December 7, 2022

Lauren McFerran
Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Roxanne Rothchild
Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Re: Standard for Determining Joint-Employer Status, 87 Federal Register 54641

Dear Chairman McFerran and Ms. Rothchild:

The National Small Business Association submits the following comments regarding a proposed rule that would broaden the joint-employer definition under the National Labor Relations Act. This rule stands to impact countless small businesses across the country, jeopardizing their role in the national economy. This proposed standard will cause a significant rearrangement of existing business relationships and have a chilling effect on the creation of new agreements between larger and smaller businesses. In turn, we will see higher costs, lower job growth and a reduction in small business start-ups.

The proposed rule would make significant alterations to a rule finalized by the Board only in 2020 and change decades of settled interpretations regarding the conditions that create a "joint-employer" situation. Essentially, the proposed rule would change the basis for determining joint-employer status from the current situation where one employer must have "direct and immediate" control over another employer's workers in terms of hiring, firing, discipline, supervision, and direction, to a much more broad and vague definition of "indirect" or "reserved" control.

I. The Proposed Rule Fails to Provide Clear Guidance

The proposed rule is overly broad, confusing, and vague. The standard could potentially target any third-party relationship that involves any level of standards for work, since the rule fails to provide a defined list of "terms and conditions." Under this rule, parties receive no guidance on which terms and conditions of employment are to be considered in a joint employer determination. Small business need clear guidance on the degree of control on which terms of conditions might trigger a determination of joint employer status. This standard provides none of this necessary guidance.

II. Small Business Opportunities Could be Greatly Diminished

These proposed standards would have a chilling effect on normal contracting relationships. For businesses that contract for services, it is completely normal for those contracts to have conditions for worker safety, hours of work, adherence to environmental standards, and much else. Without clear definitions and guidance, any of those routine requirements could render a joint employer finding, thereby creating overwhelming incentives for larger companies to bring all work internal and end contractual relationships with smaller service providers. Setting standards for vendors in terms of staff scheduling and performance is completely normal and necessary and involves all manner of service providers, from cleaning crews to temporary staffing agencies. The chilling effect for these relationships will be profound.

III. Ordinary and Necessary Standards Could be Problematic

In other cases, the necessary specialization of specific contractors would bring unavoidable additional liability risk and uncertainty to all parties. Perhaps the best example is the construction sector, where various highly specialized subcontractors all coordinate and must meet exacting and interconnected standards (including schedules and performance) to achieve a successful conclusion to the project. The requirements that a general construction contractor will necessarily seek from any subcontractor could create a substantial risk of triggering a joint employer finding under this new rule.

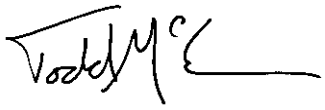
In an additional irony, the rule may not permit adherence to the very rules that the federal government requires of its contractors. The government requires its prime contractors to have the very kind of "indirect and reserved control" addressed in this proposed rule of their subcontractors. These conditions dictate safety standards, prevailing wages and the provision of employee benefits amongst others. As outlined above, many private companies have similar standards, all of which are thrown into question by these proposed rules.

IV. Conclusion

For all of the reasons outlined above (and many others that will come from specific industries and defined franchise relationships), NSBA strongly believes that these new rules should be withdrawn.

The confusion, liability, and unintended consequences that will stem from the enactment of these rules will be extensive. As a result, it is clear that these new rules would cause many larger companies to scale back their work with small businesses. Businesses will be forced to protect themselves against significantly more liability and obligations under the law. Essentially, these proposed rules would cause larger companies to bring much small-business work "in-house" rather than work with individually owned small companies. Ultimately, there will be fewer start-ups, lost innovation, higher costs, and a less vibrant entrepreneurial economy.

Sincerely,



Todd O. McCracken
President & CEO