



March 9, 2021

Al Stewart
Acting Secretary
U.S. Department of Labor
200 Constitution Ave, NW
Washington, D.C. 20210

James “Jim” Frederick
Deputy Assistant Secretary
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Dear Acting Secretary Stewart and Deputy Assistant Secretary Frederick:

As the Department of Labor begins to evaluate the necessity of an emergency temporary standard (ETS) related to the COVID-19 pandemic in response to President Biden’s recently issued “Executive Order on Protecting Worker Health and Safety,” the Construction Employers of America (CEA) would like to respectfully submit our views on the matter.

The CEA is made up of seven construction employer associations: The International Council of Employers of Bricklayers and Allied Craftworkers (ICE-BAC); FCA International (FCA); The Mechanical Contractors Association of America (MCAA); The National Electrical Contractors Association (NECA); The Sheet Metal & Air Conditioning Contractors’ National Association (SMACNA); The Signatory Wall and Ceiling Contractors Alliance (SWACCA); and The Association of Union Constructors (TAUC).

These associations represent construction firms that are proud to use union craftworkers. The more than 15,000 signatory contractor members that compose the associations comprising CEA adhere to the highest standards, and their approximately 1.4 million workers are paid family-sustaining wages and have health insurance and pensions. Contractors represented by CEA member associations invest millions in worker training and safety through jointly trustee registered apprenticeship training funds and joint labor-management cooperation committees. Contractors within CEA are committed to strengthening the construction industry and providing the best value to project owners while providing good pay and benefits for their workers.

As construction employers, our members understand that it is incumbent upon management to work in partnership with worker representatives to find effective, common sense solutions to protect workers and keep them safe on the job. Since the beginning of the pandemic, the construction industry workforce has been deemed essential to ensuring the continuing operation

of critical infrastructure. In fulfilling this charge, CEA members have prioritized worker safety and been proactive in working with our signatory unions to develop necessary work practices and to provide the resources to work safely. These efforts have included the adoption of practices to ensure social distancing on jobsites, sanitizing work areas, quarantine protocols, and providing for those workers who fall ill. Despite the efforts we have made in cooperation with our labor partners to ensure the health and safety of our workers, we recognize that not all employers are making such efforts or giving similar consideration to the concerns of workers and the input of their representatives.

As the Department evaluates whether a federal COVID-19 emergency temporary standard is necessary, we respectfully urge DOL not to override the effective work practices that contractors have developed with their signatory unions. We ask that for workplaces in which management and a recognized collective bargaining representative of the workforce mutually agree on best practices, these joint labor management efforts supersede any ETS, so long as they are faithfully adhered to by all parties.

If the Department refuses to allow labor and management to voluntarily adopt mutually agreed upon best practices, then it is imperative that any ETS avoid creating an uneven playing field for high road employers in industries with high rates of worker misclassification, like construction. In the construction industry, many employers disclaim responsibility for ensuring a healthy and safe workplace by misclassifying their workers as self-employed. States like California that have adopted an ETS mandating that when employees are excluded from work for certain COVID-19-related reasons (like having or having been exposed to COVID-19) but remain “otherwise able and available to work,” employers must pay “exclusion pay” for the employees’ time away from the job and refrain from capping those earnings. The CalOSHA mandate essentially means that honest contractors who do not misclassify workers will be forced to pay an “exclusion wage” to employees sidelined due to COVID-19 in addition to paying a replacement employee to keep to the construction schedule. The need to replace absent employees who are drawing exclusion pay and benefits means the honest contractor now pays twice—once for the absent employee and again for the replacement. Unscrupulous employers who misclassify their workers as self-employed on the other hand would be exempt from this mandate, creating a competitive advantage for contractors that can simply let the sick worker go and hire a new worker to complete a project.

We applaud President Biden for his focused and sober approach to worker safety. It mirrors the approach that contractors in CEA member associations have taken in coordination with their labor partners from the outset of the pandemic. We also hope that any standard that may be adopted will not provide further competitive advantages to unscrupulous businesses that refuse to acknowledge their obligations to their workforce by misclassifying them as self-employed individuals. An ETS to protect workers should not have the unintended consequence of putting high-road employers at a further disadvantage to unethical competitors. This would not serve workers or advance the goals of this Administration.

Thank you for your consideration of CEA's views on this matter. We look forward to working with you to ensure that all workers are kept safe and treated with dignity and respect as our nation seeks to rebuild from the COVID-19 pandemic and related economic harm it has caused.

Sincerely,

The Construction Employers of America
www.constructionemployersofamerica.com

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