



VIA ELECTRONIC SUBMISSION

December 7, 2022

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

**Re: The Standard for Determining Joint-Employer Status; RIN 3142-AA21**

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 Sept. 7, 2022, at 87 Fed. Reg. 54641.

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

ABC is a national construction industry trade association representing more than 22,000 member companies. ABC and its 68 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 general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private sector customers.<sup>1</sup>

The vast majority of ABC's contractor members are small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)<sup>2</sup> and industry workforce employment (more than 82% of the construction industry is

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<sup>1</sup> For example, see ABC's 32nd Excellence in Construction Awards program from 2022: <https://www.abc.org/Portals/1/2022%20Files/32ND%20EIC%20program--Final.pdf?ver=2022-03-25-115404-167>.

<sup>2</sup> U.S. Census Bureau 2019 County Business Patterns: <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.

employed by small businesses).<sup>3</sup> In fact, construction companies that employ fewer than 100 construction professionals comprise 99% of construction firms in the United States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.<sup>4</sup> The vast majority of small businesses are not unionized in the construction industry.

In addition to small business member contractors that build private and public works projects, ABC also has large member general contractors and subcontractors that perform construction services for private sector customers and federal, state and local governments procuring construction contracts subject to respective government acquisition policies and regulations.

ABC's 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, specifically the adverse impact of an overbroad joint-employer standard.

## **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.<sup>5</sup>

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.<sup>6</sup> 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

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<sup>3</sup> 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Page 3, <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf>.

<sup>4</sup> U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019, available at <https://thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx>.

<sup>5</sup> 362 NLRB No. 186 (2015).

<sup>6</sup> 2018 U.S. App. LEXIS 36706 (D.C. Cir. 2018).

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.<sup>7</sup> 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."<sup>8</sup> 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."<sup>9</sup> 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.<sup>10</sup> ABC disagreed with those portions of the D.C. Circuit's opinion that partially affirmed the previous *BFI* test under common law principles.

On Feb. 26, 2020, the NLRB issued the joint employer final rule,<sup>11</sup> which requires that joint-employer status may only be established where a company exercises "substantial direct and immediate control" over the essential terms and conditions of another company's employees. ABC submitted comments in support of the proposed rule<sup>12</sup> and the rule went into effect on April 27, 2020. A legal challenge was filed against the rule, which remains pending and was recently stayed pending the outcome of this proposed rulemaking.<sup>13</sup>

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

As further explained below, ABC opposes the Board's new proposed rule, which will cause great confusion and uncertainty among construction contractors, specifically small business owners. The Board's new proposal is a radical departure not only from the 2020 final rule, but also from the previous *BFI* standard, by allowing joint employer findings based solely on indicia of indirect or potential authority, without any indicia of "direct and immediate control," and without providing clear and consistent criteria for companies to apply when determining joint-employer status.

ABC urges the Board to withdraw the new proposed rule and retain the current 2020 final rule.

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<sup>7</sup> Id. at 51.

<sup>8</sup> Id. at 54-55.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> 85 Federal Register at 11184.

<sup>12</sup> See ABC's comments at <https://www.regulations.gov/document/NLRB-2018-0001-26859>.

<sup>13</sup> *Service Employees International Union v. NLRB*, 21-cv-02443-RC (D.D.C.) (minute order Sept. 12, 2022).

## **The Board’s Radical Proposal Dramatically Expands the Joint-Employer Standard Beyond the Limits of the Common Law.**

The Board’s new proposal greatly expands joint-employer liability by restoring—and then exceeding—the *BFI* standard, which deems two entities joint employers based on the mere existence of reserved joint control, indirect control or control that was limited and routine.

The proposed rule goes even further than the *BFI* case by making clear that indirect or reserved control standing alone may be sufficient to prove joint-employer status. As NLRB members Marvin E. Kaplan and John F. Ring explained in their dissent, the proposed rule “would not merely return the Board to the *Browning-Ferris Industries* standard but would implement a standard considerably more extreme than *BFI*.”<sup>14</sup>

Under the new proposed rule, two or more employers of the same particular employees are joint employers of those employees if the employers share or codetermine those matters governing employees’ essential terms and conditions of employment.<sup>15</sup> The Board defines “share or codetermine” to mean “for an employer to possess the *authority* to control (*whether directly, indirectly, or both*), or to *exercise* the power to control (*whether directly, indirectly, or both*), one or more of the employees’ essential terms and conditions of employment.”<sup>16</sup> As pointed out in the dissent, the Board for the first time asserts in the proposed rule that reserved, unexercised control, standing alone, may be sufficient to establish joint-employer status, though no court has ever so held.<sup>17</sup>

Further, the proposed rule states that essential terms and conditions of employment will “generally include, but are not limited to: wages, benefits, and other compensation, hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance.”<sup>18</sup>

By comparison, the 2020 final rule’s list of essential employment terms included *only* “wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction.” The Board’s new list, purportedly expanded due to experiences of some employees during the COVID-19 pandemic, is so broad as to render meaningless the

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<sup>14</sup> 87 Federal Register at 54657.

<sup>15</sup> 87 Federal Register at 54646.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

common law limits placed on the Board by the courts and by Congress.<sup>19</sup> Because the proposed new list of working conditions as to which any control—direct or indirect—will be found to impose joint-employer status, the proposed rule violates the common law and therefore the NLRA itself, as interpreted by the U.S. Supreme Court, the D.C. Circuit and many other courts.<sup>20</sup>

### **The Proposal Will Disrupt Long-Established Operational 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 multiemployer 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 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*:<sup>21</sup>

“[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.”

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<sup>19</sup> 87 Federal Register at 54647.

<sup>20</sup> ABC agrees with the U.S. Chamber of Commerce’s extensive comments in this proceeding which address at length the proposed rule’s numerous departures from the common law and the common law cases demonstrating such departures. Rather than repeat those comments here, ABC incorporates them by reference.

<sup>21</sup> 341 U.S. 675, 689-90 (1951).

The *Denver Building* legal principle remains embedded in labor law and is binding on both the D.C. Circuit and the Board. The proposed rule offers no recognition of it. The Board's final rule must adhere to it and recognize the clear lines around the industry which the court has drawn.<sup>22</sup>

Unfortunately, the Board's expansive proposed standard will create a legal environment that is plainly inconsistent with decades of interpretation of the Act. Under the new proposal as well as the *BFI* case, 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.

It must 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.

The Board's final rule must recognize that standard construction operational 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. If corrective action is not taken, the Board's new standard will result in massive confusion for construction contractors.

Finally, the new rule also threatens to severely hamper temporary staffing arrangements, which are often essential to allow contractors to deal productively with

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<sup>22</sup> See also H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947) expressing Congress's intent to limit the definition of "employee"— "according to the law as the courts have stated it"—as meaning "someone who works for another for hire ... under direct supervision."

wide variations in the need for workers at different stages of a construction project.<sup>23</sup> As has been widely publicized, the construction industry is confronting a widespread shortage of 650,000 skilled workers in 2022.<sup>24</sup> 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. The Board's proposal threatens the ability of contractors to deal with their staffing needs at times of peak demand.

### **The Proposed Rule, if Implemented, Would Violate the Administrative Procedure Act.**

As the dissenting Board members properly found, the proposed rule violates the Administrative Procedure Act because it fails to adequately explain or justify the Board's departure, not only from the 2020 final rule, but from previous administrations' more limited approach to joint-employer status and the common law itself. Under the APA, an agency action is arbitrary and capricious if the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."<sup>25</sup>

In the proposed rule, the Board has plainly departed from the common law factors that Congress and the Supreme Court expressly intended to limit the Board's authority over employers.<sup>26</sup> In addition, the Board here has failed to give any meaningful consideration to the historical common law relationships between general contractors and their subcontractors in the construction industry, specifically the historical understandings of independence between contractors temporarily working together to complete individual projects.<sup>27</sup> Similarly, the Board has failed to consider important aspects of the problem,

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<sup>23</sup> 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.

<sup>24</sup> ["ABC: Construction Industry Faces Workforce Shortage of 650,000 in 2022,"](#) ABC, February 2022.

<sup>25</sup> *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43; accord *Sierra Club v. U.S. Env. Prot. Agency*, 939 F.3d 649, 663-64 (5<sup>th</sup> Cir. 2019) (citations omitted).

<sup>26</sup> See *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 689-90 (1951).

<sup>27</sup> See, e.g., [Rowley v. Mayor & City Council of Balt.](#), 305 Md. 456, 505 A.2d 494, 496-97 (1986) ("The general rule is that the employer of an independent contractor is not liable for the negligence of the contractor or his employees."), citing Restatement (Second) of Torts § 409

specifically the adverse impact of the proposed rule on small businesses in the construction industry, and the critical need for explicit guidance in order for all tiers of contractors and subcontractors to know what their rights and obligations are on individual construction projects.

It is well settled that agencies that change their existing policies must “provide a reasoned explanation for the change.”<sup>28</sup> “[T]he agency must at least ‘display awareness that it is changing position’ and ‘show that there are good reasons for the new policy.’”<sup>29</sup> In the present proposed rule, the Board improperly expands the joint-employer standard beyond even the scope of the Obama-era Board’s improper *BFI* test, without acknowledging its awareness of changing positions, let alone identifying good reasons for imposing such a draconian new policy.

Finally, when an agency rescinds a prior policy, “its reasoned analysis must consider the alternatives that are within the ambit of the existing policy.”<sup>30</sup> But in the present rulemaking the Board has failed adequately to consider reasonable alternatives to its replacement of the 2020 rule with a rule that radically departs from decades of precedent under the common law.<sup>31</sup> Among other alternatives the Board should have addressed, the Board should more clearly confine joint employer findings to just those issues where common control exists between contractors and subcontractors. In other words, businesses that direct their subcontractors’ activities for the limited purpose of complying with government safety requirements or other regulations should only be found to be joint employers, if at all, solely for the limited purpose of such government compliance (not for the overbroad purpose of assessing unfair labor practice liability or collective bargaining).

The Board’s additional refusal to adopt a possible exemption for small business entities, purportedly relying on “common law principles,” is inherently flawed because the proposed rule itself dramatically departs from the common law.<sup>32</sup>

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(1965). As the Supreme Court further held in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992), adopting as a “general rule” under the NLRA as in similar statutes referencing employment without further definition, that “Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Citing Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989); [Kelley v. Southern Pacific Co.](#), 419 U. S. 318, 322-323 (1974); [Baker v. Texas & Pacific R. Co.](#), 359 U. S. 227, 228 (1959) (*per curiam*); [Robinson v. Baltimore & Ohio R. Co.](#), 237 U. S. 84, 94 (1915).

<sup>28</sup> *FCC v. Prometheus Radio Project*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 1150, 1158 (2021).

<sup>29</sup> *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016) (citation omitted).

<sup>30</sup> *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 1891, 1913 (2020) (citing *State Farm*, 463 U.S. at 51).

<sup>31</sup> 87 Federal Register at 54662.

<sup>32</sup> *NLRB v. Denver Bldg. & Constr. Trades Council*, *supra*, 341 U.S. at 689-90.



Assessed against these standards, the proposed rule cannot be sustained under the APA. It should be withdrawn unless and until the Board is able to justify the broad changes in well-settled law it proposes with a legal or factual record supporting such change.

### **The Proposed Rule Will Harm the Collective Bargaining Process in the Construction Industry.**

The proposed rule is also arbitrary in its failure to address the adverse impact of the proposed expansion of joint-employer status on the collective bargaining process in the construction industry. Contrary to the Act’s requirement that multiemployer bargaining units be based upon the consent of all parties, the proposed rule arbitrarily forces construction contractors in different tiers, who are working together only temporarily and may even be adverse to each other with regard to the employees in question, to nevertheless compel joint bargaining under a nebulous and unexplained new standard. Congress never intended to so thoroughly disrupt historical contractor/subcontractor relationships in the construction industry, and indeed the common law is to the contrary.

### **The Proposed Rule Violates the “Major Case” Doctrine and Constitutionally Required Separation of Powers.**

By announcing an overbroad and unprecedented standard that departs from the express intent of Congress—far exceeding the bounds of common law employment—the Board is imposing a rule of great economic and political significance without any indication that Congress has authorized it to do so. The Supreme Court has repeatedly held that such authority cannot be conferred without specific expression of Congressional intent.<sup>33</sup> Plainly, the consequence of the proposed rule—which would apply an unprecedented standard and potentially impose new joint-employer status on thousands of businesses across many industries, but specifically construction—constitutes a matter of “vast economic and political significance.”<sup>34</sup> The plain language and legislative history of the NLRA bars the Board from exceeding its authority in the proposed joint-employer rule.<sup>35</sup>

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<sup>33</sup> *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2608 (2022). See also *NFIB v. OSHA*, --- U.S. ---, --- S. Ct. ---, --- (2022) (OSHA regulation mandating COVID-19 vaccination was beyond scope of agency’s authority in the absence of an express direction from Congress: “We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.” citing *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 594 U. S. \_\_\_, \_\_\_ (2021) (per curiam) (slip op., at 6) (internal quotation marks omitted)).

<sup>34</sup> *West Virginia v. Environmental Protection Agency*, 142 S. Ct. at 2608.

<sup>35</sup> See also H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947) (expressing Congress’s intent to limit the definition of “employee” to mean “someone who works for another for hire ... under *direct* supervision.” (emphasis added)).

## **The Proposed Rule Will Harm Small Businesses in the Construction Industry.**

The new rule will clearly have a harmful effect on a significant segment of the construction industry: small businesses. Under the Board's overbroad standard, contractors will be vulnerable to increased liability, making them less likely to hire subcontractors, most of which are small businesses and many of whom are minority-, women-owned and disadvantaged businesses and employ a diverse workforce. The majority of these firms are not unionized in the construction industry.<sup>36</sup> As explained previously, 82% of the construction firms across the nation are small businesses with fewer than 10 employees, while more than 82% of the construction industry is employed by small businesses.

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.<sup>37</sup> And 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 minority-, women-owned and disadvantaged businesses.<sup>38</sup>

Further, under the analysis required by the Regulatory Flexibility Act, the Board wholly underestimates compliance costs and burdens the new proposal will impose on small businesses.

For example, the Board estimates:

- A human resources or labor relations specialist at a small employer who undertook to become generally familiar with the proposed changes may take at most one hour to read the text of the rule and the supplementary information published in the Federal Register;<sup>39</sup>

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<sup>36</sup> [Union Construction's Racial Equity and Inclusion Charade](#), Stanford Social Innovation Review, Travis Watson, June 14, 2021. See also [Why Are Philly's Construction Unions So White? Six Takeaways From Our Reporting On Racism In The Building Trades](#), The Philadelphia Inquirer, Sept. 1, 2022.

<sup>37</sup> 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).

<sup>38</sup> 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 Congress, (Oct. 6, 2015).

<sup>39</sup> 87 Federal Register at 54661.

- A small employer consulting with an attorney would require one hour as well;<sup>40</sup>
- Using the U.S. Bureau of Labor Statistics' estimated wage and benefit costs, the Board assessed these labor costs to be between \$147.24 and \$151.51;<sup>41</sup> and
- The minimal cost to read and understand the rule will not generate any such significant economic impacts.<sup>42</sup>

The Board's estimate of one hour to read the rule's text is extremely conservative and it will likely be substantially greater than one hour in order to understand what the new rule requires and how to comply. Further, many small contractor members do not have in-house legal counsel or a human resources director. Thus, they will be forced to seek outside counsel or hire a human resources director to navigate the uncertainties and ambiguities within the rule. Hourly fees for outside counsel are more likely in excess of \$300 per hour, as opposed to the Board's low estimate of \$151.51. Ultimately, small business construction contractors will incur significantly higher expenses to comply with the rule than the Board has estimated.

As further noted above, the Board has failed to consider the number of small businesses in the construction industry (and others) that will be deprived of business opportunities because the larger companies are deterred from subcontracting due to the risk of being found to be a joint employer. At every level, the proposed rule will discourage subcontracting, which will reduce work opportunities for small businesses throughout the supply chain.

### **The Absence of Clear Guidance in the Proposed Rule Will Cause Great Confusion and Uncertainty for Construction Contractors.**

The proposed rule provides no guidance to the regulated community, which will create uncertainty and instability among construction contractors. While the 2020 final rule provides clear guidance as well as specific examples of how it should be applied, the dissent correctly points out that the new rule "neither articulates the common-law agency principles that appropriately bear on determining joint-employer status under the NLRA nor provides any real guidance to the regulated community."<sup>43</sup>

The dissent further explains, "instead, it simply purports to expand joint-employer status to the outermost limits of the common law (while actually going beyond those limits) and leaves everything else to case-by-case adjudication."<sup>44</sup> Unfortunately, the vagueness

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<sup>40</sup> 87 Federal Register at 54661.

<sup>41</sup> Id. at 54661-54662.

<sup>42</sup> Id. at 54662.

<sup>43</sup> Id. at 54652.

<sup>44</sup> Id.

and lack of clarity will ultimately result in time-consuming and costly litigation for the construction industry.

**Conclusion**

For the reasons stated above and in other comments submitted by the business community, the Board should withdraw the new proposed rule and retain the current 2020 final rule.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Brubeck". The signature is fluid and cursive, with the first name "Ben" being more prominent than the last name "Brubeck".

Ben Brubeck  
Vice President of Regulatory, Labor and State Affairs

Of Counsel: Maurice Baskin, Esq.  
Little Mendelson, P.C.  
815 Connecticut Ave. NW  
Washington, DC 20006