



February 7, 2024

U.S. House of Representatives
Washington, DC 20515

Re: SMACNA's Support for the Final Rule Implementing Independent Contractor Reforms

Dear Representative:

The Sheet Metal and Air Conditioning Contractors' National Association (SMACNA), supported by more than 3,500 construction firms engaged in industrial, commercial, residential, architectural, and specialty sheet metal and air conditioning construction throughout the United States, applauds the Department of Labor (DOL) Final Rule, Employee or Independent Contractor Classification under the Fair Labor Standards Act, which will be effective March 11, 2024.

The Final Rule is an important first step in curbing growing and anticompetitive worker misclassification. Simply put, knowingly misclassifying workers to avoid withholding and benefit expenses is a longstanding and unscrupulous business practice in the construction industry. In fact, most states, led by Republican and Democratic Governors, have enacted tough state and local laws to police and reclaim substantial amounts in lost tax revenues and worker benefits. However, given the pervasive misclassification of workers in the construction industry, **SMACNA firmly believes that the DOL should develop even more rigorous industry-specific regulations that are targeted at rooting out pervasive and unlawful withholding fraud as a common industry practice.** For example, in NY State, an unscrupulous contractor can earn a bidding advantage of nearly a third of an employee's earnings by fraudulently misclassifying their employee as an independent contractor.

Since the 1980s, SMACNA has sounded the alarm on "worker status fraud" in the construction industry. In 1999, SMACNA called worker status fraud "an epidemic in the construction industry." To be clear, worker status fraud in the construction industry **is not** about unsophisticated businesses making "difficult legal calls" or applying complicated legal factors to ambiguous facts. It is about cheating. It is about unscrupulous contractors making a conscious decision to avoid tax laws, wage and hour laws, workers' compensation laws, unemployment insurance laws, and other basic responsibilities of being a legitimate construction contractor.

The Final Rule provides greater clarity and consistency Through codifying the long-standing six-factor economic reality test. These factors include: (1) opportunity for profit or loss depending on managerial skill; (2) investments by the worker and the potential employer; (3) degree of permanence of the work relationship; (4) nature and degree of control; (5) extent to which the work performed is an integral part of the potential employer's business; and (6) skill and initiative. In contrast to the prior rule, which is repealed as part of the Final Rule, the Final Rule makes clear that no factor or set of factors among this list of six has a predetermined weight. The Final Rule also advises that costs to a worker which a potential employer unilaterally imposes are not "investments" indicative of independent contractor status.

While many states have acted to combat worker misclassification, it has become exceedingly difficult, if not impossible, for legitimate contractors to compete against unscrupulous contractors, misclassifying the majority of their workers as independent contractors. This is done to gain a major competitive advantage against law-abiding competitors, realize tremendous profits, and avoid the financial risks that honest entrepreneurs must



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accept. Construction contractors that engage in worker status fraud do not bear the risks of unanticipated overtime, bad planning, or poor execution. Instead, this racket transfers these risks onto workers and taxpayers.

Unfortunately, the statistics show that "crime pays" and worker status fraud gives unscrupulous contractors a competitive advantage against legitimate contractors who play by the rules. Study after study has shown that unscrupulous contractors can reduce their labor costs by as much as 50% by engaging in worker status fraud.

SMACNA believes that the construction industry needs stronger protections against worker status fraud. Specifically, SMACNA believes that federal regulators, including the DOL and the IRS, should develop rules specific to the construction industry to prevent unscrupulous contractors from deliberately misclassifying workers to gain an unfair advantage over law-abiding contractors who pay middle-class wages and benefits. Not only has the existing status quo led to a general disrespect for the employment law, but it has also created perverse incentives for businesses facing vigorous competition to cheat to meet the artificially low bidding prices of their dishonest counterparts.

Therefore, **we support the Final Rule implementing the long overdue Independent Contractor enforcement regulations** and ask Congress to consider the added value to free and fair competition the new rules provide to businesses, especially in the industries, such as construction, where employee misclassification and anti-competitive bidding has been rampant for decades and continues in a widespread manner today. This explains why the majority of Governors of both parties have acted to defend tax collections, fair contracting competition and employee benefit withholding rights.

Sincerely,



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