December 13, 2022

Ms. Jessica Looman
Principal Deputy Administrator
Wage and Hour Division
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 Fair Labor Standards Act, 87 Fed. Reg. 62218, *et seq*. (Oct. 13, 2022); RIN 1235-AA43

Dear Ms. Looman:

The undersigned associations, businesses and stakeholders submit these comments to the Department of Labor ("DOL") in response to its Notice of Proposed Rulemaking and Request for Comments Regarding Employee or Independent Contractor Classification Under the Fair Labor Standards Act ("FLSA") (the "Proposed Rule").[1]

The current DOL rule regarding independent contractor classification, which went into effect on March 8, 2021 (the "2021 IC Rule")[2] provides badly needed clarity, uniformity, and simplicity to the independent contractor analysis and accounts for the realities of the modern workplace. In doing so, it allows businesses and their workers to structure mutually beneficial relationships most suitable to those realities. The Proposed Rule, which would rescind the 2021 IC Rule, would do just the opposite. Indeed, by design, the Proposed Rule reverts to the original subjective "totality of the circumstances" analysis with an array of factors, none carrying more weight than the others, with the effect being an increase in litigation and inconsistent results in the courts.

DOL's recission of the 2021 rule is unwarranted as it has been in effect for only a brief time and DOL offers no evidence that it has been shown to be inadequate for DOL's enforcement mission. Indeed, quite the opposite is the case as DOL has repeatedly boasted about the cases it has brought showing improper classification of independent contractors and the amounts of back pay remedies it has secured.

The Proposed Rule would negatively impact employers and independent contractors in a number of ways as its undefined terms and vague concepts create a scenario where a hiring entity would never be confident it has correctly classified a worker as an independent contractor. Thus, the only scenario in which a hiring entity can be sure it is safe from an enforcement action by the

[1] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218, *et seq*. (Oct. 13, 2022) (to be codified at 29 CFR Pts. 780, 788, and 795) ("87 FR 62218, *et seq.*").

[2] Independent Contractor Status Under the Fair Labor Standards Act 86 Fed. Reg. 1168, *et seq*. (January 7, 2021) (to be codified at 29 CFR Pts. 780, 788 and 795) ("86 FR 1168, *et seq.*").

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 throughout the different factors as detailed below, the Proposed Rule has the potential to all but eliminate, or at least severely limit, the use of the independent contractor model in the modern workplace.

Accordingly, the undersigned groups oppose creating a new standard for independent contractor classification and urge the DOL to withdraw the Proposed Rule
Not only does the Proposed Rule ignore the realities of how businesses and independent contractors work together in 21st century America, but in so doing, it ignores the preference many workers have to remain independent contractors.

COMMENTS

The DOL's rescission of the 2021 IC Rule is a *de facto* resurrection of the 2015 Administrator's Interpretation covering independent contractors, which was withdrawn in 2017. That AI was also built around a multi-factor "totality of the circumstances" approach and interpreted the factors so broadly that it decreed, "[A]pplying the economic realities test in view of the expansive definition of 'employ' under the [FLSA], most workers are employees under the FLSA."[3] Further, by eliminating the two "core" factors approach of the 2021 IC Rule, returning consideration of investment to a stand-alone factor, broadening the analysis of the "control" factor, and returning to the supposedly "longstanding" interpretation of the "integral" factor, the Proposed Rule ensures that employers would never be confident they have properly classified a worker as an independent contractor.

As the Comments below reflect, each of the factors that comprise the economic realities test under the Proposed Rule tilts the scale towards finding an employment relationship and leaves employers little, if any, room to find an independent contractor relationship on which millions of companies and their contractors depend.

Finally, the Proposed Rule is arbitrary and capricious under the Administrative Procedure Act because of its recission of the 2021 rule. The recission of the 2021 rule is based on mere

[3] Administrator's Interpretation No. 2015-1 ("AI 2015-1"), Dep't of Labor, Wage and Hour Division, July 15, 2015, withdrawn, June 7, 2017 (DOL News Release 17-0807-NAT, "US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance" (June 7, 2017), available at https://www.dol.gov/newsroom/releases/opa/opa20170607). Like the Proposed Rule, AI 2015-1 adopted so expansive a view of "employ" and such a biased interpretation of the economic realities factors, that it all but eliminated the independent contractor distinction. For example, AI 2015-1 emphasized that the control factor "should not play an oversized role in the analysis" and that an employer's "lack of control over workers is not particularly telling if the workers work from home or offsite." AI 2015-1 also stated that "workers' control over the hours when they work is not indicative of independent contractor status" and that the agreement between the parties is "not indicative of the economic realities of the working relationship and is not relevant to the analysis of the worker's status."

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.

The Proposed Rule would eliminate the two "core" factors approach adopted by the 2021 IC Rule and in doing so, supposedly restore the traditional analysis of the independent contractor issue. But in elevating the two core factors of the nature and degree of the worker's control over the work, and the worker's opportunity for profit or loss, the 2021 IC Rule does not, in the words of the DOL, "depart from the economic reality test," but "merely elucidates the factors' respective probative values that have always existed but never been explained."[4] Although the line of cases reviewing the independent contractor issue has recited platitudinally that none of the economic reality factors should be assigned more weight than the others, the reality paints a different picture. As the DOL noted in the 2021 IC Rule, "[t]he Department's review of case law indicates that courts of appeals have effectively been affording the control and opportunity factors greater weight, even if they did not always explicitly acknowledge doing so."[5]

Courts typically find employee classification appropriate when the hiring entity predominantly controls the work, and independent contractor classification appropriate when the worker predominantly controls the work.[6] Similarly, courts routinely find employee or

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[4] 86 FR at 1199 (citing *Sec'y of Lab., U.S. Dep't of Lab. v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).) Further, contrary to the DOL's assertion, the 2021 IC Rule still applies a "totality-of-the-circumstances" analysis that focuses on the "economic reality" of the relationship between an employer and worker. *See, e.g.*, 86 FR at 1179 ("The Supreme Court has said and the Department agrees that this is a totality of the circumstances analysis, based on the facts."); *id*. at 1171, 1172 ("The Department thus proposed to promulgate a regulation that would clarify and sharpen the contours of the economic reality test used to determine independent contractor classification under the FLSA."); *id*. at 1201 ("The Department agrees with commenters that the circumstances of the whole activity should be considered as part of the economic reality inquiry.") Indeed, all five of the factors in the 2021 IC Rule are rooted in the foundational case, *United States v. Silk*, which identified five factors as "important for decision": "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation[,] and skill required in the claimed independent operation." 331 U.S. 704, 716 (1947).

[5] *Id*. at 1198 (citing *Saleem v. Corp. Transportation Grp., Ltd.*, 854 F.3d 131, 147 (2d Cir. 2017) and *Martin v. Selker Bros.*, 949 F.2d 1286, 1295 (3d Cir. 1991) ("Given the degree of control exercised by [the employer] over the day-to-day operations of the stations, this ["special skill"] criterion cannot be said to support a conclusion of independent contractor status.")); *Silk*, 331 U.S. at 719 (truck drivers were independent contractors because of "the control [they] exercised [and] the opportunity for profit from sound management," without discussing any of the other economic reality factors); *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961) (homeworkers paid on a piece-rate basis to produce knitted goods were employees; Court did not analyze any of the specific factors that are part of the current economic realty test; determination was instead based entirely on facts that related to control ("regimented under one organization, manufacturing what the organization desires") and opportunity for profit ("selling their products on the market for whatever price they can command" versus "receiving the [piece rate] compensation the organization dictates").

[6] *Compare Hobbs v. Petroplex Pipe & Constr.*, Inc., 946 F.3d 824, 830 (5th Cir. 2020) (finding employee classification appropriate where hiring entity predominantly controlled the work) *and Gayle v. Harry's Nurses Registry, Inc.*, 594 F. App'x 714, 717-18 (2d Cir. 2014) (same) *and Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 307-09 (4th Cir. 2006) (same) *and Baker v. Flint Eng'g & Const. Co.*, 137 F.3d 1436, 1441 (10th Cir. 1998) (same)

independent contractor classification appropriate consistent with their consideration of the opportunity for profit or loss factor.[7] Moreover, in the few instances when courts have classified workers in a manner that is inconsistent with their finding on the control factor, it is precisely because the opportunity factor weighed in favor of employee or independent contractor classification.[8]

The DOL's Proposed Rule favors form over substance by concluding that "[n]o court of appeals considers any one factor or combination of factors to predominate", simply because courts of appeal have not used such express language.[9] But the substance of the case law could not be more clear—a fact made all the more salient by the DOL's complete failure in the Proposed Rule to identify any case law to the contrary—courts of appeal unwaveringly classify workers consistent with their findings on the two core factors, or a combination thereof, identified in the 2021 IC Rule: control of the work, and opportunity for profit or loss.[10]

Elevating these two core factors encouraged uniformity in the analysis of the independent contractor question. The DOL's Proposed Rule acknowledges the need for uniformity, but eliminates the core factor feature of 2021 IC Rule and then inexplicably concludes that returning to the factual "kaleidoscope" model would somehow ensure uniformity in the analysis.[11]

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and Martin v. Selker Bros., Inc., 949 F.2d 1286, 1294 (3d Cir. 1991) (same), *with Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 381-82 (5th Cir. 2019) (finding independent contractor classification appropriate where worker predominantly controlled the work) *and Nieman v. Nat'l Claims Adjusters, Inc.*, 775 Fed. Appx. 622, 624-25 (11th Cir. 2019) (same) *and Saleem*, 854 F.3d at 143-44 (same) *and Iontchev v. AAA Cab Serv., Inc.*, 685 Fed. Appx. 548, 550-51 (9th Cir. 2017) (same) *and Barlow v. C.R. England, Inc.*, 703 F.3d 497, 506-07 (10th Cir. 2012) *and Chao v. Mid-Atl. Installation Servs., Inc.*, 16 Fed. Appx. 104, 106-08 (4th Cir. 2001) (same).

[7] *Compare Hobbs*, 946 F.3d at 832-36 (finding employee classification appropriate where opportunity factor weighed in favor of employee classification) *and Acosta v. Off Duty Police Services, Inc.*, 915 F.3d 1050, 1059-62 (6th Cir. 2019) (same) *and McFeeley v. Jackson St. Entm't, LLC*, 825 F.3d 235, 243-44 (4th Cir. 2016) (same) *and Hopkins v. Cornerstone Am.*, 545 F.3d 338, 344-46 (5th Cir. 2008) (same) *and Baker*, 137 F.3d at 1441-44 (same) *and Dole v. Snell*, 875 F.2d 802, 808-12 (10th Cir. 1989) (same) *and Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059-61 (2d Cir. 1988) (same), *with Parrish*, 917 F.3d at 384-88 (finding independent contractor classification appropriate where opportunity factor weighed in favor of independent contractor classification) *and Saleem*, 854 F.3d at 140-48 (same) *and Iontchev*, 685 F. App'x at 550-51 (same) *and Freund v. Hi-Tech Satellite, Inc.*, 185 Fed. Appx. 782, 783-84 (11th Cir. 2006) (same) *and Eberline v. Media Net, L.L.C.*, 636 F. App'x 225, 228-29 (5th Cir. 2016) (same) *and Mid-Atl. Installation Servs.*, 16 F. App'x at 106-08 (same).

[8] *See, e.g.*, *Acosta*, 884 F.3d at 1235 (employee classification appropriate where worker controlled the schedule because the worker had no opportunity to increase profit or loss based on job performance); *Cromwell v. Driftwood Elec. Contractors, Inc.*, 348 Fed. Appx. 57, 61 (5th Cir. 2009) (control factor weighed in favor of independent contractor status, but employee status appropriate because of the "severely limit[ed]…opportunity for profit or loss").

[9] *See* 87 FR at 62218-01.

[10] *Supra* footnotes 8-11.

[11] *Lauritzen*, 835 F.2d at 1539 ("It is comforting to know that 'economic reality' is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy. But 'reality' encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope.")

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 workers' preference for having an 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 decision to…take more jobs[] generally do[es] not reflect the exercise of managerial skill 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.

assignments to accept or reject is recognized as being consistent with independent contractor status, but the Proposed Rule muddies the waters.[15]

(c) Investments by the worker and the employer should be part of profit or loss consideration.

According to the Proposed Rule, this factor "considers whether any investments by a worker are capital or entrepreneurial in nature," and in contrast to the 2021 IC Rule and Second Circuit case law, considers this factor to be separate and distinct from the opportunity for profit or loss factor.[16] Like the other factors, the DOL's guidance and interpretation of this factor would all but preclude an independent contractor finding.

At the outset, considering worker investment as a standalone factor is irrational. Under the 2021 IC Rule, the second "core" factor—the worker's opportunity for profit or loss—"weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work."[17] Thus, a worker's "management of his or her investment in or capital expenditure on . . . helpers or equipment or material to further his or her work" is a fact to be considered when analyzing the worker's opportunity for profit or loss, along with the worker's exercise of initiative.[18] The 2021 IC Rule states further that a worker "does not need to have an opportunity for profit or loss based on both [exercise of initiative and management of investment] for [the opportunity for profit or loss] factor to weigh towards the individual being an independent contractor."[19]

In the Proposed Rule, the DOL proposes considering "investments by the worker and the employer" as a standalone factor in the economic reality test.[20] According to the DOL, "the way in which [the 2021 IC Rule] considers investment as part of the opportunity for profit or loss

[15] *See, e.g.*, *Karlson v. Action Process Serv. & Private Investigations, LLC*, 860 F.3d 1089, 1094 (8th Cir. 2017) (recognizing that worker's ability to "decide which assignments he was willing to accept" supported jury's finding that worker was not an employee); *Saleem*, 854 F.3d at 145 (noting in support of independent contractor status that the degree to which the worker's relationship with the potential employer "yielded returns was a function . . . of the business acumen of each [worker]"); *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 304 (5th Cir. 1998) (opportunity for profit or loss factor weighed in favor of independent contractor status where the workers "had the ability to choose how much they wanted to work").

[16] *See* 87 FR at 62275; *see also* 86 FR at 1168.

[17] 86 FR at 1247 (emphasis added).

[18] *Id*.

[19] *Id*.

[20] 87 FR at 62237, 62275.

factor may incorrectly tilt the analysis in favor of independent contractor outcomes."[21] The DOL goes on at length about supposed inconsistencies that would arise if a worker's investment was considered as fact relative to the worker's opportunity for profit or loss, and in doing so, disproves its own point.[22] According to the DOL, under the 2021 IC Rule, "if either initiative or investment suggests independent contractor status, the other cannot change that outcome even if it suggests employee status."[23]

The DOL's fear is misplaced. The 2021 IC Rule does not require an independent contractor finding "if either initiative or investment suggests independent contractor status."[24] Rather, the 2021 IC Rule simply says that a worker need not have an opportunity for loss based on both initiative and investment in order to be an independent contractor.[25] The 2021 IC Rule confirms this in the very next sentence: "This [opportunity for profit or loss] 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."[26] In other words, the paramount question is whether the worker has the opportunity to increase profits or incur losses. If the answer to that question is "no" or "only by working more hours or faster," then under the 2021 IC Rule, the profit or loss factor weighs in favor of employee status and it does not matter that one of two underlying facts—initiative and investment—might weigh in favor of independent contractor status. The supposed inconsistency that could arise under the 2021 IC Rule is precisely why investment is more appropriately considered as a fact under the opportunity for profit and loss factor than as a standalone factor.

The Proposed Rule also requires that a worker's investment be "capital or entrepreneurial in nature" in order for it to weigh in favor of independent contractor status.[27] As an initial matter, this requirement is already provided for in the 2021 IC Rule, which, under the profit or loss factor, considers a worker's "capital expenditure on, for example, helpers or equipment or material to further his or her work."[28] Further, the Proposed Rule fails to articulate how investment could practically be considered independent of the opportunity for profit or loss factor as "[e]conomic investment, by definition, creates the opportunity for loss."[29] In addition,

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[21] *Id*. at 62240.

[22] *Id*.

[23] *Id*.

[24] *Id*.

[25] 86 FR at 1247.

[26] *Id*. (emphasis added).

[27] 87 FR at 62275 (§ 795.110(b)(2)); *see also id*. at 62241.

[28] 86 FR at 1247 (§ 795.105(d)(1)(ii)); *see also id*. at 1186 ("[T]he Department reiterates that the investment must be capital in nature and consistent with the worker being in business for him/herself for the investment to indicate an opportunity for profit or loss.")

[29] *Saleem*, 854 F.3d at 144 n.29; *see also Lauritzen*, 835 F.2d at 1537 ("The capital investment factor is interrelated to the profit and loss consideration."); *Donovan v. Gillmor*, 535 F. Supp. 154, 161-62 (N.D. Ohio 1982)

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 any use in conducting an independent contractor analysis. If implemented, employers and factfinders would have to ignore any amount of investment a worker made in his or her tools and equipment, even if those tools and equipment were—as in the case of a software security auditor who provides his own specially designed laptop—highly specialized and expensive.

For the same reason, the Proposed Rule's guidance that "the use of a personal vehicle that the worker already owns to perform work—or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature," is impractical and poorly suited for the modern workplace.[30] The Proposed Rule presumptively declares that a vehicle, should be considered "generally not an investment that is capital or entrepreneurial in nature."[31] While a worker's ownership of his or her own vehicle may not always indicate independent contractor status, to say it is "generally" not an indicator paints with too broad a brush. For example, a worker who is engaged to service an employer's equipment at multiple locations across a city may use his own car or may use a company-provided vehicle. If he uses his own vehicle, regardless of whether he also uses that vehicle for personal reasons, the vehicle would clearly be "an investment that is capital or entrepreneurial in nature" because the worker could not conduct his business without it. On the other hand, if that same worker used a company-provided vehicle, he might still be an independent contractor, but his use of the company-provided vehicle would either weigh in favor of employee status or be a negligible consideration.

The Proposed Rule's apparent assumption that if a vehicle is also used for personal reasons, then it is less likely to indicate independent contractor status when it is used for professional reasons, is also problematic.[32] As a practical matter, rarely does a worker who uses a vehicle for his or her business, restrict his or her use of that vehicle to only business purposes and does not also use it for personal reasons. The same is true for non-independent contractors who use a company-provided vehicle with the company's logo painted on the side to take weekend camping trips, for example. Further, the case law upon which the DOL relies in the Proposed Rule does not support a principle as generic as the one the DOL adopts. In one of the cases relied upon by the DOL, *Brock v. Mr. W Fireworks, Inc.*, for example, the workers at issue slept in their personal recreational vehicles while tending to a fireworks stand.[33] The court in that case stated as follows:

(recognizing that investments, other than investments of time, involve risking capital, which is necessarily accompanied by an opportunity for profit or loss).

[30] 87 FR at 62241.

[31] *Id.*

[32] *Id.*

[33] 814 F.2d 1042, 1052 (5th Cir. 1987).

> 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 "weighs in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships."[39] The Proposed Rule states further that this factor weighs in favor of independent contractor status "when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple entities."[40] However, the Proposed Rule suggests that a working relationship that lacks permanence would not weigh in favor of independent contractor status where the lack of permanence is due to operational characteristics (seasonal or temporary operations, for example) rather than the worker's independent business initiative.[41]

Thus, the Proposed Rule would essentially make employees out of any worker who performs temporary work for an employer, even if that worker's assignment has nothing to do with the employer's principal business. In doing so, the Proposed Rule fails to account for the modern reality that many independent contractors enter into multiple, long-term contracts with the same business. It also ignores the fact that employers derive value from working with the same independent contractors. For example, an independent contractor who, over time, develops familiarity with the various intricacies of a particular employer's worksite, may be specifically asked to return to the worksite for future projects. Thus, weighing the permanence factor in favor of employee status simply because a working relationship is "exclusive" or "continuous" is disconnected from the realities of the modern workplace and disadvantages those independent contractors who have performed well and earned the right to continue.

Further, the Proposed Rule fails to identify how "exclusiv[ity]" could have any bearing on permanence. The same worker could have indefinite or continuous working relationships with multiple hiring entities and "exclusiv[ity]" has no definitional relationship to "permanence." The DOL illogically suggests that the permanence factor only weighs in favor of independent contractor status when the indicia of a lack of permanence result from "the worker…marketing their services or labor to multiple entities."[42] Yet, as with exclusivity, the marketing of services or labor is definitionally untethered from the permanence of any single working relationship and has no place in the consideration of this factor.[43] Finally, the Proposed Rule's inclusion of "exclusiv[ity]" in the consideration of the permanence factor invites a duplicative analysis, as exclusivity of the working relationship is a component of the control factor established by the Supreme Court in *Silk* and accounted for in the 2021 IC Rule.[44] By limiting the situations in which the permanence factor weighs in favor of independent contractor status to considerations of exclusivity and the worker's marketing of services, and by directing that the continuous nature

[39] *Id*. at 62275 (§ 795.110(b)(3)).

[40] *Id.*

[41] *Id.*

[42] *See* 87 FR at 62275.

[43] *See Silk*, 331 U.S. at 719

[44] *See id.* (analyzing exclusivity as part of the control 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] could have done…but as a matter of economic reality what [the worker] 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*, 917 F.3d at 387 ("[T]he analysis is focused on economic reality, not economic hypotheticals.").

[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*, 814 F.2d at 1047) (internal quotation marks omitted) (finding it irrelevant "that the [workers] could hypothetically negotiate their rate of pay because, under the economic realities test, it is not what the [putative employees] could have done that counts, but as a matter of economic reality what they actually do that is dispositive.").

(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 machinery. The chemical plant will invariably require (and may be required to ensure under state and federal law) that the electrician is not only drug tested, but properly trained on safety protocols in the event of an emergency. The electrician might be required again, under state and federal law or the employer's safety protocols, to spend several hours attending a class learning how to don and doff a gas mask and take other appropriate action in the event of an emergency before beginning work.

In addition, many independent contractors are subject to federally-mandated drug testing requirements. The Department of Transportation ("DOT") requires drivers who operate commercial motor vehicles, including independent contractors, to undergo DOT drug and alcohol testing.[50] Various states also have drug testing requirements that apply to certain classes of workers. Georgia and South Carolina, for example, require certain state contractors and subcontractors to maintain drug-free workplaces.[51] If an employer hires an independent contractor and requires that the independent contractor be compliant with the DOT or state drug testing requirements, doing so can hardly be viewed as indicative of employee status. Even without a state or federal requirement, many employers, for liability purposes, implement some kind of drug testing protocol. After all, declining to drug test a driver on grounds that he or she is an independent contractor is not necessarily a defense in a negligent hiring lawsuit. Employers and workers should not be put in the position of choosing between complying with safety

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[48] 87 FR at 62247.

[49] *See, e.g.*, *Iontchev*, 685 Fed. Appx. at 550 (employer's control over disciplinary rules and regulations, and enforcement thereof, governing workers' conduct and operations requirements was not the type of control that weighs in favor of employee status); *Mid-Atl. Installation Servs., Inc.*, 16 Fed. Appx. at 106 (ensuring workers comply with legal obligations or technical specifications is "entirely consistent with the standard role of a contractor"); *Dole v. Amerilink Corp.*, 729 F. Supp. 73, 76 (E.D. Mo.1990) (specifications and quality control "inhere[ ] in any subcontractor relationship").

[50] 49 C.F.R. § 382.103(b) ("An employer who employs himself/herself as a driver must comply with both the requirements in this part that apply to employers and the requirements in this part that apply to drivers.")

[51] GA. CODE ANN. 50-24-2 to 50-24-6; S.C. CODE ANN. §§ 44-107-20 to 44-107-90.

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:

- sets the worker's schedule;
- supervises the work;
- explicitly limits the worker's ability to work for others;
- uses technological means of supervision;
- reserves the right to supervise or discipline workers;
- places demands on the worker's time that do not allow the workers to work for others when they choose; and
- has control over prices and marketing of the worker's services.[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 nebulous as "scheduling" and "supervision" would almost always tilt in favor of employee

[52] For example, the DOL attempts to support its position in the Proposed Rule by relying on cases such as *Shultz v. Mistletoe Exp. Serv., Inc.*, 434 F.2d 1267 (10th Cir. 1970), but its efforts are misguided, as those cases instead stand only for the proposition that the need to comply with regulations in and of itself does not confer independent contractor status. *Id*. at 1271.

[53] 87 FR at 62275 (§ 795.110(b)(4)).

status. In addition, independent contractors in the modern age, particularly those who work in data security or related fields, are frequently given access to an employer's confidential or sensitive data. Prohibiting these workers from retaining independent contractor status simply because, for example, the employer uses technology to monitor their manipulation of the sensitive data or restricts them from working for competitors while accessing that data ignores realities in the modern workplace. Even less sophisticated technology—a GPS device in a vehicle used by an independent contractor who travels between an employer's multiple worksites—is hardly indicative in this era of an employment relationship.

In addition, while substantive employment decisions may be seen as an indicator of an employment relationship, simply reserving the right to supervise or discipline an independent contractor who, for instance, shows up to work intoxicated, verbally abuses employees or customers, or refuses to comply with safety protocols, should not weigh in favor of employee status. Even less egregious circumstances, such as ensuring an independent contractor uses tools or methods that are compliant with applicable codes, can hardly be said to indicate employment status in an era of heightened legal liability and technical compliance. Finally, as with the opportunity for profit or loss factors, demands on a worker's time and control over prices and marketing are often aspects an independent contractor might seek to delegate to another entity.

(f) Extent to which the work performed is an integral part of the employer's business is vague and leans heavily towards employee classification.

The Proposed Rule's consideration of the "integral" factor would all but eliminate independent contractors in many common workplace scenarios. As one of the three non-core factors to be considered in conducting an independent contractor analysis, the 2021 IC Rule includes "whether the work is part of an integrated unit of production."[54] The 2021 IC Rule states further that "[t]his 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."[55] The 2021 IC Rule also states that the 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."[56] The 2021 IC Rule clarifies that "[t]his factor is different from the concept of the importance or centrality of the individual's work to the potential employer's business."[57] The Proposed Rule would "return[] to the framing of this factor as whether the worker's work is an 'integral part' of the employer's business."[58]

Here again the Proposed Rule ignores the realities of the modern workplace. As mentioned above, the modern economy, not to mention the ever-growing legal liability

[54] 86 FR at 1247 (§ 795.105(d)(2)(iii)).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] 87 FR at 62253.

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 1235 (articulating the factor as "the degree of skill required to perform the work); *Iontchev*, 685 Fed. Appx. at 550 (considering this factor only insofar as whether "special skill" was required to perform the job and compiling cases doing the same).

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. Among those limits, agency rules, including the DOL's rules, shall be deemed unlawful and set aside when they are "arbitrary [or] capricious."[66] To overcome an arbitrary and capricious finding, the DOL, when implementing a new rule that upends or changes a previous rule, is obligated to provide an explanation for the change, namely that the change is "permissible under the statute,

[64] 87 FR at 62275 (§ 795.110(b)(7)).

[65] *Id*. at 62219.

[66] 5 U.S.C.§ 706(2)(A).

that there are good reasons for it, and that the agency believes it to be better" than the previous policy.[67]

In articulating its justification for the proposed change, the DOL "must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[68] An agency rule is typically arbitrary and capricious if the agency (1) developed the rule in reliance on factors which Congress has not intended it to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation for its decision that runs counter to the evidence before the agency; (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise; or (5) bases the rule on a lack of evidentiary support.[69]

The Proposed Rule is arbitrary and capricious for several reasons. First, the DOL admits that the Proposed Rule is "supported" by nothing more than speculation that the courts may not adopt the 2021 rule, which is "a question that could take years of appellate litigation in different Federal circuits to sort out."[70] This sort of rank speculation is far from sufficient evidentiary support to avoid an arbitrary and capricious finding.[71] Further, the 2021 IC Rule covers all of the supposed issues that the Proposed Rule identifies. The Proposed Rule is, therefore, arbitrary and capricious in that the DOL has not explained why it must rescind the 2021 IC Rule. The DOL admits it has not waited long enough to determine whether the 2021 IC Rule would result in litigation and appellate court disapproval.[72] The DOL claims it is moving swiftly to avoid confusion of workers and employers, and to wait for courts to begin ruling could take years. But that is a wait that is supposed to occur before deciding that the 2021 IC Rule was defective in some way—it's called developing a record upon which a decision can be based.

Finally, a new rule, to a degree and by design, will alter or deviate from prior precedent, as that is the very nature of and reason for introducing a new rule.[73] In other words, any new

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[67] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-15 (2009).

[68] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted); *see also Coal. for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 WL 1073346, at *11 (E.D. Tex. Mar. 14, 2022) (agency action must be reasonable and reasonably explained).

[69] *See Motor Vehicle Mfrs.*, 463 U.S. at 43-44, 53-55; *see also Coal. for Workforce Innovation*, 2022 WL 1073346, at *12.

[70] 87 FR at 62219.

[71] *Sorenson Commc'ns. Inc. v. F.C.C.*, 755 F.3d 702, 708 (D.C. Cir. 2014) (a purported "common sense" prediction is an insufficient explanation for an agency's action); *Sierra Club v. Babbitt*, 15 F. Supp. 2d 1274, 1283 (S.D. Ala. 1998) (speculation insufficient to justify agency action and avoid arbitrary and capricious finding).

[72] 87 FR at 62219-20.

[73] *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.") (emphasis added); *Rogers v. Comm'r of Soc. Sec.*, No. 320CV00206RJCDSC, 2022 WL 135310, at *4 (W.D.N.C. Jan. 13, 2022) ("[R]evisions to agency policy that are inconsistent with judicial precedent do not make an agency's revisions

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

The DOL's Proposed Rule is biased toward finding employment relationships rather than independent contractor relationships. As a result, it will upend millions of legitimate, productive independent contractor relationships where both parties benefit, and both parties have agreed to the terms. For those employers that classify a worker as an independent contractor, there will be great uncertainty that they have properly classified that worker because of the "totality of the circumstances" approach the Proposed Rule uses, the vagueness of various terms the DOL has proposed as part of the analysis, and the catch-all additional factors that may be relevant provision. Finally, the DOL provides no supporting evidence, only pure speculation, as the basis for rescinding the 2021 rule that has been in effect only a few months and which has provided DOL ample authority to pursue its enforcement mission. For all these reasons, the Proposed Rule must be withdrawn.

Sincerely,

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arbitrary or capricious."); *see also Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996) ("[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal."); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863-64 (1984) ("An initial agency interpretation is not instantly carved in stone.").