



Dan K. Fordice, III, President
Lester C. Snyder, III, Senior Vice President
Thomas Brown, Vice President
Henry J. Massman, IV, Treasurer
Stephen E. Sandherr, Chief Executive Officer
Jeffrey D. Shoaf, Chief Operating Officer

December 13, 2022

VIA ELECTRONIC SUBMISSION: <http://www.regulations.gov>

Amy DeBisschop
Director, Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502, 200 Constitution Avenue NW
Washington, DC 20210

Re: Independent Contractor Classification Under the Fair Labor Standards Act Notice of Proposed Rulemaking (RIN 1235-AA43)

Dear Ms. DeBisschop:

On behalf of the Associated General Contractors of America (hereinafter “AGC”), thank you for the opportunity to submit the following comments on the U.S. Department of Labor’s (hereinafter “DOL” or “Department”) Wage and Hour Division’s (hereinafter “WHD”) notice of proposed rulemaking (hereinafter “NPRM”) regarding the Independent Contractor Classification Under the Fair Labor Standards Act (hereinafter “FLSA”). The NPRM was published in the Federal Register on October 13, 2022.

The Associated General Contractors of America is the leading association for the construction industry. AGC represents more than 27,000 firms, including over 6,500 of America’s leading general contractors, and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. These firms, both union and open-shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property.

Independent contractors serve a vital function in our economy by providing specialized skills to businesses that utilize them. They are often used in the construction industry, where short-term and fluctuating needs are common. An independent contractor relationship can offer advantages to the worker as well, such as flexibility, autonomy, and tax benefits. Classification of a worker as an independent contractor or an employee is critical to the determination of tax and withholding responsibilities of the company, and misclassification can lead to severe penalties.

AGC has long called for federal clarification of the independent contractor status and preservation of legitimate independent contractor relationships, such as those that have historically existed in the construction industry. AGC supported the Department’s previous Rule that adopted a consistent,

clear and common-sense standard for determining independent contractor status under the FLSA and provided an “economic reality test” in determining whether a worker is in business for himself or herself (independent contractor) or is economically dependent on a putative employer for work (employee). The final rule emphasized two “core factors,” specifically the nature and degree of the worker’s control over the work, and the worker’s opportunity for profit or loss based on initiative and/or investment. These core factors would have helped determine if a worker is economically dependent on someone else’s business or is in business for himself and the three additional factors would have clearly assisted in additional analyses. Promoting compliance protects companies with legitimate aims from harsh fines and from retrospective liability for employment taxes and employee benefits. It also renders enforcement more consistent, thereby helping to protect companies that bear the higher costs of complying with the law from being at a competitive disadvantage to companies that knowingly violate the law.

AGC joined a multi-group sign-on comments submitted by the U.S. Chamber on this proposed rulemaking. The organizations agree that this proposed rule would negatively impact employers and independent contractors in a number of ways as its undefined terms and vague concepts create a scenario where a hiring entity would never be confident it has correctly classified a worker as an independent contractor. Thus, the only scenario in which a hiring entity can be sure it is safe from an enforcement action by the DOL is when it classifies, or misclassifies, its workers as employees regardless of the economic realities of the work arrangements and regardless of whether such is to the benefit of the workers. As a result of this uncertainty, and the bias towards finding an employment relationship demonstrated throughout the different factors as detailed in the group’s comments, the NPRM has the potential to all but eliminate, or at least severely limit, the use of the independent contractor model in the modern workplace and worksite. Not only does the NPRM ignore the realities of how businesses and independent contractors work together, but in so doing, it ignores the preference many workers have to remain independent contractors. AGC supports the group’s comments submitted related to the NPRM and encourages the WHD to consider them, including opposing the creation of this new standard for independent contractor classification and the recommendation that the DOL withdraw this Proposed Rule. AGC would also like to supplement those comments to provide additional insight into the impact of the rule on the construction industry.

AGC has particular concern with how the proposed test factor addressing “Extent to Which the Work Performed is an Integral Part of the Employer’s Business (Proposed § 795.110(b)(5))” will be considered. The Department is fully aware that the construction industry is facing a historic workforce crisis and contractors are exploring every avenue of recruitment and supply of workers to deliver projects on schedule. Labor shortages in the commercial construction industry remain significant and widespread, impacting virtually every aspect. In response to this challenge, the hiring of independent contractors who perform work for a temporary period of time on a project that could be considered an “integral part of the employer’s business” might be a response to this workforce shortage and not intentional misclassification. All contractors also face issues such as seasonality in construction and transitory nature of the workers as they go to where the projects are located, and work needed. Contractors should not be punished for the lack of supply of skilled workers and for those that are available that want to decide who for, what, when and where they work on their own terms.

There were 377,000 job openings in construction, not seasonally adjusted, at the end of October, a drop of 25,000 (-6%) y/y, according to the U.S. Bureau of Labor Statistics (BLS) [reported](#) on in its monthly Job Openings and Labor Turnover Survey (JOLTS) release.¹ October openings exceeded hires for the second year in a row, implying firms wanted to hire more than twice as many workers as they were able to find. Layoffs and discharges totaled 153,000 (1.9% of employees), the lowest October total and rate in the 22-year history of the series.

Recent AGC survey data underscores this statistical reality. According to the data, 93 percent of construction firms report they have open positions they are trying to fill. Among those firms, 91 percent are having trouble filling at least some of those positions – particularly among the craft workforce that performs the bulk of onsite construction work. All types of firms are experiencing similar challenges. Nearly identical results were reported by contractors that use exclusively union craft labor and by firms that operate as open-shop employers; by firms with \$50 million or less in annual revenue and ones with more than \$500 million in revenue; by companies in all four regions of the country; and by contractors doing building construction, highway and transportation projects, federal and heavy work, or utility infrastructure.²

AGC is also concerned with the proposed core factor test that considers the “Nature and Degree of Control (Proposed § 795.110(b)(4))” in classification, especially taking into account “an employer’s compliance with legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations, for example, may in some cases indicate that the employer is exerting control, suggesting that the worker is economically dependent on the employer.” As the Department is aware, the multi-employer commercial construction site is unique in its setting, organization and employer design with general contractors, subcontractors and independent contractors all performing various work during the life of a project, independently and yet, in many instances, at the same time. Safety is paramount on these worksites, and it is the general contractor’s responsibility to ensure the safety standards on a project are met. Thus, it is absolutely necessary for general contractors to “control” and institute safety standards on the worksite to protect the safety of the workers and general public. The inability of a general contractor to confidently ensure safety on a worksite would expose them and their subcontractors to further liability under the Department’s Occupational Safety and Health Administration’s (hereinafter “OSHA”) Multi-Employer Citation Policy.³ And furthermore, the proposed control factor could create additional confusion or even conflict with the existing “Controlling Employer” guidance and thirteen examples in Multi-Employer Citation Policy. Additionally, it is generally up to the general contractors to ensure their own and their subcontractors’ compliance with legal obligations (e.g., Davis-Bacon). The construction industry’s unique nature and needs should be considered uniquely in this core factor test and be allowed to ensure general safety and legal compliance on construction worksites without concern of misclassification.

¹ U.S. Department of Labor, Bureau of Labor Statistics (November 30, 2022), *Jobs Openings and Labor Turnover Summary*, retrieved from <https://www.bls.gov/news.release/jolts.nr0.htm>.

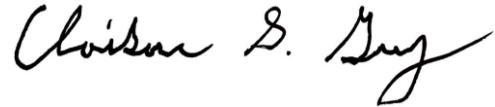
² The Associated General Contractors of America and Autodesk (August 31, 2022), *2022 Workforce Survey Analysis*, retrieved from https://www.agc.org/sites/default/files/users/user22633/2022_AG_C_Workforce_Survey_Analysis.pdf.

³ U.S. Department of Labor, Occupational Safety and Health Administration (December 10, 1999), *Multi-Employer Citation Policy*, retrieved from <https://www.osha.gov/enforcement/directives/cpl-02-00-124#MULTI>.

Conclusion

AGC reiterates its support of the Department's previous Rule and opposition to the creation of this new standard for independent contractor classification as proposed in this NPRM. AGC appreciates the opportunity to engage in the rulemaking process and looks forward to working with the WHD as it continues to amend regulations that impact construction employers. If we can aid in any way, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Claiborne S. Guy". The signature is written in a cursive style with a large, stylized "G" at the end.

Claiborne S. Guy
Director, Employment Policy & Practices