



February 14, 2023

The Honorable Bernie Sanders  
Chairman  
U.S. Senate Health Education Labor  
and Pensions Committee  
428 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Bill Cassidy  
Ranking Member  
U.S. Senate Health Education Labor  
and Pensions Committee  
455 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Sanders, Ranking Member Cassidy and Members of the Senate HELP Committee:

On behalf of Associated Builders and Contractors, a national construction industry trade association with 68 chapters representing more than 22,000 members, I am writing to express our serious concerns with recent rulemakings and proposals from the U.S. Department of Labor's Wage and Hour Division as you consider the nomination of Ms. Jessica Looman. ABC urges the committee to ensure that, as administrator of the Wage and Hour Division, Ms. Looman will take into consideration the serious concerns from the construction industry on forthcoming rulemakings, such as independent contractor, overtime and radical reforms to Davis-Bacon regulations that will increase the cost of taxpayer-funded construction projects and discourage small businesses from rebuilding America.

The WHD currently has a final rule pending at the Office of Management and Budget that would make more than 50 significant changes to existing regulations affecting how the agency determines, requires and enforces prevailing wages on covered taxpayer-funded construction contracts. In its proposed rule, the DOL estimates Davis-Bacon Act regulations apply to \$217 billion in federal and federally assisted construction spending per year, which is roughly 63% of all public construction put in place, and provide government-determined wage rates for an estimated 1.2 million U.S. construction workers.

Despite the fact that the rule will have far-reaching effects on local, state and federal government procurement, the DOL denied a request by stakeholders, taxpayers, ABC members and other construction businesses pursuing contracts and/or building federal and federally assisted construction projects to extend the comment period on the proposed rulemaking by an additional 60 days in order to have adequate time to analyze the proposal, solicit member feedback and provide meaningful input on the proposal. The denial was arbitrary and capricious, and the WHD denied it without adequate explanation in violation of the Administrative Procedure Act.

Comments submitted by ABC and other construction organizations have highlighted the new rule's failures. These criticisms include the rule's failure to fix the systematic errors within the DOL's wage determination process, elimination of prior reforms that had

increased the accuracy of wage determinations, further expansion of DBA regulatory burdens that will increase costs for more taxpayer-funded construction projects and failure to provide regulatory clarity to impacted contractors and stakeholders.

ABC also remains concerned with the anticipated final rule on worker classification under the Fair Labor Standards Act. ABC met with OMB and DOL staff in 2022 to discuss industry concerns with the proposed rule and the importance of independent contractors for the construction industry. Independent contractors provide specialized skills, entrepreneurial opportunities and stability during fluctuations of work common to construction.

ABC and other co-plaintiffs successfully sued the DOL to vacate the agency's attempts to delay and withdraw a 2021 final rule on the independent contractor standard. As a result of the litigation, the 2021 final rule is now in effect, providing much-needed clarity and simplicity to the longstanding economic reality test, based on an exhaustive analysis of traditional factors and cases applying that test around the country. ABC believes the 2021 final rule provides clearer guidance to the regulated community regarding the interplay of these factors and that the committee should urge the next WHD administrator to maintain and fully implement the rulemaking. The current rule reduces the degree of litigation chaos that has bedeviled the regulated community, promotes badly needed economic growth and protects legitimate independent contractors and employees alike.

The WHD seems poised to pursue a new final rule that will fail to promote economic growth, provide better guidance than the current rule or recognize the continuing importance of independent contractor classifications in construction and other industries.

Finally, ABC remains concerned about the WHD moving forward with a proposal altering the overtime pay requirements under the FLSA and urges the committee to support postponing any proposed changes to the current rule, which increased the minimum salary threshold only three years ago. News reports indicate certain entities and individuals are advocating to increase the current minimum salary for exemption from \$35,568 to \$90,000 a year.<sup>1</sup> This kind of increase would devastate the economy and grossly ignores the differences in cost of living across the country.

The WHD should also recognize the lingering economic consequences of the COVID-19 pandemic and the negative impact that more regulation will have on the construction industry, which currently faces global supply chain disruptions, rising materials prices and a current workforce shortage of more than half a million. A sweeping change to overtime pay regulations will further complicate the current situation and could have the unintended effect of restricting employee workplace flexibility in setting schedules/hours, hurting career advancement opportunities for employees, negatively impacting

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<sup>1</sup> Peter Coy, "The Dying Practice of Time and a Half," *The New York Times*, Feb. 1, 2023 (available at <https://www.nytimes.com/2023/02/01/opinion/worker-overtime-protection-pay.html>).

employee morale, significantly increasing both legal and operational compliance costs and making it harder to fill critical construction jobs.

ABC appreciates the HELP Committee's important attention to these critical matters for the construction and numerous other industries impacted by these anti-competitive and anti-growth federal rules and regulations. ABC hopes that the committee is able to receive these critical assurances from Ms. Looman as she seeks to lead the WHD in the coming years.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristen Swearingen". The signature is written in a cursive, flowing style.

Kristen Swearingen  
Vice President, Legislative & Political Affairs