December 7, 2022

Roxanne Rothschild
Associate Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570-0001
Submitted electronically through www.regulations.gov

RE: Comments on Proposed Standard for Determining Joint-Employer Status, RIN 3142-AA21

Dear Ms. Rothschild:

The Associated General Contractors of America[1] ("AGC") respectfully submits this letter in response to the National Labor Relations Board's (the "Board") Notice of Proposed Rulemaking and Request for Comments on the Standard for Determining Joint-Employer Status published at 87 Fed. Reg. 54641 (September 7, 2022).

AGC is a member of the U.S. Chamber of Commerce and of the Coalition for a Democratic Workplace, and fully supports the comments submitted by each of those entities in this matter. We submit the present letter to supplement those comments in order to provide additional insight into the impact that the proposed rule would have in the construction industry, especially as applied to traditional subcontracting relationships.

AGC believes that the Board should retain a standard by which an employer may be considered a joint employer of another employer's employees only if the putative joint employer has exercised "such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees" (29 CFR § 103.40). Evidence of a putative joint employer's indirect control or unexercised reservation of control should continue to be treated as probative of joint-employer status but not as determinative of such status on its own. Likewise, joint-employer status should be found only if the putative joint employer possesses sufficient control over essential terms and conditions of employment of the other employer's employees to permit meaningful collective bargaining. Such a standard allows construction companies to maintain traditional subcontracting relationships without the threat of undue joint-employer status when they do not exercise significant control over subcontractors' employment relationships

[1] AGC is the nation's largest and most diverse trade association in the commercial construction industry, representing more than 27,000 companies, including over 6,500 general contractor firms, 8,500 specialty construction firms, and 11,000 service providers and suppliers. AGC proudly represents both union- and open-shop employers through a nationwide network of 89 chapters.

through such clear employer actions as hiring, firing, discipline, supervision, and excessive direction of the work. As discussed further below, a more expansive standard like the one set forth in the proposed rule is unfair, unworkable, and inconsistent with Supreme Court precedent.

As the Board well knows, the implications of joint-employer status are considerable. For example, a company that is deemed to be the joint employer of workers employed by another company (hereinafter referred to as the "direct employer"): may become embroiled in an organizing drive of the direct employer's workforce and subject to the practical and legal concerns that arise during such a drive; may have to defend against unfair labor practice charges, and may be deemed liable for unfair labor practices, that are attributable to the direct employer's actions; and may be deemed a primary employer or an "ally" in a dispute between the direct employer and a union, therefore lose the protections from secondary activity accorded to neutral employers. Given the very serious nature of these implications, joint-employer status should be found only where the putative joint employer is significantly and extensively acting like an employer of the direct employer's employees.

This point is particularly relevant in the construction industry, where multiple companies work side-by-side at common situses and where companies routinely bear the risk of liability for their subcontractors' acts and omissions. Due to the nature of the work and well-established practices, the reservation and exercise of some control by one company over another is inherent in the industry. Like the dissent in the Board's decision in *Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery*, 362 NLRB No. 186 (2015), commented in regards to the expansive definition of joint-employer status established by the majority in that case, the standard in the proposed rule:

> poses particular questions about its applicability to common situs work in the construction industry….[T]he Supreme Court has expressly held that the fact "the 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."

(Citing *Denver Building Trades*, 341 U.S. 675, 692 [1951].)

In construction, general contractors are held accountable for ensuring that a project is completed in a timely, efficient, safe, and legally compliant manner. They (and other upper-tier contractors) are often contractually, and sometimes legally, held responsible for, and directed to control, their subcontractors' behavior, including matters affecting terms and conditions of employment. For example, AIA Document A201-2017, a widely used standard-form document setting forth the general conditions for construction in a contract between a project owner (referred to as "Owner") and a general contractor, includes the following provisions:

- "The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over,

construction means, methods, techniques, sequences, and procedures, and for coordinating all portions of the Work under the Contract." [Section 3.3.1.]

- "The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, the Contractor or any of its Subcontractors." [Section 3.3.2.]
- "The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them." [Section 3.4.3.]
- "The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract." [Section 10.l.]

Similarly, ConsensusDocs 200, another widely used standard-form contract between a project owner and general contractor, provides:

- "Unless the Contract Documents instruct otherwise, Constructor [the general contractor] shall be responsible for the supervision and coordination of the Work, including the construction means, methods, techniques, sequences, and procedures utilized." [Section 3.1.3.]
- "Constructor shall be responsible to Owner for acts or omissions of a person or entity performing on behalf of Constructor or any of its Subcontractors and Suppliers." [Section 3.4.2.]
- "Constructor shall permit only qualified persons to perform the Work. Constructor shall enforce safety procedures, strict discipline, and good order among persons performing the Work. If Owner determines that a particular person does not follow safety procedures, or is unfit or unskilled for the assigned Work, Constructor shall immediately reassign the person upon receipt of Owner's Interim Directive to do so." [Section 3.4.3.]
- "If Owner deems any part of the Work or Worksite unsafe, Owner, without assuming responsibility for Constructor's safety program, may require by Interim Directive, Constructor to stop performance of the Work, take corrective measures satisfactory to Owner, or both....Constructor agrees to make no claim for damages, for an increase in the Contract Price or Contract Time based on Constructor's compliance with Owner's reasonable request." [Section 3.11.5.]

When the project owner is the federal government, the general contractor and upper-tier contractors must assume numerous additional responsibilities, including responsibility for flowing down responsibilities to their subcontractors, often through designated contract clauses. Among those obligations are the following examples from the Federal Acquisition Regulation:

- Contractors working on contracts for construction worth over $2,000 must pay laborers and mechanics working at the site of the work at least the prevailing wage rates as determined by the Secretary of Labor, and they must include the requirement in all subcontracts to the contract. [Sections 22.403-1, 52.222-6.]

- Contractors must use E-Verify to verify employment eligibility of all new hires working in the United States and of all employees assigned to the contract, and they must include the requirement in all subcontracts for construction. [Section 22.18, 52.222-54.]

- Contractors must provide a designated amount of paid sick leave to employees working on or in connection with a federal contract for construction, and they must include the requirement in all subcontracts to the contract. [Sections 22.21, 22.403-5, 52.222-62.]

- If the contracting agency elects to use a project labor agreement on the project, then the contractor must require all subcontractors to comply with the terms of the project labor agreement, and the terms must set forth: guarantees against strikes, lockouts, and similar job disruptions; effective, prompt, and mutually binding procedures for resolving labor disputes; and other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health. Contractors must also include the requirements in all subcontracts for the project. [Sections 22.504, 52.222-34.]

The above examples illustrate the need – whether based on express contractual obligation or by the business necessity of risk management – for construction contractors to reserve and exercise some level of control over their subcontractors in ways that impact employment terms and conditions. Such reservation and exercise of control merely to meet compliance requirements, or to otherwise ensure safe and efficient performance of the project, should not on its own render the contractor a joint employer of the workers employed by its (often many) subcontractors. A contractor should be able to use and direct subcontractors without taking on joint-employer status as long as the contractor does not directly and excessively control essential terms and conditions of employment of the subcontractors' employees. The more expansive standard in the proposed rule is unfair to construction contractors, clashes with the traditional contracting relationships and practices in the industry, and is inconsistent with the Supreme Court's opinion in *Denver Building & Construction Trades Council*, *supra*.

Furthermore, the proposed standard is unworkable, or its application at least confusing, in the construction industry due to additional unique characteristics of the industry. As explained above, contractors often reserve or exercise some control over subcontractors because they are required to do so. When the project owner or law dictates terms affecting employment conditions, the putative joint employer may have control vis-à-vis the direct employer, but its hands are tied and it may have no more ability to engage in meaningful collective bargaining with the direct employer than the direct employer has on its own. Would the project owner also be deemed a joint employer along with the contractor and subcontractor? What if the project owner is a government entity that lies outside the employer coverage of the National Labor Relations Act?

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In addition, most collective bargaining in the commercial construction industry is conducted on a multiemployer basis. As such, most commercial construction employers do not directly participate in collective bargaining negotiations. Rather, they assign bargaining rights to a multiemployer bargaining agent or they adopt a collective bargaining agreement after the terms are set. If this is the case with a subcontractor direct employer, and if a general contractor is deemed to be a joint employer over certain terms and conditions of employment of employees of that subcontractor who are working at the general contractor's jobsite, how would the general contractor and subcontractor jointly and meaningfully engage in collective bargaining over those terms and conditions of employment (in the event that the employees are even still jointly employed at the time that bargaining is due)?

Finally, most collective bargaining agreements in the commercial construction industry require employers to contribute to multi-employer defined-benefit pension plans that can lead to withdrawal liability. If a general contractor may be deemed a joint employer with each of its numerous subcontractors each time it reserves or exercises any modicum of control affecting terms and conditions of the subcontractors' employees' employment, would that render the general contractor jointly liable for making pension contributions and potentially face withdrawal liability when the subcontracted work has been fully performed and the contractual relationship with the subcontractor ends, or, given ERISA's construction-industry exemption, at least limit the contractor's freedom to choose subcontractors in the five years following the end of that subcontract? If so, it seems that the risk of liability might well discourage general contractors from hiring union subcontractors in many situations.

In sum, due to the nature of the work and well-established practices, the reservation and exercise of some control by one company over another is inherent in the construction industry. A contractor should be able to use and direct subcontractors without taking on joint-employer status provided that the contractor does not directly and excessively control essential terms and conditions of employment of the subcontractors' employees and unless its participation in collective bargaining is essential to meaningful bargaining. AGC, therefore, respectfully urges the Board to withdraw the proposed rule or revise it so as to retain a more appropriate standard.

Sincerely,

Denise Gold

Denise S. Gold
Corporate & Labor Senior Counsel