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COMMITTEE ON
EDUCATION AND LABOR
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March 14, 2019

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The Honorable John Ring
Chairman
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570

Dear Chairman Ring:

We are extremely concerned about reports that the National Labor Relations Board (Board) plans to outsource to a private contractor the task of reviewing public comments submitted in response to its rulemaking on the standard for determining joint employer status.¹ The Committee has learned that on February 13, 2019, Board Members reportedly informed professional staff at the Board of their intent to contract out this work. This letter requests information about the Board's plans and its rationale for what appears to be an alarming course of action.

By outsourcing to a private contractor the review of public comments in the joint employer rulemaking, the Board risks further fueling public concerns that it is tainting the rulemaking with conflicts of interest. It would be an especially troubling development if the Board contracted this service to a law firm or company that has represented or consulted any entity that has filed comments, or any entity that is a member of an association that has filed comments. We also understand that the Board has not yet completed its internal review of its ethics and recusal procedures. The Board must err against engaging in any activities that would create the appearance of a conflict of interest in this rulemaking or otherwise undermine the public's confidence in the Board's deliberative process.

Moreover, while the Board must always ensure that it spends its resources effectively to enforce the National Labor Relations Act, it is unclear how it is cost-effective to contract out regulatory tasks when it appears that the Board has qualified professional staff. The Board's staff are seasoned professionals with knowledge of and experience in this particular field, having

¹ The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46,681 (Sept. 14, 2018).

reviewed and analyzed public comments in previous rulemakings, and they are especially well-equipped to do so in this rulemaking because it involves questions the Board has traditionally addressed through adjudication. We are therefore concerned that this contract is not the best use of the Board's resources when it already has the most qualified staff prepared to conduct this task.

Accordingly, we request that the Board produce the following information and documents before April 4, 2019:

1. Copies of any draft solicitation, purchase order, contract, or other procurement vehicle for contracting with a private entity regarding the public comments submitted in response to the proposed rule for determining joint employer status or any future rulemakings.
2. Documents describing or referencing any proposal, plan, arrangement, outline, suggestion, or other effort relating to contracting review of comments on the joint employer rulemaking or any future rulemakings, including any emails or memorandum.
3. Copies of any legal determination the Board has made as to its authority to engage a private entity involving the review of public comments, including analysis of how the Board should avoid issues of a private entity performing duties that are "inherently governmental" pursuant the Federal Activities Inventory Reform Act of 1998, Office of Management and Budget (OMB) Circular A-76, and other existing guidance on "inherently governmental" functions.
4. The current status of any effort to contract with a private entity for reviewing public comments submitted in response to the proposed rule for determining joint employer status or any future rulemaking, including the scope and anticipated timeframe for when the Board would enter into such an agreement.
5. The total amount that the Board intends to spend on a contract with a private entity involving the public comments submitted in response to the proposed rule for determining joint employer status or any future rulemakings.
6. A detailed description of any efforts the Board has taken or will take with the National Labor Relations Board Professional Association (NLRBPA) and the National Labor Relations Board Union (NLRBU) to bargain over the impact and implementation of any contracting out of work that is normally performed by professional staff, pursuant to federal law and its collective-bargaining agreements with the NLRBPA and the NLRBU.²
7. A detailed description of any efforts the Designated Agency Ethics Official has taken or plans to undertake to evaluate Board solicitations, contracts, purchase orders, or other procurement vehicles that provide for private entities to review comments on rulemakings in order to ensure that such entities do not have conflicts of interest arising

² 5 U.S.C. § 7106.

from their filing of comments, their membership in any entity that has filed comments, or their potentially being impacted from the rulemaking on joint employer status or future rulemakings.

8. Copies of any communications between the Board, including any employee of the Board, and any private entity involving the potential for contracting out any work regarding the public comments submitted in response to the proposed rule for determining joint employer status or any future rulemaking.
9. Copies of any communications between the Board, including any employee of the Board, and any individual working in the Office of Management and the Budget, the Office of Personnel Management, or the White House, including the Domestic Policy Counsel, regarding any effort to contract with a private entity involving public comments submitted to the Board.

If you have any questions, please contact Kyle deCant, Labor Policy Counsel for the Committee at (202) 226-9416 or Kyle.deCant@mail.house.gov. Please direct all official correspondence to the Committee's Chief Clerk, Tylease Alli, at Tylease.Fitzgerald@mail.house.gov. Thank you for your attention to this matter, and we look forward to your response.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Chairman



FREDERICA S. WILSON
Chairwoman
Subcommittee on Health,
Employment, Labor, and Pensions