April 9, 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: Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule (RIN 1235-AA37)

Dear Sir or Madam:

The Construction Employers of America ("CEA") supports the U.S. Department of Labor's ("DOL") March 12, 2021 proposal ("Proposed Rule")[1] to rescind DOL's January 16, 2020 final rule revising the interpretation of joint employer status under the Fair Labor Standards Act ("FLSA") ("Final Rule").[2] CEA has opposed the Final Rule since its inception. As explained below, the Final Rule will harm honest entrepreneurs, including the companies represented by CEA member associations, the men and women they employ, and taxpayers. The Final Rule also represents an impermissible interpretation of the FLSA.

I. Introduction

The CEA is a coalition of specialty construction trade associations representing 15,000 signatory contractors who employ approximately 1.4 million skilled construction craft workers. All companies under the CEA umbrella are signatory to union collective bargaining agreements. They are committed to providing the highest-quality skills training as well as middle-class wages, retirement benefits, and health plans to their employees. While the CEA includes large companies, the vast majority are small, family-owned businesses operating on tight profit margins that will be eroded by the Final Rule. The seven undersigned CEA associations urge the DOL to finalize the proposed recission of the Final Rule for the reasons set forth below.

[1] Rescission of Joint Employer Status under the Fair Labor Standards Act Rule, 86 Fed. Reg. 14038 (March 12, 2021).
[2] Joint Employer Status under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (Jan. 16, 2020).

II. The Rule Will Perpetuate a Business Model that Hurts Construction Industry Employers, Workers, and American Taxpayers.

The Final Rule's reconceptualization of who is a "joint employer" under the FLSA will encourage the practice of misclassifying construction workers as independent contractors. This will make it harder for employers providing middle class careers in our industry to compete and provide good wages, benefits, and the protections that have been part of the employer/employee relationship since the 1930s. The Final Rule will have this effect because it significantly narrows the circumstances under which a business contracting with a company that misclassifies workers as independent contractors will be liable to the affected workers as a joint employer. As management-side attorneys have made clear, "[u]nder the final rule, the likelihood of such exposure will be considerably reduced."[3]

If the Final Rule takes effect, general contractors and primary specialty subcontractors will feel more emboldened to accept the lowball bids commonly associated with subcontractors engaging in misclassification of workers as independent contractors. The Final Rule will encourage subcontractors to utilize labor brokers misclassifying workers to avoid overhead costs and eliminate the financial risk of underestimating the time a job will take and the potential overtime pay that might result. By misclassifying their workforce, companies avoid costs such as overtime, workers' compensation, unemployment insurance, employment taxes, and compliance with health and safety requirements. Companies misclassifying workers can save almost 50% compared to companies that honor their obligations as employers.[4]

Recent academic research confirms these costs to workers and taxpayers.[5] This research shows payroll fraud in construction allows employers to evade $2.98 billion per year in Social Security and Medicare taxes for workers.[6] It causes an estimated $1.74 billion annual shortfall in state workers compensation programs. Construction industry misclassification results in annual state unemployment insurance program shortfalls of over $700 million.[7] Under the "most conservative" estimates, misclassified construction workers lose over $800 million per year in overtime.[8]

Simply put, if DOL allows the Final Rule to become effective, it will fuel further misclassification that will hurt construction employers represented by CEA member associations, workers in the construction industry, and American taxpayers. To survive, construction employers that currently provide their workers with a middle-class lifestyle would be forced to reevaluate the wages and benefits they can provide. This will lead to a reduced standard of living for the hundreds of

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[3] https://nathansgibson.org/new-joint-employer-rule-has-impact-on-independent-contractor-misclassification-claims/ (last visited March 29, 2021).
[4] Hearing on "Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy" Before the Workforce Protections Subcommittee, House Education and Labor Committee, 116th Congress (Sept. 26, 2019) (Statement of Matt Townsend, President of the Signatory Wall and Ceiling Contractors Alliance at 3, available at https://edlabor.house.gov/imo/media/doc/TownsendTestimony092619.pdf, last visited March 23, 2021).
[5] Russell Ormiston, Dale Belman and Mark Erlich, *An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry* (2020), available at https://stoptaxfraud.net/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf (last visited March 29, 2021).
[6] *Id.* at 5.
[7] *Ibid.*
[8] *Ibid.*

thousands of workers these companies employ. Such a result is incompatible with the President's pledge to "Build Back Better" from the COVID-19 pandemic.

III. The Rule Represents an Impermissible Interpretation of the Fair Labor Standards Act.

As DOL notes in the Proposed Rule, several states filed suit challenging the Final Rule's legality with respect changes it made to the test for determining whether a vertical joint employment relationship exists, such as those at issue when subcontractors use labor brokers in the construction industry. In September of last year, the United States District Court for the Southern District of New York concluded that the Final Rule was contrary to law and arbitrary and capricious. [9] The court came to this conclusion because the Final Rule replaced the historic focus on economic dependence for determining joint employment with a four-factor test for assessing the level of control the potential joint employer has over the workers at issue. The court ruled that DOL failed to explain the sudden departure from its previous interpretation of joint employment under the FLSA. DOL also failed to explain why the benefits of the Final Rule exceeded the obvious costs it imposed. The court vacated the rule.

Given this ruling and the cogent reasoning behind it, DOL is obliged to rescind the Final Rule and reevaluate not only the wisdom of it, but also its legality. Moreover, because the Final Rule was vacated and is not in effect, there are no legitimate reliance interests impacted by rescinding it. Rather, failure to rescind the Final Rule would undermine the reasonable reliance interests of those states that successfully challenged the Final Rule because of its impact on workers and taxpayers.

CEA, its member associations, and the thousands of construction industry employers they serve appreciate your consideration of these comments.

Respectfully,

The Construction Employers of America
www.constructionemployersofamerica.com

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

[9] *State of New York, et. al. v. Eugene Scalia*, 1:20-cv-1689-GHW (S.D.N.Y., September 8, 2020).