



July 26, 2024

The Honorable Bernie Sanders
Chairman
Committee on Health, Education,
Labor and Pensions
U.S. Senate
Washington, DC 20510

The Honorable Bill Cassidy
Ranking Member
Committee on Health, Education,
Labor and Pensions
U.S. Senate
Washington, DC 20510

Dear Chairman Sanders, Ranking Member Cassidy and Members of the Senate Committee on Health, Education, Labor and Pensions:

On behalf of Associated Builders and Contractors, a national construction industry trade association with 67 chapters representing more than 23,000 members, I am writing in opposition of Lauren McFerran's nomination to serve as a member of the National Labor Relations Board. ABC has also joined with 40 organizations and the Coalition for a Democratic Workplace, a broad-based coalition of over 500 major business and trade organizations representing hundreds of thousands of employers and millions of employees in various industries across the country, in an [opposition letter to Chair McFerran's nomination](#).

Since Lauren McFerran became chair of the NLRB in January 2021, the Board has decidedly abandoned its role as a neutral arbiter of federal labor law and became solely focused on expanding and reinterpreting the law to favor unions at the expense of workers and employers alike. ABC is extremely concerned with the trajectory of Chair McFerran's NLRB and strongly urges the members of the committee to reject her nomination given the process and administrative concerns regarding the nominee, as well as the many determinantal rulemakings advanced under her leadership and process concerns, highlighted below.

Determinantal Rulemakings:

- **Joint Employer Rule:** On Oct. 26, 2023, the NLRB issued its [final rule](#) on joint-employer status under the National Labor Relations Act(?). The NLRB's rule created a radical and overbroad joint-employer standard, which would have disrupted long-established, efficient operational processes that are followed by construction service providers who work together to build America. Most concerningly, it would make contractors vulnerable to increased liability and risk, making them less likely to hire subcontractors, most of which are small businesses.

However, in March 2024, a federal judge in the U.S. District Court for the Eastern District of Texas vacated the Board's 2023 joint employer final rule and the Board's rescission of the preexisting [ABC-supported 2020 rule](#), which was appealed by the NLRB. Moreover, on April 10, 2024, Congress passed a bipartisan [Congressional Review Act resolution](#) disapproving and nullifying the NLRB's joint employer rulemaking, which was vetoed. The resolution's passage in the U.S. House of Representatives and U.S. Senate sends a strong message that Congress disapproves of the harmful labor policies advanced by Chair McFerran. Just last week, on July 19, the NLRB moved to withdraw its appeal of the court's decision to vacate the 2023 Joint Employer final rule, which means the court's ABC-supported decision will become final.

- **Violating Employees' Rights to a Secret Ballot in Union Elections:** The Board's [Cemex decision](#) facilitates union organizing by card check instead of a secret ballot election. It permits the NLRB to force the employer to bargain with the union even if the union lost the election or if there was no election at all. CDW filed an [amicus brief](#) before the 9th Circuit urging it to set aside the decision for violating U.S. Supreme Court precedent, ignoring congressional intent, exposing workers to intimidation and harassment and violating workers' right to a private ballot.
- **"Ambush" Election Rule:** Despite years of litigation, Chair McFerran's NLRB revived a controversial policy from the Obama era in the form of its [representation-case procedures final rule](#). The direct final rule, issued without notice or the opportunity to comment, essentially restores provisions of the [2014 "ambush" election rule](#) and rescinds the remaining ABC-supported provisions of a [2019 final rule that largely tried to unwind the 2014 rulemaking](#). The rule applies to representation petitions filed on or after Dec. 26, 2023. Under the rule, employers will have less time to respond to representation petitions.

The Board's action to reduce the amount of time between when a union files a representation petition and an election takes place imposes unnecessary urgency on employers, leaving them susceptible to violations of their due process rights, and deprives employees of the time needed to become fully informed before deciding whether or not to unionize. Ultimately, the rule infringes on the rights of employers and employees to a fair pre-election process and will have a particularly adverse impact on small construction firms, which typically do not employ legal counsel.

- **Representation Election Procedures Rule:** In November 2022, the McFerran Board issued another [proposed rulemaking](#) altering the representation-case procedures rule, which addresses election-blocking charges, voluntary recognition and construction industry bargaining relationships. The proposal would rescind the [ABC-supported 2020 NLRB final rule](#), which was intended to ["better protect employees' statutory right of free choice on questions concerning representation."](#) In February 2023, ABC submitted [comments](#) in opposition to the proposed rule.

The above-mentioned rulemakings display Chair McFerran's clear disregard for worker rights, small businesses and the American taxpayer. In her role as chair, McFerran continues to misuse taxpayer funds to promulgate and support frivolous rulemakings and legal challenges that ultimately fail to pass muster.

Breaking With Traditional NLRB Nomination Process:

With her term set to expire on Dec. 16, 2024, Chair McFerran is nominated for another five-year term ending Dec. 16, 2029. Democratic-appointed members currently hold a 3-to-1 majority on the NLRB. However, if Chair McFerran is confirmed, Democratic-appointed members will hold a majority on Board until August 2026.

Regardless of the outcome of this November's elections, the next president will not have the ability to choose their own nominees for the NLRB for years into their administration. There is no pressing need to confirm McFerran as the NLRB will continue to have a working quorum until Aug. 27, 2025, when current Republican Member Marvin Kaplan's term expires. As the next president would have ample time to fill the Board before it loses its quorum, ABC believes they should have the opportunity to place

their chosen nominees, who in turn can set the agenda for the agency. This is traditionally how the Board has operated.

Further, the Committee has decided to move forward with the nomination without a formal hearing, instead opting to consider her nomination in an off the floor, non-public markup. Given the large number of impactful regulations implemented by the NLRB under Chair McFerran's leadership, ABC believes that the Committee should at least have the opportunity to ask her questions about her record.

Administrative Concerns:

Over the last several months, the Office of the Inspector General released multiple reports on the Board's mail ballot election procedures under Chair McFerran's leadership. The [initial report](#) found the Board guilty of "gross mismanagement" and a "lack of candor" that "created the risk of great reputational harm that could negatively impact the ability of the Agency to carry out [its] mission." The [subsequent report](#) provided more detail on errors and the Board's response to the inspector general's findings. The House Education and Workforce Committee's analysis of the IG report as well as information the committee gathered from their own investigation is available [here](#).

In conclusion, ABC supports balanced policies that reflect the NLRB's original mission to fairly interpret and enforce the NLRA. However, the trajectory of the NLRB under McFerran's leadership makes it clear that she is incapable of serving as a neutral arbiter of federal labor law.

ABC appreciates your consideration of this letter and again urges you to oppose Lauren McFerran's nomination to serve as a member of the NLRB.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristen Swearingen". The signature is written in a cursive, flowing style.

Kristen Swearingen
Vice President, Legislative & Political Affairs