



VIA ELECTRONIC SUBMISSION

October 26, 2020

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; 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 notice of proposed rulemaking published in the *Federal Register* on Sept. 25, 2020, at 85 Fed. Reg. 60600.

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.

Background

On Sept. 25, 2020, the WHD issued the Independent Contractor Status Under the Fair Labor Standards Act proposed rule, which would sharpen the agency's economic reality test to determine whether independent contractors are in business for themselves or economically dependent on the potential employer for work.¹ Specifically, the proposal 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

¹ 85 Fed. Reg. 60,600.

the work; and (2) the worker's opportunity for profit or loss.² Further, the test identifies three other factors that may serve as additional guideposts in the analysis, which includes 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.

Summary of ABC's Comments in Response to DOL's Proposed Rule

As further explained below, ABC supports the DOL's proposed rule. ABC is pleased the proposed rule clarifies the DOL's interpretation of independent contractor status under the FLSA and promotes certainty for employers, independent contractors and employees. 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. At the same time, due to conflicting and confusing tests for independent contractor status, construction firms have been unfairly targeted for alleged misclassification of some workers as independent contractors, resulting in expensive and time-consuming litigation and less efficient performance of construction work.

ABC strongly advises its members at all times to properly classify workers as employees or independent contractors, in compliance with applicable law(s). But additional clarity and guidance is needed in order to properly classify workers in construction to avoid jeopardizing the ability of construction firms to continue the industry's longstanding practice of utilizing legitimate independent contractors under the FLSA.

ABC believes DOL's proposed rule will promote economic growth in the construction industry by providing greater clarity to construction industry employers as to the proper classification of independent contractors and employees under the FLSA. In the comments that follow, ABC requests some additional clarifications, and urges creation of a "safe harbor" with regard to enforcement of the FLSA, so that construction contractors do not jeopardize any independent contractors' status as such, while attempting in good faith to comply with the myriad of conflicting requirements of other federal and state laws.

1. Independent Contractors Are a Legitimate and Essential Classification of Workers in the Construction Industry.

As the U.S. Supreme Court recognized soon after passage of the FLSA, the act's definition of "suffer or permit to work" was "obviously not intended to stamp all persons as employees."³ Millions of workers choose to perform their work as independent contractors so that they can retain flexibility and control over their work lives, take advantage of entrepreneurial opportunities and structure their own working arrangements. The Bureau of Labor Statistics has concluded that the

² *Id.* at 60,612.

³ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947); *United States v. Silk*, 331 U.S. 704 (1947) (independent contractors are not within the FLSA's protections).

overwhelming majority of independent contractors “prefer their work arrangement to a traditional job.”⁴

This is particularly true in the construction industry, which relies on independent contractors to bring specialized knowledge and skills to bear where and when they are most needed. 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.

Regrettably, recent changes in classification standards at both the state and federal level have confused employers in many industries, including construction, and narrowed the opportunities to classify workers as independent contractors. The unfortunately named “ABC” test imposed by a minority of state governments, if adopted at the federal level, would drastically reduce the ability of independent contractors to be classified as such, radically changing long-accepted standards established by the U.S. Supreme Court under the FLSA, to the detriment of the construction industry and the economy as a whole. ABC therefore welcomes the DOL’s NPRM as a corrective response to recent efforts to curtail or even eliminate the jobs and opportunities that are only available because of independent contracting, and to clarify and sharpen the tests being applied based upon longstanding U.S. Supreme Court and DOL standards.⁵

2. ABC Supports the Department’s Proposed Application of the Economic Reality Test

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. Construction contractors are increasingly being placed in jeopardy by the vague and overbroad tests of employee status espoused by some courts, resulting in increased litigation costs and confusion.

The proposed rule will help to encourage the development of a unified standard for evaluating independent contractor status under the FLSA. The current overlapping factors used in the federal

⁴ Bureau of Labor Statistics, *Contingent and Alternative Employment Relationships* (July 2005), available at <https://www.bls.gov/news.release/history/conemp.txt>; see also Coalition for Workforce Innovation, *Project Details: National Survey of 600 Self-Identified Independent Contractors* (January 2020) (“CWI”) (surveying 600 self-identified independent contractors 94% of whom are “satisfied” with their independent work arrangement), at 5, available at <https://rilastagemedia.blob.core.windows.net/rila-web/rila.web/media/media/pdfs/letters%20to%20hill/hr/cwi-report-final.pdf>.

⁵ ABC agrees with DOL (85 Fed. Reg. 60,627-628) that the proposed rule is unlikely to have any significant adverse impact on workers or other stakeholders. Those who claim otherwise rely on one-sided and speculative cost estimates untethered to any verifiable data on the enhanced value of clarifying the independent contractor standards. Such claimants also wrongly assume that independent contractors can be readily replaced by or converted into wage-earning employees. Any study of the economic impact of the proposed rule must also take into account the positive impact on **job growth** in many industries, including construction, that will result from clarifying the test for independent contractor status.

courts and even within DOL for evaluating independent contractor questions under the FLSA have produced needless uncertainty for employers. ABC therefore supports the department’s proposed section 795.105(a), reaffirming from the outset that independent contractors are not employees. ABC further supports the department’s characterization of the “ultimate inquiry” under the economic reality test in section 795.105(b): “whether, as a matter of economic reality, the worker is dependent on a particular individual, business, or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor).”⁶ In this regard, the department has properly found that two factors—control and the opportunity for profit or loss—are the most probative of whether workers are economically dependent on another business or in business for themselves.⁷

Specifically with regard to the construction industry, it is important to qualify the control factor in the manner set forth in DOL’s proposed 795.105(d)(1)(i): “Requiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act.” 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.⁸ DOL should clarify and reaffirm this longstanding principle with regard to the construction industry in the final rule.

ABC further agrees with DOL’s recognition that the ability of independent contractors to work for any customer is an important part of the economic reality test. DOL proposes to analyze exclusivity under the control factor, though exclusivity is also an important indicator of economic dependence.⁹ ABC expresses no view on where the exclusivity factor is placed in DOL’s analytical scheme, including whether it should be a stand-alone core factor, so long as its importance continues to be recognized as equally probative as to economic dependence as the other core factors.

Most independent contractors in the construction industry move from project to project and are not exclusively bound to work for any one construction firm.¹⁰ 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

⁶ 85 Fed. Reg. at 60,600.

⁷ ABC views the NPRM as remaining true to the relevance of each of the seven factors that the U.S. Supreme Court has considered significant in determining the existence of an employment relationship, set forth in DOL’s longstanding Fact Sheet No. 13: Employment Relationship Under the Fair Labor Standards Act (FLSA), *available at* <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>. The department’s NPRM properly clarifies and assesses the weight to be given to the different factors under the widely varying circumstances where independent contractor issues may arise. See 85 Fed. Reg. 60,604.

⁸ *See, e.g., Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369 (5th Cir. 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”).

⁹ 85 Fed. Reg. at 60,612, and proposed section 795.110(d)(1)(i).

¹⁰ *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”).

than other options. To avoid discouraging these efficient relationships and limiting individuals' choices for work, ABC urges DOL to make clear that the relevant inquiry is whether the individual had the right and the ability to work for others.¹¹ An individual's choice to accept work from one source over other 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 towards employment.

With regard to the second "core" factor recognized in the NPRM—opportunity for profit or loss—ABC agrees with DOL's proposal to combine this factor with the contractor's investment in facilities and/or equipment.¹² Such investment is inherently interrelated with personal initiative, managerial skill, and other aspects of entrepreneurship. Independent contractors in the construction industry typically invest in their own tools and equipment, and such investment should continue to be recognized as indicative of independent contractor status.¹³ ABC further agrees with DOL's rejection of the "side-by-side comparison method" previously espoused (but withdrawn) by the department.¹⁴ 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.

3. ABC Supports DOL's Clarification of the Remaining Factors Used to Determine Independent Contractors' Status in the Absence of Clear Application of the "Core" Factors.

DOL's proposed rule states that if the two core factors of control and the opportunity for profit or loss point to opposite conclusions, then the following three subordinate factors should be used to make a determination as to independent contractor status: "skill required," "permanence of the working relationship" and/or the "integrated unit" factor.¹⁵ ABC believes the core factors with regard to the nature of the relationship are most probative and should be used to decide the proper classification. ABC supports DOL's proposed treatment of the subsidiary factors referenced above, with the following additional comments.

With regard to the skill required to be an independent contractor, it must continue to be recognized on construction sites that training 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, non-mandatory training or informative guidance made available to independent contractors who choose to utilize it does not indicate economic dependence.

¹¹ 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").

¹² 85 Fed. Reg. at 60,612. See also *Saleem v. Corp. Trans. Grp., LTD*, 854 F.3d 131, 145, n.29 (2d Cir. 2017) ("investment, by definition, creates the opportunity for profit or loss.").

¹³ 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).

¹⁴ 85 Fed. Reg. at 60,614.

¹⁵ 85 Fed. Reg. at 60,612-618.

As to 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 as discussed above. Further clarification of such terms as “definite,” “indefinite,” “continuous” and “sporadic” is needed for construction companies to understand their obligations. In particular, 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.

Finally, with regard to the “integrated unit” factor, it is unclear how the concept of an employer’s “production process” applies to the construction industry. ABC agrees with DOL’s distinction between “integration” and “importance.” As DOL further notes, everything a construction business requires to complete a project is “important,” so that should be no indicator of employee versus independent contractor status. ABC appreciates DOL’s efforts to draw the distinction between “integration” versus “integral.” Nevertheless, the construction industry’s use of independent contractors should not be considered to be part of a production “process” at all. Regardless of how this factor is further clarified in the final rule, ABC requests that 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.

4. ABC Requests Construction-Specific Examples Showing How the Proposed Rule Will Be Applied.

As DOL has recognized in other recent rulemakings, specific examples can help to clarify the application of the department’s rules under the FLSA.¹⁶ A non-exclusive list of such examples could include simple fact patterns clarifying the proper uses of skilled, independent tradesmen on construction projects. In particular, it would be helpful to include examples of job site coordination and building specifications that do not jeopardize independent status, the types of regulatory control routinely exercised by general contractors that can continue to be exercised with regard to independent contractors and the types of jobsite training that likewise are essential to workplace safety but should not detract from independent contractors’ independent status.

5. DOL Should Create a Safe Harbor for Employers Who Reasonably Classify Independent Contractors in Accordance With Established Industry Practice.

As noted above, construction industry employers are confronted with a bewildering maze of conflicting local, state and federal laws governing independent contractor status. DOL’s efforts to clarify enforcement of one of those laws—the FLSA—are salutary; but many employers will remain obligated to comply with the inconsistent requirements of different federal statutes such as the Internal Revenue Code and the National Labor Relations Act, as well as the increasingly draconian state laws that threaten to eliminate the independent contractor classification entirely. In some instances, businesses may be required to treat independent contractors as employees for state law purposes, even though the contractors otherwise qualify as independent under the FLSA.

¹⁶ <https://www.federalregister.gov/documents/2020/01/16/2019-28343/joint-employer-status-under-the-fair-labor-standards-act>; 85 Fed. Reg. 2,820 (joint employer rule).

In light of these circumstances, ABC strongly urges creation of a “safe harbor” with regard to enforcement of the FLSA wherein a business does not jeopardize an independent contractor’s status by complying with federal, state or local laws that require or permit a business providing work to also provide benefits or protections to the independent contractor. Similarly, if an individual is considered an employee under other laws, such as California’s AB 5 test, that should have no bearing on the individual’s status under the FLSA.

Conclusion

ABC supports the proposed rule and the additional clarification of independent contractor status that it provides. ABC seeks additional guidance for its members so that they can avoid inadvertently misclassifying employees as independent contractors, while still recognizing legitimate independent contractors in accordance with longstanding practices in the construction industry.

Respectfully submitted,



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