

SMRCA Roving Roofer

January 2021

Volume 33

Issue 1

The Department of Labor Publishes Final Rule on Independent Contractor Status

On January 6, the Department of Labor (“DOL”) announced its final rule intended to address and clarify what is commonly known as the Misclassification issue under the Fair Labor Standards Act. The Misclassification issue concerns whether an individual is an employee or independent contractor. In its final rule, published in the Federal Register on January 7, the DOL reaffirms that the “economic reality” test will determine whether an individual is an employee or an independent contractor under the law. The final rule takes effect on March 8. The analysis has significant consequences for the construction industry.

The DOL’s final rule on employee or independent contractor classification under the Fair Labor Standards Act notes that the law defines an employee as an individual whom an employer suffers, permits, or otherwise employs to work. An employer suffers or permits an individual to work as an employee if, as a matter of “economic reality”, the individual is economically dependent on that employer for work. In contrast, an individual is an independent contractor if the individual is, as a matter of “economic reality”, in business for himself or herself.

The rule notes that there are two core factors that determine the individual’s economic independence. These two core factors are deemed to have greater probative value than other factors provided in the final rule. Indeed, the final rule expressly states that if the two core factors both point towards the same classification, whether employee or independent contractor, there is a substantial likelihood that is the individual’s accurate classification.

The first of the two core factors is the nature and degree of control over the work. Where an individual sets his or her own schedule, selects his or her own projects, and works for others (including the potential employer’s competitors), this factor weighs toward the individual being an independent contractor, according to the final rule.

Important for the construction industry, the final rule notes that, with regard to this first core factor, requiring the individual to comply with specific legal obligations, satisfy healthy and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards that are typical of contractual relationships between businesses do not constitute control that makes the individual more or less likely to be an employee.

The second of the two core factors concerns the individual’s opportunity for profit or loss. To the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work, this factor weighs in favor of independent contractor status. On the other hand, if the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster, the factor will weigh in favor of the individual being classified as an employee. Consider your workers who are paid by the hour or by the piece and whether you are properly classifying them as employees under this factor.

The final rule identifies the following non-core factors as part of the analysis: the amount of skill required for the work; the degree of permanence of the working relationship between the individual and the potential employer; whether the work is part of an integrated unit of production; and a catch all for factors relevant to the analysis of whether an individual is in business for himself or herself, as opposed to being economically dependent on the potential employer for work.

Interestingly, the final rule does provide several examples of scenarios involving the Misclassification analysis. One of the examples does involve the construction industry. The example concerns the opportunity factor in the context of the construction industry and clarifies the concept of economic independence. In the example, an individual worker works full time performing home renovation and repair services for a residential construction company. In performing the construction work, the worker is paid a fixed hourly rate, and

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the company determines how many and which tasks she performs. Perhaps to nobody's surprise, the final rule concludes this individual is an employee. In reaching the conclusion, the final rule notes that the worker does not have a meaningful opportunity for profit or loss based on her exercise of initiative or investment because the company determines the assignment of work and she is paid a fixed hourly rate.

Under President Obama, the Misclassification issue was under the microscope. Under President Biden, we can expect much of the same. Misclassifying an employee as an independent contractor can result in significant financial consequences. In light of the DOL's final rule and the change in administration, now is as good a time as ever to revisit whether you are properly classifying your workers as either independent contractors or employees.

About the Author

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March 23-24

Roofing Day in D.C. is going virtual in 2021!

Join fellow roofing professionals at the premier roofing industry advocacy event as we take the industry's priorities to Washington, D.C.!

Roofing Day in D.C. was designed to fulfill NRCA CEO Reid Ribble's vision for raising the roofing industry profile and expanding our influence in Washington, D.C. It is crucial members of Congress hear about the critical issues facing your company, especially during a time of transition. We encourage you to include field employees and others to attend the industry can speak with one voice to Congress about the issues that mean the most to us! Don't miss this opportunity to make a difference for your business and our industry!

Although this year will look a little different, we are excited at the opportunity to increase participation and find creative ways to ensure this event is valuable to you and your company. Be on the lookout for registration opening soon!

The advocacy issues for Roofing Day in D.C. 2021 are:

- Increased funding for career and technical education to address workforce shortages;
- A strong buildings component in federal infrastructure legislation;
- Immigration reform that meets the roofing industry's workforce needs.

Roofing Day tentative agenda:

- March 17: Advocacy Training and Technical Webinar
- March 23: Virtual kickoff event
- March 24: Virtual meetings with members of Congress and congressional staff

For more information contact NRCA's Washington, D.C. office at 800-338-5765 or visit www.nrca.net/advocacy/roofingday

Upcoming Industry Trade Shows 2021

May 4-6	NERCA 94th Annual Convention & Trade Show Atlantic City, NJ www.nerca.org
June 9	Great Lakes Design and Construction Expo Novi, MI www.miconstructionexpo.com
Aug. 10-12	IRE Las Vegas, NV www.theroofingexpo.com
Sept. 15-20	2021 IIBEC International Convention and Trade Show Phoenix, AZ www.iibec.org

2021 SMRCA Golf Outing

2021 MiRCA Convention

~ SAVE THE DATE ~

~ SAVE THE DATE ~

2021 SMRCA Annual Golf Outing will be held at Twin Lakes Golf Club on Monday, May 24, 2021

2021 MiRCA Annual Convention will be held at Crystal Mountain Resort July 22-25, 2021



Frequently Cited Standards Related to COVID-19 Inspections

Employers must be vigilant meeting all of OSHA requirements, including those related to COVID-19 inspections. Following are examples of these that employers have recently failed to follow:

- Establish, implement, and update a written respiratory protection program with required worksite-specific procedures
- Providing a medical evaluation before a worker is fit-tested or uses a respirator
- Assess the workplace to determine if COVID-19 hazards are present or likely to be present, which will require the use of a respirator and/or other personal protective equipment
- Train workers to safely use respirators and/or PPE in the workplace, and retrain workers about changes in the workplace that might make previous training obsolete
- For any fatality that occurs within 30 days of a work-related incident, report the fatality to OSHA within eight hours of finding out about it
- Keep required records of work-related fatalities, injuries, and illness

To learn more about OSHA and COVID-19 requirements, visit www.OSHA.gov

SBA Releases Notice Regarding Paycheck Protection Program

On Jan 13, 2021 the Small Business Administration released a [Procedural Notice](#) to lenders related to first draw Paycheck Protection Program loan increases after enactment of the Economic Aid Act, the COVID-19 relief bill signed into law in late 2020.

In an [Interim Final Rule](#) released Jan. 6, 2021 SBA outlined additional narrow circumstances where certain eligible borrowers may reapply for a new first draw PPP loan or request an increase to a first draw loan that was approved on or before Aug. 8, 2020. First draw PPP loan increases must be made by the lender of record, and this new notice outlines the circumstances of eligibility.

Eligibility categories include eligible borrowers who fully repaid a first draw PPP loan before Dec. 27, 2020; borrowers who returned part of a first draw PPP loan before Dec. 27, 2020; and borrowers who did not accept the full approved amount in a first draw PPP loan.

However, if SBA has remitted a forgiveness payment to the lender, no loan increases or reapplications are allowed.

For more information www.sba.gov

U.S. Department of Labor Announces Annual Adjustments to OSHA Civil Penalties

The U.S. Department of Labor has announced adjustments to Occupational Safety and Health Administration (OSHA) civil penalty amounts based on cost-of-living adjustments for 2021.

In 2015, Congress passed the Federal Civil Penalties Inflation Adjustment Act Improvements Act to advance the effectiveness of civil monetary penalties and to maintain their deterrent effect. Under the Act, agencies are required to publish “catch-up” rules that adjust the level of civil monetary penalties, and make subsequent annual adjustments for inflation no later than January 15 of each year.

OSHA's maximum penalties for serious and other-than-serious violations will increase from \$13,494 per violation to \$13,653 per violation. The maximum penalty for willful or repeated violations will increase from \$134,937 per violation to \$136,532 per violation.

Visit the [OSHA Penalties page](#) for more information. The Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2021 [final rule](#) is effective January 15, 2021, and the increased penalty levels apply to any penalties assessed after January 15, 2021.

U.S. Department of Labor Reminds Specific Employers to Submit Required 2020 Injury and Illness Data by March 2, 2021

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) reminds employers that the agency will begin collecting calendar year 2020 Form 300A data on Jan. 2, 2021. Employers must submit the form electronically by March 2, 2021.

Electronic submissions are required by establishments with 250 or more employees currently required to keep OSHA injury and illness records, and establishments with 20-249 employees classified in [specific industries](#) with historically high rates of occupational injuries and illnesses.



Visit the [Injury Tracking Application Electronic Submission of Injury and Illness Records to OSHA](#) for more information and a link to the Injury Tracking Application.

IRS issues standard mileage rate for 2021

Beginning on January 1, 2021, the standard mileage rates for the use of a car, van, pickup or panel truck will be: 56 cents per mile for business miles driven and 16 cents per mile driven for medical or moving purposes.

Congressional COVID-19 pandemic response. After months of sporadic negotiations, Congress approved a massive legislative package containing \$900 billion in COVID-19 relief for businesses and individuals along with appropriations to fund the fiscal year 2021 federal budget. After a veto threat, President Trump signed the bill into law Dec. 27, 2020. The legislation includes numerous provisions of interest to NRCA members, including \$284 billion of funding for a reauthorization of the Paycheck Protection Program, ensuring expenses paid with forgiven PPP loan funds are fully tax deductible, and making nonprofit trade associations, such as NRCA, eligible for PPP loans. A summary of the COVID-19 provisions of potential interest to employers and individuals within the roofing industry can be found [here](#). The non-COVID-19 related portion of the legislation contains \$1.4 trillion to fund the federal government for the remainder of fiscal year 2021, which runs through Sept. 30, along with other tax provisions and numerous authorizing provisions.

Paycheck Protection Program to restart, open for second draw loans. The COVID-19 relief package signed into law Dec. 27, 2020, reauthorizes the PPP with modifications and an additional \$284 billion in funding. Changes to the PPP include an opportunity for the hardest-hit small businesses to apply for a second loan; an expansion of the types of forgivable expenses, including operations expenditures, such as software and supplier costs; full deductibility for forgiven loan expenses; and simplified loan forgiveness for loans under \$150,000. On Jan. 6, the Small Business Administration released regulations governing implementation of the new law for first-round PPP loans, which can be found [here](#), and for second draw loans, which can be found [here](#). SBA announced the program will officially reopen the week of Jan 11. More information, including borrower application forms for both types of loans, can be found [here](#). Also on Jan. 6, the IRS issued [Revenue Ruling 2021-2](#) reflecting expenses paid for with PPP loan funds that are forgiven are tax deductible. Inclusion of this provision in the new law was a priority for NRCA, and we commend Congress for clarifying this issue and averting a tax increase on small businesses.

Funding for Perkins State Grants for career and technical education increased. NRCA is extremely pleased the year-end appropriations legislation signed into law provides an additional \$52 million for Perkins State Grants for CTE. These grants are distributed to all 50 states for CTE programs operated at the state and local levels and are critical to employer efforts to address workforce development needs. The increase in funding brings the total budget for these grants to \$1.3 billion in fiscal year 2021. NRCA has made the reform and expansion of CTE a focus of its government relations agenda, including highlighting this critical need at Roofing Day in D.C. in recent years, and these efforts are providing a positive return on investment for the roofing industry.

Provisions of the Energy Savings and Industrial Competitiveness Act become law. NRCA is pleased large portions of the Energy Savings and Industrial Competitiveness Act—legislation to promote energy-efficiency technologies in the residential, commercial and industrial sectors of the economy—were included in the 2020 year-end legislative package. These provisions are designed to expand energy-efficiency benefits throughout the economy by employing various tools to make it easier for private-

sector energy users and the federal government to become more energy-efficient. It will expand the use of efficiency technologies that are commercially available, including those manufactured and installed by the roofing industry that help maximize energy savings in cost-effective ways for new and existing buildings. A summary of the new provisions, contained within the larger package of the Energy Savings Act of 2020, can be found [here](#).

The Construction Consensus Procurement Improvement Act becomes law. NRCA joined construction industry allies in supporting the Construction Consensus Procurement Improvement Act (S. 1434/H.R. 5644) and is pleased it was included in the 2020 year-end legislative package. The new law will reform federal procurement by prohibiting the use of reverse auctions for design and construction services. Ensuring passage of this legislation was one of NRCA's top advocacy issues in 2020 as there is broad consensus the use of these auctions for federal construction procurement is detrimental to the roofing industry. By prohibiting the use of reverse auctions in federal construction procurement, this legislation benefits roofing companies, ensures the quality of procurements for federal construction projects and protects taxpayers. NRCA looks forward to working with allied organizations to ensure this new law is properly implemented.

Energy tax deductions and credits extended. The 2020 year-end spending package included extensions of numerous tax provisions, some of which were scheduled to expire at the end of 2020, including three of interest to NRCA members. The new law provides a permanent extension of the [Energy Efficient Commercial Building Tax Deduction](#), which allows qualifying building owners to receive a deduction of up to \$1.80 per square foot for energy-efficiency upgrades that meet certain standards and indexes the deduction for inflation on an annual basis. It also provides a one-year extension of the [Residential Energy Efficiency Tax Credit](#), which allows homeowners a tax credit of up to \$500 for the cost of qualifying energy-efficient roofs, and a two-year extension of the [Solar Investment Tax Credit](#) at 26% for 2021 and 2022.

Roofing Day in D.C. 2021 goes virtual. Join your roofing industry colleagues March 23-24 for Roofing Day in D.C. 2021, which will be held in a virtual format because of ongoing COVID-19 restrictions in Washington, D.C. Don't miss the premier industrywide advocacy event of the year, which brings together all segments of the industry supply chain to speak with one voice to members of Congress. It is especially critical lawmakers hear from our industry during this time of transition to a new Congress and administration. During Roofing Day in D.C. 2021, participants will advocate for increased funding for career and technical education, a strong buildings component within infrastructure legislation and immigration reform that meets the workforce needs of the roofing industry. The event will consist of a virtual kickoff program featuring NRCA CEO Reid Ribble March 23 and virtual meetings with senators, representatives and congressional staff March 24 to discuss the industry's legislative priorities. All virtual congressional meetings will be scheduled for participants, and position papers and other materials will be provided. Registration will be opening in mid-January. For more information, please contact NRCA's Washington, D.C., office at (800) 338-5765 or go to nrca.net/roofingday.

Equal Employment Opportunity Commission COVID-19 guidance regarding employer-mandated vaccinations for employees. On Dec. 16, 2020, the EEOC released guidance confirming a COVID-19 vaccination requirement by itself would not violate the Americans with Disabilities Act. Objections based on medical or religious groups are the two primary exceptions as employers may implement mandatory vaccination programs. Although this requirement would be enforceable in most cases, it is best for each business and job site to reach reasonable accommodations with their workforce. NRCA CEO Reid Ribble and General Counsel Trent Cotney provided a webinar, What You Need to Know About COVID-19 Vaccines and Going on Worksites, to answer questions regarding this issue. A recording of this presentation can be found [here](#).

Centers for Disease Control and Prevention recommend construction workers receive COVID-19 vaccines in phase three after frontline essential workers and the elderly. On Dec. 20, 2020, a committee of the CDC issued [guidelines](#) suggesting construction workers may receive vaccine shots during phase three, which could start as early as February and go until late spring, after they are provided to the elderly, health care workers and other frontline essential workers. The guidelines cover federal classifications for essential workers and are believed to cover all types of construction workers. Based on these guidelines, states and cities will determine the order from there, and occupations that are prioritized for the vaccination are expected to return to a normal level of operations more quickly.

Georgia Senate elections. On Jan. 5, Democrats narrowly won two special elections in Georgia, with Jon Ossoff defeating incumbent Republican Sen. David Perdue and Raphael Warnock defeating

incumbent Republican Sen. Kelly Loeffler. This results in a 50-50 split between Democrats and Republicans in the Senate, with incoming Vice President Kamala Harris having the opportunity to break tie votes and allowing Democrats to set the Senate floor agenda and control the committee process. Now that Democrats will control the presidency and both chambers in Congress, they likely will pursue much of president-elect Biden's proposed agenda. However, they will be significantly constrained by their razor-thin majorities in the House and Senate, requiring bipartisan support to pass legislation on most issues and giving more power to moderates on both sides of the aisle. One possible exception will be tax legislation, where the budget reconciliation rules allow Senate passage of a tax bill with a simple majority rather than 60 votes, which could enable Democrats to pass a tax bill that includes president-elect Biden's campaign proposals, such as increasing the corporate rate to 28% and the top individual rate to 39.6% for those earning more than \$400,000 annually, on a purely partisan basis. NRCA will continue working to urge members from both parties to address issues of importance to our industry in a bipartisan manner.

If you have any questions or would like more information regarding any of the issues discussed here, please contact NRCA's Washington, D.C., office at 800-338-5765.

Spread
Kindness

JATC Training Center

The term for all Detroit Apprentices will be as follows:

Apprentice Two & Single Ply One	Monday, January 18, 2021
Apprentice One & Single Ply Two	Tuesday, January 19, 2021
BUR One & Steep Slope 1	Wednesday, January 20, 2021
BUR Two & Steep Slope 2	Thursday, January 21, 2021
Apprentice 7 & 8 Hands On + Safety & Health	Thursday, January 21, 2021

All classes begin at 6:30 pm.

Journeyworkers Skill Advancement Training Classes are available at no cost to all Detroit 149 members. Dues must be current in order to enter the Training Center.

If you have any questions, contact the Training Center at 248-543-3847 or tjaranowski@Detroitroofers.org

Birthday Wishes



Dan Casey - T.F. Beck Company
January 7

Chuck Rosa - Lifetime Member
February 16

Jim Bieszki - Architectural Building Specialties Inc.
March 6

Dennis Cyr - North Roofing Company
March 31

Bill Borgiel - Lutz Roofing Company
April 25

Jim Markiewicz - GAF Materials Corporation
April 29

Happy Anniversary



Dennis & Katie Cyr - North Roofing Company
March 2

Can We Require Our Employees to Take the COVID-19 Vaccine? Should We?

The short answer to this question is that federal law allows private employers to require vaccinations as a condition of employment. Indeed, the EEOC has now opined that the COVID-19 vaccination itself is not a medical exam. This means employers can require the vaccination as a condition of employment, although employers need to be mindful of employees claiming an exemption from the vaccination policy based on health-related or religious reasons. Employers who will be administering the vaccination to their employees will also need to clear another hurdle. Consequently, the rule does come with exceptions.

ADA Concerns

For employees claiming a disability prevents them from getting vaccinated, the question becomes whether the employer can provide the employee a reasonable accommodation that would allow the employee to continue to perform the essential functions of their job without being a direct threat to the employee's own safety and the safety of others in the workplace. The direct threat standard is a high one – there must be a significant risk of substantial harm that cannot be eliminated with reasonable accommodation. The EEOC has already opined that COVID-19 presents a direct threat. The employee claiming a health-related exemption from the vaccination policy is, in effect, asking for an accommodation in the form of a waiver of the policy as it applies to him or her. Providing this accommodation may mean subjecting this employee to other screening measures in the workplace, such as temperature taking or requiring this employee to wear a face mask in the workplace. Be careful, though, because some employees are objecting to wearing masks in the workplace for health-related reasons, which begins the analysis all over again.

Religious Concerns

Similarly, employers also have a duty to reasonably accommodate an employees' sincerely held religious beliefs, practices, or observances, unless doing so would cause more than a minimal burden on the operations of the employer's business. This means an employer may be required to make reasonable adjustments to the work environment that will allow an employee to practice his or her religion, such as waiving the requirements of the vaccination policy as it applies to this employee.

In either instance, if no reasonable accommodation exists that eliminates the direct threat in the workplace, the employee is without employment protection under either the ADA or Title VII.

Employers Administering the Vaccine

For employers who will be administering the vaccine in the workplace, the EEOC notes that pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. If the employer administers the vaccine, it must show that such pre-screening questions are job-related and consistent with business necessity. The invites the direct threat issue and analysis discussed above.

Other Considerations

Employers that choose to require their employees to get vaccinated will also need to consider whether the time employees spend getting vaccinated is compensable working time under the Fair Labor Standards Act, and whether the cost is reimbursable to the employee. Generally, if your company administers the test and determines that requiring the vaccination is job-related and consistent with business necessity, time employees spend getting vaccinated will be compensable work time. Further, the cost for the vaccine may be reimbursable, particularly if the cost of the vaccine has the effect of bringing your non-exempt employees' pay for the week below minimum wage.

What about OSHA? Under the Biden Administration, there will be efforts to publish a standard addressing the COVID-19 hazard in the workplace. Whether such a standard will impose upon employers the duty to require or administer vaccines in the workplace remains to be seen. If the past is any indication, back in 2014, OSHA did opine that during a pandemic, employers may offer appropriate vaccines to workers to reduce the number of those at risk of infection in their workplace. At that time, OSHA did not impose upon employers the duty to require employees to get vaccinated, but only suggested employers should encourage employees to get a seasonal flu vaccination as part of its pandemic preparedness guidance.

Separate from the legal considerations discussed above, before adopting a COVID-19 vaccination policy, be sure to also consider the possible fall out in employee morale, particularly with employees who are against getting vaccinated for reasons other than health related or religious reasons. Indeed, Time Magazine recently published an [article](#) citing a Pew survey which suggests that as much as 39% of the population "probably" or "definitely" will not take the COVID-19 vaccine. Are you going to terminate the employee who refuses to get vaccinated without having a protected reason for doing so? You may have a group of employees that approach you in a united effort to object to a mandatory vaccine policy. That concerted activity by your employees concerning the terms and conditions of employment is protected activity under the National Labor Relations Act.

Conclusion

While very little of this is clear at this point, what is clear that in anticipation of the COVID-19 vaccine become available, employers should implement a COVID-19 vaccination policy that addresses all of the issues raised above. Clearly, in drafting such a policy, there is a lot to consider. As they say, "Do not try this at home!" Instead, be sure to consult with your legal counsel.

By: Philip Siegel, Hendrick, Phillips, Salzman & Siegel, P.C., (404) 469-9197, or via e-mail at pjs@hpslaw.com.

SMRCA

Spells the Best in Roofing Services

- S**AFETY A safe jobsite is assured because SMRCA crews complete the M.U.S.T. Safety Training and Drug Testing.
- M**ULTIPLE SERVICES A SMRCA Roofing Contractor has the ability to provide the roof you need because of our expertise in a variety of roofing applications and techniques.
- R**ELIABLE SMRCA Contractors are Union trained professionals bringing an Industry leading standard of service, quality and knowledge to every project.
- C**ONFIDENCE Projects completed by SMRCA Contractors provide a Michigan roofing contractor 2 year standard workmanship warranty.
- A**CCOUNTABILITY SMRCA Contractors are established companies with years of experience in providing responsive service, superior workmanship and exceptional value.

Call us today at 586-759-2140 to receive our free "Roofing Facts" brochure or contact one of the SMRCA Contractors below for a no-cost estimate on your next roofing project.

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