



Jan. 28, 2019

VIA REGULATIONS.GOV AND EMAIL

Roxanne Rothschild
Associate Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001
Regulations@nlrb.gov

RE: Comments of the Association for Corporate Growth on “The Standard for Determining Joint-Employer Status,” Notice of Proposed Rulemaking and Request for Comments, RIN 3142-AA13

Dear Ms. Rothschild:

The Association for Corporate Growth (“ACG”) welcomes the opportunity to comment on the Notice of Proposed Rulemaking (“NPRM” or “Notice”) with regards to “The Standard for Determining Joint-Employer Status” (the “Notice”) published in the *Federal Register* on September 14, 2018, by the National Labor Relations Board (“NLRB” or the “Board”).¹ The proposed rule would create a new section 103.40 to Title 29 of the Code of Federal Regulations to clarify that two employers are a joint employer of a group of employees under the National Labor Relations Act (“NLRA”) only if they have exercised substantial direct and immediate control over essential terms and conditions of employment of another employer’s employees in a manner that is not limited and routine. ACG strongly supports this proposal which is critical to restore much-needed certainty surrounding the potential legal liability of U.S. businesses, particularly middle-market businesses which are the drivers of U.S. job growth.

¹ National Labor Relations Board, *Notice of Proposed Rulemaking and Request for Comments, “The Standard for Determining Joint-Employer Status,”* 83 Fed. Reg. 46681 (September 14, 2018) (“NPRM”).

I. Background on the Association for Corporate Growth

ACG was founded in 1954 and has more than 14,500 members and 59 chapters throughout the world, 45 of which are located within the United States. ACG members invest in, own, advise or lend to growing middle-market companies. This includes professionals from middle-market private equity and private debt firms, corporations, banks, and private lenders to middle market companies, as well as professionals from law firms, accounting firms, investment banks, and other advisors engaged in the process of middle-market deal making. ACG drives middle-market growth by bringing together middle-market dealmakers and business leaders who build value in companies.

Data demonstrates the critical role that ACG's middle-market members play in growing jobs and boosting the economy. For example, between 1998 through 2017, private equity-backed companies grew jobs by 60%, while all other companies in the U.S. economy grew jobs by 24%.² A substantial majority of this growth (72%) was created specifically by middle-market private equity-backed companies.³ Given the outsized job creation propelled by the middle market, the definition of a joint employer is of particular concern to ACG members.

II. The Bright-Line Proposed Rule Provides Much-Needed Clarity and Consistency to Joint Employer Status Determinations

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."⁴ The Notice goes on to state more specifically that "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."⁵

² See, "Driving Growth: The Impact of Middle-Market Private Equity on the U.S. Economy," available at <http://growtheconomy.org>.

³ *Id.*

⁴ NPRM at 46685.

⁵ *Id.*

ACG strongly supports the Board's proposal to revert back to a "direct and immediate control" standard for determining joint employer status under Section 2(2) of the National Labor Relations Act. The proposed interpretation will provide much-needed clarity, ensure consistency, restore balance, and curb unnecessary lawsuits against law-abiding businesses. It will create an environment that promotes job growth and economic prosperity while ensuring employee rights remain adequately protected.

For over thirty years, the joint employer standard has protected businesses from liability for employees over which they do not have actual or direct control. Unfortunately, however, in the 2015 *Browning-Ferris Industries* ("*Browning-Ferris*") case, the NLRB drastically changed the landscape of the joint-employer relationship by ruling that no longer would proof be required that a putative joint employer has exercised "direct" and "immediate" control over the essential terms and conditions of an employee of another employer. Instead, the Board ruled that "indirect," or "limited and routine" control could be sufficient. As the dissenters in the *Browning-Ferris* case pointed out, the new standard encompassed virtually an unlimited number of contractual relationships.⁶

In adopting this new indirect control standard, the NLRB made employers potentially liable for employees they do not directly employ, and impacted countless business partnerships in numerous industries and in businesses of all sizes. By expanding the definition of a joint employer, the *Browning-Ferris* decision made it difficult to not only determine who is a joint employer, but also to determine who should be present during collective bargaining. Overall, the indirect control standard has led to tremendous uncertainty surrounding potential joint liability for employers that Congress never intended when passing the NLRA and that has caused enormous distress throughout the business community.

By adopting a bright-line, direct control standard through this rulemaking, the Board will provide much-needed certainty and consistency to joint-employer determinations that has been undermined by the *Browning-Ferris* decision. Furthermore, ACG agrees with other industry groups that the direct control standard "worked well for decades, provided the regulated community with clarity and

⁶ See *Browning-Ferris Industries*, 362 NLRB No. 186 (Aug. 27, 2015), at 37.

predictability, and best effectuated the well-established principles of common law agency that underlie the Act.”⁷ As a result, ACG respectfully urges the Board to finalize the proposal as expeditiously as possible.

III. Conclusion

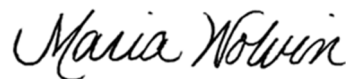
Middle-market business owners and investors need a standard for determining joint-employer status that is clear, consistent, and balanced in order to ensure they can continue growing jobs and expanding business opportunities without facing unknown legal liability. The NPRM proposes a return to a direct and immediate control standard that accomplishes all of these goals. Given this, ACG strongly supports the Proposed Rule and urges the Board to finalize it as expeditiously as possible.

ACG appreciates the opportunity to comment on the Notice and welcomes the opportunity to further discuss any of the issues addressed in this letter. If you have any questions, or if we can provide any additional information, please feel free to contact Maria Wolvin, Vice President & Senior Counsel, Public Policy, at mwolvin@acg.org or at 312-957-4274.

Sincerely,



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⁷ *Petition for Rulemaking of the Coalition for a Democratic Workplace, et. al.*, National Labor Relations Board, filed on June 13, 2018, at 12.