Joint Comments of the International Association of Sheet Metal, Air, Rail Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) to the Proposed Rule on Employee or Independent Contractor Status

Docket No. WHD–2026–0001
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The International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) submit these comments in response to the Department of Labor's *Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act.*[1] Our comments focus solely on the application of the Fair Labor Standards Act (FLSA) to the construction industry.

SMART represents over 203,000 members in diverse industries, with over 136,000 workers in the sheet metal trade, which encompasses a broad range of highly skilled work functions. Those functions include but are not limited to installation of duct and units on heating, ventilating, and air conditioning (HVAC) systems; testing, adjusting, and balancing of air-handling equipment and duct work; custom fabrication of duct; architectural sheet metal work (e.g., sheet

[1] 91 Fed.Reg. 9932 (Feb. 27, 2026).

metal work on building "envelopes"), and welding. SMACNA is an international trade association representing 3,500 signatory contracting firms with more than 100 chapters throughout the United States, Canada, Australia, and Brazil. A leader in promoting quality and excellence in the sheet metal and air conditioning industry, SMACNA has offices in Chantilly, Virginia, and in Washington, D.C.

Overview of Comments

Clear and accurate articulation of judge-made law over the past 80 years will lead to "increased precision and predictability in the economic reality test's application, which will in turn benefit workers and businesses and encourage innovation and flexibility in the economy."[2] To create a bright line rule for the benefit of businesses and workers in the construction industry, SMART and SMACNA urge the DOL to adopt a rebuttable presumption of employee status for construction workers under the economic reality test. This test, which provides greater industry employment and management certainty, has been recognized by states that have adopted a rebuttable presumption applicable to the construction industry. Importantly, there are a consistent set of facts on construction projects that support an inference that workers who perform their trades on construction sites are, indeed, employees. It is widely understood as a standard industry practice that construction employees are required to report to work at the site of a project at a prescribed time and duration[3] using the skills of their trades acquired through on-the-job training, work at the direction and control of management in coordination with other workers, perform functions that

[2] *See* NPRM, *Independent Contractor Status Under the Fair Labor Standards Act*, 85 Fed.Reg. 60600 (Sept. 25, 2020).

[3] *See e.g*., *Robicheaux v. Radcliff Material*, Inc., 697 F.2d 662, 666-67 (5th Cir. 1983) (welders who were "expected" by the company to "arrive at work each morning at 7:00 a.m. and work at least until 5:00 p.m." were deemed employees).

are integral to the contractor or subcontractor's business, and have no "opportunity for profit or loss" beyond the hourly compensation paid for their services.

The core facts involved in determining worker classification in the construction industry are not only consistent from site to site, but are also based on practices developed to address the unique features of the industry. Work practices differ drastically from industry to industry,[4] and facts relevant to workers who work from home and/or obtain assignments via app from Uber, TaskRabbit, DoorDash, etc., are often irrelevant to workers who are required to report daily to a work location. Indeed, the facts relating to level of employer control over an on-site, highly skilled construction worker who works a required schedule are vastly different from a company's control (or lack thereof) over workers who perform unskilled work, such as delivering food, running errands, or providing rides during self-selected hours (or employer-mandated hours), and receive assignments via an app. Unlike Uber drivers and other workers who receive low or unskilled assignments by app, workers at construction sites are not free to accept or reject assignments, run personal errands while awaiting new assignments, or engage in other activities of their own choosing.[5] Furthermore, the working conditions of construction workers are vastly different from those of many other occupations – 37% of all jobs[6] – that can be performed entirely from home.

Our management and labor viewpoint is that DOL should create a clear presumption of

[4] There is precedent for the DOL issuing industry-specific guidance. *See* 29 CFR § 788.16 (interpretive guidance on the FLSA's exemption for small forestry or lumbering operations) and 29 CFR 780.330(b)(sharecropper and farmers).

[5] *See* facts in dispute in *Razak v. Uber Technologies Inc*, 951 F.3d 137 (3d Cir. 2020), amended 979 F.3d 192 (3d Cir. 2020), which involves the status of Pennsylvania drivers who utilize Uber Technologies' ride-sharing mobile phone application.

[6] Jonathan I Dingel & Brent Neiman. "How many jobs can be done at home?" *J Public Econ* 2020 Jul 9: "We find that 37% of jobs in the United States can be performed entirely at home, with significant variation across cities and industries. These jobs typically pay more than jobs that cannot be done at home and account for 46% of all US wages."

employee status in the construction industry. Furthermore, the DOL should clarify, at a minimum, that hard-earned complex and specialized skills,[7] source of training, and permanence in the project-based construction industry are not factors that should count **against** a construction worker's employee status. To underscore these principles and achieve consistency with court precedent, SMART and SMACNA request that the DOL remove the construction industry examples in proposed § 795.115, *Examples of analyzing economic reality factors*. While the proposed inclusion of industry-specific examples in the NPRM could, depending upon the factors listed, provide helpful guidance in emerging industries where proper classification of workers remains murky. However, the construction industry examples would undermine the clarity and specific guidance already provided by court precedent and state and municipal law for classification of construction workers because, among other things, the examples focus on whether the worker acquired his or her specialized skills through the current work relationship or brought such skills to the workplace. These examples do not take into account that, in the construction industry, on-the-job training obtained while enrolled in a registered apprenticeship program is a dominant model for skill acquisition. In fact, when a workforce is equipped with the complex skills learned from past projects, the worker – an apprentice or journeyworker – is able to use those skills to obtain future employment. The proposed examples in § 795.115 (b)(4)(i) and (5)(i) would be most counterproductive and threaten to create the anomalous result that experienced workers would lose their "employee" status once they developed the skills to perform the specialized work without mentorship.

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[7] *Cherichetti v. PJ Endicott Co*., 906 F. Supp. 2d 312 (D. Del. 2012)(finding that an electrician's employee status is consistent with "skills" that are "of the task-specific, specialized kind that form a piece of a larger enterprise.")

Comments

I. Issuing a Final Rule that is Inconsistent with 80 Years of Court Precedent Will Create Further Uncertainty and Spawn Costly Litigation

Beginning in the 1940's, judge-made law has created a template for determining employee status that the DOL is not free to discard. In deciding FLSA worker classification cases, federal courts will continue to apply the well-settled precedent on which the Supreme Court has repeatedly opined. At this juncture, regardless of whether a regulation can be characterized pro-employer or pro-worker, issuing a final rule that is inconsistent with 80 years of court precedent will create further uncertainty to the detriment of businesses and workers and spawn costly litigation. Even the most pro-employer management law firms acknowledge that employers would act at their own peril in choosing to ignore 80 years of judge-made law in favor of the proposed regulations,[8] observing that "courts apply their own variations of the economic reality test and are not required to follow DOL guidance."[9] Significant changes are, therefore, needed to the proposal rule to ensure consistency with long-established federal precedent, particularly cases classifying workers who are required to report to a brick-and-mortar location to perform their work.

In any event, much has changed since 2021, when the DOL promulgated the first-ever regulation applicable to all industries on how to classify workers under the FLSA. Most

[8] *See* Spilman Thomas & Battle's article, *Don't Let the DOL's Proposed New Independent Contractor Rule Tempt You to Change Your Decision-Making Process When Classifying Workers*: https://www.spilmanlaw.com/resource-article/dont-let-the-dols-proposed-new-independent-contractor-rule-tempt-you-to-change-your-decision-making-process-when-classifying-workers/

[9] *See* Mayer Brown's website: *DOL Proposes New Independent Contractor Rule to Replace Biden-Era Regulation* (Mar. 19, 2026): https://www.mayerbrown.com/en/insights/publications/2026/03/dol-proposes-new-independent-contractor-rule-to-replace-biden-era-regulation Mayer Brown further advises that employers with workers in states that have adopted the ABC test "must ensure compliance with applicable state law requirements regardless of federal standards."

importantly, under the Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___ (2024), 144 S. Ct. 2244 (2024), courts exercise their independent judgment to determine statutory ambiguities and may not defer to an agency's interpretation of the law in crafting federal regulations. Secondly, even under the pre-*Loper* standard of review,[10] the DOL's repeated reversals[11] of its subregulatory and regulatory guidance on worker classification would have thwarted a court's deference to the DOL's administration of the FLSA. A subregulatory[12] and regulatory guidance that changes with every presidential administration provides no long-term predictability or clarity.

II. Adoption of a Presumption of Employee Status in the Construction Industry Would Create a Bright Line Rule that Would Benefit Both Business and Workers

SMART and SMACNA recommend that the DOL adopt a rebuttable presumption of employee status for construction workers under the economic reality test unless proven otherwise. A presumption of employee status for a worker whose putative employer has "suffered or permitted" to work on a construction site is entirely consistent with the broad statutory language of the FLSA[13] and the factors consistently used by courts in determining employee status. In this context, there is a "rational" connection between the facts that characterize construction industry

[10] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[11] *See Deep Dive* article (Mar. 2, 2026), "Labor Agency's Gig Worker Flip-Flopping Weakens Rules in Court," quoting Richard Reibstein, a partner at Troutman Pepper Locke LLP, who stated "This proposed rule is just the next point in an endless game of regulatory ping pong."

[12] The first Trump administration overrode Obama-era subregulatory guidance. In 2015, the Wage and Hour Division (WHD) issued Administrative Interpretation No. 2015-01. Authored by former WHD Administrator David Weil, the guidance stated that most workers are employees – rather than independent contractors – under the FLSA definition of "employment." The guidance effectively created a presumption that workers are employees under the FLSA.

[13] *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945)("A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame.")

employment and an inference that workers who are "suffered or permitted" to perform their trade on a construction site are, indeed, employees. A presumption is normally appropriate when "proof of one fact renders the existence of another fact 'so probable that it is sensible and timesaving to assume the truth of [the inferred] fact ... until the adversary disproves it.'"[14]

With respect to rulemaking and adjudications, the general rule is that an agency may establish a rebuttable presumption if there is a rational connection between the facts giving rise to the presumption and the fact presumed. *See, e.g., Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804-05 (1945) ("Like a statutory presumption or one established by regulation, the validity, perhaps in a varying degree, depends upon the rationality between what is proved and what is inferred."); *United Scenic Artists Local 829 v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985) ("Presumptions may, of course, be established both by legislative bodies and by administrative agencies, but their validity depends as a general rule upon a rational nexus between the proven facts and the presumed facts.").

A presumption of employee status would ensure that construction contractors are subject to a consistent set of federal and state rules, particularly in states that adopt the ABC rule and/or a presumption of employee status specifically tailored to the construction industry. California,[15]

[14] *Chemical Manufacturers Association v. Department of Transportation*, 105 F.3d 702, 705 (D.C. Cir. 1997).

[15] Cal. Labor Code § 2750.3. California continues to apply the ABC test under AB 5, though recent legislation (AB 1514, effective Jan. 1, 2026) has modified certain exemptions for creative professionals, consultants, and technology services.

New Jersey,[16] Massachusetts,[17] and other states[18] and municipalities[19] apply the more employee-friendly "ABC test," which requires employers to prove that: (1) the worker is free from the hiring entity's control and direction; (2) the work is outside the hiring entity's usual course of business; and (3) the worker is customarily engaged in an independently established trade, occupation, or business. Employers with workers in these states must ensure compliance with applicable state law requirements regardless of federal standards.[20] In addition to states that broadly apply the ABC test, other states, such as Illinois,[21] Minnesota, Maryland, and New York, apply the ABC test and/or presumptions of employee status in the construction industries. In Minnesota, in the commercial or residential building construction industry, workers are considered employees unless they meet the 14 legal requirements to be considered independent contractors.[22] Under New York's Construction Industry Fair Play Act, there is a statutory presumption that a person performing services for a construction contractor shall be classified as an employee unless it is

[16] *See Hargrove v. Sleepy's, LLC*, 106 A.3d 449, 464 (N.J. 2015), in finding that the ABC test applies to NJ Jersey Wage and Hour Law and the NJ Wage Payment Law, the court stated that this test "provides more predictability" and that the "common law right to control test, which was designed for utilization in tort cases and is incompatible with the legislative purpose of insuring income security to wage-earners." *See also,* N.J. Rev. Stat. § 34:20-4 (a presumption that services performed in the making of improvements to real property by an individual for remuneration paid by an employer shall be deemed to be employment for the purposes of laws governing prevailing wage, temporary disability, unemployment compensation, and tax liability).

[17] Mass. Gen. Laws ch. 149, § 148B.

[18] *See e.g.,* Vt. Stat. Ann. tit. 21 § 341(1), Wages and Medium of Payment; Neb. Rev. Stat. § 48-1229(1), Nebraska Wage Payment and Collection Act.

[19] Municipal laws also afford employees greater protection against wage theft. *See e.g.*, DC's *Workplace Fraud Act*, D.C. Code § 32-1331.01 *et seq.*

[20] The ABC test has also been adopted in more than 20 states and the District of Columbia to determine employee status for purposes of state unemployment compensation programs. Congressional Research Service, *Worker Classification: Employee Status Under the National Labor Relations Act, the Fair Labor Standards Act, and the ABC Test* (Apr. 20, 2021). https://www.congress.gov/crs-product/R46765

[21] 820 Ill. Comp. Stat. 185/10, Employee Classification Act (pertains to construction industry).

[22] Minn. Stat. § 181.723

demonstrated that such person is either an independent contractor, in accordance with a three-prong ABC test, or is a separate business entity, which can only be established by satisfying 12 specific criteria enumerated in the law.[23] Under the Maryland Workplace Fraud Act of 2009 (amended 2012), workers in construction and landscaping are presumed to be employees unless the "employer" can establish that the workers are independent contractors or "exempt persons."[24] Other states, including Pennsylvania, have adopted construction industry presumptions for laws designed to protect employees, such as workers' compensation.[25]

The issuance of federal regulations that are wholly inconsistent with state and municipal laws on worker misclassification would result in confusion and potential liability in an industry where the vast majority of contractors (81.48%) employing fewer than 10 employees.[26] Lack of consistency with state and municipal law, combined with the DOL's reversals of its guidance on worker classification, undermines compliance efforts to the detriment of employees and businesses, particularly small ones. A clear and concise statement of worker classification through a presumption of employee status in an industry rife with worker misclassification[27] would both

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[23] NY Labor Law § 861-C, Construction Industry Fair Play Act.

[24] Md. Code, Lab. & Empl. § 3-902-901 et seq.; *see also* Md. Code Regs. 09.32.01.18 - Presumption of Employee

[25] *See* Pennsylvania Construction Workplace Misclassification Act, 43 P.S. §933.1 (applicable to worker classification for workers' compensation and unemployment compensation).

[26] NCCER Research Department: https://www.nccer.org/media/2023/03/construction-company-size-and-employment.pdf

[27] Many of the 28 states with formal or informal task forces established to address the issue of employee misclassification focus specially on the construction industry. In the case of Colorado, in 2018 the Task Force focused even more narrowly on labor brokers in construction. *See* National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, Policy Brief (2020).

reduce compliance costs borne by employers and ensure that workers receive the FLSA protections to which they are entitled.

III. SMART and SMACNA Recommend Modifications to the Proposed "Amount of Skill Factor" to Better Reflect the Work of the Skilled Trades in the Construction Industry

SMART and SMACNA urge the DOL to clarify, at a minimum, that hard-earned specialized skills and source of training in the construction industry are not factors that count against a construction worker's employee status. In the interests of clarity and consistency with court precedent, we recommend that the DOL modify § 795.105(d)(2)(i), *The amount of skill required for the work,* to remove "specialized training" and a worker's dependency upon a "potential employer to equip him or her with any skills or training necessary to perform the job" as factors weighing against employee status.

A. The High Level of Skill Required to Work in Specialized Trades in the Construction Industry Should Not Weigh in Favor of Independent Contractor Status

Court have repeatedly stated that while "[t]he lack of the requirement of specialized skills is indicative of employee status, the use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in any independent way"[28] and/or exercise business "initiative." Simply put, while the lack of skill may be probative of employee status, high levels of skill are not. Courts are clear that, while low-skilled work is a factor that can shield a worker from a finding of independent contractor status, a high amount of skill should not

[28] *See Martin v. Selker Bros., Inc*., 949 F.2d 1314 (3d Cir. 1991)("the use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in any independent way.")

be a sword.[29] Courts have opined that "development of occupational skills is no different from what any good employee in any line of work must do. Skills are not the monopoly of independent contractors.[30] As stated by the 5th Circuit in overturning a district court decision, the "key missing ingredient in the lower court's determination is initiative. Routine work which requires industry and efficiency is not indicative of independence and nonemployee status."[31] As stated in *Superior Care*, which involved classification of nurses, "the fact that workers are skilled is not itself indicative of independent contractor status."[32]

B. The Source of Worker Training as a Factor in Determining Worker Classification Could Cause Workers to Lose "Employee" Status as Their Skill Sets Become More Proficient

Use of the source of training as a factor, particularly in industries requiring specialized skills that are acquired over many years, would potentially deprive apprentices and other newcomers to an industry of FLSA protection once they become proficient in their occupation. The sheet metal industry, like other sectors in the construction industry, is characterized by use of specialized skills aquired through on-the-job training in four or five-year registered apprenticeship programs (RAPs). The training process needed to master the sheet metal trade is time-consuming, expensive, and requires a long-term commitment by the apprentice.

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[29] *Brock v. Superior Care, Inc.,* 840 F.2d at 1060, 1061 ((2d Cir. 1988) (nurses who were "skilled workers who require several years of specialized training" were deemed employees under the FLSA: "The nurses in the present case possess technical skills but nothing in the record reveals that they used these skills in any independent way.")

[30] *Secretary v. Lauritzen,* 835 F.2d 1529, 1537 (7th Cir. 1987); *See also* concurring opinion in *Lauritzen*: "The migrant workers, by contrast, are poor in human capital, so this factor augurs for a conclusion of employment."

[31] *Usery v. Pilgrim Equipment Co*., 527 F.2d 1308, 1311 (5th Cir.), *cert. denied*, 429 U.S. 826 (1976).

[32] *Superior Care*, 840 F.2d at 1058–59.

Even in industries requiring less technical skills than sheet metal work, the proposed addition of the source of the worker training as a factor in worker classification would inevitably create inconsistent results regardless of whether the skills are acquired through a RAP, a community college's workforce program, a trade school, or training through a work relationship.[33] If this new component of the skills factor were applied, a court could reach opposite results on worker status, with all other facts being identical, if an individual, who was untrained until his previous job, uses those newly acquired skills at another company. Likewise, a worker who received training and/or a certification from community college's workforce program could lose FLSA protection if they arrived at a workplace with the required job skills.

IV. Consistent with the Recommended Changes to the Proposed "Amount of Skill" Factor, SMART and SMACNA Urge the DOL to Modify or Remove the Examples in the NPRM Pertaining to the Construction Industry

Consistent with our recommended changes to proposed § 795.105(d)(2)(i), SMART and SMACNA urge the DOL to remove of the examples in proposed § 795.115 *Examples of analyzing economic reality factors*, that pertain to the construction industry. These examples interpret the FLSA to find that novices to an industry requiring high levels of skill are likely employees but the hard-earned skill sets of experienced workers, i.e., journeyworkers, weigh against a determination that they are employees. In accordance with these examples, inexperienced workers, including registered apprentices, who require on-the-job training under the mentorship of experienced

[33] Using specialized training as a factor appears to be contrary to the administration's goal of promoting skill development by supporting workplace training programs at community colleges through expansion of Pell grant eligibility and to its goal of surpassing one million active, registered apprentices. *See Accountability in Higher Education and Access Through Demand-Driven Workforce Pell: Pell Grant Exclusion Relating to Other Grant Aid; and Workforce Pell Grants,* 91 Fed.Reg. 11378 (Mar. 9, 2026); Executive Order No. 14278, *Preparing Americans for High-Paying Skilled Trade Jobs of the Future*, 90 Fed.Reg.17525 (Apr. 28, 2025).

workers could lose their "employee" status once they develop the skills to perform the work without close oversight.

The examples in proposed § 795.115 (4)(i) and (5)(i) both focus on whether the construction work requires a "specialized training or skill" and when the worker gained the necessary skills to perform his or her trade. In proposed (4)(i), the roofer "had no roofing skills when he started" and "developed skills through on-the-job experience and training provided by the company." The "application" paragraph in the proposed rule relies on the alleged lack of "specialized skill" required to perform the roofing work and the fact that the worker "developed skills over his time at the company" in finding that the facts weigh in favor of employee status. The proposed rule reaches the opposite result in proposed (5)(i), where the individual has "specialized training in roofing and relies on his own skills to perform the work" and the "construction company provides him with no training and hired him based on his roofing skills and expertise." The "application" paragraph states that the "individual brings his own skills to the work and does not rely on the construction company to provide training. Accordingly, the skill factor weighs in favor of the individual being an independent contractor."

V. SMART and SMACNA Encourage the DOL to Eliminate Permanence as a Factor Counting Against Employee Status in the Construction Industry

A fundamental challenge in issuing regulations applicable to all industries is that the intrinsic facts of working arrangements from industry-to-industry vary so markedly that a set of criteria germane to one industry may be tangential or inapplicable to another. Without industry specific adaptation, general criteria may cause a trier of fact to reach the wrong conclusion in

industries with unique work relationships.[34] In light of the extreme importance of proper application of the "permanence" factor to project-based work relationships in the construction industry, SMART and SMACNA further recommend that proposed § 795.105(d)(2)(ii), *The degree of permanence of the working relationship between the individual and the potential employer,* be modified to state this factor is "generally less likely to be probative of worker status in industries characterized by seasonal, temporary, sporadic, or project-based work relationships but permanent and exclusive employment for the duration of a project weighs in favor of employee status."

This recommendation is based on precedent, which opines that exclusive work for the duration of the job for which the worker was hired is probative of employee status.[35] Courts recognize that "[m]any seasonal businesses necessarily hire only seasonal employees, [and] that fact alone does not convert seasonal employees into seasonal independent contractors."[36] In *Lauritzen*, the court noted that the "short duration" of employment is attributable to "nature of

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[34] The unique characteristics of the employment relationships in the construction industry are recognized in major statutory and regulatory schemes ranging from the National Labor Relations Act to ERISA. For example, ERISA's withdrawal liability exemption for construction is designed to accommodate movement from employer to employer by providing that, in contrast to other sectors, withdrawal liability is not triggered by the cessation of an employer's obligation to contribute or termination of its operations. 29 U.S.C. §1383. It exists because "the construction industry as a whole does not necessarily shrink when a contributing contractor leaves the industry; employees are often dispatched to another contributing contractor." *H.C. Elliott, Inc. v. Carpenters Pension Tr. Fund for N. California*, 859 F.2d 808, 811 (9th Cir. 1988).

[35] *See. Superior Care*, 840 F.2d at 1060-61 ("even where work forces are transient, the workers have been deemed employees where the lack of permanence is due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative"). *See also, Brock v. Mr. W Fireworks,* 814 F.2d 1042, 1053 (5th Cir. 1987). In reversing a "clearly erroneous" finding that impermanent work in a seasonal firework business was an indicia of independent contractor status, the Circuit Court opined that "when an industry is seasonal, the proper test for determining permanency of the relationship is not whether the alleged employees returned from season to season, but whether the alleged employees worked for the entire operative period of a particular season.")

[36] *Lauritzen,* 835 F.2d at 1537.

construction work." *See Baker v. Flint Eng'g & Const.* Co., 137 F.3d 1436, 1442 (10th Cir. 1998), where the court stated that rig welders who rarely worked more than two to three months in natural gas pipeline construction are "permanent and exclusive for the duration of" the particular job for which they were hired and that "these characteristics [of short duration and frequent relocation] of plaintiffs' employment are clearly due to the intrinsic nature of oil and gas pipeline construction work rather than any choice or decision on the part of plaintiffs."

Conclusion

SMART and SMACNA appreciate the opportunity to comment on the proposed rule and urge the DOL to consider the unique patterns of working relationships in the construction industry in issuing the final rule.

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