



SHEET METAL & AIR CONDITIONING  
CONTRACTORS' NATIONAL ASSOCIATION

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**VIA ELECTRONIC SUBMISSION**

Douglas W. O'Donnell  
Deputy Commissioner for Services and Enforcement  
Internal Revenue Service  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044

**RE: Public Comments on Proposed Rule, “Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements,” 88 Fed. Reg. 60018 (Aug. 30, 2023)  
IRS REG-100908-23**

Dear Mr. O'Donnell:

The Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) is supported by more than 3,500 construction firms engaged in industrial, commercial, residential, architectural and specialty sheet metal and air conditioning construction throughout the United States and North America. SMACNA members and allied quality driven contractors understand that any major investment in public infrastructure needs to recognize the extreme value of historic incentives and long overdue energy upgrades including energy decarbonization break throughs in untapped markets. Based on decades of experience SMACNA member firms understand that these important tax changes and incentives will help jump start projects that would lag or be hindered by the lack of upfront financing or investment.

The Inflation Reduction Act of 2022 (IRA), Pub. L. No. 117-169, represents the most significant legislation to invest in clean energy and climate change in U.S. history. The IRA will drive investment and economic growth, create new opportunities for workers by supporting prevailing wage jobs and Registered Apprenticeship programs (RAPs) in the energy industry.

SMACNA fully supports the IRA, particularly the prevailing wage and apprenticeship (PWA) requirements. SMACNA provides these comments in support of the IRS and Treasury Department's Proposed Rule, “Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements,” 88 Fed. Reg. 60018 (Aug. 30, 2023) (hereafter “PWA Proposed Rule”). As outlined below, however, SMACNA and its members believe that the PWA Proposed Rule should be revised and clarified to prevent low-wage and unscrupulous contractors from avoiding or eroding the IRA's PWA standards, which were specifically designed to raise employee's wages and increase the supply of skilled workers.

SMACNA is convinced that violations of the IRA's PWA standards will go undetected – thereby frustrating the intent of the IRA – in the absence of a PLA or alternative enforcement mechanisms that are designed to prevent those who refuse to sign PLAs from avoiding or eroding the IRA's PWA standards. SMACNA believes that incentivizing and creating separate compliance standards for taxpayers that are signatory to PLAs will effectuate the intent of the IRA and significant penalties will encourage compliance with the law. Those unwilling to sign PLAs will be subject to increased oversight, documentation, and penalties because history has taught that, in the absence of a PLA, PWA violations are pervasive and difficult to detect.

**I. THE PWA PROPOSED RULE SHOULD BE MODIFIED TO CREATE SEPARATE STANDARDS FOR TAXPAYERS WHO ARE SIGNATORY TO A PROJECT LABOR AGREEMENT.**

As outlined in their joint comments,<sup>1</sup> SMACNA and its labor partner, the International Association of Sheet Metal, Air, Rail and Transportation Workers (“SMART”), believe that the PWA Proposed Rule should be revised to create two separate PWA compliance standards: (1) one standard for taxpayers that are signatory to a project labor agreement (PLA) and (2) a second standard for taxpayers that are not signatory to a PLA.

A PLA is a special type of “pre-hire” collective bargaining agreement governing labor relations and working conditions for all workers, union or non-union, on a single construction project. Pre-hire agreements are agreements reached between construction unions and employers in the construction industry before any employees are hired and they are expressly authorized by Section 8(f) of the National Labor Relations Act (NLRA).<sup>2</sup>

PLAs typically include a provision binding all contractors and subcontractors to the agreement, which includes a “no-strike, no-lockout” clause and a grievance/arbitration procedure. In addition, PLAs specify the wages and fringe benefits for all workers on a project and generally require contractors to hire workers for the project through a union hiring hall that is responsible for supplying skilled labor. PLAs may also include clauses: outlining goals for hiring local community members on projects; incorporating equity plans; detailing strategic recruitment policies for workers from underserved communities; and requiring participation of small businesses.

PLAs organize complex construction projects and ensure their efficient and timely completion. The benefits of PLAs include: reducing costs by increasing efficiency and coordination; reducing uncertainty in the contracting process; supporting contractor access to skilled workers; improving worker safety and health outcomes; expanding workforce training pathways for clean energy jobs; and, preventing labor disputes (and related delays) on projects. The Department of Labor (DOL) recently described the benefits of PLAs:

PLAs organize complex construction projects and ensure their efficient and timely completion.[] Because PLAs (almost universally) contain no-strike, no-lock-out clauses they eliminate delays associated with labor unrest.[] PLAs are known for streamlining the administration of large projects by requiring all parties to enter into one agreement, that

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<sup>1</sup> See Joint Comments of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) regarding, “*Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements.*”

<sup>2</sup> 29 U.S.C. § 158(f); see also John Deklewa & Sons, 282 NLRB 1375 (1987), enforced sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988).

contains universal terms that govern the work.[] On a complex project contractors may end up working with multiple trades unions (laborers, electricians, operating engineers, painters, and plumbers, etc.) with varying work rules and individual collective bargaining agreements without one universal agreement contractors might end up negotiating individual collective bargaining agreements with each trade union.[] Those individual agreements might stipulate different start times, methods for determining overtime, break times, holidays, and dispute resolution processes that make project administration costly, complex, and inefficient.[] PLAs eliminate these issues through harmonization and coordination. In fact, the use of a PLA by the New York City School Construction Authority from 2005-2009 to facilitate the rehabilitation and renovation of schools led to a savings of \$221 million dollars over their five-year plan period because of the standardization of shifts across all trades of construction worker.[]

PLAs provide skilled workers for projects and support programs that maintain and grow a diverse skilled workforce.[] Most PLAs will include provisions requiring contractors to hire workers through union hiring halls,[] ensuring that all referred workers are qualified (like journey-workers who have graduated from Registered Apprenticeship Programs certified by the Department of Labor). PLAs can also contain clauses stating that apprentices must accompany journey-workers on projects (sometimes there are specific ratios listed)—providing critical opportunities for entrants into the trades to gain necessary skills.[] PLAs might also contain provisions related to pre-apprentices (developing workers, often from underserved communities,[] who are preparing to enter Registered Apprenticeship Programs), guaranteeing their exposure to construction work. PLAs may also fund Registered Apprenticeship Programs via joint labor-management partnerships where both unions and employers invest in the development of skilled workers.[]

Lastly, PLAs lead to improved worker safety and health.[] PLAs often contain specific provisions laying out required safety trainings[] and improve workers' awareness and exercise of their right to accompany an OSHA inspector who is conducting an OSHA inspection.[]<sup>3</sup>

A two-standard approach – i.e., one for PLA projects and one for non-PLA projects – is consistent with the Commerce Department's requirements for funding under the CHIPS and Science Act of 2022. Specifically, the Commerce Department requires contractors that are not signatory to a PLA to draft a "construction workforce plan" that meets the criteria set forth by the Notice of Funding Opportunity (NOFO).<sup>4</sup> As the Commerce Department notes, "applicants that do not commit to using a PLA will be required to submit workforce continuity plans and show that they have taken other measures to reduce the risk of delays in project delivery."

Thus, the Commerce Department requires CHIPS Program applicants in non-PLA projects to submit a "workforce continuity plan" that details the following:

- Steps taken and to be taken to ensure the project has ready access to a sufficient supply of appropriately skilled and unskilled labor to ensure construction is completed in a competent manner throughout the life of the project, including a description of any required professional certifications and/or in-house training, Registered Apprenticeships or labor-

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<sup>3</sup> DOL, Good Jobs Initiative, "*Project Labor, Community Workforce, and Community Benefits Agreements Resource Guide*" (available at [https://www.dol.gov/sites/dolgov/files/OPA/GoodJobs/Docs/Project\\_Labor\\_Community\\_Workforce.pdf](https://www.dol.gov/sites/dolgov/files/OPA/GoodJobs/Docs/Project_Labor_Community_Workforce.pdf)) (footnotes omitted).

<sup>4</sup> U.S. Department of Commerce, CHIPS Program Office, "*Workforce Development Planning Guide: Guidance for CHIPS Incentives Applicants*" (available at <https://www.nist.gov/document/workforce-development-planning-guide>).

management partnership training programs, and partnerships with entities like unions, community colleges, or community-based groups;

- Steps taken and to be taken to minimize risks of labor disputes and disruptions that would jeopardize timeliness and cost-effectiveness of the project;
- Steps taken and to be taken to avoid workplace illnesses, injuries, and fatalities, including descriptions of safety training, certification, and/or licensure requirements for all relevant workers (e.g., OSHA 10, OSHA 30, confined space, traffic control, or other training required of workers employed by contractors), the use of workplace safety committees, and whether the applicant commits to allowing employees to specify a worker or union representative to accompany any OSHA inspectors during any inspections of the construction project;
- Steps taken and to be taken to ensure that workers on the Project receive wages and benefits sufficient to secure an appropriately skilled workforce in the context of the local or regional labor market.

In contrast to non-PLA projects, the Commerce Department notes that “[t]he existence of a project labor agreement indicates that a project will have the skilled labor and coordination needed to execute on a complex construction project.” Thus, no “workforce continuity plan” is needed.

The Commerce Department directs applicants to “***strongly consider***” using a PLA and outlines the following benefits of utilizing a PLA:

- **Timely hiring.** It is imperative that CHIPS projects proceed in a timely fashion and are uninterrupted by labor stoppages. *Best-practice PLAs have language that commits unions to make available skilled workers quickly, such that worker absences do not lead to delay.*
- **Recruitment of workers from outside the region.** Local unions have arrangements through their international parent organizations to allow for workers from other areas to work on a project when the local labor force is insufficient. With adequate notice, even large projects can recruit a labor force of diverse workers with established employment records from around the nation.
- **Dispute resolution procedures.** One of the major upsides of a PLA is that it can include mechanisms to limit disputes and quickly resolve any issues between management and labor. Best-practices PLAs have no-strike/no-lockout language, as well as other dispute resolution processes, such as (1) a “traditional” three step grievance/arbitration procedure, (2) a procedure for the settlement of jurisdictional disputes, and (3) an expedited arbitration procedure. Each of these processes has proven to be highly effective in preventing disruptions on worksites.
- **Harmonization of working hours.** CHIPS projects will need to coordinate workers of many different skillsets, specialties, and backgrounds. Coordination is imperative for efficient delivery. By coordinating starting times, holidays, and other work rules, PLAs can improve efficiency, preventing inefficient use of time and/or excessive use of overtime.
- **Creation of labor/management committees.** Labor-management committees are a pivotal tool that helps oversee projects, set timelines, ensure that the tenets of a PLA are followed, and anticipate problems before they occur.
- **Local engagement.** The process of drafting a PLA should be inclusive and engage stakeholders throughout the community. Up front engagement helps ensure that the

workers and community leaders who will implement the PLA can provide input, identify with the project, and feel a sense of ownership over its timely completion.

- **Health and safety provisions.** Project safety is a foundational priority for the Department. PLAs will often include provisions that emphasize the importance of health and safety, including, but not limited to, an explicit training program for both apprentice and journeymen related to the site; procedures to ensure a culture focused on health and safety; consistent tracking of workplace injuries and illnesses on the site and evaluation of “near-miss” situations; and linking of health and safety to workers’ compensation to provide cost savings for effective health and safety programs.
- **Support for small and minority-owned businesses.** The Department will require each applicant to have a plan for supplier diversity. PLAs can support this goal by supporting small and minority-owned businesses.
- **Access and oversight.** PLAs can create access and oversight committees, which often include the project owner, prime contractor, unions, and other relevant community stakeholders. These committees meet regularly to review and analyze workforce data for the purpose of monitoring progress on recruiting, retaining, and supporting underserved workers on jobsites. These committees can also develop dedicated outreach and representation strategies to address barriers and increase opportunities for workers from underserved communities.
- **Equitable training opportunities.** Many PLAs include Registered Apprenticeship programs, opportunities for pre-apprenticeships with direct pathways to Registered Apprenticeship programs, employment placement, and advancement for entry-level workers.
- **Tracking of diversity data.** Measuring performance and following through on commitments to community benefits and inclusion is critical. PLAs will often include tracking workforce metrics related to Registered Apprenticeship and apprenticeship readiness programs, including disaggregated data by race, ethnicity, and gender, to maintain visibility on whether initiatives to build and retain a diverse workforce are succeeding.

Given the benefits of PLAs, particularly in the strengthening of PWA standards, the PWA Proposed Rule should be revised to include additional requirements for taxpayers that are not signatory to a PLA.

Specifically, taxpayers on non-PLA projects should be required to submit a “workforce continuity plan” demonstrating affirmative actions that the taxpayer will take to ensure that the PWA standards are met. The standards for such a plan have already been developed by the Commerce Department for the CHIPS Program and could easily be deployed as part of the PWA Final Rule.

## **II. THE PWA PROPOSED RULE SHOULD REQUIRE “ROBUST” DOCUMENTATION REQUIREMENTS FOR NON-PLA PROJECTS.**

To ensure that workers receive the benefit of prevailing wages and apprenticeships promised by the IRA, any PWA Final Rule should adopt additional rules requiring robust documentation from taxpayers on non-PLA projects claiming benefits and bolster accountability and enforcement.

Specifically, SMACNA endorses the joint recommendations of a dozen Attorneys General

(and other interested parties) concerning the need for “robust” documentation to avoid fraud and to facilitate compliance and enforcement of prevailing wage and apprenticeship utilization.<sup>5</sup>

The PWA Proposed Rule should be amended to require contractors and taxpayers intending to seek the tax credit enhancements to affirmatively ***file*** the following documentation with the DOL:

- **Notice of Intention to Claim Benefits** – All contractors and taxpayers intending to seek prevailing wage and apprenticeship enhancements should be required to ***file*** a notice of intention to seek a tax credit prior to commencing work.
- **Weekly Certified Payroll Records** – All contractors and taxpayers intending to seek prevailing wage and apprenticeship enhancements should be required to file certified payroll records covering each week of the time period for which they intend to claim enhanced benefits. The certified payroll records should include a signed statement certifying under the penalty of perjury that the information contained within the certified payroll records is accurate.
- **Apprentice Identification Cards** – All contractors and taxpayers intending to seek prevailing wage and apprenticeship enhancements should also be required to file apprentice identification cards from a registered apprentice program alongside certified payroll records.
- **Documentation Showing Attempts to Secure Apprentices Should Be Submitted Before a Project Commences** – Before a project commences, any contractor or taxpayer claiming the “good faith effort” exception for apprenticeship enhancements should be required to file with the DOL all records establishing that they requested qualified apprentices from a registered apprenticeship program and were denied or did not receive a timely response.
- **Prevailing Wage Notice** – All contractors and taxpayers intending to seek prevailing wage and apprenticeship enhancements should be required to notify workers on a qualifying project of their right to earn prevailing wages and to provide the DOL a signed statement certifying under the penalty of perjury that such notice was provided to obtain a tax credit related to that qualifying project.

These documentation and DOL-filing requirements are essential to prevent unscrupulous contractors and taxpayers from taking advantage of the prevailing wage and apprenticeship enhancements without providing the family-sustaining jobs that are provided by SMACNA’s members. Indeed, these requirements are similar to the requirements that federal contractors comply with under the Davis-Bacon Act.

These robust documentation requirements have the added benefit of providing certainty as to the availability of the prevailing wage and apprenticeship enhancements. Clarity as to the documentation and filing requirements ensures that honest contractors, workers, taxpayers, government programs, and enforcement officials will benefit from the IRA’s clean energy tax credits as they were intended.

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<sup>5</sup> See Comments of the Attorneys General Of Massachusetts, Colorado, Delaware, Illinois, Maine, Maryland, Michigan, New Jersey, New York, Oregon, Rhode Island, and the District of Columbia; the California Air Resources Board; and the Ramsey County, Minnesota, Attorney (Dec. 1, 2022) (available at: [https://stateimpactcenter.org/files/AGActions\\_22\\_12.1\\_IRA-IRS-State-and-Local-Govts-Comment\\_FINAL.pdf](https://stateimpactcenter.org/files/AGActions_22_12.1_IRA-IRS-State-and-Local-Govts-Comment_FINAL.pdf)).

### III. THE PENALTIES FOR NON-PLA PROJECTS SHOULD BE INCREASED.

SMACNA has long advocated for stronger protections against the deliberate misclassification of workers as independent contractors – also called “**worker status fraud.**” Specifically, the PWA Proposed Rule should include meaningful penalties that prevent unscrupulous contractors from deliberately misclassifying workers to gain an unfair advantage over law-abiding contractors that pay workers middle-class wages and benefits. Not only does this lead to general disrespect for the law, but also it creates perverse incentives for businesses facing vigorous competition to cheat in order to meet the artificially low prices of their dishonest counterparts.

According to DOL figures, the construction industry represents only **6.9%** of the total U.S. workforce, but it has nearly **20%** of the (reported) independent contractors.<sup>6</sup> A significant portion of these workers are misclassified. By contrast, the financial services industry similarly represents approximately 6.9% of the total U.S. workforce, but it has only 9.6% of the total independent contractors.

The construction industry is not a statistical anomaly. Worker misclassification in the construction industry is a long-standing and pervasive problem. While PLA projects offer significant protections against misclassification, non-PLA projects do not and the PWA Proposed Rule should include additional penalties and recordkeeping requirements to protect against cheating.

Since the 1980s, SMACNA has sounded the alarm on worker status fraud. In 1999, SMACNA called worker status fraud “**an epidemic in the construction industry.**” Even then, it was becoming impossible for legitimate contractors to compete against unscrupulous contractors that classified more than half of their workers as independent contractors. Unfortunately, the industry’s prognosis has only gotten worse.

The construction business is highly competitive. Projects are frequently awarded to the lowest bidder and, as a result, there is an inherent pressure to lower costs and win more projects. Because material costs are typically similar, unscrupulous contractors look to worker status fraud as an easy way to reduce labor costs. For example, worker status fraud avoids “employee” related costs, such as: employment taxes, withholding of employee-side taxes, unemployment insurance, workers’ compensation premiums, health insurance, retirement benefits, paid sick leave, family medical leave, and overtime premium pay. Contractors who misclassify their workers as independent contractors also avoid I-9 (or worker status) verification requirements, OSHA safety standards, and any potential union organizing.

To be clear, worker status fraud in the construction industry is **not** about unsophisticated businesses making “difficult legal calls” or applying complicated legal factors to ambiguous facts. **It is about cheating.** It is about unscrupulous contractors making a conscious decision to avoid tax laws, wage and hour laws, workers’ compensation laws, unemployment insurance laws, and other basic responsibilities of being a legitimate construction contractor. This is done for the express purpose of gaining a competitive advantage against law-abiding competitors, realizing tremendous profits, and avoiding the financial risks that honest entrepreneurs must accept. Construction contractors that engage in worker status fraud do not bear the risks of unanticipated overtime, bad planning, or poor execution. Instead, this racket transfers these risks onto workers and taxpayers.

Unfortunately, the statistics show that “crime pays” and worker status fraud gives

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<sup>6</sup> Proposed IC Rule, 87 Fed. Reg. at 62265.



unscrupulous contractors a significant competitive advantage against legitimate contractors that play by the rules. Study after study has shown that, by engaging in worker status fraud, **unscrupulous contractors can reduce their labor costs by as much as 50%:**

- A 2021 study by the Midwest Policy Institute found:
  - Unscrupulous contractors in Wisconsin can reduce their labor costs by **31%** by misclassifying workers as independent contractors.
  - Unscrupulous contractors in Minnesota can reduce their labor costs by **36%** by misclassifying workers as independent contractors.
  - Unscrupulous contractors in Illinois can reduce their labor costs by **29%** by misclassifying workers as independent contractors.<sup>7</sup>
- In 2020, Harvard Law Professor Mark Elrich opined that “[t]he ability to eliminate as much as **30% (or more)** of labor costs by simply reclassifying a company’s workforce as independent contractors was a clever and effective method to gain a competitive edge over other contractors who continued to bear the burden of required mandates.”<sup>8</sup>
- A 2019 study in the District of Columbia found that contractors who misclassify workers reduce their labor costs by **16.7% to 48.1%**.<sup>9</sup>
- A 2011 study estimated that **19%** of California construction workers were misclassified as independent contractors and these workers earned only 67 cents for every dollar earned by comparable workers with employee status.<sup>10</sup>
- A 2010 study by the Ohio Attorney General’s office estimated that misclassifying a worker makes a **20% to 30%** cost difference per worker.<sup>11</sup>

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<sup>7</sup> Nathaniel Goodell and Frank Manzo IV, M.P.P., *The Costs of Wage Theft and Payroll Fraud in the Construction Industries of Wisconsin, Minnesota, and Illinois* (January 14, 2021) (available at <https://dwd.wisconsin.gov/misclassification/pdf/meetings/210114/costs-of-payroll-fraud.pdf>).

<sup>8</sup> Mark Elrich, *Misclassification in Construction: The Original Gig Economy*, ILR Rev. (2020) (available at [https://lwp.law.harvard.edu/files/lwp/files/erlich\\_ilrr\\_final\\_article\\_11.28.20.pdf](https://lwp.law.harvard.edu/files/lwp/files/erlich_ilrr_final_article_11.28.20.pdf)).

<sup>9</sup> Karl Racine, Attorney General for the District of Columbia, *Illegal Worker Misclassification: Payroll Fraud in the District’s Construction Industry*, (May 22, 2019) (available at <https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf>).

<sup>10</sup> Yvonne Yen Liu and Daniel Flaming, *Sinking Underground: The Growing Informal Economy in California Construction*, Economic Roundtable (September 2014) (available at <https://economicrt.org/publication/sinking-underground/>).

<sup>11</sup> Press Release, Sherrod Brown Senator for Ohio, Sen. Brown Joins Colleague in Announcing Bill to Ensure that Workers Receive Protection and Benefits They Have Earned (April 22, 2010) (available at: <http://www.brown.senate.gov/newsroom/press/release/sen-brown-joins-colleague-in-announcing-bill-to-ensure-that-workers-receive-protection-and-benefits-they-have-earned>).



- A 2007 study by the Minnesota Office of the Legislative Auditor found that a construction contractor could lower its labor costs by **26%** by misclassifying employees as independent contractors.<sup>12</sup>

As you can see, contractors that “play by the rules” are at a competitive disadvantage. Not surprisingly, then, over the past 20 years, numerous studies have found misclassification rates in the construction industry varied from **12% to 33%**:

- A 2020 analysis estimated that, in 2017, between **12.4% and 20.5%** of the construction industry workforce were either misclassified as independent contractors or working “off-the-books.”<sup>13</sup>
- Statewide estimates in Tennessee, New Jersey and California suggested that **11% to 21%** of their state’s construction workforce was either misclassified or working off the books.<sup>14</sup>
- Studies on New York City and Los Angeles County suggest that these rates may be higher in metropolitan areas, with rates between **25% and 30%** in the two jurisdictions.<sup>15</sup>
- A 2011 study estimated that **19%** of California construction workers who were independent contractors were misclassified.<sup>16</sup>
- In 2014, McClatchy Company released a report entitled “*Contract to Cheat*,” which was the result of a yearlong investigation into worker misclassification in the construction industry. The investigation focused on federal housing projects from 28 states that were funded by the 2009 economic stimulus package. The investigators reviewed payroll records from these projects and interviewed hundreds of workers and employers. According to the McClatchy report, the rate of misclassification of construction workers varied by state but **was as high as 35.2% in North Carolina and 37.7% in Texas**.<sup>17</sup>
- A 2009 study in Michigan found that **26.4%** of construction firms misclassified employees; among those who did so, **18.9%** of their employees were misclassified.<sup>18</sup>

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<sup>12</sup> Minnesota Office of the Legislative Auditor, Auditor, *Illegal Worker Misclassification: Payroll Fraud in the District’s Construction Industry*, (November 2007) (available at <https://www.auditor.leg.state.mn.us/ped/pedrep/missclasssum.pdf>).

<sup>13</sup> Russell Ormiston, Dale Belman, and Mark Erlich, “*An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry*,” (January 2020) (available at <https://stoptaxfraud.net/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf>).

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

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

<sup>16</sup> Yvonne Yen Liu and Daniel Flaming, *Sinking Underground: The Growing Informal Economy in California Construction*, Economic Roundtable (September 2014) (available at <https://economicrt.org/publication/sinking-underground/>).

<sup>17</sup> Franco Ordoñez and Mandy Locke, “*IRS’ ‘Safe Harbor’ Loophole Frustrates Those Fighting Labor Tax Cheats*,” McClatchy Washington Bureau, December 14, 2014 (available at <https://www.mcclatchydc.com/news/nation-world/national/economy/article24777397.html>).

<sup>18</sup> Dale Belman and Richard Block, “*The Social and Economic Costs of Employee Misclassification in Michigan*,” Michigan State Institute for Public Policy and Social Research, 2009 available at <https://ippsr.msu.edu/sites/default/files/MAPPR/ARMisClass.pdf>).

- A 2004 study of construction firms in Massachusetts misclassified employees and ***one-in-seven construction workers*** were misclassified as independent contractors.<sup>19</sup>

As outlined above and further detailed in SMACNA and SMART's joint comments,<sup>20</sup> DOL precedent and academic studies demonstrate that financial self-interest has long resulted in misclassification of workers as independent contractors, misclassification of journeypersons to lower paying journeyperson classifications with a lower prevailing wage, misclassification of workers as apprentices even though they are not individually registered in a bona fide RAP with the OA or State Apprenticeship Agency recognized by the OA, using apprentices on covered projects even though the contractor does not have an approved apprenticeship program, failure to pay the proper percentage of the journeyperson wage rate, and/or a failure to honor required ratios of journeypersons to apprentices.

The deterrent effect of stringent penalties for PWA violations is illusory if the probability of detection of such violations is miniscule. PLAs play an important role in curbing PWA Violations and provide workers (and their labor representatives) with a vehicle to report violations without fear of retaliation. PLAs provide a viable means to ensure compliance and, as a result, the PWA Proposed Rule should be revised to include a separate and more rigorous enforcement and penalty standard for non-PLA projects.

#### **IV. SMACNA SUPPORTS A FLEXIBLE AND COMMON-SENSE RATIO REQUIREMENT FOR PLA PROJECTS.**

Section 45(b)(8)(B) provides that the applicable apprenticeship-to-journeyworker ratio is determined by reference to the ratios of the DOL or the applicable State apprenticeship agency. The PWA Proposed rule provides that the Ratio Requirement is "intended to ensure that there are enough journeyworkers to oversee the work of apprentices."

As the IRS and Treasury note, "the applicable ratios set by registered apprenticeship programs generally apply on a daily basis" and the PWA Proposed Rule "reiterate[s] this requirement and would provide that the applicable ratio established by the apprenticeship program would need to be satisfied each day during construction, alteration, or repair of the qualified facility for which apprentice labor hours are being claimed." The PWA Proposed Rule also emphasizes that "[a] mentor, technician, specialist, or other skilled individual who has documented sufficient skills and knowledge of an occupation, either through formal apprenticeship or through practical on-the-job experience and formal training may also be a journeyworker."

SMACNA agrees with this analysis and emphasizes that flexible and common-sense standards regarding the Ratio Requirement are needed for PLA projects. This is because, by definition, PLAs expand the long-term supply of highly-skilled craft workers needed for the future.<sup>21</sup> When PLAs are used, local union referral systems are forced to expand their capacity and recruit and train more workers to meet manpower demand. This, in turn, facilitates long-

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<sup>19</sup> Françoise Carré, et. al, "*The Social and Economic Costs of Employee Misclassification in Construction*," Construction Policy Research Center, (December 17, 2004).

<sup>20</sup> See Joint Comments of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) regarding, "*Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements*."

<sup>21</sup> [Redacted], Project Labor Agreements, CONGRESSIONAL RESEARCH SERVICE (June 28, 2012) ("[A] PLA will promote the agency's long-term program interests, such as training workers to meet the agency's future construction needs.").

term workforce planning and development, which is critically needed by the industry.

For example, SMACNA and SMART's partnership has been providing skilled, trained, and certified workers to respond in a timely manner to meet industry demands for more than a century. SMART, with more than 203,000 members, provides classroom, hands-on, on-the-job and rapid response training to its members through federal and state registered apprenticeships in more than 150 state of the art training centers located throughout the United States and Canada.

Academic research has found that:

Apprenticeships with union participation were found to have much higher enrollments, greater share of women and ethnic/racial minorities. These programs also have a markedly better performance for all groups on rates of attrition and completion.

Joint apprenticeship programs in the building trades remain vital and continue to improve, as demonstrated by recent accomplishments, such as the establishment of national training funds and national instructor preparation, arrangements for college credit for learning in apprenticeship, and expansion of journey-level update training.<sup>22</sup>

Indeed, research has consistently shown that: (1) "union programs enroll the majority of building trade apprentices," (2) "the apprentice completion rates from union programs is higher than from non-union programs," (3) "union programs enroll non-traditional populations in higher numbers and at higher rates than do non-union programs," and (4) "the apprentice completion rates of non-traditional populations from union programs is higher than from non-union programs."<sup>23</sup>

In contrast, non-union contractors have been unable to develop or maintain an effective system of craft training that ensures open shop workers uniformly meet requisite, minimum skill standards.<sup>24</sup> For these and other reasons, it fails to adequately invest in skill training or produce sufficient numbers of properly trained workers. This, in fact, is one of the primary causes of the industry's current skill shortages.<sup>25</sup>

Union construction apprenticeship programs regularly invest over \$600 million in state-of-the-art training programs every single year, provide a quality of training that is far superior and maintain programs that cover the wide range of all essential crafts needed for large capital facility projects. Thus, the use of PLA-construction, which provides work opportunities to union referral systems that have a greater capacity to recruit, train and deploy the next generation of skilled construction craft personnel, serve the long-term workforce development interests of project owners.

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<sup>22</sup> Glover & Bilginsoy, Registered Apprenticeship Training in the US Construction Industry, EDUCATION AND TRAINING (May 2005).

<sup>23</sup> Argyres & Moir, Building Trades Apprentice Training in Massachusetts: An Analysis of Union and Non-Union Programs, 1997-2007, LABOR RESOURCE CENTER (Oct. 2008).

<sup>24</sup> Glover & Bilginsoy, Registered Apprenticeship Training in the US Construction Industry, EDUCATION AND TRAINING (May 2005) ("To date, the non-union sector has not established effective mechanisms to address the reluctance of employers to invest in training in the face of transient construction labor markets.").

<sup>25</sup> Cihan Bilginsoy, Apprenticeship Training in the U.S. Construction Industry, at 9, UNIVERSITY OF UTAH (1998).

**V. SMACNA SUPPORTS CLEAR AND CONSISTENT RULES REGARDING PWA VIOLATIONS.**

SMACNA supports clear standards for corrections and penalties related to any failure to satisfy PWA standards. In addition, SMACNA supports the PWA Proposed Rule's waiver when the situation involves a PLA. As the PWA Proposed Rule explains:

Pre-hire project labor agreements may be used to incentivize stronger labor standards and worker protections in the types of construction projects for which taxpayers may seek the increased credit, and having a project labor agreement in place may also help ensure compliance with PWA requirements. For these reasons, the proposed regulations would also provide that the penalty payment requirement would not apply with respect to a laborer or mechanic employed under a project labor agreement that meets certain requirements and any correction payment owed to the laborer or mechanic is paid on or before a return is filed claiming an increased credit amount.<sup>26</sup>

PLAs “level the playing field” by providing uniform pay and benefits to all in the workforce for contractors and subcontractors – union or non-union. This prevents contractors, who pay prevailing wages and benefits, from being undercut by low-wage and unscrupulous competitors often operating contrary to wage and hour laws and standards.

Unfortunately, the U.S. construction industry is becoming increasingly defined by contractors who do not play by the wage and hour standards, laws, and rules. These unprincipled contractors attempt to win bids and fatten their profit margins by intentionally operating in ways that avoid fair competition and subvert the law. They will routinely submit artificially low bids knowing they have no intention of following published employment rules, such as prevailing wage laws, even when mandated by law. These contractors are increasingly engaged in “misclassifying” their employees as “independent contractors” to avoid paying federal and state taxes, workers' compensation, and unemployment insurance benefits. This allows them to submit an even lower bid while simultaneously defrauding the taxpayers by not paying requisite taxes paid by legitimate contractors. Unfortunately, it has also become a de facto part of the “race to the bottom” business model to utilize and exploit illegal and undocumented workers and pay them sub-standard wages (or not pay them at all, in some cases). And finally, these contractors are not averse to using inferior materials, and taking unsafe shortcuts on construction plans that put workers, as well as the project itself, in danger.

PLAs are a valuable tool to ensure that public dollars are leveraged to ensure not just a quality return on the construction investments, but also to ensure that taxpayer dollars are used to support a construction industry business model that also works to prevent social and economic damage –that governmental entities will have to clean up with additional taxpayer funds. As noted above, PLAs ensure that all contractors “play by the rules.” All contractors and subcontractors must sign the PLA and agree to family-sustaining pay and benefits. This raises the standard of living (and increases taxes paid) in areas where the work is being performed. Under strictly enforced PLAs, unscrupulous contractors, who often do not employ local workers, are unable to undercut law-abiding contractors and ensures that workers and local governments benefit.

**VI. PROJECTS ARE ANXIOUSLY WAITING FOR THE PWA FINAL RULE.**

While we recognize that there is more work to be done regarding the PWA Proposed Rule, there are many clean energy projects that are ready and waiting for the PWA Final Rule before breaking ground. While thorough and thoughtful consideration of our comments is necessary,

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<sup>26</sup> 88 Fed. Reg., at 60029.

particularly the need for additional standards for projects that are not subject to a PLA, we encourage the IRS and Treasury to move quickly to issue the PWA Final Rule, so that more taxpayers can take advantage of the clean energy tax credits available under the IRA.

**VII. SUMMARY AND CONCLUSION.**

SMACNA appreciates the opportunity to provide this information and the continued engagement of the Administration in ensuring that the IRA's investment in American infrastructure will generate well-paid, family-supporting jobs for American workers.

Given our expertise in the areas of prevailing wage and registered apprenticeship programs, we believe that the IRS and Treasury should carefully consider our recommendations to ensure that the PWA Final Rule effectuates the intent of the IRA, including:

- Creating a separate standard for taxpayers who are signatory to a PLA;
- Given the history of cheating and PWA violations on non-PLA projects, significantly increasing the oversight and non-compliance penalties for non-PLA projects;
- Mandating robust recordkeeping requirements for non-PLA projects, including the filing of certain documents with the DOL; and
- Creating flexible and common-sense ratio requirements for PLA projects.

We look forward to the PWA Final Rule as soon as it is available and thank you for the opportunity to submit comments on this matter.

Sincerely,



Aaron Hilger  
Chief Executive Officer  
SMACNA

cc: Julie A. Su, Acting Secretary  
U.S. Department of Labor