



Joint Comments of the International Association of Sheet Metal, Air, Rail and Transportation Workers and the Sheet Metal and Air Conditioning Contractors' National Association on the Proposed Rule on Joint Employer Status

Docket No. WHD–2026–0067

RIN 1235–AA48

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 *Joint Employer 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 in the construction industry. 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 metal work on building “envelopes”), and welding. SMACNA is an international

¹ 91 Reg. 21878 (Apr. 23, 2026).

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.

Introduction

In support of the proposed rule, the U.S. DOL states its belief “that regulations addressing joint employment is necessary to promote clarity and uniformity in the Department’s nationwide enforcement of federal wage and hour law.”² While “clarity and uniformity” would, if feasible, aid the regulated community in understanding their legal obligations, these goals cannot be achieved through the issuance of proposed rules that are inconsistent with legal precedent interpreting the FLSA³ and state statutes on joint employer status in the context of wage and hour violations. As prominent management firms advise, the multiplicity of state and federal standards on laws that impact work relationships, including those governing wage and hour, “prohibits availability of uniform/compliant national policies.”⁴ This is particularly true for the construction industry since state law governing worker protection is custom-designed to address the unique features of the industry in all aspects of the workplace: wage and hour, prevailing wage, safety, workers’ compensation, and registration and licensure of contractors and labor brokers.

In light of the prevalence of state laws holding upper-tier contractors, owners, construction managers, and/or labor brokers (often referred to as “temporary staffing” firms in statutes)

² 91 Fed.Reg. at 21884.

³ See *State of New York v. Scalia*, 490 F. Supp. 3d 748 (S.D.N.Y. 2020), and cases cited therein.

⁴ Morgan Lewis website, *Mitigating Contractor Misclassification and Joint Employment Risk* (May 3, 2021).

accountable for violations of wage and hour standards through joint and several liability, as described herein, SMART and SMACNA request that the U.S. DOL find that construction industry employment is exempt from the standards described in the proposed rule. Express exemption of the construction industry would be more consistent with the U.S. DOL’s goal of providing “clarity and uniformity” to stakeholders. It is incongruous for upper tier contractors to have no liability under the FLSA but to face stringent monetary penalties, stop orders, debarment, individual liability for construction owners for wage violations,⁵ and/or even imprisonment at the state or municipal level for wage and hour violations.⁶

The U.S. DOL can best achieve the FLSA’s goal, i.e., to ensure that workers receive the wage and overtime compensation to which they are legally entitled, by incorporating successful state efforts to combat wage theft and evasion of liability to wronged workers into federal wage and hour standards. As an important first step in this regulatory approach, SMART and SMACNA encourage the U.S. DOL to follow the recommendations of the state task forces that have identified joint and several liability as an important tool in holding contractors of all tiers accountable for non-compliance.

Comments

I. The U.S. DOL and State Legislatures Are Increasingly Acting at Cross Purposes on Joint Employer Liability

⁵ C.R.S. §8-4-101(6). See Interpretive Notice & Formal Opinion (“INFO”) # 11A: *Individual Liability under the Colorado Wage Act and Healthy Families and Workplaces Act*.

⁶ See website of the Littler law firm: Nicole S. Mulé & Paul Piccigallo (June 2025). *Wage Theft as a Crime: States Escalate Enforcement with Criminal Prosecution*.

With respect to the construction industry, the U.S. DOL and state legislatures are increasingly acting at cross purposes in oversight of wage and hour law, largely because states have become laser-focused on the construction industry in seeking to end the intractable and budget-draining practice of worker misclassification in this industry. Misclassification and joint employer liability are interdependent legal doctrines, as joint employer liability has become a well-recognized means through which states have chosen to address high misclassification rates in the construction industry. In our industry, states have recognized the need for a broad joint employment standard to provide general and upper-tier contractors on both private and public projects with proper incentives to ensure their contracted workforces can secure unpaid wages from a financially viable entity. As of 2025, at least ten states and the District of Columbia had adopted joint and several liability statutes specifically directed at the construction industry;⁷ these laws impose joint and several liability for general contractors or construction managers for the wage theft of any subcontractor at any tier on their private and public job sites.⁸ Since that time, an additional four states – Connecticut, Delaware, Maine, and Rhode Island – have adopted such legislation.⁹ In some states, such as New York, general contractors are not only liable for unpaid wages, benefits, and wage supplements, but they are also liable for penalties, liquidated damages,

⁷ The following states enacted these laws as of the publishing of Matthew F. Capece & Joshua Diamond (2025). *Use of The Joint Employer Doctrine to Advance the Enforcement Battle Against Exploitative Employment Practices*. Leadership Center for Attorney General Studies: Cal. Labor Code §218.7, D.C. Code §32-1303(5), Haw. Rev. Stat. §388-11.5, 820 Ill. Comp. Stat. 115/13.5, Md. Code Lab. & Empl. §3-507.2, Minn. Stat. §181.165, Nev. Rev. Stat § 608.150, N.J. Rev. Stat. §34:11-67.1, N.Y. Lab. Law §198-e, Va. Code §11-4.6.C.1-4. Or. Lab. Law §198 was S.B. 426 at the time of publication.

⁸ Under W. Va. Code Ann. § 21-5-7 (a), the “prime contractor” is civilly liable to employees engaged in the “performance of work under the contract for the payment of wages and fringe benefits relating to such work ...”.

⁹ Connecticut Public Act 26-12 (effective Jan. 1, 2027); 26 MRSA §1318; R.I. Gen. Laws §37-26-10; 19 Del. C. §§ 3501–3515.

attorneys' fees, and any other costs resulting from an action to recover unpaid amounts owed to workers.

While extension of strict liability for upstream contractors on private construction sites is a relatively newer tool to combat wage theft, such liability has long existed on public works projects covered by state prevailing wage laws, including but not limited to the states of Missouri, Ohio, Montana, Michigan, and Washington.¹⁰ Ohio law, for example, imposes liability for back wages and penalties on any “person, firm, corporation, or public authority” who fails to pay prevailing rates of pay.¹¹ States and municipalities have become increasingly adept at implementing measures to compel general contractors to pay workers for their labor, including suspension or termination of the contractor's right to proceed with the public work.¹²

In response to state and municipal wage and hour laws imposing joint and several liability, as well as a 4th Circuit FLSA case finding that a construction contractor was responsible as a joint employer for its subcontractor's failure to pay its own employees,¹³ management law firms are alerting their construction industry clients to “beware” because “subcontracting without joint

¹⁰ RCW §39.12.065, Michigan Compiled Laws § 408.1108, Mont. Admin. R. 24.17.141, R.S. Mo. §§ 290.210–290.340, Cal. Code Regs. Tit. 8, § 13903, NM Stat § 13-4-14, and many others.

¹¹ Ohio Rev. Code Ann. §4115.10(A). *Bergman v. Monarch Construction Co.*, 124 Ohio St.3d 534 (2010).

¹² Denver, Colorado ordinance, Sec. 20-76(d)(7) *Payment of prevailing wages*, which states that where a contractor or subcontractor fails to pay prevailing rates to workers, the “city may, by written notice to the contractor, suspend or terminate the contractor's right to proceed with the work, or such part of the work as to which there has been a failure to pay the required wages, and in the event of termination, may prosecute the work to completion by contract or otherwise, and the contractor and any sureties shall be liable to the city for any excess costs occasioned the city thereby.”

¹³ *Salinas v. Commercial Interiors*, 848 F.3d 125 (4th Cir. 2017).

liability just became more difficult.”¹⁴ There is a broad recognition among management counsel that general contractors face great liability for wage and hour violations if they fail to exercise their contractual authority to ensure that subcontractors pay workers in accordance with wage and hour and prevailing wage laws.¹⁵ The U.S. DOL would best serve the regulated community if it echoed the guidance of law firms that advise general contractors to “preemptively collect your subcontractors' wage and hour records,” “have legal counsel review the wage and hour records,” and prequalify subcontractors.

II. SMART and SMACNA Encourage the U.S. DOL to Heed the Recommendations of State Task Forces on Joint and Several Liability

SMART and SMACNA encourage the U.S. DOL to heed the recommendations of the state task forces that have identified joint and several liability as an important tool in holding contractors of all tiers accountable for non-compliance. At least 29 states, including states (e.g., Utah, Tennessee, Indiana, Iowa, Louisiana, Ohio, New Hampshire, and North Carolina) that have a history of being less proactive in holding employers accountable for wage and hour violations, have established formal or informal task forces to address the interrelated problem of rampant misclassification. Many focus specifically on the construction industry.¹⁶ Task forces are at the forefront of developing strategies to drive violators at all tiers of the contracting chain out of the construction industry. Oregon’s task force, for example, focuses on “recidivism,” i.e., “whether

¹⁴ See website of Shulman Rogers law firm: *Employment Law Alert – Employers Beware! Subcontracting Without Joint Liability Just Became More Difficult* (Mar. 7, 2017): <https://www.shulmanrogers.com/employment-law-alert-employers-beware-subcontracting-without-joint-liability-just-became-more-difficult/>

¹⁵ See website of Venable law firm: *Don't Get Nailed: How General Contractors May Avoid Getting Hammered Under New York's Construction Wage Theft Law* (Mar. 16, 2022): <https://www.venable.com/insights/publications/2022/03/dont-get-nailed-how-general-contractors-may>

¹⁶ See National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, Policy Brief (2020). In the case of Colorado, in 2018, the Task Force focused even more narrowly on labor brokers in construction.

previously audited businesses remain compliant after being investigated,” and reports that, of the 27 Interagency Compliance Network audits completed from 2022 through 2024, more than 50% of the businesses (14) have since closed, and another 15% (4) are in settlement negotiations or appealing the results of the audits.¹⁷

Regardless of political affiliation, Governors and state legislatures recognize that wage and hour violations have a staggering impact on state budgets, including workers’ compensation and unemployment funds. In states that have not yet enacted laws imposing liability on upstream contractors or construction managers, task forces are investigating accountability mechanisms for misclassification violations. Wisconsin’s Upstream Liability Working Group of the Task Force on Payroll Fraud and Worker Misclassification, for example, examines for possible solutions “various approaches to upstream liability from different states,”¹⁸ including the states of New Jersey, Maryland, California, New York, and Minnesota,¹⁹ all of which have enacted laws imposing joint and several liability on upstream contractors.

Recommendations by tasks forces, such as the New Jersey Task Force,²⁰ include imposition of joint and several liability, referral for criminal prosecution, revocation or suspension of licensure, issuance of stop orders,²¹ increasing fines and penalties, joint audits, interagency

¹⁷ *Interagency Compliance Network Report to the Oregon Legislature* (March 2025).

¹⁸ *Wisconsin’s Task Force on Payroll Fraud and Worker Misclassification Report* (2022).

¹⁹ Upstream Liability Research, Upstream Liability Workgroup Commission on Misclassification & Payroll Fraud, August 11, 2021: <https://dwd.wisconsin.gov/misclass-taskforce/pdf/meetings/210811-research.pdf>

²⁰ *Report of Gov. Murphy’s Task Force: Employee Misclassification* (July 2019).

²¹ The 2019 New Jersey Report noted that the Connecticut the Labor Commissioner has the power, after finding violations, to issue a stop-work order requiring cessation of all business operations of such employer. Conn. Gen. Stat. §31-76a.

cooperation, coordination with neighboring states, utilizing workers' compensation law to bolster enforcement,²² and other means to thwarting the practice of misclassification. Those recommendations, including joint and several liability for contractors, subsequently became law.

Likewise in Maryland and Virginia, amendments to state wage and hour law to require joint and several liability were the product of study and recommendations by state task forces that investigated and devised the most effective methods to combat non-payment of wages to which construction workers are entitled on private and public construction projects.²³ Maryland's task force advised that the legislature establish "joint and several liability for workplace fraud violations, holding general contractors responsible for violations occurring on their worksites, regardless of whether those violations are committed directly or through subcontractors and regardless of whether the subcontractor is in a direct contractual relationship with the general contractor."²⁴ Maryland subsequently adopted the "General Contractor Liability for Unpaid Wages Act," which makes the general contractor on a "construction services project" jointly and severally liable for every wage and hour law violation occurring on a construction project, including those committed by subcontractors far down the construction chain. Virginia law makes general contractors on construction projects over \$500,000 liable for any wages its subcontractors of any tier fail to pay.²⁵ Further, general contractors are deemed to be the employer of the subcontractor's

²² The 2019 New Jersey Report notes that "If an employer makes a false or misleading statement, representation or submission, including misclassification of employees, for the purpose of evading the full payment of workers' compensation benefits or premiums, the employer could be charged with a fourth degree crime. N.J.S.A. 34:15-57.4."

²³ *Report for Executive Order Thirty-Eight (EO38) from Inter-Agency Taskforce on Worker Misclassification and Payroll Fraud.* https://www.jacksonlewis.com/sites/default/files/docs/VirginiaFinal_Worker-Misclassification-Report.pdf

²⁴ *Joint Enforcement Task Force on Workplace Fraud: 2025 Annual Report* (Jan. 2026), quoting its 2024 report: <https://labor.maryland.gov/workplacefraudtaskforce/wpftfannrep2025.pdf>

²⁵ Va. Code §11-4.6.

employees for the purposes of imposition of civil and criminal penalties on employers in the case of unpaid wages.²⁶ The criminal penalties range from misdemeanors to felonies, depending upon the amounts of unpaid wages.

III. States Recognize the High Degree of Control that Upstream Contractors Have Over the Practices of Subcontractors on Construction Sites

Both federal²⁷ and state law recognize the high level of control exerted by general contractors over lower-tier contractors in holding them accountable for critical aspects of the working conditions of workers, including wage and hour law, the prompt payment of wages,²⁸ workers' compensation coverage, and safety²⁹ on job sites. Decades before states began to impose joint and several liability on general contractors for wage and hour violations of subcontractors, states addressed liability of general contractors to construction workers employed by subcontractors in the workers' compensation law in recognition of the control that they exert over construction sites. The underlying premise is that the general contractor is the entity that has control over the job site,

²⁶ Va. Code §40.1-29.

²⁷ *Solis v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009). The Eighth Circuit upheld OSHA's multi-employer worksite policy for "controlling" employers under which OSHA has the authority to issue citations to general contractors at construction sites who have the ability to prevent or abate hazardous conditions created by subcontractors through the reasonable exercise of supervisory authority regardless of whether the general contractor created the hazard or whether the general contractor's own employees were exposed to the hazard.

²⁸ Massachusetts' Prompt Payment Act (PPA), G. L. c. 149, §29E.

²⁹ See *Vargas v. Inland Washington, L.L.C.*, 194 Wash. 2d 720, 452 P.3d 1205 (2019), the Washington State Supreme Court found that general contractors face vicarious liability for the failure of others to provide a safe workplace, emphasizing that general contractors hold the primary duty to ensure workplace safety: "Our precedent therefore places 'prime responsibility for safety of all works . . . on the general contractor' . . . because 'the general contractor is in the best position to coordinate work or provide expensive safety features to protect employees of subcontractors.'"

and thus, ultimate responsibility for lower-tier contractors who fail to pay workers' compensation premiums on behalf of workers.

At present, at least 44 states and the District of Columbia statutorily regulate workers' compensation benefits and premiums owed within the general contractor-subcontractor relationship in some form,³⁰ with varying means to achieving accountability for injuries and fatalities on construction.³¹ Most states have enacted laws to impose responsibility on upper-tier contractors when subcontractors fail to obtain workers' compensation insurance. Under North Carolina law,³² for example, if the general contractor fails to obtain a valid certificate of insurance from an uninsured subcontractor before work begins on a project,³³ the general contractor is considered a statutory employer of the injured employee. The statute further protects injured employees by allowing them to go up the chain of contractors to the first insured party from whom workers' compensation benefits must be provided. As recognized under state law, since construction contractors often intentionally misclassify works to avoid the payment of higher workers' compensation premiums relative to premiums in other less dangerous industries, joint employer liability is key to inducing general contractors to monitor workers' compensation certificates of subcontractors and refuse to award work to noncompliant subcontractors.

³⁰ Anne Jorgenson Green, Legal Dept. Director of the Workforce Safety and Insurance, *Interim Workers' Compensation Study: General Contractor Liability*, Interim Workforce Committee, 2023 House Bill 1052 (June 24, 2024).

³¹ See e.g., Minnesota Statutes §176.215(1) ("Where a subcontractor fails to comply with this chapter, the general contractor, or intermediate contractor, or subcontractor is liable for payment of all compensation due an employee of a subsequent subcontractor who is engaged in work upon the subject matter of the contract."); see also e.g., Indiana Code Title 22, Labor and Safety §22-3-2-14, R.S. Mo. §287.040, N.J.S.A. 34:15-79, RCW 51.12.070, 77 P.S. §461, etc.

³² N.C. Gen. Stat. §97-19.

³³ In 2005, construction worker compensation premiums amounted to 5.0% of total compensation, compared to 3.1% in the overall goods-producing sector, 2.2% in manufacturing, 1.6% in the service sector, and 1.9% for all industries. See Dong X. (2007). *The Construction Chart Book*, 4th edition. The Center of Construction Research and Training (CPWR).

IV. Imposition of Joint and Several Liability is a State and Local Response to Stark Changes in the Construction Industry Business Model

Joint and several liability has become an especially critical accountability mechanism since worker misclassification, “off-the-book payments,” and use of labor brokers and construction managers to staff construction projects have become a business model in our industry. These practices are a stark departure from the construction industry’s historical business model, which consisted of a general contractor and a small number of subcontractors performing specialized work in a specific trade, such as sheet metal. As a result of these changes, state enforcement agencies frequently encounter subcontractors that hire dozens or hundreds of workers to perform the general contractors’ core work, including non-specialized labor. In response to rampant subcontracting of non-specialized work and use of labor brokers in the construction industry, states have elected to impose joint liability on developers, general contractors, and in some cases, construction managers.³⁴

While only one of many sectors in the construction industry, the residential sector exemplifies the degree to which our industry has devolved into a decentralized business model, with highly “splintered” business arrangements.³⁵ As described in 2021 comments of the National Association of Home Builders (NAHB),³⁶ home builders, as well as remodelers, typically

³⁴ Delaware’s Workplace Fraud Act, 19 Del. C. §§3501–3515, targets general contractors, construction managers, higher tier contractors, and labor brokers. *See also*, N.Y. Lab. Law §198-e(8)(b), which imposes joint and several liability on “any person ... construction manager, general or prime contractor...”

³⁵ Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 Cornell L. Rev. 557, 571 (2019); *see also* Kevin Conner, Frederick Purifoy, et al. (2024). *Measuring Injuries Along the Subcontracting Chain in the U.S. Construction Industry*. The Center for Construction Research and Training (CPWR).

³⁶ NAHB’s comments (April 12, 2021) in RIN 1235-AA37, NPRM on *Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule*.

subcontract a large portion of their construction work out to perform excavation, framing, roofing, plumbing, electrical, tile, finish carpentry, masonry, painting, dry wall, and paving. According to NAHB, since the late 1950s, this trend has significantly accelerated. In 2015, 70% of builders subcontracted 75% or more of the construction, whereas in 1959, only 31 % of them subcontracted that percentage.³⁷ Between 11 and 30 different subcontractors are used to build an average single-family detached home.³⁸ A typical homebuilder will contract with an average of 24 different subcontractors and specialty trades to perform a range of services (with a median of 22 subcontractors used).³⁹ Additionally, more than 90% of builders always subcontract for security systems, HVAC, technology (structured wiring, home theater, etc.), carpeting, electrical wiring, plumbing, masonry work, fireplaces, foundations, drywall, and concrete flatwork.⁴⁰ At least 95% of builders reported they always subcontracted for HVAC work, electrical wiring and plumbing, carpeting, and security systems.⁴¹

These wage and hour practices are facilitated by the use of labor brokers, who are largely “unregistered middlemen capable of recruiting and employing legions of construction workers on a jobsite on short notice and who operate in the world of cash payments and check-cashing services.”⁴² The labor brokers often contract with fly-by-night, undercapitalized contractors and

³⁷ *Id.*

³⁸ NAHB comments, citing Paul Emrath, Ph.D., *Subcontracting: Three-Fourths of Construction Cost in the Typical Home*, National Association of Home Builders (Special Study April 2015).

³⁹ NAHB comments, citing Paul Emrath, Ph.D., *Average New Home Uses 24 Different Subcontractors*, Dec. 2, 2020.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Laura Valle Gutierrez, Russell Ormiston, Dale Belman, & Jody Calemine (2023). *Up to 2.1 Million U.S. Construction Workers Are Illegally Misclassified or Paid Off the Books*. The Century Foundation.

subcontractors who lack the funds to pay backpay, interest, and other legally-required amounts when found liable for wage and hour violations. Operating as employment “middlemen,” labor brokers are capable of recruiting vast numbers of workers to a construction site and often compensate these workers via cash or check-cashing services.⁴³ Their role in the industry has grown to the point where the Pennsylvania’s Department of Labor called them the “key contributors to the problem of misclassification.”⁴⁴

In response to the widespread use of labor brokers and construction managers, states and municipalities⁴⁵ have, in recent years, extended joint and several liability under wage and hour and/or workers’ compensation laws⁴⁶ to “construction managers” and/or “temporary staffing arrangement or contract for services,”⁴⁷ and “labor brokers” responsible for violations of local

⁴³ A 2021 study published by the Catholic Labor Network, for example, demonstrated that 47% of the 79 workers surveyed on various large commercial or public construction sites in Washington, D.C., were either paid in cash or via a check without payroll deductions taken out. Clayton Sinai & Ernesto Galeas, *The Underground Economy and Wage Theft in Washington DC’s Commercial Construction Sector*, Catholic Labor Network, 2021.

⁴⁴ *Gutierrez et al.*, citing Pennsylvania Department of Labor and Industry (2022), Act 85 of 2020: *Joint Task Force on Misclassification of Workers, Final Report, Pennsylvania Department of Labor and Industry*: <https://www.dli.pa.gov/Individuals/Labor-Management-Relations/llc/Documents/Act-85-Final-Report.pdf>.

⁴⁵ Effective 2022, New York City requires businesses supplying temporary workers for construction or manual labor to obtain a Construction Labor Provider license from the Department of Consumer and Worker Protection (DCWP). <https://www.nyc.gov/site/dca/news/033-22/departement-consumer-worker-protection-begins-licensing-construction-labor-providers->

⁴⁶ Under New Jersey law, labor contractors have joint and several liability for workers’ compensation and wage and hour violations. *See* N.J. Rev. Stat. 34:11-58.2: “‘Labor contractor’ means any individual or entity that supplies, either with or without a contract, directly or indirectly, a client employer with workers to perform labor or services within the client employer’s usual course of business...”

⁴⁷ 26 MRSA §1318 (effective Jan. 1, 2027). *See also*, M.G.L. c. 149, §27C(a)(1), *Penalties for violations of certain sections by employers, contractors, subcontractors or their employees*, which holds the following entities liable for fines and imprisonment: “Any employer, contractor or subcontractor, or any officer, agent, superintendent, foreman, or employee thereof, or staffing agency or work site employer who willfully violates any provision ...” *See also* Cal. Labor Code 2810.3 (“labor contractors”).

wage and hour laws.⁴⁸ To further enhance accountability, some states and municipalities require that labor brokers register or obtain licensure with a state DOL or other government entity so that their actions and the actions of third-parties who use their services can be more effectively monitored. Illinois has made it unlawful for a third-party, such as a construction contractor, to use an unregistered temporary staffing agency.⁴⁹ States have also pursued criminal charges against construction managers.⁵⁰

Conclusion

The issuance of federal regulations that are wholly inconsistent with state and municipal laws on joint employer status would result in confusion and potential liability in an industry where the vast majority of contractors (81.48%) employ fewer than 10 employees.⁵¹ Lack of consistency with state and municipal wage and hour and prevailing wage law, combined with the U.S. DOL’s reversals of its guidance on joint employer status, undermines compliance efforts to the detriment of employees and businesses, particularly small ones. An exemption of the construction industry from the proposed rule, in combination with a subsequent rulemaking establishing joint and several liability for general contractors, upper tier contractors, labor brokers, and construction managers

⁴⁸ See D.C. Code §32–1012: “When a temporary staffing firm employs an employee who performs work on behalf of or to the benefit of a client pursuant to a temporary staffing arrangement or contract for services, both the temporary staffing firm and the client shall be jointly and severally liable for violations of this chapter to the employee and to the District.”

⁴⁹ Illinois’ Day and Temporary Labor Services Act, 820 ILCS §175.

⁵⁰ See U.S. Department of Transportation Office of Inspector General, reporting on prosecution brought by the NY County District Attorney, *New York City Construction Management Company Agrees To Forfeit \$1 Million as Part of Deferred Prosecution Agreement* (Aug. 8, 2019): <https://www.oig.dot.gov/library-item/37555>

⁵¹ NCCER Research Department: <https://www.nccer.org/media/2023/03/construction-company-size-and-employment.pdf>

in our industry would create clarity and uniformity in its nationwide enforcement of federal wage and hour law.

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

June 22, 2026

Respectfully submitted,



Michael Coleman
General President
SMART



Frank Wall
Chief Executive Officer
SMACNA