Roxanne Rothschild
Associate Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570-0001

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

Dear Ms. Rothschild:

Thank you for the opportunity to comment on the National Labor Relations Board's (NLRB's) proposed rule to repeal the broadened joint employer standard, originally established in its 2015 ruling on Browning-Ferris Industries (BFI). A major concern with the broadened standard is that it inherently reduces the incentive for firms to enter business relationships, lowering productivity and costing jobs in contract and franchise companies. Recently, however, questions have emerged regarding the broadened standard's negative consequences on businesses and workers. Proponents of the broadened standard have questioned whether it has had a significant impact on business operations, and they believe that benefits to low-wage workers outweigh the costs. Missing on both sides of the conversation, however, is any evidence of the broadened standard's impact.

My comments address questions concerning the evidence on the scope of the broadened joint standard, its impact on workers, and the characteristics of the workers affected. Existing research suggests that the NLRB's 2015 decision to broaden the joint employer standard poses a significant risk to the U.S. economy and labor market, while providing most benefits to workers who already earn high average wages. Specifically:

- The broadened joint employer standard impacts 44 percent of private sector employees or 54.6 million workers, most of whom work in the supply chain, suggesting that a reduction in outsourcing would have major consequences for the U.S. economy;
- Evidence of the negative implications of the broadened standard is found in the franchise sector, where 1.7 million franchise jobs could ultimately be lost;
- While the broadened standard's proponents assume that contractors pay low wages, the evidence indicates the opposite: Supply chain workers made on average over 50 percent more than the rest of the private sector in 2013; and
- Finally, the supply chain has a high concentration of science, technology, engineering, and mathematics jobs, suggesting that the broadened joint employer standard puts at risk highly productive and valuable workers.

In sum, the evidence indicates that the NLRB's broadened joint employer standard is a major burden to a portion of the U.S. economy that is both massive and highly productive. As the NLRB considers reversing its 2015 decision in BFI, it can be assured that the potential costs of the broadened joint employer standard are significant and its intended benefits are limited.

The Magnitude of the Broadened Joint Employer Standard

The NLRB broadened the joint employer standard in its 2015 BFI decision in order to make more companies legally accountable for the employment and pay of workers in separate independent businesses.[1] The broadened standard, however, is also harmful to businesses due to both the incentives it creates and the uncertainty regarding its applicability.

In general, when a company with a contractual business relationship with a separate company is held responsible for the separate company's workers, the relative cost of doing business with the other company increases. This inherently reduces the incentive for the company to enter a business arrangement in the first place. The separate company's workers are the ones who will likely pay the highest price, with slower wage and job growth.

The NLRB's 2015 decision amplified these consequences because it also created considerable uncertainty regarding the types of business arrangements that are now subject to the standard. Today, it is very unclear when businesses are considered joint employers. As a result, business production is likely lower that it otherwise might be, as a number of firms could be unnecessarily reluctant to enter business arrangements or limiting coordination between themselves and another firm's workers.

Proponents of the broadened standard argue that this uncertainty stems from continued litigation and legislative efforts to reverse the NLRB's 2015 decision.[2] Yet, the actual root of the current joint employer uncertainty is the 2015 decision itself. Before 2015, the NLRB had held since 1984 that a firm is a joint employer only if it exercises "direct and immediate control" of employment and pay in another business. In 2015, however, the NLRB created a new and highly ambiguous "direct or indirect control" standard for holding firms as joint employers.

The new standard has created so much uncertainty because it is not clear what constitutes "direct or indirect control" of employment and pay of another company's workers. Consequently, the ambiguity of the new standard is problematic for any company that has any form of contractual relationship with another firm. Would a company like Facebook be considered a joint employer for requiring contractors to pay workers a $15 minimum wage and provide paid leave,[3] indirectly impacting contract worker compensation? Would a chemical or manufacturing company be a joint employer if it requires contract workers to abide by certain safety standards that are time-consuming and impact work hours? Would an expanding company be a joint employer if it hires a construction company to construct a new building under a specific timeline that impacts the duration of employment for the construction workers? The examples are endless. One could surmise that the "direct or indirect control" standard is so ambiguous that it could be applied to companies in any of these situations, and, at the very least, companies must now seriously consider potential joint employer responsibilities before outsourcing tasks to other companies.

An American Action Forum (AAF) study found that because the broadened joint employer standard is so ambiguous, the incentives it creates for companies to avoid working with other firms impacts a large slice of the U.S. workforce.[4]

Table 1 details the workers impacted by the broadened joint employer standard.

Table 1: The Scope of the Broadened Joint Employer Standard

Economic Sector	**Percent of Private Sector Payroll Employees**	**Employees (in millions)**
Supply Chain	37%	46.0
SC Local	15%	18.6
SC Traded	23%	28.6
Franchise	7%	8.6
Total	**44%**	**54.6**

*Estimates may not sum to totals due to rounding.

Overall, the broadened joint employer standard incentivizes companies to avoid doing business with firms that employ 44 percent of private sector payroll workers—or 54.6 million workers.[5]

The broadened joint employer standard impacts so many workers primarily because it is so ambiguous that it upends the entire domestic supply chain. Research by Mercedes Delgado and Karen Mills indicates that 43 percent of U.S. firms are in the supply chain,[6] employing 37 percent of private sector payroll workers. This translates to 46 million employees in the supply chain.[7]

The new standard naturally creates incentives for companies to perform more tasks in-house rather than outsource them to companies specializing in those duties. If a firm is going to be held responsible for a contract company's workers, the cost of outsourcing tasks rises relative to the cost of performing those tasks in-house. The result would simply be less domestic outsourcing. Not only would the joint employer standard negatively impact supply chain firms, but supply chain jobs would also likely become more limited.

A significant portion of these supply chain workers are employed by the contract companies most closely associated with the 2015 BFI decision. Table 1 refers to these firms as local supply chain firms, which provide workers to perform specific tasks for a separate company, often on the company's premises. They include temporary help services, as well as contractors providing janitorial, security, and technological maintenance services that many businesses do not typically cover in-house. Local supply chain companies employ 15 percent of private sector payroll workers, translating to 18.6 million workers in 2017.[8]

Due to its ambiguity, however, the broadened joint employer standard also impacts traded supply chain companies, which employ considerably more workers. These companies perform specialized services or produce specific goods for other firms. They include manufacturers, engineering services, and programming, software development, and analytical web services. Altogether, traded supply chain companies employ 23 percent of private sector payroll employees, or 28.6 million workers.[9]

The broadened joint employer standard's impact on the supply chain carries significant economic risks beyond those of the job loss within supply chain companies. Supply chain companies add considerable value to the economy by virtue of specializing in specific tasks. Companies outsource those tasks because specialized contractors are able to perform the same duties more efficiently, lowering business operating costs. If the broadened joint employer standard limits outsourcing, it will raise operating costs and lower

productivity. The sheer size of the supply chain by itself indicates that a reduction in outsourcing and, consequently, productivity would substantially slow economic growth.

Evidence of the Joint Employer's Consequences

Recently, questions have emerged as to whether there is any evidence of the broadened joint employer standard's consequences. Some have sought to identify whether the broadened standard is placing a new burden on companies by tallying the number of joint employer cases brought to the NLRB since its 2015 decision in BFI.[10] Those reviewing the NLRB cases assume that if the broadened standard is very disruptive, there should be a rise in labor disputes involving the new standard. Yet, NLRB case data would provide an incomplete picture of the broadened standard's economic impact. The true impact of the rule will occur when companies take action to avoid joint employer responsibility, such as completing more tasks in-house, which shield the companies from being involved in a joint employer case in the first place. Thus, a more holistic method for evaluating these effects is to analyze employment trends in the economic sectors particularly impacted by the broadened joint employer standard.

To examine the shift in employment trends, AAF studies have looked to the franchise sector, which is also directly impacted by the broadened joint employer standard. As illustrated in Table 1, in 2017, franchises employed 8.6 million workers, representing 7 percent of private sector payroll workers.[11]

Under the broadened standard, a franchisor is more likely to be held responsible for a franchisee's workers, causing the franchisor to be less likely to sell franchise licenses to independent business owners and more likely to scale back logistical support to existing franchisees. The result would simply be fewer franchises, which have been among the most dependable sources of job creation in the United States since the end of the Great Recession. One AAF study found that from 2012 to 2016, private sector franchise employment grew 3.4 percent annually, while non-franchise jobs only rose at a 2 percent annual rate. If the broadened joint employer standard leads to franchise employment growth simply slowing to the non-franchise growth rate, 1.7 million jobs would be lost over the next 10 years.[12]

The broadened joint employer standard's negative consequences for franchise workers are not merely theoretical. Early evidence indicates that the new standard is already harming the industries that are particularly vulnerable to it. Specifically, a major portion of hotel workers are employed by franchises. An AAF study found that since the NLRB introduced the new joint employer standard, growth in hotel franchise employment has nearly halted, while non-franchise hotel jobs accelerated slightly. Specifically, in the years leading up to BFI (2011 to 2015), franchise and non-franchise employment grew together at 1.8 percent and 1.9 percent annual rates, respectively. In the years after BFI (2015 to 2017), the franchise hotel employment growth rate stalled at just 0.4 percent annually and non-franchise hotel jobs accelerated to an annual growth rate of 2.1 percent. The significant slowdown in franchise job growth caused the hotel industry's overall employment growth rate, including both franchise and non-franchise jobs, to slow from 1.9 percent to 1.5 percent annually.[13] It is becoming increasingly apparent that the broadened joint employer standard is placing a unique burden on hotel franchises and causing job growth in the industry to slow.

The lessons from the franchise sector suggest that the broadened joint employer standard could be a major drag on the entire domestic supply chain and its workers. Although data on the supply chain are not adequate to perform comparable analyses, contractors are likely facing similar pressures. Since a much

larger portion of the workforce is employed by supply chain companies, the potential job loss is also much more severe than in franchises.

Average Earnings of Supply Chain Workers

Statistics on the characteristics of supply chain workers illustrate that the NLRB's initial rationale for broadening the joint employer standard is misplaced.

When the NLRB issued its BFI decision in 2015, proponents of the broadened joint employer standard assumed that workers in supply chain companies are worse off than those in the rest of the economy. Many believed that as employers outsource tasks—e.g. janitorial, security, and delivery—to specialized smaller companies, firms have sidestepped taking responsibility for their workers' pay and benefits. As a result, a broad swath of the labor force is facing a "fissured workplace," resulting in stagnating wages and mobility, and rising income inequality.[14]

The research by Delgado and Mills, however, indicates the exact opposite: Workers in supply chain companies have significantly higher average earnings than their counterparts in the rest of the private sector. Table 2 compares average earnings of supply chain to non-supply chain workers in 2013, as reported by Delgado and Mills.[15]

Table 2: Average Earnings—Supply Chain vs Non-Supply Chain, 2013

Economic Sector	Supply Chain	Non-Supply Chain	Percent Difference
Total	$61,700	$39,200	57%
Local	$43,300	$34,500	26%
Traded	$73,800	$56,200	31%
Traded Manufacturing	$57,400	$47,200	22%
Traded Services	$80,800	$57,800	40%

In 2013, annual earnings of all supply chain workers averaged $61,700, 57 percent higher than the $39,200 earned on average by everyone else. Workers employed by supply chain companies were also paid significantly higher wages than non-supply chain workers within each of the business categories Delgado and Mills identified. At the lower end, local supply chain company workers earned an average of $43,300 in 2013, 26 percent higher than the $34,500 average earnings in local non-supply chain companies. At the upper end, some of the highest paid workers in the labor market are employed by traded supply chain companies, with average earnings of $73,800 in 2013. In the same year, all non-supply chain traded firms paid workers $56,200 on average. The workers earning the highest wages are employed by traded supply chain firms providing services (versus manufacturing products), earning $80,800 on average in 2013.

So, while the NLRB intended to strengthen labor protections for struggling, low-wage employees, in reality its decision mostly impacts the highest paid workers in the labor force. Therefore, at best, the NLRB's decision to broaden the joint employer standard adds labor protections for a group of workers who do not necessarily need them.

Worker Skills in the Supply Chain

The statistics on supply chain workers' skills further highlight the economic severity of NLRB's decision to broaden the joint employer standard. The study by Delgado and Mills indicates that the jobs put at risk by the broadened joint employer standard are highly valuable to the U.S. economy. In particular, the workers in the supply chain are likely the highest paid because they are also the highest skilled: Supply chain companies have the highest concentration of science, technology, engineering, and mathematics (STEM) occupations—jobs that are typically more productive than others. Table 3 contains the portion of jobs in each business category that are STEM.[16]

Table 3: STEM Jobs—Supply Chain vs Non-Supply Chain, 2013

Economic Sector	Supply Chain	Non-Supply Chain
Total	11.4%	2.1%
Local	2.8%	1.1%
Traded	17.0%	5.9%
Traded Manufacturing	11.7%	4.5%
Traded Services	19.3%	6.1%

Across all supply chain firms, 11.4 percent of workers are in STEM occupations. Meanwhile, STEM jobs account for only 2.1 percent of employees in non-supply chain companies. Mirroring average earnings, STEM occupations are also considerably more prevalent in supply chain than non-supply chain companies in each business category. STEM jobs are particularly concentrated in traded supply chain firms, accounting for 17 percent of employees. In traded supply chain companies that provide services, 19.3 percent of employees are in STEM occupations.

The STEM occupation statistics indicate that supply chain jobs are some of the highest skilled and most productive in the entire labor force. Thus, supply chain companies add tremendous value to the economy not only by the simple virtue of specializing in specific services and increasing efficiency, but also because the services they do specialize in are highly productive.

Further highlighting the value of supply chain jobs, Delgado and Mills suggest that the large number of STEM occupations are also a sign that the supply chain is a major source of innovation.[17] Innovation plays a major role in economic growth and is needed to keep the U.S. economy competitive. For instance, one study found that across the European Union, just a 1 percent increase in research and development expenditures as a share of gross domestic product (GDP) is associated with a 2.2 percentage point increase in the real GDP growth rate.[18] So, if businesses limit their outsourcing due to the broadened joint employer standard, the economy would lose both a major source of productivity and economic growth today, as well as a vital source of innovation that drives long-term competitiveness.

Conclusion

As the NLRB weighs repealing its 2015 decision to broaden the joint employer standard, it must consider potential implications for the U.S. economy and labor force. In sum, the evidence indicates that the broadened joint employer standard poses major risks to the U.S. economy, without providing its intended benefits. At best, the broadened standard mostly benefits workers who already earn high average wages—

hardly the NLRB's original intent. At worst, however, the broadened joint employer standard significantly undermines the economy and labor force by burdening a portion of the private sector that is massive, raises productivity by specializing in specific tasks, and provides services that are themselves highly skilled and valuable.

Sincerely,

Ben Gitis
Director of Labor Market Policy
American Action Forum

End Notes

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[15] Delgado & Mills, Table 4, p. 37.
[16] Ibid., Table 3, p. 36.
[17] Ibid., pp. 20-22.
[18] Svetlana Sokolov-Mladenovic, Slobodan Cvetanovic, and Igor Mladenovic, "R&D expenditure and economic growth: EU28 evidence for the period 2002-2012," Economic Research, Vol. 29, No. 1, pp. 1001-1020, December 22, 2016, https://www.tandfonline.com/doi/full/10.1080/1331677X.2016.1211948.