MONTANA CONTRACTORS ASSOC.
THE CONSTRUCTION ASSOCIATION

February 12, 2024

U.S. Senator Jon Tester
311 Hart Senate Office Building
Washington, DC 20510

Dear Senator Tester,

On behalf of Montana's construction businesses, I write to urge your support of S.J. Res. 49, a Congressional Review Act (CRA) resolution that would put a stop to the National Labor Relations Board's (NLRB) Joint Employer Rule, set to go into effect later this month. This rule is of grave concern to Montana's builders, contractors, and associated industries, and threatens to have a chilling effect on the relationship between contractors and the subcontractors they utilize on construction jobs in Montana.

As it currently stands, a company is deemed a joint employer only if it actually exercises substantial direct and immediate control over one or more essential terms and conditions of the other company's employees' employment. This is a commonsense standard that has worked well since 1984 (minus the Obama NLRB's attempt at rewriting this rule, which was overturned during the Trump Administration) and provides employers and subcontractors, third party contractors, franchisees, and other business relationships with a predictable, clear roadmap.

At the heart of the concern with the new NLRB rule is the broad and vague language that only manages to inject uncertainty into those same business relationships. In addition to direct control, the new rule contemplates both indirect and, in essence, theoretical control, even if such control is never exercised. For those in Montana's construction industry, the idea of a contractor potentially being held liable for the hiring and employment decisions of any number of subcontractors on a project is worrisome.

Specifically, by expanding the "essential terms and conditions of employment" to include actions like "the supervision of the performance of duties," "the assignment of duties to be performed," "the tenure of employment," and "working conditions related to the safety and health of employees," we believe the NLRB is ignoring the concerns of the construction industry that have been repeatedly brought up during this rulemaking process.

In fact, one of the NLRB Board members, Marvin Kaplan, dissented to the new rule by noting that general contractors on construction projects are "responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the contract," and that these are "routine components of company-to-company contracting in the construction industry." If any of these actions trigger a joint employer status determination, there will be operational, commercial, financial, and legal ramifications that have never been part of this relationship before. Montana construction businesses cannot afford this rule.

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The NLRB has not clearly identified the issue it is aiming to address with this ill-conceived rule. It is my hope you will both cosponsor and then vote in favor of S.J. Res. 49 when it comes to the Senate floor, and urge the NLRB to work collaboratively with industry and labor to craft a targeted, effective rule that adequately recognizes different business models and relationships without adding undue burden to America's job creators.

Roughly 38,000 Montanans are employed in the construction industry across our state. It is hard to imagine how this broad and ambiguous rule would benefit a single one of them.

Thank you for your attention to this matter.

Sincerely,

David Smith
Executive Director
Montana Contractors Association

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