



December 7, 2022

Ms. Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

RE: NPRM Standard for Determining Joint-Employer Status; Docket: NLRB-2022-0001

Dear Ms. Rothschild:

FMI – The Food Industry Association appreciates the opportunity to write regarding the Standard for Determining Joint-Employer Status notice of proposed rulemaking (NPRM) (*Docket: NLRB-2022-0001*) and to express concerns about a new joint employment standard. The comments below discuss how the expansion of the essential terms and conditions regarding health and safety and hours of work and scheduling, as well as the uncertain nature of case-by-case adjudication, have the potential to upend the business-to-business operational relationships that have been at the core of the food industry for decades. Additionally, FMI is a member of the Coalition for a Democratic Workplace (CDW) and signed the comment letter filed by the coalition. The CDW letter details legal arguments as to why a new standard is not merited and is arbitrary and capricious under the law.

As the food industry association, FMI works with and on behalf of the entire industry to advance a [safer, healthier](#), and more efficient consumer food [supply chain](#). FMI brings together a wide range of members across the value chain – from retailers that sell to consumers, to producers that supply food and other products, as well as the wide variety of companies providing critical services – to amplify the collective work of the industry.

The food industry provides a wide range of full-time, part-time, seasonal, and flexible workforce opportunities in a diverse variety of careers and serves as an essential employer in every community around the country. FMI members include food retailers, wholesalers, and product suppliers who employ millions of Americans in consumer-facing, service-related businesses of all sizes. The diversity of career opportunities offered through the food industry provide individuals with employment at any stage of life and any education level.

Operational Flexibility is Key for the Food Industry

FMI member companies rely on business-to-business relationships for various operational needs. As such, we are very concerned that the NPRM would upend these vital operational arrangements by essentially deeming every business-to-business relationship as a joint employer relationship. The NPRM's significant expansion of the essential terms and conditions of a joint employer relationship to capture health and safety



standards and hours of work and scheduling would negatively impact every aspect along the food and consumer goods supply chain.

FMI members have unique needs in meeting staffing requirements in stores, distribution facilities, and divisions throughout their business operations. In addition to hiring direct employees, these businesses fulfill operational needs through vendors, contracts, and temporary staffing relationships. Utilizing the expertise and specialty skills of these separate businesses should not constitute a joint employer status.

Supermarkets carry between 30,000-50,000 individual products on store shelves. Food retailers rely on wholesalers and product suppliers/manufacturers to bring products to their stores and distributions centers. Wholesalers rely on product suppliers/manufacturers to deliver products to their warehouses and distribution facilities. Product suppliers/manufacturers rely on commodity producers and other vendors to bring ingredients and inputs to their facilities – and so forth and so on throughout the entire supply chain.

All businesses along the supply chain utilize a host of local, regional, and national vendors, contractors, and outside staffing to supply products and move goods. Retailers often rely on outside companies to provide staffing for product sorting, palletization, loading of trucks, driving products from manufacturers or warehouses to the individual retail stores, unloading, and resorting of products depending on storage requirements, such as temperature. Once unloaded and removed from the transportation and distribution cycle, products must be stocked onto shelves or into stores' many unique sections. Food retailers rely on their own employees as well as vendors, contracted help, and staffing resources to fill important gaps in stocking needs, such as specialized skills for stacking produce or bakery products, to temporary needs such as holiday or seasonal displays.

At each step on the food and consumer goods supply chain, there are numerous health and safety regulations that must be met. In fact, FMI's Safe and Quality Foods Institute ([SQFI](#)) serves as a global leader in the establishment of standards for food industry professionals. Additionally, the movement of goods from farm to manufacturing facility to distribution center to store shelf requires a complex web of scheduling to preserve the freshness and safety of food and consumer products which are presented in a manner that makes food and products appealing and easy to find for consumers with limited time to shop. Complying with health and safety standards and laws and coordinating hours of work and scheduling between businesses along the supply chain should not be considered essential terms and conditions of a joint employer standard.

Adapting to Supply Chain Challenges and Consumer Demands in an Evolving Economy

The food industry is ever evolving due to many factors including [supply chain challenges](#), [consumer trends and demands](#), and [economic conditions](#). The staffing needs of manufacturing, warehousing, and retailing must remain flexible to meet these changes and demands. The nature of the NPRM's case-by-case adjudication of a joint employment standard will cause a significant amount of uncertainty for the food and consumer goods industry, as illustrated by two evolving supply chain, economic, and consumer trends – on demand delivery service and ecommerce ordering, and sourcing of local goods and in-store foodservice.





Since the onset of the pandemic, the increased demand for on demand delivery services and ecommerce ordering has [skyrocketed](#). According to our most recent [annual membership survey](#), 91% of FMI members report having online sales, compared to 50% pre-pandemic. FMI members are constantly navigating the operational needs of this increased demand from their customers. Food retailers are continually evaluating whether and how to contract with vendors for part or all home delivery and/or order fulfilling services. This includes direct-from-shelf order picking, warehouse staffing to handle ecommerce orders, and last mile delivery to customers' homes. The decisions that go into these staffing needs are constant and evolving and for regional and national grocery stores, often made at a local level based on consumer demand.

Additionally, food retailers have experienced an increased demand for locally sourced food and products, and [in-store foodservices](#), such as chef prepared stations and grab-and-go options. Local products such as produce, specialty jams and sauces, and baked goods are often sourced from small businesses and vendors. Fresh prepared foods and grab-and-go options are often produced by or sourced from local small businesses and vendors.

The decisions to allocate additional workforce – whether by direct employment or through vendors, contracts or staffing firms – to handle increased ecommerce, locally-sourced, and foodservice demands of American consumers is of the utmost importance to FMI members. Uncertainty about whether these staffing decisions and business-to-business relationships, some of which are with local, small vendors, would trigger a joint employer adjudication is very unsettling.

Conclusion

To reiterate, at the heart of the food industry is our commitment to a safer, healthier, and more efficient consumer food supply chain. The proposed new joint employer standard has the potential to significantly disrupt the food and consumer goods supply chain by deeming any business-to-business relationship that factors in health and safety standards and hours of work and scheduling as a joint employer relationship. Additionally, the nature of the case-by-case adjudication under the NPRM does not give FMI members the certainty needed to address [current and future consumer trends](#), [supply chain challenges](#), and [evolving economic conditions](#). For these reasons and others articulated in the CDW letter, the NPRM is a vast overreach and should not be implemented.

Sincerely,

A handwritten signature in black ink that reads 'Christine Pollack'.

Christine Pollack
Vice President, Government Relations

