October 26, 2020

Ms. Amy DeBisschop, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: RIN 1235-AA34
Independent Contractor Status under the Fair Labor Standards Act

Dear Ms. DeBisschop:

On behalf of the Coalition to Promote Independent Entrepreneurs (the "Coalition"), a coalition representing independent entrepreneurs, companies, and associations that support an individual's right to work as an independent entrepreneur, we appreciate the opportunity to submit comments concerning the above-referenced notice of proposed rulemaking ("NPRM"). The Coalition strongly supports the proposed regulations contained in the NPRM. We believe the proposed guidance would provide greater clarity and predictability in the application of the "economic realities" test to independent entrepreneurs and their clients.

Set forth below are comments that we believe could provide additional clarity and predictability. We also believe that including in the proposed regulations, or its accompanying Preamble, examples of the application of the refined test to specific facts would be of immense value to the regulated community.

I. Background

By way of background, the determination of whether an individual is an "employee" for purposes of the Fair Labor Standards Act of 1938 ("FLSA") has been the subject of great uncertainty and unpredictability ever since the term was defined by an "economic realities" test. The predominant test for determining worker status for purposes of federal statutes is the common-law test. While applying a common-law test for purposes of the FLSA would harmonize the definition of the term for purposes of federal statutes and thereby mitigate the risk of inconsistent worker-status determinations for purposes of different federal laws, the Coalition agrees with DOL's judgment that, at this juncture, it would take an act of Congress to replace the "economic realities" test for purposes of the FLSA with the common-law test.

After many decades of courts struggling with the amorphous "economic realities" test, the Coalition applauds DOL for proposing guidance for interpreting the test, which we believe will lead to greater certainty and predictability in determining an individual's status under the FLSA.

II. Coalition Comments

As a threshold matter, the Coalition concurs with DOL's stated objective in the NPRM "to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy." And we agree with the proposition that a "clear articulation will lead to increased precision and predictability in the economic reality test's application, which will in turn benefit workers and businesses and encourage innovation and flexibility in the economy."

We believe the increased precision and predictability the NPRM offers would reduce the regulatory risk and uncertainty associated with worker classification under the FLSA, which discourages companies from doing business with independent entrepreneurs. According to a 2010 study by Ph.D. economist Jeffrey A. Eisenach, "[p]olicy changes that curtail independent contracting … would result in higher unemployment, slower economic growth and reduced economic welfare."[1] The study also notes that curtailing independent contracting would

(i) reduce job creation and small business formation,
(ii) reduce competition and increase prices,
(iii) create sector specific disruptions, and
(iv) produce a less flexible and dynamic work force.[2]

The study observes that "one of the most powerful economic explanations for the widespread use of independent contractor relationships is the well-documented fact that independent contractors prefer their jobs to an employment arrangement."[3] The study suggests that the enhanced clarity and predictability the NPRM offers would be helpful to all stakeholders and the nation's economy.

During 1987, Judge Easterbrook expressed frustration at the time that "50 years after the Act's passage" courts still lacked a legal rule to govern the application of the economic realities test. He noted that the "balancing approach" called for under the economic realities test "is unsatisfactory both because it offers little guidance for future cases and because any balancing test begs questions about which aspects of 'economic reality' matter, and why."[4] Now, more than 30 years later, little has changed in this regard. The NPRM is a constructive endeavor to change this and to create much-needed certainty and predictability in determining an individual's status, as an employee or independent contractor, for purposes of the FLSA.

---

[1] Jeffrey A. Eisenach, *The Role of Independent Contractors in the U.S. Economy*, NAVIGANT ECONOMICS (December 2010) available at: http://www.navigant economics.com/docs/Role%20of%20Independent%20 Contractors%20 December%202010%20Final.pdf.
[2] *Id*.
[3] *Id*.
[4] *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).

The Coalition believes the proposed regulations are consistent with the U.S. Supreme Court's guidance governing the scope of coverage under the FLSA, and are neither overly restrictive nor overly expansive. We believe the proposed test strikes a fair and neutral balance that will result in those individuals who should be covered by the FLSA being covered, and in those self-employed individuals, who operate as independent contractors, remaining outside the scope of the FLSA and free to negotiate their business-to-business contractual relationship without government interference, as Congress intended. The following comments address specific aspects of the proposed regulations.

A. Ultimate Inquiry

The NPRM explains that the ultimate inquiry under the economic realities test is "whether, as a matter of economic reality, the worker is dependent on a particular individual, business, or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor)." In this regard, DOL observes that "the proper test of economic dependence … 'examines whether the workers are dependent on a particular business or organization for their continued employment.'"

The Coalition believes the NPRM's description of the objective of the economic realities test is consistent with applicable legal precedent. In this regard, the U.S. Supreme Court in *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947), explained that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." This guidance was amplified in *Usery v. Pilgrim Equip. Co.,* 527 F.2d 1308, 1311–12 (5th Cir. 1976), wherein the court explained:

> The five tests are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is dependence that indicates employee status. Each test must be applied with that ultimate notion in mind.[5]

(Emphasis added).

The Coalition submits that the foregoing emphasizes the importance of each factor being construed through the lens of assessing the economic dependence – or independence – of a putative independent contractor. We believe adherence to this interpretative guide is essential to achieving meaningful clarity and predictability in the application of the economic realities test.

[5] Accord, *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 380 (5th Cir. 2019) ("the focus is on "an assessment of the 'economic dependence' of the putative employees, the touchstone for this totality of the circumstances test". *Brock*, 814 F.2d at 1043–44 (citations omitted); *Usery*, 527 F.2d at 1311 ("It is dependence that indicates employee status. *Each test must be applied with that ultimate notion in mind*." (emphasis added)).")

B. The Nature and Degree of the Individual's Control over the Work

The Coalition supports the NPRM's articulation of this factor, but recommends, for reasons discussed below, that "exclusivity" be considered as part of the "permanence of the working relationship" factor.

The Coalition strongly agrees with the NPRM's clarification that requiring an individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the FLSA. We agree that these types of requirements frequently apply to work performed by employees and independent contractors alike and thus are not probative of whether an individual is economically dependent on a company. Moreover, the case law supports this approach.

For example, in *Parrish v. Premier Directional Drilling, L.P.,* 917 F.3d 369, 382 (5th Cir. 2019), the court reasoned:

> Nor were plaintiffs employees because of safety training and drug testing. To the contrary, requiring everyone working at an oil-drilling site to be educated on safety protocol, and not be under the influence of illegal drugs, is required for safe operations.
> … Requiring plaintiffs to undergo safety training and drug testing, when working at an *oil-drilling site*, is not the type of control that counsels in favor of employee status.

We submit that the NPRM's explanation of this factor also should make clear that duties or requirements imposed by any third party, whether it be a government agency or a third-party customer, should be disregarded E.g., *Iontchev v. AAA Cab Inc.,* No. CV-12-00256-PHX-ROS, 2015 WL 1345275, at *6 (D. Ariz. Mar. 18, 2015), *aff'd sub nom. Iontchev v. AAA Cab Serv., Inc.,* 685 F. App'x 548 (9th Cir. 2017), which reasoned:

> Overall, the undisputed facts show that as a matter of economic reality AAA Cab exercises little control over the activities of its drivers. What initially appeared to be substantial aspects of control (*i.e.,* supervision of grooming, hygiene, state of vehicle, choice of route) are due to City regulation. And the control *not* applicable to City regulation (*e.g.,* placement of advertisement on vehicles) is, in comparison, very minor. Instead of substantial control, AAA Cab has very little say in the manner in which the drivers perform their work.

> The first factor, therefore, strongly supports an independent contractor relationship.[6]

The Coalition submits that an individual does not become more, or less, economically dependent on a company as a consequence of any duties or requirements pertaining to the services the individual is engaged to perform that are imposed by a source other than the company. Such duties or requirements, by their nature, are services-specific.

To illustrate, consider a freelance horticulturalist in the business of maintaining healthy lawns and eliminating weeds from those lawns. The horticulturalist operates in a county that imposes detailed regulations that prohibit the use of specified types of herbicides. The individual contracts directly with homeowners in the county to provide the lawn service. When providing the service to these homeowners, the individual is prohibited under the regulations from using the specified types of herbicides. If the individual were to obtain a contract with a large landscaping firm to provide the lawn service to customers of that firm on a project basis, and the firm's contract with the individual required the individual to comply with applicable county regulations governing the use of herbicides, the fact that the individual is contractually required to comply with those regulations would not make the individual any more economically dependent on the landscaping firm than if those regulations did not exist. The reason is that the requirements are imposed by a third party, i.e. the county government, and not by the landscaping firm. It follows that, in applying this factor, third-party requirements should be disregarded.

C. The "Opportunity for Profit or Loss" Factor

The Coalition supports the proposed regulations' adoption of the Second Circuit's approach of combining the factors "opportunity for profit or loss" and "investment," and not treating them as separate factors. The DOL's approach better captures both the manufacturing-

[6] Accord, *Carrell v. Sunland Const., Inc.,* 998 F.2d 330, 332–33 (5th Cir. 1993) ("The parties agree that pipe welding requires specialized skills and that Sunland had no control over the manner or method of the pipe welding. Instead, Sunland's customers dictated the specific welding procedures and the type of welding rods required for each construction project. Before each project, the gas company customer, not Sunland, tested and certified each Welder. Sunland was prohibited from participating in the test's administration. Each Welder placed his identification number on each weld so that the gas companies could determine who was responsible for any improper welds. Either the gas company or Sunland could unilaterally remove a Welder."); *Collado v. J. & G. Transp., Inc.,* 2015 WL 1757638, at *5 (S.D. Fla. Apr. 17, 2015) ("Plaintiff also argues that Defendants exert significant control over drivers by checking their driving record and immigration status, and subjecting them to a drug test prior to employment. However, Defendants perform these duties-as well as instructing drivers about proper cell phone use while driving-pursuant to regulations promulgated by the Department of Transportation. This arguably undercuts any bearing these facts may have on the "control" analysis-Defendants *have* to perform these duties to comply with government regulation."); *Clay v. New Tech Glob. Ventures, LLC*, 2019 WL 1028532, at *17 (W.D. La. Mar. 4, 2019) ("Unfortunately for the plaintiffs, most of these arguments are not indicative of New Tech's direct control over their work. First of all, courts routinely hold that quality control and safety standards do not demonstrate the level of control over the manner and method of work necessary to support employee status. [citing collection of cases].")

based independent contractor (who likely has a tangible capital business investment) and the new-economy independent contractor (who likely does not).

The NPRM provides that the combined factor would weigh toward an individual being classified as an independent contractor if the individual has an opportunity for profit or loss based on either or both: (1) the exercise of personal initiative, including managerial skill or business acumen; and/or (2) the management of investments in, or capital expenditure on, for example, helpers, equipment, or material. This is consistent with how courts have interpreted the factor. E.g., *Safarian v. Am. DG Energy Inc.,* No. CV 10-6082, 2015 WL 12698441, at *4 (D.N.J. Nov. 24, 2015), *aff'd,* 729 F. App'x 168 (3d Cir. 2018) ("This factor centers on whether Plaintiff had meaningful opportunities for profit or any significant risk of financial loss, depending upon his managerial skill. A worker may have the opportunity for profit or loss if his earnings are tied to his performance, or if he makes a capital investment that may be lost if the business does not succeed.") (citations omitted).

The Coalition believes both considerations are interrelated. For example, the court in *Saleem v. Corp. Transportation Grp., Ltd.,* 854 F.3d 131, n 29 (2d Cir. 2017), observed:

> While "investment in the business" is, itself, indicative of independent contractor status, *Dole*, 875 F.2d at 810, it also gives rise to other economic realities relevant to the FLSA "employee" inquiry. "The capital investment factor is," for example, "interrelated to the profit and loss consideration." *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1537 (7th Cir. 1987). Economic investment, by definition, creates the opportunity for loss, but investors take such a risk with an eye to profit. In addition, a personal stake can create incentives for the exercise of "independent initiative," *see Superior Care*, 840 F.2d at 1058–59, so as to recover one's investment.

The Coalition also agrees with the proposed regulations' evaluation of an individual's economic investment as a standalone matter, and its rejection of a "side-by-side" comparison of an individual's investment relative to the investment of a client. To ascertain whether an individual is economically independent, the determinative inquiry relative to investment should be whether the individual has a sufficient investment in his or her trade or business as to enable the individual to operate independently, and without reliance on any specific client.[7] Whether an individual has the requisite investment should be determined solely with respect to that individual's trade or business. The investment of a potential client has no discernible relevance to this inquiry.

[7] In *Donovan v. DialAmerica Marketing, Inc.,* 757 F.2d 1376, 1386-87 (3d. Cir. 1985), the court observed that "[t]he distributors also had to make an investment in their business. Again, this investment consisted primarily of transportation expenses. One distributor also used paid advertising in an effort to gain more distributees. Consideration of the investment factor, therefore, supports the conclusion that the distributors were independent contractors."

To illustrate, consider a cabinet maker who owns all of the tools, equipment, and supplies used to manufacture cabinets and also owns the building where the cabinets are manufactured. When the cabinet maker contracts to make a set of cabinets, the individual makes those cabinets using the individual's own tools, equipment, and supplies, while working out of the building the individual owns. None of cabinet marker's clients provide any tools, equipment or supplies used in manufacturing a cabinet.

If this individual were to contract with a family to manufacture cabinets for the family's kitchen, there is no question the investment factor would weigh in favor of the individual's independent-contractor status. However, if this same individual were to contract with a large national homebuilder to manufacture cabinets for 10 homes being constructed in a neighborhood, the individual's business investment, under a "side-by-side" comparison with the large homebuilder, would weigh in favor of employment. Likewise, if the individual were to contract with General Motors to build one set of cabinets for a breakroom at a local facility, the individual's business investment, under a "side-by-side" comparison with the business investment of General Motors, would weigh in favor of employment.

The Coalition submits there is no rational justification for the investment factor, as applied to this individual, to vary, depending upon the relative business investment of a specific client. To be sure, the individual's investment in tools, equipment, supplies, and building are, without question, sufficient for the individual to operate with complete economic independence. It follows that such investment should be sufficient to establish the individual's economic independence with respect to any and all clients – without regard to a specific client's business investment.[8]

The nature of the business an individual operates also is important to this analysis, as certain types of businesses require more tangible capital investment than others. At one extreme are "laptop entrepreneurs" of the modern economy who require no investment other than items that many individuals already possess for personal use. For these individuals, consideration of the "the exercise of personal initiative, including managerial skill or business acumen" is more determinative of economic independence than investment. These individuals need no investment to achieve economic independence. This is why it is important that these two considerations be included in the same factor.

D. The "Skill Required" Factor

The proposed regulations provide that this factor would not include a consideration of "initiative" because facts related to initiative are considered as part of the control and opportunity for profit or loss factors.

[8] As the court observed in *Usery v. Pilgrim Equipment Co., Inc.,* 527 F.2d 1308, 1313 (1976), "[i]n determining a worker's opportunity for profit or loss, we "consider whether the worker or the alleged employer controlled the major determinants of the amount of profit which the [worker] could make." The amount of investment a client might have made in its own business offers no illumination on whether an individual controlled the major determinants of profitability.

The Coalition believes "initiative" should be considered as part of this factor. For purposes of measuring economic independence, skill, initiative, or both can contribute to economic independence. Courts sometimes combine skill and initiative when applying the economic realities test. An example is *Donovan v. DialAmerica Marketing, Inc.,* 757 F.2d 1376, 1387 (1985), wherein the court reasoned:

> The distributors' need for special skills to do their work was another finding of fact identified by the district court as a basis for its conclusion. The distributors needed to possess some degree of managerial skill to ensure that their revenues exceeded expenses. Moreover, it was necessary for the distributors to be able to keep records regarding the number of cards delivered to, and completed by, each distributee so that proper payment could be made. Some distributors benefitted from their skill in persuading others to become distributees, and they certainly exercised business-like initiative in this regard. The "skill" factor favors independent-contractor status.

What the court characterized as skill in the quoted passage is arguably more accurately described as entrepreneurial initiative, as the activities described do not require any special skill. An example of how "initiative" can affect profitability is illustrated in *Saleem v. Corp. Transportation Grp., Ltd.,* 854 F.3d 131, 143–44 (2d Cir. 2017), wherein the court reasoned:

> Accordingly, far from a circumstance, like that in *Superior Care*, where the individuals seeking "employee" classification "depended entirely on [the putative employer's] referrals to find job assignments," 840 F.2d at 1060, Plaintiffs here possessed considerable independence in maximizing their income through a variety of means. By toggling back and forth between different car companies and personal clients, and by deciding how best to obtain business from CTG's clients, drivers' "profits increased" through " 'the[ir] 'initiative, judgment[,] or foresight' "—all attributes of the "typical independent contractor." *Keller*, 781 F.3d at 809 (quoting *Rutherford*, 331 U.S. at 730, 67 S.Ct. 1473). Whatever "control" CTG exerted over negotiated fares and its rolls of institutional clients, Plaintiffs retained "viable economic status that [could] be [and was] traded to other [car companies]." *Usery*, 527 F.2d at 1312. Thus, as a matter of economic reality, Plaintiffs' affiliation with Defendants was but one means by which they generated income from their driving businesses.

The foregoing is another example of how individuals without special skills can nonetheless achieve economic independence through their entrepreneurial initiative. If "skill" is considered in isolation,

without also considering "initiative," this factor would be vulnerable to creating a false indicator of economic dependence.

To illustrate how initiative can be a more accurate indicator of economic independence than pure skill, consider a Nobel Prize winning Ph.D. mathematician who is a professor at a major university and teaches, conducts research, and writes papers. But the mathematician does not pursue any remunerative activities outside of the individual's position at the University. Nobody would dispute that this individual operates with a very high level of skill, though the individual is lacking in entrepreneurial initiative. By contrast, consider an individual who purchases a lawnmower and contracts to cut the lawn every week at 10 different homes in a neighborhood. The individual subsequently contracts to cut the lawns at five additional homes and hires another individual to assist. This individual has a lower skill level, but is unquestionably exercising entrepreneurial initiative. Viewed through the lens of economic dependence, the factor should weigh in favor of the Ph.D. mathematician being an employee and the lawn cutter an independent contractor. But if this factor were to disregard "initiative," it would be susceptible to producing a different outcome that is less consistent with the ultimate inquiry of economic dependency.

E. The "Permanence of the Working Relationship" Factor

The NPRM states that because an individual's ability to work for others is already analyzed as part of the control factor, it proposes that the "permanence" factor not reference the "exclusivity" of the relationship between the individual and potential employer. The NPRM also indicates that DOL considered keeping "exclusivity" as part of this factor and solicits comments on this alternative approach.

The Coalition submits that "permanence" and "exclusivity" of the working relationship should both be considered together. We believe an important consideration when evaluating the permanence factor in the context of economic dependency is exclusivity, i.e., whether a putative employer *requires* an individual to work exclusively for it during the working relationship

To illustrate, consider a broker/market facilitator, whose business is to assist self-employed individuals in finding client opportunities, and assist clients in finding independent contractors offering the services they are seeking. The broker imposes no direct or indirect restriction on an individual's ability to obtain clients through other means. Some individuals actively obtain clients by engaging other similar businesses and by marketing their services to clients directly, while other individuals, either because they choose to pursue this business on a part-time basis or for other reasons, rely solely on the broker for obtaining access to client opportunities. We submit that the less entrepreneurial individuals should not be permitted to undermine the broker's independent-contractor business model by their failure to exercise their entrepreneurial rights. If these individuals were to end up relying on the broker as their sole source for obtaining client opportunities over a period of years, the *appearance* of permanence the individuals would have created by their own discretionary decisions should not be viewed as weighing in favor of employment. The reason is that the *apparent* permanence resulted entirely from the individuals'

own decisions and not because the broker created economic dependence by imposing a requirement of exclusivity.

Another example is a manufacturer that enters into nonexclusive contractual relationships with individuals granting them the rights to purchase at wholesale (and resell) its products in specific territories. Some of these individuals will exercise their entrepreneurial rights to concurrently purchase (and resell) products manufactured by others, gradually hire additional staff, and grow their respective businesses.

Other individuals invariably will purchase only that manufacturer's products and not aggressively pursue many new retail buyers. After doing this for a year or so, these individuals might feel as though they are not much different from employees. These individuals could *appear* to have a permanent relationship with the manufacturer since the only products they purchase are the manufacturer's products. But this *appearance* of permanence is misleading, as it is due entirely to their own inaction and their own failure to fully exercise their entrepreneurial rights.

The Coalition submits that in examining a work relationship, the permanence factor is not a reliable indicator of economic dependence unless, in the case of an *apparent permanence*, the analysis also considers the cause of the permanence, i.e., whether it is due to the putative employer *requiring* exclusivity (which would weigh in favor of economic dependence), or due to the individual's own discretionary decisions and inaction (which would not).

Courts have recognized the importance of this distinction. For example, in *Donovan v. Brandel,* 736 F.2d 1114, 1117 (5th Cir. 1984) the appeals court, in reviewing the trial court's decision, reasoned:

> "Although approximately 40–50% of the harvesters return to Brandel annually, this factor is no more indicative of the employment relationship than when a businessman repeatedly uses the same subcontractors due to satisfaction with past performance". The [trial]court concluded that the relationship between Brandel and the workers was not one of a permanent nature.
> …
> The record supports the trial judge's conclusion that the annual return of migrant families to Brandel's fields was a product of a mutually satisfactory arrangement rather than the permanent relationship between them.

Another context in which consideration of exclusivity is important when evaluating permanence is where individuals, who are economically independent, choose to do business with one specific broker/market facilitator – because they believe that broker is the best. The fact that an independent service provider elects to maintain a long-term relationship with one specific broker/market facilitator under these circumstances should not be viewed as suggesting economic dependence.

Any type of business whose profitability is influenced largely by the number of customers who utilize its services has a business incentive to encourage its customers to use its services as much as possible. A perfect example is an airline that utilizes different types of marketing practices, such as offering frequent flyer miles, to *encourage* individuals to use its airline for all travel. A broker/market facilitator typically follows a similar marketing strategy and seeks to *encourage* both sets of clients, namely the independent service providers and the clients seeking service providers, to utilize its referral services as much as possible. Such a business should not be penalized by its success, if that success results in independent service providers choosing to utilize its services on a regular basis – provided that such service providers are not subject to any exclusivity requirement, and they have access to other alternatives.

The Coalition submits that the *permanence* factor considered in a vacuum, without consideration of *exclusivity*, can lead to this factor creating a false indication of economic dependence (i.e., employment), when the individual is unquestionably economically independent and simply chooses – by exercising unbridled individual discretion – to work with a specific broker, the same as an individual might choose to fly with one specific airline.

F. The "Integrated Unit" Factor

The proposed regulations would clarify that this factor should consider "whether the work is part of an integrated unit of production," which aligns with the Supreme Court's analysis in *Rutherford Food*, 331 U.S. at 729. The factor would focus on whether an individual works in circumstances analogous to a production line. This factor weighs in favor of employee status where a worker is a component of a potential employer's integrated production process, whether for goods or services. The overall production process need not be a physical assembly line, but it must be an integrated process that requires the coordinated function of interdependent subparts working towards a specific unified purpose.

This interpretation also was followed in *Mednick v. Albert Enterprises, Inc.,* 508 F.2d 297, 298 (5th Cir. 1975), which involved a plaintiff who worked in an apartment house-hotel of the defendants, overseeing the operation of the cardrooms. These were rooms generally devoted to the playing of card games. The plaintiff's principal obligation was to attend to the needs of the players, e.g., supplying them with candy and fresh decks of playing cards. The court reasoned:

> Mednick's work was not specialized and could be learned in about an hour's time. But it was <u>not an integrated part of the business of Harbour House</u> in the same way as the work of the meat boners in Rutherford or of the mechanic in Hodgson v. Ellis Transportation Co., 456 F.2d 937 (CA9, 1972), <u>although it may have been very useful or even necessary in the market in which Harbour House competed</u>.

(Emphasis added).

The foregoing court decisions differentiate between a service that is part of an integrated unit of production and a service that might be helpful to a company but is not part of a process in which individuals work as cogs in a product process. For example, in *Mednick* the company operated a hotel but the cardroom the individual oversaw, albeit part of the hotel, was outside the scope of the operation of a hotel.

As applied to other businesses, the first inquiry should be to define a putative employer's business. If the business is that of a manufacturer, the analysis would be similar to the analysis in *Rutherford Food*, and service performed in connection with the manufacturing process arguably would be part of an integrated unit of production. Other services, however, even though necessary to the business, would not be part of an integrated unit of production. For example, such a company might contract with outside contractors to handle advertising, social media, sales, marketing, government relations, and to provide advice on compliance with regulations governing its manufacturing process. All these services performed by outside contractors are without question useful or necessary to the manufacturer's business but they are not part of an integrated unit of production. The application of this factor to individuals providing such services should reflect their economic independence relative to the manufacturer.

The Coalition fully supports this clarification of the "integrated unit" factor and believes it conforms to the meaning the U.S. Supreme Court intended, as expressed in *Rutherford Food*. Moreover, we believe this interpretation is more consistent with the guiding principle of economic independence.

G. Affording Greater Weight to the Two Core Factors

The Coalition strongly supports the creation of the two core factors. We believe the attachment of additional weight to these two factors is a principal source of the enhanced predictability and certainty the proposed regulations accomplish.

According paramount weight to control and opportunity for profit or loss is appropriate, as these two factors are the most reliable determinants of whether an individual is economically dependent on a person, or is economically independent. In this regard, control, is widely accepted as a reliable determinant the worker status, E. G., *Meyer v. U.S. Tennis Ass'n*, 2014 WL 4495185, at *6 (S.D.N.Y. Sept. 11, 2014), *aff'd,* 607 F. App'x 121 (2d Cir. 2015) ("Though no single factor is dispositive, the 'greatest emphasis' should be placed on … the extent to which the hiring party controls the 'manner and means' by which the worker completes his or her assigned tasks.") And an individual's opportunity for profit or loss is a fundamental distinction separating employees from those who operate their own independent business.

H. Proposed Guidance Regarding the Primacy of Actual Practice

The proposed regulations provide that the actual practice of the parties involved—both of the worker (or workers) at issue and of the potential employer—is more relevant than what may be contractually or theoretically possible. The Coalition agrees with this guiding principle but believes it should be construed in a manner that protects against an individual's ability to

manipulate the outcome through discretionary acts or omissions. This concept is reflected in many of the examples provided above.

For example, in *Donovan v. DialAmerica Marketing, Inc*., 757 F.2d 1376, 1386 (1985), the court reasoned that "the district court correctly found that the defendant exercised little control over the distributors' delivery of cards. The distributors were permitted to recruit their own distributees, and some of them did so." (Emphasis added). Importantly, the court concluded that a right was not merely theoretical by virtue of the fact that some actually exercised the right – even though not everyone did. The Coalition submits that when a right exists, and the right is exercised by some, the right should be taken into account even though others elect not to exercise it.

By contrast, where a right exists in theory but it is not exercised by anyone, this arguably suggests that the right, indeed, is only theoretical and should be disregarded. This is illustrated by the following reasoning:

> Although defendant did not prohibit these persons from performing distribution work for other organizations, there was no evidence that any of them did so, either during or following the period in which they worked for the defendant. Presumably, all of the distributors ceased doing distribution work when defendant ceased providing such work for them. Thus, for the most part, the distributors were dependent on DialAmerica for continuing their work as distributors.

Donovan v. DialAmerica Marketing, Inc., 757 F.2d 1376, 1387.

To illustrate, consider a manufacturer that enters into nonexclusive contracts with individuals granting them the right to sell its products and imposes no restrictions whatsoever on their ability to similarly sell products manufactured by others. In actuality, some such individuals take advantage of the absence of any such restrictions and concurrently sell products supplied by multiple different manufacturers. But other individuals, either because they pursue this business on a part-time basis or otherwise, choose to sell only the manufacturer's products. Applying the economic realities test relative to this manufacturer, it seems patently unfair for this factor to weigh in favor of employment with respect to the individuals who choose to sell only the manufacturer's products. Rather, the fact that the more entrepreneurial individuals sold products on behalf of multiple different manufacturers should be sufficient to demonstrate that the right is not merely theoretical, but real, and should be taken into account. The individuals who – for whatever reason – choose not to exercise their entrepreneurial rights should not be allowed, through their inaction, to convert their otherwise independent-contractor relationship into one of employment.[9]

[9] In this regard, the Coalition believes it is important to acknowledge that not every individual is well-suited to entrepreneurship. Sometimes an individual will try entrepreneurship and, for whatever reason, not succeed. Often such an individual will profess to be self-employed and enter into an independent-contractor relationship, but not fully exercise the entrepreneurial opportunities that are available and contemplated under the relationship. It is important that the FLSA not be interpreted in a manner that allows an individual's unsuccessful entrepreneurial experience with

By contrast, consider a company that contracts with an individual, imposes no restrictions on their ability to perform similar services for others, but requires them to perform a specified minimum number of hours of service per week for the company that creates a practical a barrier to that individual's ability to work for others. In this case, the theoretical and contractual right to perform similar services would be negated by the hours of service requirement. Viewed through the lens of economic dependence, the company created economic dependence by requiring a specified minimum number of hours of service per week that precluded the individual from pursuing other opportunities. Consequently, the theoretical and contractual right to perform services for others in these circumstances should be disregarded.

III. Conclusion

For the reasons set forth above, the Coalition strongly supports the NPRM. We believe the proposed regulations – especially with the proposed refinements described above – would materially enhance the predictability and certainty of the economic realities test. And the Coalition submits that such predictability and certainty would be further enhanced if the final regulations (or the accompanying Preamble) were to contain examples illustrating the application of the refined test to specific facts. If you have any questions concerning these comments, please let me know. Thank you very much for your consideration.

Sincerely,

/s/ *Russell A. Hollrah*

Executive Director
Coalition to Promote Independent Entrepreneurs
1025 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
rhollrah@iecoalition.org
(202) 659-0878

a company to jeopardize the very same entrepreneurial opportunities others have utilized to build a successful business. The Coalition submits that such an outcome is woefully unfair to the successful independent entrepreneurs. This is precisely the type of fear the resulted in individuals filing an amicus brief in *Saleem v. Corp. Transportation Grp., Ltd.,* 854 F.3d 131, n. 33 (2d Cir. 2017) ("arguing that finding they were employees would jeopardize 'the future viability of their investment in black car franchises.'").