

December 7, 2022

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

Roxanne Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Comments on RIN 3142-AA21: Standard for Determining Joint-Employer Status

Dear Ms. Rothschild:

The Southern Poverty Law Center (SPLC) supports the National Labor Relations Board's (the Board, or the NLRB) proposed rulemaking that revises and clarifies the responsibilities of contracting employers under the National Labor Relations Act (NLRA, or the Act), bringing coverage in line with the longstanding scope of common-law definitions of employer and the intent of the Act. The Board's proposed rule is especially important to workers earning low wages and in dangerous jobs, who need the protections of the NLRA the most: those who are placed in jobs via temp or staffing agencies, and those who work in heavily contracted janitorial, construction, delivery, manufacturing, meat processing, home care, and warehousing jobs, to name a few.

Importance of joint employer responsibility to Southern Poverty Law Center

The SPLC is a non-profit organization founded in 1971 that throughout its history has worked to make the nation's constitutional ideals a reality for everyone. The SPLC is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. The SPLC's Immigrant Justice Project seeks to address the unique legal needs of migrant workers and represents thousands of low-wage workers – including those in fissured workplaces –throughout the South. For example, SPLC has long represented workers in the agriculture and poultry processing industries, both of which rely heavily on subcontracted workers. Much of SPLC's work on behalf of migrant workers has involved holding fractured workplaces accountable for the abuses suffered by its employees. This entails untangling a web of corporate entities, alter-egos, contractors, and sub-contractors. The SPLC's experience challenging these abuses has made one thing clear: When a company decides to subcontract functions of its business, while structuring its contract in a way that functionally sets the terms and conditions for its subcontractors' workers, some form of liability for the payment and treatment of those workers should follow.

In today's economy, corporations operating in lower-wage industries are using subcontracting arrangements that can result in degraded working conditions and diminished worker access to collective action and bargaining.¹ Companies that retain and share control over working conditions at a job should share the responsibility for complying with basic worker protections and for bargaining over job conditions. When operating correctly, joint employment results in better overall protections for workers and promotes worker voice on the job.

There are currently 3.2 million temporary staffing agency jobs in the U.S.² The past decade has seen this work (as measured by aggregate work hours and total number of jobs) grow faster than work overall,³ and temporary and staffing work has shifted from companies using temp and staffing placements primarily in clerical work to using them in more hazardous industries, such as construction, janitorial services, and logistics.⁴ Outsourced workers earn less than their direct-hire counterparts; the wage penalty is more than 21 percent in manufacturing jobs, more than 33 percent in security jobs, and more than 47 percent in teaching jobs.⁵ In addition, staffing and temporary agency workers often receive insufficient safety training and are more vulnerable to retaliation for reporting injuries than workers in traditional employment relationships.⁶

If workers don't know who their employer is and enforcement agencies fail to name companies that are truly calling the shots at work, worker voice on the job suffers and job conditions like pay are more likely to deteriorate. In today's economy, we should be looking for ways to increase workers' bargaining power and economic security, not laying the groundwork for more sweatshops.

Poultry Processing

Industries like poultry processing, which rely heavily on low-wage immigrant workers, often subcontracted through staffing agencies, demonstrate the pitfalls of a system that does not account for indirect control. Poultry processing is dangerous work, with injury rates 60 percent higher than the

¹ See, e.g., Mark John, *Workers Seize Their Moment to Shift their Balance of Power*, Reuters, July 26, 2022, <https://www.reuters.com/world/the-great-reboot/workers-seize-their-moment-shift-balance-power-2022-07-26/>; *America's Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data*, NELP, June 7, 2018, <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/>.

² Current Employment Statistics, NAICS 561320, August 2022, <https://www.bls.gov/ces/data.htm>

³ National Employment Law Project analysis of Current Employment Statistics, total private sector vs. NAICS 561320, August 2012 and August 2022, <https://www.bls.gov/ces/data.htm>.

⁴ National Employment Law Project analysis of Occupational Employment and Wage Statistics, 2014 to 2021, <https://www.bls.gov/oes/>.

⁵ National Employment Law Project analysis of Occupational Employment and Wage Statistics, 2021, <https://www.bls.gov/oes/>; *America's Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data*, National Employment Law Project, Jun. 7, 2018, <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/>; Temp Worker Justice, Chicago Workers Collaborative, Mississippi Worker Center for Human Rights, National Employment Law Project, New Labor, North Carolina Justice Center, and Warehouse Workers for Justice, *Temp Workers Demand Good Jobs*, Feb. 2022, <https://s27147.pcdn.co/wp-content/uploads/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf>.

⁶ Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America's Workers*, Jun. 10, 2014, at 11, <https://www.nelp.org/wp-content/uploads/2015/02/Temped-Out.pdf>; Temp Worker Justice, Chicago Workers Collaborative, Mississippi Worker Center for Human Rights, National Employment Law Project, New Labor, North Carolina Justice Center, and Warehouse Workers for Justice, *Temp Workers Demand Good Jobs*, Feb. 2022, <https://s27147.pcdn.co/wp-content/uploads/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf>.

national average.⁷ Because workers perform repetitive movements tens of thousands of times per day, they experience high rates of musculoskeletal disorders, especially carpal tunnel syndrome and tendonitis.^{8,9} These injuries result directly from conditions dictated by the poultry plant, not the staffing agency that purportedly employs the workers. Of particular importance is line speed, the rate at which birds move past workers on conveyor belts on the “disassembly line.” Although current regulations allow poultry plants to run the lines at punishing speeds of up to 140 birds per minute, the poultry industry has repeatedly lobbied for faster line speeds.¹⁰ Given the importance of line speeds to worker injury, any meaningful improvement in working conditions requires poultry companies to come to the bargaining table, not to avoid accountability through subcontractors.

In numerous SPLC cases regarding wage theft, sexual harassment, and other forms of discrimination, large poultry processing companies have attempted to evade liability by claiming that the staffing agency is the sole employer. Staffing agencies, meanwhile, have argued that they lack any ability to implement meaningful change at the worksite, since conditions are determined by the poultry company. This shell game allows poultry processors to maintain a high level of control over working conditions while insulating themselves from liability when those conditions harm workers.

U.S. Guestworker Programs

Subcontracting structures in U.S. guestworker programs also demonstrate the importance of accounting for indirect control of workers. The H-2 Program permits migrant guestworkers to come to the United States if a U.S. company approved for such visas contracts with the putative guestworker while they are still in their native country. H-2B visas are granted to workers of employers that attest that their underlying need is one-time, seasonal, or intermittent.¹¹ H-2B guestworkers are ubiquitous in industries

⁷ Shayla Thompson & Deborah Berkowitz, *USDA Allows 15 Poultry Plants to Raise Line Speeds, Exacerbating Risk of COVID-19 Outbreaks and Injury*, National Employment Law Project, Jun. 17, 2020, <https://www.nelp.org/publication/usda-allows-poultry-plants-raise-line-speeds-exacerbating-risk-covid-19-outbreaks-injury/>; see also Remington L. Nevin, Jon Bernt, & Michael Hodgson, *Association of Poultry Processing Industry Exposures with Reports of Occupational Finger Amputations: Results of an Analysis of OSHA Severe Injury Report (SIR) Data*, *J Occup Environ Med.*, Oct. 2017, <https://pubmed.ncbi.nlm.nih.gov/28820861/>; Kristin Musolin, Jessica G. Ramsey, James T. Wassell, David L. Hard, & Charles Mueller, *Evaluation of Musculoskeletal Disorders and Traumatic Injuries Among Employees at a Poultry Processing Plant*, National Institute for Occupational Safety and Health, Mar. 2014, <https://www.cdc.gov/niosh/hhe/reports/pdfs/2012-0125-3204.pdf>.

⁸ *Id.*; see also Jessica G. Ramsey, Kristin Musolin, & Charles Mueller, *Evaluation of Carpal Tunnel Syndrome and Other Musculoskeletal Disorders among Employees at a Poultry Processing Plant*, Jun. 2015, <https://www.cdc.gov/niosh/hhe/reports/pdfs/2014-0040-3232.pdf>; Southern Poverty Law Center, *Unsafe at These Speeds*, 2013, <https://www.splcenter.org/20130228/unsafe-these-speeds>.

⁹ Official data on workplace injuries in poultry are likely an undercount due to underreporting of workplace injuries. See, e.g., Southern Poverty Law Center, *Unsafe at These Speeds*, 2013, <https://www.splcenter.org/20130228/unsafe-these-speeds>.

¹⁰ See, e.g., Nicole Erwin, *USDA Denies Poultry Industry’s Request to Speed Up the Slaughter Line*, National Public Radio, Jan. 31, 2018, <https://www.npr.org/sections/thesalt/2018/01/31/581956147/usda-denies-poultry-industrys-request-to-speed-up-the-slaughter-line>.

¹¹ 20 C.F.R. § 655.6(a) (2016) (indicating that the “employer ... must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary” (emphasis added)); see also 8 C.F.R. § 214.2(h)(6)(ii)(B) (2016) (indicating the employer’s need is considered temporary if justified to the Secretary as either a one-time occurrence, a seasonal need, a peak-load need, or an intermittent need, as defined by the Department of Homeland Security).

such as landscaping, forestry, hospitality, amusement parks, and food processing.¹² Similarly, the J-visa, ostensibly for cultural exchange visitors, functions as a source of low-wage migrant labor, primarily in the hospitality industry.¹³

It is no surprise that when companies demand lower prices from their labor and production suppliers, bringing in migrant labor is one way that those suppliers reduce costs to remain competitive. Rather than travel to another country to hire guestworkers, most employers use intermediaries such as staffing agencies for recruitment purposes.¹⁴ Indeed, guestworkers are regularly far removed from the company which benefits most from their labor. A company may contract with a recruitment or staffing agency in the United States, which subcontracts to a nationwide recruitment firm in a foreign country, which sends the order to a local broker to find the requested workers.¹⁵ Indeed, staffing agencies generally recruit guestworkers, process their immigration documents, and transport them to the location where they will work. These intermediaries remain the guestworkers' employers of record while leasing them as laborers to other companies. A company that recruits guestworkers directly finds itself liable for any violation of U.S. law occurring during that process. By contrast, using a subcontractor almost always insulates the company from liability.

Eliminating bad practices and bad actors from this system requires holding as many links in the chain as possible liable for the conduct of their intermediaries. Joint employment improves compliance by ensuring that corporations cannot skirt the law simply by outsourcing responsibility for their workers.

The proposed rule provides clear guidance about the coverage of joint employers under the common-law standard and the statutory intent of the National Labor Relations Act.

Labor and employment laws have long held that, where more than one employer has the right to control the terms and conditions of a job, they may be liable as joint employers. More than one employer can be found responsible, jointly with another, so that companies provide better oversight of working conditions, and so that the right parties are around the bargaining table. Most of these laws have had

¹² See Emp'y & Training Admin. U.S. Dep't of Labor, Office of Foreign Labor Contracting: h-2B Temporary Non-Agricultural Labor Certification Program – Selected Statistics, FY 2022 (2022), https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2022_Q4.pdf (including a chart illustrating that the landscaping and grounds keeping industry accounted for 37.1% of H-2B labor certifications granted in 2022, while forestry workers, amusement park staff, and hotel housekeepers each received five to eight percent of labor certifications during that period, and the bulk of the remaining visas were granted for construction workers, food packers and processors, cooks, wait staff, and laborers and freight movers).

¹³ Migration that Works, *Shining a Light on Summer Work: A First Look at Employers Using the Summer Work Travel Visa 2019*, <https://migrationthatworks.files.wordpress.com/2020/01/shining-a-light-on-summer-work.pdf>; Southern Poverty Law Center, *Culture Shock: The Exploitation of J-1 Cultural Exchange Workers*, 3-5, 2014, https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/j-1_report_v2_web.pdf.

¹⁴ Megan Twohey et al., *Wanted: Foreign Workers--and the Labor Brokers Accused of Illegally Profiting from Them*, Reuters Investigates, Feb. 19, 2016, 3:20 PM, <http://www.reuters.com/investigates/special-report/workers-brokers> ("Since the 2007 fiscal year, for instance, Reuters found that intermediaries were involved in helping secure visas for 80 percent of the 2 million foreign workers approved for agricultural and other low-skill jobs."); Jornaleros SAFE, *Executive Summary: Mexican H2A Farmworkers in the U.S.: The Invisible Workforce*, 7-8, 2013, https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/resource/executive_summary_jornaleros_safe.pdf (discussing the number of interviewees and percentage using intermediaries).

¹⁵ Centro de los Derechos del Migrante, *Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change*, 11-12, https://cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.

their employer definitions since their enactment, and companies have been operating under the rules for over 75 years.

The proposed rule clarifies this standard to align with longstanding interpretation and intent of the National Labor Relations Act. Importantly, it clarifies that it must consider a company's *right to* control, a cornerstone of common-law employment determinations under long-standing Supreme Court and NLRB law; and it accounts for indirect control by an employer, a common way that companies exert control over terms and conditions of a workers' job, via supervisors at a staffing company, and other lower-level direct overseers. The rule also requires consideration of instances where two companies *share* control over important terms and conditions of work.

We also support the rule's defined scope of essential terms and conditions of work: the precise essential terms will vary by job, but should of course consider wages, hours, and health and safety conditions. 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.

For these reasons, we support the proposed rule.

Sincerely,

A handwritten signature in black ink that reads "Julia Solórzano". The signature is written in a cursive, flowing style.

Julia Solórzano
Senior Staff Attorney
Southern Poverty Law Center