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Roxanne L. Rothschild  
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### **Comments on RIN 3142-AA21: Standard for Determining Joint-Employer Status**

Submitted at: <https://www.federalregister.gov/documents/2022/09/07/2022-19181/standard-for-determining-joint-employer-status>.

Dear Ms. Rothschild,

The National Employment Law Project (“NELP”) submits these comments in support of the National Labor Relations Board (“NLRB” or “Board”) proposed rulemaking that updates the standard for determining joint-employer status under the National Labor Relations Act (“NLRA” or “Act”).<sup>1</sup> The revised standard better aligns with the common law definition of employment, better conforms with the purposes of the NLRA, and better accounts for the realities of the structures of modern employment.

NELP is a non-profit research and policy organization with over 50 years of experience advocating for the employment and labor rights of low-wage workers. NELP seeks to ensure that all employees receive the basic workplace protections guaranteed in our nation’s labor and employment laws, including the NLRA, and that all employers comply with those laws. NELP and our constituents have a direct and sustained interest in a robust national collective bargaining framework and access to the rights guaranteed by the NLRA, which are particularly relevant to the low-wage workers who comprise a disproportionate share of the workforce. We appreciate the opportunity to comment on the proposed regulations.

Our comments will address several primary points, using data-specific examples of subcontracted jobs:

- 1) The employer practice of outsourcing work is pervasive and growing in underpaid jobs, worsening job conditions and undermining the right to organize.
- 2) In-depth case studies of temp workers in warehousing and Amazon’s subcontracted delivery workforce illustrate why the Board is right to

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<sup>1</sup> *Standard for Determining Joint-Employer Status*, 87 Fed. Reg. 54641 (Sept. 7, 2022).

consider all aspects of control employers possess over their employees—including control that is indirect or reserved.

- 3) Workplace health & safety is an essential term and condition of employment for workers in industries as varied as healthcare, hospitality, meat-processing, and manufacturing, and the Board is right to include it in its proposed rule.
- 4) The proposed rule better aligns with the traditional common law definition of employment, and better supports the NLRA's goals of effective collective bargaining by ensuring that workers can negotiate with and hold accountable any employer that can control key terms and conditions of employment.

## **I. Introduction**

### **A. The Importance of Joint Employment**

Joint employment is a longstanding concept that ensures that when companies outsource portions of their workforce to staffing companies and other subcontractors without ceding control over the work, they remain jointly accountable under labor and employment law. Under the NLRA, joint employers are required to come to the bargaining table and can be held liable for committing unfair labor practices. When operating correctly, joint employment protects the right to organize, promotes worker voice on the job, supports responsible outsourcing practices by employers, and results in better overall protections for workers.

Across the economy, companies in retail, hotels, fast food, janitorial, construction, and delivery source large portions of their workforce through intermediary subcontractors like staffing agencies, specialized contract firms, and franchisees. Millions of workers in subcontracted jobs are among those most in need of the protections of the NLRA.

There are 3.2 million temporary help and staffing agency jobs in the U.S.<sup>2</sup> The past decade has seen this work (as measured by aggregate work hours and total number of jobs) grow faster than work overall,<sup>3</sup> and shift from companies using temp and staffing placements primarily in clerical work to using them in more hazardous industries, such as construction and logistics.<sup>4</sup> Since the beginning of the COVID-19 pandemic, temp employment in the U.S. has grown more than three times faster than overall employment—temp employment

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<sup>2</sup> NELP analysis of Current Employment Statistics NAICS 561320, August 2022. For underlying data, see *Current Employment Statistics*, U.S. Bureau of Lab. Statistics, <https://www.bls.gov/ces/data.htm>. The focus of the data included in this section is temp staffing, even though labor outsourcing is a much broader phenomenon, because government data is much more available than it is for, e.g., franchise workers.

<sup>3</sup> NELP analysis of Occupational Employment and Wage Statistics, total private sector vs. NAICS 561320, from Aug. 2012 to Aug. 2022. For underlying data, see *Occupational Employment and Wage Statistics*, U.S. Bureau of Lab. Statistics, <https://www.bls.gov/oes>.

<sup>4</sup> NELP analysis of employment data, 2014 to 2021. For underlying data, see *Id.*

grew 62.8 percent between April 2020 and July 2022, compared to 19.9 percent growth for overall employment.<sup>5</sup>

Staffing agency workers earn less than their direct-hire counterparts; the wage penalty is more than 18 percent in food processing jobs and more than 19 percent in transportation and warehousing jobs.<sup>6</sup> In addition, staffing agency workers often receive insufficient safety training and are more vulnerable to retaliation for reporting injuries than workers in traditional employment relationships.<sup>7</sup> According to the latest available government data, there are also 9.6 million franchise workers in the U.S., laboring in a wide range of businesses, from fast food restaurants and hotels to beauty salons and gas stations.<sup>8</sup> Franchising arrangements can have a negative impact on worker wages and bargaining power, through direct franchisor intervention and through constraints stipulated within franchise agreements, such as “no-poaching” agreements that prevent workers from moving between franchisees.<sup>9</sup>

Under current law, millions of American workers in these “fissured” workplaces are unable to organize, or see little purpose in organizing, because they have little hope of bringing the employers that can control their working conditions to the bargaining table. But, as the Board’s proposed rule recognizes, the NLR’s definition of employer covers the relationship between companies and the labor-intensive parts of their business, regardless of whether there is another business layered in between—between Walmart and the workers who package, process, and distribute its goods;<sup>10</sup> between FedEx and the drivers who deliver its packages;<sup>11</sup> and between Marriott and the housekeepers who clean its

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<sup>5</sup> NELP analysis of Current Employment Statistics, 2021. For underlying data, *see supra* note 2.

<sup>6</sup> NELP analysis of Occupational Employment and Wage Statistics, 2021. For underlying data, *see supra* note 3. *See also America’s Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data*, NAT’L EMP. L. PROJECT (Jun. 7, 2018), available at <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data>; *Temp Workers Demand Good Jobs*, NAT’L EMP. L. PROJECT (Feb. 2022), <https://s27147.pcdn.co/wp-content/uploads/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf>.

<sup>7</sup> Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America’s Workers*, NAT’L EMP. L. PROJECT at 11 (Jun. 10, 2014), available at <https://www.nelp.org/wp-content/uploads/2015/02/Temped-Out.pdf>; *Temp Workers Demand Good Jobs*, *supra* note 6.

<sup>8</sup> *Franchising is More than Just Fast Food*, U.S. CENSUS BUREAU, (Dec. 1, 2021), <https://www.census.gov/library/stories/2021/12/franchising-is-more-than-just-fast-food.html>.

<sup>9</sup> Brian Callaci, *New Research Shows the Franchise Business Model Harms Workers and Franchisees, with the Problem Rooted in Current Antitrust Law*, WASH. CTR FOR EQUITABLE GROWTH (Dec. 13, 2018), available at <https://equitablegrowth.org/new-research-shows-the-franchise-business-model-in-the-united-states-harms-workers-and-franchisees>.

<sup>10</sup> Cathy Ruckelshaus, Eunice Cho, Anastasia Christman, Rebecca Smith & Maurice Emsellem, *Chain of Greed: How Walmart’s Domestic Outsourcing Produces Everyday Low Wages and Poor Working Conditions for Warehouse Workers*, NAT’L EMP. L. PROJECT (2012), <https://s27147.pcdn.co/wp-content/uploads/2015/03/ChainOfGreed.pdf>.

<sup>11</sup> Lydia DePhillis, *How FedEx is Trying to Save the Business Model that Saved it Millions*, WASHINGTON POST (Oct. 23, 2014) available at <https://www.washingtonpost.com/news/storyline/wp/2014/10/>

rooms.<sup>12</sup> When workers in these industries exercise their right to collective action under the NLRA, it is critical that they have the opportunity to bargain with any entity that controls—or has the right to control—the terms and conditions of their employment. Effective collective bargaining can only occur where the parties at the bargaining table are the parties that have the ability to control the working conditions.

When enforcement agencies or judges fail to name companies that are truly calling the shots at work, worker voice on the job suffers and workplace conditions like safety and pay are more likely to deteriorate. In today’s economy, we should be looking for ways to increase workers’ pay and economic security via collective action and bargaining, and building worker power by ensuring the law protects workers who speak out against employer retaliation, not laying the groundwork for more sweatshops.

#### A. The Proposed Rule

The proposed rule, which returns the joint-employer standard to a broader and precedent-based test while updating relevant considerations, recognizes that the protected right to organize under Section 7 extends equally to workers in subcontracted employment. It corrects the crabbed understanding of employment advanced by the Board in its 2020 rulemaking, which arbitrarily limited the joint-employer inquiry to a confusing and narrow set of factors that effectively deprived whole categories of subcontracted workers of their rights under the NLRA.<sup>13</sup> Although the proposed rule makes only modest attempts to clarify the doctrine, it represents an important step toward ensuring that corporations cannot skirt the law simply by outsourcing responsibility for their workers, and that all workers, regardless of where they fall in a chain of subcontractors, are fully entitled to their rights to engage in protected collective action.

Under the Board’s proposed rule, joint-employer liability attaches where more than one entity “shares or codetermines those matters governing the essential terms and conditions of employment.”<sup>14</sup> It differs from the prior rule in three main ways. First, it accounts for forms of control exercised by the lead firm that are “indirect” as well as direct.<sup>15</sup> Second, it accounts for forms of control reserved by the lead firm but not actually exercised, including control reserved in contract between the parties. And third, it expands the definition of

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23/how-fedex-is-trying-to-save-the-business-model-that-saved-it-millions (describing transition by FedEx from using “independent contractor” drivers to using W-2 employee drivers hired through a subcontractor “independent service provider”).

<sup>12</sup> Dave Jamieson, *As Hotels Outsource Jobs, Workers Lose Hold on Living Wage*, HUFFPOST (Aug. 24, 2011), available at [https://www.huffpost.com/entry/-hotel-labor-living-wage-outsourcing-indianapolis\\_n\\_934667](https://www.huffpost.com/entry/-hotel-labor-living-wage-outsourcing-indianapolis_n_934667).

<sup>13</sup> *Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11184 (Feb. 28, 2020) (codified at 29 CFR Part 103).

<sup>14</sup> 87 Fed. Reg. 54645.

<sup>15</sup> Under the proposed rule, a joint employer is any entity that “possesses the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both)” the employee. 87 Fed. Reg. 54646.

“essential terms and conditions of employment” to include: 1) workplace health and safety; 2) assignment; and 3) work rules and directions governing the manner, means, or methods of work performance. The rule also makes this list of essential terms “non-exhaustive,” and therefore subject to being updated in future Board adjudications.<sup>16</sup>

Our comment will address each of these proposed changes in turn, offering concrete examples of low-wage workers whose ability to act collectively and bargain effectively about the conditions of their work free from retaliation will be materially improved by the changes.

## II. The Legal Standard Must Account for Indirect and Reserved Control

### A. Legal Background

The legal standard that applies to the definition of “employer” under the NLRA is the common law “right to control” test, a multi-factor test that considers *all* evidence of control of the terms and conditions of employment. See *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968) (“What is important is that the *total factual context* is assessed”) (emphasis added).<sup>17</sup> And since at least 1965, the Supreme Court and the Board have recognized that a group of workers may have more than one employer and that in such instances both employers must bargain collectively with the workers over the terms and conditions of employment. See *Boire v. Greyhound Corporation*, 376 U.S. 473 (1965) (reversing the lower courts’ rejection of the Board’s determination that Greyhound was a joint employer of porters, janitors and maids who worked in Greyhound’s bus terminals for a contractor).

As interpreted by the D.C. Circuit in *Browning-Ferris Industries of Cal. v. NLRB*, the common law definition of employment recognizes all forms of employer control as evidence of a joint employment relationship, including control that is indirect or reserved.<sup>18</sup> But in a break from prior Board precedent and decades of common law, the Board’s 2020 Rule arbitrarily restricted the focus of the joint-employer inquiry to only “direct and immediate” forms of control.<sup>19</sup> This rule applied the joint employer test so narrowly and unrealistically as to define a near null-set of relationships constituting joint employment, setting forth a

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<sup>16</sup> Id. at 54647.

<sup>17</sup> See also Restatement (Second) of Agency § 220(2) (explaining that the common law test has always been a multi-factor test that considers *all* evidence of control of terms and conditions of employment). The common law test for employment thus has no “shorthand formula or magic phrase” to arrive easily at a result, and instead, “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

<sup>18</sup> 911 F.3d 1195, 1199 (D.C. Cir. 2018).

<sup>19</sup> The Board tried to square the circle by asserting that “evidence of *indirect* control...is probative of joint-employer status, but only to the extent that it supplements and reinforces evidence of direct and immediate control...” 85 Fed. Reg. 11186. That rejoinder nonetheless squarely contradicted the D.C. Circuit’s mandate in *Browning-Ferris*.

shorthand narrow formula of only a few considerations that utterly failed to apply the common law and thus the NLRA.

Two examples of contemporary work arrangements illustrate why a fixation on direct and immediate control fails to account for joint-employment relationships characterized by extensive—but often indirect or reserved—employer control. NELP agrees with the proposed rule that an employer’s indirect and reserved control must be considered in order that the purposes of the NLRA are met.

### **Temp Warehouse Workers**

A large and growing subcontracted workforce of “temp workers”—those placed in jobs via staffing agencies—offers a case study of why both indirect and reserved control are central pieces of any joint-employer analysis under the common law.<sup>20</sup> Millions of temporary workers, employed by staffing agencies to work at and for the benefit of lead firms, are responsible for processing, packing, and distributing goods in warehouses on the outskirts of America’s largest metropolitan areas: in northern New Jersey; at the Inland Empire in Southern California; and in Joliet, Illinois, 35 miles from downtown Chicago. The largely Black and immigrant workforce at these distribution hubs are the essential workers of the just-in-time supply chain that powers the modern consumer goods economy.<sup>21</sup> They pack frozen pizzas for Walmart,<sup>22</sup> bottle liquor for Bacardi and Smirnoff,<sup>23</sup> load and unload

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<sup>20</sup> The example we use here is specific to warehouse workers placed in jobs via temp and staffing agencies. Many employers in many job sectors use temp and staffing agencies to source and place their workers, including in poultry and meatpacking, hospitals, hotels, and retail, but we are using just one of those sectors here for illustration.

<sup>21</sup> Blue collar temp workers are nearly three times more likely to be Black or Latinx than the overall workforce. See Dave DeSario & Janelle White, *Race, To the Bottom: The Demographics of Blue-Collar Temporary Staffing*, Report by Temp Worker Justice and Temp Worker Union Alliance Project (Dec. 2020). In Illinois, Black and Latinx workers account for 85% of temp staffing workers in Illinois factories and warehouses, while the state’s overall workforce is only 35% non-white. See Tommy Carden & Elena Gormley, *The COVID Jungle: Chicagoland’s Essential Food Workers and the Need for Vaccination Priority*, Report by Warehouse Workers for Justice & Chicago Workers’ Collaborative (Jan. 2021), available at <https://www.chicagoworkerscollaborative.org/post/california-s-forests-restoration-where-do-we-start>.

<sup>22</sup> Michael Grabell, *The Expendables: How the Temps Who Power Corporate Giants Are Getting Crushed*, PROPUBLICA (Jun. 27, 2013), available at <https://www.propublica.org/article/the-expendables-how-the-temps-who-power-corporate-giants-are-getting-crushed> (“José Miguel Rojo, for example, packed frozen pizzas for a Walmart supplier every day for eight years as a temp until he was injured last summer and lost his job. (Walmart said Rojo wasn’t its employee and that it wants its suppliers to treat their workers well.)”).

<sup>23</sup> Michael Grabell, *Taken for a Ride: Temp Agencies and ‘Raiteros’ in Immigrant Chicago*, PROPUBLICA (Apr. 29, 2013), <https://www.propublica.org/article/taken-for-a-ride-temp-agencies-and-raiteros-in-immigrant-chicago> (Smirnoff); Michael Grabell, Jeff Larson & Olga Pierce, *Temporary Work, Lasting Harm*, PROPUBLICA (Dec. 18, 2013), <https://www.propublica.org/article/temporary-work-lasting-harm> (Bacardi).

imported clothing for Nike and Macy's,<sup>24</sup> and process and package chocolate and candy for confection giant Mars.<sup>25</sup>

Despite the indispensable role of their labor in getting goods to store for big box retailers like Walmart and Target, the structure of their employment undermines and sometimes negates their right to organize. As temp workers, they are usually hired and posted to a job by a thinly-capitalized "staffing agency" that often functions as little more than a glorified recruiter and middle-manager.<sup>26</sup> Lead firms contract with staffing agencies to hire workers and manage payroll, and sometimes to transport workers from the neighborhoods in which they live to the warehouses where they work (for which the staffing agencies often charge workers).<sup>27</sup> But once the workers arrive at the warehouse, the basic conditions of their work are determined almost entirely by the lead firm.

The lead firm often exercises direct control including onsite supervision by lead firm employees, who dictate the pace at which the work needs to be performed. At a Walmart warehouse in California, Walmart set specific rates for loading and unloading, and exercised strict control over the number and cost of overtime hours worked in each warehouse.<sup>28</sup> It dictated the specific tasks to be undertaken, the manner and order in which these tasks are to be completed, creating and strictly enforcing detailed Standard Operating Procedures.<sup>29</sup>

But much of the control that the lead employers retain over their workers is reserved but not regularly exercised. In *Browning-Ferris*, the lead firm inserted a contractual clause that established the duality of control exercised by BFI (the lead firm) and LBS (the subcontractor), explicitly reserving to the lead firm the right "to closely survey and direct the actual means and methods utilized by its subcontractor to affect substantially the actual work processes of these employees."<sup>30</sup> BFI set a ceiling for temp workers wage rates, undertook responsibility for skills training and safety training, retained the right to set

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<sup>24</sup> Grabell, *The Expendables*, *supra* note 22 ("They are regular employees of temp agencies working in the supply chain of many of America's largest companies – Walmart, Macy's, Nike, Frito-Lay. They make our frozen pizzas, sort the recycling from our trash, cut our vegetables and clean our imported fish. They unload clothing and toys made overseas and pack them to fill our store shelves. They are as important to the global economy as shipping containers and Asian garment workers.").

<sup>25</sup> John Lippert & Stephen Franklin, *The Warehouse Archipelago*, THE AMERICAN PROSPECT (Aug. 9, 2021), available at <https://prospect.org/labor/the-warehouse-archipelago> (describing work performed by a temp worker at a Mars, Inc. warehouse in Joliet, Illinois, packing some of America's favorite candy, including Skittles, Life Savers, and Juicy Fruit).

<sup>26</sup> Smith & McKenna, *Temped Out*, *supra* note 7.

<sup>27</sup> Grabell, *Taken for a Ride*, *supra* note 23.

<sup>28</sup> Ruckelshaus et al., *Chain of Greed*, *supra* note 10, at 12.

<sup>29</sup> *Carrillo v. Schneider Logistics Trans-Loading & Distribution, Inc.*, No. 2:11-cv-8557, 2013 WL 12461083 at paragraph \*103(g) (C.D. Cal. 2013).

<sup>30</sup> See Harris Freeman & George Gonos, Amicus Brief of Labor Relations and Research Center, U. Mass., Amherst, in *Browning-Ferris*, NLRB RC-109684 (June 26, 2014), citing *Greyhound Corp.*, 153 NLRB No. 118 at 1492 (1965).

“standard selection procedures and tests,” and the “right to reject or discontinue use” of any temporary employees for “any or no reason.”<sup>31</sup>

For temp work in warehouses, a key feature of most staffing agency contracts is what might be called a “pay-disparity” provision: a contractual clause requiring that subcontractor employees be paid less than direct-hires for doing the same work.<sup>32</sup> Many temp workers have (understandably) perceived these provisions as grossly unfair, and have launched organizing campaigns around the slogan “equal pay for equal work.”<sup>33</sup> But staffing agencies are contractually foreclosed from granting workers their central organizing demand. Temp workers need the lead firm at the bargaining table if they want to win the right to earn the same as their direct-hire counterparts.

Worksite employers at warehouses also often retain the power to discipline and discharge workers. Contracts between lead firms and subcontractors often include explicit “Do Not Return” or “DNR” clauses, which give the lead firm the right to request to the temp agency that a specific worker not be returned to the warehouse in question.<sup>34</sup> Whether or not that control is “actually exercised” or just reserved in contract is less important than whether the lead firm “shares or codetermines the essential terms and conditions of employment,” by deciding whether a worker is allowed to show up at work the next day.<sup>35</sup>

Lead firms also exercise extensive *indirect* control over the temp workers who staff their warehouses. At Walmart’s distribution hub in the Inland Empire, company staff frequently communicate with subcontractor employees, providing instructions on staffing levels, productivity requirements, and how to deal with worker misconduct. When workers fail to meet Walmart’s onerous productivity standards, Walmart cuts compensation to the subcontractor, effectively (but indirectly) reducing worker wages.<sup>36</sup> Walmart also requires workers to receive detailed orientation materials laying out company policy and how it’s enforced. The retail behemoth has even created a multiple-choice test for its

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<sup>31</sup> *Id.* at 22 (quoting BFI-LBS contract).

<sup>32</sup> *Id.* at 26.

<sup>33</sup> The campaign by temp worker groups, Temp Worker Justice and New Labor in New Jersey, for state legislation called for “equal pay for equal work.” See *Equal Pay for Temps Proposed in NJ Bill*, Temp Worker Justice (Dec. 16, 2021), available at <https://www.tempworkerjustice.org/post/equal-pay-for-temps-proposed-in-nj-bill>.

<sup>34</sup> Grabell et al., *Temporary Work, Lasting Harm*, *supra* note 23 (“Then there is what’s known in the industry as a “DNR,” which is short for “Do Not Return.” Essentially, any host company can write “DNR” on the back of the work slip for any reason, telling the agency not to send that worker again. The more DNRs a worker gets, the less likely he is to be assigned, Purser said.”).

<sup>35</sup> For a deeper account of how lead firms and staffing agencies use contract language to control their workers, see Jane R. Flanagan, *Fissured Opportunity: How Staffing Agencies Stifle Labor Market Competition and Keep Workers “Temp”*, 20 J.L. Soc’y 257 (2020).

<sup>36</sup> Ruckelshaus et al., *Chain of Greed*, *supra* note 10, at 12.



subcontractors to administer in order to ensure that warehouse workers are properly trained.<sup>37</sup>

Walmart has sufficient market share to set the overall terms of economic relationships throughout its supply chain, with the power to dictate its suppliers' own pricing, profit margins, and operational decisions. The company's stated "Plus One" bargaining strategy, which requires that all suppliers and contractors reduce their price of goods, increase quality, or increase speed of delivery every year, vividly exemplifies the pressure that squeezes contractors' margins, giving them little choice but to reduce wages and cut labor standards.<sup>38</sup>

While the subcontracting practices that these corporations use are often complex and opaque, their outcome is straightforward: workers in warehouses are underpaid, unorganized, and the conditions of their work are under-regulated. The rate of unionization of warehouse workers nationwide fell from 28.1 percent in 1983 to 6.7 percent in 2018.<sup>39</sup> Not coincidentally, this has been accompanied by a two-decade trend of *falling* real wages.<sup>40</sup>

The lack of organization among temp workers can also undermine organizing among direct-hire workers, as employers often use temp workers to weaken cross-racial organizing campaigns. When the majority Black workforce at an Amazon warehouse in Bessemer, Alabama petitioned for a union election last year, the company enlisted the plant's 500-700 temporary staffing workers in its aggressive anti-union campaign, even though they were excluded from casting a ballot.<sup>41</sup> One temp worker, who had worked at the plant for six months earning \$13 per hour, wore a "Vote No" pin on his vest; when questioned by a reporter about this, he responded that he didn't know what the union was.

According to one of the organizers, many of Amazon's temporary staffing workers have recently been released from prison and are desperate for work—a vulnerability that Amazon is eager to exploit.<sup>42</sup> "Resisting management's requests to help its campaign, [the union organizer] adds, can put their job in jeopardy. 'They think, 'Even if I can't vote and my manager comes up to me, the manager with the authority, the manager who's giving me

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<sup>37</sup> See *Carrillo v. Schneider Logistics, Inc.*, No. 11-08557 (C.D. Cal. May 31, 2012) (Plaintiffs' Notice of Motion to Compel Responses at 1-2); *Carrillo* (C.D. Cal. May 31, 2012) (Joint Stipulation Re: Plaintiffs' Motion to Compel at 18-20).

<sup>38</sup> Ruckelshaus et al., *Chain of Greed*, *supra* note 10, at 6.

<sup>39</sup> See Lippert & Franklin, *Warehouse Archipelago*, *supra* note 25.

<sup>40</sup> *Id.* ("Despite all the job growth, inflation-adjusted earnings actually fell in the warehouse industry during the 18 years ending in 2019").

<sup>41</sup> Luis Feliz Leon, *Warehouse Workers Wage Historic Fight for Union Recognition at Amazon*, THE AMERICAN PROSPECT (Feb. 6, 2021), available at <https://prospect.org/labor/warehouse-workers-wage-historic-fight-for-union-recognition-amazon>.

<sup>42</sup> Han Lu, *Worker Power in the Carceral State*, NAT'L EMP. L. PROJECT (Aug. 2022), <http://s27147.pcdn.co/wp-content/uploads/Worker-Power-in-the-Carceral-State-Ten-Proposals.pdf>.

my paycheck, asks me to wear a pin that says, 'Vote No,' how can I tell him no?' Amazon knows they're trying to stay out of prison and feed their families.”<sup>43</sup>

The precarious reality for the temp workers at the Inland Empire in California and in New Brunswick, NJ is that they are functionally unable to organize and engage in collective action unless the law clearly recognizes the company that controls the terms and conditions of their work as a joint-employer.

### **Amazon Delivery Workers**

Elsewhere in the retail supply-chain, Amazon has created a multi-tiered system of labor contracting to sustain its nationwide network of delivery drivers.<sup>44</sup> In order to fulfill its promise of two-day and sometimes same-day delivery, the e-commerce giant employs a workforce of 275,000 delivery drivers for its “last-mile delivery” program, an army of workers that collect packages at the company’s fulfillment centers and deliver them to the doors of millions of Amazon customers each day.<sup>45</sup>

Despite their centrality to Amazon’s business, the drivers are employed, in the first instance, by one of Amazon’s subcontractor “Delivery Service Partners” (DSPs),<sup>46</sup> which Amazon claims are the sole employer of the drivers.<sup>47</sup> The DSPs are a network of near-identical subcontractors across the country, each of which contract with Amazon (and only with Amazon) to deliver packages to locations in a specific geographical area.<sup>48</sup> Amazon provides its subcontractors with all the tools necessary to establish their fleets, requiring them to lease company-emblazoned vans, and assigning them a certain number of “routes” to complete each day.<sup>49</sup> Each route originates from one Amazon warehouse, or fulfillment

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<sup>43</sup> Leon, *supra* note 41.

<sup>44</sup> Note: FedEx operates an almost identical system of delivery drivers. *See, e.g., Shannon Sobaszkiwicz et al. v. FedEx Corp. et al.*, 4:18-cv-07553, at \*5 (N.D. Cal. 2018) (FedEx retains the right to assign, reassign, disqualify, and terminate drivers as it sees fit, even posting notices in the “hub” or terminal” workplaces warning drivers of the potential for suspension or other penalty for breaking FedEx’s rules).

<sup>45</sup> *See* Anna Kramer, *Amazon’s Entrepreneur Dream is Closer to a Nightmare for Many*, PROTOCOL (Mar. 7, 2022), available at <https://www.protocol.com/workplace/amazon-delivery-program-trap>; *see also* *How Amazon’s DSP Program has Created \$26 billion in Revenue for Owners*, Amazon Corporate Website (Aug. 19, 2022), <https://www.aboutamazon.com/news/transportation/how-amazons-dsp-program-has-created-26-billion-in-revenue-for-owners>.

<sup>46</sup> Josh Eidelson & Matt Day, *Amazon Work Rules Govern Tweets, Body Odor of Contract Drivers*, BLOOMBERG (May 5, 2021), available at <https://www.bloomberg.com/news/articles/2021-05-05/amazon-work-rules-govern-tweets-body-odor-of-contract-drivers>.

<sup>47</sup> *Amazon DSP Job Posting, Minneapolis, MN* (accessed Oct. 8, 2021), <https://www.indeed.com/q-Amazon-Delivery-l-Minnesota-jobs.html>; “Frequently Asked Questions,” Amazon Logistics Website (accessed Oct. 8, 2021), <https://logistics.amazon.com/marketing/faq>.

<sup>48</sup> *Ahaji Amos v. Amazon Logistics*, 22-cv-00055, at \*2-11 (M.D.N.C. complaint filed Jan. 24, 2022).

<sup>49</sup> *See Id.*

center, and services a delineated geographical area.<sup>50</sup> According to a former manager for Amazon Logistics, “[t]he DSP contract-labor model is absolutely to mitigate risk and not take on the cost and obligation to actually employ people.”<sup>51</sup>

The delivery partners function like many staffing agencies. Amazon gives them some control over hiring the drivers and managing payroll, but the work itself is controlled almost entirely by Amazon. Some of this control is quite direct. Amazon determines the daily routes drivers are assigned to, the number of deliveries to be completed each day, and delivery deadlines, and communicates this information directly to drivers through a smartphone app.<sup>52</sup> When customers complain about a driver, they are reported only to Amazon and are often used as a basis for discipline.<sup>53</sup>

But much of the control Amazon possesses over the terms and conditions of work is exercised only indirectly. The 2020 Rule, by requiring workers to show evidence of “direct and immediate control” to establish a joint employment relationship, arbitrarily discounted evidence of indirect control, which could let companies like Amazon off the hook.

### 1. Indirect Control Over Pay

Amazon exercises extensive but largely indirect control over driver pay through its cost-plus model of rate-setting for DSPs. A cost-plus contract is an agreement by a company to reimburse its subcontractor for expenses incurred *plus* a specific amount of profit.<sup>54</sup> Because the cost of different inputs is usually laid out in contract, the company effectively fixes the amount its subcontractor can spend on labor, thus setting the wages workers will receive.<sup>55</sup> Here, Amazon covers the DSP’s costs with a fixed monthly fee to cover insurance,

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<sup>50</sup> *Fli-Lo Falcon v. Amazon*, 2:22-cv-00441 (W.D. Wash. complaint filed Apr. 5, 2022) (complaint filed by DSP against Amazon alleging in detail the structure of the relationship between the companies).

<sup>51</sup> Hayley Peterson, *Amazon Has All the Power: How Amazon Controls Legions of Delivery Drivers Without Paying Their Wages and Benefits*, BUSINESS INSIDER (Oct. 4, 2018), <https://www.businessinsider.com/amazon-controls-delivery-drivers-without-paying-wages2018-9>.

<sup>52</sup> *Amos*, complaint at \*10-11 (describing how Amazon set delivery routes centrally (including start and end times) and then assigned them to DSPs each week through the Amazon Flex cellphone app).

<sup>53</sup> *Jasmine Miller v. Amazon*, 17-cv-03488 (N.D. Cal., 2018) complaint at \*11 (“Consumer issues were only reported to AMAZON, but were used as a basis for discipline or termination, irrespective of subcontractor assessment. Any delivery driver with insufficient reasons after three incidents was terminated ... or... suspended.”)

<sup>54</sup> A cost-plus contract is where a lead firm “determine[s] [a subcontractor’s] employee wage and benefit rates” by “specifying, in the parties ‘cost-plus’ lease agreement, the rates it would reimburse” the subcontractor. *Dunkin Donuts Mid-Atlantic Distribution Center v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004); *see also Greyhound Corp.*, 153 NLRB No. 118 at 1494 (1965) (discussing the “rigid control which Greyhound exercises over [worker] wages in accord with the provisions of the “costplus” service contracts); *Hamburg Industries, Inc.*, 193 NLRB No. 13, at 67-68 (1971) (assigning weight to putative employer’s “indirect control over wages” via cost-plus arrangement).

<sup>55</sup> *See George Gonos, Fee Splitting Revisited: Concealing Surplus Value in the Temporary Employment Relationship*, 29 Pol. & Soc’y 589 (2001).

vehicle payments, and overhead, and with a flat fee for each route completed, which covers labor costs.<sup>56</sup> DSPs cannot get additional labor costs reimbursed by Amazon unless they complete more routes—i.e., unless the workers do more work—meaning that they cannot meaningfully raise wages without Amazon’s consent. The upshot is that the delivery drivers in any given geographical area make almost identical wages, irrespective of the DSP that employs them directly.<sup>57</sup> A drivers’ union at a DSP would likely be unable to negotiate a raise without bringing Amazon to the table.

Some drivers can also get additional pay in the form of a bonus paid out by the DSP. But for many drivers, their eligibility to receive a bonus is tied to a performance score determined by Amazon based on factors such as: how Amazon assessed driver safety; how many times drivers returned undeliverable packages, and how often drivers succeeded at completing their assigned routes.<sup>58</sup> If enough drivers meet these performance metrics, Amazon pays a bonus to the DSP, which the DSP can then pay out to drivers. This is another instance of indirect control: Amazon sets the rules for drivers and grades them on their compliance, but that score is then used by the subcontractor to pay the bonus. The control may not be “direct and immediate,” but collective bargaining around bonus pay will likely be fruitless without Amazon at the table.

## 2. Indirect Control Over Discipline and Performance Evaluation

Amazon also monitors drivers constantly through video surveillance systems the company installs in its vans.<sup>59</sup> Video surveillance serves Amazon in several ways. In addition to its

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<sup>56</sup> Amazon pays DSPs in three ways: “1) a fixed monthly fee to cover the cost of Amazon-branded vehicles and insurance, 2) a per delivered package fee,” determined based on the DSP achieving certain parameters (i.e., the performance scores discussed below), and “3) a flat fee for each route completed, which was to cover driver’s salaries.” See *Amos*, complaint at \*12. Put more simply, Amazon covers the DSPs’ basic costs of business, offers some profit incentives to the companies for good performance, and covers driver pay at a rate fixed by Amazon. Individual DSPs are free to pay performance bonuses to drivers or keep them for themselves as profit.

<sup>57</sup> See *Clei Group v. Amazon Logistics*, 4:22-cv-01749, at \*22 (S.D. Tex. 2022) (“AMAZON set the minimum and maximum pay rates for drivers and reimbursed DSPs...at a set hourly rate.”).

<sup>58</sup> Lauren K. Gurley, *Amazon Drivers Are Instructed to Drive Recklessly to Meet Delivery Quotas*, VICE MOTHERBOARD (May 6, 2021), <https://www.vice.com/en/article/xgxx54/amazon-drivers-are-instructed-to-drive-recklessly-to-meet-delivery-quotas> (“Amazon delivery drivers are asked to deliver upwards of 400 packages a day on grueling 10-hour shifts under pressure from contractors who earn extra revenue from Amazon when their drivers deliver packages quickly and efficiently. Amazon adds an additional revenue per package delivered, in addition to bonuses that can be pocketed by delivery companies or distributed to drivers at their discretion. These bonuses are only offered if drivers’ stats on the Mentor app collectively average to above 800 on a 100-850 scale.”). See also *Amos*, complaint at \*11, (detailing how Amazon issues a weekly scorecard assigning each driver a performance score of Poor, Fair, Great, Fantastic and Fantastic Plus, and that DSPs were provided a bonus for achieving a Fantastic or Fantastic Plus score).

<sup>59</sup> Lauren K. Gurley, *Amazon’s AI Cameras Are Punishing Drivers for Mistakes They Didn’t Make*, VICE MOTHERBOARD (Sept. 20, 2021), <https://www.vice.com/en/article/88npjv/amazons-ai-cameras-are-punishing-drivers-for-mistakes-they-didnt-make>.

ostensible purpose of monitoring driver safety, the surveillance also allows Amazon to ensure drivers aren't taking unearned breaks, telling Amazon exactly how long each driver spends outside of the van while delivering a package (one reason customers may be used to seeing drivers sprinting to deliver packages and return to their van is that drivers get dinged if they spend too long dropping a package off).<sup>60</sup> The software also tracks a worker's location, to ensure that the driver always takes the route chosen by Amazon.<sup>61</sup>

But when Amazon catches a violation of company policy on its cameras, it disciplines drivers using the DSP as an intermediary, sending them a recording of the infraction and requiring them to off-board or terminate drivers, depending on the severity of the violation.<sup>62</sup> Amazon sets the policy, surveils the workers, and contractually requires DSPs to discipline drivers—but it avoids directly punishing drivers on its own. Absent a strong joint employment standard that accounts for this kind of indirect control through surveillance, these workers may not be able to demand that Amazon bargain as a joint employer over these invasive tracking measures.

### 3. Indirect Control Through Algorithmic Management

Another form of indirect control that Amazon possesses is through its use of algorithmic management to direct the work of delivery drivers.<sup>63</sup> Through its constant surveillance and GPS tracking, Amazon has access to a mountain of data about driver routes. Using this data, the company can set algorithms that reliably predict how long a given route will take a given driver. By prescribing routes that subcontractors are required to follow, Amazon can effectively also set driver hours, determine the speed at which they have to drive to complete their routes, and specify the manner, means, and methods of completion. The prolific data collection also allows the company to refine its operations and squeeze more

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<sup>60</sup> See *Amos*, complaint at \*15 (“If a driver stopped for more than five minutes the tracking system would send an alert and [an Amazon] employee would call [a DSP] supervisor and the driver directly ordering the driver to keep moving.”).

<sup>61</sup> David Hanley & Sally Hubbard, *Eyes Everywhere: Amazon's Surveillance Infrastructure and Revitalizing Worker Power*, OPEN MARKETS (Sept. 2020), [https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f4cfea23958d79eae1ab23/1598881772432/Amazon\\_Report\\_Final.pdf](https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f4cfea23958d79eae1ab23/1598881772432/Amazon_Report_Final.pdf).

<sup>62</sup> “When the camera detects an “event,” it uploads the footage to [an] interface accessible to Amazon and its delivery companies... Each time the camera registers an event, footage is uploaded into a system, recorded, and affects a score drivers receive at the end of the week for safe driving. For many Amazon drivers, these performance scores determine whether they receive weekly bonuses, prizes, and extra pay. See Gurley, *supra* note 59. Amazon has a series of “Tier 1” and “Tier 2” infractions. If a driver violates these, Amazon requires DSPs to terminate or off-board them. See *Amazon Infraction List*, [https://www.reddit.com/r/AmazonDSPDrivers/comments/klij88/amazon\\_infraction\\_list](https://www.reddit.com/r/AmazonDSPDrivers/comments/klij88/amazon_infraction_list) (last visited Dec. 6, 2022).

<sup>63</sup> “Algorithmic management is a diverse set of technological tools and techniques to remotely manage workforces, relying on data collection and surveillance of workers to enable automated or semi-automated decision-making.” Alexandra Mateescu & Aiha Nguyen, *Explainer: Algorithmic Management in the Workplace*, DATA & SOC'Y, at 1 (Feb. 2019), [https://datasociety.net/wp-content/uploads/2019/02/DS\\_Algorithmic\\_Management\\_Explainer.pdf](https://datasociety.net/wp-content/uploads/2019/02/DS_Algorithmic_Management_Explainer.pdf).

out workers, setting performance objectives that are continually raised so as to extract maximum productivity out of workers.<sup>64</sup>

Algorithmic management at Amazon, and elsewhere—in industries like retail, trucking, warehousing, and others—offers employers a way to maintain control over the work of their employees while disclaiming their legal obligations.<sup>65</sup> In the final rule, the Board should note clearly its consideration of algorithmic management, either as a common form of indirect control, or as an essential term and condition of employment.

#### 4. Reserved Control

Lastly, Amazon also retains substantial control over drivers in contract—control that is reserved, even if not regularly exercised. DSPs are contractually required by Amazon to have policies on “employment at-will,” giving DSP management the discretion to fire workers for almost any reason or no reason at all.<sup>66</sup> Workers demanding just cause protections would be stymied without Amazon at the bargaining table. DSPs are only allowed to hire drivers and other employees with Amazon’s approval. According to one DSP lawsuit, the company retained the power “to pre-approve all hires, and routinely overrode and rejected employment offers made to drivers by the [DSP].”<sup>67</sup>

Because Amazon shares or codetermines the essential terms and conditions of its drivers’ employment, effective collective bargaining is only possible with Amazon at the table. More fundamentally, as long as Amazon is not liable as an employer for committing unfair labor practices, the corporation can in theory retaliate against organizing workers with impunity—either by instructing subcontractors to terminate workers who are causing trouble, or more ominously, by cutting its contracts with a DSP whose drivers are trying to unionize.<sup>68</sup> Delivery drivers dissatisfied with their working conditions are trapped, unable to organize unless the Board accounts for all evidence of employer control over the

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<sup>64</sup> Because these algorithms can be individualized, Amazon can move the goalposts for drivers who have proven to be especially productive. See Annette Bernhardt, Lisa Kresge & Reem Suleiman, *Data and Algorithms at Work: The Case for Worker Technology Rights*, U.C. BERKLEY LABOR CENTER (Nov. 2021), <https://laborcenter.berkeley.edu/wp-content/uploads/2021/11/Data-and-Algorithms-at-Work.pdf>.

<sup>65</sup> See, e.g., Steven Rolf & Wei Wei, *Cyborg Trucking: An interview with Karen Levy on surveillance and automation in the trucking industry*, PHENOMENAL WORLD (Nov. 2, 2022), available at <https://www.phenomenalworld.org/interviews/karen-levy>.

<sup>66</sup> Eidelson & Day, *supra* note 46 (“Amazon’s recent DSP contract, and the policy it requires those companies to follow, includes several provisions shielding the retailer from liability or further embarrassment. DSPs are required to have policies on “employment at-will,” the discretion of management to fire workers for almost any reason or with no stated reason at all.”).

<sup>67</sup> *Amos*, complaint at \*15.

<sup>68</sup> Amazon’s intensive video surveillance of drivers allows the company to track any potential organizing efforts, which it can respond to by shifting output to another DSP, or by moving drivers from one DSP to another.

essential terms and conditions of employment, including control that is indirect and reserved.

## B. Common Law Requires Consideration of Indirect & Reserved Control

The Board’s recognition of indirect and reserved control is an important step towards restoring the labor rights of subcontracted workers. It is also an important step toward bringing Board law “within the common-law lines identified by the judiciary.”<sup>69</sup>

As the D.C. Circuit held in *Browning-Ferris*, the common law standard, which the Board must follow,<sup>70</sup> requires consideration of indirect control. “Common law decisions have repeatedly recognized that indirect control over matters commonly determined by an employer can, at a minimum, be weighed in determining one’s status as an employer or joint employer, especially insofar as indirect control means control exercised through an intermediary.” *Browning-Ferris Industries of Cal. v. NLRB*, 911 F.3d 1195, 1216-17 (D.C. Cir. 2018). The holding follows from the Supreme Court’s declaration in *Boire v. Greyhound* that what matters for the joint-employer analysis is the amount of control possessed by the lead firm, not whether it is exercised directly or indirectly.<sup>71</sup>

The common law also requires consideration of reserved control. Per the D.C. Circuit, the “leitmotif” of the common law employment standard is the employer’s *right to control* the worker, not the *exercise-in-fact* of control over the worker.<sup>72</sup> An employer who retains control over essential terms and conditions of employment—such as firing and discipline of workers, work changes, wage rates or extra hours, and inspection of a worksite—can house sufficient control in the employer to create an employment relationship, even if the control is not actually exercised.<sup>73</sup> The key consideration is whether the lead company

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<sup>69</sup> *Browning-Ferris Industries of Cal. v. NLRB*, 911 F.3d 1195, 1208 (D.C. Cir. 2018).

<sup>70</sup> The NLRB joint-employer standard must be consistent with common law agency doctrine. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). The Board must apply the NLRA in a manner “bounded by the common-law’s definition of a joint employer.” *Browning-Ferris*, 911 F.3d at 1208.

<sup>71</sup> *Boire v. Greyhound Corp.*, 376 U.S. 472, 481 (1964) (the determination turns on “whether [the alleged joint employer] possessed sufficient indicia of control to be an employer”).

<sup>72</sup> *Browning-Ferris*, 911 F.3d at 1211 (“In short, [a]t common law the relevant factors defining the master-servant relationship focus on the master’s *control* over the servant, whether that means the servant ‘is controlled or *is subject to the right to control* by the master,’ and so that common-law element of control is the principal guidepost in determining whether an entity is an employer of another”) (quoting Restatement (Second) of Agency § 2(1), at 12 (Am. Law. Inst. 1958)). Under the common law, the right or ability to control the work, rather than the actual exercise of that right, is the primary consideration in determining whether an employment relationship exists. *See, e.g., Taylor’s Oak Ridge Corp.*, 74 NLRB 930, 932 (1947).

<sup>73</sup> The right of an employer to terminate a worker can be evidence of an employment relationship, whether or not ultimately exercised. *See, e.g., Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985) (citing, among factors that “particular[ly] supported” a joint employer finding, the fact that the employee leasing agreement gave the user employer “authority to reject any driver that did not meet its standards and [to] direct [the supplier employer] to remove any driver whose conduct was

possesses control over the conditions that are the subject of bargaining and the protections of the NLRA, not how—or whether—it exercises that control.

### C. A Per Se Rule of Liability for Exclusive Service Relationships

While NELP commends the Board on its inclusion of indirect and reserved control in the proposed rule, we think the Board should go further to safeguard the labor rights of subcontracted workers. The joint employer analysis should look not only to the relationship between the worker and the lead firm, but also at the relationship between the employers. Where a lead firm is dominating its subcontractor, giving the subcontractor limited mobility to change its business practices or shift its production to a different lead firm, that should weigh heavily in favor of a finding of joint employer status. For small staffing agencies supplying workers to a narrow set of global retailers, for delivery subcontractors working exclusively for Amazon or FedEx, and for franchisees subject to the domineering control of their franchisor, the lead firm is highly likely to have an employment relationship with the subcontracted workers.<sup>74</sup>

The Board should therefore consider adopting a rule of per se joint employer liability in situations where a labor-only contractor provides workers for a much larger lead firm, especially where the subcontractor exists exclusively to serve that lead firm, as with Amazon DSPs and some temp staffing agencies. By taking into account all aspects of this triangular employment relationship, the Board can better assess whether joint employment liability should attach.

## III. **The Board's Expanded List of Essential Terms and Conditions of Employment**

### A. Workplace Health & Safety

NELP agrees with the Board's decision to revise the list of essential terms and conditions of employment to re-incorporate workplace health and safety into the joint-employer analysis. Despite being a core workplace condition and mandatory subject of bargaining

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not in [the user employer's] best interests." Similarly, an employer who "reported his opinion about [warehouse applicants'] qualifications, which [the contractor] generally followed," and "prevented hiring of [driver] applicants he did not approve" was an employer, considering totality of both indirect and reserved control. *Dunkin Donuts Mid-Atlantic Distribution Center, Inc., v. NLRB*, 363 F.3d 437, 440 (D.C. Cir. 2004).

<sup>74</sup> See Andrew Elmore, *Regulating Mobility Limitations in the Franchise Relationship*, 55 U.C. DAVIS L. REV. 1227 (2021). "[W]hen a lead firm uses mobility restraints such as non-compete and no-poaching agreements, it should be treated as a joint employer under a per se rule... Franchisors often recruit and retain undercapitalized, unsophisticated franchisees, and require capital investments in franchise stores." *Id.* at 1237. "Franchising can facilitate legal violations by recruiting small, judgement-proof franchisees and subjecting them to such onerous operational standards that the only way to increase profit is reducing labor costs." *Id.* at 1238.



under longstanding Board precedent,<sup>75</sup> the 2020 Rule inexplicably stripped it from the list of “essential terms and conditions of employment” that must be shared or codetermined for joint-employer liability to attach.

For many workers, in industries as varied as meat-processing, hospitality, warehousing, manufacturing, and trucking, workplace health and safety is an, if not *the*, essential term and condition of employment. Poultry workers who feed, care, and slaughter chickens for multinational meat-production companies often toil in unsafe working conditions, suffering staggeringly high rates of work-related injury and illness—rates 60 percent higher than the average industry.<sup>76</sup> At a Tyson Foods processing plant in Texas, OSHA found that the company had failed to install basic safety guards on hazardous machinery, leaving employees exposed to the risk of amputation, and had failed to train workers on the risks of a highly dangerous acid used in the facility.<sup>77</sup> Last year at a poultry plant in Gainesville, Georgia, six workers were killed when a toxic chemical leaked from the plant’s freezer.<sup>78</sup> And almost everywhere there are poultry plants, there are hard-to-trace staffing agencies funneling immigrant workers to plants run by multinational corporations like Tyson.<sup>79</sup>

Nurses working in COVID wards during the peak of the pandemic were often hired and paid by nursing referral agencies.<sup>80</sup> But the entity in control of workplace health and safety—tasked with keeping the nurses from contracting COVID—was the hospital. Hospitals, as joint employers, were responsible for establishing safety protocols, ensuring workers have adequate protective equipment, and properly disposing of hazardous biomedical waste.<sup>81</sup> Nurses seeking to organize around health and safety could only achieve their bargaining demands with both the staffing agency and the hospital present at the negotiating table.

For temp workers in warehousing and manufacturing, who face deteriorated working conditions and significant increases in health and safety violations, the health and safety

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<sup>75</sup> See *NLRB v. Am. Nat. Can Co., Foster-Forbes Glass Div.*, 924 F.2d 518, 524 (4th Cir. 1991), *enfg.* 293 NLRB 901, 904 (1989).

<sup>76</sup> *USDA Allows Poultry Plants to Raise Line Speeds, Exacerbating Risk of COVID-19 Outbreaks and Injury*, NAT’L EMP. L. PROJECT (Jun. 2020), <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-USDA-Poultry-Line-Speed-Increases-Exacerbate-COVID-19-Risk.pdf>.

<sup>77</sup> Bryce Covert, *Tyson Foods Fined \$263,000 Over Unsafe Working Conditions in Poultry Plant*, WORKPLACE FAIRNESS (Aug. 26, 2016), available at <https://www.workplacefairness.org/blog/2016/08/26/tyson-foods-fined-263000-over-unsafe-working-conditions-in-poultry-plant>.

<sup>78</sup> Luis Feliz Leon, *Life and Death in the Poultry Capital of the World*, THE NATION (Feb. 2021), available at <https://www.thenation.com/article/society/poultry-plant-georgia>.

<sup>79</sup> Tina Vasquez, *The Incalculable Cost of Cheap Chicken—and the Hidden Industry That Shoulders It*, TYPE INVESTIGATIONS (Jul. 20, 2021), available at <https://www.typeinvestigations.org/investigation/2021/07/20/cost-of-cheap-chicken>.

<sup>80</sup> Y. Tony Yang & Diana J. Mason, *COVID-19’s Impact on Nursing Shortages, the Rise of Travel Nurses, and Price Gouging*, HEALTH AFFAIRS (Jan. 28, 2022), available at <https://www.healthaffairs.org/doi/10.1377/forefront.20220125.695159>.

<sup>81</sup> See, e.g., *Barfield v. N.Y. City Health & Hosp. Corp.*, 537 F.3d 132 (2d Cir. 2008) (finding that temp nursing assistants were jointly employed by the hospital at which they worked).

conditions of their worksite are almost always determined in large part by the lead firm.<sup>82</sup> As one study of subcontracted and temporary logistics workers in New Jersey found, more than one in ten workers had reported an injury on the job, over 40 percent had not received necessary safety equipment, and more than one in five earned incomes below the federal poverty level.<sup>83</sup>

According to reports of a Verizon warehouse operated by XPO Logistics, the workers—many of whom are employed by temporary agencies—are required to lift and drag 45-pound boxes in a warehouse where the temperature can exceed 100 degrees.<sup>84</sup> Several workers suffered miscarriages and one worker died after being denied requests for lighter duty or additional breaks. In Illinois, factories and warehouses staffed largely by temp workers had more COVID outbreaks than any workplace other than nursing homes.<sup>85</sup> Temp workers doing dangerous work should be empowered to confront their employer about the hazards they face without fear, not stymied by employers disclaiming responsibility.

Workplace health and safety has been a major site of historical worker organizing and continues to be a central organizing demand of subcontracted workers today.<sup>86</sup> By reintroducing this as an essential term and condition of employment, the proposed rule encourages workers to organize around these conditions without fear of retribution, and offers a roadmap to bring all employers to the bargaining table.

#### B. Assignment and Work Rules and Directions Governing the Manner, Means, or Methods of Work Performance

The Board's proposed rule also introduces two additional essential terms and conditions of employment: 1) assignment of work, and 2) work rules and directions governing the manner, means, or methods of work performance. In many subcontracted workplaces, the

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<sup>82</sup> In fact, OSHA has identified this, publishing a bulletin noting that temporary staffing agency arrangements “typically” give rise to joint employment, since “both employers are responsible to some degree for determining the conditions of employment and for complying with the law.” *Injury and Illness Recordkeeping Requirements*, TWI Bulletin No. 1, OSHA.

<sup>83</sup> Jason Rowe, *New Jersey's Supply Chain Pain: Warehouse and Logistics Work Under Wal-Mart and Other Big Box Retailers*, New Labor (2012), [https://www.nelp.org/wp-content/uploads/2015/03/NJ\\_SupplyChainPain\\_Report.pdf](https://www.nelp.org/wp-content/uploads/2015/03/NJ_SupplyChainPain_Report.pdf); Jason Sturna, et al., *Unsafe and Unfair: Labor Conditions in the Warehouse Industry*, POLICY MATTERS: A QUARTERLY PUBLICATION OF THE UNIVERSITY OF CALIFORNIA, RIVERSIDE (2012).

<sup>84</sup> Jessica Silver-Greenberg & Natalia Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES (Oct. 21, 2018); Micaela Watts, *Working Conditions in Memphis Warehouse Linked to Miscarriages*, NYT Reports, COMMERCIAL APPEAL (Oct. 22, 2018).

<sup>85</sup> Carden & Gormley, *The COVID Jungle*, *supra* note 21.

<sup>86</sup> In the seminal case, *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), the Supreme Court found concerted activity protected by the Act's Section 7, where workers were fired for walking off the job in protest over unhealthy working conditions: a freezing plant where the heat was not working on an unusually cold winter's day.

principal place of interaction between workers and their lead employer is when workers receive their assignments or are instructed on how to complete certain tasks.

Temporary staffing agency workers at warehouses and distribution facilities usually receive almost no guidance on how to do their work from their hiring employer. Instead, the lead firm will have its own supervisory employees onsite at a workplace to assign work, and to supervise closely the “manner, means, and methods” of performance. At some facilities, this might mean that certain workers are asked to lift heavier boxes, given trickier assignments, or directed to complete their work in an unreasonably short time.

Housekeepers working at hotels across the country similarly experience “assignment” and “direction” as essential conditions of employment around which they may want to organize. Hired through staffing agencies, they often have little instruction about what their daily work will look like until they show up at the hotel and receive direction from an onsite employer. If housekeepers are consistently being assigned excess workloads or are repeatedly asked to clean rooms of hotel patrons known to sexually harass staff, they may seek to subject control over assignment and direction to the democratic accountability of a union.<sup>87</sup>

The inclusion of these factors as essential terms and conditions of employment further restores the joint-employer analysis to a consideration of the totality of the facts at issue. It also offers better opportunities for housekeepers and warehouse workers, among others, to exercise their rights to organize around all of their bargaining demands without fear of retaliation from any of their employers.

### C. Non-Exhaustive List

Lastly, in addition to expanding the list of terms and conditions of employment that the Board will consider to be “essential,” the rule also clarifies that this list will be considered non-exhaustive.<sup>88</sup> That is, additional terms of employment might be added to this list in future adjudications if a party can show that they are “essential.” This is important because it creates flexibility for the Board to update the joint-employer standard in light of emerging features of employment relationship.

Like the courts, the Board has long used case-by-case adjudication as a means of fleshing out and revising the meaning of the NLRA. While rule-making in this area may be appropriate to the extent it provides actual clarity to workers seeking to organize and to employers seeking to comply with the law, the fact-intensive nature of joint-employment determinations makes it especially important to leave open the list of “essential” terms and conditions. Future Board adjudicators need space within the confines of the Act to assess

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<sup>87</sup> See Yu-Chin Hsieh, Yorghos Apostopoulos & Sevil Sönmez, *Work Conditions and Health and Well-Being of Latina Hotel Housekeepers*, J. IMMIGRANT MINORITY HEALTH (2015).

<sup>88</sup> 87 Fed. Reg. 54647.

the totality of the circumstances before deciding whether the Act requires a particular joint-employer to be present at bargaining.

#### IV. Conclusion

Pervasive subcontracting practices across the economy are undermining the right to organize in lower-paid and more dangerous jobs. Large corporations can maximize profits and deliver value to their shareholders by using subcontracting to immunize themselves from the risk of unionization, shielding their profits from collective bargaining. Workers are forced to negotiate with thinly-capitalized middlemen with no market power and very little excess profits to share with workers in the form of increased wages.<sup>89</sup> With competition between subcontractors fierce, they often yield to the company's control or illegally cut labor costs to keep their contracts.<sup>90</sup> The decline of organized labor and the stratification of the American economy over the last 45 years owes much to the failure of labor law to keep pace with this dramatic shift by the nation's largest producers to subcontracted labor.

The joint-employer doctrine is the principal legal tool available to the Board to combat these exploitative employer practices and to fulfill its responsibility to "adapt the Act to the changing patterns of industrial life." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). With this proposed rule, the Board takes one step in that direction. The expanded definition—through its promise to take into account instances of indirect and reserved control, as well as its inclusion of workplace health and safety as an essential term of employment—better effectuates the text and purpose of the NLRA by encouraging collective bargaining among staffing agency and other subcontracted workers. But the Board should go further yet in its final rule, looking closely to the relationships between lead firms and subcontractors as well as just to the relationship each has with the workers at issue. Workers employed by small, labor-only subcontractors, especially those exclusively serving a single large corporation, should be presumed to be jointly employed.

Corporations that engage low-road contractors and then look the other way or actively seek to avoid bargaining with their workers gain an unfair advantage over companies that play by the rules, resulting in a race to the bottom that rewards cheaters. It's one reason why the job quality of what were formerly middle-class jobs in America is suffering today. Without aggressive enforcement of labor rights for subcontracted workers, this second-tier workforce will find it virtually impossible to alter their second-class terms and conditions of employment at the bargaining table.

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<sup>89</sup> "Because franchisors, not franchisees, are the parties with meaningful profit margins that could be redistributed to the workforce during bargaining, they are also the linchpin to effective collective bargaining and contractual outcomes for labor unions." Andrew Elmore & Kati L. Griffith, *Franchisor Power as Employment Control*, 109 CAL L. REV. 1317, 1319 (2021).

<sup>90</sup> See David Weil, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 15 (2014).

For these reasons, we write in support of the proposed rule.

Sincerely,

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