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Submitted via www.regulations.gov

Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington DC 20570-0001

**Re: Comments Regarding NLRB's Notice of Proposed Rulemaking
Defining the Standard for Determining Joint-Employer Status, RIN
3142-AA13**

Dear Ms. Rothschild:

The National Employment Law Project (“NELP”) submits these comments to the National Labor Relations Board’s (“NLRB” or “Board”) Notice of Proposed Rulemaking regarding the standard for determining joint-employer status. RIN 3142-AA13; Fed. Reg. Vol. 83, No. 179 (Sept. 14, 2018) (“NPRM”). NELP is a non-profit research and policy organization with over 45 years of experience advocating for the employment and labor rights of low-wage workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation’s labor and employment laws, and that all responsible employers comply with those laws, including the National Labor Relations Act (“NLRA” or “Act”). NELP and our constituents have a direct and sustained interest in a robust national collective bargaining framework and access to the rights guaranteed by the NLRA, which are particularly relevant to the low-wage workers who comprise a disproportionate and growing share of the workforce. We appreciate the opportunity to comment on the proposed regulations.

Our comments will address five primary points:

- 1) The proposed rule is narrower than the common law and is so limiting that it will exclude from the bargaining table parties controlling essential terms and conditions of employment.
- 2) The proposed rule arbitrarily fails to properly consider the NLRA’s statutory purpose of supporting worker collective action.
- 3) Outsourced work is pervasive in low-wage jobs, and workers’ experiences in contracted jobs demonstrate that the proposed rule would be contrary to the intention of the Act.

- 4) The proposed rule will negatively impact small businesses.
- 5) Determining the proper standard for finding joint employment is not appropriate for rulemaking.

I. Introduction

Joint employment is a longstanding concept that ensures that when companies decide to outsource portions of their workforce to staffing companies or other subcontractors, while still retaining control over the work, they remain accountable, along with their contractors, for labor conditions. Often more than one employer is a necessary party to ensuring compliance and accountability. The current standard, as set out in *Browning-Ferris Industries*, 362 NLRB No. 186 (2015) (“*BFI*”) properly effectuates common-law principles and reflects the purposes of the Act. *BFI* states that “[t]he Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.” *Id.* at 2.

The proposed rule is contrary to the common law and thus the National Labor Relations Act, as it unduly narrows the scope of the common law, failing to allow a fact-finder to consider factors that have historically been deemed critical to determining whether the critical aspects of the employment relationship exists. As the D.C. Circuit recently held in *Browning-Ferris Industries v. NLRB*, No. 16-1028 (D.C. Cir. Dec. 28, 2018) (“*Browning-Ferris*”), the common law standard, which the Board acknowledges it must follow, NPRM at 46682, is much broader and requires consideration of the *right to control*, not just the exercise-in-fact of control, among other indicia of control. *Browning-Ferris*, slip op. at 23. Furthermore, and contrary to the *Browning-Ferris* decision, the Board’s proposed test doesn’t at all consider *indirect* control, which is necessary to capture how control is actually exercised in the workplace. *Id.*, slip op. at 23. The proposed rule also fails to consider the reality of *shared control* across employers. Effectively, the proposed rule excludes parties controlling essential terms and conditions of employment, and that is impermissibly contrary to the common law and the Act. If finalized in its proposed form, this standard would not be “in accordance with law,” and therefore in violation of the Administrative Procedure Act (APA). 5 U.S.C. § 706(2)(A).

The proposed standard is also arbitrary because it fails to properly consider the statutory purpose of the NLRA. Section 7 of the Act grants employees the right to form unions and bargain collectively with their employers. The proposed rule would diminish opportunities for collective bargaining and shut down protections for those seeking to exercise their rights under the Act. The Act’s purposes are key to understanding the purpose behind joint employment principles, and practically speaking, the proposed rule would effectively eliminate collective bargaining rights for most of the staffing and subcontracted workforce. Contrary to the implication of the *BFI* dissent, a traditional consideration of statutory purpose remains relevant, and is entirely consistent with the Taft-Hartley Act.

The Board seeks to narrow its joint employment standard at a time when companies in low-wage sectors are increasingly using temporary and staffing agencies to source their labor. Outsourced work is a pervasive part of the low-wage economy today, and workers' experiences in outsourced industries demonstrate that the proposed rule would be contrary to the purposes of the Act. The number of workers employed by temporary staffing agencies has increased dramatically, especially in low-wage occupations. In many fast-growing industries – including warehouse and logistics, janitorial, hospitality, waste management, and manufacturing – outsourcing has become deeply entrenched. Companies that hire their workers via subcontractors or temp agencies but still retain control over the work should not be able to skirt the Act simply because they have outsourced their workers. The Board should not adopt a standard that permits outsourcing employers to contract away their legal duties and immunize themselves from responsibility for the workplace conditions they created and can control. Such a standard would degrade these workers' labor conditions and deprive them of their statutory right to engage in meaningful collective bargaining.

The proposed rule would also adversely affect small business. The rule would leave small businesses to ensure compliance with the Act alone, in situations where they may not be able to ensure compliance without involvement of the larger lead or worksite employer. The proposed rule pushes liability onto smaller companies and places small businesses at a competitive disadvantage.

Finally, the Board should not engage in resource-intensive rulemaking on joint employment. In *Browning-Ferris*, the Circuit holds that the content and meaning of the common law is a pure question of law that the court reviews de novo, without deference to the Board. This recent decision by the most authoritative of Federal Appeals Courts thoroughly examines the common law scope of joint employment and expressly concludes that at common law both indirect control and reserved control are considered in determining joint employment. Founded on the common law principle that the right to control and not the exercise of control determines employer and employee status, this decision must be considered the most extensive and authoritative treatment of common law joint employment under the NLRA. This legal authority applies to rulemaking and adjudication. *Browning-Ferris*, slip op. at 17. The Board cannot depart from the *Browning-Ferris* common law interpretation through rulemaking. Moreover, the fact-intensive nature of joint employment determinations makes rulemaking in this area inappropriate.

II. The proposed rule is narrower than the common law and is so limiting that it will exclude from the bargaining table parties controlling essential terms and conditions of employment.

The Board states in the NPRM that its joint employer standard must be consistent with common law agency doctrine, as it must. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). The Board agrees that joint employer determinations should not “leav[e] out parties necessary to meaningful collective bargaining.” NPRM at 46686.

And yet the Board then goes on to devise a set of relevant factors that so narrows the legal consensus test that it defines a near null-set of relationships constituting joint employment. Under the Board's proposed rule, even many single-company direct employees would not be

considered employees, despite the fact that they would be considered employees under the common law agency doctrine.

The Board does little to explain how its test will advance the statutory goal of fostering resolution of workplace disputes through collective bargaining. It does state that the test seeks to determine whether “essential terms and conditions of employment” are shared or codetermined by two employers. But of all the essential terms and conditions that are the subject of mandatory collective bargaining, the Board lists only control over “hiring, firing, discipline, supervision, and direction,” aspects of the employment relationship that are virtually always delegated to contractors in subcontracting relationships. The Board fails to consider many other conditions of employment that are important to employees and that often must be negotiated at the bargaining table.

The Board’s relevant factors ignore or discount many facts that are relevant and even determinative under the common-law test, and fail completely to consider facts that show the putative joint employers are *sharing* control over the terms and conditions of work. The rule, if enacted, would frustrate the purposes of the NLRA by permitting subcontracting companies to evade their statutory obligations to bargain over wages, hours, and working conditions that they share or codetermine.

The Board seeks comment on the current status of the common law on joint employment relationships, NPRM at 46687, and below we describe required considerations that are missing from the Board’s unduly-narrow formulation.

A. Common-law agency principles are much broader than the Board’s narrow proposal.

In the nineteenth and twentieth centuries, the common law developed a precursor definition of the employment relationship in its master and servant doctrine, to determine whether and when a business would be liable for the negligence or torts of its servants under the doctrine of respondeat superior. Common-law agency principles are used to determine whether sufficient right to control resides in a putative joint employer. These vicarious liability principles were intended to deter torts and distribute liability to those who had the right to control the servant. These principles were referenced in a non-exhaustive list in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989):

We consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

The current Board’s proposal prohibits consideration of most of these Supreme Court-identified

factors, all of which are used to determine whether two companies share or codetermine essential functions of a job such that they are both needed at the bargaining table. See NPRM at 46683; 46686 (listing relevant factors and those it will not consider). The Board has no authority to so restrict settled law.

The Restatement (Second) of Agency, cited with approval in several U.S. Supreme Court cases interpreting the NLRA, includes many considerations that are broader and less formalistic than the current Board test, and includes such factors as whether or not the one employed is engaged in a distinct occupation or business, and whether the work is a part of the regular business of the putative employer. Restatement (Second) of Agency § 220(2) (1958); *Browning-Ferris*, slip op. at 31 (“controlling precedent makes the Restatement (Second) of Agency a relevant source of traditional common-law agency standards in the National Labor Relations Act context”). The common law test for employment thus has no “shorthand formula or magic phrase” to arrive easily at a result, and instead, “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968). The Board’s current proposal attempts to set forth a shorthand narrow formula of only a few considerations that utterly fails to apply the common law and thus the NLRA.¹

To carry out the intended purposes of the NLRA and to comport with the common-law test, the Board should require objective and realistic consideration of all factors that reasonably bear on which entity or entities have the ability to control the terms and conditions of the affected workers’ employment. The joint employer standard should be applied broadly as a totality of the circumstances inquiry; all relevant factors should be assessed in order to permit workers to bargain with the entity or entities that, as a practical, real-world matter, have the power to determine the terms and conditions of their employment. No one factor should be dispositive, and no relevant factors should be ignored.

The Board’s *BFI* decision appropriately required a factual showing that an entity was a common-law employer *and* that it possessed sufficient continuing control over the employees’ essential terms and conditions of employment to permit meaningful collective bargaining over those particular terms. *Browning-Ferris Industries of California (BFI)*, 362 NLRB No. 186 (2015). Thus, the *BFI* majority required a resolution of the joint employer question by consideration of specific factual circumstances aimed at answering the central question of whether there was shared or codetermined control.²

The Board’s *BFI* factors were developed in the context of the facts of the case – BFI decided to use a staffing agency to bring in 90 workers to work on a production line on its premises, and it retained and exercised control over the work. The Board listed a non-exhaustive list of factors that should be considered: hiring, firing, discipline, supervision, and direction, the number of

¹ See, e.g., Member Liebman’s concurrence noting “the sharp limits of the Board’s joint-employer doctrine, which may prevent employees from bargaining with the company that, as a practical matter, determines the terms and conditions of employment.” *Airborne Freight Co.*, 338 NLRB 597, 598 (2002).

² *NLRB v. United Insurance*, 390 US 254 (1968) (describing that multifactor common law inquiries are inherently nuanced and indiscriminate, and what is important is that the total factual context is assessed in light of the pertinent common law agency principles); *Eastex, Inc., v. NLRB*, 437 US 556 (1978), quoting *Electrical Workers v. NLRB*, 366 US 667 (1961) (nature of the problem, as revealed by unfolding variant situations requires an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer).

workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance.³

The common law test for employment and joint employment does not require control to be exercised, direct, and immediate; only that the proposed joint employer have the right to control how the work is done. *See Garcia-Celestino, et al., v. Ruiz Harvesting and Consolidated Citrus* No. 17-12866 (Aug. 2, 2018 11th Cir.) (applying common law employer test in case involving workers employed under the H-2A program); *Browning-Ferris*, slip op. at 16 (“We emphasize that ‘it is the right to control, not the actual exercise of control, that is significant’”). Nor does the common law test ignore the exercise of control that is “routine,” as required by the NPRM. Since all agree that the common law test applies, the Board’s substantial narrowing of the common law goes beyond its Congressional authority.

The current Board’s proposed rule fails to acknowledge settled law and unfairly deprives employees of their statutory right to bargain effectively over all essential terms and conditions of employment, in contravention of the NLRA. In addition, the Board’s proposed standard is so narrow as to be inconsistent with the common law agency doctrine, and would violate the APA if adopted.

B. The common law test requires consideration of the right to control and other indicia of control.

The right or ability to control the work, rather than the actual exercise of that right, is the primary consideration in determinations of an employment relationship under the common law, *see, e.g., Taylor’s Oak Ridge Corp.*, 74 NLRB 930, 932 (1947), and the Board’s proposed test does not account for reserved control, in contravention of the common law test. *See Browning-Ferris* slip op. at 24-27; 31-32. The common law looks to the right to control because whether or not the employer actually exercises control over the work, the employer’s authority over the work prevents another from deciding to render the service in a manner different from that which serves the employer. *Restatement of the Law: Employment Law*, American Law Institute, 2012, Section 1.04. An employer’s retention of control over such things as termination of an employee, wage rates or extra hours, work changes, or inspection of a worksite – even when not exercised – can house sufficient control in an employer to create an employment relationship.

For instance, in the *BFI* case, BFI had the ability to control, among other aspects, applicant screening requirements, and thus hiring and firing of workers; wages, by capping the amounts workers were to be paid; and the production line speed, which determined how fast the workers must work. The Board ruled that this reserved authority to control was relevant. *BFI* at 2. *See also, Greyhound*, 153 NLRB 1488, 1495 (1965) (janitorial contract employees’ work is integral part of Greyhound’s transportation services, and Greyhound thereby exercises control over their work). In other staffing agency situations, the lead company’s business practices and authority dictate the manner and means by which the work is done, regardless of whether the lead company actually intervenes and instructs workers on the minutiae of their tasks. As the Supreme Court has found, the question of right to control is essentially a factual one for the

³ *Browning-Ferris Indus. of Cal.*, 362 NLRB No. 186, at 19.

Board to decide.⁴ A lead company that enters into a contract providing it with reserved control and laying out respective requirements for subcontractors should be held accountable for worksite conditions if it retains sufficient control to ensure compliance with workplace safety rules, fair pay, hours, breaks, and any benefits that may be provided to the workers. Without this shared responsibility for those in joint control, a subcontractor would not be able to bargain fully over terms and conditions of a job, and could not ensure compliance with the Act by itself, abandoning workers in subcontracted workplaces from the rights of the Act.

C. Indirect control by the putative employers must be considered, along with direct control, in order to capture how control is exercised in many subcontracted workplaces.

As the *BFI* decision notes, “[i]f otherwise sufficient, control exercised indirectly – such as through an intermediary – may establish joint-employer status.” *BFI* at 2. The D.C. Circuit’s recent *Browning-Ferris* decision states, “common-law decisions have repeatedly recognized that indirect control over matters commonly determined by an employer can, at a minimum, be weighed in determining one’s status as an employer.” *Browning-Ferris*, slip op. at 39. In jobs that are relatively simple or jobs that are performed in a large workplace, most control is indirectly communicated. Temporary staffing and other subcontracted employees sent to work onsite at a lead or contracting company’s premises are often given instructions via onsite supervisors. The joint employment determination should look to the controlling directives by the lead company, sent via its own employees or by supervisors of the subcontractor, and therefore it makes no difference whether the control is exercised directly or indirectly. The key consideration is whether the lead company has control over the conditions that are the subject of bargaining and the protections of the NLRA.

D. The proposal to ignore “routine” control would absolve most employers.

In jobs where employees are rarely directly supervised in their day-to-day tasks, the lead employer’s level of day-to-day supervision is less relevant. *See, e.g., Holyoke Visiting Nurses Ass’n v. NLRB*, 11 F.3d 302 (1st Cir. 1993) (right to control requires only such supervision as the nature of the work requires); *Breaux & Daigle, Inc. v. U.S.*, 900 F.2d 49, 52 (5th Cir. 1990) (crab picking is a simple task that does not require much supervision in Federal Insurance Contributions Act independent contractor case). Any company’s routine exercise of control over the details of work would make it an employer – be it conducted jointly with another company, or directly on its own employees. There is no logic to the Board’s formulation in its proposal that “routine” control should not be considered.

Furthermore, “routine” can mean “often”, and indeed that should point in *favor* of a showing of employer status. If “routine” is used in the sense of “not specialized”, then the employer may not need to exercise further control because the work is relatively simple to do. *See* NPRM at 46689, fn. 26 (dissent by Member McFerran, citing the Restatement (Second) of Agency, section 220(2)(a)).

⁴ *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964).

E. The Board’s test does not consider shared control.

This Board’s proposed rule does not consider the common circumstance in which two companies – the lead contractor and its temporary staffing company or subcontractor – share control over the terms and conditions of employment. This is a common fact pattern, where two or more entities exercise some, but not all, of the control: control is not an “either/or” concept. Companies do not necessarily have to jointly engage in or collaborate on shared decision-making on all aspects of a job in order to be joint employers. Sharing can mean that the two companies divide and conquer the terms and conditions – most companies deciding to engage a staffing agency to recruit and hire workers who are then assigned to perform work on a lead company’s worksite engage in this type of division. There would be no reason for a lead company to exercise control over hiring when its staffing company is charged with that task, and conversely, the staffing company would likely not be in a position to set pay rates, or ensure that the onsite safety requirements are met if the lead contracting company present on the site were in charge of that aspect of the job. *See* NPRM at 46691 (McFerran, dissenting). Where there is sufficient evidence of this kind of shared control over the terms and conditions of a job, both employers should be at the bargaining table.

Take for example, the facts in the *BFI* case itself. There, the work was performed in the Browning-Ferris plant on a line owned and run by Browning-Ferris, at a speed determined by Browning-Ferris, with safety procedures and precautions determined by it, during times and days determined by Browning-Ferris, and with break and lunch stoppages determined by the recycling company. The work was integrated into the more encompassing Browning-Ferris process for unloading material for the line and then reloading those materials to be recycled, and those to be discarded by directly-hired Browning-Ferris employees. While the subcontractor had to accept the above-listed conditions of employment, these conditions were likely quite important to Browning-Ferris, or would not have been so specifically enumerated. Where employees sought to modify any or all of these conditions of employment, Browning-Ferris undoubtedly would have to be at the bargaining table.

Under the proposed Board test, these aspects of control could be ignored as “routine,” depending on how the Board decides to interpret that term. They could also be disregarded as indirect or not immediate. These strong facts showing a clear sharing and codetermining of the terms and conditions of employment should be included in the overall assessment as to whether the lead company and its subcontractor are joint employers.

III. The proposed standard arbitrarily fails to properly consider the NLRA’s statutory purpose of supporting worker collective action.

A. The NLRA, like other labor and employment laws, has long encompassed joint employment, and supporting collective action by workers is key to understanding what constitutes a legally permissible standard under the Act.

Since at least 1965, the Supreme Court and the Board have recognized that a group of workers may have more than one employer and that in such instances both employers must bargain collectively with the workers over the terms and conditions of employment. Such “joint employment” can exist where an employer contracts with a staffing or temp agency or other

subcontractor to bring in labor to work at the company. Although joint-employer claims arise only rarely, where the issue has arisen, the Board has always applied variations of a common-law test to specific facts, aimed at answering the question whether two companies share or codetermine the terms and conditions of work. These cases arise because the workers seeking to collectively bargain argue that they cannot bargain with only one of the companies controlling their workplace, and without both at the table, the National Labor Relations Act's support for collective worker action and avoidance of workplace disruptions would be thwarted.⁵

As described below, today temporary and staffing agency arrangements are very common in certain sectors. These trends were seen decades ago in *Boire v. Greyhound Corporation*, 376 U.S. 473 (1965), where the Supreme Court reversed the lower courts' rejection of the Board's determination that Greyhound was a joint employer of porters, janitors and maids who worked in Greyhound's bus terminals for a contractor. The Board had found that:

[W]hile [the contractor] hired, paid, disciplined, transferred, promoted and discharged the employees, Greyhound took part in setting up work schedules, in determining the number of employees required to meet those schedules, and in directing the work of the employees in question. The Board also found that [the contractors'] supervisors visited the terminals only irregularly—on occasion not appearing for as much as two days at a time—and that... Greyhound had prompted the discharge of an employee whom it regarded as unsatisfactory.

Boire v. Greyhound Corp., 376 U.S. at 475. In remanding for a determination of the joint employer status of Greyhound, the Court rejected the notion that Greyhound could not be required to bargain jointly with its contractor if the contractor were found to be a viable independent business, saying,

[w]hether Greyhound... possessed sufficient control over the work of the employees to qualify as a joint employer with [the contractor] is a question which is unaffected by any possible determination as to [the contractor's] status as an independent contractor... And whether Greyhound possessed sufficient indicia of control to be an 'employer' is essentially a factual issue."

Id at 481.⁶

⁵ It is worth noting that there are not very many joint employer cases overall, as compared to other subjects of cases before the Board, despite the current Board's pronouncement that the joint employer question is "one of the most important issues in labor law today." NPRM at 46682. Since the decision in the *Browning Ferris* case in 2015, adjudicators at the NLRB have applied the test in just 14 cases, a "tiny fraction of the nearly 1,100 cases these tribunals have decided while *Browning-Ferris* has been in effect." Robert Iafolla, *Joint Employment's Test's Bark May Be Worse Than Its Bite*, Daily Labor Report, Oct. 2, 2018.

⁶ On remand, the Board and the Fifth Circuit found that Greyhound was indeed a joint employer of the maintenance and service workers in the terminals. *NLRB v. Greyhound Corp.*, 368 F.2d 778, 781 (5th Cir. 1966) (holding that "[e]nforcement of the Board's order does not prevent [the contractor] and Greyhound from continuing their contractual arrangement. As stated in the Board's reply brief, they 'may retain their present relationship in every respect except one – they may not finally establish the wages, hours, and other conditions of employment of unit employees by contract... although they may take a common position and, in good faith, bargain to impasse with the Union.'")

Thus, the “joint employer” concept recognizes that the business entities involved are in fact separate, but they share or codetermine those matters governing the essential terms and conditions of employment. *NLRB v. Browning-Ferris Industries* 691 F.2d 1117, 1123 (3d. Cir. 1982). The purpose of the test is to determine *whether a company is a necessary participant in collective bargaining or unfair labor practice adjudication*, and the specific factors developed by the Board and the Courts should be relevant to answer that question.⁷

In a later case, the Supreme Court explained that under the common-law agency doctrine, servants could have two accountable masters. *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 94 (1995). Joint employment under the NLRA is consistent with and does not expand common-law principles.

Joint employer principles align with the statutory purposes for finding a joint employment relationship under the NLRA because they identify the employers with the ability to control or codetermine working conditions over which bargaining is likely to occur. Effective collective bargaining can only occur where the parties at the table have the ability to control the disputed issues. *Tanforan Park Food Purveyors Council v. NLRB*, 656 F. 2d 1358, 1361 (9th Cir. 1981) (“Indeed, the breadth of Hapsmith's control over fundamental areas of mandatory collective bargaining makes its position as a joint employer emerge *a fortiori* from *Boire, Sun-Maid*, and *Gallenkamp*”); *Sun-Maid Growers of California v. NLRB*, 618 F. 2d 56, 59 (9th Cir. 1980) (“Here, Sun-Maid controlled the electricians’ work schedules, assigned the work and decided when additional electricians were needed. These actions amply support the Board's finding that Sun-Maid was the joint employer of the electricians.”)

In enacting the NLRA, Congress noted the importance of collective bargaining over “wages, hours, [and] other working conditions” as a means of “friendly adjustment of industrial disputes” that without resolution could lead to “industrial strife and unrest” jeopardizing the “free flow of commerce.” 29 U.S.C. §151. And, as the Board acknowledged in *BFI*, “the diversity of workplace arrangements in today’s economy has significantly expanded” due to companies’ increasing hiring of employees through staffing and subcontracting arrangements or other contingent employment. 362 NLRB No. 186, at *15 (Aug. 27, 2015). The Board has a responsibility to “adapt the Act to the[se] changing patterns of industrial life” in a way that best encourages the practice and procedure of collective bargaining. *Id.* citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979). The Board’s proposed narrow definition of joint employment is contrary to the intent of the National Labor Relations Act because it will severely limit subcontracted and temporary workers’ opportunities for collective bargaining with the parties that control or have the right to control terms and conditions of their employment. It will also dilute the bargaining power of permanent employees, who will be restricted from engaging in protected concerted activity with temporary and contracted workers at their worksite. And it will incentivize companies to restructure and outsource parts of their business to avoid liability and a legal duty to bargain with the workers whose wages and working conditions they control or have the right to control.

⁷ When a joint employer question before the Board arises under an unfair labor practice claim, the specific relevant factors may differ, but the overall question is still whether the putative joint employer shares or codetermines the essential terms and conditions of employment.

B. The *BFI* dissent misrepresents the effect of the Taft-Hartley amendments on the Board’s common law analysis.

Contrary to the suggestion of the proposed rule and the dissent in *BFI*, the current standard as stated in *BFI* does not revert to the economic dependency test of *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). The current standard is consistent with the common law and the Taft-Hartley amendments of 1947. Taft-Hartley requires a common law analysis: it does not require that the common law test be modified such that it *excludes* factors which might also appear in an economic realities test.⁸

The Taft-Hartley amendments make clear that common law principles of agency define employee status under the NLRA, contrary to the Supreme Court’s ruling in *Hearst*. In *Hearst*, the Board considered whether newspaper vendors were properly classified as independent contractors or employees. *Id.* at 125. The Supreme Court explicitly read the Act’s definition of employee to *reject* “the traditional common law conceptions.” *Id.* at 125. The Court upheld the Board’s finding that the “primary consideration” was not the common law but the “declared policy and purposes of the Act,” and found the newspaper vendors to be employees. *Id.* at 132. The Taft-Hartley Amendments of 1947 – among many substantial changes to the NLRA – then explicitly excluded independent contractors from the definition of employee and required the application of common law principles in the NLRA’s definition of employee.

The dissent in *BFI* greatly expands the import of the changes in the Taft-Hartley Amendments. The dissent claims that *BFI* “effectively resurrected” theories of “economic realities” and “statutory purpose” that were “endorsed” by the Supreme Court in *Hearst* and “rejected by Congress” in the Taft-Hartley Amendments. However, Taft-Hartley does not divorce the NLRA from traditional principles of statutory interpretation requiring consideration of statutory purpose – Taft-Hartley does not support an argument that the Board must *exclude* from the traditional common law test factors that might also be considered in an economic realities test.

The legislative history makes clear that the “legal effect of the amendment... is *merely* to make it clear that the question of whether or not a person is an employee is always a question of law... under the general principles of the law of agency.” Proceedings in the Senate, Eightieth Congress, First Session, reprinted in 2 LEG. HIST. OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 1537 (emphasis added). See also 68 H.R. REP. NO. 80-245 (1947), reprinted in 1 LEG. HIST. OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 296 (1949) (“to correct what the Board has done [in *Hearst*]... the bill excludes “independent contractors” from the definition of “employee”). The drafters took care to emphasize that the goal of the Act continues to be labor peace and the bill does not “restrict or in any manner interfere with employees’ rights to organize and bargain collectively when they wish to do so.” 68 H.R. REP. NO. 80-245 (1947), reprinted in 1 LEG. HIST. OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 296 (1949) (stating the bill “does not take away any rights guaranteed by the existing National Labor Relations Act”).

The Board agrees that common law principles are controlling in an analysis of employment status under the NLRA. The *BFI* test is firmly grounded in the common law and does not revert

⁸ Notably, while the *Browning Ferris* majority considered the macroeconomics of evolving contingent workforces, it specifically rejected the General Counsel’s proposal for an economic realities test. *Browning-Ferris* at 17.

to the economic realities test of *Hearst* – the current test considers “only an entity’s control over terms of employment, not the wider universe of all ‘underlying economic facts’ that surround an employment relationship.” *BFI* decision, at 17. Indirect control is a factor in the common law test, and that fact is not negated by the factor’s inclusion in economic realities tests as well. *See id.* The current standard is consistent with the common law and Taft-Hartley does not alter the applicable common law principles.

IV. Outsourced work is pervasive in low-wage jobs, and workers’ experiences in contracted jobs demonstrate that the proposed rule would be contrary to the intention of the Act.

Corporate outsourcing to temporary staffing companies is on the rise in low-wage sectors, and because workers in nonstandard or contingent jobs generally suffer wage penalties, fewer benefits, hazardous work, and less job security, employer accountability is paramount today.⁹ This section will focus on one type of outsourcing that is particularly relevant for the proposed rule—the use of temporary staffing companies—and the ways in which it diminishes workers’ ability to organize and engage in concerted activity and degrades working conditions.

A. The number of workers employed by temporary staffing agencies has increased dramatically in recent years, especially in low-wage, “blue-collar” occupations.

The number of workers employed by temporary and staffing agencies has risen sharply in recent years. There are currently 3.1 million workers employed through temporary staffing agencies, representing 2.4 percent of the workforce.¹⁰ According to the American Staffing Association, during the course of a year, staffing companies in the United States hire more than 15 million temporary and contract employees who are then placed into jobs at another employer.¹¹ Since the end of the Great Recession in June 2009, staffing and temporary agency work—as measured both by the aggregate number of hours and total number of jobs (part-time and full-time)—has grown faster than work overall. Temporary and staffing agency work hours have grown 3.9 times faster than overall work hours, and temporary and staffing agency jobs have grown 4.3 times faster than jobs overall.¹²

Temporary and staffing work has increased in low-wage, “blue-collar” occupations in particular, reflecting a shift in corporate use of temp and staffing agency placements in clerical work to more hazardous industries, such as construction, manufacturing and logistics. Between 2014 and 2017, of the 10 occupations that added the most temporary and staffing workers, nine are low-wage.¹³ Several of these occupations entail physically-demanding work with higher-than-average

⁹ *America’s Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data*, NELP, June 7, 2018, available at <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/>.

¹⁰ NELP analysis of Current Employment Statistics, NAICS 561320, current figure from September 2018, available at <https://www.bls.gov/ces/data.htm>.

¹¹ American Staffing Association, Staffing Industry Statistics, available at <https://americanstaffing.net/staffing-research-data/fact-sheets-analysis-staffing-industry-trends/staffing-industry-statistics/>.

¹² NELP analysis of Current Employment Statistics, NAICS 561320, June 2009 to September 2018, available at <https://www.bls.gov/ces/data.htm>.

¹³ Low-wage is defined as median hourly earnings below \$15 per hour.

rates of workplace injuries.¹⁴ For example, the “Laborers and Freight, Stock, and Material Movers” occupation, which is comprised of workers who manually move freight and stock, and whose injury rate is 3.4 times the average rate, saw an increase of over 61,000 temporary workers between 2014 and 2017. Temporary workers in this occupation have a median hourly wage of \$11.45, representing a 2.5 percent wage penalty relative to permanent, direct-hire workers.¹⁵

In California, temporary help service jobs grew 50 percent faster than jobs overall between 2014 and 2017. California added over 50,000 temporary help service jobs—far more than any other state—between 2014 to 2017—and two-thirds of the growth occurred in low-wage sectors. In particular, the “Transportation and Material Moving Occupations” group saw a 55 percent increase in temporary help service jobs in California during this time period, and the median hourly wage for these temporary workers is \$11.70.¹⁶

Manufacturing work—which historically has paid better than other types of “blue collar” jobs—has seen its compensation premium erode in part because of the increase in manufacturing companies hiring their workers through temp and staffing firms. According to a recent study, staffing and temporary help services provided 11.3 percent of all manufacturing employment in 2015, up from just 2.3 percent in 1989.¹⁷ This increase in the staffing agency workforce lowered the manufacturing compensation premium by 4 percent.¹⁸

Other types of outsourcing are also increasingly prevalent in low-wage, “blue-collar” industries. Outsourcing of janitorial services, for example, has grown dramatically over the past two decades, resulting in an estimated 37 percent of janitorial workers hired through labor contractors rather than directly by the company at which they work.¹⁹ According to one study, janitors working for contractors or staffing firms experienced a 4 to 7 percent wage penalty relative to direct hires.²⁰ Similarly, 58 percent of security guard positions are outsourced, and, according to

¹⁴ For example, the “Transportation and Material Moving Occupations” group includes warehouse workers and other types of laborers who manually move freight and stock. *See* U.S. Bureau of Labor Statistics, Occupational Employment and Wages, May 2017, 53-0000 Transportation and Material Moving Occupations (Major Group), <https://www.bls.gov/oes/current/oes530000.htm>. OSHA identifies its “public warehousing and storage” industry group, which includes establishments engaged in the warehousing and storage of general goods, as one of the industries with a high injury/illness rate and a high proportion of severe injuries/illnesses. Occupational Safety and Health Administration, Target Industry Profiles, https://www.osha.gov/dep/industry_profiles/index.html.

¹⁵ NELP analysis of Occupational Employment Statistics, NAICS 561320, available at <https://www.bls.gov/oes/tables.htm>.

¹⁶ NELP analysis of U.S. Bureau of Labor Statistics, Occupational Employment Statistics Research Estimates by State and Industry, NAICS 561320.

¹⁷ Lawrence Michel, *Yes, Manufacturing Still Provides a Pay Advantage, but Staffing Firms are Eroding It*, ECONOMIC POLICY INSTITUTE, March 12, 2018, available at <https://www.epi.org/files/pdf/141193.pdf>.

¹⁸ *Id.*

¹⁹ Annette Bernhardt, *Labor Standards and the Reorganization of Work: Gaps in Data and Research*, Inst. for Research on Labor and Emp’t, Jan. 2014, available at: <https://cloudfront.escholarship.org/dist/prd/content/qt3hc6t3d5/qt3hc6t3d5.pdf?t=mzgg4c>.

²⁰ *Id.*

the same study, these outsourced positions have experienced an 8 to 24 percent wage penalty relative to direct hires.

Workers in these jobs are precisely the ones that require the protections of the NLRA, and who should not be left outside of the Act's protections when their outsourcing employers retain the same right to control over the means and manner of production they always had. Companies that are responsible in fact must be also legally responsible for their actions; outsourcing workers should not mean outsourcing responsibility under the law.

B. In many fast-growing industries, outsourcing has become a deeply entrenched practice that can permit employers to avoid their legal duties to workers, degrade labor conditions, and limit workers' ability to bargain.

By inserting temporary and staffing agencies and other types of subcontractors between themselves and workers, contracting companies can degrade work conditions and more successfully avoid liability for violations of workplace laws even as they benefit from and have the right to control the work itself.

Workers employed through intermediaries like temporary and staffing agencies earn less money and endure worse working conditions than permanent, direct-hires. Full-time staffing and temporary help agency workers earn 41 percent less than do workers in standard work arrangements.²¹ They also experience large benefit penalties relative to their counterparts in standard work arrangements. Over 50 percent of workers in standard arrangements receive an employer-provided health insurance benefit, compared to only 12.8 percent of temporary and staffing help agency workers. And while 46 percent of workers in standard arrangements are covered by an employer-provided pension plan, only 6.6 percent of staffing and temporary help agency workers are.²²

In addition, staffing and temporary agency workers typically work in more hazardous jobs than permanent workers. Yet, according to OSHA, temporary agency workers often receive insufficient safety training and are more vulnerable to retaliation for reporting injuries than workers in traditional employment relationships.²³

Workers hired by temporary and staffing firms and other types of subcontractors are especially vulnerable to violations of workplace laws. Competition among subcontractors is fierce, and these subcontractors—many of which are thinly-capitalized—often yield to the lead company's control or illegally cut labor costs to keep their contracts.²⁴ One staffing firm's 2014 evaluation of the industry affirms this sentiment: "smaller to midsize firms often struggle in securing

²¹ *America's Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data*, National Employment Law Project, June 7, 2018, available at <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/>.

²² *Id.*

²³ Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America's Workers*, June 10, 2014, at 11, available at <https://www.nelp.org/wp-content/uploads/2015/02/Temped-Out.pdf>.

²⁴ See David Weil, *The Fissured Workplace: Why Work Became so Bad for so Many and What Can be Done to Improve It*, at 15 (2014).

workers' compensation insurance, capital to secure such insurance coverage, administrative capabilities to manage unemployment claims, and sources of funding accounts receivable.”²⁵

See the *Appendix* to these comments for a description of the outsourcing and job quality impacts, including specific recent stories, in (1) warehouse and logistics; (2) janitorial services, (3) recycling and waste management, and (4) manufacturing.

V. The proposed rule will negatively impact small businesses.

Contrary to statements by the Board, NPRM at 46693-4, small businesses will be substantially adversely affected by the proposed rule. In effect, small businesses will be left to ensure compliance with the Act alone, without any assistance from the larger employer, in situations where the smaller company may not be able to ensure compliance without the cooperation of the larger lead or worksite employer. For example, in *Browning-Ferris*, the smaller company, Leadpoint, was unable to deliver collective bargaining demands independently. Under the proposed narrow standard, small businesses that can't afford to subcontract out operations will be at a competitive disadvantage to large corporations that can and do outsource.²⁶ Under the proposed rule, for example, a smaller temporary staffing agency seeking to remedy dangerous working conditions in the collective bargaining process would be solely responsible and liable, although certain aspects of the work relationship might be outside the company's control. If the small business is liable and not able to properly remedy the situation, it may be unable to operate, hurting small business owners and leaving workers and their families without relief. The proposed rule pushes liability onto smaller business owners and places small businesses at a competitive disadvantage.

VI. Determining the proper standard for finding joint employment is not appropriate for rulemaking.

The Board has asked for comments on the issue of whether this rulemaking is authorized under the Act. NPRM at 46686. That question is largely irrelevant, because even if the Board has general rulemaking authority, rulemaking on the standard for joint employment is a waste of valuable Board resources, as no final rule will receive deference from the Courts. The D.C. Circuit has already defined the parameters of the statute for purposes of joint employment. The D.C. Circuit decided de novo whether the *BFI* standard was proper. *Browning-Ferris* at slip op. 17.

As the D.C. Circuit, *Browning-Ferris*, slip op. at 17, and the Board, NPRM at 46682, agree, the test for joint employment is determined by the common law of agency, and determining the scope of that test is a “pure” question of law which the Courts review de novo. The Board does not have the authority, through either adjudication or rulemaking, to “recast traditional common law principles of law in identifying covered employees and employers.” *Browning-Ferris*, slip op. at 19. Rules promulgated through notice-and-comment rulemaking do not get more

²⁵ Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America's Workers*, June 10, 2014, at 7, available at <https://www.nelp.org/wp-content/uploads/2015/02/Temped-Out.pdf>.

²⁶ See NELP Fact Sheet, September 2017, Joint Employment Explained: How H.R. 3441 Legalizes a Corporate Rip-Off of Workers.

deference than agency interpretations arrived at through formal adjudications.²⁷ To the extent that the Board engages in rulemaking to determine a standard for joint employment, it must “color within the common law lines identified by the judiciary.” *Browning-Ferris*, slip op. at 21. Indeed, the Board in *Hy-Brand Industrial Contractors Ltd.*, 365 NLRB No 156 (2017) agreed, “courts have accorded deference in this context merely as to drawing factual distinctions when applying the common law agency standard” and the Board “cannot modify the [common law] agency standard.” In the recent *Browning-Ferris* decision, the court identified the common-law lines that bound the definition of joint employment. Any definition that is inconsistent with those lines, as the proposed rule is, would not withstand judicial scrutiny under the Administrative Procedures Act as it would be “not in accordance with law,” (APA section 706 (a)(2)), and is therefore “unreasonable.” See *NLRB v. Town and Country Electric Inc.*, 516 U.S. 85, 94 (1995).

As the Board majority indicates in the preamble to the proposed rule,²⁸ the current Board standard was adopted in 2015 in the *BFI* case. In December 2017, a majority of a new Board overruled *BFI* in *Hy-Brand Industrial Contractors Ltd.*, 365 NLRB No 156 (2017), and replaced it with what is in essence the proposed rule. *Hy-Brand* was decided despite the fact that the issue of joint employment had not been raised or briefed by the parties in that case, and no public input, in the form of amicus briefs or otherwise, was requested. Because of serious ethical conflicts involving a majority Board member, the Board later vacated its earlier decision in *Hy-Brand Industrial Contractors Ltd.*, 366 NLRB No. 156 (2017). Unable to overrule the current standard through adjudication, the Board has now decided to engage in rulemaking on joint employment. While rulemaking is subject to different recusal rules than a decision,²⁹ a majority of the Board supporting the proposed standard endorsed it previously in the conflicted *Hy-Brand* case. If the proposed rule is finalized in its current form, it could be subject to an APA challenge on the grounds that the outcome was predetermined.

The Board’s proposed revision of its joint employer standard via rulemaking is also inappropriate because of the fact-intensive nature of joint employer determinations. Rulemaking is resource-intensive and used infrequently at the Board, especially when it is addressing an issue that is more appropriately addressed through adjudication, where facts can be developed. Proposing this new narrower standard, this close to the recently-decided *BFI* decision, is premature, as there have been few joint employer cases since that decision and there is a lack of experience with the current standard.

VII. Conclusion

We urge the Board to maintain the current standard as set out in *Browning-Ferris*. Most importantly, the proposed rule is contrary to the common law as interpreted by the Courts, including the *Browning-Ferris* decision, which the Board must follow, and as such would be in violation of the APA if finalized in its current form. Furthermore, the proposed rule will effectively reduce workers’ access to the Act’s collective bargaining rights and thereby increase

²⁷ JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 459 (5th Ed. 2012).

²⁸ 83 Fed. Reg at 46684-5

²⁹ Under the Standards of Ethical Conduct for Executive Branch Employees, 5 CFR 2635.402, rulemaking has different recusal considerations than adjudication.

labor strife, particularly for the large and growing numbers of especially low-wage workers who are part of the nation's temporary staffing and outsourced workforce.

Sincerely,

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Appendix to Comments from National Employment Law Project

1. Warehouse and Logistics

Outsourcing has reshaped the warehouse and logistics industry with the use of “third party” logistics firms, highly integrated companies with the capacity to handle goods at several points in a supply chain. An estimated 90 percent of Fortune 500 companies operating within the United States contract with one or more third party logistics providers to handle their goods.³⁰ These logistics companies, in turn, contract with staffing agencies, which hire workers to unpack, load, and ship goods to retail facilities across the country,³¹ and with truck driving and courier companies, to deliver the goods. Logistics firms encourage bidding wars among motor carriers and staffing firms, placing continual pressure on contractors to provide cheaper services. These lower rates are passed on in the form of decreased prices for truck drivers (who are often employed by thinly-capitalized subcontractors or misclassified as independent contractors) or decreased wages for warehouse workers.³²

Workers employed at the bottom of this supply chain face deteriorated working conditions, with significant increases in wage and hour and health and safety violations as staffing agencies cut corners. As one study of subcontracted and temporary logistics workers in New Jersey found, more than one in five workers earned incomes below the federal poverty level, more than one in ten had reported an injury on the job, and over 40 percent had not received necessary safety equipment.³³ According to recent reports of a Verizon warehouse operated by XPO Logistics, the workers—many of whom are employed by temporary agencies—are required to lift and drag 45 pound boxes in a warehouse where the temperature can exceed 100 degrees.³⁴ Several workers suffered miscarriages and one worker died after being denied requests for lighter duty or additional breaks.

Amazon is another well-known example of a giant corporation that has eroded working condition in its supply chains by putting competitive pressure on labor costs. Although Amazon operates many of its warehouses, it relies heavily on staffing firms to provide the labor. According to one estimate, staffing agencies employ up to half of the workers in Amazon’s warehouses during the first ten months of the year—often in a “permatemp” status where

³⁰ Jennifer McKeivitt, *Fortune 500 Companies are Using 3PLs more, Study Finds*, SUPPLY CHAIN DIVE, May 30, 2017, available at <https://www.supplychaindive.com/news/third-party-logistics-3pl-increase-large-companies-2017/443710/>.

³¹ Jason Rowe, *New Jersey’s Supply Chain Pain: Warehouse and Logistics Work Under Wal-Mart and Other Big Box Retailers* (2012); Jason Sturna, et al., *Unsafe and Unfair: Labor Conditions in the Warehouse Industry*, POLICY MATTERS: A QUARTERLY PUBLICATION OF THE UNIVERSITY OF CALIFORNIA, RIVERSIDE (2012).

³² Michael Belzer, *Technological Innovation and the Trucking Industry: Information Revolution and the Effect on the Work Process*, 23 JOURNAL OF LABOR RESEARCH 375 (2002).

³³ Rowe, *supra* note 31.

³⁴ Jessica Silver-Greenberg & Natalia Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, THE NEW YORK TIMES, Oct. 21, 2018; Micaela Watts, *Working Conditions in Memphis Warehouse Linked to Miscarriages*, NYT Reports, COMMERCIAL APPEAL, Oct. 22, 2018.

workers may work for months or years without being offered a permanent positions—and employ up to three quarters of the workers in the final two months of the year.³⁵

This division in its labor force has allowed Amazon to avoid liability for exploitative workplace practices. For example, in 2010, two employees of Integrity Staffing Solutions who worked at Amazon warehouses filed a class action lawsuit against Integrity for back wages, arguing that they should have been compensated for the time spent going through security checks at the warehouse every day, which could take upwards of 30 minutes a day. The Supreme Court reversed the circuit court’s decision and ruled in Integrity’s favor. *Integrity Staffing Solutions v. Busk*, 574 U.S. ___ (2014). By inserting an intermediary between itself and its warehouse workers, Amazon took no action to ensure compliance with worker protections in its warehouses.

The *Integrity Staffing Solutions* case also demonstrates why both staffing agencies and on-site employers need to be at the bargaining table. In that case, Amazon imposed security measures that affect a key condition of its temporary workers’ assignments—the amount of unpaid time spent at work each day. In fact, Justice Thomas’ majority opinion states that the workers’ compensation claims are “properly presented at the bargaining table, not to a court in a FLSA claim.” *Id.* at 515. Security measures often present privacy concerns for workers as well. Because the temporary staffing agency likely has no control over the security measures at Amazon warehouses, this condition of employment cannot be addressed at bargaining unless Amazon is also at the table, and under the Board’s proposed rule, workers sent to Integrity Staffing to get a job in an Amazon warehouse would not be able to bargain with Amazon.

Exploitative and illegal workplace practices are also common among Amazon’s courier services that Amazon arranges for its delivery services. A federal judge recently ruled that an Amazon courier service had violated wage and hour law by paying its workers a flat rate per day, regardless of the number of hours worked.³⁶ The workers alleged that they were under such intense pressure to deliver high package volumes that they were unable to take breaks for meals or to use the bathroom. The allegations in the lawsuit echo interviews with other Amazon drivers employed through couriers, who described a “lack of overtime pay, missing wages, intimidation, and favoritism,” as well as “a physically demanding work environment in which, under strict time constraints, they felt pressured to drive at dangerously high speeds, blow stop signs, and skip meal and bathroom breaks.”³⁷

2. Janitorial Services

³⁵ Olivia LaVecchia & Stacy Mitchell, *Amazon’s Stranglehold: How the Company’s Tightening Grip is Stifling Competition, Eroding Jobs, and Threatening Communities*, Institute for Local Self-Reliance, Nov. 2016, at 42, available at https://ilsr.org/wp-content/uploads/2016/11/ILSR_AmazonReport_final.pdf.

³⁶ Jon Steingart, *Amazon Courier’s Daily Pay Glitch Shows Need to Track Hours*, BLOOMBERG LAW, Aug. 28, 2018. Hayley Peterson, *More than 200 Delivery Drivers are Suing Amazon Over Claims of Missing Wages*, BUSINESS INSIDER, Sept. 13, 2018, available at <https://www.businessinsider.com/amazon-delivery-drivers-claim-missing-wages-lawsuit-2018-9>

³⁷ Hayley Peterson, *Missing Wages, Grueling Shifts, and Bottles of Urine: The Disturbing Accounts of Amazon Delivery Drivers May Reveal the True Cost of ‘Free’ Shipping*, BUSINESS INSIDER, Sept. 11, 2018, available at <https://www.businessinsider.com/amazon-delivery-drivers-reveal-claims-of-disturbing-work-conditions-2018-8>.

Outsourcing of janitorial services has exploded in recent years, along with the growth of other contingent work in the sector, such as franchising and independent contractor misclassification.³⁸ Under a typical model of outsourced labor in the janitorial industry, a lead company contracts with a janitorial company to provide maintenance services at the lead company's facilities.³⁹ The janitorial company generally hires a second-tier subcontractor to supply workers to clean the facilities. Often, these subcontractors can make a profit only by engaging in cost-savings strategies, including misclassifying janitors as independent contractors or selling "franchise" licenses to unwitting workers. *See, e.g., Awuah v. Coverall No. Amer.*, 554 F.3d 7 (1st Cir. 2006). Second-tier subcontractors shave labor costs by evading payroll taxes and workers' compensation, minimum wage, and overtime requirements at the workers' expense.⁴⁰

Job quality in the industry has decreased significantly since the emergence of these contracting and franchising models, and violations of basic labor law protections are now endemic in the janitorial industry. One study found that contracted janitors in California earned 20 percent less than non-contracted janitors (\$10.31 compared to \$12.85 per hour).⁴¹ An academic survey of low-wage workers found that at least 26 percent of building service and ground service workers had not received minimum wage payments, and 71 percent had not received overtime pay. Over half did not receive required meal breaks.⁴²

A recent enforcement action by the California Labor Commissioner's office illustrates the problem.⁴³ Cheesecake Factory restaurants contracted janitorial services to Americlean Janitorial Services Corp., which subcontracted the work to Magic Touch Commercial Cleaning. Workers employed by Magic Touch worked from midnight to morning without breaks. Each morning Cheesecake Factory managers conducted walkthroughs to review the work and frequently added additional tasks for the janitorial workers, which resulted in each worker logging up to 10 hours of unpaid overtime per week. Because a California law holds lead employers or worksite employers liable for subcontractors' workplace violations, the office issued citations against Cheesecake Factory, Americlean and Magic Touch. Under the Board's proposed joint employer standard, however, Cheesecake Factory would likely not be required to be at the bargaining table even though it exerts control over the work the janitors perform and the number of hours per day they work, among other indicia of control.

³⁸ *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work*, National Employment Law Project, 9-10, available at <https://www.nelp.org/publication/whos-the-boss-restoring-accountability-for-labor-standards-in-outsourced-work/>.

³⁹ *Id.*

⁴⁰ David Weil, *Market Structure and Compliance: Why Janitorial Franchising Leads to Labor Standards Problems* (2011)(unpublished manuscript)(on file with (Boston Univ. School of Mgmt); Steven Greenhouse, *Among Janitors, Labor Violations Go with the Job*, NY TIMES, July 13, 2005, at A19.

⁴¹ Sara Hinkley, Annette Bernhardt and Sarah Thomason, *Race to the Bottom: How Low-Road Subcontracting Affects Working Conditions in California's Property Services Industry*, UC Berkeley Labor Center, at 4, March 8, 2016, available at <http://laborcenter.berkeley.edu/pdf/2016/Race-to-the-Bottom.pdf>.

⁴² Annette Bernhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, 31, 34, 37 (2009), available at http://www.unprotectedworkers.org/index.php/broken_laws/index.

⁴³ Press Release, California Department of Industrial Relations, *Labor Commissioners Office Cites Cheesecake Factory, Janitorial Contractors More Than \$4.5 Million for Wage Theft Violations*, June 11, 2018, available at <https://www.dir.ca.gov/DIRNews/2018/2018-40.pdf>.

3. Recycling/waste management

Subcontracting in the recycling and waste management sector rose sharply in the past several decades as cities and counties privatized this traditionally municipal service performed by public sector workers.⁴⁴ By 2002, 53 percent of cities relied on private companies to collect private trash.⁴⁵ Many of these private contractors, in turn, engage staffing agencies to perform part or all of the necessary labor. One of the nation's largest providers of waste and environmental services, for example, relies on a staffing agency network to supply workers to 90% of its recycling centers in the U.S.⁴⁶

Jobs at waste and recycling facilities present a unique set of health and safety dangers beyond those required for manual labor generally, but both waste management companies that operate the job sites and the staffing agencies with which they contract often fail to provide the appropriate warnings, training, and equipment to workers.⁴⁷ Workers are exposed to sharp objects and infectious materials while collecting and sorting waste on fast-moving conveyor belts;⁴⁸ face vehicular injuries riding on the back of garbage trucks, and operating forklifts at busy landfills and transfer stations;⁴⁹ and are exposed to dangerous chemicals used to treat waste.⁵⁰ Through investigations into accidents at waste management facilities, OSHA has repeatedly found that employers failed to provide temporary workers with the same equipment and training as regular full-time employees even though they performed the same work and were exposed to the same hazards, including fatalities that might have been avoided had the workers simply been issued reflective vests.⁵¹ Workers hired by staffing agencies have also reported that

⁴⁴ See Peter Downs, "Past Experience of Many Cities Suggests Privatizing Sanitation Services Wasn't a Panacea," (The Commercial Appeal, July 10, 2011), available at <http://www.commercialappeal.com/news/2011/jul/10/no-quick-fix/> [hereinafter, Downs]. See also David Bacon, "Invisible No More," SAN FRANCISCO BAY GUARDIAN (June 10, 2014), available at [http://www.sfbg.com/2014/06/10/invisible-no-more-\(Only-one-city-in-the-Bay-Area-does-not-contract-out-garbage-collection\)](http://www.sfbg.com/2014/06/10/invisible-no-more-(Only-one-city-in-the-Bay-Area-does-not-contract-out-garbage-collection)).

⁴⁵ Downs, *supra* note 44 (citing academic research by noting that some cities that privatized waste management subsequently brought it back into the public sphere).

⁴⁶ *Waste Services Provider: Staffing Case Study*, ELITE STAFFING WEBSITE, <http://www.elitestaffinginc.com/waste-services-case-study> (last visited June 23, 2014).

⁴⁷ See e.g., *The Challenge of Temporary Work in Twenty-First Century Labor Markets: Flexibility with Fairness for the Low-Wage Temporary Workforce*, Labor Relations and Research Center – University of Massachusetts Amherst, Working Paper 2011, available at <https://digitalcommons.law.wne.edu/facschol/160/>.

⁴⁸ David Bacon, *Christina Lopez, East Bay Recycler*, SAN FRANCISCO BAY GUARDIAN (June 10, 2014), available at [http://www.sfbg.com/2014/06/10/cristina-lopez-east-bay-recycler?page=0,0\(recycling-plant-worker-was-punctured-twice-by-hypodermic-needles-injured-by-falling-equipment-and-slipped-and-fell-at-job\)](http://www.sfbg.com/2014/06/10/cristina-lopez-east-bay-recycler?page=0,0(recycling-plant-worker-was-punctured-twice-by-hypodermic-needles-injured-by-falling-equipment-and-slipped-and-fell-at-job)) [hereinafter, "East Bay Recycler"]; David Bacon, *Invisible No More*, SAN FRANCISCO BAY GUARDIAN (June 10, 2014), available at <http://www.sfbg.com/2014/06/10/invisible-no-more>

⁴⁹ See, *Deadly Accident at Recycling Center* WTHR CHANNEL 13, (Nov. 11, 2013) [http://www.wthr.com/story/23932221/2013/11/11/emergency-crews-at-recycling-center-\(Forklift-operator-crushed-to-death-at-a-recycling-facility-dependent-on-formerly-incarcerated-workers-employed-on-a-temporary-basis\)](http://www.wthr.com/story/23932221/2013/11/11/emergency-crews-at-recycling-center-(Forklift-operator-crushed-to-death-at-a-recycling-facility-dependent-on-formerly-incarcerated-workers-employed-on-a-temporary-basis)).

⁵⁰ See, Staffing Industry Analysts, *Buyer Gets Brunt of OSHA Penalties*, (February 5, 2014) (OSHA cited staffing agency Sizemore for failing to provide temporary workers with training regarding formaldehyde).

⁵¹ Sandy Smith, *OSHA Fines Company \$84,500 Following Temp Worker's Death*, EHS TODAY (Jan. 23, 2003), http://ehstoday.com/news/ehs_imp_36098; *OSHA Fines Waste Hauling Company Following Fatality*, OSHA (Nov. 1, 2000), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=350

they were not told that they needed vaccinations to prevent the infections and illnesses associated with handling hazardous materials.⁵²

In addition to the *Browning Ferris* NLRB case, which involved recycling workers placed by a staffing company alongside permanent BFI workers, an example from Massachusetts emphasizes the perverse result the Board's proposed standard would have in this industry. In January 2016, a group of permanent employees at Bob's Tires, a tire recycling yard in New Bedford, Massachusetts, joined with temporary staffing workers assigned to the worksite to vote to join a union as employees of both the tire recycling company and the temp agency.⁵³ According to one news report, the organized workforce overwhelmingly consisted of Guatemalan immigrants; companies in the area frequently employed workers through temporary staffing companies to avoid liability for hiring undocumented immigrants. The temporary workers now can collectively bargain for better working conditions with their fellow permanent workers without fear of retaliation from the tire company. As one labor law professor put it: "This would have been hard to do before the NLRB changed the definition of joint employment. 'Oh, your employees formed a union, a temp agency? We're going to cut you off. They're out of a job because they formed a union. Now, if they're a joint employer, if they do that, that's an unfair labor practice.'"⁵⁴

4. Manufacturing

Outsourcing has also increased in the traditionally high-wage manufacturing sector. According to a recent study, staffing and temporary help services provided 11.3 percent of all manufacturing employment in 2015, up from just 2.3 percent in 1989.⁵⁵ This increase in the staffing agency workforce lowered the manufacturing compensation premium by 4 percent.⁵⁶

A recent organizing of an auto manufacturing plant illustrates how the divisions between permanent employees and temporary staffing agency workers hinders concerted action by both groups. The United Auto Workers engaged in a years' long campaign to organize workers at a Nissan plant in Canton, Mississippi, which culminated in an election in August 2017 in which a majority of eligible workers voted not to have union representation. The large temporary agency workforce—which was ineligible to vote in the election—faced significant barriers to engaging in concerted action because of the threat of retaliation, such as losing their already tenuous position or jeopardizing their chances at permanent employment. As the secretary treasurer of the UAW noted about the vulnerability of temporary workers at the Canton plant: "[the firms contracting for staff] kind of dangle the carrot out there that one of these days, you're going to be full-time. . . . Even in places where they say they have a pathway to full employment, if you

⁵² *The Challenge of Temporary Work in Twenty-First Century Labor Market*, *supra* note 47 at 6; EAST BAY RECYCLER, *supra* note 48.

⁵³ Simon Rios, *One Step Closer to Collective Bargaining, Some Temp Workers Unionize*, NPR, Jan. 6, 2016, available at <https://www.npr.org/2016/01/06/457859684/one-step-closer-to-collective-bargaining-some-temp-workers-unionize>.

⁵⁴ *Id.*

⁵⁵ Lawrence Michel, *Yes, Manufacturing Still Provides a Pay Advantage, but Staffing Firms are Eroding It*, ECONOMIC POLICY INSTITUTE, March 12, 2018, available at <https://www.epi.org/files/pdf/141193.pdf>.

⁵⁶ *Id.*

clear all these thresholds and jump over all these hurdles, it usually weeds out like 99 percent of the people.”⁵⁷

Nissan’s use of temporary workers also hindered organizing by the permanent workforce. In October 2015, Robert Hathorn, a Nissan employee who had recently transitioned to permanent status at the Canton plant after two years as a temporary agency worker, spoke about the barriers to organizing at an event at the White House.⁵⁸ He explained that the “Pathways” program – the Nissan program through which some temporary employees become permanent Nissan employees – keeps these newly permanent employees in a second class status because their wages and benefits are significantly lower than they would have been had they been direct hires. The “Pathways” program hinders concerted action by temporary workers – who don’t want to do anything to jeopardize their chance at permanent status—and permanent workers, who see the temporary employees and the transitioned permanent employees as a threat to higher wages and benefits.

Absent a broader joint employer standard that covers employers that have the right to control workers, employers will have additional incentives to divide their workforce- through the use of contractors, temporary staffing firms and other forms of outsourcing- to subvert organizing campaigns and other workplace activity.

⁵⁷ *Id.*

⁵⁸ Nissan’s Robert Hathorn Speaks to the White House, <https://www.youtube.com/watch?v=N0GeRJWGbNY>