



March 12, 2024

The Honorable Bernie Sanders  
Chairman  
Committee on Health, Education,  
Labor & Pensions  
United States Senate  
Washington, D.C. 20510

The Honorable Bill Cassidy  
Ranking Member  
Committee on Health, Education,  
Labor & Pensions  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman and Senator Cassidy:

On behalf of the Construction Employers of America (CEA) and the 15,000 signatory contractors and the 1.4 million employees we represent, we write to advise you of our strong opposition to S.J. Res. 63, a Congressional Review Act resolution to nullify the Labor Department's (DOL's) January 10, 2024, final rule on "Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA)." Passing this resolution and repealing DOL's final rule will place law-abiding employers in the construction industry at a competitive disadvantage to businesses that thrive at the expense of honest job creators, American workers, and the nation's taxpayers.

The CEA is made up of seven employer associations representing construction firms that utilize union craftworkers. Our members adhere to the highest standards and provide superior wages and benefits—including health insurance, pensions, and investments in worker safety and training—and are committed to working to strengthen the construction industry and provide opportunities for American workers. CEA members provide the best value to project owners while securing high-value compensation and benefits for workers and their families, and vital unemployment insurance and workers compensation payments to their communities. As you know, companies do not pay employment taxes, unemployment insurance, workers compensation or provide benefits to workers treated as independent contractors.

This increasingly popular business model is rooted in a decision to treat almost every worker on a jobsite as an independent contractor. This not only provides a cost advantage, it also absolves the contractors who use it of the responsibility to ensure their workers are legally authorized to be employed in the United States. S.J. Res. 63 would further encourage this model by weakening the standards for when workers are employees versus independent contractors through its rescission of the DOL's 2024 final rule on independent contractor status. The 2024 rule returned DOL regulations to well-understood parameters clarified through decades of judicial precedents. The 2024 final rule rescinded and replaced a 2021 regulation intended to

make it easier to classify construction workers as contractors instead of employees and harder to challenge these determinations by adopting a novel standard that has never been interpreted or clarified by the courts.

Our members testified before Congress in 2019<sup>1</sup> and in 2023<sup>2</sup> regarding the impact that growing use of independent contractor status in the construction industry is having on the ability of honest job creators to compete for work and provide family-sustaining wages and benefits. We highlighted that construction companies that treat their workforce as independent contractors save a minimum of 20 to 30 percent on labor costs. When competing against companies like the ones represented by CEA that pay middle-class wages and offer retirement plans and health benefits, the independent contractor business model nets closer to a 50 percent cost advantage.<sup>3</sup> The testimony of CEA member organization witnesses also highlighted that this issue is not simply a “red” or “blue” state issue, but rather a universal one that affects all Americans regardless of political affiliation or belief.

The prevalence of construction employers pursuing the independent contractor model to avoid payment of taxes has come to be an issue of concern for the guardians of the integrity of the U.S. financial system. On August 15, 2023, the Financial Crimes Enforcement Network (FinCEN) along with the IRS Criminal Investigation Division issued a detailed notice<sup>4</sup> warning U.S. financial institutions to take extra precautions to prevent the banking system from being used to facilitate a “concerning increase in state and federal payroll tax evasion and workers’ compensation insurance fraud in the U.S. residential and commercial real estate construction industries.” The notice details how “many payroll tax evasion and workers’ compensation fraud schemes involve networks of individuals and the use of shell companies and fraudulent documents,” and included examples of “red flags,” such as a company who’s bank account has minimal to no tax- or payroll-related to federal, state, and local tax authorities. Just last month, the Treasury Department’s published its “National Money Laundering Risk Assessment” with a “Special Focus” section on tax crime that discusses at length workers’ compensation insurance fraud and payroll tax evasion in the U.S. residential and commercial real estate construction industry<sup>5</sup> driven by construction employers treating most or all of their workforce as contractors for whom they say they owe no taxes.

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<sup>1</sup> Testimony of Matt Townsend, Workforce Protections Subcommittee, U.S. House of Representatives Committee on Education and Labor, Hearing on “Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy” (Sept. 26, 2019), *available at* <https://www.congress.gov/116/meeting/house/110019/witnesses/HHRG-116-ED10-Wstate-TownsendM-20190926.pdf>.

<sup>2</sup> Testimony of T. David Long, Workforce Protections Subcommittee, U.S. House of Representatives Committee on Education and the Workforce, Hearing on “Examining Biden’s War on Independent Contractors” (April 19, 2023), *available at* <https://www.congress.gov/118/meeting/house/115679/witnesses/HHRG-118-ED10-Wstate-LongM-20230419.pdf>.

<sup>3</sup> [Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio \(Feb. 18, 2009\)](#).

<sup>4</sup> FinCEN notice FIN-2023-NTC1, “[FinCEN Calls Attention to Payroll Tax Evasion and Workers’ Compensation Fraud in the Construction Sector](#).”

<sup>5</sup> [2024 National Money Laundering Risk Assessment](#), pg. 40, U.S. Department of the Treasury (Feb. 7, 2024).

DOL's January 10, 2024 final rule will help to reverse these trends in our industry by replacing a 2021 standard that *invited and protected* broader use of a business model fueling a race to the bottom in the U.S. construction industry. Congress should not rescind a rule critical to protecting honest employers and deterring further abuse of independent contractor status that is now threatening the integrity of the U.S. financial system. It restores and provides greater clarity and consistency for employers and workers in a manner consistent with the congressional intent of the FLSA and judicial precedent. We therefore strongly oppose S.J. Res. 63 and urge the Committee to reject this and any similar attempts to repeal DOL's January 10, 2024 final rule. We appreciate your attention to our views on these matters.

Sincerely,

The Construction Employers of America  
[www.constructionemployersofamerica.com](http://www.constructionemployersofamerica.com)

FCA International  
International Council of Employers of Bricklayers and Allied Craftworkers  
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