

United States Senate

WASHINGTON, DC 20510

December 7, 2022

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

RE: Standard for Determining Joint-Employer Status

Dear Ms. Rothschild:

We write to support the National Labor Relations Board's (NLRB) Notice of Proposed Rulemaking (NPRM) concerning its standard for determining joint-employer status.¹ The NLRB's proposal to reinstate the NLRB's historic standard, which properly allows for a full examination of all relevant facts and circumstances in deciding whether a joint-employment relationship exists, is both good policy and furthers congressional intent motivating the passage of the National Labor Relations Act (NLRA) itself.² Returning to the longstanding principles as set forth in the NLRB's *Browning-Ferris Industries* decision is an important, and necessary, step in the right direction.³

Section 1 of the NLRA declares it to be the policy of the United States to “encourag[e] the practice and procedure of collective bargaining and [protect] the exercise by workers of full freedom of association, self-organization, and designation of representative of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”⁴ Through the NLRA, Congress entrusted the NLRB with the exclusive authority to enforce workers' rights “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection [...]”⁵ The NLRB therefore wields an incredible responsibility to guarantee employees' free exercise of those privileges.

The joint-employer doctrine is a critical issue under the NLRA, ensuring that employees can engage in meaningful collective-bargaining. As is the case with any other legal matter, the practice and procedure of collective bargaining cannot be accomplished unless all relevant parties are at the negotiating table. The proposed rule helps guard workers against increasingly fissured workplaces and protects small employers against having to constantly shuttle bargaining proposals between other parties who themselves should be present.

The proposed rule is both consistent with and further effectuates congressional intent behind the NLRA itself. Indeed, the Supreme Court has repeatedly found that it is the NLRB's “special

¹ 87 Fed. Reg. 54641 (proposed Sept. 7, 2022) (to be codified at 29 C.F.R. pt. 103).

² 29 U.S.C. § 151 *et seq.* (1935).

³ *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB 1599 (2015), *aff'd* in part, *rev'd* in part, and *remanded*, 911 F.3d 1195 (D.C. Cir. 2018).

⁴ 29 U.S.C. § 151.

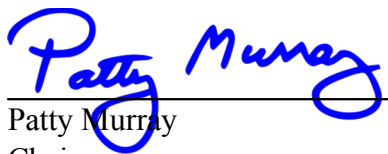
⁵ 29 U.S.C. § 157.

function of applying the general provisions of the Act to the complexities of industrial life.”⁶ In this proposed rule the NLRB has acknowledged the full scope of the real-world issues presented in the modern workplace by considering “two or more employers [as] joint employers if they ‘share or codetermine those matters governing employees’ essential terms and conditions of employment,’ such as wages, benefits and other compensation, work and scheduling, hiring and discharge, discipline, workplace health and safety, supervision, assignment, and work rules” and considering “both direct evidence of control and evidence of reserved and/or indirect control over these essential terms and conditions of employment when analyzing joint-employer status.”⁷ This standard correctly recognizes the rights and obligations set forth in parties’ binding legal documents and Congress’ purpose for the NLRA.

The issue comes at an important time for workers. The NLRB’s own case processing statistics confirm that we are experiencing a surge in organizing activity—in FY2022, union representation petitions increased by 53 percent from the prior year, the highest number of petitions filed since FY2016.⁸ Workers from every walk of life are joining together to stand up for their rights and for one another.

Accordingly, we strongly support the NLRB’s proposed rule and urge thorough and swift action in promulgating the final rule to provide clear guidance to workers and employers.

Sincerely,



Patty Murray
Chair
Committee on Health,
Education, Labor, and
Pensions

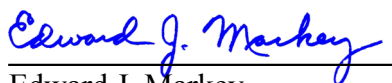


Charles E. Schumer
United States Senator

⁶ *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

⁷ National Labor Relations Board, NLRB Issues Notice of Proposed Rulemaking on Joint-Employer Standard (September 6, 2022), <https://www.nlr.gov/news-outreach/news-story/nlr-issues-notice-of-proposed-rulemaking-on-joint-employer-standard>.

⁸ National Labor Relations Board, Election Petitions Up 53%, Board Continues to Reduce Case Processing Time in FY22 (Oct. 6, 2022), <https://www.nlr.gov/news-outreach/news-story/election-petitions-up-53-board-continues-to-reduce-case-processing-time-in>.



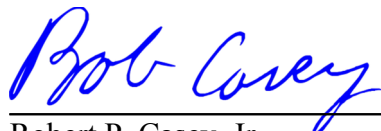
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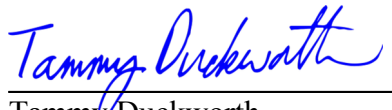
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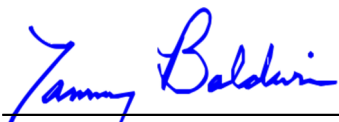
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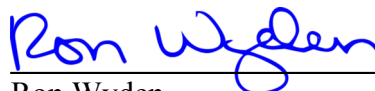
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