



July 13, 2016

The Honorable Hal Rogers
Chairman, House Committee on
Appropriations
U.S. Capitol
Washington, DC 20515

The Honorable Nita Lowey
Ranking Member, House Committee on
Appropriations
U.S. Capitol
Washington, DC 20515

Dear Chairman Rogers and Ranking Member Lowey:

On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with 70 chapters representing nearly 21,000 chapter members, I write in regards to the July 13 markup of the FY 2017 Labor, Health and Human Services, Education and Related Agencies Appropriations Bill. ABC commends you for including several important policy provisions and encourages the Committee to adopt an amendment dealing with the Department of Labor's (DOL) controversial "persuader" rulemaking.

The first provision included in the underlying bill would address the NLRB's final rule establishing "ambush" elections (Representation-Case Procedures, 79 Fed. Reg. 74307). The rule significantly changes the union representation election process by reducing the amount of time between when a union files a representation petition and an election takes place from a median 38 days to as few as 10 to 14 days. The rule also seeks to "streamline" the process by deferring or eliminating long-held employer rights. In addition, the rule requires employers to hand over their employees' names, home addresses, phone numbers, email addresses, work locations, shifts and job classifications to union organizers.

The second provision included in this bill stops the NLRB from invalidating the existing joint employer standard. On May 12, 2014, the NLRB issued an invitation to the public to file amicus briefs in the *Browning Ferris Industries* case, on whether the Board should revisit its 30-year-old joint employer standards. The unprecedented changes the Board is considering would redefine who qualifies as a "joint employer" under the NLRA, potentially imposing unnecessary barriers to and burdens on the contractor and subcontractor relationship throughout the construction industry. 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.

While we are grateful the committee included language addressing these important issues, we are disappointed that other issues of great concern to our members were not.

The first of those policies is OSHA's Crystalline Silica Final 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 and found in many commonly used construction 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). OSHA's proposal will simply not work in the real world of construction and will ultimately cost the industry nearly \$5 billion dollars annually. 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.

Second, is 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. ABC is supportive of report language in the Senate FY2017 Labor Health and Human Services Appropriations 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,

Lastly is the previously mentioned DOL's "Persuader" Reporting Final Rulemaking. By December 2015 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 funding limitations on DOL's development of the persuader rulemaking.

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 2017 fiscal year.

Sincerely,

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

Kristen Swearingen

Vice President, Legislative & Political Affairs