HB 299
Labor and Employment – Employment Standards and Conditions – Definition of Employer
Economic Matters Committee
Position: Unfavorable

Maryland AGC, the Maryland Chapter of the Associated General Contractors of America, provides professional education, business development, and advocacy for commercial construction companies and vendors, both open shop and union. AGC of America is the nation's largest and oldest trade association for the construction industry. AGC of America represents more than 26,000 firms, including over 6,500 of America's leading general contractors, and over 9,000 specialty-contracting firms, all through a nationwide network of chapters. Maryland AGC opposes HB 299 and respectfully urges HB 299 be given an unfavorable report.

HB 299 addresses the joint employer doctrine but unfortunately is a confused bill. The whereas clauses all refer to the Maryland Wage Payment and Collection Law ("MWPCL") and state the legislative intent as being to make the MWPCL "function as a compliment to the Maryland Wage and Hour Law". The bill proposes to accomplish this by crafting a definition of employer that includes a person who acts directly or indirectly in the interest of another employer with an employee.

However, the bill not only addresses the MWPCL, the stated target of the bill, but extends its reach into four other subtitles under Title 3 Employment Standards and Conditions: (1) Subtitle 3 Equal Pay for Equal Work; (2) Subtitle 4 the Maryland Wage and Hour Law; (3) Subtitle 7 Miscellaneous, § 3-702 Lie Detector Test; and (4) Subtitle 8 Leave, § 3-801 Adoption Leave and § 3-802 Bereavement Leave. As if this weren't confusion enough, four of the seven sections changed by the bill already include in existing law the "new" definition of employer: §§ 3-301, 3-401, 3-801, and 3-802. Presumably, these are drafting errors and can be corrected.

For discussion purposes, let us suppose that the change to the new definition is made only to § 3-501. This raises the fundamental issue of what degree of control over another employer or its employees justifies application of the joint employer rule. The issues surrounding the joint employer have been exhaustively researched and examined by the National Labor Relations Board ("NLRB"). While the NLRB was focused on the application of the joint-employer doctrine in a union-management context, the issues are the same and apply with equal force to the MWPCL. On February 26, 2020, the NLRB issued its final rule. Under the final rule, a company – a construction contracting firm, for example — is considered a joint employer of another company's employees only if the two share or co-control the employees' "essential terms and conditions of employment," which are defined as wages, benefits, work hours, hiring, termination, discipline, supervision and direction. Unless this substantial, immediate and direct control exists, they are not considered joint employers.[1]

Quoting the NLRB, "The final rule restores the joint-employer standard that the Board applied for several decades prior to the 2015 decision in *Browning-Ferris*, but with the greater precision, clarity, and detail that rulemaking allows. As a result, the final rule provides clear guidance in this significant area of the law. To be a joint employer under the final rule, a business must possess and exercise substantial direct and immediate control over one or more essential terms and conditions of employment of another employer's employees. The final rule defines key terms, including what are considered 'essential terms and conditions of employment,' and what does, and what does not, constitute 'direct and immediate control' as to each of these essential employment terms. The final rule also defines what constitutes 'substantial' direct and immediate control and makes clear that control exercised on a sporadic, isolated, or de minimis basis is not 'substantial.'"[2] (Full text of the Final Rule.)

[1] *NLRB issues final joint-employer rule* Construction Dive, 2/26/2020, https://www.constructiondive.com/news/nlrb-issues-final-joint-employer-rule/572984/, retrieved 1/27/2022, 7:41 p.m.
[2] NLRB Issues Joint-Employer Final Rule Office of Public Affairs, National Labor Relations Board, News and Publications, 2/25/2020, https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-joint-employer-final-rule, accessed 1/27/2022, 7:52 p.m.

HB 299 moves in entirely the wrong direction. A better bill would adopt the NLRB's language and amended the definition of employer in the entire Labor and Employment Article to be consistent. Employers, employees and the unions that represent them deserve to have the joint-employer status defined with clarity. Instead, HB 299 uses "squishy" and imprecise language that serves no one well.

Accordingly, for the reasons set forth above, Maryland AGC respectfully urges HB 299 be given an unfavorable report.

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