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Ms. Jessica Looman
Principal Deputy Administrator
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

By electronic submission: http://www.regulations.gov

Re: Proposed Rule, Department of Labor; Employee or Independent Contractor Classification under the Fair Labor Standards Act; Fed. Reg. 62218; RIN 1235-AA3487 (Oct. 13, 2022)

Dear Ms. Looman:

The U.S. Chamber of Commerce (the "Chamber") presents these comments to the Department of Labor ("the Department" or "DOL") in response to its Notice of Proposed Rulemaking and Request for Comments regarding Employee or Independent Contractor Classification under the Fair Labor Standards Act (the "FLSA" or the "Act") ("Proposed Rule").

The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system. More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Introduction

The implicit premise of the Proposed Rule is that legitimate independent contracting is a poor substitute for being an employee. This is simply wrong. Use of independent contractors offers workers (as well as businesses) important advantages over employment status. It is a disservice to both businesses and to the independent contractors themselves—as well as consumers—to take away their right to choose and to rewrite the structure of their economic relationships.

Businesses of all kinds and sizes choose independent contracting to remain nimble and competitive in the face of a fluctuating business environment. The benefits to companies are well-documented. Independent contractors allow businesses to benefit from greater efficiency, as independent contractors are typically experts in their product, market, and/or service or otherwise provide access to services that would not be available

to consumers. The Supreme Court itself has recognized these benefits in the trucking context, *see Transamerica Freight Lines, Inc. v. Brada Miller Freight Sys.*, 423 U.S. 28, 35 (1975), and economists have recognized these benefits for all sectors of the economy.

The independent contractor model is particularly vital to small businesses, which rely on independent contractors' expertise to grow their businesses. Because contracting reduces the importance of economies of scale, it allows small businesses to compete with larger ones (foreign and domestic), thereby increasing competition and lowering prices for all consumers.[1] Access to independent contractors is critical in industries where securing talent is increasingly competitive and the talent pool prefers short-term, flexible work arrangements without committing to a single employer.

Workers, for their part, choose independent contracting because it offers them flexibility and independence.[2] An independent contractor, unlike an employee, enjoys "the ability to choose his or her own hours, clients and manner in which the work is completed." Contracting offers workers the opportunity to take "control over their economic destiny." Because independent contractors can decide when, how, and with whom to do business, "the quantity and quality of work is better correlated with the amount of money they make."[3] Critically, independent contractors are able to diversify the sources of their income so that they are better able to withstand downturns in the economy or the fortunes of the businesses with which they contract most often.

In sum, policies that encourage independent contracting facilitate productivity growth, thereby making the economy more competitive. They also help workers with entrepreneurial inclinations[4] to pursue higher income, and an autonomy that leads to greater work satisfaction for nine in ten independent contractors.[5] Policies that inhibit the formation of independent contractors have the opposite effect: muzzled competition, stunted incomes, decreased flexibility and opportunity, and significant job loss.

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[1] Jeffrey A. Eisenach, *The Role of Independent Contractors in the U.S. Economy*, Navigant Economics (Dec. 2010) at ii, *available at* https://bit.ly/3v68vwF (last visited, Nov. 10, 2022) (hereinafter "Eisenach, *The Role of ICs*"); Philip J. Romero, *The Economic Benefits of Preserving Independent Contracting* (Sept. 2011), *available at* https://tinyurl.com/35nu4xk7 (last visited, Nov. 12, 2022) (hereafter "Romero, *Economic Benefits of ICs*").

[2] In January 2020, the Chamber published a white paper, *Ready, Fire, Aim*, which catalogues myriad studies showing the benefits of the gig economy to the modern economy and the harm reclassification of independent contractors into employees would have on the economy and workers. A copy of this white paper is attached to this Comment as Exhibit A.

[3] Cohen and Eimicke, *Independent Contracting Policy and Management Analysis*, at 16 (Aug. 2013), *available at* https://tinyurl.com/525hra35 (last visited, Dec. 5, 2022).

[4] At various places, as DOL discusses being entrepreneurial, the implication is that being entrepreneurial subsumes having a strong drive or zeal in connection with the service or result delivered. While the Chamber agrees that such initiative is indicative of independent business activity and, thus, independent contractor status, the failure to exercise drive or zeal in connection with the work performed or other aspects of the worker's business does not support employee status. Plenty of workers are in business for themselves without demonstrating great drive or zeal; in fact, the lack of zeal might be exactly why they like being independent and reflective of their independence.

[5] Eisenach, *The Role of ICs*, at 33-34.

Earlier this year, Secretary of Labor Marty Walsh observed in remarks during the U.S. Conference of Mayors: "In addition to retirements, we are also seeing more people go into business for themselves. In 2021, the number of self-employed workers grew by over seven percent."[6]

Against this backdrop, the Department has proposed a rule that would not only lead to significant reclassification of independent contractors but would also lead to a considerable increase in litigation. The bias in favor of employee status, which appears throughout the Proposed Rule, makes the risk that independent contractors would be misclassified as employees especially acute, with potentially dramatic consequences for entire industries. The Department does not appear to have considered the harm that would result to businesses and workers.

Moreover, the Proposed Rule would revert to a completely unweighted, nebulous, multi-factor balancing test, referred to as "totality of circumstances," 87 Fed. Reg. 62219 and *passim,* that was the hallmark of Administrator's Interpretation 2015-1 issued by Wage and Hour Administrator David Weil during the Obama administration and subsequently rescinded by Secretary Acosta. The Proposed Rule's amorphous standard is sure to result in endless, costly, and widespread litigation. The Proposed Rule rejects the clear rules of decision established by the Department's January 2021 rule entitled "Independent Contractor Status Under the Fair Labor Standards Act" (the "2021 IC Rule"). The approach set out in the Proposed Rule would yield *less* predictability and less consistent results,[7] which is contrary to a primary asserted justification for the Proposed Rule—predictability.

Like AI 2015-1 before it, the Proposed Rule would leave employers uncertain they have correctly classified a worker as an independent contractor since they would not be able to know which factors the Department of Labor would favor in their analysis. The only time an employer would be certain their classification would withstand scrutiny is if they classify a worker as an employee, as the Department of Labor will never question that classification.

Accordingly, for the reasons stated below, the Chamber urges the Department not to rescind the 2021 IC Rule and to discard the Proposed Rule entirely.

Comments

A. The Proposed Rule hinders worker freedom and ignores economic benefits.

[6] U.S. Department of Labor, *Remarks of Labor Secretary Martin J. Walsh to U.S. Conference of Mayors* (January 21, 2022) https://www.dol.gov/newsroom/speech/20220121 (last visited Dec. 6, 2022).

[7] *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 136 (2014) ("[E]xperience has shown that . . . open-ended balancing tests . . . can yield unpredictable and at times arbitrary results."); *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010) (rejecting a multi-factor test in favor of a clear rule to "produce[] reasonably predictable results").

Numerous recent studies confirm that independent workers believe they are more financially secure as independent contractors than as employees.[8] One study found that "[a] large majority of self-employed women (73 percent) have realized a better work-life balance as compared to their status as traditional employees, with most earning as much if not more income working for themselves (68 percent)."[9] Independent contractors are also more productive (i.e., produce higher value per hour worked), allowing them to achieve higher incomes than equivalent occupations in large firms.[10] As the Department previously found, "freelancers and contract workers are paid more per hour than traditional employees."[11]

The advantages afforded by independent contracting have led to greater work satisfaction. According to the Pew Research Center, self-employed workers are "significantly more satisfied with their jobs than other workers. They are more likely to work because they want to and not because they need a paycheck."[12] The Department's own statistics on the matter confirm that "79 percent of independent contractors preferred their arrangement over a traditional job."[13] Indeed, industry-specific studies have likewise found that independent contractors overwhelmingly favor their independent contractor status.[14]

There is also a trend toward younger, more educated, creative workers embracing the independent contractor model, freelancing their skills across various industries. A study conducted on behalf of the Direct Selling Association showed that while 77% of Americans are interested in flexible, entrepreneurial/income-earning opportunities, 91% of Gen Zers and 88% of Millennials were interested in entrepreneurial opportunities. This study also found that about 80% of respondents viewed direct selling and gig opportunities favorably.[15] Similarly, Morning Consult surveyed 1,251 app-based workers across the country and found that 77% of app-based workers wanted to remain working as

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[8] *See* "State of Independence," MBO Partners (Dec. 2021), *available at* https://tinyurl.com/5n8kc4jj (last visited, Nov. 15, 2022); Dr. Adam Ozimek, Freelance Forward Economist Report, *available at* https://tinyurl.com/4avkbf63 (last visited, Nov. 15, 2022).

[9] FreshBooks 2019 Annual Report, at p. 2, *available at* https://tinyurl.com/4pxsvcvt (last visited, Nov. 13, 2022).

[10] *See* Arne L. Kalleberg, "Nonstandard employment relations: Part-time, temporary and contract work." Annual Review of Sociology, at 357 (2000), *available at* https://tinyurl.com/24hzs8nz (last visited, Nov. 13, 2022).

[11] 86 Fed. Reg. at 1219, 1219 n. 126 (citing Lawrence F. Katz and Alan B. Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015," ILR Review 72.2, 382-412 (2019); BLS, 2017 CWS data).

[12] Rich Morin, "Job Satisfaction Among the Self-Employed," Pew Research Center (Sep. 2009), *available at* https://tinyurl.com/mw5f242s (last visited, Nov. 15, 2022).

[13] *See* Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements News Release* (May 2017), *available at* https://www.bls.gov/news.release/conemp.htm (last visited, Nov. 11, 2022).

[14] For example, a 2011 study conducted by the Mack-Blackwell Rural Transportation Center at the University of Arkansas found that independent truck drivers preferred working as independent contractors. A September 2012 survey by Elance.com (now Upwork.com) found that 69% are happier working as a freelancer, and 23% are equally as happy as working as W-2s.

[15] *Available at* https://tinyurl.com/5ccj7xnz (last visited, Nov. 13, 2022).

independent contractors, with only 11% preferring employment status.[16] Other studies have likewise found that "gig" workers overwhelmingly preferred working as independent contractors.[17]

One example is the September 2020 Freelance Forward Study commissioned by Edelman Intelligence for Upwork ("Freelance Forward Study"), which found: (1) the freelance workforce remains an essential pillar of the U.S. economy (with freelancers contributing $1.2 trillion dollars to the U.S. economy in annual earnings; a 22% increase since 2019); (2) freelancers are increasingly high-skilled (50% provide skilled services such as computer programming, marketing, IT, and business consulting); (3) freelancing increases earnings potential (75% of independent workers reported earning the same or more pay than their earnings as an employee); and (4) 58% of traditional employees are increasingly considering independent work in the future. Upwork's Chief Economist noted that "the changing dynamics of the workforce that has occurred during the (pandemic) crisis demonstrate the value that freelancing provides to both businesses and workers."[18]

This mountain of scholarly research debunks the misconception that workers are involuntarily forced into independent contracting. Rather, the popularity of independent contracting results from the unique benefits to both workers and businesses. These benefits go far beyond worker preference. In addition to workers' desire to "be their own boss," "there is a strong relationship between independent contracting, entrepreneurship, and small business formation."[19] The connection between contracting and small business formation stems from the skills acquired during contracting work — "unlike employees, independent contractors are required to learn how to prepare and send invoices, maintain records, acquire capital, comply with licensing and other regulatory requirements, file taxes, and so on."[20]

These "entrepreneurial small businesses are critical to our economy."[21] An extensive body of economic literature establishes that small businesses have been responsible for most of the net growth in U.S. employment for decades.[22] Besides its long-run significance, firm creation is also a potent weapon during recessions (*i.e.*, it is counter-cyclical), as a JPMorgan Chase Institute study establishes.[23] "Thus, for example, independent contracting facilitates the transition of laid off workers into new jobs, and provides workers in general,

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[16] *Available at* https://www.flexassociation.org/workersurvey (last visited, Nov. 13, 2022).

[17] Lyft Classification Survey, Uber Study, Cygnal Boll.

[18] *Available at* https://www.upwork.com/research/freelance-forward-2021 (last visited, Nov. 12, 2022).

[19] Eisenach, *The Role of ICs*, at 36, *available at* https://bit.ly/3v68vwF (last visited, Nov. 10, 2022).

[20] Eisenach, *The Role of ICs*, at 37.

[21] Steven H. Hobbs, *Toward A Theory of Law and Entrepreneurship*, 26 Cap. U. L. Rev. 241, 297 (1997).

[22] *See* Romero, *Economic Benefits of ICs*.

[23] D. Farrell, F. Greig, and A. Hamoudi, "The Online Platform Economy in 27 Metro Areas: JPMorgan Chase Institute," JPMorgan Chase Institute (2019), *available at* https://www.jpmorganchase.com/institute/research/labor-markets/report-ope-cities.htm (last visited, Nov. 13, 2022).

but especially women, with the ability to enter and exit the workforce in response to family, retirement, and other life changes."[24]

Independent contracting has also fostered innovation.[25] Network companies that facilitate the process of matching providers with customers have spurred the dramatic growth of the "gig" economy.[26] One of the best-known innovative types of "gigs" allows people to use personal or other vehicles to make extra money. Prior to the app revolution, thousands of Americans owned cars and were willing to use them to earn extra income, but the barriers to entry were insurmountable. As picking up riders looking for transportation or volunteering to deliver food from restaurants were not realistic options, Americans who wanted to drive for a living would have had to quit their jobs, find employment as a taxi driver or courier, and—in many cases—drive someone else's car.

Apps such as Uber, Lyft, Grubhub, Postmates, and DoorDash changed all that. Drivers who want to find passengers or deliveries can simply download an app and be connected with passengers or consumers who want their services. By working independently—when, where, how, and for whom they wish—drivers can boost their income while accommodating their other work or personal lives: a parent can work around school functions; a retiree can supplement savings; an artist can work in between shows; a person with a long commute can make extra money by driving someone else home. Significantly, the vast majority of drivers for apps such as Uber or Lyft do so part-time, because they either engage in other independent contractor work or are gainfully employed.[27] Independent work allows these workers to take control of their earning potential by supplementing their income when they desire.[28]

The innovation has carried particular benefits for lower-income Americans who historically have had trouble accessing goods and services that higher-income Americans take for granted. For example, many lower-income Americans live in "food deserts"—areas with low access to stores selling fresh, healthy food. Yet, a recent study shows that 90% of

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[24] Eisenach, *The Role of ICs*, at 39.

[25] Studies have indicated that companies that successfully carried out process or production innovations displayed higher levels of non-traditional employment models—including contracting, part-time, freelance and temporary workers. (Kratzer 35.)

[26] The Chamber Paper defines the gig economy as "the one-to-one exchange of goods and services between service providers and end-market customers facilitated by virtual-marketplace companies (or "platform holders")." (Chamber Paper at 11.) These platforms are incredibly diverse and, collectively, encompass large swaths of the economy. For example, network companies match providers with customers in the following industries (among others): short-term accommodations; business; wellness; creative design; accounting; copy editing; personal fitness; commercial real estate; healthcare; handyman services; pet care; legal services; finance; fundraising; customer services; logistics; and management consulting.

[27] *See* Jonathan V. Hall and Alan B. Kruger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States*, 71 ILR Rev.: J. Work & Pol'y 705, 713 (2018) ("Hall and Kruger, *Uber's Driver-Partners Analysis*"), *available at* https://tinyurl.com/4drmf2zu (last visited, Nov. 15, 2022) (two-thirds of Uber drivers work either full-time or part-time on another job).

[28] *Id*. at 713 (noting that "71% of driver-partners in 2014 replied that partnering with Uber has increased their overall income").

people living in food deserts have at least one digital food access option—and the service rate exceeds 95% in food deserts within metropolitan areas.[29]

Unsurprisingly, study after study has made corollary findings that deterring independent contractor use would be deleterious for the American economy, leading to significant job loss and outsourcing.[30] For example, recent research conducted by Beacon Economics found that reclassifying rideshare and food delivery drivers from independent contractors to employees would result in a loss of more than 116,000 app-based jobs in Massachusetts alone.[31] Additional support for the conclusion that any legal rule which is overly restrictive and hostile to independent work opportunities would be detrimental to the American economy is detailed throughout the Chamber's *Ready, Fire, Aim* white paper.[32]

B. The proposed rescission of the 2021 IC Rule is arbitrary and capricious because the Department has failed to provide "good reasons" for rescinding the 2021 IC Rule.

As the Chamber noted in its Comment opposing the Department's attempted rescission of the 2021 IC Rule, the 2021 IC Rule "has provided a contemporary interpretation of the economic realities test that has been long relied upon to determine whether a worker should be classified as an employee or an independent contractor under the FLSA. The Chamber believes the [2021 IC Rule] . . . properly focuses on modern, understandable, and meaningful factors. This would benefit workers, consumers, entrepreneurs, independent artists, writers and creators, sole proprietors, business of all sizes, and the overall economy." After the Department's effort to withdraw the 2021 IC Rule was rejected by the Eastern District of Texas, it now seeks again to rescind the 2021 IC Rule. However, its reasons for doing so are arbitrary and capricious because it has failed to provide legally sufficient reasons for its abrupt reversal in policy.[33]

While agencies are free to reverse policy, they must, at a minimum, offer good reasons for the change and explain why they are "disregarding facts and circumstances that underlay or were engendered by the prior policy."[34] This requires the agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational

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[29] *See* Caroline George & Adie Tomer, *Delivering to Deserts: New Data Reveals the Geography of Digital Access to Food in the U.S.*, Brookings (May 11, 2022), *available at* https://brook.gs/3NI3YcG (last visited, Nov. 12, 2022).

[30] *See, e.g.*, Eisenach, *The Role of ICs*, at 35-38.

[31] *Available at* https://tinyurl.com/4x3k6h4a (last visited, Nov. 13, 2022).

[32] Chamber Paper at 31-37. Proponents of changing the law to include more workers in the employee category also claim that gig platforms' business models are inherently wrong, and that they threaten traditional employment relationships and the social safety net. However, data shows that traditional employment still far outpaces independent worker models, and even businesses that contract with independent workers do have their own traditional employees in roles that suit such a relationship: "Gig companies did not undermine the traditional labor market; they provided new opportunities to workers" (internal citation omitted). (Id. at 32-33.)

[33] *See Encino Motors, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

[34] *Encino Motors, LLC*, 136 S. Ct. at 2125.

connection between the facts found and the choices made."[35] Arbitrariness may be inferred from a "clear error" in judgment, such as where an agency has "offered an explanation for its decision that runs counter to the evidence before the agency."[36] In short, "[a]n agency acts arbitrarily and capriciously when it offers inaccurate or unreasoned justifications for a decision."[37] The Department's proposed rescission of the 2021 IC Rule fails this standard in multiple ways.

First, the Department appears to be using an outdated (and overruled) methodology for interpreting the FLSA. In *Encino Motorcars, LLC v. Navarro*, the Supreme Court rejected the "flawed premise that the FLSA 'pursues' its remedial purpose 'at all costs.'"[38] Instead, the Court held that the FLSA must be given a "fair read." In its Notice of Proposed Rulemaking ("NPRM"), the Department contends that *Encino* is limited to construing FLSA exemptions.[39] Yet, there is nothing in the Supreme Court's opinion to suggest that its interpretative principle is limited to analyzing exemptions, as courts have clarified. In *McKay v. Miami-Dade County*, for example, the Eleventh Circuit held that when determining whether a person is an employee or not, the FLSA must be given a "fair read," not construed in light of the FLSA's supposed humanitarian and remedial purposes.[40]

Second, the Department contends that the 2021 IC Rule does not "comport" with the text of and case law construing the FLSA because it elevates the control and opportunity for profit/loss prongs, analyzes investment and initiative under the opportunity for profit/loss prong (as opposed to separately), and replaces the integral prong with the "integrated unit" inquiry. 87 Fed. Reg. at 62227–62229. However, the Department was justified in fashioning the 2021 IC Rule in this manner.

The control and opportunity for profit/loss prongs "strike at the core" of what it means to be in business for oneself, 85 Fed. Reg. 60612, and therefore are more probative of independent contractor status than other factors. As courts and scholars have found, despite the ostensible variances between the economic realities and common law control tests, "there is no functional difference between" these tests.[41] Thus, the Department rightly elevated the importance of control, which makes good sense because if the hiring entity exercises too much control that precludes the worker from being able to exercise

[35] *State Farm*, 463 U.S. at 43.

[36] *State Farm*, 463 U.S. at 43.

[37] *Environmental Defense Fund v. EPA*, 992 F.3d 446, 454 (D.C. Cir. 2019).

[38] 138 S. Ct. 1134, 1142 (2018) (quoting *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 234 (2013)).

[39] 87 Fed. Reg. at 62234 n. 206.

[40] 36 F.4th 1128, 1133 (11th Cir. 2022) (citing *Encino*).

[41] *See Murray v. Principal Fin. Grp., Inc.*, 613 F.3d 943, 945 (9th Cir. 2010) (finding that "there is no functional difference between the three formulations" of employee status expressed by the common law agency test, the economic realities test, and a hybrid test); Restatement of Emp't Law § 1.01 rep. notes (Am. Law Inst. 2015) (noting the "lack of any sharp distinction between the common-law test . . . and a multifactor economic-realities").

entrepreneurial control to further her own interests, which is a hallmark of being an independent contractor.[42]

Similarly, the Department was right to elevate the opportunity for profit/loss prong, because this factor, like control, speaks directly to whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss—again, a hallmark of someone in business for themselves. Contrary to the Department's view expressed in the Proposed Rule, the case law fully supports the standard articulated by the 2021 IC Rule.[43]

The other factors are simply not as probative. Take the skill prong. Despite the fact that painting may be a "low-skilled" job, no one would dispute that an individual who paints a house is an independent contractor of the homeowner. The probative value of permanence is often unclear. As courts have found, businesses may "repeatedly use[] the same subcontractors due to satisfaction with past performance," and this is not probative of employment status.[44] Similarly, as the Fifth Circuit found, "the permanency of the relationship may, in reality, be not all that permanent," due to the contractor's skillset and voluntary choice *not* to contract with others.[45] Finally, some courts simply do not consider the integral prong whatsoever.[46] It therefore cannot possibly be as important as the control and opportunity for profit/loss prongs.

The Department also correctly, in the 2021 IC Rule, analyzed investments and initiative under the opportunity for profit/loss prong, as investment in one's business and managerial initiative are "interrelated to the profit and loss consideration."[47] Investing in one's business necessarily entails creating an opportunity for profit or risking a loss on that investment. As the Fourth Circuit explained, "[t]he more the worker's earnings depend on his own managerial capacity rather than the company's, and the more he is personally invested in the capital and labor of the enterprise, the less the worker is 'economically dependent on the business' and the more he is 'in business for himself' and hence an independent contractor."[48] Stated differently, when a worker makes a capital investment in resources required for the work, they assume responsibility for economic uncertainty associated with the investment. If a worker purchases a car to use as a driver for a ride-sharing application, for example, they may find themselves with a potential loss if automation significantly reduces the demand for ride-sharing drivers in the near future. The purchase of the vehicle is thus risking capital, even if they also use the vehicle for personal use.

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[42] Restatement of Emp't Law § 1.01 cmt. d.

[43] *See, e.g.*, *Gayle v. Harry's Nurses Registry, Inc*., 594 F. App'x 714, 717 (2d Cir. 2014) (describing control and profit/loss prongs as "critical" factors); *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 344 (5th Cir. 2008) (finding no independent contractor status in large part because the evidence showed the putative employer controlled all meaningful aspects of the business model, along with the opportunity for profit).

[44] *See Donovan v. Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984).

[45] *See Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 387 (5th Cir. 2019).

[46] *See Parrish*, 917 F.3d at 379.

[47] *Saleem v. Corp. Transp. Group, Ltd.*, 854 F.3d 131, 144 n.29 (2d Cir. 2017).

[48] *McFeeley v. Jackson Street Entertainment, LLC*, 825 F.3d 235, 243 (4th Cir. 2016).

Focusing the integral prong on an integrated unit of production is fully supported by the extant decisional law.[49] The Supreme Court has described this prong as considering whether the worker is part of an "integrated economic unit" in the putative employer's business.[50] In *U.S. v. Silk*, the Court clarified that merely because a service is important to a business does not make the workers providing that service employees:

> There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. . . Where a part of an industrial process is in the hands of independent contractors, they are the ones who should pay the social security taxes.[51]

Therefore, the 2021 IC Rule's lesser focus on "integrated unit," as opposed to importance, fully aligns with Supreme Court precedent, which the Department acknowledges should be the touchstone for crafting an independent contractor test.

Third, the Department justifies rescinding the 2021 IC Rule on the grounds that it would be confusing and disruptive. 87 Fed. Reg. at 62229. This is paradoxical. In connection with the 2021 IC Rule, the Department "compiled a record that contained extensive evidence" of the confusion that regulated parties face while classifying individuals as employees or independent contractors, and the resulting costs from this confusion, due to the often conflicting results reached by courts, sometimes within the *same* jurisdiction. 86 Fed. Reg. 1,246; *see also* 86 Fed. Reg. 1168-1175, 1178-1196, 1209-1234. This stemmed from the problems inherent in the economic-realities test, as Judge Easterbrook explained:

> But "reality" encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why? A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision.[52]

The 2021 IC Rule provided much needed guidance on how to "sift the material from the immaterial" by consolidating the test around two core factors.[53] At the same time, it remained flexible by not making the two core factors dispositive and by incorporating the

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[49] *See, e.g.*, *Green v. Premier Telecomm. Servs., LLC*, 2017 WL 4863239, at *14 (N.D. Ga. Aug. 15, 2017) ("While certainly Plaintiff performing his job was integral to Premier's bottom-line, unlike in *Rutherford*, Plaintiff did not perform one step in an integrated system.).

[50] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726 (1947).

[51] 331 U.S. 704, 714 (1947).

[52] *Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring).

[53] Really, three core factors, because the 2021 IC Rule subsumes the investment factor into the profit/loss factor. The investment factor is, therefore, part of the core factor analysis.

other factors that courts have traditionally used to determine independent contractor status.

In its place, the Department seeks to return to a nebulous and malleable "totality-of-circumstances" approach, but asking "judges to examine all the facts, and balance them, avoids formulating a rule of decision." A test that asks courts to conduct a case-by-case analysis of the economic relationship without any reliance on formal guidance risks increasing the level of unpredictability and variations across and within jurisdictions.

The contention that the 2021 IC Rule will be confusing and disruptive is at odds with the fact that certain Courts of Appeal *already view* control and opportunity for profit and loss as core factors and analyzing investments under the profit and loss prong.[54] Far from disrupting FLSA jurisprudence, the 2021 IC Rule is in conformity with it.

The Department's contention is further undermined by the fact that the regulated community overwhelmingly favored the 2021 IC Rule. In addition to the Chamber, many other stakeholders found that the clarity of the 2021 IC rule would help workers and businesses to accurately structure and maintain their relationships and fully realize the macroeconomic benefits of independent work across the economy for the benefit of independent workers, consumers, and businesses.

Thus, by rescinding the 2021 IC Rule, the Department is exacerbating a problem it purports to be solving. This is inherently arbitrary and capricious action. Moreover, not only is there no evidence that the 2021 IC Rule is deficient, to the contrary, the Department has issued nearly 20 press releases extolling its success in enforcing misclassification since the 2021 Rule was reinstated.

Finally, the Department now believes that the 2021 IC Rule did not "fully consider[] the likely costs, transfers, and benefits that could result from the Rule." 87 Fed. Reg. at 62229. More specifically, the Department criticizes the 2021 IC Rule for failing to consider the consequences of workers being misclassified as independent contractors. *Id*. at 62230. Here the Department confuses misclassification for changing the rules. Misclassification occurs when an employing entity, using the rules in place, reaches a conclusion that is demonstrably contrary to that which the facts and rules dictate, for example when a dishwasher at a restaurant is misclassified as an independent contractor. For the Department to say legitimate independent contractors were misclassified under the 2021 IC Rule, merely because it now proposes a new standard is nonsensical and reveals the true intent of the NPRM to lead to more employee classifications rather than being a better tool for identifying true cases of misclassification.

Implicit in the Department's new belief is the assumption that working as an independent contractor is undesirable and low-paying. The data refutes this assumption. As delineated above, myriad studies establish that the overwhelming number of independent contractors voluntarily choose to be independent contractors not only because of the opportunity to increase their earnings, but also because of the non-

[54] *See Saleem*, 854 F.3d at 144; *McFeeley*, 825 F.3d at 243; *Gayle*, 594 F. App'x at 717.

pecuniary benefits that come with independence, such as the ability to choose their own hours, clients and manner in which the work is completed.

Moreover, contrary to the Department's current belief, the Department *did* consider the costs and benefits associated with the 2021 IC Rule and found that it "is expected to result in cost savings to firms and workers." 86 Fed. Reg. at 1232. More specifically, in enacting the 2021 IC Rule, the Department considered the increased legal clarity and reduced litigation, improved labor market conditions, improved worker satisfaction and flexibility, income smoothing (i.e., income supplementing), and diversification likely to result from the 2021 IC Rule. *Id*. at 1232–1238.

Workers and businesses must have an easily understood, unambiguous, updated, and uniform test to determine whether a worker is an employee or an independent contractor under the Act. That's what the 2021 IC Rule provided, and the Department has utterly failed to provide *any* good reason to rescind it and replace it with a convoluted, vague, and outdated standard for determining independent contractor status.

C. The Proposed Rule fundamentally misconstrues the factors used by courts to determine independent contractor status and tilts them all in favor of finding employee status.

There is nothing more helpful to workers and businesses in setting up their relationships, and managing them to conform to legal requirements, than for regulatory bodies and courts to provide specific guidance regarding the effect of common fact situations on the ultimate classification of the worker as an employee or independent contractor. The Proposed Rule fails to do so. Instead of doing this, the Proposed Rule would lead to greater uncertainty and litigation because it is inherently vague and standardless.

Moreover, the Proposed Rule frames the economic realities test in a way that places a thumb on the scale in favor of employee status at every opportunity. Indeed, it relies on cases and principles that have nothing to do with the ultimate inquiry: whether a worker is economically dependent on a business or in business for themselves.

1. The Department misconstrues the control prong.

The Chamber agrees with the Department that the nature and degree of a worker's control over the work is an appropriate factor in determining whether a worker is economically dependent on a business or in business for themselves independently. As courts and scholars have noted, this is a "critical" factor and decisions largely turn on this factor alone.

As courts have recognized, a worker's right to impact their work schedule (by deciding how much work they do and retaining the right to reject or seek out additional projects subcontractors, engagements, gigs, or offers), as well as a worker's right to impact the type of work they do, are examples of a worker's control over the work and therefore

proof of independent contractor status.[55] So too is a worker's ability to determine the manner and method of how they choose to complete a project and if they work with little to no supervision by the putative employer, regardless of the nature of the work to be performed. In contrast, and as the case law overwhelmingly establishes, compliance with legal rules and safety requirements is *not* evidence of employee status, because such rules and requirements apply to employees and independent contractors equally.[56] As the Second Circuit held in the joint employment context, "supervision with respect to contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry, as such supervision is perfectly consistent with a typical, legitimate subcontracting arrangement."[57]

The Department departs from these well-settled principles defining evidence of control. Instead, the Department states that the nature of a business, technological means of supervision, compliance with safety and legal obligations, and reserved control are relevant to the analysis. As explained below, the Department's assertions are misguided.

a. Nature of employer's business is irrelevant.

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[55] *See, e.g., Karlson v. Action Process Serv. & Private Investigations, LLC,* 860 F.3d 1089, 1094-95 (8th Cir. 2017) (a worker is an independent contractor where the worker decides which assignment to accept, does not report to work at a specific time, or punch a time clock); *Alexander v. Avera St. Luke's Hosp.,* 768 F.3d 756, 762 (8th Cir. 2014) (a doctor who maintained complete freedom to set his schedule showed independence).

[56] *See, e.g.*, *Parrish*, 917 F.3d at 382 (safety standards on oilfield not probative of control); *Iontchev v. AAA Cab Serv., Inc.*, 685 F. App'x 548, 550 (9th Cir. 2017) (noting that the potential employer's "disciplinary policy primarily enforce the Airport's rules and [the city's] regulations governing the [drivers'] operations and conduct" in finding that the potential employer "had relatively little control over the manner in which the [d]rivers performed their work"); *Chao v. Mid-Atl. Installation*, 16 F. App'x 104, 106 (4th Cir. 2001) (rejecting argument that backcharging workers "for failing to comply with various local regulations or with technical specifications demonstrates the type of control characteristic of an employment relationship," and noting that withholding money in such circumstances is common in contractual relationships); *Taylor v. Waddell & Reed, Inc.*, 2013 WL 435907, at *6 n. 27 (S.D. Cal. Feb. 1, 2013) (finding Financial Advisors were independent contractors and rejecting the notion that broker-dealer's supervisory requirements under SEC and FINRA rules constituted control for purposes of determining employment status); *Murray v. Principal Fin. Grp., Inc*., No. CV 08-1094-PHX-SRB, at 10 n.4 (D. Ariz. July 14, 2009) ("[s]imply requiring Plaintiff to comply with laws and regulations related to insurance (a heavily-regulated industry) does not rise to the level of control an employer has over an employee."), *aff'd*, 613 F.3d 943 (9th Cir. 2010); *Feldmann v. N.Y. Life Ins. Co*., 2011 WL 382201, at *9-10 (E.D. Mo. Feb. 3, 2011) (finding on summary judgment that financial advisor was an independent contractor under economic realities test); *see also Moreau v. Air France*, 356 F.3d 942, 950-51 (9th Cir. 2003) (nothing that control exercised by potential joint employer over contractor's employees to "ensure compliance with various safety and security regulations" is "qualitatively different" from control that indicates employer status); *Weary v. Cochran*, 377 F.3d 522, 526 (6th Cir. 2004) (compliance with legal guidelines as stated in corporate manual "is not the type of control that establishes an employer/employee relationship"); *Chao v. Bebe Stores, Inc*., 247 F. Supp. 2d 1154, 1161 (C.D. Cal. 2003) (ensuring compliance with California labor laws is not "control" under the FLSA in the joint employment context).

[57] *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 75 (2d Cir. 2003) (citing, *inter alia*, James Brian Quinn and Frederick G. Hilmer, Strategic Outsourcing, Sloan Mgmt. Rev., Summer 1994, at 43, 53 (explaining that "[t]he most successful outsourcers find it absolutely essential to have both close personal contact and rapport at the floor level and political clout and understanding with the supplier's top management")).

The Department states that "the lack of supervision is not alone indicative of independent contractor status," and that the "nature of an employer's business or the nature of the work may make direct supervision unnecessary," in which case "a lack of supervision in those circumstances, without further inquiry," would not weigh in favor of independent contractor status. 87 Fed. Reg. at 62249. This turns the concept of control on its head. If substantial supervision shows control and, therefore, is evidence of employment, then the absence of supervision must demonstrate the opposite: evidence of independence. Operating without supervision or oversight as to the manner and means of how the work is done is a hallmark of independence. Narrowing the relevance of a lack of supervision in this way ignores basic economic reality: that workers are more likely to be in business for themselves where the precise way in which they complete their work is not dictated by others, regardless of the reason for the lack of supervision.[58] This is also an example of where the Proposed Rule all but eliminates the possibility of this factor supporting independent contractor status: if lack of supervision is not indicative of independent contractor status, and surely high supervision would be indicative of employee status, what level, or lack of supervision, would support independent contractor status?

b. Technological monitoring is not necessarily indicative of control.

Second, the Proposed Rule states that control may come in the form of "technological means of supervision (such as by means of a device or electronically)." Proposed § 795.110(b)(4). Yet, businesses use electronic means of supervision not to establish an employment relationship, but to ensure workplace safety and protect consumers oftentimes, in compliance with applicable federal industry-specific regulations. Direct sellers, for example, use web crawling software to monitor the internet for unsubstantiated earnings and product claims made on social media by salesforce members. If something is flagged, the company requests that the salesforce member remove the claim immediately or proceed with disciplinary measures such as withholding commission checks or suspending their account so they cannot sell for a certain period of time. The purpose of doing this is to ensure that salesforce members are abiding by current FTC guidance in this area. By having technological means of supervision count toward employee status, the Proposed Rule would effectively force direct selling companies to choose between abiding by FTC guidance that is intended to protect consumers and the ability to continue to use independent contractors.

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[58] *See Estate of Suskovich v. Anthem Health Plans of Virginia, Inc.*, 553 F.3d 559, 566 (7th Cir. 2009) (computer programmer was an independent contractor where the reason why the company retained him in the first place was because the company had no employees who could adequately supervise programmer's work); *Diego v. Victory Lab, Inc.*, 282 F. Supp. 3d 1275, 1281 (S.D. Fla. 2017) (canvasser whose primary duty included on the ground, door-to-door work was independent contractor where the company exerted only minimal control over manner that canvasser performed his work); *Pendleton v. JEVS Human Servs., Inc*., 463 F. Supp. 3d 548, 562 (E.D. Pa. 2020) (service providers, who took individuals with intellectual disabilities into their homes to live with them and to provide support similar to foster care model, were independent contractors where the company exercised control merely to monitor the quality of the services provided); *Grace v. United States*, 754 F. Supp. 2d 585, 597 (W.D.N.Y. 2010) (performance of task "without day-to-day supervision" is indicative of independent contractor status).

Likewise, the Proposed Rule's statement with respect to technological monitoring overlooks that compliance monitoring stemming "from the nature of the goods or services being delivered" is "qualitatively different from control that stems from the nature of the relationship between employees and the putative employer."[59] However, the Proposed Rule does not account for this nuance. Instead, it just states, without any guidance, that control "may" come from "technological means of supervision." This component of the Proposed Rule's interpretation of electronic monitoring of the final result and to ensure compliance with applicable regulatory and other requirements is thus far too broad.

c. Compliance with legal rules and safety and quality standards are not probative of employee status.

Third, and relatedly, the Proposed Rule states that "[c]ontrol implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer services standards may be indicative of control." Proposed § 795.110(b)(4). Aside from the use of "may" not providing any sort of comprehensible standard and contributing to the vagueness and open-ended nature of the Proposed Rule, it is expressly contradicted by the great weight of authority.[60]

The Department's attempts to distinguish the cases holding that compliance with legal and safety requirements are not probative of employee status are unavailing. For example, in *Parrish v. Premier Directional Drilling, LP*, the Fifth Circuit rejected the argument that the putative employer's requirement that its independent contractors comply with drug testing and safety requirements was evidence of control. In an attempt to rewrite this holding, the Department contends that the Fifth Circuit found the drug testing and safety requirements were not evidence of control because the "workers were not made economically dependent on the employer because of these safety requirements." 87 Fed. Reg. at 62247-48. But this is true for *all* compliance with legal requirements and safety standards: attempts to create a safer work environment do not make workers more *dependent* on a business for work. Thus, even the Department's strained interpretation of *Parrish* and similar cases does not support the proposition that compliance with legal obligations, safety standards, and quality standards "may" evidence employee status.

Moreover, what animated the Fifth Circuit's holding was the "nature of the employment"—oilfields are dangerous and, thus, requiring *all* workers to undergo safety training and drug testing was sensible and good policy.[61] Accordingly, because "the reason for [the] requirement applie[d] equally to individuals who are in business for themselves

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[59] *Godlewska v. HAD*, 916 F. Supp. 2d 246, 260 (E.D.N.Y. 2013).

[60] *See* note 54, *supra*. As the IRS has recognized with respect to analysis of this issue, "Virtually every business will impose on workers, whether independent contractors or employees, some form of instruction (for example, requiring that the job be performed within specified time frames). …. the weight of 'instructions' in any case depends on the degree to which instructions apply to **how the job gets done** rather than to the **end result**." (bold in original). Training Materials: Independent Contractor or Employee? https://www.irs.gov/pub/irs-utl/emporind.pdf pp. 2 -8 (October 30, 1996).

[61] *Parrish*, 917 F.3d at 382 ("Requiring plaintiffs to undergo safety training and drug testing, when working at an *oil-drilling site*, is not the type of control that counsels in favor of employee status." (emphasis in original)).

and those who are employees, imposing the requirement [was] not probative." 86 Fed. Reg. at 1183.

Even courts using the ABC test[62] to determine employee status recognize that compliance with legal obligations is not indicative of control. For example, a New Jersey appellate court, applying that State's ABC test, held that a law office's supervision of an independent contractor paralegal did not constitute control because it stemmed from ethical obligations imposed by the New Jersey Bar.[63] Yet, the Department would construe control more broadly in favor of employee status than how control is defined even under the ABC test.

Other federal agencies likewise recognize that control which stems from a legal requirement does not suggest employee status, such as the IRS with respect to affiliates of broker-dealers[64] and the DOT with respect to motor carriers.[65] For example, specifically, independent contractor financial advisors are required, by federal regulations promulgated by the SEC and FINRA, to be supervised to ensure compliance with regulations by the businesses they represent. This is true even where the broker-dealers exert meaningful control over the economic aspects of their business. This supervision, mandated by federal regulations, is not an example of discretionary supervision or control being exercised by the business, and should be eliminated from the Proposed Rule. The Department would make itself an outlier among federal agencies by using legal requirements as a test for control to the detriment of the worker and consumers.

Should the Department maintain its position that legally required supervision be deemed a critical indicia of employment, it would also fundamentally threaten industries that rely on contractors but have legal obligations to maintain a certain level of oversight. For example, the insurance industry is heavily regulated at the state level, and insurance agents' compliance with these regulations is not optional. Similarly, financial rules and

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[62] The ABC test for determination of independent contractor status is not found in any federal statute regulating worker relationships. A variation of the test is used in some states to determine whether a person is an employee or an independent contractor under certain employment laws, such as state wage-and-hour and unemployment laws. See, e.g., Mass. Gen. Laws Ann. ch. 149, § 148B and *Dynamex Operations W., Inc. v. Superior Court,* 416 P. 3d 1, 33- 34 (Cal. 2018). Although the precise factors vary state to state, generally, the test requires employers claiming a worker is an independent contractor to prove the following: (A) the worker is free from the employer's control or direction in performing the work; (B) the work takes place outside the usual course of the business of the company; and (C) customarily, the worker is engaged in an independent trade, occupation, profession, or business.

[63] *L. Off. Of Gerard C. Vince, LLC v. Bd. Of Rev.*, No. A-5441-17T2, 2019 WL 4165066, at *3 (N.J. Super. Ct. App. Div. Sept. 3, 2019) (holding that paralegal was independent contractor under ABC test).

[64] See Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 921, 111 Stat. 879 (in determining classification of a registered representative of broker-dealer for federal tax purposes, "no weight shall be given to instructions from the service recipient that are imposed only in compliance with investor protection standards imposed by the Federal government, any State government, or a governing body pursuant to a delegation by a Federal or State agency."); Training Materials, IRS Training Course 3320-102, TPDS 84238I, at 2-11 (Oct. 30, 1996) ("If a business requires its workers to comply with rules established by a third party . . . the fact that such rules are imposed by the business should be given little weight in determining the worker's status.").

[65] 49 C.F.R. § 376.12(c)(4).

regulations legally obligate broker-dealers to supervise the securities activities of affiliated financial advisors, regardless of whether they are considered employees or independent contractors.[66] These supervisory obligations are non-delegable and are designed to protect investors from actors who seek to evade regulatory requirements and harm investors for their own personal gain.[67] Compliance with these regulations should be *encouraged*.

By suggesting that control stemming from a legal requirement may be indicative of employment status, the Department is creating bad policy. Businesses should be able to ensure their contractors are following the law and being safe. Ensuring that contractors follow anti-discrimination, OSHA, human trafficking, and other safety laws should be encouraged. Bsinesses that rely on contractors will be disincentivized to enact procedures designed to protect consumers and workers, or go above the bare minimum in compliance with any mandatory rule or regulation, lest their business model be challenged under the Proposed Rule. This cuts against the stated purpose of the FLSA, which is to increase the "health, efficiency, and general well-being of workers[.]" 29 U.S.C. § 202(a).

In short, workers and businesses should not be discouraged from incorporating terms (as well as audit and other certification processes) into their relationship that support sound, lawful, safe work practices, as those terms do not evidence control.[68] Examples of such terms may include incorporation of an obligation that the work be performed pursuant to acceptable professional, industry and customer service standards, as well as commonly accepted safety, ethics, licensure and other standards and recommendations (such as compliance with limitations or control imposed or necessitated by law, regulation, order or ordinance). None of these terms, nor compliance with them by the worker, evidence control over the worker *by the business* under the Act's economic realities test.[69]

d. Reserved control is qualitatively different than actual control.

Finally, departing from the 2021 IC Rule, which considers whether the putative employer actually exercises control, the Proposed Rule states that even if the purported employer did not exercise control but retained "reserved control" that could be determinative. 87 Fed. Reg. at 62275. This contradicts the principle that "[i]t is not significant how one 'could have' acted under the contract terms. The controlling economic realities are reflected by the way one actually acts."[70] Indeed, for decades, courts have held that "the focus is on economy reality, not contractual language."[71] Yet, the Proposed Rule

[66] *See* FINRA Rule 3110 (requiring firms to establish and maintain a system to supervise the activities of its associated persons); FINRA Rule 3270; *In the Matter of William V. Giordano*, Securities Exchange Act Release No. 36742 (Jan. 19, 1996).

[67] *See* FINRA Regulatory Notice 18-15.

[68] *See Zheng*, 355 F.3d at 75.

[69] Similarly, no inference of control over the worker's work should be drawn from a business's use of both employees and independent contractors who perform similar or overlapping services or work. Today many companies supplement work performed by employees with services provided by independent contractors, because of a worker's unique expertise or immediate or short term need for additional resources.

[70] *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308, 1312 (5th Cir. 1976).

[71] *See, e.g.*, *Parrish*, 917 F.3d at 388 (summarizing case law).

would have courts find that control—the most important factor—weighs in favor of employee status entirely based on contractual language. This would effectively elevate reserved contractual rights above the actual practice of the parties. The economic *realities* test would be replaced by a contractual reservation test.

To be clear, contractual language can be relevant to the analysis because it evidences "'the parties' beliefs about the nature of the relationship.'"[72] However,to have contractual language eclipse actual practice would flip the economic realities on its head. It would also prohibit certain facts from being introduced into evidence: namely, the actual practice of the parties, which according to the Supreme Court is the touchstone of the analysis. In this manner, the Proposed Rule contradicts the supposed totality-of-circumstances test the Department is purportedly trying to enact.

In addition, "reserved control" is not elsewhere defined which will leave companies guessing what will constitute it. This level of uncertainty will mean they will never be confident they have analyzed the control prong correctly as the Department may decide that some form of "reserved control" existed that would demonstrate employee status.

2. The Department misconstrues the opportunity for profit or loss prong.

The Chamber agrees with the Department that the ability to accept or decline jobs, negotiate prices, engage in marketing and advertising (and similar activities), as well as whether a worker hires others, purchases materials and equipment, and/or rents space is relevant to whether workers are independent contractors or employees.

The Department is wrong to require a worker to "exercise" these decisions to exemplify independent contractor status. In most cases, the more important question is whether the worker has the *opportunity* to impact their profits and losses by engaging in various activities such as working for other companies, regardless of whether the worker actually acts on that opportunity.

The Department's position also contradicts the Department's proposal that the right to control, regardless of whether that right is exercised, is probative of employee status. See 87 Fed. Reg. at 62258. On the one hand, the Department is saying that an unexecuted contractual right (working for other businesses) is irrelevant but another unexecuted contractual right (the right to control) is relevant. That makes no sense. The Department is simply positing contradictory hypotheticals to support its desired conclusion.

Furthermore, the focus on exercising an entrepreneurial activity overlooks that when a contractor voluntarily decides to forgo contracting with other parties, this *is* an example of a business decision. There is an opportunity cost to choosing to only provide services to a finite number of businesses. Therefore, "it is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that

[72] *Saleem*, 854 F.3d at 141 (quoting *Estate of Suskovich v. Anthem Health Plans of Va, Inc.*, 553 F.3d 559, 564 (7th Cir. 2009)).

is most relevant for the purpose of determining whether he is an independent contractor."[73]

Moreover, the Department wrongly narrows the inquiry to "whether the worker exercises managerial skill," as opposed to "managerial skill or business acumen or judgment," as stated in the 2021 IC Rule. *Compare* 86 Fed. Reg. at 1247 *with* 87 Fed. Reg. at 62274. Not only does this conflict with decisional law,[74] it conflicts with the totality-of-circumstances test the Department purportedly is trying to enact, because a focus on just "managerial skill," to the exclusion of "business acumen or judgment," necessarily will limit the facts considered.

Finally, the Proposed Rule states that a worker's decision to "work more hours *or take more jobs*" is not probative of independent contractor status. 87 Fed. Reg. at 62274. In so doing, the Proposed Rule misses that the ability to accept, reject, or take on more jobs is probative of independent contractor status because, as courts have held,[75] it is evidence that the worker has control and, therefore, is not dependent on the employer for work. It is also evidence of the worker exercising a managerial decision, because there is an opportunity cost to accepting any job, and often independent contractors will accept jobs that are most profitable.[76]

3. The Department misconstrues the investment prong.

Departing from case law[77] and the 2021 IC Rule's treatment of investment as part of the opportunity for profit or loss inquiry, the Proposed Rule states that "an investment borne by a worker must be capital or entrepreneurial in nature to indicate independent contractor status," and that "the worker's investments should be evaluated on a relative basis with the employer's investments." 87 Fed. Reg. at 62240. This flat comparison between a worker's investment and a business's investment has no probative value in whether a worker is dependent on a company for work. "Large corporations can hire independent contractors, and small businesses can hire employees."[78] Accordingly, courts have rightly held that the key inquiry—and the one that speaks to whether or not workers are in business for themselves—is whether workers have invested in equipment or knowledge to be able to perform a discrete service for businesses.[79] Comparing an

[73] *C.C.E., Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995); *see also FedEx Home Delivery v. NLRB*, 563 F.3d 492, 502, 504 (D.C. Cir. 2009) (noting that "the failure to take advantage of an opportunity is besides the point").

[74] *See, e.g.*, *Saleem*, 854 F.3d at 145 (looking to "business acumen of each worker").

[75] *See, e.g.*, *Nieman v. Nat'l Claims Adjusters, Inc.*, 775 F. App'x 622, 625 (11th Cir. 2019) (finding worker was independent contractor because, inter alia, "he ultimately controlled how and when he completed the assignments and whether he would take on more or less of them").

[76] *See Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 304 (5th Cir. 1998).

[77] *See, e.g.*, *Saleem*, 854 F.3d at 144 ("Economic investment, by definition, creates the opportunity for loss, but investors take such a risk with an eye to profit.").

[78] *Karlson v. Action Process Serv. & Priv. Investigations, LLC*, 860 F.3d 1089, 1096 (8th Cir. 2017).

[79] *See, e.g.*, *Freund v. Hi-Tech Satellite, Inc.*

individual worker's investment in the materials necessary to perform her work with the business investment to run the business is, at the very least, a false dichotomy.

In this manner, the Department is also wrong to propose that the "[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." Proposed § 795.110(b)(2). This contradicts the weight of case law, which has held that a worker's investment in the equipment necessary to perform a discrete job is evidence of independent contractor status. Even the Fifth Circuit, which utilizes a "relative investment" inquiry, has found this to be true.[80] Courts have also held that deducting business-related expenses, such as personal car and truck expenses, is evidence of independent contractor status.[81]

The Proposed Rule would effectively force independent contractors to make substantial capital investments to maintain their independent contractor status. However, workers can be in business for themselves without having to expend huge sums of money. As noted above, if workers purchase a car to drive for a ridesharing app, they risk a potential loss if automation (or some other dynamic) significantly reduces the demand for ride-sharing drivers in the near future. That is inherently entrepreneurial activity—taking on risk in hopes of turning a profit—even though the purchase was only for the "tools and equipment" necessary "to perform" a "specific job." Additionally, some drivers will purchase a cart to assist the efficient delivery of several packages within a block, apartment, or spaces within close proximity. A "knowledge-based" worker, such as an IT worker, may be able to perform independent work with only a laptop or tablet, which are seemingly ubiquitous and relatively inexpensive.

Similarly, the Department's commentary suggesting that a personal vehicle a worker "already owns" should not be considered a capital or entrepreneurial investment is misguided. 87 Fed. Reg. at 62241. This absolutist statement ignores the fact that contractors may utilize their personal vehicles in a way that shows entrepreneurial activity. For example, if workers forgo selling their personal vehicle and, instead, choose to use their vehicle to drive for a ridesharing platform, that is quintessentially entrepreneurial activity. The fact that they had already owned their vehicle is immaterial. The IRS permits the independent worker to deduct the mileage utilized from the worker's gross income, thereby recognizing that the car is a deductible business expense. Similarly, individuals purchase cell phones for their personal use and then choose to monetize them through gig work. The idea that certain items must be categorized as either "personal" or an "investment" is antiquated and again is not shared by the IRS. Thus, adopting a bright-line rule that originally purchasing an item for personal use precludes the later use of that item

[80] *See, e.g.*, *Carrell v. Sunland Const., Inc*., 998 F.2d 330, 333 (5th Cir. 1993) (Finding it significant that welders spent on average $15,000 on tools and equipment, even though the defendant's "overall investment in each pipeline construction project was obviously significant.").

[81] *See, e.g.*, *Thibault v. Bellsouth Telecommunications, Inc*., 612 F.3d 843, 848 (5th Cir. 2010) (in finding worker was independent contractor, noted that he used his own "motor home" to perform work); *Gate Guard Servs. L.P. v. Solis*, 2013 WL 593418, at *7 (S.D. Tex. Feb. 13, 2013) (that worker deducted business expenses related to his truck evidence of independent contractor status).

to generate income as evidence of independent contractor status belies logic and eschews the totality-of-circumstances test the Department purports to adopt.

4. The Department misconstrues the permanence prong.

The Proposed Rule states that "[t]his 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 themselves and marketing their services or labor to multiple entities." Proposed § 795.110(b)(3). While the Chamber agrees that working project to project can be strong proof of independent contractor status,[82] this formulation overlooks that "business[es] repeatedly use[] the same subcontractors due to satisfaction with past performance."[83] Indeed, the concept of "indefiniteness" is a poor proxy for economic dependence, because even independent contractors who contract with a business for an "indefinite" amount of time may do so voluntarily and because the business relationship is mutually beneficial.[84]

The Proposed Rule also states that "the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification." Proposed § 795.110(b)(3). A worker who only occasionally and/or sporadically performs work for a particular business is obviously less likely to be dependent on that employer for work. A clear example of this sort of worker is a plumber who may periodically visit a home or business to fix a pipe or unclog a drain. It is unquestionably an operational characteristic of the plumber's work that they only occasionally or sporadically performs services for a particular entity, and that they do not have a permanent or indefinite relationship with the recipients of their services. The nature of their work is a plain indication that they are operating a separate business, are not dependent on any particular company for work, and are thus not an employee.[85]

Similarly, the Department's reformulation of the 2021 IC Rule to exclude from the analysis situations "[w]here a lack of permanence is due to operational characteristics" is mistaken. As the Department concedes, when work occurs on a project-by-project basis, that fact "counsels heavily" in favor of independent contractor status.[86] It makes no difference whether the result of this project-to-project work occurs as a result of "operational characteristics." The Chamber urges the Department to consider that those independent workers who cease providing services to a company terminate their services for purposes of this prong when the provision of services is over. The fact that a worker may keep a phone app that provides it with opportunities to provide services does not

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[82] *See Parrish*, 917 F.3d at 387.

[83] *Donovan*, 736 F.2d at 1117.

[84] *See Faludi v. U.S. Shale Sols., LLC*, 950 F.3d 269, 275-76 (5th Cir. 2020) (attorney who agreed to work as a consultant for "an indefinite period of time" was an independent contractor where attorney's relationship with the firm lacked permanency because he worked for the company for approximately 16 months and could leave whenever he wanted so long as he provided fifteen days' notice).

[85] *See Torres-Lopez v. May*, 111 F.3d 633, 644 (9th Cir. 1997) (lack of permanency of the working relationship because the farmworkers only harvested for the farm for thirty-two days in a year did not support a conclusion that an employment relationship existed between the farmworkers and the farm).

[86] *Parrish*, 917 F.3d at 387.

suggest or imply that the worker is continuously providing services. What is shown by these facts is that the worker is choosing how, when, and the volume of services to provide -- a factor that is supportive of an independent contractor relationship.

5. The Department misconstrues the integral prong.

The Department has mistakenly equated "integral" with "critical, necessary, or central to the employer's business" 87 Fed. Reg. at 62253 in its desire to shade this analysis towards finding an employment relationship. Taken literally, this could include *every* independent contractor, because a business would not hire an independent contractor unless it was "necessary" to do so.

In *Rutherford Food Corp. v. McComb*, the Supreme Court found that a slaughterhouse jointly employed beef de-boners, who used the premises and equipment of the slaughterhouse, physically worked side by side with "admitted employees," performed their duties under close supervision of the slaughterhouse's supervisors, and performed "a specialty job on the production line."[87] Against this backdrop, the Court found that the plaintiffs were "part of the integrated unit of production," which tended to show employee status.

Contrary to the Department's assertions, *Rutherford* does not support the Proposed Rule's focus on whether the work is "critical, necessary, or central to the [putative] employer's business." The Supreme Court made clear that what it meant by "integration" was the way in which the work was *performed*, not whether it was "important" to the business.

Moreover, as the Supreme Court observed in *Silk*, "[f]ew businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors." Independent contractors who help a business source the raw materials or distribute the finished product are "critical" to that business. Yet, the Supreme Court recognized that fact was immaterial to determining employment status.

This makes good sense. Economic "dependence" means dependence on *work*.[88] The importance of work to a company says nothing about a worker's dependence on the company for work. For example, a company that produces and provides maintenance for manufacturing equipment used in a different company's facilities will typically offer such products and services to multiple manufacturers, and not depend on any single company to allow it to remain in business. In those circumstances, the provision and maintenance of equipment is undoubtedly central to the manufacturer's operations, but that is immaterial to whether the company providing the equipment depends on the manufacturer for work. Similarly, "[a]n omission to design a building would be fatal to an effort to build it, but this

[87] 331 U.S. at 730.

[88] *See Halferty v. Pulse Drug Co.*, 821 F.2d 261, 268 (5th Cir. 1987) ("[I]t is not dependence in the sense that one could not survive without the income from the job that we examine, but dependence for continued employment.").

does not imply that architects are the 'employees' of firms that want to erect new buildings."[89]

In today's economy, independent contractors provide services in all aspects of the economy and all aspects of individual businesses, including core and non-core functions, as well as in the same or different lines of business. Fifteen years ago, if a business wanted to create a new website, it might have had to hire its own web designers. Today, it can easily connect with an independent designer to do the work on a one-off contract. That kind of contract benefits all parties. It helps the business keep long-term costs down by buying only the services it needs, and it helps the worker serve multiple clients, increasing his or her personal income and autonomy. The Proposed Rule threatens those benefits by unduly tightening the independent contractor standard through its misconceived "integral" prong.

Indeed, it appears that the Proposed Rule's shift away from the Supreme Court's focus on an "integrated unit" to whether the work is "critical, necessary, or central" is a thinly veiled attempt to inject Prong B of the ABC test—whether the work takes place outside the usual course of the putative employer's business—into the analysis. Courts employing the ABC test often hold that Prong B looks to whether "the service the worker provides is *necessary* to the business of the putative employer."[90] This attempt to bring the ABC test through the back door contradicts the Department's concession that only Congress has the authority to enact the ABC test into law.

The Proposed Rule's decision to not follow controlling Supreme Court precedent in *Rutherford Food* is a fatal error in the Department's interpretation of the integral prong analysis. The Department has not explained why its framing of the integral prong away from the Supreme Court's *Rutherford Food* inquiry as "whether the work is part of an integrated unit of production" to "whether the work is critical, necessary or central to the employer's business."[91] The Department's acceptance of certain lower court decisions that focus on the work's importance to the business, without explanation as to how this is an accurate interpretation of the statutory text, or implementation of the Supreme Court's guiding interpretation, is arbitrary, capricious, and should be rejected.

6. The Department misconstrues the skill and initiative prong.

The Department is wrong to focus on "specialized skills" as probative in determining independent contractor status, Proposed § 795.110(6). Even low-skilled workers can work as independent contractors if they have a skill that they can market to customers. For example, in the case of a driver who does not need a specialized skill in driving *per se* to pick up a rider and transport the rider to the rider's destination, that lack of a traditionally recognized specialized skill does not impact the driver's unique abilities to control their work and their profits as a result of their business acumen and other traits. It likewise does

[89] *See Lauritzen*, 835 F.2d at 1541 (Easterbrook, J., concurring).
[90] *See, e.g.*, *Great N. Constr., Inc. v. Dep't of Lab.*, 204 Vt. 1, 12, 161 A.3d 1207, 1216 (2016).
[91] *Compare Rutherford Food Corp.,* 331 U.S. at 729 *with* 87 Fed. Reg. 62218.

not measure one's independence. Independence may exist irrespective of a specialized skill.

Today's independent work opportunities are expansive. As a result, they encompass a far wider array of workers beyond those who possess a specific skill that is part of a traditional learned profession or trade. Independent work opportunities also include workers whose managerial, logistical, and customer service skills, often enhanced by the worker's business initiative and judgment, lead to productive and profitable independent work relationships. Thus, a focus on "the amount of skill required" separate from a worker's initiative that impacts the worker's profits is an unnecessarily restrictive view of independent work currently being performed in the U.S. economy. In today's modern economy, entrepreneurial opportunities are often created and fostered by a worker's experience in building managerial, logistical, and customer service skills as well as business judgments instead of through more traditional learned profession, trade or "specialized" skills. Furthermore, independent contractor opportunities offer low barriers to entry to entrepreneurship and economic activity. The judgment of skills denies entrepreneurs and opportunities.

For example, marketing consultants, designers, drivers, and technology specialists, to name a few types of independent contractors, may be self-taught or hold innate abilities that do not require a "skill" recognized in the Proposed Rule.[92] While they may or may not have a degree, or formal training, under this formulation, the Department would determine those workers to not have satisfied the amount of skill required factor. Yet, their work and the worker's initiative in developing their own business and other skills may be key to their opportunities to provide these services to businesses and to control the means and manner of work they perform.

Many independent workers are able to multi-home (provide services to multiple clients by moving back and forth to different apps that are open at the same time) during the same week, day, or even hour. This type of worker flexibility is evidence of independence.[93] For example, workers who use rideshare company and other delivery company apps demonstrate their independence not only by choosing when, whether, where, and how long to work, but also by toggling back and forth between different platforms to promote themselves and seek opportunities. Considering skill required without reference to a worker's acumen, initiative, and judgment is out of step with today's economy and the available flexible work opportunities enjoyed by so many workers that have been made possible because of the lack of barriers to entry into these relationships (including not requiring prior development of specialized skills).

[92] While driving a non-regulated vehicle may not be considered a specialized skill, the ability to sort and sequence, utilize local knowledge, and analyze traffic patterns are examples of skills that independent workers can leverage to increase profits.

[93] *See, e.g., Saleem*, 854 F.2d at 141-143 (holding a worker's opportunity or ability to simultaneously provide services to multiple entities demonstrates "considerable independence").

7. The Department's inclusion of "additional factors" is confusing, vague, and ambiguous.

The Proposed Rule states as support for creating an "additional factors" prong the following: "every fact that is relevant to economic dependence should be considered in the analysis. Because the entirety of the economic reality must be considered, both the actual practices of the parties and the contractual possibilities must be considered." 87 Fed. Reg. The Department's inclusion of unnamed, unlimited, "additional factors" that should be considered as part of the analysis of whether a worker is properly classified as an independent contractor for FLSA purposes is unworkable and erroneous. It is an amorphous additional factor which has the potential to swallow the six defined factors which the Department claims offers the structured guidance necessary for informed compliance. Businesses and workers alike are being asked to consider, weigh, and make significant business decisions under a test that has unlimited undefined possibilities. To the extent that the six defined factors include those elements that the Department believes provide the guidance necessary to define the worker's status, the seventh undefined "additional factor" simply wipes the slate clean and leaves the classification determination up to the whim of a WHD inspector or a private litigator. However, giving this "factor" a regulatory citation creates a patina of authority which does not exist in fact. The Department's formulation of the test without defined factors does not clarify but confuses and leaves nothing but uncertainty as to the classification of any worker for FLSA purposes.

The equal weight the Department proposes to give these undefined additional factors highlights the vagueness of the Proposed Rule, which in turn undermines one of the Department's core justifications for rescinding the 2021 IC Rule—to bring clarity to this area of the law. *See* 87 Fed. Reg. at 62229. At the bottom, the Proposed Rule's additional factors state that *any* fact may be probative of economic dependence. A standard saying that any fact may be probative, without explaining how fact-finders should make this determination, "avoids formulating a rule of decision."[94]

As noted above, inclusion of this prong will also significantly increase compliance costs. At best, when auditing their classifications, businesses will not be able to say with certainty that a worker is properly classified as an independent contractor because it will depend on facts that may or may not be found and considered under this prong.

The Department seems to justify inclusion of this prong, at least in part, on the 2021 IC Rule stating that its list of factors is "not exhaustive." 87 Fed. Reg. at 62257. The 2021 IC Rule, unlike the Proposed Rule, does not give equal weight to undefined additional factors. Moreover, the 2021 IC Rule provided examples of relevant additional facts, thereby narrowing the prong's application.

Indeed, the inherent ambiguity of the proposed "additional factors" prong is compounded by the ambiguity of the other prongs, as delineated above, and the Department's current guidance to workers and businesses highlights this vagueness. For

[94] *Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring).

example, on the Department's website, the Department claims that an employee is "working for someone else's business" and an independent contractor is "running their own business." However, this depends on what constitutes a "business."[95] Does the fact that an independent worker files a Form 1099 mean they have a business, or must they have an established business entity? Gig workers and freelancers who work independently often do not have established physical business locations in the traditional sense. Yet, they are still in business for themselves.

Similarly, the Department states on its website that employees are "paid hourly, salary, or by piece rate" and independent contractors are "paid upon completion of project." Yet, many independent contractors bill by the hour, or on a piece rate basis. Also, lawyers are not paid upon completion of a case. Does that mean that lawyers are employees of their client? Independent contractors are often paid by "piece rate," and being paid in this manner suggests that workers can increase their profits by taking on additional projects. This guidance is therefore misleading.

The Department also states that an employee is in a "[c]ontinuing relationship with the employer" while an independent contractor is in a "[t]emporary relationship until project completed." But, as explained above, the *length* of a contractual relationship is not a meaningful proxy to show economic dependence. The Department's failure to be able to provide operational guidance will only be exacerbated if it enacts the "additional factors" prong of the Proposed Rule.

D. The Department's Proposed Rule is arbitrary and capricious because it is based on erroneous policy considerations, miscalculations of its familiarization costs, and a fundamental misreading of the decisional law.

For the reasons articulated above, the Department has no basis for rescinding the 2021 IC Rule, because there are no good reasons under *State Farm* for doing so. The Department also has no basis for adopting the Proposed Rule because it is based on erroneous policy considerations and a fundamental misreading of the decisional law.

1. The rationale for the Proposed Rule is divorced from the FLSA's protections.

The Proposed Rule appears to be motivated by a desire to provide benefits and other workplace protections to workers—other than minimum wage and overtime protection. *See* 87 Fed. Reg. at 62267. But this is not a concern of the FLSA, which is solely focused on minimum wage and overtime. *See* 29 U.S.C. §§ 206(a)(1)(C), 207(a)(1).[96] It is inherently arbitrary and capricious for an agency to consider policy issues not within its

[95] *See* https://www.dol.gov/agencies/whd/flsa/misclassification (last visited, Dec. 2, 2022).

[96] *See also Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) ("The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours.").

statutory purview, or to cite to them as a justification for a rule under a statute where they are not relevant.

Moreover, the Department's rationale is based on a false premise: implementing a rule that unduly favors employment status will lead to more employees, which, in turn, will lead to more workers with protections and benefits. But as research has shown, this is not necessarily true. For example, as explained above, approximately two-thirds of drivers for Uber have part-time or full-time jobs besides occasionally providing driving services for riders on the Uber app.[97] In other words, the majority of drivers only drive for Uber part-time. This means that even if these workers were reclassified as employees, they would not necessarily be entitled to health insurance and workplace protections, as explained in the Chamber's White Paper:

> For starters, not every employee qualifies for every employment benefit. To take one example, the Family Medical Leave Act protects an employee's leave only after the employee works 1,250 hours in a 12-month period. Many gig workers will likely never meet that threshold.
>
> They tend to engage in gig work only sporadically: one study showed that half of all workers who earned income through an online labor platform in a given month earned no income from a similar platform in the next month. That finding matched other studies, which have shown that few gig workers use gig platforms consistently. To the contrary, they more often turn to gig work only to supplement [] their own sources of income. It is likely, then, that many gig workers will never qualify for employment benefits tied to working consistently on a platform over a period of time. Unemployment benefits also fall in this category.[98]

Therefore, even if the Department forces employers to reclassify independent contractors (against their preference) to employees, there is no reason to believe that this would lead to significantly more workers with employer-provided employee benefits.

Only minimum wage and overtime protections are provided to employees under the FLSA. Yet, the aforementioned resources make clear these protections are not needed as the work performed by the vast majority of independent workers, because statistics show that the vast majority do not work over 40 hours in a workweek and are paid an equivalent hourly wage that far exceeds the hourly minimum. Studies collected by the Department itself show that independent contractors generally make substantially *more* than the FLSA's minimum wage, even when considering an overtime premium. According to the 2017 CWS data, the median hourly rate for independent contractors is $21.27 per hour, based on a 40 hour full-time workweek. A 2019 study by the Internal Revenue Service and U.S. Department of Treasury concluded that "[t]he largest share of workers with

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[97] *See* Hall and Kruger, *Uber's Driver-Partners Analysis*, at 713.

[98] *See* Chamber, *Ready*, *Fire*, *Aim*, at 34 (collecting studies). The Chamber also notes that the Affordable Care Act does *not* require employers to provide part-time employees (i.e., workers working less than 30 hours per week) with healthcare. *See* 26 U.S.C. § 4980H.

independent contractor income are those in the top quartile of earnings."[99] Indeed, a recent study by ADP analyzing the payroll data of more than 75,000 large companies, found that 1099-MISC contractors working in the gig economy tend to be "highly educated and more likely to have a higher income" than their W-2 counterparts.[100] ADP also found that "90% of gig workers have health insurance."[101]

In short, there is no basis for the Proposed Rule's speculation that a stricter independent contractor test is needed to protect workers under the FLSA.

2. The Department miscalculates and severely underestimates familiarization and other costs of the Proposed Rule.

Every new regulatory decision results in familiarization costs, which is a deadweight loss imposed on society by the regulatory process of the administrative state. The Department has estimated that the initial familiarization cost for businesses, governments, and independent contractors of its Proposed Rule will be approximately $188 million dollars. The Department's calculation of familiarization cost is rife with errors and omissions.

The Department calculates the familiarization cost to be imposed on business establishments as thirty minutes per establishment multiplied by an hourly cost of $49.94 multiplied by 2.8 million affected establishments, which equals $70.4 million. This calculation is flawed for several reasons.

First, the Department incorrectly assumes that only those 2.8 million businesses and other entities that engaged an independent contractor (based on issuance of one or more IRS Form 1099-NECs) in the typical year will need to become familiar with the new regulations. 87 Fed. Reg. at 62266. But the real number will be higher since every establishment that may wish to engage an independent contractor will need to become familiar with the Proposed Rule.

Second, the Department makes similar errors with respect to familiarization costs to be imposed on independent contractors. The Department calculates this cost as 15 minutes per worker multiplied by $21.85 per hour value of time (median wage opportunity cost) multiplied by 22.1 million independent contractors, which equals $118 million. The Department incorrectly assumes that only those 22.8 million workers estimated to do full or part-time primary or secondary work during the typical year are affected by and needing to know about the new rule. *Id*. at n. 551 & 552. This number will fluctuate but there is every reason to believe it will be higher as a result of the surge in independent

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[99] *See* Katherine Lim, et al., "Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data," IRS/U.S. Treasury (July 2019), *available at* https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf (last visited, Nov. 14, 2022).

[100] Ahu Yildirmaz, et al., "Illuminating the Shadow Workforce: Insights into the Gig Workforce in Business," ADP Research (Feb. 2020) (explaining that gig workers earn approximately $330 per month more than average employee), *available at* https://tinyurl.com/a94uweyc (last visited, Nov. 13, 2022).

[101] *Id*.

contracting activity brought on by economic conditions where people losing employee based positions are attracted to becoming independent contractors.

Third, the Department also provides no empirical data or reasoned analysis to support its assumptions that the typical hiring establishments will need only 30 minutes to read, understand, and assess the implications of the Proposed Rule and that the typical potential affected worker will need only 15 minutes to understand and assess the implications of the Proposed Rule. On its face, the Department's assumption that, on average, it will take only 30 minutes of a businesses' time to read, analyze, understand, and apply the Proposed Rule to its independent worker relationships and contemplated relationships is risible. Pending results of empirical data collection, an economically appropriate approach for gauging the scale of familiarization costs is to assume no less than one hour of familiarization time for both affected workers and hiring establishments.[102]

A reasonable consideration of the length and complexity of the proposed rule—with seven different factors to consider, each of which is fact intensive—suggests that even a single reviewer will require several hours of review time to read and comprehend the regulation. By simply assigning a panel of Department employees from outside the Wage and Hour Division for a timed reading exercise, followed by a multiple choice comprehension test, the Department could have easily produced a review time estimate with more credibility than the baseless speculation presented with the obvious intent to minimize the total cost calculation.

Similarly, the Department asserts, without providing any empirical basis, that a junior level compensation analyst whose time is valued at $49.94 per hour, including benefits and overhead, is the appropriate labor model for a business to understand and access the implications of the Proposed Rule on its policies and operations. There is no basis for this assertion. The Department's selection of "Compensation, Benefits and Job Analysis Specialist" as the model reviewer for its calculation of familiarization costs misunderstands and misrepresents the seriousness and complexity of the regulation being proposed. That occupation title describes a junior level administrative support worker within a human resources office. Given the serious consequences of any company subject to the Proposed Rule, review of the implications of the Proposed Rule for a given company will require the attention of members of top management, including chief executives, in-house attorneys, senior human resource managers and other top executives. For many affected companies, fiduciary obligations to company shareholders and creditors will require seeking the advice of specialized outside counsel. The Chamber further notes that understanding and applying the Proposed Rule is work in many establishments that will be done in house by lawyers or senior financial executives or outsourced to expert attorneys in the field at rates that far exceed the $49.94 per hour rate it assumes would be employed.

[102] The Chamber notes, that based on feedback from its members, in reality, an estimate of tens of hours for some businesses to hundreds of hours for businesses with multiple locations and types of independent contractor relationships is a far more accurate estimate of the familiarization costs attendant to the Proposed Rule.

A reasonable familiarity with decision-making in a business organization should have also led the Department to conclude that more than one senior manager, executive, or legal advisor would be involved in the review process for each establishment. If, for example, each reviewer requires one hour and three reviewers are involved in the process for the typical establishment, the total number of review hours for the typical establishment will be three hours, not the mere 30 minutes the Department contemplates.

Furthermore, as explained above, a more appropriate valuation model includes an owner or chief executive officer and top executives, who exercise fiduciary and management responsibilities for the business owners/shareholders, as well as compensation and benefits managers, in-house counsel, and outside counsel. The fully loaded (wage, benefits, and overhead) cost for chief executives is $139.82 per hour, $99.32 for benefits managers, $76.89 for top executives, $99.69 for in-house lawyers, and $400 for outside lawyers.[103]

Accordingly, the Department's familiarization cost calculations, at best, serve as a lower range with upper end not attainable given too many variables with respect to how many businesses and independent contractors would have to review.

Beyond the initial year familiarization costs, the proposed rule would impose costs on both establishments considering independent contractor classification for certain workers and on workers seeking independent contractor status for themselves. The Department has not presented a quantitative estimate of these annual classification compliance review costs. Hiring establishments will need to assign their own employee staff attorney or engage an outside counsel law firm to conduct a thorough analysis of each classification decision with respect to each of the seven factors that the proposed rule requires to be considered. Similarly, workers who seek or will be affected by the classification decision will find it necessary to expend their own time to provide information and documentation associated with the classification review process. For the typical hiring establishment, the annual compliance cost will vary depending on the number of attorney hours required for each classification review and by the number of such reviews conducted for the typical establishment each year. It is reasonable to assume that new independent contractor classification decisions will be reviewed, and existing classifications will also be reviewed in cases where the work continues across years to ensure that the totality of circumstances has not changed. Workers will be required to provide information and documentation to assist in annual classification reviews by each of the clients with whom they are engaged at any time during the year.

A key question that the Department has not considered explicitly is how many additional hours (compared to the 2021 IC Rule baseline) will be required for each classification review under the proposed rule. The range of potential costs to be imposed

[103] The outside counsel rates are based on rates cited by the Securities and Exchange Commission for similar work at a typical client billed hourly rate of $400. 87 Fed. Reg. at 21459. All other rates are based on the Department's assumed benefit and overhead rates of 45% and 17% applied to the $86.31 median wage for the respective titles reported by BLS at https://www.bls.gov/oes/current/oes_nat.htm#00-0000 (last visited, Nov. 29, 2022).

on both firms and workers is too great to ignore even if using the minimum reasonable time per case (one hour) and number of cases per establishment and per worker (one case each) and further assuming that all of the establishment review work is done by a staff employee attorney at only $99.69 per hour. If establishments need to engage outside counsel attorneys for even some of the work involved, the annual compliance cost increases significantly.

Under Executive Orders 12866 and 13563, the Department must show that the benefits of its regulation justify its costs based on a reasoned determination.[104] As discussed herein, the Department's assertions of greater consistency, reduced misclassifications, and increased availability of employee benefits as benefits flowing from this Proposed Rule are speculative to the point of being illusory.

Before moving to rescind the 2021 IC Rule, the Department should have, at least, gathered additional information, which would help guide the cost-benefit analysis necessary for reasoned administrative action:

- How many new hiring decisions (independent contractor or employee) does the typical covered establishment make each year?
- For each new hiring and classification decision by a covered establishment, what is the expected difference in familiarization by the hiring manager between application of the 2021 IC Rule and application of the Proposed Rule?
- What is the estimated total annual number of misclassifications that are made under the 2021 IC Rule versus the total number of misclassifications that will likely occur under the Proposed Rule?
- What is the mean or median difference in wages received by a typical worker misclassified as an independent contractor instead of as an FLSA covered employee?

3. The Department overlooks the other significant costs of adopting the Proposed Rule.

Implementing a rule that curtails independent contracting, which the Proposed Rule surely would, will have significant costs to workers, businesses, and the American economy in at least four ways.

First, as noted above, independent contractors start businesses and create jobs. Thus, any policy that reduces the use of independent contracting would almost certainly

[104] *See* E.O. 12866, 58 Fed. Reg. 51735 (October 4, 1993), E.O, 13563, 76 Fed. Reg. 3821 (January 18, 2011).

lead to reduced small business creation, small business employment, and entrepreneurial activity.[105]

For example, one recent study concluded that widespread reclassification could destroy as many as 769,000 work opportunities and wipe out $9.1 billion in earnings,[106] and these are not low-paying jobs. One study found that app-workers in Massachusetts earned an average of $26 per hour.[107] When these jobs are gone, so are the earnings and the resulting economic activity.

Second, erecting barriers to independent contracting will harm small businesses, because they will not be able to compete as efficiently against larger businesses. "A small trucking company, for example, can offer timely and efficient nationwide delivery by contracting with multiple independent truckers; a construction company can take on a complicated job by engaging specialized labor."[108] But if independent contracting becomes too difficult, or legally risky, these small businesses will not be able to utilize the expertise and flexibility of independent contractors and compete with larger businesses.

Third, independent contracting is a primary business model in a number of important industries, including construction, emergency medicine, financial advice, insurance, app platform, timber harvesting, and transportation. Limitations on independent contracting would create serious economic disruptions in these and other industries, because they would require businesses to fundamentally alter their business models. As explained above, with respect to ridesharing companies, economists have estimated that a switch from an independent contractor model to an employee model would result in a significant loss of work opportunities.[109]

Fourth, curtailing independent contracting would result in a less flexible and dynamic workforce. Independent contracting allows both firms and workers to respond to changes in the economy, reducing "structural" unemployment. Empirical studies show independent contracting facilitates workers' re-entry into the workforce after being laid off. "Thus, for example, independent contracting facilitates the transition of laid off workers into new jobs, and provides workers in general, but especially women, with the ability to enter and exit the workforce in response to family, retirement, and other life changes."[110]

The Proposed Rule fails to take these adverse effects into account. Failing to do so is arbitrary and capricious.

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[105] Eisenach, *The Role of ICs*, at 37.

[106] Robert Shapiro and Luke Stuttgen, "The Many Ways Americans Work and the Costs of Treating Independent Contractors as Employees," Chamber of Progress (Apr. 2022), *available at* https://tinyurl.com/2zaeh99r (last visited, Nov. 16, 2022).

[107] "Hourly Earnings of App-Based Rideshare Drivers and Food Delivery Workers in Massachusetts," Mass Insight (Mar. 20220), *available at* https://tinyurl.com/uanfv82s (last visited, Nov. 16, 2022).

[108] Eisenach, *The Role of ICs*, at 38.

[109] *See* note 26, *supra*.

[110] Eisenach, *The Role of ICs*, at 39 (citing Anne E. Polivka, "Into Contingent and Alternative Employment: By Choice?" *Monthly Labor Review* (Oct. 1996) 55-64).

Conclusion

The Chamber urges the Department to withdraw the Proposed Rule as both substantively and procedurally irrevocably flawed. The Proposed Rule is arbitrary and capricious for all the reasons described above and is not based on a reasonable interpretation of the FLSA. It will create confusion and uncertainty among employers and independent contractors, and will lead to fewer independent contractor opportunities. The Proposed Rule has too many vague terms and its equal weighting of all factors will mean employers will never be confident of an independent contractor classification. Throughout the Proposed Rule, the factors to be considered are biased toward finding employee status so that only if an employer classifies a worker as an employee will it be confident of not being challenged.

Equally critical, the Chamber urges the Department to not rescind the 2021 IC Rule, which represents appropriate, modern, balanced, clear, and certain guidance, grounded in applicable law, as to how businesses and workers should apply the economic realities factors to address the ultimate determination of worker status. Indeed, not only is there no evidence the 2021 IC Rule is not working, the Department's own press releases offer compelling evidence that it is.

Sincerely,

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