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January 28, 2019

Roxanne Rothschild  
Associate Executive Secretary  
National Labor Relations Board  
1015 Half Street, S.E.  
Washington, D.C. 20570-0001

Submitted via email to [Regulations@nlrb.gov](mailto:Regulations@nlrb.gov)

**RE: Comments on Proposed Rule Regarding the Standard for Determining Joint-Employer Status, RIN 3142-AA13**

Dear Ms. Rothschild:

The Associated General Contractors of America<sup>1</sup> (“AGC”) respectfully submits this letter in response to the National Labor Relations Board’s (the “NLRB” or “Board”) Notice of Proposed Rulemaking and Request for Comments regarding The Standard for Determining Joint-Employer Status published in the Sept. 14, 2018, issue of the Federal Register (the “Proposed Rule”). AGC is a member of the Coalition for a Democratic Workplace (“CDW”) and is a signatory to comments on the Proposed Rule submitted by CDW. We submit the present letter to supplement those comments in order to provide additional insight into the impact of the rule in the construction industry.

AGC strongly supports the Board’s proposal to reinstate a standard that establishes joint-employer status only when the putative joint employer actually exercises substantial direct and immediate control over essential terms and conditions of employment of another employer’s employees and does so in a manner that is not limited and routine. As the Board has acknowledged, the implications of joint-employer status are substantial. For example, when a company is deemed to be the joint employer (“Joint Employer”) of workers employed by another company (the “Employer”): the Joint Employer may become embroiled in an organizing drive of the Employer’s workforce and subject to the practical and legal concerns that arise during such a drive; the Employer’s unfair labor practices may be attributed to the former company; and the Joint Employer may be deemed a primary employer or an “ally” in a dispute between the Employer and a union, and therefore lose the protections from secondary activity accorded to neutral employers. Given the serious nature of these implications, joint-employer status should

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<sup>1</sup> AGC is the nation’s largest and most diverse trade association in the commercial construction industry, representing more than 26,000, including over 6,500 general contractors, 9,000 specialty contractors, and 10,500 service providers and suppliers. AGC proudly represents both union- and open-shop employers through a nationwide network of approximately 90 chapters throughout the United States.

be found only when the putative Joint Employer is significantly and extensively acting like an employer of the Employer's employees. Evidence of indirect or reserved control on its own is inadequate to support such a finding.

This point is particularly relevant in the construction industry, where multiple companies work side-by-side at common sites and where companies routinely bear the risk of liability for another company's acts and omissions. General contractors are 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.

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 10.1.]

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. Many of these obligations affect terms and conditions of employment. 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 render the contractor a joint employer of the workers employed by its (often many) subcontractors.

This position is consistent with Supreme Court and lower court precedent. As the Board acknowledged in the preamble to the Proposed Rule and in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017), the Supreme Court in *NLRB v. Denver Building & Construction*

*Trades Council*, 341 U.S. 675 (1951) held that the fact that “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. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.” AGC agrees with the Board that the expansive definition of joint-employer status established in *Browning-Ferris Industries of California*, 362 NLRB No. 186 (2015), cannot be reconciled with this Supreme Court decision.

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 as long as the contractor does not directly and excessively control essential terms and conditions of employment of the subcontractors’ employees. Therefore, AGC urges the Board to adopt the Proposed Rule with the clarifications recommended in the CDW’s comments.

Thank you for the opportunity to comment and for your consideration of our submission.

Sincerely,

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

Denise S. Gold  
Associate General Counsel