



October 23, 2020

The Honorable Eugene Scalia
Secretary
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Amy DeBisschop, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
United States Department of Labor, Room S-3502
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: (RIN) 1235-AA34, Independent Contractor Status Under the Fair Labor Standards Act

Dear Secretary Scalia and Ms. DeBisschop:

On September 22, 2020, the Wage and Hour Division (WHD) of the U.S. Department of Labor published a notice of proposed rulemaking that would create new regulations interpreting whether workers are employees or independent contractors under the Fair Labor Standards Act (FLSA), 85 Fed. Reg. 60,600. The proposed rule raises issues of extreme importance to the Construction Employers of America (CEA), a coalition of specialty trade associations representing 15,000 signatory contractors who employ approximately 1.4 million workers. While the CEA includes companies that are large businesses, the vast majority are small- and family-owned businesses with small profit margins.

The seven undersigned associations oppose the Department of Labor's proposed new regulation. If implemented, it will provide a more lenient framework compared to current case law and state laws, making it easier for employers to misclassify workers as independent contractors. This action will deprive misclassified workers of wage and hour protections and make them ineligible for employer-provided health insurance. Finally, it will place construction contractors who properly classify their employees at a significant competitive disadvantage in bidding for work.

In recent years, states and localities have taken a different approach, strengthening their laws and regulations to combat worker abuse and protect lawful, responsible contractors from unfair

competition.^{1,2} New regulations promoted under the guise of increasing flexibility and entrepreneurship are unnecessary and counterproductive, and will make it more difficult to prevent the misclassification of employees. Perceptive, interested employers have already adapted to a changing workforce and are able to provide flexible schedules to employees without misclassifying them as independent contractors.

CEA employers have a particular stake in the issue of employment status because construction is a head-to-head bid industry. Companies that deliberately misclassify their workers have a strong competitive advantage in the marketplace. We are rightfully concerned; studies clearly document that willful misclassification and payroll fraud is rampant in the construction industry. Construction is so plagued by independent contractor abuses that many studies about misclassification of employees as independent contractors have focused specifically on the construction industry and general studies have shown that rates of misclassification are higher in construction as compared with the workforce as a whole.

The competitive bid nature of construction industry procurement gives dishonest contractors an incentive to misclassify their employees in order to avoid responsibility for the cost of paying payroll taxes, as well as federal and state unemployment taxes and workers' compensation premiums – the latter of which is considerable due to the dangerous nature of the work. Contractors who misclassify their employees are also able to avoid providing health insurance and pensions, and to bypass the requirements of the Fair Labor Standards Act (FLSA), such as overtime pay.

Since employee misclassification is fraud, it is difficult to document and quantify the true magnitude of this problem. Numerous academic and government studies have looked at construction misclassification rates for specific states and found that approximately 19 percent of self-employed construction workers nationwide are misclassified as independent contractors,

¹ “IC Laws: State and City Laws Enacted and Federal Bills Proposed (Since July 2007),” Independent Contractor Misclassification and Compliance, Richard Reibstein/Locke Lord LLP, accessed October 23, 2020, <https://www.independentcontractorcompliance.com/legal-resources/state-ic-laws-and-selected-bills/>. The article notes that most of the state laws listed “are intended to create greater penalties for IC misclassification or to curtail the use of independent contractors, especially in selected industries where IC misclassification is regarded as prevalent by state legislatures.”

² “Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries,” National Employment Law Project Fact Sheet, September 2017: Page 4. <https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf> Summarizes the findings from over 20 state-level studies. The studies rely on a range of data and methods. Most studies rely on data from unemployment insurance and workers' compensation audits, targeted or random; some draw on the records of multi-level government agencies; and a few used interviews with workers. Some studies examine the workforce as a whole, while others focus on industries where misclassification is rampant, such as construction.

which costs taxpayers \$2.6 billion a year.^{3, 4} To address this crisis in the construction industry and level the playing field for both union and nonunion law-abiding contractors, the CEA believes that the Wage and Hour division should be taking steps to strengthen – not relax – enforcement of the FLSA. Unfortunately, the proposed rule would make it easier for employers who misclassify their employees to avoid their legal obligations to their workers and gain an unfair advantage in competing for construction work.

Workers would be clearly affected by changes in the way FLSA is administered and enforced because they could lose certain workforce protections, assume increased costs for their own employment and be ineligible for worker benefits such as pensions and health care benefits. *However, the way the FLSA is administered and enforced is also very important to construction industry employers who follow the law.* Construction employers who properly classify workers are responsible for submitting Social Security and FICA taxes, must pay minimum wage and overtime, and must pay into workers' compensation funds, all with appropriate record-keeping requirements.

The recent pandemic and associated recession demonstrate how critical it is to have employers paying into state unemployment funds. Employers also must abide by other federal employment laws, including those regarding discrimination and harassment, the Family and Medical Leave Act, and requirements to hold job positions for employees who are called to active military duty. Construction contractors who participate in the federal procurement marketplace with employees must also abide by certain employment and wage laws that do not apply to contractors who use independent contractors.

When considering the costs associated with being an employer, it is easy to see why unscrupulous businesses would seek to inappropriately use independent contractors as a business model. However, it is difficult to ascertain why the federal government would want to relax standards to the detriment of law-abiding contractors, workers and federal and state government treasuries.

In addition, CEA notes that there is a lack of enforcement in the “economic reality” test, despite the fact that enforcement is mentioned six times without a clear definition. The Washington Center for Equitable Growth in a September 2020 report noted that the FLSA itself lacks

³ U.S. Government Accountability Office (August 2009). *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention.* <http://www.gao.gov/assets/300/293679.pdf>.

⁴ Treasury Inspector General for Tax Administration (February 4, 2009). *While Actions Have Been Taken to Address Worker Misclassification, and Agency-Wide Employment Tax program and Better Data are Needed.* <http://www.treasury.gov/tigta/auditreports/2009reports/200930035fr.pdf>. The report notes that “Preliminary analysis of Fiscal-Year 2006 operational and program data found that underreporting attributable to misclassified workers is likely to be markedly higher than the \$1.6 billion estimate from 1984.”

strategic enforcement tools.⁵ The 2009 GAO study (see Footnote 3) noted that although employee misclassification itself is not a violation of law, it is often associated with labor and tax law violations. The study also noted that the agency rarely uses penalties in cases of misclassification. The proposed regulation by the Wage and Hour division is heading in the wrong direction with relaxed rules and without an enforcement model.⁶

In these trying times, CEA employers are proud to provide good-paying jobs with healthcare and related benefits that are already scarce in construction and other industries. However, workers classified as independent contractors are even less likely to receive any type of health and pension benefits, including workers' compensation should they be injured on the job. They are burdened with paying the full portion of Social Security and Medicare taxes, yet numerous reports document that they are not making these payments, primarily because they are not aware of their responsibility to do so.

When responsible employers are unable to compete with employers who use a business model based on independent contractors, it tears at the social and economic fabric of this country. The current pandemic further exacerbates the problem and provides an even stronger incentive for unethical employers to take advantage of workers. The Department of Labor should carefully evaluate the risk to workers, consider the viability of responsible, lawful employers and weigh the long-term public interest.

The Administration should further recognize that the epidemic rise of worker misclassification in construction has nothing to do with career enhancement or individual entrepreneurship, but rather everything to do with unfair low-wage competition and workforce degradation. The construction industry can ill afford hiring workers with declining skills and abilities at a time when projects are expanding in complexity and sophistication. Unfair competition by firms that misclassify employees to avoid the payment of employment taxes and other requirements of employment law threatens the maintenance of workforce standards.

Respectfully,

Construction Employers of America (CEA)

www.constructionemployersofamerica.com

CEA Members: International Council of Employers of Bricklayers and Allied Craftworkers - FCA International - Mechanical Contractors Association of America - National Electrical Contractors Association - Sheet Metal & Air Conditioning Contractors' National Association - Signatory Wall and Ceiling Contractors Alliance - The Association of Union Constructors

⁵ Janice Fine et al., "Maintaining effective U.S. labor standards enforcement through the coronavirus recession," Washington Center for Equitable Growth, Sept. 2020: Page 28. <https://equitablegrowth.org/wp-content/uploads/2020/09/090320-labor-enforcement-report.pdf>

⁶ GAO, *Employee Misclassification*, Page 6.