



January 7, 2014

The Honorable Barbara Mikulski
Chairwoman
Senate Committee on Appropriations
Washington, DC 20510

The Honorable Richard Shelby
Vice Chairman
Senate Committee on Appropriations
Washington, DC 20510

The Honorable Tom Harkin
Chairman, Subcommittee on Labor,
Health and Human Services, Education, and
Related Agencies
Senate Committee on Appropriations
Washington, DC 20510

The Honorable Jerry Moran
Ranking Member, Subcommittee on Labor,
Health and Human Services, Education, and
Related Agencies
Senate Committee on Appropriations
Washington, DC 20510

Dear Chairwoman Mikulski, Vice Chairman Shelby, Chairman Harkin and Ranking Member Moran:

On behalf of Associated Builders and Contractors (ABC), a national trade association with 70 chapters representing 22,000 member firms from more than 19,000 construction and industry-related companies, I am writing to highlight existing or proposed regulatory and sub-regulatory actions from the U.S. Department of Labor (DOL) and the National Labor Relations Board (NLRB) that have or will have negative impacts on job growth and economic recovery in the construction industry. ABC urges the Committee on Appropriations to carefully examine these concerns and ensure they are addressed in the upcoming omnibus appropriations package for fiscal year 2014.

U.S. Department of Labor

“Persuader” Reporting Rulemaking

In March 2014, DOL plans to finalize drastic changes to how the Labor-Management Reporting and Disclosure Act (LMRDA) is interpreted and enforced (*Labor-Management Reporting and Disclosure Act; Interpretation of the “Advice” Exemption*, 76 Fed. Reg. 36178). Section 203 pertains to federal reporting and disclosure requirements for individuals and entities hired by employers “to persuade employees to exercise or not exercise or persuade employees as to the manner of exercising, the right to organize...” Employers and true “persuaders” have long been required to file disclosure reports with DOL. However, when attorneys or consultants do not communicate directly with employees, but instead simply advise the employer, they have not been required to disclose. DOL’s proposal virtually eliminates this exemption, resulting in the drastic expansion of the types of circumstances that will trigger reporting—including communications between attorneys and their clients. If finalized, the proposal will deny employers their rights to free speech, freedom of association and legal counsel, and

deprive employees of their right to obtain balanced and informed input as they decide whether to be represented by a union.

It is essential that employers in the construction industry retain the ability to receive expert counsel and advice on labor relations matters. The vast majority of employers are small businesses without in-house attorneys or advisors; accordingly, they should not be burdened with vague and intrusive reporting regimes before, during and after a union organizing campaign.

ABC supports the preservation of the long-held and current interpretation of the LMRDA's Section 503(c) "advice exemption" provision, and formally requests that the Committee establish funding limitations on DOL's development of the persuader rulemaking.

Crystalline Silica Rulemaking

On Sept. 12, 2013, OSHA issued its proposal to significantly revise its standards governing workplace exposure to respirable crystalline silica, a material ubiquitous on construction sites as part of commonly used materials (*Occupational Exposure to Respirable Crystalline Silica*, 78 Fed. Reg. 56273). Despite OSHA's claims, industry experts assert that the implementation of this proposal is technologically and economically infeasible for many industries, including construction. In addition, the agency has failed to explain how a drastically lower permissible exposure limit for silica dust will reduce the number of silica-related illnesses and deaths. OSHA has also acknowledged its inability to properly enforce existing standards (which existed over a four-decade period during which American workplaces experienced a 93 percent drop in silica-related deaths).

ABC is extremely concerned about the implications this rulemaking would have on the construction industry, and supports funding limitations on OSHA's development of this proposal.

Letter of Interpretation on Walk-Around Inspections at Nonunion Worksites

On Feb. 21, 2013, OSHA issued a letter of interpretation (LOI) addressing enforcement and walk-around inspections at nonunion worksites. In response to a union inquiry, the letter (not made public until April 5) stated that one or more employees at a worksite not subject to a collective bargaining agreement can designate an outside individual (individuals "affiliated with a union or a community organization" were offered as examples) to serve as the representative of all employees at the worksite in enforcement-related matters and during OSHA inspection walk-arounds. OSHA maintains this policy has been the practice of the agency for years, and added generally that its LOIs, "do not create new or additional requirements but rather explain these requirements and how they apply to particular circumstances." However, the Feb. 21 letter plainly contradicts the agency's field operations manual and its own regulations governing employee representatives.

We are troubled by the implications OSHA's letter could have on the labor relations and property rights of nonunion employers and their employees. More importantly, our members are troubled by the

implications such a policy would have on the safety integrity of their worksites. ABC supports any language preventing the Occupational Safety and Health Administration (OSHA) from implementing these alarming sub-regulatory policy revisions.

NLRB

“Ambush” Elections Rulemaking

ABC has been outspoken in its opposition to the NLRB’s “ambush” elections proposal (*Representation-Case Procedures*, 76 Fed. Reg. 36811), which, if implemented, will drastically reduce the amount of time between a union filing a representation petition and a representation election taking place from the current average of approximately 40 days to as few as 10. A federal district court struck down the Board’s initial final rule on procedural grounds. The NLRB has indicated, however, that it plans to issue another final rule in the near future. A new final rule would unnecessarily expedite the election time frames by eliminating procedural due process rights for employers prior to the election, including determinations on which employees are considered supervisors, and which employees constitute a potential bargaining unit. These changes will ensure that employees are denied access to critical information about the pros and cons of union representation, and that employers are deprived of their right to free speech and the ability to fairly educate their employees.

In addition, the ambush proposal would require employers to disclose employee email addresses and phone numbers to union organizers. Such a requirement ignores recent email attacks that have become part of union corporate campaigns in the construction industry. A recent example is described in the case of *Pulte Homes, Inc. v. LIUNA Construction*, where union organizers deliberately flooded an employer’s email system in order to disrupt the employer’s operations. It should also be noted that a long-standing Board case, titled *Excelsior Underwear Inc. 156 NLRB 1236 (1966)*, limits the information an employer must provide to names and home addresses of employees eligible to vote in a union representation election.

ABC formally requests that the Committee establish funding limitations on the NLRB’s development of the ambush elections rulemaking.

Secret Ballot Protection

Currently, workers decide whether they want to be represented by a union through a federally supervised secret ballot election. Strict procedures are followed to ensure fair elections, free of coercion by employers and unions alike. Although employer and union representatives are present for the election, they may only observe, and are not allowed to speak with employees or see how a particular individual votes. Elections are held promptly—typically within 40 days of a petition being filed (and more than 90 percent conducted within 56 days).

While it is true that existing procedures for fair elections call for secret ballot elections, these procedures must be protected from misguided and politically motivated attempts by the NLRB to curtail, circumvent and ultimately eliminate them through regulation. What was true in the days of the ironically named Employee Free Choice Act (EFCA) remains true today—the secret ballot is one of the cornerstones of the democratic process, and it deserves the utmost protection from those who wish to eliminate it.

ABC supports the protection of workers' right to anonymous, secret ballot elections when deciding whether to be represented by a union, and the prohibition of policies that mandate so-called "card check" campaigns.

####

Amid today's economic challenges, DOL and the NLRB should be helping employers get workers back on the job, and creating opportunities for businesses to grow. Unfortunately, many of the current priorities of these agencies will unquestionably do the opposite. ABC appreciates the Committee's consideration of our members' concerns, and looks forward to working with you as funding levels and priorities are set for the 2014 fiscal year.

Sincerely,

A handwritten signature in black ink, appearing to read "G. G. Burr", with a long horizontal flourish extending to the right.

Geoffrey G. Burr

Vice President, Government Affairs