January 28, 2019

Roxanne Rothschild
Associate Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570–0001

Re: Notice of Proposed Rulemaking (RIN:3142-AA13)
The Standard for Determining Joint-Employer Status

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 350 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 opposes the proposed rule issued by the National Labor Relations Board (the Board) to change the joint-employer standard which governs the status and liability of an employer that shares control over the terms and conditions of workers' employment with another employer. SWACCA supports the existing Browning-Ferris standard that considers not only the control an employer actually exercises over workers, both direct and indirect, but also the employer's reserved but unexercised right to control workers' essential terms and conditions of employment.

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 may also be exploited by unscrupulous employers to avoid various obligations, including those of the National Labor Relations Act (the Act).

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

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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, cheating contractors. First, the majority of the construction industry operates on a project basis, which 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.[1] 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.

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In its rulemaking notice, the Board asked what benefits or harms to business practices and collective bargaining might result from finalization of the proposed rule. A final rule that permits employers to retain and even exercise control over a workforces' essential terms and conditions without risking joint employer status will constitute a roadmap for employers wishing to limit their exposure to a bargaining obligation under the Act. The nature of the construction industry makes it less likely that meaningful remedies will be imposed on joint employers that eventually do exercise sufficient control over workers' essential terms and conditions. As a result, the proposed regulation would perpetuate if not promote nefarious subcontracting schemes to the detriment of workers and responsible employers alike.

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

[1] 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, nearly half of all drywall installers, ceiling tile installers, and tapers in the United States are foreign born. Nat'l Ass'n of Home Builders, Immigrant Workers in the Construction Labor Force (dated Feb. 13, 2015), available at https://www.nahbclassic.org/fileUpload_details.aspx?contentTypeID=3&contentID=241345&subContentID=637756 (Last accessed January 28, 2019).

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.

In September 2018, Ricardo Batres, operator of American Contractors and Associates LLC (American Contractors), was criminally charged in Minnesota's Hennepin County District Court with felony counts of labor trafficking, theft by swindle and insurance fraud.[2] According to the complaint, the workers employed by American Contractors performed wall framing and drywall installation – the same work performed by SWACCA members. Reporting by the Minneapolis Star Tribune revealed that American Contractors worked on residential developments for at least two national building firms. Both firms named in the article acknowledged that American Contractors was a "sub of a sub" on their development projects.[3]

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According to the complaint, Batres recruited men to work for his company to do wood wall framing and sheetrock installation. Batres knew the men were undocumented workers and used that leverage to force them to work long hours at low pay and without adequate safety protection. He also did not purchase worker's compensation insurance as required by law. He told his employees they would lose their job and be deported if they went to a doctor for injuries suffered on the job.

The Batres complaint alleges that, "after a number of workplace injuries had occurred, a group of employees decided they could no longer work for Defendant. In addition to the concerns about injuries and lack of medical care, Defendant had put the workers up in an overcrowded house in Bloomington with no hot water. Defendant then stopped paying their rent."

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[2] *See* Complaint, *State of Minnesota v. RICARDO ERNESTO BATRES* (Sept. 25, 2018), available at https://www.hennepinattorney.org/-/media/Attorney/NEWS/2018/Batres-Ricardo-finalcplt.pdf?la=en&hash=7D74E3E52F4B9931B734DC25FD30C5AF9E1F90F7 (last accessed January 28, 2019).

[3] *See* Charges: Twin Cities contractor threatened to report his undocumented workers if they complained (dated September 28, 2018), available at http://www.startribune.com/charges-twin-citis-contractor-threatened-to-report-his-undocumented-workers-if-they-complained/494386221/ (Last accessed January 28, 2019).

Later, the Complaint alleges that, "Defendant tried to get several workers to sign documents that indicated they were actually independent contractors."

Significantly, according to the Hennepin County Attorney Batres had been in business for 10 years by the time the 2018 charges were filed.[4]

The facts about the relationship between American Contractors and the contractors that hired this labor broker are not described in the complaint. But if the other facts alleged are accurate, it can be reasonably inferred that it would have been difficult if not impossible for American Contractors employees to exercise their Section 7 rights to improve wages and working conditions against their labor broker employer, because Batres was willing to commit unlawful acts that would interfere with those rights.

The facts alleged in the Batres case are not unique. In a 2016 special report, Reuters reporters 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.[5] For that same special report, Reuters examined more than 200 civil and criminal cases filed in federal court 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.

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The Board's proposed rule would permit an employer to engage a labor broker like American Contractors, retain substantial control over the essential terms and conditions of the labor brokers employees, but avoid a joint employer status under the Act unless that control is actually exercised in a direct and immediate fashion. The contractor that retains such control will make a decision about whether and how to exercise it based on the facts and circumstances of the moment, instead of at the time the decision to use the labor broker was made. The result is a more subjective, more fact-intensive standard that is more difficult for parties to apply, more difficult for the Board to enforce, and less efficacious of the purposes of the Act than the Browning-Ferris standard.

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[4] *See* Crystal man has been charged with labor trafficking (undated), available at https://www.hennepinattorney.org/news/news/2018/September/Batres-Ricardo-labortrafficking (Last accessed January 28, 2019).

[5] *See* Wanted: foreign workers — and the labor brokers accused of illegally profiting from them (dated February 19, 2016), available at https://www.reuters.com/investigates/special-report/workers-brokers/ (Last accessed January 28, 2019).

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 exercise certain control over a workforce's essential terms of employment without assuming joint employer liability incentivizes and encourages labor broker arrangements.

If the Board's proposed rule is finalized, it will serve as an inducement for unscrupulous construction contractors to use labor brokers and other subcontracting schemes to avoid their obligations under the Act. As a result, it will surely accelerate the growing use of a business model that undermines the law-abiding employers SWACCA represents.

For the foregoing reasons, SWACCA respectfully requests that the Board preserve the Browning-Ferris joint employer standard rather than adopting the proposed rule.

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

Sincerely,

Matt Townsend
President

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