

April 18, 2023

The Honorable Kevin Kiley
Chairman, Subcommittee on
Worker Protections
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Alma Adams
Ranking Member, Subcommittee on
Worker Protections
U.S. House of Representatives
Washington, D.C. 20515

Dear Chair Kiley and Ranking Member Adams:

On behalf of the Construction Employers of America (CEA) and the 15,000 business owners we represent, who employ 1.4 million U.S. workers, we appreciate the opportunity to submit this statement for the subcommittee's hearing on independent contractors. We think it is critical that this hearing consider the harm that expanding use of independent contractor models, willful misclassification of workers as independent contractors, and the dearth of enforcement resources to pursue such misconduct in the construction industry are having on honest entrepreneurs creating family-sustaining jobs with retirement and health benefits, their employees, and American taxpayers.

The CEA is composed of seven construction employer associations that take pride in representing construction contractors that accept responsibility for providing family-sustaining wages and benefits and abiding by labor and employment standards, worker compensation laws, and unemployment insurance requirements. Our members adhere to the highest standards and are committed to strengthening the construction industry and providing opportunities for our workers. Our members' efforts provide the best value to project owners while securing high-value compensation and benefits for employees and their families. The wages our members generate and fund social security, Medicare, unemployment insurance, workers compensation, and other critical components of the nation's social safety net.

I. Improper Classification of Workers as Independent Contractors Harms Honest Construction Employers

Our business model stands in stark contrast to the increasingly pervasive business model in the construction industry that is rooted in a decision to treat almost every worker on a jobsite as an independent contractor without regard to the requirements of the Fair Labor Standards Act (FLSA) and other basic workplace laws. Such behavior prevents a "level playing field" for honest construction contractors—the majority of which are small businesses. Contractors that insist all or most of their workers are independent contractors can always submit a bid that is lower than a law-abiding employer because the independent contractor model is a mechanism to dissociate themselves from the obligations and expenses that come with being an employer. This model allows those who use it to get the benefits of workers' labor while evading the costs of paying minimum wage, overtime, workers' compensation, unemployment insurance, payroll taxes, and other costs our members accept.

Congress heard extensive and undisputed testimony in a 2019 hearing¹ before this same subcommittee regarding the impact of the abuse of independent contractor status in the construction industry is having on the ability of honest job creators to compete for work. As detailed during that hearing, construction companies that treat their workforce as independent contractors save a minimum of 20 to 30 percent on labor costs. When competing against companies like the ones represented by CEA that pay middle-class wages and offer retirement plans and health benefits, the independent contractor business model nets closer to a 50 percent cost advantage.² With such a cost differential, even the acknowledged difference in the skill and efficiency of our workforce makes it very hard to compete against this business model. The proliferation of this cut-rate way of doing business threatens to destroy honest job creators producing family-sustaining employment opportunities. The lack of resources at the federal and state level to police this dishonest means of doing business is creating a “race to the bottom” that represents an existential threat to the construction industry and its ability to attract and retain the quality workforce required to realize the vision of recently enacted infrastructure laws.

This is not a “red” or “blue” state issue. Honest employers, their workers, and taxpayers across the nation are being harmed by this pervasive cheating and the seeming inability of government to address the scale of it. As the state of Tennessee explained in 2019,³ people perpetrating these schemes know that even if their violations of wage, tax, and other laws associated with misclassifying their employees as independent contractors are detected, they can often just close their businesses and reopen as a newly formed LLC that for all practical purposes is a continuation of the closed business. By reopening under a new name, these individuals avoid meaningful penalties for non-compliance *and* continue to engage in misclassification knowing it is unlikely the new entity will be discovered. And if it is, these individuals can just repeat the pattern. This leaves workers with no recourse against these individuals and makes the small cadre of enforcement officials available to pursue them feel as if they are trying to use a seashell to hold back the tide.

II. Employee Misclassification Harms Workers

The misclassification of construction workers as independent contractors harms the hard-working Americans we rely on to build and maintain our infrastructure. Analysis shows an estimated 20 percent of construction workers who are not treated as employees—but should be—lose close to \$1 billion in wages annually⁴ by virtue of being misclassified. A separate study

¹ Testimony of Matt Townsend, Workforce Protections Subcommittee, U.S. House of Representatives Committee on Education and Labor, Hearing on “Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy” (Sept. 26, 2019), *available at* <https://www.congress.gov/116/meeting/house/110019/witnesses/HHRG-116-ED10-Wstate-TownsendM-20190926.pdf>.

² [Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio](#) (Feb. 18, 2009).

³ [Annual Report on Employer Coverage Compliance, Tennessee Bureau of Workers’ Compensation at 12](#) (February 1, 2019).

⁴ Russell Ormiston, Dale Belman, and Mark Erlich, *An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry* (2020) at 3, 5, *available at* <https://stoptaxfraud.net/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf>.

released earlier this year⁵ found that construction workers lose between \$10,177 to \$16,729 annually when they are misclassified as independent contractors. These figures align with independent academic research of the California construction industry finding that workers treated as independent contractors are only paid 64 cents for every dollar paid to a worker classified as an employee.⁶

In addition to contributing to lower pay for construction workers, the growing independent contractor business model in our industry is also driving a decline in the number of construction workers covered by retirement plans, health insurance benefits, workers compensation, and unemployment insurance. Construction workers treated as independent contractors must rely on social safety net programs to make up for the loss of these benefits. Independent contractors are more likely to rely on Social Security benefits to cover a large portion of their retirement income needs and state and federal programs take on the increased burden to provide for the growing contractor workforce. A study last year confirmed that the absence of benefits and low wages in a construction industry that is increasingly reliant on the independent contractor model has resulted in 39 percent of construction workers' families being enrolled in social safety net programs. These include programs that are driving federal spending, such as Medicaid, the Children's Health Insurance Program, the Earned Income Tax Credit, the Temporary Assistance for Needy Families program, and the Supplemental Nutrition Program.⁷ Simply put, the growing independent contractor business model in construction is making life worse for workers in our industry. It is also placing increasing and unfair demands on taxpayers.

III. Employee Misclassification Reduces Tax Revenues

By evading all the legal requirements and costs associated with being an employer, purveyors of the independent contractor business model in the construction industry also victimize American taxpayers. A recent study in 2020 examining the costs associated with the improper treatment of workers as independent contractors using conservative, mid-range numbers found that employee misclassification resulted in more than \$9 billion of lost tax revenues in 2017. This includes shortfalls of \$717 million in unemployment insurance contributions, \$5.814 billion in Social Security and Medicare taxes, \$1.83 billion in federal income taxes, and \$730 million in state income taxes.⁸ Moreover, as reported by the Congressional Research Service, it is generally accepted that "employers are more likely to withhold and submit taxes than independent contractors are to voluntarily pay their tax liabilities."⁹ Data from the Government

⁵ John Schmitt, Heidi Shierholz, Margaret Poydock, and Samantha Sanders, "The economic costs of worker misclassification," *Economic Policy Institute* (January 2023). <https://www.epi.org/publication/cost-of-misclassification/>

⁶ Yvonne Yen Liu, Daniel Flaming, and Patrick Burns, *Sinking Underground: The Growing Informal Economy in California Construction*, at 2, 11, and 12 (Sept. 2014), available at <https://economicrt.org/publication/sinking-underground>.

⁷ Ken Jacobs, Kuochih Huang, Jenifer MacGillvary, and Enrique Lopezlira, *The Public Cost of Low-Wage Jobs in the United States Construction Industry*, UNIV. OF CALIFORNIA LABOR CENTER (Jan. 2022), available at <https://laborcenter.berkeley.edu/wp-content/uploads/2022/01/The-Public-Cost-of-Low-Wage-Jobs-in-the-US-Construction-Industry-FINAL.pdf>.

⁸ Ormiston, *supra* note 4, at 5.

⁹ See Congressional Research Service, *The Tax Gap: Misclassification of Employees as Independent Contractors*, at 1 (Dec. 23, 2011), available at https://www.everycrsreport.com/files/20111223_R40807_f23bbc37cc588a74650a677be2a69c4a49b1faa6.pdf.

Accountability Office¹⁰ confirms that 61 percent of self-employed individuals with no employees underreported their income in 2001, accounting for \$68 billion of the estimated \$345 billion tax gap that existed over twenty years ago and has surely grown exponentially with the proliferation of the independent contractor business model. Hardworking, honest American taxpayers must make up for these shortfalls that are being pocketed by dishonest people masquerading as entrepreneurs and falsely claiming to be job creators of the type that the associations in CEA represent.

IV. Conclusion

Curbing the growth of abusive independent contractor models in the construction industry is essential to ensure honest job creators can compete on a level playing field and continue to provide the family-sustaining jobs they create and the tax revenues they produce. Halting the spread of this race-to-the-bottom business model also protects taxpayers and reduces spending on social safety net programs that are a focus of hard discussions about reigning in our nation's deficits.

Addressing abusive independent contractor business models is also about the meaning of America and the concept of entrepreneurship we honor and extoll in this country. Historically, we have honored those who "built the better mouse" or developed more efficient means of production to create and grow businesses that provided secure livelihoods for Americans. The independent contractor model is wholly foreign to this conception of what our capitalist system has traditionally honored. It focuses solely on transferring costs to workers and taxpayers to gain a massive cost advantage used to undercut the companies seeking to compete by developing more efficient building processes and training the most skilled and efficient workers. It is grounded in an intentional evasion of legal and financial obligations. It is encouraged by the low probability of detection and accountability. Whatever debates there may be during today's hearing on what the standards should be for delineating the line between employees and independent contractors, hopefully everyone can agree that we need to rigorously enforce the rules that we have or may establish in the future. This will ensure a level playing field, promote the rule of law, and retain a system of free enterprise that we can be proud of and that is a net benefit to our nation.

CEA appreciates the Worker Protections Subcommittee's consideration of our concerns, and we welcome the chance to discuss these important issues with members of the Subcommittee.

Sincerely,

The Construction Employers of America
www.constructionemployersofamerica.com

FCA International
International Council of Employers of Bricklayer and Allied Craftworkers

¹⁰ U.S. Gov't Accountability Office, GAO-07-1014, *Tax Gap: A Strategy for Reducing the Gap Should Include Options for Addressing Sole Proprietor Noncompliance*, at 3, 9-10 (July 2007), available at <https://www.gao.gov/assets/270/265399.pdf>.

Mechanical Contractors Association of America
National Electrical Contractors Association
Sheet Metal & Air Conditioning Contractors' National Association
Signatory Wall and Ceiling Contractors Alliance
The Association of Union Constructors