FINISHING CONTRACTORS ASSOCIATION
Educate | Advocate | Legislate

To: Congressional Staff
From: FCA International Members / Mike Oscar (Director of Legislative Affairs)
Subject: FCA International's 2023 Legislative Issues
Date: July 19, 2023

FCA International, an international contractor trade association representing more than 7,000 employers engaged in industrial coating, painting & wallcovering, architectural glass & metal, drywall finishing, flooring, and sign & display work, is the nationally recognized voice of the finishing construction industry that employs over 100,000 employees annually impacting buildings and communities across the nation. The following legislative issues are important to our membership:

- *Pension Reform (Multiemployer Pension):* Congress should provide employers and employees participating in multiemployer benefit plans with more choices in retirement plan models. We support Composite Plan design, a hybrid model, to bridge the gap between the existing options of traditional defined benefit plans and the defined contribution model.
- *Workforce Development:* We support proposed Fiscal Year 2024 (FY 24) Education Appropriations Report Language regarding college apprenticeship programs: "provided further, that section 3(20) of the Perkins Act shall be applied as if the term ''eligible institution'' includes a public or nonprofit apprenticeship program that is registered with the Office of Apprenticeship of the Employment and Training Administration of the Department of Labor or a State apprenticeship agency recognized by the Office of Apprenticeship pursuant to the Act of August 16, 1937 (commonly known as the "National Apprenticeship Act"; 50 Stat. 664, chapter 663) and accredited by an agency recognized by the Secretary of Education."
- *Prevailing Wage:* We support prevailing wage provisions in current law, and we oppose the repeal of the Davis-Bacon Act; thereby, we oppose H.R. 720, the Davis Bacon Repeal Act.
- *Change Orders:* We support H.R. 2726, Small Business Payment for Performance Act of 2023, which would require prompt payment to contractors for change orders. The federal government must do more to address enforcement of prompt payment to subcontractors and suppliers. This legislation is Amendment 453 to the House FY24 NDAA.
- *P3 Bonding Requirements:* We support H.R. 1740, legislation clarifying that current payment and performance security requirements for federally funded infrastructure projects should apply to Water Infrastructure Finance and Innovation Act (WIFIA) financed infrastructure projects, including Public Private Partnerships (P3).
- *Refine Tax Reform:* We support efforts to restore tax rate parity for all businesses and make individual tax rates, pass-through deductions, and tax extenders permanent. Additionally, we oppose the Death Tax; thereby, we support S. 1108, the Death Tax Repeal Act of 2023.
- *Misclassification of Employees as Independent Contractors:* We support the tightening of laws to stop misclassification of employees as independent contractors and close loopholes for tax avoidance and payroll fraud.
- *Executing Permitting Reform:* We have long advocated for needed reforms to expedite the project review and approval process without sacrificing existing environmental protections. Accordingly, the Biden administration should prioritize the implementation of "One Federal Decision" and other Infrastructure Investment Jobs Act (IIJA) process enhancements before adding new regulatory requirements. These include:
    - Deterring unwarranted litigation and mitigating permitting review delays at federal agencies,
    - Requiring a two-year deadline for completing major project reviews, and
    - Enacting page limits on environmental review documents.
- *Project Labor Agreements:* We support E.O. 13502 (the current Executive Order) which permits agencies and contracting officers to use Project Labor Agreements when they deem it appropriate, without any mandate.
- *House Construction Procurement Caucus:* We support this caucus as a vehicle to address construction procurement policies and practices in the public and private sectors.

FINISHING CONTRACTORS ASSOCIATION
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To: FCA International Members
Subject: FCA International's Fly In Toolkit
Date: July 19, 2023

MEETING CHECK LIST

- **Attire:** Professional business attire!
- **Business Cards:** Bring enough business cards to share with members of Congress and their staff.
- **Comfortable Shoes:** You will be doing a lot of walking as you move from meeting to meeting across Capitol Hill.
- **Pack a power bar:** Often, your meeting schedule will have you in nonstop meetings for several hours, pack a power bar in the event you cannot stop for lunch.
- **Handouts:** Please remember to have FCA International materials for the member of Congress or their staff. Pack a pen so you can take notes on member or staff comments along with keeping track of follow up requests.

THE VISIT

- **Tell your story:**
  - Stay authentic and make your story personal
  - Be values based
  - Be relevant to your audience
  - Make it a conversation
- **Share your concerns:** Inform the member of Congress and/or their staff of FCA International's legislative priorities.
- **Stay Neutral:** Remain neutral, bipartisan, and positive. Do not engage in political conversations with the member of Congress and/or their staff. **REMEMBER:** Congressional staff are prohibited from engaging in political conversations!
- **Don't Speculate:** Members of Congress and their staff do not expect you to know everything. If you are asked a question, you do not know how to answer, tell the member and/or staff you will get back to them, and use that question as a talking point to engage in follow-up conversations.
- **Show your appreciation:** Thank the member of Congress and/or staff for taking the time to hear your concerns. If the member or staff has supported FCA International's legislative agenda, be sure to offer your appreciation.
- **Take pictures:** Take a photo with the member of Congress and/or their staff, but ask permission first. Send all photos to Mike Oscar, moscar@finishingcontractors.org, for inclusion on FCA International's Social Media platforms and FCA International's Publications. Please share these photos with your affiliate executive director along with your company's social media department!

AFTER YOUR MEETING

- **Follow-Up in the Short Term:** Send a thank you email to the member of Congress and/or staffer shortly following the meeting. Please respond to any questions you could not answer in the meeting and provide any follow-up information you promised. Please carbon copy Mike Oscar on any follow-up emails to staff at moscar@finishingcontractors.org.
- **Follow-Up in the Long Term:** As FCA International's legislative priorities change, send a quick note to staff on current issues facing our industry. Be sure to check with Mike Oscar before offering comments to staff. By keeping the lines of communication open, you will build trust and form a relationship that will aid your industry's efforts!

Letter of Support to Make Perkins Funding Available for Our Accredited Apprenticeship Programs

CONSTRUCTION EMPLOYERS OF AMERICA

http://www.constructionemployersofamerica.com/

April 24, 2023

The Honorable Kay Granger
Chairwoman, Committee of Appropriations
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Rosa DeLauro
Ranking Member, Committee of Appropriations
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairwoman Granger and Ranking Member DeLauro:

On behalf of the Construction Employers of America (CEA) and the 15,000 signatory contractors and 1.4 million employees we represent, we write today respectfully requesting your support of proposed Fiscal Year 2024 (FY24) Education Appropriations Report Language regarding college apprenticeship programs. The proposed report language is:

> Provided further, that section 3(20) of the Perkins Act shall be applied as if the term ''eligible institution'' includes a public or nonprofit apprenticeship program that is registered with the Office of Apprenticeship of the Employment and Training Administration of the Department of Labor or a State apprenticeship agency recognized by the Office of Apprenticeship pursuant to the Act of August 16, 1937 (commonly known as the "National Apprenticeship Act"; 50 Stat. 664, chapter 663) and accredited by an agency recognized by the Secretary of Education.

The CEA is made up of seven employer associations that represent construction firms that utilize union craftworkers. We understand the critical role quality, accredited apprenticeship programs play in ensuring there is a robust, highly trained workforce to meet the construction needs that drive our economy and which will employ the next generation of builders and contractors. Our organizations independently finance 1,000 apprentice training centers across the country. With over 100,000 future construction workers currently enrolled in our apprenticeship programs, we are creating a path to prosperity for blue collar workers that are the backbone of America. We have invested significantly in apprenticeship programs, even providing paid "on the job" instruction for our apprentices. Quality apprenticeship programs are vital to the continued growth and success of the construction and specialty trade industries.

The proposed report language would allow our 16 college apprenticeship programs with nine in candidacy to receive federal Perkins Funding. These apprenticeship programs are accredited by the U.S. Department of Education (DOE). This accreditation allows our apprentices the opportunity to receive an associate and/or bachelor's degree if they are inclined to pursue higher education.

Despite this accreditation, we are not able to receive Perkins Funding for our college apprenticeship programs. If we could, this funding would go directly to our apprenticeship training centers, their staff, curriculum, tools, and equipment, etc. This funding would not be available to our apprentices as we provide the funding for their apprentice training.

For the past two years, the House adopted report language noted below and we are proposing slightly similar FY24 language. This proposed language was included in the House FY22 and FY23

Appropriations Bills, but unfortunately, was not included in the final budgets for those years. Please bear in mind, we are not seeking any additional funds with this language, we are simply requesting access to the existing Perkins funds, which should be available to our college apprenticeship programs.

> Previous House adopted language:
> The House report language in H. R. 4502[Report No. 117–96], which would do the following: "Provided further, That section 3(20) of the Perkins Act shall be applied as if the term ‘‘eligible institution’’ includes an apprenticeship program that is registered under the National Apprenticeship Act and accredited by an agency recognized by the Secretary of Education." This language would allow accredited apprenticeship centers the opportunity to receive Perkins Act Funding for staffing, curriculum development, etc…

Over the last several years, we have been working with the DOE to allow registered, accredited apprenticeship programs to receive Perkins funding. Under the Perkins authorizing language (Perkins V, Section 20), eligible institutions are:

> Eligible Institutions Subparagraph (B). A registered apprenticeship is " a non-profit private institution" that "offers... career and technical education courses that lead to technical skill proficiency or a recognized postsecondary credential..."

Though this authorizing language does exist, we believe it needs to be modified to allow the accredited college apprenticeships schools have access to these funds from their state Departments of Education. DOE specifically praises apprenticeships as being one of the ways to further enhance career and technical education; thereby, it seems inconsistent in intent to systemically exclude from Perkins funding college apprenticeship programs, which are themselves recognized as a peer institution by other accredited centers of higher learning.

We respectfully request your support of this proposed FY24 Education Appropriations Report Language regarding college apprenticeship programs. Please do not hesitate to contact us with any questions. Thank you for your attention regarding this important matter.

Respectfully,

The Construction Employers of America
www.constructionemployersofamerica.com

FCA International
International Council of Employers of Bricklayers and Allied Craftworkers
Mechanical Contractors Association of America
National Electrical Contractors Association
Sheet Metal & Air Conditioning Contractors’ National Association
Signatory Wall and Ceiling Contractors Alliance
The Association of Union Constructors

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118TH CONGRESS
1ST SESSION

H. R. 1740

To amend the Water Infrastructure Finance and Innovation Act of 2014 to establish payment and performance security requirements for projects, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 23, 2023

Mr. BOST (for himself, Mr. PAPPAS, Mr. BALDERSON, and Mr. LYNCH) introduced the following bill; which was referred to the Committee on Transportation and Infrastructure, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend the Water Infrastructure Finance and Innovation Act of 2014 to establish payment and performance security requirements for projects, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FEDERAL REQUIREMENTS FOR WIFIA ELIGIBILITY AND PROJECT SELECTION.

Section 5028(a)(1)(C) of the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. 3907) is amended—

(1) by striking ''The Secretary'' and inserting the following:

''(i) FINANCING SECURITY FEATURES.—The Secretary''; and

(2) by adding at the end the following:

''(ii) CONSTRUCTION PAYMENT AND PERFORMANCE SECURITY.—

''(I) IN GENERAL.—The Secretary or the Administrator, as applicable, shall ensure that the construction of a project carried out with assistance under this subtitle shall have payment and performance security.

''(II) USE OF STATE OR LOCAL REQUIREMENTS.—With respect to the construction of a project for which payment and performance security is required to be furnished by applicable State or local law, the Secretary or the Administrator, as applicable, shall accept such payment and performance security requirements for purposes of subclause (I), except that the amount of any payment and performance security accepted shall not be less than

50 percent of the total construction contract amount.

''(III) USE OF OTHER REQUIREMENTS.—With respect to the construction of a project for which no State or local payment and performance security requirements are applicable, the payment and performance security described in paragraphs (1) and (2) of section 3131(b) of title 40, United States Code, shall be required for purposes of subclause (I).''.

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118TH CONGRESS
1ST SESSION

H. R. 2726

To amend the Small Business Act to provide interim partial payment to small business contractors that request an equitable adjustment due to a change in the terms of a construction contract, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 19, 2023

Mr. STAUBER (for himself, Mr. PETERS, Mr. FITZPATRICK, and Mr. VEASEY) introduced the following bill; which was referred to the Committee on Small Business

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A BILL

To amend the Small Business Act to provide interim partial payment to small business contractors that request an equitable adjustment due to a change in the terms of a construction contract, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Small Business Payment for Performance Act of 2023''.

SEC. 2. EQUITABLE ADJUSTMENTS TO CONSTRUCTION CONTRACTS.

(a) IN GENERAL.—Section 15 of the Small Business Act (15 U.S.C. 644) is amended—

(1) by redesignating subsections (x) and (y) as subsections (y) and (z), respectively; and

(2) by inserting after subsection (w) the following new subsection:

''(x) INTERIM PARTIAL PAYMENTS FOR EQUITABLE ADJUSTMENTS TO CONSTRUCTION CONTRACTS.—

''(1) REQUEST FOR AN EQUITABLE ADJUSTMENT.—A small business concern that was awarded a construction contract by an agency may submit a request for an equitable adjustment to the contracting officer of such agency if the contracting officer directs a change in the terms of the contract performance without the agreement of the small business concern. Such request shall—

''(A) be timely made pursuant to the terms of the contract; and

''(B) specify the estimated amount required to cover additional costs resulting from such change in the terms.

''(2) AMOUNT.—Upon receipt of a request for equitable adjustment from a small business concern under paragraph (1), the agency shall provide to

such concern an interim partial payment in an amount equal to not less than 50 percent of the estimated amount under paragraph (1)(B).

''(3) LIMITATION.—Any interim partial payment made under this section may not be deemed to be an action to definitize the request for an equitable adjustment.

''(4) FLOW-DOWN OF INTERIM PARTIAL PAYMENT AMOUNTS.—A small business concern that receives an equitable adjustment under this subsection shall pay to a first tier subcontractor of such concern the portion of each interim partial payment received that is attributable to the increased costs of performance incurred by such subcontractor due to the change in the terms of the contract performance described in paragraph (1). A first tier subcontractor that receives a portion of an interim partial payment under this section shall pay to a subcontractor (at any tier) the appropriate portion of such payment.''.

(b) IMPLEMENTATION.—The Administrator of the Small Business Administration shall implement the requirements of this section not later than the earlier of the following dates:

(1) The first day of the first full fiscal year beginning after the date of the enactment of this Act.

(2) October 1, 2025.

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April 26, 2023 Alerts

Building and Construction Industry Exemption to Withdrawal Liability May Apply Narrowly

By Michael G. McNally

A recent decision from the Southern District of New York reveals that courts may be inclined in some withdrawal liability cases to narrowly apply the building and construction industry exemption based on the nature and location of the work performed.

It is commonly understood by union contractors that contribute to a multiemployer pension fund on behalf of their employees that the building and construction industry exemption will protect them and they will not owe withdrawal liability if they cease operations. Only if they "go non-union" do they potentially face withdrawal liability.

While that is correct as a general proposition, some employers may discover that the exemption may not apply to them depending on the nature of the work their union employees perform and where they perform it.

How the Building and Construction Industry Exemption Works

In general, when an employer either completely or partially ceases to have an obligation to contribute to a multiemployer defined benefit pension plan, it has withdrawn from the plan. If the plan has unfunded vested benefits (UVBs), and depending upon the allocation method, the employer is then liable for their allocable share of the plan's UVBs.

Congress, however, recognized the unique nature of the unionized building and construction industry – as it existed in 1980 – and crafted special rules for employers in the industry.

Under the building and construction industry exemption, an employer is deemed to have withdrawn from a plan only if it ceases to have an obligation to contribute to the plan, but continues to perform work of the type for which contributions were required in the trade and geographic jurisdiction of the collective bargaining agreement pursuant to which contributions were made within the five-year period following the cessation of the obligation to contribute.

That means that if a building and construction industry employer ceases operations, or discontinues performing work that was covered under the collective bargaining agreement, no withdrawal has occurred.

If on the other hand however, the employer terminates a collective bargaining agreement pursuant to which it made contributions, and continues to perform work of the type for which contributions were required in the jurisdiction of the collective bargaining agreement within the five-year period following termination, the employer has withdrawn.

Most commonly, withdrawal liability for building and construction industry employers will arise when an employer is no longer signatory to a collective bargaining agreement and operates non-union, thus not contributing to the pension fund, and either self-performs or subcontracts work covered by the former collective bargaining agreement. Less commonly, it may occur when an employer remains signatory to a collective bargaining agreement, but the collective bargaining agreement no longer includes an obligation to contribute to the plan.

On its face the exemption appears straightforward. But far less straightforward is the question of what constitutes work in the building and construction industry, and when the exemption applies to an employer.

The exemption covers an employer where "substantially all the employees with respect to whom the employer has [had] an obligation to contribute to the plan perform[ed] work in the building and construction industry."

The phrase "substantially all" is not defined in regulations or guidance from the Pension Benefit Guaranty Corporation (PBGC), but has been consistently interpreted by courts to mean 85%.

The term "building and construction industry" is not defined in MPPAA and is given the same meaning in MPPAA as it has for purposes of the Taft-Hartley Act. Most courts have held that the term should be interpreted under MPPAA according to the case law under § 8(f) of the National Labor Relations Act.

The National Labor Relations Board has generally defined the term as "subsum[ing] the provision of labor whereby materials and constituent parts may be combined on the building site to form, make[,] or build a structure."

The cases have made clear that certain work, although involved in building or construction of a "structure," does not fall within the exemption because it is not performed on the "building site." For example, neither the fabrication of materials in a manufacturing shop nor the delivery of materials to a site would qualify for the exemption.

More plainly stated, building and construction industry work is jobsite work, whereas work not performed on a jobsite is not.

But the law is less settled about specific nature of the work, and what constitutes a "building site."

Telecommunications Installation

In *Dycom Indus. v. Pension, Hospitalization & Benefit Plan of Elec. Indus.*, a federal judge confirmed an arbitration award assessing $13 million in withdrawal liability where the arbitrator applied a narrow reading of the exemption. The employer had a contract with Time Warner Cable and employed field technicians who completed cable installation and disconnections primarily at residential single and multi-family units. The general scope of work included running wire from a pole to a house or building and throughout the house to the actual device. The specific tasks typically included drilling wall anchors into the exterior of the home, running wire throughout the home, and then making connections to devices.

The employer argued that this constituted work in the building and construction industry for purposes of the exemption because its employees provided labor to combine materials at residential or commercial buildings to receive new or additional cable, Wi-Fi, internet, phone and security services. The Fund argued that the employer was not issued building permits for its work, and that telecommunications installation performed outside of new construction does not constitute work in the building and construction industry.

The arbitrator sided with the Fund, relying heavily on the fact that the employer almost never worked on new construction projects; rather it provided installation where residences had been prewired, which generally did not require any repairs or alterations to an existing building or structure. The arbitrator also considered relevant that the employer never obtained building permits for the work performed, that the employees did not have any qualifications or training to be a licensed/journeyman electrician, and that the employees were not paid the same rate as construction journeyman electricians.

The court confirmed the arbitrator's award, finding in a *de novo* review that the arbitrator's legal and factual analysis were sound.

The court's and arbitrator's rulings offer a narrow reading of the building and construction industry exemption that may surprise employers who believe their operations fell within the exemption. It is critical that construction industry employers with union operations have a thorough understanding of how the exemption may apply to their workforce when considering ceasing covered operations.