April 28, 2026

ELECTRONIC SUBMISSION

Attn: WHD-2026-0001

Daniel Navarrete
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Ave NW
Washington, DC 20210

Re: Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act

Dear Director Navarrete:

On February 27th, 2026, the Wage and Hour Division (WHD) of the U.S. Department of Labor published the proposed rule, "Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act."[1] In this publication, WHD proposes to: (1) rescind a 2024 Final Rule[2] that codified an unweighted six-factor test to determine whether workers qualify as employees or independent contractors; (2) reinstate the preexisting 2021 Final Rule[3] with several modifications; and (3) more clearly align the regulatory definitions of employees and independent contractors under the Fair Labor Standards Act (FLSA),[4] Family and Medical Leave Act (FMLA),[5] and Migrant and Seasonal Agricultural Worker Protection Act (MSPA).[6]

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[1] U.S. Dep't of Labor, Wage and Hour Division, "Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act," *Federal Register*, Vol. 91, No. 39, February 27, 2026, p. 9,932.
[2] U.S. Dep't of Labor, Wage and Hour Division, "Employee or Independent Contractor Classification Under the Fair Labor Standards Act," *Federal Register*, Vol, 89, No. 7, January 10, 2024, p. 1,638.
[3] U.S. Dep't of Labor, Wage and Hour Division, "Independent Contractor Status," *Federal Register*, Vol. 86, No. 4, January 7, 2021, p. 1,168.
[4] 29 U.S.C. §§ 201-19.
[5] 29 U.S.C. § 2611(3).
[6] 29 U.S.C. § 1802(5).

Background

WHD has been entrusted[7] with the unenviable task of applying (and disentangling) the FLSA statutory definitions for "employer,"[8] "employee,"[9] and "employ,"[10] which are, when read on their own, both unclear and circular. Independent contractors are not defined in FLSA, but are effectively workers who are not covered by the employment relationship delineated in the statute.

In a head-spinning violation of the bedrock definitional principle that the term being defined should not be included in the text of the definition,[11] the FLSA statutory definition for "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee."[12] Similarly, the FLSA defines "employee" as "any individual employed by an employer,"[13] with certain limited exceptions. The FLSA statutory definition for "employ" is not circular in the same way, but is so broad as not to be particularly helpful on its own, stating simply, "'Employ' includes to suffer or permit to work."[14] The "conventional relation of employer and employee"[15] at common law boils down relatively simply to one of control, with a straightforward employment relationship established where "employees…were bound by the rules and regulations of the…company."[16]

Yet, as WHD is aware, Congress did not rely on the common law definition of employment when drafting the FLSA, but rather provided its own definition. From the statutory language alone, it is not entirely clear what this definition covers, although Congress did not speak in the traditional common law terms that to employ is to control, but rather in the arguably broader terms that to employ is "to suffer or permit to work." As they do when faced with such unclear statutory definitions, the courts stepped in with their own effort to bring clarity to these terms, and the Supreme Court held that this rather vague definition effectively imposed an "economic reality"[17] test, which went beyond the lone issue of control to determine the economic reality of the relationship, based on five factors, namely control, the worker's opportunities for profit or loss, investment in facilities, the permanence of the relationship, and the skill required.[18]

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[7] 29 U.S.C. § 204.
[8] 29 U.S.C. § 203(d).
[9] 29 U.S.C. § 203(e).
[10] 29 U.S.C. § 203(g).
[11] *Definitions*, Nat'l Archives & Recs. Admin., https://www.archives.gov/federal-register/write/legal-docs/definitions.html (Mar. 1, 2022) (stating that "[a] true definition should not include the term being defined as part of the definition").
[12] 29 U.S.C. § 203(d).
[13] 29 U.S.C. § 203(e)(1).
[14] 29 U.S.C. § 203(g).
[15] *E.g.*, *Robinson v. B&O RR Co.*, 237 U.S. 84, 94 (1915).
[16] *Id.* at 93.
[17] *U.S. v. Silk*, 331 U.S. 704, 713 (1947).
[18] *Id.* at 716.

Over the years, as WHD details in its Notice, the Federal courts have adapted various versions of this "economic reality" test.[19] Yet, while the multi-factor analysis has a certain benefit in terms of flexibility, too much flexibility in the hands of regulators and tribunals can lead to arbitrary outcomes for regulated employers, and the resulting lack of clarity can make it difficult for businesses and workers alike to understand what is allowed, and to act accordingly.

Although the Federal courts are no longer required to defer to agency interpretations of ambiguous statutes,[20] having a single national standard for a Federal statute, which employers and workers throughout the country can consult, and which courts throughout the country can use as a uniform standard against which to measure fact patterns and arguments, has the potential to provide much-needed assistance to businesses and workers alike as they navigate a complex area of Federal law. This articulated, national standard could be especially helpful for small businesses, and self-employed contractors, who frequently do not have the resources to hire sophisticated counsel, or the institutional experience to understand when independent contract work turns into an employment relationship.

I. The Department is Correct to Rescind the 2024 Independent Contractor Rule, which is Over-Inclusive, and too Indecisive and Confusing to Provide Small Businesses and Workers with the Guidance that they Need

Unfortunately, the existing regulation does not provide the guidance that would help businesses and workers throughout the country understand their respective rights and obligations. The existing regulation is confusing for the following reasons.

1) *The Existing Introductory Statement in § 795.105 is Conclusory, and WHD is Correct to Rescind this Provision.*

The existing introductory statement quotes *Skidmore v. Swift*,[21] to the effect that WHD intends for its interpretations to serve as a "practical guide to employers and employees."[22] Understanding *Skidmore*'s value as Supreme Court precedent, the value of these regulations would hopefully be broader, in providing guidance not just to employers, but to businesses and to individuals of all stripes who seek to engage workers. Similarly, the guidance would be valuable, not only to employees, but to workers of all types, including, crucially, independent contractors.

[19] 91 Fed. Reg. at 9,935.
[20] *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 412 (2024).
[21] *Skidmore v. Swift*, 323 U.S. 134 (1944).
[22] 29 CFR 795.100.

First, it is very odd that WHD cites *Skidmore* in this introductory statement. In *Skidmore*, the status of the plaintiff firemen and lift operators as employees or independent contractors was not at issue; they were undisputedly understood to be employees. The case revolved around whether they were entitled to receive pay for their downtime at the fire station, when waiting for potential fire calls.[23] Their status as employees or independent contractors was not argued, and did not play any role in the analysis.

Given that the distinction between employees and contractors played no role in the preceding litigation, holding, or rationales behind the *Skidmore* decision, it is unclear why WHD would cite *Skidmore* in the introductory text to regulations defining employees and independent contractors in the first place. The Court in *Skidmore* did in fact apply the language of the FLSA to resolve the dispute between the employers and employees in question, which made it appropriate for *Skidmore* to discuss the litigants in those terms.

Yet given that the entire point of the regulations here is to help businesses, individuals, and workers determine whether an employment relationship arose in the first place, *Skidmore*'s language is at best inapt in this context. At worst, the existing text is conclusory, in that the language seems to indicate an assumption that readers who apply these regulations will be the employers and employees with the relationship mentioned in *Skidmore*. In either event, the language is confusing, in that it raises the question of the applicability of these regulations to the independent contractors and clients who are also meant as the target audience for this guidance.

Thus, WHD is correct to rescind this language, and the proposed text provides a considerable improvement, both in avoiding the inapt citations to *Skidmore*, and in using language that more clearly explains that the central import of the following regulatory guidance is to determine whether an employment or independent contractor relationship exists, rather than assume that the audience will consist of employers and employees.

2) *The Existing § 795.105 is Confusing, in that it Merely Repeats the Circular Language of the Underlying Statute Without Providing Further Clarification*

Amongst other items, the existing regulation simply repeats the statutory definition for employers in 23 U.S.C. § 203(d), stating that an "'[e]mployer' is defined to 'include[] any person acting directly or indirectly in the interest of an employer in relation to an employee."[24]

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[23] *Skidmore*, 323 U.S. at 136 ("[W]e hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time").

[24] 29 CFR 795.105(b).

As discussed above,[25] this statutory definition is confusingly circular. While WHD, as a regulatory agency, is stuck with the statutory definition that Congress provided, simply repeating the circular definition in the implementing regulations merely serves to confuse readers who actually seeks guidance from the WHD regulations. WHD's proposed text, which avoids the circular statutory definition and instead provides the economic reality test that the courts have applied, is significantly more helpful to any reader looking for guidance as to whom WHD would classify as an employer for the purposes of the FLSA.[26]

3) *The Existing List of Factors in § 795.110 Provides Little in the Way of Guidance*

The current six-factor list already promulgated by WHD provides at most preliminary guidance as to whether a worker is properly classified as an employee or independent contractor. Leaving aside any specific questions as to the definitions themselves, simply providing the list of factors that courts have used provides little in the way of meaningful guidance, unless all the factors weigh in one direction. Simply listing factors, without providing any information as to their relative weights or how they interact, increases the probability that courts will continue to provide conflicting guidance, and makes it difficult for workers and businesses alike to understand both the most pertinent factors, and the point at which the relationship transitions from client/contractor to employer/employee.

Moreover, such an expansive, unweighted list harms small businesses far more than large businesses. Part of this is because, relatively speaking, smaller businesses that struggle with scale are likelier to rely on independent contractors. Yet perhaps more importantly, the problem is that smaller businesses, not to mention individuals who are interested in contract work, will not as a group have the resources to seek out sophisticated legal advice, and will not have the institutional perspective that larger, longer-lived enterprises will have, to understand how the various factors weigh against each other and interrelate.

In the current proposal, WHD has provided a helpful service to small businesses and potential contract workers, by distilling the caselaw in a way that is readily comprehensible to businesses and workers alike, and which would help courts understand how the factors are weighed. Indeed, one of the major benefits of the Notice is not in any change to the law, but rather that it provides a no-cost, universally accessible reference to the type of analysis that a business or worker would otherwise need to obtain from an attorney, at a fee. While room will remain to discuss the contours of each factor, and more complex situations will still arise, the proposed text helps provide regulators, the courts, and the players in the marketplace with a common language with which to understand the application of these definitions.

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[25] *Supra*, p. 2.
[26] 91 Fed. Reg. at 9,973.

In its 2024 Rule, WHD explained its reluctance to weight any factors, on the grounds that the promulgated analysis needs to be "flexible enough to apply to all kinds of work, and all kinds of workers."[27] Such flexibility is an odd priority by the agency, given that the entire point of the classification of workers into categories such as "employees" and "independent contractors" is exactly that there will be work and workers to which either category does not apply. Indeed, to this point, while flexibility can be a benefit in allowing regulators to respond to unique circumstances, flexibility ceases to be a benefit, and in fact turns into an excuse for arbitrariness, when the agency uses that flexibility as an opportunity simply to list a broad swath of factors, without providing any predictability or guidance into how those factors might be applied. Such a broad range of factors would at this point be turned on its head, and become a justification for arbitrariness rather than meaningful guidance. As WHD noted, "A legal approach…to examine all of the facts, and balance them, avoids formulating a rule of decision."[28]

Thus, even if the proposed regulatory text were not adopted, agency guidance that explains how courts have weighed these factors in the past, and applies these weights in its own sub-regulatory guidance, is far more actionable than the unweighted list that exists at present. As such, WHD's proposal to rescind the existing regulation, including the unweighted list of factors, represents a welcome improvement in providing clarity to the labor market that WHD regulates.

II. The Current Proposal Addresses the Concerns that Led WHD to Finalize the Existing Regulation.

In proposing the existing regulatory language, which rescinded the 2021 Rule, WHD expressed the concern that elevating two core factors created confusion among regulated parties and the courts. Specifically, WHD explained:

> "For example, courts and regulated parties must now grapple with what it means in practice for two factors to be 'core' factors and entitled to greater weight. In addition, they must determine, in cases where two 'core' factors point to the same classification, how 'substantial' the likelihood is that they point toward the correct classification if the other factors point toward the other classification."[29]

With respect, WHD may have been overthinking the level of confusion created by the elevation of the two "core" factors. Certainly, it is notable that WHD's discussion of the confusion created by the elevation of the two core factors did not cite to any courts that actually expressed confusion at the elevation of these factors, or to any evidence of confusion among

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[27] 89 Fed. Reg. at 1,670.
[28] *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).
[29] U.S. Dep't of Labor, Wage and Hour Division, "Employee or Independent Contractor Classification Under the Fair Labor Standards Act," *Federal Register*, Vol. 87, No. 197, October 13, 2022, p. 62,218 at 62,229.

workers and potential employers. WHD did not even describe any challenges that they faced in applying these factors to WHD's own enforcement actions, information into which WHD would have unique insights.

Nonetheless, in the current notice WHD has done an admirable job in explaining the applicability of the two core factors, as laid out in the 2021 Rule that this Notice seeks to reinstate, in language that any reasonably competent layman could understand. In particular, the proposed text identifies two core factors, namely: (i) the nature and degree of control over the work; and (ii) the individual's opportunity for profit or loss.[30] The proposed regulatory text explains that "the two core factors listed…are the most probative as to whether or not an individual is an economically dependent 'employee'…and each therefore carries greater weight in the analysis than any other factor."[31]

The proposed regulatory text further explains that the listed factors are not exhaustive, and no single factor is dispositive, but that the other factors "are highly unlikely, either individually or collectively, to outweigh the combined value of the two core factors."[32] There may be more small improvements to the amendatory text, discussed below, to ensure that the procedure is clear from the regulatory text, rather than from the preamble, which small businesses and individual workers (and even some attorneys) are less likely to read.

Nonetheless, the proposed regulatory text not only addresses the concerns articulated in the 2024 Final Rule about lack of clarity, but provide much more helpful guidance than the regulation that the 2024 Final Rule put in place. Namely, from the regulatory text, it is clear that while the two core factors are not dispositive, when they point to the same classification outcome they are "highly unlikely" to be outweighed by the other listed factors. This formulation maintains a certain level of flexibility for both WHD and the courts, with the disclaimer that even when combined these factors are not dispositive, while still providing much clearer guidance to small businesses and to workers who try to understand how these factors interact.

This guidance is not just important for the purpose of classification, but for the purpose of guiding behavior. It is true that, in the relatively unusual circumstance that the core factors point in different directions, it will be difficult to tell how the analysis should result. Yet this is true both for an unweighted multifactor analysis, and for an analysis that elevates two core factors.

However, for businesses and workers seeking to structure their contracts, including any work requirements, it is easier for them to align these two core factors, rather than to seek to align all six, which might not even be possible. Thus, the regulations as proposed would not

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[30] 91 Fed. Reg. at 9,973-74.
[31] 91 Fed. Reg. at 9,973.
[32] *Id.*

only help stakeholders determine the classification of an existing or potential relationship, but would also provide much more useful guidance into how a proposed (or even existing) relationship can be modified, to create greater clarity at the outset.

Thus, the proposed regulatory text not only addresses the clarity concerns articulated in the 2024 Final Rule, but provide much greater clarity than the existing regulations that the 2024 Rule finalized, and should therefore be adopted on the very same clarity rationale that WHD used to justify the 2024 Rule.

III. The Proposal Should Not be Further Streamlined by Treating the Common Law Control Test as an Independent Ground for "Employee" Status Under the FLSA

Notwithstanding the benefits of the Notice, WHD noted that the proposed rule could be further streamlined by advising stakeholders to analyze the common law "control" factor at the first instance. If the person (or entity) who hires the worker exhibits "control," then the worker is an employee of the hirer, regardless of any other factors. Only if the "control" factor is not met, should the analysis continue to the second core factor, of opportunity for profit or loss by the worker. The other factors would be analyzed as well, but if both control and opportunity for profit and loss pointed to contractor status, the other factors would be unlikely to disturb that outcome. Only in the comparatively rare circumstances where the control factor for employment is *not* met, but the (lack of) opportunity for profit or loss factor for employment *is* met, would the remaining factors become influential.

This approach would help focus the analysis because, as noted above, control *is* the test at common law for whether an employer/employee relationship exists.[33] However, such an approach would contradict the specific language of *Silk*, which displaces the common law test, rather than adds to it. Specifically, the Court in *Silk* listed all six factors, including the common law factor of control, and declared after listing the factors, "No one is controlling nor is the list complete."[34] If WHD were intended to treat the control factor as dispositive, then it would make little sense for the Court in *Silk* to declare that none were controlling, if an affirmative answer to the "control" response in fact, well, controlling.

In his concurrence in *Silk*, Justice Rutledge noted that the case would be borderline, "even if the so-called 'common law control' test were conclusive."[35] Indeed, Justice Rutledge noted that, even under common law principles, at least one of the defendants, and possibly both, would be subject to employer liability under common law tort principles.[36] Yet rather than

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[33] *E.g.*, *Robinson*, 237 U.S. at 94.
[34] *Silk,* 331 U.S. at 716.
[35] *Silk*, 331 U.S. at 719-20.
[36] *Id.* at 720, n. 2.

overturn the lower courts on these narrow grounds, which would generally be the judicially favored approach, the Court overturned the lower courts on the broader grounds using the "economic reality" test. This would indicate that the Court intended the "economic reality" test to displace the common law test, rather than simply add an additional ground for coverage besides common law control.

Moreover, this approach makes sense when read in the context of the statutory goals of FLSA, FMLA, and MSPA. Traditionally speaking, courts only applied the common law "control" test in the limited context of determining whether to apply vicarious employer liability in torts cases.[37] Even at common law, this was not some universal test applied beyond the tort context. Indeed, the agency principles applied in contract law differed from the agency principles applied for determining employer liability for employees in tort suits.[38] Given that, even when determining agency at common law, the "control" test was applied only in limited tort circumstances, WHD should be cautious before using control as an independent test for its own regulatory purposes, particularly given that the Supreme Court has already confirmed that control by itself is not dispositive.

In many ways, it makes sense that the Court would not use "control" as a dispositive factor, given not only that Congress defined employment in the FLSA and other statutes in a way that did not mention control, but also given that the purposes of these statutes are quite distinct from the tort context in which control predominates. Specifically, at common law, this definition of employment is generally limited to determining whether the employer should be held liable for the employee's negligence; in such cases, the level of control over the employee's actions in the workplace is clearly relevant. Yet the FLSA is about the duties that the employer owes its employees; the FMLA is about the obligation of employers to provide medical leave to employees in specific contexts; and the MSPA governs the applicable standards that agricultural employers must meet in their employment of migrant and seasonal agricultural workers. The distinct aim of the statute in question, along with the Congressional decision to define employment separately in the statute, was critical in the Court's decision to adopt the economic reality test.[39]

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[37] *See id.*

[38] *Compare* Restatement (Third) of Agency § 6.01 (addressing agency principles in the context of the principal's contract liability) and § 7.07 (addressing agency principles in the context of vicarious liability for torts committed by employees) (Am. Law. Inst. 2006).

[39] *Silk,* 331 U.S. at 713 ("The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the 'technical concepts pertinent to an employer's legal responsibility to third persons for the acts of his servants.' This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. Restatement of the Law, Agency, s. 220. We approved the statement of the National Labor Relations Board that 'the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act.").(citing *NLRB v. Hearst Pubs.*, 322 U.S. 111 (1944)).

In this context, it is perhaps worth noting that several of the factors listed in the economic reality test in *Silk* are in fact also included in the *Second Restatement on Agency* as factors that help to establish control for vicarious employer liability in the torts context; specifically the skill required, whose tools and facilities are used, and the period of employment (which overlaps with the permanence factor).[40] This is not due to sloppy reasoning on the Court's part, and does not show redundancy. Rather, it was worth listing these factors separately because they were being considered in a different light. Namely, at common law, these factors were important to evaluate in order to help determine the level of control that the putative employer exercised over the worker in question. In contrast, the Court evaluated these factors differently in *Silk* and its progeny, not to determine the existence of control, but rather to shed light on the distinct statutory question, of whether the worker relied on the putative employer for work as a matter of economic reality.

Given that: (a) even at common law, the "control" test is only used for very limited purposes; (b) those common law purposes have no relationship to the purposes underlying the statutes at question; and (c) the Supreme Court has explicitly said that the common law control test is not dispositive, WHD should not further streamline its proposal to treat the common law "control" test as a controlling factor that, in the affirmative, would suffice to create an employment relationship on its own.

IV. The Proposed Rule Will Benefit Workers, Businesses, and Consumers

The Proposed Rule does not purport to substantively change the underlying law in question, but instead more clearly applies existing Supreme Court caselaw to the question of who qualifies as an employee within the meaning of the statutes in question. Nevertheless, independent contract work is a vital element to the American economy, and to the extent that this clarity helps workers and their clients engage in economic relationships more flexible than traditional employment, to the mutual benefit of both parties, this proposed rule will bring benefits to workers, businesses and consumers alike.

1) *Independence is a Valuable Option for Workers*

The statutes that this regulation would administer do not actually define "independent contractor." Rather, the Supreme Court has acknowledged that the wording in the FLSA definition, limited to those whom the employer "suffers or permits" to work, is "obviously not intended to stamp all persons as employees,"[41] and the Supreme Court has separately recognized that "[t]here may be independent contractors who would alone be responsible for the wages and

[40] Restatement (Second) of Agency § 220.2 (Am. Law Inst. 1958).
[41] *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

hours of their own employees."[42] Thus, the "independent contractor" term has effectively been used to cover workers who are not covered by the statutory definition of "employee" as laid out in these statutes.

All Americans benefit from the dignity of work, even when this extends beyond a formal employment relationship. In fact, working outside the scope of formal employment allows workers to retain greater autonomy, maintaining control over their hours, the conditions according to which they work, and the methods that they employ to achieve their client's objectives. Americans choose independent work in substantial, and growing numbers. According to the U.S. Bureau of Labor Statistics (BLS), 11.9 million Americans were independent contractors for their sole or main job in July of 2023, representing 7.4 percent of total employment.[43]

According to MBO Partners, which publishes an annual report on the independent labor market, and thus provides a more consistent update, the numbers are significantly higher and growing, from 26 million independent employees in 2023, to 27.6 million in 2025.[44] The gap between the 2023 BLS and MBO numbers are partly due to MBO's broader definition of independent work, but also due to the fact that MBO's numbers include part-time workers as well. Yet regardless of any numerical differences, the overall trend is clear; independent work makes up a significant, and growing form of employment, and is valuable as a form of employment both for full-time workers and for part-time workers, the latter of whom especially benefit from the autonomy that comes from collecting a paycheck and performing work according to their own schedule, even while maintaining the ability to work in a way that suits their own needs and requirements, rather than an employer's.

As a whole, independent contractors understand these benefits from and prefer their status as independent workers over that of employees. According to BLS statistics, 79 percent of independent contractors prefer their independent status, whilst only 9 percent would prefer to be traditional employees.[45] In fact, a majority of independent contractors believe that they make the same (18 percent) or a higher (44 percent) salary as contractors than they would in traditional employment, and moreover, the majority go far enough to say that no amount of money would induce them to return to traditional employment.[46] This is actually truer of full-time independent

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[42] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).
[43] U.S. Bureau of Labor Statistics. (2024, November 8). *Economic News Release: Contingent and Alternative Employment Arrangements Summary*. U.S. Department of Labor. https://www.bls.gov/news.release/conemp.nr0.htm
[44] MBO Partners. (2025). *15th Annual State of Independence in America Report*. https://info.mbopartners.com/rs/mbo/images/MBO_2025_State_of_Independence_Research_Report.pdf
[45] U.S. Bureau of Labor Statistics. (2018, June 8). *Economic News Release: Contingent and Alternative Employment Arrangements Summary.* U.S. Department of Labor. https://www.bls.gov/news.release/archives/conemp_06072018.htm
[46] Adam Ozimek, "Freelance Forward Economists Report," commissioned by Upwork, 2021.

workers compared to part-time independent workers, and is especially (if perhaps unsurprisingly) true among remote, full-time independent workers.[47]

This is perhaps unsurprising, when the benefits of independent work are taken into account. As MBO Partners reports in its most annual update, independent workers report having a greater sense of security (which makes sense, given that their economic fate is not tied to a single employer, but rather to their own ability to secure work and clients), greater health, and greater earnings.[48] Other reports have shown that independent workers report greater work-life balance and less stress.[49] This flexibility, meanwhile, has real economic value. Although it is difficult to estimate the economic value with specificity, independent workers as a group are known to value this flexibility highly, and there are plausible estimates that workers value Uber's on-demand platform at the value of 38 to 50 percent of their earnings, or $150 per week on average.[50] For Americans with complex personal commitments, or health challenges that make regular work difficult, the flexibility that independent work provides can be an essential way to maintain their connection to work, even while balancing their other commitments.

2) *Independent Contracting Provides a Critical Lifeline to Businesses*

Independent contracting provides a critical lifeline to businesses of all sizes, but especially to smaller businesses, which benefit from the ability that independent contracting provides to scale their services without requiring them to assume the full cost and compliance burden of hiring full-time employees. Notwithstanding the relative fame of such high-profile independent contracting platforms as Uber, Lyft, and Door Dash, smaller businesses make a proportionally higher use of independent contractors. Any regulatory treatment that discourages independent contract work therefore has the deleterious result of favoring large businesses over their smaller counterparts.

The coronavirus pandemic showed the benefits of remote work, not only to employees and independent contractors who could increasingly work from home, but for small businesses who valued the increased flexibility as well. In fact, small businesses established during and after the pandemic are a major driver in the growth of independent workers, helping the small business remain agile and flexible in cost-effective ways, as they retain the option to maximize the effectiveness of their capital by concentrating their payments to the specialized services that

[47] *Id.*
[48] *Supra*, n. 44.
[49] FreshBooks, *Women in the Independent Workforce – 2nd Annual Report, 2019*. https://www.freshbooks.com/press/data-research/women-in-the-workforce-2019
[50] Rachel Greszler, "The Value of Flexible Work is Higher Than You May Think," The Heritage Foundation Backgrounder No. 3246, September 15, 2017. https://www.heritage.org/jobs-and-labor/report/the-value-flexible-work-higher-you-may-think

they need, even in situations where that need might not be sufficiently time-intensive to justify a formal employee.[51]

This is especially true as changing demographics trigger labor shortages, with McKinsey estimating that in May 2024, the U.S. had 1.5 million fewer unemployed workers than jobs available.[52] This labor shortage is further exacerbated by a longstanding skills mismatch between worker skills and business needs.[53] To the extent these trends are driven by demographic shifts brought by declining fertility and increasing lifespans, these gaps are only set to accelerate.[54]

In a world where labor shortages are, on average, only set to grow, and where skills mismatches are likely to continue or increase for at least the mid-term future, independent contracting provides a lifeline to businesses of all sizes, but especially to smaller businesses and new entrants, by making it possible for one skilled worker to fill the needs of multiple entities. To the extent that this rule provides greater clarity for workers and businesses seeking to enter contracting relationships, this proposed rule will help equip U.S. businesses with the resilience needed to thrive in future labor markets.

3) *Consumers Benefit from Independent Contracting*

Given that FLSA, FMLA, and MSPA are all Federal labor statutes, it is perhaps inevitable that analysis of the effects of these bills, and of any implementing regulations, would be concentrated on the impacts on the workers themselves, and on the businesses who engage these workers. Yet we would be remiss not to note the benefits that accrue to consumers as well, when businesses are able to hire willing workers as independent contractors.

To the extent that independent contractors help keep business expenses low, consumers stand to gain when any of those cost savings are passed on to the end market. These benefits extend beyond the purely financial, to include the benefit of convenience, as any user of

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[51] Bowen, T. (2024, October 23). Small Business Started Post Covid are a Key Driver of the Increase in Contractor Usage. *Gusto Insights*. https://gusto.com/resources/gusto-insights/contractors-research-2024

[52] Madgavkar, A., & Olivia White. (2025). *Empowering the U.S. Workforce*. McKinsey & Company. https://www.mckinsey.com/industries/public-sector/our-insights/empowering-the-us-workforce

[53] *E.g.*, Burke, Mary A., Alicia Sasser Modestino, Shahriar Sadighi, Rachel B. Sederberg, and Bledi Taska. 2020. “No Longer Qualified? Changes in the Supply and Demand for Skills within Occupations.” Federal Reserve Bank of Boston Research Department Working Papers No. 20-3. https://doi.org/10.29412/res.wp.2020.03; and Aysegül, Sahin, Joseph Song, Giorgio Topa, and Giovanni L. Violante. 2011. “Measuring Mismatch in the U.S. Labor Market.” Federal Bank of New York. https://www.newyorkfed.org/medialibrary/media/research/economists/topa/usmismatch_v14.pdf

[54] *E.g.*, Madgavakar, A., Marc C. Noguer, Chris Bradley, Olivia White, Sven Smit, and TJ Radigan. 2025. *Dependency and depopulation? Confronting the consequences of a new demographic reality*. McKinsey & Company. https://www.mckinsey.com/mgi/our-research/dependency-and-depopulation-confronting-the-consequences-of-a-new-demographic-reality

platforms like Uber, Lyft, Door Dash, or Task Rabbit can readily attest. In fact, the benefits that pass to consumers can literally be life-saving; with the ready availability of rideshares, for example, alcohol-related traffic fatalities in the U.S. have declined by 6.1 percent, and total traffic fatalities have declined by 4.0 percent. Using standard estimates for the value of a statistical life, the annual life-saving benefits from these services can be quantified in the range of $2.3 to $5.4 billion.[55]

Thus, allowing businesses and workers to engage freely in independent contractor relationships, and providing the clear and stable regulatory environment to make those relationships possible, does not only benefit workers and any business that hires them, but benefits consumers as well.

Suggested Modifications to Proposed Regulatory Text

While the proposed regulatory text would be a strong improvement over the existing regulation, there is room for further improvement. In particular:

Proposed 29 CFR 500.20(h)(4)

The proposed change to the MSPA definition for employ could tightened, by changing the word "may" in the first sentence to "shall." Specifically, using the word "may" undermines the import of this regulatory change, by explicitly allowing the Department of Labor to disregard the FSLA definition when classifying workers as employees or contractors. In addition, the optional language in the first sentence undercuts the language later in the definition, that "[t]hese questions should be resolved in accordance with the criteria set forth in §§ 795.105 through 795.110 of this chapter."

The proposed definition of "employ" under MSPA does not contain any other potential means to decipher the definition, except for this cross-reference to Part 795. Accordingly, the use of "may" in the first sentence would empower the Department of Labor to disregard the FSLA definition, even without including any alternative standards to consider. In the interests of both clarity and regulatory restraint, this term should be changed to "shall."

Proposed 29 CFR 795.105(c)

The regulatory text is fairly clear as proposed, and certainly clearer than the existing regulation. However, particularly given that the 2024 Rule rescinded a similar regulation in part

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[55] Anderson, M.L., and Lucas W. Davis, "Uber and Alcohol-Related Traffic Fatalities," National Bureau of Economic Research Working Paper 29071 (2021).
https://www.nber.org/system/files/working_papers/w29071/w29071.pdf

for being unclear, there could be room to add further clarity by adding the following words to the end of this section: “when the core factors align to the same classification.”

Thus, the last sentence would read in full, “This is because other factors are less probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors when the core factors align to the same classification.”

The existing proposal is clear, but this added language may help clarify, without the need for reference to the preamble, how the core factors relate to the additional factors, in situations in which the core factors align.

Proposed 29 CFR 795.105(d)(ii)

All references to the “individual’s opportunity for profit or loss” should be changed to the “worker’s opportunity for profit or loss.” Many of the businesses that hire workers, and which may have classification questions, include sole proprietorships who are individuals themselves. In addition, many individuals hire contractors for non-commercial reasons that have nothing to do with their own potential profit or loss, such as when they hire workers such as handymen, gardeners, housekeepers, attorneys, or the full set of possible service providers. In addition, many “contractors” themselves are employed by an intermediate party, such as an attorney who works for a law firm, or a consultant who works for a firm. Indeed, in the Federal context that many Federal employees and regulators are most immediately familiar with, Federal contractors are usually not in fact sole proprietors, but actually are employed by contracting firms that act as intermediaries between the individual worker and the Federal Government.

Given that individuals and entities can and do operate at both sides of the workplace transaction, and that the import of this factor is limited to the *worker’s* opportunity for profit or loss (or otherwise his employing firm’s), this factor should be changed as suggested, to refer to the “worker” rather than to an “individual.”

Proposed 29 CFR 795.115(b)(2)(i)

As a minor matter, the proposed text here appears to include a typographical error. The text should read, “The individual is able to *meaningfully* increase his earnings by exercising initiative and business acumen…”, rather than, “The individual is able to meaningful increase his earnings….”

Conclusion

Contract work, separate from formal employment, provides a crucial avenue for workers to engage in paid labor, without needing to commit to the time or formal arrangements required by formal employees. On the other side of the coin, businesses and individuals who hire contractors benefit from the ability to cost-effectively meet their needs, when formal employment is neither required nor appropriate. Consumers will often benefit as well, as anybody who has ever benefited from contractors using platforms such as Uber, Lyft, or TaskRabbit will readily attest.

Yet in order for these relationships to thrive, and in order to protect businesses and workers alike from surprise enforcement actions, regulatory certainty is critically important. Although there is room for some improvement from the proposed regulatory text, as indicated above, this proposal represents a significant improvement from the existing regulatory text. WHD is to be congratulated on this improvement, and encouraged in this direction.

Thank you for the opportunity to comment on this proposal.

Respectfully yours,

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