Questions for the Record for Jessica Looman

Subcommittee on Workforce Protections Hearing:

"Examining the Policies and Priorities of the Wage and Hour Division"

February 14, 2024

Chairwoman Virginia Foxx (R-NC)

Independent Contractor (IC) Final Rule

1. *On April 19, 2023, the Workforce Protections Subcommittee heard from industry experts and ICs on the Biden administration's proposed IC rule. One witness from Southern California knew all too well the effects of her state's devastating AB5 law, which President Biden has cited as his model. The Subcommittee heard accounts of children's theaters closing, local bar bands being unable to perform, and court reporters suddenly losing their assignments, among many others.* ***Now that the Wage and Hour Division's (WHD) IC rule is final as of January 10, 2024, what has the Department of Labor (DOL) done to ensure that the catastrophic impacts seen in California are not made national by this rule?***

The *Employee or Independent Contractor Classification Under the Fair Labor Standards Act* final rule revises the Department's guidance on how to analyze who is an employee or independent contractor under the federal Fair Labor Standards Act (FLSA). Specifically, the final rule rescinds the 2021 Independent Contractor Rule that was published on January 7, 2021 and replaces it with guidance for how to analyze the employee or independent contractor classification that aligns with the FLSA as consistently interpreted for decades by the Supreme Court and U.S. Courts of Appeals.

Unlike some states, the Department's final rule does not adopt an "ABC" test, which permits an independent contractor relationship only if all three factors in a three-factor test are satisfied. Under the final rule, the Department relies on the long-standing multifactor "economic reality" test used by courts to determine whether a worker is an employee or independent contractor under the FLSA. This test relies on the totality of the circumstances where no one factor is determinative.

2. *An economic analysis by the Chamber of Progress showed the dangers of reclassifying ICs as employees. Among other findings, the analysis showed that a national rule reclassifying ICs as employees could result in the loss of direct income for an estimated 3.4 million workers and a total of 4.4 million workers involuntarily reclassified.* ***What steps has WHD taken to mitigate such devastating impacts from the final IC rule?***

The Chamber of Progress document referenced above discusses the potential impacts of adopting a nationwide ABC test and therefore, its analysis is not applicable to the Department's final rule. The Department's final rule *Employee or Independent Contractor Classification Under the Fair Labor Standards Act* does not adopt an "ABC" test. Further, because the final classification rule aligns with longstanding analysis, the Department does not expect widespread reclassification of workers as a result of this rule. The rule reflects the legal analysis that courts have long applied in distinguishing between employees and independent contractors under the FLSA.

3. *An analysis done by the Chamber of Progress shows that for the estimated 1.5 million workers who choose to work as ICs because of health, family responsibilities, and other reasons that prevent them from working as a traditional W-2 employee, involuntary reclassification would cost these workers $31.4 billion. How has DOL has taken this cost into account when finalizing and implementing the final IC rule?*

The Chamber of Progress document referenced above discusses the potential impacts of adopting a nationwide ABC test and therefore, its analysis is not applicable to the Department's final rule. The Department's final rule *Employee or Independent Contractor Classification Under the Fair Labor Standards Act* does not adopt an "ABC" test. Further, the Department's final rule is not expected to result in widespread reclassification of independent contractors. The rule reflects the legal analysis that courts have long applied in distinguishing between employees and independent contractors under the FLSA.

4. *DOL states in its final IC rule that one of the factors the agency will consider when assessing whether a worker is an IC or employee is whether the work performed is an integral part of the potential employer's business.* ***Please provide one or more examples in which DOL would find a purported IC not integral to the business where the company at issue is a registry, referral, or a similar business that connects individual service providers to individuals seeking services.***

The FLSA's economic reality test involves a fact-based determination about specific individuals and the work they are performing. One of the six factors that the *Employee or Independent Contractor Classification Under the Fair Labor Standards Act* final rule applies to analyze employee or independent contractor status under the FLSA is the extent to which the work performed is an integral part of the potential employer's business. This factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the potential employer's principal business. This factor weighs in favor of the worker being an independent contractor when the work they perform is not critical, necessary, or central to the potential employer's principal business.

The final rule's analysis may be applied to workers in any industry, but the Department is not able to prejudge a situation without knowing all the facts and considering them in the context of the economic reality analysis.

As with the other enumerated factors of the economic reality test, the integral factor is just one area of inquiry that is considered along with the other factors to analyze whether a worker is economically dependent on the employer for work and is therefore an employee, or whether the worker is in business for themselves and is therefore an independent contractor.

5. *The final IC rule's change of the interpretation of "integral factor" will cause disproportionate harm to small businesses.*
    a. ***Does WHD consider integral factor to be applied differently to small versus larger businesses because of differences in resources?***
    b. *Smaller companies may need to rely on independent workers more for necessary services, whether it be information technology, advertising, or accounting.* ***Would DOL take this into account in the integral factor analysis and, if so, how would it evaluate the circumstance differently?***

The guidance provided by the *Employee or Independent Contractor Classification Under the Fair Labor Standards Act* final rule aligns with longstanding judicial precedent on which employers have previously relied to determine whether a worker is an employee or independent contractor under the FLSA.

The Department recognizes the important role small businesses play in our economy and carefully considers all comments it receives, including those made by small businesses and their membership associations, as well as potential regulatory alternatives when drafting any final rule. WHD published a Small Entity Compliance Guide to assist small businesses in understanding the economic realities test under the Department's final rule. The Small Entity Compliance Guide provides an overview of the final rule and examples of each of the six factors, including the integral factor, to help small businesses understand how to analyze who is an employee or independent contractor under the FLSA.

To further illustrate how the integral factor may apply, consider a small farm that is in the business of farming tomatoes and pays an accountant to provide non-payroll accounting support, including filing its annual tax return. This accounting support is not critical, necessary, or central to the principal business of the farm, and thus the accountant's work is not integral to the business.

As with the other enumerated factors of the economic reality test, the integral factor is just one area of inquiry that is considered along with the other factors to analyze whether a worker is economically dependent on the employer for work and is therefore an employee or whether the worker is in business for themselves and is therefore an independent contractor.

6. *A December 2023 study from the Government Accountability Office (GAO) found that the federal government lacks sufficient information on independent workers. Among other findings, the report notes that "policymakers do not have reliable and consistent data with which to make key decisions concerning these workers" and recommends that DOL "lead efforts to improve the measurement of nonstandard and contract work."* ***What steps is DOL taking to improve data collection on independent work and fulfill GAO's recommendation?***

On January 16, 2024, Karin Orvis, Chief Statistician of the United States invited members of the Interagency Council on Statistical Policy to participate in the OMB-established Work Arrangements Committee (WAC). BLS agreed to chair the newly established committee and carry out the management of the committee's work. Currently 12 agencies are participating in WAC. Additionally, BLS plans on publishing results from the 2023 Contingent Worker Supplement to the Current Population Survey before September 30, 2024.

7. *Colorado, the District of Columbia, Florida, Maryland, and Minnesota are all taking particularly aggressive approaches against the IC model, harming many workers who choose to take part in it.* ***What role has WHD played to encourage states to take such aggressive action against the IC model?***

WHD's *Employee or Independent Contractor Classification Under the Fair Labor Standards Act* final rule revises the Department's guidance under the federal FLSA. The Department's rule does not address other federal, state, or local laws.

8. *DOL states in its final IC rule that it may consider additional factors in determining whether a worker is an employee or IC under the Fair Labor Standards Act (FLSA) if they are relevant to the ultimate question of whether the workers are economically dependent on the employer for work or are in business for themselves. In the rule, DOL notes that it "declines to identify in this final rule any particular additional factors that may be relevant."*
    a. ***Do you intend to provide any additional guidance to employers that would provide details on these additional factors?***
    b. ***Can you provide any examples from past enforcement or otherwise that would provide additional details?***

Under the *Employee or Independent Contractor Classification Under the Fair Labor Standards Act* final rule, and as the Supreme Court and Court of Appeals have indicated, additional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themself, as opposed to being economically dependent on the potential employer for work. This guidance is similar to guidance provided in the Department's 2021 Independent Contractor Rule and is consistent with judicial precedent. The Department recognizes that, in many instances, consideration of additional factors will not be necessary because the relevant factual considerations can and will be considered under one or more of the enumerated factors.

The Department is committed to providing the public with clear and easy-to-access information on how to comply with federal employment laws. WHD has provided several compliance assistance tools for this final rule, including a Small Entity Compliance Guide, Frequently Asked Questions, and Fact Sheet: Employee: Employee or Independent Classification under the Fair Labor Standards Act (FLSA). WHD will continue to assess potential guidance, resources and materials that would be helpful and welcomes input from the Committee and the public.

9. *DOL states in the new IC rule that one of the factors the agency will consider when assessing whether a worker is an IC or employee is whether the work performed is an integral part of the potential employer's business. DOL says "[t]his factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the potential employer's principal business."*
    a. ***Please provide examples of work performed by ICs that would not meet this definition.***
    b. ***Please describe any cases where DOL has found against employment status when applying this factor***

As noted in an earlier response, the extent to which the work performed is an integral part of the potential employer's business weighs in favor of the worker being an independent contractor when the work they perform is not critical, necessary, or central to the potential employer's principal business. As with the other enumerated factors of the economic reality test, the integral factor is just one area of inquiry that is considered along with the other factors to analyze whether a worker is economically dependent on the employer for work and is therefore an employee or whether the worker is in business for themselves and is therefore an independent contractor.

To further illustrate how the integral factor may apply, consider a coffee shop's "principal" business is making, selling, and serving coffee. A coffee shop might need a window washer to

ensure clear views and a clean appearance for customers, but the window washer is not generally integral to the principal business of the coffee shop. Only work that is critical, necessary, or central to the potential employer's principal business is integral.

10. *Employers need clarity, predictability, and responsiveness from WHD when classifying employees.* ***Under the "totality of circumstances" analysis where every factor has the same weight, how will an employer know it has properly classified a worker as an IC before WHD confirms the classification?***

The *Employee or Independent Contractor Classification Under the Fair Labor Standards Act* final rule provides guidance on employee or independent contractor status that is consistent with decades of case law interpreting the FLSA. The final rule's analysis may be applied to workers in any industry and will be easily accessible in the Code of Federal Regulations (CFR). For these reasons, the final rule provides helpful guidance for workers and businesses alike. The final rule and additional WHD compliance assistance resources provide detailed information regarding the application of the economic realities analysis.

The Department is committed to providing the public with clear and easy-to-access information on how to comply with federal employment laws and has provided several compliance assistance tools for this final rule. WHD will continue to assess potential guidance and resources that would be helpful and welcomes input from the Committee and the public.

11. *I understand DOL's priority is identifying ICs who should have been classified as employees.* ***Would WHD ever question an employer classifying someone as an employee, i.e., would WHD suggest that the person should have been classified as an IC? Under what circumstances?***

It is fundamental to the Department's obligation to administer and enforce the FLSA that workers who should be covered under the Act are able to receive its protections. The Department recognizes that there is a wide assortment of independent contractors across industries and believes that the guidance in this rule provides an analysis for appropriately classifying both employees and independent contractors.

12. *Vague terminology can cause problems for businesses that already struggle to comply with existing federal regulations.*
    a. ***Since the term "reserved right to control" under the control factor is not defined in the IC rule and has not been used before, what does it mean?***
    b. ***Does WHD plan to issue guidance to define the term "reserved right to control"?***

The *Employee or Independent Contractor Classification Under the Fair Labor Standards Act* final rule provides guidance regarding the multi-factor economic reality analysis, including the "nature and degree of control" factor. This factor considers the potential employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship. The final rule explains how a potential employer's reserved right to control the work may affect the behavior of the worker in their performance of the work and thus may be indicative of the reality of the economic relationship between the worker and the potential

employer. Further, the final rule states that the fact that a potential employer's reserved right to control might indicate an employment relationship does not preclude a finding of independent contractor status based on other factual indicators of the economic reality of the relationship.

The Department is committed to providing the public with clear and easy-to-access information on how to comply with federal employment laws. WHD will continue to assess potential guidance and resources that would be helpful and welcomes input from the Committee and the public.

13. *During the listening sessions WHD held before the IC regulation was proposed, there was an almost universal chorus of people asking WHD to not issue a regulation that would make maintaining IC relationships harder. Yet, that is exactly what the WHD did.* ***What was the value of the listening sessions if WHD ignored everything it heard?***

In developing the *Employee or Independent Contractor Classification Under the Fair Labor Standards Act* final rule, WHD considered input provided by stakeholders prior to the development of its proposal and received approximately 55,400 comments during the public comment period that followed the proposal's issuance in October 2022. The input and comments were provided by a diverse array of stakeholders, including employees, self-identified independent contractors, businesses, trade associations, labor unions, advocacy groups, law firms, members of Congress, state and local government officials, and other interested members of the public, and commenters expressed a wide variety of views on the merits of the Department's proposal. Several adjustments were made in the final rule after careful consideration of the comments received.

The Department does not expect widespread reclassification as a result of this rule because the Department is adopting guidance in this rule that is essentially identical to the standard it applied for decades prior to the 2021 IC Rule, derived from the same analysis that courts have applied for decades and continued to apply following publication of the 2021 IC Rule.

14. *The Federal Trade Commission (FTC) now considers the improper use of independent contractors to be an unfair trade practice.*
    a. ***If the FTC determines that a company improperly classified someone as an IC but WHD determines the classification was proper, would WHD defend the company's classification?***
    b. ***How would you foresee resolving a conflict between the FTC and WHD?***

WHD enforces the Fair Labor Standards Act (FLSA) and provides guidance for the analysis of employee or independent classification under the FLSA. WHD defers to the Federal Trade Commission on what it determines to be an unfair trade practice.

15. *The Biden administration is taking an "all-of-government" approach to undermine independent work opportunities. In addition to DOL's recently finalized rule, the National Labor Relations Board's (NLRB) recently issued decision in The Atlanta Opera, Inc. adopts a flawed classification standard rejected by federal courts. Meanwhile, the FTC has indicated it is interested in injecting itself into worker classification matters—an area where it has no jurisdictional history and zero expertise. DOL itself has signed*

memoranda of understanding (MOUs) with the FTC and the NLRB to collaborate on enforcement related to the misclassification of employees, among other things. ***Can you provide more information on your engagement with the FTC and the NLRB with respect to worker classification, including examples of industries you have targeted and pursued enforcement actions against under these MOUs?***

WHD enforces the Fair Labor Standards Act (FLSA) and provides guidance for the analysis of employee or independent classification under the FLSA. WHD prioritizes its enforcement efforts in lower-paid industries where wage and hour violations are more likely to occur, but where workers are less likely to make complaints.

WHD has entered into an MOU with the NLRB to encourage greater coordination between the agencies through relevant information sharing, joint investigations and enforcement activity, cross-training, and joint education and outreach.

Because the Department and the FTC share an interest in protecting and promoting competition in labor markets and promoting the welfare of American workers, the agencies entered into an MOU on September 21, 2023, which includes provisions addressing coordination on training, outreach, and education efforts, where appropriate.

Proposed Overtime Rule

16. *During a Subcommittee on Workforce Protection hearing on November 29, 2023, the Subcommittee heard testimony about the proposed overtime rule published in the Federal Register on September 8, 2023, stating, "[F]rom the employer's perspective, moving a worker from exempt to non-exempt takes away scheduling flexibility, reduces labor cost predictability, and generates a less desirable set of employee behaviors."* ***Considering employers have managed countless challenges such as persistent inflation these last few years, how can they also be expected to rewrite their payroll structure to account for the changes contained in WHD's proposed overtime rule?***

The FLSA generally requires that covered employers pay employees at least the federal minimum wage (currently $7.25 an hour) for all hours worked, and overtime pay of at least one and one-half times an employee's regular rate of pay for all hours worked over 40 in a workweek. However, section 13(a)(1) of the FLSA exempts bona fide executive, administrative, or professional (EAP) employees from both of these wage and hour protections.

On April 26, 2024, the Department published a final rule, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, which will take effect on July 1, 2024. The final rule updates and revises the regulations issued under section 13(a)(1) of the Fair Labor Standards Act implementing the exemption from minimum wage and overtime pay requirements for executive, administrative, and professional (EAP) employees. Revisions include increases to the standard salary level and the highly compensated employee total annual compensation threshold, and a mechanism to regularly update these earnings thresholds using current earnings data and the methodologies in effect at the time of each update.

In the final rule, the Department discussed that currently, EAP exempt employees account for about 24 percent of the U.S. labor force; accordingly, the Department expects that most

employers of EAP exempt workers also employ nonexempt workers. Those employers already have in place recordkeeping systems and standard operating procedures for ensuring employees only work overtime under employer-prescribed circumstances. Thus, such systems generally do not need to be invented for managing formerly exempt EAP employees. The Department has also strived to minimize respondent recordkeeping burden by requiring no specific form or order of records under the FLSA and its corresponding regulations. Moreover, employers would normally maintain the records under usual or customary business practices.

17. *The American Action Forum has estimated that the proposed overtime rule would cost $6,000 per employee or roughly $18.8 billion annually.* ***Where will these billions of dollars come from?***

In the *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees* final rule, the Department estimated that total annualized direct employer costs over the first 10 years would be roughly $803 million with a 7 percent discount rate. This rulemaking will also give employees higher earnings in the form of transfers of income from employers to employees. The Department estimated annualized transfers to be $1.5 billion, with a 7 percent discount rate. Most of these transfers will be attributable to wages paid under the FLSA's overtime provision; a smaller share will be attributable to the FLSA's minimum wage requirement. These transfers also account for employers who may choose to increase the salary of some affected workers to at least the new threshold so that they can continue to use the EAP exemption. Further, as noted in Table 12 of the final rule, 69% of the affected workers who will gain overtime protection do not work overtime hours.

18. *Many areas of the country would be devastated by a dramatic increase in the minimum salary threshold included in WHD's proposed overtime rule.* ***Please describe what research WHD conducted on the impact the proposed rule on low-income areas.***

In the *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees* final rule, to ensure the proposed standard salary level would not be too high in any region of the country, the Department used earnings in the lowest-wage Census Region (currently the South) to set the salary level. The final rule provides an analysis of the effects of the rule by region and industry.

19. *The proposed overtime rule includes a requirement to increase the minimum salary threshold automatically. However, in doing so, DOL would be able to implement these increases without obtaining feedback from the regulated community, including small businesses around the country that would be disproportionately affected by these changes.*
    a. ***Why does WHD believe seeking stakeholder input is unnecessary to increasing the salary threshold?***
    b. ***Does WHD believe stakeholder input would not benefit the agency in increasing the salary threshold?***

c. What are the legal justifications for not undergoing the formal notice-and-comment process as mandated by the Administrative Procedure Act when increasing the salary threshold?

The updating mechanism in the *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees* final rule will allow for regular and more predictable updates to the earnings thresholds, which will benefit both employers and employees and better fulfill the Department's statutory duty to define and delimit the EAP exemption by preventing the erosion of those levels over time. Through the updating mechanism, the Department can timely and efficiently update the standard salary level and the highly compensated employee total annual compensation requirement based on the methodology used to set each threshold that is in place at the time of the update.

The Department believes that input from stakeholders with respect to the proposed salary level methodologies and the updating mechanism is essential, which is why the Department specifically welcomed comments on all aspects of the proposed salary level methodology and the proposed updating mechanism in the proposed rule. The Department received over 33,000 comments during the comment period. The Department takes seriously its obligation to consider all "written data, views, or arguments" submitted by commenters and carefully considered comments submitted in response to the proposed rule in developing the final rule.

The Department's authority to update the salary level tests for the EAP exemption is grounded in section 13(a)(1), which expressly gives the Secretary broad authority to define and delimit the scope of the exemption. The Department's final rule explained that an updating mechanism would better fulfill its statutory duty to define and delimit the EAP exemption because it will maintain the effectiveness of the salary levels, which have previously become eroded during large gaps between regulatory updates.

20. WHD chose to apply its new overtime proposed rulemaking to Puerto Rico.

a. What data and research were used to make that decision?

b. What deliberations were given to the fact that Puerto Rico has a lower cost of living than other areas of the country?

c. What outreach did you conduct to employers in Puerto Rico in industries that will be hit especially hard by this change, such as restaurants and retail?

d. During that outreach, did any employers raise concerns with WHD about the application of the overtime regulations to Puerto Rico's economy? If so, what did those employers say, and why did WHD choose to ignore their concerns?

On April 26, 2024, the Department published a final rule, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, which will take effect on July 1, 2024. The Final Rule does not finalize proposals to raise the salary threshold for workers in four U.S. territories that are subject to the federal minimum wage—Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI). The rule also doesn't finalize updates to the special salary levels for American Samoa and the motion picture industry in relation to the new standard salary level. The Department will address these aspects of its proposal in a future final rule.

Child Labor

21. *As you are aware, illegal aliens often submit false identification when securing employment. In some cases, this fraud has led to minors being employed in dangerous jobs in violation of the FLSA.* ***What has DOL done to work with good-faith employers or to provide compliance assistance to employers who may need more guidance on how to verify the age of prospective employees and how to prevent minors from being unknowingly employed in their facilities?***

Providing guidance to employers is a major component of the Department's work, and WHD maintains a range of tools to help employers understand their legal obligations. This includes an "elaws Advisor" on child labor rules under the FLSA and a database of state child labor laws that, among other things, discusses requirements in some states that employers receive work permits from the state in order to employ minors. WHD also engages in thousands of outreach events and programs annually. Further, the Department has a "YouthRules!" initiative that includes employer self-assessment tools, best practices, and resources and materials for employers who employ young workers. WHD also partners with business associations, schools, and other government entities to provide guidance on federal child labor standards to parents, educators, employers, and young people seeking employment.

WHD Budget and Enforcement

22. *I am concerned about your agency's enforcement results for violations of the FLSA. The Biden administration's track record is poor in this regard. In Fiscal Year (FY) 2019, the last full year before COVID, the Trump administration recovered back wages for more than 95,000 workers with minimum wage violations. Last year, WHD recovered back wages for about a third of that number of employees—only 31,150 workers. Over the same time, WHD recovered back wages for nearly 45 percent fewer workers with overtime violations.* ***WHD's budget is more than 13 percent higher than it was in FY 2019, and it has about the same number of full-time equivalent employees. Why is WHD coming up short in enforcing these violations?***

WHD enforcement staff and outreach specialists achieved significant results for America's workers in FY23. In the last fiscal year, WHD recovered more than $274 million in back wages and damages for more than 163,000 workers nationwide. This included more than 31,000 employees receiving more than $20 million in back wages for minimum wage violations.

WHD uses comprehensive, data-driven strategies while prioritizing its limited resources towards those sectors of the economy where large numbers of lower-paid workers are most vulnerable to labor standards violations, including children employed in violation of federal child labor laws. As a result, back wage recovery is comparatively lower than it would be in cases involving big earners – and for key, resource-intensive Departmental priorities such as enforcement of child labor laws, there may be no back wages owed at all.

23. *According to its Congressional Budget Justification, in FY 2022, WHD revised its methodology to include an "equity measure." In FY 2023, WHD discontinued setting performance targets for concluding compliance actions. By making these changes, WHD has injected subjectivity and uncertainty into the performance measures it provides to the*

public. ***How can this Committee and Congress make informed policy decisions about WHD following these changes?***

WHD uses a balance of performance measures to advance evidence-based strategies focused on achieving agency priorities and outcomes. Through a robust, data-informed strategic planning process, WHD works to ensure its performance measures align with DOL priorities, drive continuous improvement, and maintain the focus on impactful enforcement. WHD provides summary data about enforcement activities on its "By the Numbers" webpage and also offers information about investigations on the DOL's enforcedata.dol.gov website.

Davis-Bacon Act

24. *The Davis-Bacon Act requires most contractors and subcontractors that perform work on federally funded or assisted construction contracts to pay government-determined prevailing wage and benefit rates. Unfortunately, regulations implementing these requirements are inherently flawed and often fail to produce accurate, prevailing, or timely rates. DOL published a final Davis-Bacon rule on August 8, 2023, which not only fails to address these problems but which also undoes prior reforms tos the regulations.*
    a. ***Why did DOL take flawed regulations and make them worse with the new Davis-Bacon rule?***
    b. ***Will you commit to reconsidering and revising the new Davis-Bacon regulations to make necessary changes such as reforming the broken wage-survey process?***

The Department's final rule, *Updating the Davis-Bacon and Related Acts Regulations,* provides greater clarity to contracting agencies, contractors, and workers, and will enhance the effectiveness and consistency of the administration and enforcement of the DBRA in the modern economy to better carry out Congress' intent, given that the last comprehensive DBRA regulatory review was nearly 40 years ago. In that time, Congress has added numerous new Related Act statutes, there have been an increased number of federally funded construction projects, and the federal contracting system has undergone significant changes.

The Department held 23 listening sessions in 2021 as part of its Davis-Bacon Initiative and spoke with over 50 contractor associations, contractors, unions and contracting agency representatives about their ideas to improve the Davis-Bacon program. The final rule updates the regulations to reflect those concerns and other significant changes in federal contracting and the construction industry over the past several decades.

The Department welcomes input from the Committee, the regulated community, and the public on potential future regulatory and subregulatory actions.

25. *During the rulemaking process to revise the Davis-Bacon regulations, many commenters raised concerns that the proposed revisions appeared to be aimed at ensuring that union wage rates prevail over true market rates that are paid to a majority of workers. By ensuring union wage rates prevail, DOL seems to be putting its thumb on the scale in favor of union over non-union contractors.*
    a. ***Can you assure the Committee this will not be the case?***
    b. ***Can you assure non-union contractors—whose workers represent more than 89 percent of the construction industry—that they will not be at a disadvantage when competing for federal construction contracts subject to Davis-Bacon?***

When conducting Davis-Bacon wage surveys, the agency notifies contractors, union or non-union, and any other interested parties and strongly encourages participation in construction wage surveys conducted by the Department. Through this voluntary survey process, the Department gathers wage rate data paid to workers performing work on construction projects in the local community. Using this survey information, WHD determines the local prevailing wage for the various classifications of construction workers.

Whether wage determinations are based on collectively bargained rates or on non-collectively bargained rates, both non-union and union contractors are on similar footing in that they are all required to pay at least the same specified minimum rates for any given project. Ultimately, prevailing wages that more accurately reflect local wages in their community will ensure that all contractors can compete in their own market.

26. *The Davis Bacon Act expressly requires that public contracts contain Davis-Bacon stipulations, but WHD's final rule automatically and retroactively imposes Davis-Bacon stipulations on contracts by operation of law even if the stipulations were not originally in the bid documents or contract.*
    a. ***How can DOL expect contractors to bid properly and compete on such projects and comply with such requirements when the procuring agency did not even know they were Davis-Bacon-covered projects?***
    b. ***Do you believe Davis-Bacon stipulations should be the procuring agency's responsibility and not the contractors' responsibility to figure out and ultimately clean up after the bid is awarded?***

Under the Davis-Bacon Act and the final rule, *Updating the Davis-Bacon and Related Acts Regulations,* contracting agencies are required to include the Davis-Bacon and Related Act (DBRA) labor standards contract clauses and applicable wage determination(s) in covered contracts. And while in most cases this requirement is properly met, the final rule ensures that when the clauses or wage determinations should have been included in a contract, but were not, they still apply. This operation of law provision ensures that, in all cases, a mechanism exists to enforce Congress' mandate that workers on covered contracts receive prevailing wages. The final rule expressly states that contracting agencies must compensate contractors for any increase in costs caused by the government's failure to properly incorporate the Davis-Bacon labor standards clauses or wage determinations in accordance with applicable procurement law.

27. *The Committee understands from GAO, DOL's Office of Inspector General, and witness testimony that WHD's Davis-Bacon prevailing wage surveys have long had critically low response rates, contributing to increased inaccuracy of WHD's wage determinations.* ***What efforts is WHD taking to increase contractor participation regarding wage surveys?***

The Department is making several efforts to increase participation in wage surveys. These efforts include simplifying the data submission process with the revised wage survey form, and deploying a comprehensive communications plan that involves issuing press releases, utilizing social media platforms, and increasing email and direct communication with stakeholders. Prior to and during the survey period, survey briefings are conducted for local stakeholders and

interested parties to provide guidance on the survey process to further increase survey participation.

28. *Since the Davis-Bacon final rule was issued in August 2023, it has become the subject of multiple lawsuits from the construction industry. WHD's failure to adhere strictly to the Davis-Bacon and Related Act statutes has invited this litigation, resulting in regulatory uncertainty and wasting valuable agency time and resources on a rule that the courts may ultimately reject.* ***Will WHD commit to withdrawing the final rule to avoid this considerable taxpayer expense?***

The final rule, *Updating the Davis-Bacon and Related Acts Regulations,* provides for regulatory changes that improve the Department's ability to administer and enforce DBRA labor standards more effectively and efficiently. As the first comprehensive regulatory review in nearly 40 years, the final rule will promote compliance, provide appropriate and updated guidance, and enhance the regulations' usefulness in the modern economy.

The final rule took effect on October 23, 2023. The Department has provided robust compliance assistance on the final rule, including webinars, FAQs, and educational engagements and materials to the construction industry, federal contracting agencies, and state and local partners.

29. *Many economists and stakeholders have recommended that DOL adopt Bureau of Labor Statistics (BLS) wage surveys when calculating Davis-Bacon prevailing wage rates because BLS uses scientific statistical sampling techniques to establish more accurate market wage rates. The final rule on Davis Bacon prevailing wage rates does not adopt these surveys but instead selectively updates certain non-collectively bargained prevailing wages based on BLS Employment Cost Index data. There are concerns this will result in the inflation of flawed wages that are collected using the current survey process.* ***Can you explain why WHD is willing to use BLS data for wage increases but not for establishing more accurate, scientific prevailing wage rates?***

The Department has considered multiple times whether it would be appropriate to base prevailing wage rates on BLS data, including during its recent Davis-Bacon rulemaking, but each time has concluded that relying on BLS data sources to determine prevailing wages is not preferable to conducting Davis-Bacon wage surveys. BLS survey data does not provide the wage and fringe benefit data necessary to establish prevailing wage rates in accordance with the Department's interpretations of the Davis-Bacon Act's statutory requirement that prevailing wages be based on the "corresponding class[es]" of workers on "projects of a character similar" within "civil subdivisions of the State" in which the work is to be performed.

The Davis-Bacon final rule includes a provision for periodically updating certain non-collectively bargained prevailing wage rates between surveys based on certain BLS data. The periodic updating process is used only to adjust prevailing wage rates after WHD has determined the underlying prevailing wage rates for specific classifications of workers on projects of a similar character within the relevant locality through the survey process.

30. *The Davis-Bacon final rule reversed a key reform to prevailing wage regulations by allowing WHD to identify wages as prevailing when there is no wage rate paid to a*

majority of workers, as long as at least 30 percent of workers are paid the same rate. ***What data is the WHD relying on to justify this change as improving the accuracy of prevailing wage rates, despite the change leading to the designation of prevailing rates that are not actually being paid to the vast majority of workers in a locality?***

As the Department explained in the final rule, *Updating the Davis-Bacon and Related Acts Regulations,* the use of the 30 percent threshold in the three-step process is more consistent with the language and intent of the Davis-Bacon Act. An analysis of wage determination data shows that the Department's reliance on average rates had increased significantly since the Department eliminated the 30 percent threshold from the prevailing wage determination process in 1982. The overuse of average wages is inconsistent with the Department's longstanding interpretation—across administrations for 85 years—that the word "prevailing" means a wage rate that is predominant or most widely paid.

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31. *The Small Business Administration's (SBA) Office of Advocacy has stated that WHD failed to comply with the Regulatory Flexibility Act (RFA) as it promulgated its tipped worker final rule on October 29, 2021. The RFA requires federal agencies to review rules that will have a significant economic impact on a substantial number of small entities. SBA's Office of Advocacy states that WHD improperly certified that the rule will not have a significant impact on a substantial number of small entities.* ***Given that the final rule will impact a substantial number of small entities, please explain DOL's reasoning for ignoring the RFA and moving ahead with the certification.***

The Department recognizes the important role small businesses play in our economy and is committed to engaging with them across our programs, including regulatory development, compliance assistance, and other outreach. The Department appreciates the importance of the RFA in assessing the potential impact of covered rules on small entities—and especially rules that are likely to have a significant economic impact on a substantial number of small businesses, small governmental jurisdictions, and small organizations—and in considering regulatory alternatives that could minimize such impact.

In its comment on the *Tip Regulations Under the Fair Labor Standards Act (FLSA)* Notice of Proposed Rulemaking, SBA Advocacy noted that it was concerned about DOL's certification that the rule would not have a significant economic impact on a substantial number of small entities, because it believed DOL "omitted some and underestimated other compliance costs . . . for small employers." As the Department explained in the Regulatory Impact Analysis accompanying the Final Rule, however, the Department believes that the changes and clarifications put forth in the final rule mitigate the SBA Office of Advocacy and commenters' concerns about compliance costs. The Department also established that the "minute to minute" tracking that the SBA Advocacy expressed concern about is not required by the rule and is not necessary to comply with the rule. Finally, the Department noted that some monitoring of duties would already have been in place as a result of the Department's 2018/2019 guidance, so the cost calculation for the final rule should take into account only the change from that guidance to the current rule.

32. *Policies that raise labor costs can often hurt workers by causing reduced hours, lost benefits, and job loss. For example, in July 2023, the Congressional Budget Office*

published its score for H.R. 4889, the Raise the Wage Act, which projects that by increasing the federal minimum wage to $17 per hour by 2029, up to 1.4 million jobs could be lost. Similarly, the final tip rule increases labor costs. ***How many job losses does DOL expect to occur due to its tip regulations final rule?***

The 2021 *Tip Regulations Under the Fair Labor Standards Act (FLSA)* Final Rule became effective on December 28, 2021. Since that time, employment has increased in both Drinking Places (Alcoholic Beverages) and Full-Service Restaurants, the two industries that the Department's economic analysis predicted to be most impacted by the Final Rule. As of January 2024, employment in Drinking Places increased by 65,300 since December 2021, and employment in Full-Service Restaurants increased by 363,900 since December 2021. *See* https://www.bls.gov/ces/.

Rep. Tim Walberg (R-MI)

1. *The rule on independent contractor status has many flaws.* ***The NPRM said that compliance with the legal obligations of other regulations or agencies could actually be considered as control over the individual and detrimental to independent contractor status.*** *Although defensive in its wording of this factor in the NPRM, the final rule recognized the confusion evident in the comments.*
   The Department further revised the regulation to state "actions taken by the potential employer that go beyond compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control."
   Many businesses in today's economy voluntarily go above and beyond relevant laws through self-regulation and industry codes and standards. Laws are viewed as a floor and not a ceiling to protect consumers. These systems are good for the companies, consumers and economy. ***Should individuals and companies have to choose between going above and beyond minimal legal standards or being an independent contractor?***

Under the *Employee or Independent Contractor Classification Under the Fair Labor Standards Act* final rule, actions taken by a potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control. The final rule further states that a potential employer's control over compliance methods, safety, quality control, or contractual or customer service standards that goes beyond what is required by specific, applicable Federal, State, Tribal, or local law or regulation may in some—but not all—cases be relevant to the analysis of a potential employer's control if it is probative of a worker's economic dependence.

Under the economic reality test, no single factor (or set of factors) automatically determines a worker's status as either an employee or an independent contractor. Instead, the economic reality factors are all considered to assess whether a worker is economically dependent on a potential employer for work, according to the totality of the circumstances.

Rep. James Comer (R-KY)

1. *The Barkley Regional Airport in my district participates in the FAA Contract Tower Program – a public-private-partnership that enhances aviation safety at small airports around the country. The shortage of air traffic controllers continues to be a major challenge for the program.* ***Will you commit to working with your colleagues at the FAA to examine the outdated wage determination for contract controllers to ensure we can keep contract towers operating safely and efficiently?***

Yes, WHD commits to working with the FAA to obtain additional information to aid in determining prevailing wages for contract controllers, including in Kentucky.

2. *Kentucky is a growing hub of health care innovation including the nation's largest concentration of aging care headquarters. We have providers of health care services in Kentucky who support adults with intellectual and developmental disabilities that will be impacted in the millions of dollars by the proposed overtime rule. Health care providers are already extraordinarily strained and would not be able to withstand this unfunded mandate. At a minimum, I would expect to see providers reducing services and modifying pay scales to stay afloat. That does not seem like a positive outcome for anyone.* ***What advice would you give to providers having to plan for the added costs to our health care system and the employees who may face losing their job because of this rulemaking?***

In the Department's *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees* final rule, the Department estimates that while transfers and costs will impact the healthcare and social services industry, this is partially due to the large size of this industry, and transfers per affected worker would be relatively low in this industry compared to national estimates.

In the Department's experience, employers have multiple options for responding to an increase in the overtime salary threshold. The Department will continue to provide outreach, education, compliance assistance and resources for employers and employees about this rule.

Rep. Eric Burlison (R-MO)

1. *We all know certain cities and states have higher costs of living, and for them specifically, maybe an increase in their thresholds for overtime would be appropriate. We also know, however, that there are areas of the country that would be devastated by a dramatic increase in the minimum salary threshold beyond what local economies can tolerate.* ***Considering this, did the Wage and Hour Division conduct any research on the impact the proposed overtime rule would have on low-income areas or consider the consequences of such a dramatic increase as is being considered in the proposed rulemaking? Please provide the research, data, and deliberations that were used.***

In the *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees* final rule, to ensure the standard salary level is not too

high in any region of the country, the Department used earnings in the lowest-wage Census Region (currently the South) to set the salary level. The final rule provides an analysis of the effects of the rule by region and industry.