



October 26, 2020

Division of Regulations, Legislation, and Interpretation
Wage and Hour Division, US Department of Labor
Room S-3502
200 Constitution Avenue N.W.
Washington, DC 20210

RIN Number: 1235-AA34 (Independent Contractor under FLSA)

Dear Sir/Madam:

The New Jersey Civil Justice Institute (NJCJI) is New Jersey's leading organization advocating for the business community on matters of law and legal policy. NJCJI's mission is to promote a fair and predictable civil justice system, and defend the value of the rule of law in protecting innovation and fostering economic growth.

NJCJI and the organizations signed hereon offer the following comments.

Overview

NJCJI supports the United States Department of Labor, Wage and Hour Division's (WHD) proposed general industry regulation defining independent contractor (IC) status under the Fair Labor Standards Act (FLSA). We support the proposal because the one sentence summary of the rule matches, almost verbatim, our mission statement. The summary of the rule states its purpose is to, "...promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy."

The USDOL does an excellent job at II. Background, summarizing the disorder of determining IC status under the FLSA. Currently, IC status is determined by having to cull through over 70 years of decisions by the US Supreme Court and Circuit Courts of Appeal, which vary by circuit in how they apply the same test, as well as WHD Opinion Letters. Secretary Scalia acknowledges as much when he stated:

"Part of what's notable about this proposed rule is simply that we're doing it. In the more than 80 years since enactment of the Fair Labor Standards Act, or FLSA, the Department has never adopted a rule defining the term for general industry. The Supreme Court last spoke to the issue nearly 60 years ago; its most significant pronouncement came just after the Second World War. Since then, employers and workers looking for guidance have had to parse the sometimes-divergent decisions of the federal courts of appeals, and opinion letters the Labor Department issues occasionally without public notice or input.¹

¹ <https://www.foxbusiness.com/economy/labor-secretary-gig-workers-rule-contractors-businesses>

The proposed rule should be adopted because it articulates one clear and concise test for independence in accordance with statutory language of the FLSA and does so after carefully considering alternative approaches.

The USDOL has asked for comment on specific aspects of the proposal. NJCJI's comments to various aspects of it are below.

Economic Reality Factors

The USDOL asks commenters to offer specific input on the economic reality factors at 29 CFR Part 795.105(d), which we do here. Before offering specific input, NJCJI commends the USDOL for proposed 29 CFR Parts 795.105(a)-(c). The incontrovertible language that independent contractors are not employees 795.105(a), economic dependence is the ultimate arbiter of status as an employee or independent contractor 795.105(b), and economic dependence is determined using an economic reality test with two core factors 795.105(c), are acknowledged for their brevity and clarity.

The proposed test for IC status “economic reality factors” is neither new nor radical. Rather, USDOL has simply recalibrated the existing economic reality test by placing greater weight on two “core factors” - the nature and degree of control over the work 29 CFR Part 795.105(d)(1)(i) and opportunity for profit and loss 29 CFR Part 795.105(d)(1)(ii).

NJCJI supports the test and the emphasis placed on the core factors of “control” and “opportunity for profit and loss.” USDOL is correct in making these two factors “core” as they are fundamental to being in business for one’s self. We note the importance of the word “opportunity” for profit and loss as it emphasizes the initiative inherent in being in business for one’s self, as opposed to the “dependence” of an employer for “profit” as an employee is.

The USDOL also asks for input on the “other factors” - amount of skill required 29 CFR Part 795.105(d)(2)(i), degree of permanence 29 CFR Part 795.105(d)(2)(ii), and whether the work is part of an integrated unit of production 29 CFR Part 795.105(d)(2)(iii).

NJCJI supports the USDOL proposed “other factors” as they are complimentary to the core factors. If both core factors point to the same determination i.e., the individual is an employee or independent contractor, it is unlikely that the remaining factors would reverse the determination.

The other factors recognize that an individual is still properly classified as an IC under the FLSA if they decide to regularly work for the same entity (permanence) or if they are not “integrated” into the production process. The USDOL is to be commended for providing the historical analysis of how “integrated” morphed into “integral” and is now codifying “integrated” into the rule.

Primacy of Actual Practice

While the USDOL did not ask for comments on proposed 29 CFR Part 795.110, we would be remiss if we did not indicate our strong support for this provision. Our support is because the USDOL is reaffirming its commitment to the rule of law by establishing a clear standard in the

economic reality test and holding the parties to it based on what actually transpires, as opposed to presuming an individual's status.

Harmonization with IRS Test

NJCJI offers one comment that is not part of this proposal, the USDOL should also work to harmonize its proposed analysis for the “core factors” with the existing analysis under the IRS test to determine whether an individual is an independent contractor or employee.

The IRS test is based on “control” and uses a three part analysis: behavioral control, financial control, and type of relationship. All three of these factors should inform the analysis under the core factor of control in this USDOL proposal. Harmonization between the USDOL and IRS will help achieve the USDOL’s objective promoting “certainty for stakeholders.”

As USDOL has recognized, stakeholders who are “promoting innovation in the economy” need certainty - across all interactions with the government - when making a determination about the same set of real world facts applied to various governmental tests for determining an individual’s status as an independent contractor or employee.

In addition to providing certainty for stakeholders, such harmonization would also provide a model for states looking to align their own state level tests on worker classification tests with federal standards.

NJCJI urges the USDOL to adopt this rule at the earliest possible moment.

Please address any inquiries regarding this submission to Eric DeGesero
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Sincerely,

Association of Bi-State Motor Carriers
Chamber of Commerce Southern New Jersey
Fuel Merchants Association of New Jersey
Garden State Seafood Association
National Association Industrial Office Properties - New Jersey
New Jersey Builders Association
New Jersey Business & Industry Association
New Jersey Civil Justice Institute
New Jersey Concrete and Aggregate Association
New Jersey Food Council
New Jersey Independent Electrical Contractors Association
New Jersey Motor Truck Association
New Jersey State Chamber of Commerce
New York Shipping Association, Inc.