

Statement for the Hearing Record

Submitted by The Sheet Metal and Air Conditioning Contractors

National Association (SMACNA)

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Submitted to:

The Committee on Education and The Workforce
Subcommittee on Workforce Protections

Hearing Topic

**“EXAMINING THE POLICIES AND PRIORITIES
OF THE WAGE AND HOUR DIVISION”**

Introduction

The Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) is supported by more than 3,500 construction firms specializing in industrial, commercial, residential, architectural and specialty sheet metal and air conditioning construction in public and private markets throughout the United States.

On behalf of SMACNA, we share our endorsement of Jessica Looman, and her work as Administrator of the US Department of Labor's Wage and Hour Division (WHD). Ms. Looman was confirmed by the Senate October 25th after being reported by a bipartisan HELP Committee vote to the Senate floor March 28th due to her outstanding qualifications, experience, fairness, and judgement while serving at the Department of Labor as well as in many highly important private and public service positions at the local, state, and federal levels.

We well understand that many inside the construction industry and in other market sectors, as well as Members of Congress, have opposed many, if not most every, labor, bidding enforcement, wage and employee classification law going back decades. Further, a nearly equal level of opposition has been displayed for countless contractor qualification, compliance and performance standards. Nevertheless, if one puts partisan politics aside, a fair assessment will recognize the value of labor, management and project standards and their enforcement on behalf of project owners and taxpayers.

To Administer this monumental and growing assignment we have endorsed Director Looman, an outstanding nominee with decades of legal and public service experience at many private and public sector levels. **For her record of accomplishment, fairness and professionalism, she was endorsed by many private sector employers and their organizations as well as a variety of national construction associations. These firms and associations each recognize the essential enforcement role of the Wage and Hour Division.** In consideration of the booming private and public contracting economy across all areas of the nation, we would suggest the Wage and Hour Division's enforcement resources, as well as staffing should be expanded to meet the challenges of a growingly complex project portfolio.

As many on the subcommittee would acknowledge, the Administrator's fair but vigilant oversight and enforcement role is of vital importance to both contractors and their workforce seeking a quality driven construction worksite where the rules are clear, and the law enforced with penalties for misconduct and contracting fraud. Fraud and misconduct harmful to everyone on the project site – subcontractors and workers alike. Corporate contracting firms, most often with the Building Trades as a partner, is now investing record levels of private funds to jointly expand workforce development and upscale Registered Apprenticeship Programs (RAPs). Especially in a booming construction contracting economy. This boom is directly related to bipartisan Congressional measures enacted into law in recent years, the construction industry is experiencing a record number of infrastructure, CHIPS, healthcare, manufacturing, and related project. Most significant, are the historic number of private sector technology related “mega projects”, placing even greater demands on the Wage and Hour Division to oversee long established and reasonable workplace standards, federal contracting compliance rules, oversight on bidding and regulatory performance and quality standards for prevailing wage laws. The Wage and Hour Division and the construction industry is challenged as never before due to a skilled workforce shortage and the need for enforcing apprenticeship program quality in privately funded registered apprenticeship programs – long deemed the “Gold Standard” by bipartisan supporters in Congress and the White House.

Over many decades of reviewing candidates for federal appointments, SMACNA as a CEO member corporate trade association has very rarely endorsed a nominee for federal office. However, we make a special exception to support Jessica Looman to be WHD Administrator due to years of appreciation for

her dedication and ability as well as our first-hand experience viewing her fairness, judgement, and professionalism at the state and federal levels. Our member corporations have appreciated her work up close, from her service as Minnesota Commissioner of Commerce, Assistant and Deputy Commissioner of the Minnesota Department of Labor and later as Executive Director of the Minnesota State Building and Construction Trades Council.

Ms. Looman made significant progress in Minnesota to increase **private and public investment** in construction infrastructure, an effort **benefitting contractors, business and workers alike** as well as the Minnesota taxpayer. During tenure at the Minnesota and US DOL she actively supported increasing construction workforce training quality, public project safety and productivity. On these long ignored regulatory matters she has earned the trust of our industry and introduced policy proposals important to our thousands of firms and their workforce.

The Wage and Hour Issue Portfolio: Necessary Reform of Long Ignored Rules

1. **Davis-Bacon Reform Rule** – SMACNA expressed our strong support for the recently issued and long overdue final rules to modernize and simplify compliance with the Davis-Bacon Act. By supporting the Department of Labor’s Wage and Hour Division multi-year effort to produce comprehensively updated final rules, you are supporting construction workforce training quality, public project safety and productivity. Prevailing wage laws and registered apprenticeship standards are important to our thousands of public and private market contracting firms and their hundreds of thousands of highly skilled construction trades employees. SMACNA members and allied quality driven contractors understand that any major investment in public infrastructure should recognize the extreme importance of a highly trained and skilled workforce. Enforcing Federal, state, and local prevailing wage laws encourage employers to:

- Pay a locally prevailing wage and offer health care coverage to their employees and their families.
- Provide for skilled construction careers as well as the future retirement of their employees, and
- Make significant essential investments in DOL **registered apprenticeship** training and safety programs.

Our members have many decades of experience helping build and maintain the most complex Federal projects, including those on Capitol Hill and throughout the Executive Branch. SMACNA member firms understand the merit in creating a skilled workforce by providing quality wages, benefits, and training. Further, we know that the payment of prevailing wages and benefits **should not be cast as a union versus nonunion issue**. According to Department of Labor reports, most Davis-Bacon wage decisions have paid less than the union wage. First-rate construction industry firms should not be disadvantaged when bidding federal projects against unscrupulous competitors because they offer their highly skilled and trained employees locally prevailing wages, health care, pensions and invest in the “Gold Standard” in registered apprenticeship programs.

Again, we strongly support DOL’s long overdue modernization and simplification of the Davis-Bacon Act rules and other legislative efforts to enhance compliance with the Act’s prevailing wage standards. Enforcing prevailing wage and benefit standards better serves construction quality, productivity, skilled workforce training and safety on all public projects. The Federal government, the taxpayer and quality contractors on federal projects deserve no less.

2. **Independent Contractor Reform Rule** – SMACNA 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**

worker misclassification - Misclassifying workers is an unscrupulous and anti-competitive business practice in the construction industry that many states have policed to reclaim substantial lost tax revenues and worker benefits.

Given the long-standing and 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 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 Republican and Democratic led 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 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 give 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.

The bottom line: 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 competition the new rules provide, 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.**

- 3. Registered Apprenticeship Reform Draft Rules** - While many of our members are of significant size and provide a wide scope of expert construction services on major projects, most of these contractors operate family-owned businesses with a highly skilled workforce. This industry profile explains why these firms, providing expertise far above industry standards, rely on their local Department of Labor (DOL) registered apprenticeship programs to provide them with quality certified skilled workers.

Simply put, DOL has reviewed this crisis in the skilled labor marketplace and the considered owner-developer concerns and proposed long overdue RAP reforms. The proposal also affirms Registered Apprenticeship programs have a proven track record of getting workers into good-paying jobs with a benefit structure befitting skilled long-term careers not just transient or temporary work. The proposed changes would reinforce the principles of a changing construction workforce. It reflects today's and the future's workforce featuring reforms to worker diversity, equity, inclusion, and accessibility, and extend worker protections for apprentices across the industry sectors now benefiting from Registered Apprenticeships.

SMACNA has long been a champion of National Apprenticeship standards over decades of supporting and investing far above the industry standard in registered apprenticeship programs (RAPs). Along with other quality contractors, these extraordinary investments will help alleviate the shortage of highly skilled workers in the face of an increasing number of national construction projects. Decades ago, it was clear that a skilled labor crisis was coming and was caused by an insufficient commitment to registered apprenticeship training investment across too much of the construction industry for far too long. In addition, there has been a persistent aversion to investing in job training in any formal or consistent manner outside the organized construction employer sector. These corner-cutting and improvised sham training efforts by non-union contractors opposing the registered apprenticeship model have noticeably impacted workforce supply and quality.

Without question, the industry's ability to meet ever changing design complexities, and owner demands for project excellence have been and continue to be compromised.

On December 14th the Department of Labor took a significant step in the right direction by announcing a notice of proposed rulemaking that would make the following enhancements to apprenticeship programs:

- Strengthening of labor standards, quality, and worker protections by making occupational skills and training more portable, enhancing alignment with postsecondary education, and providing better performance data.
- Better defining roles for State Apprenticeship Agencies and other stakeholders within the National Apprenticeship System.
- Codifying the Office of Apprenticeship's role for national leadership, promotion, and standards.
- Promoting apprenticeship pathways, including pre-apprenticeship and apprenticeship readiness programs, by expanding performance and data requirements to improve accountability, transparency, and program outcomes.

- Creating a student-centric model of Registered Apprenticeship, called Registered Career and Technical Education Apprenticeship designed to make them more seamless for full-time high school and community college students to enroll in a Registered Apprenticeship. This approach is modeled after high-quality youth apprenticeship systems in states across the country.

SMACNA contractors and allied quality driven contractors have invested billions of dollars of private funds to support even greater amounts of resources to provide their employees with the highest quality certified training in a safe environment. This is training that allows workers to not only graduate after acquiring first-rate marketable skills but forges the path to a lifelong career in the ever-complex construction industry. Further, we offer a leading pay and benefits package appropriate for attracting a highly skilled and trained workforce. More than 10,000 apprentices are registered in affiliated training facilities in the United States and Canada.

The registered apprenticeship programs sponsored by SMACNA contractors and their SMART union labor counterparts, had a national and local combined training investment totaling hundreds of millions of dollars invested in training, infrastructure, and instructors with more than 14,000 pre and indentured apprentices being trained as of the beginning of 2023. These apprentices work for thousands of SMACNA firms, all with a substantial investment in public works projects involving energy savings, facility energy management and residential, commercial, public, and industrial energy system service, construction, and efficient retrofits.

Based upon our extensive and long-term involvement in the registered apprenticeship programs nationwide we believe these standards are vital to future growth. Collectively, the changes will ensure that apprentices receive broad-based, quality training that will provide them with marketable skills for their entire careers and further the DOL’s goal of “rebuilding the middle class” and “connecting a diverse workforce to family-sustaining jobs.” SMACNA is but a small part of the vast network of certified and registered apprenticeships already available in the construction industry. As noted, by DOL statistics, construction represents 48% of all registered apprenticeship programs in the United States.

Only by expanding the support for registered apprenticeships can the industry meet the demand for top-flight contractors employing a highly skilled and trained workforce based upon the registered apprenticeship model, considered the ‘gold standard’ for training across the globe.”

4. **Project Labor Agreement Executive Order** - SMACNA supports the appropriate use of construction project labor agreements (PLAs) on public construction and strongly supports their federal construction contract use. The recent Biden Administration Final Rule implementing the EO gives government owners the flexible authority to use PLAs when appropriate for federal construction projects exceeding \$35 million **with certain exemptions**. It would also boost the skilled labor workforce and direct the Labor and Defense departments and OMB to create a strategy to train federal contract officers on how to implement the order.

Key facts behind our endorsement of the President’s Final Rule / Executive Order:

- **PLAs are most often used in the private sector where corporate budget and scheduling decisions are highly scrutinized:** PLAs are valued by experienced and cost-conscious owners and construction contractors in the private sector large and small, pro-union and anti-union. This has been true in the private sector for over 100 years. Private and public-sector PLAs offer a valued and systematic process for methodical planning and scheduling to ensure cost-effective construction projects, allowing more accurate bidding and lower costs. Simply put, they work.

- **Public sector PLAs do not discriminate against nonunion construction contractors or workers:** In the private sector, owners are free to select union-only PLAs to build their projects taking advantage of more skilled workers as an economic benefit. However, on public projects, once a PLA has been negotiated, **both union and nonunion contractors are free to bid** on the work as they do on any other construction projects. Negotiated government PLAs allow nonunion firms to bring their own top employees without discrimination. Federal PLAs are open to all bidders, as PLA opponents know. **To claim federal PLAs are union-only simply and knowingly false.**
- **PLAs help local communities boost registered apprenticeship programs and the skilled labor workforce at a time of historic shortages and allow for workforce screening and background credentialing for added project security:** PLAs benefit the local community by guaranteeing skill training and work opportunities to the local workforce on each complex public construction project. The hiring hall process, which cannot discriminate against the nonunion worker, creates the benefit of project security screening, an important government priority for all federal government projects, especially defense, homeland security and other federal infrastructure facilities.

SMACNA's position supports the option of considering and utilizing public sector PLA's when deemed in the best economic interest of the project owner on behalf of the taxpayer. **Economics, not ideology, should drive PLA decisions.** Therefore, **we support the President's Final Rule implementing the Executive Order** and ask Congress to adopt their use to expand the use of PLAs on federal construction to boost the skilled workforce via registered apprenticeship programs.

Summary

SMACNA has long viewed Ms. Looman as a highly competent, first-rate administrator supportive of a construction industry featuring a growing skilled workforce led by quality driven firms that play by the rules for their workforce and the taxpayer. For that reason and many more, we endorsed Jessica Looman to be the Administrator of the Wage and Hour Division. **In our view, she has demonstrated since her nomination that there is no more qualified and experienced person to lead the Wage and Hour Division.**

Again, we applaud the Administrator's performance to date in her highly challenging but essential enforcement role at the Department of Labor. Most importantly, we urge that the Congress recognize the record economic activity they helped create by passing the infrastructure, CHIPS and Science Act, IRA and related Military Construction programs places massive additional demands on the Wage and Hour Division. These substantial and new oversight responsibilities require far greater resources to meet the rapidly expanding construction economy. Widespread private and public mega project activity and a crisis need for greater workforce skill enhancement for registered apprenticeships both demand far more support, not less for the agencies impacted, including the Wage and Hour Division.