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Via Email & U.S. Mail

Santiago Avila-Gomez, Executive Secretary
Agricultural Labor Relations Board
1325 J Street, Suite 1900
Sacramento, California 95814

RE: **Barsamian & Moody's Comments and Input Regarding Proposed ALRB Regulations (as of October 2, 2024) to Implement the Provisions of Assembly Bill No. 113 (2023-2024 Reg. Sess.; Stats. 2023, ch. 7)**

Dear Board Members and Executive Secretary:

Barsamian & Moody represents agricultural employers in every segment of the California agricultural industry. We represent farmers from the smallest operations to the very largest throughout the state in all areas of federal and state labor and employment laws, and we have practiced before the ALRB since 1979 in representational matters, unfair labor practice and compliance proceedings and in litigation concerning the practices of the ALRB. We make the following comments about the latest rounds of changes made to the proposed regulations concerning the implementation of AB 113.

20292. Contents of Compliance Specification Involving Monetary Remedies or Notice of Hearing without Specification.

Subdivision (e) would allow the Regional Director to name the person or entity that they think is jointly or derivatively liable regardless of whether that person or entity has had notice and opportunity to contest the allegations in the underlying liability proceedings. In other words, this regulation expressly allows joint or derivative liability issues to be determined—for the first time—during the compliance proceedings. The compliance proceedings are too late for employers to be notified of potential joint or derivative liability issues and this regulation would easily result in due process rights being trampled. For this reason, the Regional Director should only be permitted to assert joint or derivative liability issues during compliance proceedings *if* the Regional Director can (a) demonstrate that the would-be jointly derivatively liable person or entity has been provided with notice and opportunity to participate in the underlying liability proceedings, or (b) plead in any specification its reasonable justification for the delay in naming the respondent in the underlying proceedings and the grounds for naming the person or entity at the later stage.

20391. Majority Support Petitions Under Labor Code Section 1156.37.

Service of Petitions. Subdivision (a)(1) provides, in part, that, "If such service is not possible, the petition may be personally served upon a supervisor of employees covered by the petition." Given the short time limits for responding to MSP elections, this provision should be stricken from the proposed regulations. Supervisors are not always easily identified, and questions arise whether crew bosses are in fact "supervisors" under the Act. Further, this allows supervisors (or crew bosses) of farm labor contractors to be served on behalf of agricultural employers for a petition which may include a proposed bargaining unit involving direct employees and the employees of other farm labor contractors. Thus, allowing supervisors (or crew bosses) to be served with such a critical legal document will invite disputes over whether the employer was adequately served based on arguments that the individual served lacked the authority to be deemed a supervisor, or due to delays in the agricultural employer receiving notice due to information being relayed through several levels of administration and/or remote locations and marginal telephonic or electrical communications.

While this subdivision provides for an apparent safeguard when supervisors are served—i.e., "[i]f service is made by delivering a copy of the petition to anyone other than an owner, officer, or director of the employer, the petitioner shall immediately provide notice to the owner, officer, or director of the employer declaring that a majority support petition is being filed and stating the name and location of the person actually served"—this is not a cure for the problems associated with serving a supervisor because the supervisor would be served because the owner, officer, or director cannot be readily or reliably located.

Authorization Cards. Subdivision (a)(2)(A) allows the Regional Director to accept authorization cards that have been "signed and dated before the effective date of this regulation… if the card is in substantial compliance with the requirements of this subdivision." The "substantial compliance" standard is vague and unclear and will invite challenges from employers. First, allowing any pre-regulation cards lengthens the time for the use of authorization cards that can be questioned without the proscribed language of the proposed regulations. There have already been too many delays in having regulations for the implementation of AB 113, and allowing pre-regulation authorization cards will extend it by another year from the date the regulations are finally in effect. Second, what constitutes "substantial compliance" needs to be set forth…for example, setting forth the name of the employer on the pre-regulation card. There is evidence in a pending matter that such information was added after workers signed authorization cards. Leaving this to the Regional Director's discretion and determination, unless the Regional Director is required to set forth what it is basing its determination on, it simply invites further administrative and legal challenges.

The proposed regulations would allow pre-regulation cards naming one employer to be used against a completely different employer - irrespective of whether the employee wants the union to represent it at the new/different employer. The regulations should specify that if an authorization bears the name of an employer that is different than the name of the employer named in the majority support petition, then it shall be deemed invalid.

If signing the card is irrevocable, and if the notice that signing the card is "is a vote" for the union is intended to meaningfully apprise individuals of their rights, then that language/advisement should appear **before the signature line**. Otherwise, it is largely meaningless because employees are not advised that their signature is a vote until after they have signed. The same is true for subdivision (a)(2)(B) because the advisement should appear at the top of the petition. Moreover, and like the comments made above for subdivision (a)(2)(A), the same issues concerning allowing pre-regulation petitions for the showing of support and the vagueness of "substantial compliance" are equally applicable.

Employer's Name on Petition. Again, subdivision (a)(3) provides, in part, that "authorization card or authorization petition signed by an employee at a time when the employee was not working for the employer shall, if otherwise valid, be counted in determining whether a showing of majority support is established." While these provisions make sense in the secret ballot context because employees will still have an opportunity to vote in the election with their current employer in mind, these provisions do not make sense in the MSP election. At the time of casting a ballot, employees are considering whether they want the union to represent them in collective bargaining with a specific employer - not employers generally.

Employer's Response. Subdivision (b) extends the deadline to respond to an MSP when the deadline falls on a Saturday, Sunday, or legal holiday to the "corresponding hour on the next business day." This is a necessary provision.

Employee List. Subdivision (b)(2) indicates that the Board would require employers to provide their employee's "landline and cellular telephone numbers" and their "email addresses." We strongly disagree with requiring both a landline and cellular telephone numbers and email addresses. It is extremely uncommon for employers to obtain and keep, and for agricultural workers to provide due to various privacy concerns (such as concerns about immigration status) this information for seasonal, agricultural workers, many of whom choose to be contacted through designated co-workers for work schedules (carpooling, etc.). Those are the facts of agricultural employment. Likewise, requiring an email address also clearly goes beyond the statute, which simply refers to a telephone number. The regulation should allow employers and employees to offer a current telephone – whether it be a landline or cell phone. No email should be required.

Regional Director's Investigation. Subdivision (c) would require the Regional Director to issue its decision "within three days after receipt of the employer's response." This is potentially in conflict with the statute, which allows the parties to be notified within five days of the filing of the MSP petition. In the event an employer responded within the first 24 hours, the regional director's response would be due one day earlier than it would be due under the regulations. Likewise, the amended proposed regulation should track the statute with the additional proviso that if the *fifth* day falls on a Saturday, Sunday, or a legal holiday, then the regional director's deadline is extended to the next business day.

Subdivision (c)(2) requires the Regional Director to return the majority support petition to the labor organization that it finds invalid. The Regional Director should be required to make a copy of the originally submitted evidence as it should be considered in the Regional Director's later review of the validity of any evidence submitted during the "cure period." If signatures or information are suddenly different, then the Regional Director should be required to investigate.

Subdivision (c)(2) would give the Regional Director just two days to finalize the review after the cure period closes. At the very least, this should be two business days. In the very first MSP matter, the Regional Director testified that one of the reasons that she made a questionable decision on a Friday evening instead of waiting was because she saw no point to have the determination "hanging over her staff's head" over the weekend. This will hopefully minimize abrupt decisions being made that can be avoided instead of having to be challenged.

Subdivision (c)(2) we support the Regional Director's tally including the number of voters, the number of cards received, and the number of invalid cards.

Eligibility Disputes. Subdivision (c)(4)(A) would allow the "regional director or a labor organization, for good cause shown, may challenge the eligibility of an individual included on the employer's employee list based on any of the grounds listed in regulation 20355, subdivisions (a)(1)-(7)." There is no legal or logical reason for excluding employers from the challenge process. While employers will not normally know of challenge issues, there are situations where employees might notify them of reasons for a challenge. For example, upon being notified that an MSP has been filed, an employee might approach the employer and notify them that an authorization card was signed, but they felt defrauded, coerced, pressured, etc. or that their name was forged. The Regional Director should not be relied upon to protect the interests of the employees or one party (the employer) while the other party (the labor organization) gets the right to challenge eligibility issues. This is a complete abandonment of due process.

Moreover, the Regional Director should be required to notify the employer of the names and other identifying information of the workers allegedly left off the list. The proposed regulations are unclear. *The proposed regulations only allow for the information to be shared according to subdivision (c)(4)(D)(ii).*

Subdivision (c)(4)(B)(ii) would allow the Regional Director to resolve eligibility disputes but limits the amount of information that the employer is given (i.e., prohibits the Regional Director from disclosing the names of individuals alleged to be omitted from the employer's list). Again, this is a denial of due process to the employer. In a pending matter, the agricultural employer is challenging certain ballots on the basis that the individuals were added as positive votes without their actual permission. This proposed process does not account for that. The Regional Director would be the only entity capable of safeguarding the employer's and employees' associational rights and refused to do so in that matter.

Subdivision (c)(4)(E) allows the employer to challenge any eligibility disputes by filing objections. [Note that the Board, through its delegation of authority to the Regional Director, determined that no challenges were allowed under AB 113, and yet the Board recently decided that the employer should have filed objections…which begs the obvious question, which way is it? The number of delays in formulating these proposed regulations have led to situations which completely undermine the actions of the last 12 months under AB 113.] However, subdivision (c)(4)(E)(i) appears to limit "the scope of examination at hearing shall be strictly limited to the eligibility of the employees to be included in the bargaining unit as comprised during the pay period immediately preceding the filing of the majority support petition." Does this mean that an employer would *not* be permitted to challenge the validity of the underlying vote and whether it was obtained unlawfully? In other words, would the question be limited to whether the employee

worked or did not work during the eligibility period and exclude any question of whether they did or did not sign an authorization card and/or with knowledge that it was a vote?

Subdivision (d)(1) would penalize an employer for "otherwise fail[ing] to cooperate with the regional director's investigation of the petition." However, this regulation provides no relief valve for the situation where the employer's failure to cooperate is through no fault of its own. For example, what if an employer cannot provide current and accurate street addresses because employees refuse to provide accurate information? The "substantially inadequate" standard set forth in subdivision (d)(1)(B) is vague and will undoubtedly need to be fleshed out through litigation unless it is defined now.

Subdivision (d)(3) should expressly state that the "failure of an employer to provide a complete or accurate employee list shall be excused by the fact that the employer based its information on information supplied to it by its employees" regardless of whether they are direct-hire of farm labor contractor employees.

Subdivision (d)(4) states that missing or incorrect contact information "shall be deemed to constitute voter suppression." This assumes that employees provide accurate information upon request. This also shifts the burden of an employee's mistake to the employer. Again, there is nothing defining what the Regional Director's investigation should include before any such determination is made, leading to a further denial of due process.

Board Review of Certification. Subdivision (e)(1) provides labor organizations with an opportunity to challenge certification. Is this different than the objections process? That needs to be explained or reconsidered.

We appreciate the opportunity to address and comment on the proposed amended regulations. If you have any questions arising from our comments, please contact the undersigned directly.

Respectfully submitted,

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