

Resolution No. 6

Date: 6/9/2023

City: Washington, DC

NAHB Resolution

Title: Protection of Rights of Independent Contractors
Sponsor: Federal Government Affairs Committee
Submitted by: Eugene Graf IV

WHEREAS, the construction of a home entails the expertise of a host of specialty trades;

WHEREAS, home builders and remodelers typically subcontract a large portion of their construction work out to those specialty trade subcontractors operating as independent contractors who can more efficiently deliver individual pieces of the construction process;

WHEREAS, independent contractors are entrepreneurs pursuing the American dream of starting and growing their own businesses;

WHEREAS, under current federal laws, the Department of Treasury/Internal Revenue Service, Department of Labor, National Labor Relations Board and Equal Employment Opportunity Commission oversee laws such as the National Labor Relations Act, the Civil Rights Act, Fair Labor Standards Act, Federal Insurance Contribution Act (FICA), Social Security Act and Employee Retirement Income Security Act (ERISA), which rely on different definitions of an employee and various tests, or criteria, to distinguish independent contractors from employees.

WHEREAS, some of these Acts fail to define who is a covered employee;

WHEREAS, in 1947, the United States Supreme Court ruled in two landmark cases that the employer-employee relationship should be determined using an “economic realities test,” based on whether the worker was “dependent upon the business to which they rendered services;”

WHEREAS, Congress subsequently believed the economic realities test would be interpreted too broadly and jeopardize the financial stability of the Social Security system, leading Congress to pass a resolution calling on Treasury and the Internal

Revenue Service to rely on a common law interpretation of the employee/independent contractor distinction when administering the Social Security Act;

WHEREAS, since Congress did not reject the Supreme Court's economic realities test, divergent tests emerged between the Fair Labor Standards Act administered by the Department of Labor, which remained subject to the economic realities test, and those laws administered by the Internal Revenue Service and National Labor Relations Board, which rely on their respective forms of common law test;

WHEREAS, states also have laws covering employees and therefore also define which workers are employees and which are independent contractors;

WHEREAS, state laws governing independent contractors generally fall into two camps: those that rely on the common law approach and are similar to the Internal Revenue Service's method, and those that rely on an ABC test, which typically outlines three specific criteria that must be met for a worker to be considered an independent contractor;

WHEREAS, the different tests used the Department of Labor, Internal Revenue Service, National Labor Relations Board and the states result in unnecessary confusion, conflict, and cost;

WHEREAS, the National Labor Relations Board and Department of Labor often make significant changes to their independent contractor standards following changes in presidential administrations;

WHEREAS, these frequent changes cause further uncertainty as to the current and future status of a given worker's classification;

WHEREAS, the Internal Revenue Service's "20-Factor Test" allows the flexibility necessary for building industry workers to function in a changing economy and recognizes the unique characteristics of the home building business;

WHEREAS, the current rules under Sec. 530 of the Revenue Act of 1978 provide adequate relief for taxpayers who become involved in disputes over worker reclassification;

WHEREAS, a rigid application of static rules would result in the improper classification of legitimate independent subcontractors as employees, and thereby unfairly burden both builders and workers; and

WHEREAS, federal legislation has been introduced to replace the Department of Labor's economic realities test with the common law test used by the IRS in an attempt to harmonize the two processes for determining worker status;

NOW, THEREFORE, BE IT RESOLVED that the National Association of Home Builders (NAHB), in recognition of the unique characteristics of the home building business and the need for flexibility to allow building industry workers to function in a changing economy, urge Congress to enact legislation that would facilitate qualification of workers in the home building and remodeling industries as independent contractors, and

BE IT FURTHER RESOLVED that NAHB oppose any effort to enact legislation that would restrict the ability of specialty subcontractors complying with current law to qualify as independent contractors, and

BE IT FURTHER RESOLVED that NAHB urge Congress and the Administration to harmonize the assorted tests for classification of independent contractors in a manner that preserves, protects, and promotes the historic and present use of independent contractors in residential construction.

Leadership Council Action:

Resolutions Committee Action:

Construction Safety & Health Committee Action:

Custom Home Builders Committee Action:

Remodelers Council Board of Trustees Action:

State and Local Government Affairs Committee Action:

Federal Government Affairs Committee Action:

Single Family Builders Committee Action:

Construction Liability, Risk Management &

Building Materials Committee Action:

Employment, Labor & Immigration Subcommittee

of the Construction Safety & Health Committee Action:

If approved, this resolution will supersede current policy 2023.2 No. 3 DOL Enforcement of Misclassification of Employees. This resolution also updates and replaces policy that will sunset: 1995.7 No. 7 Independent Contractor