American Road & Transportation Builders Association

250 E Street, S.W.
Suite 900
Washington D.C. 20024

P 202.289.4434
W artba.org

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Ms. Roxanne L. Rothchild
Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570-0001

Re: RIN 3142-AA21, Standard for Determining Joint-Employer Status

The American Road & Transportation Builders Association (ARTBA) respectfully offers the following comments regarding the proposed rulemaking of the National Labor Relations Board (NLRB) on the standard for determining joint-employer status.

Introduction

NLRB's proposal expands the standard for determining "joint employers" of the same employee. Specifically, an employer would be jointly liable for an employee if it has "indirect or reserved forms of control" over one or more essential terms of employment. These include elements such as the ability to hire and fire, discipline, supervision, wages and scheduling.

ARTBA objects to the proposed rule because it is vague enough to impose joint liability on certain employers when they are merely fulfilling legally required obligations over individual non-employees on their worksite. We suggest several very feasible improvements below.

NLRB's Proposal Could Penalize Prime Contractors for Following the Law

Transportation construction worksites often include multiple employers, with one prime contractor overseeing one or more subcontractors or suppliers. Under various legal provisions, prime contractors must take responsibility for subcontractors' conduct, including, but not limited to, Occupational Health and Safety Administration (OSHA) regulations, as well as payment of Davis-Bacon wage rates. However, this responsibility alone does not establish an employer-employee relationship between the prime contractor and those working for a subcontractor.

However, under the proposed rule's language, a prime contractor enforcing federally-mandated safety regulations and wage rates could be construed as impacting the "essential terms of employment" of a subcontractor's employee. Enforcing the rule in this manner would penalize the prime contractor for following existing law by making them jointly liable for a subcontractor's employees.

NLRB's proposal does state that "dictating the results of a contracted service to control or protect an employer's property" or setting "objective, basic ground rules and expectations for a third-party contractor" will not be regarded as impacting essential terms of employment. Similarly, the proposed rule notes that "routine components of a company-to-company contract" will also not be "material" to the existence of a joint-employer relationship. Unfortunately, the proposal does not define these terms with any precision, which if adopted would result in the possibility of overly-subjective enforcement and inadequate predictability among transportation contractors.

NLRB Needs to Provide Further Clarification

ARTBA requests NLRB clarify the proposed rule by enumerating that "routine components of a company-to-company contract" (which are therefore not considered dispositive of a joint-employer relationship) include the following:

- construction projects schedules and timing requirements;
- construction site and operational safety programs (for compliance with OSHA, state and local regulations), including general contractor specific programs and required subcontractor compliance therewith; standards for required subcontractor supervision; quality and safety terms which necessarily dictate technical means and methods of performance; and
- any minimum compensation requirements as determined by public contracting rules and regulations (including but not limited to Davis-Bacon wages and local minimum wages).

NLRB should also specify that terms accepted as standard in company-to-company contracts should be considered "routine" and not determinative of a joint-employer relationship.

Finally, the proposal uses the term "routine components of a company-to-company contract" as dicta to explain a more general point that such matters are immaterial to a joint-employer inquiry. ARTBA requests that NLRB explicitly state, for clarity, that such contracts will not be used to determine joint-employer status.

Conclusion

Without further clarifications, NLRB's proposal will penalize prime contractors in transportation construction – and expose them to employment-related risks – for simply complying with necessary federal safety, wage and other regulations. Any such additional risks, or uncertainty as to a prime contractor's responsibilities for employment-related compliance, can result in increased project costs. We urge NLRB to adopt the clarifications described herein, which will minimize this possibility and better enable the transportation construction industry to deliver on the generational investments featured in the Infrastructure Investment and Jobs Act (IIJA), hallmark legislation of the Biden-Harris Administration.

Thank you for considering these views.

Sincerely,

Nick Goldstein
Vice President of Regulatory & Legal Issues