



VIA ELECTRONIC SUBMISSION

September 28, 2020

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

**Re: Representation-Case Procedures: Voter List Contact Information; Absentee Ballots for Employees on Military Leave; RIN 3142-AA17**

Dear Ms. Rothschild:

Associated Builders and Contractors hereby submits the following comments to the National Labor Relations Board in response to the above-referenced notice of proposed rulemaking published in the *Federal Register* on July 29, 2020, at 85 Fed. Reg. 45553.

### **About Associated Builders and Contractors**

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, which 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.

### **Background**

On Dec. 15, 2014, the NLRB issued the Representation-Case Procedures final rule,<sup>1</sup> which significantly changed the union representation election process. During the rulemaking process, ABC voiced its strong opposition to the proposed rule<sup>2</sup> during oral testimony before the NLRB,<sup>3</sup> and ABC and more than 1,200 of its members filed written comments, requesting that the NLRB

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<sup>1</sup> 79 Fed. Reg. 74308.

<sup>2</sup> 79 Fed. Reg. 74378.

<sup>3</sup> See testimony on behalf of ABC at <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-4233/publicmeeting4-10.pdf>.

withdraw its election proposal.<sup>4</sup> ABC and its members specifically opposed the NLRB's burdensome and intrusive requirement to require new disclosures of employees' personal contact information to unions, including personal phone numbers and emails. ABC affiliates in Texas subsequently sued for declaratory and injunctive relief against the final rule, but that challenge was rejected by the U.S. Court of Appeals for the Fifth Circuit.<sup>5</sup>

Since it went into effect in April 2015, ABC members have found the 2014 final election rule's requirements to be unduly burdensome for employers, intrusive on employee privacy rights and an infringement on the rights of employers and employees to a fair pre-election process.

Under the Trump administration, the NLRB has issued various rulemakings to modify or rescind entirely the 2014 final election rule. In 2017, the NLRB issued a request for information<sup>6</sup> scaling back some of the final rule changes, and ABC submitted comments in support of such changes.<sup>7</sup> In revising the Obama-era rule, ABC encouraged the NLRB to return to the election procedures that were in place prior to adoption of the 2014 final election rule.

The NLRB issued its new Representation-Case Procedures final rule on Dec. 18, 2019, which modified procedures for union elections and scaled back provisions of the 2014 final election rule.<sup>8</sup> However, the 2019 rule retained the requirement that employers disclose the available email addresses and home and personal cell phone numbers of eligible voters to nonemployer parties to an election petition, once an election is agreed to by the parties or directed by the regional director.<sup>9</sup>

Shortly before the 2019 final rule was set to go into effect on May 31, 2020, the U.S. District Court for the District of Columbia blocked some of the new changes from going into effect following a lawsuit filed by the AFL-CIO. On June 1, the NLRB announced that it would move forward with the election rules changes that were not affected by the court's ruling, which the district court later upheld.<sup>10</sup> The NLRB and the AFL-CIO filed cross-appeals from the district court's decision, and both appeals remain pending before the U.S. Court of Appeals for the District of Columbia Circuit as of this writing.

On July 29, the NLRB issued its NPRM on Representation-Case Procedures: Voter List Contact Information; Absentee Ballots for Employees on Military Leave as part of its ongoing efforts to more effectively administer the National Labor Relations Act.<sup>11</sup> The NPRM would modify the NLRB's voter list provisions to eliminate the requirement that the employer provide available personal email addresses and home and personal cell phone numbers of all eligible voters to the

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<sup>4</sup> See ABC's comments dated April 7, 2014 at [http://www.abc.org/Portals/1/Documents/Newsline/2014/ABC\\_NLRB\\_R-Case%20Procedures\\_NPRM\\_040714\\_FINAL.pdf](http://www.abc.org/Portals/1/Documents/Newsline/2014/ABC_NLRB_R-Case%20Procedures_NPRM_040714_FINAL.pdf).

<sup>5</sup> *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. June 10, 2016). The court held that the new rules were permissible, though not required, under a highly deferential standard. The court also confined its legal analysis to what it viewed as a "facial" challenge to the rule, adhering to the very high bar for upholding such pre-enforcement challenges. *Id.* at 220, 226. The court declined to consider how the rule is now being applied in practice. *Id.* Thus, nothing in the court decision precludes the NLRB from returning to the previous election rules or otherwise modifying the 2014 rule.

<sup>6</sup> 82 Fed. Reg. 58783.

<sup>7</sup> See ABC's comments dated April 18, 2018 at [https://www.abc.org/Portals/1/2020%20Files/ABC\\_NLRB\\_R-Case%20Procedures\\_RFI\\_12.14.17%20FINAL.pdf?ver=2020-09-28-105501-547](https://www.abc.org/Portals/1/2020%20Files/ABC_NLRB_R-Case%20Procedures_RFI_12.14.17%20FINAL.pdf?ver=2020-09-28-105501-547).

<sup>8</sup> 84 Fed. Reg. 69524.

<sup>9</sup> *Id.* at 69564.

<sup>10</sup> <https://www.nlr.gov/news-outreach/news-story/nlr-to-implement-all-election-rule-changes-unaffected-by-court-ruling>.

<sup>11</sup> 85 Fed. Reg. 45553.

regional director and other parties. Additionally, the proposed rule would modify the NLRB's general policy of not providing absentee ballots by establishing a procedure to provide absentee ballots to employees who would otherwise be unable to vote in the election because they are on military leave.<sup>12</sup>

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

ABC strongly supports the NLRB's proposed changes to the above-referenced amendments in the NPRM. In particular, ABC applauds the long overdue change to the NLRB's required disclosure of personal email addresses and phone numbers of eligible voters. As further discussed below, ABC members have found the current voter eligibility list requirements to be unduly burdensome for employers, unduly intrusive into employee privacy and unduly infringing on the rights of employers and employees to a fair pre-election process.

ABC also supports the NLRB's separate proposal to adopt a policy of providing for absentee mail ballots for employees on military leave, provided that employers are not subjected to additional burdens posed by the potential logistical challenges, and provided also that the new policy is restricted to the unique circumstances of the military and is not expanded to other types of leave that may arise during union elections.

#### **1. Elimination of Provision of Personal Email Addresses and Personal Telephone Numbers in Voter List**

Throughout the Obama-era rulemaking process, the NLRB failed to identify any statutory mandate warranting an expansion beyond existing *Excelsior* list requirements.<sup>13</sup> Congress has never sought to change or expand the *Excelsior* list, nor did the NLRB provide any other reason for expanding the personal employee information disclosures in 2014, except for the NLRB's observation that an "evolution" toward electronic communications is taking place in "pre-election campaign communication."<sup>14</sup> The existence of multiple avenues for employer-employee communication has never been interpreted by Congress or the NLRB to require equal access by union organizers to every vehicle for communication, regardless of employee privacy concerns.

If anything, the communications evolution has reduced the need for unions to be given person-to-person addresses (and certainly not email addresses and phone numbers), because employees have widespread access to union-sponsored websites, Twitter and social media sites such as Facebook and YouTube, none of which require the involuntary disclosure of sensitive and personal employee contact information. Despite the absence of any congressional mandate and notwithstanding the various alternative forms of communication that can be used to engage employees without the use of sensitive information, the Obama NLRB moved forward with its expanded personal disclosure requirements in its 2014 rule.

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<sup>12</sup> Id. at 45554.

<sup>13</sup> The phrase "*Excelsior* list requirements" relates to the case in which the voter eligibility list requirement was first articulated by the Board. See *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966). See also *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 768 (1969).

<sup>14</sup> 79 Fed. Reg. 7327.

The requirement that employers disclose employee email addresses and phone numbers imposes unnecessary invasions of privacy and related burdens on both construction employers and employees. As ABC noted in its response to the NLRB’s RFI on this issue, a survey of ABC member labor attorneys found that 90% of respondents reported complaints by employees about the infringement of their privacy rights under the 2014 final election rule.<sup>15</sup> If anything has become clear during the explosive growth of electronic and social media, it is the increased potential for abuse, harassment, malicious security intrusions and identity theft. In particular, the requirement that employers disclose employee email addresses and personal phone numbers ignores email “hack attacks” that have become part of union corporate campaigns.<sup>16</sup> For example, in the case of *Pulte Homes, Inc. v. LIUNA Construction*,<sup>17</sup> the Laborers’ Union deliberately flooded a homebuilder with emails intended to disrupt the employer’s computer system. In another reported case, *Pelletier v. Communications Workers of America, Local 1103*,<sup>18</sup> a union abused a decertification petitioner’s personal information by maliciously subscribing her to hundreds of unsolicited and unwanted magazines and consumer products. These kinds of attacks are expected to become even more common if employers are forced to continue to provide union access to employee email addresses and phone numbers.

It cannot be disputed that compelling disclosure of employee personal email and phone numbers, on top of the previously required disclosure of home addresses, greatly increases the opportunities for identity theft and invasion of privacy generally.<sup>19</sup> For this reason, the IRS advises taxpayers to “protect your personally identifiable information; keep it private.”<sup>20</sup> The NLRB’s 2014 rule needlessly exposes employees to such threats, and its proposed rule correctly prevents such exposures.<sup>21</sup>

At the same time, the 2014 rule’s required disclosure of “available” personal employee phone numbers and email addresses does not accomplish either of the purposes of the *Excelsior* decision. This information is not necessary to “identify issues concerning eligibility.”<sup>22</sup> Nor would a mandated employer disclosure of personal email addresses and phone numbers give unions effective access to “all employees”<sup>23</sup> because employers rarely require the disclosure of this information, and many employees—if asked—refuse to provide it.<sup>24</sup> Reverting to the voter

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<sup>15</sup> See ABC’s comment letter dated April 18, 2018 at [https://www.abc.org/Portals/1/2020%20Files/ABC\\_NLRB\\_R-Case%20Procedures\\_RFI\\_12.14.17%20FINAL.pdf?ver=2020-09-28-105501-547](https://www.abc.org/Portals/1/2020%20Files/ABC_NLRB_R-Case%20Procedures_RFI_12.14.17%20FINAL.pdf?ver=2020-09-28-105501-547).

<sup>16</sup> See ABC’s comment letters dated April 7, 2014 at [http://www.abc.org/Portals/1/Documents/Newsline/2014/ABC\\_NLRB\\_R-Case%20Procedures\\_NPRM\\_040714\\_FINAL.pdf](http://www.abc.org/Portals/1/Documents/Newsline/2014/ABC_NLRB_R-Case%20Procedures_NPRM_040714_FINAL.pdf) and dated April 18, 2018 at [https://www.abc.org/Portals/1/2020%20Files/ABC\\_NLRB\\_R-Case%20Procedures\\_RFI\\_12.14.17%20FINAL.pdf?ver=2020-09-28-105501-547](https://www.abc.org/Portals/1/2020%20Files/ABC_NLRB_R-Case%20Procedures_RFI_12.14.17%20FINAL.pdf?ver=2020-09-28-105501-547).

<sup>17</sup> 648 F. 3d 295 (6th Cir. Aug. 2, 2011).

<sup>18</sup> Case No. Cv-08-5021589-S (Conn. Sup. Ct. 2010).

<sup>19</sup> See, e.g., New York Times, *Cyberattack Exposes I.R.S. Tax Returns* (May 26, 2015), [http://www.nytimes.com/2015/05/27/business/breach-exposes-irs-tax-returns.html?\\_r=0](http://www.nytimes.com/2015/05/27/business/breach-exposes-irs-tax-returns.html?_r=0) (“The I.R.S. said the attackers exploited data, like email addresses and passwords gleaned from other breaches, to answer basic authentication questions about subjects like birth dates or the names of family members”).

<sup>20</sup> “Identity Protection Tips,” [www.irs.gov](http://www.irs.gov); see also Gayle Momchilovich, “5 Reasons Cyber Criminals and Thieves Want Your Email Address,” (Oct. 12, 2017), Available at <https://www.libertyid.com/blog/>.

<sup>21</sup> ABC agrees with the Board’s statement that there is no meaningful distinction between the compelled disclosure of cell phone numbers and personal emails. 85 Fed. Reg. 45561, n.50.

<sup>22</sup> 79 Fed. Reg. 7327.

<sup>23</sup> *Excelsior*, supra note 14, 156 NLRB at 1242-43 (emphasis in original).

<sup>24</sup> <http://myprivateballot.com/wp-content/uploads/2014/04/CDW-Comments-NLRB-Proposed-Election-Rule-2014.04.07-RIN-3142-AA08.pdf> at appendix 2, page 20.

eligibility list requirements laid out in *Excelsior* allows employers and employees to more easily comply with the current timeline and submit voter lists without hindering the progress of an election.

ABC therefore encourages the NLRB to finalize removing the personal electronic information disclosure requirement through this rulemaking process.

## **2. Absentee Mail Ballots for Employees on Military Leave**

ABC also supports in concept the NLRB's separate proposal to adopt a new policy of allowing absentee mail ballots for employees on military leave. ABC supports the military and the principles espoused by Congress in the Uniformed Services Employment and Reemployment Rights Act.<sup>25</sup> ABC urges the NLRB to take precautions to prevent employers from being subjected to additional burdens posed by the potential logistical challenges of military absentee ballots; and the NLRB should also make as clear as possible that the new policy is restricted to the unique circumstances of the military and should not be expanded to other types of leave that may arise during union elections.

In response to the NLRB's specific logistical questions in the NPRM,<sup>26</sup> ABC believes there should be a time limit on when an absentee ballot must be requested and returned. Absentee ballots should be permitted but not required. No employer should be required to search for locations of employees serving in the military or to determine whether an absentee ballot is called for, unless the employer is the party seeking approval for the absentee ballot. The responsibility to provide such information should reside with the employee and/or the party who seeks inclusion of the employees. The NLRB should also make clearer that no new penalties should be imposed on employers as a result of the new policy.

### **Conclusion**

For the reasons stated above, ABC strongly supports the overdue change to the NLRB's required disclosure of personal email addresses and phone numbers of eligible voters and urges the NLRB to remove the personal electronic information disclosure requirement. ABC also supports the NLRB's separate proposal to adopt a policy of providing for absentee mail ballots for employees on military leave as long as employers are not subjected to additional burdens posed by the potential logistical challenges and the new policy is restricted to the unique circumstances of the military and is not expanded to other types of leave that may arise during union elections.

Respectfully submitted,



Ben Brubeck  
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<sup>25</sup> 38 U.S.C. 4301-4355 (1994). But see *Cedar Tree Press, Inc.*, 169 F.3d 794 (3d Cir. 1999) (upholding the Board's absentee ballot policy, notwithstanding the enactment of USERRA).

<sup>26</sup> 85 Fed. Reg. 45563.

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