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December 7, 2022

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

Submitted via regulations.gov

RE: RIN 3142-AA21, "Standard for Determining Joint-Employer Status"

Dear Ms. Rothschild,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 230 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, we write in support of the National Labor Relations Board's ("NLRB" or "the Board") proposed rulemaking that revises and clarifies the responsibilities of contracting employers under the National Labor Relations Act ("NLRA" or "the Act"). The Leadership Conference supports the NLRB's proposed rule, which brings coverage in line with the longstanding scope of common-law definitions of employer, furthers the intent of the Act, and ensures that federal labor law is responsive to the needs of low-wage workers.

What's at stake

Workers in subcontracted, temped-out, and "fissured" work relationships often operate at one or more levels removed from the company that controls their pay and other conditions of work. They are often directly hired by a subcontractor or secondary firm, even though they perform work primarily for the benefit of a larger "lead firm" that claims to not recognize the workers as its employees. This can often have the perverse effect of denying workers their right to negotiate with the company that actually has the power to meet their demands, undermining the effectiveness of collective bargaining and the right to organize enshrined in the NLRA. It can also permit employers that retaliate against organizing workers to hide behind subcontractors and escape responsibility for unfair labor practices.

Workers in low-wage sectors where these practices are most pervasive, who are disproportionately Black and immigrant workers, are unable to improve their pay and working conditions through collective bargaining if they cannot bring all necessary employers to the negotiating table or hold them accountable for retaliation. In most cases, the alleged joint employer is a larger "lead firm," and is the entity ultimately in control of the workers' most basic conditions of employment, including their pay and hours, the safety of their working conditions, and whether they keep their jobs. Updating the joint employer

standard is sorely needed and promises to make federal labor law more responsive to the needs of low-wage workers in the modern economy.

A common-sense standard

The proposed rule provides clear guidance about the coverage of joint employers under the common-law standard and the statutory intent of the National Labor Relations Act. Labor and employment laws have long held that when more than one employer has the right to control the terms and conditions of a job, those employers should be jointly held responsible for those conditions. Recognizing this reality helps to ensure that employers provide better oversight of working conditions and that the right parties are around the bargaining table. Most of these definitions have been consistent since their enactment, and employers have been operating under the rules for over 75 years.

The proposed rule clarifies this standard to align with longstanding interpretation and intent of the National Labor Relations Act. Importantly, it clarifies that a company's right to control, a cornerstone of common-law employment determinations under long-standing Supreme Court and NLRB law, must be considered as part of a determination of joint employer responsibility. Further, the proposed rule accounts for indirect control by an employer, a common way that companies exert control over terms and conditions of a workers' job – for example, via supervisors at a staffing company or temp agency. The rule also requires consideration of instances where two companies share control over important terms and conditions of work.

We also support the rule's defined scope of essential terms and conditions of work. While the precise essential terms will vary by job, they should at least consider wages, hours, and health and safety conditions.

The Board's proposed rule corrects the Trump administration's unnecessarily burdensome standard requiring workers making joint-employer allegations to show that the alleged joint-employer exercised "direct and immediate control" over them. This needless barrier makes it more difficult for low-wage workers often placed in jobs via temp or staffing agencies, and those who work in heavily contracted jobs, to engage in collective bargaining with their lead firm and demonstrate any wrongdoing on the behalf of the lead firm.

Impact on working people

The definition of joint-employer status is especially important to the 3.2 million workers employed by temporary staffing agencies in the U.S. The past decade has seen this sector of the labor market, as measured by aggregate work hours and total number of jobs, grow faster than employment overall. Further, temporary and staffing work has shifted from companies using these types of placements primarily in clerical work to using them in more hazardous industries, such as construction, janitorial services, and logistics. Outsourced workers earn less than their direct-hire counterparts, and this wage penalty is more than 21 percent in manufacturing jobs, more than 33 percent in security jobs, and more than 47 percent in teaching jobs. In addition, staffing and temporary agency workers often receive

insufficient safety training and are more vulnerable to retaliation for reporting injuries than workers in traditional employment relationships.¹

In today's economy, corporations operating in lower-wage industries are using subcontracting arrangements that can result in degraded working conditions and diminished worker access to collective action and bargaining. In fact, 71 percent of temp workers said that they experienced some form of retaliation for raising workplace issues with a supervisor and 17 percent of temp workers reported suffering from a work-related injury while employed through a staffing agency.² These employees cannot improve their pay, working conditions, or hiring practices if they cannot bring all their employers to the negotiating table.

Compounding the problem, these risks tend to be greater for workers of color and women. These workers face systemic discrimination in the workplace and other areas of society, are less likely to have access to institutional power and knowledge, and are also least likely to have the resources to withstand the consequences of retaliation for collective bargaining.³ Collective bargaining is critical for promoting equity across race and gender, and studies show it also improves economic security. Under collective bargaining agreements, average income increases 14 percent for Black workers, 20 percent for Latino workers, and 6 percent for women.⁴

Most blue-collar temp jobs are staffed by Black and Latino workers, with blue-collar temp workers being nearly 3 times more likely to be Black and Latino than the overall workforce.⁵ Black workers also make up 33 percent of temp workers in manufacturing and warehousing occupations despite only accounting for 15.5 percent of overall manufacturing and warehousing employees.⁶ The racially disproportionate ramifications of the direct control standard are especially salient in hazardous industries like construction. Current regulations limit employer accountability for these practices as agencies "often deny their own responsibility for discriminatory behavior, suggesting that they are merely complying with the hiring requests of the employers that they serve."⁷

¹ Laura Padin and Maya Pinto. "Lasting Solutions for America's Temporary Workers." National Employment Law Project. August 26, 2019. <https://s27147.pcdn.co/wp-content/uploads/Lasting-Solutions-for-Americas-Temporary-Workers-Brief.pdf>.

² Ibid.

³ Deborah L. Blake, "Retaliation," *Minnesota Law Review*. July 21, 2008. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1166863.

⁴ Christian Collins. "Policy Makers Must Invest in PRO Act to Build Worker Power, Address Economic Inequality." *The Center for Law and Social Policy*. May 2, 2022. <https://www.clasp.org/blog/policymakers-must-invest-in-pro-act-to-build-worker-power-address-economic-inequality/>.

⁵ Dave DeSario and Janelle White. "Race to the Bottom: The Demographics of Blue-Collar Temporary Staffing." *Temp Worker Justice and Temp Worker Union Alliance Project*. December 2020. <https://www.tempworkerjustice.org/post/race-to-the-bottom>.

⁶ "Survey of Temp Workers Spotlights Widespread Industry Abuses: Poverty Pay, Permatemping, Wage Theft, Unsafe Conditions." *National Employment Law Project*. February 3, 2022. <https://www.nelp.org/news-releases/survey-of-temp-workers-spotlights-widespread-industry-abuses-poverty-pay-permatemping-wage-theft-unsafe-conditions/>.

⁷ Meghan Sweeny. "'We'd Love to Match Them, But...': How Temporary Employment Agencies Understand and Use Race and Ethnicity." *Connecticut Public Interest Law Journal*. 2011. <https://cpilj.law.uconn.edu/wp-content/uploads/sites/2515/2018/10/11.1-%E2%80%9CWe%E2%80%99d-Love-to-Match-Them-But...%E2%80%9D-How-Temporary-Employment-Agencies-Understand-and-Use-Race-and-Ethnicity-by-Meghan-M.-Sweeny.pdf>.

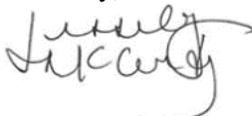
The direct control standard is particularly hazardous to the health of workers with disabilities. People with disabilities are more likely to be temporarily employed than other workers.⁸ These workers are more prone to health hazards in the workplace but are too often left without proper protocols to ensure their safety. Throughout the COVID-19 pandemic, warehouses have failed to institute safety protocols, masks, or social distancing, putting workers with autoimmune diseases and older workers at significant risk.⁹ Too often, temp workers are put in unsafe situations without the ability to speak up or hold all their employers accountable. Correcting the direct control standard would empower workers with disabilities to address these issues with their employers.¹⁰

Workers in subcontracted labor relationships should not be left behind. Reinforcing that companies remain accountable to their workers recognizes the realities of subcontracted labor and protects employees from unfair labor practices. The proposed rule will help workers in subcontracted employment relationships by addressing disparities that workers face along the lines of race, gender, and disability. And it makes a crucial distinction by allowing evidence of indirect forms of control to establish joint employer status which underscores employer accountability throughout webs of contracting arrangements, boosts compliance with safety standards, and ensures that workers are paid what they are owed. Plus, corporations that engage low-road contractors and then look the other way or actively seek to avoid bargaining with their workers gain an unfair advantage over companies that play by the rules, resulting in a race to the bottom that rewards cheaters. It's one reason why the job quality of many formerly middle-class jobs in the United States are suffering today.

Companies that retain and share control over working conditions at a job should share the responsibility for complying with basic worker protections and for bargaining over job conditions. When operating correctly, joint employment results in better overall protections for workers and promotes worker voice on the job.

Thank you for your consideration of our views. Please contact Josh Boxerman, senior policy analyst, at boxerman@civilrights.org or Chanel Sherrod, government affairs program manager, at sherrod@civilrights.org with any questions.

Sincerely,



Jesselyn McCurdy
Executive Vice President for Government Affairs

⁸ "Persons with a Disability: Barriers to Employment and Other Labor-Related Issues." *U.S. Bureau of Labor Statistics*. Marc 30, 2022. https://www.bls.gov/news.release/archives/dissup_03302022.html.

⁹ "Survey of Temp Workers Spotlights Widespread Industry Abuses: Poverty Pay, Permatemping, Wage Theft, Unsafe Conditions." *National Employment Law Project*. February 3, 2022. <https://www.nelp.org/news-releases/survey-of-temp-workers-spotlights-widespread-industry-abuses-poverty-pay-permatemping-wage-theft-unsafe-conditions/>.

¹⁰ Mia Ives- Rublee, Rose Khattar, Lily Roberts. "Removing Obstacles for Disabled Workers Would Strengthen the U.S. Labor Market." *Center for American Progress*. May 24, 2022. <https://www.americanprogress.org/article/removing-obstacles-for-disabled-workers-would-strengthen-the-u-s-labor-market/>.