

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION**

**COALITION FOR WORKFORCE
INNOVATION; ASSOCIATED
BUILDERS AND CONTRACTORS OF
SOUTHEAST TEXAS; ASSOCIATED
BUILDERS AND CONTRACTORS,
INC.; AND FINANCIAL SERVICES
INSTITUTE, INC.,**

Plaintiffs,

vs.

**JULIE SU, ACTING SECRETARY,
UNITED STATES DEPARTMENT OF
LABOR, in her official capacity;
JESSICA LOOMAN,
ADMINISTRATOR, WAGE AND
HOUR, DIVISION, U.S. DEPARTMENT
OF LABOR, in her official capacity; and
UNITED STATES DEPARTMENT OF
LABOR,**

Defendants.

CASE NO. 21-CV-00130

PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Pursuant to Rule 15 of Federal Rules of Civil Procedure, and in accordance with the remand order of the Court of Appeals for the Fifth Circuit (ECF No. 37), plaintiffs COALITION FOR WORKFORCE INNOVATION, ASSOCIATED BUILDERS AND CONTRACTORS OF SOUTHEAST TEXAS, ASSOCIATED BUILDERS AND CONTRACTORS, INC., and FINANCIAL SERVICES INSTITUTE, INC. (collectively "Plaintiffs"), by and through their undersigned counsel, respectfully move this Court for leave to file a Second Amended Complaint ("Second Amended Complaint"). Pursuant to Local Rule CV-7(k), the Second Amended Complaint is filed separately and immediately after this motion.

As grounds for this motion, Plaintiffs submit as follows:

1. On March 14, 2022, this Court held that the Department violated the Administrative Procedure Act (“APA”) in delaying and then withdrawing the 2021 Independent Contractor Rule. The Court vacated both the Delay Rule and the Withdrawal Rule and concluded that the 2021 Independent Contractor Rule went into effect on March 8, 2021. (ECF No. 32, 33).

2. On May 16, 2022, the Department appealed the Court’s decision to the U.S. Court of Appeals for the Fifth Circuit. *See Coalition for Workforce Innovation v. Walsh*, No. 22-40316 (5th Cir.) (ECF No. 34). Soon thereafter, the Department announced its intent to engage in a new independent contractor rulemaking. *See id.*, Appeals Court Docket Entry No. 19 (June 7, 2022). At the Department’s request, the Fifth Circuit ordered the appeal held in abeyance pending the outcome of that rulemaking. *Id.* Appeals Court Docket Entry No. 27 (June 10, 2022).

3. On January 10, 2024, the Department published a final rule in the *Federal Register* titled “Employee or Independent Contractor Classification Under the Fair Labor Standards Act” (“2024 Rule”). Like the Withdrawal Rule that this Court invalidated, the 2024 Rule purports to rescind the 2021 Independent Contractor Rule, for essentially the same reasons that the Court previously found to be insufficient. *See* 89 Fed. Reg. 1,639. The 2024 Rule is scheduled to become effective on March 11, 2024.

4. On January 11, 2024, Plaintiffs filed a motion with the Fifth Circuit to remand so that Plaintiffs could file an amended complaint challenging the new rule. *Id.*, Appeals Court Docket Entry No. 51 (January 11, 2024), citing *inter alia Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022) (remanding to district court to “consider in the first instance” whether post-decision agency action complied with the APA).

5. On February 19, 2024, the Fifth Circuit granted Plaintiffs’ motion, remanding the

case to this Court expressly “to allow the Plaintiffs to file an amended complaint.” *Id.*, ECF No. 37 (February 19, 2024).¹ On February 28, 2024, the Fifth Circuit expedited issuance of its mandate to this Court. (ECF No. 38).

6. Pursuant to Local Rule CV-7(i), counsel for the plaintiffs has complied with the meet and confer requirements in Local Rule CV-7(h), and informs the Court that defendants have taken no position with respect to this motion.

Wherefore, Plaintiffs now seek leave of the Court to amend their complaint to: (a) challenge the Department’s issuance of the 2024 Rule and rescission of the 2021 Rule by way of the 2024 Rule; (b) remove certain claims already adjudicated by the Court; and (c) add additional plaintiffs who seek to challenge the 2024 Rule. See also F.R. Civ. P. 15, providing that a party “may amend its pleading ... [with] the court’s leave” which “should freely [be] give[n] when justice so requires.”

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to grant leave to file their Second Amended Complaint, attached hereto.

¹ In the same order, the Fifth Circuit vacated this Court’s previous order as moot, without reaching its merits, in light of the Department’s issuance of the 2024 Rule. *Id.*

Dated March 5, 2024

Respectfully submitted,

/s/ Robert F. Friedman

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2024, the foregoing Motion for Leave to File Second Amended Complaint was electronically filed in the above and foregoing with the Clerk of the Court, utilizing the ECF system, which sent notification of such filing to the following counsel for Defendants:

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/s/Maurice Baskin
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CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(i), counsel for the plaintiffs hereby certifies that on March 5, 2024, a personal conference was conducted via telephone with attorney for the defendants, Lisa Olson. Defendants do not object to the filing of this motion.

/s/Maurice Baskin
Maurice Baskin