VIA ELECTRONIC SUBMISSION

February 24, 2021

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

Re: Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date; RIN 1235-AA34

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 delay of effective date published in the *Federal Register* on Feb. 5, 2021, at 86 Fed. Reg. 8326.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 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 firms that perform work in the industrial and commercial sectors. Moreover, 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.

ABC's Arguments in Opposition to Delaying the Final Rule's March 8 Effective Date

1. Introduction.

On Sept. 25, 2020, the WHD issued the Independent Contractor Status Under the Fair Labor Standards Act proposed rule in order to sharpen the agency's economic reality test for determining

whether independent contractors are in business for themselves or economically dependent on the potential employer for work.[1] ABC submitted comments[2] in support of the proposed rule.
On Jan. 7, 2021, the WHD issued its final rule[3], which simplifies and clarifies the factors for determining when a worker is an independent contractor versus an employee under the FLSA. Specifically, the final rule improves the certainty and predictability of the test by focusing it on two core factors: (1) the nature and degree of the worker's control over the work and (2) the worker's opportunity for profit or loss.[4] 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.

The effective date of the Trump administration's final rule is March 8, 2021. However, on Feb. 5, the WHD proposed to delay the effective date of the final independent contractor rule until May 7.[5] The proposal indicates that the sole purpose of the delay is for the WHD to "review and consider the rule as the Regulatory Freeze Memorandum[6] and Office of Management and Budget Memorandum M-21-14[7] contemplate," specifically the "legal, policy, and/or enforcement implications of adopting that standard…."[8] WHD asserts that the proposed delay is reasonable and would not be disruptive since the "independent contractor final rule is not yet effective, and WHD has not implemented the rule."[9] The notice requires comments to be submitted by Feb. 24, *i.e.*, only 19 days from the date of the notice, and states that WHD "will consider only comments about its proposal to delay the rule's effective date."[10]

As further explained below, ABC objects to the WHD's proposed delay of the effective date of the final rule because the Feb. 5 notice is both substantively and procedurally defective and should be withdrawn, or at a minimum extended and explained. The final rule must be allowed to go into effect in the meantime, because it provides urgently needed clarification of the independent contractor standard applicable under the FLSA. The WHD's hasty and unsupported attempt to delay the effective date of the final rule is arbitrary, capricious, and in violation of the Administrative Procedure Act. ABC therefore urges the WHD to maintain the rule's current effective date of March 8.

2. The WHD Notice Arbitrarily Fails to Provide a Meaningful Opportunity for Comment by Unreasonably Shortening the Time and Substance of the Comments to Be Submitted.

As noted above, the WHD notice set the time period for submission of comments at 19 days, significantly less than the 30-60 day norm for notice and comment rulemaking. In addition, the

[1] 85 Fed. Reg. 60600.
[2] https://www.regulations.gov/document?D=WHD-2020-0007-1694.
[3] 86 Fed. Reg. 1168.
[4] *Id*. at 60612.
[5] 86 Fed. Reg. 8326.
[6] 86 Fed. Reg. 7424 (Jan. 28, 2021).
[7] https://www.whitehouse.gov/wp-content/uploads/2021/01/M-21-14-Regulatory-Review.pdf.
[8] 86 Fed. Reg. 8327.
[9] 86 Fed. Reg. 8327.
[10] *Id*.

notice states that WHD will not consider comments on any issue other than the proposal to delay the rule's effective date, thereby making clear that WHD will not consider substantive comments on the impact of the rule itself. No explanation is given for either of these arbitrary restrictions, both of which violate the APA.

Numerous courts have held that reducing the number of days for comments below 30 days (though 60 days is more common), requires good cause and substantial exigent circumstances to justify what is otherwise an unreasonably short period of time for public comments.[11] In *Omnipoint Corp v. FCC*, for example, the D.C. Circuit found a shortened comment period to be justified only because the agency demonstrated "urgent necessity," including a Congressional mandate for action combined with a recent Supreme Court ruling calling into question the terms of the agency's requirements. No such showing can be made by the WHD here.

The unexplained brevity of the present public comment period is even more likely to be found arbitrary and capricious because it has been combined with the WHD's refusal to consider substantive comments on the merits of the rule being delayed. The Fourth Circuit so held in *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, [12] where President Obama's Department of Labor attempted to "suspend" the previous administration's H-2A regulations following a shortened comment period combined with restricting the public to "comments concerning the suspension action itself" and not the merits of the rule at issue. The court relied on both the substantive and procedural restrictions to find the department did not provide a "meaningful opportunity to comment…."[13]

By letter dated Feb. 22, ABC requested extension of the public comment period to March 8 (30 days from the date of the published notice) and lifting of the restriction on the comments being submitted.[14] The WHD unreasonably denied both requests. Having thus failed to comply with the requirements of the APA to provide a meaningful opportunity to comment, the unlawful notice should be withdrawn.

3. The Stated Reasons for the WHD's Proposed Delay of the Effective Date of the Final Rule Provide No Justification for Such Action Under the APA.

The violation of the APA in the present matter is particularly egregious because the WHD's notice fails to articulate any substantive, permissible ground for delaying the effective date of the final rule. Instead, the WHD relies primarily on the regulatory "freeze" memoranda of the president's chief of staff and the OMB for the proposition that the effective date of any final rule of the Trump administration should be delayed pending "review and consideration" of the rule.[15] But the WHD notice does not comply with or explain how the final rule meets the criteria specified in the freeze memoranda. In any event, courts have held that executive branch freeze memoranda themselves

[11] 78 F.3d 620, 629 (DC Cir 1996); *see also Florida Power & Light Co. v. United States*, 846 F.2d 765, 772 (DC Cir 1984) (finding a shortened comment period sufficient where Congress imposed a deadline on the agency).
[12] 702 F.3d 755, 761 (4th Cir. 2012).
[13] *Id.* at 770. *See also, Puget Soundkeeper All. v. Wheeler*, 2018 U.S. Dist. LEXIS 199358 (W.D. WA. 2018) (invalidating agency attempt to change the applicability date of a final rule where the comment period was similarly restricted with regard to both the time period and substance of public comments).
[14] https://www.regulations.gov/comment/WHD-2020-0007-2782.
[15] 86 Fed. Reg. 8326.

violate the APA where they purport to authorize agencies to arbitrarily delay the effective date of final rules without good cause.

Thus, in *Natural Resources Defense Council v. Abraham*,[16] the court struck down an attempt by the Department of Energy to delay the effective date of a 2001 rule upon a similar change of administration, where the DOE relied on a presidential chief of staff "freeze" memo issued at the beginning of the Bush administration. The court concluded that DOE's claimed amendment of the rule's effective date was invalid because "the delay was promulgated without complying with the APA's notice-and-comment requirements."[17] The court determined the agency's attempts to delay the rule's effective date were unlawful, holding as follows: "A new administration's simple desire to have time to review, and possibly revise or repeal, its predecessor's regulations falls short" of the good cause standard of the APA.[18] Likewise in *Pineros Y Campesinos Unidos v. Pruitt,*[19] the court nullified the attempt by President Trump's Environmental Protection Agency to delay the effective date of a rule promulgated by the previous administration in Jan. 2017, before its scheduled effective date of March 2017—virtually the same timetable presented here. Again, the court found no good cause for delaying the final rule's effective date, merely because a new administration had taken office and wanted to "review" a rule with an eye towards rescinding it.

Compounding the problem here, the WHD's notice fails to identify any specific aspect of the final rule which merits further review or consideration, other than a cursory reference to "legal, policy, and/or enforcement implications of adopting [final rule]…."[20] 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."[21]

Equally specious is the WHD's statement in its notice that the delay in effectuating the final rule will "not be disruptive" because the rule is not yet effective and WHD has not yet implemented it. The notice further errs in claiming the rule creates a "new legal standard," when in reality the WHD by its own admission merely "sharpened" and clarified the existing economic realities test. That test has long guided the WHD's enforcement of the FLSA and many court decisions.

In claiming delay of the final rule will not cause disruption, the WHD ignores the administrative record demonstrating a longstanding need for greater uniformity and sharpening of the independent contractor standard, accomplished by the final rule. As testified to by many employers and their associations, the rule is long overdue and much needed to correct a litigation crisis afflicting the construction industry and many other industries as well. The current enforcement standards of the WHD and the courts are so confusing and inconsistently applied that employers

[16] 355 F.3d 179, 189 (2d Cir. 2004).
[17] *Id.* at 206.
[18] *Id.* at 1067. *See also Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (Vacating an order delaying a rule's effective date as "tantamount to amending or revoking a rule."); *NRDC v. Nat'l Highway Traffic Safety Admins.*, 894 F.3d 95, 115 (2d Cir. 2018) ("An agency may not promulgate a rule suspending a final rule and then claim that post promulgating notice and comment procedures cure the failure to follow [the APA].").
[19] 293 F. Supp. 3d 1062, 1067 (N.D. Cal. 2018).
[20] 86 Fed. Reg. 8327.
[21] *Connecticut Light & Power Co. v. Nuclear Regulatory Comm.*, 673 F.2d 525, 528 (D.C. Cir. 1982).

are seriously harmed every day that goes by without implementing the much-improved standard described in the final rule. Far from being "already familiar" with the standard that WHD and courts will apply when determining a worker's status under the FLSA,[22] the administrative record and the final rule itself conclusively demonstrate that the current standard applied by WHD and the courts is impossible for most employers to understand or comply with.

4. Construction Industry Employers Will Be Irreparably Harmed by Any Stay of the Effective Date of the Independent Contractor Final Rule.

ABC is on record as strongly supporting the independent contractor final rule, which clarifies the WHD's interpretation of independent contractor status under the FLSA and promotes certainty for employers, independent contractors and employees. [23]

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 multi-tiered, 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 tradesmen 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.

ABC therefore believes it is essential that the final rule be allowed to take effect in March so that it can provide the additional clarity and guidance needed to properly classify workers in construction and avoid jeopardizing the ability of construction firms to continue the industry's longstanding practice of utilizing legitimate independent contractors under the FLSA. The rule also promotes certainty for many other types of employers, independent contractors and employees as well as economic growth in multiple industries.

[22] 86 Fed. Reg. 8327.
[23] https://abc.org/News-Media/News-Releases/entryid/18377/abc-supports-final-dol-revisions-to-independent-contractor-status.

Conclusion

The present notice allows insufficient time and inadequate explanation for ABC to provide more substantive comments on the issues raised therein. ABC encourages WHD to extend the time for comments after the notice itself is amended to provide detailed grounds for the otherwise unlawful action of staying the effective date of a final rule. The final rule must in any event be allowed to go into effect on March 8, 2021, because the WHD has failed to show good cause for delay.

Respectfully submitted,

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