VIA ELECTRONIC SUBMISSION

December 13, 2022

Amy DeBisschop
Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave. NW
Washington, DC 20210

Re: Employee or Independent Contractor Classification Under the Fair Labor Standards Act; RIN 1235-AA43

Dear Ms. DeBisschop:

Associated Builders and Contractors hereby submits the following comments to the U.S. Department of Labor's Wage and Hour Division in response to the above-referenced proposed rule published in the Federal Register on Oct. 13, 2022, at 87 Federal Register 62218.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 22,000 member companies. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private sector customers.[1]

The vast majority of ABC's contractor members are small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)[2] and

[1] For example, see ABC's 32nd Excellence in Construction Awards program from 2022: https://www.abc.org/Portals/1/2022%20Files/32ND%20EIC%20program--Final.pdf?ver=2022-03-25-115404-167.
[2] U.S. Census Bureau 2019 County Business Patterns: https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900C

industry workforce employment (more than 82% of the construction industry is employed by small businesses).[3] In fact, construction companies that employ fewer than 100 construction professionals comprise 99% of construction firms in the United States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.[4] The vast majority of small businesses are not unionized in the construction industry.

In addition to small business member contractors that build private and public works projects, ABC also has large member general contractors and subcontractors that perform construction services for private sector customers and federal, state and local governments procuring construction contracts subject to respective government acquisition policies and regulations.

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

ABC has signed on to a multigroup comment letter on the DOL's proposed rule, which is being submitted by the U.S. Chamber of Commerce. ABC supports the comments and hereby incorporates them by reference. In the comments below, ABC focuses on issues of primary importance to the construction industry.

Background

On Jan. 7, 2021, the DOL issued the final rule on independent contractor status under the Fair Labor Standards Act,[5] which simplifies and clarifies the factors for determining when a worker is an independent contractor versus an employee under the FLSA. ABC submitted comments[6] in support of the proposed rule.

Specifically, the 2021 final rule improves the certainty and predictability of the test by focusing it on two core factors: the nature and degree of the worker's control over the

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BP&hidePreview=true and https://www.census.gov/programs-surveys/cbp/data/tables.2019.html.

[3] 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Page 3, https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf.

[4] U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019, available at https://thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx.

[5] 86 Federal Register at 1168.

[6] See ABC comments at https://www.regulations.gov/document?D=WHD-2020-0007-1694.

work and the worker's opportunity for profit or loss.[7] Further, the test identifies three other factors that may serve as additional guideposts in the analysis, which include the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the potential employer and whether the work is part of an integrated unit of production.

On Feb. 5, the DOL proposed to delay the effective date of the final independent contractor rule from March 8 to May 7.[8] ABC submitted comments[9] arguing that the DOL's hasty and unsupported attempt to delay the effective date of the independent contractor final rule was arbitrary, capricious and in violation of the Administrative Procedure Act. The final rule was issued in March.[10]

Soon after, the DOL issued a proposed rule to withdraw the January 2021 independent contractor final rule[11] and ABC submitted comments[12] arguing that the proposed withdrawal of the final rule was based upon the false premise that the delay rule was valid, and the NPRM should be withdrawn for that reason alone.

On March 26, ABC, the ABC Southeast Texas Chapter and the Coalition for Workforce Innovation filed suit against the DOL for delaying the effective date of the January 2021 final rule to May 7 and proposing to withdraw it.[13] In May, the DOL rescinded the January 2021 final rule.[14]

On March 14, 2022, the court ruled against the Biden administration's efforts to delay and rescind the January 2021 final rule and held that the rule went into effect as scheduled on March 8, 2021, and remains in effect today.[15]

ABC's Comments in Opposition to the Proposed Rule

It is unfortunate that the DOL will not let the January 2021 final rule stay in effect long enough to work. It does not create a new standard; instead, the January 2021 final rule clarifies and simplifies the longstanding economic reality test based on an exhaustive

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[7] 86 Federal Register at 1168.
[8] Id. at 8326.
[9] See ABC comments at https://www.regulations.gov/comment/WHD-2020-0007-3125.
[10] 86 Federal Register at 12535.
[11] Id. at 14027.
[12] See ABC comments at https://www.regulations.gov/comment/WHD-2020-0007-4210.
[13] *Coalition for Workforce Innovation vs. Walsh*, No. 1:21-cv-00130 (E.D. Tex.).
[14] 86 Federal Register at 24303.
[15] See court decision: https://www.abc.org/Portals/1/CWI%20v.%20Walsh%20Decision%20re%20DOL%20IC%20Rule.pdf?ver=2022-03-15-151525-497.

analysis of cases applying that test around the country, which the DOL properly found put the greatest weight on the right of control and economic opportunity, along with other traditional factors.

ABC believes the January 2021 final rule provides clearer guidance to the regulated community regarding the interplay of these factors. The current rule will reduce the degree of litigation chaos that has bedeviled the regulated community until now. This will promote much-needed economic growth and will protect legitimate independent contractors and employees alike.

As further explained below, ABC opposes the DOL's new proposed rule, which eliminates the 2021 final rule's emphasis on two "core" factors—a worker's control over their work, and their opportunity for profit or loss, both of which are paramount in making an independent contractor determination. Instead, the department's approach is to restore a "totality-of-the circumstances" analysis of the "economic reality test." The proposal creates an ambiguous and difficult-to-interpret standard under which employers will be forced to guess which factors will be more important in the determination and how to analyze the facts of their contractual relationships under multiple factors. This confusion will lead to more litigation, as employers and workers alike will not understand who qualifies as independent contractors.

The proposed rule also contains inconsistent guidance on the factors to be given weight in determining independent status. In particular, the proposed rule gives undue weight to enforcement of governmental safety requirements on jobsites as somehow proving "control" of employee status.

Additionally, the proposed rule creates new confusion regarding the "integral" nature of work performed; the duration of the work; entrepreneurial opportunities; investment in tools or equipment; and the weight given to specialized skills. While this is not an exclusive list of the errors in the proposal, it shows the proposed rule will cause workers who have long been properly classified as independent contractors in the construction industry to improperly lose their independent status.

Finally, the proposed rule falsely assumes independent contractors are dissatisfied or somehow exploited, when numerous studies have shown the vast majority of independent contractors prefer their freedom and independence and do not want to be reclassified as employees at all.

The Proposed Rule's Six-Factor Test Will Cause Workers Who Have Long Been Properly Classified as Independent Contractors in the Construction Industry to Improperly Lose Their Independent Status

1. ***Opportunity for profit or loss depending on managerial skill***

The new proposal focuses the opportunity for profit or loss factor on whether the worker exercises "managerial skill" that affects the worker's economic success or failure in performing the work.[16] And it sets forth the following facts that can be relevant to assessing the degree to which the worker's managerial skill affects the worker's economic success or failure in performing the work: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment and/or rent space.[17] The proposed provision states that if a worker has no opportunity for a profit or loss, then that fact suggests that the worker is an employee.[18]

This aspect of the proposed rule improperly presumes that independent contractors must have a staff and a marketed "business" to "manage." The proposed rule ignores the freelance, owner-operator contractors who are an established presence in the construction industry, and many others. Contrary to the proposed rule, many independent contractors deliberately offer their services to employers of their choosing for the express purpose of avoiding negotiating costs. They do not want to run a business that requires overhead for services, advertising and hiring support staff. They may not want to expand their business but want the freedom to choose to do so—or not. The proposed rule consigns such individual entrepreneurs to an employment status they do not want, without any basis in the law.

The proposed rule provides an example of a landscaper who fails to exercise managerial skill because the worker does not independently choose assignments, solicit additional work from other clients, advertise their services or endeavor to reduce costs.[19] The rule then flips the example's facts so that all of them point toward independent status. The rule gives no guidance as to which

[16] 87 Federal Register at 62237.
[17] Id. at 62238.
[18] Id. at 62237.
[19] Id. at 62239-62240.

facts, if stated differently, ultimately have the greatest impact on the outcome. It should be made clear that a worker who does solicit work from multiple clients remains an independent contractor, even if they choose to rely on word of mouth rather than advertising to expand services, and even if they choose to work for one customer at a time and not to hire helpers.

2. *Investment by the worker and the employer*

Instead of considering investment within the opportunity for profit or loss factor as in the 2021 final rule, the proposed rule erroneously restores consideration of a worker's investment in a business as a stand-alone factor.[20]

Under the proposed rule, the factor examines whether a worker's investment is "capital or entrepreneurial in nature."[21] The proposal indicates that costs borne by a worker to perform a job, such as tools and equipment, are not capital and entrepreneurial investment, and instead indicates employee status.[22] To the contrary, independent contractors in the construction industry who invest in their own tools and equipment are in fact acting as entrepreneurs, and such investment should continue to be recognized as indicative of independent contractor status.[23] The proposed rule's negative attitude toward ownership of a work vehicle as an indicator of independent contractor status is arbitrary and not supported by the fact-specific cases cited by the department.[24]

The proposal also indicates that a worker's investment should be considered on a relative basis with the employer's investment in its overall business.[25] But independent contractors in the construction industry are often individuals or small business entities whose investment is inherently unlikely to approach the much larger financial resources invested by the larger businesses with whom they contract. Accordingly, limiting the focus to the investment an individual has made to perform the work contracted to be done should be the relevant inquiry.

[20] 87 Federal Register at 62240.
[21] Id.
[22] Id.
[23] *See, e.g., Herman v. Mid-Atlantic Installation Servs*., 164 F. Supp. 2d 667, 675 (D. Md. 2000), aff'd, *Chao v. Mid-Atlantic Servs*., 16 Fed. Epx. 104 (4th Cir. 2001).
[24] 87 Federal Register at 62241.
[25] Id. at 62240.

3. *Degree of permanence of the work relationship*

Under the proposed rule, this factor examines whether a work relationship is indefinite in duration or continuous, which suggests employee status. The proposed rule states that "an indefinite or continuous relationship is consistent with an employment relationship, but that a worker's lack of a permanent or indefinite relationship with an employer is not necessarily indicative of independent contractor status if it does not result from the worker's own independent business initiative."[26]

The DOL is also proposing to include exclusivity as an additional consideration under the permanency factor.[27] The rule notes "that working for others and having multiple jobs in which workers are economically dependent on each employer for work—as compared to a worker who is in business for themself and chooses to market their independent services or labor to multiple entities—does not weigh in favor of independent contractor status."[28]

Regarding the permanence of working relationships, the absence thereof should continue to weigh in favor of independent contractor findings in the construction industry, because independent contractors typically move from project to project or at least have the ability to work for others. In particular, the DOL should make clear that an independent contractor working on a specific project does not become an employee simply because the definite date of work completion cannot be determined or is extended due to change orders or other common delays in construction.

With respect to exclusivity, most independent contractors in the construction industry move from project to project and are not exclusively bound to work for any one construction firm.[29] However, when a mutually beneficial relationship is developed, some contractors do choose to work for extended periods of time with one construction business when each project offered is a better choice for that contractor than other options. To avoid discouraging these efficient relationships and limiting individuals' choices for work, ABC urges the DOL to make clear that the relevant inquiry is whether the individual had the right and the ability to work for others.[30] An individual's choice to accept work from one source over other

[26] 87 Federal Register at 62243.
[27] Id. at 62245.
[28] Id.
[29] *See Jaworski v. Master Hand Contrs*., 2013 U.S. Dist. LEXIS 43597 (N.D. IL. Mar. 27, 2013) (opportunity and ability to work for other firms "strongly suggests … opportunity to increase or decrease revenues").
[30] *See also, Parrish v. Premier Directional Drilling, L.P*., 917 F.3d at 388 ("project-by-project" work "counsels heavily in favor of IC status").

options does not make the individual any less of an independent contractor. Only where the business directly or indirectly restricts the individual's ability to work elsewhere does the exclusive relationship point toward employment.

4. *Nature and degree of control*

Unlike the January 2021 final rule, the new proposal will not elevate control as a ''core'' factor in the economic reality test.[31] The agency is proposing to broaden control to include "reserved control" over the performance of the work and the economic aspects of the working relationship.[32] According to the proposed rule, certain aspects of control should also include scheduling, supervision over the performance of the work (including the ability to assign work) and the worker's ability to work for others.[33] Further, the DOL indicates it would consider additional aspects of control in the workplace, such as control mediated by technology or control over the economic aspects of the work relationship.[34]

Most concerning, the proposal gives undue weight to enforcement of governmental safety requirements on jobsites as somehow proving "control" of employee status. The proposal provides the following example: "If an employer requires all individuals to wear hard hats at a construction site for safety reasons, that is less probative of control; if an employer chooses a specific time and location for weekly safety briefings and requires all workers to attend, that is more probative of control."[35]

The most common construction jobsites are multiemployer worksites. Typically, the general contractor or construction manager schedules and coordinates the work of many subcontractors, often in multiple tiers, who perform their services simultaneously or in sequence. The general contractor directs the work on the site and controls the schedule, which may be affected by weather, availability of materials, local building inspection regimes and many other factors. A general contractor must exercise a certain amount of control over its subcontractors and their employees simply to ensure the safe and efficient performance of the work.

The prime contractor is called upon to impose on all subcontractors certain obligations to comply with federal, state and local employment laws relating to wages, hours, safety, drug testing, discrimination, harassment, immigration and

[31] 87 Federal Register at 62246.
[32] Id. at 62246-62247.
[33] Id. at 62246.
[34] Id.
[35] Id. at 62248.

other issues affecting multiple workforces. Additionally, they are routinely called upon to maintain control over all jobsite access, establish the hours when work is to be performed at the site and comply with pre-assignment procedures. Prime contractors also are required to ensure the subcontractors' employees adhere to specific safety rules, attend safety meetings, wear protective gear and report accidents and injuries. Finally, the federal Davis-Bacon Act and an increasing number of state and local jurisdictions impose responsibility on higher-tier contractors to ensure that employees of lower-tier subcontractors are properly paid their wages and fringe benefits and are properly classified. In order to fulfill this responsibility, contractors may be required to monitor or audit their subcontractors' payroll practices and make sure the subcontractors' employees are paid properly and in a timely manner.

The fact that a developer or general contractor is required by law to exercise sufficient control over a jobsite to comply with government regulations and to coordinate the subcontractor schedules necessary to meet project deadlines has not and should not be deemed sufficient to impose employee status as to everyone on the site.[36]

The DOL must recognize that standard construction operational methods require project owners and/or prime contractors to exercise routine control over the site, and that doing so does not convert independent contractors into employees.

5. Extent to which the work performed is an integral part of the employer's business

The proposed rule creates new confusion regarding the "integral" nature of work performed**.** Under the proposal, the DOL returns to considering whether the worker's work is an "integral part" of the employer's business.[37] It does not examine whether any individual worker in particular is an integral part of the business, but rather whether the function they perform is an integral part.[38]

Everything a construction business requires to complete a project is "important," so that should be no indicator of employee versus independent contractor status. ABC requests that the DOL make clear that the mere incorporation of independent contractors into the process of construction does not in and of itself weigh against their independent status.

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[36] *See, e.g., Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369 (5th Circuit 2019) (requirement that independent welders undergo drug testing and OSHA-mandated safety training deemed "not the type of control that counsels in favor of employee status").
[37] 87 Federal Register at 62253.
[38] Id.

6. Skill and initiative

Under the proposal, this factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative.[39] Employee status is indicated where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the employer to perform the work.[40] The rule furthers states that "where the worker brings specialized skills to the work relationship, it is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor."[41]

For example, the rule states, "Specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that suggests independent contractor status."[42]

With regard to the skill required to be an independent contractor, it must continue to be recognized on construction sites that education and upskilling required to ensure compliance with typical contractual terms or regulations, such as jobsite OSHA safety training, may apply equally to independent contractors and employees alike, without jeopardizing independent contractors' status. Similarly, nonmandatory training or informative guidance made available to independent contractors who choose to utilize it does not indicate economic dependence.

The example given of a highly skilled welder in the proposed rule improperly presumes employee status for the welder unless they "use their skill for marketing purposes."[43] In the case of a welder who performs work for multiple clients, their welding skills are inherently part of the reason they are able to act independently and should not have to be paired with independent business marketing skills. The skills themselves should be given greater weight than the proposed rule allows.

7. Additional Factors

According to the proposal, additional factors may be relevant if they indicate whether the workers are in business for themselves, as opposed to being

[39] 87 Federal Register at 62254
[40] Id.
[41] Id.
[42] Id. at 62256.
[43] Id. at 62257.

economically dependent on the employer for work.[44] Omitted from this list is whether it is a recognized, longstanding practice for a large segment of the industry to treat certain types of workers as independent contractors. That is certainly true in the construction industry, and the proposed rule has provided no justification for disrupting the industry's longstanding practices.

The Proposed Rule Violates the Administrative Procedure Act

Particularly with regard to the construction industry, the proposed rule violates the Administrative Procedure Act by failing to adequately explain or justify the DOL's departure from the January 2021 final rule. Under the APA, an agency action is arbitrary and capricious if the agency has "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[45]

It is well settled that agencies who change their existing policies must "provide a reasoned explanation for the change."[46] "[T]he agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'"[47]

The stated reasons for rescinding the January 2021 final rule provide no justification for such action under the APA. The DOL states it is appropriate to move forward with this proposed regulation because the 2021 final rule departed from legal precedent and it is not clear whether courts will adopt its analysis.[48] It is well settled that an agency cannot satisfy the notice requirements under the APA with such vague statements. As the D.C. Circuit has long held: "If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals."[49]

Further, "the agency also believes that departing from the longstanding test applied by the courts may result in greater confusion among employers in applying the new analysis."[50] The DOL ignores the administrative record, demonstrating a longstanding

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[44] 87 Federal Register at 62257.
[45] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43; *accord Sierra Club v. U.S. Env. Prot. Agency*, 939 F.3d 649, 663-64 (5th Cir. 2019) (citations omitted).
[46] *FCC v. Prometheus Radio Project*, __ U.S. __, 141 S. Ct. 1150, 1158 (2021).
[47] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016) (citation omitted).
[48] 87 Federal Register at 62219.
[49] *Connecticut Light & Power Co. v. Nuclear Regulatory Comm.*, 673 F.2d 525, 528 (D.C. Cir. 1982).
[50] 87 Federal Register at 62219.

need for greater uniformity and sharpening of the independent contractor standard, which is accomplished by the January 2021 final rule. As indicated by many employers and their associations, the 2021 final rule was long overdue and much needed to correct a litigation crisis afflicting the construction industry and many other industries as well.

Moreover, the DOL fails to acknowledge in the proposed rule that it is not merely rescinding the 2021 rule, but the proposed rule also departs dramatically from the DOL's guidance preceding the 2021 rule. Failure to acknowledge that it is changing position from that prior guidance is a hallmark violation of the APA.[51]

Finally, when an agency rescinds a prior policy, "its reasoned analysis must consider the alternatives that are within the ambit of the existing policy."[52] But in the present rulemaking the DOL has failed adequately to consider reasonable alternatives to its replacement of the January 2021 final rule. The most obvious reasonable alternative is to leave the 2021 rule in effect long enough to work. The DOL's one sentence dismissal of this alternative does not constitute rational decision making. Another alternative would have been to reinstate the DOL's previous guidance. While that would not have addressed the confused litigation posture in the courts prior to the 2021 rule, it would at least not have made the situation worse, as the newly proposed rule certainly does. Yet another reasonable alternative would have been to give greater consideration to longstanding recognition of independent contractor status in specific industries, and to give greater recognition to the impact of the proposed rule on small business, particularly in the construction industry.

Assessed against these standards, the proposed rule cannot be sustained under the APA. It should be withdrawn unless and until the DOL is able to justify the changes in well-settled law it proposes with a legal or factual record supporting such change.

The Proposed Rule Will Have Major Negative Repercussions for the Construction Industry Overall

ABC is on record as strongly supporting the January 2021 final rule, which clarifies the DOL's interpretation of independent contractor status under the FLSA and promotes certainty for employers, independent contractors and employees. [53] Instead of promoting badly needed economic growth and protecting legitimate independent contractors and employees alike, the proposed rule will result in more confusion and

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[51] *Encino Motorcars, LLC v. Navarro*, 579 U.S. at 221-22.
[52] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, ___ U.S. ___, 140 S. Ct. 1891, 1913 (2020) (citing *State Farm,* 463 U.S. at 51).
[53] For example, see ABC's press release from 2021: https://abc.org/News-Media/News-Releases/entryid/18377/abc-supports-final-dol-revisions-to-independent-contractor-status.

expensive, time-consuming litigation that the construction industry has regrettably dealt with for years.

Legitimate independent contractors in the construction industry play an important role for large and small contractors delivering construction projects safely, on time and on budget for their government and private customers.

Independent contractors are essential to many aspects of the construction industry. They provide specialized skills, entrepreneurial opportunities and stability during fluctuations of work common to construction. The multitiered, project-by-project contracting model has long been essential to cost-efficient construction. Independent contractors can more readily move from project to project on an as-needed basis, thereby allowing construction firms to adjust their workforce needs to constantly fluctuating business requirements. Independent, skilled craft professionals can fill gaps in the specialized project needs of general contractors and subcontractors in order to meet the unpredictable and ever-changing demands of construction timetables.

A determination of whether a worker may properly be classified as an independent contractor who is exempt from the FLSA overtime requirements is rarely black and white, as evidenced by the thousands of lawsuits filed in federal and state courts on these issues. The conflicting court rulings have confused and frustrated efforts of construction employers to maintain longstanding industry practices that have allowed the industry to perform services on a cost-efficient basis.

Due to the current vague and overbroad tests of employee status espoused by some courts, construction contractors are increasingly being placed in jeopardy, resulting in increased, expensive and time-consuming litigation and less efficient performance of construction work costs and confusion. Further, construction firms have been unfairly targeted for alleged misclassification of some workers as independent contractors.

Unfortunately, this proposal will clearly have a harmful effect on a significant segment of the construction industry—small businesses. As explained above, 82% of the construction firms across the nation are small businesses with fewer than 10 employees, while more than 82% of the construction industry is employed by small businesses.

Under the proposed rule, small business construction contractors will be forced to hire a human resource specialist or seek outside counsel in order to understand the department’s complex analysis used in determining independent contractor status. This will result in significant costs for such business owners.

Conclusion

For the reasons stated above and in other comments submitted by the business community, the DOL should withdraw the new proposed rule and retain the current 2021 final rule.

Respectfully submitted,

Ben Brubeck
Vice President of Regulatory, Labor and State Affairs

Of Counsel:

Maurice Baskin
Littler Mendelson, P.C.
815 Connecticut Ave. NW
Washington, DC 20006