

MARK KNIGHT, President
ART DANIEL, Senior Vice President
B.E. STEWART, JR., Vice President
SCOTT WILLIAMS, Treasurer
STEPHEN E. SANDHERR, Chief Executive Officer
DAVID LUKENS, Chief Operating Officer

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



March 16, 2016

The Honorable Crescent Hardy
Chairman
Small Business Subcommittee on Investigations, Oversight and Regulations
U.S. House of Representatives
Washington, DC 20515

Re: AGC Concerns with New Joint Employer Standard

Dear Chairman Hardy:

The Associated General Contractors of America (AGC) thanks you for holding the hearing entitled “Risky Business: Effects of New Joint Employer Standards for Small Firms.” The National Labor Relations Board’s (NLRB) August 27, 2015, opinion in the *Browning-Ferris Industries* case relaxes the standard for determining when two companies constitute “joint employers” under the National Labor Relations Act (NLRA). Administrator’s Interpretation No. 2016-1 issued by the Department of Labor’s Wage and Hour Division on January 20, 2016, sets forth an even broader definition of “joint employer” under the Fair Labor Standards Act (FLSA) and the Seasonal Agricultural Worker Protection Act. AGC is concerned about these changes and the impact they may have on small businesses in the construction industry.

Prior to the *Browning-Ferris Industries* decision, the NLRB maintained that separate entities are considered joint employers only if they share direct control over, or co-determine, essential terms and conditions of employment. The new, relaxed standard goes so far as to render one company a joint employer of an unrelated company’s workers when the putative joint employer has exercised only indirect control over those workers’ terms and conditions of employment through an intermediary, or even if it has the potential to exercise control but has never actually exercised control. Moreover, the vagueness of the totality of circumstances test set forth in the *Browning-Ferris Industries* has left employers with almost no guidance as to when they may be crossing the line. Employers are left unable to predict when they will be found to be joint employers under the NLRA and, therefore, left unable to determine appropriate actions to prevent such a finding.

A “joint employer” finding is significant. Companies that are joint employers may be held jointly responsible for any unfair labor practices and collective bargaining obligations related to the workers. In the construction industry, it could also mean losing the protections from secondary boycott activity accorded to neutral employers in NLRA Section 8(b)(4).

These changes can disrupt long-standing standards in labor law and potentially change the way the industry operates. The change could also have a particularly destabilizing impact on well-settled subcontracting practices in the construction industry, where critical issues such as safety and scheduling often dictate that a contractor have some say in how its subcontractors’

employees behave and have some oversight in their terms and conditions of employment. Small businesses are the most vulnerable because they are less likely to have the legal advice, staff time, or bargaining power to structure business arrangements that minimize their risk of inadvertently becoming a “joint employer” under the new standard.

AGC looks forward to working with Congress on changing the definition under the NLRA to its previous standard and on keeping the Administrator’s Interpretation of the standard under the FLSA from becoming law.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey D. Shoaf". The signature is fluid and cursive, with the first name being the most prominent.

Jeffrey D. Shoaf
Senior Executive Director, Government Affairs