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March 29, 2021

Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S – 3502
200 Constitution Avenue NW
Washington D.C. 20210

Submitted via the Federal eRulemaking Portal at http://www.regulations.gov

RE: Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal (RIN 1235-AA34)

To Whom It May Concern:

The Signatory Wall and Ceiling Contractors Alliance (SWACCA) is a national, non-profit trade association that advocates for the interests of union-signatory wall and ceiling construction industry employers. SWACCA represents approximately 400 wall and ceiling construction employers – including many of the largest employers in our industry – who perform commercial framing, drywall, and interior systems work nationwide. Our members employ thousands of carpenters, drywall finishers, plasterers, and other skilled building trades professionals throughout the United States. SWACCA prides itself on representing construction contractors that accept responsibility for providing family-sustaining wages and benefits and abiding by labor and employment standards, workers compensation laws, and unemployment insurance requirements.

Curbing the growing practice of construction industry employers underbidding responsible contractors, like our members, by classifying most (or all) of their workforce as independent contractors is critical to our members' ability to compete and provide middle-class wages and benefits. SWACCA has consistently opposed efforts to make it easier to convert workers from employees into independent contractors. Consistent with this position, SWACCA supports the Department's proposal[1] to withdraw the January 7, 2021 final rule entitled, "Independent Contractor Status Under the Fair Labor Standards Act" ("the Rule").[2]

SWACCA submitted extensive comments in October 2020 on the Rule as originally proposed, as well as on the Department's more recent proposal to delay the Rule's effective date pending further review. SWACCA continues to believe that the Rule does not effectuate the FLSA's purpose. It does not provide clarity for stakeholders. Moreover, the Department failed to adequately consider the costs of

[1] Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal, 86. Fed. Reg. 14027 (March 12, 2021).
[2] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021).

the Rule while overstating its benefits. SWACCA also agrees with the Department's view that withdrawal of the Rule will not be disruptive because it has yet to take effect.

I. The Rule Fails to Effectuate the FLSA's Purpose.

In past comments, SWACCA emphasized that the Rule endorses and encourages the use of more independent contractors in the construction industry. This results from an undue emphasis on two "core" factors – the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss. By giving greater emphasis to these two factors, the Rule improperly narrows the analysis of the facts and circumstances surrounding the business-worker relationship, thereby reducing the scope of the FLSA's protections. As the Department points out in the proposal to withdraw the Rule, this approach is inconsistent with judicial precedent indicating that no single factor in the analysis is dispositive.[3]

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Congress intended for the FLSA's minimum pay mandate, maximum hour provisions, and recordkeeping requirements to be broadly construed.[4] Consistent with this intent, the FLSA defines the term "employer" broadly as "any person acting directly or indirectly in the interest of an employer in relation to an employee." It is reinforced by the FLSA's expansive definition of an "employee" as "any individual employed by an employer," and the statute's definition of the term, "employ" as "includ[ing] to suffer or permit to work."

These definitions have been analyzed in caselaw for more than 70 years. This caselaw has produced a six-factor economic reality balancing test that SWACCA does not believe DOL has the authority to rewrite into a narrower test that will leave fewer workers protected under the FLSA. This is exactly what the Rule does by narrowing the economic reality test to focus disproportionately on the two "core" factors. This amounts to rewriting the common law interpretation of a statute by the federal courts.

In a very understated manner, the Department conceded in the Rule that it "could lead to a greater incidence of independent contracting," but argued that this is because "businesses and workers will be able to more freely adopt independent worker arrangements without fear of FLSA liability."[5] Whatever rationale is used, it is indisputable that the Rule will result in more individuals being deemed independent contractors instead of employees protected under the FLSA. This will disrupt the traditional employer-employee relationships Congress sought to make the norm when it enacted the FLSA. Reversing such a significant social policy requires an act of Congress. It is not something DOL can or should arrogate to its

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[3] *Supra* note 1 at 14031.
[4] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947).
[5] *Supra* note 2 at 1215.

regulatory authority in contravention of decades of judicial interpretation that Congress has declined to reverse.

SWACCA also disagrees with the Department's assertion that the Rule will create many *new* independent contractor jobs but will not result in many existing employee positions being converted to independent contractor relationships.[6] SWACCA believes that many current employees would be converted to independent contractor status if the Rule takes effect. Moreover, it is important to acknowledge the context in which the Rule would take effect. The COVID-19 pandemic has caused significant disruption in employment markets. Under the Rule, as the economy recovers, employers will find it easier and less costly to fill positions under a more expansive definition of an independent contractor and fewer people will return to work as employees protected by wage, safety, unemployment insurance and other laws that have been critical components of economic security since the Great Depression.

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II. The Rule Will Not Provide Greater Clarity for Stakeholders.

In promulgating the narrower test that emphasizes two core factors, the Department argued that the existing six-factor economic reality test creates confusion among stakeholders. This argument was supported by the fact that the federal appellate courts have not consistently applied the six-factor test. But this lack of uniformity is not surprising because, as the Department also noted, the six-factor test was developed in caselaw and has not yet been conclusively addressed by the Supreme Court. Moreover, the Department's faith that the Rule will provide clarity is misplaced. There is no reason to believe the courts will uniformly adopt or defer to the Rule's interpretation of the FLSA if it takes effect. The Rule may well result in greater confusion among courts analyzing employment relationships under the FLSA and produce less clarity for the regulated community. Only Congress or the U.S. Supreme Court could guarantee the clarity and certainty that DOL hopes the Rule will create.

The fact that the Rule is a departure from years of caselaw, combined with the Department's lack of authority to depart so sharply from applicable judicial precedent, makes it less likely that the Rule will be consistently applied. The only outcome certain to follow from DOL's attempt to redefine the employment relationship is more litigation.

III. The Department Failed to Adequately Analyze the Costs and Benefits Attributed to the Rule.

The Department summarily dismissed concerns about the costs the Rule would impose on workers currently classified as employees by stating that "many workers who are most likely to be converted due to this rule likely do not presently receive

[6] *Id.* at 1221, n.147.

benefits or, if they do receive fringe benefits, their value (both as measured by the worker and as an absolute cost to the employer) falls below the economy-wide average."[7] The Department goes on to concede that it "did not attempt to quantify such an impact." Because the Department has no data to support this assertion, it relies on a weak qualitative argument positing that in a conversion to independent contractor status employees with bargaining power could negotiate a wage premium to offset their loss of benefits, while employees who do not have sufficient bargaining power to negotiate a wage premium probably did not have benefits to begin with.[8]

This is absurd. It ignores that fact that workers who lose their status as employees also lose their legal right to seek a collective bargaining representative to increase their bargaining power. Such speculative arguments that wholly ignore significant legal ramifications of reclassifying workers as independent contractors are simply an unacceptable basis on which to implement a rule of any kind—especially one that may result in the loss of health insurance and other valuable, employer-provided fringe benefits in the midst of a public health emergency.

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SWACCA members and many other employers would also bear costs under the Rule that the Department failed to consider. The Department argued that the Rule "is expected to reduce the time spent analyzing how the economic reality test's factors interact," although it would result in *de minimis* "incremental familiarization costs in future years."[9] As in its previous comments, SWACCA continues to disagree. Initially, employers would be required to familiarize themselves with the application of the Rule, which is novel and has not been analyzed by any court. Litigation is likely to follow should the Rule be applied. This will impose further costs on employers who currently understand the demarcation between employers and employees as they assess new caselaw that will necessitate additional, ongoing familiarization costs.

Finally, taxpayers would bear significant costs if the Rule were to take effect. Many commentors, including SWACCA, have previously explained that independent contractor arrangements, whether lawful or fraudulent in nature, result in reduced tax revenues and increased costs to federal, state, and local governments for programs ranging from unemployment insurance to workers compensation to payroll taxes. The Department dismissed these concerns, asserting that estimates of tax revenue losses assume that freelance workers do not report their full earnings.[10] The fact is that independent contractor arrangement *are rife with fraud* insofar as it is generally accepted that "employers are more likely to withhold and submit taxes

[7] *Id.* at 1221.
[8] *Id.*
[9] *Id.* at 1229.
[10] *Id.* at 1230.

than independent contractors are to voluntarily pay their tax liabilities."[11] This reality is an acknowledged part of the "tax gap." Workers are even less likely to report cash payments received when working as independent contractors—a practice that is prevalent among some construction employers seeking to evade their obligations to pay unemployment and various other taxes.[12] The costs to taxpayers of workers in construction and other industries being classified as independent contractors has even been the subject of a recent Congressional hearing.[13]

An increase in the use of independent contractors as compared to employees will also cause a decrease in individuals covered by retirement plans, health insurance, workers compensation insurance, and unemployment insurance. Social safety net programs funded by taxpayers will have to make up the difference. Independent contractors will be more likely to rely on social security benefits to cover a larger portion of their retirement income needs. State and federal health insurance programs will take up the burden to provide coverage to uninsured independent contractors. State workers compensation programs will be underfunded. And various alternatives to employer-supported unemployment insurance, such as the exclusively taxpayer-funded "Pandemic Unemployment Assistance Program" that Congress created in the *CARES Act* for independent contractors, will be required to provide benefits to even more workers that fall on hard times.

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IV. Withdrawal of the Rule Would not be Disruptive.

SWACCA agrees with the Department's present position that withdrawing the Rule would not be disruptive because it has yet to take effect.[14] Courts have not applied the Rule to decide cases and the Department has not yet implemented the weighted five-factor test. Of particular note, the Department recently withdrew two opinion letters issued in January 2021 applying the Rule's analysis to a number of factual scenarios on the grounds that the letters were "issued prematurely because they are based on [a Rule] that ha[s] not gone into effect."[15] This is clearly the correct approach in light of the fact that the regulated community has been functioning

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[11] Congressional Research Service, *The Tax Gap: Misclassification of Employees as Independent Contractors* at 1 (December 23, 2011), last accessed March 22, 2021 at https://www.everycrsreport.com/files/20111223_R40807_f23bbc37cc588a74650a677be2a69c4a49b1faa6.pdf

[12] See *Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry* September 2019), last accessed March 15, 2021 at https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf (noting that "[m]isclassification is disturbingly common"). Congress has also held hearing in the pervasive nature of misclassification in construction and other industries documenting the costs it imposes on taxpayers.

[13] *Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy* United States House of Representatives Committee on Education and Labor, Subcommittee on Workforce Protections September 26, 2019, last accessed March 15, 2021 at https://www.congress.gov/event/116th-congress/house-event/110019.

[14] *Supra* note 1 at 14035.

[15] https://www.dol.gov/agencies/whd/opinion-letters/search, last visited March 24, 2021 (noting the withdrawal of Opinion Letters FLSA2021-8 and FLSA2021-9).

under the current state of the law and will benefit from the continuity provided by withdrawing the Rule.

Conclusion

As explained above, the Rule would not provide greater clarity. It will only encourage businesses models that use independent contractors instead of employees. This will hurt entrepreneurs who take on the responsibility of having employees and providing the economic protection Congress mandated in the FLSA. The Rule also ignores the significant costs it imposes on workers, taxpayers, and many responsible employers. For these reasons, SWACCA commends the Department for undertaking this effort to withdraw the Rule.

Thank you for your efforts and the opportunity to submit these comments.

Sincerely,

Scott Casabona
President

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