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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



March 12, 2013

VIA E-MAIL: WHDPRAComments@dol.gov

Ms. Karen Livingston
Director, Division of Strategic Planning and Performance
Wage and Hour Division
U.S. Department of Labor
Frances Perkins Building, Room S-3510
200 Constitution Avenue, NW
Washington, DC 20210

Re: Information Collection Request (ICR) for the Worker Classification Survey

Dear Ms. Livingston:

On behalf of the Associated General Contractors of America (hereinafter "AGC"), let me thank you for the opportunity to submit the following comments on the Wage and Hour Division's (hereinafter "WHD") comment request regarding the proposed information collection request (ICR) for a worker classification survey, as published in the *Federal Register* on January 11, 2013.

AGC is among the oldest and largest of the nationwide trade associations in the non-residential construction industry. It is a non-profit corporation founded in 1918 at the express request of President Woodrow Wilson, and it now represents more than 32,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,000 of the nation's leading general contractors, more than 12,000 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms, both union and open shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property.

In recent communications by the labor department, the construction industry has been named as an industry of target for audits concerning worker misclassification. AGC is writing today to educate WHD on the use of independent contractors in the non-residential construction industry and to provide alternative solutions for meeting the legitimate enforcement objectives of the agency.

The construction industry is a unique industry that is project-based with a transitory workforce. Due to the nature of the industry, the use of independent contractors in the non-residential construction industry serves a legitimate business purpose.

According to a 2010 study by Navigant Economics, construction workers are often called from project to project, working for multiple construction companies frequently, for relatively brief periods. The report also states that many construction companies are not large enough to keep specialized workers fully occupied at all times, or need the ability to respond to changes in demand, and thus benefit from engaging workers on a project-by-project basis.

One example of this in construction is with the use of trucks and truck drivers. Trucks and truck drivers may only be necessary for the first portion of a construction project in order to carry dirt, large materials and other objects to and around a construction jobsite. Once the basic structure has been erected, the use of trucks and truck drivers will likely decrease and eventually be eliminated altogether as more cosmetic work begins to take place. Rather than having the long-term expenses associated with having truck driver-employees (particularly during periods when no work is available) in addition to the expense of owning and maintaining several trucks, a construction company may be better suited financially to work with independent contractors who provide truck driving services along with the use of their truck for a specific period of time.

Another example is building information modeling (BIM). BIM is a relatively new technical service ideally provided to commercial construction companies by independent contractors. BIM services require the use of special software programs and expertise, which can be costly. These services are not required after the start of actual construction work. It is not uncommon for this type of virtual construction to be completed by one individual or a small team of individuals who will then move on to another project, possibly for another employer, to provide the same service. Without independent contractors in these roles, employee-workers and expensive software and/or equipment will be sitting, without work, possibly in a lay-off status, until the start of the next project, which could be weeks or months down the road.

The proposed collection of information is unnecessary for the performance of the functions of the WHD and will therefore not have practical utility.

AGC understands that it is the responsibility of the WHD to enforce laws that affect workers' pay and benefits. AGC also supports WHD efforts that "weed out" bad-actor employers that intentionally misclassify true employees as independent contractors. Such employers not only deprive the government of tax revenue and potentially deprive employees of various benefits (as discussed below), but they also gain a competitive advantage against law-abiding employers. However, it is unclear how speaking with workers directly to "gather information about workers' employment and pay arrangements" and to "measure workers' knowledge about the rights and benefits associated with their job status," will directly help with enforcement; particularly when there are several opportunities for the WHD to work with the Internal Revenue Service (IRS) to accomplish its enforcement goals.

In 2011, the WHD announced that a memorandum of understanding had been signed between the agency and the IRS that would allow the two agencies to share information for the purpose of

enforcement. If it is the WHD's intent to educate workers who are classified as independent contractors on their potential loss of benefits, perhaps the WHD could work with the IRS to revise the instructions included on IRS Form W-9 to clearly explain the difference between being an employee and being an independent contractor. According to the IRS, a person or company who is required to file an information return with the IRS must obtain a worker's or company's taxpayer identification number – obtained by using IRS Form W-9 – to report income paid prior to issuing Form 1099.

On the other hand, if it is the WHD's intent to use the information collected by the survey to obtain potential leads for enforcement, then AGC recommends another solution to assist with accomplishing this goal. For example, companies who use independent contractors, legitimately or not, are likely to submit IRS Forms 1099 as verification of a business expense that can be claimed as a tax deduction. The IRS could provide to the WHD a list of individuals or companies who submitted Forms 1099 each tax year. As a result, the WHD could focus its audit procedures on Form 1099 recipients who did not report Forms 1099 received from multiple companies. This could be an indicator that the worker may be or may have been treated as an independent contractor when they should have been classified as an employee of the company. The WHD could then target those companies that show a pattern of issuing Forms 1099 to multiple individuals who did not report Forms 1099 received from other companies. Rather than going on a "witch hunt", it would make more sense to analyze this type of data provided by the IRS in order to narrow down a truly targeted list of potential violators.

There are additional costs that should be considered by the WHD before moving forward with a survey.

The notice states that a representative sample of more than 10,000 workers will participate in surveys lasting 15 minutes with an additional 7,000 participating in five-minute surveys. One hundred executives will also be contacted. In AGC's opinion, none of these groups represent a large enough sample of the workforce or employer executives. Furthermore, how will these individuals be selected? Isn't it a possibility that all of those surveyed could have a good understanding of how they are compensated, in which case, the expense associated with conducting and analyzing this survey would have been unnecessary?

Will workers and executives be contacted during business hours? If so, has the WHD considered the cost associated with the loss of productivity to the company if workers and executives are contacted during business hours? In addition, workers who are contacted to participate in the survey will likely bring questions back to the employer causing an additional cost burden for the time required to respond to workers' inquiries and also to train management on how to respond to workers' questions.

The WHD appears to ignore the "benefits" associated with being independent contractors and their impact on the overall economy and instead chooses to focus on whether workers understand the "implications of their classification status" as an independent contractor.

As the comment request states, AGC agrees that there are some disadvantages to being an independent contractor such as the possible loss of employer-provided health insurance, unemployment insurance and workers' compensation. However, there are also many advantages to being an independent contractor such as work-life flexibility, being your own boss, being able to deduct legitimate business expenses for tax purposes, and in most cases, an increase in take-home pay.

Increased work-life flexibility and take-home pay are two areas in which the current administration has expressed an interest. With regard to work-life flexibility, the WHD has recently celebrated the 20th anniversary of the Family and Medical Leave Act by expanding existing leave laws to benefit workers. Does the WHD seek to take away the very work-life flexibility it says workers need? Because he or she can work without direct supervision and can accept or decline work as he or she sees fit, being an independent contractor allows workers the flexibility necessary to have a good work-life balance.

With regard to an increase in take-home pay, in the President's most recent State of the Union Address, he discussed the desire for increased wages. Because companies don't have the expensive, long-term commitments they do with permanent employees, employers often pay independent contractors more than they would normally pay an employee, in terms of take-home pay, to do the same job. When so many families are trying to do more with less, does the WHD want take steps that could decrease take-home pay for so many workers at such a fragile economic time?

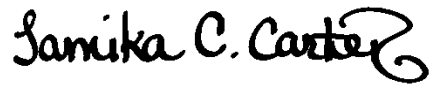
In addition, many become independent contractors as a first step to entrepreneurship, and entrepreneurship should be celebrated, not made to seem less than a person's status as an employee. Also, many independent contractors start out by creating a job for themselves and eventually expand into small businesses that create jobs for others. According to the U.S. Department of Commerce, small companies – many of them arising out of independent contracting beginnings – create three out of every four new jobs. They are the key to job growth and economic recovery. Discouraging independent contractor status would impede economic growth and the start of small businesses. So, *if* a survey *shall* be conducted of workers, the survey should not only discuss the benefits that might be lost when a worker is an independent contractor but also the benefits to be gained by becoming one. To do otherwise, would be misleading the surveyed workers.

Conclusion

AGC commends the WHD on its effort to eradicate the use of *intentionally* misclassified workers by employers who wish to defraud the government, seek out an unfair advantage over law-abiding employers, and take advantage of workers who believe they are employees and lawfully qualify as such. However, AGC does not believe its members meet this criterion and instead, have legitimate needs for the use of independent contractors. Furthermore, to the extent that AGC members are found to have misclassified workers, it is because the governing laws in this area are overly complex, heterogeneous, and nebulous. In closing, AGC believes that surveying workers and executives is unnecessary and will have a costly impact on businesses, the government, and the overall economy, possibly without providing the results sought after by the

WHD. AGC looks forward to continued dialogue with WHD concerning this and other issues related to the construction industry.

Sincerely,

A handwritten signature in black ink that reads "Tamika C. Carter". The signature is written in a cursive, flowing style with a large, decorative flourish at the end of the last name.

Tamika C. Carter, PHR
Director, Construction HR