December 6, 2022

Submitted via www.regulations.gov
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Re: Notice of Proposed Rulemaking Regarding the Standard for Determining Joint Employer Status (87 Fed. Reg. 54,641 (Sept. 7, 2022)) (Docket No. NLRB 2022-0001)

Dear Sir or Madam:

The Energy Marketers of America (EMA or Association) submits the following comments on the National Labor Relations Board's (Board) Notice of Proposed Rulemaking (NPRM) regarding the Standard for Determining Joint Employer Status. EMA urges the Board to withdraw its NPRM, because the proposed definition is too broad and too vague to be workable in practice, including for the energy marketers represented by the Association. A functional joint employer standard must be clearly defined to require direct control to be exercised over a worker's essential terms and conditions of employment. The open-ended nature of the Board's proposed definition of "essential terms and conditions of employment" is just one compliance problem that will be created for employers, including energy marketers, if the NPRM is promulgated "as proposed." The Board should keep in place its 2020 Final Rule.

Introduction of EMA

EMA is a federation of 47 state and regional trade associations representing family-owned and operated small business energy marketers throughout the United States. Energy marketers represent a vital link in the motor and heating fuels distribution chain. EMA members supply 80 percent of all finished motor and heating fuel products sold nationwide, including renewable hydrocarbon biofuels, gasoline, diesel fuel, biofuels, heating fuel, jet fuel, kerosene, racing fuel and lubricating oils. Moreover, energy marketers represented by EMA own and operate approximately 60,000 retail motor fuel stations nationwide, supply motor fuels to an additional 40,000 gas stations and heating fuel to more than five million homes and businesses.

Expansion of the Joint Employer Standard is Unwarranted

The Board downplays the significance of the NPRM, suggesting its proposal is a simple reversion to longstanding and consistent case common law. This is disingenuous on the Board's part when, in fact, the NPRM would gut federal case law dating back to the 1980s, including *TLI/Laerco* and their progeny. The Board misstates the relevant common-law authorities and misreads those court decisions. More fundamentally, the Board relies heavily on non-common law authorities, including its own precedents, in advancing a politically motivated proposal.

Importantly, the Board does not demonstrate in the NPRM the need for opening the joint employment definition so dramatically, particularly in departing from its 2020 Final Rule. Revising the 2020 Final Rule is premature at this time, and such regulatory action cannot be sufficiently justified by the Board under the Administrative Procedures Act (APA). It is well-settled under the APA that an agency may change existing policy but must "provide a reasoned explanation for the change," *Encino Motorcars, LLC v. Navarro*, 57 U.S. 211, 221 (2016), and then "show that there are good reasons for the new policy," *Id*. at 221. Since the Board adopted the existing rule in 2020, EMA is unaware of any decision issued by the Board, applying the current joint employer framework. In the absence of any enforcement experience with the 2020 Final Rule, or any evidence to show how or why it purportedly fails to effectuate the purposes of the National Labor Relations Act, it is difficult to understand how the Board can justify a significant update to a two-year old rule.

Expansion of the Joint Employer Standard is Unworkable

EMA reads the NPRM as making virtually every company a joint employer of another company's employees. Moreover, by leaving the regulatory definition of "essential terms and conditions of employment" non-exhaustive, the Board's proposal creates uncertainty. Here are four examples of such uncertainty affecting energy marketers.

First, many energy marketers operate convenience stores where the employees of vendors of beverages, snacks, and other items come into the store and stock the coolers and shelves as part of the deliveries. Energy marketers, as convenience store operators, have agreements with their vendors that commonly set forth prudent, reasonable service expectations and requirements that have an impact on the vendor's employees. One such contractual provision allows the energy marketer to retain the right to reject the vendor's delivery driver if the driver berates the convenience store staff, threatens violence, or behaves in an inappropriate manner while at the energy marketer's facility. Under the NRPM, the Board can find that the energy marketer's contractual retention of the right to reject a driver as retaining a right to control the vendor's employment practices.

Second, as part of their retail motor fuel operations, energy marketers often dictate the time of day when transport deliveries of gasoline or diesel fuel can be made into the underground storage tanks at a particular location, largely because of the store's smaller "footprint." It is difficult, and it increases safety hazards, to have a large transport truck blocking driveway access during the store's rush hours. Merely limiting the "window" for fuel deliveries conceivably could subject the energy marketer to joint employer liability.

The NPRM, therefore, does not adequately take into consideration the reasonable and prudent needs for customers, such as the energy marketers represented by EMA, to require their vendors to meet certain standards and requirements, especially those relating to health, safety, and security. Customers should have reasonable rights to hold vendors accountable for meeting these standards and requirements and providing employees that meet them without subjecting the customers to joint employment liability. The Board should respect the freedom of vendors and customers to bargain and enter into reasonable agreements with reasonable rights for customers to hold vendors accountable for their employees.

Third, many energy marketers represented by EMA have branding agreements for the use of nationally recognizable tradenames, trademarks, and logos (mostly owned by refiners) in the distribution and sale of motor fuels. These branding agreements are *not* considered franchise agreements, and the brand licensor does not control the licensee's employees, including hiring and disciplinary actions. While the parties have contractually agreed to terms and conditions governing the presentation of the licensor's brand, none of them makes one the joint employer of the other's employees or vice versa. This type of branding or licensing agreement, wholly separate from any

kind of franchise arrangement, should be expressly exempted by the Board from the determination of joint employer status.

Fourth, energy marketers routinely contract for third-party services, such as cleaning and store maintenance. Like the first two examples above, the energy marketers can dictate the times for these services to be provided. The NPRM can affect such services in ways not contemplated by the energy marketer and its service provider, including when a third-party contract might be terminated. Any final rule, thus, should cover only *direct* control of such terms and conditions. The inclusion of the possibility of "indirect control" makes the NPRM overly vague and unworkable. To properly apply this analysis to the foregoing example, the energy marketer would have to know how valuable its contract is to the employment of the service provider's workers. If the contract is terminated, will some of the service provider's employees lose their jobs and will such job losses become the energy marketer's responsibility? There is really no way for the parties to know or properly allocate the burdens between them, especially if some of the contractual provisions do not rise to the level of direct control of essential terms and conditions of employment.

`The Board should abandon the provision in the NPRM which states that simply possessing the right to control just one of the essential terms and conditions of employment, even if such a right is never exercised, creates joint employer liability. Contractual fine print, when never actually put into force, should not result in a joint employment finding; instead, joint employer status should hinge on only the *exercised* right to control such terms or conditions of employment, not on the hypothetical ability to do so. Accordingly, the Board should retain the exhaustive list of what constitutes "essential terms and conditions of employment" found in the 2020 Final Rule.

The Board Underestimates the NPRM's Regulatory Burdens

EMA disagrees with the Board's claim in the NPRM that, if promulgated as proposed, the regulatory burden would be minimal as it would only require a one-time regulatory compliance check. This simply is not accurate. Every contract an energy marketer enters will need additional scrutiny by legal counsel for its possible exposure to a joint employer finding. Further, the vagueness of the NPRM makes it a near certainty that, at some point, every business, including the energy marketers represented by the Association, will be subject to a joint employer claim and the costs associated with such claim are significant.

Conclusion

The Board should withdraw its NPRM as unworkable in the real world of business operations. The proposed rule, if promulgated as proposed, is much too vague and unclear to enable companies, including energy marketers represented by EMA, to conduct a proper evaluation of their business practices with an eye towards a possible determination of joint employer status with their contractual partners. EMA respectfully encourages the NLRB to leave in place its 2020 Final Rule.

Sincerely,

Rob Underwood
President