

December 1, 2022

Roxanne L. Rothchild  
Executive Secretary  
National Labor Relations Board  
1015 Half Street, S.E.  
Washington, D.C. 20570-0001

RE: Comments on National Labor Relations Board “Standard for Determining Joint-Employer Status,” RIN 3142-AA21

Dear Ms. Rothchild,

On behalf of the Rio Grande Foundation (RGF), I am submitting comments regarding the National Labor Relations Board (NLRB) Notice of Proposed Rulemaking entitled, “Standard for Determining Joint-Employer Standard,” which was published in the Federal Register on September 7.<sup>1</sup> The proposal would effectively wipe the slate clean and start over when it comes to the rules governing who is, and who is not a joint employer under the National Labor Relations Act (NLRA). Such uncertainty in the law is bad for business and economic growth and could have a devastating impact on New Mexico and, particularly, its substantial small business community.

RGF has a significant interest in the NLRB’s proposal that would add additional obstacles to small business owners and future entrepreneurs in New Mexico and across the country. Founded in 2000, the RGF is committed to ensuring economic freedom for all New Mexicans and we are very concerned about the impact this proposal would have on our state.

New Mexico is among the poorest states in the country. Transparency, accountability, and innovation have been stifled by heavy-handed government policies and over-regulation. The NLRB’s proposal would only add another level of regulatory complexity and uncertainty for the tens of thousands of New Mexico small business owners who are growing the state’s economy and providing good jobs to its citizens. As the state tries to regain its economic footing after Covid-19, regulations like the NLRB proposed rule would force many small business owners to close and discourage other New Mexicans from joining their ranks.

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<sup>1</sup> 87 Fed. Reg. 54,641.

Latest estimates indicate there are 158,844 small businesses in New Mexico, making up 99 percent of all businesses in the state.<sup>2</sup> One in four of those New Mexico small businesses are minority owned – the fifth-highest rate in the country.<sup>3</sup> Accommodations and construction are top industries for minority-owned employers in New Mexico.<sup>4</sup>

Like many other industries prominent in New Mexico those in accommodations and construction rely on vendors to perform various tasks. For example, a small hotel often will contract with an outside firm to perform housekeeping or provide security. A small construction firm will work with a variety of specialized subcontractors on any given project. Yet, NLRB's proposed rule imposes new liabilities on businesses like these who rely on outside firms and even staffing agencies to help them run their business as efficiently and effectively as possible.

Over two years ago the NLRB published a final rule that clearly articulated a bright-line test as to who was and who was not a joint employer.<sup>5</sup> For small business owners, bright-line rules are particularly helpful, since they do not have attorneys, human resource professionals or other regulatory compliance officials at the ready to help them navigate nebulous regulatory requirements.

Yet, without even giving the 2020 final rule a chance to operate and evaluate its impact on employers and workers alike, the NLRB chose to return to an amorphous regulatory standard. As a result, New Mexico's small business community will be forced to spend thousands of dollars trying to understand and navigate the new joint employer rules that ultimately will be sorted out following years and years of litigation. Adding insult to injury, the NLRB claims that this new proposed rule will not have a significant economic impact on a substantial number of small entities.<sup>6</sup> As the U.S. Small Business Administration's Office of Advocacy rightly points out, the NLRB underestimates the compliance costs of this proposed rule for small business.<sup>7</sup>

By jettisoning the 2020 bright-line test; considering whether the employer indirectly or reserves the right to control the employees of contractors; and adding new factors, like "workplace health and safety" and "work rules and directions governing the manner, means or methods of work performance" to the list of "essential terms and conditions of employment" to be considered in the relationship, the Board is exposing small business owners to significant new liability. Even more dire, the proposed rule could encourage

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<sup>2</sup> U.S. Small Business Administration Office of Advocacy, 2021 Small Business Profile, New Mexico, <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/08/30143117/Small-Business-Economic-Profile-NM.pdf> (last visited November 30, 2022).

<sup>3</sup> New Mexico Department of Workforce Solutions, [https://www.dws.state.nm.us/Portals/0/DM/LMI/DataFocus\\_Characteristics\\_Business\\_Owners\\_NM.pdf](https://www.dws.state.nm.us/Portals/0/DM/LMI/DataFocus_Characteristics_Business_Owners_NM.pdf) (Last visited, November 30, 2022)

<sup>4</sup> Id.

<sup>5</sup> 85 Fed. Reg., 11184 (February 26, 2020)

<sup>6</sup> 87 Fed. Reg. at 54,659.

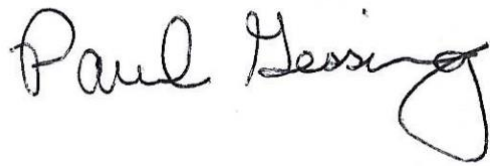
<sup>7</sup> Comment of U.S. Small Business Administration Office of Advocacy (Submitted November 29, 2022) [file:///C:/Users/karen/Downloads/NLRB-2022-0001-7502\\_attachment\\_1.pdf](file:///C:/Users/karen/Downloads/NLRB-2022-0001-7502_attachment_1.pdf) (Last visited November 30, 2022).

many bigger businesses to cancel contracts with small businesses to avoid joint employer status and the liability that comes with it.

Small businesses are the heartbeat of New Mexico. Small business owners employ most of our workers, are leaders in our communities, and, despite the odds, have realized the American dream. NLRB's proposed rule would significantly harm, if not destroy many of these businesses. For these reasons, we respectfully request that the Board withdraw this rule and reinstate the 2020 Final Rule.

Thank you for your consideration of these comments. If I can provide additional information or answer any questions you might have, please contact me.

Best regards,

A handwritten signature in black ink that reads "Paul Gessing". The signature is written in a cursive style with a large, looping 'G' at the end.

Paul J. Gessing

President