direct employer to perform background checks); see also *In re Jimmy John's*, 2018 WL 3231273, at *15 (finding no power to hire when franchisor did not directly hire employees but provided interview forms, instructed franchisees to hire additional staff, and implemented restrictions on who could be hired).

- Approvals of leases and setting standards for equipment purchases. *In re Domino's Pizza Inc.*, No. 16CV2492AJNKNF, 2018 WL 4757944, at *8 (S.D.N.Y. Sept. 30, 2018).

- Retaining the ability to terminate a franchise agreement. *See, e.g.*, *Ochoa v. McDonald's Corp.*, 133 F. Supp. 3d 1228, 1236 (N.D. Cal. 2015); *Brunner v. Liautaud*, No. 14-c-5509, 2015 WL 1598106, at *4 (N.D. Ill. Apr. 8, 2015); *see also Singh v. 7-Eleven, Inc.*, No. C-05-04534 RMW,

2007 WL 715488, at *4 (N.D. Cal. Mar. 8, 2007) (finding that a franchisor's power to terminate its franchise agreement with its franchisee if the franchisee did not satisfy the franchisor's service standards did not evince a joint employment relationship).

- Retaining the authority to bar certain of the vendor's employees from the premises. *Boutin v. Exxon Mobil Corp.*, 730 F. Supp. 2d 660, 681 (S.D. Tex. 2010); *Browning-Ferris Industries of California, Inc.*, 362 NLRB 1599, 1614 (2015)(finding irrelevant to joint employer analysis contract terms that aim ''to control or protect [the employer's] own property").

It likewise is important to underscore that socially desirable initiatives such as corporate social responsibility policies and programs, workforce developments programs, and public health initiatives such as COVID responses would be at risk unless it were made clear that a franchisor's providing resources to a franchisee or developing brand standards on these matters will not give rise to a joint employer finding.[3]

In particular, the Proposed Rule does not establish guardrails regarding the kinds of "health and safety" initiatives over which control could lead to a joint employer determination. We trust that merely requiring compliance with legal requirements such as the ADA or fire safety regulations would not constitute joint employer evidence. The Board should make this clear. Equally so, the Board should underscore that health and safety protocols established by a franchisor or brand during a pandemic such as COVID are irrelevant to joint employer analysis. For example, many hotel brands created health and safety protocols during the pandemic by following CDC guidelines and the science available. These cleaning standards, or requirements for certain equipment to be used in hotels to respond to a health epidemic in order to protect guests and workers should not be weaponized against the business to create joint employer liability. The watchword of any new rule in this area cannot be: no good deed goes unpunished.

VI. CONCLUSION

Our members seek clear, predictable, and stable rules and regulations to arrange and administer the many different forms of relationships that are essential to their industry and which support a strong, vibrant economy. The Board's Current Rule provides predictability and stability in the law, resulting in increased investment from the business community and economic growth across all sectors of the economy. Stable legal arrangements encourage economically fruitful business-to-business relationships, which are particularly beneficial to small businesses.

The Proposed Rule, in contrast, would inject uncertainty and unpredictability into contracting relationships at a time when the economy is on the precipice of a recession. Untethered to the common law, the Proposed Rule would cause our members to be saddled with unwarranted obligations solely based on the fact that they contracted with vendors to provide routine services. For these reasons, as well as those explained above, the Board should abandon this misguided

[3] The U.S. Small Business Administration Office of Advocacy's November 29 comments to the proposed rule raise concerns similar to some of those we note here.

attempt at rulemaking for the benefit of the regulated community. Should the Board nonetheless be determined to proceed, it must explicitly acknowledge and incorporate into any final rule those forms of influence and control that the common law does not recognize as relevant to joint employer status.

Sincerely,

Chirag Shah
Senior Vice President, Federal Affairs
& Policy Counsel