



April 28, 2026

The Honorable Andrew Rogers
Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW, Room S-3502
Washington, D.C. 20210

Submitted via regulations.gov

RE: Employee or Independent Contractor Status; RIN 1235-AA46

Dear Administrator Rogers:

The FMI – The Food Industry Association welcomes the opportunity to comment on the Department of Labor’s (DOL) notice of proposed rulemaking (NPRM) on *Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act (RIN 1235-AA46)*. FMI appreciates DOL’s recognition of the importance of independent contractors to various economic sectors, including the food industry, by proposing a flexible standard for determining worker status.

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 a variety of companies providing critical services – to amplify the collective work of the industry.

A collective of FMI’s membership manufactures, distributes, and sells the food and consumer goods that are found in pantries, refrigerators, medicine cabinets, and laundry rooms across the country. Our retail members, which range in size from independent operators to regional and large national and international businesses and brands, operate 45,000 grocery stores and 12,000 supermarket pharmacies. The food industry produces and supplies over 30,000 different food and consumer good products found on store shelves, employs over 6.3 million individuals, and ultimately touches the lives of more than 100 million U.S. households per week.

FMI members have unique needs in meeting staffing requirements in stores, distribution facilities, and divisions throughout business operations. The food industry provides a wide range of 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. The diversity of career



opportunities offered through the food industry provides employment to individuals at any stage of life and with any education and skill level. 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 also ever evolving due to many factors including supply chain challenges, consumer trends and demands, and economic conditions. Staffing options for manufacturing, warehousing, and retailing must remain flexible to meet these changes and demands. The NPRM recognizes the need for this operational flexibility in our industry.

Thus, FMI welcomes the prudent decision of DOL in this NPRM to readopt the independent contractor standard finalized in 2021, which FMI supported¹, and to rescind the divergent standard implement in 2024, which FMI opposed². FMI also appreciated that DOL acted on May 1, 2025, through Field Assistance Bulletin No. 2025-1, to not enforce the 2024 rule.

Under the NPRM and 2021 rule, five factors are applied 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 herself or himself. In the NPRM and 2021 rule, DOL wisely elevated two factors as core factors because they are most probative on the ultimate question of economic dependence and hence should carry more weight. These core factors are: (1) the nature and degree of control over work; and (2) an individual's opportunity for profit or loss. The NPRM and 2021 rule also identify three additional factors that act as guideposts in the event a decision cannot be made based on the two core factors alone. These factors 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. FMI believes that this approach is grounded in a streamlined, easy to comprehend economic realities test and represents an articulation well-suited for the 21st century workforce.

Conversely, the 2024 rule adopted 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. As noted in the NPRM, the 2024 rule failed to provide effective guidance regarding how these different factors should be weighed or applied together, creating uncertainty and risk when engaging individuals as independent contractors. The NPRM and 2021 rule and their streamlined core factors approach provide vital clarity to employers while accounting for the economic realities of the modern world. Because of our razor-thin margins,

¹ FMI [comments](#) on RIN1235-AA34 Independent Contractor Status under FLSA, October 26, 2020

² FMI [comments](#) on RIN1235-AA443 Employee or Independent Contractor Classification under FLSA, December 12, 2022

the food industry is particularly vulnerable to any regulatory structure, like the 2024 rule, that depresses innovative operational models and increases both uncertainty and litigation.

Further, the NPRM and 2021 rule, as well as the 2024 rule, permit additional unnamed factors in an independent contractor analysis if the factors tend to show whether the worker is in business for herself or himself or reliant on a business for work. As the NPRM notes, the 2024 rule cited the additional unnamed factors following the six-factor totality of the circumstances test and thus, was interpreted as if a seven- or more-factors had to be considered in every case to classify a worker. This approach created uncertainty and confusion among businesses. FMI appreciates that the NPRM recognizes this misaligned citation, reiterates that the underlying economic reality test is based on two core factors, and notes that "...additional factors will not be considered in many cases because the identified factors will be more than sufficient to make the determination."

In conclusion, FMI appreciates that the NPRM readopts the independent contractor standard under the 2021 rule and rescinds the standard under the 2024 rule. The NPRM provides clarity and consistency to ensure that businesses and workers have the flexibility and tools by which to determine their prospective working relationships. We appreciate your consideration of these comments and our prior detailed comments filed on the NPRMs in 2020 and 2022.

Sincerely,

A handwritten signature in cursive script that reads "Christine Pollack".

Christine Pollack
Vice President, Government Relations