TESTIMONY OF DAVID LONG
CEO OF THE NATINAL ELECTRICAL CONTRACORS ASSOCIATION

BEFORE THE WORKFORCE PROTECTIONS SUBCOMMITTEE
HOUSE EDUCATION AND WORKFORCE COMMITTEE

HEARING ON "Examining Biden's War on Independent Contractors."

April 19, 2023

Good morning Chairman Kiley, and Ranking Member Adams, and Member of the Subcommittee:

My name is T. David Long. I am the Chief Executive Officer of the National Electrical Contractors (NECA), a national trade association and the leading voice of the $202 billion electrical contracting industry that brings power, light, and communication technology to buildings and communities across the U.S. NECA collectively represents over 4,000 electrical contractor members served by 118 local chapters across the country. NECA employs a unionized workforce with contracts collectively bargained with IBEW. I've been in the electrical construction industry since 1975, when I began working as a construction wireman for Miller Electric. After graduating from the Jacksonville Joint Apprenticeship Training Center (JATC) in 1981, I began my career as a journeyman wireman that led to foreman and supervisory positions. In 1991, I moved into management as an estimator and assistant project manager, and I rose through the ranks at Miller Electric until I became president of the company in 2012. Additionally, I served in various positions for NECA at the local, state, and national level including as chair of the Workforce Development and Compensation Committee and co-chaired several organizations including the electrical training ALLIANCE, Council on Industrial Relations, National Labor Task Force, and the National Labor-Management Coordinating Committee (LMCC) Committee. I was then elected by NECA to serve as their President and chosen to be their CEO in 2019.

I am privileged and honored to appear before you today as CEO of NECA. NECA prides itself on serving as a voice for responsible electrical contractor employers in the construction industry. Our members are entrepreneurs who compete based on quality services, efficient execution, and investments in training and innovation. Like other honest business owners, NECA members strive for true entrepreneurship by creating their businesses and having a fair and open competition amongst other electrical contractors. However, they also do not want to be complicit in the low-road employers' misclassification scheme to compete. We thank you for holding this hearing and allowing me to explain the threat that worker misclassification poses to law-abiding employers in the construction industry to compete and create good-paying jobs that benefit the communities we serve.

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I want to state that all of our over 4000 contractors we represent provide their employees with good-paying careers that include fair wages, health care, pension, and other benefits that will allow them to provide for their families and eventually retire that dignity. In my industry, NECA contractors make the conscious choice to properly classify the electricians that work for them as employees. However, an alarming number of contractors disregard wage and hour laws, workers' compensation laws, unemployment insurance regulations, and other routine responsibilities of an employer. This is done to gain a significant advantage against law-abiding contractor competitors reaping profits and avoiding liability at the expense of honest responsible contractors. These low-road contractors, who use the misclassification model, avoid the risk of unanticipated overtime, bad design, or poor execution that responsible contractors assume when on a construction project to gain an unfair and significant business advantage. Instead, these low-road contractors transfer the risk unduly onto the misclassified worker, drive out responsible contractors, and cost the American taxpayer. I will go into detail about how this works in the real world.

NECA's members operate in various electrical construction projects such as transmission lines, conduits, integrated network systems, power, lighting, controls, electric vehicle charging stations and other electrical equipment in commercial and industrial buildings. We are typically hired through a cost-competitive bidding process administered by a general contractor or a construction manager that a property owner has retained. The highest cost in any construction project is the cost of labor. This includes the number of workers, the time estimate, and scheduled overtime if needed. If a bid is accepted and our estimates regarding our project labor costs are wrong, that directly affects any potential profits from the project. That, however, does not prevent us from meeting our obligations to the workers that conducted the work by paying them for their work, any overtime that occurred, having social security and employment taxes withheld, and appropriate workers' compensation insurance throughout the project. Our members bear the inherited risk of an inaccurate bid and ensure the project's timely completion, not the electrician. This is how a competitive, free enterprise system should operate that encourages competition amongst competitors, not a race to the bottom.

Suppose you were to contrast our model, with the ever-increasing business model of misclassifying electricians as independent contractors, with those who purposefully evade the Fair Labor Standards Act (FLSA) requirements and other essential workplace laws. In that case, you can see that this only hurts competition and tarnishes true entrepreneurship. Low-road contractors using this model can always submit a lower labor cost bid against those responsible competitors reaping even greater profits at their 'independent contractors' expense. This happens because these contractors do not have to take into consideration the hours it may take to complete the project, so they don't have to consider 40 work weeks, potential overtime pay, contribute to FICA taxes or paying benefits to such. These contractors don't have to consider workers' compensation or unemployment insurance because they have delegated those responsibilities to labor brokers that pay by completing a set task, i.e., installing an electrical box. But these so-called' piece rate' arrangements are not lawful because they do not even consider the labor over 40 hours a week to finish on schedule. Additionally, these low-road

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contractors delegate the social security and Medicare payments to the 'independent contractor' without informing them of their duties. This independent contractor model eviscerates the responsibility of what contractors do for the care and well-being of their employees and puts the onerous squarely on the misclassified employee.

There should be no mistake; those low-road contractors who characterize these workers as 'independent business owners' are not based on a good-faith assessment of their duties under the law. Typical misclassification schemes in the industry use their 'labor brokers' to tell the workers where to go, what time, and what they will do. They control all aspects of their work and direct the workers to the job site like any traditional contractor. These workers do not have a legitimate representation of their pay and benefits. These are traditional electricians, dependent on their 'labor broker' as they move from one job site to another. To say these so-called 'independent contractors' exercise some sort of control like a business owner is completely false, hiding under the guise of 'entrepreneurship' to evade legal scrutiny.

More often than not, these misclassified workers are paid in cash or a 1099 tax form under the guise that they are an independent contractor to file the requisite paperwork needed to evade legal scrutiny. Some labor brokers will go even further to evade FLSA by creating LLCs in their name to facetiously state they are an independent contractor. All of these tactics further erode away responsible contractors from even competing in the marketplace. Given the control the 'labor brokers' have over these workers, such paperwork no more makes them independent contractors than if the staff in a Congressional office had their own LLCs and were issued 1099s. This wouldn't be acceptable practice in a congressional office with the requirements of FLSA and other workplace laws.

These contractors intentionally disregard the law intentionally drive out real market competition and exploit workers. Immigrant workers are particularly at risk, as the Construction Workers Report stated[1],

> *"Because day laborers often enter into verbal agreements through which they are paid by the day, if they leave at the end of contractual hours, they risk not being paid. As one representative of the United Brotherhood of Carpenters said, "Most immigrants, when they do get hired or when they negotiate, they don't work by hours or wages. They work by day. If they make a deal, then it's $150 a day. That day could be 12 hours; that could be 14 hours. It doesn't matter. [If they refuse to stay, the boss] would just tell them, 'Don't come anymore.'" Many interviewees said that immigrants are exploited because they do not have larger representation and have to do their own negotiating. Furthermore, when people are paid in cash "off-the-books," workers do not qualify for*

[1] Center for Migration Studies of New York (CMS) *Climbing the Ladder: Roadblocks Faced by Immigrants in the New York City Construction Industry*.., https://cmsny.org/wp-content/uploads/2022/06/Social-Determinants-of-Immigrants-Health-in-New-York-City-A-Study-of-Six-Neighborhoods-in-Brooklyn-and-Queens-June-15-2022-FINAL.pdf.

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unemployment benefits from the US Department of Labor in the case they cannot find work."

These low-road contractors sometimes prey on the immigrant populations in desperate search of work to be paid as in independent contractor, fearful of their documentation status. This allows the leverage of the contractor to exploit the worker with no questions asked and reap all the benefits.

Considering this, how much of a competitive advantage is this business practice giving to those who evade the FLSA? The Economic Policy Institute (EPI) published a new analysis[2] quantifying the impact on workers in eleven occupations when they are misclassified as independent contractors. The analysis found that construction workers lost between $10,177 to $16,729 when misclassified—the second most occupation listed behind trucking ($11,076 to $18,053).

With the lack of sufficient enforcement and new laws, States have been on the front lines with new laws to help curb the misclassification problem. For example, in Pennsylvania, the recently passed 'Act 72' instituted new legal measures for misclassifying construction workers, it found Office of Unemployment Compensation Tax Services (OUCTS) found 220 construction employers had misclassified 1,658 employees as independent contractors, representing $27,918,895 in underreported wages[3]in 2022. In Ohio, the Attorney General has estimated that the misclassification of workers as independent contractors provides a 20-30% labor cost advantage against law-abiding employers[4] Former Attorney General Karl Racine released a report[5] shows that District construction companies that misclassify workers unlawfully avoid *at least* 16.7 percent in labor costs, and their savings at the expense of workers can exceed more than 40 percent if the company is engaged in other forms of wage theft. OAG commissioned this report as part of a broader effort to crack down on wage theft in the District.

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[2] Economic Policy Institute "The Economic Costs of Worker Misclassification.", (January 25, 2023) https://www.epi.org/publication/cost-of-misclassification/.

[3] Pennsylvania Department of Labor and Industry. *Administration and Enforcement of the Construction Workplace Misclassification Act*, (March 1, 2023). https://www.dli.pa.gov/Individuals/Labor-Management-Relations/llc/act72/Documents/2022-Act-72-Report.pdf.

[4] Ohio Attorney General, *Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio*, (Feb. 18, 2009) https://iiiffc.org/images/pdf/employee_classification/OH%20AG%20Rpt%20on%20Misclass.Workers.2009.pdf.

[5] District of Columbia Attorney General, and Karl Racine. Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry, Sept. 2019. https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf. Accessed 14 Apr. 2023.

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While these efforts are promising, what makes the situation worse is that this business model breeds subsequent evasion tactics for non-compliance with FLSA and other laws. The state of Tennessee detailed in their report[6]:

> *"Often when a business owner learns their non-compliance has been identified and they are subject to a penalty, they shut down their businesses. The owner will reopen as a newly formed business entity that is a continuation of the closed business. By reopening under a new name, business owners avoid assessed monetary penalties for non-compliance with workers' compensation laws. This is especially true in the construction industry."*

While some may cite the enforcement actions of the U.S Wage and Hour Division or their State counterpart that show the system is working to curb misclassification, in reality, this should not be misconstrued as we should keep the status quo. The status quo has been to foster this bad behavior should serve as these enforcements to be an indicator of the spread of pervasiveness of misclassification and the greedy ambitions of the low-road contractors who used this model. The Wage and Hour Division or their investigators are not at fault for attempting to enforce the law correctly, but the lack of investigators and resources is at the root of the problem. Congress, in the Fiscal Year 2023 Appropriations gave the Wage and Hour Division $260 million, an increase of $9 million. In Fiscal Year 2022 Appropriations, hampered by a Continuing Resolution, the Wage and Hour division received $251 million, an increase of $5 million - 2 percent more than the previous year's bill. In Fiscal Year 2020 Appropriations, the Wage and Hour division received $246 million, an increase of $4 million more than in the fiscal year 2020. As Congress appropriated historic investments in our nation's infrastructure and subsequent private investments, it is hard to see how the Wage and Hour Division can keep pace. While the reports of the Wage and Hour Division's plan to hire 100 new investigators is a step in the right direction, it still falls short of its peak from 2010-2013. Still, it is inadequate to meet the demand placed upon them.

Responsible employers in my industry view their workers as partners critical to their success. They make investments to maximize the skill and efficiency of their workers to reduce the probability that they will have to pay for unanticipated work hours to fix things that were not done right the first time. Responsible employers invest in safety training that leads to fewer injuries on job sites because we care about our workers and want to reduce the premiums, we pay for our workers' compensation insurance. Under the misclassification model, business owners have no incentive to invest in training their workforce to be safer and more efficient. They don't bear the risks of unanticipated overtime to redo work or of accidents on the job.

In the electrical contracting industry, misclassification isn't just bad for responsible contractors. It hurts workers, their families, and our communities. When employers unjustly use this business model, they unduly evade their responsibilities for health and safety laws and fail to communicate with their now independent contractors. This can create hazardous situations for the

[6] Tennessee, Bureau of Workers' Compensation, *Annual Report on Employer Coverage Compliance*, (Feb. 1, 2019). https://www.tn.gov/content/dam/tn/workforce/documents/injuries/2019ComplianceAnnualReport.pdf.

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workers on the job site. The construction industry is a hazardous industry and could potentially be fatal workers in transportation and material moving occupations and construction and extraction occupations accounted for nearly half of all fatal occupational injuries (47.4 percent), representing 1,282 and 976 workplace deaths, respectively[7].

The workers trapped in this scheme are not the only ones harmed by this business model. It also affects responsible contractors who genuinely care about their employees. Legitimate contractors want to pay their workers family-sustaining wages and provide healthcare and retirement benefits to live and retire with dignity. NECA members know that providing these wages and benefits will result in better craftsmanship, and they will be less likely to leave. This will create greater productivity on the job site and reduce costly turnover. NECA and its members take pride in creating jobs that are the way to the middle-class while being some of the most successful contractors in the nation. NECA members can prove it does not have to be an either-or choice. To further their profits in America's free enterprise system, low-road contractors who intend to evade FLSA do it intentionally. NECA members are willing to compete in a fair and open marketplace, but these contractors who intentionally evade the law tear at the fabric of free markets. In some construction markets, this intentional use of misclassification is spurring a race to the bottom that only suppresses the wages and working conditions of the entire construction site and places the economic viability of honest employers at risk from even trying to compete.

The cost of evading the legal requirements and costs associated with being an employer affects not only their responsible contractor competitors but also their workers. These practices also harm taxpayers more generally. Payroll fraud defunds these critical programs, leading to higher unemployment insurance and workers' compensation tax rates on law-abiding businesses and increased stress on other income-supporting social programs. It is estimated that there was a $1.74 billion shortfall in state workers' compensation programs in 2017. The most substantial savings to employers engaging in payroll fraud is offloading Social Security and Medicare's "employer share" onto workers at conservative assumptions of $2.98 billion[8]. This means that they don't pay their unemployment insurance premiums, pay workers' compensation premiums, nor do make FICA contributions. They unduly evade their responsibilities and costs of unemployed and injured workers onto taxpayer-funded social safety nets while still committing tax fraud, wage violations, labor violations, and other labor and employment crimes. In my experience, the exploitation of these workers is far too common. For example, the Wage and Hour Division recently recovered $724,082 in back wages and damages for 255 employees of an electrical

[7] Occupational Safety & Health Administration Common Stats, "Commonly Used Statistics", https://www.osha.gov/data/commonstats

[8] Ormiston, Russell, et al *An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry*, (Jan. 2020) https://stoptaxfraud.net/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf.

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contractor in Phoenix[9]. The Wage and Hour Division learned they would arrive at 4:45 a.m. and continue through 7 p.m. that day without overtime compensation, evading the law purposefully.

This practice of misclassification has become so widespread that I do not see how the situation will progressively change unless the federal government and state partners take swift action to change existing laws and regulations to better detect, deter, and ultimately punish those who attempt to swindle the system to gain a competitive advantage over responsible contractors by exploiting vulnerable workers and American taxpayer through this scheme. The Wage and Hour Division needs the resources to properly enforce the law and have everyone play by the same rules, but that is a decision for Congress to decide. While the Wage and Hour Division has proactively increased its compliance seminars, this still does not cut to the issue's root. Increasing penalties for repeated or willful misclassification and holding bad actors accountable for their actions is an important step toward protecting workers and ensuring fair competition in the marketplace. By doing so, the federal government can send a strong message that misclassifying employees is unacceptable and will not be tolerated. This could include increased audits and investigations and greater collaboration between federal and state agencies to share information and resources.

NECA would like to applaud the Department of Labor and Wage and Hour Division for the Notice of Proposed Rule Making (NPRM) that would return back to the original six-factor means test when determining whether is an employee or independent contractor. NECA believed that that previous Final Rule proposal to narrow its interpretation of employee status directly conflicts with the FLSA's text and congressional intent by creating a new test that centers around a control factor. The Department's flawed previous proposed rule would only exacerbate this problem of misclassification. Construction workers could be misclassified if, based on the Department's narrow control test, employers improperly change their classification from employee to independent contractor or hire them as independent contractors where they would otherwise be classified as employees. NECA supports the codification of the long-standing six-factor balancing test to ensure certainty for construction employers, provide protection to law-abiding responsible contractors and the workers in the construction industry, reduce burdensome litigation, and provide certainly in employment. The proposed rule will reduce to previous norms and significantly reduce the incidences of using independent contractors as a classification on construction sites. NECA supports the Proposed Rule because it will restore and ultimately provide greater clarity and long-standing consistency return to the six-factor economic realities test. By showing no bias to one factor it will give deference to the 'totality-of-the-circumstances' that will allow for a honest opinion of the employer-employee relationship.

NECA members and other responsible contractors in the construction industry want a truly open competitive market to compete. But the misclassification model poses a grave threat to

[9] United States Department of Labor Press Release, "Department of Labor Recovers $724k in Back Wages, Damages for 255 Workers after Phoenix Contractor Denied Overtime Pay, Falsified Records, (Jan. 23, 2023)https://www.dol.gov/newsroom/releases/whd/whd20230123-1.

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responsible contractors in my industry. The effect of this malpractice causes real harm to true entrepreneurship, workers, and the taxpayer. NECA members throughout the country are working to better the lives of their employees and the communities they serve. I hope that raising this issue and having a thoughtful discussion can lead to meaningful action by this committee and Congress that addresses the increasingly pervasive misclassification of workers in my industry. Thank you for the opportunity to be with you all here today. I welcome any questions you may have.

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