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December 13, 2022

Jessica Looman
Principal Deputy Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue NW., Rm S-3502
Washington, D.C. 20210

RE: *Comments on Notice of Proposed Rulemaking: Docket No. WHD-2022-0003 – Employee or Independent Contractor Classification Under the Fair Labor Standards Act (RIN 1235-AA43)*

Dear Principal Deputy Administrator Looman:

On behalf of the more than 140,000 members of the National Association of Home Builders of the United States (NAHB), I am pleased to submit these comments in response to the Department of Labor (DOL or the Department) Notice of Proposed Rulemaking (NPRM) setting forth its interpretation of the Fair Labor Standards Act (FLSA) as relevant to the question whether workers are “employees” or independent contractors under the FLSA, published in the Federal Register on October 13, 2022 (87 Fed. Reg. 62,218). NAHB has also joined a coalition of associations, businesses and stakeholders that oppose creating a new standard for independent contractor classification and urge the DOL to withdraw the proposed rule.¹

NAHB is a Washington, D.C.-based trade association whose members are involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. NAHB is affiliated with more than 600 state and local home builders’ associations around the country. NAHB’s builder members construct about 80 percent of the nation’s new housing units, making housing a large engine of economic growth in the country.

NAHB supports enforcement of the current rules on the classification of workers, but also supports clarification of those rules to improve compliance across all industries, which is why, as an interested stakeholder in this regulatory activity, NAHB supports the Department’s 2021 IC Rule of a sharper “economic reality” test to determine a worker’s status under the FLSA as an employee or an independent contractor. This proposed rule will have a confusing and disruptive effect on workers and businesses alike.

¹ NAHB joined the U.S. Chamber of Commerce and other trade associations and business organizations in filing comments, which were submitted on Dec. 13, 2022.

Under the current test the actual practice is more relevant than what may be contractually or theoretically possible in determining whether a worker is an employee or an independent contractor, and it provides a clearer and simpler federal test for determining worker status for regulated employers and small businesses, including home builders and specialty trade contractors who are essential to the residential construction sector.

I. About the Residential Construction Industry

At the outset, it has long been the position of NAHB that the current law pertaining to worker classification recognizes the unique characteristics of home building and allows the flexibility necessary for building industry workers to function in a changing economy. It has been our concern that a rigid application of the static rules regarding the classification of workers would result in the improper classification of legitimate independent subcontractors as employees, and thereby unfairly burden both small businesses and workers.

A lack of clarity and inconsistent measurement of the concept of economic dependence as a determining factor of employment has, for many years, presented a unique challenge to the residential construction industry due to its highly decentralized business structure. Home builders employ individuals whose primary functions are to supervise and manage the process of constructing homes, contractor relationships, and many of the administrative tasks associated with the construction process from inception to completion.

Home builders, as well as remodelers, typically subcontract a large portion of their construction work out to trade contractors who can more efficiently deliver individual pieces of the construction process. Specialized subcontractors perform much or even all the actual labor associated with most new home construction and renovation work. Work typically performed by subcontractors includes excavation, framing, roofing, plumbing, electrical, tile, finish carpentry, masonry, painting, dry wall, and paving.

As part of its justification for rescinding the 2021 IC Rule, the Department provides² that:

The proposal's discussion of how courts and the Department's previous guidance apply the factors brings the multifactor test into focus, reduces confusion as to the overlapping factors, and provides a better basis for understanding how the test has the flexibility to be applied to changes in the modern economy, such that the Department no longer views the concerns articulated in the 2021 IC Rule as impediments to using the economic reality test formulated by the courts and the Department's longstanding guidance.

² 87 Fed. Reg. at 62,226.

But recognition should be given to the “industry custom and historical practice” of a given industry. In the construction industry the practice of subcontracting the various phases of the work is well-established and no evidence exists that it was implemented in order to avoid compliance with the provisions of the Labor Law. *See Matter of Ovadia v. Office of the Indus. Bd Of Appeals*.³

Since the late 1950s, this trend of specialization within the residential construction industry has significantly accelerated. In 2015, 70 percent of builders subcontracted 75 percent or more of the construction, whereas in 1959, only 31 percent of them subcontracted that percentage. A major reason for this trend is due in part to the increasing complexity, features, and amenities supplied with new and remodeled homes. Today, between 11 and 30 different subcontractors are used to build an average single-family detached home,⁴ and a large majority of NAHB’s single-family builder members use up to 30 different subcontractors (24 subcontractors on average) to build a typical home.⁵ Additionally, more than 90 percent of builders always subcontract for security systems, HVAC, technology (structured wiring, home theater, etc.), carpeting, electrical wiring, plumbing, masonry work, fireplaces, foundations, drywall, and concrete flatwork.⁶ Likewise, between 80 to 89 percent of builders reported they always subcontracted for roofing, kitchen countertops, ceramic tiles, flooring (except carpet and tile), painting and wall covering, landscaping, kitchen cabinets and exterior doors and windows.⁷

Another reason for this increased use of independent specialty trade contractors is the prevalence of small builder firms in the residential construction industry. More than 95 percent of NAHB’s builder members are small entities as defined by the U.S. Small Business Administration (SBA). The results of an annual census conducted by NAHB shows that the typical NAHB builder member was a relatively small business in 2020, with medians of \$2.6 million in gross revenue, five housing starts, and five payroll employees.⁸

Business reality dictates that firms employ in-house labor only when the costs of doing so are less than the cost of contracting with another firm. In general, labor costs are lower for businesses that

³ 19 N.Y.3d 138 n. 6, 946 N.Y.S.2d 86, 89, 969 N.E.2d 202 (N.Y. 2012), *citing Zheng v. Liberty Apparel Co. Inc.* 355 F3d 61, 74 (2d Cir. 2003).

⁴ Paul Emrath, Ph.D., National Association of Home Builders, *Subcontracting: Three-Fourths of Construction Cost in the Typical Home*, April 2015, http://www.nahbclassic.org/fileUpload_details.aspx?contentTypeID=3&contentID=247385&subContentID=656869&channelID=311 (accessed Dec. 2, 2022).

⁵ Paul Emrath, Ph.D., National Association of Home Builders, *Average New Home Uses 24 Different Subcontractors*, Dec. 2, 2020, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2020/special-study-average-new-home-uses-24-different-subcontractors.pdf> (accessed Dec. 2, 2022).

⁶ *Id.*

⁷ *Id.*

⁸ Paul Emrath, Ph.D., National Association of Home Builders, *Who Are NAHB’s Builder Members?*, April 5, 2021, <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-who-are-nahb-builder-members-april-2021.pdf> (accessed Dec. 2, 2022).

specialize in a particular activity compared to a business that attempts to do all tasks in-house. For most builders, there is simply insufficient internal demand to justify hiring an employee for the numerous specialized and limited tasks required to complete a home project. Further, specialized tradespeople are neither in the business of nor typically possess all of the specialized skills needed to complete full construction of a home themselves. For example, plumbers are not in the business of framing houses. Neither are framers in the business of laying pipes and connecting plumbing and ventilation systems. Consequently, without these specialized independent subcontractors, many small home building businesses would simply cease to be viable operations.

At the same time, there are advantages for specialty tradespeople to operate as independent contractors. Not surprisingly given the demand issue discussed above, self-employed construction trades workers are more common in rural areas and smaller cities, where home building occurs on a smaller scale. Independent contractor status also affords the opportunity of growth and expansion, whereby a successful contractor hires his or her own staff to meet the increasing needs of his business. Indeed, many contracting businesses begin operation as a self-employed independent trade worker.⁹

For home builders, the ability to compete efficiently in the residential construction industry and optimally price a home depends on the degree to which overall costs are certain and predictable. This impact is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low to moderate-income homebuyers who are more susceptible to being priced out of the market.

NAHB's latest estimates show that nationally, 87.5 million households (roughly 69% of all U.S. households) are already unable to afford the median-priced (\$412,505) new home. A \$1,000 increase in the price of that median-priced new home will further price 117,932 U.S. households out of the market. Based on their incomes and standard underwriting criteria, these households would be able to qualify for a mortgage to purchase the home before the price increase, but not afterward.¹⁰

Successful delivery of homes is inextricably tied to the ability to promptly schedule the work of different trades and manage issues that could result in production delays. As a result, if the Department were to start with the premise that a home builder is the employer of a subcontractor, this could have severe negative effects on the residential construction industry.

⁹ For more information, see: Michael Carliner, Housing Economics, *Construction Workers: Settling In*, October 2003; Elliot Eisenberg, Housing Economics, *Self Employment in Construction*, January 2001.

¹⁰ Na Zhao, Ph.D., National Association of Home Builders, *Households Priced-Out by Higher House Prices and Interest Rates*, <https://www.nahb.org/news-and-economics/housing-economics/housings-economic-impact/households-priced-out-by-higher-house-prices-and-interest-rates> (accessed Nov. 29, 2022).

In *Matter of Ovadia v. Office of the Indus. Bd of Appeals*,¹¹ the Court recognized that in the construction industry the subcontractor is often a distinct entity with its own employees. In finding that employees of a subcontractor were not jointly employed by the general contractor, the Court noted that many of the usual factors used to establish a joint employer relationship are not applicable in the construction setting; that if those factors were “applied consistently in the construction realm, [they] would likely render most general contractors the joint employers of their subcontractors’ employees - a proposition that does not reflect the actual relationships in the construction industry.”¹² The reason lies in the fact that the general contractor normally interfaces solely with the principal of the subcontractor, not with the subcontractor’s employees.

As a practical matter, general contractors in the construction industry do not hire or supervise the workers employed by their subcontractors; they do not usually maintain the employment records for each worker or track the individual workers’ schedules or rates of pay. The primary objective of a general contractor is to keep the project on schedule and to coordinate the work among subcontractors in order to avoid costly delays in the completion of the project. Thus, general contractors frequently interact with the principals and supervisors of the subcontractors and generally have no direct control or functional supervision over the employees performing work for the subcontractors.¹³

This scenario aptly describes the role of many builders, or in many cases their project supervisors or superintendents (alternatively it might be a project manager, field manager, construction manager, assistant construction manager, etc.), who perform a multitude of functions, as more fully described below, in nearly all significant day-to-day matters regarding home construction and managing the home building process. Chiefly, scheduling and supervising the work of subcontractors is a responsible, everyday business practice of home builders, consistent with a typical, legitimate subcontracting relationship.

A. Management of Contractors and Vendors.

They spend the majority of their time managing and directing the work of subcontractors and vendors, whose crew sizes can number dozens of workers. In managing the work of vendors and subcontractors, they are responsible for scheduling the tasks and overseeing the work performed by the workers. The individuals can recommend and/or decide whether to retain or terminate the services of the contractors and vendors. They also can recommend or decide to withhold approval for payment to the contractors and vendors if they deem that their work does not meet the standards of the contract.

¹¹ 19 N.Y.3d 138, 946 N.Y.S.2d 86, 89, 969 N.E.2d 202 (N.Y. 2012).

¹² *Id.*

¹³ *Id.* at 143, 946 N.Y.S.2d 86, 89, 969 N.E.2d 202.

B. Project Management.

This includes managing applicable benchmarks and timetables to ensure that contractors and vendors perform on schedule, within budget, and pursuant to the scope of work in their contracts. They schedule some or all aspects of construction projects including subcontractors, material deliveries, and inspections, as well as modifying work schedules to accommodate delays due to material delivery delays, inspection issues, and weather. Additionally, they monitor the work of the subcontractors and address a myriad of other issues that may arise on a job site.

C. Regulatory Compliance and Government Relations Representative.

The builder or his or her on-site representative also is responsible for monitoring compliance with building code, environmental, and safety compliance by contractors and vendors.

II. The provisions within the NPRM directly contrast with the stated goal of the Department

As a general proposition, the proposed rule narrows the circumstances under which a worker could be an independent contractor. For instance, the second factor pertaining to investment by the worker and the employer provides that the worker's investments should be evaluated on a relative basis with the employer's investments.¹⁴ What is the relevance of their relative investments? Why, for example, compare the investment of a framing subcontractor in his or her business with the investment by the builder in his or her business. How can the parties know when the investments are sufficiently comparable to support a finding of independent contractor status? How would either party even know the other's relevant investment? The framing contractor could provide the same service to two different builders, and its classification could be different based on the size of the builder. Unlike the 2021 IC rule, requiring a builder and the subcontracted entity to navigate this analysis could result in inconsistent determinations solely based on the size of the parties involved.

Also troubling is the fourth factor covering the nature and degree of control wherein the proposed guidance states that the assessment may include consideration of control that is due to an employer's compliance with legal, safety, or quality control obligations.¹⁵ The Department says that this type of control may be evidence that the worker is not entrepreneurial enough to comply with legal and other requirements on his or her own. To take one example, how are we to reconcile that with government regulation that mandates supervision? What of the general contractor who is cited by OSHA as a "controlling contractor" under its multi-employer citation policy for failing to make a sufficient effort to detect, correct, and prevent its subcontractors' violations of an OSHA standard? Regarding this issue of the nature and degree of control, in its guidance the Department

¹⁴ 87 Fed. Reg. at 62,240.

¹⁵ 87 Fed. Reg. at 62,246.

acknowledges that the case law is not uniform on this, and others have noted that this not a commonly held view.

At the same time DOL supposedly seeks to avoid this inconsistency and confusion with the issuance of this proposal, the agency overtly contrasts with its own stated purpose with these and other provisions of the NPRM. Further, NAHB believes the Department failed to recognize the concerns of both employers and employees across various industries in a series of listening sessions conducted by the agency earlier in 2022.¹⁶ Therefore, NAHB strongly recommends the agency rescind the current proposed rule and work with both worker and employer representatives of the regulated community to develop sensible policies that take into account the intricacies of residential construction and other industries.

III. Request that the regulatory text contain examples

Should the Department move forward in issuing a final rule, however, NAHB requests the inclusion of interpretations that will serve as a practical guide to employers and employees, and upon which they may rely, as to how DOL's Wage and Hour Division will seek to apply the rule. Specifically, NAHB requests the inclusion of the illustrative example below involving common business scenarios between contractors and subcontractors in the home building industry.

Example. A builder is hired to build a custom home on the owner's lot. He hires skilled trade subcontractors such as electricians, plumbers, carpenters, and masons, which are needed to complete the project. The subcontractor is to provide and furnish services, training, facilities, supervision, and administration necessary for the proper and complete performance and acceptance of the work. Per the subcontract, the work is to be performed in compliance with all applicable building codes, statutes, regulations, and ordinances. The manner in which the work is to be completed is left to the discretion of the subcontractor. During the course of construction the builder's construction manager was on the job site daily and supervised the work with various subcontractors with respect to warranties of quality and time for delivery. At the construction manager's request, several of the subcontractor's provided additional labor and time on the job site when weather-related delays jeopardized deadlines. While on site, the construction manager requested the subcontractors to correct any OSHA safety and health violations. There are no explicit requirements that the subcontractors work exclusively for the builder and the subcontractors have the ability to work for others, including the builder's rivals.

¹⁶ DOL's Wage and Hour Division conducted listening two listening sessions, one for employers and one for workers, on June 24, 2022, and June 29, 2022, respectively, to gather feedback on the current independent contractor standard and potential revisions to those policies. NAHB, along with business organizations, trade associations and employers, participated in the employer listening session.

Application. In this case, the subcontractors remain in substantial control of key aspects of their work and they are free to offer services to others, which suggests that they are independent contractors. The control exercised by the employer pertaining to quality and compliance monitoring are typical of a subcontracting relationship and weigh in favor of classification of the subcontractors as independent contractors.

In addition to the inclusion of these examples in any final rule, NAHB urges the addition of language providing a safe harbor from an enforcement action by the Department provided an employer follows the law in good faith and does not knowingly violate the standard. The inclusion of this language would more strongly ensure an employer would not be liable for violations that are beyond his or her control, nor would clear, concise guidance on actions that constitute acting in good faith be exploited to harbor bad actors who willingly choose to remain noncompliant.

IV. Conclusion

In conclusion, NAHB supports the narrower 2021 IC Rule currently used to determine a worker's status as an FLSA employee or an independent contractor and as such does not concur that the proposed rule will be most beneficial for stakeholders and provide useful guidance to workers on whether they are correctly classified as employees or independent contractors. To the contrary, it will have a confusing and disruptive effect on workers and businesses alike.

We appreciate the opportunity to provide these comments on the proposed rule and hope you will find them valuable. NAHB welcomes the opportunity to further engage with the Department as it moves forward with this rulemaking and anticipates these comments will lead to the Department fully understanding the impact of its regulatory activities on the residential construction industry. Please contact me if you have any questions or require any additional information.

Sincerely,



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