

January 25, 2019

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

*Via electronic submission*

***Re: 83 FR 46681 - Notice of proposed rulemaking: Revisions to The Standard for Determining Joint-Employer Status***

Dear Ms. Rothschild:

The Association of Corporate Counsel (“ACC”) and its Employment and Labor Law Network fully support the National Labor Relations Board’s (NLRB) proposed rule on The Standard for Determining Joint-Employer Status. We appreciate the Board’s willingness to establish a rule in light of the instability caused by the *Browning-Ferris* ruling and subsequent procedural developments. We approve of the proposed standard as written because it provides a simple and fair standard by which companies can determine the existence of an employment relationship. The proposed rule also promotes predictability and consistency regarding determinations of joint-employer status.

ACC is a global bar association with more than 43,000 members that promotes the common professional and business interests of in-house counsel who work for corporations, associations, and other organizations. More than 7,000 members participate in our Employment and Labor Law Network, which assists ACC members in keeping current on the latest case law and legislative and regulatory actions affecting labor and employment law.

Since the NLRB's decision in *Browning-Ferris* first redefined the joint-employer standard in 2015, American companies and their corporate counsel have been subject to flip-flopping standards, and that volatility has led to much difficulty in advising companies regarding joint-employer liability. This is because the implications of the vague joint-employer standard under *Browning-Ferris* are potentially far-reaching. In-house counsel struggled to determine what constitutes “indirect control” or the potential for indirect control, as many routine business transactions involve individuals working for one company performing some effort on behalf of another company. The vagueness of the *Browning-Ferris* standard is particularly troubling in the context of parent-subsidiary, contractor-subcontractor, and franchisor-franchisee relationships. In-house counsel see the risk of litigation rise unnecessarily when the companies they advise are

unable to make basic business decisions due to the uncertainty created by the NLRB's inconsistent approaches to the joint-employer definition.

The Board's decision to restore the pre-*Browning-Ferris* standard through a rulemaking, as opposed to adjudication is to be applauded. ACC's members will benefit from having a formal rule in place under which they can advise their companies. American companies deserve a consistent and predictable standard for determining the existence of an employment relationship. The proposed revisions will create a more predictable environment for companies involved in the variety of business relationships which may require a determination of joint-employer status. Under the proposed revisions, for two employers to be considered a joint-employer, both companies must exercise substantial, direct, and immediate control over the employee. The proposed standard under the Board's consideration provides clarity and allows contracting parties a predictable method to determine when and where an employment relationship may exist.

The ACC's members also support modifications to the proposed revisions as suggested by NLRB General Counsel Peter Robb in December 2018. Specifically, ACC would favor a modification to the proposed revisions which would prohibit a joint employer from being required to enter into bargaining with a union unless it controlled all listed essential terms and conditions of employment. Further, ACC would be in favor of a final rule which held that the mere finding of a joint employer relationship by the NLRB would not, in and of itself, impute the legal liability of the unfair labor practices of the co-employer business partner. ACC's members agree with the NLRB's General Counsel that such modifications would further add to the clarity and predictability of the final rule.

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We are extremely pleased by the proposed Standard for Determining Joint-Employer Status. We strongly urge the Board to adopt the rule with the above modifications to further enhance the clarity and predictability of employment relationships.

Sincerely,



Susanna McDonald  
Vice President and Chief Legal Officer  
Association of Corporate Counsel

Mary Blatch  
Associate General Counsel and Senior  
Director of Advocacy  
Association of Corporate Counsel

Ryan L. Brown  
Co-Chair  
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