

SMACNA APPLAUDS DOL'S INDEPENDENT CONTRACTOR RULE AS "IMPORTANT FIRST STEP" Rule Targets Anti-Competitive Contractor Wage and Withholding Fraud

CHANTILLY, Va., January 9, 2024 – The Sheet Metal and Air Conditioning Contractors' National Association (SMACNA), 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, today applauds the release of the Department of Labor (DOL) Final Rule, *Employee or Independent Contractor Classification under the Fair Labor Standards Act*, which will be effective March 11, 2024.

The Final Rule is an "important first step" in curbing the misclassification - Misclassifying workers is an unscrupulous and anti-competitive business practice in the construction industry that many states have policed to reclaim substantial lost tax revenues and worker benefits. However, given the long-standing and pervasive misclassification of workers in the construction industry, SMACNA firmly believes that the DOL should develop even more rigorous industry-specific regulations that are targeted at rooting out pervasive and unlawful withholding fraud as a common industry practice. For example, in NY State an unscrupulous contractor can earn a bidding advantage of nearly a third of an employee's earnings by fraudulently misclassifying their employee as an independent contractor.

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.***" 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.

"While the Final Rule is an important step in curbing misclassification, said Aaron Hilger, SMACNA Chief Executive Officer, we believe that the construction industry needs stronger protections against a specific type of misclassification: "***worker status fraud.***" Hilger added, "tax and benefit withholding fraud" is the deliberate misclassification of workers as independent contractors by unscrupulous contractors in order to rob taxpayers, shortchange workers, and steal business from legitimate contractors. Contractors following the letter of the tax, employment and withholding laws should not be at a major bidding disadvantage in the construction or any industry, expressed Aaron Hilger, SMACNA CEO."

The Final Rule provides greater clarity and consistency - By through the codification of the longstanding six-factor economic reality test. These factors include: (1) opportunity for profit or loss depending on managerial skill; (2) investments by the worker and the potential employer; (3) degree of permanence of the work relationship; (4) nature and degree of control; (5) extent to which the work performed is an integral part of the potential employer's business; and (6) skill and initiative.

In contrast to the prior rule, which is repealed as part of the Final Rule, the Final Rule makes clear that no factor or set of factors among this list of six has a predetermined weight. The Final Rule also advises that costs to a worker which are unilaterally imposed by a potential employer are not "investments" indicative of independent contractor status.

While many states acted, it has becoming exceedingly difficult, if not impossible, for legitimate contractors to compete against unscrupulous contractors misclassifying the majority of their workers as independent contractors. This is done for the express purpose of gaining a major 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 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%.***

SMACNA believes that the construction industry needs stronger protections against worker status fraud. ***Specifically, SMACNA believes that federal regulators, including the DOL and the IRS, should develop rules specific to the construction industry to 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 the existing status quo 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.

ABOUT SMACNA:

SMACNA is an international trade association representing 3,500 contributing contractor firms and is a leader in promoting quality and excellence in the sheet metal and air conditioning industry. SMACNA members are responsible for effectively delivering the clean air Americans breathe in offices, homes, and hospitals; for many of the attractive facades you see on today’s stadiums and office buildings; and for the comfortable, healthy, and safe living environments in which our citizens live out their daily lives. SMACNA has national offices in Chantilly, Va., outside of Washington, D.C., and on Capitol Hill. For more information, visit www.SMACNA.org.