Coalition to Promote Independent Entrepreneurs

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April 12, 2021

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, NW
Washington, DC 20210

Re: **RIN 1235–AA34**
Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal

Dear Ms. DeBisschop:

The Coalition to Promote Independent Entrepreneurs[1] appreciates the opportunity to comment on the Department of Labor's ("DOL") notice of proposed rulemaking[2] ("NPRM") proposing to withdraw the final regulations on *Independent Contractor Status Under the Fair Labor Standards Act*[3] (the "Independent Contractor Rule").

The Coalition respectfully urges DOL not to withdraw the Independent Contractor Rule because it provides much needed clarity to the application of the "economic realities" test and reflects an objective restatement of the court decisions that have applied the test. The enhanced clarity cuts in both directions. It not only helps legitimate independent contractors and their clients enter into contractual relationships with a greater degree of certainty that the relationships will be respected for purposes of the FLSA, but it also more glaringly exposes instances of worker misclassification under the FLSA. The only beneficiary of a withdrawal of the Independent Contractor Rule would be the trial attorneys who profit from the uncertainty and unpredictability that exists under current law.

Furthermore, a withdrawal of the Independent Contractor Rule would be disquieting to the regulated community. While a new Administration certainly can disagree with the policy positions of a prior Administration, a withdrawal of the Independent Contractor Rule would be inconsistent with DOL's own published research findings, based on its review of decades of federal court

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[1] The Coalition, www.iecoalition.org, consists of organizations, companies and individuals dedicated to informing the public and elected representatives about the importance of an individual's right to work as a self-employed individual, and to defending the right of self-employed individuals and their respective clients to do business with each other.
[2] 86 Fed. Reg. 14027 (Mar. 12, 2021).
[3] The Independent Contractor Rule was published in the *Federal Register* as a final regulation at 86 Fed. Reg. 1168 (Jan. 7, 2021).

decisions applying the *economic realities* test, including the U.S. Supreme Court decision in *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722 (1947).

DOL's proposal to withdraw the Independent Contractor Rule is premised on three principal assertions, namely (i) "upon further review and consideration of the Rule, the Department questions whether the Rule is fully aligned with the FLSA's text and purpose or case law describing and applying the economic realities test,"[4] (ii) "concern regarding the possibility that [the Rule] will cause confusion or lead to inconsistent outcomes rather than provide clarity or certainty, as intended,"[5] and (iii) "[u]pon review the Department does not believe the Rule fully considered the likely costs, transfers, and benefits that could result from the Rule.[6]

As to the first premise, DOL states that "upon further review and consideration of the Rule, the Department questions whether the Rule is fully aligned with the FLSA's text and purpose or case law describing and applying the economic realities test." But in DOL's September 2020 NPRM,[7] which produced the Independent Contractor Rule, DOL explains that the proposed five-factor test, with two "core factors," represents "general interpretations to which courts and the Department have long adhered."[8] Several months later, when it published the Independent Contractor Rule[9] in January 2021, DOL repeats that conclusion, while also noting that:

> Although this rule will change the Department's analysis for classifying workers as employees or independent contractors in some respect, those changes do not favor independent contractor classification (*i.e.*, the ultimate legal outcome) relative to the status quo, but rather offer greater clarity as to workers' proper classifications.[10]

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[4] 86 Fed. Reg. 14027, 14031.
[5] 86 Fed. Reg. 14027, 14034.
[6] 86 Fed. Reg. 14027, 14035.
[7] 85 Fed. Reg. 60600 (Sep. 25, 2020).
[8] Id. The unabridged explanation is as follows:

> The proposed regulations would adopt general interpretations to which courts and the Department have long adhered. For example, the proposed regulations would explain that independent contractors are workers who, as a matter of economic reality, are in business for themselves as opposed to being economically dependent on the potential employer for work. The proposed regulations would also explain that the inquiry into economic dependence is conducted through application of several factors, with no one factor being dispositive, and that actual practices are entitled to greater weight than what may be contractually or theoretically possible. The Department proposes to sharpen this inquiry into five distinct factors, instead of the five or more overlapping factors used by most courts and the Department previously. Moreover, consistent with the FLSA's text, its purpose, and the Department's experience administrating and enforcing it, the Department proposes that two of those factors—the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss—should be more probative of the question of economic dependence or lack thereof, and thus are afforded greater weight in the analysis than any others.

[9] 86 Fed. Reg. 1168.
[10] 86 Fed. Reg. 1168, 1177 (emphasis added).

Thus, in its September 2020 NPRM and its January 2021 Independent Contractor Rule, DOL provides assurance that its five-factor test, with two "core factors," is fully aligned with FLSA's case law describing and applying the economic realities test.

As noted, DOL in its March 2021 NPRM, expresses concerns with its restatement of the economic realities test.[11] For example, as to the two "core factors" of the five-factor test, DOL states that:

> In view of this elevation of only two factors, the Department is concerned that the Rule's approach may be inconsistent with the position, expressed by the Supreme Court and federal courts of appeals, that no single factor in the analysis is dispositive.[12]

As a threshold matter, the Independent Contractor Rule would not make any single factor dispositive. Instead, it provides a five-factor test and attaches additional weight to two "core factors." And those two factors would not be *dispositive*. Rather, the Independent Contractor Rule provides that in cases where those two core factors "point towards the same classification, whether employee or independent contractor, there is a substantial likelihood that is the individual's accurate classification."[13]

More importantly, as to DOL's concern in its March 2021 NPRM that "the Rule's approach may be inconsistent with the position, expressed by the Supreme Court and federal courts of appeals," DOL recounts in its September 2020 NPRM that only after having reviewed decades of federal court decisions – which presumably were decided by taking into account the FLSA's text and purpose and case law describing and applying the economic realities test – did DOL discover that when those two "core factors" aligned in one direction or the other, they correlated with the outcome.[14]

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[11] 86 Fed. Reg. 1407.
[12] 86 Fed. Reg. 14027, 14032.
[13] *New* 29 CFR § 795.105(c).
[14] In the September 2020 NPRM, DOL set forth its own research findings on this issue as follows:

> The Supreme Court cautioned that control is not the sole consideration, see Rutherford Food, 331 U.S. at 730, but it did not deny that factor's significance in the analysis. Indeed, the Court recognized that, "[o]bviously control is characteristically associated with the employer-employee relationship," Bartels, 332 U.S. at 130. And the opportunity for profit and loss factor is more closely tied to the concept of economic dependence than any other factors because it is a necessary component of being in business for oneself.
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> ...
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> Focusing on control and opportunity for profit or loss is further supported by the results of federal courts of appeals cases weighing the economic reality factors since 1975. In these cases, whenever the court found (or affirmed a district court finding) that the potential employer predominantly controlled the work, that court concluded that the worker is an employee. See, e.g., Hobbs, 946 F.3d at 830-36; Verma, 937 F.3d at 230-32; Gayle v. Harry's Nurses Registry, Inc., 594 F. App'x 714, 717-18 (2d Cir. 2014); Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 307-09 (4th Cir. 2006); Baker, 137 F.3d at 1440-44; Martin, 949 F.2d at 1289. Conversely, whenever the court of appeals found (or affirmed a district court finding) that the worker predominantly controlled the

In this regard, the Preamble accompanying the Independent Contractor Rule, reiterates at 86 Fed. Reg. 1168 at 1196, that "The NPRM further explained that focusing on the two core factors is … supported by the Department's review of case law. The NPRM presented a remarkably consistent trend based on the Department's review of the results of appellate decisions since 1975 applying the economic reality test." And, the Preamble, at 86 Fed. Reg. 1168 at 1198, states that "[a]mong the appellate decisions since 1975 that the Department reviewed, whenever the control factor and the opportunity factor both pointed towards the same classification— whether employee or independent contractor—that was the worker's ultimate classification." Finally, at 86 Fed. Reg. 1168 at 1240, the Preamble observes that "because the Department's analysis of appellate case law since 1975 has found workers' control and opportunity for profit or loss to be most predictive of a worker's classification status, the finalized standard provides more accurate guidance."

Thus, the additional weight the Independent Contractor Rule accords these two "core factors" was not intended to alter the test. Rather, the weight attached to these factors simply

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work, that court nearly always concluded that the worker is an independent contractor. See, e.g., Parrish, 917 F.3d at 379-388; Nieman, 775 F. App'x at 624-25 (per curiam); Saleem, 854 F.3d at 140-48; Iontchev, 685 F. App'x at 550-51; Barlow v. C.R. England, Inc., 703 F.3d 497, 506-07 (10th Cir. 2012); Mid-Atl. Installation Servs., 16 F. App'x at 106-08.

The few occasions where an appellate court's ruling on a worker's classification was contrary to what the control factor indicated were cases in which the other core factor—opportunity for profit or loss—pointed in the opposite direction. For example, in Acosta v. Paragon Contractors Corporation, the Tenth Circuit held that the control factor "indicates status as an independent contractor" because the defendant "could set his own hours and determine how best to perform his job within broad parameters." 884 F.3d 1225, 1235-36 (10th Cir. 2018). The court nonetheless held that he was an employee, in part, because he "was paid only a flat fee" and therefore "could not increase or decrease his profits based on how well he did his job." Id. at 1236; see also Cromwell, 348 F. App'x at 61 (concluding that the workers were employees even though they "controlled the details of how they performed their work [and] were not closely supervised" because, in part, defendant's "complete control over [their] schedule and pay[ ] had the effect of severely limiting any opportunity for profit or loss").

This trend is also true, indeed even more so, for the opportunity for profit or loss factor. Since 1975, virtually every time a circuit court of appeals has found (or affirmed a district court finding) that the potential employer predominantly determined the opportunities for profit or loss, the court has concluded that the worker was an employee. See, e.g., Hobbs, 946 F.3d at 832-36; Off Duty Police, 915 F.3d at 1059-1062; McFeeley, 825 F.3d at 243-44; Hopkins, 545 F.3d at 344-46; Baker, 137 F.3d at 1441-44; Snell, 875 F.2d at 808-812; Superior Care, 840 F.2d at 1059-61. Conversely, if the court found (or affirmed a district court finding) that the worker predominantly determined the opportunities for profit or loss, the court concluded that the worker was an independent contractor. See, e.g., Parrish, 917 F.3d at 384-88; Saleem, 854 F.3d at 140-48; Iontchev, 685 F. App'x at 550-51; Freund, 185 F. App'x at 783-84; Eberline v. Media Net, L.L.C., 636 F. App'x 225, 228-29 (5th Cir. 2016); Mid-Atl. Installation Servs., 16 F. App'x at 106-08. The opportunity for profit or loss factor as proposed in this rulemaking should be even more probative than these cases indicate because it would incorporate the probative value of the facts regarding investment.

In summary, each of the two core factors is, by itself, highly probative of a worker's economic dependence. Together, i.e., in cases where they both indicate the same classification, they are substantially likely to point to the answer of the classification question—whether employee or independent contractor.

The Department's proposal is consistent with case law and adopting a more focused approach. 85 Fed. Reg. 60600, 60618-19.

reflects what DOL gleaned from its review of decades of federal court decisions applying the test. It follows that a formal recognition by DOL of its own research findings – that when federal courts have applied the multi-factor economic realities test over many decades, the "two factors," when aligned in one direction, have dictated the outcome – creates no discernable inconsistency with the position expressed by the Supreme Court and federal courts that no single factor in the analysis be dispositive.

As to DOL's concern regarding the possibility that the Independent Contractor Rule will "cause confusion or lead to inconsistent outcomes rather than provide clarity or certainty, as intended," the Coalition respectfully submits that this possibility seems remote. In the Preamble accompanying the Independent Contractor Rule, DOL provides examples of blatantly inconsistent outcomes under the current uncertain and unpredictable state of the law.[15] Thus, there is no question that inconsistent outcomes occur in the absence of Independent Contractor Rule. DOL's issuance of the Independent Contractor Rule is intended to mitigate or eliminate such inconsistencies.

Furthermore, each of the five factors comprising the Independent Contractor Rule is premised on existing case law. Each factor brings with it federal court decisions providing ample guidance on how that specific factor is to be applied. And the Independent Contractor Rule provides an opportunity to conform all federal circuits to one unified explication of the test.[16]

Finally, as to DOL's concern that "[u]pon review the Department does not believe the Rule fully considered the likely cost, transfers, and benefits that could result from the Rule," the Coalition respectfully submits that because the Independent Contractor Rule is a restatement of existing law, it is not intended to alter the outcome of worker-status determinations.[17] Its primary effect would be to enable the affected individuals and the persons with whom they contract to

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[15] E.g., 86 Fed. Reg. 1168, 1170, wherein the Preamble compares "*Sec'y of Labor* v. *Lauritzen,* 835 F.2d 1529, 1534–35 (7th Cir. 1987) (applying six-factor economic reality test to hold that pickle pickers were employees under the FLSA), *with Donovan* v. *Brandel,* 736 F.2d 1114, 1117 (6th Cir. 1984) (applying the same six-factor economic reality test to hold that pickle pickers were not employees under the FLSA)." Similarly, at 86 Fed. Reg. 1168 at 1173, the Preamble compares "*Cromwell* v. *Driftwood Elec. Contractor, Inc.,* 348 F. App'x 57 (5th Cir. 2009) (holding that cable splicers hired by Bellsouth to perform post-Katrina repairs were employees), and *Thibault* v. *BellSouth Telecommunication,* 612 F.3d 843 (5th Cir. 2010) (holding that cable splicer hired by same company under a very similar arrangement was an independent contractor)."

[16] At this time, different federal circuits apply different iterations of the test. For example, courts in the First and Fifth Circuits have applied a four-factor version of the "economic realities" test, e.g., *Baystate Alternative Staffing v. Herman*, 163 F.3d 666 (1st Cir. 1998), *Orozco v. Plackis,* 757 F.3d 445 (5th Cir. 2014); whereas courts in the Second and Fifth (which is split on this issue) Circuits have applied a five-factor version of the test, e.g., *Brock v. Superior Care, Inc.,* 840 F2d 1054 (2d Cir. 1988), *Thibault v. BellSouth Telcoms, Inc.,* 2010 U.S. App. LEXIS 15267 (5th Cr. 2010); and courts in the Third, Fourth, Sixth, Seventh and Ninth Circuits have applied a six-factor version of the test, e.g., *Martin v. Seker Bros., Inc.,* 949 F.2d 1286 (3d Cir. 1991), *Schultz v. Capital Int'l Sec., Inc.,* 466 F.3d 298 (4th Cir. 2006), *Imars v. Contractors Mfg. Servs. Inc.,* 165 F.3d 27 (6th Cir. 1998), *Secretary of Labor v. Lauritzen,* 835 F.2d 1529 (7th Cir. 1987), *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1982).

[17] See above notes 7-10 and accompanying text.

ascertain the individuals' true status without having to incur substantial litigation costs. The principal financial impact would be a reduction in the cost of such litigation.[18]

While DOL asserts that its withdrawal of the Independent Contractor Rule would not be disruptive because it has yet to take effect,[19] the Coalition respectfully submits that the withdrawal would be highly disruptive and could have undesirable practical implications.

For example, if DOL were to withdraw the Independent Contractor Rule and bring an enforcement lawsuit against a company, asserting that the company had misclassified individuals as independent contractors, the company could respond by relying on DOL's own research findings that are published in the *Federal Register*.[20] The company could assert (if factually supportable) that because the five-factor test, with its two "core factors," as applied to the individuals at issue, indicate an independent-contractor relationship, the company could reasonably assume that it properly classified those individuals as independent contractors.[21] If this were to occur, would DOL dispute its own published research findings? To be sure, a company could have conformed its independent-contractor relationships to the final regulations, based not only on the final regulations, but also – and independently – on DOL's published research findings that produced those regulations.

For the foregoing reasons, the Coalition respectfully urges DOL not to withdraw the Independent Contractor Rule. The enhanced certainty and predictability the Independent Contractor Rule creates would benefit all direct stakeholders. As noted, the only beneficiaries of a withdrawal of the Independent Contractor Rule would be trial attorneys.

Thank you very much for your consideration.

Very truly yours,

Coalition to Promote Independent Entrepreneurs

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[18] DOL's estimate, which it characterizes as a "lower bound estimate" is that "$48.7 million in litigation costs related to independent contractor disputes will be avoided per year as a result of this rule." 86 Fed. Reg. 1168, 1234.

[19] 86 Fed. Reg. 14027, 14035.

[20] See above note 14.

[21] DOL's publication in the *Federal Register* of its September 2020 NPRM and its January 2021 Independent Contractor Rule represent two separate actions, namely, (i) DOL's publication of its research findings concerning its review of decades of federal court decisions applying the multi-factor economic realities test in determining worker status, and (ii) DOL's publication of a final regulation based on those research findings. It is arguable that a withdrawal of the latter would necessarily impugn the former.