May 12, 2025

Russell T. Vought
Director
Office of Management and Budget
725 17th St. NW
Washington, DC 20503

RE: OMB's Request for Information: Deregulation

Dear Director Vought:

Associated Builders and Contractors hereby submits the following comments to the Office of Management and Budget in response to the above-referenced request for information published on April 11, 2025, at 90 Federal Register 15481.

<u>About Associated Builders and Contractors</u>

ABC is a national construction industry trade association established in 1950 with 67 chapters and more than 23,000 members.

Founded on the merit shop philosophy, ABC helps 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 firms that perform work in the industrial and commercial sectors.

The vast majority of ABC's contractor members are also small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration's Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (81% of all construction firms have fewer than 10 employees)[1] and industry workforce employment (81% of the construction industry is employed by small businesses).[2] In fact, construction companies that employ fewer than 100 construction professionals comprise nearly 99% of construction firms in the United States and account for 69% of all construction industry employment.[3]

[1] U.S. Census Bureau 2022 County Business Patterns: https://data.census.gov/table/CBP2022.CB2200CBP?q=CBP2022.CB2200CBP&hidePreview=true and https://www.census.gov/programs-surveys/cbp/data/tables.html.
[2] 2024 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2024), at page 4, https://advocacy.sba.gov/wp-content/uploads/2024/11/United_States.pdf.
[3] U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States and Selected Geographies: 2022, available at https://data.census.gov/table/CBP2022.CB2200CBP?q=CBP2022.CB2200CBP&hidePreview=true.

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.

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

ABC's Comments in Response to OMB's RFI on Deregulation

ABC strongly supports comprehensive regulatory reform, which includes across-the-board requirements for departments and agencies to appropriately evaluate risks, weigh costs and assess the benefits of all regulations.

Unfortunately, the Biden administration moved forward with an aggressive and burdensome rulemaking agenda, where regulations were promulgated hastily with limited stakeholder input and questionable legal authority. Many of the Biden-era regulations are currently being litigated.

Rescinding or withdrawing the below Biden-era regulations will eliminate needless red tape and uncertainty while providing clarity to the regulated community. Additional background on each regulation is provided below. The regulations are:

Federal Acquisition Regulation Council:

- Use of Project Labor Agreements for Federal Construction Projects Final Rule (RIN: 9000–AO40)

U.S. Department of Labor:

- Updating the Davis-Bacon and Related Acts Regulations Final Rule (RIN: 1235-AA40)
- Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees Final Rule (RIN: 1235-AA39)
- Employee or Independent Contractor Classification Under the Fair Labor Standards Act Final Rule (RIN 1235–AA43)
- Worker Walkaround Representative Designation Process Final Rule (RIN 1218–AD45)
- Improve Tracking of Workplace Injuries and Illnesses Final Rule (RIN 1218–AD40)

- Heat Injury and Illness Prevention in Outdoor and Indoor Settings Proposed Rule (RIN 1218–AD39)
- Revision of the Form LM-10 Employer Report Final Rule (RIN 1245–AA13)

National Labor Relations Board:

- Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships Final Rule (RIN 3142-AA22)
- Representation-Case Procedures Final Rule (RIN 3142–AA18)

Federal Trade Commission:

- Non-Compete Clause Final Rule (RIN: RIN 3084-AB74)

FAR Final Rule of Concern

Use of Project Labor Agreements for Federal Construction Projects Final Rule (RIN: 9000–AO40)

On March 28, 2024, ABC and its Florida First Coast chapter filed suit[4] against the federal government seeking to overturn the final rule implementing the Biden administration's Executive Order 14063, Use of Project Labor Agreements for Federal Construction Projects, which requires federal construction contracts of $35 million or more to be subjected to anti-competitive and inflationary project labor agreements.[5]

ABC's complaint asserts that the Biden administration lacked the legal and constitutional authority to impose the mandate as it will injure economy and efficiency in federal contracting and illegally steer construction contracts to certain unionized contractors.

While there have been positive developments under the Trump administration, ABC continues to oppose the December 2023 final rule[6] implementing the PLA mandate on all federal projects over $35 million and is advocating for an executive order/rulemaking to overturn the requirement.

Additionally, ABC member federal contractors have filed several bid protests at the U.S. Court of Federal Claims against PLA mandates in federal agency solicitations for construction services, and on Jan. 19, 2025, the court ruled in favor of ABC members

[4] See complaint: https://www.abc.org/Portals/1/NewsMedia/24229466-0--108732%20Complaint.pdf?ver=n2ZFHl6-GE0851GSygOtCw%3d%3d×tamp=1711644087179.
[5] See executive order: https://www.federalregister.gov/documents/2022/02/09/2022-02869/use-of-project-labor-agreements-for-federal-construction-projects.
[6] 88 Federal Register 88708.

and ordered the federal agencies to remove the PLA mandate from the relevant solicitations.[7]

A PLA is a multiemployer, multiunion, pre-hire collective bargaining agreement that all general contractors and subcontractors on a jobsite must agree to in order to win a contract to build a federal construction project. While differences may exist in the specific language of each PLA document, government-mandated PLAs typically contain provisions with anti-competitive and costly effects.

ABC and the federal contracting community broadly oppose government-mandated PLAs as these schemes needlessly restrict competition, discriminate against nonunion employees and place nonunion general contractors and subcontractors at a significant competitive disadvantage. Government-mandated PLAs will exacerbate the construction industry's skilled labor shortage by discouraging participation from 89.7% of the U.S. construction industry workforce who do not belong to a union.

Likewise, typical government-mandated PLAs are anti-competitive in nature and severely restrict fair and open bidding on taxpayer-funded projects, including from small businesses and their employees. Ultimately, studies have shown government-mandated PLAs drive up the costs of federal construction from 12% to 20%.[8]

Additionally, the final rule violates federal law and should be rescinded for this reason. It violates the Competition in Contracting Act, which states that when awarding federal contracts federal agencies "shall obtain full and open competition through the use of competitive procedures."[9] By discriminating against nonunion contractors and employees who do not belong to a union, the final rule's PLA mandate drastically restricts competition and gives an unfair advantage to unionized businesses and employees.

The final rule also exceeds the authority of the executive branch under the Federal Property and Administrative Services Act.[10] Congress has never authorized across-the-board PLA mandates.

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[7] See decision: https://www.abc.org/Portals/1/NewsMedia/01515829614-C.pdf?ver=0_ty_1ShqizDvGxG3mSKpA%3d%3d.

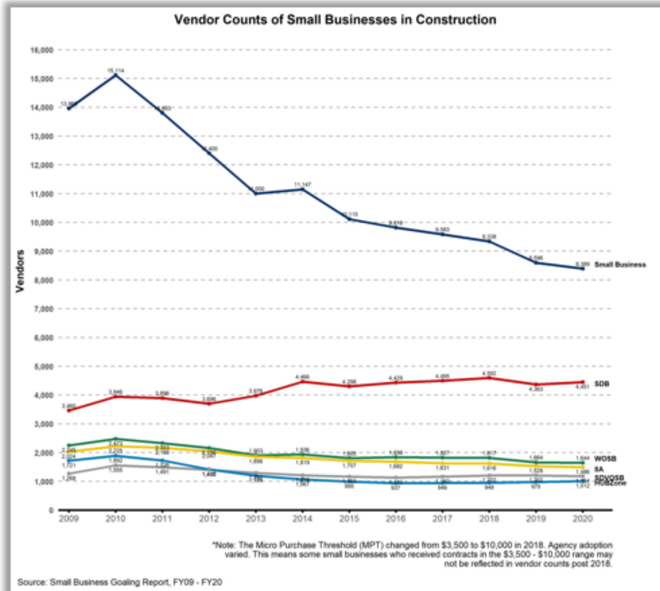
[8] See various studies: https://buildamericalocal.com/learn-more/#gmpla-studies.

[9] 41 U.S.C. § 253. The Competition in Contracting Act of 1984 (41 U.S.C. 253) (FAR Subpart 6.1 "Full and Open Competition") is a public law enacted for the purpose of encouraging the competition for the award of all types of government contracts. The purpose was to increase the number of competitors and to increase savings through lower, more competitive pricing. CICA became law in 1984 as a foundation for the Federal Acquisition Regulation.

[10] 40 U.S.C. § 101.

The final rule continues a trend of policies that have reduced small business participation in federal contracting. Small businesses have suffered a 60% decline in the number of firms awarded federal contracts from 2010 to 2020, according to SBA data.[11]

Number of Construction Industry Small Businesses Awarded Federal Contracts Declined 60% From 2010-2020



Vendor Counts of Small Businesses in Construction

FY	Small Business	SDB	SDVOSB	HUBZone	WOSB	8A	SBGR
2009	13960	3460	1268	1721	2245	2024	16186
2010	15114	3946	1555	1892	2473	2225	17644
2011	13803	3896	1491	1726	2333	2168	16335
2012	12400	3696	1400	1416	2156	2047	14510
2013	11000	3976	1292	1199	1903	1856	12690
2014	11147	4466	1216	1067	1936	1819	12706
2015	10115	4298	1163	995	1805	1707	11724
2016	9818	4429	1133	937	1838	1682	12465
2017	9583	4495	1160	946	1827	1631	12146
2018	9338	4592	1202	948	1817	1616	11424
2019	8596	4363	1202	975	1664	1528	10504
2020	8389	4451	1184	1012	1644	1486	10191

The decline in small business participation in federal contracts directly correlates with increasing federal regulatory burdens. Small business contractors may choose to bid on private sector and state and local government contracts when increased regulatory clarity and lower regulatory burdens reduce costs related to the need for expertise from attorneys and compliance professionals.

According to a September 2022 survey of ABC contractor members, 98% surveyed opposed the PLA mandate at the proposed rule stage. Additionally, 97% surveyed said a construction contract that required a PLA would be more expensive compared to a contract procured via fair and open competition, 99% said they were less likely to bid on a taxpayer-funded construction contract if the bid specifications required the winning firm to sign a PLA with labor unions and 97% of respondents said that government-mandated PLAs decrease economy and efficiency in government contracting.[12]

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[11] Chart available at: https://thetruthaboutplas.com/wp-content/uploads/2022/09/60-percent-decline-of-small-businesses-awarded-federal-construction-contracts-2010-to-2020.png. The data was prepared by an SBA economist who said, “The charts represent data on vendors who have received obligations. The definition of ‘small’ comes from the contracting officer’s determination when the contract was awarded. The COs follow the NAICS size standards.” Data is from FPDS that can be publicly accessed through SAM.gov: https://sam.gov/reports/awards/standard.

[12] See ABC Newsline: https://www.abc.org/News-Media/Newsline/survey-97-of-abc-contractors-say-bidens-government-mandated-project-labor-agreement-policies-would-make-federal-construction-more-expensive.

When the rule was initially proposed, ABC filed extensive formal comments that further outline the anti-competitive and costly nature of government-mandated PLAs.[13]

For the reasons outlined above, ABC requests a new executive order that directs the FAR Council to rescind the 2023 final rule, restricts government-mandated PLAs and restores robust fair and open competition on federal and federally assisted construction projects.

DOL Final Rules of Concern

Updating the Davis-Bacon and Related Acts Regulations Final Rule (RIN: 1235-AA40)

ABC applauded a June 26, 2024, decision[14] by the U.S. District Court for the Northern District of Texas granting a nationwide preliminary injunction that blocks some provisions of the DOL's Aug. 23, 2023, final rule, Updating the Davis-Bacon and Related Acts Regulations. This regulation drastically revises existing rules regarding government-determined prevailing wage rates that must be paid to construction workers on federal and federally assisted construction projects funded by taxpayers. The final rule took effect on Oct. 23, 2023.[15]

Associated General Contractors of America's lawsuit[16] asserted that the Biden administration lacked the legal authority to expand the law to cover manufacturing facilities miles away from projects and delivery truck drivers spending any amount of time on a jobsite, or to retroactively impose the measure on already-executed contracts, among other things. The court granted AGC's motion for a nationwide preliminary injunction, asserting that the challenged provisions of the rule were "facially invalid" and blocking them pending a final ruling.

Previously, on Nov. 7, 2023, ABC and its ABC Southeast Texas chapter announced the filing of a complaint[17] in the U.S. District Court for the Eastern District of Texas challenging the DOL's final rule. ABC's challenge is broader in scope than AGC's and seeks to fully overturn the final rule.

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[13] See comments: https://www.abc.org/News-Media/News-Releases/abc-lawmakers-and-industry-groups-call-on-president-biden-to-withdraw-his-inflationary-pla-mandate-policies1.

[14] See preliminary injunction: https://www.abc.org/Portals/1/0624%20AGC%20Injunction.pdf?ver=9CN_Pdo2bXRGKMV4jdTJYw%3d%3d.

[15] 88 Federal Register 57526.

[16] See AGC-filed complaint: https://www.agc.org/sites/default/files/Files/Communications/2023.11.07_AGC_v_DOL_Complaint_Challenging_DBA_Final_Rule_Final.pdf.

[17] See ABC-filed complaint: https://www.abc.org/Portals/1/NewsMedia/2023-11-07 ABC-Su Doc 1 Plaintiffs' Complaint for Declaratory and Injunctive Relief.pdf?ver=M4ZROoIzbsnhK8iRmGtZPQ%3d%3d×tamp=1699381976724.

ABC challenged this final rule due to its exacerbation of longstanding flaws in the DOL's prevailing wage system in violation of the law. For decades, the Government Accountability Office,[18] DOL Office of Inspector General,[19] think tanks,[20] taxpayer advocates[21] and construction industry stakeholders[22] have criticized the DOL Wage and Hour Division's methodology used to determine prevailing wages as well as the WHD's enforcement of DBA regulations on taxpayer-funded construction projects covered by the DBA. The final rule failed to acknowledge or address these criticisms; in many instances, the changes to the DOL's DBA rules will only make things worse while violating the DBA statute, the Administrative Procedure Act, the Small Business Regulatory Flexibility Act and other laws.

The final rule included more than 50 significant policy changes to DBA prevailing wage regulations that together needlessly increase the cost of construction, discourage competition from small businesses and create confusion, regulatory uncertainty and new red tape burdens for contractors pursuing contracts subject to the DBA as well as government stakeholders procuring taxpayer-funded construction contracts.

Among many other concerns, ABC opposed the following changes that make prevailing wages less accurate and compliance more burdensome for contractors:

- Lowering the definition of "prevailing wage" to a wage paid to at least 30% of workers in a locality, down from 50%
- Allowing the DOL to adopt state or local prevailing wage rates as DBA wage rates
- Making DBA requirements effective by "operation of law"

The continued lack of regulatory clarity in DBA regulations, worsened by the final rule, has resulted in confusion from government and private sector stakeholders,

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[18] See, e.g., "Davis-Bacon Act Should Be Repealed," April 27, 1979; "Davis-Bacon Act: Process Changes Could Raise Confidence that Wage Rates Are Based on Accurate Data," May 31, 1996; "Davis-Bacon Act: Labor Now Verifies Wage Data, but Verification Process Needs Improvement," Jan. 11, 1999; "Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey," March 22, 2011.

[19] See "Report to the Wage and Hour Division: Better Strategies Are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Prevailing Wage Rates," DOL Office of the Inspector General, March 29, 2019; and "Concerns Persist with the Integrity of Davis-Bacon Act Prevailing Wage Determination," DOL Office of Inspector General, 04-04-003-04-420, March 30, 2004.

[20] See e.g., James Sherk "Labor Department Can Create Jobs by Calculating Davis-Bacon Rates More Accurately," The Heritage Foundation, January 2017 and George C. Leef, 2010. "Prevailing Wage Laws: Public Interest or Special Interest Legislation?," Cato Journal, Cato Journal, Cato Institute, vol. 30(1), pages 137-154, Winter.

[21] See Rep. Bob Good, R-Va., press release on H.R. 2218, the Repeal Davis-Bacon Act, April 14, 2021: https://good.house.gov/media/press-releases/rep-good-introduces-two-bills-confront-corrupt-union-bosses and Rachel Greszler, "Why Congress Must Cancel the Davis Bacon Act," The Heritage Foundation, April 7, 2021.

[22] See written congressional testimony by ABC General Counsel Maury Baskin before House Education and Workforce Subcommittee on Workforce Protections, June 18, 2013, https://www.abc.org/Portals/1/Documents/Newsline/2013/ABC%20Testimony_Baskin_House%20EW%20Wkfc%20Protections%20Subcmte_Hearing_061813_FINAL.pdf and hearing transcript at https://www.govinfo.gov/content/pkg/CHRG-113hhrg81435/html/CHRG-113hhrg81435.htm.

unintentional violations and costly litigation resulting in fees, penalties and back pay that undermines the ability of many small businesses to be profitable in an industry with extremely low profit margins.

Further, Davis-Bacon rules around labor classifications tilt the scales toward unionized contractors. When union wage rates prevail for a specific classification, the union work rules in the relevant collective bargaining agreement define what work can be performed by workers in that profession. However, these CBAs are frequently not available publicly, leading contractors to face Davis-Bacon violations for paying their workers according to their usual practice.

Ultimately, the DOL's final rule is likely to result in less value and job creation from government investment in infrastructure to improve America's roads, bridges, transportation systems, schools, affordable housing and water, energy and broadband utilities.

On May 17, 2022, ABC submitted extensive comments urging the DOL to rescind the rule.[23] Despite this, the final rule was largely implemented as proposed. ABC's comments further outline in detail the unnecessary cost increases, compliance burdens on small businesses and numerous unlawful provisions inherent to the final rule.

For the reasons outlined above, ABC urges the DOL to rescind the Biden administration's Davis-Bacon Act prevailing wage final rule. Additionally, the DOL should take steps to ensure union CBAs are publicized when union work rules are controlling.

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees Final Rule (RIN: 1235-AA39)

On Nov. 15, 2024, ABC applauded a decision[24] by the U.S. District Court for the Eastern District of Texas that vacated the DOL's controversial 2024 final rule, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees. The rule changed overtime regulations under the Fair Labor Standards Act.[25] ABC joined a coalition of business groups in filing a complaint in the U.S. District Court for the Eastern District of Texas challenging the DOL's overtime rule in May 2024.[26]

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[23] See ABC's comments: https://www.abc.org/Portals/1/NewsMedia/ABC Comments on Updating the Davis-Bacon and Related Acts NPRM - 5.17.22.pdf?ver=2022-05-17-234901-040.

[24] See decision: https://www.abc.org/Portals/1/NewsMedia/OT%20SJ%20Decision.pdf?ver=LGrF90F3Olzq7B4_YoMJtg%3d%3d.

[25] 89 Federal Register 32842.

[26] See ABC release: https://www.abc.org/News-Media/News-Releases/abc-returns-to-court-to-fight-dols-new-unlawful-overtime-rule.

The court found that the Biden DOL's overtime rule's July 1, 2024, increase was unlawful, as was the increase scheduled for Jan. 1, 2025. Specifically, the DOL's final rule increased the minimum annual salary level threshold for exemption to $43,888 on July 1, and it was scheduled to increase to $58,656 on Jan. 1, 2025. In addition, the threshold for highly compensated employees increased to $132,964 on July 1, 2024, and was scheduled to increase to $151,164 on Jan. 1, 2025. Further, salary thresholds would have been updated every three years starting on July 1, 2027.

As a result of this decision, the minimum salary threshold for exemption is once again set to $35,568, and the threshold for highly compensated employees is set to $107,432.

The decision is an important win for ABC members and the rest of the regulated community. It's also no surprise. In 2017, this court permanently enjoined the DOL's 2016 overtime rule on similar grounds, writing that the rule increased the minimum salary level threshold for exemption far beyond a level which the DOL is permitted to adopt.[27] The court also found unlawful the automatic indexing provision in the new rule that would have further increased the salary threshold without the notice-and-comment rulemaking required by the APA.

Some ABC members employ workers who would have lost their exempt status as of Jan. 1 because of the 2024 overtime rule's scheduled increase. This would have disrupted the construction industry, specifically harming small businesses, restricting employee workplace flexibility in setting schedules and hours and hurting career advancement opportunities.

The 2024 rule's radical increase in the salary threshold for exemption would have also further complicated the current economic outlook. Multiple industries, like construction, are grappling with widespread regulatory burdens, high interest rates, expiring tax provisions and workforce shortages, all of which push operational costs ever higher. Specifically, the construction industry will need to attract an estimated 439,000 net new workers in 2025 to meet anticipated demand for construction services.[28] The rule's triennial automatic indexing provision would have exacerbated its harmful impact on businesses.

On Nov. 7, 2023, ABC submitted comments urging the DOL to withdraw the proposed rule and arguing it is unlawful, inconsistent with historic norms and will specifically harm small businesses.[29]

For the reasons stated above, ABC urges the DOL to rescind the Biden administration's overtime final rule.

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[27] Consolidated case of *Plano Chamber of Commerce et. al. v. Thomas E. Perez*, *et. al*. No. 4:16-cv-732-ALM.

[28] See ABC release: https://www.abc.org/News-Media/News-Releases/abc-construction-industry-must-attract-439000-workers-in-2025.

[29] See ABC's comments: https://www.abc.org/Portals/1/2023/ABC_WHD_Overtime_NPRM_11.07.2023.pdf?ver=ez8otZ4zscWV-huWj6YvBg%3d%3d.

Employee or Independent Contractor Classification Under the Fair Labor Standards Act Final Rule (RIN 1235–AA43)

On May 1, 2025, ABC applauded the DOL's announcement[30] that it will pause enforcement of the Biden administration's 2024 Employee or Independent Contractor Classification Under the Fair Labor Standards Act final rule[31] in current enforcement matters while the agency reviews this regulation. ABC, its Southeast Texas chapter, the Coalition for Workforce Innovation and five other organizations are currently challenging the 2024 final rule in federal court, [32] arguing that the 2024 final rule is unlawful and a violation of the APA. The final rule went into effect on March 11, 2024.

The 2024 final rule creates an ambiguous and difficult-to-interpret standard for determining independent contractor status. Under the rule's multifactor test, employers are forced to guess which factors should be given the greatest weight in making the determination. Instead of promoting much-needed economic growth and protecting legitimate independent contractors, the final rule results in more confusion and expensive, time-consuming, unnecessary and often frivolous litigation, as both employers and workers will not understand who qualifies as an independent contractor.

Regrettably, the confusion and uncertainty resulting from the final rule causes workers who have long been properly classified as independent contractors in the construction industry to lose opportunities for work. Legitimate independent contractors are a vital part of the construction industry, providing specialized skills, entrepreneurial opportunities and stability during fluctuations of work common to the industry. They play an important role for large and small contractors, delivering construction projects safely, on time and on budget for their government and private customers.

ABC continues to support the Trump administration's 2021 final rule,[33] which simplified and clarified the factors for determining when a worker is an independent contractor versus an employee under the FLSA. The Biden DOL froze and then rescinded the 2021 rule over the opposition of ABC and other industry associations. In 2022, the U.S. Court for the Eastern District of Texas found that the DOL violated the APA when it first attempted to delay and later withdraw the 2021 final rule.[34]

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[30] See DOL's release: https://www.dol.gov/newsroom/releases/whd/whd20250501.
[31] 89 Federal Register 1638.
[32] See amended complaint: https://img1.wsimg.com/blobby/go/afca31c0-5c41-4b51-a572-dc8f062842f4/downloads/show_temp.pdf?ver=1709665069260.
[33] See ABC release: https://www.abc.org/News-Media/News-Releases/abc-supports-final-dol-revisions-to-independent-contractor-status.
[34] See court decision: https://www.abc.org/Portals/1/CWI%20v.%20Walsh%20Decision%20re%20DOL%20IC%20Rule.pdf?ver=2022-03-15-151525-497.

On Dec. 13, 2022, ABC submitted detailed comments[35] in opposition to the independent contractor proposed rule.[36]

For the reasons stated above, following the completion of the litigation regardless of which way the courts decide, the DOL should rescind the Biden administration's independent contractor final rule and reinstate the 2021 Trump independent contractor final rule.

Worker Walkaround Representative Designation Process Final Rule (RIN 1218–AD45)

On May 21, 2024, ABC joined the U.S. Chamber of Commerce and a coalition of business groups in filing a lawsuit[37] in the U.S. District Court for the Western District of Texas, Waco Division against the DOL's Occupational Safety and Health Administration's Worker Walkaround Representative Designation Process final rule.[38]

Effective May 31, 2024, the final rule allows employees to choose a third-party representative, such as an outside union representative or community organizer, to accompany an OSHA safety inspector during site inspections, regardless of whether the workplace is unionized or not.

Now, construction employees and employers could face serious safety concerns because the final rule has the potential to allow anyone on a jobsite.

By allowing outside union agents access to nonunion employers' private property, OSHA is injecting itself into labor-management disputes and casting doubt on its status as a neutral enforcer of the law. This final rule negatively impacts the rights of employers while simultaneously ignoring the rights of the majority of employees who have not authorized a union to represent them.

OSHA's final rule also poses unnecessary risk to the individual joining the inspection and others on the jobsite if the authorized person is not trained to safely walk a construction jobsite. The rule does not include any requirement that the authorized person be equipped or conduct themselves to the same standards as OSHA safety inspectors. Further, the final rule fails to answer who is legally responsible if the third party gets injured during the inspection or harms someone else.

OSHA can have a bigger impact on jobsite safety by fostering positive partnerships with employers and promoting safety practices that produce results. For example, according

[35] See ABC's comments: https://www.abc.org/Portals/1/2022%20Files/Government%20Affairs/ABC_DOL%20Independent%20Contractor%20Proposed%20Rule_12.13.2022.pdf?ver=TCRgIZzCdSlObU_3uuvWWQ%3d%3d.
[36] 87 Federal Register 62218.
[37] See filed complaint: https://www.uschamber.com/assets/documents/Complaint-Chamber-of-Commerce-v.-Occupational-Health-and-Safety-Administration-W.D.-Tex.pdf.
[38] 89 Federal Register 22558.

to ABC's 2025 Safety Performance Report,[39] top-performing contractors that implemented ABC's STEP® Health and Safety Management System[40] reduced recordable incidents by up to 85%, making the best-performing companies 658% safer than the industry average.

On Nov. 13, 2023, ABC submitted comments[41] urging the DOL to withdraw its proposed rule.[42]

For the reasons stated above, following the completion of the litigation regardless of which way the courts decide, the DOL should rescind the Biden administration's worker walkaround final rule.

Improve Tracking of Workplace Injuries and Illnesses Final Rule (RIN 1218–AD40)

On July 21, 2023, OSHA issued its Improve Tracking of Workplace Injuries and Illnesses final rule,[43] which undoes the ABC-supported provisions of the 2019 final rule[44] promulgated under the Trump administration and reprises the 2016 Obama-era rule.[45] The final rule went into effect on Jan. 1, 2024, for certain employers.

Similar to the 2016 final rule, which ABC objected to, the Biden administration final rule does nothing to achieve OSHA's stated goal of reducing injuries and illnesses. Instead, the rule forces employers to disclose sensitive information to the public that can easily be manipulated, mischaracterized and misused for reasons wholly unrelated to safety, as well as subject employers to illegitimate attacks and employees to violations of their privacy.

The OSHA Form 300, in particular, contains sensitive and personal medical information about individual employees, which the government has historically kept private. It includes employee names, job titles, descriptions of injuries and body parts affected as well as the extent of the injury and whether the injury resulted in lost work days or restricted duty.

The OSHA Form 301 contains much of the same information as the Form 300 but also includes additional information about the employee, for example, home address, date of birth, physician information and detailed information about the injury, such as whether it resulted in the employee being hospitalized, how the incident occurred and what body parts are affected.

[39] See ABC's 2025 Safety Performance Report: https://www.abc.org/spr.
[40] See STEP: https://www.abc.org/abcstep.
[41] See ABC's comments: https://www.abc.org/Portals/1/2023/ABC_OSHA_Worker%20Walkaround%20NPRM_11.13.2023.pdf.
[42] 88 Federal Register 59825.
[43] 88 Federal Register 47254.
[44] 84 Federal Register 380.
[45] 81 Federal Register 29624.

Additionally, ABC member employers have serious concerns about the potential public disclosure of the OSHA Form 300A as it includes confidential business information such as the number of employee hours worked. Especially in a labor-intensive industry like construction, publicizing this information would give outsiders insight into confidential processes and operations of a business, which could be used against the company by competitors and others. ABC believes information such as hours worked is proprietary and should continue to be protected by OSHA.

Finally, the final rule puts smaller companies at a comparative disadvantage by making them appear to be less safe than larger companies. A smaller company with the same number of injuries and illnesses as a larger company is likely to have a higher incident rate. Providing such data to the public without appropriate context could lead to unnecessary damage to a company's reputation, related loss of business and jobs and misallocation of resources by the public, government and industry.

In June 2022, ABC submitted comments[46] outlining its concerns on the proposed rule.[47]

For the reasons stated above, ABC urges the DOL to rescind the Biden administration's Improve Tracking of Workplace Injuries and Illnesses final rule.

Revision of the Form LM-10 Employer Report Final Rule (RIN 1245–AA13)

On July 28, 2023, the DOL's Office of Labor-Management Standards published its Revision of the Form LM-10 Employer Report final rule,[48] which adds a checkbox to the Form LM-10 report requiring certain reporting entities to indicate whether they were federal contractors or subcontractors in their prior fiscal year as well as two lines for entry of filers' unique entity identifier and the contracting agency or agencies, if applicable. The revision went into effect on Aug. 28, 2023.

Under the Labor-Management Reporting and Disclosure Act, employers must file the LM-10 form to disclose payments and loans to unions or union officials and payments to employees or outside labor relations consultants for the purpose of persuading employees with respect to their bargaining and representation rights (referred to as "persuader activities").

In October 2022, ABC submitted a comment letter[49] to the DOL opposing the proposed revision, stating it is clear that the intent of the proposed revision is to discourage persuader activities by federal contractors, despite the fact that these activities are

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[46] See ABC's comments: https://www.abc.org/Portals/1/2022%20Files/ABC%20Comments_OSHA%20Improve%20Tracking%20of%20Workplace%20Injuries%20and%20Illnesses_NPRM_6.30.2022.pdf?ver=zr19QqmXnmgujj-AMWFoVg%3d%3d.
[47] 87 Federal Register 18528.
[48] 88 Federal Register 49230.
[49] See ABC's comments: https://www.abc.org/Portals/1/2022%20Files/ABC_DOL_Revision%20of%20the%20Form%20LM%2010%20Employer%20Report_101322.pdf?ver=nqLHhhmhAvNtiAPIKQromA%3d%3d.

lawfully permitted by the LMRDA within certain limitations. The revision would accomplish this goal by increasing public pressure on these federal contractors, assisting advocacy efforts against these companies and federal agencies that choose to employ them, and potentially providing a basis for federal agencies to "blacklist" these contractors in future regulations.

For the reasons stated above, ABC urges the DOL to rescind the 2023 Revision of the Form LM-10 Employer Report final rule.

DOL Proposed Rule of Concern

Heat Injury and Illness Prevention in Outdoor and Indoor Settings Proposed Rule (RIN 1218–AD39)

On Jan. 14, 2025, ABC submitted comments[50] to OSHA on its Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings proposed rule,[51] urging the agency to withdraw the rule as proposed and revise it to allow greater flexibility for affected industries and, at a minimum, develop a separate standard for the construction industry.

OSHA's proposed rule would apply to all employers conducting outdoor and indoor work in general industry, construction, maritime and agriculture sectors where OSHA has jurisdiction and require employers to develop programs and implement controls to protect employees from heat hazards.

ABC strongly supports worker health and safety and protection from heat injury and illness, while maintaining flexibility for the fluid nature of the construction environment. Throughout the heat rulemaking, ABC has continued to urge OSHA to focus on the key concepts of "water, rest, shade" and provide construction employers the necessary flexibility to make such a standard effective.

ABC believes employers should equip their employees and leadership teams to develop their own health and safety plans, unique to their jobsites. ABC provides tools to employers so that they can equip and empower supervisors to recognize the signs and symptoms of heat illness as well as provide necessary water, rest and shade that is dependent on local conditions. ABC's members work to ensure that jobsites are safe and strive to implement the most appropriate practices for working in extreme heat conditions that focus on the individual worker.

Unfortunately, the more than 1,000-page proposed rule imposes prescriptive, complicated requirements on construction industry employers, limiting all flexibility, which could weaken contractor efforts to prevent heat stress for workers. Flexibility is limited because OSHA has imposed rigid requirements, which include heat triggers, an

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[50] See ABC's comments: https://www.abc.org/Portals/1/2025/Newsline/ABC%20Comments_OSHA%20Heat%20Injury%20and%20Illness%20Proposed%20Rule_01.14.2025.pdf?ver=VcAE3pwfVqvZjGM5o2NlUw%3d%3d.

[51] 89 Federal Register 70698.

acclimatization schedule for new and returning employees, mandatory rest breaks and the use of a heat safety coordinator, among others.

OSHA failed to recognize the practical applications needed on construction jobsites. Employers and employees need flexibility to account for differences among worksites, geographical locations, work responsibilities and available technology. Additionally, construction jobsites vary in size, time, scope and duration, and flexibility is needed to ensure feasibility for compliance.

ABC has consistently urged OSHA to develop a separate regulatory approach for the construction industry. Combining all employers conducting outdoor and indoor work in general industry, construction, maritime and agriculture sectors into one regulatory approach is misguided at best. ABC and its coalition partners urged OSHA to recognize that there are significant differences in the types of job tasks, the work performed and even the environmental conditions in which construction industry employees work. Moreover, there is existing precedent for the agency to develop a separate standard for the construction industry based on previous rulemakings.

For the reasons stated above, ABC urges OSHA to withdraw the Heat Injury and Illness Prevention in Outdoor and Indoor Settings rule as proposed and revise it to allow greater flexibility for affected industries and, at a minimum, develop a separate standard for the construction industry.

NLRB Final Rules of Concern

Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships Final Rule (RIN 3142-AA22)

On Aug. 1, 2024, the Biden-era National Labor Relations Board issued Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships final rule,[52] which rescinded the ABC-supported 2020 Election Protection final rule,[53] jeopardizing employees' right of free choice in representational matters. The Trump-era 2020 final rule was intended to "better protect employees' statutory right of free choice on questions concerning representation." The Biden-era final rule went into effect on Sept. 30, 2024.

The final rule makes three key policy changes. Specifically, the rule reinstates the blocking charge policy, which halts union representation or decertification elections if the union alleges the employer committed unfair labor practices until those charges are resolved; eliminates the 45-day window that allows workers to demand a secret ballot election if the employer voluntarily recognizes the union based on the flawed card check process; and rescinds amendments that require unions in the construction industry to

[52] 87 Federal Register 62952.
[53] 85 Federal Register 18366.

maintain proof of majority support if they want an exclusive collective bargaining relationship that is resistant to challenge.

Of most concern to ABC is the 2024 final rule's return to the precedent set by the *Staunton Fuel*[54] decision, which permitted contract language alone to create a Section 9(a) bargaining relationship in the construction industry, notwithstanding the plain language of Section 8(f) preventing such agreements from acting as bars to employee election petitions. Courts have repeatedly rejected the NLRB's holding in *Staunton Fuel*, requiring instead that a Section 9(a) relationship can only be established upon a showing of actual evidence of union-majority status contemporaneous with the agreement. The Biden-era final rule is inconsistent with this judicial authority and with longstanding principles of majority status under Section 9(a).

The 2024 final rule fails to protect the Section 7, Section 8 and Section 9 rights of construction industry employers and employees by removing the requirement for positive evidence that a union has unequivocally demanded recognition as the Section 9(a) exclusive bargaining representative of employees in an appropriate bargaining unit.

In February 2023, ABC submitted comments outlining its concerns on the proposed rule.[55] That same month, ABC also joined comments submitted by the Coalition for a Democratic Workplace.[56]

For the reasons stated above, ABC urges the NLRB to rescind the 2024 Representation-Case Procedures: Election Bars; Proof of Majority Support Construction Industry Collective-Bargaining Relationships final rule.

Representation-Case Procedures Direct Final Rule (RIN 3142–AA18)

Despite being litigated for years, the Biden-era NLRB revived controversial policy from the Obama era in the form of its 2023 Representation-Case Procedures direct final rule.[57] The direct final rule, issued without notice or the opportunity for the regulated community to comment, essentially restores the election rule of 2014[58] issued during the Obama administration and rescinds the remaining ABC-supported provisions of the Trump-era 2019 final rule.[59] The 2023 final rule went into effect on Dec. 26, 2023.

The 2023 final rule makes numerous changes to the union election processes that result in the speeding up of union representation elections. It reduces the amount of time between when a union files a representation petition and an election takes

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[54] 335 NLRB 717 (2001).
[55] See ABC's comments: https://www.abc.org/Portals/1/ABC_NLRB_Rep-Case%20Procedures_NPRM_02_02_2023.pdf.
[56] See CDW's comments: https://myprivateballot.com/wp-content/uploads/2023/02/CDW-Comments-re-Proposed-Fair-Choice-Employee-Voice-NPRM.pdf.
[57] 88 Federal Register 58076.
[58] 79 Federal Register 74308.
[59] 84 Federal Register 69524.

place, which imposes unnecessary urgency on employers, leaving them susceptible to violations of their due process rights, and deprives employees of the time needed to become fully informed before deciding whether or not to unionize. Ultimately, the rule infringes on the rights of employers and employees to a fair pre-election process. Prioritizing speed over fully informed workers is in direct conflict with the National Labor Relations Act and Congressional intent.

The Trump-era 2019 final rule implemented commonsense policies to ensure workers were given a sufficient amount of time to be fully informed during an organizing campaign as well as protect employers' due process rights during the process.

For the reasons stated above, ABC urges the NLRB to rescind the 2023 Representation-Case Procedures final rule.

FTC Final Rule of Concern

Non-Compete Clause Final Rule (RIN: RIN 3084-AB74)

On Aug. 20, 2024, the U.S. District Court for the Northern District of Texas blocked[60] the Federal Trade Commission from implementing its final rule to ban noncompete agreements,[61] which was set to take effect on Sept. 4, 2024. The court found that the FTC lacked statutory authority to promulgate the rule and that the rule is arbitrary and capricious. On Oct. 18, 2024, the FTC appealed the court's Aug. 20 decision, and the litigation is ongoing.

The FTC's 2024 final rule to ban all noncompete agreements nationwide—except existing noncompetes for senior executives—is a radical departure from hundreds of years of legal precedent. In comments[62] submitted on April 19, 2023, ABC urged the FTC to withdraw its proposed rule[63] to ban noncompete agreements for several reasons.

First, the FTC lacks the statutory authority to issue the rule and regulate competition in the market—there is no congressional authorization for such action. In fact, recent U.S. Supreme Court cases indicate this will likely be viewed by the courts as an improper delegation of legislative authority.

Second, there is a lack of evidence supporting the need for a federal standard. There is already robust regulation at the state level, and currently state courts do not and should not enforce unreasonably restrictive noncompete clauses.

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[60] See decision: https://files.lbr.cloud/public/2024-08/ryan%20opinion.pdf?VersionId=yjmZ75Ewhedpbx9.7nFN2gwqLTR6qwVt.
[61] 89 Federal Register 38342.
[62] See ABC's comments: https://www.abc.org/Portals/1/2023/ABC_FTC%20Noncompete%20Clause%20Proposed%20Rule_04.19.2023.pdf?ver=6dUqh_qUNP3R-W9uxhSmIQ%3d%3d.
[63] 88 Federal Register 3482.

Third, issuing a categorical ban and rejecting any of several available alternatives is an additional arbitrary and capricious act in violation of the Administrative Procedure Act, though the agency lacks authority to impose even the lesser restrictions.

Finally, a blanket ban on noncompete agreements will harm the construction industry overall, especially small businesses. If allowed to go into effect, the overbroad rule would have invalidated millions of reasonable contracts—including construction project contracts—around the country that are beneficial for both businesses and employees.

ABC members have valid business justifications for utilizing noncompete agreements, such as protecting confidential information and intellectual property. The FTC's 2024 rule would have had a harmful effect on their companies as well as their employees, forcing companies to rework their compensation and talent strategies.

For the reasons stated above, ABC urges the FTC to rescind its 2024 final rule to ban noncompete agreements.

Conclusion

Rescinding or withdrawing the Biden-era rules outlined in this letter aligns with the Trump administration's deregulatory efforts and will eliminate needless red tape, uncertainty and burdensome barriers to job creation while providing regulatory clarity for the construction industry.

Thank you for the opportunity to submit comments on these important matters.

Respectfully submitted,

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