WRITTEN STATEMENT OF HR POLICY ASSOCIATION
"Should Taxpayer Dollars Go to Companies that Violate Labor Laws?"
HEARING BEFORE THE SENATE COMMITTEE ON THE BUDGET

HR Policy ("HRPA" or "the Association") is a public policy advocacy organization that represents the chief human resource officers of more than 400 of the largest corporations doing business in the United States and globally. Collectively, our member companies employ more than 11 million employees in the United States, over nine percent of the private sector workforce. Additionally, two-thirds of the Association's member companies are federal contractors. Since its founding, one of HRPA's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

The Association submits this written testimony for the record to provide its members a voice in the debate that is the subject of this hearing, to offer needed clarity on several misconceptions about the representation process and labor law generally that have been promulgated during this debate, and to reframe the narrative regarding violation of labor and employment laws and the awarding of federal contracts. The Association and its members, many of whom are federal contractors, are committed to their workforces and should not be lumped in with a minority of bad actors and vilified on that basis, nor on the basis of unproven allegations of unfair labor practices alone. Nor should companies be stripped of their ability to bid on federal contracts – potentially resulting in the loss of significant business affecting jobs and local communities – solely on the basis of noncompliance with extremely complex areas of labor and employment law, particularly as the interpretations of such laws swing wildly from one administration to the next. Moreover, each of those laws has its own enforcement and penalty regime which should be deferred to in ensuring compliance with them.

Association members are deeply committed to their employees, offering competitive wages, comprehensive benefits, and skills, education, and training investments, among other efforts.[1] These companies have been significant drivers of the American economy over the last decade and beyond, and in particular in leading the recent economic recovery as the country emerges from the worst days of the COVID-19 pandemic. Much of the rhetoric in this hearing involves unfounded criticism of certain companies as serial intentional violators of labor and employment laws, ignoring their substantial, industry-leading commitments to the American workforce and economy. To the extent that there are rogue actors in this country regarding labor and employment laws, whether they be employers, unions, or employees, such actors should be dealt with by enforcing the considerable number of federal and state labor and employment laws that are already in place.

Furthermore, characterizing major companies as union-busting violators of federal labor and employment law is misleading and inaccurate. As a starting point, the narrative that workers at the Staten Island Amazon facility "voted overwhelmingly to join the independent Amazon Labor Union" in the face of "illegal anti-union activity" is simply false. In fact, only 58% of eligible workers participated in the election, and less than a third of eligible workers voted in favor of representation. In contrast, and perhaps more indicative of Amazon employee attitudes towards unionization, a separate Amazon Staten Island facility recently voted more than two to one against union representation, while workers at an Amazon warehouse in Bessemer, Alabama, have twice now voted against union representation.[2]

[1] For example, Amazon has noted that it offers employees an average starting pay that is more than double the federal minimum wage, a comprehensive package of benefits including health care coverage, paid parental leave more generous than the national average, access to numerous training and upskilling programs, and fully funded college tuition.

[2] It is worth noting that unions have continued to win elections at the same rate that they always have. Union election win rates have remained relatively stable historically, while union petitions for representation have decreased on average over the last decade. While it is true that so far this year there has been an increase in petitions, such numbers are in fact inflated by numerous petitions filed against one company – Starbucks. If you subtract all Starbucks petitions from petitions filed in 2022, the number of petitions filed does not represent any increase and in fact is down compared to recent years. See Appendix for further information.

Further, while it is undisputed that the Amazon Labor Union has accused Amazon of unfair labor practices during the Amazon campaign, such charges are mere allegations only – they do not in any way show that Amazon has actually violated federal labor law. Indeed, on average, nearly two-thirds of unfair labor practice charges result in dismissal or withdrawal – a number that does not account for the large number of charges that result in settlement agreements that specifically involve non-admissions of guilt. In other words, it is significantly more likely than not for an unfair labor practice charge to result in no violation being found. Indeed, some of these charges involve allegations of unfair labor practices based on novel theories of law yet to be resolved by the National Labor Relations Board or the courts.

It is therefore premature at best and disingenuous at worst to suggest that Amazon has engaged in "illegal anti-union activity" regarding the union campaign at the Staten Island Amazon facility. This assertion is made further misleading by its glaring omission of the fact that the Amazon Labor Union has also been accused of several unfair labor practices for conduct during this same election campaign, or of the fact that several objections to the result of the election have been filed due to National Labor Relations Board ("NLRB" or "Board") conduct during this same election campaign. Moreover, the suggestion that mandatory meetings in which employers express the potential consequences of unionization are per se illegal is incorrect. Such meetings are a lawful exercise of employer speech rights meant to balance out the unlimited access that unions have to employees outside of work time, and are backed up by years of Board precedent.[3]

Besides targeting companies for alleged "anti-union" conduct, the Committee has called this hearing to determine whether the federal government should automatically debar companies on the basis of labor and employment law violations. Such an approach would disproportionately penalize employers for violations of the National Labor Relations Act, the Fair Labor Standards Act, or other labor

[3] *See* 29 U.S.C. § 158(c); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); *Babcock & Wilcox Co.*, 77 NLRB 577 (1948).

and employment laws that are often unintentional, de minimis, and/or sporadic, and for which such respective laws already impose penalties on companies for noncompliance, whether the violations are intentional or not.

Continuous perfect compliance with the National Labor Relations Act, the Fair Labor Standards Act, and other federal labor and employment laws is nearly impossible. This hearing, for example, has highlighted misclassification of workers as independent contractors as a basis for debarment, and yet, the question of employee status is one of the most complex areas of employment law. Multiple tests for independent contractor exist at the federal level alone, even between just the FLSA and the NLRA, not to mention the varying standards among different states, and even among different courts. Perhaps no single issue in employment law has produced more inconsistent judicial and regulatory interpretation.[4] In short, compliance with employee classification laws and regulations is anything but straightforward, and consequently the vast majority of misclassification cases are the result of misinterpretation or similar error, and not an intentional evasion of the law.

Compliance with wage and hour provisions of the FLSA can be similarly complex. Indeed, in the same GAO report cited by Committee Chairman Sanders in his letter to President Biden, it is acknowledged that many FLSA violations requiring back pay are due to increasing difficulties calculating fringe benefits, among other reasons that do not involve intentional violation of the law but instead are the result of unintentional error or miscalculation.[5]

Although this testimony has already rebutted some of the assertions put forth by advocates regarding unfair labor practices under the NLRA, it is nevertheless worth emphasizing that many such violations are again unintentional, particularly given the increasing tendency of the Board over the last

[4] *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When it Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295, 335-42 (2001).
[5] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-11, FEDERAL CONTRACTING: ACTIONS NEEDED TO IMPROVE DEPARTMENT OF LABOR'S ENFORCEMENT OF SERVICE WORKER WAGE PROTECTIONS 17 (2020).

two decades to engage in unpredictable policy oscillation from administration to administration. As former NLRB Member Brian Hayes has acknowledged, "many critics believe the Board's present path has been completely errant and has proved as destabilizing and disruptive as it has been unremitting."[6] A company practice, policy, or action that was considered lawful under one Board could suddenly be deemed an unfair labor practice by another. Consider, for example, the Obama-era Board, which found merely having workplace policies such as "behave in a professional manner," and "maintain a positive work environment" to be unfair labor practices. Even defenders of the Obama Board's approach must acknowledge how the average company, supervisor, or manager would reasonably assume that promulgating such a seemingly innocuous policy would not be an unfair labor practice – let alone be an intentional violation of federal labor law.

It is unreasonable, therefore, to subject companies to potential debarment from federal contracts on the basis of previous violations of labor and employment laws, when such violations are so often the unintentional results of error, miscalculation, or misunderstanding of a law or policy that can so often be in flux or inconsistently applied. This is particularly true given that in such situations, the company is already penalized under the respective law's statutory penalty scheme, even if the violation was in fact unintentional. The Association does not dispute that there are bad actors that willfully and repeatedly violate labor and employment laws to their own benefit, or that debarment may be appropriate in such very specific cases. However, the vast majority of companies that do not intentionally and consistently violate the law should not be lumped in with a small set of bad actors, particularly given the potentially significant negative consequences of debarment under the approach put forth by Chairman Sanders for both companies and the federal government. For many companies, federal contracts comprise large percentages of their business, and debarment for unintentional and irregular labor and employment law violations would be a disproportionate penalty that would

[6] Hayes et al., *Brian in Brief*, THE PRACTICAL NLRB ADVISOR, Winter 2017, at 3.

unnecessarily eliminate substantial business for thousands of companies and consequently thousands of jobs.

Further, this type of debarment policy would also drastically reduce the pool of qualified federal contractors and therefore prevent federal contracts from being performed as effectively and efficiently as possible, at the taxpayer's expense. Federal contracts address some of the most critical needs of our country, including national defense, health care, and environmental protections, among others. It is for that reason that the federal government should continue to rely on the enforcement schemes of the labor laws to ensure compliance, and only consider potential debarment in cases, if any, of the most egregious violators.

Thank you for the opportunity to submit this written statement on behalf of HR Policy Association members. The Association appreciates your attention to our concerns and encourages committee members to contact us with questions.

APPENDIX