



Statement for the Record for Associated Builders and Contractors

Testimony of
Geoff Burr

Before the
House Committee on Appropriations
Subcommittee on Labor, Health and Human Services,
Education, and Related Agencies

On
“Regulatory Approaches to Foster Economic Growth”

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The Voice of the Merit Shop®

Chairman Kingston, Ranking Member DeLauro, and members of the Subcommittee on Labor, Health and Human Services, Education, and Related Agencies:

Good morning and thank you for the opportunity to testify before you today on “Regulatory Approaches to Foster Economic Growth.”

My name is Geoff Burr. I serve as vice president of federal affairs for Associated Builders and Contractors (ABC), a national trade association with 72 chapters representing nearly 22,000 construction and construction-related firms in the commercial and industrial sectors of the industry. ABC’s membership is bound by a shared commitment to the *merit shop philosophy*, based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through competitive bidding. We help our members win work and deliver it safely, ethically and profitably for the betterment of the communities in which they do business.

I also appear today as chairman of the Coalition for a Democratic Workplace (CDW), a broad-based coalition consisting of more than 600 member organizations, which in turn represent millions of employers concerned with labor policy issues.

The Impact of Federal Labor Rules on Economic Growth and Job Creation

The construction industry was particularly hard hit by the recession and, like many other industries, its recovery has been slow. Post-recession growth has been impeded by a number of obstacles, including limited access to capital and increased costs resulting from unnecessary federal regulations with uncertain fates.

For the last four years, the Obama administration has driven an aggressive rulemaking agenda. Many of these regulations have been promulgated hastily with limited stakeholder input and questionable legal authority. Some of these regulations are in effect now and impacting employers in the field. Many more are slated to go into effect in the next few years, which creates significant uncertainty for businesses. Clearly, this is not an environment conducive to growth.

As builders of our nation’s communities and infrastructure, our members understand the value of regulations based on solid evidence and findings, with appropriate input from affected stakeholders. However, when regulations are unjustified or improperly promulgated, they often

translate into needlessly higher costs, which are then passed along to the consumer or lead to construction projects being priced out of the market. This chain reaction ultimately results in fewer projects, and hinders businesses' ability to hire and expand.

The uncertainty surrounding employers today makes it difficult to adequately plan for the future, and is an even greater concern in an industry experiencing both high unemployment¹ and skilled labor shortages. Of particular interest to ABC and CDW are regulations promulgated by the National Labor Relations Board (NLRB) and the U.S. Department of Labor (DOL) that are designed to neutralize all employers' voices in worksite labor matters, as well as policies that restrict access to federal projects for the 86.8 percent of the construction industry that does not belong to a labor union.²

National Labor Relations Board (NLRB)

The NLRB is tasked with interpreting and enforcing the National Labor Relations Act (NLRA). The Board—which normally consists of five members—was meant to serve as a neutral arbiter of federal labor law. Recently, however, the NLRB has abandoned this role in an effort to unabashedly promote union organizing without regard to the impact on employers, employees and economic growth. The Board has issued controversial rulemakings, expanded its enforcement authority and issued dozens of precedent-reversing legal decisions impacting American workplaces—all under questionable authority.

On Jan. 4, 2012, the White House ignored constitutionally established separation of powers and the rules of the U.S. Senate by appointing three individuals to the NLRB while the chamber was in session. Several legal challenges were filed against the appointments, including *Noel Canning v. NLRB*, in which CDW was involved. On Jan. 25, 2013, a three-member panel of the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) unanimously ruled that the president's recess appointments were, in fact, unconstitutional. ABC and CDW strongly supported the D.C. Circuit's decision, affirming the Senate's responsibility to provide advice and consent on presidential appointments.

Uncertainty surrounding the unlawful appointments continues to raise questions regarding the NLRB's authority as it applies to recently decided cases, as well as pending and future

¹ See: <http://1.usa.gov/dRbkuz>.

² See: <http://1.usa.gov/fEgi>.

enforcement actions and adjudications. The uncertainty created by this situation is imposing tangible time and resource costs on employers and other parties involved in pending Board actions.

Neither the administration nor the NLRB has appropriately addressed the uncertainty created in the wake of the *Noel Canning* decision. In fact, both have doubled down on their respective positions. In February, the White House re-nominated two of the controversial recess appointees for consideration by the Senate, and on the same day the D.C. Circuit issued its ruling in *Noel Canning*, NLRB Chairman Mark Pearce stated that the Board “will continue to perform [its] statutory duties and issue decisions,” even as it formally seeks Supreme Court review.³

It is clear the NLRB is unwilling to impose any kind of restraint on itself. Therefore, it is up to Congress to intervene to ensure the Board does not make an already unfortunate situation worse. Action is needed immediately to limit the NLRB’s power to issue new decisions, prevent it from enforcing decisions that date back to the president’s unlawful appointments, and guarantee such restrictions stay in place until a definitive Supreme Court ruling is issued or a constitutionally valid quorum can be confirmed by the Senate.

In addition to the NLRB’s refusal to mitigate the uncertainty created by the recess appointments in the wake of the *Noel Canning* ruling, the Board also is responsible for two controversial rulemakings that seek to promote union organizing in the construction industry and elsewhere.

“Ambush” Elections Rule⁴

In December 2011, the NLRB issued a final rule to overhaul its procedures for dealing with union representation elections. The rule was an expedited portion of a larger plan, which first was proposed in June 2011, and limits the issues an employer can raise at a pre-election hearing and significantly curbs the employer’s opportunity for appeals. Experts estimated the rule will shorten election timeframes from approximately 40 days to as few as 17. The rule will deny employers their right to due process and prevent them from presenting facts and information to their employees regarding union representation.

In May 2012, the U.S. District Court for the District of Columbia (D.C. District Court)

³ See: <http://1.usa.gov/XdwRQ3>.

⁴ The full June 2011 proposal available at: <https://federalregister.gov/a/2011-15307>. As noted in ABC’s testimony, portions of this proposal were finalized in December 2011 (available at: <https://federalregister.gov/a/2011-32642>), which was ultimately invalidated by a U.S. District Court.

deemed the rule invalid and no longer in effect because it was adopted without the statutorily required quorum of three Board members. The NLRB subsequently appealed that decision. CDW recently amended its arguments in the case to point out that under *Noel Canning*, former Board Member Craig Becker received an unconstitutional 2010 recess appointment, which would reinforce the invalidation of the Board’s adoption of the rule. In response to CDW’s filing, the appeals court has suspended the NLRB’s appeal, pending an outcome in the *Noel Canning* case.

“Employee Rights” Notice Posting Rule⁵

In November 2011, the NLRB issued a final rule requiring employers to display a poster—twice the size of most other federal notices—in their workplace that contains an unbalanced and incomplete list of employee rights under the NLRA. Among the omitted rights are the right to decertify their union and the right to pay only the portion of union dues attributable to collective bargaining, contract administration and grievance adjustment. The rule has been subject to several legal challenges, all asserting that the NLRB lacked the requisite authority to issue the rule.

In March 2012, the D.C. District ruled the NLRB could mandate the notice posting, but could not impose automatic sanctions for failure to post. The following month, the U.S. District Court for South Carolina ruled in a separate case that the notice posting requirement exceeded the Board’s statutory authority. Both cases have been appealed, and a formal injunction was granted by the D.C. Circuit in April 2012, preventing the Board from implementing the rule pending appeal.

Unfortunately, uncertainty continues to plague employers and human resource professionals alike regarding the notice posting rule. Despite the best efforts of ABC, CDW, and other organizations to inform employers of the legal hold on the NLRB’s requirements, we have learned that many employers still believe they must post the Board notice right now. This confusion has been reinforced by the availability of “all-in-one” federal notice posters, available from third-party vendors, which have prematurely incorporated the NLRB notice into their latest versions. Such confusion over critical compliance requirements could have been avoided if the Board had waited to set its initial effective date until after the legal questions surrounding the rule—and the Board itself—were resolved.

⁵ See: <https://federalregister.gov/a/2011-21724>.

U.S. Department of Labor

“Persuader” Reporting Rule⁶

In June 2011, DOL proposed drastic regulatory changes to how it interprets and enforces Section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA), which covers federal reporting and disclosure requirements for entities hired by employers to communicate to employees regarding their right to organize. For decades, both employers and “persuaders” have been obligated to file public reports with DOL, disclosing finances and other information if they engage in such activity.

Section 203(c), better known as the “advice exemption,” has long exempted attorneys, trade associations and other third-party advisors from these reporting requirements when they discuss labor issues with an employer but do not engage in direct contact with employees. Currently, employers that engage in these protected activities also are exempt.

Under DOL’s proposed rule, the “advice exemption” will no longer extend to most advisors or their employer clients, who could be required to start filing persuader reports as well. Any activity in which DOL deems an advisor planned (or orchestrated) a campaign or program to avoid (or counter) a union organizing or collective bargaining effort will now be reportable. This means that some communications between attorneys and their clients that were previously deemed to be privileged will now trigger the Section 203 reporting requirements. One of only a handful of examples provided in the proposal indicated that some advisors could become persuaders merely by hosting conferences or meetings that focus on labor relations. For the most part, though, it is unclear exactly which situations and activities will trigger the new reporting requirements. These ambiguous procedures are alarming—especially considering criminal penalties could be imposed for non-compliance.

DOL’s proposal is concerning for several reasons. It guts the underlying statute’s protection of attorney-client privilege, improperly restricts the definition of “advice,” blurs the line defining true persuasion, and conflicts with attorney ethics. In addition, the proposal infringes on employers’ rights to free speech, freedom of association and legal counsel. For employees, their collective right to obtain balanced information about joining a union will be all but

⁶ See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1245-AA03>.

eviscerated. In turn, competitors, union organizers and others stand to benefit from having access to previously confidential information.

DOL's proposal runs contrary to the congressional intent behind the LMRDA, and is not supported by any compelling justification for such extreme changes. However, the agency tentatively plans to finish its rulemaking soon. If implemented, the new requirements will have a profound chilling effect on employers in need of advice on labor relations matters, as well as the parties from which they seek advice. Small businesses will be unquestionably discouraged from using outside legal assistance, and newly minted "persuaders" also will be more reluctant to offer what previously constituted as advice due to the unreasonable burdens that could be placed on them and their other clients. It is essential that employers in the construction industry, many of which do not have in-house attorneys or advisors, retain the ability to receive expert counsel.

ABC supports the preservation of the current interpretation of the LMRDA's Section 203(c) "advice exemption" provision, and urges Congress to join ABC, CDW and others in opposing these unjustified changes to an area of long-settled federal labor law.

Project Labor Agreements

A project labor agreement (PLA) is a project-specific collective bargaining agreement with multiple unions in which project construction contracts can be awarded only to contractors and subcontractors that agree to its terms and conditions. These agreements force contractors to recognize unions as the representatives of their employees on a job; use the union hiring hall to obtain workers; hire apprentices exclusively through union apprenticeship programs; pay fringe benefits into union-managed benefit and multi-employer pension programs; and obey the unions' restrictive and inefficient work rules and job classifications. PLAs needlessly increase construction costs, discourage competition and stifle job creation that would benefit workers in the construction industry.

On Feb. 6, 2009, President Obama issued Executive Order 13502, which strongly encourages federal agencies—including DOL—to require PLAs on a case-by-case basis on federal construction projects exceeding \$25 million in total cost. When federal agencies mandate PLAs, they effectively end open competition on public works projects, denying the vast majority of qualified contractors the opportunity to fairly bid. Contracts subject to government-mandated

PLAs amount to special interest carve-outs designed to funnel work to the small number of unionized contractors and workforces.

Qualified merit shop contractors, their skilled employees, and many communities and states strongly oppose government-mandated PLAs because they discourage fair and open competition and impose a regulatory impediment to new jobs for firms in the construction industry.

Taxpayers also lose with government-mandated PLAs. In a September 2009 study, the Beacon Hill Institute (BHI) predicted government-mandated PLAs would add 12 percent to 18 percent in federal construction costs without providing corresponding benefits to taxpayers or construction owners. To determine this cost increase, BHI used the results of three previous studies measuring the effect government-mandated PLAs had on school construction projects subject to prevailing wage laws in Massachusetts, Connecticut and New York.

New Hampshire Job Corps Center

One example of a government-mandated PLA resulting in needless litigation, delays, reduced competition and increased costs to federal taxpayers involved DOL's construction of a new Job Corps Center in Manchester, N.H. In September 2009, DOL mandated a PLA on the project, despite the fact that approximately 11 percent of the construction workforce belongs to a union in that state.

Facing a bid protest filed at the Government Accountability Office (GAO) by a New Hampshire contractor opposed to the PLA mandate, DOL canceled the Job Corps Center solicitation in November 2009. But rather than remove the controversial PLA mandate and proceed with the procurement process using fair and open competition, DOL waited more than two years to issue a new solicitation, which still contained a PLA mandate. Public record requests revealed that the agency spent almost \$430,000 for a consultant (Hill International) to complete two studies to evaluate the use of PLAs on federal contracts and justify DOL's use of a PLA on the Manchester Job Corps Center. Federal contractors, with the assistance of ABC, filed another GAO protest against DOL's PLA. As a result, last summer GAO forced the agency to take corrective action and the agency once again canceled the solicitation in the face of the bid protest. However, DOL only did so after it had already received and publicly unsealed bids.

Last fall, DOL finally issued a solicitation without a PLA mandate. In February, DOL opened

the bids, which provided for the first time an “apples to apples” comparison of the same federal project being bid with and without a PLA mandate.

When the PLA mandate was removed, the number of pre-qualified companies bidding on the project increased threefold. The low bidder, a local firm from New Hampshire, submitted an offer that was approximately 18 percent less than the lowest bid submitted by an out-of-state firm during the first round of bidding in 2012.

The results in the Manchester Job Corps Center example demonstrate government-mandated PLAs reduce competition, increase costs and harm local businesses. PLA mandates are one of many examples of ill-conceived government regulations advanced by the White House that serve special interests while punishing job creators and taxpayers.

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On behalf of ABC and CDW, I'd like to again thank the subcommittee for holding today's hearing. These sustained efforts to silence employers in labor relations, and the administration's de facto exclusion of 86.8 percent of the U.S. construction industry from winning federal work, are top concerns for our members. We hope the issues raised today also are of significant concern to this subcommittee, which is responsible for appropriating the taxpayer funds used by the NLRB and DOL to implement these harmful and counterproductive policies. We look forward to working with you to find ways to help employers during this time of economic and regulatory uncertainty.

Mr. Chairman, this concludes my formal remarks. I am prepared to answer any questions you and the other members of the subcommittee may have.