EPI comments regarding the standard for determining joint-employer status

Public Comments • By Celine McNicholas and Heidi Shierholz • December 10, 2018

Submitted online December 9, 2018, via regulations.gov

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Executive Secretary
National Labor Relations Board
1015 Half Street, SE
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Re: Proposed Rule: The Standard for Determining Joint-Employer Status (RIN 3142-AA13)

Members of the National Labor Relations Board:

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-income workers, and assesses policies with respect to how well they further those goals.

EPI strongly opposes the National Labor Relations Board's (NLRB/Board) proposed rulemaking regarding the joint-employer standard under the National Labor Relations Act (NLRA). Under the proposed rule, an employer may be found to be a joint employer only where the employer possesses and exercises substantial direct and immediate control over an employee's essential terms and conditions of employment in a manner that is not limited and routine. A joint-employer relationship would no longer be found where a firm exerts indirect control over the terms and conditions of employment, or reserves control through the terms of a contract. The proposed change in the joint-employer standard under the NLRA would result in fewer joint-employer findings, leaving more workers unable to hold the firms that play a role in determining the terms and conditions of their employment accountable for violations of labor law. Further, the proposed rule advances a joint-employer standard narrowed to the point at which many workers would find it nearly impossible to bring all firms with the power to influence their wages and working conditions to the bargaining table—frustrating workers' fundamental right under the NLRA to engage in collective bargaining. The proposed rule is a betrayal of the express goal of the statute the agency is obligated to administer: "encouraging the practice and procedure of collective bargaining."[1]

Procedural flaws

While the proposed rule represents a flawed analysis of an appropriate joint-employer standard, equally troubling is the Board's decision to engage in this process at all. It is deeply concerning that the Board has chosen to codify the joint-employer standard through rulemaking rather than adjudication only after the Board was forced to vacate its initial attempt to overrule the existing joint-employer standard when it was determined that Board Member Emanuel should have been recused from participation in that decision.[2] In this context, the rulemaking the Board Majority advances appears to simply be an end-run around adjudication.

This raises serious ethical concerns. The Board Majority's actions here suggest a troubling precedent—the NLRB intends to work around the technicality of a Board Member's ethical obligations to avoid matters in which they have a conflict of interest by engaging in rulemaking on the identical issue presented in case matter in which they would otherwise be ethically prohibited from participating. This is the appearance created by the Board Majority's decision to engage in rulemaking at this time and in this context—following the failed adjudication on ethical grounds. As Board Members Ring and Kaplan stated in *Hy-Brand III*, "…the Board must act promptly and decisively to ensure that in carrying out its work, it not only adheres to exacting standards of integrity and impartiality…but that it is perceived by the public as adhering to such standards."[3]

The perception that this rulemaking is simply a way around the Board's recusal obligation in case adjudication is compounded by the Board Majority's inadequate justification for this rule. The Board Majority merely references "continuing uncertainty" surrounding the joint-employer standard as its main rationale for engaging in rulemaking. However, the Board Majority fails to cite evidence of continuing uncertainty. Further, the Board Majority is creating uncertainty by ensuring that the joint-employer standard will remain unsettled (in flux) while the Board issues a final rule that is highly susceptible to legal challenge in federal court.

Further, the Board Majority does not provide information on the adverse consequences of adhering to the existing standard as set by the Board's 2015 joint-employer decision in *Browning-Ferris Industries*.[4] In fact, the Board Majority has chosen to undertake this rulemaking while *Browning-Ferris* remains under review in the District of Columbia Circuit. As Board Member McFerran points out in her dissent, when that court's decision issues, the Board will benefit from relevant judicial guidance on the joint-employer standard under the NLRA. And, should the Board Majority's final rule be inconsistent with the D.C. Circuit's decision, it would be unlikely to survive judicial review in that court.[5]

Flawed analysis of law and modern workplace

Regardless of these procedural flaws and concerns, the Board Majority has proposed a significantly narrowed joint-employer standard that fails to serve the statutory purpose of the NLRA and ignores the public input and legal analysis that the Board undertook in issuing *Browning-Ferris*. The proposed joint-employer standard is narrower than common-law agency doctrine provides. Instead of enabling the Board to consider relevant factors in reaching a determination of employment, the Board Majority advances a standard that prevents full consideration of these factors. Therefore, the proposed standard is not consistent with common-law agency doctrine.

Further, the Board Majority's advancement of a standard that fails to consider shared control in the assessment of a joint-employment relationship is particularly devastating to workers' ability to access their NLRA rights. Consider that employers increasingly outsource various functions to contractors and subcontractors, resulting in a "fissuring" of the workplace.[6] This means that two or more firms often control the terms and conditions of employment (such as pay, scheduling, and job duties). These arrangements enable employers to limit and evade liability for labor standards violations and avoid the bargaining table. Often, large corporate employers insist on complicated contracts with these intermediary firms that allow the large corporations to restrict the subcontractors' ability to grant wage increases or institute other changes in the workplace. As a result, in order for the NLRA to provide workers with the fundamental right to engage in meaningful collective bargaining, the law must provide a means to bring large corporations that reserve contractual control and/or indirectly control the terms and conditions of employment, as well as the subcontractors, to the bargaining table.

In spite of this reality, under the Board Majority's proposed joint-employer standard, a subcontractor would be solely responsible for violations of labor law. Subcontractors would also be left alone at the bargaining table—even though they may be bound by contractual obligations that limit their ability to address workers' demands for higher wages and improved working conditions. This narrow joint-employer standard serves only the interests of large corporations, enabling them to escape responsibility under the very law the Board is bound to effectuate.

Most importantly, the Board Majority's proposed joint-employer standard will make it impossible for hundreds of thousands of workers to access the rights guaranteed them by the NLRA to join a union and collectively bargain. This will particularly affect workers employed in industries in which there is high reliance on subcontracting, temporary work, and other alternative work arrangements. The proposed standard will severely limit the ability of these workers to engage in protected concerted activity, win workplace representation, and collectively bargain. We quantify the harm this will cause workers by examining the impact on two groups of workers that will be negatively impacted: unionized workers who work for contract firms—i.e., workers who are employed by a company that provides their services to other firms under contract—and unionized workers who work for temporary help agencies.

According to data from the Bureau of Labor Statistics' 2017 Contingent Worker

Supplement (CWS), there are 933,000 workers who work for contract firms and 1,356,000 workers in temporary help agencies—for a total of 2.3 million workers in these two categories.[7] The CWS microdata allow us to identify which of these 2.3 million workers who work for contract firms or temporary help agencies are in unions. The data show that 170,000—or 7.4 percent—of these workers are covered by union contracts. The data further show that union workers in contract firms and temporary help agencies have average weekly earnings of $1,108. Research shows that on average in the U.S., a worker covered by a union contract earns 13.2 percent more in wages than a peer in a nonunionized workplace (where a "peer" is someone in the same area of the country, in the same occupation and industry, and with the same demographic characteristics, education, and experience).[8] That implies that 13.2 percent of the $1,108 weekly earnings of union workers working for contract firms and temporary help agencies—or $146 per week on average—is the pay boost these workers receive as a result of being in a union. Multiplied by the 170,000 unionized workers in contract firms and temporary help agencies, we find that, all together, these workers get a $24.8 million pay boost per week from being in a union—or $1.3 billion per year. Because the narrow proposed joint-employer standard will make collective bargaining among subcontracted and temporary workers nearly impossible, this $1.3 billion is the amount of money we estimate will be transferred from workers to employers if the rule is finalized.

It is worth noting that there is a substantial amount of uncertainty around the $1.3 billion estimate, but we believe it to be a conservative estimate. Consider that there is little doubt that the CWS undercounts the number of workers who work for contract firms and temporary help agencies. This is due in part to the fact that workers self-report what kind of firm they work for and may erroneously report that they work for the company where they are *doing* their work instead of for their contract firm or temporary help agency that placed them at that site.

Establishment surveys—where the firm, not the worker, does the reporting—get around this problem. High-quality establishment data on employment in contract firms do not exist to our knowledge, but there are excellent establishment data on employment in temporary help agencies from the Bureau of Labor Statistics' Current Establishment Survey (CES). These data show that there were 2.9 million workers in temporary help agencies in 2017, *more than double* (2.2 times) what is reported in the CWS. All else equal—i.e., using the unionization rates and wages of union workers in temporary help agencies from the CWS—accounting for the undercount of workers in temporary help agencies in the CWS by benchmarking the employment numbers to those in the CES would raise our estimate by $446.9 million. And if we were to assume that the same CWS undercount of employees in temporary help agencies exists for workers employed by contract firms, accounting for the undercount of workers in the contract firms measured in the CWS would raise our estimate by an additional $616.8 million.

Further, the CWS only includes one very specific type of contract worker in their count of workers employed by contract firms—workers who are usually assigned to only one client and usually work at the client's worksite. That excludes the many contract workers who work for multiple clients (e.g., janitorial workers or IT consultants) or offsite (e.g., call center workers or industrial laundry workers). We do not attempt to quantify this undercount.

Another sizeable group of workers that we do not include, but who will be negatively impacted by the rule, are workers in franchise establishments. According to the Census Bureau's 2016 Annual Survey of Entrepreneurs, 6.4 million workers were employed at a business where all or part of the business operated as a franchise.[9] According to the survey, the annual payroll for these franchises was $189,927,173, or $29,863 per worker on average. We don't have unionization rates for this group, but if we were to assume they have the same unionization rates as do workers in contract firms and temporary help agencies, and that these union workers earn the overall average pay in franchises (the latter assumption likely being a conservative one since union workers tend to earn more than their nonunion counterparts), our estimate of the transfer from workers to employers as a result of the rule would rise by $1.9 billion.

Another way our estimate of the transfer from workers to employers is an underestimate is that it does not take into account the fact that this rule, if finalized, will harm the unionized employees of "lead" companies—i.e., companies who are contracting for labor—who work alongside contract and temporary workers. This is due to the fact that if the two groups of union workers (those who work for the lead company and those who work for the contract firm or temporary help agency) work together but cannot bargain with the same employer, then this will dilute the bargaining power of not just the contract or temporary workers, but also the union workers in the lead company. We do not attempt to quantify this effect.

An additional way our estimate of the transfer from workers to employers is an underestimate is that it ignores the union "spillover" effect. Strong unions set pay and benefits standards and norms that nonunion employers often have to follow in order to get and keep the workers they need and to forestall organizing drives. Thus, if the rule is finalized and therefore results in a large transfer from union workers to employers, it will also result in a transfer from *nonunion* workers to employers. We do not attempt to quantify this effect.

The final way in which our estimate of the transfer from workers to employers as a result of the rule is an underestimate is that it doesn't take into account the fact that because the rule would mean that employers would newly be able to avoid liability and the legal duty to bargain with outsourced workers while still substantially controlling the wages and working conditions of those workers, companies will therefore be incentivized to restructure and outsource parts of their business. Research shows that the wage losses associated with this kind of domestic outsourcing are substantial (on the order of 10–15 percent relative to jobs that are not outsourced).[10] Thus the rule will likely result in a substantial transfer away from workers whose firms decide, as a result of the rule, to outsource the work that they do. We do not attempt to quantify this effect.

Admittedly, there is one way our estimate likely overestimates the transfer from workers to employers. It is unlikely that unionized workers in the contract firms and temporary help agencies that we capture in our estimate will lose *all* of the pay boost their unions provide. Unionized workers in contract firms and temporary help agencies will be severely limited in their ability to collectively bargain as a result of the rule, and that will have knock-on negative effects as the reduced ability of these unions to produce gains for workers will impede organizing efforts, reducing the aggregate union premium further. However, the benefits of unionization to workers in these firms will be unlikely to disappear completely. We believe it is safe to assume that this way in which our estimate likely overestimates the transfer from workers to employers is more than offset by the numerous substantial ways in which our estimate is an underestimate, as described above. As a result, we believe our estimate of a transfer of $1.3 billion as a result of the rule is a conservative estimate. However, it is worth noting that these losses won't happen instantaneously. The effect will unfold over time as existing union contracts expire and unions are unable to secure the same gains in future contracts, and as that in turn hampers unions' ability to maintain union membership rates. In other words, $1.3 billion is an estimate of the long-run annual impact of the rule.

Clearly, the proposed rule would have a significant impact on working people. While, in its proposal, the Board Majority gives little consideration to the impact the rule will have on workers, it *overstates* the harm to employers posed by adherence to the existing standard. The Board Majority asserts "uncertainty" surrounding the standard as a reason for the standard advanced in the rulemaking. However, it is undisputed that employers are already subject to distinct, more expansive joint-employer standards under the Fair Labor Standards Act as well as under Title VII of the Civil Rights Act of 1964. The rulemaking does nothing to address this issue. The joint-employer standard adopted by the NLRB in *Browning-Ferris* was more closely aligned with those standards than the standard the Board Majority proposes in this rulemaking. Further, the Board Majority does not provide any evidence of harm to employers. By its own admission, the joint-employer issue is implicated in fewer than one percent of Board filings.

It is important to note again that the joint-employer standard proposed in this rulemaking will aid only large employers that seek to contract out their responsibilities under our nation's labor law. Small businesses will still be required to comply with the NLRA—even when they may not actually possess the ability to do so without the cooperation of a larger corporation with which they have contracted.

The impact of the Board Majority's proposed rule on working people will be significant. The proposed rule would make it nearly impossible for some workers to organize and collectively bargain. Conservatively, we estimate that it will cost workers $1.3 billion per year. We urge the Board to maintain the current joint-employer standard, as articulated in *Browning-Ferris*, and to strongly oppose any attempt to institute a standard that deprives working people of their rights under the NLRA.

Sincerely,

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Endnotes

1. 29 U.S.C. §151.

2. See *Hy-Brand International Contractors, Ltd.*, 366 NLRB No. 156 (2017).

3. See *Hy-Brand International Contractors, Ltd.*, 366 NLRB No. 63 (2018) (Hy-Brand III).

4. See *Browning-Ferris Industries of California d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015).

5. Dissent 46688.

6. David Weil, *The Fissured Workplace: Why Work Became So Bad and What Can Be Done to Improve It* (Cambridge, Mass.: Harvard Univ. Press, 2014).

7. Bureau of Labor Statistics, "Table 5. Employed Workers with Alternative and Traditional Work Arrangements by Selected Characteristics, May 2017," *Contingent and Alternative Employment Arrangements–May 2017*, June 7, 2018.

8. Josh Bivens et al., *How Today's Unions Help Working People: Giving Workers the Power to Improve Their Jobs and Unrig the Economy*, Economic Policy Institute, August 2017.

9. U.S. Census Bureau, *2016 Annual Survey of Entrepreneurs*, public data series accessed via the American FactFinder data tool, 2018. It is worth noting that the franchise employment reported in the 2016 survey is likely a meaningful undercount of the number of today's franchise workers. For example, data from the ADP Research Institute shows that franchise employment in January 2018 was 8.8 million (ADP Research Institute, *National Employment Report: National Franchise Report–January 2018* [downloadable Excel file]).

10. Deborah Goldschmidt and Johannes F. Schmieder, "The Rise of Domestic Outsourcing and the Evolution of the German Wage Structure," *Quarterly Journal of Economics* 132, no. 3 (August 2017): 1165–1217.