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**Cognizant Technology Solutions U.S. Corporation
and Google LLC, Joint Employers and Alphabet
Workers Union—Communications Workers of
America, Local 1400.** Case 16–RC–305751

July 19, 2023

ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS WILCOX AND
PROUTY

Google LLC and Cognizant Technology Solutions U.S. Corporation’s Requests for Review¹ of the Regional Director’s Decision and Direction of Election (pertinent portions of which are attached) are denied as they raise no substantial issues warranting review.

In denying review,² we agree with the Regional Director that, under Section 103.40 of the Board’s Rules and Regulations, the Petitioner has established that Google is a joint employer of the petitioned-for employees because it “share[s] or codetermine[s] the employees’ essential terms and conditions of employment” with Cognizant. 29 CFR § 103.40(a).³ As the Regional Director found, Google possesses and exercises such substantial direct and immediate control over the employees’ supervision, benefits, and hours of work as to warrant finding that Google meaningfully affects matters relating to the employment relationship with those employees. Id.⁴

¹ We have treated Cognizant’s “joinder” as a request for review.

² The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has exercised its discretion to read the record in this case. See Board’s Rules and Regulations, Sec. 102.67(e).

³ The Board promulgated a final rule containing its current joint-employer standard on February 26, 2020. See *Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11184 (Feb. 26, 2020). As of the 2020 final rule’s April 27 effective date, the final rule’s standard has applied to all pending representation and unfair labor practice cases involving questions of joint-employer status. The Regional Director correctly applied the joint-employer standard set forth in the 2020 final rule, and we do so as well. On September 7, 2022, the Board issued a notice of proposed rulemaking proposing to rescind and replace the Board’s current standard for determining joint-employer status under the National Labor Relations Act. See *Standard for Determining Joint-Employer Status*, 87 Fed. Reg. 54641 (Sept. 7, 2022).

⁴ We do not rely on the Regional Director’s finding that the Petitioner established that Google exercises substantial direct and immediate control over direction within the meaning of Sec. 103.40(a) and (c)(8) by assigning particular employees their individual work schedules, positions, and tasks, because the record does not establish that Google assigns individual work schedules or positions, while individual employees choose their own tasks from a daily queue provided by Google. Contrary to the Employers’ arguments on brief, however, the Board does not require a showing of authority over any specific number

First, we agree with the Regional Director that Google exercises substantial direct and immediate control over the supervision of the petitioned-for employees within the meaning of Section 103.40(a), (c)(7), and (d) by actually instructing Cognizant’s employees how to perform their work.⁵ In this respect, the record shows that Google controls the manner and means of Cognizant’s employees’ performance of all their work in that it drafts and maintains “workflow training charts” which govern the details of employees’ performance of specific tasks, maintains exclusive control over the digital tools and processes that Cognizant employees use to perform the contracted-for work, and maintains tight control over the prioritization and expected rate of performance of assigned tasks. Google also exercises substantial direct and immediate control over supervision by actually issuing weekly employee performance appraisals within the meaning of Section 103.40(c)(7) through its exclusive control of the detailed quality “rubrics” under which the employees’ work is constantly evaluated. With respect to its control over the details of Cognizant employees’ performance of tasks through training and continuous evaluation, Google exercises its authority over supervision through intermediary employees of Cognizant. But because the record establishes that no intermediary Cognizant employee has discretion or authority to modify the detailed operational instructions or evaluative rubrics exclusively imposed by Google, Google’s control over supervision in these respects remains direct and immediate within the meaning of Section 103.40(a) and (c)(7).⁶ Google’s supervision of the employees’ work here bears a strong resemblance to the “high degree of detailed awareness and control of unit employees’ daily activities” that the Board found indicative of a joint-employer relationship in *Quantum Resources Corp.*, 305 NLRB

or combination of essential terms and conditions of employment as a prerequisite to a joint-employer finding. *Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11184, 11198 (Feb. 26, 2020) (Joint Employer Rule) (“[A] finding that an entity exercises ongoing supervision and direction (as the rule defines those terms) over the employees of another entity will likely suffice to establish a joint-employer relationship . . . [but] [e]vidence of control over other essential terms and conditions of employment may suffice to establish joint-employer status even absent supervision and direction”).

⁵ See Joint Employer Rule, 85 Fed. Reg. at 11226 (“Over supervision, an entity exercises direct and immediate control by actually instructing another employer’s employees how to perform their work or by actually issuing employee performance appraisals.”) (citing *International Transfer of Florida, Inc.*, 305 NLRB 150, 150 (1991)).

⁶ See Joint Employer Rule, 85 Fed. Reg. at 11209 (quoting *Brown-Ing-Ferris v. NLRB*, 911 F.3d 1195, 1217 (D.C. Cir. 2017)) (“[T]he common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of [an employment] relationship.”).

759, 760 (1991).⁷ We find that none of the control described above that Google exercises over the employees' supervision is "limited and routine" in nature within the meaning of Section 103.40 (c)(7).

Next, with respect to Google's control over benefits, we additionally note that Google requires suppliers (such as Cognizant) of its "extended workforce" to provide a minimal level of benefits to those employees, and thereby exercises substantial direct and immediate control over the employees' benefits within the meaning of Section 103.40(a), (c)(2), and (d), including "selecting . . . the level of benefits" (emphasis added).⁸ As the Regional Director found, the Petitioner established that Google selects the level of benefits provided by requiring Cognizant to provide employees eight fully paid sick days per year, 12 weeks of fully paid parental leave, tax free tuition reimbursement, and six employee assistance program support sessions per year.⁹

Finally, with respect to Google's control over the employees' hours of work, we agree with the Regional Director that Google and Cognizant codetermine the employees' holiday schedule and their overtime hours, which establishes substantial direct and immediate control over hours of work within the meaning of Section 103.40(a), (c)(3), and (d).¹⁰

Based on the totality of the relevant facts, it is clear that the Petitioner has established that Google possesses and exercises such substantial direct and immediate control over one or more essential terms or conditions of the petitioned-for employees' employment as to warrant a

finding that Google "meaningfully affects" matters relating to their employment relationship and is therefore their joint-employer under Section 103.40(a).¹¹

Dated, Washington, D.C. July 19, 2023

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
DECISION AND DIRECTION OF ELECTION

On October 21, 2022, Alphabet Workers Union—Communications Workers of America, Local 1400 (Petitioner) filed a representation petition under Section 9(b) of the National Labor Relations Act (the Act) to represent certain employees of Cognizant Technology Solutions U.S. Corporation (Cognizant) and Google LLC (Google), as joint employers. Petitioner seeks a bargaining unit (the petitioned-for unit) that includes all full-time and regular part-time Senior Process Executive-Data/Music Generalist (SPEs) and Project/Process Specialists/Subject Matter Experts (SMEs) employees employed by the Employer in YouTube Music Content Operations who are employed to work from the Employer's facility in Austin, Texas, excluding Team Leads, temporary employees, seasonal employees, managerial employees, professional employees, confidential employees, guards and supervisors as defined in the Act. There are approximately 60 employees in the petitioned-for unit.

⁷ See also *International Transfer of Florida*, above, 305 NLRB at 150 (finding joint-employer relationship where one entity "hires, fires, and determines the compensation of" employees, while a second "exercises exclusive daily supervision and direction" of employees, including "[t]hrough its operational rules and procedures . . . control[ing] the manner and means of" employees' performance of the work).

⁸ See Joint Employer Rule, 85 Fed. Reg. at 11225 ("Over benefits, an entity exercises direct and immediate control if it actually determines the fringe benefits to be provided or offered to another employer's employees . . . includ[ing] selecting the . . . level of benefits provided.").

⁹ Although not necessary to support this finding, we note further that witnesses confirmed that the only employees of Cognizant who receive at least two of the benefits provided – tuition reimbursement and 12 weeks of paid parental leave – are those who work on the Google contract.

¹⁰ See Joint Employer Rule, 85 Fed. Reg. at 11225 ("Over hours of work, an entity exercises direct and immediate control if it actually determines work schedules . . . including overtime, of another employer's employees."); *Quantum Resources Corp.*, above, 305 NLRB at 760-761 (finding joint-employer relationship in part because user-employer "authorizes overtime . . . and, through its contract . . . code-termines hours [and] holidays"); *Gourmet Award Foods, Northeast*, 336 NLRB 872, 873 (2001) (finding joint-employer relationship in part because user-employer determined the employees' hours including overtime).

¹¹ Because we have determined that the Regional Director did not err in finding Cognizant and Google joint employers based on Google's possession and exercise of substantial direct and immediate control over several essential terms and conditions of the employees' employment, we need not determine the extent to which record evidence of Google's possession or exercise of indirect control over other essential terms and conditions of employment or of control over mandatory subjects of bargaining other than essential terms and conditions of employment is also probative of its status as a joint employer under the Board's joint employer rule. We note, however, that, as a rule, each joint employer is required to bargain with respect to such terms and conditions of employment which it possesses the authority to control. See Joint Employer Rule, 85 Fed. Reg. at 11186 (probative value of indirect control), 11206-11207 and fn. 202 (probative value of control over mandatory subjects of bargaining other than essential terms and conditions of employment and joint employers' bargaining obligations).

Pursuant to Section 102.63(b)(3) of the Board's Rules and Regulations, Cognizant and Google each timely submitted a Statement of Position. In response, Petitioner submitted a Responsive Statement of Position. On November 29, December 1, 2 and 5, 2022, a video hearing was held before a hearing officer of the Board, at which Cognizant, Google, and Petitioner appeared. All parties timely filed post-hearing briefs, which I have carefully considered.

Petitioner contends that Cognizant and Google are joint employers. Cognizant and Google both assert that they are not joint employers.¹

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board (the Board) has delegated its authority in this proceeding to me. Based upon the entire record in this matter and in accordance with the discussion below, I conclude and I find that Cognizant and Google are joint employers and that the petitioned-for unit is an appropriate unit.

I. FACTS

Cognizant provides consulting and technology services to several business verticals, including companies in healthcare, life sciences, communications, technology, banking, and financial services. Google is a technology company engaged in the business of providing internet-related services and products.

Google contracted with Cognizant to support its YouTube Music Content Operations (MCO). MCO is responsible for data quality and coverage to ensure that YouTube Music is a complete premium offering.

Google refers to contractors like Cognizant as "supplier[s] of Google's extended workforce." Employees working on the MCO project support the YouTube Music platform. The bulk of this work is performed by (1) Senior Process Executive-Data/Music Generalist employees (SPEs) who fix problems, or bugs, on the YouTube Music platform and (2) Project/Process Specialists/Subject Matter Experts (SMEs) who assist the SPEs in their work and run quality assurance checks on SPEs' work.

¹ Additionally, Cognizant initially argued that Project/Process Specialists/Subject Matter Experts (SMEs) should be excluded from the unit due to a lack of community of interest with Senior Process Executives-Data/Music Generalists; however, Cognizant stated in its post-hearing brief that it was no longer challenging the inclusion of SMEs. Google took no position. Community of interest evidence was presented at the hearing. Based on functional integration, common job functions, the similarity of hours and working conditions, common skills and training, and common management and supervision, I find there is sufficient community of interest among the employees in the petitioned-for unit. See, generally, *NLRB v. Action Auto.*, 469 U.S. 490, 494 (1985); *United Operations*, 338 NLRB 123 (2002); *Overnite Transportation*, 322 NLRB 723, 724 (1996).

Team Leads directly supervise the SPEs and SMEs. SMEs are assigned to certain queues or types of tasks. Team Leads oversee a group of such tasks. Team Leads report to the Service Delivery Manager.²

Prior to the COVID-19 pandemic, employees on the MCO project worked at a Google-owned, vendor-operated facility in Austin. During the pandemic, employees worked remotely at home. The record evidence showed that employees were expected to report to a new Cognizant-owned office in Austin on February 6, 2023.

A. Wages

Employees receive their paychecks from Cognizant. SPEs are paid between \$19 and \$20 per hour. The starting wage for SMEs is \$22 per hour. While Cognizant sets the wage rates for employees on the MCO project, Google requires all vendors to pay their employees at least \$15 per hour or the locality's minimum wage, whichever is higher. Merit increases and bonuses are tied to performance evaluations, which are performed by Cognizant.

A heavily redacted version of the Statement of Work between Cognizant and Google was admitted at the hearing. This contract requires that Google pay Cognizant for personnel, based on the monthly rates provided. The contract includes a chart showing the roles of SME, SPE, Team Lead, and Operations Lead with a redacted monthly rate beside each role. Because this information is redacted, it is unclear whether the rate shown is per employee or a total for all, e.g., SME work for a month. The contract further states that the monthly rates are based on 155 hours per month, which accounts for holidays, vacation, and sick days. Further, the actual billing is to be prorated based on the actual hours worked. The redacted SOW also includes a premium rate in the event of "exceptional circumstances" leading to significant or workload increase at Google's request. Upon approval from Google, Cognizant may invoice Google at rates using a rate multiplier for the additional hours of work performed during public holidays, outside the service window hour (Monday to Friday 10:00 p.m. to 6:00 a.m. local time), and overtime on additional work hours beyond the scheduled 40 hours per week or 155 hours per month.

² The parties agreed to exclude Team Leads who have supervisory authority over employees in the petitioned-for unit. Team Leads provide performance evaluations, approve timecards, make decisions about accommodating schedule requests, start performance improvement plans, review disciplinary actions, give performance coachings, and help make hiring decisions. I find Team Leads were properly excluded from the unit.

B. Benefits

Cognizant offers employees medical, dental, and vision insurance; income protection; health savings accounts; flexible spending accounts; and 401(k) retirement plans. These benefits are administered by Cognizant. Neither Google nor any other client of Cognizant is involved in answering questions about benefits provided by Cognizant.

However, as with wages, Google sets standards for its vendors, such as a list of required essential health benefits and the maximum cost to employees. Google also requires its personnel vendors to provide employees eight fully paid sick days per year, 12 weeks of fully paid parental leave, tax free tuition reimbursement, and six employee assistance program support sessions per year. Although Cognizant already provided approximately 90 percent of the benefits required by Google, pursuant to Google requirements, Cognizant added, at its own cost, the remaining 10 percent of benefits for employees working on the MCO project.

C. Hours of Work

Google has been clear that it wants employees working and available to Google from 8:00 a.m. to 5:00 p.m. Notwithstanding this fact, the Statement of Work states, “The hours of operations will be **Monday - Friday, 9am - 5pm CST** for all workflows” (emphasis in original).

Google may ask that an employee or employees stay late to finish a project, but that request ultimately must be approved by Cognizant. Further, if Cognizant approved overtime for an employee on the MCO project, it would alert Google. If the overtime leads to more billing from Cognizant, Google must approve the overtime. If the overtime does not lead to more billing from Cognizant, Google would not have to approve the overtime but would still need to know about the overtime so it would know employees would be using its systems past normal working hours.

Cognizant handles employee requests for days or time off work. Employees input their names and requested off dates into a Google form,³ which is populated into a Google sheet. The requests are routed to the employees’ Team Lead or the Service Delivery Manager. Employees may monitor the requests online to see if they have been approved. Once approved, employees submit the requests into Cognizant’s system to be reflected on employees’ timesheets.

³ While utilizing Google technology, these forms are not internal to Google and are simply the online fillable forms that Cognizant uses to track time off requests.

Employees working on the MCO project only receive days off for holidays that are recognized by both Cognizant and Google. If Cognizant recognizes a certain holiday that Google does not, employees on the MCO project are required to work. Similarly, if Google recognizes a certain holiday that Cognizant does not, employees on the MCO project are required to work. It is only when both employers recognize a holiday that employees on the MCO project may receive the holiday off.

The petitioned-for unit employees use Cognizant’s timekeeping system to track their hours worked. If an employee needs an accommodation to his/her hours, the decision whether to grant the accommodation belongs to Cognizant, not Google.

D. Hiring

Cognizant determines the number of employees to assign to the MCO project. Cognizant is not reimbursed by Google for the salaries of some employees on the project that it chooses to add to support the project, but Cognizant must notify Google about these extra employees because Google has to grant access to its system for all employees.

1. Applicants

Cognizant recruits, screens, interviews, and hires the employees in the petitioned-for unit. Google has no role in this process except that the job descriptions used to recruit new employees were agreed to by both Cognizant and Google.

2. Training and Orientation

Both Cognizant and Google participate in the orientation of new employees on the MCO project. New employees attend a week of orientation on Cognizant-specific information and policies, including Cognizant’s time-keeping system and benefits.

Following the Cognizant training, employees on the MCO project attend about two weeks of training on Google-specific tasks.⁴ This Google training consists of onboarding to the Google system; an overview of Google and YouTube Music; using spreadsheets; business etiquette; an introduction to each team; training on each workflow; and compliance and ethics, including how to keep data secure. During this section of training, new employees receive knowledge checks to assess their progress. New employees are ultimately placed on a team and complete a week-long training program, which is

⁴ This training was initially conducted by Google employees. Currently, SMEs and Team Leads typically train new SPEs. Recently, a Google employee trained a hiring class of SPEs at Cognizant’s request because Team Leads and SMEs were overburdened at the time. During this training, the Google employee gave new SPEs scores and feedback during their training.

delivered to the team via slide show presentations. Thereafter, new employees begin nesting, which is hands-on training with the work itself. New SPEs shadow SMEs to see how they approach their work. After about a week or two, SMEs shadow the new SPEs to watch them work and provide feedback. After this process is completed, new SPEs officially begin working themselves.

Google drafted and maintains ownership of the training documents for new SPEs, specifically the workflow training charts. Cognizant may not make changes to those documents; however, SMEs and Team Leads may suggest changes to Google or ask for an update if the materials are outdated.

Pursuant to the Statement of Work, Cognizant must ensure that all employees complete the required training and “pass the certification exam with a passing score, defined by Google” before they may begin actual work.

E. Discharge

While Cognizant has the ultimate decision-making authority regarding discharges, Google may request that an employee be discharged or removed from the Google project.

In one instance, Google alerted Cognizant about a data leak. Cognizant investigated, found the source of the leak, and terminated the employee because he had violated Cognizant’s code of conduct, specifically a violation of data security.

F. Discipline

Like discharges, Cognizant is the decision-maker regarding disciplining employees on the MCO project. Cognizant’s employee relations team conducts investigations with support from Cognizant’s security and compliance teams.

Cognizant also maintains a progressive discipline policy and a performance improvement process in which Google does not play a role.

G. Supervision

On a weekly basis, Google, through an automatic script it created, sends batches of samples of SPEs’ work to SMEs. These samples are used in a process called Quality Analysis (QA).⁵ SMEs use these QAs to audit the SPEs’ work quality. This QA process constitutes the bulk of the SMEs’ job. They audit quality by using rubrics that are created and proposed by Google. Each workflow has its own rubric, and each SPE has his/her own grade. Examples of some of the items in a rubric are capitalization/punctuation, additional primary artists missing, and incorrect artist was used. Each error counts

as a certain number of points on the rubric, as determined by Google. For example, the record reflects one question in an SME’s workflow, counts as 40 points in the Google-created rubric. As an example of the exchanges in which Cognizant and Google may engage regarding the QA process, the record reflects that Cognizant asked Google if points could be split such that a partial fix to the issue would result in only 20 points. Cognizant may not make that decision on its own; it requires dialogue with Google, who has the final say on the rubric.

After completing the QAs for the week, SMEs provide feedback to the SPEs. If an SME spots an error, he/she may take a screenshot and let the SPE know that he/she missed something in a workflow, e.g., providing an incorrect primary artist for a song.

An SME testified that Google conducts reviews of QA scores because it has insight into employees’ QA scores. This testimony was based on discussions that Google has initiated about QA scores.

Another SPE testified that about once a week, Google, through its Music Operations Specialist, sends him an email stating that it has reviewed one of his tasks. The email includes his score and a link to the evaluation details. If the score is less than 100 percent, he must acknowledge the score, make any necessary corrections, and alert Google that the changes have been made.

Even though Google reviews some tasks of SPEs, it claims to only be interested in the QAs at the vendor level versus at the individual employee level. If a particular employee were working slowly, Google would not question that employee’s rate, but it would question the performance rate of the team as a whole.

Cognizant, specifically the Team Leads, conduct performance reviews of employees in the unit. Google does not have access to performance evaluations of any individual employee. Cognizant ranks employees on a team and gives them a score, with five being the highest. SPEs must score at least a three to be promoted to SME.

Google requested that Cognizant return employees on the MCO project to the office instead of employees working at home, but it was Cognizant’s decision to effectuate that change.

When Google introduces new workflows, it trains the SMEs who then disseminate the training to SPEs. Further, Google conducts regular mandatory security compliance and ethics trainings that employees in the petitioned-for unit must attend.

Every tool that is used in the performance of unit employees’ work creates an audit trail, which is a log showing who accessed what tool at what time. Google has access to these logs, but the record did not reveal whether anyone at Google chooses to view them.

⁵ The samples themselves are referred to as “QAs.”

An SPE testified about Google's MoMA system, which, among other things, hosts a profile page for each worker within Google. Although the SPE is identified as a vendor, the chain of command on his profile page shows a Google Vendor Manager directly above him with the chain continuing to the CEO of YouTube and, ultimately, the CEO of Google and Alphabet.

H. Direction of Work

The work performed by employees in the petitioned-for unit is routed to employees from Google through workflows, or queues. The workflows are associated with a particular team. When SPEs start work, they log in for the day then start picking their tasks from their teams' workflows.

Google also sets the rate per hour at which workflows must be completed, e.g., 30 per hour. Google recently raised the rate per hour of at least two particular workflows. Although Cognizant may provide suggestions or input for the rate per hour, Google ultimately sets the rate at which SPEs must work. Google will question Cognizant if the actual production rate is higher than the set rate per hour. In about the fall of 2022, employees received a program called Average Handling Time (AHT). Using this program, SPEs enter a value into a spreadsheet when they begin a task and then enter another value when they complete the task. After 50 entries, SPEs will have logged the time that it takes to complete each task. Google added this program and requirement and told SPEs it was using the program to monitor productivity. The results of the AHT were used to raise the rate per hour requirement in some workflows.

For errors in the YouTube Music database, called "bugs," Google sets the priority levels and time limits for correcting the bug.

If Google determines that it wants employees in the petitioned-for unit to work on an ad hoc project, i.e., one that is over and above the existing or regular scope of work, Google creates an online ticket for the work and then assigns the ticket to the Service Delivery Manager or a Team Lead to delegate to employees. These ad hoc projects usually have a deadline so employees typically prioritize them above their regular work. Further, when creating the ticket for an ad hoc project, Google alerts employees that they may perform less than their expected normal work in order to prioritize ad hoc project. In October 2022, Google sent such a ticket and wrote, "[W]orkflows that can be deprioritized in favor of this ad [] hoc," followed by a list of workflows. Ad hoc projects are available for employees to work on in addition to their workflows approximately 40% to 50% of the time.

SMEs regularly interact with Google employees. They attend weekly video meetings for about 30 to 45 minutes,

chat online daily, and may reach out to Google employees for help with any bugs they are unable to fix. It is expected in the course of SMEs' work that they are in contact with and work with Google employees. During their weekly meetings, Google employees discuss trends they see with the work from SMEs and SPEs.

II. BOARD LAW

On February 26, 2020, the Board issued its final joint-employer rule (the Rule), which became effective April 27, 2020. The Rule provides:

An employer, as defined by Section 2(2) of [the Act], may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment. To establish that an entity shares or codetermines the essential terms and conditions of another employer's employees, the entity must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees.

29 C.F.R. § 103.40. The Rule defines "essential terms and conditions of employment" as "wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction." *Id.* The Rule makes clear that for substantial direct and immediate control to "meaningfully affect matters relating to the employment relationship with those employees," the actions must have a regular or continuous consequential effect on an essential term or condition of employment. 29 CFR § 103.40(d). The Rule also requires that the Board determine joint-employer status based on "the totality of the relevant facts in each particular employment setting," and places the burden of proof on the party asserting a joint-employer relationship. *Id.*⁶

A joint-employer relationship therefore exists where one employer, while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. *Walter B. Cooke Inc.*, 262 NLRB 626 (1982).

⁶ To the extent the Board, under prior precedent, found entities meaningfully affected matter relating to the employment relationship only where they had direct and immediate control over at least one essential term or condition of employment, the Rule clarifies that the standard is "totality of the circumstances."

III. ANALYSIS

Cognizant and Google maintain that Google is not a joint employer. Throughout the hearing and in its post-hearing brief, Google moved that it be dismissed from the petition. As discussed in detail below, I find that Google exercises direct and immediate control over benefits, hours of work, supervision, and direction of work. To a lesser extent, Google also exercises control over unit employees' wages by setting minimum standards. Based on the totality of the circumstances, I find that Cognizant and Google are joint employers. As such, I deny Google's Motion to Dismiss.

A. Wages

While Google does not pay unit employees directly, it requires that all vendors pay employees at least \$15 per hour or the locality's minimum wage. The Statement of Work also outlines how much Google will pay for each position's wage based on 155 hours of work per month. If employees work more or less, Google adjusts the pay to Cognizant accordingly.

The Rule makes it clear that to exercise control over wages, the purported joint employer must "actually determine[]" the wage rates, salary or other rate of pay that is paid to another employer's individual employees or job classifications." 29 CFR § 103.40(c)(1).

As it requires Cognizant to pay unit employees at least \$15 per hour or their localities' minimum wage, Google exercises control in determining the unit employees' rate of pay. Here, Cognizant has determined to pay the petitioned-for unit employees a rate of at least \$19 per hour, which is above the minimum required by Google. Because Google maintains some control over the unit employees' wages, this factor is neutral regarding joint employer status.

B. Benefits

Similar to wages, Google requires a certain threshold level of benefits for unit employees. Unlike wages, however, Cognizant did not already offer benefits exceeding those required by Google. In order to maintain the contract with Google, Cognizant was required by Google to offer more benefits to petitioned-for unit employees – benefits it does not offer to its employees on other contracts.

The Rule states that to exercise control over benefits, the purported joint employer must "actually determine[]" the fringe benefits to be provided or offered to another employer's employees." 29 CFR § 103.40(c)(2).

Here, Google actually determines that unit employees must receive certain health benefits with a maximum cost to employees, eight fully paid sick days per year, 12 weeks of fully paid parental leave, tax free tuition reim-

bursement, and six employee assistance program support sessions per year. This factor weighs in favor of joint employer status.

C. Hours of Work

The Rule states that "[a]n entity exercises direct and immediate control over hours of work if it actually determines work schedules or the work hours, including overtime, of another employer's employees." 29 CFR § 103.40(c)(3).

Here, Google expects unit employees to be available from 8:00 a.m. to 5:00 p.m. The Statement of Work states that the hours of operation for all workflows is from 9:00 a.m. to 5:00 p.m. Google may ask employees to work overtime, and that request must be approved by Cognizant. The opposite is also true; Cognizant may ask that employees work overtime, and that request must be approved by Google if it will result in more billing to Google.

Further, Google sets the holiday schedule such that if Cognizant recognizes a holiday that Google does not, unit employees must work.

Because Google determines the hours of work and holiday schedule, and plays a role in overtime, this factor weighs in favor of joint employer status.

D. Hiring

Google does not "actually determine[]" which particular employees will be hired and which employees will not" as required by the Rule. See 29 CFR § 103.40(c)(4). It does set minimal hiring standards, which, per the Rule, does not confer joint employer status. This factor weighs against joint employer status.

E. Discharge

The Rule states that to exercise control over discharge, the purported joint employer must "actually decide[]" to terminate the employment of another employer's employee." 29 CFR § 103.40(c)(5). Bringing misconduct or poor performance to the attention of another employer, expressing a negative opinion of an employee, refusing to allow an employee to continue performing work under a contract, or setting minimal standards of performance does not rise to the level of joint employer. *Id.*

Here, Cognizant determines whether to discharge employees. The instances where Google has drawn Cognizant's attention to misconduct and Google's ability to request that an employee be removed from the project do not confer joint employer status under the Rule. This factor weighs against joint employer status.

F. Discipline

The Rule regarding discipline reads the same as the rule regarding discharge. See 29 CFR § 103.40(c)(6).

Similar to situations involving discharges, Cognizant makes the ultimate decision regarding disciplining employees. This factor weighs against joint employer status.

G. Supervision

If an employer “instruct[s] another employer’s employees how to perform their work,” they are exercising direct and immediate control over supervision. 29 CFR § 103.40(c)(7).

Here, Google trains some Cognizant employees, including unit SMEs, on how to perform the work. Google creates training documents, which may not be edited or altered by Cognizant, that SMEs use to train SPEs. In this regard, Google instructs employees in the petitioned-for unit how to perform the work. Google also tracks SPEs’ performances by sending weekly QAs to SMEs to audit the work of SPEs. Google creates the rubrics and grading system that SMEs must use. Google also directly audits SPEs’ work.

Because Google instructs unit employees how to perform their work, this factor weighs in favor of joint employer status.

H. Direction of Work

When an employer “assign[s] particular employees their individual work schedules, positions, and tasks,” it exercises direct and immediate control over direction.

Google sends workflows to Cognizant, and, based on Google-specific training, SPEs working on a particular workflow commence work from those workflows. Google sets the rate at which workflows must be completed, closely monitors petitioned-for employees’ performance time and productivity through the AHT program, sets the priority level and time limits for employees to complete certain types of projects, prioritizes work for employees, and maintains regular contact with SMEs regarding the status of work and any issues. Given this extensive control over the direction of work of employees in the petitioned-for unit, this factor weighs in favor of joint employer status.

In summary, I find that Cognizant and Google are joint employers given the totality of the circumstances and given that Google has retained for itself substantial direct and immediate control over benefits, hours of work, supervision, and direction of work.