



CONSTRUCTION EMPLOYERS OF AMERICA

February 13, 2024

The Honorable Kevin Kiley
Chairman,
Subcommittee on Workforce Protections
Committee on Education & the Workforce
Washington, DC 20515

The Honorable Alma S. Adams
Ranking Member,
Subcommittee on Workforce Protections
Committee on Education & the Workforce
Washington, D.C. 20515

Dear Chairman Kiley and Ranking Member Adams:

On behalf of the Construction Employers of America (CEA) and the 15,000 signatory contractors and 1.4 million employees we represent, we are writing to provide our views for tomorrow's hearing on the policies and priorities of the Labor Department's Wage and Hour Division (WHD). First and foremost, our organization strongly supports the work of Administrator Jessica Looman and WHD since 2021 to support and strengthen the construction industry. Under Looman's leadership, WHD has secured key regulatory changes to the Davis-Bacon and Related Acts and restored the independent contractor rule to its longstanding 70-year precedent, all while expanding employer assistance to increase compliance, transparency, and accountability with DOL programs and initiatives. These key regulatory changes and mission philosophies have helped facilitate more effective and efficient government, a more productive construction workforce, and created a "level-playing field" for responsible contractors to thrive in.

The CEA is made up of seven employer associations that represent construction firms that utilize union craftworkers. Our members adhere to the highest standards and provide superior wages and benefits—including health insurance, pensions, and investments in worker safety and training—and are committed to working to strengthen the construction industry and provide opportunities for our workers. Our members' efforts help provide the best value to project owners while securing high-value compensation and benefits for workers, their families, and their communities.

I. Davis-Bacon and Related Acts Regulatory Changes

CEA has long advocated for many of the reforms incorporated in WHD's August 2023 final rule updating the Davis-Bacon and Related Acts regulations to provide a more comprehensive implementation of these statutes, as well as for widespread prevailing wage laws across the nation. The Davis-Bacon Act was enacted more than 90 years ago to provide a level playing field for local construction workers working for local contractors and subcontractors by protecting those local workers and employers from losing out on federal projects to "outside contractors...who recruited labor from distant cheap labor areas." Specifically, the Act requires



that on most federally funded projects, workers are to be paid a minimum of the prevailing wage for the area in which the work will be performed as determined by the Department of Labor.

The Davis-Bacon Act's guarantee of prevailing wages not only benefits workers, their families, and their communities, it also supports the types of quality workforce training, project safety, and productivity that prevent delays, repairs, and re-dos of projects and the associated costs they entail. In so doing, the Act provides taxpayers with the best long-term value by ensuring that federally funded projects are built to the highest standards using skilled and well-trained construction craftspeople.

The positive impacts of the final rule changes on CEA, its members, Davis-Bacon Act supporters, and union workforces across the complex and quality driven public construction industry will be substantial. These important regulatory changes are long overdue and represent significant progress toward achieving the Administration's goal of fulfilling the statutory intent of the Davis-Bacon Act while working to expand the registered apprentice program to grow the nation's skilled workforce. Finally, vigorously enforced and supported prevailing wage standards benefit the federal government as well as play a vital role in expanding a well-trained, highly skilled, and productive construction workforce needed now more than ever during a time of widespread skilled labor shortages.

II. Independent Contractor Regulatory Changes

The prior administration's DOL finalized an independent contractor rule that narrowed the scope of construction workers considered an employee under the FLSA. That rule made it easier for some employers in the construction industry to misclassify workers as independent contractors. This allows them to avoid the costs associated with paying workers compensation, unemployment and other costs associated with having employees. Avoidance of these costs provides an unfair competitive advantage over contractors affiliated with CEA member associations, who take seriously their responsibility to provide middle class wages, health insurance, and retirement benefits while honoring their obligations to pay workers compensation and unemployment insurance. The 2021 independent contractor rule's divergence from the well-established common law approach to classifying workers under the FLSA would have created enormous confusion and uncertainty in the construction industry. WHD's January 10, 2024 final rule will provide greater clarity and consistency for employers and workers, consistent with congressional intent and judicial precedent.

The 2024 final rule also permits a level playing field for the business model of contractors associated with CEA instead of encouraging wider adoption of a business model rooted in a decision to treat almost every worker on a jobsite as an independent contractor without regard to



the requirements of the FLSA and other basic workplace laws. Such behavior prevents a level playing field for honest construction contractors—the majority of which are small businesses. Contractors that insist all or most of their workers are independent contractors can always submit a bid that is lower than a law-abiding employer because the independent contractor model is a mechanism to dissociate themselves from the obligations and expenses that come with being an employer. This model allows those who use it to get the benefits of workers’ labor while evading the costs of paying minimum wage, overtime, workers’ compensation, unemployment insurance, payroll taxes, and other costs our members accept.

Congress heard extensive and undisputed testimony from two CEA members in hearings before this same subcommittee in 2019¹ and in 2023² regarding the impact that wanton abuse of independent contractor status in the construction industry is having on the ability of honest job creators to compete for work. As detailed during that hearing, construction companies that treat their workforce as independent contractors save a minimum of 20 to 30 percent on labor costs. When competing against companies like the ones represented by CEA that pay middle-class wages and offer retirement plans and health benefits, the independent contractor business model nets closer to a 50 percent cost advantage.³ The testimony of CEA member organization witnesses highlighted that this issue isn’t a “red” or “blue” state issue, but rather a universal one that affects all Americans regardless of political affiliation or belief. As the state of Tennessee explained in 2019,⁴ people perpetrating these schemes know that even if their violations of wage, tax, and other laws associated with misclassifying their employees as independent contractors are detected, they can often just close their businesses and reopen as a newly formed LLC that for all practical purposes is a continuation of the closed business. By reopening under a new name, these individuals avoid meaningful penalties for non-compliance *and* continue to engage in misclassification knowing it is unlikely the new entity will be discovered.

¹ Testimony of Matt Townsend, Workforce Protections Subcommittee, U.S. House of Representatives Committee on Education and Labor, Hearing on “Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy” (Sept. 26, 2019), *available at* <https://www.congress.gov/116/meeting/house/110019/witnesses/HHRG-116-ED10-Wstate-TownsendM-20190926.pdf>.

² Testimony of T. David Long, Workforce Protections Subcommittee, U.S. House of Representatives Committee on Education and the Workforce, Hearing on “Examining Biden’s War on Independent Contractors” (April 19, 2023), *available at* <https://www.congress.gov/118/meeting/house/115679/witnesses/HHRG-118-ED10-Wstate-LongM-20230419.pdf>

³ [Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio](#) (Feb. 18, 2009).

⁴ [Annual Report on Employer Coverage Compliance, Tennessee Bureau of Workers’ Compensation at 12](#) (February 1, 2019).



III. Necessity of Ensuring Full Funding for WHD

CEA has also advocated for Congress to sufficiently support budgetary increases to support the mission of the Department of Labor's survey, wage calculation, and enforcement role to the fullest extent under the law. Last year, however, the House Appropriations Subcommittee on Labor-Health and Human Services went in the opposite direction, approving an FY 2024 spending bill that imposes drastic cuts across the Labor Department, and specifically to WHD and other key enforcement agencies. If such cuts are enacted, it will severely limit WHD's ability to ensure that the recipients of the more than \$2 trillion in federal construction funds authorized during the 117th Congress to improve U.S. manufacturing and competitiveness adhere to both the spirit and letter of the law. CEA believes that it is absolutely imperative that Congress provide WHD with full funding to address its staffing and resource needs and to ensure that the recipients of recently enacted federal construction funds meet their obligations to workers.

In conclusion, the CEA strongly supports the efforts of the Labor Department and WHD over the past two years to support and strengthen the construction industry. Under the leadership of Principal Deputy Administrator Looman, WHD has taken swift actions against those who have attempted to improperly classify workers as independent contractors to reduce their own labor costs. WHD has also expanded employer assistance programs, issued a final rule strengthening and modernizing the Davis-Bacon regulations to better serve both workers and employers in the 21st century, vigorously enforced and supported prevailing wage standards, and played a central role in expanding a well-trained, highly skilled, and productive construction workforce.

We appreciate your attention to our views on these matters.

Sincerely,

The Construction Employers of America
www.constructionemployersofamerica.com

FCA International
International Council of Employers of Bricklayers and Allied Craftworkers
Mechanical Contractors Association of America
National Electrical Contractors Association
Sheet Metal & Air Conditioning Contractors' National Association



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Signatory Wall and Ceiling Contractors Alliance
The Association of Union Constructors