

February 5, 2024

The Honorable Jessica Looman  
Administrator  
Wage and Hour Division  
United States Department of Labor  
200 Constitution Avenue NW  
Washington, D.C. 20210

Dear Administrator Looman:

On behalf of the millions of direct sellers and qualified real estate agents around the country who are classified as independent contractors and members of the Direct Selling Association (DSA) and the National Association of REALTORS® (NAR), we write to urge further clarity under the Department’s Final Rule “Employee or Independent Contractor Under the Fair Labor Standards Act” which is set to take effect on March 11th. If the Department does not clarify application of this rule, it could result in confusion for millions of Americans.

Direct sellers and qualified real estate agents have been defined as independent contractors under the Internal Revenue Code (“IRC”) for federal tax purposes since 1982. This language demonstrates the federal government’s long-standing recognition of the unique nature of the direct selling and real estate industry and, as such, the need to treat it differently than other industries. Of the 1.5 million members of NAR practicing real estate across the country, approximately 87 percent are classified as independent contractors. All 7.3 million direct sellers in the United States are classified as independent contractors and sell to 44.6 million preferred customers, discount buyers and many other consumers.

Being classified as an independent contractor is why many individuals are attracted to the direct selling and real estate sales industries – it empowers entrepreneurship, maximizes flexibility, and promotes autonomy. Preserving the ability to be classified as an independent contractor is integral to the functioning of these professions for the benefit of the consumer sales and housing markets. Direct sellers contributed \$40.9 billion to the United States economy in 2022 and the real estate industry comprises of \$3.9 trillion or 17 percent of the economy. Homeowners across the country and micro-entrepreneur direct sellers therefore rely on this status, to boost the economy.

In its final rule, the Department did not accept DSA and NAR's recommendation that 26 USC § 3508 be incorporated to specifically recognize direct sellers and real estate agents as independent contractors to promote consistency and clarity. By failing to address this in the final rule, the Department declined to identify any additional relevant factors.

The Department also cited in its "Small Entity Compliance Guide" that an individual can be an employee for FLSA purposes even if they are an independent contractor for tax purposes. However, the Department has still not directly addressed the question of conflicting issues that will arise as it relates to workers being classified as statutory non-employees for tax purposes and potentially misclassified as employees for labor purposes. The Labor Department should address this issue.

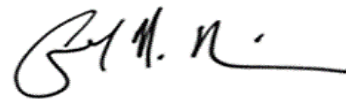
DSA and NAR strongly urge the Department to amend the "Small Entity Compliance Guide" and "Frequently Asked Questions" to clarify that specific statutory language in the Internal Revenue Code defining individuals as statutory non-employees will be determinative of if that individual is an independent contractor under the Fair Labor Standards Act (FLSA). Any additional guidance and clarity the Department can give legacy contractors would be helpful.

Thank you for the opportunity to provide additional comments. We would be pleased to answer any questions or provide further information and to meet with the Wage and Hour Division to further discuss the rule.

Sincerely,



Kevin M. Sears  
President  
National Association of REALTORS



Joseph N. Mariano  
President  
Direct Selling Association

