



VIA ELECTRONIC SUBMISSION: WHDPRAComments@dol.gov

March 12, 2013

Ms. Mary Ziegler
Director, Division of Regulations, Legislation and Interpretations
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW, Room S-3502
Washington, DC 20210

Re: Comments on DOL's Proposed Information Collection Request for the Worker Classification Survey

Dear Ms. Ziegler:

Associated Builders and Contractors, Inc. (ABC) submits the following comments to the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) in response to the above-referenced information collection request (ICR) published in the *Federal Register* on January 11, 2013, at 78 Fed. Reg. 2447.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing 22,000 contractors, subcontractors, materials suppliers and construction-related firms within a network of 72 chapters throughout the United States. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of contractor members are classified as small businesses. ABC's membership is bound by a shared commitment to the *merit shop philosophy*. This philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures taxpayers and consumers will receive the best product for their construction dollar.

ABC's Comments in Response to DOL's ICR

Thank you for the opportunity to submit comments regarding the proposal by DOL to conduct a survey to "collect information about employment experiences and workers' knowledge of basic employment laws and rules so as to better understand employees' experiences with worker misclassification."¹ The data collected during this survey likely will be used to support DOL's

¹ See: Proposed Information Collection Request (ICR) for the Worker Classification Survey, 78 Fed. Reg. 2447-2449 (Jan. 11, 2013).

imposition of additional recordkeeping requirements on employers, as previously announced in DOL's regulatory agenda. DOL's planned "Right to Know" regulations would revise the Fair Labor Standards Act (FLSA) recordkeeping regulations to "enhance the transparency and disclosure to workers of their status as the employer's employee or some other status, such as an independent contractor, and if an employee, how their pay is computed."²

Because the planned "Right to Know" regulations would impose significant additional administrative burdens and costs on employers, the survey will have a significant impact on our members. If left uncorrected, the flawed and untested survey instrument and sampling methodology will lead to invalid results, which could not be used to support the need for or benefits of additional FLSA recordkeeping and disclosure requirements.

I. DOL HAS NOT SUFFICIENTLY ESTABLISHED THE NECESSITY FOR CONDUCTING A WORKER CLASSIFICATION SURVEY

DOL's supporting documentation indicates the proposed worker classification survey is necessary because the absence of legally required disclosures regarding employment status may cause employers to "intentionally or unintentionally classify a worker as a contractor rather than as an employee without full knowledge of the worker." This justification is based on DOL's belief that "[c]urrent labor law does not require employers to disclose information regarding employment status (whether the worker is considered an employee or not), the basis for those status determinations, or pay (including hours worked, pay rates, and wages paid) to workers."

DOL's justification is in error regarding both the lack of disclosure requirements and the cause of misclassification.

DOL's current recordkeeping regulations at 29 C.F.R. Part 516 require employers to keep records regarding the pay of employees, including (*inter alia*, for employees subject to the FLSA minimum wage and overtime requirements) each employee's rate of pay, basis of pay (e.g., hourly, salary, piece rate, commission), hours worked each day and each week, and total straight-time and overtime wages paid. 29 C.F.R. § 516.2(a). Most states have paycheck disclosure laws requiring employers to disclose such information to employees each pay period on earning statements (or "paystubs"). Typically, such laws require the paystubs to disclose hours worked, rates of pay, gross wages, deductions from wages, net wages, the pay period dates, and the name and address of the employer.³As state laws have long required such disclosures, additional

² See: 2012 Unified Agenda, RIN 1235-AA04, available at <http://1.usa.gov/W6ZjoE>.

³ See: e.g., Alaska Admin. Code tit. 8, §15.160(h); Cal. Lab. Code §§226(a); 204 (b)(2); Colo. Rev. Stat. §8-4-103(4); Conn. Gen Stat. §31-13a; Del. Code tit 19, §1108(4); D.C. Mun. Regs. tit. 7, §911.2; Haw. Rev. Stat. §§ 387-6(c), 388-7(4); Haw. Code R. §12-21-5; Ind. Code §22-2-2-8; Iowa Code §91A.6(3), (4); Me. Rev. Stat tit 26, §665(1); Md. Code Lab. & Empl. §§ 3-504(a)(2); Mass. Gen. Laws Ch. 149 §§148; 150A; Mich. Comp. Laws §408.479 (2); Mich. Admin. Code R408.9012; Minn. Stat. §181.032; Neb. Rev. Stat. §§ 48-1230(2), 48-1231(2), 29-431, 29-436; N.M. Stat. §§ 50-4-2(B); NY Lab. Law §§ 191(1)(c), 195(3); N.D. Admin. Code §46-02-07-02(10); Or. Rev. Stat. §§652.610; 652.130; 652.640; Or. Admin. R. 839-020-0012; 34 Pa. Admin. Code §231.36; R.I. Gen. Laws §28-14-2.1; Tex. Lab. Code §62.003; Code of Vermont Rules 24-090-003(VI); Wash. Admin. Code 296-126-040; W.Va Code §21-5-9(4); W.Va. Code R. §42-5-14; Wis. Stat. §§103.457; 103.93; Wis. Admin. Code DWD 272.10.

federal regulations in this area seem unnecessary and an added cost with little or no additional benefits.

An individual can determine his status as an employee or independent contractor based on the tax forms completed and received. An employee completes an IRS Form W-4 when hired and again annually so the employer can determine the level of tax withholdings. Each year, an employee also receives IRS Form W-2 setting forth total earnings and deductions. An independent contractor completes IRS Form W-9 to provide his tax identification number and certify that he is not subject to tax withholdings, as well as receives a IRS Form 1099 as a record of earnings. An employee classified as exempt from the FLSA does not receive overtime for work exceeding 40 hours in a workweek; non-exempt employees are paid overtime. Thus, exemption status should be obvious from the state-required paystubs.

In short, through disclosures required under state law and the Internal Revenue Code, workers already have access to a significant amount of information regarding their employment status and pay (including hours worked, pay rates and wages paid). Yet, DOL's proposed survey does not include questions regarding what type of information the respondents currently receive regarding their employment status and pay, or whether the respondents review and understand that information.

Currently, companies are not required to prepare and maintain records detailing the basis for their determination that a worker is properly classified as an independent contractor or as exempt from the FLSA overtime requirements. Such a requirement would be very costly and the benefits would be speculative. A determination of whether a worker may be properly classified as an independent contractor or exempt from the FLSA overtime requirements is rarely black and white, as evidenced by the thousands of lawsuits filed in federal and state courts on these issues. If the answers were clear and easy, litigation would be unnecessary. Rather, determining the right answer on independent contractor or exemption status—if, indeed, a right answer exists—requires a detailed analysis for each individual of the type of work performed, how work is performed, who controls how the work is performed, the business structure or lack thereof of the independent contractor, how the individual is paid for the work, etc. Such facts will be different for each worker and business. A single worker could meet the requirements for classification as an independent contractor and for classification as an overtime exempt executive, administrative, computer and/or professional employee. Over time, as the work changes, a worker's qualification for independent contractor or exemption status may change. Thus, unless DOL envisions "Right to Know" regulations that require only a cursory analysis and boilerplate disclosures, the cost of such disclosures (which we estimate could be no less than \$500 per worker) would far outweigh any additional marginal benefit to workers in receiving additional information that they are unlikely to understand and that could change frequently.

DOL also does not adequately explain why the information sought could not be better obtained from studying its own investigation files, and reviewing records of IRS and state agency independent contractor audits. The proposed survey seeks to determine whether employees have been misclassified. Such determinations require detailed factual information and expert-level knowledge of a complex web of federal and state laws. Standards for determining independent contractor status differ even between federal laws, with DOL applying the "economic reality" test to determine employment status under the FLSA, while the IRS applies its 20-factor test. Standards for determining independent status also differ from state to state. Within a state, the

legal standards can differ under various laws (wage-hour laws versus unemployment insurance laws versus workers' compensation laws).

Despite these complexities, DOL proposes to assess whether workers are properly classified by having interviewers without demonstrable knowledge of legal standards spend 15 minutes directing only a handful of questions to respondents who may not even understand the questions. We must wonder if DOL's planned "Right to Know" regulations consider this to be an adequate process to ensure workers are properly classified. Certainly, expert employment attorneys who advise companies on independent contractor and exemption status would not feel comfortable reaching a legal conclusion based only on the DOL's proposed 15-minute interviews. DOL's own wage-hour investigators also likely require more than a 15-minute interview to determine whether a worker has been misclassified.

In fact, DOL could learn far more regarding employee misclassification by studying its own investigation files. Under its "Misclassification Initiative," DOL has reported WHD collected more than \$9.5 million in back wages for more than 11,400 workers as the result of investigations where the primary violation found was the failure to classify workers as employees.⁴ Records from the many investigations that preceded collection of these back wages will contain factual information and legal analysis that is far more detailed and reliable than any proposed employee survey could generate. In addition, DOL has entered Memorandums of Understanding (MOU) regarding independent contractor misclassification with labor commissioners and other agency leaders in 14 states.⁵ These MOUs "enable the Department to share information and to coordinate enforcement efforts with participating states." Thus, DOL could review the records of investigation files on independent contractor misclassification in at least these 14 states. DOL also has an MOU on independent contractor misclassification with the IRS. Because the IRS has pursued many audits on this issue, DOL should review IRS audit files.

Thus, DOL's statement that, without the proposed survey, "policymakers will have no substantive relevant data upon which to base policy decisions regarding worker classification," ignores the vast amount of data to be mined in its own files, at the IRS and through state agencies.

II. DOL HAS NOT PROVIDED SUFFICIENT TIME FOR REVIEW OF THE SURVEY INSTRUMENT AND SAMPLING METHODOLOGY

This is the first survey DOL will conduct addressing the complex issue of employee versus independent contractor status. Accordingly, it's critical to ensure all aspects of the project plan—including sample selection, question content and survey administration—meet accepted survey and statistical standards. Inadequate sampling methods, imprecise questions or poorly worded directions would result in unreliable and invalid survey results that do not meet federal information quality standards. If the survey results are unreliable and invalid, the information collected could not be used by DOL as it proposes new regulations or other policy changes.

⁴ See: <http://www.dol.gov/opa/media/press/whd/WHD20122496.htm>.

⁵ See: <http://www.dol.gov/whd/workers/Misclassification/index.htm>.

Yet, despite the significant influence the survey results will have over future DOL policy, DOL failed to publish in the *Federal Register*, or on any website, its supporting statement justifying the need for the survey, the sampling methodology document and the survey instrument itself – almost 125 pages of materials essential for the public to review before it can provide meaningful comments on the survey. Although publication of the survey instrument and sampling methodology on www.dol.gov, www.reginfo.gov or www.regulations.gov would have been a simple matter, the only means by which the public currently can obtain copies of these key documents is by calling a non-toll-free DOL number and leaving a voicemail message requesting copies. Obtaining copies also assumes interested parties have discerned the need to call the DOL from the oblique reference in the *Federal Register* notice.⁶ Further, it is our understanding that there have been delays in sending out the survey documents even after leaving a voicemail message.

Because of the difficulty in obtaining copies of the survey and supporting documents, and the time required to provide meaningful, in-depth and expert review of the proposed survey instrument and sampling methodology, the original 60-day comment period was grossly inadequate. Accordingly, DOL should extend the comment period for an additional 90 days, *running from the date of the publication of an announcement in the Federal Register that the proposed survey instrument, sampling methodology and other supporting documents have been made available online.*

Assuming the comment period will not be extended, following is an outline of the significant flaws in the survey design revealed after a cursory review of the proposed survey instrument and sampling methodology.

III. THE PLANNED EMPLOYEE SAMPLING SIZE IS INADEQUATE

DOL plans to conduct telephone interviews of persons aged 18 or older who have been employed in the 30 days prior to the interviews, and estimates that the eligible respondent universe is between 132.9 million and 139.7 million adults. DOL's planned sample size of 10,000 adults seems to only contemplate global estimates of the proportions of workers who are (1) self-employed versus not self-employed and (2) correctly classified versus incorrectly classified. These are the only tabulations addressed in the statistical power and precision estimates (Exhibits 3, 4 and 5) included in the documentation for OMB information collection clearance.

Such global estimates will be of extremely limited value as a basis for assessing the complex issue of classification of workers as independent contractors or employees. In order to obtain useful results, the sample plan needs to obtain enough completed interviews to enable statistically reliable estimates of target items (e.g., self-employed versus employee and correctly versus incorrectly classified) cross-tabulated by salient respondent characteristics.

At the very least, the correct versus incorrect classification proportions should be estimated in cross-tabulation with the presented classification status (self-employed versus not self-employed). Estimates should be made separately of the proportions (1) of persons identified as self-employed who have been correctly classified versus incorrectly classified, and (2) of persons

⁶ See: 78 Fed. Reg. at 2447, col. 3 (“A copy of the proposed information request can be obtained by contacting the office listed below”).

identified as not self-employed who have been correctly classified versus incorrectly classified. For policymaking purposes, it is important to know whether a misclassified worker is identified as a contractor but should properly be treated as an employee, or is identified as an employee but could be correctly classified as a contractor. The documentation presented does not calculate the power and precision of estimates for results cross-tabulated in this way. As presented, the sample design risks obtaining ambiguous results that are worthless for the purposes of public policy.

In addition to these basic cross-tabulation estimates, the survey sample size should be large enough to support statistically reliable estimates of classification and classification correctness cross-tabulated by salient worker characteristics such as gender, age cohort, immigration status, educational attainment, occupation and industry. If the purpose of the survey is to inform public policy decisions regarding the possible need for regulations or the form of regulations, it will be important to know, for example, whether misclassification is a common problem across the spectrum of the labor market or whether it is a problem that disproportionately affects certain demographics, industries, occupations or types of workers (e.g., categorized by educational attainment). Only with such detailed information about the incidence and pattern of perceived misclassification can efficient and effective education, information or regulation strategies be devised.

Another significant flaw in such a small sample size is the expected small proportion of the labor force (less than 10 percent) who perceive themselves as self-employed independent contractors. Thus, the planned sample size of 10,000 interviews may yield only about 1,000 completed interviews with such workers. (The documentation submitted to OMB lists 1,100 in Exhibit 3 as the expected number of self-employed to be identified.) In Exhibit 4, the documentation estimates that the number of misclassified independent contractors found among survey respondents will be 500, but it is not clear whether these 500 are all expected to be self-employed independent contractors who should properly have been classified as employees. Even if the number of identified self-employed persons who are estimated to be misclassified turned out to be 500, this number likely would be too few to impute findings cross-tabulated by salient characteristics, especially by industry or occupation.

For example, the draft survey instrument identifies 11 distinct industry classifications and 23 distinct occupations. A cross-tabulation matrix of the industry by occupation survey results for a target variable such as employment classification, which has three possible outcomes, would potentially have 759 cells (3 x 11 x 23). With a sample of only 10,000, even if 100 percent of respondents were able to understand and answer question regarding employee versus independent contractor status correctly (which is highly unlikely given the flawed survey questions as describe below), the average number of respondent observations per cell would be only 13, and an average cell might only contain one or two identified self-employed persons and less than one misclassified self-employed person. To ensure that statistically reliable cell estimates of putatively misclassified self-employment proportions can be estimated by industry and occupation, the sample size needs to be at least 10 times larger (e.g., 100,000), or alternatively, the sample frame needs to be redesigned to start with a sample of persons pre-determined to be identified as self-employed (e.g., start with a random sample of 10,000 persons who have been previously identified as claiming self-employed status).

IV. THE SURVEY PLAN SHOULD INCLUDE A PRE-TESTING COMPONENT

As stated in DOL's supporting documents, the proposed worker classification survey is "the first of its kind," and most of the key questions in the survey questionnaire have never been used. Further, one purpose of the survey is to test whether the respondents are properly classified as employees or independent contractors—a legal conclusion that cannot be reached without detailed knowledge of both the particular factual circumstances and a complex web of state and federal laws. The data collected during the survey will impact DOL policy, including perhaps new and costly recordkeeping requirements.

Yet, nothing in DOL's supporting documents indicates that the survey questionnaire has been tested. To ensure that the survey results are credible and useful, the survey questions should be thoroughly pre-tested with a panel of individuals whose classification as an employee or independent contractor, and the legal correctness of that classification, is known. The questionnaire must be pre-tested not only with respect to whether the respondents understand the questions, but also with respect to the accuracy of their answers. Many of the questions relate to facts that can be established objectively, and it is important that the answers provided by the test sample be correlated with actual facts to determine whether the answers to the survey are accurate.

Without such testing, the validity of any survey results will be suspect. An invalid survey cannot be used by DOL to support policy changes or new regulations.

V. THE SURVEY QUESTIONNAIRE IS FLAWED

Beginning with the introductory statements in the survey questionnaire, DOL proposes to use language that is, at best, value laden and thus a potential source of bias. The proposed employee survey would inform respondents that the purpose of the interviews is to conduct "a national study on American work experiences and benefits" in order to allow DOL "to improve policies and benefits for American workers" and to "help the Department's efforts to promote fair hiring practices, and access to critical workplace benefits, opportunities and protections." There is no proposed similar language discussing the benefits of independent contractor status, such as being able to set your own schedule, not having to punch a time clock, and owning your own business. Thus, such language will ensure that the respondents attempt to discern and provide answers that trend toward employment status, rather than independent contractor status, in order to ensure their own "critical workplace benefits, opportunities and protections," which DOL obviously views as only available to employees.

This language in the employee survey stands in sharp contrast to the neutral introductory language used in the proposed letters to employers invited to complete in-depth interviews: "We are trying to gather the insights of employers and their representatives on issues related to employment classification, the use of temporary and contract labor and other alternative staffing strategies. ... The purpose of this research is to gain a better understanding of the staffing challenges that employers face in the current economic and regulatory environment."

The introductory language for the employee interviews needs significant modification to achieve a similar neutral tone. For example, the language could be changed to read as follows:

This is [INTERVIEWER] calling for a study that is being conducted by Abt Associates. We are conducting this study to learn more about American work arrangements, in particular about how people distinguish between traditional employment and independent contractor work arrangements. We are not asking for your opinion, but for facts about your own working arrangement and about what you perceive to be your rights and obligations. Your phone number was randomly selected and we want to assure you that your responses to our survey will be kept private. We hope that you will participate in this study, and we will call back within the next day or two. Thank you.

Questions throughout the draft survey instrument reflect a similar bias that assumes the respondent is an employee, would prefer to be an employee and is better off as an employee. More attention in the questionnaire design needs to be given to the perspective of persons who are, and prefer to be, self-employed independent contractors. For example, the survey repeatedly uses the term “job” or “main job.” This terminology also is a potential source of confusion because its meaning may be different for a person whose usual work arrangement is as an employee compared to a person who engages in self-employment. An employee might understand the term “job” as identical to a given work arrangement. A self-employed consultant or contractor might understand the term “job” as identifying a particular task assignment or client relationship within his business or self-employment working arrangement. A freelance writer, might identify each of several contract assignments to produce articles for different magazines to be distinct “jobs.” While independent, self-employed lawyers or doctors may refer to their individual work engagements as “clients” or “patients.” Self-employed carpenters, plumbers or printers more typically refer to their individual work engagements as “jobs.” Indeed, a standard printed form that trade contractors use to estimate and schedule work assignments is called a “job order.” Misunderstanding of the term by self-employed respondents could lead to erroneous survey results.

The survey asks respondents to answer questions regarding employment status without providing definitions of key terms, or providing definitions only well after a term is first used. For example, employee respondents are asked questions about the following concepts without simultaneous definitions or examples:

- “employee,”
- “self-employment,”
- “independent contractor,”
- “private company,”
- “nonprofit organization,”
- “work hours,”
- “partnership,”
- “limited liability company,”
- “franchise,”
- “sole proprietorship,”
- “temporary worker,”
- “probationary worker,”
- “intern,”

- “contract worker,”
- “day laborer,”
- “temporary agency,”
- “employee staffing agency,” and
- “professional employer organization.”

Without confirmation that respondents understand these concepts, their responses cannot be reliable and survey results cannot be valid.

The survey design could be improved and simplified by introducing at the outset the distinctions between employment and alternative work arrangements. The survey instrument should present a definition of each, and it should ask the respondent to apply those definitions when answering questions about his work arrangements. The first questions should identify which of the following categories describes the individual situation:

1. Employee with only one employer in the past 30 days
2. Employee with only one employer at a time, but changed employers in last 30 days
3. Employee with multiple employers simultaneously in the last 30 days
4. Self-employed exclusively with multiple clients or customers
5. Self-employed with one client or customer in the last 30 days; in this case, determine how many different clients or customers in last 12 months and /or duration of assignments
6. Both self-employment and employee during the last 30 days

From each of these starting points, a different series of questions should be developed to more clearly and specifically fit the circumstances. The concept of “main job” then could be dropped and instead, for persons with multiple work arrangements, a separate series of questions can be asked about each type of work arrangement. This type of structure would eliminate potential confusion over the meaning of “job” and “main job,” thus increasing the likelihood that the respondents will understand the questions being asked.

Attached as Exhibit A are additional comments on specific proposed survey questions.

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Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,



Geoffrey Burr
Vice President, Federal Affairs

EXHIBIT A: ADDITIONAL COMMENTS ON SPECIFIC SURVEY QUESTIONS

Proposed Survey Question	Comment
Do you USUALLY work 35 hours or more per week at your main job?	The purpose of this question is unclear. Why is 35 hours or more significant?
In what state is your job? [IF NECESSARY: Please think about your [QMAIN] job.]	The survey sample size is too small to make any inferences by states. Thus, this question is unnecessary unless the sample size is greatly increased.
At your [QMAIN] job are you employed by a private company or individual, a non-profit organization, by government, or were you self-employed or working in the family business? 1. Private company (for profit) or individual 2. Nonprofit organization 3. Government 4. Self-employed such as an independent contractor, independent consultant, or freelance worker [IWER NOTE: INCLUDES "Own my own business"] 5. Working in the family business 6. OTHER	This is a key question, but it is unclear. A freelance worker can be employed by a series of private employers. An independent consultant can have employees whom it deploys to work at various clients. This individual is not employed by the employer in the office where the work is performed, but may be the employee of the independent consultant who on this list is grouped among the self-employed. "Self-employed" is a conclusory term. What about two individuals who form a partnership in which they each own one-half. Are they self-employed? Can each say "I own my own business?" Later in the questionnaire, working in a family business is referred to as not self-employed, which seems inconsistent with this question. This list should be modified to include choices such as self-employed sole proprietor, owner of my own incorporated business, partner in an unincorporated partnership, part owner of a closely held incorporated business or limited liability partnership.
In the last 30 days, did you work as an independent contractor, independent consultant, freelance worker or something else?	This asks for a legal conclusion. It would be better to ask whether the person for whom you worked treated you as an employee or independent contractor, and give some of the hallmarks of an independent contractor relationship. None of these categories are defined.
Are you/is your business registered with the state?	What does it mean to be "registered with the state?" Is every licensed professional "registered" in some fashion, or is this asking whether the business of a licensed professional is registered independently of its owner?
In what year did you become self-employed in the work you do for your [QMAIN] job?	If an individual is self-employed, by definition the work is being done for oneself, not "for your main job."
At your [QMAIN] job, are you an employee?	This is purely a legal conclusion. Why not ask about the underlying facts instead? Is the point to see if respondents know the legal definition of "employee?"

Proposed Survey Question	Comment
<p>Since beginning this job, have you always been an employee?</p>	<p>What if there is a period of layoff? Suppose someone was employed for three years, laid off for a year, and then re-employed. This person would answer “no,” not because the employment relationship changed, but because of the absence of any relationship for that one-year period.</p>
<p>You just told me that you had a different status at your [QMAIN] job before you became an employee. BEFORE you became an employee, were you?</p> <ol style="list-style-type: none"> 1. Self-employed 2. Independent contractor 3. Independent consultant 4. Contract worker 5. Free-lance worker 6. Day laborer 7. Temporary worker 8. On-call worker 9. Probationary worker 10. Intern 11. Something else 	<p>As the previous example indicates, the premise of this question is not necessarily true. The “status” that caused the change in the example was the transition from employment to unemployment to employment—not from self-employed, etc., to employed, as this phrasing assumes.</p>
<p>How certain are you that you are SELF EMPLOYED on your [QMAIN] job and not an employee of the company or clients for whom you work?</p>	<p>Why does the strength of anyone’s subjective belief matter, particularly when they are not provided the criteria by which to make the decision regarding what constitutes self-employment?</p>
<p>How certain are you that you are an EMPLOYEE on your [QMAIN] job and not another type of worker such as an independent contractor, or temporary worker?</p>	<p>On what facts are the respondents to base these distinctions, let alone their degree of confidence in these categorizations?</p>
<p>Some companies provide employees or their services to other companies or clients under contract. A few examples of services that can be contracted out include security, landscaping, or computer programming. Did you work for a company that contracts out you or your services in the last THIRTY DAYS?</p>	<p>There’s no clear-cut criteria for answering this question. Suppose the respondent works in a barber shop owned by someone else. If the respondent cuts the hair of a customer, at a price set by the owner, isn’t the respondent working for “a company that contracts out you or your services?” Don’t most service providers contract out the services of their employees for a fee? Is that the group this question targets?</p>
<p>To work at your [QMAIN] job, were you REQUIRED to do any of the following?</p> <ol style="list-style-type: none"> a. Sign a contract, form or other legal document b. Agree to create your own business or LLC c. Pay a fee d. Join a partnership e. Enroll with a professional/hiring/matching agency 	<p>“Other legal document” could be anything. A construction contractor might have to sign many documents pertaining to the purchase of the land, or to obtain utility service in order to complete the project, but none of them would be an employment contract. Not clear what the point of this question might be.</p>
<p>What kind of business or industry is this? [IF NECESSARY: What do they make or do where you work? For example: hospital, newspaper</p>	<p>This list consists almost entirely of blue-collar businesses or industries. The fact that there is only one category (“other”) for everyone else is likely</p>

Proposed Survey Question	Comment
<p>publishing, mail order house, auto engine manufacturing, bank] ? [IF NECESSARY: Please think about your [QMAIN] job.]</p> <ol style="list-style-type: none"> 1. CONSTRUCTION 2. TECHNOLOGY 3. JANITORIAL OR CLEANING SERVICES (INCLUDES DOMESTIC WORKERS, MAIDS, HOME CLEANING SERVICES) 4. HOME HEALTH CARE SERVICES 5. CHILD CARE SERVICES 6. TRANSPORTATION (TRUCKING/CAB DRIVER) 7. TELECOMMUNICATIONS SERVICES (CABLE, PHONE, INTERNET) 8. BEAUTY / PERSONAL CARE SERVICES (HAIR, NAIL, SKIN) 9. LANDSCAPING 10. CONSULTING 11. FOOD SERVICE 12. OTHER 	<p>to cause respondents to mistakenly check one of the listed industries rather than the “other” category. Although the source of this question is said to be the CPS, in fact the CPS asks for this information using open-ended questions. DOL should do the same, and use more specific descriptions of industries from BLS.</p>
<p>Provided the economy does not change and your job performance is adequate, can you continue to work in your current job as long as you wish? [IF NECESSARY: Please think about your [QMAIN] job.]</p>	<p>No one has the ability to work in a job as long as he or she wishes, as employment in the United States is at-will. The only correct answer to this question is “no.” Any other response would be invalid.</p>
<p>Are you working only until a specific project is completed?</p>	<p>Does the answer reflect the intentions of the employee or the terms of the engagement?</p>
<p>(Including overtime pay, tips and commissions), what are your usual earnings on your [QMAIN] job, before taxes or other deductions? Please give me your best estimate. [INTERVIEWER: IF R PROVIDES AN HOURLY WAGE, ASK HOURS PER WEEK WORK AND CALCULATE AND ENTER WEEKLY EARNINGS (HOURLY WAGE X HOURS PER WEEK)]</p>	<p>This question is confusing, especially because most employees are more likely to know their net take-home pay rather than their gross earnings. Instead, the survey is more likely to collect accurate information by asking: What is your usual take-home pay? Is that paid weekly, bi-weekly, semi-monthly, monthly or other? Are you paid hourly or a salary? Do you receive tips? Commissions? A bonus? Overtime pay?</p>
<p>To confirm, your annual earnings are approximately [INSERT CALCPAY=CALCULATED FROM QPAY_3, QPAY3A AND QPAY3B]. Is that correct?</p>	<p>This question can lead to misleading calculations. A respondent might be paid \$100,000 per year, but work only four days per week. That doesn’t mean that his or her pay is reduced to \$80,000.</p>
<p>Which category represents your annual earnings on your [QMAIN] job, before taxes and other deductions?</p>	<p>The definition of “main job” may lead to ambiguous results. The construction contractor may make \$10,000 in one year on the main job worked during the survey month. But if that same contractor works on 20 projects during the year, annual income should be calculated as \$200,000.</p>
<p>Who writes out your check? [SOURCE: New]</p> <ol style="list-style-type: none"> 1. Employer via a payroll company 2. Employer (directly) 	<p>Very few employees are likely to know whether the employer uses a payroll company or whether the payroll company merely prints and sends</p>

Proposed Survey Question	Comment
3. Temporary agency 4. Staffing organization 5. Professional employer organization 6. Client or customer 7. Someone else	payroll checks or is responsible for calculating employee wages based on reports of work hours from a timekeeping system. A better approach would be to ask the employees to look at their pay stubs and state the name of the business printed on the paystub.
Who gives you the [INSERT BASED ON QPAY_4. IF QPAY_4=3 INSERT "cash"; IF QPAY_4=4 INSERT "ATM card"; IF QPAY_4=6 INSERT "[QPAY_4 RESPONSE]"?	Is the question intended to learn who hands the payment to the respondent? What if it is distributed electronically, via an interbank transfer?
Who makes the deposit?	This question is confusing. If the cash, ATM card or check is handed to the respondent (rather than direct deposit), under what circumstances would the respondent not make the deposit himself?
On your [QMAIN] job, do you report directly to a manager, supervisor, foreman or someone else who regularly oversees or approves HOW you do your work?	A self-employed contractor also must report to "someone else who oversees or approves" how he does his work." In fact, it is difficult to conceive of any situation where no one has any right to oversee or approve the work.
Do you determine your own schedule or the hours that you work?	This question is overbroad. A contractor with control over his own work-hours may nonetheless be limited by building security, local building codes or noise reduction ordinances, or the sleeping patterns or work-hours of the client, owner or neighbors. Rarely is anyone free to work at a job at any hour of the day or night.
Does your job or client set limits on your schedule or the hours when you can work? For example, a theatre actor may work evening hours because the play shows in the evening, or a home cleaning service will consider when the client wants them to come clean. Does your job or client set limits on your work schedule in this way?	Under what circumstances would the answer to this question be "no?"
Do you need permission to leave your place of work, or can you come and go at will? 1. NEED PERMISSION 2. CAN COME AND GO AT WILL/DO NOT NEED PERMISSION 3. IT DEPENDS	The question provides two options, but three answers are given. Again, it is unlikely that even the construction contractor can come and leave at-will without any permission.
How often does someone tell you how to perform your usual work activities and duties?	This question has no legal significance without knowing who is telling the respondent how to perform the work, and how detailed such instructions are.
How closely would you say you are required to follow the manual? Are you required to follow it very closely, somewhat closely, not very closely, or not at all? Please give me your best estimate.	This question assumes the respondent knows the contents of the manual and that the manual deals with the specifics of the job. For example, the manual primarily could pertain to safety issues, and all of these, although not the mechanics of the job, must be adhered to rigidly.

Proposed Survey Question	Comment
At your [QMAIN] job, do you have the ability to? a. hire additional workers? b. change the way the business is run?	A respondent who is employed as a manager or foreman, and a respondent who owns his or her own business, can both answer “yes” to both questions.
Are the duties you perform on your [QMAIN] job a part of the regular, day-to-day services or operations of the company where you work? [IF NECESSARY: Is the work you do the same as the work the company does for its customers?]	This question is so vague that it is unlikely to result in helpful information. Instead, the survey should take a more fact-based approach by asking the respondent: “What type of product or services does the company where you perform work sell to the public?” Whether the work performed by the respondent is essential to producing the product or service (thus indicating the respondent cannot be classified as an independent contractor) is a legal conclusion that respondents most likely will not be qualified or have the knowledge required to make.
Besides your [QMAIN] job, do you perform similar work for others [IF NECESSARY: other companies or businesses]?	“Companies or businesses” is an essential qualification in this question because “similar work for others” could include work performed for friends and relatives.
In the event that the company where you work loses money, would you continue to earn your wage for the work you perform?	This question is very unclear. In most cases, if the company continues to lose money, the respondent may not be able to perform any work because the company will cease to exist. Also, the question is in terms of “earn,” when it should be “receive.” If someone works for a company that is broke, the wages due have been “earned,” but they may not be received. Also, “the company where you work” may be a third party, a customer or an employer. For example, a computer repair technician may work for a small business, but “the company where you work” may be a large corporation, and the technician works in their offices.
You have indicated that you are either NOT an EMPLOYEE or NOT SURE if you are an EMPLOYEE. Are there workers at your [QMAIN] job who are called “employees” and perform the same work duties that you do?	Called “employees” by whom? The choices assume that if someone is called an employee, they are in fact an employee.
Earlier you indicated that you are [an employee/self-employed]. Do you agree with this classification or do you think that legally, you should be [self-employed/an employee]?	There is no basis for knowing why a respondent may dispute any classification and whether his reasoning is correct. This is pure speculation, which will not help DOL develop policy.

Proposed Survey Question	Comment
<p>Just to confirm, you have indicated that you are [self-employed/an employee]. Do you agree with this classification or do you think that legally, you should be [an employee/self-employed]?</p> <p>Based on your responses to earlier questions, we are unable to determine if you are considered an employee or self-employed. What do you think your legal worker status should be? Should it be...?</p>	<p>The insertion of the leading questions such as this in the “knowledge” section of the survey seems to create a bias toward disagreeing with the independent contractor classification.</p>
<p>What is the highest level of school you have completed or the highest degree you have received?</p>	<p>The survey sample size is too small to support inferences of classification or misclassification based on education levels.</p>
<p>What is the total combined income of all members of your FAMILY during the past 12 months? This includes money from jobs, net income from business, farm or rent, pensions, dividends, interest, social security payments and any other money income received by members of your family who are 15 years of age or older.</p> <p>Are you currently:</p> <ol style="list-style-type: none"> 1. Married, 2. Living with a partner, 3. Separated, 4. Divorced, 5. Widowed, or 6. Never married? 	<p>These and similar questions do not seem relevant to the stated policy purpose of the survey.</p>