

CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA

MARC FREEDMAN  
VICE PRESIDENT, WORKPLACE POLICY  
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.  
WASHINGTON, D.C. 20062  
202/463-5522

February 24, 2021

Ms. Amy DeBisschop  
Division of Regulations, Legislation, and  
Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Avenue NW  
Washington, DC 20210

By electronic submission: [www.regulations.gov](http://www.regulations.gov)

**RE: Independent Contractor Status Under the Fair Labor Standards Act:  
Delay of Effective Date; RIN 1235-AA34; 86 Fed. Reg. 8326 (February 5,  
2021)**

Dear Ms. DeBisschop:

The U.S. Chamber of Commerce enthusiastically supported the final regulation describing how to classify a worker as an independent contractor or an employee under the Fair Labor Standards Act that was published in the Federal Register on January 7, 2021. We believe the regulation sets out a very balanced analysis that respects the interests of all parties. Accordingly, we oppose the Wage and Hour Division's proposed extension of the effective date to May 7, 2021 and believe the regulation should go in to effect as originally planned on March 8, 2021.

In addition to our support for the merits of the regulation, the Department of Labor's proposal to extend the effective date is lacking in several critical ways. First, it does not establish a legitimate basis to warrant the review that is the reason for the extension of the effective date. Secondly, it contradicts itself as to whether the regulation represents a new legal standard. Finally, the Department's notice entirely ignores the factors identified in OMB Memorandum M-21-14 (Implementation of Memorandum Concerning Regulatory Freeze Pending Review) that agencies are to consider when deciding whether to postpone the effective date of a regulation.

**The Department's Notice Fails to Identify a Legitimate Issue to Support a Postponement of the Effective Date**

The DOL's sole reason for proposing to delay the final regulation on independent contractors is inaccurate, and cannot justify the proposed additional delay. The Federal Register notice claims that the regulation adopts a "new legal standard." (86 Fed. Reg. 8327, February 5,

2021) However, the basis for the regulation is a well established construct known as the “economic realities test,” a test first articulated by the U.S. Supreme Court more than 50 years ago and subsequently applied and modified by various federal courts of appeal. The regulation merely codifies and amplifies criteria already being used, and provides an analytic structure to create consistency and transparency when applying the economic realities test. As the Department explained in the preamble to the final regulation:

The ultimate inquiry is whether, as a matter of economic reality, the worker is dependent on a particular individual, business, or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor).

This economic realities test and its component factors have not always been sufficiently explained or consistently articulated by courts or the Department, resulting in uncertainty among the regulated community. The Department believes that a clear articulation will lead to increased precision and predictability in the economic reality test’s application, which will in turn benefit workers and businesses and encourage innovation and flexibility in the economy. (86 Fed. Reg. 1168, January 7, 2021)

The Department asserts in its proposed effective date extension that the final regulation “would adopt a new legal standard for determining employee and independent contractor status under the FLSA,” (86 Fed. Reg. 8327) yet fails to explain how the economic realities test at the heart of the regulation is a new legal standard. Absent supporting explanation, this claim cannot serve as the basis for postponing the effective date by 60 days.

### **The Department’s Notice Contradicts Itself as to Whether the Regulation Represents a New Legal Standard**

As explained above, the Department claims the new regulation represents a new legal standard, and thus warrants further review. However, in justifying postponing the effective date because doing so would have no impact, the Department says, “In sum, employers and workers are already familiar with the standard that WHD and courts will apply when determining a worker’s status under the FLSA during any delay of the rule’s effective date.” (86 Fed. Reg. 8327) This directly contradicts the Department’s position that the regulation represents a new legal standard. It also confirms that the regulation is simply codifying existing common law. Accordingly, it should go into effect as originally intended on March 8, 2021.

### **The Department’s Notice Does Not Take into Consideration Factors Identified by OMB for Considering Whether to Postpone Effective Dates**

On January 20, 2021 OMB Acting Director Robert Fairweather issued Memorandum M-21-14, “Implementation of Memorandum Concerning Regulatory Freeze Pending Review” (available at: <https://www.whitehouse.gov/wp-content/uploads/2021/01/M-21-14-Regulatory-Review.pdf>, last viewed February 21, 2021). The memo gives instructions to agency heads on how to comply with the Chief of Staff memo issued the same day, “Regulatory Freeze Pending Review.”

The memo enumerates eight factors an agency is to consider when deciding whether to postpone effective dates of regulations for 60 days:

Your decision for each such rule should include consideration of whether:

- (1) the rulemaking process was procedurally adequate;
  - (2) the rule reflected proper consideration of all relevant facts;
  - (3) the rule reflected due consideration of the agency's statutory or other legal obligations;
  - (4) the rule is based on a reasonable judgment about the legally relevant policy considerations;
  - (5) the rulemaking process was open and transparent;
  - (6) objections to the rule were adequately considered, including whether interested parties had fair opportunities to present contrary facts and arguments;
  - (7) interested parties had the benefit of access to the facts, data, or other analyses on which the agency relied; and
  - (8) the final rule found adequate support in the rulemaking record.
- (OMB Memorandum M-21-14, page 2)

The Department's notice does not even mention these factors, let alone attempt to discuss whether any of them have been met. The rulemaking record is unequivocal that each of these criteria has been satisfied and thus "you [the agency head] need do nothing further." If a regulation does not satisfy all of the criteria an agency "should consider postponing the effective date for 60 days for the purpose of enabling further review..." (OMB Memo, page 2) Because the Department's notice fails to demonstrate that any of OMB's criteria have not been met, the proposed extension of the effective date should be withdrawn and the regulation should go into effect on March 8, 2021.

## **Conclusion**

The Department's notice proposing postponement of the independent contractor status under the FLSA regulation's effective date is substantively deficient, inherently contradictory, and ignores instructions from OMB about when such postponement is appropriate. Accordingly, the Department should not postpone the effective date and the regulation should go into effect on March 8, 2021 as originally announced.

Sincerely,



Marc Freedman  
Vice President, Workplace Policy  
Economic Policy Division