



Congress of the United States
House of Representatives
Washington, DC 20515

January 8, 2019

The Honorable John Ring
Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dear Chairman Ring:

We write to urge the National Labor Relations Board (Board) to withdraw its Notice of Proposed Rulemaking (NPRM) on determining joint employer status,¹ to abide by its current joint employer standard articulated in *Browning-Ferris*,² and to refrain from spending further resources on this flawed rulemaking. On December 28, 2018, the United States Court of Appeals for the District of Columbia Circuit affirmed *Browning-Ferris*'s "articulation of the joint employer test" and invalidated the NPRM's critical assumptions regarding the scope of the common law.³

Labor law has long held that when two or more entities share or codetermine terms and conditions of employment, both entities may be joint employers under the National Labor Relations Act.⁴ In *Browning-Ferris*, the Board returned to a standard that relies on the common law of agency for determining when an entity has sufficient control to render it a joint employer. Under this standard, an entity may be a joint employer even if it reserves control in its contract with an intermediary, or if it exercises control indirectly through an intermediary. *Browning-Ferris*'s reliance on the common law is rooted in Supreme Court precedent that applies common law definitions whenever Congress leaves statutory terms like "employee" and "employer" undefined.⁵

The NPRM seeks to overturn *Browning-Ferris* by holding that an entity may be a joint employer only if it "actually exercise[s] substantial direct and immediate control" over essential terms and conditions of employment.⁶ In doing so, the NPRM questioned whether *Browning-Ferris* complies with the common law, and claimed that its proposed rule is consistent with the common law.⁷ The NPRM asked public comments to answer whether "the common law dictate[s] the approach of the proposed rule or of *Browning-Ferris*," and

¹ The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46,681 (Sept. 14, 2018).

² 362 NLRB No. 186 (2015).

³ *Browning-Ferris Indus. v. NLRB*, Case Nos. 16-1063, 16-1064, 2018 U.S. App. LEXIS 36706 at *4 (D.C. Cir. Dec. 28, 2018), *granting rev. in part* 362 NLRB No. 186 (2015).

⁴ *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1124 (3d Cir. 1982).

⁵ See *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968) (requiring the Board to "apply general agency principles in distinguishing between employees and independent contractors under the Act"); see also *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 102 (2011) ("Where Congress uses terms that have accumulated settled meaning under the common law, we must infer, unless the statute otherwise dictates, the Congress means to incorporate the established meaning of those terms.").

⁶ 83 Fed. Reg. 46,686.

⁷ *Id.*

whether “the common law leave[s] room for either approach.”⁸ The Board prematurely issued the NPRM even though *Browning-Ferris*, and the specific questions asked in the NPRM, were pending before the court. Fortunately, the court’s decision provided definitive answers to the NPRM’s questions.

On December 28, the court upheld “as fully consistent with the common law the Board’s determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis.”⁹ Specifically, it found that consideration of an entity’s right to control “is an established aspect of the common law of agency,” and that *Browning-Ferris* was also correct that “an employer’s indirect control over employees can be a relevant consideration.”¹⁰ The court’s decision forecloses the NPRM by concluding that “the common-law inquiry is not woodenly confined to indicia of direct and immediate control.”¹¹ The proposed rule, or any rule that refuses to consider reserved or indirect control as relevant evidence of a joint employer relationship, would thus fail to comply with the common law.

Accordingly, the Board should withdraw the NPRM, resolve the issues remanded from the court in good faith, and apply the *Browning-Ferris* standard when considering allegations of joint employer status in future deliberations. As the court observed, “[t]he Board’s rulemaking...must color within the common-law lines identified by the judiciary,” and it issued its decision to prevent “the Board [from taking] the first bite of an apple that is outside its orchard.”¹² The court’s decision provides unambiguous answers to the questions raised in the NPRM, and withdrawing the NPRM would end the uncertainty created by repeated attempts to overturn *Browning-Ferris*.¹³

Since the court issued this decision during a period in which the Board is accepting comments on its rulemaking, it is imperative that the public receives guidance in a prompt manner regarding the Board’s course of action. If you have any questions, please contact Kyle.deCant@mail.house.gov and Elizabeth.Albertine@mail.house.gov.

Sincerely,



ROBERT C. “BOBBY” SCOTT
Chairman
Committee on Education and Labor



ROSA DELAURO
Chairwoman
Subcommittee on Labor, Health and Human
Services, Education, and Related Agencies
Committee on Appropriations

⁸ *Id.* at 46,687.

⁹ *Browning-Ferris Indus.*, 2018 U.S. App. LEXIS 36706 at *56.

¹⁰ *Id.* at *27.

¹¹ *Id.*

¹² *Id.* at *26.

¹³ *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (2017), vacated by 366 NLRB No. 26 (2018); *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46,681 (Sept. 14, 2018).