December 13, 2022

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U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Via Electronic Submission: https://www.regulations.gov

Re: Comments Regarding Employee or Independent Contractor Classification Under

the only scenario in which a hiring entity can be sure it is safe from an enforcement action by the DOL is when it classifies, or misclassifies, its workers as employees regardless of the economic realities of the work arrangements and regardless of whether such is to the benefit of the workers because the DOL makes no habit out of challenging employee classification. As a result of this uncertainty, and the bias towards finding an employment relationship demonstrated

speculation about possible legal challenges, meaning that it is not supported by adequate data or evidence, and should therefore be left in place.

1. Under the Proposed Rule, employers can never be confident they have properly classified a worker as an independent contractor.

(a) Eliminating the two "core" factors approach is inconsistent with case law.

Elevating two core factors is precisely the type of aid the DOL is positioned to provide. The DOL is not a judicial body that interprets the laws, but it can provide guidance to the judiciary that will aid in doing so and promote uniformity in that interpretation, not to mention a more predictable legal landscape for employers and workers. Discarding the core factor feature of the 2021 IC Rule goes directly against this goal.

(b) Opportunity for profit or loss depending on managerial skill favors employee status.

As discussed in more detail below, the Proposed Rule directs that the opportunity for profit or loss factor be considered distinct from the investment factor. According to the Proposed Rule, the opportunity for profit or loss factor considers whether the worker exercises managerial skill that affects the worker s economic success or failure in performing the work. [12] The Proposed Rule states further that the following additional factors can be relevant :

- whether the worker determines or can meaningfully negotiate the charge or pay for the work provided;

- whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed;

- whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and

- whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space.[13]

The opportunity for profit or loss factor, considered under the Proposed Rule s framework would virtually always weigh in favor of employment status. Many independent contractors offer their services to select employers for the express purpose of avoiding negotiating costs for services, advertising, and hiring support staff. The Proposed Rule utterly fails to account for independent contractor relationship that avoids these costs, which is an increasingly common reality in the modern workplace.

Further, the Proposed Rule is unclear on whether, when assessing the opportunity for profit or loss factor, a worker s ability to accept or decline work weighs in favor of independent contractor status. On one hand, the DOL indicates that a worker s ability to accept[] or decline[] jobs is consistent with independent contractor status, but on the other hand, states that the decis
indicating independent contractor status under this factor. [14] Whatever the DOL s intent with the Proposed Rule s interpretation of this factor, a worker s ability to determine which work

[12] 87 FR at 62237 (§ 795.110(b)(1)).

[13] *Id.*

[14] *Id.* at 62224.

the Proposed Rule s guidance that [c]osts 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 is far too broad of a directive to be of

> It is true, as the court pointed out, however, that nearly every operator testified to sleeping in a sleeping bag, trailer or recreational vehicle while attending the stand at night. This is hardly surprising, since the record also shows that the operators were required by Mr. W to spend the night at the stands. Thus, it is simply bootstrapping to say that this indicates a substantial investment on the part of the operators.
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> Second, and of equal importance, only one operator claimed to have purchased a recreational vehicle solely for the fireworks business, and only one operator claimed to have rented a trailer for the season. At least ten operators who testified that they slept in sleeping bags or recreational vehicles purchased these items prior to becoming operators, and used such items for family recreational purposes as well as for the fireworks business.[34]

Thus, the vehicles in *Brock v. Mr. W Fireworks* were owned by workers who worked in a seasonal business and clearly did not own the vehicles for the purpose of engaging in that business. Likewise, the personal vehicles in *Acosta v. Off Duty Police Servs., Inc.*, were simply parked and sat in for hours at a time and required no specialized mastery.[35] Consequently, [t]his limited investment in specialized equipment favor[ed] employee status. . . .[36]

These cases do not support the general presumption the DOL posits in its Proposed Rule. A vehicle is a substantial investment and few independent contractors who rely on their personal vehicle to conduct business also keep a separate vehicle for personal use. As explained above, there may well be scenarios, as in *Brock v. Mr. W Fireworks*, where use of a personal vehicle does not indicate independent contractor status, but these scenarios are fact-specific and do not support the broad assumption that a vehicle is generally not an investment that is capital or entrepreneurial in nature.[37]

Finally, the DOL s proposal to consider the worker s investment in relation to the employer s (which will almost certainly always be greater than the worker s) is nonsensical.[38] To the extent this a useful consideration at all, it is already appropriately accounted for in the 2021 IC Rule s profit or loss factor framework, which considers the worker s investment in relation to his or her opportunity for profit or loss.

(d) Proposed degree of permanence of the work relationship favors employee status regardless of analysis.

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[34] *Id*.

[35] 915 F.3d 1050, 1057 (6th Cir. 2019).

[36] *Id*.

[37] 87 FR at 62241.

[38] *Id*. at 62241-42.

According to the Proposed Rule, this factor

of a working relationship weigh in favor of employee status, the DOL ignores modern workplace realities and virtually assures that the permanence factor will weigh in favor of an employment relationship.

(e) Nature and degree of control factor expands analysis to increase chances of employee status.

In addition to de-emphasizing the control factor as a core factor, the Proposed Rule seeks to broaden the analysis of what constitutes an employer s control over the work performed and in so doing tilts the analysis towards finding an employment relationship.[45]

(i) Broadening control to include undefined "reserved control" introduces new, undefined, vague terminology.

In the Proposed Rule, the DOL introduces reserved control as part of the control factor, but neither defines reserved control nor specifies the degree to which it should be considered. Presumably, reserved control embodies the concept of right to control and refers to circumstances in which a hiring entity has the ability to exercise control over a worker but does not or has not exercised such control. Assuming this is the case, the DOL fails to specify just how important such reserved control is. Besides exacerbating the uncertainty with which the Proposed Rule may be implemented, the DOL s interpretation apparently directs the factfinder to weigh the control factor in favor of employee classification if a hiring entity *merely possesses* the ability to exercise control of a worker, regardless of whether the hiring entity ever has exercised such control.

The inclusion of reserved control in the worker classification consideration turns the economic reality test on its head. By definition, the economic reality test does not look to what [a worker] co
actually [did]. [46] Indeed, unexercised control has not been a significant consideration when applying the economic reality test because [t]he controlling economic realities are reflected by the way one actually acts. [47] By including the vague concept of reserved control , which is to be considered in some unstated capacity, the Proposed Rule broadens the control factor far beyond its historical bounds and creates such uncertainty that the definition of control under the Proposed Rule is unworkable and would all but preclude an independent contractor finding.

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[45] *See* 87 FR at 62246.

[46] *Saleem*, 854 F.3d at 142; *see also Parrish*
reality, not economic h

[47] *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013) (quoting *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1312 (5th Cir.1976)) (internal quotation marks omitted) (emphasis added); *see also Hobbs*, 946 F.3d at 833 (quoting *Brock*

(ii) Broadening control to include compliance requirements undermines workplace safety and quality control.

The DOL proposes taking into account an employer s compliance with legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations when assessing the nature and degree of control an employer has over the work, and suggests that such compliance could weigh in favor of employee classification.[48] Not only is the DOL s interpretation contrary to how courts interpret the control factor, but it also ignores modern workplace realities and would leave little, if any, room for an independent contractor finding under this factor.[49]

For example, very many employers have drug-free workplace requirements and require all workers, including independent contractors, to be drug tested before being allowed to enter the jobsite. This is particularly true of employers in the energy industry. For example, a chemical plant might hire an independent contractor to provide electrical maintenance on the plant s machineF1 1-11(maintena)6(nc)4(e)4(on th)-11(e)4( )] TJETQq0.00000912 PB12 0 612 79(nc TJETQq(

requirements and best practices or maintaining an independent contractor relationship. The Proposed Rule, however, suggests this exact trade-off.

The notion in the Proposed Rule that an employer cannot require an independent contractor to comply with legal obligations, attend safety training, or take other steps necessary to meet contractual or quality control obligations without converting that independent contractor to an employee ignores completely the reality of the modern segmented workplace, the need for specialization that only an independent contractor can provide, as well as the potential for liability if an employer does not meet its contractual or quality control obligations, and is contrary to the substantive case law.[52] The Proposed Rule s analysis of the control factor would make any worker who took on a job that required compliance with legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations (*i.e.* virtually any job of import and any job where the hiring entity must comply with federal, state, or local laws) an employee. In the age of specialization, where the smallest detail of a process might be contracted out to ensure it is performed with maximum efficiency and expertise, such an analysis is simply unworkable.

(iii) The remaining control elements all but ensure employee status.

The Proposed Rules states that additional facts are relevant to the question of control, including whether the employer:

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- supervises the work;

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- uses technological means of supervision;

- reserves the right to supervise or discipline workers;

- places demands on the ow the workers to work for others when they choose; and

- [53]

Like the opportunity for profit or loss factors, these elements all but ensure an employee status finding. Indeed, rare is the case that an employer will not place at least some restrictions on when, where, and how often an independent contractor works for the employer. Thus, factors as nebul would almost always tilt in favor of employee

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landscape, requires employers to achieve unprecedented levels of specialization and precision in order to stay competitive. For this reason, employers often outsource some of the most integral parts of their business to independent contractors. Indeed, on some level, all tasks are integral to an employer s business. If the task was not integral, the employer would have little interest in seeing that it was performed. Drug testing laboratories, for example, often do not collect the samples they test and third party administrators, who facilitate drug testing programs for employers often do not collect or analyze samples. If the litmus test for independent contractor status depends on whether a worker is performing a task that is integral to the employer s business, then it is hard to imagine a scenario in today s economy where that worker would not be considered an employee. Leaving employers to decide what is integral to a particular business will only increase uncertainty and, as a result, costly litigation.

(g) Skill and initiative factor is narrowed so that it points toward finding an employment relationship.

According to the Proposed Rule, this factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative. [59] Where a worker does not use specialized skills in performing the work, or where the worker is dependent on training from the employer to perform the work, this factor weighs in favor of employee status.[60] Where the worker brings specialized skills to the work relationship, it is the worker s use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor. [61] While this factor in the Proposed Rule largely conforms to the recitation of the same factor in the 2021 IC Rule, it differs in one key aspect: it considers this factor to weigh in favor of independent contractor status only when the worker uses specialized skill in connection with business-like initiative. [62]

The inclusion of initiative in the consideration of this factor is problematic, as initiative is encompassed by the control and opportunity for profit or loss factors. Further, tying an independent contractor finding to whether a worker uses specialized skill in connection with business-like initiative is not only a vague concept, but inconsistent with *Silk* s articulation of the skill factor.[63] To be sure, the DOL s proposed narrow application of the skill factor does not consider skill at all unless it has some connection to business-like initiative, which is already considered under the control and opportunity for profit and loss factors. In addition to creating yet another unnecessary duplication in the analysis, the DOL s approach in the Proposed Rule dispenses with all independent consideration of a worker s specialized skills obtained or

[59] *Id*. at 62275.

[60] *Id*.

[61] *Id*.

[62] *Id*.

[63] *See Silk*, 331 U.S. at 716; *see also Acosta*, 884 F.3d at
required to perform the work); *Iontchev*, 685 Fed. Appx. at 550 (considering this factor only insofar as whether

developed separate and apart from the hiring entity. In so doing the DOL, again, all but ensures consideration of this factor will preclude an independent contractor finding.

(h) Anything else the DOL considers relevant is a new factor that means an employer will never be confident of an independent contractor classification.

Finally, the DOL proposes adding to the economic realities test any [a]dditional factors [that] may be relevant in determining whether [a] worker is an employee or independent contractor for purposes of the FLSA, 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 [64] Thus, the Proposed Rule contains a miscellaneous or catch-all factor that not only renders its application impossible to predict, but would allow the DOL to dictate the nature of the relationship however they please. In other words, the DOL inserts into the Proposed Rule a mechanism whereby it can hinge its classification decision on anything it deems to indicate that a worker is either in business for themselves or economically dependent on an employer, regardless of whether such consideration has historically, or ever, been considered as part of the classification analysis. This renders the Proposed Rule useless for hiring entities, as they can never be certain they have correctly classified an independent contractor.

2. The DOL's Proposed Rule's Recission of the 2021 Rule Renders it arbitrary and capricious.

Contrary to what the DOL now asserts about a rule it introduced a little over a year ago, the 2021 IC Rule does not depart from decades of case law. [65] Rather, it seeks to homogenize and codify that case law for consistent application in the modern workplace. The Proposed Rule creates the impression that the 2021 IC Rule crafted a new framework out of whole cloth, without any reference to or reliance on legal precedent. Nothing could be further from the truth. In reality, the 2021 IC Rule codified, for the first time, a doctrine that until 2021, existed only as a patchwork of jurisprudence dating back to the 1940s, that left employers and workers without any consistency in how courts might view their working relationship under the FLSA. To the extent the 2021 IC Rule departed from precedent at all, such departure was necessary, given the passage of time and disarray of opinions, to accomplish the goal of creating a workable framework in the modern economy.

The Administrative Procedure Act establishes the limits on agency rulemaking.

rule, especially one that seeks to harmonize (to the extent possible) 75 years of jurisprudence, necessarily will conflict with some prior cases that interpreted the prior rule. This fact alone is not a reason to reject an existing rule. If it were, no rule could ever be materially changed.

CONCLUSION

Dana Point Chamber of Commerce
Duarte Chamber of Commerce
El Dorado County Chamber of Commerce
El Dorado Hills Chamber of Commerce
Encinitas Chamber of Commerce
Escondido Chamber of Commerce
Folsom Chamber of Commerce
Gateway Chambers Alliance
Greater Conejo Valley Chamber of Commerce
Greater San Fernando Valley Chamber of Commerce
Inland Empire Regional Chamber of Commerce
Laguna Hills Chamber of Commerce
Lincoln Area Chamber of Commerce
Long Beach Area Chamber
Los Angeles Area Chamber of Commerce
Norwalk Chamber of Commerce
Oceanside Chamber of Commerce
Orange County Business Council
Palm Desert Area Chamber of Commerce
Palos Verdes Peninsula Chamber of Commerce
Port Hueneme Chamber of Commerce
Rancho Cordova Area Chamber of Commerce
Roseville Area Chamber of Commerce
San Gabriel Valley Economic Partnership
San Juan Capistrano Chamber of Commerce
San Marcos Chamber of Commerce
Santa Barbara South Coast Chamber of Commerce
Santa Clarita Valley Chamber of Commerce
Simi Valley Chamber of Commerce
Slavic-American Chamber of Commerce
Torrance Area Chamber of Commerce
Vista Chamber of Commerce
West Ventura County Business Alliance
Yorba Linda Chamber of Commerce

Florida
Florida Chamber of Commerce

Georgia
Barrow County Chamber of Commerce

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