VIA ELECTRONIC SUBMISSION

January 28, 2019

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

Re: The Standard for Determining Joint-employer Status; RIN 3142-AA13

Dear Ms. Rothschild:

Associated Builders and Contractors Inc. hereby submits the following comments to the National Labor Relations Board (NLRB or the Board) in response to the above-referenced notice of proposed rulemaking published in the *Federal Register* on Sept. 14, 2018, at 83 Fed. Reg. 46681.

About Associated Builders and Contractors Inc.

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

ABC is a member of the Coalition for a Democratic Workplace, which is filing a more detailed set of comments on the NLRB's proposed rule. ABC supports CDW's comments and hereby incorporates them by reference. In the comments below, ABC focuses on issues of primary importance to the construction industry, including specifically the adverse impact of the current, overbroad joint-employer standard, and the need for additional guidance aimed at preserving the separate status of longstanding multi-employer relationships in construction.

Background

In August 2015, the NLRB under the Obama administration uprooted more than 30 years of precedent and issued a decision in *Browning-Ferris Industries of California* that greatly expanded joint-employer liability under the National Labor Relations Act.[1]

On Sept. 14, 2018, the NLRB issued a proposed rule[2] that aims to foster predictability, consistency and stability in the determination of joint-employer status under the NLRA. Under the proposal, an employer may be found to be a joint employer only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine.

On Dec. 28, 2018, the U.S. Court of Appeals for the District of Columbia Circuit, in a 2-1 decision, partially affirmed the Board's *BFI* standard but denied enforcement of the Board's order in that case.[3] Although the court found the Board could take into consideration both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment, the court did not require the Board to adopt or maintain a standard incorporating these elements. The court expressly denied enforcement of the Board's *BFI* decision because the court found the Board failed to adequately define and limit considerations of indirect control.[4] As the court stated, the *BFI* decision obscured the line between "global oversight" and wielding "direct and indirect control over the essential terms and conditions of employees work lives."[5] The court tasked the Board with providing clear guidance between "routine features of independent contracts" and those terms and conditions that are "essential to meaningful collective bargaining."[6] The court certainly left the door open for the Board to conclude in this rulemaking that employers who might otherwise be considered "joint" under the common law should nevertheless be treated separately as a matter of labor policy.[7]

Summary of ABC's Comments in Response to the NLRB's Proposed Rule

As further explained below, ABC supports the Board's proposed rule. ABC disagrees with those portions of the D.C. Circuit's opinion that partially affirm the previous BFI test under common law principles, but notes that the court has not foreclosed a test that, as a matter of labor policy within the purview of the Board, ultimately treats employers as separate entities where one entity does not exercise substantial, direct and immediate control over the essential terms and conditions of employment by the other entity. It is vital to the continued productivity of the construction industry, one of the primary engines of the nation's economy, that the Board clearly delineate and limit the types of control that will henceforth be treated as creating joint-employer status under the NLRA.

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[1] 362 NLRB No. 186 (2015).
[2] 83 Fed. Reg. 46681.
[3] 2018 U.S. App. LEXIS 36706 (D.C. Cir. 2018).
[4] *Id.* at 51.
[5] *Id.* at 54-55.
[6] *Id.*
[7] *Id.*

The *BFI* Standard Jeopardizes Long Established Methods By Which Construction Service Providers Work Together To Build America

The construction industry has long consisted primarily of specialized, separate employers who come together on specific construction projects to achieve the highest degree of productivity, while maintaining their separate status from project to project. Owners, developers, design firms, construction managers, general contractors, subcontractors and staffing agencies, to name only the most common specialties, each play unique roles in the construction process on individual jobsites. Their functions routinely overlap, but they typically remain separate entities with their own workforces.

The most common construction jobsites are multi-employer worksites. Typically, the general contractor or construction manager schedules and coordinates the work of many subcontractors, often in multiple tiers, who perform their services simultaneously or in sequence. The general contractor directs the work on the site and controls the schedule, which may be affected by weather, availability of materials, local building inspection regimes and many other factors. A general contractor must exercise a certain amount of control over its subcontractors and their employees simply to ensure the safe and efficient performance of the work.

The U.S. Supreme Court has repeatedly recognized the separate status of such construction industry employers under the NLRA. As the Court held in *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689-90 (1951):

> "[T]he fact that [a] contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so."

This legal principle remains embedded in labor law and is binding on both the D.C. Circuit and the Board. The Board's final rule must adhere to it. Yet the Board's expansive *BFI* standard has created a legal environment that is plainly inconsistent with decades of interpretation of Section 8(b)(4) of the Act. Under *BFI*, unions are encouraged to inflict economic injury on the primary employer with whom they have a dispute by pressuring every higher- and lower-tier contractor who has any degree of economic relationship with the primary employer. *BFI*'s concept of "reserved control" (or "potential control") certainly conflicts with the Supreme Court's recognition that general contractors routinely control most construction jobsites, which should not in and of itself create joint-employer status under the NLRA.

The Board's final rule must recognize that standard construction methods require project owners and/or prime contractors to exercise routine control over the site in ways that indirectly impact many employees' terms and conditions of employment, without in any legitimate sense converting the independent employers of such employees into "joint employers" within the meaning of the Act. The *BFI* standard has caused great confusion among construction contractors, requiring corrective action in the form of the proposed rule.

It must also be acknowledged that the prime contractor is called upon to impose on all subcontractors certain obligations to comply with federal, state and local employment laws relating to wages, hours, safety, drug testing, discrimination, harassment, immigration and other issues affecting multiple workforces. Additionally, they are routinely called upon to maintain control over all jobsite access, establish the hours when work is to be performed at the site and comply with pre-assignment procedures. Prime contractors also are required to ensure the subcontractors' employees adhere to specific safety rules, attend safety meetings, wear protective gear and report accidents and injuries. Finally, the federal Davis-Bacon Act and an increasing number of state and local jurisdictions impose responsibility on higher-tier contractors to ensure that employees of lower-tier subcontractors are properly paid their wages and fringe benefits and are properly classified. In order to fulfill this responsibility, contractors may be required to monitor or audit their subcontractors' payroll practices and make sure the subcontractors employees are paid properly and in a timely manner.

Smaller subcontractors may require more "hands-on" guidance and training from higher tier contractors; but the exercise of such responsibilities for compliance purposes does not create "joint employment" in the construction industry as that term has long been understood.[8] An overbroad joint-employer standard threatens to adversely impact the small, minority, women and veteran-owned businesses in construction in particular. Because these small businesses often lack the resources to bid directly on large projects, they can only gain access to larger markets for their services if higher-tier contractors are encouraged to partner with them and provide guidance and assistance in directing the subcontractors' workforces. The threat of joint-employer findings, however, perversely discourages higher-tier contractors from entering into such partnerships with small businesses, to the detriment of minorities, women and veterans.[9]

Finally, the *BFI* joint-employer standard needs to be clarified and limited because it otherwise threatens to severely hamper temporary staffing arrangements, which are often essential to allow contractors to deal productively with wide variations in the need for workers at different stages of a construction project. As has been widely publicized, the construction industry is confronting a severe labor shortage. The U.S. Bureau of Labor Statistics estimates that there are currently more than seven million job openings in the United States.[10] Temporary staffing companies often play a critical role in allowing construction contractors to meet fluctuating demands for workers and perform their often-unpredictable project assignments in a timely manner. Recent decisions applying the *BFI* test to temporary staffing arrangements in the construction industry threaten the ability of contractors to deal with their staffing needs at times of peak demand.[11]

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[8] *See* testimony of Kevin R. Cole, CEO, Ennis Electric Co., *H.R. 3459, "Protecting Local Business Opportunity Act,"* House Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor and Pensions, 114th Congress, (Sept. 29, 2015).

[9] *See* testimony of Edward Martin, president and CEO of Tilson Home Corp., *S. 2015, Stealing the American Dream of Business Ownership: The NLRB's Joint Employer Decision*, Senate Committee on Health, Education, Labor and Pensions, 114th Cong. (Oct. 6, 2015).

[10] https://www.bls.gov/news.release/jolts.nr0.htm.

[11] *See, e.g., Retro Environmental Inc.*, 364 NLRB No. 70 (2016), applying *BFI* to find joint-employer status between a contractor and a temporary staffing agency, even though the parties asserted they were imminently ceasing operations. Even more egregious is the Board's decision in *Miller & Anderson Inc.*, 364 NLRB No. 39 (2016), in which the Board found joint-employer status between a staffing agency and a contractor that had already ceased doing business years previously.

The Path Forward: What the Final Rule Should Contain

As stated at the outset, ABC supports the Board's proposed rule. The examples provided for guidance are particularly helpful. Nevertheless, additional guidance is called for, particularly in light of the terms of the D.C. Circuit's remand in the *BFI* case.

ABC supports the expanded definitions recommended in the comments of the Coalition for a Democratic Workplace, which are incorporated here by reference. These expanded definitions will serve to add clarity to such terms as "essential terms and conditions of employment," "routine contractual requirements that should not qualify as substantial control," other types of activities that should not constitute "substantial control," and the statement that "reserved control shall not alone be dispositive of joint-employer status." In light of the D.C. Circuit decision, the Board should also take additional steps to clarify that indirect or reserved control, to the extent such control is considered at all, must be limited to essential terms and conditions of employment, and specific examples should be provided for "global oversight" and "routine aspects of independent contracts," which should not be treated as indicia of joint-employer status.

Conclusion

For the reasons stated above and in other comments submitted by the business community, the Board should return to the pre-BFI joint-employer standard that was in place for more than 30 years. Additional guidance should be required that both clarifies and limits the extent to which indirect or reserved control can be an indicator of joint-employer status.

Respectfully submitted,

Ben Brubeck
Vice President of Regulatory, Labor and State Affairs