



December 5, 2022

Submitted via www.regulations.gov

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

Re: Comments Regarding NLRB's Notice of Proposed Rulemaking on the Standard for Determining Joint-Employer Status, RIN 3142-AA21

Dear Ms. Rothschild:

Jobs With Justice and Governing for Impact (“GFI”) submit this comment on the National Labor Relations Board’s (“Board” or “NLRB”) notice of proposed rulemaking “Standard for Determining Joint-Employer Status” RIN 3142-AA21; Fed Reg. Vol. 87, 54641 (September 7, 2022) (“Proposed Rule”). Jobs With Justice is a national network made up of thousands of organizations and individuals committed to standing with workers and communities to win workers’ rights and economic justice. GFI works to ensure that the federal government works more effectively for everyday working Americans.

We appreciate the opportunity to comment on the proposed regulations and we write in support of the Proposed Rule. The Proposed Rule will protect workers’ ability to vindicate their rights under the nation’s labor law by ensuring that the companies that possess or exert control over their workers also bear responsibilities inherent to an employment relationship.

The remainder of our comment focuses on the role that worker surveillance practices should play in a determination of joint employment. While it has always been a feature of employment, worker surveillance in the 21st century has accelerated as a result of advancements in technology. In addition to the detrimental effects they can have on workers’ health and ability to organize, some surveillance practices allow companies to tightly control workers with whom the companies disclaim having an employment relationship. Especially in situations where the surveillance itself negatively affects working conditions, this means that workers are not able to exercise their rights under labor law to file complaints and bargain with the employer who has the power to remedy their problems. Under a new joint employment standard, surveillance should be interpreted as an indicium of control over a worker’s essential terms and conditions of employment.

This comment suggests that the Board should explicitly consider the effect worker surveillance has on a finding of joint employment and amend its proposed regulatory text accordingly. Accurately accounting for the way in which surveillance technology allows companies to maintain a high degree of control over the employees of franchisees and third-party contractors could help employees of *bona fide* joint employers hold companies accountable for their employment relationships.

Specifically, this comment states:

1. The Proposed Rule returns the Board’s joint employer standard to its proper form.

2. Companies frequently use surveillance practices to control frontline workers, even while disclaiming an employment relationship with those workers. This makes it more difficult for workers to exercise their rights under the NLRA.
 - a. Companies use a variety of technologies to surveil workers.
 - b. Surveilling supposedly non-employee workers is common throughout the economy.
 - c. Companies' surveillance of non-employee workers impedes workers' ability to exercise their rights under the NLRA.
3. A company's use of pervasive worker surveillance practices should lead to a finding of "control" over "essential terms and conditions of employment" for purposes of a joint employer status determination.
 - a. Companies use surveillance practices to control workers with whom they disclaim an employment relationship.
 - b. Surveillance allows companies to directly and indirectly control several "terms and conditions of employment."
4. The Board should revise the Proposed Rule in one or both of two ways.
 - a. Supplement the regulatory definition of "control."
 - b. Add new items to the list of "essential terms and conditions of employment."

1. The Proposed Rule returns the Board's joint employer standard to its proper form.

The Proposed Rule will return the Board's standard for joint employment to the proper common law of agency test, which the Supreme Court mandated for employment determinations under the nation's labor laws.¹ The test outlined in the Proposed Rule will give clear guidance to workers and employers, and ensure that workers can hold the appropriate employer accountable in labor disputes.

The Proposed Rule reflects an accurate picture of the modern economy and new ways that companies can possess and exert control over workers. It does this by permitting evidence of direct and indirect control, considering control through an intermediary, and recognizing that an entity is an employer if it possesses the authority to control, regardless of whether that control is actually exercised.²

2. Companies frequently use surveillance practices to control frontline workers, even while disclaiming an employment relationship with those workers. This makes it more difficult for workers to exercise their rights under the NLRA.

- a. Companies use a variety of technologies to surveil workers.

Worker surveillance is a term with wide and varied definitions. One definition that appears in various forms in the literature is: "the monitoring of employees and collection of employee data, identifiable or not, for the purpose of influencing and managing the behavior of those being

¹ See *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). Affirmed recently by the D.C. Circuit in *Browning-Ferris Indus. of California, Inc. v. Nat'l Lab. Rel. Bd.*, 911 F.3d 1195, 1207 (D.C. Cir. 2018).

² NLRB, Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641, 54663 (Sept. 7, 2022) (hereinafter "Proposed Rule").

monitored.”³ The types of technologies that enable this surveillance include: handheld devices, point-of-sale systems, mobile phones, fingerprint scanners, fitness and wellness apps, cameras, microphones, body sensors, keycards, electronic communication monitoring, geolocation tracking, collaboration tools, and customer review solicitation.⁴ While intrusive surveillance of worker activity has a long history in the United States, the advent of new technologies make it easier for employers to keep close tabs on workers and simultaneously disengage from modes of management that, in a pre-digital world, would likely have been indicators of a joint employer relationship.⁵

While surveillance is increasingly prevalent in high-wage “knowledge” work,⁶ this comment primarily discusses worker surveillance in the low-wage context because, as a recent Data & Society report explained:

[L]ow-wage and hourly work—including in restaurant, retail, logistics, warehousing, agriculture, hospitality, domestic work, and healthcare—is more susceptible to datafication because these jobs’ tasks are easily measured. These workers are also often immigrants, women, and people of color, populations historically facing higher scrutiny and levels of surveillance and monitoring.⁷

Worker surveillance in the low-wage context has a variety of negative impacts on workers, including: wage theft; physical injuries as a result of the increased pace of work; mental health effects from job strain; and decreased worker power through disrupted organizing networks⁸ and “fissured” employment.⁹

³ United Tech and Allied Workers, Webpage: Employee Surveillance, (Accessed: Sept. 23, 2022), <https://utaw.tech/surveillance/what-is-employee-surveillance>. This definition is a variation on a definition of “surveillance” which has permeated the literature. See, e.g., Kirstie Ball, European Commission, *Electronic Monitoring and Surveillance in the Workplace* 10, (2021), <https://publications.jrc.ec.europa.eu/repository/handle/JRC125716> quoting David Lyon, *Surveillance Society: Monitoring Everyday Life* (2001).

⁴ Aiha Nguyen, Data & Society, *The Constant Boss: Work Under Digital Surveillance* 3 (May 2021), https://datasociety.net/wp-content/uploads/2021/05/The_Constant_Boss.pdf; Kathryn Zickuhr, *Workplace surveillance is becoming the new normal for U.S. workers* 4, Washington Center for Equitable Growth (Aug. 2021), <https://equitablegrowth.org/wp-content/uploads/2021/08/081821-worker-surv-report.pdf>.

⁵ For example, Amazon’s tight monitoring and discipline of non-employee delivery drivers through technology instead of on-site supervisors. See Spencer Soper, *Fired by Bot at Amazon: It’s You Against the Machine*, Bloomberg (Jun. 28, 2021), <https://www.bloomberg.com/news/features/2021-06-28/fired-by-bot-amazon-turns-to-machine-managers-and-workers-are-losing-out>.

⁶ See Jodi Kantor and Arya Sundaram, *The Rise of the Worker Productivity Score*, New York Times, (Aug. 14, 2022), <https://www.nytimes.com/interactive/2022/08/14/business/worker-productivity-tracking.html>.

⁷ Nguyen, *supra* note 4 at 4.

⁸ See, e.g., Daniel A. Hanley & Sally Hubbard, *Eyes Everywhere: Amazon’s Surveillance Infrastructure and Revitalizing Worker Power* 12-3, Open Markets Institute (Sept. 2020), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f4cffe23958d79eae1ab23/1598881772432/Amazon_Report_Final.pdf (reproducing quotes from an Amazon worker about how the company uses surveillance practices proactively to prevent workers from organizing).

⁹ See generally, David Weil, *The Fissured Workplace: How Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2014) and more recently, Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, *The Russell Sage Foundation Journal of the Social Sciences* 5(5):147-165 (Dec. 2019), https://www.researchgate.net/publication/337038671_Understanding_the_Present_and_Future_of_Work_in_the_Fissured_Workplace_Context.

b. Surveilling supposedly non-employee workers is common throughout the economy.

Large companies using worker surveillance practices to control non-employee workers is common and occurs with increasing frequency throughout the economy. This kind of arrangement occurs in a variety of scenarios, including franchise businesses, companies that contract out their workforce to smaller companies, and in cases where companies classify their workers as independent contractors rather than employees.

As early as the 1990s, franchisors like 7-Eleven were using point-of-sale (POS) software to maintain tight control over the employees of their franchisees by monitoring the amount of time spent at the cash register and the speed of the ordering process in order to discipline franchisees' workers.¹⁰ By the 2010s, surveillance technology enabled Domino's and McDonald's to control their non-employee workforce in similar, but more sophisticated, ways.¹¹ In addition to disciplining workers for slow order processing, the mandatory software allowed the companies to dictate worker schedules and screen job applicants from headquarters.¹² In a lawsuit against McDonald's, the NLRB's General Counsel detailed the company's use of technology to compare franchisees' labor costs to their sales.¹³

Non-franchise companies engage in similar practices. Amazon, for example, contracts out most of its delivery business to third-parties in part to avoid the costs and liabilities associated with employment relationships. While delivery drivers are employed by small, nameless contractors, Amazon has accelerated efforts to surveil drivers in order to maintain uniform operations.¹⁴ Amazon maintains a variety of requirements¹⁵ for its non-employee drivers and enforces its dictates through handheld devices that track package drop-offs and determine routes, as well as through artificial intelligence-enabled camera systems that monitor driving behavior.¹⁶ Contract drivers even report being fired via system-generated email.¹⁷ FedEx uses in-truck cameras to surveil its non-employee drivers as well.¹⁸

Though not a joint employment problem so much as a misclassification one, many companies who work with independent contractors, like rideshare apps Via and Uber, also tightly control those

¹⁰ Brian Callaci, Data & Society, Puppet Entrepreneurship: Technology and Control in Franchised Industries 6-7, 13 (Jan. 2021), <https://datasociety.net/wp-content/uploads/2021/01/DataSociety-PuppetEntrepreneurship-Final.pdf> (hereinafter "Puppet Entrepreneurship Report").

¹¹ *Id.*

¹² *Id.*

¹³ Jeffrey M. Hirsch, *Joint Employment in the United States*, Italian Labour Law e-Journal Vol. 13 at 57 (2020), https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1574&context=faculty_publications.

¹⁴ Josh Eidelson and Matt Day, *Drivers don't work for Amazon but company has lots of rules for them*, (May 5, 2021), <https://www.detroitnews.com/story/business/2021/05/05/drivers-dont-work-amazon-but-company-has-lots-rules-them/4955413001/>.

¹⁵ Including minutiae like dress codes, hair styles, and deodorant usage. *Id.*

¹⁶ Caroline O'Donovan & Ken Bensinger, *Amazon's Next-Day Delivery Has Brought Chaos And Carnage To America's Streets — But The World's Biggest Retailer Has A System To Escape The Blame*, BuzzFeed News (Sept. 6, 2019), <https://www.buzzfeednews.com/article/carolineodonovan/amazon-next-day-delivery-deaths>; Tyler Sonnemaker, *Amazon is deploying AI cameras to surveil delivery drivers '100% of the time'*, Business Insider (Feb 3, 2021), <https://www.businessinsider.com/amazon-plans-ai-cameras-surveil-delivery-drivers-netradyne-2021-2>.

¹⁷ Spencer Soper, *Fired by Bot at Amazon: It's You Against the Machine*, Bloomberg (Jun. 28, 2021), <https://www.bloomberg.com/news/features/2021-06-28/fired-by-bot-amazon-turns-to-machine-managers-and-workers-are-losing-out>.

¹⁸ Max Garland, *FedEx Ground requires video recorders in delivery vehicles. Is driver privacy a concern?*, USA Today (Apr. 30, 2021), <https://www.usatoday.com/story/money/2021/04/30/fedex-ground-ups-amazon-vehicle-recording-systems/7400325002/?gnt-cfr=1>.

workers through ride and job assignment and speed-monitoring apps, customer reviews, and cameras.¹⁹

While companies argue that using these surveillance devices increases worker safety and improves productivity, many workers attest that the burdens that the technologies impose outweigh these benefits. For example, an Amazon delivery driver explained that Amazon fines them for “traffic violations” that cannot be appealed.²⁰ These fines justify reducing salary incentives he would have received otherwise, effectively resulting in wage theft.²¹ According to this worker, the surveillance camera does not consider the context. Thus, any regular driving maneuver can be interpreted as a “traffic violation,” for example: a hard brake to avoid a collision with a car that cuts in front or a traffic light turning red even if the driver entered the intersection while the light was yellow. This example demonstrates the control enabled by these technologies – and the consequences of that control.

c. Companies’ surveillance of non-employee workers impedes workers’ ability to exercise their rights under the NLRA.

The National Labor Relations Act (“NLRA”) protects workers against an employer’s efforts to “interfere with, restrain, or coerce employees in the exercise of” their rights to organize, bargain collectively, and engage in other concerted activities for the purpose of “mutual aid or protection.”²² In some cases, an employer’s surveillance of workers’ efforts to exercise their NLRA-protected rights, or the impression thereof, can constitute an Unfair Labor Practice (“ULP”) under the NLRA.²³ A recent General Counsel memo illustrated how different types of surveillance are already illegal under the NLRA and Board case law, noting that “electronic surveillance and the breakneck pace of work set by automated systems may ... prevent employees from engaging in protected conversations about unionization or terms and conditions of employment that are a necessary precursor to” NLRA-protected concerted activity.²⁴

Companies frequently engage in worker surveillance with the purpose of disrupting worker organizing.²⁵ If a company tightly surveils its supposedly non-employee workers in a way that interferes with the exercise of their NLRA rights, those workers should have the ability to seek appropriate recourse by filing a ULP charge through the NLRB’s administrative adjudication system. However, that recourse may not be available if that same company is able to avoid joint employer status. If the company is allowed to disclaim having an employment relationship, the workers can only file charges against their contractor or franchisee employer who, of course, does not direct or

¹⁹ Mary Wisniewski, *Uber says monitoring drivers improves safety, but drivers have mixed views*, Chicago Tribune (Dec. 19, 2016), <https://www.chicagotribune.com/news/breaking/ct-uber-telematics-getting-around-20161218-column.html>.

²⁰ Author interview with New Jersey-based Amazon delivery driver, (Nov. 14, 2022).

²¹ Amazon claims that these deductions are not wage theft because workers sign the fines they are given. However, these workers are coerced to sign under the penalty of losing their jobs.

²² 29 U.S.C. § 158(a)(1), 157.

²³ For example, McDonald’s franchise owners settled ULP surveillance charges in connection with their efforts to surveil workers who were involved in union organizing. See Brief of the NLRB General Counsel, *Fast Food Workers Comm. v. Nat’l Lab. Rel. Bd.*, 31 F.4th 807 (D.C. Cir. 2022),

https://fingfx.thomsonreuters.com/gfx/legaldocs/gkvlgmzmpb/EMPLOYMENT_NLRB_MCDONALDS_brief.pdf.

²⁴ See generally, GC 23-02, *Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights*, (Oct. 31, 2022).

²⁵ See, e.g., Jo Constantz, *They Were Spying On Us’: Amazon, Walmart, Use Surveillance Technology to Bust Unions*, Newsweek (Dec. 13, 2021), <https://www.newsweek.com/they-were-spying-us-amazon-walmart-use-surveillance-technology-bust-unions-1658603>.

have the power to alter the lead company’s surveillance operation. This arrangement leaves workers without an adequate remedy.

According to an Amazon delivery driver who experienced the change from an unsurveilled to a surveilled environment, workers’ interactions immediately changed, and not for the better.²⁶ He claimed that, before the installation of the artificial intelligence-enabled cameras, he and his colleagues discussed their working conditions, management relations, salaries, etcetera. The surveillance cut off those discussions. “It’s like everyone became suspicious of everyone else,” he said. Even if Amazon’s claims that it does not spy on workers to prevent them from organizing are correct, the mere existence of such surveillance devices effectively creates the same infringement on workers’ rights under labor law.

Perhaps more broadly, this arrangement makes it more difficult for workers to bargain collectively with the appropriate employer over working conditions. Companies engage in “domestic outsourcing” through subcontracting and franchising²⁷ in part to avoid collective bargaining with organized employees. If those same companies tightly surveil workers, and that surveillance causes privacy, safety, or other problems in the workplace,²⁸ workers may not be able to bargain with the employer who has the most significant control over these working conditions.

3. A company’s use of pervasive worker surveillance practices should weigh in favor of a finding of “control” over “essential terms and conditions of employment.”

The extent to which companies use worker surveillance technology is an excellent indicator of whether they, in the words of the Proposed Rule, “possess[] the authority to control or exercise[] the power to control” a worker’s essential terms and conditions of employment.²⁹

²⁶ Author interview with New Jersey-based Amazon delivery driver, (Nov. 14, 2022).

²⁷ Kathryn Zickuhr, *Workplace surveillance is becoming the new normal for U.S. workers* 6, Washington Center for Equitable Growth (Aug. 2021), <https://equitablegrowth.org/wp-content/uploads/2021/08/081821-worker-surv-report.pdf>.

²⁸ “Domestic outsourcing,” accelerated by surveillance technology, also leads to declining job quality and wages. Kate Bahn, *Research finds the domestic outsourcing of jobs leads to declining U.S. job quality and lower wages*, (Aug. 21, 2019), <https://equitablegrowth.org/research-finds-the-domestic-outsourcing-of-jobs-leads-to-declining-u-s-job-quality-and-lower-wages/>.

²⁹ Proposed Rule at 54663.

- a. Companies use surveillance practices to control workers with whom they disclaim an employment relationship.

Courts across the country have recognized that worker monitoring should play a role in determining whether a company possesses or exerts control for the purposes of establishing an employment relationship.³⁰ So has the NLRB's General Counsel.³¹

Indeed, the entire reason worker surveillance technology is so popular among companies is the control it affords them over frontline workers,³² even while the companies may disclaim having a traditional employment relationship with those workers.

In responding to criticism about invasive worker surveillance practices, companies come very close to conceding this same point. Amazon, for example, emphasized safety when defending its decision to install the cameras in the vans of its delivery contractors and require drivers to consent to biometric monitoring or be fired.³³ While enhancing safety is a laudable goal, attempting to do so by installing an artificial intelligence-aided system with four always-on cameras and oral warnings for unsafe driving behavior is clearly an attempt to control the driver.³⁴

More generally, purveyors of monitoring technology insist that monitoring can make workers more productive.³⁵ While experimental evidence on its efficacy is sparse and conflicting, one study of chain restaurants that implemented a particular surveillance system found that the technology decreased worker theft and increased revenues through improved job performance *because* of the increased monitoring.³⁶ Again, decreasing theft and increasing job performance are reasonable objectives for a business, but the fact that they occur as a result of new monitoring necessarily implies the exercise of, or authority to exercise, control.³⁷ Indeed, it is difficult to imagine companies surveilling workers for purposes other than possessing or exercising control.

³⁰ See, e.g., *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1316 (11th Cir. 2013) (dismissing a business's claims that "its quality control measures and regulation of schedules stemmed from 'the nature of the business' and are therefore not the type of control that is relevant to the economic dependence inquiry. We disagree. The economic reality inquiry requires us to examine the nature and degree of the alleged employer's control, not why the alleged employer exercised such control."); *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1102 (9th Cir. 2014) (explaining that the employer's practice of "monitoring the progress of each driver" weighed in favor of a finding of control); *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1150–51 (N.D. Cal. 2015) (discussing evidence that "Uber monitors its drivers to ensure compliance with Uber's many quality control 'suggestions'" and therefore may exert control like that in an employer-employee relationship).

³¹ See Jeffrey M. Hirsch, *Joint Employment in the United States*, Italian Labour Law e-Journal Vol. 13 at 57 (2020), https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1574&context=faculty_publications (discussing the NLRB General Counsel's complaints against McDonald's that explained the company's use of monitoring technology to track sales, set shift numbers, determine work schedules, and screen applicants).

³² One article about the benefits of worker surveillance even applauded the "lack of widespread regulation" as a reason to engage in such practices. Lynne Haley Rose, *The Advantages of Surveillance in the Workplace*, (Accessed Oct. 3, 2022), <https://smallbusiness.chron.com/advantages-surveillance-workplace-21607.html>.

³³ Tyler Sonnemaker, *Amazon is deploying AI cameras to surveil delivery drivers '100% of the time'*, (Feb 3, 2021), <https://www.businessinsider.com/amazon-plans-ai-cameras-surveil-delivery-drivers-netradyne-2021-2>.

³⁴ *Id.*

³⁵ Ellen Ruppel Shell, *The Employer-Surveillance State*, *The Atlantic*, (Oct. 15, 2018), <https://www.theatlantic.com/business/archive/2018/10/employee-surveillance/568159/>.

³⁶ Andrew McAfee, *In Praise of Electronically Monitoring Employees*, *Harvard Business Review* (Oct. 24, 2013), <https://hbr.org/2013/10/in-praise-of-electronically-monitoring-employees>.

³⁷ See *Scantland*, 721 F.3d at 1316 (explaining that the fact and extent of control, not the reason for it, is relevant).

While its statutory test for employment is more capacious than the NLRB's, the Department of Labor ("DOL") has also considered the effect of surveillance on a finding of control. As a 2015 DOL Administrator's Interpretation about worker classification put it: "[t]echnological advances and enhanced monitoring mechanisms may encourage companies to engage workers not as employees yet maintain stringent control over aspects of the workers' jobs, from their schedules, to the way that they dress, to the tasks that they carry out."³⁸ In its October 2022 proposed rule for employee versus independent contractor classification, the Department similarly highlighted surveillance practices, explaining that "control may be exercised through nontraditional means such as automated systems that monitor performance, but it can be found to be control nonetheless."³⁹ This kind of liability evasion-plus-control two-step is just as relevant to the joint employer context as it is to worker misclassification.⁴⁰

b. Surveillance allows companies to directly and indirectly control several "terms and conditions of employment."

The Proposed Rule defines "essential terms and conditions of employment" to include: "wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; **discipline; workplace health and safety; supervision;** assignment; and work rules and directions governing the manner, means, or methods of work performance" (emphasis added).⁴¹ While surveillance impacts each of these terms and conditions in some way, this section will focus on the three bolded items.

The detrimental effects of increased worker surveillance on worker health and safety are well documented. More intense surveillance is associated with greater risk of physical injury as a result of the increased pace of work. The rates of physical injury in Amazon warehouses and meat processing facilities, for example, are substantially higher than the industry average due, in part, to increased use of surveillance.⁴² Not only are physical injuries as a result of surveillance and automated management a significant concern, so too are mental ones. Surveillance practices increase the risk of mental health problems primarily through "job strain," which occurs when workers have high demands at work but have little control over that work.⁴³ Workers surveyed by Human Impact Partners reported that "constant surveillance results in stress, anxiety, and depression."⁴⁴ In 1987, the now-defunct United States Office of Technology Assessment issued a report that highlighted how "monitoring

³⁸ U.S. Department of Labor, Administrator's Interpretation No. 2015-1 9, (Jul. 15, 2015), https://www.blr.com/html_email/ai2015-1.pdf.

³⁹ DOL, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218, 62250 (Oct. 13, 2022) (hereinafter "DOL Proposed IC Rule")

⁴⁰ As noted, the DOL's statutory test under the Fair Labor Standards Act ("FLSA") for employment is broader than the NLRB's common law of agency test. In this document, references to DOL's test for employment is meant to illustrate the relationship between surveillance practices and control, not to imply that the NLRB's test should be the same as DOL's.

⁴¹ Proposed Rule at 54663.

⁴² See Reveal, *Find Out what injuries are like at the Amazon warehouse that handled your packages*, (Nov. 25, 2019), <https://revealnews.org/article/find-out-what-injuries-are-like-at-the-amazon-warehouse-that-handled-your-packages/>; see also Saima Akhtar, *Employers' new tools to surveil and monitor workers are historically rooted*, Washington Post (May 6, 2021), <https://www.washingtonpost.com/outlook/2021/05/06/employers-new-tools-surveil-monitor-workers-are-historically-rooted/>.

⁴³ Matt Scherer, Center for Democracy & Technology, *Bossware May be Hazardous to Your Health 4*, (Jul. 29, 2021), <https://cdt.org/wp-content/uploads/2021/07/2021-07-29-Warning-Bossware-May-Be-Hazardous-To-Your-Health-Final.pdf>.

⁴⁴ Martha Ockenfels-Martinez, *Blog: Workplace surveillance harms essential workers*, Berkeley Othring & Belonging Institute (Jan. 21, 2021), <https://belonging.berkeley.edu/blog-workplace-surveillance-harms-essential-workers>.

contributes to employee stress by creating a feeling of being watched.”⁴⁵ And as previously noted, furthering workplace health and safety is often the explicit justification employers provide for imposing surveillance measures.⁴⁶

Perhaps even more direct is the bearing that worker surveillance has on “discipline” and “supervision” of workers. The entire purpose of these technologies is to supervise the workers’ activities and discipline them, directly or indirectly, if they fall behind. The DOL’s recent proposed rule on independent contractor classification explained that “supervision can be maintained remotely through technology instead of, or in addition to, being performed in person.”⁴⁷ As discussed in a previous section, POS software allows franchisors like McDonald’s and Domino’s to supervise workers’ speed and discipline franchisees for slow order processing, who in turn are contractually obligated to discipline the worker at the cash register.⁴⁸ Amazon’s company-issued handheld devices for drivers who worked for third-party contractors also helped the company control performance through “supervision.”⁴⁹ The devices allowed Amazon to monitor the drivers’ progress as they delivered their packages and dictate the routes they drove.⁵⁰ As discussed above, to enhance its ability to supervise drivers, Amazon also began requiring drivers (with whom, again, Amazon would disclaim having an employment relationship) to sign consent forms to be monitored by in-van artificial intelligence-enabled cameras.⁵¹ FedEx’s cameras also enable control through “supervision.”

The fact that some of the discipline meted out as a result of surveillance comes from third-party contractors or franchisees would not undercut the finding of control. As the Proposed Rule states, “[c]ontrol exercised through an intermediary person or entity is sufficient to establish status as a joint employer.”⁵²

4. The Board should revise the Proposed Rule in one or both of two ways.

There are several ways that the Board could incorporate a discussion of the effects of worker surveillance on a joint employer determination. A previous proposed NLRB joint employer rule provided several example scenarios to illustrate how different conditions weighed on a finding of joint employment.⁵³ Another previous NLRB joint employer rule decided instead to provide more guidance and definitional language about certain concepts like “control” and “essential terms and conditions” in the regulatory text itself.⁵⁴ As discussed above, the DOL’s proposed rule on worker classification between employee and independent contractor status explained, in the regulatory text discussing the meaning of the term “control,” that “facts relevant to the employer’s control over the

⁴⁵ U.S. Congress, Office of Technology Assessment, *The Electronic Supervisor: New Technology, New Tensions*, OTA-CIT-333 (Washington, DC: U.S. Government Printing Office, Sept. 1987), <https://ota.fas.org/reports/8708.pdf>.

⁴⁶ See *supra* at 7.

⁴⁷ DOL Proposed IC Rule at 62250.

⁴⁸ As well as the authority to prescribe how franchisees set employee schedules and screen employees. Puppet Entrepreneurship Report at 7.

⁴⁹ Caroline O’Donovan & Ken Bensinger, *Amazon’s Next-Day Delivery Has Brought Chaos And Carnage To America’s Streets — But The World’s Biggest Retailer Has A System To Escape The Blame*, BuzzFeed News (Sept. 6, 2019), <https://www.buzzfeednews.com/article/carolineodonovan/amazon-next-day-delivery-deaths>.

⁵⁰ *Id.*

⁵¹ Lauren Kaori Gurley, *Amazon Delivery Drivers Forced to Sign ‘Biometric Consent’ Form or Lose Job*, Vice (Mar. 23, 2021), <https://www.vice.com/en/article/dy8n3j/amazon-delivery-drivers-forced-to-sign-biometric-consent-form-or-lose-job>.

⁵² Proposed Rule at 54663.

⁵³ NLRB, *The Standard for Determining Joint-Employer Status*, 83 FR 46697, 46697 (Sept. 14, 2018).

⁵⁴ NLRB, *The Standard for Determining Joint-Employer Status*, 85 FR 11184, 11187 (Feb. 26, 2020).

worker include whether the employer uses technological means of supervision (such as by means of a device or electronically)” or “reserves the right to supervise or discipline workers.”⁵⁵

In the final joint employment rule, the Board could:

- a. Supplement the regulatory definition of “control.”

The Board’s rule could track the Department of Labor’s independent contractor proposed rule and change the definition of “control” to include worker monitoring and surveillance. The NLRB could change the language at the Proposed Rule’s 29 CFR § 103.40(e) from:

Whether an employer possesses the authority to control or exercises the power to control one or more of the employees' terms and conditions of employment is determined under common-law agency principles. Possessing the authority to control is sufficient to establish status as a joint employer, regardless of whether control is exercised. Exercising the power to control indirectly is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly. Control exercised through an intermediary person or entity is sufficient to establish status as a joint employer.⁵⁶

to (changes in bold):

Whether an employer possesses the authority to control or exercises the power to control one or more of the employees' terms and conditions of employment is determined under common-law agency principles. Possessing the authority to control is sufficient to establish status as a joint employer, regardless of whether control is exercised. Exercising the power to control indirectly is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly. Control exercised through an intermediary person or entity is sufficient to establish status as a joint employer. **Control possessed or exercised through worker monitoring or surveillance practices and technologies can be sufficient to establish status as a joint employer.**⁵⁷

- b. Add new items to the list of “essential terms and conditions of employment.”

Another straightforward way to include this factor would be to make a simple wording change to add surveillance and monitoring to another part of the regulatory text. In the Proposed Rule’s suggested regulatory language at 29 C.F.R. § 103.40(d) that defines “essential terms and conditions,” the text could change from:

“Essential terms and conditions of employment” will generally include, but are not limited to: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance.⁵⁸

⁵⁵ DOL IC Proposed Rule at 62275.

⁵⁶ *Id.*

⁵⁷ This additional language, of course, should not be interpreted as *limiting* the circumstances in which a company can be found to possess control. Rather, as with the phrase that precedes it, it is merely an example of an arrangement that can contribute to a finding of control.

⁵⁸ Proposed Rule at 54663.

to (changes in bold):

“Essential terms and conditions of employment” will generally include, but are not limited to: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; **surveillance; monitoring;** and work rules and directions governing the manner, means, or methods of work performance.

Alternatively, the Board could make the Proposed Rule’s list of “essential terms and conditions” match the NLRB’s existing category of mandatory subjects of bargaining. Worker surveillance would still be considered in this formulation of the joint employment rule because, as the General Counsel’s recent memo explains, employers must “provide information about, and bargain over, the implementation of tracking technologies and their use of the data they accumulate.”⁵⁹ Several Board and affirming court decisions have found the implementation of surveillance activities to be a mandatory bargaining subject.⁶⁰

5. Conclusion

We commend the Board on its solid Proposed Rule that will provide protection to a wide range of workers and urge the Board to consider highlighting the role worker surveillance plays in determining whether an entity is a joint employer for the purposes of NLRA enforcement.

Sincerely,

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Additional endorsing organizations:
Tompkins County (NY) Workers Center
DC Jobs With Justice
Arizona Jobs With Justice
Chicago Jobs With Justice

⁵⁹ GC 23-02, *Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights* 5, (Oct. 31, 2022).

⁶⁰ See, e.g., *Anheuser-Busch, Inc.*, 342 NLRB 560, 560 (2004), *enforced in pertinent part sub nom. Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36 (D.C. Cir. 2005); *Colgate-Palmolive Co.*, 323 NLRB 515 (1997).