



Week of 7-17-23
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Congressional Overview

The House passed its version of the Federal Aviation Administration (FAA) reauthorization bill, which seeks to pare agency bureaucracy, address aviation workforce shortages, and advance new flying technology. Additionally, the House passed legislation that would restrict the use of public-school facilities to provide shelter for immigrants who have not been admitted to the U.S. The Senate continued voting on nominations and began debate on its version of the FY 24 National Defense Authorization Act (NDAA), which includes various procurement policies important to the construction industry.

CISC Feedback on OSHA's Use of Leading Indicators

The Construction Industry Safety Coalition (CISC), that FCA works with on construction safety issues, submitted comments in response to the Occupational Safety and Health Administration (OSHA)'s request for feedback on the effectiveness of leading indicators, which was announced on May 11, 2023. The CISC supports the agency's development of a Leading Indicator Resource and offered the following comments:

"In the construction industry, it can be challenging to clearly define the most effective leading indicators, as certain safety measures that are successful within one sector, geographic location or even individual project may not yield the best results for others. Additionally, with the near-ubiquitous presence of multiple specialty trade contractors performing tasks throughout the lifetime of a project, certain best practices may not guarantee the success of a specific entity's safety performance. While there is no preset list of leading indicators that can be applied and have the same result on the extensive spectrum of construction projects, types of work performed and workers, members of the CISC have developed procedures that measure successful safety efforts within certain sectors of the industry. With this data, along with feedback provided by entities represented by Coalition members, the CISC recommends several best practices that can apply to a majority of jobsites at both the contractor and subcontractor levels and can be tailored to fit the needs of smaller businesses in order to maximize their effectiveness while minimizing employer burden."

The Coalition's recommendations include the following leading indicators that are commonly practiced throughout the industry:

- **Training at All Levels Within a Business:** Successful practices in this area include new hire safety orientations, where employers provide workers who are new or returning to the industry with an in-depth knowledge of job-specific hazard elimination and injury prevention processes, as well as an overview of the company's safety culture that can be seen at every level. For a safety culture to exist, however, employers must also couple these orientations with recurring training for current workers and training that engages supervisors and other leadership.
- **Programs that Emphasize Physical and Mental Well-being:** More attention is being placed on emerging industry issues, such as mental health and substance abuse, as construction workers experience some of the highest rates of heavy alcohol and illicit drug use and suicide among full-time employees. Therefore, incorporating robust substance abuse programs and suicide

prevention information and resources, many of which are more readily available and tailored to apply to different industries, as part of a business' safety training program can be an effective method of reducing incidence rates.

- **Safety Inspections and Safety Program Auditing:** Not only are regular jobsite safety inspections a significant contributor to reducing jobsite injuries and illnesses, but reviewing a business' safety program and correcting or strengthening potential flaws is another helpful method to improve safety performance. As the CISC includes small-business members, the CISC recognizes that not all businesses are able to implement these processes due to their size and financial/staff limitations. However, for the larger businesses that are able to conduct these regular inspections and analyses, they should consider utilizing these business practices.

House Hearing on Davis-Bacon, Independent Contractor, and Wage and Hour Reforms

On Tuesday, the House Education and Labor Committee held a hearing entitled, "Cutting Corners at Wage and Hour Division (WHD): Examining the Cost to Workers, Small Businesses, and the Economy." The hearing examined the impacts of Davis-Bacon and independent contractor regulations. Per the Subcommittee on Workforce Protections Chair Kevin Kiley (R-CA), "WHD is pushing economically damaging regulations that will negatively impact the economy and small businesses. WHD rules are excessively burdensome, impose enormous costs on businesses and workers, and harm job creation and economic growth. Congress has made clear the importance of carefully considering small businesses' needs in agency rulemaking, yet DOL continues to push federal legislation harmful to job creators."

In advance of the hearing, FCA's legislative coalition, the Construction Employers of America (CEA), sent a letter providing their views on the regulatory activities of the Labor Department's WHD, along with their position on Davis-Bacon and independent contractor reforms. The CEA strongly supports the work of Principal Deputy Administrator Jessica Looman and WHD since 2021 to support and strengthen the construction industry.

Per their letter, "Under Looman's leadership, WHD has undertaken key regulatory changes to the Davis-Bacon and Related Acts and restore the independent contractor rule to its longstanding 70-year precedent, all while expanding employer assistance to increase compliance, transparency, and accountability with DOL programs and initiatives. These key regulatory changes and mission philosophies have helped facilitate more effective and efficient government, a more productive construction workforce, and created a "level-playing field" for responsible contractors to thrive in."

The letter highlighted the following:

- **Davis-Bacon and Related Acts Regulatory Changes**
The CEA has long advocated for many of the proposed regulatory reforms endorsed in our comments for a more comprehensive implementation of the Davis-Bacon and Related Acts, as well as for widespread prevailing wage laws across the nation. The Davis-Bacon Act was enacted more than 90 years ago to provide a level playing field for local construction workers working for local contractors and subcontractors by protecting those local workers and employers from losing out on federal projects to "outside contractors...who recruited labor from distant cheap labor areas." Specifically, the Act requires that on most federally funded projects, workers are to be paid a minimum of the prevailing wage for the area in which the work will be performed as determined by the Department of Labor.

The Davis-Bacon Act's guarantee of prevailing wages not only benefits workers, their families,

and their communities, it also supports the types of quality workforce training, project safety, and productivity that prevent delays, repairs, and re-dos of projects and the associated costs they entail. In so doing, the Act provides taxpayers with the best long-term value by ensuring that federally funded projects are built to the highest standards using skilled and well-trained construction craftspeople.

The positive impact of the proposed rule changes on CEA, its members, Davis-Bacon Act supporters, and union workforces across the complex and quality driven public construction industry would be substantial. These important regulatory changes are long overdue and would represent significant progress toward achieving the Administration's goal of fulfilling the statutory intent of the Davis-Bacon Act while working to expand the registered apprentice program to grow the nation's skilled workforce. Finally, vigorously enforced and supported prevailing wage standards would benefit the federal government as well as play a vital role in expanding a well-trained, highly skilled, and productive construction workforce needed now more than ever during a time of widespread skilled labor shortages.

- **Independent Contractor Regulatory Changes**

The prior administration's DOL finalized an independent contractor rule that narrowed the scope of who is considered an employee under the FLSA. That rule stacked the deck against workers and enables employers to misclassify workers as independent contractors with no rights to minimum wage, overtime, or the protections of our child labor laws. The 2021 independent contractor rule's divergence from the well-established common law approach to classifying workers under the FLSA would have created enormous confusion amongst the judicial system, employers, workers, enforcement officials, and private officials. WHD's October 2022 proposed rule will restore and provide greater clarity and consistency for employers and workers, as well as provide an accurate evaluation of employment relationships consistent with congressional intent and judicial precedent.

Our business model stands in stark contrast to the one becoming increasingly pervasive in the construction industry, a model that is rooted in a decision to treat almost every worker on a jobsite as an independent contractor without regard to the requirements of the FLSA and other basic workplace laws. Such behavior prevents a level playing field for honest construction contractors—the majority of which are small businesses. Contractors that insist all or most of their workers are independent contractors can always submit a bid that is lower than a law-abiding employer because the independent contractor model is a mechanism to dissociate themselves from the obligations and expenses that come with being an employer. This model allows those who use it to get the benefits of workers' labor while evading the costs of paying minimum wage, overtime, workers' compensation, unemployment insurance, payroll taxes, and other costs our members accept.

- **Necessity of Ensuring Full Funding for WHD**

CEA has also advocated for Congress to sufficiently support budgetary increases to support the mission of the Department of Labor's survey, wage calculation, and enforcement role to the fullest extent under the law. Recently, however, the House Appropriations Subcommittee on Labor-Health and Human Services went in the opposite direction, approving an FY 2024 spending bill that imposes drastic cuts across the Labor Department, and specifically to WHD and other key enforcement agencies. If enacted in its current form, these cuts will severely limit WHD's ability to ensure that the recipients of the more than \$2 trillion in federal construction

funds authorized during the 117th Congress to improve U.S. manufacturing and competitiveness adhere to both the spirit and letter of the law. The CEA believes it is imperative that Congress provide WHD with full funding to address its staffing and resource needs and to ensure that the recipients of recently enacted federal construction funds meet their obligations to workers.

Supreme Court Ethics Code Legislation

This week, the Senate Judiciary Committee approved legislation (S.359) that would impose an ethics code on the Supreme Court and add new disclosure and recusals requirements for the justices. The legislation was prompted by reports that Justice Clarence Thomas did not disclose luxury trips or a real estate transaction with a billionaire GOP donor; that Justice Samuel A. Alito Jr. did not disclose a private jet flight that was provided by a hedge fund billionaire; and that Justice Sonia Sotomayor used court staff to advance book sales. Republicans are firmly opposed, and Sen. Lindsay Graham (R-SC) argues that the legislation is part of a "concentrated effort" to undermine the court more broadly.