Federation of American Hospitals®

Charles N. Kahn III
President and CEO

December 7, 2022

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

RE: RIN 3142-AA21; Standard for Determining Joint Employer Status; Notice of Proposed Rulemaking; 87 Fed. Reg. 172 (Sep. 7, 2022)

Dear Ms. Rothschild:

The Federation of American Hospitals (FAH) is the national representative of more than 1,000 leading tax-paying community hospitals and health systems throughout the United States. FAH members provide patients and communities with access to high-quality, affordable care in both urban and rural areas across 46 states, plus Washington, DC and Puerto Rico. Our members include teaching, acute, inpatient rehabilitation, behavioral health, and long-term care hospitals and provide a wide range of inpatient, ambulatory, post-acute, emergency, children's, and cancer services. The FAH appreciates the opportunity to provide comments to the National Labor Relations Board (NLRB) regarding the above-referenced Notice of Proposed Rulemaking (Proposed Rule) on standards to be used in determining joint employer status under the National Labor Relations Act.

THE PROPOSED RULE DOES NOT ACCOUNT FOR THE UNIQUE NATURE OF HOSPITALS AND HEALTH SYSTEMS

Hospitals and related healthcare systems occupy a unique position in the world of labor relations. Unlike other industries, hospitals must operate under an extensive labyrinth of both federal and state regulations which tightly control the manner in which hospitals must operate. Additional regulations and controls, including regarding hospitals' revenues, are imposed by

federal and state reimbursement programs such as Medicare and Medicaid, as well as the Children's Health Insurance Program (CHIP), and other regulatory accreditation organizations, such as The Joint Commission.

The NLRB for decades has consistently acknowledged that hospitals and health systems are unique and must be treated differently than other industries to ensure continued access to medical care for patients. This recognition, for example, includes the NLRB's promulgation of specific industry-wide regulations for hospitals regarding collective bargaining units.[1] Yet, the Proposed Rule makes no consideration for the unique status that hospitals occupy and as such, if finalized, would significantly threaten the efficient operation of hospitals which are already strained by virtue of the COVID-19 public health emergency (PHE) and chronic labor shortages of skilled personnel, which ultimately would create undue risk for patient care. Thus, in consideration of hospitals' unique mission in treating patients, we urge the NLRB to exempt hospitals and health systems from any final rule.

Further, the Proposed Rule does not consider how its provisions would impact federal and state laws and regulations, such as those under the Medicare and Medicaid programs, that mandate payment amounts and formulas for setting those amounts. In establishing payment amounts, these formulas take into account many inputs, for example, employees wages and benefits, which would be impacted by the Proposed Rule's broadened parameters for hospital joint employer status. This deficiency should be addressed and further highlights that any final rule should not apply to hospitals and health systems.

THE PROPOSED RULE IS OVERLY BROAD AND UNWORKABLE FOR HOSPITALS

The Proposed Rule is much too broad, especially for hospital and health systems. Under the proposal, joint employer status is conferred even if an employer only possesses the authority to control (whether directly, indirectly, or both) regardless of whether that control is exercised. Thus, merely reserving the right to control a workers' terms and conditions of employment, even though an employer may never exercise such control, would result in a joint employer relationship. Since the Proposed Rule would make indirect or reserved control a dispositive indicator of joint-employer status, the Proposed Rule would far exceed common law principles, even though it seems to endorse these principles.

In addition, the Proposed Rule adds a new layer of risk and difficulty in the operations of running a hospital which diverts resources from patient care. To effectively and efficiently provide a wide range of services to patients, hospitals must contract for services across a vast array of independent vendors whose employees' must perform their work on-site at the hospital. Virtually every hospital in America utilizes outside vendors that employ and contract with hospitals to supply a variety of skill sets that are essential to the operation of the hospital. These include, but are not limited to, services such as highly skilled clinical personnel, including

[1] *See* 54 Fed. Reg. 16,336 (1989); S*ee also* 29 C.F.R. § 103.30 (1990).

physicians, nurses, and various types of medical technicians, as well as other crucially important professionals who provide operations such as food preparation, janitorial services, security, and groundkeepers. Hospitals must have flexibility and agility in contracting with these vendors so that they are positioned on an ongoing basis to provide quality of care for patients and save lives 24/7 everyday, including during a crisis, disaster, or a pandemic, such as the current COVID-19 PHE.

Given the extensive regulatory framework imposed on hospitals, hospital management is required by law to maintain some control over some aspects of their contractors' employees who provide services on site. Some of the numerous forms of required control are background checks, security clearance, verification of training and licensure and vaccination requirements. These issues are best exemplified when, in response to the COVID-19 PHE, the Department of Health and Human Services' Centers for Medicare & Medicaid Services (CMS) mandated that all hospitals receiving Medicare and Medicaid reimbursement ensure that all personnel on a hospital site receive COVID-19 vaccinations. Under the mandate, hospitals were specifically charged by federal regulation with enforcement of this requirement over all vendor employees who came on site.

Yet, under the Proposed Rule, this control aspect could render a hospital a joint employer with every one of its vendors' employees. It is unreasonable and unworkable to expect that hospitals and health systems should or could be a joint employer with every one of its vendors, whose employees are required to be on site to provide care to patients. For example, if numerous hospitals contract with the same nurse staffing company, under the Proposed Rule, because each hospital or health system retains some control over aspects of the nurses assigned to its facility, the hospital could be deemed a joint employer. However, all the other hospitals using nurses from the same agency would then also be deemed a joint employer. If the nurses were or became unionized and the staffing agency was required to negotiate with a nurses' union each of the joint employers also would have to be involved. This would create a completely untenable and unworkable situation in terms of reaching a consensus agreement among all parties, who would have varied and unaligned interests. The end result would be endless litigation, along with chaos and confusion, for all involved. As discussed above, due to the unique nature of hospitals' operations and patient mission, hospitals should be exempt from any final rule.

THE PROPOSED RULE IS PROCEDURALLY PREMATURE AND UNNECESSARY

As noted by Proposed Rule's dissent, it has been just over two years since the NLRB promulgated its current joint employer rule (2020 Rule). During this time, the NLRB has not ruled on a single case related to the 2020 Rule nor has any court of law interpreted or issued an opinion on the rule. Despite these facts, the Proposed Rule seeks to completely toss aside the 2020 Rule and issue a new rule that exceeds the confines of the law as it existed prior to the 2020 Rule. Even the Proposed Rule itself states that for "nearly the entirety of the Act's history, the Board has developed its joint-employer jurisprudence through case-by-case adjudication.…The issue of common-law joint-employer status is a highly fact-specific one, which may be better

suited to individualized determination on a case-by-case basis."[2] Thus, there does not appear to be any justification or data showing need for the Proposed Rule nor has the NLRB demonstrated why such a drastic departure from long established legal principles is necessary and why rulemaking rather than administrative adjudication is necessary.

Further, the Proposed Rule offers little to no practical guidance for how key terms and aspects of the rule apply for purposes of joint employment, such as essential terms and conditions of employment or how an employer can avoid becoming a joint employer. Instead, the Proposed Rule merely recites that "common law agency principles will apply" without further analysis or consideration of the practical aspects of joint employment, especially in the context of hospitals and health systems.

In light of the foregoing, we urge the NLRB consider and specifically address the impact of the Proposed Rule on hospitals and exempt hospitals and health systems from any final rule.

****

The FAH appreciates the opportunity to submit these comments on these important issues to hospitals and their patients. If you have any questions, please contact me or any member of my staff at (202) 624-1500.

Sincerely,

[2] 87 Fed. Reg. 54,644 (Sep. 7, 2022).