December 12, 2022

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

RE: RIN 1235-AA43, NPRM on Employee or Independent Contractor Classification Under the Fair Labor Standards Act

Dear Administrator Looman:

FMI - The Food Industry Association appreciates the opportunity to submit comments in response to the Department of Labor's (DOL) Notice of Proposed Rulemaking entitled "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" (FLSA), 87 Fed. Reg. 62218 (*RIN 1235-AA43*) (hereinafter "NPRM" or the "proposed rule"). For the reasons set forth below, FMI respectfully urges DOL to withdraw the proposed rule and keep the existing FLSA independent contractor regulatory framework in place.

I. About FMI - The Food Industry Association

As the food industry association, FMI works with and on behalf of the entire industry to advance a safer, healthier, and more efficient consumer food supply chain. FMI brings together a wide range of members across the value chain – from retailers that sell to consumers, to producers that supply food and other products, as well as the wide variety of companies providing critical services – to amplify the collective work of the industry.

The food industry provides full-time, part-time, seasonal, and flexible workforce opportunities in a variety of careers and serves as an essential employer in every community around the country. FMI members include food retailers, wholesalers, and product suppliers who employ millions of Americans in consumer-facing, service-related businesses of all sizes. The diversity of career opportunities offered through the food industry provide individuals with employment at any stage of life and any education level.

FMI members have unique needs in meeting staffing requirements in stores, distribution facilities, and divisions throughout their business operations. In addition to hiring direct employees, these businesses fulfill operational needs through vendors, contracts, and temporary staffing relationships. All businesses along the supply chain utilize a host of local, regional, and national vendors, contractors, and outside staffing to supply products and move goods.

The food industry is ever evolving due to many factors including supply chain challenges, consumer trends and demands, and economic conditions. The staffing needs of manufacturing, warehousing,

and retailing must remain flexible to meet these changes and demands. For example, since the onset of the pandemic, the increased demand for on demand delivery services and ecommerce ordering has skyrocketed. According to our most recent annual membership survey, 91% of FMI retail members report having online sales, compared to 50% pre-pandemic. FMI members are constantly navigating the operational needs of this increased demand from their customers. Food retailers are continually evaluating whether and how to contract with vendors for part or all home delivery and/or order fulfilling services. This includes direct-from-shelf order picking, warehouse staffing to handle ecommerce orders, and last mile delivery to customers' homes.

Additionally, the ongoing workforce shortage remains the food industry's top supply chain challenge. According to our annual membership survey, almost all responding food industry companies report that challenges with attracting and retaining quality employees are having negative impacts on their businesses. With 2021 unemployment at low levels (3.9% in December 2021), food retailers saw turnover rates maintain their record-highs. The average turnover for all employees was 48%, down slightly from a record high in the prior year. Part-time employee turnover was at 67%, comparable to 74% in 2020. The food industry, like most other sectors of the U.S. economy, has been working hard to overcome hurdles in hiring and retention to keep operations properly staffed. FMI members employ strategies for attracting and retaining full-time employees including increased wages and salaries, improved benefits, flex time, training and skills development, bonuses, and education programs and benefits. Retailers and product suppliers/manufacturers have been pursuing a wide range of creative strategies to alleviate challenges on the labor front. The rise of ecommerce and the needs of the 21st century workforce including the gig economy have created a more complex relationship between businesses and workers.

With the ongoing workforce shortage challenges, the increased demand for ecommerce services, and the staffing needs to address the demand, FMI requests that DOL maintain the clarity and consistency of the current independent contractor regulatory framework to ensure that businesses and workers have the flexibility and tools by which to determine their prospective working relationships.

II. Summary of Argument

FMI opposes the NPRM and disagrees with the Department's position that it represents a return to the *status quo ante* analysis prior to the 2021 final rule which added part 795 to Title 26 of the *Code of Federal Regulations* (CFR). The proposal represents a dramatic departure from the current unambiguous standard, as well as binding case law, and too closely approaches the controversial ABC test (a standard DOL acknowledges is beyond its legal authority to impose) to improperly tilt the standard in favor of employee status. FMI's reasons for objecting to the proposal, which are discussed in further detail below, are as follows:

- The current rules were properly adopted pursuant to notice-and-comment rulemaking and grounded in the economic reality test favored in U.S. Supreme Court jurisprudence (which the NPRM acknowledges is the proper standard). Rather than make assumptions as to the

impact of the existing regulatory framework, DOL should allow the current rules to be applied in enforcement actions and analyze those results, if necessary;

- Practically speaking, the current rules provide clear guidance for employers, employees, and independent contractors regarding their employment status under the FLSA;

- In contrast, the NPRM – which purports to provide clarity to the regulated community – will have the exact opposite effect. By deemphasizing the current rule's "core factors" analysis, blurring the lines between factors and including a seventh "catch all" factor, the proposal provides no assurances for well-meaning employers that have made the correct classification determination. Instead, the proposal will lead to confusion and uncertainty for employers and second guessing "gotcha" litigation by plaintiffs' attorneys and government enforcement officials;

- This resulting uncertainty will arrive at a time at which our economy is still reeling from the COVID-19 pandemic and its aftereffects. Now more than ever, businesses and workers are availing themselves of innovative and nontraditional work arrangements. The proposed rule threatens to stifle this innovation. Moreover, ongoing supply chain difficulties and recruitment and retention challenges continue to plague the overall economy and have a disproportionate negative impact on the food industry; and

- FMI contends that this NPRM is a disingenuous attempt to adopt a final rule that favors the ABC test as opposed to a final rule that is akin to the *status quo ante*.

III. Overview of the Proposed Rule

On October 13, 2022, the DOL published an NPRM which sought to rescind and replace its 2021 Independent Contractor Status Under the FLSA Rule (the "current rule") and do away with its streamlined, more user-friendly "core factors" approach. If implemented as drafted, the proposed rule would:

- Adopt an economic reality test to assess whether a worker is in business for her/himself or is economically dependent on the business for worker and thus an employee; and

- Dispose of the current rule's practice of elevating two particularly dispositive "core factors" above other guiding factors in favor of a six-factor totality of the circumstances test based on the following factors: (1) opportunity for profit and loss depending on managerial skill; (2) investments by the worker and the employer; (3) degree of permanence of the work relationship; (4) nature and degree of control; (5) extent to which the work performed is an "integral" part of the employer's business; and (6) skill and initiative; without assigning special weight to any of these factors.

The NPRM also permits additional unnamed factors not articulated by the proposed rule in an independent contractor analysis if the factors tend to show whether the worker is in business for her/himself or reliant on a business for work.

IV. Argument

a. The Existing Regulatory Framework Provides Certainty for the Regulated Community and Should Remain in Place

FMI disagrees that the current rule should be rescinded and replaced as proposed in the NPRM. The current rule applies five factors to assess the totality of the circumstances to determine whether, as a matter of economic reality, a worker is either economically dependent on a potential employer for work or is in business for themselves. In crafting the current framework, DOL wisely elevated two factors as core factors because they are most probative on the ultimate question of economic dependence and hence carry more weight. Those core factors are: (1) the nature and degree of control over work; and (2) an individual's opportunity for profit or loss. These factors are discussed more thoroughly in section 795.105(d)(1).

The current regulatory framework also identifies three additional factors that act as guideposts in the event a decision cannot be made based on the two core factors alone. They are: (1) the amount of skill required for the work; (2) the degree of permanence of the working relationship between the individual and the potential employer; and (3) whether the work is part of an integrated unit of production. Section 795.105(d)(2) goes into more details about these factors.[1]

The NPRM inaccurately asserts that the current rule sows the seeds of uncertainty and confusion because it is not clear what reception the courts may give it and it has ambiguous terms and concepts. As outlined above, the current rule is grounded in a streamlined, easy to comprehend economic realities test. Not only was the current rule adequately justified by its preamble, but it also represents an articulation well-suited for the 21st century workforce.

The current rule and its streamlined core factors approach provide vital clarity to employers while accounting for the economic realities of the modern world. In drafting the current rule, DOL sought to eliminate confusing duplicative provisions, highlight the two most dispositive factors of the independent contractor analysis (while not doing away with the other guiding factors), and focus on the realities of both current economic needs and factors intrinsic to the independent contractor/business relationship. As the economy and types of independent contractor work become more fluid, it is crucial that businesses have clear framework on which to base their contractual relationships with workers rather than a nebulous and at times subjective multi-factor test. The current rule provides just that – businesses are guided to look first to two clearly identified and well-articulated primary factors before examining the relationship under guiding factors when necessary. This certainty allows for continued economic growth. The NPRM, in contrast, threatens to hamper this progress and create additional economic burdens for employers, workers, and consumer alike. Because of its razor-thin profit margins, the food industry is particularly vulnerable to any regulatory structure – such as the proposed NPRM – that depresses innovative operational models and increases both uncertainty and litigation.

[1] The current regulations state that additional factors may be relevant to the analysis of whether a worker is an employee or independent contractor. *See* § 795.105(d)(iv).

b. Criticism of the Proposed Rules

DOL identified several reasons for its reversal from the current rule which it now believes "does not fully comport with the FLSA text and purpose as interpreted by the courts."[2] In doing so, the proposal erroneously claims that the current regulations preclude the "consideration of relevant facts under several factors" which could lead to a "misapplication of the economic reality test." 87 FR at 62225. Put simply, this assertion ignores the plain language in section 795.105(d)(iv) that allows for consideration of other relevant factors in applying the economic realities test.

The proposal maintains that the current rule is not supported by judicial precedent or its own historical guidance, and that it fails to effectuate the FLSA. The NPRM refers to the current rule as a "stratified analysis" that ignores judicial warnings "against a mechanical or formulaic application of the economic realities test" and characterizes part 795 as constituting "predetermined and mechanical weighting of factors."[3] FMI takes issue with the NPRM for multiple reasons.

1. **Probative Value of Factors.** An error of the NPRM is that it ignores the distinction between a factor being more probative versus the facts associated with a particular factor carrying more weight. The 2021 final rule preamble addressed the practice of courts to accord the core factors weight when balancing the factors using a totality-of-the-circumstances analysis. As the 2021 final rule preamble discussed, there is a "subtle but important distinction…between a factor's probative value as a general matter and its specific weight in a particular case."[4] The thrust of a factor's probative value is its evidentiary value to identify facts bearing on the ultimate inquiry of whether there is economic dependence. Conversely, the weight of a factor turns on "how strongly specific facts within the factor, on balance, favors [sic] a particular classification." 86 FR at 1199.

2. **Nature and Degree of Control.** The NPRM also seeks to undo the current rule's elevation of the nature and degree of control over work factor as a core factor. FMI believes the proposed rule's suggested changes to this factor ignore several realities inherent to the business practices of independent contractors in the current economy and existing case law.

FMI believes the NPRM errs in considering "controls" necessary to comply with government regulations or safety standards may be relevant in assessing this factor. For years, businesses have relied on well-established case law that provides any "controls" necessary to comply with such regulations and standards are not relevant to the overall analysis of nature and degree of control. The current rule explicitly adopted this body of case law, making it consistent with relevant precedent. The proposed rule, in sharp contrast, seeks to deviate from this body of legal precedent and take such oversight into account. Yet, the proposed rule fails to address (or even contemplate) the serious risks this creates for businesses who engage independent contractors. This is of particular concern for heavily regulated industries. For example, the food industry must ensure proper food safety measures are taken by independent contractors to ensure compliance with

[2] 87 FR at 62225.
[3] 87 FR at 62227.
[4] 86 FR at 1199.

government regulations concerning food safety and to protect the public from food related illness. The NPRM, however, would force businesses to choose between ensuring safety regulation compliance and a favorable independent contractor analysis outcome.

If a business cannot ensure or demand that an independent contractor comply with such externally mandated requirements, the business could ultimately suffer consequences for turning a blind eye to potential non-compliance by an independent contractor acting on its behalf. Surely, DOL does not wish to shield bad actors who flout industry-standard regulatory compliance as independent contractors, or to create food-related safety hazards for the public by limiting a business' ability to verify its independent contractor is abiding by necessary regulations and safety practices. DOL should continue to exclude oversight of regulatory compliance and safety regulations from the control analysis to protect public safety and prevent businesses from suffering legal consequences because of their own inability to adequately oversee their independent contractors.

3. **Work Performed as an "Integral" Part of the Employer's Business.** FMI believes the NPRM ignores the importance of an independent contractor's work to the contracting business entity. Under the current rule, the analysis of this factor focuses on whether the worker's work is "part of an integrated unit of production" – a standard set forth by the Supreme Court in *Rutherford Food Corp. v. McComb*. The NPRM, in contrast, appears to consider whether work is "important" to a business (which the NPRM proposes should weigh against a finding of independent contractor status) rather than "integral." The problems with this approach are twofold: (1) the NPRM provides no guidance on how to tell if a worker is "important" to the business, and (2) it is unclear what tasks a worker could perform that would not be important to the business, yet still make the worker worth contracting with. In this way the proposal is improperly like the second prong of the ABC independent contractor test.

As noted above, the pandemic contributed to the increased consumer desire for on demand delivery services which utilize independent contractors. Food retailers also contract with vendors, temporary staffing services, and independent contractors for cleaning and sanitization services. Such tasks, although not part of a grocery store's "integrated unit of production," are undoubtedly important for ensuring the health and safety of customers. Accordingly, the new proposed version of this factor is likely to cause confusion for businesses seeking to ensure compliance with the FLSA as well as an anticipated lack of consistency in industry practices and DOL determinations. DOL should thus continue to utilize the current rule's articulation of this factor.

4. **Investments by the Worker and Employer.** Under the proposed rule, DOL suggests that where a worker's investment does not compare favorably to a business', it suggests the worker is economically dependent on the business and thus likely an employee. The proposed rule also considers whether any investments by a worker are "capital or entrepreneurial" in nature. However, it remains unclear what type of investments this is meant to include. Further, the proposed rule states that costs borne by a worker to perform their job (such as tools and equipment to perform specific jobs) are not evidence of capital or entrepreneurial investment. Given this lack of clarity and the apparent difference in economic positions between a business and

worker, it is unclear how, or indeed whether, this factor could ever weigh in favor of independent contractor status as drafted.

5. **Actual Versus Potential Control.** FMI further disagrees with the NPRM's proposed imposition of a right to control test. Control has always been evaluated based upon the actual exercise of control, that is, what the actual practice of the business and worker is – *not* the theoretical reservation of control. In other words, the proposed rule notes that the right to control within a contract, *even if never exercised*, must be reviewed. The proposal fails to justify where, much less how, reserved control crept into its articulation of the control factor other than to say it "believe[s] it is appropriate to maintain a regulatory provision" that considers "reserved rights that are not exercised."[5] Furthermore, the NPRM conveniently ignores the fact that it contradicts the articulation of the control factor in Administrator's Interpretation (AI) No. 2015-1 (July 15, 2015). In its discussion of the control factor, AI No.2015-1 (now withdrawn) debunked the idea that reserved control should be a consideration:

> The worker must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her own business. See *Scantland*, 721 F.3d at 1313 (" 'Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity.' ")… And the worker's control over meaningful aspects of the work must be more than theoretical – the worker must actually exercise it. See, e.g. *Snell*, 875 F.2d 808; *Mr. W. Fireworks*, 814 F.2d at 1047 ("it is not what the operators could have done that counts, but as a matter of economic reality what they actually do that is dispositive.") (emphasis original).

Should DOL proceed with this proposed rulemaking, FMI urges the agency to remove any reference to theoretical, reserved, or purported control.

c. The NPRM Will Stifle Innovation and Economic Growth

Businesses of the 21st century are more streamlined and cost-efficient, enabling them to hire workers for specific tasks or who possess special skills or qualifications and thus are better classified as independent contractors as opposed to employees. Similarly, independent contractors can perform work or provide services to multiple businesses. The economy has and continues to diversify from an industrial-based economy and transition to an economy that creates service-based work opportunities as well as opportunities for individuals to use their diverse and growing knowledge and intellectual abilities.

Furthermore, as 2022 ends, the job market for individuals who want the security and related benefits of being classified as an employee is very plentiful, such that a potential worker who seeks employment as an employee should be able to and can find it. Nonetheless, the service-based and

[5] 87 FR at 62258 fn 500

knowledge-based economics create opportunities for workers to be in business for themselves for a variety of reasons, whether it is to control their own work life, to be selective in applying their time and talents to selective industries, such as multiple businesses in green industries, etc. The current rule fosters opportunities without foreclosing or limiting the traditional employer-employee work relationship.

Finally, the 21st century economy is fueled in great part by innovations and technological advances. The current rule is designed to foster opportunity growth which furthers these innovations and technological advances. As noted in the preamble to the current rule, there is no assurance that a return to the *status of no ante* would further such advances.

V. Conclusion

FMI urges DOL to maintain the current independent contractor regulatory framework. Proceeding with the proposed rule will lead to confusion and uncertainty for all stakeholders, and lead to unnecessary negative impacts on our already fragile economy. As noted previously, the food industry is ever evolving due to many factors including supply chain challenges, consumer trends and demands, and economic conditions. The staffing needs of manufacturing, warehousing, and retailing must remain flexible to meet these changes and demands. The decisions to allocate additional workforce – whether by direct employment or through vendors, contracts or staffing firms – to handle evolving economic conditions and the demands of American consumers is of the utmost importance to FMI members.

Thank you for your consideration of these comments. Please contact us if you have questions or would like to discuss our comments on this vital issue to the food industry.

Sincerely,

Christine Pollack

Christine Pollack
Vice President, Government Relations