NATIONAL ASSOCIATION OF REALTORS®

December 6, 2022

Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570

Submitted via FederalRegister.gov Public Comment Online Portal

Re: Proposed Standard for Determining Joint-Employer Status Under the National Labor Relations Act (NLRA)

Dear Ms. Rothschild:

On behalf of the 1.5 million members of the National Association of REALTORS® (NAR), I submit the following comments in response to the National Labor Relations Board's (NLRB) Notice of Proposed Rulemaking to rescind and replace the final joint employer rule under the *National Labor Relations Act* (NLRA). NAR understands the importance of a consistent joint employer standard and appreciates the opportunity to comment on the Board's proposed rule.

NAR supports a joint employer standard that clearly defines the employer-employee relationship and provides predictability in business relationships. This is accomplished by ensuring the final rule does not result in one business entity bearing employment liability for another business entity's employees unless it exerts substantial direct and immediate control over those employees. NAR believes that an employer should be liable under the NLRA, only if the employer possesses and exercises direct and immediate control over the terms or conditions of another entity's employees. Such a standard better recognizes the nuances and operations of various industries, including real estate, that utilize a franchise brokerage model with an independent contractor workforce.

State laws regulate the real estate profession, and most states require real estate agents to be supervised by a broker, affiliated with a real estate brokerage, in order to practice real estate. Brokerages and the managing brokers, offer agents support, guidance, and oversight where needed and in compliance with state law, while maintaining real estate agents' classification as independent contractors. Many brokerages also have some employees, but the practicing real estate agents are primarily classified as independent contractors. Brokers may choose to operate independently or as a franchise. Operating as a franchise provides brokers many benefits, including but not limited to broad business support; training, branding, and marketing support; guidance for growth and business scalability; and access to a network of business leaders. According to NAR's research, 41 percent of real estate brokerages are affiliated with a franchise.[1] Independent brokers and those affiliated with a franchise generally have teams of agents, who are independent contractors working under the brokerage. However, brokerages that are operating under a

[1] Copyright ©2022 "Member Profile Report." *NATIONAL ASSOCIATION OF REALTORS®*. July 2022, https://www.nar.realtor/infographics/2022-member-profile-snapshot.

franchisor-franchisee model may be exposed to greater liability under the proposed joint employer rule.

NAR believes that broad adoption of a joint employer standard consistent with the *Browning-Ferris*[i] standard could have many unintended consequences and will likely lead to greater harm to real estate brokerages operating as franchises, including the potential for the misclassification of real estate agents. The proposed rule would impose liability based upon an employer's "indirect or unexercised control" over another entity's employees or work conditions, which could lead to unsubstantiated legal liability for real estate franchise brokerages. Under an expanded joint employer standard, franchisors may be liable for NLRA violations of franchisee brokerages, and other employment laws may be implicated including other federal and state labor laws causing greater challenges.

NAR is concerned about the misclassification of real estate agents that could occur due to adoption of the proposed joint employer rule. Eighty-seven percent of NAR members are classified as independent contractors with many agents choosing to be classified as independent contractors, because of the flexibility and freedom that comes with independent work. As noted previously, many brokerages have teams of independent contractor real estate agents who contract with a brokerage but have their own employees and/or interact significantly with brokerage employees.

Under the franchise brokerage model, an example of a relationship that would engender a joint-employer and misclassification risk under the Board's proposed rule might be an independent contractor agent that has contact with brokerage employees who assist with administrative tasks, marketing, transaction support, or other functions. To the extent the independent contractor agent plays a role with respect to any of the broadly defined "essential terms and conditions of employment" of such brokerage employees (e.g., directing or supervising their work), it is likely that the NLRB would find a joint-employer relationship between the brokerage and the independent contractor agent with respect to those employees under the proposed rule. Likewise, to the extent that a brokerage exercises or reserves any control over the terms and conditions of employment of employees hired by independent contractor agents, it is likely that under the proposed rule the NLRB would find the brokerage and the agents to be joint employers with respect to the agents' employees, resulting in unexpected increases in costs to the broker or to the independent contractor agent due to joint employer liability.

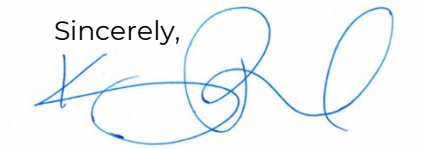
The proposed rule requires a common-law employment business relationship be established between the putative joint employer and employees; however, the rule offers minimal details or clarity on what conduct by the parties would meet this standard, aside from expressly stated common-law agency principles. To that end, the conduct of the parties can heavily impact the scope and nature of a business relationship for purposes of this rule. Terms defined in the proposed rule, including the broad reading of the "share or codetermine" definition as it relates to an employer's indirect or reserved control over employees, and the "essential terms and conditions of employment" definition for determining joint employer status are concerning for franchise real estate brokerages. NAR believes that more narrow and concise definitions will result in greater clarity and compliance.

Additionally, the fiscal impact of this proposed rule is a concern for many real estate brokerages. In a time of great uncertainty and unpredictability, many businesses including

real estate firms need stability and regulatory clarity, as they continue to ensure the dream of homeownership remains a reality for many families. Real estate professionals and their independent and franchised brokerages are all facing increasing challenges including rising housing costs, record low housing stock, supply chain issues, and inflation matters. The adoption and implementation of the proposed rule may add an additional burden for many which may result in some practitioners reconsidering their work and the franchise business model.

For the reasons stated above, NAR respectfully asks this Board to consider adopting a proposed joint employer rule that takes into consideration the uniqueness of the real estate industry, while also providing the real estate franchise community with greater clarity. NAR greatly values the NLRB's efforts in working to provide a clear and consistent joint employer standard. We welcome opportunities to work with you now and in the future on this important work. If you have any additional questions or are interested in connecting, please contact me or Nia Duggins, Senior Policy Representative at NDuggins@NAR.REALTOR or (202) 383-1085.

Sincerely,



Kenny Parcell
2023 President, National Association of REALTORS®

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[2] *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (August 27, 2015).