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**ELECTRONICALLY SUBMITTED VIA REGULATIONS.GOV**

April 12, 2021

Jessica Looman  
Principal Deputy Administrator  
Wage and Hour Division  
U.S. Department of Labor  
200 Constitution Avenue NW., Rm S-3502  
Washington, D.C. 20210

**RE: RIN 1235-AA34; Independent Contractor Status Under the Fair Labor Standards Act;  
Notice of Proposed Rulemaking**

Dear Principal Deputy Administrator Looman:

On behalf of the more than 140,000 members of the National Association of Home Builders of the United States (NAHB), thank you for the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) by the Department of Labor (the Department) proposing to withdraw the final rule titled Independent Contractor Status Under the Fair Labor Standards Act (FLSA) published in the Federal Register on March 12, 2021<sup>1</sup>

NAHB is a Washington, D.C.-based trade association whose members are involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. NAHB is affiliated with more than 700 state and local home builders' associations around the country. NAHB's builder members construct about 80 percent of the nation's new housing units, making housing a large engine of economic growth in the country.

NAHB strives to protect the American Dream of housing opportunities for all while working to achieve professional success for its members who build communities, create jobs, and strengthen our economy. For example, in the first quarter of 2019, home building and remodeling accounted for approximately 14.7% of the U.S. gross domestic product (GDP).<sup>2</sup>

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<sup>1</sup> Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 14027 (March 12, 2021).

<sup>2</sup> Robert Dietz, Ph.D., *Housing Affordability Reducing Housing Share of GDP* (April 26, 2019) (available at <http://eyeonhousing.org/2019/04/housing-affordability-reducing-housing-share-of-gdp/>) (last visited May 10, 2019).

NAHB supports enforcement of the rules on the classification of workers, but also supports clarification of those rules to improve compliance across all industries. As an interested stakeholder in this regulatory activity, NAHB supports the rule adopted by DOL on January 7, 2021, providing a sharper “economic reality” test to determine a worker’s status as under the FLSA as an employee or an independent contractor. We believe that this rule provides a clearer and simpler federal test for determining worker status for regulated employers and small businesses, including home builders and specialty trade contractors who are essential to the residential construction sector.

The Department’s stated justification for withdrawing the Rule it issued four months ago is its concern that the Rule’s approach is in tension with the language of the Act as well as the position, expressed by the Supreme Court and in appellate cases from across the Circuits, that no single factor is determinative in the analysis of whether a worker is an employee or independent contractor and, as such, questions whether the Rule’s “core factor” approach is supportable.<sup>3</sup> And, the Department proposes to withdraw the Rule in part because it eliminates from the economic realities test several facts and concepts that have deep roots in both the courts’ and WHD’s application of the analysis.<sup>4</sup>

These stated justifications are disingenuous and the attempt to withdraw the Rule does nothing to provide clarity that the Department contends it is seeking. In the past four months the language of the Act has not changed, the law cited in support of the Rule issued on January 7<sup>th</sup> has not changed, and the WHD’s application of the analysis that supported the January 7<sup>th</sup> Rule has not changed. As the United States Supreme Court noted in *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, (*State Farm*) an agency changing its course is obligated to provide a reasoned analysis for the change.<sup>5</sup> “[T]he requirement that an agency provide reasoned explanation for its action ... ordinarily demand[s] that it display awareness that it is changing position. ... [T]he agency must show that there are good reasons for the new [position].”<sup>6</sup> The Agency has no basis at this time for changing its earlier conclusions from four months ago. In this setting, the burden of explanation derived from *State Farm* is relatively light. America’s regulated employers and small businesses deserve better from the DOL than to be whipsawed in this manner.

At the outset, it has long been the position of NAHB that the current law pertaining to worker classification recognizes the unique characteristics of the home building business and allows the flexibility necessary for building industry workers to function in a changing economy. It has been our concern that a rigid application of the static rules regarding the classification of workers would result in the improper classification of legitimate independent subcontractors as employees, and thereby unfairly burden both small businesses and workers.

A lack of clarity and inconsistent measurement of the concept of economic dependence as a determining factor of employment has, for many years, presented a unique challenge to the residential construction

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<sup>3</sup> Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 14032

<sup>4</sup> Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 14034

<sup>5</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 41-42 (1983)

<sup>6</sup> *University of Texas M.D. Anderson Cancer Center v. United States Department of Health and Human Services*, 985 F.3d 472 (5<sup>th</sup> Cir. 2021), citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

industry due to its highly decentralized business structure. Residential construction constitutes approximately half of the construction industry as a whole. It includes for-sale builders of housing, custom home builders, multi-family builders, and residential remodelers. Many home builders and policy-makers have focused efforts on increasing the availability of affordable housing in recent years, but this objective is complicated by increasing labor and material costs and increased federal, state, and local regulation that drive up both the cost and complexity of housing construction projects.

Most construction projects require a variety of work in highly specialized trades. As a result, general contractors will often have multiple subcontracts on any given project. A 2020 study showed that 69 percent of home builders engage between *11 and 30* subcontractors to construct the average single-family home, with an average of 24 subcontractors per home.<sup>7</sup> The subcontracting practices that characterize the construction industry have proven to be efficient and to ensure that only the workers with the requisite skills—and a comprehension of the relevant safety practices—are performing the specialized work. Examples of such work in just the home-building sector include HVAC installation, electrical wiring and plumbing, roofing, exterior siding, and fireplace installation. The industry's subcontracting practices also reflect that no one company can efficiently acquire and maintain the expertise to safely perform all of the specialized work required to complete a modern project. Indeed, in the construction industry it is common for subcontractors to subcontract portions of their work to even more specialized firms. On a modern building construction project, it is common to find four or five tiers of specialized firms at work. Home builders employ individuals whose primary functions are to supervise and manage the process of constructing homes, contractor relationships, and many of the administrative tasks associated with the construction process from inception to completion.

Another reason for this specialization is the prevalence of small firms in the residential construction industry. More than 95 percent of NAHB's builder members are small entities as defined by the U.S. Small Business Administration (SBA). Over 80 percent of NAHB's builder members construct 25 homes or fewer per year and nearly two-thirds build 10 homes or fewer per year. Twenty-nine percent of builders only build 1 to 3 units per year. Seventy-four percent of NAHB's members have fewer than 10 employees.<sup>8</sup>

Business reality dictates that firms employ labor in-house only when the costs of doing so are less than the cost of contracting with another firm. In general, labor costs are lower for businesses that specialize in a particular activity compared to a business that attempts to do all tasks in-house. For most builders, there is simply insufficient internal demand to justify hiring an employee for the numerous specialized and limited tasks required to complete a home project. Further, specialized tradespeople are neither in the business of nor typically possess all of the specialized skills needed to complete full construction of a home themselves. For example, plumbers are not in the business of framing houses. Neither are framers in the business of laying pipes and connecting plumbing and ventilation systems. Consequently,

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<sup>7</sup> Paul Emrath, Ph.D., *Average New Home Uses 24 Different Subcontractors*, Dec. 2, 2020, <https://www.nahb.org/-/media/4A97F5BAA5BB459EBE26459B2159C79B.ashx>.

<sup>8</sup> Carmel Ford, *Who are NAHB's Builder Members?*, National Association of Home Builders (Special Studies August 1, 2020) (noting the median number of employees in 2019 was 5 and unchanged from 2015 to 2018 and up 1 from 2008 to 2014).

without these specialized subcontractors, many small home building businesses would simply cease to be viable operations.

At the same time, there are advantages for specialty tradespeople to operate as independent contractors. Not surprisingly given the demand issue discussed above, self-employed construction trades workers are more common in rural areas and smaller cities, where home building occurs at a smaller scale. Independent contractor status also affords the opportunity of growth and expansion, whereby a successful contractor hires his own staff to meet the increasing needs of his business. Indeed, many contracting businesses begin operation as a self-employed independent trade worker.<sup>9</sup>

For home builders, the ability to compete efficiently in the residential construction industry and optimally price a home depends on the degree to which overall costs are certain and predictable. This impact is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low to moderate-income homebuyers who are more susceptible to being priced out of the market. NAHB conducts studies on what it identifies as its “priced out effect.”<sup>10</sup> NAHB estimates that at the national level, for every \$1,000 a home increases, 158,857 households are priced out of the market for a median priced new home.<sup>11</sup> Successful delivery of homes is inextricably tied to the ability to promptly schedule the work of different trades and manage issues that could result in production delays. As a result, if the Department were to find that a home builder is the employer of a subcontractor, this could have severe negative effects on the residential construction industry.

NAHB welcomed the examples provided by the Department of an individual’s substantial control, including “choosing assignments, working with little or no supervision, and being able to work for others, including a potential employer’s competitors” – further weighing in favor of independent contractor classification “even if the worker is not solely in control of the work.”<sup>12</sup> This is especially pertinent delineation in the residential construction industry. The builder, or, in many cases, his or her superintendent (alternatively it might be a project manager, field manager, construction manager, assistant construction manager, etc.) perform a multitude of functions in nearly all significant day-to-day matters regarding home construction and managing the home building process. Chiefly, scheduling and supervising the work of subcontractors is a responsible, everyday business practice of home builders.

This aspect of the Department’s proposal is supported by case law regarding joint employer status. For example, in *Matter of Ovadia v. Office of the Indus. Bd Of Appeals*, 19 N.Y.3d 138, 946 N.Y.S.2d 86, 89, 969 N.E.2d 202 (2012), the case involved the question of whether the employees of a subcontractor were jointly employed by the general contractor (the Court found they were not), but of particular interest is the Court’s implicit recognition that in the construction industry the subcontractor is often a distinct entity with its own employees.

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<sup>9</sup> For more information, consult “Construction Workers: Settling In.” Michael Carliner. Housing Economics, October 2003; and “Self Employment in Construction.” Elliot Eisenberg. Housing Economics, January, 2001.

<sup>10</sup> Na Zhao, Ph.D., *US Households Priced Out of the Market by Increases in House Prices* (NAHB Housing Economics <sup>11</sup>) (“2020 Priced Out Study”) (available at

<https://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=271366>).

In finding that employees of a subcontractor were not jointly employed by the general contractor, the Court noted that many of the usual factors used to establish a joint employer relationship are not applicable in the construction setting; that if those factors were “applied consistently in the construction realm, [they] would likely render most general contractors the joint employers of their subcontractors' employees - a proposition that does not reflect the actual relationships in the construction industry.” The reason lies in the fact that the general contractor normally interfaces solely with the principal of the subcontractor, not with the subcontractor's employees.

As a practical matter, general contractors in the construction industry do not hire or supervise the workers employed by their subcontractors; they do not usually maintain the employment records for each worker or track the individual workers' schedules or rates of pay. The primary objective of a general contractor is to keep the project on schedule and to coordinate the work among subcontractors in order to avoid costly delays in the completion of the project. Thus, general contractors frequently interact with the principals and supervisors of the subcontractors and generally have no direct control or functional supervision over the employees performing work for the subcontractors.

*Id.* at 143, 946 N.Y.S.2d 86, 89, 969 N.E.2d 202.

This aptly describes the role of many builders, or in many cases their project supervisors or superintendents, who perform the following, which have been found to be consistent with a typical, legitimate subcontracting relationship:

*Management of Contractors and Vendors.* They spend the majority of their time managing and directing the work of subcontractors and vendors, whose crew sizes can number dozens of workers. In managing the work of vendors and subcontractors, they are responsible for scheduling the tasks and overseeing the work performed by the workers. The individuals can recommend and/or decide whether to retain or terminate the services of the contractors and vendors. They also can recommend or decide to withhold approval for payment to the contractors and vendors if they deem that their work does not meet the standards of the contract.

*Project Management.* This includes managing applicable benchmarks and timetables to ensure that contractors and vendors perform on schedule, within budget, and pursuant to the scope of work in their contracts. They schedule some or all aspects of construction projects including subcontractors, material deliveries, and inspections, as well as modifying work schedules to accommodate delays due to material delivery delays, inspection issues, and weather. Additionally, they monitor the work of the subcontractors and address a myriad of other issues that may arise on a job site.

*Regulatory Compliance and Government Relations Representative.* The builder or his or her onsite representative also is responsible for monitoring compliance with building code, environmental, and safety compliance by contractors and vendors.

As noted in the January 7<sup>th</sup> Rule, the first core factor – The Nature and Degree of the Individual’s Control Over the Work – considers whether a worker has freedom to pursue external opportunities by working for others. More specifically, the control factor concerns the *ability* to work for others. For home builders, this distinction is important because, given the nature of the industry, it is not uncommon for a subcontractor or specialty trade contractor to *choose* to work almost exclusively for one builder, notwithstanding that he/she has the freedom to pursue opportunities with other builders, including a potential employer’s rivals. It is common knowledge that there is a labor shortage in the industry; consequently, a builder and a subcontractor or a specialty contractor might find it mutually beneficial that they work exclusively together. In such a case the control factor would still weigh in favor of independent contractor status. As an economic reality, a builder who finds a reputable and reliable trade contractor who provides quality work wants to keep working with that trade. Similarly, a trade contractor who finds a builder who can keep him/her and their employees busy will want to stay with that builder.

Other indicia that are probative of an individual’s substantial control, supporting the ability to work for others, include, but are not limited to, making its services available to the general public or the business community on a continuing basis, and in many cases, maintaining office space. NAHB favors the Rule’s distinction between bona fide quality control measures and control that is indicative of an employment relationship.

In conclusion, NAHB continues to support the Final Rule adopting a narrower “economic reality” test to determine a worker’s status as an FLSA employee or an independent contractor, and rejects the contention and justification offered as support for withdrawing the January 7<sup>th</sup> Rule that courts and WHD could struggle with applying the new concepts introduced by the Rule, when no such concern was raised a mere four months ago by the same agency that now seeks to withdraw the Rule.

We appreciate the opportunity to provide these comments on the proposed rule and hope you will find them valuable. NAHB welcomes the opportunity to further engage with the Department as it considers the implications of withdrawing the Final Rule and anticipates these comments will lead to the Department fully understanding the impact on the residential construction industry. Please contact me if you have any questions or require any additional information.

Sincerely,

A handwritten signature in blue ink, appearing to read "David S. Jaffe", with a long horizontal line extending to the right.

David S. Jaffe  
Vice President, Construction Liability  
Office of Legal Affairs  
National Association of Home Builders