Docket No. NLRB-2022-0001

COMMENT

of

WASHINGTON LEGAL FOUNDATION

to the

NATIONAL LABOR RELATIONS BOARD

Concerning

STANDARD FOR DETERMINING JOINT-EMPLOYER STATUS

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED AT 87 FED. REG. 54,641 (SEPTEMBER 7, 2022)

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November 3, 2022

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Submitted Electronically (http://www.regulations.gov)
Ms. Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street Southeast
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Re: Standard for Determining Joint-Employer Status, Docket No. NLRB-2022-0001

Ms. Rothschild:

On behalf of Washington Legal Foundation, please consider this comment responding to the invitation for comments at 87 Fed. Reg. 54,641 (Sept. 7, 2021). WLF appreciates the opportunity to weigh in on whether the National Labor Relations Board should rescind and replace the Final Rule, *Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11,184 (Feb. 26, 2020). As explained below, NLRB should neither rescind nor replace the Final Rule.

For 85 years after the National Labor Relations Act's passage, whether a company qualified as a joint employer was decided by the courts. Despite the Department of Labor's issuing regulations about joint-employer status under the Fair Labor Standards Act, *see, e.g.*, Dep't of Labor, *Migrant and Seasonal Agricultural Worker Protection Act*, 62 Fed. Reg. 11,734 (Mar. 12, 1997), NLRB did not act. Nor could NLRB lean on the DOL's definition of joint-employer because the FLSA and NLRA define employer differently. *Compare* 29 U.S.C. § 152(2) and *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1206 (D.C. Cir. 2018) *with* 29 U.S.C. § 203(d) and *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985).

A few years ago, however, NLRB decided that it should join DOL and promulgate a regulation of joint-employer status under the NLRA. After an extensive notice-and-comment rulemaking, NLRB promulgated the Final Rule in February 2020. Pro-labor activists did not like the Final Rule because it tracked the common-law history of joint-employer status. Based only on

political pressure from these groups, the current NLRB now seeks to rescind the Final Rule and replace it with a standard for joint employer that was unknown at common law. Because the proposal conflicts with the common law and would harm stakeholders, NLRB should withdraw the notice.

I. WLF's Interest

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF defends free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears before federal tribunals opposing employment rules that hurt the economy. *See, e.g.*, *In re Velox Express, Inc.*, 2019 WL 7584332 (N.L.R.B. Sept. 30, 2019); *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (2019); *Browning-Ferris*, 911 F.3d 1195.

WLF also regularly submits comments to federal regulatory agencies on joint-employer issues. *See, e.g.*, WLF Comment, *Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule* (Apr. 7, 2021); WLF Comment, *In re Standards for Determining Joint-Employer Status* (June 25, 2019).

WLF's Legal Studies Division, the Foundation's publishing arm, often produces and distributes articles on joint employment. *See, e.g.*, Nathaniel M. Glasser et al., *Joint Employment Liability: What Administrative Agencies' Rule Revisions Mean For Employers*, WLF LEGAL BACKGROUNDER (Mar. 6, 2020); Michael J. Lotito, *Predictable, Uniform Standard Needed For Who Is A Joint Employer*, WLF LEGAL BACKGROUNDER (May 19, 2017).

II. The Proposal Departs From The Common Law.

NLRB spills much ink trying to justify a new rule, insisting that the Final Rule conflicts with the common law while the new proposal is consistent with the common law. That argument relies on an incorrect framing of the relevant common-law and a misreading of court decisions. On a more fundamental level, it leans heavily on non-common law authorities. Correctly interpreted, the common law fully supports the Final Rule and conflicts with NLRB's politically motivated proposal.

The notice of proposed rulemaking's "Validity and Desirability of Rulemaking" section exposes how NLRB's proposal to rescind the Final Rule and replace it is based on non-common law authorities. As NLRB admits, its argument on the common-law history of joint employment relies on its own

idiosyncratic "joint-employer jurisprudence." 87 Fed. Reg. at 54,644. The problem is that NLRB does not create common law. Common law is "[t]he body of law derived from *judicial* decisions." Black's Law Dictionary (11th ed. 2019) (emphasis added). "The judicial Power of the United States" is "vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1.

"The judicial Power of the United States" thus cannot "be shared" with executive agencies any more than the President can "share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *United States v. Nixon*, 418 U.S. 683, 704 (1974) (cleaned up). So Congress "cannot vest any portion of the judicial power of the United States, except in courts [it] ordained and established." *Martin v. Hunter's Lessee*, 14 U.S. 304, 330 (1816). Thus, administrative agencies cannot exercise the judicial power of the United States because they are not Article III courts. *See* William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1539 (2020).

NLRB's heavy reliance on its own precedent to show that the Final Rule contradicts the common law is thus unpersuasive. Rather than looking to its own precedent, NLRB should have looked to American court decisions when deciding what the proper test is for joint employment.

NLRB's focus on the Restatement is similarly off base. The Restatement no longer restates the law. Rather, it seeks "to promote changes which will tend better to adapt the laws to the needs of life." *Ostrowsky v. Jengo*, 2020 WL 1488674, *3 (N.J. Super. Ct. App. Div. Mar. 25, 2020) (cleaned up). Even the American Law Institute admits that is what the Restatement does. Patrick J. Kelley, *Introduction: Did the First Restatement Adopt A Reform Agenda?*, 32 S. Ill. U. L.J. 1, 15 n.3 (2007) (citing *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 ALI Proc. 1, 14 (1923)). Thus, looking at the cases cited in the Restatement may help the analysis but citing straight to the Restatement is unhelpful. Yet that is all NLRB can muster when arguing that repealing the Final Rule and replacing it with a union-backed proposal fits with the common law.

In 1947, Congress amended the NLRA to overturn two Supreme Court decisions that had read the statute too broadly. *See* H.R. Rep. No. 80-245, 18 (1947), *reprinted at*, 1 NLRB, Legislative History of the Labor Management Relations Act 309 (1948). Soon after that amendment, courts looked to common-law principles when deciding whether a company was an employer.

Generally, under the common law "if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is" not an employee of the company. *Loc. 777, Democratic Union Org. Comm., Seafarers Int'l Union of N. Am., AFL-CIO v. NLRB*, 603 F.2d 862, 897 (D.C. Cir. 1978) (cleaned up). "The matter o[f] control which is material is that which" a company "exercise[s] over the" workers "rather than what the" company has the power to exercise. *Party Cab Co. v. United States*, 172 F.2d 87, 92 (7th Cir. 1949).

Courts—who make common law—continued to apply this actual-control requirement throughout the 20th century. The Second Circuit held that "an essential element" of any joint employer determination is "sufficient evidence of immediate control over the employees." *Clinton's Ditch Co-op Co. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985). This inquiry looked at "whether the alleged joint employer (1) did the hiring and firing; (2) directly administered any disciplinary procedures; (3) maintained records of hours, handled the payroll, or provided insurance; (4) directly supervised the employees; or (5) participated in the collective bargaining process," *AT&T v. NLRB*, 67 F.3d 446, 451 (2d Cir.1995) (citation omitted). More recently, courts looked at whether a company supervised and directed someone to determine employment status. *Serv. Emps. Int'l Union, Loc. 32BJ v. NLRB*, 647 F.3d 435, 443 (2d Cir. 2011). NLRB's notice of proposed rulemaking doesn't even address the Second Circuit's *AT&T* decision. It is hard to understand then how NLRB undertook a full analysis of the common-law history of joint employment. That is because it was too focused on decisions outside the common law. In other words, it engaged in illicit cherry-picking.

The Final Rule recognized this common-law principle. Rather than rely on mere theoretical and indirect control, like the proposed replacement, the Final Rule focused on actual control, which is what mattered under the common law of agency. The same is true in other areas of the law. For example, just because a paycheck may have one company's name on it does not mean that the recipient of that paycheck is "employed" by that company. *See Marzano v. Computer Sci. Corp.*, 91 F.3d 497, 514 (3d Cir. 1996). In those circumstances, courts look to who is actually controlling the employee to determine the employer. *See id.* Yet NLRB wants to roll back the clock to the pre-1947 NLRA as interpreted by the pre-1947 Supreme Court. But the Constitution does not give NLRB the power to nullify laws or their amendments. To ensure that the common law is followed, NLRB should withdraw its notice of proposed rulemaking.

III. The Final Rule Provides Real Benefits To All Stakeholders.

The Final Rule benefits workers by bolstering economic growth. As former Department of Labor chief economist Dr. Ronald Bird explained, the the Final Rule's test "foster[s] job growth, and thus increase jobs" Ronald Bird Decl. ¶ 8, *New York v. Scalia*, 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020) (No. 20-cv-1689), ECF 110-7.

This job creation makes sense. Some companies—particularly small ones—hesitate to hire employees on their own. Other companies—normally larger companies—are afraid to assist these smaller companies if they may be considered a joint employer for NLRA purposes. Without this assistance from the larger companies, smaller companies would hire fewer employees. But with the Final Rule in place, this barrier to hiring disappears. Increased salaries are also a logical result; it is simple economics. When the demand curve shifts to the right, the intersection with the labor supply moves up. This means higher wages for workers.

More jobs also help States and localities. As Dr. Bird said, more jobs increases the "taxable wage base in states." Bird Decl., *supra* ¶ 8. Multiple tax streams benefit from the Final Rule. First, with greater employment, there is higher payroll-tax collection. Second, it leads to increased personal-tax revenue from employees. Third, it leads to increased business-tax revenues. Finally, the trickle-down effect means more sales-tax collections.

The other side of the same coin is that governments need not spend as much on governmental programs. Rather than cutting unemployment checks, governments can collect unemployment taxes from those same people. And other social service expenditures will decrease because companies provide those services to their employees. In short, under the Final Rule governments see more revenues and spend less money.

The Final Rule also encourages the rooting out of the scourges of human trafficking and sexual harassment. It allows companies to train others' employees to detect human trafficking without fear of being found a joint employer. *See* Lisa Nagele-Piazza*, Labor Department Releases Final Joint-Employer Rule*, Society for Human Resource Management (Jan. 13, 2020), https://bit.ly/34XhCot. Without the Final Rule's clear guidance, companies might stop providing human-trafficking training. So unless NLRB thinks more human trafficking is beneficial, the Final Rule helps the community.

The same is true of sexual harassment training. Many franchisors train franchisees' employees to avoid sexual harassment. Nagele-Piazza, *supra*. By rescinding and replacing the Final Rule, NLRB would discourage companies from providing sexual harassment training to others' employees. This hurts the goal of recognizing that men must treat women with respect in the workplace. The notice proposing rescinding and replacing the Final Rule does not address these concerns. This alone is reason to reconsider whether rescission and replacement is proper.

* * *

Rescinding and replacing the Final Rule would hurt businesses, workers, and state and local governments. The resulting increased regulatory uncertainty would mean fewer jobs for workers, less tax revenue for governments, and more human tracking and sexual harassment of workers. The only winners are unions who will leverage the uncertainty to extort unjust agreements from businesses. NLRB should not invite these negative consequences. Rather, it should hold the line and keep the Final Rule.

Respectfully submitted,

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