Economic Policy Institute

EPI comments on NLRB's proposed rulemaking on the Standard for Determining Joint-Employer Status

Public Comments • By Celine McNicholas, Heidi Shierholz, and John Schmitt • December 7, 2022

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National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Re: Standard for Determining Joint-Employer Status (RIN 3142-AA21)

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 supports the National Labor Relations Board's (NLRB/Board) proposed rulemaking rescinding and replacing the rule on the joint-employer standard under the National Labor Relations Act (NLRA). The proposed rule would rescind the current joint-employer rule, which EPI estimated in 2018 would result in an annual transfer of $1.3 billion from workers to employers.[1] Further, it would codify the long-standing joint-employer standard under the NLRA that has been approved by the Third Circuit and the District of Columbia Circuit Court of Appeals.

Under the proposed rule, a firm may be found to be an employer where there is evidence of indirect and reserved forms of control, as long as those forms of control bear on employees' essential terms and conditions of employment. This standard reflects the NLRA's purpose of promoting collective bargaining: It ensures that, when two or more statutory employers each possess some authority to control or exercise the power to control employees' essential terms and conditions of employment, both employers are parties to bargaining over those employees' working conditions. This will enable more workers to engage in effective collective bargaining. Further, it will ensure that the NLRA is meaningfully enforced. The proposed change in the joint-employer standard will make it easier for workers to hold the firms that play a role in determining the terms and conditions of their employment accountable for violations of labor law.

Proposed rule reflects analysis of law and modern workplace

By requiring that an employer possess and exercise substantial direct and immediate control over an employee's essential terms and conditions of employment in a manner that is not limited and routine, the 2020 rule instituted a joint-employer standard that was narrower than common-law agency doctrine, under which the Board was prohibited from considering relevant factors in reaching a determination of employment. This betrayed the Board's statutory mandate to promote collective bargaining, essentially creating a standard incongruous with common-law principles that made it impossible for hundreds of thousands of workers to access the rights guaranteed them under the NLRA to join a union and collectively bargain. The proposed rule seeks to remedy this by rescinding this flawed rule and instituting a joint-employer standard that is consistent with common-law agency doctrine.

Under the proposed rule, firms will be held to be joint employers if the firm has an employment relationship with those employees under established common-law agency principles, and the firm shares or codetermines those matters governing at least one of the employees' essential terms and conditions of employment. By ensuring that joint employer status can be established with evidence of indirect and reserved forms of control, the Board institutes a standard that is consistent with common-law agency doctrine, but also reflects the realities of the modern workplace whereby multiple firms may share control over workers' terms and conditions of employment.

Employers increasingly outsource various functions to contractors and subcontractors, resulting in a "fissuring" of the workplace.[2] 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 and subcontractors to the bargaining table.

The true size of the fissured economy is unknown and understanding the scope is a major challenge that researchers are currently undertaking. David Weil, who coined the term "fissured workplace," estimates that "close to 19 percent of private-sector workforce were in industries where fissured arrangements predominate."[3] Research shows the growth of the fissure economy has contributed to the erosion of wages and labor standards for workers.[4] The proposed rule would prevent employers from evading their liability for NLRA violations for many workers in fissured establishments.

Further, the proposed rule ensures that subcontractors are not solely responsible for violations of labor law, nor are they 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 proposed joint-employer standard ensures that large corporations are not able to escape responsibility under the NLRA.

Most importantly, the Board's proposed joint-employer standard will make it possible 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 make it easier for these workers to engage in protected concerted activity, win workplace representation, and bargain collectively. We quantify the benefit this will bring to workers by examining the impact on two groups of workers that will be affected: 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.

Proposed rule would benefit workers by at least $1.06 billion annually

We estimate that the proposed rule will result in a boost of pay to workers of $1.06 billion annually or $20.4 million per week. By adopting a joint-employer standard that enables workers to more effectively unionize and collectively bargain, more workers will be able to win the benefits of union representation, including higher wages. Our estimate almost certainly understates the economic benefits to workers brought by the Biden administration's rule change. Our less conservative estimates suggest a range of long-run benefits to workers between $1.79 billion and $3.97 billion per year.

Methodology

In this section, we lay out the methodology used to estimate the proposed rule's annual benefits to workers.

We approach this estimate by estimating the costs to workers of the Trump administration rule, which the Biden administration proposal would overturn. We use this approach because the Trump administration rule took effect only two-and-a-half years ago, which is not enough time for the impact of that rule to truly unfold. We estimate the long-run benefits to workers of the Biden administration proposal as the absence of the costs to workers of the long-run impact of the Trump administration rule. This is discussed further below.

We begin by estimating the total number and the total earnings of two core groups of workers put at a disadvantage by the Trump administration rule: (1) unionized workers who work for contract firms—i.e., unionized workers who are employed by a company that provides their services to other firms under contract—and (2) unionized workers who work for temporary help agencies. The most recent data on these types of workers were collected by the U.S. Bureau of the Census for the Bureau of Labor Statistics (BLS) in the May 2017 Contingent Worker Supplement (CWS) to the Current Population Survey. According to the BLS analysis of the CWS data, in 2017 there were 933,000 workers in contract firms and 1,356,000 workers in temporary help agencies—for a total of 2.29 million workers in these two categories.[5] The CWS data show that in the same year about 170,000—or 7.4%—of these workers were covered by union contracts. According to BLS calculations using the same data, these union workers in contract firms and temporary help agencies had average weekly earnings of $1,108 in 2017.[6]

Given the absence of more recent data of this type for contract firm and temporary help agency workers, we have adjusted the 2017 CWS data to reflect several changes in the economy since 2018. We use these adjusted numbers as the basis for our analysis of the total long-run annual benefit to workers of replacing the Trump administration joint-employer rule with the standard proposed by the Biden administration.

We start by taking into account the fact that employment in these two affected industries changed little between 2017 and 2021—falling slightly from 2.29 million to 2.26 million.[7] We also reduce the estimated share of unionized workers in the two industries by 0.2 percentage points, from 7.4% in 2017 to 7.2% in 2021, to reflect the small decline in the economywide unionization rate between 2017 and 2021.[8] Our updated estimate of the number of unionized workers in contract firms and temporary help agencies is 163,000.

In the absence of more recent data on the earnings of these two groups of workers, we assume that the 2017 average weekly earnings for these workers rose in line with the overall price level (CPI-U) between 2017 and 2021, from $1,108 to $1,225.[9] To reflect research using more recent data, we also made downward adjustments to the wage premium associated with union representation, from 13.2% in 2017 to 10.2[10] The 10.2% union wage premium implies that 10.2% of the $1,225 weekly earnings of union workers working for contract firms and temporary help agencies—or $125 per week on average—is the pay boost for union workers relative to nonunion workers in these sectors. When we multiply this union pay premium by our updated estimate of 163,000 unionized workers in contract firms and temporary help agencies in 2021, we find that together, these workers receive a $20.4 million pay boost per week from union representation—or $1.06 billion per year. Because the Trump administration joint-employer standard makes collective bargaining among subcontracted and temporary workers nearly impossible, this $1.06 billion per year is the amount of money that would be transferred from workers to employers in the long-run if the Trump administration rule is not rescinded and replaced by the Biden administration's proposal.

Alternative estimates of the benefit to workers of the proposal

This section provides information on the uncertainty around our primary estimate that this proposal would provide a $1.06 billion pay boost to workers annually, on why we believe that estimate is conservative, and on how our less conservative estimates suggest a range of long-run benefits to workers between $1.79 billion and $3.97 billion per year.

There is little doubt that the CWS undercounts the number of workers in contract firms and temporary help agencies. This is partially because 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 the contract firm or temporary help agency that placed them at that site. Establishment surveys—where the firm, not the worker, does the reporting—provide a more accurate count of the number of workers. 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 based on employer responses. This count is *more than double* (2.2 times) what was reported in the same year in the CWS, based on worker responses. 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 2021 employment numbers to those in the CES would raise our estimate of the long-run benefits to workers of replacing the Trump administration rule with the Biden administration proposal to $1.79 billion. Further, if we were to assume that the same CWS undercount of employees in temporary help agencies is representative of the experience of workers employed by contract firms, accounting for the undercount of workers in the contract firms measured in the CWS would raise our estimate to $2.30 billion.

Further, the CWS only includes one specific type of contract worker in their count of workers employed by contract firms—workers who are typically assigned to 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 in our primary estimate, but who will benefit from the Biden administration's proposal, are workers in franchise establishments. Estimates of the total number of workers employed in franchise establishments vary. The private firm Statista estimates that 8.2 million workers were employed in franchise establishments in 2021.[11] The Statista data, however, show a higher number of workers in franchises in 2016—7.8 million—than appear in the most recent available official census of franchises, where the Census Bureau found 6.4 million franchise workers in 2016.[12] In the absence of more recent official Census data, and in the interest of producing conservative estimates of the benefits to workers of the proposed rule, we estimate total franchise employment in 2021 at 6.8 million, calculated as the 2016 Census figure for franchise employment (6.4 million) increased by the percentage growth in franchise employment reported in the Statista data (up 5.5%).[13] We estimate annual average earnings of franchise workers in 2021 as $33,716, calculated by increasing the 2016 Census figure by the rise in the overall price level between 2016 and 2021.[14] Unionization rates for this particular group are not available. However, if we assume that they have the same unionization rates as 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 benefits to workers of the proposed rule would rise to $3.97 billion.

Our estimate of the transfer from workers to employers also underestimates how the Trump administration's rule harms the unionized employees of "lead" companies—i.e., companies who are contracting for labor—who work alongside contract and temporary workers. This is because 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, diluting the bargaining power of both the contract or temporary workers and the union workers in the lead company. We do not attempt to quantify this effect.

Our estimate of the benefits to workers of the proposed rule is also an underestimate because it ignores the union "spillover" effect.[15] Strong unions set pay and benefits standards and norms that nonunion employers often have to follow in order to attract and retain the workers they need, as well as to forestall organizing drives. The Biden administration's proposal would put an end to a large transfer from both union and *nonunion* workers to employers. We do not attempt to quantify this effect.

The final way in which our estimate underestimates the proposed rule's benefits to workers is that it doesn't take into account that the Trump administration rule allows employers 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 therefore have an incentive 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).[16] Thus, the Biden administration's proposal would end the incentives built into the Trump administration rule that foster transfers away from workers whose firms decide, to outsource the work that they do. We do not attempt to quantify this effect.

To be clear, as mentioned above, our estimates of the cost to workers capture the long-run effects of the Trump administration rule and, by extension, the long-run benefits of adopting the Biden administration proposal. The labor market dynamics we review here unfold over time as existing union contracts expire and unions are unable to secure the same gains in future contracts; those setbacks in turn hamper unions' ability to maintain union membership rates. In other words, the estimated $1.06 billion benefits to workers of the implementation of the Biden administration proposal is an estimate of the long-run annual impact of the rule. Given the relatively short time that the Trump administration rule has been in place, the impact this year is likely to be smaller than the $1.06 billion figure. Our estimates, however, give a reasonable—and likely conservative—estimate of the true cost to workers of the longer-term failure to rescind the Trump administration rule and replace it with the Biden administration proposal.

One specific consideration to bear in mind is that under the Trump administration rule, it is unlikely that unionized workers in the contract firms and temporary help agencies that we capture in our estimate would lose *all* of the pay boost their unions provide. The Trump administration rule severely limits the ability of unionized workers in contract firms and temporary help agencies to collectively bargain. In turn, this has knock-on negative effects as the reduced ability of these unions to produce gains for workers impedes organizing efforts, reducing the aggregate union premium further. However, the benefits of unionization to workers in these firms would 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 calculations underestimate the transfer, as described above. As a result, we believe our estimated $1.06 billion benefit to workers as a result of implementing the Biden administration proposed rule is a conservative estimate.

Conclusion

The proposed rule would have a significant impact on working people. We estimate that the proposed rule will boost pay to workers by $1.06 billion annually or $20.4 million per week. By adopting a joint-employer standard that enables workers to more effectively unionize and collectively bargain, more workers will be able to win the benefits of union representation including higher wages. The proposed rule will help further the express goal of the NLRA, which the agency is obligated to administer: "encouraging the practice and procedure of collective bargaining."[17] EPI strongly supports the proposal and encourages the NLRB to adopt the rule.

Sincerely,

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1. Celine McNicholas and Heidi Shierholz, "EPI Comments Regarding the Standard for Determining Joint-Employer Status," submitted to the National Labor Relations Board, December 9, 2018.

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

3. David Weil, "The Present and Future of Work in the Fissured Workplace Context," *Russell Sage Foundation Journal of the Social Sciences* 5, no. 5.

4. *See* Lawrence Mishel and Josh Bivens, *Identifying the Policy Levers Generating Wage Suppression and Wage Inequality*, Economic Policy Institute, May 2021 and David Weil, "The Present and Future of Work in the Fissured Workplace Context," *Russell Sage Foundation Journal of the Social Sciences* 5, no. 5.

5. 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.

6. In a 2018 analysis, we used these data to estimate the long-run cost to workers of the implementation of the Trump administration joint-employer rule, concluding that that cost would be at least $1.3 billion per year. *See* Celine McNicholas and Heidi Shierholz, "EPI Comments Regarding the Standard for Determining Joint-Employer Status," submitted to the National Labor Relations Board, December 9, 2018.

7. We assume that total employment in the CWS category temporary help service followed the same trend in employment between 2017 and 2021 as the BLS's Current Employment Statistics (CES) measure of "Temporary help services" (NAICS 56132), which fell 1.2%; and further that employment in the CWS category for "contract firms," where there is not a comparable category in the CES, followed the same trend.

8. See Bureau of Labor Statistics, "Data Retrieval: Labor Force Statistics (CPS)," series LUU0204899700.

9. The annual average CPI-U increased 10.5% between 2017 and 2021. See Bureau of Labor Statistics, https://data.bls.gov/, series CUUR0000SA0.

10. See Economic Policy Institute, "Unions Help Reduce Disparities and Strengthen Our Democracy" (fact sheet), April 23, 2021. The analysis there shows that a U.S. worker covered by a union contract earns, on average, 10.2% 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.

11. See, Statista, "Number of Employees in Franchise Establishments in the United States from 2007 to 2021 With a Forecast for 2022 (in Millions)" (web page), accessed October 10, 2022.

12. U.S. Census Bureau, *2016 Annual Survey of Entrepreneurs*, public data series accessed via the American FactFinder data tool, 2018. Note that the franchise employment reported in the 2016 Census survey is lower than other estimates, including the Statista estimate cited in the text, as well as data from the ADP Research Institute, which put franchise employment in January 2018 at 8.8 million (ADP Research Institute, *National Employment Report: National Franchise Report–January 2018* [downloadable Excel file]).

13. 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]).

14. According to the 2016 Census survey cited above, the annual payroll for franchises was $189,927,173, or $29,863 per worker on average. The CPI-U increased 12.9% between 2016 and 2021.

15. See, for example, Patrick Denice and Jake Rosenfeld, "Unions and Nonunion Pay in the United States, 1977-2015," *Sociological Science*, August 15, 2018.

16. 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. See also, Arindrajit Dube and Ethan Kaplan, "Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards," *ILR Review*, vol. 63, no. 2 (2010), pp. 287–306. Dube and Kaplan find domestic outsourcing lowers janitors' wages 4-7% and security guards' wages 8-24%.

17. 29 U.S.C. §§ 151-169