



June 8, 2016

Senator Thad Cochran  
Chairman, Committee on Appropriations  
The Capitol  
Washington, DC 20515

Senator Barbara Mikulski  
Vice Chairwoman, Committee on Appropriations  
The Capitol  
Washington, DC 20515

Dear Chairman Cochran and Vice Chairwoman Mikulski:

On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with 70 chapters representing nearly 21,000 chapter members, 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 FY 2017 Labor, Health and Human Services, Education and Related Agencies Appropriations bill.

### **U.S. Department of Labor**

#### **“Persuader” Reporting Rulemaking**

DOL’s final Persuader rule drastically 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 final rule 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. This rule denies employers their rights to free speech, freedom of association and legal counsel, and deprives 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 requirements 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 March 25, 2016, OSHA published a final rule that would drastically lower the permissible exposure limit (PEL) of respirable crystalline silica for the construction industry (*Occupational Exposure to Respirable Crystalline Silica*, 81 Fed. Reg. 16286). The final rule lowers the PEL from the current standard of 250 micrograms per cubic meter of air to 50 micrograms per cubic meter of air, averaged over an eight hour day. OSHA failed to take into account the substantial evidence submitted to the rulemaking docket and moved forward with a technologically and economically infeasible rule. The final rule displays a fundamental misunderstanding of the real world of construction.

ABC is extremely concerned about the implications this final rule will have on the construction industry, and supports funding limitations on OSHA's implementation of this rule.

### **Blacklisting**

ABC supports the bill denying the U.S. Department of Labor's (DOL) request for funds to establish an Office of Labor Compliance to implement President Obama's controversial Fair Pay and Safe Workplaces Executive Order 13673, commonly referred to as the "Blacklisting" initiative. The DOL already has the existing tools needed to suspend and debar federal contractors violating federal laws. Creating a new bureaucracy would be wasteful and unnecessary. ABC is opposed to the Blacklisting proposal because it imposes an illegal de facto debarment system that will restrict a company's ability to counter alleged violations of the 14 federal laws and equivalent state laws identified in the proposal. Depriving contractors of due process rights will lead to litigation, reduced competition, increased costs and needless delays to the detriment of all stakeholders.

### **National Labor Relations Board**

#### **"Ambush" Elections Rulemaking**

ABC has been outspoken in its opposition to the NLRB's "ambush" elections rule (*Representation-Case Procedures*, 76 Fed. Reg. 36811), which has reduced the amount of time between a union filing a representation petition and a representation election taking place to as few as 10 days. A federal district court struck down the Board's initial final rule on procedural grounds and the NLRB issued another final rule thereafter. The final rule unnecessarily expedites 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. Now employees are denied access to critical information about the pros and cons of union representation, and employers are deprived of their right to free speech and the ability to fairly educate their employees.

In addition, the ambush final rule requires employers to disclose employee email addresses and phone numbers to union organizers - ignoring recent email attacks that have become part of union corporate campaigns in the construction industry.

ABC formally requests that the Committee establish funding limitations on the NLRB's "ambush" election final rule.

### **Browning-Ferris Industries Case**

In August, 2015 the Board issued its *Browning-Ferris Industries* decision, in which the Board overturned the traditional "joint employer" standard. The unprecedented changes by the Board redefined who qualifies as a "joint employer" under the NLRA, which has the potential to create barriers to and burdens on the contractor and subcontractor relationship throughout the construction industry. Under the new interpretation, contractors may find themselves vulnerable to increased liability—making them less likely to hire subcontractors, most of which are small businesses, to work on projects. We urge the Committee to include a provision within the FY 2017 Appropriations Bill restoring the long-standing "joint employer" standard.

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 2017 fiscal year.

Sincerely,



Kristen Swearingen  
Vice President of Legislative & Political Affairs