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Proposed Rule

The Standard for Determining Joint-Employer Status

A Proposed Rule by the National Labor Relations Board on 09/14/2018

This document has a comment period that ends in 57 days. (11/13/2018)
SUBMIT A FORMAL COMMENT

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Comments regarding this proposed rule must be received by the Board on or before November 13, 2018. Comments replying to comments submitted during the initial comment period must be received by the Board on or before November 20, 2018. Reply comments should be limited to replying to comments previously filed by other parties. No late comments will be accepted.

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National Labor Relations Board.

ACTION:

Notice of proposed rulemaking; request for comments.

SUMMARY:

In order to more effectively enforce the National Labor Relations Act (the Act or the NLRA) and to further the purposes of the Act, the National Labor Relations Board (the Board) proposes a regulation establishing the standard for determining whether two employers, as defined in Section 2(2) of the Act, are a joint employer of a group of employees under the NLRA. The Board believes that this rulemaking will foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby promoting labor-management stability, one of the principal purposes of the Act. Under the proposed regulation, an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. More specifically, to be deemed a joint employer under the proposed regulation, an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine.

DATES:

Comments regarding this proposed rule must be received by the Board on or before November 13, 2018. Comments replying to comments submitted during the initial comment period must be received by the Board on or before November 20, 2018. Reply comments should be limited to replying to comments previously filed by other parties. No late comments will be accepted.

ADDRESSES:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through *http://www.regulations.gov*.

Delivery—Comments should be sent by mail or hand delivery to: Roxanne Rothschild, Associate Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. Because of security precautions, the Board continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments. The Board encourages electronic filing. It is not necessary to send comments if they have been filed electronically with *regulations.gov*. If you send comments, the Board recommends that you confirm receipt of your delivered comments by contacting (202) 273-2917 (this is not a toll-free number). Individuals with hearing impairments may call 1-866-315-6572 (TTY/TDD).

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Only comments submitted through *http://www.regulations.gov*, hand delivered, or mailed will be accepted; ex parte communications received by the Board will be made part of the rulemaking record and will be treated as comments only insofar as appropriate. Comments will be available for public inspection at *http://www.regulations.gov* and during normal business hours (8:30 a.m. to 5 p.m. EST) at the above address.

The Board will post, as soon as practicable, all comments received on *http://www.regulations.gov* without making any changes to the comments, including any personal information provided. The website *http://www.regulations.gov* is the Federal eRulemaking portal, and all comments posted there are available and accessible to the public. The Board requests that comments include full citations or internet links to any authority relied upon. The Board cautions commenters not to include personal information such as Social Security numbers, personal addresses, telephone numbers, and email addresses in their comments, as such submitted information will become viewable by the public via the *http://www.regulations.gov* website. It is the commenter's responsibility to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's email address unless the commenter chooses to include that information as part of his or her comment.

FOR FURTHER INFORMATION CONTACT:

Roxanne Rothschild, Associate Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, (202) 273-2917 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

Whether one business is the joint employer of another business's employees is one of the most important issues in labor law today. There are myriad relationships between employers and their business partners, and the degree to which particular business relationships impact employees' essential terms and conditions of employment varies widely.

A determination by the Board regarding whether two separate businesses constitute a "joint employer" as to a group of employees has significant consequences for the businesses, unions, and employees alike. When the Board finds a joint-employer relationship, it may compel the joint employer to bargain in good faith with a Board-certified or voluntarily recognized bargaining representative of the jointly-employed workers. Additionally, each joint employer may be found jointly and severally liable for unfair labor practices committed by the other. And a finding of joint-employer status may determine whether picketing directed at a particular business is primary and lawful, or secondary and unlawful.

The last three years have seen much volatility in the Board's law governing joint-employer relationships. As detailed below, in August 2015, a divided Board overruled longstanding precedent and substantially relaxed the evidentiary requirements for finding a joint-employer relationship. *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery,* 362 NLRB No. 186 (2015) (*Browning-Ferris*), petition for review docketed *Browning-Ferris Indus. of Cal.* v. *NLRB,* No. 16-1028 (D.C. Cir. filed Jan. 20, 2016). Then, in December 2017, a different Board majority restored the prior, more stringent standard. In February 2018, the Board vacated its December 2017 decision, effectively changing the law back again to the relaxed standard of *Browning-Ferris*. A petition for review challenging *Browning-Ferris'* s adoption of the relaxed standard as beyond the Board's statutory authority is currently pending in the United States Court of Appeals for the District of Columbia Circuit. In light of the continuing uncertainty in the labor-management community created by these adjudicatory variations in defining the appropriate joint-employer standard under the Act, and for the reasons explained below, the Board proposes to address the issue through the rulemaking procedure.

I. Background

Under Section 2(2) of the Act, "the term `employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. 151 *et seq.*], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." Under Section 2(3) of the Act, "the term `employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter [of the Act] explicitly states otherwise . . . ."

Section 7 of the Act grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]," and Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of *his* employees . . . ." (emphasis added).

The Act does not contain the term "joint employer," much less define it, but the Board and reviewing courts have over the years addressed situations where the working conditions of a group of employees are affected by two separate companies engaged in a business relationship. *Boire* v. *Greyhound Corp.,* 376 U.S. 473 (1964) (holding that Board's determination that bus company possessed "sufficient control over the work" of its cleaning contractor's employees to be considered a joint employer was not reviewable in federal district court); *Indianapolis Newspapers, Inc.,* 83 NLRB 407, 408-409 (1949) (finding that two newspaper businesses, Star and INI, were not joint employers, despite their integration, because "there [wa]s no indication that Star, by virtue of such integration, t[ook] an active part in the formulation or application of the labor policy, or exercise[d] any immediate control over the operation, of INI").

When distinguishing between an "employee" under Section 2(3) of the Act and an "independent contractor" excluded from the Act's protection, the Supreme Court has explained that the Board is bound by common-law principles, focusing on the control exercised by one employer over a person performing work for it. *NLRB* v. *United Insurance Co. of America,* 390 U.S. 254, 256 (1968); see also *Nationwide Mutual Insurance Co.* v. *Darden,* 503 U.S. 318, 322-323 (1992) ("[W]hen Congress has used the term `employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine.") (citations omitted). Similarly, it is clear that the Board's joint-employer standard, which necessarily implicates the same focus on employer control, must be consistent with the common law agency doctrine.

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The Development of the Joint-Employment Doctrine Under the NLRA

Under the Act, there has been a longstanding consensus regarding the general formulation of the Board's joint-employer standard: Two employers are a joint employer if they share or codetermine those matters governing the employees' essential terms and conditions of employment. See *CNN America, Inc.,* 361 NLRB 439, 441, 469 (2014), enf. denied in part 865 F.3d 740 (D.C. Cir. 2017); *Southern California Gas Co.,* 302 NLRB 456, 461 (1991). The general formulation derives from language in *Greyhound Corp.,* 153 NLRB 1488, 1495 (1965), enfd. 368 F.2d 778 (1966), and was endorsed in *NLRB* v. *Browning-Ferris Industries,* 691 F.2d 1117, 1122-1123 (3d Cir. 1982), where the United States Court of Appeals for the Third Circuit carefully explained the differences between the Board's joint-employer and single-employer doctrines, which had sometimes been confused.[1]

At certain points in its history, the Board has discussed the relevance of an employer's direct control over the essential employment conditions of another company's employees, as compared with its indirect control or influence, in determining whether joint-employer status has been established. For example, in *Floyd Epperson,* 202 NLRB 23, 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974), the Board found that a dairy company (United) was the joint employer of truck drivers supplied to it by an independent trucking firm (Floyd Epperson) based on evidence of both United's direct control and indirect control over the working conditions of Epperson's drivers. The Board relied on "all the circumstances" of the case, including the fact that United dictated the specific routes that Epperson's drivers were required to take when transporting its goods, "generally supervise[d]" Epperson's drivers, and had authority to modify their work schedules. Id. at 23. The Board also relied in part on United's "indirect control" over the drivers' wages and discipline.[2] Id. Importantly, in *Floyd Epperson* and like cases, the Board was not called upon to decide, and did not assert, that a business's indirect influence over another company's workers' essential working conditions, standing alone, could establish a joint-employer relationship.[3]

In fact, more recently, the Board, with court approval, has made clear that "the essential element" in a joint-employer analysis "is whether a putative joint employer's control over employment matters is direct and immediate." *Airborne Express,* 338 NLRB 597, 597 fn. 1 (2002) (citing *TLI, Inc.,* 271 NLRB 798, 798-799 (1984), enfd. mem. sub nom. *General Teamsters Local Union No. 326* v. *NLRB,* 772 F.2d 894 (3d Cir. 1985)); see also *NLRB* v. *CNN America, Inc.,* 865 F.3d 740, 748-751 (D.C. Cir. 2017) (finding that Board erred by failing to adhere to the Board's "direct and immediate control" standard); *SEIU Local 32BJ* v. *NLRB,* 647 F.3d 435, 442-443 (2d Cir. 2011) (" `An essential element' of any joint employer determination is `sufficient evidence of immediate control over the employees.' ") (quoting *Clinton's Ditch Co-op Co.* v. *NLRB,* 778 F.2d 132, 138 (2d Cir. 1985)); *Summit Express, Inc.,* 350 NLRB 592, 592 fn. 3 (2007) (finding that the General Counsel failed to prove direct and immediate control and therefore dismissing joint-employer allegation); *Laerco Transportation,* 269 NLRB 324 (1984) (dismissing joint-employer allegation where user employer's supervision of supplied employees was limited and routine).

Accordingly, for at least 30 years (from no later than 1984 to 2015), evidence of indirect control was typically insufficient to prove that one company was the joint employer of another business's workers. Even direct and immediate supervision of another's employees was insufficient to establish joint-employer status where such supervision was "limited and routine." *Flagstaff Medical Center, Inc.,* 357 NLRB 659, 667 (2011); *AM Property Holding Corp.,* 350 NLRB 998, 1001 (2007), enfd. in relevant part sub nom. *SEIU, Local 32 BJ* v. *NLRB,* 647 F.3d 435 (2d Cir. 2011); *G. Wes Ltd. Co.,* 309 NLRB 225, 226 (1992). The Board generally found supervision to be limited and routine where a supervisor's instructions consisted mostly of directing another business's employees what work to perform, or where and when to perform the work, but not how to perform it. *Flagstaff Medical Center,* 357 NLRB at 667.

The Board's treatment of a company's contractually reserved authority over an independent company's employees also evolved over the years. In the 1960s, the Board found that a contractual reservation of authority, standing alone, could establish a joint-employer relationship even where that reserved authority had never been exercised. For example, in *Jewel Tea Co.,* 162 NLRB 508, 510 (1966), the Board found that a department store (the licensor) was a joint employer of the employees of two independent companies licensed to operate specific departments of its store. The text of the license agreements between the store and the departments provided, inter alia, that "employees shall be subject to the general supervision of the licensor," that the licensee "shall at all times conform to a uniform store policy with reference to wages, hours and terms, and conditions of employment for all sales and stock personnel," that the licensor shall approve employees hired by the licensee, and that the licensor "may request discharge and the licensee will immediately comply with such request." The Board found it "clear beyond doubt" that the license agreements gave the store the "power to control effectively the hire, discharge, wages, hours, terms, and other conditions of employment" of the other two companies' employees. According to the Board, "[t]hat the licensor has not exercised such power is not material, for an operative legal predicate for establishing a joint-employer relationship is a reserved right in the licensor to exercise such control, and we find such right of control adequately established by the facts set out above." Id.; see also *Thriftown, Inc.,* 161 NLRB 603, 607 (1966) ("Since the power to control is present by virtue of the operating agreement, whether or not exercised, we find it unnecessary to consider the actual practice of the parties regarding these matters as evidenced by the record.").

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However, even during the same period, not all contractual reservations of authority were found sufficient to establish a joint-employer relationship. For example, in *Hy-Chem Constructors, Inc.,* 169 NLRB 274 (1968), the Board found that a petrochemical manufacturer was not a joint employer of its construction subcontractor's employees even though their cost-plus agreement reserved to the manufacturer a right to approve wage increases and overtime hours and the right to require the subcontractor to remove any employee whom the manufacturer deemed undesirable. The Board found that the first two reservations of authority "are consistent with the [manufacturer's] right to police reimbursable expenses under its cost-plus contract and do not warrant the conclusion that [the manufacturer] has thereby forged an employment relationship, joint or otherwise, with the [subcontractor's] employees." Id. at 276. Additionally, the Board found the manufacturer's "yet unexercised prerogative to remove an undesirable . . . employee" did not establish a joint-employment relationship. Id.

Over time, the Board shifted position, without expressly overruling precedent, and held that joint-employer status could not be established by the mere existence of a clause in a business contract reserving to one company authority over its business partner's employees absent evidence that such authority had ever been exercised. For example, in *AM Property Holding Corp.,* the Board found that a "contractual provision giving [a property owner] the right to approve [its cleaning contractor's] hires, standing alone, is insufficient to show the existence of a joint employer relationship." 350 NLRB at 1000. The Board explained that "[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties." Id. (citing *TLI,* 271 NLRB at 798-799). Because the record in *AM Property* failed to show that the property owner had ever actually participated in the cleaning contractor's hiring decisions, the Board rejected the General Counsel's contention that the two employers constituted a joint employer. See also *Flagstaff Medical Center,* 357 NLRB at 667 (finding that business contract's reservation of hospital's right to require its subcontractor to "hire, discharge, or discipline" any of the subcontractor's employees did not establish a joint-employer relationship absent evidence that the hospital had ever actually exercised such authority); *TLI,* 271 NLRB at 798-799 (finding that paper company's actual practice of only limited and routine supervision of leased drivers did not establish a joint-employer relationship despite broad contractual reservation of authority that paper company "will solely and exclusively be responsible for maintaining operational control, direction and supervision" over the leased drivers).

The law governing joint-employer relationships changed significantly in August 2015. At that time, a divided Board overruled the then-extant precedent described above and substantially relaxed the requirements for proving a joint-employer relationship. Specifically, a Board majority explained that it would no longer require proof that a putative joint employer has exercised any "direct and immediate" control over the essential working conditions of another company's workers. *Browning-Ferris,* 362 NLRB No. 186, slip op. at 2, 13-16. The majority in *Browning-Ferris* explained that, under its new standard, a company could be deemed a joint employer even if its "control" over the essential working conditions of another business's employees was indirect, limited and routine, or contractually reserved but never exercised. Id., slip op. at 15-16.

The *Browning-Ferris* majority agreed with the core of the Board's long-recognized joint-employer standard: whether two separate employers "share" or "codetermine" those matters governing the essential terms and conditions of employment. Elaborating on the core "share" or "codetermine" standard, the *Browning-Ferris* majority noted that, in some cases, two companies may engage in genuinely shared decision-making by conferring or collaborating directly to set an essential term or condition of employment. Alternatively, each of the two companies "may exercise comprehensive authority over different terms and conditions of employment." Id., slip op. at 15 fn. 80.

While agreeing with the core standard, the *Browning-Ferris* majority believed that the Board's joint-employer precedents had become "increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships." Id., slip op. at 1. The *Browning-Ferris* majority's expressed aim was "to put the Board's joint-employer standard on a clearer and stronger analytical foundation, and, within the limits set out by the Act, to best serve the Federal policy of `encouraging the practice and procedure of collective-bargaining.' " Id., slip op. at 2 (quoting 29 U.S.C. 151).

According to the *Browning-Ferris* majority, during the period before *Laerco* and *TLI* were decided in 1984, the Board had "typically treated the *right* to control the work of employees and their terms of employment as probative of joint-employer status." Id., slip op. at 9 (emphasis in original). Also during that time, "the Board gave weight to a putative joint employer's `indirect' exercise of control over workers' terms and conditions of employment." Id. (citing *Floyd Epperson,* 202 NLRB at 23).

The *Browning-Ferris* majority viewed Board precedent, starting with *Laerco* and *TLI,* that expressly required proof of some exercise of direct and immediate control as having unjustifiably and without explanation departed from the Board's pre-1984 precedent. Specifically, the *Browning-Ferris* majority asserted that, in cases such as *Laerco, TLI, AM Property,* and *Airborne Express,* the Board had "implicitly repudiated its earlier reliance on reserved control and indirect control as indicia of joint-employer status." Id., slip op. at 10. Further, the *Browning-Ferris* majority viewed those decisions as "refus[ing] to assign *any significance* to contractual language expressly giving a putative employer the power to dictate workers' terms and conditions of employment." Id. (emphasis added).

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In short, the *Browning-Ferris* majority viewed Board precedent between 1984 and 2015 as having unreasonably "narrowed" the Board's joint-employer standard precisely when temporary and contingent employment relationships were on the rise. Id., slip op. at 11. In its view, under changing patterns of industrial life, a proper joint-employer standard should not be any "narrower than statutorily required." Id. According to the *Browning-Ferris* majority, the requirement of exercise of direct and immediate control that is not limited and routine "is not, in fact, compelled by the common law—and, indeed, seems inconsistent with common-law principles." Id., slip op. at 13. The *Browning-Ferris* majority viewed the common-law concept of the "right to control" the manner and means of a worker's job performance—used to distinguish a servant (*i.e.,* employee) from an independent contractor—as precluding, or at least counseling against, any requirement of exercise of direct and immediate control in the joint-employment context. Id.

Browning-Ferris reflects a belief that it is wise, and consistent with the common law, to include in the collective-bargaining process an employer's independent business partner that has an indirect or potential impact on the employees' essential terms and conditions of employment, even where the business partner has not itself actually established those essential employment terms or collaborated with the undisputed employer in setting them. The *Browning-Ferris* majority believed that requiring such a business partner to take a seat at the negotiating table and to bargain over the terms that it indirectly impacts (or could, in the future, impact under a contractual reservation) best implements the right of employees under Section 7 of the Act to bargain collectively through representatives of their own choosing. The *Browning-Ferris* majority conceded that deciding joint-employer allegations under its stated standard would not always be an easy task, id., slip op. at 12, but implicitly concluded that the benefit of bringing all possible employer parties to the bargaining table justified its new standard.

In dissent, two members argued that the majority's new relaxed joint-employer standard was contrary to the common law and unwise as a matter of policy. In particular, the *Browning-Ferris* dissenters argued that by permitting a joint-employer finding based solely on indirect impact, the majority had effectively resurrected intertwined theories of "economic realities" and "statutory purpose" endorsed by the Supreme Court in *NLRB* v. *Hearst Publications,* 322 U.S. 111 (1944), but rejected by Congress soon thereafter. In *Hearst,* the Supreme Court went beyond common-law principles and broadly interpreted the Act's definition of "employee" with reference to workers' economic dependency on a putative employer in light of the Act's goal of minimizing industrial strife. In response, Congress enacted the Taft-Hartley Amendments of 1947, excluding "independent contractors" from the Act's definition of "employee" and making clear that common-law principles control.

Additionally, the *Browning-Ferris* dissenters disagreed with the majority's understanding of the common law of joint-employment relationships. The dissenters argued that the "right to control" in the joint-employment context requires some exercise of direct and immediate control.

Then, accepting for argument's sake that the common law does not preclude the relaxed standard of *Browning-Ferris,* the dissenters found that practical considerations counseled against its adoption. They found the relaxed standard to be impermissibly vague and asserted that the majority had failed to provide adequate guidance regarding how much indirect or reserved authority might be sufficient to establish a joint-employment relationship. Additionally, the dissenters believed that the majority's test would "actually foster substantial bargaining instability by requiring the nonconsensual presence of too many entities with diverse and conflicting interests on the `employer' side." Id., slip op. at 23.

The *Browning-Ferris* dissenters also complained that the relaxed standard made it difficult not only to correctly identify joint-employer relationships but also to determine the bargaining obligations of each employer within such relationships. Under the relaxed standard, an employer is only required to bargain over subjects that it controls (even if the control is merely indirect). The dissenters expressed concern that disputes would arise between unions and joint employers, and even between the two employers comprising the joint employer, over which subjects each employer-party must bargain. Further, the dissenters found such fragmented bargaining to be impractical because subjects of bargaining are not easily severable, and the give-and-take of bargaining frequently requires reciprocal movement on multiple proposals to ultimately reach a comprehensive bargaining agreement. Finally, the dissenters were suspicious about the implications of *Browning-Ferris* for identifying an appropriate bargaining unit in cases involving a single supplier employer that contracts with multiple user employers and with potential subversion of the Act's protection of neutral employers from secondary economic pressure exerted by labor unions. Accordingly, the dissenters would have adhered to Board precedent as reflected in cases such as *Laerco, TLI,* and *Airborne Express*.

Recent Developments

In December 2017, after a change in the Board's composition and while *Browning-Ferris* was pending on appeal in the D.C. Circuit, a new Board majority overruled *Browning-Ferris* and restored the preexisting standard that required proof that a joint employer actually exercised direct and immediate control in a manner that was neither limited nor routine. *Hy-Brand Industrial Contractors, Ltd.,* 365 NLRB No. 156 (2017). Soon thereafter, the charging parties in *Hy-Brand* filed a motion for reconsideration. The Board granted that motion and vacated its earlier decision for reasons unrelated to the substance of the joint-employer issue, effectively returning the law to the relaxed joint-employer standard adopted in *Browning-Ferris. Hy-Brand,* 366 NLRB No. 26 (2018). Subsequently, the Board in *Hy-Brand* denied the respondents' motion for reconsideration and issued a decision finding it unnecessary to address the joint-employer issue in that case because, in any event, the two respondents constituted a single employer under Board precedent and were therefore jointly and severally liable for each other's unfair labor practices. 366 NLRB No. 93 (2018); 366 NLRB No. 94 (2018). As stated above, a petition for review of the Board's *Browning-Ferris* decision remains pending in the court of appeals.

II. Validity and Desirability of Rulemaking; Impact Upon Pending Cases

Section 6 of the Act, 29 U.S.C. 156, provides, "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5 [the Administrative Procedure Act, 5 U.S.C. 553], such rules and regulations as may be necessary to carry out the provisions of this Act." The Board interprets Section 6 as authorizing the proposed rule and invites comments on this issue.[4]

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Although the Board historically has made most substantive policy determinations through case adjudication, the Board has, with Supreme Court approval, engaged in substantive rulemaking. *American Hospital Assn.* v. *NLRB,* 499 U.S. 606 (1991) (upholding Board's rulemaking on appropriate bargaining units in the healthcare industry); see also *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion.").

The Board finds that establishing the joint-employer standard in rulemaking is desirable for several reasons. First, given the recent oscillation on the joint-employer standard, the wide variety of business relationships that it may affect (*e.g.,* user-supplier, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, lessor-lessee, parent-subsidiary, and contractor-consumer), and the wide-ranging import of a joint-employer determination for the affected parties, the Board finds that it would be well served by public comment on the issue. Interested persons with knowledge of these widely varying relationships can have input on our proposed change through the convenient comment process; participation is not limited, as in the adjudicatory setting, to legal briefs filed by the parties and amici. Second, using the rulemaking procedure enables the Board to clarify what constitutes the actual exercise of substantial direct and immediate control by use of hypothetical scenarios, some examples of which are set forth below, apart from the facts of a particular case that might come before the Board for adjudication. In this way, rulemaking will provide unions and employers greater "certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labeling [their] conduct an unfair labor practice," as the Supreme Court has instructed the Board to do. *First National Maintenance Corp.* v. *NLRB,* 452 U.S. 666, 679 (1981). Third, by establishing the joint-employer standard in the Board's Rules & Regulations, employers, unions, and employees will be able to plan their affairs free of the uncertainty that the legal regime may change on a moment's notice (and possibly retroactively) through the adjudication process. *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 777 (1969) ("The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming.") (Douglas, J., dissenting).

III. The Proposed Rule

Under the proposed rule, an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

The proposed rule reflects the Board's preliminary view, subject to potential revision in response to comments, that the Act's purposes of promoting collective bargaining and minimizing industrial strife are best served by a joint-employer doctrine that imposes bargaining obligations on putative joint employers that have actually played an active role in establishing essential terms and conditions of employment. Stated alternatively, the Board's initial view is that the Act's purposes would not be furthered by drawing into an employer's collective-bargaining relationship, or exposing to joint-and-several liability, a business partner of the employer that does not actively participate in decisions setting unit employees' wages, benefits, and other essential terms and conditions of employment. The Board's preliminary belief is that, absent a requirement of proof of some "direct and immediate" control to find a joint-employment relationship, it will be extremely difficult for the Board to accurately police the line between independent commercial contractors and genuine joint employers. The Board is inclined toward the conclusion that the proposed rule will provide greater clarity to joint-employer determinations without leaving out parties necessary to meaningful collective bargaining.

The proposed rule is consistent with the common law of joint-employer relationships. The Board's requirement of exercise of direct and immediate control, as reflected in cases such as *Airborne Express,* supra, has been met with judicial approval . See, *e.g., SEIU Local 32BJ* v. *NLRB,* 647 F.3d at 442-443.