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June 25, 2019

VIA ELECTRONIC SUBMISSION: <http://www.regulations.gov>

The Honorable Cheryl Stanton
Administrator
Wage and Hour Division
U.S. Department of Labor
Room S-3502, 200 Constitution Avenue NW
Washington, DC 20210

Re: Joint Employer Status Under the Fair Labor Standards Act; Notice of Proposed Rulemaking (RIN 1235-AA26)

Dear Ms. Stanton:

On behalf of the Associated General Contractors of America (hereinafter “AGC”), thank you for the opportunity to submit the following comments on the U.S. Department of Labor’s (hereinafter “DOL” or “Department”) Wage and Hour Division’s (hereinafter “WHD”) notice of proposed rulemaking (hereinafter “NPRM”) regarding the Joint Employer Status Under the Fair Labor Standards Act (hereinafter “FLSA”). The NPRM was published in the Federal Register on April 9, 2019.

AGC is the leading association for the non-residential construction industry, representing more than 26,000 firms, including over 6,500 of America’s leading general contractors and over 8,500 specialty contracting firms. More than 11,500 service providers and suppliers are also associated with AGC, all through a nationwide network of approximately 90 chapters through the United States. These firms, both union and open-shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property.

AGC applauds the Department’s proposal to adopt a consistent, common-sense standard for determining joint employer status under the FLSA (Part 791) and supports the acknowledgment that the facts of the relationship between the employee and the employer should govern the joint employer determination, not the structure of the relationship between purported joint employers or business-to-business partners. The NPRM’s emphasis on the actual exercise of control as a prerequisite to a joint employer finding encourages cooperation between businesses without exposing them to potential liability under an uncertain standard.

AGC is also a member of The Coalition for a Democratic Workplace (hereinafter “CDW”), a collection of nearly 500 organizations representing the interests of millions of employers nationwide.

All CDW's members are or represent the interests of "employers" as defined by the FLSA and are consequently affected by the NPRM. CDW advocates for its members on numerous issues of significance related to federal employment policy and interpretations and applications of the Act. AGC supports the comments submitted by CDW related to the NPRM and encourages the WHD to consider them. AGC would also like to supplement those comments to provide additional insight into the impact of the rule on the construction industry.

The NPRM and application of a joint employer standard is uniquely impactful and relevant to 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 subcontractors) 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 subcontractors 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:

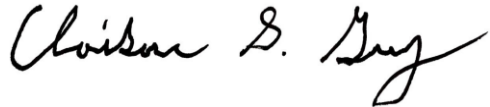
- Contractors working on contracts for construction worth over \$2,000 must pay laborers and mechanics working at the site of the work at least the prevailing wage rates as determined by the Secretary of Labor, and they must include the requirement in all subcontracts to the contract. They must also pay covered workers on a weekly basis and retain and submit weekly payroll records. [Sections 22.403-1, 22.403-6, 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. While the Department proposes several examples to assist in clarifying joint employer status, AGC asks that the Department provide further examples, including those specific and useful to the construction industry.

Conclusion

AGC reiterates our appreciation for the Department's efforts clarifying its joint employer regulations under the FLSA and supports new standards that makes sense for today's construction employers nationwide. AGC also appreciates the opportunity to engage in the rulemaking process and looks forward to working with the WHD as it continues to amend regulations that impact construction employers. If we can aid in any way, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Claiborne S. Guy". The signature is written in a cursive style with a large, sweeping "G" at the end.

Claiborne S. Guy
Director, Employment Policy & Practices