



UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

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Department of Labor  
Bureau of Labor Statistics

**RE: Contingent Worker Supplement to the Current Population Survey  
(OMB Control Number 1220-0153)**

Dear Sir or Madam:

On April 10, 2023, the Department of Labor Bureau (“DOL”) published in the *Federal Register* an information collection request (“ICR”) proposing alterations to the Contingent Work Supplement (“CWS”) to the Current Population Survey (“CPS”).<sup>1</sup> Please consider this submission to be the United Brotherhood of Carpenters and Joiners of America’s (“UBC”) comments regarding the ICR.

**I. Introduction and Statement of Interest.**

With hundreds of thousands of members employed primarily in the construction and wood products industries, the UBC is one of North America’s largest building-trades unions. The UBC has a continent-wide presence composed of its international union headquarters in Washington, D.C., and approximately twenty councils, and hundreds of local unions. Since its founding, the UBC has led efforts to curb the abuse of labor in the construction industry.

The UBC has consistently encouraged improvements to make America’s construction markets fairer, safer, more productive, and more favorable for both workers and honest employers. To that end, the UBC and its affiliated councils and local unions frequently engage with construction workers, contractors, lawmakers and federal and state law-enforcement agencies regarding the current and growing flagrant instances of serious tax fraud, insurance fraud, wage theft, labor trafficking, threats to safety, and other abuses of labor and employment laws occurring

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<sup>1</sup> *Agency Information Collection Activities: submission for OMB Review: Comment Request: Contingent Worker Supplement to the Current Population Survey*, 88 Fed Reg. 21210 (April 10, 2021) (hereinafter “ICR”).

in the construction industry. The UBC and its affiliates have sponsored authoritative studies on illegal schemes that exploit construction workers, including wage theft perpetrated through the misclassification of construction workers as independent contractors and off-the-books employment. These efforts inform our interest in the ICR and its objective to gather more useful and accurate information on contingent work arrangements.

## **II. Criminal Activity in the Construction Industry is Widespread and Growing.**

To understand our recommendations and the need for more useful and accurate data on contingent workers, it is important to understand the alarming growth of illegal schemes that have taken hold in the construction industry.

The construction industry is a highly competitive business. Construction contracts are frequently awarded to low bidders. Material costs in any given market will not differ tremendously, and the cost of labor is the variable that drives differences in bids. Ethical contractors reduce labor costs by having well-trained efficient workers, supervisors and jobsite practices. Other contractors reduce labor costs by not providing family healthcare and retirement benefits. Others find far greater savings by evading their legal obligations to pay employment taxes, unemployment insurance contributions, workers' compensation insurance premiums, and overtime premium pay. These costs are only required in the compensation of workers treated as *employees*. To evade these costs, scofflaw contractors intentionally misclassify employees as independent contractors and issue a 1099-MISC report or simply pay them "off-the-books" by check or cash with no reporting to state or federal taxing authorities or workers' compensation insurers. A study commissioned by the Office of the Attorney General of the District of Columbia found that contractors using these illicit practices cut 16.7 to 48.1 percent off their labor costs.<sup>2</sup> This gives cheating contractors a substantial bidding advantage over law-abiding competitors.

Fraud in the industry is also aided by the layering of contractors and subcontractors. On a typical commercial or residential job site, specialty subcontractors<sup>3</sup> do the actual construction work. Specialty subcontractors will have construction agreements with general contractors or directly with owners or developers. There are many ways to break the law. The simplest way for a subcontractor to break the law is by paying its employees as independent contractors or off-the-

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<sup>2</sup> Karl Racine, Attorney General for the District of Columbia, *Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry*, economic analysis by Dale Belman and Aaron Sojourner, 1, 2 and 15 (May 22, 2019), available at <https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf>.

<sup>3</sup> Examples of specialty subcontractors in the carpentry trade include pile driving, concrete form construction, interior systems (metal stud, drywall and ceiling installation) and flooring.

books. But that leaves the subcontractor vulnerable. To insulate themselves, subcontractors often rely on a layer of subcontracted labor brokers. Labor brokers typically supply the bulk of the construction employees under a subcontractor's supervision. Workers for labor brokers fit federal and state employee definitions,<sup>4</sup> however most are treated as independent contractors for whom no taxes are withheld, and no overtime is paid. They are issued 1099-MISC forms or, more often, are paid off-the-books.<sup>5</sup> In this scheme, the labor broker is the low hanging fruit that insulates the specialty subcontractor from liability.

To protect labor brokers and further confound law enforcement, in the most "advanced" fraud schemes, the construction industry has added yet another layer—the shell company operator.<sup>6</sup> Labor brokers will operate in the guise of shell companies registered with offices of secretaries of state. The shell company identity is rented from the operator or another person or entity that is facilitating the scheme. These rented shell companies often feature a workers' compensation policy that has a premium derived from a false and wildly inaccurate minimum payroll. Shell company operators sign incorporation documents, applications and renewals of workers' compensation insurance, and any tax forms, making them the low-hanging fruit for law enforcement. The operators, or their co-conspirators, often "rent" a single shell company and its related insurance forms to numerous labor brokers at the same time.

To facilitate off-the-books, cash payments to workers, labor brokers will negotiate the check payments from subcontractors for cash at stand-alone money service businesses, grocery stores, liquor stores, roving vans, bars, or gas stations. When a labor broker is using a shell company identity, and the bank check from the subcontractor is \$10,000 or more, the currency transaction report required by federal anti-money laundering regulations will be falsified by noting that the shell company operator negotiated the check and not the labor broker. The cash used to pay

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<sup>4</sup> Because of the shared control of the workforce, the subcontractors and labor brokers are joint employers. See, e.g., *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1974) (joint employer doctrine under the Fair Labor Standards Act).

<sup>5</sup> Oliver Cooke, Deborah Figart and John Foonjian *The Underground Construction Economy in New Jersey*, Stockton University William J. Hughes Center for Public Policy, 9 (June 2016); Yvonne Yen Liu and Daniel Flaming, *Sinking Underground: The Growing Informal Economy in California Construction*, 1 and 2, (2014) ; Dale Belman and Richard Block, *The Social and Economic Costs of Employee Misclassification in the Michigan Construction Industry*, School of Labor and Industrial Relations, Michigan State University, 9 (2008). All reports are available at [StopTaxFraud.net/reports](http://StopTaxFraud.net/reports).

<sup>6</sup> David Borum & Geoffrey Branch, *How Construction Cons Steal Workers' Comp Premiums: It's a Shell Game*, Journal of Insurance Fraud in America, April 25, 2017, reprinted by Property Casualty 360, available at, <https://www.propertycasualty360.com/2017/04/25/how-construction-cons-steal-workers-comp-premiums>.

employees may be “clean,” but it may also be laundered proceeds from criminal syndicates or drug cartels that is supplied to the money service business.<sup>7</sup>

The schemes described above, and their variations, are becoming standard operating procedure in the construction market in many states, including Florida, Georgia, Tennessee, Colorado, Utah, Virginia, Maryland, the District of Columbia, Louisiana, Oklahoma, Texas and other states. The schemes exist, though are less dominant currently, throughout the rest of the country.

The labor broker fraud model has spread far and wide for many reasons. Chief among them is that it is lucrative, and it works. Market forces are eviscerating self-policing, because malign contractors win the bids, thus stealing work from law-abiding construction businesses and their employees. Responsible contractors are forced into niche markets or are pressured to utilize these schemes or go out of business. Either because of the complexity of the layers of entities used in these cases, lack of resources, or other pressing priorities, law enforcement rarely, either through joint-employer or conspiracy doctrines, hold the specialty or other upper-tier contractors accountable. Thus, the fraud model is vindicated every time a labor broker or shell company operator is the only entity held liable.

Many believe that this unlawful business model is isolated to single-family home construction. It is true that it dominates the residential construction industry in every state, but the unfortunate truth is these illegal practices have spread across all segments of the construction industry. UBC affiliates and enforcement agencies have uncovered labor-broker schemes at military bases, hospitals, universities, luxury condominium towers, office buildings, hotels, legislative office buildings, airports, and horizontal housing developments being constructed by some of the leading general contractors, construction managers, and specialty subcontractors in the industry.

Data proves the severity of the problem. A study of construction-employer fraud nationally disclosed that up to 20.5 percent of construction workers who should be treated as employees are not.<sup>8</sup> Using conservative estimates, the researchers found that construction workers lose close to \$1 billion of overtime and other premium pay annually.<sup>9</sup> Social Security and Medicare losses are \$5.08 billion annually.<sup>10</sup> Approximately \$717 million of state unemployment contributions are

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<sup>7</sup> *Id.*

<sup>8</sup> Russell Ormiston, Dale Belman and Mark Erlich, *An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry*, 3 (2020), available at <https://stoptaxfraud.net/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf>.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.*, using mid-range numbers.

not made, and workers' compensation carriers lose \$2.03 billion in premiums. Federal income tax losses amount to \$1.8 billion annually and state income tax losses are about \$730 million.<sup>11</sup> Moreover, adding insult to injury, the scofflaws foist \$3.48 billion of federal employment taxes they should pay onto the backs of workers and their families.<sup>12</sup>

The damage caused by malign contractors reverberates throughout society. Construction families suffer and American taxpayers foot the bill. The University of California Berkeley Labor Center issued a report in January 2022 on the number of construction worker families in the United States enrolled in social safety net programs—adult Medicaid, children's Medicaid, the Earned Income Tax Credit, Temporary Assistance for Needy Families, and the Supplemental Nutrition Assistance Program.<sup>13</sup> Shockingly, 3 million families, or 39 percent of construction worker families, are enrolled in at least one of these social safety net programs, costing state and federal taxpayers \$28 billion a year.<sup>14</sup> Additionally, 31 percent of construction workers do not have health insurance compared to 10 percent of all workers.<sup>15</sup> The authors of the report attributed the high degree of reliance on public assistance to a number of factors. Chief among those were low pay, wage theft, misclassification as independent contractors, off-the-books payments, and “payroll fraud.”<sup>16</sup>

The array of federal and state laws being violated in these schemes is staggering. They include employment-tax fraud, failure to deduct income taxes, failure to report wages,<sup>17</sup> failure to pay state unemployment contributions, insurance fraud,<sup>18</sup> money laundering, falsifying or failing

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* Additional data on individual states can be found at [StopTaxFraud.net/reports](https://stoptaxfraud.net/reports).

<sup>13</sup> Ken Jacobs, Kuichih Huang, Jenifer MacGillvary and Enrique Lopezlira, *The Public Cost of Low-Wage Jobs in the US Construction Industry*, UC Berkeley Labor Center (January 2022) (“Public Cost”); available at, <https://laborcenter.berkeley.edu/the-public-cost-of-low-wage-jobs-in-the-us-construction-industry/>.

<sup>14</sup> *Id.* at 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1, 2-3 and 6.

<sup>17</sup> Tom Juravich, Russell Ormiston and Dale Belman, *The Social and Economic Costs of Illegal Misclassification, Wage Theft and Tax Fraud in Residential Construction in Massachusetts*, UMass-Amherst Labor Center Working Paper, 26 (June 28, 2021), available at, <https://www.umass.edu/lrrc/sites/default/files/Juravich%20Wage%20Theft%206%2028%2021.pdf>.

<sup>18</sup> See, e.g., Press Release, Dept. of Justice, U.S. Attorney's Office Middle District of Florida, *Two Men Plead Guilty to Fraudulent Scheme to Evade Payroll Taxes and Workers' Compensation Requirements in the Construction Industry*, (March 30, 2021) (hereinafter “Two Men Plead Guilty”), available at, <https://www.justice.gov/usao-mdfl/pr/two-men-plead-guilty-fraudulent-scheme-evade-payroll-taxes-and-workers-compensation> (This case is an example of a workers' compensation premium fraud scheme where shell companies were used also involving federal offences. The defendants pleaded guilty to wire fraud and tax fraud. The estimated payroll taxes owed on the \$22,793,748 of checks cashed was \$5,766,286. The

to file currency transaction reports, failure to pay minimum wages, failure to pay overtime premium pay, mail fraud, wire fraud, racketeering, child labor violations and labor trafficking of immigrant workers. The sheer volume of lawlessness has led some industry watchers to deem the sector the “Wild West.”<sup>19</sup> The depth of this crisis cannot be explained away as small businesses being confused by complicated laws and definitions of employment. These illegal actions have dire consequences for the workers who are exploited, the taxpayers who are cheated, and the law-abiding contractors who are forced out of business or frozen out of market segments in many states.<sup>20</sup>

### **III. Data Limitations Hinder Research and Effective Public Policy.**

The three principal mechanisms for this lawlessness in the construction industry are: (1) the misclassification of employees as independent contractors (i.e., the inappropriate use of 1099-MISCs); (2) the growth and pervasiveness of the underground economy (i.e., off-the-books employment); and (3) the proliferation of subcontracting (i.e., “workplace fissuring”). The first two mechanisms should be relatively straight forward to assess in population surveys administered by the Bureau of the Census and the Bureau of Labor Statistics. Unfortunately, to date, there has not been a government-sponsored survey instrument that has evaluated worker misclassification or employment in the underground economy, thereby ignoring an issue that affects millions of workers and costs taxpayers billions of dollars annually.

The absence of direct data assessing worker misclassification and off-the-books employment—both in construction and across the entire economy—represents a significant obstacle to motivating and designing effective public policy to address this illegal activity. Lacking direct evidence, policy-minded economists have demonstrated the pervasiveness of these issues using *indirect* statistical methods and one-off collaborations with state departments of labor to publish the results of their unemployment insurance (“UI”) audits. These are the best approaches

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workers’ compensation insurers should have charged a premium of \$3,600,000, instead of what they charged--\$15,206 to \$31,268 per policy year.).

<sup>19</sup> Tom Juravich, Essie Ablavsky, and Jake Williams, *The Epidemic of Wage Theft in Residential Construction in Massachusetts*, UMass-Amherst Labor Center Working Paper, 37 (May 11, 2015), available at, [https://www.umass.edu/lrrc/sites/default/files/Wage\\_Theft\\_Report.pdf](https://www.umass.edu/lrrc/sites/default/files/Wage_Theft_Report.pdf).

<sup>20</sup> *Hearing on Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy: Before the Workforce Protections Subcommittee, House Education and Labor Committee, 116th Congress* (2019) (Statement of Matt Townsend, President of the Signatory Wall and Ceiling Contractors Alliance), 1, available at, <https://edlabor.house.gov/imo/media/doc/TownsendTestimony092619.pdf>. See also, Doug Burton, op-ed, *To help NC businesses, end the misclassification fraud*, The News & Observer, June 3, 2015 (“This fraud is a growing problem that harms workers, puts a strain on government resources and provides an unfair advantage when these unscrupulous employers compete with law-abiding businesses.”), available at <https://www.newsobserver.com/opinion/op-ed/article23037534.html>.

currently available to researchers, but *direct* evidence of worker misclassification and off-the-books employment from a nationally representative household survey like the CPS would undoubtedly improve the reliability of these estimates and offer better information for policymakers.<sup>21</sup>

In sum, there is a considerable need in research and policy circles for worker-level data on misclassification and employment in the underground economy. First, motivating effective public policy to protect workers, law-abiding employers, and taxpayers requires a more accurate assessment of the extent and economic costs associated with these illegal labor practices. Second, worker-level data would allow researchers to identify industries, occupations, and regions most affected by misclassification and off-the-books employment. This would better inform federal, state and local regulators on how to expend their limited investigatory resources. Third, consistent data on these issues over time will allow for more effective evaluation of public policy initiatives designed to reduce unlawful practices in the labor market.

#### **IV. Recommendations and Responses to the Information Collection Request.**

The Census and the BLS already have a vehicle in place that could evaluate these issues in the American labor market: the Contingent Worker Supplement of the Current Population Survey. Unfortunately, the CWS has been underused—featured just once since 2005 despite the changing shape of employment in the United States in the last two decades—and needs significant updating. While the supplement is touted as evaluating alternative work arrangements, methodological weaknesses and an outdated perspective on construction employment have rendered the CWS somewhat ineffective in assessing independent contracting in the construction industry, much less the extent of misclassification or off-the-books employment in the sector. As a result, it is important that revisions to the structure of the CWS address its shortcomings in identifying contingent workers in construction and assess whether workers are being misclassified or are operating in the informal labor market. This comment highlights four key areas of improvement that are needed.

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<sup>21</sup> Indirect methods of estimating worker misclassification are the most often-used approaches by economists and researchers, but the indirect nature of the analysis features a margin of error and relies on assumptions linking tax fraud to worker misclassification (Ormiston, Belman and Erlich, *supra* note 8, at 7). Studies based on state UI audits offer direct evidence of illegality however there are many reasons to believe that these reports significantly undercount the extent of misclassification and, especially, off-the-books employment in the construction industry (Juravich, Ormiston and Belman, *supra* note 17, at 24).

### **A. Ask Probing Questions to More Completely Identify Employment.**

The Current Population Survey is the foundation of monthly employment statistics in the United States, however Katharine Abraham has led a team of scholars from the University of Maryland and the U.S. Census Bureau to publish a series of studies over the past 10 years that clearly demonstrates that the CPS substantially undercounts all forms of work, especially informal work and jobs in the gig economy.<sup>22</sup> For example, Abraham et al. (2020) compared employment data of individuals from the CPS to administrative data on those workers supplied by the Social Security Administration.<sup>23</sup> They found that (a) self-employment as documented in administrative data is 45% higher than suggested in the CPS and (b) wage-and-salary work is 9.5% higher in Social Security data than it is in the household survey.

The research and policy implications of these gaps are considerable. However, relevant to the current discussion, the substantial undercounting of employment in the CPS represents a fundamental threat to the accuracy and validity of the results offered by the Contingent Worker Supplement. That is because the questions about alternative work arrangements are *only* asked of people who identify as being employed in the main part of the CPS.<sup>24</sup> This is especially troubling because many of the people who fail to report employment in the CPS are self-employed and presumably operate in the gig economy or in other informal labor markets (e.g., construction workers employed off-the-books). As a result, the current survey structure means that the CWS will not be administered to a substantial portion of the self-employed workforce that comprises the very audience the Census is attempting to assess through this supplement. Unless there are substantial changes, this means that the Contingent Worker Supplement in its current form is, at best, an incomplete instrument to measure contingent work that systematically and substantially underestimates the scale of alternative work arrangements in the United States.

Although there may be many reasons for underreported employment in the CPS, follow-up research by Abraham and various scholars has revealed that it is possible to *partially* bridge the gap between actual employment and CPS-reported employment by asking additional, probing questions especially about low-hour, secondary, and informal employment. For example, Abraham

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<sup>22</sup> Katharine G. Abraham, John C. Haltiwanger, Kristin Sandusky, Speltzer, *Exploring Differences in Employment Between Household and Establishment Data*, Journal of Labor Economics, S140 (2013), Vol.31(S1), pp. S129-S172; Katharine G. Abraham, John C. Haltiwanger, Kristin Sandusky, and James R. Speltzer, *Measuring the Gig Economy: Current Knowledge and Open Issues*, National Bureau of Economic Research Working Paper #24950, 46 (August 2018), available at: <https://www.nber.org/papers/w24950>.

<sup>23</sup> Katharine G. Abraham, John C. Haltiwanger, Claire Hou, Kristin Sandusky, and James R. Speltzer, *Reconciling Survey and Administrative Measures of Self-Employment*, Journal of Labor Economics, 840-841 (2021), Vol. 39(4), 825-860.

<sup>24</sup> Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements Technical Note*, available at, <https://www.bls.gov/news.release/conemp.tn.htm>.



and her colleague Ashley Amaya were able to identify additional jobs by first asking the standard CPS employment questions to survey respondents and then asking a follow-up query in a 2019 study:

Sometimes people who don't have a job do other things to earn money. Did (you) do other things to earn money last week?<sup>25</sup>

While the battery of questions may differ—Abraham and two other scholars use a different set of questions in a 2020 paper—asking additional probing questions to more completely identify respondents' employment will be critical to the success of the CWS.<sup>26</sup> In other words, if employment is deemed to be the qualifying factor that results in a respondent being selected for the supplement, the CPS that month will need to ask far more extensive questions about respondents' situation than it currently does. Without these changes, the Contingent Worker Supplement will continue to have limited utility in research and public policy conversations about misclassified workers and workers in alternative work arrangements.

### **B. The CWS Needs to Better Distinguish Independent Contractors.**

The Contingent Worker Supplement was commissioned to assess the extent of alternative work arrangements in the United States. To identify independent contractors, the CWS currently takes the very direct approach of simply asking respondents whether they are independent contractors. If a respondent needs assistance in making this delineation, the surveyor will add that an independent contractor is “someone who obtains customers on their own to provide a product or service.”<sup>27</sup> This approach—and especially the follow-up statement—are likely to underestimate the number of workers who are independent contractors, a conclusion echoed by a team of scholars led by Abraham in a 2021 study published in the *Journal of Labor Economics*.<sup>28</sup> This underestimation in independent contracting occurs because many workers are confused or are unsure of the classification of their work arrangement. This is evidenced in numerous ways. First, as published in a 2018 study, Abraham and two scholars from the Upjohn Institute conducted focus groups with workers in Southwest Michigan to understand how they perceived the definition of

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<sup>25</sup> Katharine G. Abraham and Ashley Amaya, *Probing for Informal Work Activity*, Journal of Official Statistics, 494 (2019), Vol. 35(3), pp. 487-508, available at: <https://sciencodo.com/article/10.2478/jos-2019-0021>.

<sup>26</sup> Katharine G. Abraham, Brad Hershbein, and Susan Houseman, *Contract Work at Older Ages*, Journal of Pension Economics and Finance, 429 (2021), Vol. 20(3), 426-47.

<sup>27</sup> Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements Technical Note*, available at, <https://www.bls.gov/news.release/conemp.tn.htm>.

<sup>28</sup> Abraham, Haltiwanger, Hou, Sandusky, and Speltzer, *supra* note 23, at 830.

various working arrangements. In describing workers' perception of "independent contractors," the authors wrote:<sup>29</sup>

...some focus group participants indicated that they thought of independent contractors, independent consultants, and freelance workers as terms applying only to professionals or workers in the construction trades. Some thought that an independent contractor was "the boss" who directed the work of others...

As highlighted in that 2018 study, many workers clearly do not understand the difference between independent contracting and regular employment. This leads many independent contractors to incorrectly assume that they are employees, which would invalidate the CWS's current approach to identify independent contractors. This conclusion is validated in study after study of alternative work arrangements in the U.S. Consider the following:

- In a 2023 working paper published by the National Bureau of Economic Research, Abraham and three scholars from the Upjohn Institute concluded that across the entire economy, "roughly one in 10 workers who initially reports working for an employer on one or more jobs (and thus is coded as an employee) is in fact an independent contractor on at least one of those jobs."<sup>30</sup>
- In a separate 2019 working paper, Abraham and two researchers from the Upjohn Institute discovered that "about 14 percent of those who reported being independent contractors, independent consultants, or freelance workers on their main job in the 2017 Contingent Worker Supplement to the CPS had previously reported being an employee on that job in the basic CPS."<sup>31</sup>
- In a 2020 study on the construction industry, Russell Ormiston of Allegheny College and two other scholars highlighted that an estimated 8.7 million workers identified themselves as employees in the industry via the CPS despite there only being 7.4 million employees in the industry according to UI records.<sup>32</sup> This means that 1.3

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<sup>29</sup> Katharine G. Abraham, Brad Hershbein, and Susan Houseman, *Independent Contract and Informal Work: Preliminary Evidence from Developing Better Measures in Household Surveys*, Working paper presented at 2019 Allied Social Science Association annual meeting, 9-10 (December 2018), available at <https://www.aeaweb.org/conference/2019/preliminary/paper/kGEn73Ns>.

<sup>30</sup> Katharine G. Abraham, Brad Hershbein, Susan N. Houseman, and Beth Truedale, *The Independent Contractor Workforce: New Evidence On Its Size and Composition and Ways to Improve Its Measurement in Household Surveys*, National Bureau of Economic Research Working Paper #30997, Abstract (March 2023), available at: <https://www.nber.org/papers/w30997>.

<sup>31</sup> Abraham, Hershbein, and Houseman, *supra* note 29 at 22.

<sup>32</sup> Ormiston, Belman and Erlich, *supra* note 8, at 25.

million workers—or about 15% of the industry workforce—falsely believed themselves to be employees when, in fact, they were likely independent contractors or were engaged in an alternative work arrangement (e.g., off-the-books employment).

Although there may be many solutions that allow respondents to the CWS to accurately identify their work arrangement, Abraham and three colleagues from the Upjohn Institute offered a defining question that seems especially promising: “Did this employer take any taxes out of your pay?”<sup>33</sup> While the authors were concerned that respondents would be sensitive or react defensively about questions surrounding taxes, they concluded that “the question did not prompt interview terminations; further, the question’s item nonresponse rate was very low and comparable to the item nonresponse rate for other questions.”<sup>34</sup> Whether the Census uses this query or other questions, it is imperative that it include inquiries that lead respondents to the correct characterization of their employment status. Without these or other changes, the Contingent Worker Supplement will continue to undercount the number of independent contractors in the U.S. labor market.

### **C. Identify Misclassified Workers.**

While the first two suggestions in this comment are geared to producing more reliable estimates of independent contracting in the United States, it is vital that the CWS evaluates whether a portion of those independent contractors are misclassified and should, instead, be considered employees. At present, there is simply no single reliable and accurate data source on worker misclassification on a national basis using household surveys; this, in turn, represents a critical obstacle to research and effective public policy. This is an especially important issue in the construction industry given that small surveys of tradespeople on job sites indicate that up to 47% of workers may be misclassified or working off-the-books in some urban areas.<sup>35</sup> The Contingent Worker Supplement would seem to be the most obvious vehicle to evaluate this issue and obtain accurate and reliable data that could have enormous impact on research and public policy discussions.

Considering that the differentiation between independent contractors and employees is a standard employment concern generally, there would seem to be numerous options for the Census and BLS to consider as additions to the CWS. For example, the survey could ask questions

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<sup>33</sup> Abraham, Hershbein, and Houseman, *supra* note 29, at 10.

<sup>34</sup> *Id.* at 10.

<sup>35</sup> Clayton Sinai and Ernesto Gales, *The Underground Economy and Wage Theft in Washington DC’s Commercial Construction Sector*, Catholic Labor Network, 3 (April 2021), available at, <https://catholiclabor.org/wp-content/uploads/2021/04/Underground-Economy-and-Wage-Theft-Report-4.14.pdf>.

consistent with Internal Revenue Service's 20-factor test regarding the degree of behavioral and financial control maintained by the worker, and the type of relationship between the worker and employer.<sup>36</sup> Some of the more probing queries could include:

- the integration of the worker's services into the business operations of the service recipient;
- whether the services must be performed personally;
- whether the worker can hire assistants;
- whether the working relationship is ongoing;
- who sets the hours of work;
- whether the work is performed on the employer's premises;
- whether the worker determines the order or sequence of work;
- does the worker receive instructions on when, where and how to perform the work;
- is the worker paid by the job or day, hour, week or month;
- who supplies tools and materials;
- is the worker trained by the employer to perform the work;
- does the worker earn more by working more hours or by increasing his or her profit over expenses; and
- can the worker be discharged or terminated in the midst of the work being performed without having a claim of breach of contract.

Regardless of the questions used, the evaluation of the legitimacy of independent contracting situations is paramount to understanding the extent and economic costs of worker misclassification and, more broadly, the changing employment relationships in the United States.

#### **D. Assess Off-the-Books Employment and Update CWS's Outdated View of Construction.**

While worker misclassification affects nearly every corner of the U.S. labor market, the construction industry is also plagued by a significant underground economy. Some segments of the construction sector are dominated by unregistered employers and labor brokers, cash-only payments made to workers, and innumerable unethical and illegal actions (e.g., human trafficking, tax fraud, unsafe working conditions, exploitation of undocumented workers).<sup>37</sup> The underground economy also distorts the operation of legal labor markets in construction, pushing down wages,

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<sup>36</sup> Internal Revenue Service, *Independent Contractor (Self-Employed) or Employee?*, available at, <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>.

<sup>37</sup> Juravich, Ablavsky, and Williams, *supra* note 19.

denying workers legal employment opportunities, and driving law-abiding firms out of business. But while hundreds of thousands of tradespeople may be operating on a cash-only basis, the underground construction economy is largely a “black box” to researchers and policymakers in terms of both the numbers of workers and the amount of money involved.

This lack of information is unfortunate considering that it appears that the original development of the Contingent Worker Supplement reflects some interest in assessing the informal labor market in the construction industry. Specifically, the CWS maintains a category of employment for *day laborers*, with the supplement asking respondents the following:<sup>38</sup>

[Some people get work by waiting at a place where employers pick up people to work for a day. These people are sometimes called DAY LABORERS.] (Were/Was) (you/NAME) a DAY LABORER last week?

While laborers lined up for work opportunities at local home improvement store parking lots may have characterized off-the-books employment in the construction industry when the CWS was first used in 1995, things have undoubtedly changed in the last 30 years. The underground construction economy has evolved such that unregistered labor brokers are often responsible for recruiting massive numbers of workers across state and national borders onto job sites using shell companies, check-cashing services, and cash-only payments to those workers. As highlighted in papers authored by Tom Juravich (University of Massachusetts) and two teams of researchers, tradespeople are no longer found exclusively in a parking lot or on a street corner. Rather, labor brokers and contractors tap into familial and ethnic networks and can access large numbers of workers simply by calling them or answering their phones when workers call looking for work.<sup>39</sup> Further, the underground construction economy is no longer characterized by *day laborers* as many workers may operate under the management of the same contractor or labor broker for weeks, months, or even years.

To resolve this problem, we suggest that the Census and BLS scrap their outdated approach of focusing on day laborers and instead take a more holistic approach in assessing the full extent of off-the-books employment and unreported compensation in the construction industry and across the U.S. labor market. While the questions may vary, the CWS could identify indicia of off-the-books employment by asking how workers are compensated (e.g., cash, personal check, check-cashing service, debit cards), whether they ever filled out IRS W-4s or W-9s for their job, whether

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<sup>38</sup> IPUMS-CPS, *Supplement Questionnaire: May 2017 Contingent Work Supplement*, University of Minnesota, available at, [https://cps.ipums.org/cps-action/source\\_documents/enum\\_form\\_cps2017\\_05s\\_tag.xml#4](https://cps.ipums.org/cps-action/source_documents/enum_form_cps2017_05s_tag.xml#4).

<sup>39</sup> Juravich, Ablavsky, and Williams, *supra* note 19, at 24; Juravich, Ormiston, and Belman, *supra* note 17, at 8.

the worker was operating as an incorporated business, whether they received a 1099-MISC form (if the worker is unincorporated) or W-2, and numerous other queries.

To identify the volume of money changing hands in the underground construction economy, it is highly recommended that the CWS also includes questions assessing worker incomes generated from alternative work arrangements. Concerns that workers may not reveal their off-the-books income are likely overblown. In a 2016 study in the journal *Public Budgeting and Finance*, James Alm and Brian Erard compared data from the 2001 CPS to IRS tax data to conclude that self-employed construction workers reported earning an aggregate \$53.3 billion on the CPS but just \$40.9 billion on IRS tax forms.<sup>40</sup> In effect, workers operating in the informal labor market appeared to have little concern about providing accurate information to representatives from the Census Bureau while keeping it hidden from the Internal Revenue Service.

## **V. Conclusion.**

This comment has attempted to highlight the pervasiveness of worker misclassification and off-the-books employment in the construction industry. These are not victimless crimes as millions of workers are denied their legal rights, law-abiding employers are denied economic opportunities, and taxpayers are out billions of dollars in an implicit subsidy to unscrupulous employers. Despite the magnitude of the problem—and the broader direction towards independent contracting in the American labor market—household surveys offer little to no insight on the true nature or legitimacy of employment relationships in the United States. While the Contingent Worker Supplement offers promise as the best vehicle to assess independent contracting, worker misclassification, and off-the-books employment, its current structure limits its accuracy and use in research and policy initiatives. The revision of the supplement is an opportunity to change this.

We have offered in this comment recommendations to improve the overall reliability of the CWS to assess independent contracting and alternative work arrangements. The importance of adding questions to evaluate worker misclassification and off-the-books employment in construction and other industries cannot be understated. Anecdotal reports, small jobsite surveys, UI audit studies, and indirect statistical methods all point to the fact that misclassification, other illegal employment practices and financial crimes—including wage theft, which is another potential frontier to be considered in this or future CPS supplements—are ubiquitous in segments of the construction sector. But in our experience, the lack of direct data on illegal labor practices is a considerable barrier to research efforts to call attention to the problem and to public policy initiatives that could improve the lives of millions of working-class Americans. We hope that our suggested improvements to the CWS can close this information gap and help launch a new wave

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<sup>40</sup> James Alm and Brian Erard. *Using Public Information to Estimate Self-Employment Earnings of Informal Suppliers*, *Public Budgeting & Finance*, 34 (2016), Vol. 36(1), 22-46.

of research and policy attention focused on worker misclassification and off-the-books employment, both in the construction industry and elsewhere in the labor market. We appreciate your consideration of our comments.

Respectfully submitted,

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