October 26, 2020

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Wage and Hour Division
U.S. Department of Labor
Room S-3502
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Submitted to: Federal eRulemaking Portal
http://www.regulations.gov

Subject: Request to the Labor Department to Withdraw Proposed Regulations on Independent Contractor Status under the Fair Labor Standards Act (RIN 1235-AA34)

On behalf of the 2,600 member companies of the Mechanical Contractors Association of America (MCAA) that employ United Association of Plumbers and Pipefitters (UA) workers on mechanical construction, maintenance, and service projects nationwide and the 350,000 skilled trade workers in the UA working in the high-skill sector of the domestic U.S. specialty construction and service industries, we request that the Labor Department withdraw the regulatory proposal captioned above.

Instead, the MCAA and UA respectfully request that the DoL consider a much broader and comprehensive remedial inter-agency collaborative approach to the intractable and widespread abuse of worker misclassification that injures workers, legally compliant companies, high-skilled workforce standards, our customers, and the economy and taxpayers as a whole.

MCAA and UA member firms invest well over $200 million annually in some 280 jointly administered apprenticeship and journeymen upgrade training programs nationwide. The MCAA/UA joint training infrastructure, along with those of our skilled trade partners and signatory employers in the other Building Trades, comprise the unparalleled skilled

trades, high-skill training infrastructure that undergirds the skill base of the entire domestic production economy.

Moreover, the MCAA/UA joint training, safety, pension, and health benefits systems provide robust economic benefits to our members and employees, their families, our industry clients, the economy as a whole, and government tax authorities and programs nationwide, as well as our communities.

Given all that, perforce, the MCAA/UA joint interest in finally and comprehensively staunching the longstanding and persistent scourge of worker misclassification, unfair competition, legal compliance avoidance, and tax cheating by unscrupulous employers in the construction industry – where misclassification goes beyond prevalent to rampant – and others is very strong and in perfect parallel with the public interest in maintaining high workforce standards. ("***Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries***," National Employment Law Project, Fact Sheet, September 2017.)

Given the prevalence and seriousness of the worker misclassification abuses, it is long past time for responsible Federal agencies to carry out established and well-founded recommendations to craft a comprehensive and more effective inter-agency approach to finally stem the well-documented widespread abuse of worker misclassification.

In fact, the DoL proposal is hasty in the extreme, too narrow, unfairly permissive, and misses an opportunity to make significant strides in stemming abuses, rather than narrowing the established DoL economic reality/suffer and permit framework for worker classification analysis, to open up a more lax administration of that standard.

The 30-day comment period is not customary, and the proposal is cursory in noting the withdrawal of the prior DoL guidance on the subject, "***The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors,"*** WHD Interpretation No. 2015-1, July 15, 2015, which was withdrawn by the Labor Department on June 7, 2017. Moreover, the new DoL standard appears to be a new variant adding to the welter of different classification standards used by various Federal agencies to determine the validity of worker classification. The common law 20-factor agent/principal test used by the IRS and others for these various statutes: Federal Insurance Contributions Act, Federal Unemployment Tax Act, Income Tax Withholding, Employee Retirement Income Security Act, National Labor Relations Act, and Immigration Reform and Control Act. The "economic realities test," of which the proposed rule is a new variant, is used under the Fair Labor Standards Act, Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Family and Medical Leave

Act. And then there is a hybrid standard of which the proposed rule may be a new variant, which is a combination of the common law test and the economic realities test used for Title VII, ADEA and ADA. ("***What is an Employee? The Answer Depends on the Federal Law,"*** U.S. DoL Monthly Labor Review, January 2002.)

Our view is that the 30-day comment period is too short to test the regulatory rationale cited in the proposed rules as follows:

> "Courts and the Department have long interpreted the "suffer or permit" standard to require an evaluation of the extent of the worker's economic dependence on the potential employer – *i.e.*, the putative employer or alleged employer – and have developed a multifactor test to analyze whether a worker is an employee or an independent contractor under the FLSA.
>
> "The ultimate inquiry is whether, as a matter of economic reality, the worker is dependent on a particular individual, business or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor).
>
> "But the test's underpinning and the process for its application lack focus and have not always been sufficiently explained by courts or the Department, resulting in uncertainty among the regulated community.
>
> "The Department believes that clear articulation will lead to increased precision and predictability in the economic reality test's application, which will in turn benefit workers and businesses and encourage innovation and flexibility in the economy."

We submit that these assertions may fail in the final result and aim, and just as plausibly may be read as a rationale for issuing a more permissive rule that could encourage greater abuses rather than "innovation." To emphasize, our joint position does not disfavor legitimate independent contractor classifications – rather, experience and long-standing policy counsels for a tighter and broader remedial approach to long-recognized abuses that the current regulatory framework has failed to stem for a long time.

The practice of misclassifying workers as contractors is rampant across the country and causes untold harm. The proposed rule will only cause an already grave situation to become considerably worse. The ultimate negative impact from misclassification is staggering. It causes the loss of billions of dollars in taxes and seriously undercuts vital federal and state laws. Moreover, such practices essentially amount to illegal, unfair

competition that harms legitimate employers, as well as their workers. Indeed, there is substantial, extensive evidence that the cost of worker misclassification to both states and the federal government is astronomical.

For example, companies that engage in these practices evade unemployment insurance taxes for employees who are misclassified as independent contractors, which results in billions of dollars of lost tax revenue that would otherwise be used to support critical programs, including Social Security, Medicare, and unemployment insurance.[1] Specifically, a comprehensive study on the effects of misclassification by the IRS found that it resulted in a loss of $1.6 billion of tax revenue in a single year.[2] Adjusted for inflation, this finding suggests that the federal government currently loses over $2.7 billion in tax revenue per year from this unlawful practice.[3]

Further, the pervasiveness of the problem of worker misclassification means that law-abiding businesses that *do* correctly classify their workers are at a major competitive disadvantage by making all required payments illegally evaded by unscrupulous firms.

Obviously, this is particularly devastating in industries such as construction, where projects are generally awarded to the lowest bidder.[4]

We recommend a much broader Federal government inter-agency approach to this multidimensional problem, ranging from immediate narrow collaboration, up to and including novel inter-agency collaboration, as follows.

DoL should fully implement its Memorandum of Understanding with the Treasury Department's Office of Inspector General for Tax Administration. ("***Additional Actions Are Needed to Make the Worker Misclassification Initiative With the Department of Labor a Success***," Treasury Inspector General for Tax Administration, Office of Inspections and Evaluations, 2018-IE-R002, February 20, 2018.) In a recent report the Treasury TIGTA said that, "The Commissioner, Small Business/Self-Employed Division, should evaluate provisions of the [Memorandum of Understanding with the Department of Labor] require amendment, revision, or termination and ensure that the duties and responsibilities of the IRS, as outlined in the MOU, are executed as required." (***Treasury***

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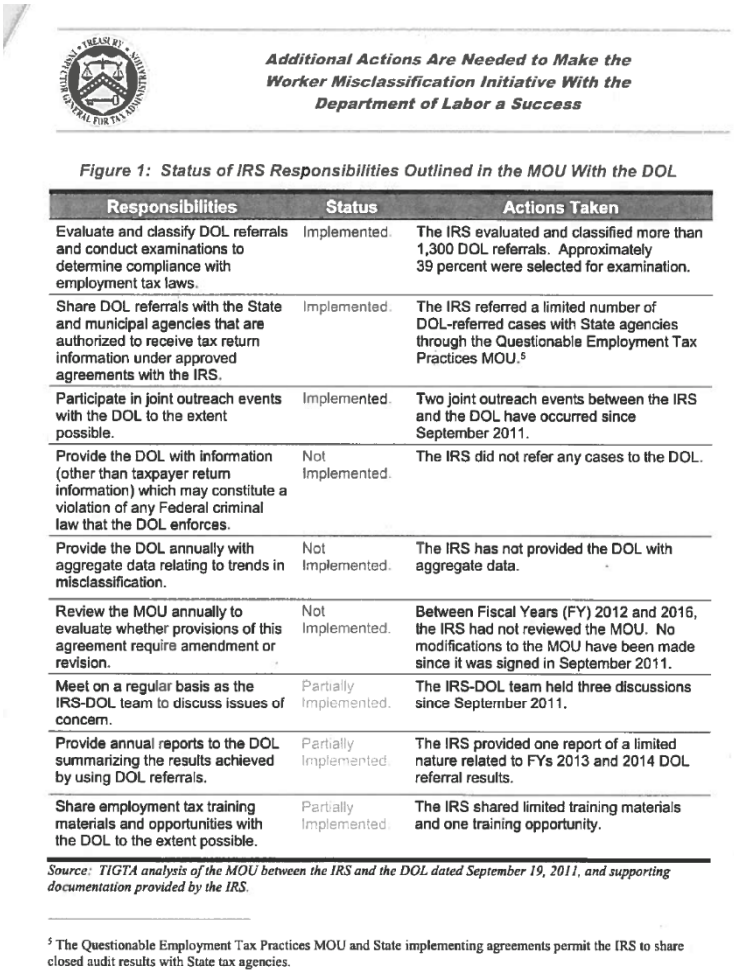
[1] Françoise Carré, ECON. POLICY INSTITUTE, *(In)dependent Contractor Misclassification*, at 1-2, 7-8 (June 8, 2015), available at https://files.epi.org/pdf/87595.pdf.

[2] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER MISCLASSIFICATION, at 1-2 (2006), available at https://www.gao.gov/new.items/d06656.pdf.

[3] *Id.* at 2.

[4] Carré, *supra* note 1, at 2, 5.

Inspector General for Tax Administration Semiannual Report to Congress, October 1, 2019 – March 31, 2020.) Excerpts reprinted below.



Additional Actions Are Needed to Make the Worker Misclassification Initiative With the Department of Labor a Success

Figure 1: Status of IRS Responsibilities Outlined in the MOU With the DOL

Responsibilities	Status	Actions Taken
Evaluate and classify DOL referrals and conduct examinations to determine compliance with employment tax laws.	Implemented.	The IRS evaluated and classified more than 1,300 DOL referrals. Approximately 39 percent were selected for examination.
Share DOL referrals with the State and municipal agencies that are authorized to receive tax return information under approved agreements with the IRS.	Implemented.	The IRS referred a limited number of DOL-referred cases with State agencies through the Questionable Employment Tax Practices MOU.[5]
Participate in joint outreach events with the DOL to the extent possible.	Implemented.	Two joint outreach events between the IRS and the DOL have occurred since September 2011.
Provide the DOL with information (other than taxpayer return information) which may constitute a violation of any Federal criminal law that the DOL enforces.	Not Implemented.	The IRS did not refer any cases to the DOL.
Provide the DOL annually with aggregate data relating to trends in misclassification.	Not Implemented.	The IRS has not provided the DOL with aggregate data.
Review the MOU annually to evaluate whether provisions of this agreement require amendment or revision.	Not Implemented.	Between Fiscal Years (FY) 2012 and 2016, the IRS had not reviewed the MOU. No modifications to the MOU have been made since it was signed in September 2011.
Meet on a regular basis as the IRS-DOL team to discuss issues of concern.	Partially Implemented.	The IRS-DOL team held three discussions since September 2011.
Provide annual reports to the DOL summarizing the results achieved by using DOL referrals.	Partially Implemented.	The IRS provided one report of a limited nature related to FYs 2013 and 2014 DOL referral results.
Share employment tax training materials and opportunities with the DOL to the extent possible.	Partially Implemented.	The IRS shared limited training materials and one training opportunity.

Source: TIGTA analysis of the MOU between the IRS and the DOL dated September 19, 2011, and supporting documentation provided by the IRS.

[5] The Questionable Employment Tax Practices MOU and State implementing agreements permit the IRS to share closed audit results with State tax agencies.

Inspections and Evaluations Statistical Reports

Reports With Significant Unimplemented Corrective Actions[26]

The Inspector General Act of 1978, as amended, requires identification of significant recommendations described in previous semiannual reports for which corrective actions have not been completed. The following list is based on information from Department of the Treasury's Joint Audit Management Enterprise System (JAMES).

Reference Number	Issued	Projected Completion Date	Report Title and Recommendation Summary (F = Finding No., R = Recommendation No.)
2018-IE-R002	February 2018	09/15/20	**Additional Actions Are Needed to Make the Worker Misclassification Initiative With the Department of Labor a Success** F-1, R-1: The Commissioner, Small Business/Self-Employed Division, should evaluate whether provisions of the MOU require amendment, revision, or termination and ensure that the duties and responsibilities of the IRS, as outlined in the MOU, are executed as required.
2018-IE-R005	August 2018	05/15/20	**Controls Over Pocket Commissions Must Be Improved** F-1, R-3: Subsequent to the establishment of a complete and accurate record of non-enforcement commissions in Personal Identity Verification Data Synchronization (PDS), the Chief, Facilities Management and Security Services, should reinstate the requirement for an annual reconciliation to account for issued commissions to ensure that PDS records remain complete and accurate.
2019-IE-R002	November 2018	06/15/20	**Although Virtual Face-to-Face Service Shows Promise, Few Taxpayers Use It** F-1, R-1: The Commissioner, Wage and Investment (W&I) Division, and the National Taxpayer Advocate (NTA) should formally develop and document a vision and specific goals for their Virtual Service Delivery (VSD) programs and develop performance measures to monitor and evaluate the performance of the individual programs.
2019-IE-R002	November 2018	06/15/20	**Although Virtual Face-to-Face Service Shows Promise, Few Taxpayers Use It** F-2, R-2: The Commissioner, W&I Division, and the NTA should both conduct public awareness activities to increase taxpayers' knowledge of the VSD program.

[26] The Office of Inspections and Evaluations has previously designated one report with unimplemented recommendations as "Sensitive But Unclassified (SBU)." The SBU report concerns the physical security of IRS facilities or subject matter that might create a risk of circumvention of the law if publicly released. There are no potential cost savings associated with any unimplemented recommendations from the report.

More broadly, DoL should convene an inter-agency task force, Advisory Committee or some other forum to go through these long-established Government Accountability Office recommendations that have no less validity today than when they were issued.

Employee Misclassification – Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention, GAO-09-717, August 2009 Excerpt of recommendations below.

Table 4: Options for Addressing Employee Misclassification

A. Clarify the employee/independent contractor definition and expand worker rights
1. Clarify the distinction between employees and independent contractors under federal law
2. Allow workers to challenge a classification determination in U.S. Tax Court
3. Ensure that workers have adequate legal protection against retaliation from filing a Form SS-8
4. Define misclassification as a violation under FLSA
B. Revise section 530 of the Revenue Act of 1978
5. Narrow the definition of "a long-standing recognized practice of a significant segment of the industry" so that fewer firms qualify for this reasonable basis for the section 530 safe harbor provision
6. Lift the ban on IRS/Treasury issuing regulations or revenue rulings clarifying the employment status of individuals for purposes of employment taxes
C. Provide additional education and outreach
7. Require service recipients[a] to provide standardized documents to workers that explain their classification rights and tax obligations
8. Expand IRS outreach to service recipient, worker, and tax advisor groups to educate them about classification rules and related tax obligations, targeting groups IRS deems to be "at risk"
9. Create an online classification system, using factors similar to those used in the SS-8 determination process, to guide service recipients and workers on classification determinations
10. Increase the use of IRS notices to service recipients in industries with a potentially high incidence of misclassification to educate them about classification rules and ask them to review their classification practices
D. Withhold taxes for independent contractors
11. Require service recipients to withhold taxes for independent contractors whose TINs IRS cannot verify or who IRS has determined are not fully tax compliant
12. Require universal tax withholding for payments made to independent contractors, using tax rates that are relatively low (e.g., 1 percent to 5 percent of payment amounts)
13. Require service recipients to withhold taxes from payments made to independent contractors who request withholding in writing
E. Collect data on misclassification and independent contractors
14. Measure the extent of misclassification and related impacts on tax revenues at the national level
15. Require each independent contractor to apply for a separate business TIN
F. Enhance IRS compliance programs
16. Expand IRS's CSP to include service recipients that voluntarily contact IRS about their misclassified workers
17. Require service recipients to submit Forms SS-8 for all newly retained independent contractors
G. Enhance coordination and information sharing
18. Enhance coordination between IRS, DOL, and other federal agencies to share data and address misclassification
19. Enhance coordination between IRS, states, and selected local governments to share data and address misclassification

Source: GAO analysis of literature reviews and interviews with affected stakeholders.

[a]By "service recipients," we mean businesses and other entities that receive services from independent contractors or employees in the course of a trade or business, not including consumers or individuals who seek services for their homes or personal use.

[42]The list also does not include options that we have recently analyzed or recommended in prior reports that are indirectly related to worker misclassification, such as information reporting on payments made to independent contractors. For example, in GAO-09-238 we made various recommendations to improve compliance with filing Forms 1099-MISC, and in GAO-07-1014 we analyzed various options to address tax noncompliance among sole proprietors, a group of taxpayers that includes independent contractors.

We asked 11 external stakeholders to provide input on these 19 options, including (1) the extent to which they supported or opposed each option and (2) the benefits and drawbacks of each option (see app. II for a summary of these benefits and drawbacks for each option).[43] These stakeholders included 4 groups that represent the views of small businesses, independent contractors, and those who hire them (i.e., independent contractor groups); 4 groups that represent the views of organized labor (i.e., labor groups); 2 groups that represent the tax

[43]We identified these 11 stakeholder groups from the original 19 that we interviewed early in our study. We selected the 11 based on those that provided specific ideas and comments on the options in our first round of interviews and that expressed willingness to respond to our written data collection instrument.

Going back even further, DoL should pay heed to the recommendations of the 1994 Final Report of the Dunlop Commission on the Future of Worker-Management Relations, as follows: "The definition of 'employee' in statutes across the employment and labor law spectrum should be changed and made uniform in a way that reflects the economic realities of the relationship between providers and recipients of services." (***The Dunlop Commission on the Future of Worker-Management Relations – Final Report,*** December 1, 1994, p. 69.)

In pursuing this carefully considered and long overdue inter-agency collaboration, DoL should convene the IRS, EEOC and NLRB and perhaps the Department of Commerce as the Dunlop Commission did. Moreover, in addition to the statutory recommendations on the definition of 'employee' across Federal labor/employment laws, and necessary revisions to Section 530 of the 1978 tax law, the inter-agency group should consider

compliance analysis on an industry-by-industry basis, reflecting the various unique circumstances of work and services in various industries. The unique conditions of construction definite term, job site subcontracting work and employment are vastly different from more casual, part-time personal services work in the GIG economy. Likewise, insurance and real estate agents, and IT service consultants perform vastly different functions under arrangements with clients and service recipients as compared with drywall hangers and rig welders working on specific projects in the construction industry. If the analysis and regulatory and statutory recommendations would better be performed outside specific agency jurisdictions, then we would suggest an outside commission or even a Statutory Review Program analysis by the Administrative Conference of the United States.

Significantly, state governments have relied on the multi-agency, cross-disciplinary approach as a primary strategy for combatting misclassification problems and associated law violations. The federal government would likewise benefit from this approach, which allows diverse agencies working on the same overarching problems to share information on evidence and other issues and collaborate effectively on developing solutions. As the following examples show, this approach is eminently logical since the law violations that are committed with misclassification practices affect multiple laws and policy areas. *See* 15 Ill. Comp. Stat. 205/6.4 (creating the Illinois "Worker Protection Unit Task Force"); Mo. Exec. Order No. 20-15 (Sep. 11, 2020), https://www.sos.mo.gov/library/reference/orders/2020/eo15 (creating the Missouri "Task Force on Worker Classification"); Va. Exec. Order No. 38 (Aug. 8, 2019), https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-38-Reauthorizing-an-Inter-agency-Taskforce-on-Worker-Misclassification-and-Payroll-Fraud.pdf (re-authorizing the Virginia "Inter-Agency Taskforce on Worker Misclassification and Payroll Fraud").

The overall point of our recommendation is for responsible Federal policy makers to begin to implement the well-established remedial recommendations that have been neglected for a decade or more.

Respectfully submitted,

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Mark McManus, UA General President