Flex Comments

Re: RIN 1235–AA43

Employee or Independent Contractor Classification Under the Fair Labor Standards Act

December 13, 2022

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Washington, DC 20210

Dear Ms. DeBisschop:

Flex[1] respectfully submits these comments in response to the Department of Labor's ("Department" or "DoL") Notice of Proposed Rulemaking ("Notice" or "NPRM") seeking comment on the Department's proposal to modify Wage and Hour Division ("WHD") regulations for determining employee or independent contractor status under the Fair Labor Standards Act ("FLSA" or "Act").

Introduction.

Flex represents America's app-based rideshare and delivery platforms and the people who use them. We are committed to ensuring that workers' voices—and their desire to earn on their own terms—are fully heard by policymakers.

To that end, Flex commissioned the first national poll of app-based workers earlier this fall.[2] The survey found that the vast majority (77%) of app-based workers prefer to remain independent contractors, preserving the flexibility and freedom to choose when, where, and how often to work. The survey also found that:

[1] Flex is the voice of the app-based economy, representing America's leading app-based rideshare and delivery platforms and the people who count on them. Our member companies—DoorDash, Gopuff, Grubhub, HopSkipDrive, Instacart, Lyft, Shipt, and Uber—help provide access to crucial goods and services to customers safely and efficiently, offer flexible earning opportunities to workers, and support economic growth in communities across the country. Together, we advocate for policies that enable our industry to continue delivering for the people who count on our platforms.

[2] Flex, New Morning Consult Poll Shows 77% of App-Based Workers Prefer to Remain Independent Contractors, Oct. 24, 2022, https://www.flexassociation.org/post/mcworkersurvey ("Exhibit A"). The survey was conducted by Morning Consult on behalf of Flex from September 23-September 28, 2022. 1,251 workers who earn on app-based platforms in the United States were surveyed. Interviews were conducted online, and the data was weighted to approximate a target sample of app-based workers based on gender, age, race, educational attainment, and region. Results have a margin error of +/- 3 percentage points.

- 8 in 10 spend 20 hours or fewer per week with app-based platforms (with most—61%—working 10 or fewer hours a week),
- More than 84% are satisfied with app-based platforms[3]; and
- 85% say app-based platforms have been fair to the flexibility of workers' schedules.[4]

These survey results should come as no surprise. Workers today have real choices in deciding how they earn income—and for what kind of paycheck. There are over 10 million jobs open across the U.S.,[5] with no shortage of jobs for people looking for extra income with traditional W-2 employers. Yet, nearly 25 million people choose to work with app-based platforms to earn extra money.[6] That's nearly 25 million people who are making their own choices every day about where, when, how often—and with which companies—they want to work.

More broadly, there is no doubt that the economic landscape is shifting. As the Department knows, for roughly a century, U.S. labor laws have been based on a dual classification system; a worker is either an employee or an independent contractor. Historically, independent contractors were service providers like financial planners, dentists, and graphic designers. The common thread was workers' control over how, when, where, and for whom to work. Employees, on the other hand, generally have set hours and set tasks, dictated and controlled by their employer.

However, app-based platforms have transformed how workers earn: nearly 25 million people earn on app-based platforms,[7] and the way we live: sixty percent of Americans have used app-based platforms for various services.[8] Technological innovation has made flexible, independent work available to more people than ever before. These earners have voted with their feet to choose an evolutionary path of economic independence made possible by advances in technology.

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[3] This is echoed by Pew Research Center's survey findings. Pew Research Center, The State of Gig Work in 2021 (Dec. 8, 2021), https://www.pewresearch.org/internet/2021/12/08/americans-experiences-earning-money-through-online-gig-platforms/ ("[M]ost gig platform workers say they have had a positive experience with these jobs…") (hereinafter "Pew Research Center Survey").

[4] *Id*.

[5] Bureau of Labor Statistics, Economic News Release, Job Openings and Labor Turnover Summary – September 2022 (Nov. 1, 2022), https://www.bls.gov/news.release/jolts.nr0.htm (noting that "[t]he number of job openings increased to 10.7 million on the last business day of September.").

[6] *See supra* note 3.

[7] *Id*.

[8] Flex, New Survey Finds Overwhelming Majority of U.S. Consumers View App-Based Workers as Crucial to Key Community Needs, (Dec. 7, 2022), https://www.flexassociation.org/post/release-app-based-consumers. The survey was conducted by Morning Consult on behalf of Flex from September 21-September 24, 2022 among a sample of 3,010 adults in the United States. Interviews were conducted online, and the data was weighted to approximate a target sample of adults based on gender, age, race, educational attainment, and region. Results have a margin error of +/- 2 percentage points.

Some of these app-based earners are parents working around school or special needs schedules; some just need more money amid inflationary pressures; and some seek transitional income as they become burgeoning entrepreneurs. In fact, last year saw a record number of applications filed to form new businesses,[9] and app-based platform work plays an enabling role in supporting those entrepreneurial efforts. Rice University found a 7% to 12% increase in entrepreneurial interest after the arrival of rideshare platforms in a community, attributed to the safety net that app-based work provides while people pursue their dreams.[10]

App-based platforms like those represented by Flex have also become crucial in meeting important community needs, like access to safe transportation, supporting individuals with disabilities or illnesses, and access to food and other essentials.[11] Examples abound of app-based platforms helping communities tackle food insecurity[12], aid food banks,[13] provide more equitable healthcare,[14] and recover from natural disasters.[15] This shows that just as millions leverage these app-based platforms to unlock income earning opportunities in ways that make sense for them, millions count on these platforms to better meet the demands and responsibilities of their lives and their community's needs.

For these reasons, we urge policymakers to exercise caution in considering regulatory actions that could increase costs for millions of American consumers and impact those

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[9] NPR, New businesses soared to record highs in 2021 (Jan. 12, 2022), https://www.npr.org/2022/01/12/1072057249/new-business-applications-record-high-great-resignation-pandemic-entrepreneur.

[10] John M. Barrios et al., Launching with a parachute: The gig economy and new business formation, Journal of Financial Economics (April 2022), Volume 144, Issue 1, 2022, https://www.sciencedirect.com/science/article/abs/pii/S0304405X21005390.

[11] For instance, overwhelming majorities of Americans said that app-based earners are important for safe transportation (80%), supporting those with disabilities or illness (79%), and providing access to food (77%) and essential items/supplies (78%), according to a recent survey. Flex, New Survey Finds Overwhelming Majority of U.S. Consumers View App-Based Workers as Crucial to Key Community Needs, (Dec. 7, 2022), https://www.flexassociation.org/post/release-app-based-consumers ("Exhibit B").

[12] David Downey, California city first in US to partner with DoorDash to deliver food to hungry households, The Mercury News (Nov. 3, 2022), https://www.mercurynews.com/2022/11/03/riverside-joins-with-doordash-to-deliver-food-to-hungry-households/.

[13] Instacart, Instacart Launches Community Carts, Enabling Online Grocery Donations to Food Banks Nationwide in Just a Few Taps (Nov. 29, 2022), https://www.prnewswire.com/news-releases/instacart-launches-community-carts-enabling-online-grocery-donations-to-food-banks-nationwide-in-just-a-few-taps-301688299.html.

[14] Walgreens, Partners with DoorDash and Uber Health to Provide Free Paxlovid Delivery (Oct. 25, 2022), https://news.walgreens.com/press-center/news/walgreens-partners-with-doordash-and-uber-health-to-provide-free-paxlovid-delivery.html (noting that "[f]ree delivery will help accelerate access to COVID-19 treatment for communities across America with a focus on underserved populations.").

[15] Lyft, Disaster Response, https://www.lyft.com/blog/posts/help-after-hurricane-ian (noting Lyft is providing "access to free and discounted rides to help those affected [by Hurricane Ian] in Florida move to designated shelters and critical resources.').

looking for extra income opportunities,[16] particularly in a time of significant inflationary pressures.[17]

Flex wants to work with policymakers to support independent work. That means centering the qualities of app-based work that have drawn a diverse array of people[18]—from mothers and fathers to veterans, caregivers, entrepreneurs, and many others—to our members' platforms, while also promoting common-sense policies that enhance and enable independent work. That means supporting the millions of consumers and app-based earners who turn to app-based platforms every day to create opportunities to live, work, and run their businesses on their own terms.

Our comments on the NPRM fall into two categories. First, in Part I, we explain why the Department should not jettison the current Final Rule on Independent Contractor Status under the Fair Labor Standards Act, published at 86 FR 1168 (Jan. 7, 2021) and codified at 29 CFR Part 795 ("2021 Rule" or "Current Rule"). Second, in Part II, if the Department chooses to proceed with a new Final Rule, the Department should revise the proposed rule in several key respects.

I. The Department Should Not Jettison the Current Rule, Which Was Adopted for Sound and Laudable Policy Reasons and Is Effectively Less Than a Year Old.

The 2021 Rule represented a milestone in DoL rulemaking. Before the Current Rule, "the Department ha[d] never promulgated a generally-applicable regulation addressing who is an independent contractor and thus not an employee under the FLSA."[19] The NPRM that led to the Current Rule was "the Department's first ever notice-and-comment rulemaking to provide a generally applicable interpretation of independent contractor status under the FLSA."[20]

The current regulation was set forth in the 2021 Rule, which has been in place less than a year.[21] A great deal of work went into the Current Rule, by both the Department and members of the public who provided carefully considered and thoughtful comments. More

[16] Chamber of Progress, New Study Finds Millions Could Lose Work if U.S. Reclassifies Contractors (April 6, 2022), https://progresschamber.org/new-study-finds-millions-could-lose-work-if-u-s-reclassifies-contractors/.

[17] Bloomberg, Economists See US Inflation Running Even Hotter Through Next Year (Nov. 15, 2022), https://www.bloomberg.com/news/articles/2022-11-15/economists-revise-up-us-inflation-forecasts-in-bloomberg-survey ("Underpinned by a strong labor market and higher wages, consumer spending has largely held up in the face of the fastest price growth in a generation.").

[18] Flex, App-Based Worker Survey at Slide 17, https://www.flexassociation.org/workersurvey.

[19] 86 FR 1168, 1172.

[20] 86 FR 1168, 1172.

[21] While its effective date was March 8, 2021, the Rule's implementation was immediately suspended, and the suspension was not lifted until the federal district court's order in *Coalition for Workforce Innovation v. Walsh*. No. 1:21–CV–130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022).

than 1,800 individuals and organizations submitted comments.[22] The Department reported that the "overwhelming majority" of comments from independent contractors supported adoption of the Current Rule.[23] Stated another way, the "overwhelming majority" of independent contractors—the precise population this proposed rule is intended to benefit—wanted to move away from the type of unweighted multi-factor balancing test that the Department is now proposing. Instead, independent contractors made clear they wanted the clarity and crystallization articulated by the Department in its 2021 Rule.

For the following reasons, the Department should not jettison the 2021 Rule.

A. The Current Rule Provides a More Workable and Predictable Classification Analysis.

The Current Rule was developed "to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy."[24] And, indeed, the Current Rule did increase certainty for stakeholders. By designating two core factors, the 2021 Rule not only provided a more workable and predictable focus for performing a classification analysis, it also emphasized the two factors most probative of a worker's economic independence. And that, of course, is the ultimate issue at hand. As the Department explained in the 2021 Rule, "these core factors … drive at the heart of what is meant by being in business for oneself: Such a person typically controls the work performed in his or her business and enjoys a meaningful opportunity for profit or risk of loss through personal initiative or investment. The other economic reality factors—skill, permanence, and integration—are also relevant as to whether an individual is in business for him- or herself. But they are less probative to that determination."[25]

The Department's focus on the two core factors "is also supported by the Department's review of case law."[26] The Department—*this* Department—reviewed "the results of appellate decisions since 1975 applying the economic reality test" and found that "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 classification favored by the opportunity factor aligned with the ultimate classification in every case."[27]

The Department continued, "These two findings imply that whenever the control and opportunity factors both pointed to the same classification—whether employee or independent contractor—that was the court's conclusion regarding the worker's ultimate classification. … In other words, *the Department did not uncover a single*

[22] 86 FR 1168, 1171.

[23] 86 FR 1168, 1171-72.

[24] 86 FR 1168.

[25] 86 FR 1168, 1196.

[26] 86 FR 1168, 1196.

[27] 86 FR 1168, 1196-97.

court decision where the combined weight of the control and opportunity factors was outweighed by the other economic reality factors. In contrast, the classification supported by other economic reality factors was occasionally misaligned with the worker's ultimate classification, particularly when the control factor, the opportunity factor, or both, favored a different classification."[28]

The adoption of two core factors, therefore, simplified the economic dependence analysis. It did not *change* the results. Nor did it strike all other factors as irrelevant. It just recognized, through an examination of 45 years of appellate case law, that two core factors are determinative of the outcome in almost all cases.

In short, the Department's decision to move away from a completely unweighted multi-factor balancing test was well-considered and reflected the proper economic reality inquiry.

The Department's decision was also based on practicality. Multi-factor balancing tests are inherently subjective and are prone to confusion and error. As the Supreme Court observed in 2014, "experience has shown that … open-ended balancing tests, can yield unpredictable and at times arbitrary results."[29]

This experience is readily apparent to anyone who has ever been involved in a case in which the legal outcome is determined by a multi-factor balancing test. Two judges can evaluate the same set of facts through the lens of the same multi-factor balancing test and easily reach different results. And they often do, as evidenced by every Court of Appeals decision that has ever reversed a District Court ruling that, based on the facts presented in summary judgment or at trial, there either was or was not misclassification.[30]

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[28] 86 FR 1168, 1197 (emphasis added, internal citation omitted).

[29] *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 136, 134 S. Ct. 1377, 1392, 188 L. Ed. 2d 392 (2014).

[30] *See, e.g., Acosta v. Off Duty Police Servs.*, 915 F.3d 1050 (6th Cir. 2019) (reversing district court's ruling that some plaintiffs were independent contractors under the FLSA and holding instead, on the same record, that all of the workers were employees); *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297 (5th Cir. 1975) (reversing district judge's determination that plaintiff was independent contractor under the FLSA and, on the same record, concluding instead that plaintiff was employee); *Walsh v. Alpha & Omega USA, Inc.*, 39 F.4th 1078 (8th Cir. 2022) (reversing district court's determination that plaintiff was an employee under the FLSA and, on the same record, holding that there were genuine issues of material fact that could support the conclusion that plaintiff was an independent contractor); *Agerbrink v. Model Service LLC*, 787 Fed. Appx. 22 (2d. Cir 2019) (reversing district court's grant of summary judgment on FLSA misclassification question and holding that there were genuine issues of material fact); *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308 (11th Cir. 2013) (reversing district court's grant of summary judgment that plaintiff was independent contractor under FLSA and instead holding that there were genuine issues of material fact); *Henderson v. Inter-Chem Coal Co., Inc.*, 41 F.3d 567 (10th Cir. 1994) (reversing district court's finding that plaintiff was an independent contractor under the FLSA and, on the same record, finding that there were genuine issues of material fact that could support the conclusion that plaintiff was an employee); *Imars v. Contractors Manuf. Servs., Inc.*, 165 F.3d 27 (6th Cir. 1998) (reversing district court's determination on summary judgment that plaintiff was an independent contractor under the FLSA and holding, on the same record, that there were genuine issues of material fact).

Under prior iterations of the test (and under the Department's proposed new rule), there was no guidance as to how to weigh the relative importance of the various factors in any given situation. The Current Rule's distillation of case law and articulation of the courts' historic reliance on the two core factors improved predictability and certainty. Under the Current Rule, parties are more readily able to determine whether a worker is an independent contractor or an employee, which means there is a lower risk of erroneous outcomes or wasteful litigation. As the Supreme Court has noted, well-crafted regulations should provide notice and predictability, thereby aiding in the interpretation of and compliance with a statute.[31]

At a time of uncertainty for stakeholders in all sectors of the American economy, the Department should not seek to eliminate a rule that was just recently enacted "to promote certainty" and replace it with an open-ended balancing test of the sort that, as "experience has shown … can yield unpredictable and at times arbitrary results."[32]

B. The Current Rule Better Reflects the 21st Century Economic Landscape.

In adopting the 2021 Rule, the Department explained that "prior articulations of the test have proven to be unclear and unwieldy," "under-developed and sometimes inconsistently applied," "a source of confusion," lacking in "guidance on how to prioritize or balance different and sometimes competing considerations," "inefficien[t]," and displaying a "lack of structure."[33] Moreover, the Department determined that "these shortcomings have become more apparent over time as technology, economic conditions, and work relationships have evolved."[34]

It is no longer 1938, when Congress enacted the FLSA. Today, independent contractors can leverage app-based technology to build their own businesses in ways we could not have conceived even 20, let alone 84, years ago. The tools now exist for independent contractors to strategically toggle between competing applications to maximize their personal profit; to evaluate demand and offer pricing so they can choose, instantaneously, whether to work, where to work, and how long to work; and to plan their own lives and schedules with autonomy, unshackled from traditional employer-employee norms.

But now, less than a year after the March 2022 ruling[35] that allowed the Current Rule to take effect, the Department proposes to reverse course and revert back to an unweighted multi-factor balancing test, which the Department had just excoriated as confusing,

[31] *See, e.g., Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012); (castigating agencies for "promulgat[ing] vague and open-ended regulations that they can later interpret as they see fit, thereby 'frustrat [ing] the notice and predictability purposes of rulemaking.'"); *see also Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring).

[32] *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 136 (2014).

[33] 86 FR 1168, 1172.

[34] 86 FR 1168, 1172.

[35] See *supra* note 21.

inefficient, unclear, unwieldy, and out of touch with the modern economy. This significant reversal has not been sufficiently explained by the Department in its NPRM.

In essence, the NPRM fails to explain how the same Department, staffed largely by the same career civil servants, who based the Current Rule on a factual analysis of 45 years of appellate case law, could reach such a diametrically opposite and ultimately misguided conclusion.

The Department's NPRM certainly does not argue that the courts have misapplied the 2021 Rule or that the 2021 Rule has had unintended consequences. Nor could it, because there is no evidence that the courts have misapplied the 2021 Rule, and the Department offers not a single example of unintended consequences arising from the 2021 Rule.

C. The Department Has Shown Success in Pursuing Misclassification Enforcement Actions Under the Current Rule.

The Department also does not argue that the 2021 Rule has stifled its efforts to clamp down on worker misclassification. The reason is straightforward: There is simply no evidence that the Current Rule is making it harder to crack down on worker misclassification. Indeed, in the last three months alone, the Department has repeatedly touted its successes in addressing actual worker misclassification:

- On November 16, 2022, the Department reported, "From Arizona to Florida and from Illinois to Louisiana, our investigations have recovered millions of dollars in back wages for thousands of healthcare workers. One Pennsylvania case alone recovered over $9 million in back wages and liquidated damages for more than 1,700 employees who were misclassified as independent contractors.[36]

- On November 16, 2022, the Department also announced it had secured $160,477 in overtime back wages for 129 misclassified healthcare workers.[37]

- On November 10, 2022, the Department shared that it had reached a settlement of nearly $1.13 million, after "[t]he division determined the employers denied a total of 193 home healthcare workers overtime wages for hours over 40 in a workweek when they misclassified the employees as independent contractors."[38]

- On October 27, 2022, the Department announced that it had obtained a consent judgment for $1.05 million against an assisted living provider for unpaid overtime

[36] U.S. Department of Labor Blog, This November, We Honor Healthcare Workers – and Continue Protecting Their Rights (Nov. 16, 2022), https://blog.dol.gov/2022/11/16/this-november-we-honor-healthcare-workers-and-continue-protecting-their-rights?.

[37] U.S. Department of Labor, US Department of Labor Recovers $1.2M in Back Wages for 599 Home Healthcare Workers Employed by Four Agencies in Texas, Louisiana (Nov. 16, 2022), https://www.dol.gov/newsroom/releases/whd/whd20221116-0.

[38] U.S. Department of Labor Seeking Maryland Home Healthcare Workers Who May Be Owed Back Wages, Damages in $1.13M Recovery (Nov. 10, 2022), https://www.dol.gov/newsroom/releases/whd/whd20221110-1.

on the grounds that the company "[w]illfully misclassified direct care workers and direct care leads as independent contractors and improperly classified them as exempt from overtime."[39]

- On October 6, 2022, the Department announced that it had secured an award of $278,073 from a construction staffing firm for back wages and liquidated damages for 208 misclassified construction workers.[40]

- On September 28, 2022, the Department reported that it had recovered $103,979 in back wages for 55 security company workers misclassified as independent contractors.[41]

- On September 28, 2022, the Department announced a partnership with the Louisiana Workforce Commission to "continue to work together on important issues such as the misclassification of employees as independent contractors."[42]

- On September 27, 2022, the Department declared that it had obtained a consent judgment that will recover $9.3 million in back wages and liquidated damages for 1,756 employees of a Philadelphia healthcare staffing company that misclassified them and willfully denied their hard-earned overtime pay."[43]

- On September 23, 2022, the Department publicized that it had recovered $352,347 in back overtime wages for 653 staffing agency workers who had been misclassified as independent contractors.[44]

[39] U.S. Department of Labor, Part-Owner of Pittsburgh Assisted Living Provider That Denied Wages, Intimidated Workers Pays $1M in Back Wages, Damages After Federal Investigation, Litigation (Oct. 27, 2022),https://www.dol.gov/newsroom/releases/whd/whd20221027.

[40] U.S. Department of Labor Investigation, Litigation Secures $278K in Back Wages, Damages for 208 Construction Workers Denied Overtime by Suffolk Agency (Oct. 6, 2022), https://www.dol.gov/newsroom/releases/whd/whd20221006-0.

[41] U.S. Department of Labor, US Department of Labor Recovers $104K for Tulsa-Area Security Workers After Investigation Finds Employer Misclassified Workers (Sept. 28, 2022), https://www.dol.gov/newsroom/releases/whd/whd20220928-3.

[42] U.S. Department of Labor, Louisiana Workforce Commission Renew Partnership to Protect Workers From Misclassification (Sept. 28, 2022), https://www.dol.gov/newsroom/releases/whd/whd20220928.

[43] U.S. Department of Labor, US Department of Labor Obtains Judgment to Recover $9.3M in Back Wages, Damages for 1,756 Workers Misclassified by Philadelphia Staffing Company (Sept. 27, 2022), https://www.dol.gov/newsroom/releases/whd/whd20220927.

[44] U.S. Department of Labor, US Department of Labor Recovers $352K in Back Pay for 653 Workers After Detroit Area Staffing Agency Misclassifies Them as Independent Contractors (Sept. 23, 2022), https://www.dol.gov/newsroom/releases/WHD/WHD20220923.

- On September 22, 2022, the Department announced that it had recovered $22,492 in overtime back wages owed to 39 drywall installers who had been misclassified as independent contractors.[45]

D. Adoption of the Proposed Rule Would Be Arbitrary and Capricious.

The Administrative Procedure Act "directs that agency actions be 'set aside' if they are 'arbitrary' or 'capricious.'"[46] With this proposed rulemaking, the Department has failed to explain its abrupt change from less than two years ago, failed to justify why it should jettison a rule that it adopted "to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy," failed to demonstrate that the Current Rule is not working or that the Current Rule has made misclassification more difficult to enforce, and failed to adequately explore—and largely outright ignored—the potential adverse economic impacts of its proposed change.[47] Applying the legal standards in the Administrative Procedure Act, the proposed rule is arbitrary and capricious and, therefore, likely to be rejected by the first federal court to evaluate its enforceability.[48]

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[45] U.S. Department of Labor Investigation Finds Houston Area Drywall Contractor Violated Federal Law, Misclassified Workers as Independent Contractors (Sept. 22, 2022), https://www.dol.gov/newsroom/releases/whd/whd20220922-0.

[46] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 207 L. Ed. 2d 353, 140 S. Ct. 1891, 1905 (2020); *see also* 5 U.S.C. § 706(2)(A).

[47] The Department also fails to consider the economic impact of the proposed rule on the labor market and the economy in general. The uncertainty created by the new rule, whether by design or not, could decrease opportunities for individuals to work as independent contractors. Vulnerable consumers and the economy generally would be adversely affected as well. Caroline George and Adie Tomer, The Brookings Institution, Delivering to deserts: New data reveals the geography of digital access to food in the U.S. (May 11, 2022), https://www.brookings.edu/essay/delivering-to-deserts-new-data-reveals-the-geography-of-digital-access-to-food-in-the-us/. The Department has not adequately explored these or other possible adverse consequences of the proposed rule, which, if finalized, promises to inject uncertainty to the economic dependence analysis and reignite a problem that the Department successfully tackled less than two years ago. The potential consequences of the proposed rule make the Department's failure to articulate a rational foundation for this abrupt change even more baffling. Various studies indicate that if a rule change and subsequent enforcement actions were to result in widespread findings of misclassification, the result could be a significant loss of work for many Americans. *See, e.g.*, NERA Economic Consulting, The Economic Impact of Instacart on the U.S. Retail Grocery Industry Before and During the COVID-19 Pandemic (Sept. 2021), https://www.nera.com/publications/archive/case-project-experience/nera-study-finds-direct-causal-relationship-between-instacart-ad.html; Beacon Economics, How Many App-Based Jobs Would be Lost by Converting Rideshare and Food Delivery Drivers from Independent Contractors to Employees in the Commonwealth of Massachusetts? (Feb. 2022, https://independentmass.org/wp-content/uploads/2022/07/Massachusetts_Drivers_Design-Final.pdf; Chamber of Progress, The Many Ways Americans Work and The Costs of Treating Independent Contractors as Employees(Apr. 2022, https://progresschamber.org/new-study-finds-millions-could-lose-work-if-u-s-reclassifies-contractors/. Nor does the NPRM mention the damage to reliance interests, let along meaningfully consider such interests, flowing from a potential revocation and replacement of the Current Rule.

[48] Other deficiencies in the proposed rule that would render it vulnerable as arbitrary and capricious are set forth below in Part II.

The Department's abrupt about-face also damages its credibility and reliability, instead indicating to the public that the Department is a political institution whose interpretation of a 90-year-old statute will change with every transfer of executive power.

For all these reasons, the Department should withdraw the NPRM. Instead of pursuing this rulemaking, the Department should monitor court decisions applying the Current Rule and self-monitor its own ability to address misclassification.

II. Recommended Changes to the Proposed Rule

If the Department is committed to revoking the Current Rule, regardless of the circumstances described above, the Department should make several revisions to the proposed rule, for the reasons set forth below.

A. Overview

Several aspects of the proposed rule are inconsistent with the ultimate inquiry in an economic realities test. The ultimate inquiry, as established by the U.S. Supreme Court, is whether the workers "as a matter of economic reality are dependent upon the business to which they render service."[49]

In *United States v. Silk*, the Supreme Court concluded that "employees' included workers who were such as a matter of economic reality."[50] In *Rutherford Food v. McComb*, the Supreme Court adopted the reasoning of the Court of Appeals, which determined that worker classification under the FLSA was based on the "underlying economic realities" of the relationship.[51]

Any rule adopted by the Department thus should have only one objective—to assist in making the determination as to **whether the workers "as a matter of economic reality are dependent upon the business to which they render service."** The proposed rule, however, strays from this ultimate objective in several respects.

B. Specific Proposed Changes

1) In Factor #1, the Commentary about "Managerial Skill" Should Be Deleted or Revised Because It Fails to Account for the Realities of 21st Century Work.

Proposed Factor #1 weighs a worker's "[o]pportunity for profit or loss depending on managerial skill." The proposed rule then lists four examples of facts that can be relevant to the analysis. However, the last sentence in proposed section 795.110(b)(1) strays from both the purpose of this rule and the ultimate purpose of the economic realities test.

[49] *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947).

[50] 331 U.S. 704, 713 (1947).

[51] 331 U.S. 722, 727, 731 (1947).

The proposed last sentence reads: "*Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor."*

The sentence is misleading. While "some" decisions by a worker "that can affect the amount of pay that a worker receives" are not indicative of independent contractor status, some may well be. If a cashier at a fast-food restaurant voluntarily chooses to work overtime or pick up an additional shift, that decision would not support independent contractor status given the amount of control the employer generally exerts over that worker's schedule and the availability of those opportunities. On the other hand, if an independent contractor chauffeur who was planning to drive clients five days one week is solicited by a new client for a lucrative opportunity on Saturday, the decision to accept that new client and work an extra day is plainly an entrepreneurial decision that reflects managerial decision making.

The inclusion of the proposed last sentence in Factor #1 would likely lead to the discounting of evidence that is, in fact, highly relevant to a worker's "opportunity for profit or loss depending on managerial skill." The proposed sentence is also inconsistent with the ultimate inquiry as to whether the workers "as a matter of economic reality are dependent upon the business to which they render service."

The proposed sentence ignores the economic realities of modern work and an independent contractor's ability to maximize return on options for work into the parameters of life's other demands. This is particularly the case because of technological advances that have facilitated independent contractors' ability to quickly determine what earnings opportunities and hours worked will yield *for them* the biggest return on the investment of *their* time. While control over work opportunities has always been a sign of independence, technological innovation has facilitated economic independence in ways that are significantly different from the traditional notion of employer-employee relationships, which makes the rule's language in 795.110(b)(1) even more concerning.

The clearest example is the emergence of app-based platforms, which have created new paths for individuals to use their managerial skill to earn a profit or incur a loss. Independent contractors using app-based technology make managerial decisions every day that demonstrate economic *independence* and their *lack of economic reliance* on a particular platform.[52] Workers using app-based technology to run their own businesses constantly exercise managerial skill by making cost-benefit analyses that they could not make and do not make in a traditional employer-employee relationship. Such decisions reflecting managerial skill and economic independence include:

- Using more than one platform simultaneously;

[52] Indeed, 53% of app-based workers use more than one app-based platform for work regularly; that percentage rises to 81% for veterans and 66% for parents. Flex, App-Based Worker Survey, https://www.flexassociation.org/workersurvey.

- Switching between platforms on different days or within the same day;

- Exercising discretion over which days to work, which hours to work, how many hours to work, and which locations to work from;

- Selecting a work vehicle based on factors that will affect the worker's potential for profit or loss, such as fuel economy, storage space, amenities for passengers, and hauling capacity, rather than personal needs;

- Accepting or rejecting potential rideshare or delivery opportunities based on observing real-time changes in potential earnings from working or not working; and

- Setting their own schedules and making cost-benefit decisions about whether to deviate from their schedules based on a personalized evaluation of conditions that change in real time, such as whether demand suddenly exceeds supply in a way that would result in sufficiently enticing profit opportunities.

All these decisions involve, at some level, working more hours or taking more jobs. But these decisions are driven by managerial skill and individual cost-benefit analyses that consider the potential return on investment for each potential engagement.

App-based technologies, in fact, create more opportunities for economic independence because of the way app-based workers find opportunities for additional profit. App-based platforms make finding work easier, reduce transaction costs, and open up new kinds of work that otherwise would not have been available.

The logic of deleting the final sentence applies to a broad range of independent tradespeople, not just app-based platform workers. Independent contractors in many trades exercise managerial skill every day in deciding whether to work more hours or take more jobs. Plumbers, electricians, musicians, wedding planners, interior designers, landscapers, snowplowers, executive coaches, truck drivers, and business consultants all perform individualized cost-benefit analyses and apply managerial skill when deciding to accept or decline jobs or to accept or decline to work additional hours.

Both employees and independent contractors make decisions about whether to take more jobs or work more hours. The ability to make such decisions is not probative of whether workers "as a matter of economic reality are dependent upon the business to which they render service."

In fact, the opposite is equally likely, if not more likely. As a matter of economic reality, if a worker has discretion to take more jobs (or not) or to work more hours (or not), the worker is demonstrating economic independence from the business offering the extra jobs or hours every time the worker decides whether or not to take the extra job or accept the work. In contrast, traditional employees are scheduled by their supervisors and must perform the tasks and work the hours they are assigned.

For all these reasons, the final sentence in proposed Factor #1 is factually incorrect and not probative of economic dependence. Accordingly, the following sentence should be stricken from proposed section 795.110(b)(1):

~~**"Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor."**~~

Alternatively, if the Department feels it is necessary to say something about how the decision to accept or decline work applies to this factor, then the Department should say what it said less than two years ago with respect to core factor #2, the opportunity for profit or loss: "**This factor weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster**."

2) Factor #2 Should Be Substantially Revised to Remove Provisions That Are Illogical, Incompatible with Economic Realities, and Contrary to FLSA Case Law.

There are several troubling aspects of proposed Factor #2. The first three sentences limit the scope of investments that are deemed relevant. We will address these first, in part (a). The final two sentences address the Department's proposal to evaluate the relative investments of the worker and her client. We will address these second, in part (b).

a) The First Three Sentences of Factor #2 Should Be Removed Because They Inappropriately Diminish the Relevance of Investment in Tools and Equipment in a Way That Would Render Factor #2 Not Probative of the Economic Realities of the Relationship.

Proposed Factor #2 begins with the consideration of a worker's investments in her own business venture. But the Department's proposed guidance about how to interpret that factor strays significantly from decades of case law interpreting the FLSA and is inconsistent with the ultimate purpose of the economic realities test.

The first three sentences of proposed Factor #2 read as follows: "*This factor considers whether any investments by a worker are capital or entrepreneurial in nature. Costs borne by a worker to perform their job (e.g., tools and equipment to perform specific jobs and the workers' labor) are not evidence of capital or entrepreneurial investment and indicate employee status. Investments that are capital or entrepreneurial in nature and thus indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach.*"

These three sentences are noteworthy in several respects. First, the proposed text limits the scope of relevant investments to those that "are capital or entrepreneurial in nature." Second, the proposed text says that investments by a worker in the tools and equipment

needed to perform the job are “not evidence of capital or entrepreneurial investment” and are, therefore, not relevant in supporting a worker's independent contractor status. Third, the proposed text inexplicably goes a step further, and says that a worker's investments in tools and equipment “indicate employee status.” Fourth, the proposed text says that relevant investments are those that “serve a business-like function, such as increasing the worker’s ability to do different types of or more work, reducing costs, or extending market reach.”

All of these limiters should be removed because they are arbitrary and capricious and contrary to common sense, to decades of case law, and to the Department’s own sub-regulatory guidance. Moreover, these proposed limitations undermine and are inconsistent with the ultimate inquiry of a worker’s economic independence and will result in inconsistent and arbitrary determinations by the Department and the courts.

Consider the independent plumber, electrician, dog walker, house sitter, interior designer, graphic designer, guitarist, or florist. These are all typically independent contractor roles that require modest capital investments, involve few costs, and can be performed successfully in a limited geographic market.

Nonetheless, each of these independent contractors make investments in their businesses, and they make such investments for the purpose of preserving economic independence. They buy the tools and equipment with which the work is performed. These investments allow them to perform such work for more than one client. Plumbers use their tools to work at more than one facility; landscapers use their equipment to work on more than one yard; painters use their tools to work on more than one building.

The tools need not be “capital or entrepreneurial in nature” to have the effect of helping the worker achieve economic independence. Tools and equipment that help a worker achieve economic independence may include paint brushes, drills, ladders, wrenches, laptop computers, and musical instruments.

When a worker’s investment in tools and equipment allows the worker to move from client to client, the worker’s investment in those tools and equipment makes the worker less economically reliant on any one client. And that, of course, is the ultimate inquiry. The Department’s proposal to exclude from consideration a worker’s investment in tools and equipment used to perform their work, therefore, makes no logical sense.

The proposed rule not only says that investments by a worker in tools and equipment needed to perform the job is “not evidence of capital or entrepreneurial investment” and are therefore not relevant in supporting a worker's independent contractor status. But then, inexplicably, it goes a step further, saying that a worker's investments in tools and equipment “indicate employee status.”[53]

[53] This text appears in the second sentence of proposed Factor #2: “Costs borne by a worker to perform their job (e.g., tools and equipment to perform specific jobs and the workers’ labor) are not evidence of capital or entrepreneurial investment and **indicate employee status**." (Emphasis added.)

Both parts of this sentence are simply wrong. It is both illogical and inconsistent with decades of interpretive case law for the Department to propose to (1) limit the scope of relevant investments and (2) exclude from relevance (or worse, to treat as evidence of employee status) the worker's investment in tools and equipment that enable that worker to become economically independent.

Furthermore, courts consistently recognize the relevant economic realities factor to be "a worker's investment in equipment and materials for the task."[54] Courts applying this factor do not limit the scope of relevant investments the way the NPRM proposes to do.

The text accompanying Factor #2 also directly contradicts the Department's subregulatory guidance in Fact Sheet #13, which for decades has advised that "the amount of the alleged contractor's investment in facilities and equipment"[55] is not only relevant to a worker's status but tends to support classification as an independent contractor. The proposed rule, without explanation, would abandon the subregulatory guidance in Fact Sheet #13 and would narrow the scope of relevant investments to be considered.

The Department's proposed re-imagining of the historical "investment" factor turns logic on its head. When a worker bears her own costs by investing in the tools and equipment needed to perform the job, she is acting in a manner consistent with independent contractor status. Such investments enable her to operate independently, permit her to work for multiple clients, and empower her to be less economically reliant on any one business.

Finally, the proposed text explaining what it means for an investment to be "capital or entrepreneurial in nature and thus indicate independent contractor status" is similarly divorced from economic reality. Not every independent contractor wants to "do different types of … work" or "extend[ ] market reach." A successful independent contractor entrepreneur may offer a service that requires little in capital expenditures. Nothing about being an independent contractor requires a desire to do different types of work or to expand into new markets. The desire to expand into new types of work or extend market reach says nothing about whether workers "as a matter of economic reality are dependent upon the business to which they render service."

Accordingly, for all these reasons, the following sentences should be stricken from proposed section 795.110(b)(2):

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

[54] *See, e.g., Acosta v. Off Duty Police Servs., Inc.*, 915 F.3d 1050, 1055 (6th Cir. 2019); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979); *Nieman v. Nat'l Claims Adjusters, Inc.*, 775 F. App'x 622, 625 (11th Cir. 2019); *Schultz v. Cap. Int'l Sec., Inc.*, 466 F.3d 298, 305 (4th Cir. 2006).

[55] U.S. Department of Labor, Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA), https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship.

~~**Costs borne by a worker to perform their job (e.g., tools and equipment to perform specific jobs and the workers' labor) are not evidence of capital or entrepreneurial investment and indicate employee status.**~~

~~**Investments that are capital or entrepreneurial in nature and thus indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach.**~~

b) The Last Two Sentences of Factor #2 Should Be Deleted or Revised Because They Are Not Probative of Economic Realities, Do Not Reflect Actual Conditions for Small Business Owners, and Will Lead to Unintended Consequences That Hurt Small Businesses.

The last two sentences in proposed Factor #2 are as follows: "*Additionally, the worker's investments should be considered on a relative basis with the employer's investments in its overall business. The worker's investments need not be equal to the employer's investments, but the worker's investments should support an independent business or serve a business-like function for this factor to indicate independent contractor status*."

The guidance in these two sentences is illogical, will lead to absurd and unintended consequences, will hurt small business owners by dissuading them from performing services for large businesses, and has no probative value in addressing the ultimate inquiry about economic dependence.

The Department proposes that a worker's investment in her own business should be compared to the hiring party's investment in its own business, but that makes little sense. The size of the party receiving the service has no relevance to whether the worker providing the service is, as a matter of economic reality, dependent upon the business receiving the service. The financial resources of the party receiving the services is not relevant to determining whether the individual providing the services is an employee or an independent contractor.

Thus, the Department's proposal to consider the *relative* investments of service provider and service recipient is misplaced. If the contractor performing the service and the business receiving the service are being run as two separate businesses, and if both have made investments in their respective businesses that support their ability to operate independently from each other, then there is no probative value in comparing the relative investments that the two parties have made in their own businesses.

This aspect of the proposed rule would lead to absurd consequences. The proposed guidance creates a scenario in which an independent contractor could provide the same service to two businesses, one small and one large, and the worker's classification could be different based solely on the size of the business receiving the services. A plumber would be an independent contractor on Monday when fixing a toilet at a local restaurant, but an employee on Tuesday when fixing a toilet at a Fortune 500 company.

The nature of an independent contractor's business dictates the amount of investment needed to operate the business. Florists, plumbers, or musicians-for-hire may require modest amounts of capital investment to run their own businesses. If their status as independent contractors is determined in part by the size of the businesses who receive their services, they will be dissuaded from expanding their businesses to serve larger clients. There is no logical reason to create such financial disincentives, and the proposed comparison in investments does not tend to make it more or less likely that a worker has made a *sufficient* investment to be in business for herself. The final two sentences in this proposed factor are not probative of the ultimate inquiry—whether workers "as a matter of economic reality are dependent upon the business to which they render service."

Accordingly, the following text should be deleted from proposed section 795.110(b)(2) should be deleted:

- In the name of the factor, the words "and employer" should be deleted:

(2) Investments by the worker ~~and the employer~~.

- In the final paragraph, the text should be changed as follows:

~~Additionally, the worker's investments should be considered on a relative basis with the employer's investments in its overall business. The worker's investments need not be equal to the employer's investments, but t~~ The worker's investments should support an independent business or serve a business-like function for this factor to indicate independent contractor status.

3) Factor #4 Should Remove the Commentary That Legally Required Control May Be Relevant Evidence of Control Because This Commentary Is Contrary to Controlling Case Law, Contrary to this Department's Own Guidance, and Not Probative of the Economic Realities of a Relationship.

Historically, the right-to-control portion of the analysis has examined the right to control the manner and means by which the work is performed. The right-to-control analysis historically looks at the hiring party's right to control essential terms and conditions of the engagement, such as the right to dictate when and how the work is to be performed. Legally required control is generally disregarded since that is control imposed by the government, not by the client or hiring party. The client or hiring party is not choosing to exercise legally required control; it is required to do so.

In Factor #4, however, the Department proposes to include the following guidance on how to perform the right-to-control analysis: "*Control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control*." The Department's proposed guidance on this point should be removed from the proposed rule.

a) Factor #4's Commentary is Contrary to Controlling Case Law.

First, this proposed guidance is contrary to decades of case law analyzing the nature of control in the worker classification context. Legally required control is not the type of control that is relevant for a control analysis in a misclassification evaluation. The D.C. Circuit Court of Appeals made the point most concisely in *Local 777 v. NLRB*, when it held, "Government regulation constitutes supervision not by the employer but by the state."[56]

This has been the prevailing view by the courts for decades. A sampling of relevant decisions leaves no doubt on this point of law:

- *E.E.O.C. v. North Knox School Corp*., 154 F.3d 744, 748 (7th Cir. 1998) (finding no employer-employee relationship between a bus driver and a school district because the significant state regulations that govern that relationship "reflect no 'control' by … the putative employer," but rather "the state … controls these factors").

- *Iontchev v. AAA Cab Serv., Inc.*, 685 F. App'x 548, 550 (9th Cir. 2017) (finding that taxicab drivers were independent contractors under the FLSA and disregarding alleged control by the hiring party because its "disciplinary policy primarily enforced the Airport's rules and regulations governing the Drivers' cab operations and conduct.").

- *SIDA of Hawaii, Inc. v. N.L.R.B*., 512 F.2d 354, 358 (9th Cir. 1975) ("[T]he fact that a putative employer incorporates into its regulations [various] controls required by a government agency does not establish an employer-employee relationship.").

- *Chao v. Mid-Atl. Installation Servs., Inc.,* 16 F. App'x 104, 106 (4th Cir. 2001) (finding that installers were independent contractors under the FLSA and rejecting the Department's argument that "'backcharging' Installers for failing to comply with various local regulations or with technical specifications demonstrates the type of control characteristic of an employment relationship.").

- *N.L.R.B. v. A. Duie Pyle, Inc*., 606 F.2d 379, 385 (3rd Cir. 1979) (referring to various governmental regulations that impose control over independent contractor owner-operators and finding, "these regulations by themselves do not establish that the owner-operators are employees of Pyle. They are designed to protect the shipping and highway-traveling public, not to facilitate control by the company over the owner-operators. Substantial precedent indicates that government regulations, standing alone, are insufficient to turn owner-operators into employees.").

- Air Trans., Inc. v. N.L.R.B., 679 F.2d 1095, 1100 (4th Cir. 1982) (finding that because the requirements for all drivers to possess a valid chauffeur's license, to

[56] *Local 777, Democratic Union Org. Comm., Seafarers Int'l Union of N. Am., AFL-CIO v. NLRB*, 603 F.2d 862, 875 (D.C. Cir. 1978).

have their vehicles properly licensed as taxicabs, and to charge metered rates are all requirements imposed by state law, they "are not indicative of control").

- *N.L.R.B. v. Tri-State Trans. Corp*., 649 F.2d 993, 995 (4th Cir. 1981) ("[A] contractor is an employee only if there was 'a layer of carrier regulation put upon the contractor beyond what was required by government regulation, impairing the contractor's independence.'" (quoting *Local 814, International Brotherhood of Teamsters (Santini Bros., Inc.)*, 208 N.L.R.B. 184, 197 n.18 (1974))).

- *Cilecek v. Inova Health System Servs.*, 115 F.3d 256, 261–61 (4th Cir. 1997) ("It is true that Cilecek was required to abide by hospital rules and regulations for the treatment of patients, which regulated his work at the hospitals in substantial detail… All of these regulations, however, relate to the professional standard for providing health care to patients for which both Emergency Physicians and the Inova hospitals had professional responsibility to their patients…. Because of the overarching demands of the medical profession, the tension in professional control between doctors and hospitals for medical services rendered at hospitals is not, we believe, a reliable indicator of whether the doctor is an employee or an independent contractor at the hospital.").

- *N.L.R.B. v. Assoc. Diamond Cabs, Inc.*, 702 F.2d 912, 922 (11th Cir. 1983) ("Consistently the courts have held that regulation imposed by governmental authorities does not evidence control by the employer. Indeed, employer imposed regulations that incorporate governmental regulations do not evidence an employee employer relationship…. Here the requirement that trip sheets be maintained is not imposed on the drivers by the Company but only by the city code. Thus, the existence of the requirement is not indicative of control by the employer; rather Government regulations constitute supervision not by the employer but by the state … and it is the law that controls the driver.") (internal quotations and citations omitted).

- *Local 777, Democratic Union Org. Comm., Seafarers Int'l Union of N. Am., AFL-CIO v. NLRB*, 603 F.2d 862, 875 (D.C. Cir. 1978) ("Government regulations constitute supervision not by the employer but by the state. Thus, to the extent that the government regulation of a particular occupation is more extensive, the control by a putative employer becomes less extensive because the employer cannot evade the law either and in requiring compliance with the law he is not controlling the driver. It is the law that controls the driver. Thus requiring drivers to obey the law is no more control by the lessor than would be a routine insistence upon the lawfulness of the conduct of those persons with whom one does business.").

- *Yellow Taxi Co. of Minneapolis v. N.L.R.B.*, 721 F.2d 366, 376 (D.C. Cir. 1983) ("Courts have consistently held that regulation imposed by governmental authorities does not evidence employer control… Reasonable efforts to ensure compliance with governmental regulations do not evidence control unless pervasive control by the employer exceeds to a significant degree the scope of the government control.").

- *Taylor v. Waddell & Reed, Inc.*, No. 09–02909, 2013 WL 435907, at *6 (S.D. Cal. Feb.1, 2013) ("Importantly, allegations of 'control' pursuant to legal requirements are not employment indicia," and adding in a footnote, "As [FINRA] members … W & R and financial advisors are subject to FINRA regulations, as well as a variety of other securities requirements. Jaeger argues the alleged 'control' that W & R exercised over him is indicative of an employment relationship. However, the vast majority of Jaeger's misclassification allegations relate to W & R's conduct mandated by FINRA and SEC requirements, including licensing requirements and other regulations. As Judge Sabraw previously recognized in this case, terms of a putative 'employment' relationship imposed by legal requirements do not suggest control by W & R.").

- *Murray v. Principal Fin. Gp., Inc.*, No. CV 08-1094, 2009 WL 10674191, at *6 n. 4 (D. Ariz. July 14, 2009) ("Simply 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. Courts have concluded as much in a variety of scenarios.").

- *Santangelo v. New York Life Ins. Co.*, No. 12–11295–NMG, 2014 WL 3896323, *9 (D. Mass. Aug. 7, 2014), aff'd, 785 F.3d 65 (1st Cir. 2015) ("A company does not exercise the requisite control necessary to create an employer-employee relationship merely because it restricts the manner or means of their work in order to comply with statutory and regulatory requirements.").

b) Factor #4's Commentary is Contrary to the Department's Own Guidance.

The proposed guidance is contrary to the Department's own conclusions, published in Opinion Letter FLSA2021-9.[57] In FLSA2021-9, the Department concluded that "the requirements to comply with certain legal, health, and safety obligations are **not a factor** in determining whether a driver is an employee or an independent contractor under the FLSA."[58] In this opinion letter, the Department also advised: "As we recently explained, insisting on adherence to certain rules to which the worker is already legally bound" says nothing about whether the worker is an employee or an independent contractor."[59]

The Department continued:

> "Congress and federal regulators have placed significant responsibility on motor carriers for their independent contractors' safety performance, distinguishing the

[57] On January 19, 2021, the Department issued opinion letter FLSA2021-9. The Department withdrew this letter on January 26, 2021, solely on the grounds that it was based on the 2021 Rule, which had not yet gone into effect. Now, however, the 2021 Rule is in effect, and the Department's guidance on this issue should be viewed as a public position by the Department about how to interpret the FLSA. Although the DOL has removed the letter from its website, third parties have preserved the content of the letter. See, e.g., https://www.jacksonlewis.com/sites/default/files/docs/2021_01_19_09_FLSA.pdf.

[58] FLSA2021-9, at 4 (emphasis added).

[59] *Id*. at 4.

> trucking industry from many other businesses and industry sectors. This translates to a strong incentive for motor carriers to pursue safety measures and improve regulatory compliance with respect to all of their drivers, employees and independent contractors alike. As you note, the camera- and sensor-based safety systems monitor the driver, some internal components of the vehicle, and some external conditions. The speed limiter prevents the driver only from driving in a way that the law prohibits. The mandatory meetings and trainings educate drivers on their legal obligations to drive safely. And a contractual obligation to comply with safety requirements requires no particular action except what the law already requires. Each of these are the types of legal, health, and safety standards that **do not suggest control indicative of employee status**."[60]

With the 2021 Rule now in effect, this opinion letter is not only an explicit statement of the Department's position on how to interpret the FLSA, but the letter is also entitled to Portal-to-Portal Act deference.[61] Such reliance is appropriate, even if "such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."[62]

The Department's new position that its interpretation of the FLSA as of 2021—an opinion endorsed and signed by the Wage and Hour Administrator—is now somehow incorrect is not substantiated by law, is contrary to sound public policy, and is arbitrary and capricious.

c) The Cases Relied Upon by the Department Do Not Support the Department's Conclusions.

The cases cited by the Department[63] do not support the Department's proposed new position that legally required control should be considered as relevant control. Ignoring the voluminous case law that is contrary to its proposed text, the Department relies on *Scantland v. Jeffry Knight*, but this case provides no support for the Department's position that *legally required* control should be relevant to the control factor.[64] In *Scantland*, the court discussed the many aspects of control exerted by the putative employer.[65] The putative employer argued that the control exerted was because of the "nature of the business," a vague argument that the court properly rejected.[66] The defendant in *Scantland* did not argue that control was required by law, and the relevance of legally required control is never considered by the *Scantland* court.

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[60] *Id*. at 5 (emphasis added).

[61] *Id*. at 8.

[62] *Id*. at 8; see also 29 U.S.C. § 259(a)

[63] 87 FR 62247

[64] 721 F.3d 1308, 1316 (11th Cir. 2013).

[65] *Id*.

[66] *Id*.

The Department then cites to *Shultz v. Mistletoe Exp. Service, Inc*. to try to support its position.[67] But *Shultz* also fails to support the Department's position.[68] In *Shultz,* the court analyzed the "integrated" factor and observed that the plaintiff's work was fully integrated into the defendant's operation. The court's only mention of legally required control was in the context of reciting factors that the defendant argued weighed in favor of independent contractor status. The court did not independently assess whether some factors, including legally required control, might have weighed in favor of independent contractor status. The court merely concluded that, after listing all of the factors the defendant cited, the "overall situation" weighed in favor of employee status. There was no consideration whatsoever in *Shultz* as to whether legally required control should be part of the control analysis.[69]

The Department then points to *Chao v. National Lending Corp*., as support for the relevance of legally required control.[70] *National Lending* is a federal district court case from a court in the Sixth Circuit, where binding precedent holds that legally required control is not relevant. In any event, the opinion in *National Lending* does not support the Department's position.[71] Rather, the opinion in *National Lending* spent several paragraphs discussing numerous factors that weigh in favor of employee status. Then, just before reaching its conclusion, the court observed that the plaintiff's employer held the plaintiff's license and that the plaintiff worked exclusively for the putative employer. The opinion said nothing about legally required control, and the word "control" appears nowhere in this discussion.[72] In fact, the court's discussion of the control factor started and ended three paragraphs earlier.[73] Instead, based on the court's roadmap of how it would be evaluating the economic realities factors, the exclusivity discussion appears to be in the context of the sixth factor, whether the work was integral to the business. The point being considered by the court was only that the plaintiff had worked for just one business and that he was economically dependent on that business as his sole source of income. The court then summarized the totality of circumstances and concluded that the worker was economically dependent on the putative employer.[74]

The Department cites to *Badon v. Berry's Reliable Resources, LLC*, but this case also provides no support for the Department's position.[75] In *Badon*, the defendant argued that

[67] 87 FR 62247, n. 360.

[68] 434 F.2d 1267, 1271 (10th Cir. 1970).

[69] *Id*.

[70] 87 FR 62247, n. 361

[71] *Chao v. First Nat. Lending Corp.*, 516 F. Supp. 2d 895, 900 (N.D. Ohio 2006), *aff'd*, 249 F. App'x 441 (6th Cir. 2007).

[72] *Id*. at 900.

[73] *Id*. at 899.

[74] *Id*. at 900.

[75] 87 FR 62247.

it was required by state law to exert control over the plaintiff,[76] but the court rejected that argument by listing numerous aspects of control that were not required by state law.[77] The *Badon* court never said that legally required control is a relevant aspect of the control analysis; it said that the defendant in that case exerted significant amounts of control that were not required by state law.[78]

The Department also argues that its position is supported by *Molina* v. *South Florida Express Bankserv, Inc.*[79] Again, not true. In *Molina*, the court merely listed arguments by both sides as to the types of control exerted by the putative employer.[80] The defendant made several arguments, including that it exerted control to satisfy customer requirements. The plaintiff made several arguments, including pointing to multiple ways in which the defendant exerted control. The court did not examine which aspects of control were required by customers or contracts, and the issue of legally required control was never even mentioned in the case. After listing the arguments from both sides, the court concluded that there were genuine issues of material fact. The court took no position as to the relevance of legally required control, and this case provides no support for the Department's proposed change.

The few cases cited by the Department do not support its position that legally required control may be considered as relevant evidence of control. To the contrary, this position as been rejected time and again by courts of appeals and district courts that directly address this issue. The Department's position on this issue is contrary to law, and the applicable text should be removed.

d) The Department's Position Absurdly Treats Compliance with the Law as a Negative Factor, Sending a Confusing Message to Law-Abiding Businesses That Engage with Legitimate Independent Contractors.

The Department's position would also create illogical and impractical conundrums for businesses that engage with independent contractors.

Many laws impose requirements on companies with respect to their interactions with independent contractors, especially where the independent contractors will be on public roadways. For example, the Department of Transportation and Federal Motor Carrier Safety Administration impose onerous requirements on companies retaining independent contractor owner-operator drivers, including with respect to applications, drug testing, road testing, handling of hazardous materials, and motor vehicle safety standards;[81] Georgia law, for example, requires that third party delivery drivers making alcohol

[76] Nos. 19–12317 c/w 20–584 & 21–596, 2022 WL 2111341, at *3 (E.D. La. June 10, 2022).

[77] *Id*. at *4.

[78] *Id*. at *4.

[79] 87 FR 62247.

[80] 420 F. Supp. 2d 1276, 1284 n.24.

[81] *See, e.g.*, 49 CFR Parts 40, 100-180, 300-399, 571.

deliveries are provided a safety education course that conforms with curriculum mandated by the state;[82] and Alabama law requires third party delivery drivers making alcohol deliveries to be trained in conformance with state requirements.[83]

To the extent companies control legal compliance by independent contractors, such control is exerted primarily because the law would assign liability to the company if it failed to exert such control. The Department should not use a company's compliance with federal, state, or local law as a negative factor in the classification analysis, *especially* since these laws generally acknowledge that the regulations imposed are with respect to relationships that are understood to be independent contractor relationships and are accepted by the regulatory body as such.

e) The Department's Position Is Inconsistent with the Government's Role in Protecting Public Safety and Health.

The proposed text creates a similarly negative inference for control exerted to protect public safety and health. This proposal is misplaced for the same reasons why legally required control is not relevant. In the interests of public safety, an app-based platform company may require rideshare or delivery drivers to submit to background checks and to comply with speed limits and other traffic laws. During the height of the pandemic, app-based platform companies instituted the use of face coverings and that drivers conduct periodic cleaning of surfaces in their vehicles. Some of these measures were required by public health agencies.

Courts have rightly acknowledged that measures intended to protect public safety, such as safety training and drug testing, are not evidence of the type of control that would support a finding of misclassification.[84]

f) The Department's Rule Ignores Basic Realities Involved in Third Party Contracting.

The proposed text would also consider, as relevant control, control that is exerted for the purpose of complying with "contractual or customer service standards." But that ignores the realities of third party subcontracting relationships. In almost every service contract, the client includes a requirement that the service provider must comply with certain specifications or service levels. If the Department's proposed text were adopted, the mere act of entering into a commercially reasonable contract with an independent contractor could ironically jeopardize the independent contractor status of the service provider.

[82] Ga. Code § 3-3-10(e).

[83] Ala. Code § 28-3A-13.1(a)(6).

[84] *See, e.g., Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 382 (5th Cir. 2019) ("Nor were plaintiffs employees because of safety training and drug testing. To the contrary, requiring everyone working at an oil-drilling site to be educated on safety protocol, and not be under the influence of illegal drugs, is required for safe operations.").

The Department should not weave a regulatory web that would potentially entangle businesses in a misclassification trap as a consequence of complying with legal, regulatory, safety, or contractual requirements. It is not necessary. It is not logical. It is contrary to sound public policy. It is not required by the FLSA. It is not consistent with decades of case law on indicia of relevant control. Most important of all, the proposed language is not even probative of the ultimate inquiry—whether workers "as a matter of economic reality are dependent upon the business to which they render service."

g) The Department's Position Is Internally Inconsistent with the Department's Own Preamble to the Proposed Rule.

Finally, the Department's proposed regulation on consideration of legally required controls and safety measures is internally inconsistent with the rationale expressed by the Department in the preamble to the proposed rule.

In the part of the preamble that explains proposed Factor #4, the Department explains: "The Department believes that the nature and degree of the employer's control should be fully assessed, and this assessment *may, in some cases***,** include consideration of control that is due to an employer's compliance with legal, safety, or quality control obligations."[85]

In attempting to justify this portion of the proposed rule, the Department explains that this type of control may be evidence that the worker is not entrepreneurial enough to comply with legal and other requirements on her own: "For example, when an employer, rather than a worker, controls compliance with legal, safety, or other obligations, it may be evidence that the worker is not in fact in business for themself because they are not doing the entrepreneurial tasks that suggest that they are responsible for understanding and adhering to the legal and other requirements that apply to the work or services they are performing such that they are assuming the risk of noncompliance."[86]

The proposed rule itself, however, lacks all of the context provided in the preamble. The proposed rule simply states, "Control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control." If the Department's intent is to make clear that there "may" be "some cases" in which compliance with legal, safety, or quality control obligations "may" be relevant, then the rule should say that and should provide the full context contained in the narrative.

That said, even that language would invite the question as to what those circumstances are and what the term "some cases" means. If the Department ventures in that direction, it should provide a comprehensive set of examples to illustrate that such cases would be rarities. The proposed rule lacks any of the necessary context and simply offers the admonishment that businesses choosing to comply with legal requirements, safety standards, or quality control measures do so at the risk of misclassification.

[85] 87 FR 62247 (emphasis added).

[86] *Id*.

The purpose of a regulation should be to add clarity. This proposed text adds confusion.

Accordingly, for all of these reasons, the following text should be deleted from proposed section 795.110(b)(4):

~~**Control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control.**~~

4) In Factor #4, Use of Technology to Supervise Should Not Be Referenced as a Relevant Control Factor.

In proposed Factor #4, Nature and degree of control, the proposed rule would include new types of control as relevant to the control portion of the analysis. One proposed new type of control to be considered is the use of technology. The proposed rule says that "*facts relevant to the employer's control over the worker include whether the employer uses technological means of supervision (such as by means of a device or electronically).*"

This proposed text should be deleted. The NPRM's reference to technology as a means of supervision is vague and confusing. The way this text is drafted reflects a lack of understanding about how technology is used in connection with legitimate independent contractor relationships. In the modern, tech-driven economy, technology is used to monitor contracts, vendors, suppliers, customers, deliveries, supply chain, and compliance with contractual terms of service.

App-based companies use technology in many ways to enhance the user experience for consumers that use the app. Such technologies may include geolocation, which is a form of monitoring, not supervision. Geolocation can be used, for example, to match a consumer with a nearby service provider, to provide information to consumers using the app about the expected delivery or arrival time, to facilitate the exchange of money, or to allow the consumer using the app to rate the service provider. None of these technologies are for supervising the manner and means by which the service provider performs the service.

The use of technology can be also driven by public safety goals. In fact, the federal government requires that independent contractor owner-operators subject to Federal Motor Carrier Safety Administration regulations must install electronic logging devices that automatically record the following data elements at certain intervals: date; time; location information; engine hours; vehicle miles; and identification information for the driver, authenticated user, vehicle, and motor carrier.[87]

The use of technology to monitor is not the same as supervising. The right to control factor traditionally considers control over the manner and means by which the work is

[87] *See* Federal Motor Carrier Safety Administration, ELD Functions FAQs, https://www.fmcsa.dot.gov/hours-service/elds/eld-functions-faqs.

performed. The use of technology as described above does not constitute supervision. Unfortunately, the way the rule is drafted, the text seems to presume that the use of technology "by means of a device or electronically" is naturally a form of supervision. It is not, and any such inference should be removed to avoid confusion.

Accordingly, the Department should modify the text in proposed section 795.110(b)(4) as follows:

> **Additionally, facts relevant to the employer's control over the worker include whether the employer ~~uses technological means of supervision (such as by means of a device or electronically),~~ reserves the right to supervise or discipline workers, or places demands on workers' time that do not allow them to work for others or work when they choose.**

5) Factor #5 Should Preserve the Current "Integrated Unit of Production" Analysis and Should Not Adopt a Flawed "Integral Part" Analysis That is Contrary to Case Law and Legally Unsupported.

Proposed Factor #5 would consider the "*[e]xtent to which the work performed is an integral part of the employer's business*," but the Department considered and rejected this formulation less than two years ago, when it released the 2021 Rule.

The Current Rule provides that a relevant factor in the economic realities analysis is "whether the work is part of an integrated unit of production."[88] In reaching that conclusion about the proper interpretation of the FLSA, this Department carefully analyzed the relevant Supreme Court case law and the purposes of the economic realities inquiry, then concluded that the extent to which the work performed is an *integral* part of the hiring party's business is not a legally relevant factor.

The 2021 Rule explains the legally relevant factor as follows:

> (iii) *Whether the work is part of an integrated unit of production*. This factor weighs in favor of the individual being an employee to the extent his or her work is a component of the potential employer's integrated production process for a good or service. This factor weighs in favor of an individual being an independent contractor to the extent his or her work is segregable from the potential employer's production process. This factor is different from the concept of the importance or centrality of the individual's work to the potential employer's business.[89]

The decision to use "integrated" and not "integral" in the test was based on a carefully reasoned analysis by this Department less than two years ago:

> Though circuit courts have applied an ''integral part'' factor, it was not one of the factors analyzed by the Supreme Court in *Rutherford Food.* Rather, the Court considered whether the worker was part of an ''integrated unit of production,'' 331

[88] 29 CFR § 795.105(d)(2)(iii).

[89] 29 CFR § 795.105(d)(2)(iii), 86 FR 1168, 1247 (Jan, 7, 2021).

> U.S. at 729, as this final rule does. The Department believes that circuit courts—and even the Department itself—have deviated from the Supreme Court's guidance and, in doing so, have introduced an ''integral part'' factor was not one of the distinct factors identified in *Silk* as being ''important for decision.'' 331 U.S. at 716. The ''integrated unit'' factor instead derives from *Rutherford Food,* where the Supreme Court observed that the work at issue was ''part of an integrated unit of production'' in the potential employer's business and concluded that workers were employees in part because they ''work[ed] alongside admitted employees of the plant operator at their tasks.'' 331 U.S. at 729. As the NPRM explained, the Department began using the ''integral part'' factor in subregulatory guidance in the 1950s. *See* WHD Opinion Letter (Aug. 13, 1954); WHD Opinion Letter (Feb. 8, 1956).[40] And circuit courts in the 1980s began referring to it as the ''integral part'' factor and analyzing it in terms of the ''importance'' of the work to the potential employer. *See, e.g., Lauritzen,* 835 F.2d 1529, 1534–35; *DialAmerica Mktg.,* 757 F.2d at 1386.
>
> The NPRM explained the reasons that the Department now believes the Supreme Court's original ''integrated unit'' formulation is more probative than the ''integral part'' (meaning ''important'') approach. As Judge Easterbrook pointed out in his concurrence in *Lauritzen,* ''[e]verything the employer does is 'integral' to its business—why else do it?'' *Lauritzen,* 835 F.2d at 1541 (Easterbrook J., concurring); *see also Zheng,* 355 F.3d at 73 (cautioning in the joint employer context that interpreting the factor to focus on importance ''could be said to be implicated in *every* subcontracting relationship, because all subcontractors perform a function that a general contractor deems 'integral' to a product or a service'').[90]

As the Department concluded, use of the term "integral" says nothing about whether the worker is economically dependent on the business for work:

> The NPRM further explained that ''the relative importance of the worker's task to the business of the potential employer says nothing about whether the worker economically depends on that business for work.'' 85 FR 60617. While some courts assumed that business may desire to exert more control over workers who provide important services, there is no need to use importance as an indirect proxy for control because control is already a separate factor. *Id.* (citing *Dataphase,* 781 F. Supp. at 735, and *Barnard Const.,* 860 F. Supp. at 777, *aff'd sub nom. Baker* v. *Flint Eng'g & Const. Co.,* 137 F.3d 1436 (10th Cir. 1998)). And this assumption may not always be valid. Modern manufacturers, for example, commonly assemble critical parts and components that are produced and delivered by wholly separate companies through contract rather than employment arrangements. And low transaction costs in many of today's industries make it cost-effective for firms to hire contractors to perform routine tasks.[91]

[90] 86 FR 1168, 1194.

[91] 86 FR 1168, 1194.

In its NPRM, the Department attempts to rely on *U.S. v. Silk*[92] to justify its proposed switch from "integrated" to "integral," but even *Silk* does not go as far as the Department wishes to go here. In *Silk*, the Supreme Court recognized that workers performing services that are, in the big picture, integral to the overall success of a business *may still be independent contractors*. For example, it is obvious that production and distribution are both integral to any business that sells goods. The goods cannot be sold if they are not produced; and the goods cannot be sold if they are not distributed. The Court in *Silk* made clear that the undertaking of one of these integral facets of a business does not mean the worker is an employee:

> Of course, this does not mean that all who render service to an industry are employees. *Compare Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 520, 46 S.Ct. 172, 173, 70 L.Ed. 384. Obviously the private contractor who undertakes to build at a fixed price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees. The distributor who undertakes to market at his own risk the product of another, or the producer who agrees so to manufacture for another ordinarily cannot be said to have the employer-employee relationship. Production and distribution are different segments of business.[93]

When the Department reached its conclusion less than two years ago that the relevant analysis must focus on whether the work is "integrated," not "integral," the Department also took into consideration the economic realities of how businesses operate. The Department's 2021 Rule "makes clear that":

> the relevant facts are the integration of the worker into the potential employer's production processes, rather than the nature of the work performed. As explained above, identifying the ''core or primary business purpose'' is not a useful inquiry in the modern economy. Falling transaction costs and other factors described above allow businesses to hire independent contractors to carry out tasks that are part of the businesses' core functions, while keeping those functions separate from its own production processes. At the same time, seemingly peripheral functions may be integrated into an employer's own processes, indicating employee status. What matters is the extent of such integration rather than the importance or centrality of the functions performed, which the Department does not find to be a useful indicator of employee or independent contractor status.[94]

The Department's 2021 conclusion that the proper legal test involves analysis of whether there exists an "integrated unit of production," not an "integral part" analysis, was reached not merely in its Notice of Proposed Rulemaking but in its Final Rule, which the Department released *after* it considered all public comments submitted on this subject and after it completed its internal deliberative process.

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[92] 331 U.S. 704, 712 (1947).

[93] *Id*.

[94] 86 FR 1168, 1194.

The Department has made no showing that its legal analysis in the 2021 Rule was flawed or inconsistent with the economic realities inquiry. The Department has made no showing that the Supreme Court has altered or rejected the *Rutherford Food* analysis relied upon in the 2021 Rule. The Department has made no showing that its conclusions reached in the 2021 Final Rule on this point have been rejected by any federal district court or appellate court or the Supreme Court, and indeed we have been unable to find any federal court decision anywhere in the nation that considered this (or *any*) part of the 2021 Final Rule and found anything wrong with it.

The Department's sudden reversal on this point, therefore, is arbitrary and capricious. Accordingly, proposed Factor #5 should be deleted, and the text in the current 29 CFR § 795.105(d)(2)(iii) should be inserted in its place, as follows:

> ~~▪ (5) Extent to which the work performed is an integral part of the employer's business.~~
> ~~This factor considers whether the work performed is an integral part of the employer's business.~~
>
> ~~This factor does not depend on whether any individual worker in particular is an integral part of~~
> ~~the business, but rather whether the function they perform is an integral part.~~
>
> ~~This factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the employer's principal business. This factor weighs in favor of the worker being an independent contractor when the work they perform is not critical, necessary, or central to the employer's principal business.~~
>
> **(5) Whether the work is part of an integrated unit of production. This factor weighs in favor of the individual being an employee to the extent his or her work is a component of the potential employer's integrated production process for a good or service. This factor weighs in favor of an individual being an independent contractor to the extent his or her work is segregable from the potential employer's production process. This factor is different from the concept of the importance or centrality of the individual's work to the potential employer's business.**

6) Any Final Rule Should Preserve the Helpful Subregulatory Guidance in Fact Sheet #13, Clarifying That Certain Factors Are Not Relevant.

The proposed new rule not only adds new interpretations to old factors, it omits the helpful guidance in Fact Sheet #13 about information that is not relevant to a classification analysis under the FLSA. Fact Sheet #13 advises:

> There are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether an

> alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.[95]

The proposed rule omits this helpful guidance and takes no position on the relevance of these facts. The purpose of a regulation is to provide clarity, and the removal of this clarifying text is unhelpful and counterproductive.

The Department provides no explanation for its decision to disregard its own subregulatory guidance as to factors that are explicitly not relevant to the analysis. The Department does not conclude that its subregulatory guidance was inaccurate or confusing or is superseded by statute. The Department simply ignores it in the proposed rule.

Accordingly, the Department should add guidance to the proposed rule that mirrors the subregulatory guidance in Fact Sheet #13, and make clear that the same factors previously deemed not relevant are still deemed not relevant. The Department should add the following text to the proposed rule:

> **There are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. Additionally, the Supreme Court has held that the time or mode of pay does not control the determination of employee status.**

7) Any Final Rule Should Replace the Term "Employer" with "Principal" or a Similarly Neutral Term.

When describing the principal business making use of a worker's services, the proposed rule consistently refers to that party as the "employer." But the entire point of the economic realities test is to determine whether the principal is or is not the worker's employer. The final rule should use a neutral phrase like "principal" or "business," not "employer." By using the word "employer," the Department suggests its predisposition to finding employment status every time.

The word "employer" obviously suggests an employment relationship and therefore not independent contractor status. There is no sound reason to use the word "employer," when other equally descriptive but neutral phrases are available. Neutral terms like principal, business, and hiring party are used throughout the United States, at both the

[95] *See supra* note 55.

federal and state level, *including by the Department*, in tests for determining worker status.

For example:

- In Fact Sheet #13, the Department uses the term "principal."[96]
- In IRS Publication 15-A, Employer's Supplemental Tax Guide (2022), the Internal Revenue Service uses the term "business."[97]
- In *Nationwide Mut. Ins. Co. v. Darden*, the Supreme Court used the term "hiring party," but did so in the context of quoting from a copyright case.[98]

Accordingly, in any Final Rule, the Department should omit the word "employer" and substitute a neutral term like "principal," which is the term already used by the Department in Fact Sheet #13.

Conclusion.

We thank the Department for the opportunity to comment on this important issue. The Department should preserve the Current Rule. But if it chooses to issue a new rule, then substantial revisions, as discussed above, are necessary.

Sincerely,

/s/ Kevin Ryan

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[96] DOL Fact Sheet #13, available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf

[97] IRS Publication 15-A, Employer's Supplemental Tax Guide (2022), at 7, https://www.irs.gov/pub/irs-pdf/p15a.pdf.

[98] 503 U.S. 318, 323, 112 S. Ct. 1344, 1348, 117 L. Ed. 2d 581 (1992).

Exhibit A

New Morning Consult Poll Shows 77% of App-Based Workers Prefer to Remain Independent Contractors

In the first national poll of app-based workers, 8 in 10 spend 20 hours or fewer per week on app-based platforms; more than 84% are satisfied with app-based platforms; and 85% say app-based platforms have been fair to the flexibility of workers' schedules

Washington, D.C. – The vast majority of app-based workers prefer to remain independent contractors, preserving the flexibility and freedom to choose when, where, and how often to work. A new survey released by Morning Consult was conducted on behalf of Flex, the voice of the app-based economy, and is the first national survey specific to app-based workers.

In a survey of 1,251 app-based workers across the United States, **77%** said they support maintaining their current classification as independent contractors. Notably, four in five (**80%**) typically spend only 20 or fewer hours per week using app-based platforms (**61%** percent work 10 or fewer hours per week).

Furthermore, workers are overwhelmingly satisfied **(84%)** with app-based platforms according to the new survey. In addition, **85%** say app-based platforms have been fair regarding the flexibility of workers' schedules.

"This data reflects a simple truth: app-based earners overwhelmingly prefer to remain independent," said **Flex CEO Kristin Sharp**. "*Flex encourages policymakers to listen to app-based earners as we work together to support the independent work that has drawn workers from a variety of backgrounds and experiences - from parents and veterans to caregivers and so many others - to app-based platforms."*

"App-based work offers me the independence to earn income on my own terms," said **Blakely Segroves**, an app-based worker from Alabama. *"After leaving the classroom to be a stay-at-home mom, I joined the app-based economy to save for my children's college education. Being my own boss lets me work when my family's busy schedule allows. Policymakers should recognize how apps have enabled millions of Americans like me to experience the freedom and flexibility that independent work provides."*

KEY TAKEAWAYS

App-Based Workers | Preference to Remain Independent

- **77%** support maintaining their current classification as independent contractors.

App-Based Workers | Work Frequency and Income Generation

- **80%** of earners earn with app-based platforms for 20 or fewer hours per week. **61%** work 10 or fewer hours per week.
- **Nearly 8 in 10** workers say their income from work on app-based platforms is less than half of their overall income.

App-Based Workers | Satisfaction with Platforms, Pay, Schedule, and Safety

- **84%** of app-based workers are satisfied with using app-based platforms. 3 out of 4 say app-based platforms have been fair regarding pay to workers.
- **83%** of app-based workers said they are likely to continue using app-based platforms for work in the next year and they are likely to recommend that others use app-based platforms for work.
- **85%** say app-based platforms have been fair in terms of flexibility of schedule.

Methodology. The survey was conducted by Morning Consult on behalf of Flex from September 23-September 28, 2022. 1,251 workers who earn on app-based platforms in the United States were surveyed. Interviews were conducted online, and the data was weighted to approximate a target sample of app-based workers based on gender, age, race, educational attainment, and region. Results have a margin error of +/- 3 percentage points.

About Flex. Flex is the voice of the app-based economy, representing America's leading app-based rideshare and delivery platforms and the people who count on them. Our member companies —DoorDash, Gopuff, Grubhub, HopSkipDrive, Instacart, Lyft, Shipt, and Uber—help provide access to crucial goods and services to customers safely and efficiently, offer flexible earning opportunities to workers, and support economic growth in communities across the country. Together, we advocate for policies that enable our industry to continue delivering for the people who count on our platforms.

Exhibit B

Release: New Survey Finds Most Consumers View App-Based Workers as Crucial to Key Community Needs

Majority (60%) of Americans have used app-based platforms, highlighting the importance of sound public policy for this sector

Washington, D.C. - An overwhelming majority of Americans see app-based platforms and those who earn on them as crucial to key community needs like safe transportation, supporting individuals with disabilities or illnesses, and access to food and other essentials, according to a new Morning Consult survey released by Flex, the voice of the app-based economy. The survey - which explored Americans' sentiment towards platforms like Uber, Lyft, DoorDash, Instacart, and Shipt - found that 6 in 10 Americans have used app-based platforms for various services, and nearly two-thirds say these services have positively impacted their lives.

The 3,010 consumers surveyed across the U.S. said that app-based earners are important for: safe transportation **(80%)**, supporting those with disabilities or illness **(79%)**, and providing access to food **(77%)** and essential items/supplies **(78%)**.

The survey found that **60%** of Americans have now used app-based platforms for various services, with the majority of that use beginning in the last two years **(61%)**. Over half of respondents (**51%**) shared that a key benefit to using app-based platforms is time-savings. Of those who have not used app-based platforms, **54%** say they are likely to use app-based platforms for various services in the future.

"This data shows that the vast majority of American consumers recognize the value of the app-based economy," said Flex CEO Kristin Sharp. "Just as millions leverage these app-based platforms to unlock income earning opportunities in ways that make sense for them, millions count on these platforms to save time and make life easier."

The data also has implications for ongoing policy discussions regarding worker classification. In October, Flex released the first national survey of app-based workers, which found that 77% of app-based workers prefer to remain independent contractors.

"Consumers understand that app-based workers and platforms are crucial to their lives and communities," Sharp added. "In a time of deep economic uncertainty and historic inflation, policymakers should exercise caution in considering regulatory interventions that could increase costs for millions of American consumers."

"As Mayor of Columbia, I saw the adoption of technology by workers and consumers change the fabric of our communities. Today millions use technology to innovate the ways they work and live: with the app-based economy as a prime example. Hundreds of millions of Americans have embraced app-based platforms to obtain services, earn on their own terms, and serve their communities." said Mayor Steve Benjamin, Flex

Chairman. “Flex Association looks forward to working with policymakers on solutions that expand these opportunities, and protect the innovation and flexibility reshaping our workforce.”

Methodology. The survey was conducted by Morning Consult on behalf of Flex from September 21-September 24, 2022 among a sample of 3,010 adults in the United States. Interviews were conducted online, and the data was weighted to approximate a target sample of Adults based on gender, age, race, educational attainment, and region. Results have a margin error of +/- 2 percentage points.

About Flex. Flex is the voice of the app-based economy, representing America's leading app-based rideshare and delivery platforms and the people who count on them. Our member companies —DoorDash, Gopuff, Grubhub, HopSkipDrive, Instacart, Lyft, Shipt, and Uber—help provide access to crucial goods and services to customers safely and efficiently, offer flexible earning opportunities to workers, and support economic growth in communities across the country. Together, we advocate for policies that enable our industry to continue delivering for the people who count on our platforms.

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