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

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

RE: Proposed Rule Regarding "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" (RIN 1235-AA43)

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 who perform commercial framing, drywall, and interior systems work nationwide. Our members employ thousands of carpenters, drywall finishers, plasterers, laborers, 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. SWACCA contractor members, many of which are small businesses, will benefit from a return to the six-factor test for determining when a worker is an employee or an independent contractor under the Fair Labor Standards Act ("FLSA"). Accordingly, SWACCA is writing to express its strong support for the Wage and Hour Division's (WHD) October 13, 2022 proposed rule "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" ("Proposed Rule").[1]

Curbing the growing practice of misclassifying construction workers as independent contractors to underbid responsible contractors, like SWACCA members, is critical to the ability of our members to compete and provide middle-class wages and benefits while funding the training of the next generation of skilled construction trades workers. SWACCA has therefore consistently opposed efforts that encourage or make it easier to treat construction workers as independent contractors. In addition to providing

[1] "Employee or Independent Contractor Classification Under the Fair Labor Standards Act," 87 Fed. Reg. 62218 (Oct. 13, 2022) (hereinafter, "Proposed Rule").

congressional testimony on this issue,[2] SWACCA submitted extensive comments expressing opposition to the September 25, 2020 proposed rule entitled, "Independent Contractor Status Under the Fair Labor Standards Act," which was finalized on January 7, 2021 ("January 2021 Rule").[3] SWACCA also filed comments supporting the February 5, 2021 proposal to delay that January 2021 Rule's effective date[4] and the March 12, 2021 proposal to withdraw the rule.[5]

As we have previously explained, the January 2021 Rule does not effectuate the FLSA's purpose and does not provide clarity for stakeholders. By imposing a novel standard, the January 2021 Rule makes it harder for employers and workers to ascertain status under the FLSA. The confusion caused by this new standard gives cover to bad actors who want to label their construction workforce as independent contractors to gain a competitive advantage. The uncertainty created by the January 2021 rule also makes it more difficult and costly for the government address misclassification of workers under the FLSA. This further tilts the playing field against SWACCA members and other construction contractors that treat workers as employees and pay corresponding wages, overtime, and taxes. For these reasons, SWACCA supports rescinding the January 2021 Rule and replacing it with the traditional six-factor, "totality-of-the-circumstances" analysis for determining whether a worker is an employee or an independent contractor under the FLSA.

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[2] 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://edlabor.house.gov/imo/media/doc/TownsendTestimony092619.pdf.

[3] "Independent Contractor Status Under the Fair Labor Standards Act," 86 Fed. Reg. 1168 (Jan. 7, 2021) (hereinafter, "January 2021 Rule"); *see also* SWACCA Comments, "Independent Contractor Status Under the Fair Labor Standards Act (RIN 1235-AA34)" (Oct. 26, 2020), *available at* https://www.swacca.org/media/1244/2020-10-26-swacca-comments-on-rin-1235-aa34-final.pdf *and* Construction Employers of America (CEA) Comments, "(RIN) 1235-AA34, Independent Contractor Status Under the Fair Labor Standards Act" (Oct. 23, 2020), *available at* https://www.swacca.org/media/1245/20201026-cea-dol-independent-contractor-flsa-reg-comment-final.pdf (to which SWACCA was a signatory as a CEA member).

[4] "Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date," 86 Fed. Reg. 8326 (Feb. 5, 2021); *see also* SWACCA Comments, "Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date (RIN 1235-AA34)" (Feb. 24, 2021), *available for download at* https://www.swacca.org/news-events/whd-finalizes-delay-of-ic-rule/.

[5] "Independent Contractor Status under the Fair Labor Standards Act; Withdrawal," 86 Fed. Reg. 14027 (March 12, 2021); *See also* SWACCA Comments, "Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal (RIN 1235-AA34)" (March 29, 2021), *available at* https://www.swacca.org/media/1273/3-29-21-swacca-comments-on-withdrawal-of-independent-contractor-rule-rin-1235-aa34.pdf.

By grounding the regulations in well-established and understood court precedents and legal constructs, the Proposed Rule will enhance clarity for employers, workers, and enforcement officials. This will reduce uncertainty that breeds litigation and minimize regulatory familiarization costs, which are a particular challenge for small businesses. Using the longstanding interpretation reflected in the Proposed Rule also facilitates more efficient compliance and enforcement of the law, thereby reducing the incidence of construction workers being misclassified as independent contractors and ensuring a level playing field for our members in a very competitive industry.

SWACCA also believes that the benefit/cost analysis for the Proposed Rule understates its benefits for employers, workers, and taxpayers. We urge WHD to supplement its qualitative analysis with more quantitative data on the costs and transfers avoided by the Proposed Rule and the benefits it produces, especially for small businesses, when compared to the January 2021 Rule. We offer several such datapoints below.

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I. BACKGROUND

The use of multiple contractors on a single project is standard practice in the construction industry. They may work under a general contractor, directly for a project owner, or under a hybrid arrangement where the project owner contracts directly with multiple contractors who are overseen by a construction manager that also contracts with the project owner. These arrangements can be lawful and legitimately structured for the use of specialized subcontractors to perform specific scopes of work. However, the subcontracting structure is also exploited by unscrupulous individuals to evade various obligations and their associated costs, including the overtime and minimum wage requirement of the FLSA. Such practices enable dishonest contractors to reduce costs and underbid competitors who act in good faith to comply with the law.

SWACCA's members increasingly find themselves competing with businesses that reduce their cost structures and liabilities by dissociating themselves from the requirements of the FLSA and other traditional obligations that come with being an employer. The key to these schemes is a contractor's willingness to characterize most or all their regular, recurring workforce as independent contractors rather than as employees—even if the law does not support such classifications. This business model allows those who use it to get the benefits of workers' labor while evading the costs of paying minimum wage, overtime, workers' compensation, unemployment insurance, payroll taxes, and other costs associated with treating workers as employees instead of as independent contractors.

As SWACCA has explained in testimony before Congress,[6] the nature of the construction industry already makes it difficult for enforcement officials to pursue these bad actors. The challenges inherent in construction include the fact that the industry operates on a project basis, which allows bad actors to isolate risk to specific projects and the time periods associated with them. These contractors can also establish multiple LLCs and continue operating under a new entity if an old one comes under scrutiny for misclassifying workers. These hurdles would be compounded if enforcement officials had to pursue bad actors under the January 2021 Rule's novel interpretation of the law that could require protracted litigation to clarify and would permit more contractors to argue that their classification of workers as independent contractors is permissible, or at least defensible, under the FLSA.

SWACCA has consistently asserted that the January 2021 Rule will encourage the use of more independent contractors in the construction industry because of its 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, despite having "no legal support for doing so,"[7] the January 2021 Rule improperly narrows the analysis of the facts and circumstances surrounding the business-worker relationship, thereby reducing the scope of the FLSA's protections.

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II. PROPOSED RULE

Congress intended for the FLSA's minimum wage mandate, overtime, and recordkeeping requirements to be broadly construed.[8] Consistent with this intent, the FLSA defines the term "employer" expansively as "any person acting directly or indirectly in the interest of an employer in relation to an employee." This is reinforced by the FLSA's definition of an "employee" as "any individual employed by an employer," and the statute's broad interpretation of the term, "employ" as "includ[ing] to suffer or permit to work."

These terms have been analyzed and refined in caselaw for more than 70 years. This body of law evolved into the six-factor economic reality test embodied in the Proposed Rule. The six factors considered in this test are: (1) the opportunity for profit or loss depending on managerial skill; (2)

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[6] Testimony of Matt Townsend, *supra* note 2, at 4 (highlighting, among other challenges, the difficulties of obtaining statements and evidence from a transient and fearful workforce and the sheer volume of misclassification schemes in the construction industry that threaten to swamp enforcement officials' time and resources).
[7] Proposed Rule, *supra* note 1, at 62226.
[8] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947).

investments by the worker and the employer; (3) the degree of permanence of the work relationship; (4) the nature and degree of control; (5) the extent to which the work performed is an integral part of the employer's business; and (6) the worker's skill and initiative. Unlike the January 2021 Rule, and consistent with the great weight of judicial precedents, the Proposed Rule aims to ensure that all these factors are examined under a "totality-of-the-circumstances approach," without assigning a predetermined or greater weight to a particular factor or set of factors.

a. Codifying the six-factor economic reality balancing test will achieve added certainty, reduce litigation, and reduce regulatory familiarization costs.

SWACCA supports the codification of the six-factor balancing test to promote certainty for construction employers, protect law-abiding contractors and workers in the construction industry, reduce litigation, minimize regulatory familiarization costs, and avoid significant disruption to employment relationships. The Proposed Rule will ultimately reduce the incidence of independent contractor classifications in construction. It avoids new complexities for enforcement officials. And it provides greater clarity for employers seeking to understand their obligations under the FLSA and workers trying to ascertain their rights under this law.

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Codification of the six-factor balancing test will achieve more certainty than the January 2021 Rule because it reflects a standard that the courts have clarified and explained in numerous specific contexts through decades of judicial rulings. It is a well understood body of law that employers, workers, enforcement officials, private attorneys, and the federal courts all have considerable experience applying. Importantly, it remains unclear if courts would defer to and apply the standard in the January 2021 Rule to the extent it diverges from the well-developed common law approach to classifying workers under the FLSA embodied in the Proposed Rule. Judicial disregard of the January 2021 Rule's interpretation of the FLSA would create considerable confusion. Instead, parties can avoid new regulatory familiarization costs and continue drawing on 70 years of existing interpretations from the courts and Department of Labor guidance[9] in applying the Proposed Rule's standard. Codifying this well-understood framework will encourage more consistent analysis of worker status under the FLSA. This will in turn save time and resources for all stakeholders compared to the January 2021 Rule's novel, untested weighted framework.

[9] *See, e.g.,* Administrator's Interpretation (AI) 2015-1, "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors."

b. <u>The Proposed Rule will reduce the prevalence of construction workers being treated as independent contractors instead of employees.</u>

We read WHD's assertion that the Proposed Rule "would not make independent contractor status significantly less likely" as limited given that WHD compares it with the standard in effect before the January 2021 Rule[10] – not the January 2021 Rule itself.[11] The Proposed Rule expressly reverses the January 2021 Rule's rebalancing of the classification of workers under the FLSA that favors independent contractor status. We stress that the decrease in independent contractors in construction resulting from the Proposed Rule "would mainly be due to a reduction in misclassification"[12] that would otherwise ensue under the January 2021 Rule as employers acting in good faith wrestled with the confusion wrought by a novel standard and bad actors exploited this uncertainty to gain or solidify a competitive advantage.

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The Proposed Rule correctly acknowledges that "the misclassification of employees as independent contractors remains one of the most serious problems facing workers, businesses, and the broader economy."[13] SWACCA appreciates WHD highlighting in the Proposed Rule the especially "[h]igh incidence" of misclassification in the construction industry.[14] We fully agree that the Proposed Rule is sure to reduce misclassification by ensuring continuity and clarity in the standard employers use to classify workers under the FLSA.[15]

c. <u>WHD should supplement its analysis in support of the rule with additional data on its benefits and the costs of the January 2021 Rule that will be avoided.</u>

To the extent that the Proposed Rule would reduce the incidence of workers being treated – rightly or wrongly – as independent contractors by replacing the January 2021 Rule, it would generate significant benefits for honest employers (especially small businesses), workers, taxpayers, and the overall economy. WHD acknowledges these benefits on a qualitative level.[16] SWACCA, however, urges the agency to highlight more of the quantitative data on these benefits, as well as the costs that would be avoided by finalizing the Proposed Rule.

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[10] *Id.*
[11] Proposed Rule, *supra* note 1, at 62260.
[12] *Id.*
[13] Proposed Rule, *supra* note 1, at 62225.
[14] Proposed Rule, *supra* note 1, at 62267.
[15] Proposed Rule, *supra* note 1, at 62266.
[16] *See* Proposed Rule, *supra* note 1, at 62267-68.

It has been well established that by misclassifying their workforce – a practice that the Proposed Rule aims to curb – construction companies avoid costs such as overtime, workers' compensation, unemployment insurance, employment taxes, and compliance with health and safety requirements. Such behavior precludes a "level playing field" for honest construction contractors – the majority of which are small businesses.[17] It makes it extremely difficult for these honest contractors to compete. Recent academic research confirms the competitive advantage contractors derive by misclassifying workers, as well as the costs misclassification imposes on workers and American taxpayers.[18] As former SWACCA President Matt Townsend detailed in a 2019 Congressional hearing on worker misclassification, construction companies that treat their workforce as independent contractors save at least 20 to 30 percent on labor costs.[19] When competing against companies like SWACCA members that pay middle-class wages and offer retirement plans and health benefits, contractors who misclassify their workers gain closer to a 50 percent cost advantage.[20] The exit of "high road" employers unable to compete with contractors using a workforce of independent contractors further degrades working conditions in construction, leading to a "race to the bottom" that represents an existential threat to the industry and its ability to attract and retain a quality workforce.

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The classification of workers as employees versus independent contractors also has a critical impact on tax revenues and the well-being of individual workers. Examining the costs associated with classifying workers as independent contractors in the construction industry and using conservative, mid-range numbers, the lost taxes have been estimated at more than $9 billion. This includes shortfalls of $717 million in unemployment insurance contributions, $5.814 billion in Social Security and Medicare taxes, $1.83 billion in federal income taxes, and $730 million in state income taxes.[21] Moreover, as reported by the Congressional Research Service, it is generally accepted that "employers are more likely to withhold and submit taxes than

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[17] See "Small Companies Account for Larger Share of Construction Fatalities," USGLASS MAGAZINE (Dec. 18, 2018), *available at* https://www.usglassmag.com/2018/12/small-companies-account-for-larger-share-of-construction-fatalities/ (citing Center for Construction Research and Training analysis of U.S. Census Bureau data indicating that 81.6 percent of construction companies employ fewer than ten people, 9.4 percent employ ten to 19 people, 8 percent employ 20-99 people, and only 1.1 percent of companies employ 100 people or more).

[18] *See, e.g.,* Russell Ormiston, Dale Belman, and Mark Erlich, *An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry* (2020) at 5, *available at* https://stoptaxfraud.net/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf.

[19] Testimony of Matt Townsend, *supra* note 2, at 3.

[20] *Ibid.*

[21] Ormiston, *supra* note 18, at 5.

independent contractors are to voluntarily pay their tax liabilities."[22] Data from the Government Accountability Office confirms that 61 percent of self-employed individuals with no employees underreported their income in 2001, accounting for $68 billion of the then-$345 billion tax gap.[23] This is an acknowledged part of the "tax gap" that reduces resources available for public services and social safety net programs, including worker's compensation, unemployment insurance, and disability insurance programs. American taxpayers are left to make up these shortfalls.

On an individual level, the estimated 20 percent of construction workers who should be treated as employees (but are not) lose close to $1 billion in wages annually.[24] In a landmark 2017 study, researchers interviewed 1,435 construction workers in Atlanta, Charlotte, Dallas, Houston, Miami and Nashville and determined that the workers had $29.8 million in wages stolen from them.[25] The January 2021 Rule threatens workers with further losses by falsely asserting that independent contractors generally earn a higher hourly wage than employees. In the Proposed Rule, WHD notes "inconclusive" data in its determination that this assertion from the January 2021 Rule was "inappropriate."[26] As a concrete example of this "inappropriate" conclusion, SWACCA notes 2012 data from the Department of Labor's own Unemployment Insurance Tax Chief indicating that a construction worker earning a gross income of $31,200 per year before taxes would have an annual net income after taxes and other costs of self-employment of just $10,660.80 if paid as an independent contractor. If the construction worker was classified as an employee, however, the annual net compensation rises to $21,885.20.[27] These figures largely align with a recent report on the California construction industry, which found that workers classified as independent contractors were only paid 64 cents for every dollar paid to a worker classified as an employee.[28] Considered alongside the overtime and premium pay that would otherwise come with

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[22] *See* Congressional Research Service, *The Tax Gap: Misclassification of Employees as Independent Contractors,* at 1 (Dec. 23, 2011), *available at* https://www.everycrsreport.com/files/20111223_R40807_f23bbc37cc588a74650a677be2a69c4a49b1faa6.pdf.

[23] U.S. Gov't Accountability Office, GAO-07-1014, *Tax Gap: A Strategy for Reducing the Gap Should Include Options for Addressing Sole Proprietor Noncompliance*, 3, 9-10 (July 2007), *available at* https://www.gao.gov/assets/270/265399.pdf.

[24] Ormiston, *supra* note 18, at 3, 5.

[25] *See* Dr. Nik Theodore, Bethany Boggess, Jack Cornejo, and Emily Timm, *Build a Better South* (2017), *available at* https://workersdefense.org/wp-content/uploads/2020/10/research/Build%20a%20Better%20South.pdf.

[26] Proposed Rule, *supra* note 1, at 62269.

[27] Tim Crowley, UI Tax Chief, U.S. Department of Labor, "Worker Misclassification – An Update from Constitution Ave." at 13 (Oct. 24, 2012).

[28] Yvonne Yen Liu, Daniel Flaming, and Patrick Burns, *Sinking Underground; The Growing Informal Economy in California Construction*, at 2, 11, and 12 (Sept. 2014), *available at* https://economicrt.org/publication/sinking-underground.

FLSA coverage for employees, the data belies assertions of a net increase in remuneration resulting from more workers being classified as independent contractors under the January 2021 Rule.

Finally, and in conjunction with lower pay, an increase in the use of independent contractors as compared to employees would be accompanied by a decrease in individuals' coverage for retirement benefit plans, health insurance, workers compensation insurance, and unemployment insurance. Under the framework envisioned in the January 2021 Rule, social safety net programs would take the place of these programs for the increased number of independent contractors. Independent contractors would 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 would take up the burden to provide coverage to uninsured independent contractors. State uninsured workers compensation pools would absorb the burden to provide benefits to injured independent contractors. These outcomes are not hypothetical, as a recent study by U.C. Berkeley Labor Center revealed that low pay, a lack of benefits, and poor working conditions in the construction industry have already resulted in 39 percent of construction workers' families being enrolled in a social safety net program, including children's Medicaid, the earned income tax credit, and the Supplemental Nutrition Assistance Program (SNAP).[29]

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As the data indicates, there are significant transfer costs associated with an increase in independent contractor classifications. These costs would be borne by law abiding employers, workers, and taxpayers. To the extent that WHD would avoid these costs through the rescission of the January 2021 Rule and adoption of the Proposed Rule, the agency should highlight the ample data quantifying these savings and benefits as part of its economic analysis of the Proposed Rule and its positive impact on small businesses.

III. CONCLUSION

SWACCA supports the Proposed Rule because it will provide greater clarity and consistency through the codification of the longstanding six-factor economic reality test. This approach will help to address the rampant misclassification of workers in the construction industry and reduce the overall incidence of workers being classified as independent contractors in the construction industry. Honest employers, workers, American taxpayers, government programs, and enforcement officials will benefit from finalizing

[29] Ken Jacobs, Kuochih Huang, Jenifer MacGillvary, and Enrique Lopezlira, *The Public Cost of Low-Wage Jobs in the United States Construction Industry*, UNIV. OF CALIFORNIA LABOR CENTER (Jan. 2022), *available at* https://laborcenter.berkeley.edu/wp-content/uploads/2022/01/The-Public-Cost-of-Low-Wage-Jobs-in-the-US-Construction-Industry-FINAL.pdf.

the Proposed Rule. Employers – especially small employers – will benefit from a level playing field with their competitors. Workers will receive greater net compensation and benefits. Taxpayers will avoid the costs that widespread use of independent contractors transfers to them through lost revenues for social safety net programs associated with more independent contractors. And WHD enforcement officials will have the benefit of a well-understood framework for vindicating workers' rights under the FLSA, which will deter rather than encourage the misclassification of workers. Finally, SWACCA urges the agency to emphasize the quantitative data on the benefits of the Proposed Rule and the transfer costs it avoids, including the benefits the Proposed Rule promises for small businesses.

Thank you for your consideration of our comments.

Sincerely,

Robert Klugh
President

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