CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

MARC FREEDMAN
VICE PRESIDENT, WORKPLACE POLICY
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April 12, 2021

Ms. Jessica Looman
Principal Deputy Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, DC 20210

By electronic submission: www.regulations.gov

RE: Independent Contractor Status Under the Fair Labor Standards Act: Withdrawal; RIN 1235–AA34; 86 Fed. Reg. 14027 (March 12, 2021)

Dear Ms. Looman:

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 opposed the Wage and Hour Division's extension of the effective date to May 7, 2021 and similarly oppose this proposed rescission of the independent contractor regulation.

The need for this regulation has never been greater as the use of the independent contractor model has increased substantially, most notably in the online platform context, but also in many other settings. This regulation sought, and the Chamber believes accomplished, to bring a consistent analytical framework and updated criteria to determining when legitimate independent contractor relationships exist.

As we detailed in our comments on the proposed regulation:

> The confusion regarding whether a worker is properly classified as an employee or an independent contractor has long been a vexing problem for the business community, across many different industries and work settings. This has led to considerable amounts of litigation and other legal actions that the Chamber believes would be reduced by the clarity and definitive nature of the Proposed Rule.
>
> In the Proposed Rule, the Department 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 Proposed Rule… properly focuses on modern, understandable, and meaningful factors. This would benefit workers, consumers, entrepreneurs, independent artists, writers and creators, sole proprietors, businesses of all sizes, and the overall economy.
>
> The Proposed Rule would provide long-awaited and much needed structure and clarity to the evaluation of worker relationships under the Act. When finalized, this proposed rule would be seen in light of significant technological changes that have expanded opportunities for workers to provide goods and services in relationships that thrive on independence, freedom, and flexibility. However, its full value is its application to a wide array of workplaces and relationships. (Comments of the U.S. Chamber of Commerce to Independent Contractor Status Under the FLSA NPRM, p. 1, October 26, 2020)

The WHD explained the need for the regulation in the preamble to the final regulation: "the existing economic realities test applied by WHD and courts suffered from confusion regarding the meaning of 'economic dependence,' a lack of focus in the multifactor balancing test, and confusion and inefficiency caused by overlap between the factors. The Rule explained that the shortcomings and misconceptions associated with the test were more apparent in the modern economy and that additional clarity would promote innovation in work arrangements." (86 Fed. Reg. 14030, quoting preamble of final regulation, citations omitted)

The regulation provided structure to the economic realities test that had been used by courts for decades. The economic realities (or economic dependence) test enumerated six factors "typically articulated by WHD previously: (1) The nature and degree of the employer's control; (2) the permanency of the worker's relationship with the employer; (3) the amount of the worker's investment in facilities, equipment, or helpers; (4) the amount of skill, initiative, judgment, and foresight required for the worker's services; (5) the worker's opportunities for profit or loss; and (6) the extent of the integration of the worker's services into the employer's business." (86 Fed. Reg. 14030, quoting WHD Opinion Letter FLSA 2019-6, citations omitted) The key to the independent contractor regulation was to change the analysis from one where all the factors were given equal weight and no one factor was considered dominant, to one where the factors were given specific weight leading to greater consistency and predictability for determining the status of workers.

Under the regulation, the two "core" factors given the most weight are the nature and degree of the employer's control, and the worker's opportunity for profit or loss. If consideration of those two factors does not lead to a conclusion about the status of the worker, then other factors would be considered: the amount of skill required for the work; the degree of permanence of the working relationship between the individual and the potential employer; and whether the work is part of an integrated unit of production. Additionally, the actual practice of the parties would be more relevant than contractual terms. (86 Fed. Reg. 1247, January 7, 2021)

The WHD proposes to withdraw the regulation fundamentally because it would "narrow the scope of facts and considerations comprising the analysis of whether the worker is an employee or independent contractor" and that as a result, "as a policy matter, that the Rule's

narrowing of the analysis would result in more workers being classified as independent contractors not entitled to the FLSA's protections, contrary to the Act's purpose of broadly covering workers as employees." (86 Fed. Reg. 14034) The Chamber believes this view is misguided and presumes conclusions that the regulation does not guarantee.

In WHD's view, the preferred environment is the *status quo ante* where employers are uncertain how to classify a worker under the economic realities test because they can not know how WHD will evaluate the different factors. That lack of clarity and certainty puts employers at risk of WHD enforcement and private litigation, and can impede businesses from engaging many smaller businesses or sole proprietors. For this reason, as well as others identified in our comments to the proposed regulation (attached), the Chamber urges the WHD to withdraw this proposed rescission and allow the Independent Contractor Status under the FLSA regulation to take effect as currently scheduled on May 7, 2021.

Sincerely,

Marc Freedman
Vice President, Workplace Policy
Employment Policy Division