MODERN ECONOMY PROJECT

December 13, 2022

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

RE: Notice of Proposed Rulemaking, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 FR 62218 (RIN 1235-AA43)

Dear Ms. DeBisschop:

The Modern Economy Project ("MEP") writes to express our concerns with the Wage and Hour Division's ("WHD") above-referenced notice of proposed rulemaking, Employee or Independent Contractor Classification Under the Fair Labor Standards Act ("NPRM" or "Proposed Rule"). MEP is concerned that if the Proposed Rule is finalized as currently drafted, it will create significant uncertainty and confusion with regard to work classification under the Fair Labor Standards Act ("FLSA"), particularly for our small business members. We also feel WHD should not abandon the core factors and emphasis on actual practices of a contractual relationship that are hallmarks of WHD's current rule[1] and have provided clarity to the regulated community. For this reason, MEP urges WHD to maintain the current worker classification test established in the 2021 Rule and withdraw the NPRM altogether. If WHD decides, however, it must make changes to the 2021 Rule, MEP suggests modifications to the NPRM set forth below that will produce a final rule that more accurately reflects the modern economy. We also urge WHD to reevaluate the costs of this NPRM, which the agency has significantly underestimated.

MEP is a broad coalition of leading stakeholders focused on bipartisan policy solutions that promote economic opportunity for all through modern jobs, modern employers, and a modern government. We are dedicated to resetting the conversation in Washington, D.C., on economic policy. Our goal is to convene thought leaders, employers, and other stakeholders on policy conversations that more accurately reflect the realities of our modern economy. Worker classification policy is a prime example of where MEP can contribute additional data and experience from across the economy, particularly on an issue that impacts tens of millions of American employers and workers.

MEP is composed of numerous organizations that represent small and minority-owned businesses, and we consistently hear from our members as well as advocates representing minority-owned and women-owned businesses that working with independent contractors is fundamental to their

[1] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (January 7, 2021).

growth and success. Too often, the public discourse about independent contractors focuses on a very specific subset of individuals rather than reflecting on how much our modern economy relies on such contractors and why many individuals are choosing the autonomy and flexibility of independent work. As a result, the narrative has become disconnected from reality, lacking the facts and context about the role independent contractors play in our economy. The economy has naturally evolved to provide a number of benefits and opportunities unique to the community of people who choose to work independently through contractor arrangements. Policy that is out of touch with these realities risks raising unnecessary economic barriers for individuals who identify as independent contractors as well as the businesses and consumers who rely on them. Unfortunately, we believe this NPRM will do just that.

The Independent Contractor Standard Proposed by WHD

An individual's "economic dependence" is considered the ultimate inquiry when attempting to determine their proper classification as an employee or independent contractor under the FLSA. An individual is an independent contractor if he or she is not economically dependent on an employer for work and is, as a matter of economic reality, in business for him or herself.

In conducting the worker classification determination, the Proposed Rule calls for parties to use a "totality-of-the-circumstances" analysis. The test relies on multiple factors to assess the economic realities of the working relationship, and the factors are given equal weight in the analysis weighted. They are used as tools or guides to analyze the circumstances of the whole contractual relationship to determine the individual's proper classification. The proposed factors as articulated under the Proposed Rule are as follows:

1. Opportunity for profit or loss depending on managerial skill
2. Investments by the worker and the employer
3. Degree of permanence of the work relationship
4. Nature and degree of control
5. Extent to which the work performed is an integral part of the employer's business
6. Skill and initiative

The Proposed Rule's equal-weight analysis abandons the current rule's approach, in which WHD designated two factors – opportunity for profit or loss and nature and degree of control – as "core factors," giving them more weight in the worker classification determination. The current rule reviewed existing case law and found that courts have found these two factors more probative of an individual's economic dependence and consistently relied upon the "core factors" in making determinations.

Additionally, the Proposed Rule reinstates overlapping analysis between the factors and eliminates the emphasis in the analysis on the actual practices of the contractual relationship rather than the contractual or theoretical possibilities. The Proposed Rule calls for "additional factors" to be considered in the determination if they "in some way indicate whether the [worker] is in business for him- or herself, as opposed to being economically dependent on the potential employer for work." Finally, the Proposed Rule makes several changes to the individual factors that greatly alter the factors' meanings and applications.

Modern Economic Project's Concerns with the Proposed Rule

The Modern Economy Project believes several of the policy decisions made by WHD in its current rule strengthened the worker classification analysis and provided much needed clarity to the regulated community. Indeed, one of MEP's founding members, the Association for Enterprise Opportunity (AEO) describes the vibrancy, dynamism and size of the microbusiness community in its *Bigger Than You Think* study and is following that report with a study on the high utilization of independent contractors by America's smallest businesses.[2]

For the same reasons, we find the choices by the agency to eliminate or alter these policies in NPRM will be detrimental to the economy, bona fide independent contractors, and the businesses who rely on their expertise and services. Specifically, MEP urges WHD to reconsider its decisions to: eliminate the core factors; reinstate overlap in the analysis; and eliminate the emphasis on actual practices of a contractual relationship. MEP also suggests important changes to the individual factors in the NPRM to ensure they accurately reflect the modern economy and the realities of today's workforce. Finally, MEP urges WHD to reevaluate the costs associated with this Proposed Rule, as the current estimates are simply not accurate.

DOL Should Preserve "Core Factors" as They Appropriately Focused the Analysis

WHD's decision in the current rule to designate the control and opportunity for profit or loss factors as "core factors" is consistent with legal precedent and appropriately focused the worker classification analysis. In doing so, WHD provided the regulated community with guidance as to how courts have historically viewed which aspects of the relationship are generally determinative of an individual's classification. As WHD explained in the current rule, DOL's prior "lack of guidance [led] to uncertainty regarding 'which aspects of 'economic reality' matter, and why.'" In short, DOL's approach prior to the current rule did not provide the regulated community with any direction as to how best to balance conflicting factors, leading to confusion and inconsistency with respect to compliance and enforcement.

Additionally, the two factors designated as core factors by WHD are more probative of an individual's economic dependence and, therefore, should carry more weight in the analysis. As the current rule explained, the 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… [I]t is not possible to properly assess whether individuals are in business for themselves or are instead dependent on another's business without analyzing their control over the work and profit or loss opportunities." This is evident by the appellate court record. The current rule explained, "Among [appellate cases since 1975], 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." There was not a "single court decision where the combined weight of the control and opportunity factors was outweighed by the other economic reality factors." Clearly, these two core factors are more probative of an individual's classification.

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[2] Association for Enterprise Opportunity, *Bigger Thank You Think: The Economic Impact of Microbusiness In the United States* available at https://aeoworks.org/wp-content/uploads/2019/03/Bigger-than-You-Think-Report_FINAL_AEO_11.10.13.pdf. The Association could not complete the additional research on the regulatory timeline for the Proposed Rule but will share its findings with the Department.

The Proposed Rule's approach, on the other hand, provides no clear guidance as to which facts of the contractual relationship are more significant and should be given more weight. It is common for various factors to point towards different determinations, and the absence of guidance on how factors should be weighted will necessarily lead to greater inconsistency with respect to enforcement and compliance. This benefits no one, but it is particularly troubling for small businesses, which generally do not have the same access to legal expertise as larger companies. Yet big or small, all businesses are liable for accidental or inadvertent FLSA violations. Vague standards mean some businesses may misinterpret the multifactor test and expose themselves to substantial liability following an improper classification. Others, fearing liability, may fail to utilize independent contractors altogether, resulting inefficiencies for the business, fewer legitimate contracting opportunities for individuals, and fewer options for consumers.

DOL Should Abandon Overlapping Factors in the NPRM as They Will Create More Ambiguity

The Proposed Rule imposes overlapping analysis among the factors. For example, initiative is considered under three factors – skill and initiative, opportunity for profit or loss, and control. However, as the current rule explained, that overlap "undermines the structural benefits of a multifactor test." The multifactor test is only truly useful when the facts of a contractual relationship are easily organized into distinct categories. This simplifies the process of analyzing the facts' impact on an individual's economic dependence, but "this benefit is lost if the lines between the factors blur."

Overlap makes it more difficult for the regulated community to understand how to analyze the different elements of the contractual relationship. The current rule's decision to limit that overlap clarified the worker classification test for the regulated community and should, therefore, be maintained.

The NPRM Should Emphasize Actual Practices of the Contractual Relationship over Theoretical Possibilities

The Proposed Rule eliminates the current rule's emphasis on the actual practices of the contractual relationship in the worker classification analysis and elevates as part of the determination provisions in the agreements that could theoretically or potentially impact an individual's economic dependence but have not actually done so.

This is a disappointing decision. The actual practices between parties should be more important in determining an individual's economic dependence. They dictate the realities of the contractual relationship more so than potential or theoretical possibilities. Importantly, the current rule allowed contractual practices to be included in the analysis, but it recognized that unexercised powers, rights, and freedoms "are merely *less* relevant than powers, rights, and freedoms which are actually exercised under the economic reality test."

The current rule's approach was also consistent with court precedent. The Supreme Court called for the worker classification test to focus on the "reality" of the work arrangement in its *Silk* decision.[3] The 2nd Circuit explained in *Saleem*, "it is not what [Plaintiffs] could have done that

[3] *United States v Silk*, 331 U.S. at 713 (1947).

counts, but as a matter of economic reality what they actually do that is dispositive."[4] The 5th Circuit ruled in *Parrish* that "the analysis is focused on economic reality, not economic hypotheticals,"[5] while the 11th Circuit in *Scantland* stated, "It is not significant how one 'could have' acted under the contract terms. The controlling economic realities are reflected by the way one actually acts."[6]

The current rule's approach, backed by clear court precedent, is the appropriate method for WHD's independent contractor standard. It ensures the true nature of the contractual relationship is considered above all but leaves room for theoretical possibilities to still be considered.

Proposed Factors Should Be Altered to Establish More Common-Sense Policies that Reflect the Modern Economy and Workforce

While MEP suggests WHD withdraw the NPRM in its entirety for the aforementioned reasons, should WHD choose to move forward with the policies of the Proposed Rule, MEP suggests making the following changes to the individual factors to improve any final rule.

1. *Opportunity for Profit or Loss Depending on Managerial Skill*

The Proposed Rule says that an individual's decision to work more hours or take more jobs is not reflective of managerial skill. This is simply not true. Having the ability to make decisions about which jobs to take and when to work is a clear indication of an individual's economic independence. Independent contractors decide what work they want to do and what hours they want to devote to doing that work, and these decisions will determine the success of the business. An individual with managerial skill best ensures the business' success by making good decisions about the allocation of resources, and their time is one of the most valuable resources they possess. Picking what work you want to do, including more work, and determining how you spend your hours of work are essential elements of economic independence and should be recognized as such. WHD should reconsider the language of this proposed factor, so it better recognizes that independent contractors exercise economic independence and managerial skill when deciding what hours to work or whether to accept new work.

Additionally, managerial skill should be broadly defined. An independent contractor's managerial skill should include an individual's ability to complete the work more efficiently or effectively. For example, independent contractor drivers use their own expertise and knowledge to identify the best short cuts or prepare for traffic surges or ongoing construction, and they make decisions about their business accordingly. Likewise, independent contractors engaged in the construction industry may decide which suppliers to use for a project based on past experiences or accumulated knowledge of the suppliers' ability to fulfill an order in a timely manner. Similarly, and as was raised with SBA's Office of Advocacy in a roundtable on this Proposed Rule, marketing firms and consultants regularly use graphic and creative designers to complete client deliverables on time based on their knowledge of the independent contractors past performance and special skills. These are all examples of an individual exercising managerial skill to ensure their business is successful, and the Proposed Rule should recognize all such displays in the worker classification analysis.

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[4] *Saleem v Corporate Transportation Group,* 854 F.3d at 142 (2017) (citation omitted).
[5] *Parrish v Premier Directional Drilling, L.P.,* 917 F.3d at 387 (2019).
[6] *Scantland v Jeffrey Knight, Inc.,* 721 F.3d at 1311 (2013) (citation omitted).

2. *Investments by the Worker and the Employer*

The Proposed Rule states that an individual's investments that are relevant to the worker classification analysis 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." The examples provided, however, unnecessarily limit the personal investments that should be considered in the analysis and seem to suggest that independent contractors can only be those individuals who want to expand their business, increase their workload, or extend the business' market reach. This is an inappropriate expectation.

Independent contractors are not required to want to do different types of or more work, and they are not required to desire additional market reach. The classification of these individuals should not be determined based on their ambitions to expand their business but instead should be focused on their economic dependence on the putative employer. Furthermore, individuals may not have, and are not required to have, significant costs associated with their business to qualify as independent contractors. Many independent contractors can operate their bona fide business without requiring much overhead, thereby limiting their costs. The question to be asked in the worker classification analysis should focus on an individual's economic dependence, not whether they want to engage in new or more work, reduce their expenditures, or expand to new markets.

Additionally, an individual's investment in certain types of property should not be reflective of an employment relationship. Within the Proposed Rule (but not explicitly referred to in the proposed regulatory text), WHD states that the "use of a personal vehicle that the worker already owns to perform work… is generally not an investment that is capital or entrepreneurial in nature;" in essence, these investments cannot be used as evidence that the individual is an independent contractor. This interpretation should be set aside by WHD in any final rule it develops.

Individuals can make personal investments for a multitude of reasons, such as family needs, social activities, or other day-to-day uses. These investments can include personal vehicles and cell phones as well as other items, such as bike carts for deliveries. Individuals may not make these investments for the purpose of performing work, but individuals can choose to monetize those investments through independent work arrangements, such as via the gig economy. Using these pre-owned investments to engage in independent work should reflect economic independence, which is the ultimate inquiry in the worker classification analysis.

Furthermore, if an individual chooses to make such an investment specifically to perform services that interest them d, that should be indicative of independent contractor status, regardless of the other activities for which the individual uses the investment. These investments can involve or be indications of managerial skill, as the terms of those purchases (*e.g.*, lease or ownership, terms of a loan) or the types of items in which the individual invests (*e.g.*, the make or model of the vehicle) can result in more or less profit and, therefore, more or less success for the business. These investments should be viewed as business choices, not an indication of economic dependence on the putative employer. WHD should view these investments as entrepreneurial in nature, meeting the criteria for an independent contractor determination.

3. *Degree of Permanence of the Work Relationship*

Under the Proposed Rule, the degree of permanence factor "weighs in favor of the worker being an employee when the work relationship is indefinite in duration or continuous." Considering the dynamics of the modern economy, however, WHD should provide clarity on how the factor applies when an individual has limitless access to applications (and therefore opportunities) on their smart phones. The ubiquitous availability of phone apps should not imply continuous employment and be used to establish an employer-employee relationship.

The modern economy allows anyone, anywhere to perpetually be available for opportunities, especially via the gig economy. Having a wide range of potential opportunities for independent contractors also removes barriers to entry to entrepreneurship, economic activity, and wealth creation. Importantly, the individuals are largely the ones deciding when their contractual relationship starts and ends. For example, individuals could have the app(s) on their phones at all hours of the day, for years on end, but might go many months without performing any services on the app. It's even possible for the individual to download the app but never actually perform any services at all.

As the Proposed Rule is currently written, there is uncertainty as to how this reality affects the worker classification analysis. WHD should recognize that the contractual relationship between a business and an individual ends when the performance of the services is over. When an individual logs off the app, the contractual relationship should be considered to have terminated.

4. Nature and Degree of Control

One of the most concerning aspects of the Proposed Rule centers on the idea that, under the nature and degree of control factor, a hiring entity's requirement that a business partner comply with "legal obligations, safety standards, or contractual or customer service standards may be indicative of control" and can trigger independent contractor status. This policy decision is woefully misguided and should be abandoned in its entirety.

Businesses must have the ability to impose certain requirements and place certain expectations on business partners without establishing an employer-employee relationship. This should include common-sense contractual elements, including compliance with the law, quality assurance obligations, and safety requirements. Businesses must be able to require their business partners, for example, not commit federal crimes and comply with federal or state workplace safety and health laws. If a company contracts with drivers to deliver products, for example, the company should be able to require the individual wear a seat belt. If a hospital contracts for IT services, they should be able to require the individual abide by health information privacy laws and/or complete a background check. These are logical policies that protect consumers, other workers, and the general public and should be encouraged, not made into a potential threat for the company.

Businesses must also be able to play their part in public health initiatives. During the height of the COVID-19 pandemic, businesses across the country were encouraged to require their business partners meet basic health measures, like wearing masks in the workplace and social distancing. These common-sense measures ensured public and workplace safety and were in the workers, customers, and general public's best interest. This Proposed Rule, however, would make sure requirements legally dubious, threatening the relationship the company may have with their business partners.

Corporate social responsibility initiatives should also not be used against a putative employer as signs of control over an individual. These initiatives, including anti-discrimination, anti-harassment, and human trafficking training, are beneficial to the community at large, and the American public has made clear they expect the businesses they patron to do their part to better the community. Company initiatives to provide independent contractors with access to apprenticeship opportunities, skills or safety training, or access to technology that amplify environmental sustainability goals serve important social goals. These policies too should be encouraged, but as currently proposed, the NPRM would make such initiatives a liability.

Courts have concluded that requiring such types of compliance is not probative of an employment relationship. In *Parrish*, the 5th Circuit explained that while safety training and drug testing is an exercise of control, "[r]equiring ... safety training and drug testing, when working at an *oil-drilling site*, is not the type of control that counsels in favor of employee status."[7] The 9th Circuit explained in *Iontchev* that the putative employer's disciplinary policy "primarily enforced the Airport's rules and [the city's] regulations governing the [drivers'] operations and conduct," leaving the employer with "little control over the manner in which the [d]rivers performed their work."[8] In *Mid-Atlantic Installation*,[9] the 4th Circuit rejected an argument that penalizing workers for noncompliance with local regulations or specifications for the work demonstrated an employment relationship. The court in that case recognized that "withholding money in such circumstances is common in contractual relationships"[10] and requiring installation specifications "is entirely consistent with the standard role of a contractor who is hired to perform highly technical duties."[11]

Without clear guidance that companies can require compliance with legal, safety, and quality control mandates without triggering employee status, businesses will find themselves in a position where they will be forced to abandon policies that better the community, their workers, their customers, and the independent contractors with whom they partner. Companies shouldn't be punished for caring about their communities. Having a social conscience should be supported by the government. This is an absurd outcome that is contrary to the public good and not remotely supported by the text or case law interpreting the FLSA.

In a final note, the U.S. Small Business Administration's ("SBA") Office of Advocacy recently took a position that aligns with our perspective in comments to the National Labor Relations Board on a different rulemaking that raised similar issues. The SBA's Office of Advocacy stated that "the Board should clarify that contract terms to abide by federal requirements should be considered routine components of a company-to-company contract, and not essential terms and conditions subject to joint employer liability."[12] This same theory should apply to WHD's independent contractor standard.

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[7] *Parrish*, 917 F.3d at 379 (2019) (emphasis in original).
[8] *Iontchev v. AAA Cab Service, Inc.*, 685 F. App'x 548, 550 (2017).
[9] *Chao v Mid-Atlantic Installation Services, Inc.*, 16 F. App'x 104 (2001).
[10] Independent Contractor Status Under the Fair Labor Standards Act, 86 FR at 1183 (January 7, 2021).
[11] *Chao*, 16 F. App'x at 106 (2001).
[12] U.S. Small Business Administration's Office of Advocacy, Comments on RIN 3142-AA21, Notice of Proposed Rulemaking, Standard for Determining Joint-Employer Status, filed on November 29, 2022, available at https://cdn.advocacy.sba.gov/wp-content/uploads/2022/11/29104056/Comment-Letter-NLRB-Joint-Employer-Rule-508c.pdf?utm_medium=email&utm_source=govdelivery.

5. Extent to which the Work Performed Is an Integral Part of the Employer's Business

The Proposed Rule interprets the fifth factor as analysis of "whether the work performed is an integral part of the employer's business." The NPRM states, "if the employer could not function without the service performed by the workers, then the service they provide is integral." This language, however, could theoretically implicate nearly every type of contractual relationship.

Businesses do not engage in activities that are not "integral" to the business' success. They do not waste resources on activities that are superfluous, meaning every service a business performs or contracts out to other entities could, therefore, qualify as integral. This is particularly the case with small businesses that need to rely on outside expertise. IT or security services for example, may not be the main intent of a business, but they may all be critical to the business. Similarly, marketing or legal consulting services are often necessary for small businesses, but are certainly not the main intent of the business. These services ensure customers are protected and have positive experiences with the business, protecting the business' reputation and success. Just because these services are critical, however, does not mean the individual providing them is an employee of the hiring entity. It does not mean that the individual is economically dependent on the putative employer. The fact that they are critical simply shows the value of independent contractors in our economy and the need to protect their ability to share their expertise. WHD should remove this interpretation in its final rule.

Additionally, focusing the factor on whether the work is integral pulls the FLSA's independent contractor standard toward an "ABC test," which states that an individual can only be an independent contractor if they perform work outside the usual course of the putative employer's business. WHD has already acknowledged in the Proposed Rule that it does not have the authority to implement the ABC test. WHD would, therefore, be wise to avoid obvious legal challenges to this provision and abandon this policy change.

6. Skill and Initiative

The Proposed Rule requires that the skill and initiative factor "considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative." This language, however, is unreasonably narrow. The NPRM does not provide guidance as to what qualifies as a "specialized skill" under this factor, but as WHD moves forward with a final rule, it should recognize a wide variety of skills that demonstrate an individual's business-like initiative.

Specialized skills should not be limited to highly technical information, such as medical or computer knowledge. It should include more nuanced knowledge, expertise, or experience as well. Driving itself may not be a specialized skill, for example, but the ability to sort and sequence ride requests and local knowledge of the streets and traffic patterns are skills that should be recognized. The managerial skill to use judgment and discern the best means of providing a service efficiently and effectively should be recognized as specialized skills.

Furthermore, the government should not be in the business of judging which skills are considered specialized or nonspecialized or place high or low value on the skills independent contractors provide. This approach would deprive these individuals of the dignity they deserve for their work

and expertise. Independent work arrangements offer low barriers of entry to entrepreneurship and economic activity, but they should not be limited by the government stepping in and deciding that the services they provide are not sufficiently specialized.

7. Additional Factors

The Proposed Rule establishes that "additional factors" can be used in the worker classification determination if the factors "in some way indicate whether the worker is in business for themself, as opposed to being economically dependent on the employer for work." Unfortunately, WHD chose to leave this provision largely undefined, providing the regulated community with no guidance as to how to apply such an ambiguous policy. Which additional factors will be relevant will be entirely dependent on who is conducting the analysis, forcing the regulated community to guess what elements of their contractual relationships may matter to a future hypothetical individual looking at worker classification determination.

Businesses need certainty for long-term planning. This ambiguous provision provides no guidance, introducing instability into every contractual relationship across the economy. This provision should be pulled from any final rule or, at the very least, dramatically altered to provide much needed clarity to the regulated community.

<u>WHD Underestimated the Costs of the Proposed Rule and Needs to Reassess before Moving Forward with any Aspect of the NPRM</u>

The Proposed Rule drastically underestimates the time and resources that the regulated community will need to expend to understand and implement the standard. The NPRM estimates business entities will need 30 minutes and independent contractors will only need 15 minutes. This is unreasonably low. The length and complexity of this rulemaking as well as the convoluted nature of the issue of worker classification determinations necessitate significantly more time.

Because of the numerous changes being proposed in this NPRM, businesses and independent contractors will likely need to hire legal counsel to help them understand the rule, conduct a risk analysis of their business operations to identify potential risks, and implement any necessary changes to limit liability. These assessments are not easy or quickly done, and businesses, independent contractors, and their legal counsel may need hours, days, weeks, or months to understand the potential implications. The uncertainty and ambiguity created by the NPRM will also result in more litigation and legal problems. Without understanding who is or is not an independent contractor, the regulated community will have no choice but to go through the court system to understand how the test applies to their contractual relationships. This means the regulated community will face additional legal fees and expend ever more resources.

Businesses and independent contractors are already struggling in the current economic environment. There is historic inflation, workforce shortages across the economy, and supply chain disruptions hindering economic activity. Many industries are still recovering from the COVID-19 pandemic as well, and economists from both sides of the aisle are predicting a recession in the coming months. Considering these circumstances, stakeholders – particularly small businesses and independent contractors – need an accurate accounting of the costs the rule will impose. WHD must reassess the costs of the Proposed Rule before engaging in any effort to move forward with all or even part of the NPRM.

WHD Should Delay the NPRM

The Proposed Rule acknowledges that courts have not yet applied the current rule, saying that "if left in place, it is not clear whether courts would adopt its analysis."

The standard adopted in the current rule has not been discredited, criticized, or even assessed by a court. Even so, WHD wants to abandon the rule's policies. MEP strongly believes WHD should allow the courts to weigh in on the current rule before determining the analysis does not work and replacing it with a standard that will clearly create substantial confusion and uncertainty for the regulated community.

In addition, MEP is in the process of conducting research on the current workforce and market. We believe the data we are compiling could prove useful to WHD as it develops a final rule on the independent contractor standard and could assist the agency in creating a policy that does not unintentionally harm the people it is meant to help. MEP encourages WHD to wait to develop a final rule until that data is available. We will submit that research to the agency as soon as it is available.

Conclusion

WHD's current rule established a better approach to simplifying the worker classification test for the regulated community. It focused the test on the most probative factors, streamlined the analysis, and provided clarity to the regulated community on how to apply the test. The Proposed Rule, on the other hand, threatens to create new uncertainties for the regulated community, creating a convoluted, confusing, and sometimes duplicative analysis that will leave the regulated community with less guidance than it currently enjoys. MEP, therefore, urges WHD to affirm the current independent contractor standard and abandon the test proposed in the NPRM. If WHD does move forward, we recommend it only do so after reassessing cost estimates, evaluating the impact of court decisions under the current rule, adjusting terms consistent with these comments, and considering our soon-to-be-released research.

The Modern Economic Project thanks the WHD for the opportunity to comment on this important policy. We look forward to working with the agency as it continues to develop an appropriate independent contractor standard under the FLSA.

Sincerely,

John Stanford
Co-Chair
Modern Economy Project