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December 5, 2022

Roxanne L. Rothschild
Executive Secretary, National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001
Submitted via http://www.regulations.gov

Re: Notice of Proposed Rulemaking (RIN 3142-AA21)
Standard for Determining Joint Employer Status

To Whom It May Concern:

The Signatory Wall and Ceiling Contractors Alliance (SWACCA) is a national, non-profit trade association that advocates for the interests of union-signatory wall and ceiling construction industry employers. SWACCA represents more than 400 wall and ceiling construction employers – including many of the largest employers in our industry – who perform framing, drywall, and interior systems work nationwide, primarily in the commercial construction industry. Our members employ many thousands of carpenters, drywall finishers, plasterers and other building trades personnel throughout the United States. SWACCA fully supports the National Labor Relation Board's (the Board) adoption of the Standard for Determining Joint-Employer Status and offers the following comments concerning the proposed rule.

Misclassification of workers as independent contractors is an all-too-common occurrence in the wall and ceiling industry (and the construction industry as a whole). For this reason, in 2019, SWACCA offered comments opposing the joint-employer standard that the Board now proposes to rescind.[1] SWACCA agrees with the Board's concern that the final rule issued in 2020 "constrained the joint-employer standard."[2] A return to the *Browning-Ferris* joint-employer standard will protect workers from exploitation and protect law-abiding employers from unfair competition by unscrupulous contractors seeking to avoid their obligations under federal law by misclassifying workers as independent contractors.[3] Moreover, allowing a factfinder to consider evidence of "indirect and reserved forms of control" will prevent the type of arrangements that are commonly used in the construction industry to subvert the law.

[1] SWACCA, Comment Letter on The Standard for Determining Joint-Employer Status (Jan. 28, 2019), available at https://www.regulations.gov/comment/NLRB-2018-0001-27105 (accessed Dec. 5, 2022).
[2] Nat'l Labor Relations Board, Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641, 54642 (Sept. 7, 2022) (to be codified at 29 C.F.R. Part 103).
[3] SWACCA agrees with the inclusive list of "essential terms and conditions of employment" in proposed § 103.40(d).

Background

The use of multiple employers on a single project is standard practice in the construction industry where SWACCA members compete. Multiple contractors may work under a general contractor, directly for a project owner, or under a hybrid arrangement where the project owner contracts directly with multiple contractors who are overseen by a construction manager that also contracts with the project owner. These arrangements are ordinarily lawful and legitimately structured for the use of specialized contractors to perform specific scopes of work. However, the subcontracting construct can be perverted by unscrupulous employers to avoid various obligations, including those of the National Labor Relations Act (the Act).

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Increasingly, SWACCA's members find themselves competing with companies that seek to reduce their cost structures and liabilities by dissociating themselves from the traditional obligations that come with being an employer. The key to these schemes is often a contractor's willingness to characterize most or all of their regular, recurring workforce as subcontractors rather than as employees. This business model allows unscrupulous employers to get the benefits of workers' labor while disclaiming the costs of paying overtime, workers compensation and unemployment insurance for their workforce. And, of course, it allows those employers to avoid their obligations under the Act and structurally interfere with workers' exercise of the rights granted to them by Section 7 of the Act.

The nature of the construction industry can make it difficult for government authorities to achieve meaningful enforcement against unscrupulous contractors. First, the project-based nature of construction can have the effect of isolating risk to specific projects and the time period associated with them. Second, the construction industry relies heavily on foreign-born workers who are especially vulnerable to nefarious subcontracting schemes that exert unlawful control over their wages and working conditions.[4] Finally, when liability is pushed down to unstable employers, it becomes extremely difficult – due to undercapitalization, corporate shape-shifting, and individuals who cannot be located – to achieve meaningful enforcement even when the responsible party can be identified.

[4] The presence of foreign-born workers in the wall and ceiling segment of the construction industry is especially significant. According to the National Association of Home Builders, half of all drywall installers and ceiling tile installers are foreign born. Nat'l Ass'n of Home Builders, Immigrant Workers in the Construction Labor Force (March 3, 2020), available at https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2020/special-study-immigrant-workers-in-the-construction-labor-force-march-2020.pdf (accessed Dec. 5, 2022).

The subcontracting scheme with perhaps the most nefarious potential is that involving labor-only subcontractors or "labor brokers." Under these arrangements, a contractor, often a subcontractor working for a developer or general contractor, subcontracts to a labor broker to procure manpower to perform his project. The most easily discernable employment relationship exists between the labor broker and the workers, but because the labor broker himself is not a legitimate construction contractor it is all but certain that control over workers' essential terms and conditions will be retained by the employer that contracts with the labor broker. Whether that control is exercised indirectly or directly, and whether that control is limited and routine, are potentially fact intensive questions that are difficult if not impossible to resolve timely to effectuate the Act's goals of encouraging the practice and procedure of collective bargaining and promoting labor-management stability.

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For example, in 2020, a Minnesota court sentenced framing and drywall contractor Ricardo Batres to four months in jail and five years' probation for labor trafficking and insurance fraud.[5] Mr. Batres knowingly employed undocumented workers "and used that knowledge as leverage to force them to work long hours for less than market pay and without adequate safety protections," according to the charges filed against him.[6] Notably, when contacted by the media, the builders involved asserted that it was subcontractors, and not their companies, who hired Mr. Batres's company to work on their projects.[7]

While criminal prosecutions for labor trafficking may be rare[8], the facts alleged in that case are not unique. In 2019, SWACCA President Matt Townsend highlighted the problem of misclassification of workers when he testified before the Workforce Protections Subcommittee of the Education and Labor Committee of the U.S. House of Representatives:

> In my industry, misclassification is not about making tough calls applying complicated laws to ambiguous facts. Rather, it is a choice simply to disregard wage and hour laws, workers' compensation laws, unemployment insurance regulations, and other basic

[5] CBS News Minnesota, "Contractor Ricardo Batres Gets Jail Time, Probation For Labor Trafficking" (Jan. 15, 2020), available at https://www.cbsnews.com/minnesota/news/contractor-ricardo-batres-gets-jail-time-probation-for-labor-trafficking/ (accessed Dec. 5, 2022).
[6] Paul Walsh, "Charges: Twin Cities contractor threatened to report his undocumented workers if they complained" (Sept. 28, 2018), available at https://www.startribune.com/charges-twin-citis-contractor-threatened-to-report-his-undocumented-workers-if-they-complained/494386221/ (accessed Dec. 5, 2022).
[7] *Id.*
[8] CBS News Minnesota, *supra* n. 5 ("Activists say the case is the first of its kind in Hennepin County and one of the few prosecuted in Minnesota").

> responsibilities of being an employer. This is done for the purpose of gaining an advantage against law-abiding competitors, realizing tremendous profits, and avoiding the financial risks that honest entrepreneurs must accept. Business owners using the misclassification model do not bear the risks of unanticipated overtime, bad planning, or poor execution. Instead, this racket transfers these risks onto workers and taxpayers.[9]

A 2020 paper published in the *ILR Review* also noted the frequency of misclassification in construction:

> Although independent contractors represent only 7% of the total national workforce, roughly 20% of all independent contractors work in construction (U.S. BLS 2018). The fluidity of the workforce and minimal regulation of a decentralized industry have created an environment that encourages the purposeful misclassification of employees as independent contractors – a business strategy that has led to a decline in union density and contributed to decreased standards in the industry over the past 50 years.[10]

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And in a 2016 special report, Reuters found that since the 2007 fiscal year, employer intermediaries, including labor brokers, were involved in helping secure visas for 80 percent of the 2 million foreign workers approved for agricultural and other low-skill jobs.[11] For that same special report, Reuters examined more than 200 civil and criminal cases filed in federal court (between 2005 and 2015) by lawyers representing the government and tens of thousands of foreign workers. According to the report, the complaints allege misdeeds, including human trafficking and wage theft, committed by labor brokers enlisted by U.S. companies to navigate government bureaucracy, recruit workers, help secure visas, and arrange transportation for those who are hired. A DOL spokesman quoted in the article noted, "Until we have the authority to hold U.S. employers accountable when they rely on unscrupulous labor recruiters, our ability to deal with these practices remains limited."[12]

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[9] Testimony of Matt Townsend, Hearing on Misclassification of Employees: Examining the Costs to Workers, Businesses and the Economy, 116th Congress (2019), available at https://edlabor.house.gov/imo/media/doc/TownsendTestimony092619.pdf (accessed Nov. 28, 2022).

[10] Mark Erlich, "Misclassification in Construction: The Original Gig Economy," *ILR Review* (Nov. 28, 2020), available at https://lwp.law.harvard.edu/files/lwp/files/erlich_ilrr_final_article_11.28.20.pdf (accessed Dec. 5, 2022).

[11] Megan Twohey, Mica Rosenberg, & Ryan McNeil, "Wanted: foreign workers — and the labor brokers accused of illegally profiting from them" (Feb. 19, 2016), available at https://www.reuters.com/investigates/special-report/workers-brokers/ (accessed Dec. 5, 2022).

[12] *Id.*

Indeed, the example cited by the Board in its Notice of Proposed Rulemaking – a putative joint employer (e.g., a project owner or general contractor) who "communicates work assignments and directives to another entity's managers or exercises ongoing oversight to ensure that job tasks are performed properly"[13] – is, as described above, a common occurrence in the construction industry.

The proposed rule will help fight misclassification in the construction industry.

In its Notice of Proposed Rulemaking, the Board "seeks input from employees, unions, and employers with experience in workplaces in which multiple entities possess or exercise some control over a particular group of employees' working conditions."[14] SWACCA is comprised of more than 400 contractor members who work in just such an industry. SWACCA supports rescinding the 2020 joint-employer rule and replacing it with the proposed rule.

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The proposed standard for determining joint employers will help reduce misclassification in the construction industry. In particular, presuming joint employment where a putative employer (1) possesses the authority to control, regardless of whether such control is exercised; (2) indirectly exercises the power to control; or (3) exercises control through an intermediary[15] will discourage unscrupulous contractors from using labor brokers/subcontractors or otherwise misclassifying workers as independent contractors to avoid their obligations under the Act.

The current rule's requirement of "direct and immediate control" ignores the plain reality of labor broker arrangements.[16] The dissenting members assert that, under the current rule, evidence of indirect control is "probative" of joint-employer status, but they concede it is probative "only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment."[17] That is, under the current rule, evidence of indirect control can only be supporting evidence in the joint-employer determination. The proposed rule closes this loophole, preventing a non-law-abiding contractor (who maintains indirect control

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[13] 87 Fed. Reg. at 54650.
[14] *Id.* at 54641.
[15] Proposed Rule, § 103.40(e), 87 Fed. Reg. at 54663.
[16] It can also lead to absurd results. *See, e.g., SEIU v. NLRB*, No. 1:21-cv-02443 (D.D.C. Sept. 17, 2021), ¶ 56 ("Under the [2020] Rule, a company is a non-employer if it retains control over workers under a contract, but the same company is an employer when it exercises that control"), available at https://fingfx.thomsonreuters.com/gfx/legaldocs/movankqjbpa/EMPLOYMENT_JOINTEMPLOYER_SEIU_complaint.pdf (accessed Dec. 5, 2022).
[17] 87 Fed. Reg. at 54652.

over work conditions) from shielding itself by using a labor broker or subcontractor (who exerts direct control over work conditions).

Employers hire labor brokers and other intermediaries for a variety of reasons. SWACCA's position is that construction industry employers should not be lawfully permitted to use labor broker arrangements to structurally avoid their obligations under the Act, or to undermine their workforce's Section 7 rights under the Act. Permitting an employer to retain and even indirectly exercise certain control over a workforce's essential terms of employment without assuming joint employer liability incentivizes and encourages labor broker arrangements.

Importantly, the Board notes that "an employer's control over matters that are immaterial to the existence of an employment relationship under established common-law agency principles, or that otherwise do not bear on the employees' essential terms and conditions of employment, is not relevant" to the inquiry.[18] Thus, the dissenting members' concern that the proposed rule is an "expansion[ ] of joint-employer status"[19] is unfounded. By its terms, the proposed rule excludes matters irrelevant to the joint-employer determination.

For the foregoing reasons, SWACCA respectfully requests that the Board rescind the 2020 joint-employer standard and replace it with the proposed joint-employer standard set forth in the Notice of Proposed Rulemaking.

Thank you for the opportunity to comment on the Board's joint employer standard.

Sincerely,

Robert Klugh
President

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[18] *Id.* at 54650; Proposed Rule, § 103.40(f), *id.* at 54663.
[19] *Id.* at 54657.