VIA ELECTRONIC SUBMISSION

December 21, 2018

Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

**Re: Definition of ''Employer'' Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans; RIN 1210-AB88**

Dear Assistant Secretary Rutledge:

Associated Builders and Contractors Inc. hereby submits the following comments to the U.S. Department of Labor's Employee Benefits Security Administration in response to the above-referenced proposed rule, published in the *Federal Register* on Oct. 23, 2018, at 83 Fed. Reg. 53534.

## About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 70 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 firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our 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.

## Background

On Aug. 31, President Trump issued Executive Order 13847, Strengthening Retirement Security in America, which seeks to expand quality, affordable workplace retirement plan options for America's small businesses and their employees.[1] The E.O. directs the Secretary of Labor to issue a notice of proposed rulemaking, other guidance, or both, that would clarify when a group or association of employers or other appropriate business or organization could be an "employer" within the meaning of section 3(5) of the Employee Retirement Income Security Act of 1974.[2]

[1] 83 Fed. Reg. 45321.
[2] 83 Fed. Reg. 45322.

On Oct. 23, DOL's EBSA issued a proposed rule, Definition of "Employer" Under Section 3(5) of ERISA-Association Retirement Plans and Other Multiple-Employer Plans,[3] which would make it easier for small and mid-sized businesses to band together and offer 401(k) plans to their employees through association retirement plans.

**ABC's Comments in Response to the Department's Proposed Rule**

ABC writes in support of the DOL's proposal, which will provide a vehicle for millions of hard-working Americans to save for the future through association retirement plans. By allowing more businesses to pool together to offer 401(k) plans, ARPs will create an attractive alternative for small employers to offer high-quality benefits to their workforce and allow them to focus their time and resources on managing the day-to-day activities of their businesses.

Providing quality employee benefits is a top priority for ABC and its member companies. Regulatory complexity, administrative burdens, fiduciary liability exposure and other competing costs, however, limit the ability of many small employers to sponsor their own workplace retirement plans. DOL's proposal to expand access to association retirement plans will not only help to alleviate some of the burdens for small business owners, but also will benefit many employees who otherwise lack access to quality, affordable retirement saving opportunities.

In competing with large employers for their workforce, it is essential that our small contractor members have the ability to offer the same, high-quality employee benefits that large employers can afford to offer their employees. By pooling together plan participants and assets into one large plan, ARPs will provide small businesses the opportunity to offer their employees access to the same low-cost funds and obtain the same economies of scale, bargaining clout and administrative efficiencies now available to employees in large-asset plans.

ABC appreciates the Trump administration and the Department's commitment to expanding access to workplace retirement plans and offers the following recommendations to ensure all qualified employers, especially small businesses, can take advantage of these plans:

- ABC urges DOL to give sponsors of association retirement plans the ability to delegate or outsource some or all of their administrative, operational and regulatory compliance duties to qualified third parties (e.g. a third-party administrator or independent investment advisor). As a sponsor of a multiple-employer plan, ABC would have serious concerns about the responsibilities and liabilities it might have to assume as well as any litigation without the ability to outsource the administration and management of the plan to those with expertise. The risks for sponsors would be largely mitigated under such an option, which ABC strongly supports.

- ABC urges the DOL to work closely with the Department of Treasury and Internal Revenue Service to eliminate the unified plan rule, also known as the "one bad apple" rule. Currently, this rule is a major deterrent to joining a MEP, because one non-compliant participating employer could put all the other employers in the plan at risk. It should be eliminated in order to increase participation in MEPs. ABC also supports limiting the liability of the MEP and MEP assets for compliance issues that occur prior to a participating employer's entry into the MEP since many of those issues may not be known at the time of the merger. In addition, ABC strongly supports clear language and best practices related to a forced spinoff and termination if a participating employer fails to comply with the plan document or fiduciary best practices. It would be

[3] 83 Fed. Reg. 53534.

preferable to have this written into the participation agreement, so the participating employer can be spun out by the plan fiduciary if they do not comply.

- ABC urges the DOL to allow MEP sponsors the option to terminate their participation in the plan if it becomes too burdensome, without requiring a spinoff. Currently, for a participating employer in a MEP to terminate their plan, they are required to spin off into an individual plan and then terminate that newly established plan. This process is needlessly cumbersome and costly for a participating employer and presents a significant limitation challenge for MEP participants that may need to terminate their plan due to a corporate acquisition or other business needs. In addition, the need to spin off to a new plan creates potential issues with the permanency requirement given that the participant's intent is to immediately terminate the plan.

- ABC strongly encourages the DOL work with the IRS to extend the annual testing deadline from March 15 to June 30. Given the additional complexity that can arise when testing the participating employers of a MEP, and the fact that refunds are no longer taxed in the prior calendar year, it is imperative that plan administrators have additional time to complete necessary testing. Testing during a two-and-a-half-month window places an undue burden on plan administrators and increases costs to plan sponsors since providers are required to over-staff to meet the arbitrary March 15 deadline. A June 30 deadline will allow plan administrators additional time to work with plan sponsors on their compliance testing and will increase the quality of the testing as well. An extended deadline will also benefit small employers with resource constraints, who will appreciate the opportunity to close their books prior to submitting their plan data for testing.

- ABC urges DOL to provide clear guidance on how to handle a MEP participating employer who decides to discontinue its association membership when the plan criteria is based on such membership. Clarification by DOL will help to alleviate confusion about required next steps and assist administrators in complying with all applicable laws and regulations.

- ABC appreciates that the proposal reduces administrative burdens for participating employers by requiring one Form 5500 and one 408(b)(2) notice for the entire MEP instead of one for each participating employer. As the DOL outlines in its proposal, this approach will produce cost savings for both large and small employers who are required to file Form 5500 and who may be subject to costly audit requirements. Many small employers operate with low profit margins, and any increase in costs and time to comply with new regulatory requirements can take money and time away from the business that could be used to invest in expanding operations or hiring new employees. With this reduced administrative burden, employers will be able to focus their time and assets on growing their business, not on filling out burdensome and duplicative paperwork.

- ABC encourages DOL to update its regulations regarding electronic delivery so that ARP plan sponsors may utilize email and other electronic methods to deliver important notices related to ARPs. E.O. 13847 directs DOL, in consultation with Treasury, to consider possible regulatory actions to make retirement plan disclosures more understandable and useful for participants and beneficiaries, while also reducing the costs and burdens they impose on employers and other plan fiduciaries.[4] ABC strongly encourages the DOL and IRS to change its standard for electronic delivery to allow plan sponsors the ability to send required notices via email or by text using a secure link, and give plan sponsors the authority to make electronic delivery the default option for benefit notices if they chose to do so. Not only is email the preferred method

[4] 83 Fed. Reg. 45322.

of communication for the majority of plan participants, but also the use of electronic delivery will result in major cost savings for all parties involved.

- Although addressed in the proposal's preamble, ABC encourages DOL to adopt safe harbor language in the text of the final rule to protect ARP members from joint-employer liability**.** The legal standards for determining joint-employer status were greatly expanded under the Obama administration to the point that even tenuous business relationships can give rise to joint-employer liability. Since ARPs will be considered "employers" under Section 3(5) of ERISA, it raises concerns for association members regarding liability under ARPs for potential labor and employment violations of their partner businesses. It is critical that the final rule includes safe harbor language to protect those acting in good faith. Adopting this language in the text of the final rule will not only alleviate the concerns of many employers who wish to participate, but also limit the ability of a future administration to change its policy on whether participation in an ARP could put employers at risk of joint-employer liability. Similarly, ABC encourages DOL to codify the language in the preamble related to independent contractors.[5]

**Conclusion**

ABC appreciates the actions being taken by the Trump administration to help American workers save for the future through association retirement plans. Expanding access to ARPs is a key step towards leveling the playing field for small businesses and strengthening retirement security for workers. ABC looks forward to continuing to work with the administration to promote ARPs and decrease the barriers to offering high-quality workplace savings plans options for our members throughout the country.

Respectfully submitted,

Ben Brubeck
Vice President of Regulatory, Labor and State Affairs

[5] 83 Fed. Reg. 53537.