



July 30, 2013

The Honorable Thomas Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW,
Washington, DC 20210

Dear Secretary Perez:

On behalf of Associated Builders and Contractors (ABC), a national trade association representing 22,000 members from more than 19,000 construction and industry-related firms, we want to congratulate you on your confirmation as Secretary of the Department of Labor (DOL). As you begin to implement the Department's agenda, we respectfully request that you seriously consider our concerns regarding DOL initiatives, several of which are referenced in the July 3 DOL regulatory agenda.

ABC and its 72 chapters help our members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. The vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which 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. This process assures taxpayers and consumers receive the most value for their construction dollar.

As builders of our nation's communities and infrastructure, ABC members believe exceptional jobsite safety and health practices are inherently good for business. They understand the value of standards and regulations when they are based on solid evidence, with appropriate consideration paid to implementation costs and input from the business community. However, many of the regulations listed in the July 3 DOL regulatory agenda do not meet this standard and will impose crippling costs on the construction industry with questionable benefits. For the construction industry, unjustified and unnecessary regulations translate to higher costs, which are then passed along to the consumer or lead to construction projects being priced out of the market. This chain reaction ultimately results in fewer projects being built, and hinders businesses' ability to hire and expand.

Further, the full impact and outcomes of several DOL rulemakings are currently unclear, creating an environment of uncertainty in the construction industry that makes it difficult for firms to adequately plan for the future.

Please take into consideration ABC's serious concerns regarding the following DOL initiatives.

Office of Labor-Management Standards (OLMS)

- ***“Persuader” Reporting Under the Labor-Management Reporting and Disclosure Act (LMRDA)***¹: In June 2011, DOL proposed drastic regulatory changes to how it interprets and enforces Section 203 of the LMRDA, which covers federal reporting and disclosure requirements for entities hired by employers to communicate to employees regarding their right to organize. Section 203(c), better known as the “advice exemption,” has long exempted attorneys, trade associations and other third-party advisors from these reporting requirements when they discuss labor issues with an employer but do not engage in direct contact with its employees. Under DOL's proposed rule, the “advice exemption” will no longer extend to most advisors or their employer clients, which could be required to start filing persuader reports as well.

ABC has serious concerns about DOL's proposal. It violates the plain language of the Act and clear Congressional intent to broadly exempt advice from the reporting requirement. The proposed rule further infringes on employers' rights to free speech, freedom of association and legal counsel, as well as longstanding ethical protections of the confidentiality of attorney-client communications. The proposed rule improperly limits employees' collective right to obtain balanced information from their employers, based on sound expert advice, to enable them to decide whether or not to be represented by a union. If implemented, the new requirements will have a profound chilling effect on employers in need of advice on labor relations matters, as well as the parties from whom they seek advice. It is essential that employers in the construction industry, many of which do not have in-house attorneys or advisors, retain the ability to receive expert counsel.

Finally, DOL's published regulatory analysis grossly understated the cost impact and administrative burdens that will result from the proposed rule. Millions of employers will be affected by the new reporting requirements, and significant time and money will have to be spent by employers, particularly small businesses, in order to come into compliance. For all of these reasons, the proposed rule should not become final, but rather should be reconsidered and withdrawn.

ABC also has concerns about OLMS expanding Form LM-21, which is filed annually by persuaders and discloses receipts and disbursements associated with covered persuader activity.² When viewed together with the agency's persuader rule, the implications of more intrusive reporting forms are of even more concern to the construction industry.

¹ See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=1245-AA03>.

² See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=1245-AA05>.

Office of Federal Contract Compliance Programs (OFCCP)

- ***Affirmative Action and Nondiscrimination Obligations Regarding Individuals with Disabilities³ and Veterans⁴; and Construction Contractors' Affirmative Action Requirements⁵***: ABC is troubled by the proposed changes to the regulations concerning veterans and individuals with disabilities. The proposed rules ignore the unique nature of the construction industry, which has long been recognized as requiring exemption from the type of detailed workforce utilization analysis that is called for in the proposed rules. The proposals contain numerous additional burdensome data collection and reporting requirements, and set infeasible compliance requirements with no recognition of the unique hazards that are present on most construction worksites. Currently under section 503 of the Rehabilitation Act, federal contractors and subcontractors are required to maintain affirmative action and nondiscrimination programs. The proposal drastically revises its section 503 regulations by requiring government contractors to meet hiring quotas for disabled workers. While ABC supports OFCCP's mission to address employment discrimination against individuals with disabilities, and remains committed to helping veterans find jobs in the construction industry, concerns remain regarding the agency's proposal.

ABC is also concerned about a proposed regulation that would make changes to existing affirmative action obligations for federal contractors in the construction industry. As the agency moves forward, it is important to take into account the unique challenges confronting construction contractors.

Wage and Hour Division (WHD)

- ***Right to Know Under the Fair Labor Standards Act (FLSA)⁶***: Although the July 3 regulatory agenda lists this rulemaking in long-term actions, the agency has expressed interest in promulgating a rulemaking in which employers would be required to provide workers classified as independent contractors with individualized, written "classification analyses" that detail their classification under the FLSA. In addition, employers would be required to provide written justification for workers' status as exempt/non-exempt on a rolling basis. ABC is concerned this complex rulemaking would significantly burden employers, serve merely as an enforcement tool, and increase the number of FLSA lawsuits concerning misclassification.
- ***Unwarranted Expansion of Davis-Bacon, Lack of Transparency and Failure to Accurately Determine Prevailing Wage Rates***: Numerous government agency reports and Congressional hearings have highlighted the failure of DOL to properly determine prevailing wage rates under the Davis-Bacon Act. Yet, DOL has recently approved unprecedented expansion of the Act's coverage and changed coverage rulings without engaging in notice and comment rulemaking in violation of the Administrative Procedure Act. Worse still, DOL has failed to give contractors notice of many of its letter rulings and with rare exceptions has not posted such rulings on DOL's website. DOL should

³ See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=1250-AA02>.

⁴ See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=1250-AA00>.

⁵ See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=1250-AA01>.

⁶ See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=1235-AA04>.

immediately increase the transparency of worker assignment rules under the published wage determinations if it is truly interested in increased contractor compliance.

Occupational Safety and Health Administration (OSHA)

- ***Letter of Interpretation on OSHA Site Inspections, Dated Feb. 21, 2013***⁷: On April 5, OSHA released a letter of interpretation that states nonunion employees can authorize an individual “affiliated with a union or a community organization” to act as their representative during agency-sanctioned inspections and other enforcement situations. The letter plainly contradicts the agency’s field operations manual and its own regulations governing employee representatives. ABC is concerned about the implications this letter will have on the labor relations rights of nonunion employers and employees. Most importantly, ABC members are troubled by the implications such a policy would have on the safety integrity of their worksites.
- ***Injury and Illness Prevention Program (I2P2)***⁸: OSHA is considering a proposal that would require employers of all sizes to develop and implement internal safety programs designed to “find and fix” workplace hazards on a rolling basis under penalty of enforcement. ABC is concerned the proposal could impose significant compliance burdens on businesses, and could lead to “double-dip” citations for infractions (once under existing rules and once under the new I2P2 requirements). This proposal also could negatively impact employers that already have effective safety and health programs on their jobsites. ABC believes safety and health plans are beneficial tools, but criminalizing such plans will undermine their effectiveness.
- ***Occupational Exposure to Crystalline Silica***⁹: ABC and the construction industry are highly concerned about a proposed rule that would alter the permissible exposure limits for crystalline silica dust. ABC is concerned about the economic and technological feasibility of compliance with such changes and the possibility of inconsistency or conflict with other federal regulatory requirements.

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Again, we respectfully request that you seriously consider the negative impact costly and unjustified rulemakings have on the construction industry and small businesses in particular. We would welcome the opportunity to meet with you to discuss these concerns.

Thank you for your time and consideration.

Sincerely,



Michael D. Bellaman
ABC President and CEO

⁷ See: https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604.

⁸ See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=1218-AC48>.

⁹ See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201304&RIN=1218-AB70>.