



**Via <http://www.regulations.gov>**

December 12, 2022

Submitted via the Federal eRulemaking Portal at <http://www.regulations.gov>

Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor Room S – 3502  
200 Constitution Avenue NW  
Washington, DC 20210

**Re: Notice of Proposed Rule: Employee or Independent Contractor Classification Under the Fair Labor Standards Act, RIN 1235-AA43**

To Whom It May Concern:

On behalf of The Association of Union Constructors (TAUC), please accept these comments in strong support for the Wage and Hour Division’s (WHD) October 13, 2022 proposed rule “Employee or Independent Contractor Classification Under the Fair Labor Standards Act” (“Proposed Rule”).

**The Association of Union Constructors**

TAUC is the premier national trade association for the union construction and maintenance industry in the United States. We represent close to 1,800 union contractor member companies in the industrial maintenance and construction fields. TAUC contractors employ skilled union craft personnel on construction and industrial maintenance projects that build and maintain the most critical elements of our nation's industrial infrastructure.

Our members conduct these vital activities by employing and investing in skilled craft personnel on construction and maintenance projects to deliver value to their clients. These men and women are among the most well trained and highly skilled construction industry professionals in the world and ensure our members provide the safest, highest quality, and most cost-effective construction services to their customers.

**Misclassification in the Construction Industry**

Our members properly classify their craftworkers, which requires payment of Social Security and FICA taxes, meeting Fair Labor Standards Act requirements, paying into workers’ compensation funds, as well as complying with federal employment laws. Unfortunately, with

employee misclassification and payroll fraud rampant in the construction industry this places our members at a significant competitive disadvantage in an industry where contracts are often determined in a head-to-head bid process.

A recent study of worker misclassification and payroll fraud in the construction industry found that in August 2017 between 12.4 percent and 20.5 percent of the construction industry workforce nationwide was either misclassified as independent contractors or working “off the books,” which is estimated to amount to between 1.45 to 2.41 million workers.<sup>1</sup> A similar report issued by the District of Columbia Attorney General’s Office found that construction contractors save between 17 percent and 40 percent by misclassifying workers.<sup>2</sup>

The result of this misclassification in the construction industry is a significant loss of wages and benefits to workers, tax revenue, and contributions to social insurance programs. A conservative estimate found that misclassification in the construction industry resulted in lost federal and state income taxes, social security and Medicare taxes, as well as unemployment insurance contributions of approximately \$9 billion annually.<sup>3</sup> Similarly using conservative income assumptions, contractors who deliberately misclassify their workers are estimated to save between 14.2 percent and 30.75 percent in labor costs compared to employers who properly classify their workers.<sup>4</sup>

This practice and the cost savings associated with it provide contractors who deliberately misclassify their workers a substantial competitive advantage in the marketplace.

### **Rescission of the January 2021 Rule**

TAUC strongly opposed the “Independent Contractor Status Under the Fair Labor Standards Act” rule published on January 7, 2021. This rule created significant uncertainty and made it easier for employers who misclassify their employees to avoid their legal obligations to their workers and gain an unfair advantage in competing for work.

The January 2021 rule established a more lenient framework for determining employee classification by narrowing the factors used to determine worker classification status under the FLSA. Instead of the long-standing multifactor economic reality test, the January 2021 rule placed an emphasis on two factors -- the nature and degree of the worker’s control over the work and the worker’s opportunity for profit or loss – in determining worker status.

As a result of the narrowing of the factors to be considered, workers lost workforce protections, assumed increased costs for their employment and became ineligible for worker benefits such as

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<sup>1</sup> Russell Ormiston, Dale Belman, and Mark Erlich, “An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry.” Page 5. (2020) <https://stoptaxfraud.net/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf>

<sup>2</sup> Dale Belman and Aaron Sojourner, “Economic Analysis of Incentives to Fraudulently Misclassify Employees in District of Columbia Construction” (2019) <https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf>

<sup>3</sup>Ormiston, Page 5.

<sup>4</sup>Ormiston, Page 49.

pensions and health care benefits. It also placed construction contractors who properly classify their employees and invest in their workforce at a significant competitive disadvantage in bidding for work.

For this reason, we strongly support the rescission of the January 2021 rule as called for in the proposed rule.

**Restoration of the Totality of Circumstances Economic Reality Test**

TAUC fully supports the proposed rule’s codification of the long-standing “totality-of-the-circumstances approach” used in determining worker status under the FLSA.

Returning to a broad multi-factor economic reality test provides a clear analysis of the nature of the employment relationship between a worker and an employer. It is also critical that this analysis be undertaken without assigning a predetermined weight to a specific factor or set of factors in making a determination regarding the nature of the working relationship and the degree of economic dependence a worker has on an employer.

This approach is consistent with long-standing judicial precedent and provides greater certainty to employees regarding the definition of employee.

**Conclusion**

TAUC supports efforts to level the playing field for both law-abiding construction contractors and steps to strengthen – not relax – enforcement of the FLSA. This proposed rule will help ensure that it is more difficult for unscrupulous employers to avoid their legal obligations to their workers and gain an unfair advantage in competing for construction work. Rescinding the January 2021 rule and implementing a multi-factor economic reality test proposed in the rule will provide a clearer reflection of the economic nature of the relationship between workers and employers. It will also provide greater clarity to employers regarding their obligation under the FLSA and will likely reduce the occurrence of worker misclassification in the construction industry. For these reasons we strongly support the proposed rule.

Thank you for your consideration in this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel M. Hogan", enclosed within a thin black rectangular border.

Daniel M. Hogan  
Chief Executive Officer