Coalition to Promote Independent Entrepreneurs

IECoalition.org · (202) 659-0878
1025 Connecticut Avenue, N.W. Suite 1000
Washington, D.C. 20036

December 13, 2022

BY EMAIL
Ms. Amy DeBisschop
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–AA43**
Employee or Independent Contractor Classification Under the Fair Labor Standards Act

Dear Ms. DeBisschop:

The Coalition to Promote Independent Entrepreneurs[1] (the "Coalition") appreciates the opportunity to comment on the Department of Labor's ("DOL") notice of proposed rulemaking ("NPRM") that would rescind the final regulations on *Independent Contractor Status Under the Fair Labor Standards Act*[2] (the "2021 IC Rule") and issue regulations containing a new iteration of the economic reality test for determining an individual's status as an employee or independent contractor for purposes of the Fair Labor Standards Act ("FLSA").

The Coalition respectfully submits that it is premature to rescind the 2021 IC Rule. If DOL rescinds the 2021 IC Rule, the Coalition urges DOL not to issue regulations containing its proposed new iteration of the economic reality test.

Importantly, the 2021 IC Rule was issued by the same federal agency that now criticizes it. For DOL to issue the 2021 IC Rule, based on what DOL informed the regulated community to be its careful review of decades of federal court decisions,[3] and now inform the regulated

---

[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 Preamble accompanying the 2021 IC Rule observed at 86 Fed. Reg. 1168, 1240 (Jan. 7, 2021), 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." Also, see below note 8.

community that "[a]fter further consideration, the Department believes that the 2021 IC Rule … departs from decades of case law applying the economic reality test"[4] – where the only intervening change is a change in Administrations – creates confusion for the regulated community. Accordingly, the Coalition respectfully submits that if DOL elects to rescind the 2021 IC Rule, it should recognize this area of the law as one that is not appropriate for general regulatory guidance and continue its policy of issuing subregulatory guidance on the application of the economic reality test to specific facts. This coincides with the fourth alternative that DOL considered in the NPRM.[5]

If DOL issues regulations containing a new iteration of the economic reality test, the Coalition urges that the proposed iteration be revised to better reflect the ultimate question of "economic dependence," better reflect the modern economy, and be more neutral and less artificially weighted toward characterizing individuals as employees for purposes of the FLSA.

I. Premature to Rescind the 2021 IC Rule

The Coalition respectfully submits that it is premature to rescind the 2021 IC Rule. While DOL now expresses concerns about its 2021 IC Rule, there is not yet any evidence to support such concerns.

The gravamen of DOL's criticism of its 2021 IC Rule is based on DOL's characterization of the rule as a departure from the multifactor economic reality test, due to the additional weight the 2021 IC Rule accords the two "core factors" and to the context in which the test would consider the other economic-realities factors, e.g., considering investment as part of the opportunity for profit or loss factor.[6]

A. The Claim that Courts Will Not Apply the 2021 IC Rule is Speculative

The NPRM expresses concern that because of the deficiencies it now identifies with the 2021 IC Rule, courts might refuse to apply the rule and it could take years of appellate litigation

[4] 87 Fed. Reg. 62218, 62219 (Oct. 13, 2022).
[5] "For the fourth alternative, the Department considered rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through subregulatory guidance instead of through new regulations." 87 Fed. Reg. 62218, 62232.
[6] For example, the NPRM states that "the Department believes that the 2021 IC Rule does not fully comport with the FLSA's text and purpose as interpreted by courts and departs from decades of case law applying the economic reality test." 87 Fed. Reg. 62218, 62219. Moreover, the NPRM states that "the Department now finds that giving extra weight to two factors cannot be harmonized with decades of case law and guidance from the department…." 87 Fed. Reg. 62218, 62226. And the NPRM expresses concern that "[t]he 2021 IC Rule's elevation of certain factors and its preclusion of consideration of relevant facts under several factors … may have conveyed to employers that it might be easier than it used to be to classify certain workers as independent contractors rather than FLSA-covered employees. Elevating certain factors and precluding consideration of relevant facts may increase the risk of misclassification of employees as independent contractors." 87 Fed. Reg. 62218, 62225.

for courts to "sort out" whether or how to apply it.[7] The Coalition submits that at this juncture it is not known how courts will react to the 2021 IC Rule.

Accordingly, the Coalition urges DOL to defer action until courts have had an opportunity to apply the 2021 IC Rule. If DOL's concerns are vindicated, and courts refuse to apply the 2021 IC Rule, DOL could promptly open a new rulemaking project and rescind the 2021 IC Rule – based on solid evidence rather than speculation.

B. The Claim that the 2021 IC Rule is Not Aligned with Court Decisions is Speculative

The NPRM states that "the Department does not believe that the Rule is fully aligned with the FLSA's text as interpreted by the courts or the Department's longstanding analysis, as well as decades of case law describing and applying the multifactor economic reality test." 87 Fed. Reg., 62218, 62227 (Oct. 13, 2022). But when issuing the 2021 IC Rule, DOL assured that the rule is based on its careful review of decades of extant court decisions.[8] And in all these decisions that DOL analyzed to develop the 2021 IC Rule, the courts applied the multifactor economic reality test without according any artificial weight to any factor. DOL's review of these court decisions revealed that the two core factors are highly predictive of the outcome.

DOL now expresses skepticism about its own research findings but offers no evidence to disprove them. It offers only broad generalized skepticism, such as that:

> the 2021 IC Rule's discussion of the case law review did not provide full documentation or citations, did not make clear what the scope of the review entailed (*e.g.,* whether it included only published circuit court decisions or all cases, whether it included cases that were simply remanded to the district court for any reason, etc.), and

[7] The NPRM argues that "because the 2021 IC Rule departed from courts' longstanding precedent, if left in place, it is not clear whether courts would adopt its analysis—a question that could take years of appellate litigation in different Federal circuits to sort out." 87 Fed. Reg. 62218, 62225.

[8] E.g., 86 Fed. Reg. 1168, 1194, wherein the Preamble accompanying the 2021 IC Rule recounts that DOL reviewed appellate cases since 1975 involving independent contractor disputes under the FLSA. Also, at 86 Fed. Reg. 1168, 1196, the Preamble notes that "[t]he 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. Among those cases, the classification favored by the control factor aligned with the worker's ultimate classification in all except a handful where the opportunity factor pointed in the opposite direction." And, the Preamble, at 86 Fed. Reg. 1168, 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." Moreover, at 86 Fed. Reg. 1168, 1206, the Preamble states that "[t]he final rule takes into account facts and factors that have historically been part of the economic reality test, and decades of appellate decisions indicating that the two core factors frequently align with the ultimate determination of economic dependence or lack thereof." Finally, at 86 Fed. Reg. 1168, 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."

> oversimplified the analysis provided by the courts because court decisions regarding classification under the FLSA generally emphasize the fact-specific nature of the totality-of-circumstances analysis. Mechanically deconstructing court decisions and considering what courts have said about only two factors—even when courts did present their analyses in this manner—ignores the broader approach that most courts have taken in determining worker classification.

87 Fed. Reg., 62218, 62227-28.

The NPRM does not demonstrate that the application of the 2021 IC Rule to specific factual scenarios would produce outcomes that differ from the outcomes produced by an application of the traditional multifactor economic reality test. And the assertion that DOL did not provide full documentation or citations to identify the court decisions it reviewed is an odd criticism to be made by the very same agency that conducted the review.

If courts apply the 2021 IC Rule and the outcomes materially diverge from the outcomes that would be expected under the traditional multifactor economic reality test, DOL could then take action to rescind the 2021 IC Rule. Such a rescission, once again, would then be based on specific court decisions revealing the deficiency in the 2021 IC Rule, rather than speculation.

But if courts apply the 2021 IC Rule and the outcomes are wholly aligned with the outcomes that would be expected under the traditional multifactor economic reality test – which is possible, based on the research DOL conducted to develop the test – the enhanced predictability and certainty the 2021 IC Rule affords would benefit all affected stakeholders.

C. The Claim that Special Weight Given the Control Factor is Incompatible with the Economic Reality Test is Contradicted by Court Decisions

Another criticism of the 2021 IC Rule contained in the NPRM is that "the Department remains concerned that the *outsized role of control* under the 2021 IC Rule's analysis is *contrary to the Act's text and case law* interpreting the Act's definitions of employment," 87 Fed. Reg., 62218, 62228 (emphasis added), and "*the Department is not aware of any court that has, as a general and fixed rule, elevated any one economic reality factor* or subset of factors above others, and there is no statutory basis for such a predetermined weighting of the factors." 87 Fed. Reg., 62218, 62225 (emphasis added). This is quite different from DOL's prior research findings that "a review of federal appellate case law since 1975 shows that the classification outcome of almost every FLSA employee/independent contractor dispute has aligned with the court's specific finding on the control factor." 85 Fed. Reg. 60600, 60635 n. 145 (Sept. 25, 2020).[9]

---

[9] Accord, 85 Fed. Reg. 60612 n. 33. "the Department's review of federal appellate decisions indicates that, when the two proposed core factors are in alignment, they point to what the court finds to be the individual's correct classification."

Moreover, in *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), the court explicitly elevated the "control" factor, and it is not alone in this regard.[10] Applying the economic reality test for determining the plaintiffs' status for purposes of the FLSA, the court in *Meyer* explained its iteration of the test as follows:

> "Though no single factor is dispositive, the '*greatest emphasis' should be placed* on [this] factor—that is, *on the extent to which the hiring party controls the 'manner and means'* by which the worker completes his or her assigned tasks." *Wadler v. Eastern College Athletic Conference,* No. 00 Civ. 5671(JSM), 2003 WL 21961119, at *2 (S.D.N.Y. Aug. 14, 2003).

(Emphasis added).[11]

It follows that the fact that the 2021 IC Rule accords greater weight to certain factors does not render the rule incompatible with an economic reality analysis – especially since the 2021 IC Rule is derived from decades of court decisions in which the economic reality test was applied without any artificial weighting of any factor. To the extent the 2021 IC Rule accurately reflects the decades of court decisions applying the economic reality test – as DOL only a couple of years ago claimed it does – and offers greater predictability and certainty, the 2021 IC Rule would appear to be helpful to the regulated community, courts, and the DOL.

D. DOL Should Defer Action Until the Effects of 2021 IC Rule are Known

The NPRM characterizes worker misclassification as "one of the most serious problems facing workers, businesses, and the broader economy." 87 Fed. Reg., 62218, 62225. To the extent this characterization is accurate, it would seem to follow that a refined iteration of the economic reality test offering greater predictability and certainty for making worker classification determinations would be highly desirable.

---

[10] E.g., *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 135 (2d Cir. 1999), *holding modified by Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61 (2d Cir. 2003)("Appellant here interfered in business affairs where, the record reveals, he had considerable control over employees. Under the Fair Labor Standards Act, such *control of employees is central* to deciding whether appellant should be deemed an employer and therefore liable to his employees for unpaid wages.") (emphasis added); *Waller v. Habilitation Grp., LLC*, 2022 WL 17105493, at *5 (W.D. Pa. Nov. 22, 2022) ("Although it alone is not dispositive, the issue of control 'is highly relevant to the FLSA analysis.' *Razak*, 951 F.3d at 145. The 'right to control' is a critical consideration for whether a worker is an employee. *Id.* (citing *Drexel v. Union Prescription Ctrs.*, 582 F.2d 781, 785 (3d Cir. 1978)).").

[11] The elevation of the "control" factor in an economic reality analysis was reaffirmed when the Second Circuit affirmed this decision in *Meyer v. U.S. Tennis Ass'n*, 607 F. App'x 121 (2d Cir. 2015), wherein the appellate court explained:

> "No one of these factors is dispositive; rather, the test is based on a totality of the circumstances." Similarly, under the NYLL, "*the critical inquiry* in determining whether an employment relationship exists *pertains to the degree of control* exercised by the purported employer over the results produced or the means used to achieve the results.

(Emphasis added) (citations omitted).

Accordingly, the Coalition respectfully urges DOL to defer taking any action with respect to the 2021 IC Rule until its application can be tested.

II. DOL Should Not Issue Regulations Containing a New Iteration of the Economic Reality Test

If DOL decides to rescind the 2021 IC Rule, the Coalition urges DOL not to issue regulations containing a new iteration of the economic reality test. As a threshold matter, a decision by DOL to rescind the 2021 IC Rule and a decision to issue regulations are two separate and distinct decisions.

The NPRM's proposed new iteration of the test could have modernized the test to reflect the current economy, but it did not. It also could have developed an improved iteration of the test offering enhanced predictability, along the lines of the 2021 IC Rule, but it did not. Instead, the proposed new iteration is simply another multifactor iteration of the economic reality test – to augment the 13 other iterations of the test that federal courts have developed during the past 80 years. The Coalition respectfully urges that this proposed iteration of the test not be adopted.

A. The Proposed New Iteration of the Economic Reality Test Would Expand Coverage Under the FLSA – Without Congressional Authorization

An important difference between the NPRM's proposed novel iteration of the economic reality test and the other 13 iterations under current law is that the proposed iteration would create a more expansive interpretation, which would broaden the definition of "employee." But the Congress did not authorize DOL to broaden the test.[12]

The economic reality test was established by the U.S. Supreme Court and the federal circuit courts that interpret the Supreme Court decisions.[13] The DOL has no special expertise in interpreting Supreme Court precedent. In *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1203 (11th Cir. 2015), the Eleventh Circuit explained that "with all due respect to the Department of Labor, it has no more expertise in construing a Supreme Court case than does the Judiciary."

A fundamental concern with the proposed new articulation of the test set forth in the NPRM is that – unlike 2021 IC Rule – the NPRM articulation does not profess to be an objective distillation of decades of case law applying the economic reality test. Instead, the NPRM acknowledges that the proposed new iteration also reflects DOL's own policy views as reflected

---

[12] For certain aspects of the FLSA, the Congress granted DOL the explicit authority to define and delimit the scope of specific terms, e.g., 29 U.S.C 213(a)(1), which provides that "The provisions of sections 206 … and 207 of this title shall not apply with respect to- (1) any employee employed in a bona fide executive, administrative, or professional capacity…, or in the capacity of outside salesman (*as such terms are defined and delimited from time to time by regulations of the Secretary*…." (Emphasis added). But no such authority is granted DOL to define or delimit – or expand the scope of – the term "employee," which the FLSA defines in 29 U.S.C 203(e).

[13] E.g., 87 Fed. Reg. 62218, 62220-22; see, generally, Russell Hollrah & Patrick Hollrah, *The Time Has Come for Congress to Finish Its Work on Harmonizing the Definition of "Employee,"* 26 J.L. & POL'Y 439 (2018).

in its enforcement. In this regard, the NPRM notes that its proposal is "based on case law *and the Department's enforcement expertise in this area*." 87 Fed. Reg., 62218, 62235 (emphasis added). DOL's enforcement expertise presumably is reflected in the legal briefs it files in litigation premised on allegations that an entity has misclassified individuals as independent contractors. But the Congress did not authorize DOL to modify the test to advance its litigation objectives – and the NPRM does not identify any such authority. Accordingly, DOL has no authority to develop a test that departs from the case law and instead reflects its own policy views.

Additional evidence suggesting that the NPRM's proposed iteration of the test is broader than current law is the NPRM's numerous citations in support of its proposed new iteration to Administrator's Interpretation No. 2015–1, *The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors* (Jul. 15, 2015) ("AI 2015–1"). The AI 2015–1 guidance is remarkably similar to the NPRM's proposed new iteration of the test.[14] But AI 2015–1 was highly controversial, due to the breadth with which it interpreted the economic reality factors, and DOL withdrew it in 2017. The NPRM does not explain the appropriateness of citing to guidance that DOL has withdrawn and is no longer in effect.

The NPRM's numerous citations to the now-withdrawn AI 2015–1 and the striking similarity between the NPRM's content and AI 2015–1 suggest an intent by DOL to expand the scope of the economic reality test beyond current law to reflect the controversially broad interpretation contained in the now-withdrawn AI 2015–1. As noted, the Congress did not

---

[14] Certain examples are substantively identical, with only cosmetic changes, such as the type of industry. For example, compare the example for permanence in the NPRM and AI 2015–1:

NPRM Example: Permanence

Example: A cook has prepared meals for an entertainment venue continuously for several years. The cook prepares meals as directed by the venue, depending on the size and specifics of the event. The cook only prepares food for the entertainment venue, which has regularly scheduled events each week. The relationship between the cook and the venue is characterized by a high degree of permanence and exclusivity. The permanence factor indicates employee status.

A cook has prepared specialty meals intermittently for an entertainment venue over the past 3 years for certain events. The cook markets their meal preparation services to multiple venues and private individuals and turns down work for any reason, including because the cook is too busy with other meal preparation jobs. The cook has a sporadic or project-based non- exclusive relationship with the entertainment venue. These facts indicate independent contractor status.

AI 2015–1 Example: Permanence

Example: An editor has worked for an established publishing house for several years. Her edits are completed in accordance with the publishing house's specifications, using its software. She only edits books provided by the publishing house. This scenario indicates a permanence to the relationship between the editor and the publishing house that is indicative of an employment relationship.

Another editor has worked intermittently with fifteen different publishing houses over the past several years. She markets her services to numerous publishing houses. She negotiates rates for each editing job and turns down work for any reason, including because she is too busy with other editing jobs. This lack of permanence with one publishing house is indicative of an independent contractor relationship.

authorize DOL to expand the scope of FLSA coverage and thereby include individuals who, under current law, would qualify as independent contractors.

Because the NPRM's proposed new iteration of the economic realty test would be broader and more expansive than current law and Congress has not authorized DOL expand the test, the proposed iteration should not be adopted.

B. The NPRM's Economic Impact Analysis of its Proposed New Iteration of the Economic Reality Test Does Not Meet the Burden of Executive Order 13563

The NPRM acknowledges that "Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs…"[15] For purposes of evaluating the economic impact of this proposed rule, DOL adopted the 2021 IC Rule as the "official baseline to compare against when estimating the economic impact of this proposed rule."[16]

The Coalition submits that the 2021 IC Rule is an appropriate baseline for determining whether to rescind the 2021 IC Rule but, for reasons discussed below, it is not an appropriate baseline for evaluating the separate and distinct issue of whether to issue regulations containing a new interpretation of the multifactor economic reality test.

C. The 'Benefits' Attributable to the Proposed New Iteration of the Economic Reality Test are Speculative

The "benefits" that the NPRM indicates would result from the adoption of its proposed iteration of the economic reality test are speculative.[17] The NPRM identifies two such benefits, namely, increased consistency and reduced misclassification. 87 Fed. Reg., 62218, 62266.

1. Increased Consistency

The NPRM's claim to increased consistency is premised predominantly on the NPRM's characterization of the 2021 IC Rule as inconsistent with judicial precedent. The NPRM's contention is that its proposed iteration of the economic reality test is more consistent with judicial precedent than its 2021 IC Rule. The NPRM argues that "[t]he economic reality test, the case law, and the Department's position have remained remarkably consistent since the 1940's" 87 Fed. Reg., 62218, 62235, and that "[g]iven the substantial uniformity among the circuit courts in the application of the economic reality test prior to the 2021 IC Rule, the Department believes that

[15] 87 Fed. Reg., 62218, 62259.
[16] 87 Fed. Reg., 62218, 62260.
[17] As the court explained in *Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 708 (D.C. Cir. 2014), "[t]hough an agency's predictive judgments about the likely economic effects of a rule are entitled to deference, deference to such judgments must be based on some logic and evidence, not sheer speculation." Moreover, in *Nat'l Ass'n of Home Builders v. E.P.A.*, 682 F.3d 1032, 1040 (D.C. Cir. 2012), the court observed that "when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable."

rescinding the 2021 IC Rule would provide greater clarity than retaining the 2021 IC Rule." 87 Fed. Reg., 62218, 62232. To the extent that DOL's criticisms of the 2021 IC Rule are valid (which, as noted, are at this time speculative), DOL's rationale for rescinding the 2021 IC Rule would be sound.

But to meaningfully evaluate the benefits of issuing a new iteration of the economic reality test, the more appropriate baseline would be the alternative option DOL considered, namely, the "current economic and legal landscape"[18] without regard to the 2021 IC Rule. The decision to rescind the 2021 IC Rule and the decision to issue new regulations containing a novel iteration of the economic reality test are each separate and distinct decisions. DOL acknowledges that it could rescind the 2021 IC Rule and then either issue new regulations or not issue new regulations.[19] To be sure, once the 2021 IC Rule is rescinded, the decision whether to then adopt a new iteration of the economic reality test is being made in a context where the 2021 IC Rule does not exist.

The NPRM states that "if the Department were to instead compare the proposed rule to the *current economic and legal landscape*, the economic impact would be much smaller, because this proposed rule is consistent with the longstanding judicial precedent and guidance that the Department was relying on prior to March of 2022." 87 Fed. Reg., 62218, 62260 (emphasis added).

The Coalition submits that under the *current economic and legal landscape* baseline, the economic impact of DOL's proposed new iteration of the test might, or might not, be "much smaller." The direction of its economic impact, though, would likely be negative – due to the increased uncertainty and confusion it would produce and the adverse economic impact it would create by denying individuals their right to be recognized as independent contractors under the FLSA.

The NPRM proposes a 14th iteration of the economic reality test – to augment or replace the iterations of the test that the federal circuits have each developed through published decisions during the past 80 years. The proposed new iteration of the test represents an amalgamation of different courts' interpretations of different discrete factors. The NPRM does not identify any federal circuit that currently applies the iteration of the economic reality test that it proposes. The adoption of the proposed new iteration of the economic reality test could well introduce new confusion and uncertainty into an already uncertain area of the law. It also could have the effective of depriving individuals who currently qualify as independent contractors for purposes of the FLSA of their right to retain that status in the future, which can result in higher unemployment, slower economic growth, and reduced economic welfare.[20]

---

[18] 87 Fed. Reg. 62218, 62260.

[19] The NPRM explained that "[f]or the fourth alternative, the Department considered rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through subregulatory guidance instead of through new regulations. 87 Fed. Reg. 62218, 62232.

[20] E.g., Jeffrey A. Eisenach, *The Role of Independent Contractors in the U.S. Economy*, NAVIGANT ECONOMICS (December 2010) available at: http://www.naviganteconomics.com/docs/Role%20of%20Independent%20

The NPRM offers no compelling explanation as to why the adoption of a new 14th iteration of the test is preferable to simply rescinding the 2021 IC Rule and taking no further action. The NPRM argues that issuing regulations would (i) allow DOL to formally collect and consider a wide range of views from stakeholders by electing to use the notice-and-comment process and (ii) because courts are accustomed to considering relevant agency regulations, providing guidance in this format may further improve consistency among courts regarding this issue.[21] But these do not withstand scrutiny.

a. The Economic Reality Test Should Reflect Federal Court Decisions Rather Than Stakeholder Input

The NPRM acknowledges that the economic reality test was established by U.S Supreme Court precedent and the federal court decisions following that precedent. 87 Fed. Reg., 62218, 62220 - 22. And, importantly, DOL's principal criticism of its 2021 IC Rule is that the rule is not "fully aligned" with the FLSA's text as interpreted by the courts. 87 Fed. Reg., 62218, 62227. But if the regulations are to be "fully aligned" with federal precedent, this leaves no role for stakeholder input to modify federal precedent – just as it leaves no role for DOL to modify federal precedent by interjecting its own policy views as reflected in its enforcement experience.

b. Predictions of How Courts Would React to a New Iteration of the Economic Reality Test are Highly Speculative

As to the NPRM's claim that courts are accustomed to considering relevant agency regulations and, therefore, its proposed 14th iteration of the economic reality test may "further improve consistence among courts," this claim is vulnerable to the very same criticism that DOL asserted against its 2021 IC Rule. It is no clearer how courts would react to DOL issuing a novel 14th iteration of the economic reality test than how courts would react to DOL's 2021 IC Rule – especially since DOL's interpretation of the decided court cases applying the economic reality test

Contractors%20December%202010%20Final.pdf. ("[p]olicy changes that curtail independent contracting … would result in higher unemployment, slower economic growth and reduced economic welfare."[20] 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.) The study also 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." Id.

[21] The NPRM states in this regard that "issuing regulations allows the Department to provide in-depth guidance that is more closely aligned with circuit case law, rather than the regulations set forth in the 2021 IC Rule which have created a dissonance between the Department's regulations and judicial precedent. Additionally, issuing regulations allows the Department to formally collect and consider a wide range of views from stakeholders by electing to use the notice-and-comment process. Finally, because courts are accustomed to considering relevant agency regulations, providing guidance in this format may further improve consistency among courts regarding this issue." 87 Fed. Reg. 62218, 62232.

appears to be unsettled. As the NPRM observed, it could take years of appellate litigation for courts to "sort out" their response to a new iteration of the test.[22]

2. Reduced Misclassification

The NPRM's claim that its proposal would reduce misclassification is premised on the NPRM's assumption that the 2021 IC Rule "could increase misclassification because its elevation of certain factors and its preclusion of consideration of relevant facts under several factors may result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it used to be to classify certain workers as independent contractors rather than FLSA- covered employees." 87 Fed. Reg., 62218, 62260. This claim is doubly speculative. It is premised on an assumed behavioral response in reaction to an assumed perception of the 2021 IC Rule. The first assumption is that companies perceive the 2021 IC Rule as a deviation from reported court decisions resulting in the term "employee" covering fewer individuals. The second assumption is that companies would react to this perception by more aggressively misclassifying individuals as independent contractors. The NPRM offers no studies or other evidence to support either of these assumptions.

At the time DOL issued the 2021 IC Rule, DOL was of the opinion that the 2021 IC Rule is aligned with judicial precedent and that the rule provided enhanced predictability in making worker status determinations under the FLSA. Whether this enhanced predictability would result in the classification of more, or fewer, individuals as independent contractors is unknown at this time. As the NPRM acknowledges, "the Department is not aware of any Federal district or appellate court that has relied on the substance of the 2021 IC Rule so far to resolve a dispute regarding the proper classification of the worker as an employee or independent contractor." 87 Fed. Reg., 62218, 62260. It follows that at this time there is no evidence indicating whether the outcomes in worker classification disputes when resolved under the 2021 IC Rule would deviate from the outcomes that would have occurred in the absence of the 2021 IC Rule.

To the extent the 2021 IC Rule produces outcomes that are consistent with the outcomes that would have occurred in the absence of the 2021 IC Rule, there is no reason to suspect that the 2021 IC Rule would result in "employers [believing] that it might be easier than it used to be to classify certain workers as independent contractors rather than FLSA- covered employees." It follows that at this time there is no evidence to support DOL's doubly speculative concerns.

But even if the NPRM's claim that rescinding the 2021 IC Rule would reduce misclassification is valid, the claim does not support the NPRM's other proposed action, namely, issuing regulations that would adopt its proposed novel 14th iteration of the economic reality test.

---

[22] The NPRM argues that "because the 2021 IC Rule departed from courts' longstanding precedent, if left in place, it is not clear whether courts would adopt its analysis—a question that could take years of appellate litigation in different Federal circuits to sort out." 87 Fed. Reg. 62218, 62225.

D. The NPRM's Analysis of 'Transfers' is Flawed

The NPRM's analysis of "Transfers," 87 Fed. Reg., 62218, 62267-69, is problematic. The NPRM suggests that a company's classification of an individual as an employee or independent contractor for purposes of the FLSA can influence the company's classification of the individual for purposes of employer-provided fringe benefits and federal employment taxes.

In this regard, the NPRM explains that "[a]lthough this proposed rule only addresses whether a worker is an employee or an independent contractor under the FLSA, the the Department assumes in this analysis that employers are likely to keep the status of most workers the same across all benefits and requirements, including for tax purposes." 87 Fed. Reg., 62218, 62268. In support of this assumption the NPRM asserts that "Courts have noted that the FLSA has the broadest conception of employment under Federal law. *See, e.g., Darden,* 503 U.S. at 326. To the extent that businesses making employment status determinations base their decisions on the most demanding Federal standard, a rulemaking addressing the standard for determining classification of worker as an employee or an independent contractor under the FLSA may affect the businesses' classification decisions for purposes of benefits and legal requirements under other Federal laws." 87 Fed. Reg., 62218, 62268 n.562.[23]

But this is simply not true. And it is legally incorrect. The test for determining an individual's status for purposes of benefits and federal employment taxes is the common-law test.[24] As the NPRM acknowledges, the common-law test is a narrower test for defining employee status than the economic reality test.[25] It follows that an individual who is deemed to be an employee for purposes of the FLSA will not necessarily *qualify* as an employee for purposes of fringe benefits and federal employment taxes.

The NPRM's assertion that "the standard for determining classification of worker as an employee or an independent contractor under the FLSA may affect the businesses' classification decisions for purposes of benefits and legal requirements under other Federal laws," 87 Fed. Reg., 62218, 62268 n.562, is not only incorrect but it could create severe problems for an employer that actually adopts such a practice.

An employer that allows common-law independent contractors (who are employees for purposes of the FLSA) to participate in its employee benefit plans could breach its fiduciary duty[26]

---

[23] The NPRM observes that "[t]o the extent that this proposed rule would reduce misclassification, it could result in transfers to workers in the form of employer-provided benefits like health care and retirement benefits." 87 Fed. Reg., 62218, 62267.

[24] E.g., *Darden v. Nationwide Mut. Ins. Co.,* 503 U.S. 318 (1992) (employee benefits); *Cencast Servs., L.P. v. United States*, 62 Fed. Cl. 159, 161 (2004), *aff'd,* 729 F.3d 1352 (Fed. Cir. 2013) (federal employment taxes).

[25] The NPRM observes in this regard that "the Court has repeatedly observed that the FLSA's scope of employment is broader than the common law standard often applied to determine employment status under other Federal laws." 87 Fed. Reg. 62218, 62220.

[26] 29 U.S.C. § 1104 (a) provides that a plan "fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." In *Clark v. E. I. Dupont De Nemours & Co*., 1997 U.S. App. LEXIS 321, 20 E.B.C. 2309 (4th Cir. 1997), the court explained that to acquire participant status under an ERISA plan, an

under any qualified retirement plans it maintains while exposing itself – and affected individuals – to substantial federal tax liabilities. For example, a qualified retirement plan that an employer maintains for its employees could be disqualified, and thereby lose its preferential tax treatment, if it extends eligibility to individuals who are employees for purposes of the FLSA, but not under the common-law test.[27] Similarly, the tax-preferred treatment accorded other employer-sponsored benefits, such as employer-provided health benefits, are available only to common-law employees.[28]

Similarly, federal employment taxes are imposed only on common-law employees. A company does not have the right to *elect* to withhold federal employment taxes from individuals who are not common law employees – even though they might qualify as employees for purposes of the FLSA.[29]

It follows that the NPRM's analysis of "Transfers" attributable to employer-provided benefits and federal tax liabilities"[30] is not compatible with applicable law.

To be sure, this is precisely why the Coalition for years has been advocating for Congress to harmonize the definition of "employee" for purposes of all federal statutes along the lines of the common-law test. If all federal statutes were, indeed, so harmonized, the NPRM's discussion of

---

individual must (i) be an employee, and (ii) satisfy the plan's eligibility criteria). ERISA plans are *not* required to cover all common-law employees of the sponsor, but can exclude categories of employees, so long as the basis for exclusion is not an impermissible age or length-of-service requirement. *E.g., Bronk v. Mountain States Telephone and Telegraph, Inc.*, 140 F.3d 1335 (10th Cir. 1998) *rev'g* 943 F.Supp. 1317 (D. Colo. 1996); *Abraham v. Exxon Corp.*, 85 F.3d 1126 (5th Cir. 1996).

[27] The "exclusive benefit" rule, contained in Internal Revenue Code sections 401(a) and 401(a)(2), requires that a qualified retirement plan's assets be used for the *exclusive* benefit of a plan sponsor's employees. Covering a nonemployee violates Internal Revenue Code section 401(a)(2) and can result in the plan being disqualified for tax purposes. *See, e.g., Professional & Executive Leasing, Inc. v. Commissioner*, 862 F.2d 751 (9th Cir. 1998), *aff'g* 89 T.C. 225 (1987) (disqualification of plan maintained by employee leasing firm for covering nonemployees).

[28] The Internal Revenue Code provides for an exclusion from taxable income of benefits received under a variety of welfare benefit plans. Examples include health benefit plans under Internal Revenue Code sections 105 and 106, group term life insurance under Internal Revenue Code section 79, education assistance plans under Internal Revenue Code section 127, dependent care assistance plans under Internal Revenue Code section 129. Such exclusion provisions are all premised on the benefits being provided to an employee of the plan sponsor. If the benefits are provided by an entity that is determined *not* to be the common-law employer of the recipient, the tax-exclusion provisions would not apply, and the benefits would be fully taxable to the recipient. Similarly, if a cafeteria plan mistakenly allows a worker who is not a common-law employee of the plan sponsor to participate, any benefits provided under the plan could be deemed taxable to the recipients.

[29] See, generally, Non Docketed Service Advice Review, 1994 IRS NSAR 5023 (Apr. 21, 1994) (citations omitted) ("federal law … requires an employer to withhold and pay over income taxes for the employee's projected income tax liability. … An employer/employee relationship is also a prerequisite to the requirement to withhold…. [i]f FICA taxes apply to a payment because the recipient is an employee, SE taxes will not apply. Conversely, if SE taxes apply to a payment because the payee is an independent contractor, FICA taxes will not apply.") The exclusive remedy for wrongful withholding of taxes is an action against the United States pursuant to 26 U.S.C. § 7422. *Burda v. M. Ecker Co.*, 2 F.3d 769, 778 (7th Cir. 1993).

[30] 87 Fed. Reg., 62218, 62267-68.

"Transfers" involving benefits and federal employment taxes would be valid – because the term "employee" for purposes of all applicable laws would be governed by the same common-law test.

E. The Coalition Urges DOL Not to Adopt its Proposed Regulation

For the foregoing reasons, the Coalition urges DOL not to issue regulations adopting its proposed novel 14th iteration of the economic reality test. The issuance of such regulations would only create additional uncertainty for an already highly uncertain area of the law. And the economic analysis contained in the NPRM does not support such an action.

III. Comments Concerning the Proposed New Iteration of the Economic Reality Test

If DOL decides to rescind the 2021 IC Rule and adopt final regulations setting forth a new iteration of the economic reality test, the Coalition respectfully urges DOL to modify its proposed iteration of the test to better reflect reported court decisions and the modern economy, and better answer the ultimate question of "economic dependence."

A. Each Factor of the Test Should Measure the Degree of Dependence of Alleged Employees on the Business With Which They Are Connected.

The Coalition endorses DOL's statement of the ultimate objective of an economic reality test, as set forth in proposed new 29 CFR section 795.105(b):

> The Act's definitions are meant to encompass as employees all workers who, as a matter of economic reality, are economically dependent on an employer for work. A worker is an independent contractor, as distinguished from an ''employee'' under the Act, if the worker is, as a matter of economic reality, in business for themself.

The NPRM explains that "[p]roposed § 795.105(b) would affirm that economic dependence is the ultimate inquiry for determining whether a worker is an independent contractor or an employee…," 87 Fed. Reg., 62218, 62233, and that "the economic reality factors help determine whether a worker is in business for themself or is instead economically dependent on the employer for work. ''Ultimately, economic dependence " examines whether the workers are dependent on a particular business or organization for their continued employment.'' 87 Fed. Reg., 62218, 62236

The NPRM's statement of the ultimate question is consistent with legal precedent. In *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311–12 (5th Cir. 1976), the Fifth Circuit explained that " The … 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.* (Emphasis added).[31]

[31] Accord, *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 751–52 (5th Cir. 1983) ("the economic reality test is used to determine whether an individual is economically dependent for his livelihood on the business to which he renders service.").

The NPRM states that "[t]he Department believes that this proposed rule's approach offers a better framework for understanding and applying the concept of economic dependence by explaining how the touchstone of whether an individual is in business for themself is analyzed within each of the six economic realities factors." 87 Fed. Reg., 62218, 62226. For the NPRM's proposed test to be consistent with DOL's stated objective, each factor should reflect the concept of economic dependence. E.g., *Usery*, 527 F.2d at 1311 ("*Each test must be applied with that ultimate notion in mind*") (emphasis added).[32]Moreover, to the extent courts offer alternative interpretations of a specific factor, the proposed new iteration of the factor should adopt the interpretation that best advances the concept of economic dependence.

But the proposed regulations are not faithful to answering the question of economic dependence. Rather, the proposed regulations consistently resolve alternative interpretations of a specific factor in the direction of broadening the scope of the factor, to bring more individuals within the scope of covered employment.

The Coalition respectfully submits that – in accord with the court's admonition in *Usery* and the NPRM's numerous acknowledgements of the ultimate question the economic reality factors are intended to answer – the proposed interpretation of each factor of the NPRM's proposed economic reality test should be examined with reference to whether it is the best indicator of "the degree of dependence of alleged employees on the business with which they are connected."[33]

First Factor – Profit or Loss

The proposed regulations would interpret this factor as follows:

> This factor considers whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work. The following facts, among others, can be relevant:
>
> - whether the worker determines or can meaningfully negotiate the charge or pay for the work provided;
> - whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed;
> - whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and
> - whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space.
>
> If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee. Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.

The Coalition urges DOL to refine the NPRM's proposed treatment of (i) an opportunity for loss, and (ii) technical proficiency. Each is discussed below.

---

[32] 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" (citations omitted).

[33] *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311–12 (5th Cir. 1976).

- **Having no Opportunity for Loss Is Not Necessarily Indicative of Economic Dependence**

The proposed regulation states that "[i]f a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee." The NPRM adds rigidity to the analysis by clarifying that "the fact that a worker has no opportunity for loss indicates employee status" 87 Fed. Reg., 62218, 62238. But the NPRM's clarification is premised on a capital-intensive economy and does not take into account the modern knowledge-based service economy.

The early court decisions that developed the factors for determining an individual's status for purposes of the FLSA were decided when the nation's economy was highly industrialized.[34] Those decisions properly considered an individual's opportunity for loss in evaluating the individual's economic dependence. But times have changed, as has our nation's economy. Today's economy includes an exceptionally large service sector.

There are countless numbers of individuals today who operate thriving businesses with their laptop computers and incur no risk of loss whatsoever. The fact that these individuals operate a type of business that does not require a substantial financial investment should not deny them their right to offer their services as independent contractors.

Accordingly, the Coalition urges that this factor be defined with less rigidity, so it recognizes that an individual's opportunity for loss is not relevant for measuring an individual's economic dependence if the individual's business consists of providing a service that does not require a significant capital investment.

- **Technical Proficiency Can Signify Economic Independence**

Similarly, the NPRM asserts that "a worker's 'ability to earn more by being more technically proficient is unrelated to [the worker's] ability to earn or lose profit via his managerial skill, and it does not indicate that he operates his own business.'" 87 Fed. Reg., 62218, 62239. This interpretation also does not reflect current market conditions.

In many fields today, technical proficiency and reputation can dramatically impact an individual's profitability – and economic independence. This is true in fields such as, but certainly not limited to, technology, law, government relations, and business consulting. Individuals who operate in these fields who are more proficient and competent in the services they provide can charge higher rates, can complete projects more efficiently, or can attract more and higher paying clients. This makes them less economically dependent on any one company. Moreover, these individuals exercise entrepreneurial judgment when pursuing the attainment of their technical proficiency and when ascertaining the best means for commercially exploiting their proficiency. An individual's ability to maximize the profitability attributable to the individual's technical

---

[34] E.g., *United States v. Silk,* 331 U.S. 704 (1947); *Bartels v. Birmingham,* 332 U.S. 126 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

proficiency will depend on the individual's managerial skill and ability to persuasively communicate to a potential client the value of such proficiency.

Accordingly, the Coalition respectfully urges DOL to modify this factor to acknowledge that technically proficient and reputation can be indicative of economic independence for an individual who operates in a field in which the individual's proficiency can enable the individual to charge higher rates, complete projects more efficiently, or attract more and higher paying clients.

Second Factor – Investments by the Worker and the Employer

The proposed regulations would interpret this factor as follows:

This factor considers whether any investments by a worker are capital or entrepreneurial in nature.

- Costs borne by a worker to perform their job (e.g., tools and equipment to perform specific jobs and the workers' labor) are not evidence of capital or entrepreneurial investment and indicate employee status.
- Investments that are capital or entrepreneurial in nature and thus indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach.
- Additionally, the worker's investments should be considered on a relative basis with the employer's investments in its overall business. The worker's investments need not be equal to the employer's investments, but the worker's investments should support an independent business or serve a business-like function for this factor to indicate independent contractor status.

➢ **Comparing An Individual's Investment With a Client Company's Investment Does Not Measure Economic Dependence**

The NPRM's interpretation of this factor is self-contradictory and would introduce additional confusion to the analysis. The NPRM states that:

> *Comparing the worker's investment to the employer's investment can be a gauge of the worker's independence or dependence. If the worker's investment compares favorably to the employer's investment, then that fact suggests independence on the worker's part and the existence of a business-to-business relationship between the worker and the employer*. If the worker's investment does not compare favorably to the employer's investment, then that fact suggests that the worker is economically dependent and an employee of the employer. *The Department understands that a worker's investment need not be (and rarely ever is) of the same magnitude and scope as the employer's investment to indicate that the worker is an independent contractor*. Thus, although a worker's investment need not be par with the employer's investment, it should support an independent business for this factor to indicate independent contractor status.

87 Fed. Reg., 62218, 62242 (emphasis added). And the proposed regulation makes clear that "the worker's investments should be considered on a relative basis with the employer's investments in its *overall business*." (Emphasis added).

The NPRM explains that its proposed iteration of this factor would require a comparison of an individual's investment in the individual's overall business to a company's investment in the company's overall business – but then acknowledges that such a comparison is not a reliable indicator of an individual's dependence or independence relative to the company.

The Coalition submits that for a consideration of an individual's investment to be a reliable indicator of the individual's economic dependence or independence, the focus needs to be on the investment in those specific items required for the individual to provide the services the individual is in the business of providing.[35] By contrast, comparing an individual's investment in the individual's *overall* business to the investment by a company in the company's *overall* business is meaningless for purposes of measuring the individual's economic dependence on that company.

The NPRM states generally that the proposed interpretation of the economic reality test is intended to reflect a "refined focus on whether each factor shows a worker is economically dependent upon the employer for work versus being in business for themselves..." 87 Fed. Reg., 62218, 62232. The NPRM offers no cogent explanation for how the comparison it proposes offers any insight, whatsoever, into whether an individual is economically dependent on a company.

The Coalition submits that a diagnostic tool that can be used to evaluate whether the NPRM's interpretation of a specific factor accomplishes DOL's stated goal of measuring economic dependence is provided by the third circuit in *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385, n.11 (3d Cir. 1985), which is whether an interpretation "would lead to senseless results if carried to its logical conclusion."[36]

---

[35] See, e.g., *Nelson v. Texas Sugars, Inc.*, 838 F. App'x 39, 42 (5th Cir. 2020) ("although the Club made significant investments in, *inter alia*, advertising, décor, food, and alcohol, the jury could have concluded that those investments were not essential for the dancers to perform their work and thus the relative investments of the Club and the dancers were not necessarily comparable").

[36] In *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385, n.11 (3d Cir. 1985), the court explained its diagnostic tool as follows:

> Although the district court's interpretation of "economic dependence" may appear to be reasonable on the surface, *it would lead to senseless results if carried to its logical conclusion*. Consider the following example. Two persons do exactly the same work for the same organization. The first worker, who relies on the job as a primary source of income, would be considered "economically dependent" on the organization and thus an "employee" subject to the minimum-wage provisions of the FLSA. The other worker, whose spouse provides the primary source of family income, would not be considered "economically dependent" and thus would not necessarily be entitled to receive the minimum wage. Moreover, upon the first worker's subsequent marriage to a spouse who would provide the primary source of family income, he or she might then lose the status as an "employee," resulting in a possible reduction in wage rate.

(Emphasis added).

To apply the *Donovan* diagnostic tool to the NPRM's proposed interpretation of this factor, consider the graphic designer described in the second fact pattern in the example for this factor contained in the NPRM.[37] This graphic designer purchased design software, computer, drafting tools, rents an office in a shared workspace, and spends money to market the individual's services. The individual occasionally completes design projects for a local design firm. The NPRM properly concludes that this factor weighs in favor of the individual being economically independent, and not an employee of the local design firm.

The Coalition submits that a proper analysis of this factor would indicate the same outcome if this same individual also occasionally completes design projects under the same arrangement for a different company that invests billions of dollars in its overall business. But the NPRM's proposed comparison of relative investments by the graphic designer and this other company would result in this factor weighing in the opposite direction and indicating economic dependence. The NPRM's proposed comparison would – in the words of the Third Circuit in *Donovan* – "lead to senseless results if carried to its logical conclusion." The graphic designer's investment in the individual's business either reflects an economically independent business, or it does not. The answer should not change when the same individual enters into the same arrangement with other clients – when the *only* difference is the magnitude of a client's investment in its *overall* business.

The NPRM seeks to diminish the impact of the misalignment created by its interpretation of this factor with the observation that "a worker's investment need not be (and rarely ever is) of the same magnitude and scope as the employer's investment," 87 Fed. Reg., 62218, 62242. But this only introduces additional confusion. The NPRM offers no guidance on how to distinguish between those arrangements for which its proposed comparison of an individual's investment with a company's investment in its *overall* businesses would be relevant and those arrangements for which its proposed comparison should be disregarded.

The Coalition respectfully submits that a clearer interpretation of this factor that is more in accord with the ultimate question of measuring economic dependence would measure an individual's investment in the specific items the individual requires to perform the individual's services, or compare the relative investment in those specific items by an individual and the company. Under the Coalition's proposed interpretation, if an individual provides the items the

---

[37] Example: Investments by the Worker and the Employer

A graphic designer provides design services for a commercial design firm. The firm provides software, a computer, office space, and all the equipment and supplies for the worker. The company invests in marketing and finding clients and maintains a central office from which to manage services. The worker occasionally uses their own preferred drafting tools for certain jobs. In this scenario, the worker's relatively minor investment in supplies is not capital in nature and does little to further a business beyond completing certain jobs. Thus, this factor indicates employee status.

A graphic designer occasionally completes design projects for a local design firm. The graphic designer purchases their own design software, computer, drafting tools, and rents an office in a shared workspace. The worker also spends money to market their services. These types of investments support an independent business and are capital in nature (*e.g.,* they allow the worker to do more work and extend their market reach). Thus, these facts indicate that the worker is in business for themself and may be a freelance graphic designer (*i.e.,* an independent contractor), not an employee of the local design firm. 87 Fed. Reg. 62218, 62243.

individual requires to perform the individual's services, this would suggest that the individual is economically independent. By contrast, if a firm provides such items, this would suggest that the individual is economically dependent on the firm to provide individual's services. In a case where the services an individual is in the business of providing requires no investment, this factor would be neutral.

The Coalition's proposed interpretation would be more consistent with the decision in *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1314 (5th Cir. 1976), wherein the Fifth Circuit reasoned that "[a]ll investment or risk capital is provided by Pilgrim. It furnishes the station, cash register, fixtures, security devices, counters, racks, hangers, bags, tags, receipts, utilities, telephone, and liability insurance. The 10 dollar per-year rental set up for these capital items is so nominal as to be de minimis. *But for Pilgrim's provision of all costly necessities, these operators could not operate*. Their total dependency upon Pilgrim is confirmed rather than denied by these facts." (Emphasis added). The key words in the court's analysis – which focus directly on the ultimate question of economic dependence – are that "but for [the company's] provision of all costly necessities, these operators could not operate." This is the essence of economic dependence.

The Coalition's proposed interpretation also would obviate the need for the qualification contained in the NPRM that the DOL "understands that a worker's investment need not be (and rarely ever is) of the same magnitude and scope as the employer's investment to indicate that the worker is an independent contractor." The Coalition's proposed interpretation would be a reliable measure of economic dependence in all factual scenarios – with no exceptions.

For the foregoing reasons, the Coalition respectfully urges DOL to replace the proposed iteration of this factor with an alternative iteration that would measure an individual's investment in the specific items the individual requires to perform the individual's services, or compare the relative investment in such items by an individual and the company.

- **A Finding that an Individual Incurs the Costs to Perform an Engagement Does Not Evidence Employment**

The proposed regulations assert that "[c]osts borne by a worker to perform their job (*e.g.,* tools and equipment to perform specific jobs and the workers' labor) are not evidence of capital or entrepreneurial investment and *indicate employee status*." (Emphasis added.) The NPRM notes that "[i]n *Acosta* v. *Paragon Contractors Corp.,* the Tenth Circuit reasoned that ''[t]he mere fact that workers supply their own tools or equipment does not establish status as independent contractors." But *not establishing status* as independent contractors is vastly different from *establishing status* as employees. At most, a finding that an individual bears that costs of performing a service would be neutral.

Other federal circuit courts have determined an investment that is expedient to perform a particular job (such as tools or equipment purchased to perform the job and that have no broader use for the worker) *can establish status* as independent contractors. For example, in *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1386–87 (3d Cir. 1985), the Third Circuit reasoned:

> The 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.[38]

To be sure, when an individual bears costs associated with the services the individual provides, this is an indication, if anything, of economic independence. It certainly does not suggest economic dependence. This is an example of the NPRM interpreting a factor – not in a manner that would better measure economic dependence – but in a manner that would expand the scope of the term "employee."

Accordingly, the Coalition respectfully urges that the proposed regulation be amended by deleting the sentence "Costs borne by a worker to perform their job (e.g., tools and equipment to perform specific jobs and the workers' labor) are not evidence of capital or entrepreneurial investment and indicate employee status."

- **Initiative Should Outweigh Investment for Service-Based Industries**

The NPRM expresses disagreement with the interpretation contained in the 2021 IC Rule that "if the worker makes no investment in the work but exercises initiative, then the opportunity for profit or loss factor indicates independent contractor status." 87 Fed. Reg., 62218, 622440. The NPRM states that such an analysis "may incorrectly tilt the analysis in favor of independent contractor outcomes." But the NPRM does not explain why this would occur.

The Coalition submits that the 2021 IC Rule is more consistent with the ultimate question of measuring an individual's economic dependence than the NPRM. The reason is that the 2021 IC Rule takes into account the modern knowledge-based economy in which large numbers of individuals operate thriving economically independent businesses but have no need for capital investment. Examples include, among many others, freelance writers, editors, translators, website designers, business consultants, attorneys, and singers. A common characteristic of all these individuals is the ability to operate a thriving business based solely on their initiative, knowledge, and talent, but without any need for capital investment. For most, owning a personal laptop computer is all that is required. And this does not even take into account the individuals who have learned to exploit social media and earn a significant income based purely on their creativity and ingenuity.

---

[38] Accord, *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983) ("[a]s a Manufacturer's Sales Representative, Hickey had a continuing investment in his business. While his capital outlay was minimal, he had operating expenses, automobile expenses and travel expenses which had a direct relationship to the overall cost of operating his business. All investment or risk capital was not provided by Arkla.").

The Coalition submits that for these types of industries, an evaluation of an individual's investment – without also considering initiative – is not a reliable indicator of economic independence.

- **The NPRM's Proposed Distinction Between Business Assets and Personal Assets is Anachronistic**

The NPRM disregards the relevance of personal assets when evaluating an individual's investment. It states, for example, that "the use of a personal vehicle that the worker already owns to perform work—or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature." 87 Fed. Reg., 62218, 62241. While distinguishing between an asset being purchased for business use or for personal use is certainty important for tax purposes, which confers favorable tax treatment on a purchase of assets for business purposes[39] (but not for personal purposes), the distinction is not relevant in today's economy for purposes of evaluating an individual's economic independence. It is a relic of the past.

Considering an individual's investment in personal assets is not without precedent under current law, but courts tend to accord diminished value to such investments.[40] The Coalition submits that this artificial dichotomy between personal and business assets is no longer defensible in the modern world when the ultimate question being measured is economic dependence.

During the 1940s and the early decades that followed, when the economic reality factors were developed, an individual's work life and personal life were largely compartmentalized. But this is no longer true. Individuals' work lives and personal lives are becoming increasingly blended.[41] Today, many individuals invest large sums in personal (albeit, dual use) technology, e.g., computers, video cameras, cellular telephones, and network connectivity. Moreover, many individuals now operate their businesses out of their personal residence. For these individuals, there is no rationale business justification to replicate their personal investments in such items with corresponding business investments in similar items. The personal investments provide the individual with the same level of economic independence as would business investments in similar items. For the NPRM to encourage irrational duplicative investments in such items, solely to obtain the right to be recognized as self-employed for purposes of the FLSA, seems woefully misguided.

---

[39] E.g., Internal Revenue Code section 162(a), which provides that "[t]here shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

[40] E.g., *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 304 (5th Cir. 1998) ("The relative investment by Express is indeed significant. Although the driver's investment of a vehicle is no small matter, that investment is somewhat diluted when one considers that the vehicle is also used by most drivers for personal purposes.").

[41] E.g., *Work-life blending: When private and professional become one*, https://greator.com/en/work-life-blending/ ("Thanks to all these technical achievements, which we simply cannot and no longer want to do without today, the boundary between work and private life is becoming increasingly blurred. This is known as work-life blending….").

Consider an individual who operates a thriving website design business for a multitude of different clients out of the individual's personal residence using the individual's personal laptop computer. This individual is economically independent, inasmuch as the individual is not dependent on a client to provide any item the individual requires to provide the contracted services. But the individual's economic independence is the same, regardless of whether the laptop computer the individual uses was purchased for business purposes or for personal purposes. The NPRM offers no explanation why such an individual would be less economically independent if the individual purchased the laptop computer for personal purposes.

Accordingly, the Coalition urges DOL to modify this factor to consider all investments an individual makes in the items the individual requires to provide the services the individual is in the business of providing, without regard to whether the investment was made for a business or personal purpose.

Third Factor – Degree of Permanence

The proposed regulations would interpret this factor as follows:

- This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships.
- This factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non- exclusive, project-based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple entities.
    - This may include regularly occurring fixed periods of work, although the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification.

Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers' own independent business initiative, this factor is not indicative of independent contractor status.

The NPRM's interpretation of this factor is not balanced. It tilts the factor in favor of finding employment. It accomplishes this by characterizing an indefinite or continuous relationship as *necessarily* suggesting employment in all cases but characterizing the *absence* of such a relationship as not suggesting independent contractor status *unless* an additional condition is satisfied. The additional condition the NPRM imposes is that the absence result from the worker's own *independent business initiative*. In this regard, the NPRM states:

> Consistent with case law analyzing this factor, the Department is proposing to provide further specificity by noting that an indefinite or continuous relationship is consistent with an employment relationship, but that a worker's lack of a permanent or indefinite relationship with an employer is *not necessarily indicative of independent contractor status if it does not result from the worker's own independent business initiative*. The Department is also proposing to continue to recognize that a lack of permanence may be inherent in certain jobs—such as temporary and seasonal work and that this is not necessarily an indicator of independent contractor

> status because a lack of permanence does not necessarily mean that the worker is in business for themselves instead of being economically dependent on the employer for work.
>
> Courts typically describe this factor's relevance as follows: *'Independent contractors' often have fixed employment periods and transfer from place to place as particular work is offered to them*, whereas 'employees' usually work for only one employer and such relationship is continuous and of indefinite duration.''

87 Fed. Reg., 62218, 62243 (emphasis added).

The NPRM's assertion that a "lack of a permanent or indefinite relationship with an employer is not necessarily indicative of independent contractor status if it does not result from the worker's own independent business initiative" is belied by the very next paragraph of the NPRM, which states "Courts typically describe this factor's relevance as follows: ' 'Independent contractors' often have fixed employment periods and transfer from place to place *as particular work is offered to them*…'" (emphasis added). Thus, the NPRM acknowledges that independent contractors often transfer from place to place as particular work "is offered to them." To be sure, the *offering of work* to an individual is a unilateral, discretionary decision made by a company. It does not result from a worker's own independent business initiative. It follows that even the case law the NPRM cites contradicts its interpretation of this factor.

Courts should be permitted to apply a nuanced interpretation of this factor, as the relevance of this factor for purposes of measuring economic dependence will depend on the specific facts. For example, an individual operating an economically independent business that finds a client willing to pay the individual a premium fee for a type of work the individual prefers to perform might choose to contract with that client, on a project by project basis, on as many projects as the client is willing to offer. If that client relationship were to extend for many years, this fact, in and of itself, would not be a reliable indicator of the individual's economic dependence, as the individual always remains free to decline the offered projects and accept projects offered by others. Importantly, however, the individual's ability to continue performing projects for this client would not result from the individual's own independent business initiative, because it necessarily would depend on the client's willingness to continue offering projects.

From an economic dependence perspective, the ultimate inquiry should focus on an individual's economic freedom and autonomy, as evidenced by the individual's ability to influence the terms and permanency of the individual's relationship with a company and to operate independently of a client and move the individual's business to other clients. For example, in *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983), the court reasoned:

> the permanence or duration of the working relationship," also favors a finding that Appellants are independent contractors…. As in *Saleem*, the economic reality of Appellants' freedom to buy and

> sell their distribution rights therefore weighs in favor of finding that they were independent contractors.
>
> [w]ith respect to the permanency of his relationship with Arkla, Hickey, notwithstanding his tenure of ten years, was capable of terminating relations with Arkla upon 30 days notice and taking his business organization and talents to other manufacturers of similar or different products.… Upon losing a major customer, or in this case, a "supplier," serious economic adjustments naturally will have to be made to make up for the loss. Even so, however great the loss, it will not necessarily serve to establish "economic dependence" so as to create an employer-employee relationship.")

This nuanced interpretation of the factor captures the essence of economic dependence.

The interpretation of this factor in *Hickey* is consistent with the Firth Circuit's interpretation in *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1314 (5th Cir. 1976), wherein the court determined the factor to weigh in favor of employment based on findings that "[m]any of the operators have previously served as Pilgrim's employees and are performing essentially the same functions as operators. Not a single operator is shown to be capable of terminating relations with Pilgrim and taking her organization to another laundry. The operators have nothing to transfer but their own labor. The plain fact of the matter is that every one of them is dependent upon Pilgrim's continued employment." The Court's analysis makes clear that economic independence can be demonstrated by an individual being capable of terminating relations with the putative employer and taking the individual's services to a different client.

Accordingly, the Coalition urges DOL to modify this factor (i) by removing the requirement that for an individual's lack of a permanent or indefinite relationship with an employer to be indicative of economic independence it must be due to the individual's "own independent business initiative," and (ii) by interpreting the factor in a more nuanced manner the includes consideration of an individual's economic freedom and autonomy, as evidenced by the individual's ability to influence the terms and permanency of the individual's relationship with a company and to operate independently of a client and move the individual's business to other clients.

Fourth Factor – Nature and Degree of Control

The proposed regulations would interpret this factor as follows:

This factor considers the employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship. Facts relevant to the employer's control over the worker include whether the employer

- sets the worker's schedule,
- supervises the performance of the work, or
- explicitly limits the worker's ability to work for others.

Additionally, facts relevant to the employer's control over the worker include whether the employer

- uses technological means of supervision (such as by means of a device or electronically),
- reserves the right to supervise or discipline workers, or
- places demands on workers' time that do not allow them to work for others or work when they choose.

Whether the employer controls economic aspects of the working relationship should also be considered, including control over

- prices or rates for services and
- the marketing of the services or products provided by the worker.

Control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control. More indicia of control by the employer favors employee status; more indicia of control by the worker favors independent contractor status.

The Coalition respectfully urges DOL to modify the NPRM's proposed iteration of this factor to make it more balanced, by including examples of facts evidencing independent-contractor status, and to provide that an analysis of this factor with respect to a company that does business with similarly situated individuals should be conducted on a business-model basis rather than on an individual-by-individual basis.

- **This Factor Should Also Include Facts Evidencing Independent-Contractor Status**

The proposed iteration of this factor is unbalanced. It recites only facts evidencing employment. It recites no facts evidencing independent-contractor status. The Coalition respectfully submits that for the proposed iteration of this factor to be objective, and not favoring either status, it should also recite facts evidencing independent-contractor status.

Examples of facts relevant to an individual's right of control include an individual's control over the overall scope of the individual's operations, including, among others:

- the individual's right to control the means and methods of performance,[42]
- the individual's right to engage others to assist in performing services,[43]
- the individual's right to set the individual's own work schedule without any minimum hour requirements,[44] and
- the individual's right to do business with others, including competitors of the putative employer.[45]

---

[42] E.g., *Schultz v. Cap. Int'l Sec., Inc.*, 466 F.3d 298, 304–05 (4th Cir. 2006) ("The emphasis on economic reality has led courts to develop and apply a six-factor test to determine whether a worker is an employee or an independent contractor. The factors are (1) the degree of control that the putative employer has over the manner in which the work is performed….").

[43] E.g., *Chao v. Mid-Atlantic Installation Servs., Inc.*, 16 Fed. Appx. 104, 107 (4th Cir. 2001) (affirming independent contractor status for cable television installers in part based on the fact that it was the "Installer's decision whether to hire his own employees or to work alone" to try to increase profits).

[44] E.g., *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983) ("Hickey, as a Manufacturer's Sales Representative, was largely independent of Arkla's control… He was not required to keep documented reports or to account for his daily activities.").

[45] E.g., *Saleem v. Corp. Transportation Grp., Ltd.*, 854 F.3d 131, 141 (2d Cir. 2017)("The fact that Plaintiffs could (and did) work for CTG's business rivals and transport personal clients while simultaneously maintaining their franchises without consequence suggests, in two respects, that CTG exercised minimal control over Plaintiffs. First,

As noted, for the factor to be stated in a neutral manner, the Coalition urges that it also include examples of facts establishing an individual's economic independence, such as the foregoing.

- **This Factor Should be Applied on a Business Model Basis Rather than Individually**

The Coalition urges DOL to explicitly acknowledge that when evaluating a company's working relationship with similarly situated individuals, the evaluation should focus on the business model as applied to the individuals as a group, and not as applied to discrete individuals. This is most important with respect to matters relating to an individual's economic independence, such as an individual having the right to work for others, the right to control the number of hours worked, and the right to choose which clients to accept.

Evaluating a company's business model as applied to similarly situated individuals as a group would protect against any one individual who is engaged as an independent contractor being able to intentionally undermine the individual's independent-contractor status by affirmatively not exercising the same rights that other similarly situated individuals affirmatively do exercise.

This concept is illustrated by the Eleventh Circuit's analysis in *Freund v. Hi-Tech Satellite, Inc.*, 185 F. App'x 782, 783 (11th Cir. 2006), which considered findings that "Freund was free to perform installations for other companies and could have established his own subcontracting corporation." [46] "Freund could take as many or as few jobs as he desired."[47] The court also found that "several of Hi–Tech's other installers had created their own corporate entities,"[48] and "although Freund did not hire any workers, other of Hi–Tech's installers did."[49]

Based on the foregoing findings, the court reasoned that:

> Just because Freund worked six days a week does not mean that he had to, especially in light of the evidence that other installers did not. *Under Freund's logic, we would be compelled to determine, in another type of case, that a firm did not give sick days if the employee never took them.* This does not make common sense. In the absence of evidence demonstrating that the relationship with

---

on its face, a company relinquishes control over its workers when it permits them to work for its competitors. Second, when an individual is able to draw income through work for others, he is less economically dependent on his putative employer. This lack of control, while not dispositive, weighs in favor of independent contractor status."); *Herman v. Express Sixty-Minutes Delivery Serv., Inc.,* 161 F.3d 299, 303 (5th Cir. 1998) (finding that "[t]he drivers can work for other courier delivery systems" supported independent contractor status); *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 171 (2d Cir. 1998) (affirming finding of independent contractor status when the worker "was allowed to sell merchandise on behalf of other companies"); *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983) ("Hickey, as a Manufacturer's Sales Representative, was largely independent of Arkla's control. He was not required to deal exclusively with Arkla.").

[46] *Freund v. Hi-Tech Satellite, Inc.*, 185 F. App'x 782, 783 (11th Cir. 2006).

[47] 185 F. App'x 782, 784.

[48] 185 F. App'x 782, 783.

[49] 185 F. App'x 782, 784.

> Freund was different, evidence of how Hi–Tech treated its other installers is probative of the working relationship.

Freund v. Hi-Tech Satellite, Inc., 185 F. App'x 782, 784–85 (11th Cir. 2006) (emphasis added).

The logic the court expressed in *Freund* demonstrates the advisability of evaluating a company's business model on a business model basis rather than an individual basis. An individual who, for example, is free from any restriction, direct or indirect, against doing business with others is no less economically independent by electing not to exercise the right than other similarly situated individuals who do exercise the right.

The Coalition respectfully urges that the NPRM's explanation of this factor include guidance that when evaluating a company's working relationship with similarly situated individuals the factor should evaluated on a business-model basis, rather separately evaluating each individual who does business with the company.

Fifth Factor – Integrated Unit

The proposed regulations would interpret this factor as follows:

This factor considers whether the work performed is an integral part of the employer's business. This factor does not depend on whether any individual worker in particular is an integral part of the business, but rather whether the function they perform is an integral part. This factor weighs in favor of the worker being an employee when the work they perform is

- critical,
- necessary, or
- central

to the employer's principal business. This factor weighs in favor of the worker being an independent contractor when the work they perform is not critical, necessary, or central to the employer's principal business.

The NPRM would replace the interpretation of this factor contained in the 2021 IC Rule, which considers whether an individual's work "is part of an integrated unit of production" of the employer's business, with a broader, more expansive interpretation of the factor, which would consider whether the work an individual performs is critical, necessary, or central to the employer's principal business.

- **This Factor Should be Interpreted Consistent With *Rutherford Food Corp.***

The 2021 IC Rule's interpretation is drawn from the interpretation of this factor by the U.S. Supreme Court in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), which reasoned that when individuals perform services in an employer's production line, on the employer's premises, where the employer's employees perform a function immediately prior to and immediately following the function performed by the individuals at issue, and all three functions are part of one

production process, this suggests that the individuals are economically dependent on that employer.[50]

The NPRM would replace the Supreme Court's interpretation with one that measures the extent to which the services an individual performs is critical, necessary, or central to the employer's principal business. The NPRM reasons, at 87 Fed. Reg., 62218, 62253, that:

> if the employer could not function without the service performed by the workers, then the service they provide is integral. Such workers are more likely to be economically dependent on the employer because their work depends on the existence of the employer's principal business, rather than there having an independent business that would exist with or without the employer.

But the NPRM does not explain why a finding that a company could not function without the service performed by an individual suggests that the individual is economically dependent on the company. The Coalition submits that such a finding proves nothing with respect to the individual's economic dependence on the company. The individual might well have many different clients for whom the individual performs services and not be remotely dependent on that specific employer for the individual's business to exist. The NPRM's formulation of the factor conflates the measurement of an individual's economic dependence on an employer with an employer's economic dependence on an individual.

The NPRM acknowledges that "there will be instances in which this factor [when interpreted in accordance with the NPRM's proposal] 'misaligns' with the ultimate result," but dismisses this reality, noting that "it is to be expected that not every factor will 'align' with the ultimate result in many cases." 87 Fed. Reg., 62218, 62254. It is submitted that the NPRM's proposed interpretation of this factor creates a high probability of misalignment because it does not measure an *individual's* economic dependence.

There are countless examples of scenarios where a company could not function without the service performed by an individual – but the individual is economically independent of that company. For example, consider a builder that offers clients a complete package whereby the company provides architectural drawings for a new structure and also builds the structure described in those drawings. To provide this complete package, the architectural drawings

[50] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947), provided the following analysis:

> the workers did a specialty job on the production line. The responsibility under the boning contracts without material changes passed from one boner to another. The premises and equipment of Kaiser were used for the work. The group had no business organization that could or did shift as a unit from one slaughter-house to another. The managing official of the plant kept close touch on the operation. While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. Upon the whole, we must conclude that these meat boners were employees of the slaughtering plant under the Fair Labor Standards Act.

arguably would be a critical, necessary, or essential part of the company's business. Without the architectural drawings, the company could not offer the complete package.

But it is entirely possible that the architect whom the company engages to provide the architectural drawings operates an economically independent business out of leased office space and with an abundance of different clients. It also is possible that the company has relationships with numerous different independent architects who each have their own clientele and a special expertise in designing a certain type of structure. Applying the NPRM's iteration of this factor to the company's relationship with these architects will produce a "misaligned" result in every case.

The NPRM also claims that "[n]o court has applied the 'integrated unit' approach adopted by the 2021 IC Rule." 87 Fed. Reg., 62218, 62254. This is simply not true. In *Tobin v. Anthony-Williams Mfg. Co.*, 196 F.2d 547, 548 (8th Cir. 1952), the court considered a case in which:

> About three years prior to the trial…, defendant made new arrangements with most of its employees who drove trucks hauling logs from the place where the timber was cut to the mill. Such haulers had previously been considered and paid as employees. Under the new arrangement, the truck drivers purchased their trucks from defendant and agreed to be paid for the logs hauled at a certain rate per thousand board feet hauled, dependent on the actual length of the haul.

In applying the economic reality test to these facts, the Eighth Circuit interpreted this factor as follows:

> In the case of Rutherford Food Corp. v. McComb, 331 U.S. 722, 729, 67 S.Ct. 1473, 1476, 91 L.Ed. 1772, in applying the Fair Labor Standards Act to boners of meat in a slaughter house operation, the Supreme Court said: 'We agree with the Circuit Court of Appeals, quoted above, in its characterization of their work as a part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment. Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act.' The same analysis can be made here. Defendant owns the timber or the timber rights where the logs are cut. Defendant's employee loads the trucks at defendant's will. The haulers and woods workers here are such an integrated part of defendant's production set-up that it would take a much clearer showing than anything indicated by the testimony in this case to remove these haulers and woods workers from the category of employees.

Tobin v. Anthony-Williams Mfg. Co., 196 F.2d 547, 550 (8th Cir. 1952).

The Coalition urges DOL to modify its NPRM by adopting the original interpretation of this factor, as set forth in in *Rutherford Food Corp.* As between the original U.S. Supreme Court interpretation and the interpretation the NPRM proposes, the original iteration is more aligned with answering the ultimate question of whether an individual is dependent on a particular business or organization for the individual's continued employment.

Sixth Factor – Skill and Initiative

The proposed regulations would interpret this factor as follows:

This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative. This factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the employer to perform the work. Where the worker brings specialized skills to the work relationship, it is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.

Explaining the proposed interpretation of this factor, the NPRM states:

> The Department is proposing that this factor be described as the ''skill and initiative'' factor and consider whether a worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative that is consistent with the worker being in business for themselves instead of being economically dependent on the employer.

87 Fed. Reg., 62218, 62254.

The NPRM's interpretation of this factor leans heavily toward indicating employment. First, the only skills it considers are "specialized skills." Second, for business-like initiative to be considered it must be attributable to those specialized skills. For an interpretation of this factor to faithfully adhere to answering the question of economic dependence, it should consider any type of skill and initiative that best measure an individual's economic dependence or independence.

- **The NPRM's Interpretation of this Factor Improperly Restricts its Consideration to Only Skills that are 'Specialized'**

The proposed interpretation of this factor considers only "specialized skills." But the NPRM acknowledges the narrowness of its interpretation by its observation that "[c]onsistent with the principle that no one factor is dispositive, however, workers who lack specialized skills may be independent contractors even if this factor is very unlikely to point in that direction in their circumstances." 87 Fed. Reg., 62218, 62254. This acknowledgment is followed by an example illustrating the interpretation's undue narrowness:

> A landscaper, for example, may perform work that does not require specialized skills, but application of the other factors may

> demonstrate that the landscaper is an independent contractor (for example, the landscaper may have a meaningful role in determining the price charged for the work, make decisions affecting opportunity for profit or loss, determine the extent of capital investment, work for many clients, and/or perform work for clients

The NPRM acknowledges that its interpretation of this factor is misaligned as applied to this example. But there are countless examples of individuals operating a type of business that does not require a skill that the NPRM would characterize as "specialized" but nonetheless requires a high level of skill and business acumen for the business to operate profitably. A proper interpretation of the factor, when applied to this example, would accurately point in the direction of economic independence.

A true measure of economic independence would not restrict the analysis of skill and initiative to only "specialized skills" but instead would consider "all major components open to initiative," *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1314–15 (5th Cir. 1976), such as "managerial skill," which the Third Circuit considered in *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1386–87 (3d Cir. 1985) In *Donovan,* the court reasoned that:

> 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.

(Emphasis added).[51]

It is submitted that an interpretation of this factor that considers a broader scope of skills, such as "managerial skill," would be more consistent with federal circuit decisions and better measure economic dependence.

---

[51] Accord, *Saleem v. Corp. Transportation Grp., Ltd.*, 854 F.3d 131, 143–44 (2d Cir. 2017)("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").

- **The NPRM's Interpretation of this factor Improperly Restricts its Consideration of Business-Like Initiative to Initiative Attributable to Specialized Skills**

As noted, the NPRM's interpretation would ignore any initiative that is not attributable to an individual's specialized skill. The landscaper example, discussed above, demonstrates that the proposed interpretation does not accurately measure economic dependence. The business management skills described in the landscaping example arguably could also be characterized as initiative. But because such initiative would not be attributable to "specialize skills," it would be disregarded.

A proper interpretation of this factor is wholly aligned with the outcome when applied to facts similar to those in the landscaper example. This is illustrated by the decision in *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983), which involved a manufacturer's sales representative, the court reasoned that:

> Hickey was able to exert initiative in the operation of his business. Certain major components of a business which are open to initiative—advertising himself and his companies, the methods of marketing and sales, the choice of other products to sell—were controlled by him. In short, he had an enterprise whose success actually depended upon *his* initiative, judgment and foresight.

The initiative that Hickey exercised, and which the court found to evidence economic dependence, was not attributable to any "specialized skill."

Accordingly, the Coalition respectfully urges DOL to interpret this factor to consider any business initiative that demonstrates an individual's economic independence, regardless of whether the initiative is attributable to any skills. Such an interpretation would better measure an individual's economic dependence.

IV. Conclusion

The Coalition respectfully urges DOL not to rescind the 2021 IC Rule and not to issue regulations containing a new iteration of the economic reality test.

The NPRM's proposed new iteration of the economic reality test would not provide additional clarity or predictability, it would not update the test to reflect the modern economy, and it would broaden the definition of "employee" and thereby expand the coverage of the FLSA, without Congressional authorization.

If DOL nonetheless issues regulations containing a new iteration of the test, the Coalition respectfully urges DOL to adopt the proposed modifications contained herein, so the new iteration better answers the ultimate question of economic dependence and better reflects the modern economy.

Thank you very much for your consideration. The Coalition would welcome an opportunity to meet with you and your colleagues to discuss these comments.

Very truly yours,

Russell A. Hollrah

Russell A. Hollrah
Executive Director
rhollrah@iecoalition.org