Federation of American Hospitals®
Charles N. Kahn III
President & CEO

December 10, 2018

John F. Ring
Chairman
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Re: RIN 3142-AA13; The Standard for Determining Joint Employer Status Under the National Labor Relations Act Proposed Rule; 83 Fed. Reg 46,681 (September 14, 2018)

Dear Chairman Ring,

The Federation of American Hospitals (FAH) appreciates the opportunity to comment on *The Standard for Determining Joint-Employer Status* proposed rule and supports the predictability and consistency in determining joint employment relationships that will come from the promulgation of an appropriate regulation. The FAH is the national representative of more than 1,000 investor-owned or managed community hospitals and health systems throughout the United States. Our members include teaching and non-teaching full-service community hospitals in urban and rural parts of America, as well as inpatient rehabilitation, psychiatric, long-term acute care, and cancer hospitals.

Today, nearly all acute care hospitals and other integrated health care organizations use a variety of independently established vendors to provide a wide range of specialized services. Because of the hands-on nature of health care services, those vendors' employees must often work on site at the hospital to perform the contracted-for services. The scope of typical health care services provided by outside vendors are varied – ranging from grounds keeping and janitorial services to highly specialized contracted physician groups that provide direct patient care. With each of these services, hospitals face the prospect of joint employment when workers are placed at the location where they perform their services. Reflective of the importance of joint employment to the health care industry is the fact that two of the examples contained in the

proposed rule involve staffing at hospitals.[1] Indeed, the potential of a joint employment relationship results from the intermingling of employees and supervisors from two different employers. Hospitals desiring to avoid joint employer liability must have definitive and certain legal and practical guidance as to what will trigger joint employer liability so they are able to structure their relationships to avoid such a finding, if they choose to do so.

The National Labor Relations Board's (the Board) decision in Browning-Ferris Industries, 363 NLRB No. 186 (2015) represented the abandonment of decades of clear and concise legal precedent for determining when two separate companies should be held to be joint employers. Prior to Browning-Ferris Industries, the Board had utilized the so-called "direct and immediate control test," which provided employers with meaningful guidance and a good degree of certainty of outcome when engaging in business relationships with vendors whose employees work on site at a hospital property. The Browning-Ferris decision abandoned this precedent and instead adopted a vague and uncertain test by holding that any employer – in this case our member hospitals – could be a joint employer if it had the ability to exercise indirect control over a vendor's employees. The Browning-Ferris standard was unrealistic and unworkable because it meant that every contractual relationship (*i.e.*, one employer pays money for the services of another employer's employees) could result in some form of control by one over the other.

In 2017, the Board overruled Browning-Ferris in Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co., 365 NLRB No. 156 (2017), thus reinstating prior precedent. While we supported the Hy-Brand decision, these drastic shifts in important Board decisions are disconcerting for employers. The legal standards surrounding a finding of joint employment are simply too important to our member organizations – and to all employers – to leave unmitigated the potential for future shifts based upon the changing composition of the Board. As such, in this case, we strongly support the Board's promulgation of a clear and concise regulation governing joint employment relationships as opposed to the Board's more traditional method of creating policy through case law.

While the FAH generally supports the proposed regulation as drafted, we believe that the regulation's clarity would be enhanced by deleting the word "or" and substituting it with the word "and" as noted in bold italics below:

> An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share ***and*** codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.

[1] 83 Fed. Reg. 46,697 examples 7 and 8 (September 14, 2018).

The FAH appreciates the opportunity to comment on the proposed rule. If you have any questions regarding our comments, please do not hesitate to contact me or a member of my staff at (202) 624-1500.

Sincerely,