

Congress of the United States
Washington, DC 20515

October 10, 2018

The Honorable John Ring
Chairman
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dear Chairman Ring:

We write to request information relating to the National Labor Relations Board's ("the Board") Notice of Proposed Rulemaking ("NPRM") on joint employment under the National Labor Relations Act ("NLRA").¹ This NPRM proposes to overturn the standard for joint employment determinations under the NLRA that was articulated in the 2015 decision *Browning-Ferris Industries*.² In furtherance of the Board's commitment to "seek[ing] comment on all aspects of its proposed rule," we also request that the Board extend the comment period for at least 60 days and schedule public hearings.³

This issue impacts workers' rights under the NLRA, especially those of workers who are employed through alternative work arrangements—including temporary help agency workers, on-call workers, and contract workers. For many workers, the name on the door of the building where they work may not be the name of the company that signs their paycheck. When workers organize unions, the NLRA guarantees them the right to collectively bargain for better wages and working conditions without fear of retaliation. Where multiple entities control the essential terms and conditions of employment, this right is rendered futile if workers cannot bargain with all those entities controlling wages and working conditions. In *Browning-Ferris*, the Board in 2015 returned to its traditional standard for determining when an entity's control over terms and conditions of employment is sufficient to render it a joint employer. In doing so, the Board held that such control may not merely be direct and immediate, but that it may also be exercised indirectly through an intermediary, or reserved in its contract with an intermediary.

The NPRM provides scant research or analysis to justify initiating a rulemaking. The NPRM merely notes the number of filings in the past five years that have asserted a joint employer relationship and offers a rough estimate as to the number of employers implicated in these filings, even though the Board is capable of quantifying the exact number of such employers.⁴ In order for commenters to provide meaningful analysis on the rulemaking, including on whether rulemaking is appropriate, the Board must make available additional information, including data regarding its case handling involving putative joint employers.

¹ The Standard for Determining Joint Employer Status, 83 Fed. Reg. 46681 (Sept. 14, 2018) (to be codified at 29 C.F.R. § 103.40).

² 362 NLRB No. 186 (2015).

³ 83 Fed. Reg. at 46687.

⁴ *Id.* at 46693.

Accordingly, we request that you produce the following by no later than October 22, 2018:

1. Information regarding whether the Board completed the comprehensive internal ethics and recusal review it announced on June 8, 2018.⁵ If the Board has completed its review, please provide the results of that review and explain whether and how it applied to the NPRM.
2. Information regarding whether the Board issued the NPRM prior to the completion of its comprehensive internal ethics and recusal review. If the Board issued the rulemaking prior to the completion of this review, please explain why.
3. Peer reviewed research demonstrating a causal connection between the Board's current joint employer standard and the national employment rate or the employment rate of any state or political subdivision.
4. Any memoranda from the Board's Division of Advice or Office of Appeals applying the *Browning-Ferris* standard to other cases.

Please also provide by no later than October 22, 2018, the following information with respect to representation case petitions ("RC cases") or unfair labor practice charges ("CA cases") from August 27, 2015, the date the Board decided *Browning-Ferris*, to December 14, 2017, the date the Board first attempted to overturn *Browning-Ferris* in *Hy-Brand Industrial Contractors*.⁶ Please provide the same information for a period of equal length going back from August 27, 2015. Please also provide the following information with respect to RC petitions and CA charges filed in both of those time periods for each of the types of employers you identified as "most likely to be impacted by the rule": contractors/subcontractors, temporary help service suppliers and users, and franchises.⁷

1. The number of RC cases in which the petition alleged a joint employer relationship. Please identify each such case by name and case number.
2. The number of RC cases in which the petition alleged a joint employer relationship and the parties to the election consented or stipulated to an election agreement waiving a hearing on whether the employers are joint employers. Please identify each such case by name and case number.

⁵ Office of Public Affairs, "NLRB to Undertake Comprehensive Internal Ethics and Recusal Review," (June 8, 2018) <https://www.nlr.gov/news-outreach/news-story/nlr-undertake-comprehensive-internal-ethics-and-recusal-review> ("Recent events have raised questions about when Board Members are to be recused from particular cases and the appropriate process for securing such recusals.").

⁶ 365 NLRB No. 156 (2017).

⁷ 83 Fed. Reg. at 46694.


3. The number of RC cases in which the petition alleged a joint employer relationship and the Regional Director found that the employers are joint employers. Please identify each such case by name and case number.
4. The number of RC cases in which the petition alleged a joint employer relationship and the Regional Director found that the employers are not joint employers. Please identify each such case by name and case number.
5. The number of RC cases in which the Board reversed the Regional Director's finding that the employers are joint employers. Please identify each such case by name and case number.
6. The number of RC cases in which the Board affirmed the finding in a Regional Director's Decision and Direction of Election that the employers are joint employers. Please identify each such case by name and case number.
7. The number of RC cases in which the Board reversed the finding in a Regional Director's Decision and Direction of Election that the employers are not joint employers. Please identify each such case by name and case number.
8. The number of CA cases in which the charge alleged a joint employer relationship. Please identify each such case by name and case number.
9. The number of CA cases in which the charge alleged a joint employer relationship and the employers did not contest that allegation. Please identify each such case by name and case number.
10. The number of CA cases in which the charge alleged a joint employer relationship and the Regional Director found that the allegation had merit. Please identify each such case by name and case number.
11. The number of CA cases in which the charge alleged a joint employer relationship and the Regional Director did not find the allegation to have merit. Please identify each such case by name and case number.
12. The number of CA cases in which the charge alleged a joint employer relationship and the Regional Director issued a complaint alleging a joint employment relationship. Please identify each such case by name and case number.
13. The number of CA cases in which the complaint alleged a joint employer relationship and the Administrative Law Judge concluded that two or more employers were not joint employers. Please identify each such case by name and case number.

14. The number of CA cases in which the complaint alleged a joint employer relationship and the Administrative Law Judge concluded that two or more employers were joint employers. Please identify each such case by name and case number.
15. The number of CA cases in which the Board reversed the Administrative Law Judge's conclusion that two or more employers were joint employers. Please identify each such case by name and case number.
16. The number of CA cases in which the Board affirmed or declined to reverse the Administrative Law Judge's finding that two or more employers were joint employers. Please identify each such case by name and case number.
17. The number of CA cases where a United States Court of Appeals granted review of the Board's finding of a joint employer relationship. Please identify each such case by name and case number.


Finally, please provide a date prior to November 1, 2018, on which you are available to brief our staff on the status of, and, if available, the content of the internal ethics and recusal review.

Please contact our staff at Kyle.deCant@mail.house.gov and John_DElia@help.senate.gov if you have any questions about this request. Thank you for your attention to this matter, and we look forward to your response.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Ranking Member
House Committee on Education and the
Workforce



PATTY MURRAY
Ranking Member
Senate Committee on Health, Education,
Labor and Pensions