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

Comments on RIN 3142-AA21: Standard for Determining Joint-Employer Status

Dear Ms. Rothschild,

The Center for Law and Social Policy (CLASP) supports the National Labor Relations Board's (the Board, or the NLRB) proposed rulemaking that revises and clarifies the responsibilities of contracting employers under the National Labor Relations Act (NLRA, or the Act), bringing coverage in line with the longstanding scope of common-law definitions of employer and the intent of the Act. The Board's proposed rule is especially important to workers earning low wages and in dangerous jobs, who need the protections of the NLRA the most: those who are placed in jobs via temp or staffing agencies, and those who work in heavily contracted janitorial, construction, delivery, manufacturing, home care, and warehousing jobs, to name a few.

Importance of joint employer responsibility to The Center for Law and Social Policy

The Center for Law and Social Policy (CLASP) is a national, nonpartisan, nonprofit advancing anti-poverty policy solutions that disrupt structural, systemic racism and remove barriers blocking people from economic justice and opportunity. With deep expertise in a wide range of programs and policy ideas, longstanding relationships with anti-poverty, child and family, higher education, workforce development, and economic justice stakeholders, and over 50 years of history, CLASP works to amplify the voices of directly-impacted workers and families and help public officials design and implement effective programs. CLASP also seeks to improve job quality for low-income workers. That includes increasing wages and providing access to paid sick days, paid family and medical leave, and stable work schedules. Quality jobs enable individuals to balance their work, school, and family obligations – promoting economic stability as well as career advancement.

In today's economy, corporations operating in lower-wage industries are using subcontracting arrangements that can result in degraded working conditions and diminished worker access to collective action and bargaining.¹ Companies that retain and share control over working

¹ See, e.g., Mark John, *Workers Seize Their Moment to Shift their Balance of Power*, Reuters, July 26, 2022, <https://www.reuters.com/world/the-great-reboot/workers-seize-their-moment-shift-balance-power-2022-07-26/>; *America's Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S.*

conditions at a job should share the responsibility for complying with basic worker protections and for bargaining over job conditions. When operating correctly, joint employment results in better overall protections for workers, and promotes worker voice on the job.

If workers don't know who their employer is and enforcement agencies fail to name companies that are truly calling the shots at work, worker voice on the job suffers and job conditions like pay are more likely to deteriorate. In today's economy, we should be looking for ways to increase workers' bargaining power and economic security, not laying the groundwork for more sweatshops.

Surveillance and Algorithmic Scheduling

Employer surveillance has created a layer of separation between the employer and employee. Therefore, employers using surveillance technology have indirect control over their employees. Worker surveillance is a term with wide and varied definitions. One definition that appears in various forms in relevant literature is: "the monitoring of employees and collection of employee data, identifiable or not, for the purpose of influencing and managing the behavior of those being monitored."² The types of technologies that enable this surveillance include: handheld devices, point-of-sale systems, mobile phones, fingerprint scanners, fitness and wellness apps, cameras, microphones, body sensors, keycards, electronic communication monitoring, geolocation tracking, collaboration tools, and customer review solicitation.³ While intrusive surveillance of worker activity has a long history in the United States, the advent of new technologies make it easier for employers to keep close tabs on workers and simultaneously disengage from modes of management that, in a pre-digital world, would likely have been indicators of a joint employer relationship.⁴

Surveillance practices have detrimental effects on workers' health and, as the NLRB's General Counsel explained,⁵ workers' ability to organize. Additionally, some surveillance practices allow companies to tightly control workers with whom the companies disclaim having an employment relationship. Workers stuck in these situations are not able to exercise their rights under labor law to file complaints and bargain with the company that has the power to remedy their

Data, NELP, June 7, 2018, available at <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/>.

² United Tech and Allied Workers, Webpage: Employee Surveillance, (Accessed: Sept. 23, 2022), <https://utaw.tech/surveillance/what-is-employee-surveillance>. This definition is a variation on a definition of "surveillance" which has permeated the literature. See, e.g., Kirstie Ball, European Commission, *Electronic Monitoring and Surveillance in the Workplace* 10, (2021), <https://publications.jrc.ec.europa.eu/repository/handle/JRC125716> quoting David Lyon, *Surveillance Society: Monitoring Everyday Life* (2001).

³ Aiha Nguyen, Data & Society, *The Constant Boss: Work Under Digital Surveillance* 3 (May 2021), https://datasociety.net/wp-content/uploads/2021/05/The_Constant_Boss.pdf; Kathryn Zickuhr, Washington Center for Equitable Growth 4 (Aug. 2021), <https://equitablegrowth.org/wp-content/uploads/2021/08/081821-worker-survey-report.pdf>.

⁴ For example, Amazon's tight monitoring and discipline of non-employee delivery drivers through technology instead of on-site supervisors. See Spencer Soper, *Fired by Bot at Amazon: It's You Against the Machine*, Bloomberg (Jun. 28, 2021), <https://www.bloomberg.com/news/features/2021-06-28/fired-by-bot-amazon-turns-to-machine-managers-and-workers-are-losing-out>.

⁵ GC 23-02, *Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights* 2, (Oct. 31, 2022).

problems. Under a new joint employment standard, surveillance should be interpreted as an indicator of control over a worker’s essential terms and conditions of employment. In the Proposed Rule’s suggested regulatory language at 29 C.F.R. § 103.40(d) that defines “essential terms and conditions,” the text should change to (changes in bold):

“Essential terms and conditions of employment” will generally include, but are not limited to: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; **surveillance; monitoring;** and work rules and directions governing the manner, means, or methods of work performance.⁶

Accurately accounting for the way in which surveillance technology allows companies to maintain a high degree of control over the employees of franchisees and third party contractors could help employees of bonafide joint employers hold companies accountable for their employment relationships.

Temporary Staffing Agencies

There are currently 3.2 million temporary staffing agency jobs in the U.S.⁷ The past decade has seen this work (as measured by aggregate work hours and total number of jobs) grow faster than work overall,⁸ and temporary and staffing work has shifted from companies using temp and staffing placements primarily in clerical work to using them in more hazardous industries, such as construction, janitorial services, and logistics.⁹ Outsourced workers earn less than their direct-hire counterparts; the wage penalty is more than 21 percent in manufacturing jobs, more than 33 percent in security jobs, and more than 47 percent in teaching jobs.¹⁰ In addition, staffing and

⁶ Alternatively, the Board could make the Proposed Rule’s list of “essential terms and conditions” match the NLRB’s existing category of mandatory subjects of bargaining. Worker surveillance would still be considered in this formulation of the joint employment rule because, as the General Counsel’s recent memo explains, employers must “provide information about, and bargain over, the implementation of tracking technologies and their use of the data they accumulate.” Several Board and affirming court decisions have found the implementation of surveillance activities to be a mandatory bargaining subject. GC 23-02, *Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights 5*, (Oct. 31, 2022); see, e.g., *Anheuser-Busch, Inc.*, 342 NLRB 560, 560 (2004), *enforced in pertinent part sub nom. Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36 (D.C. Cir. 2005); *Colgate-Palmolive Co.*, 323 NLRB 515 (1997).

⁷ Current Employment Statistics, NAICS 561320, August 2022, available at <https://www.bls.gov/ces/data.htm>.

⁸ NELP analysis of Current Employment Statistics, total private sector vs. NAICS 561320, August 2012 and August 2022, available at <https://www.bls.gov/ces/data.htm>.

⁹ NELP analysis of Occupational Employment and Wage Statistics, 2014 to 2021, available at <https://www.bls.gov/oes/>.

¹⁰ NELP analysis of Occupational Employment and Wage Statistics, 2021, available at <https://www.bls.gov/oes/>.¹⁰ *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/>; *Temp Workers Demand Good Jobs*, Temp Worker Justice, Chicago Workers Collaborative, Mississippi Worker Center for Human Rights, National Employment Law Project, New

temporary agency workers often receive insufficient safety training and are more vulnerable to retaliation for reporting injuries than workers in traditional employment relationships.¹¹

The Franchise Model

The franchise model is especially pernicious to workers and the NLRB proposed rule would greatly affect holding both franchisees and franchisors accountable. Franchises are particularly prominent in the fast-food industry. Workers suffer wage theft, discrimination, unsafe work environments, and unstable schedules.¹² Franchises are squeezed by their franchisor, creating incentives to cut labor costs as much as possible and even violate labor law.

At its core, the structure of the franchise model can incentivize this abuse. In most franchise models, the franchisee pays a royalty to the franchisor linked to revenue, not profit, and must follow strict rules around operation, quality of services and sourcing of input products, known in the industry as *vertical restraints*. All those confines leave very little room for profit. One of the few things a franchisee can control is labor costs, and that's where they squeeze.¹³ This system can create incentives for franchise operators to violate the law to eke out a profit on the backs of their employees.

The NLRB's proposed standard for joint employer status is critical to protect workers employed by franchises and other subcontractors to ensure that our labor laws are enforced. In application, this standard would protect employees when they exercise their rights to concerted activity and collective bargaining. Joint employer status would ensure workers can effectively negotiate with their corporate employers, who ultimately make massive profits from these workers and tightly control many aspects of their working conditions.

The proposed rule provides clear guidance about the coverage of joint employers under the common-law standard and the statutory intent of the National Labor Relations Act.

Labor and employment laws have long held that, where more than one employer has the right to control the terms and conditions of a job, they may be liable as joint employers. More than one

Labor, North Carolina Justice Center, and Warehouse Workers for Justice, February 2022, available at <https://s27147.pcdn.co/wp-content/uploads/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf>.

¹¹ 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>; *Temp Workers Demand Good Jobs*, Temp Worker Justice, Chicago Workers Collaborative, Mississippi Worker Center for Human Rights, National Employment Law Project, New Labor, North Carolina Justice Center, and Warehouse Workers for Justice, February 2022, available at <https://s27147.pcdn.co/wp-content/uploads/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf>

¹² Brady Meixell and Ross Eisenbrey, 2014. "An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year," *Economic Policy Institute*. Available at: [An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year | Economic Policy Institute](https://www.epi.org/publication/an-epidemic-of-wage-theft-is-costing-workers-hundreds-of-millions-of-dollars-a-year/)

¹³ David Weil, 2014. "The Fissuring Workplace: Why Work Became So Bad For So Many and What Can Be Done About it." *Harvard University Press*.

employer can be found responsible, jointly with another, so that companies provide better oversight of working conditions, and so that the right parties are around the bargaining table. Most of these laws have had their employer definitions since their enactment, and companies have been operating under the rules for over 75 years.

The proposed rule clarifies this standard to align with longstanding interpretation and intent of the National Labor Relations Act. Importantly, it clarifies that it must consider a company's *right to control*, a cornerstone of common-law employment determinations under long-standing Supreme Court and NLRB law; and it accounts for indirect control by an employer, a common way that companies exert control over terms and conditions of a workers' job, via supervisors at a staffing company, and other lower-level direct overseers. The rule also requires consideration of instances where two companies *share* control over important terms and conditions of work.

We also support the rule's defined scope of essential terms and conditions of work, specifically the inclusion of wages, hours, and health and safety conditions, and recommend the additional inclusion of surveillance and monitoring, as noted above.

Corporations that engage low-road contractors and then look the other way or actively seek to avoid bargaining with their workers gain an unfair advantage over companies that play by the rules, resulting in a race to the bottom that rewards cheaters. It's one reason why the job quality of what were formerly middle-class jobs in America is suffering today.

For these reasons, we support the proposed rule.

Sincerely,

Lorena Roque, Senior Policy Analyst

Center for Law and Social Policy