**Coalition to Promote Independent Entrepreneurs**

**Foundation for Government Accountability**

February 19, 2021

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

Re: Proposal to Delay Effective Date of Final Regulations on *Independent Contractor Status Under the Fair Labor Standards Act*
Regulatory Information Number (RIN) 1235-AA34

Dear Ms. DeBisschop:

The Coalition to Promote Independent Entrepreneurs[1] and the Foundation for Government Accountability[2] appreciate the opportunity to comment on the Department of Labor's ("DOL") Proposed Rule that would delay the effective date of the final regulations on *Independent Contractor Status Under the Fair Labor Standards Act* (the "Independent Contractor Rule") from March 8, 2021, to May 7, 2021.

We respectfully urge DOL not to delay the effective date, because the Independent Contractor Rule provides much needed clarity to the application of the "economic realities" test and reflects an objective distillation of the court decisions that have applied the test. The Independent Contractor Rule does not reflect a policy change that warrants reconsideration by a new Administration, so the only beneficiary of the proposed delay would be the trial attorneys who profit from the uncertainty and unpredictability that exists under current law.

The stated reason in the Proposed Rule for proposing the delay is for the Wage and Hour Division ("WHD") to consider:

> among other important issues, the legal, policy, and/or enforcement implications of adopting that standard, such as: Whether the rule effectuates the FLSA's purpose, recognized

[1] The Coalition to Promote Independent Entrepreneurs, www.iecoalition.org, consists of organizations, companies and individuals dedicated to informing the public and elected representatives about the importance of an individual's right to work as a self-employed individual, and to defending the right of self-employed individuals and their respective clients to do business with each other.

[2] The Foundation for Government Accountability (FGA), www.thefga.org, is a nonprofit organization that advocates for federal and state policy solutions to advance the power of work so that more people may achieve the American Dream.

> repeatedly by the Supreme Court, to broadly cover workers as employees; the costs and benefits attributed to the rule, including the assertion that workers as whole will benefit from the rule; and/or whether the rule's explanation of the standard provides clarity for stakeholders and for the purposes of WHD enforcement, as was intended.[3]

(Footnotes omitted).

The Proposed Rule also states that the proposed delay would not be disruptive, reasoning that "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."[4]

There is no question that a new Administration's review of the administrative actions of a prior Administration is proper. This process is especially salutary in the case of actions taken by a prior Administration that are political in nature. A new Administration certainly should consider "the legal, policy, and/or enforcement implications" of such actions. But the Independent Contractor Rule is not fairly characterized as an action that is political in nature. DOL appropriately declined invitations to adopt a test other than the "economic realities" test.[5]

The Independent Contractor Rule was promulgated to address a long-standing problem that has been vexing the regulated community for decades, namely, the unpredictability, inconsistency, and confusion in the application of the "economic realities" test that courts commonly apply in determining an individual's status, as an employee or independent contractor, under the FLSA. Beyond the fact that different federal circuits apply different iterations of the test,[6] the Preamble accompanying the Independent Contractor Rule identifies examples of courts reaching contradictory decisions concerning individuals in substantially similar work relationships[7] and documents how courts have strayed from the U.S. Supreme

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[3] 86 Fed. Reg. 5326, 5327 (Feb. 5, 2021).

[4] Id.

[5] In the Preamble, DOL rejected requests to adopt a common-law test or an "ABC" test, see, 86 Fed. Reg. 1168 at 1238-1243. DOL notes, at 1243, that "the Department engaged in this rulemaking to clarify the existing standard, not to radically transform it."

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

[7] E.g., 86 Fed. Reg. 1168, 1170 (Jan. 7, 2021), wherein the Preamble compares "*Sec'y of Labor* v. *Lauritzen,* 835 F.2d 1529, 1534–35 (7th Cir. 1987) (applying six-factor economic reality test to hold that pickle pickers were employees under the FLSA), *with Donovan* v. *Brandel,* 736 F.2d 1114, 1117 (6th Cir. 1984) (applying the same six-factor economic reality test to hold that pickle pickers were not employees under the FLSA)." Similarly, at 86

Court's initial formulation of the "economic realities" test.[8] By contrast, a clarified test benefits all stakeholders. It more readily exposes companies engaged in worker misclassification, offers greater certainty to the legitimate independent entrepreneurs who seek to do business with potential clients, and enables the WHD to make worker-status determinations in the context of an investigation with greater certainty and decisiveness.

As to whether the Independent Contractor Rule effectuates "the FLSA's purpose, recognized repeatedly by the Supreme Court, to broadly cover workers as employees," the Independent Contractor Rule defers to the decisions of federal judges throughout the country who applied the Supreme Court's guidance in making worker-status determinations.[9] When these regulations were issued, DOL officials were mindful that the regulations would become effective during a Biden Administration and that this was no opportunity to develop a clarified test that privileges independent-contractor status. A fair reading of the Independent Contractor Rule and accompanying Preamble confirms this.[10]

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Fed. Reg. 1168 at 1173, the Preamble compares "*Cromwell* v. *Driftwood Elec. Contractor, Inc.,* 348 F. App'x 57 (5th Cir. 2009) (holding that cable splicers hired by Bellsouth to perform post-Katrina repairs were employees), and *Thibault* v. *BellSouth Telecommunication,* 612 F.3d 843 (5th Cir. 2010) (holding that cable splicer hired by same company under a very similar arrangement was an independent contractor)."

[8] E.g., 86 Fed. Reg. 1168 at 1170, wherein the Preamble observes that "*Silk* analyzed workers' investments, 331 U.S. at 717–19. However, the Fifth Circuit has revised the 'investment' factor to instead consider 'the extent of the relative investments of the worker and the alleged employer.' *Hopkins,* 545 F.3d at 343. Some other circuits have adopted this 'relative investment' approach but continue to use the phrase 'worker's investment' to describe the factor. *See, e.g., Keller* v. *Miri Microsystems LLC,* 781 F.3d 799, 810 (6th Cir. 2015); *Dole* v. *Snell,* 875 F.2d 802, 805 (10th Cir. 1989)," and that "*Rutherford Food*'s consideration of whether work is 'part of an integrated unit of production,' 331 U.S. at 729, has now been replaced by many courts of appeals by consideration of whether the service rendered is 'integral,' which those courts have applied as meaning important or central to the potential employer's business. *See, e.g., Verma* v. *3001 Castor, Inc.,* 937 F.3d 221, 229 (3rd Cir. 2019) (concluding that workers' services were integral because they were the providers of the business's 'primary offering')."

[9] E.g., 86 Fed. Reg. 1168 at 1194, wherein the Preamble recounts that DOL reviewed appellate cases since 1975 involving independent-contractor disputes under the FLSA. Also, at 86 Fed. Reg. 1168 at 1196-97, the Preamble notes that "The NPRM further explained that focusing on the two core factors is … supported by the Department's review of case law. The NPRM presented a remarkably consistent trend based on the Department's review of the results of appellate decisions since 1975 applying the economic reality test. Among those cases, the classification favored by the control factor aligned with the worker's ultimate classification in all except a handful where the opportunity factor pointed in the opposite direction." And, the Preamble, at 86 Fed. Reg. 1168 at 1198, states that "Among the appellate decisions since 1975 that the Department reviewed, whenever the control factor and the opportunity factor both pointed towards the same classification— whether employee or independent contractor— that was the worker's ultimate classification." Moreover, at 86 Fed. Reg. 1168 at 1206, the Preamble states that "The final rule takes into account facts and factors that have historically been part of the economic reality test, and decades of appellate decisions indicating that the two core factors frequently align with the ultimate determination of economic dependence or lack thereof." Finally, at 86 Fed. Reg. 1168 at 1240, the Preamble observes that "because the Department's analysis of appellate case law since 1975 has found workers' control and opportunity for profit or loss to be most predictive of a worker's classification status, the finalized standard provides more accurate guidance."

[10] For example, DOL criticizes the reasoning of court decisions that upheld the independent-contractor status of plaintiffs, e.g., at 86 Fed. Reg. 1168, 1173, wherein the Preamble "highlighted the decision in *Parrish* v. *Premier Directional Drilling,* 917 F.3d 369, as an example of inconsistent articulation of economic dependence," and at 86 Fed. Reg. 1168, 1174, "highlighted a case in which a court found that workers exercised enough on-the-job

Considering whether "workers as whole will benefit from the rule," it is submitted that workers would benefit by a clearer and more predictable test for determining their status as employees or independent contractors to the same extent as all other stakeholders in the regulated community. To be sure, individuals are no better off when their status cannot be determined with certainty in the absence of prolonged litigation, or when courts reach contradictory decisions concerning individuals in substantially similar work relationships.[11]

As to the final consideration the Proposed Rule mentions, which is "whether the rule's explanation of the standard provides clarity for stakeholders and for the purposes of WHD enforcement, as was intended," we submit that the five-factor test, with its two "core factors," provides extraordinary clarity for both purposes. First, the five-factor "economic realities" test provides the basis for a national standard that can be followed by all federal circuits, and thereby bring an end to different federal circuits applying different iterations of the test, e.g., applying different factors and different numbers of factors. Second, the two "core factors" appropriately allocate additional weight to the two factors that, when both point in the same direction, courts overwhelmingly have determined an individual's status to be that to which those factors point. As mentioned, this additional weighting creates clarity that is helpful in both directions. It more readily identifies instances of worker misclassification, while offering greater certainty to the contractual relationships entered into by legitimate independent entrepreneurs. Third, DOL's adoption of a definitive iteration of the "economic realities" test increases the probability that when DOL makes a determination of worker status in an investigation, a reviewing court would

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initiative for the control and opportunity factors to point towards independent contractor status, but nonetheless found the 'skill and initiative factor points towards employee status' due to 'the key missing ingredient . . . of initiative.' 85 FR 60607 (quoting *Express Sixty-Minutes Delivery,* 161 F.3d at 303);" or that vacated trial court decisions holding plaintiffs to be independent contractors, e.g., 86 Fed. Reg. 1168 at 1198, wherein the Preamble cited with approval "*Agerbrink* v. *Model Service LLC,* 787 F. App'x 22, 25–27 (2d Cir. 2019) (denying summary judgement based solely on disputed facts regarding plaintiff's 'control over her work schedule, whether she had the ability to negotiate her pay rate, and, relatedly, her ability to accept or decline work'). The Third Circuit in *Razak* v. *Uber Technologies* took a similar approach by emphasizing disputed facts regarding 'whether Uber exercises control over drivers' and had 'the opportunity for profit or loss depending on managerial skill' to deny summary judgment. 951 F.3d at 145–47." In addition, the Preamble, and text of the final regulations, explicitly reject an arguably pro-independent-contractor analysis of "economic dependence" as including consideration of an individual's investment in business ventures unrelated to the specific services at issue, e.g., 86 Fed. Reg. 1168 at 1173, wherein the Preamble rejected the reasoning in *Thibault* v. *BellSouth Telecommunication,* 612 F.3d 843 (5th Cir. 2010) (holding that cable splicer hired by same company under a very similar arrangement was an independent contractor. In this regard, the Preamble states "The *Thibault* court distinguished its result from *Cromwell* in part by highlighting Mr. Thibault's significant income from (1) his own sales company that had profits of approximately $500,000, (2) 'eight drag-race cars [that] generated $1,478 in income from racing professionally[,]' and (3) 'commercial rental property that generated some income.' *Thibault,* 612 F.3d at 849."

[11] E.g., 86 Fed. Reg. 1168, 1170 (Jan. 7, 2021), wherein the Preamble compares "*Sec'y of Labor* v. *Lauritzen,* 835 F.2d 1529, 1534–35 (7th Cir. 1987) (applying six-factor economic reality test to hold that pickle pickers were employees under the FLSA), *with Donovan* v. *Brandel,* 736 F.2d 1114, 1117 (6th Cir. 1984) (applying the same six-factor economic reality test to hold that pickle pickers were not employees under the FLSA)." Similarly, at 86 Fed. Reg. 1168 at 1173, the Preamble compares "*Cromwell* v. *Driftwood Elec. Contractor, Inc.,* 348 F. App'x 57 (5th Cir. 2009) (holding that cable splicers hired by Bellsouth to perform post-Katrina repairs were employees), and *Thibault* v. *BellSouth Telecommunication,* 612 F.3d 843 (5th Cir. 2010) (holding that cable splicer hired by same company under a very similar arrangement was an independent contractor)."

apply the same test when reviewing the DOL's determination, regardless of the federal circuit in which the case is decided.

The observation contained in the Proposed Rule that the proposed delay would not be disruptive – because "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" – understates the impact of the glaring deficiencies in the current state of the law governing worker-status determinations under the FLSA. As noted, at this time different federal circuits apply different tests and the tests themselves yield inconsistent determinations even in substantially similar facts. This has resulted in prolonged and very expensive litigation to ascertain the status of individuals under the FLSA.[12] The longer this adverse condition persists, the longer the regulated community will suffer. Legitimate independent entrepreneurs will continue to struggle to find client companies willing to take the risk of doing business with them. Meanwhile, companies engaged in worker misclassification can continue to avoid detection due to the uncertain and unpredictable application of the current "economic realities" test.

The undersigned respectfully urge that the effective date for the Independent Contractor Rule remain March 8, 2021, and not be delayed, so the uncertainties and conflicting determinations from the seemingly endless worker-status litigation under the "economic realities" test can end. As noted, the only beneficiaries of the status quo are trial attorneys.

Thank you very much for your consideration.

Very truly yours,

Coalition to Promote Independent Entrepreneurs

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