



VIA ELECTRONIC SUBMISSION

April 12, 2021

Ms. Amy DeBisschop
Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave., N.W.
Washington, DC 20210

Re: Independent Contractor Status Under the Fair Labor Standards Act: Withdrawal; RIN 1235-AA34

Dear Ms. DeBisschop:

Associated Builders and Contractors hereby submits the following comments to the U.S. Department of Labor's Wage and Hour Division in response to the above-referenced proposed withdrawal published in the *Federal Register* on March 12, 2021, at 86 Fed. Reg. 14027.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which 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.

ABC's Arguments in Opposition to Withdrawal of the Final Rule

1. Introduction.

On Sept. 25, 2020, the WHD issued the Independent Contractor Status Under the Fair Labor Standards Act proposed rule in order to sharpen the agency's economic reality test for determining

whether independent contractors are in business for themselves or economically dependent on the potential employer for work.¹ ABC submitted comments² in support of the proposed rule.

On Jan. 7, 2021, the WHD issued its final rule³, which simplifies and clarifies the factors for determining when a worker is an independent contractor versus an employee under the FLSA. Specifically, the final rule improves the certainty and predictability of the test by focusing it on two core factors: (1) the nature and degree of the worker's control over the work and (2) the worker's opportunity for profit or loss.⁴ Further, the test identifies three other factors that may serve as additional guideposts in the analysis, which include the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the potential employer and whether the work is part of an integrated unit of production.

On Feb. 5, the WHD proposed to delay the effective date of the final independent contractor rule from March 8 to May 7.⁵ The proposal indicated that the sole purpose of the delay was for the WHD to “review and consider the rule as the Regulatory Freeze Memorandum⁶ and Office of Management and Budget Memorandum M-21-14⁷ contemplate,” specifically the “legal, policy, and/or enforcement implications of adopting that standard....”⁸ WHD asserted that the proposed delay was reasonable and would not be disruptive since the “independent contractor final rule is not yet effective, and WHD has not implemented the rule.”⁹ The notice required comments to be submitted by Feb. 24, which was only 19 days from the date of the notice, and stated that WHD “will consider only comments about its proposal to delay the rule’s effective date.”¹⁰

On Feb. 22, ABC filed a request for extension of time to file comments on the delay proposal and further protested the department’s restriction on the nature of comments which could be filed.¹¹ The department denied the extension request on Feb. 24.¹²

On Feb. 24, ABC submitted comments¹³ arguing that the WHD’s hasty and unsupported attempt to delay the effective date of the independent contractor final rule was arbitrary, capricious and in violation of the Administrative Procedure Act. ABC therefore urged the WHD to maintain the final rule’s effective date of March 8.

¹ 85 Fed. Reg. 60600.

² <https://www.regulations.gov/document?D=WHD-2020-0007-1694>.

³ 86 Fed. Reg. 1168.

⁴ *Id.* at 1168.

⁵ 86 Fed. Reg. 8326.

⁶ 86 Fed. Reg. 7424 (Jan. 28, 2021).

⁷ <https://www.whitehouse.gov/wp-content/uploads/2021/01/M-21-14-Regulatory-Review.pdf>.

⁸ 86 Fed. Reg. 8327.

⁹ 86 Fed. Reg. 8327.

¹⁰ *Id.*

¹¹ <https://www.regulations.gov/comment/WHD-2020-0007-2782>.

¹² <https://www.regulations.gov/document/WHD-2020-0007-3119>.

¹³ <https://www.regulations.gov/comment/WHD-2020-0007-3125>.

On March 4, the WHD issued a final rule that delays the independent contractor final rule's effective date from March 8 to May 7, 2021.¹⁴ Soon after, on March 12, DOL issued a proposal to withdraw the independent contractor final rule.¹⁵ In explaining its decision to withdraw the final independent contractor rule, the department highlighted that it “ha[d] not yet taken effect,”¹⁶ and that accordingly, the department “[did] not believe that withdrawing it would be disruptive.”¹⁷

On March 26, ABC, ABC Southeast Texas Chapter and the Coalition for Workforce Innovation filed suit against DOL for delaying the effective date of the independent contractor final rule to May 7 and proposing to withdraw it.¹⁸ The filed complaint asserts that the steps taken by DOL to negate the independent contractor final rule are in violation of the APA.¹⁹

As further explained below, ABC argues the final delay rule was unlawfully promulgated, and because the department's subsequent proposal to withdraw the independent contractor final rule relied on the unlawfully promulgated rule for the assertion that the independent contractor final rule had not already gone into effect, the subsequent proposal itself must be ordered withdrawn.

2. The Delay Rule was Unlawfully Promulgated, Therefore the Department's Proposed Rule is Unlawful.

As explained in ABC's court complaint, the WHD's purported delay of the effective date was unlawful, and the independent contractor rule must be deemed to have gone into effect on March 8. Thus, the underlying premise of the current proposal to withdraw the rule, i.e., the claim that the rule has not yet gone into effect, is false and has been engineered through unlawful means. Numerous cases have held that administrative actions based on similarly unlawful delays of final rules' effective dates are void *ab initio* and are themselves unlawful. The Fourth Circuit so held in *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*,²⁰ where President Obama's DOL attempted to “suspend” the previous administration's H-2A regulations following a shortened comment period combined with restricting the public to “comments concerning the suspension action itself” and not the merits of the rule at issue. The court relied on both the substantive and procedural restrictions to find the department did not provide a “meaningful opportunity to comment....”²¹

¹⁴ 86 Fed. Reg. 12535.

¹⁵ 86 Fed. Reg. 14027.

¹⁶ 86 Fed. Reg. 14031.

¹⁷ 86 Fed. Reg. 14035.

¹⁸ Coalition for Workforce Innovation vs. Walsh, No. 1:21-cv-00130 (E.D. Tex.).

¹⁹ http://shared.littler.com/tikit/2021/Materials/CWI_ABC_Complaint_against_USDOLs_IC_Delay_Rule_21-cv-00130.pdf.

²⁰ 702 F.3d 755, 761 (4th Cir. 2012).

²¹ *Id.* at 770. See also, *Puget Soundkeeper All. v. Wheeler*, 2018 U.S. Dist. LEXIS 199358 (W.D. WA. 2018) (invalidating agency attempt to change the applicability date of a final rule where the comment period was similarly restricted with regard to both the time period and substance of public comments).

The WHD Feb. 5 delay proposal set the time period for submission of comments at 19 days, significantly less than the 30–60-day norm for notice and comment rulemaking. Even the “freeze” memorandum on which the department purported to rely in this case called for agencies to allow a “30-day” comment period prior to delaying final rules.²² In addition, the delay proposal stated that WHD would not consider comments on any issue other than the proposal to delay the rule’s effective date, thereby making clear that WHD would not consider substantive comments on the impact of the rule itself. The WHD’s subsequent claim that a truncated time period was compelled by the need to act prior to the March 8 date is inadequate to justify the shortened comment period. WHD’s excuse for failing to adhere to the 30-day requirement was entirely self-inflicted, because the WHD could have published the NPRM more than 30 days in advance of the effective date and chose not to do so.

Numerous courts have held that reducing the number of days for comments below 30 days (though 60 days is more common), requires good cause and substantial exigent circumstances to justify what is otherwise an unreasonably short period of time for public comments.²³ In *Omnipoint Corp v. FCC*, for example, the D.C. Circuit found a shortened comment period to be justified only because the agency demonstrated “urgent necessity,” including a Congressional mandate for action combined with a recent Supreme Court ruling calling into question the terms of the agency’s requirements. No such showing can be made by the WHD here.

By letter dated Feb. 22, ABC requested extension of the delay proposal public comment period to March 8 (30 days from the date of the published notice) and lifting of the restriction on the comments being submitted.²⁴ The WHD unreasonably denied both requests,²⁵ and thus failed to comply with the requirements of the APA to provide a meaningful opportunity to comment.

In addition, WHD’s delay of the effective date of the independent contractor rule violated the APA because the WHD failed to articulate any substantive, permissible ground for delaying the effective date to May 7. Instead, the WHD relied primarily on the regulatory “freeze” memoranda of the president’s chief of staff and the OMB for the proposition that the effective date of any final rule of the Trump administration should be delayed pending “review and consideration” of the rule.²⁶ The WHD failed to comply with or explain how the final delay rule met the criteria specified in the freeze memoranda. In any event, courts have held that executive branch freeze memoranda themselves violate the APA where they purport to authorize agencies to arbitrarily delay the effective date of final rules without good cause.

²² 86 Fed. Reg. 7424.

²³ 78 F.3d 620, 629 (DC Cir 1996); *see also Florida Power & Light Co. v. United States*, 846 F.2d 765, 772 (DC Cir 1984) (finding a shortened comment period sufficient where Congress imposed a deadline on the agency).

²⁴ <https://www.regulations.gov/comment/WHD-2020-0007-2782>.

²⁵ <https://www.regulations.gov/document/WHD-2020-0007-3119>.

²⁶ 86 Fed. Reg. 8326.

Thus, in *Natural Resources Defense Council v. Abraham*,²⁷ the court struck down an attempt by the Department of Energy to delay the effective date of a 2001 rule upon a similar change of administration, where DOE relied on a presidential chief of staff “freeze” memo issued at the beginning of the Bush administration. The court concluded that DOE’s claimed amendment of the rule’s effective date was invalid because the delay was promulgated without complying with the APA’s requirements.²⁸ The court held: “A new administration’s simple desire to have time to review, and possibly revise or repeal, its predecessor’s regulations falls short” of the good cause standard of the APA.²⁹ Likewise in *Pineros Y Campesinos Unidos v. Pruitt*,³⁰ the court nullified the attempt by President Trump’s Environmental Protection Agency to delay the effective date of a rule promulgated by the previous administration in Jan. 2017, before its scheduled effective date of March 2017—virtually the same timetable presented here. Again, the court found no good cause for delaying the final rule’s effective date, merely because a new administration had taken office and wanted to “review” a rule with an eye towards rescinding it.

In promulgating the final delay rule, the WHD failed to identify any specific aspect of the independent contractor final rule which merits further review or consideration, other than a cursory reference to “legal, policy, and/or enforcement implications of adopting [final rule]”³¹ It is well settled that an agency cannot satisfy the notice requirements under the APA with such vague statements. As the D.C. Circuit has long held: “If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency’s proposals.”³² Indeed, while the department cited comments with which it agreed in promulgating the final delay rule, the department still failed to explain its reasoning in promulgating the final delay rule in the first place.

Further, the WHD incorrectly justified the final delay rule on the ground that the delay of the independent contractor final rule’s effective date would not be “disruptive” because the rule never went into effect.³³ In claiming that delaying the effective date will not cause disruption, the WHD ignores the administrative record demonstrating a longstanding need for greater uniformity and sharpening of the independent contractor standard, accomplished by the independent contractor final rule. As testified to by many employers and their associations, the final rule is long overdue and much needed to correct a litigation crisis afflicting the construction industry and many other industries. The current enforcement standards of the WHD and the courts are so confusing and

²⁷ 355 F.3d 179, 189 (2d Cir. 2004).

²⁸ *Id.* at 206.

²⁹ *Id.* at 1067. See also *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (Vacating an order delaying a rule’s effective date as “tantamount to amending or revoking a rule.”); *NRDC v. Nat’l Highway Traffic Safety Admins.*, 894 F.3d 95, 115 (2d Cir. 2018) (“An agency may not promulgate a rule suspending a final rule and then claim that post promulgating notice and comment procedures cure the failure to follow [the APA].”).

³⁰ 293 F. Supp. 3d 1062, 1067 (N.D. Cal. 2018).

³¹ Compare 86 Fed. Reg. 12,535, with, *California v. BLM*, 286 F. Supp. 3d at 1064-6.

³² *Connecticut Light & Power Co. v. Nuclear Regulatory Comm.*, 673 F.2d 525, 528 (D.C. Cir. 1982).

³³ 86 Fed. Reg. 12536.

inconsistently applied that employers are seriously harmed each day that goes by without implementing the much-improved standard described in the final rule. Far from “already familiar” with the standard that WHD and courts will apply when determining a worker’s status under the FLSA,³⁴ the administrative record and the final rule itself conclusively demonstrate that the current standard applied by WHD and the courts is impossible for most employers to understand or comply with.

3. The Current Proposal to Withdraw the Independent Contractor Rule is Arbitrary and Capricious and Not in Accordance With Law Under the APA and FLSA.

Due to the department’s failure to justify the final delay rule in meaningful detail, and to consider how delaying the independent contractor final rule would harm employers and independent contractors, the department’s promulgation of the final delay rule was arbitrary and capricious and is therefore invalid. The WHD’s current proposal to withdraw the rule is likewise unlawful since it is premised on the false assertion that the independent contractor rule did not go into effect on March 8. The WHD cannot use one unlawful action, improperly delaying the effective date of the rule, as support for the unlawful action of withdrawing the rule prior to it taking effect.

In attempting to articulate a substantive reason for the withdrawal of the final rule, the department repeatedly mischaracterizes the final rule as “creating a new standard.” This ignores the long-standing and broadly supported application of the economic reality test, as defined with reference to economic independence, adopted in the final rule.

As expressly set forth in its text, the final rule retains the long-standing “economic reality” test for determining employee or contractor status, while clarifying and harmonizing the confusing and oft-conflicting methods of analysis used to apply this test across different circuits. To suggest that the codification and clarification of a test applied for decades (albeit at times inconsistently by courts) is an entirely “new legal standard” is simply incorrect as a matter of fact and law.

The department further “questions whether the rule is fully aligned with the FLSA’s text and purpose or case law.”³⁵ But the department ignores its own extensive analysis of these issues, which establishes that the rule’s clarifying treatment of the multiple factor test is consistent with past interpretations of many courts.³⁶

Finally, the department asserts its proposed withdrawal of the rule will not be disruptive “[b]ecause the Independent Contractor Rule has yet to take effect....”³⁷ To the contrary, the purported delay of the rule’s effective date is currently the subject of a legal challenge. Even assuming *arguendo* that the rule is not yet effective, the department’s assertion that it is not disruptive to withdraw a

³⁴ 86 Fed. Reg. 8327.

³⁵ 86 Fed. Reg. 14031.

³⁶ *See, e.g.*, 86 Fed. Reg. 1180-84.

³⁷ 86 Fed. Reg. at 14035.

rule which was published months ago and put the regulated community on notice of their upcoming obligations, is simply incorrect.

Contrary to the NPRM, most employers do not wait until the day that a rule becomes effective to prepare to come into compliance. Instead, when a final regulation is published, many businesses immediately begin to assess the steps they will need to take to be certain their business activities are lawful under any new regulation.

For each of these reasons, the department's proposed withdrawal is arbitrary and capricious and not in accordance with law, and should itself be withdrawn.

4. Construction Industry Employers Will be Irreparably Harmed By Withdrawal of the Rule.

ABC is on record as strongly supporting the independent contractor final rule, which clarifies the WHD's interpretation of independent contractor status under the FLSA and promotes certainty for employers, independent contractors and employees.³⁸

Independent contractors are essential to many aspects of the construction industry. They provide specialized skills, entrepreneurial opportunities and stability during fluctuations of work common to construction. The multi-tiered, project-by-project contracting model has long been essential to cost-efficient construction. Independent contractors can more readily move from project to project on an as-needed basis, thereby allowing construction firms to adjust their workforce needs to constantly fluctuating business requirements. Independent, skilled craft professionals can fill gaps in the specialized project needs of general contractors and subcontractors in order to meet the unpredictable and ever-changing demands of construction timetables.

A determination of whether a worker may properly be classified as an independent contractor who is 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. The conflicting court rulings have confused and frustrated efforts of construction employers to maintain longstanding industry practices that have allowed the industry to perform services on a cost-efficient basis.

Due to the current vague and overbroad tests of employee status espoused by some courts, construction contractors are increasingly being placed in jeopardy, resulting in increased, expensive and time-consuming litigation and less efficient performance of construction work costs and confusion. Further, construction firms have been unfairly targeted for alleged misclassification of some workers as independent contractors.

³⁸ <https://abc.org/News-Media/News-Releases/entryid/18377/abc-supports-final-dol-revisions-to-independent-contractor-status>.

Conclusion

Based on the above arguments, the final delay rule was unlawfully promulgated, as the department allowed insufficient time and inadequate explanation for ABC to provide more substantive comments on the issues raised in the proposed delay rule and failed to show good cause for enacting the final delay rule. Thus, the proposed withdrawal of the independent contractor final rule is based upon the false premise that the delay rule was valid, and the NPRM should be withdrawn for that reason alone. In addition, because the department's proposal to withdraw the independent contractor final rule is based on conclusory assertions, flawed assumptions, and disregard of the administrative record, the NPRM is arbitrary and capricious and not in accordance with law.

Respectfully submitted,



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