October 26, 2020

The Honorable Cheryl M. Stanton
Administrator
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

RE: Notice of Proposed Rulemaking, RIN1235 – AA34
Independent Contractor Status under the Fair Labor Standards Act

Dear Administrator Stanton,

This letter presents the comments of FMI – The Food Industry Association (FMI) on the Notice of Proposed Rulemaking (NPRM) published by the Wage and Hour Division (WHD or the Division) of the U.S. Department of Labor (DOL or the Department) proposing regulations and requesting comments on independent contractor status under the Fair Labor Standards Act (FLSA). This NPRM was published in the Federal Register on Friday, September 25, 2020, (85 Fed. Reg. 60600) and allowed a 30-day comment period expiring October 26, 2020. In sum, FMI supports this independent contractor status rulemaking, provides comments and input on several provisions, requests US DOL/WHD clarify certain aspects of the NPRM, and shares examples for the Division to consider for inclusion in the final rule.

I. FMI – The Food Industry Association

FMI advocates on behalf of a wide range of members within the food industry value chain. From food wholesalers and suppliers that create and provide goods available to consumers, to the grocery retailers that help stock and sell those goods, our members' collective reach and impact ultimately touches lives of over 100 million households in the United States and represents an $800 billion industry with nearly 6 million employees.

For well over half a century, our members have played a crucial role in communities across the country. From large retailers and wholesalers to local chains and independent operators, the food industry has helped ensure Americans have access to the foods they need to support themselves and their families. Although our goals have largely remained the same over the years, the rise of e-commerce and the new era of "gig economy" workers have created a more complex relationship between businesses and workers.

These complexities have been made even more apparent during the COVID-19 pandemic, where FMI research has shown over 50% of shoppers at least occasionally rely on online

shopping for their groceries on a monthly basis.[1] Of that group, nearly 86% rely on some form of delivery service for their purchased goods. Many of these are provided by third party businesses—typically in the form of popular phone and web applications—who often employ independent contractors for these tasks. With the rise in these services and workers, FMI believes now, more than ever, DOL action on establishing clarity and consistency represents a vital step in ensuring businesses and workers have the right tools by which to determine their prospective working relationships.

II. Background for Proposed Rule

Briefly, the proposed rule ultimately recommends the application of an economic reality test for determining whether workers are independent contractors who are in business for themselves or employees who are suffered or permitted to work by their employer. The NPRM extensively traces the boundaries of the employer-employee relationship and development of a multi-factor economic reality test through case law and WHD guidance. Finally, this is the first attempt by US DOL/WHD to issue regulations differentiating between an independent contractor who is not an employee and an individual who is employed by an employer, as the term "employee" is defined in the FLSA. 29 U.S.C. §203(e)

The NPRM analyzes numerous Supreme Court and federal appellate court cases that gave rise to the multi-factor economic reality test and different articulations by the courts. Rather than review the development and variations in the economic reality test, FMI believes it is more relevant to note, and agrees with, the shortcomings of the economic reality test which US DOL/WHD cites as justification for this rulemaking. For example, while "economic dependence is the touchstone of the economic reality test", WHD first states that the concept has been applied inconsistently, resulting in confusing and sometimes conflicting outcomes. 85 Fed. Reg. at 60605. The Department guides that the economic reality test turns on "[d]ependence for work as opposed to income" such that the "individual who depends on a potential employer for work is an employee… In contrast, an independent contractor does not work at the sufferance or permission of an employer because, as a matter for economic reality, he or she is in business for" themselves. 85 Fed. Reg. at 60605 - 60606.

Also, the NPRM discusses the variations followed by the courts as well as the Department in analyzing the various factors - and the myriad of facts that bear on these factors - in determining whether a worker's classification is that of an independent contractor or employee. While the totality of the circumstances has bearing on the level and nature of dependence in a given employment relationship, the NPRM observes that "neither the Department nor courts have articulated clear, generally applicable guidance about how the multiple factors, and the countless facts…, are to be balanced…" 85 Fed. Reg. at 60606. The lack of guidance as to "the relative importance of the factors" causes uncertainty for the regulated community. 85 Fed. Reg. at 6067.

US DOL/WHD identifies a third shortcoming with the current analysis of the economic reality test as applied by the Department and the courts. In particular, the NPRM identifies several factors that overlap because the same facts are analyzed to address them, resulting in inefficiency,

[1] "U.S. Grocery Shopper Trends COVID-19 Tracker July 14 - 20, 2020", document attached

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inconsistency and even redundancy, and that contribute to confusion on the part of employers in attempting to classify workers. The final criticism with the current multi-factor economic reality test is that it is ill-suited for the economy of the 21st century. The NPRM observes that the modern economy is more knowledge-based and less industrial-driven, that technology has made workers more efficient and cost effective, and that societal changes have resulted in innovative work arrangements and changes in job tenure expectations. As mentioned before, FMI's members see this not only in delivery service-related enterprises, but also in some instances with commercial motor vehicle operations, seasonal workforce additions, and other positions that do not always fall under a traditional employee-employer relationship. All this has given risen to what many refer to as the "gig economy." See generally 85 Fed. Reg. at 60624 fn. 60; at 60625 fn. 74; and at 60635 fn. 146 and fn. 150.

FMI echoes these points identified in the NPRM as justifications for this new rulemaking. While US DOL/WHD is not proposing a different test than exists in interpretive regulatory guidance, this proposal is an alteration of US DOL/WHD's guidance on the economic reality test in various documents. This proposal streamlines the current iterations and factors, allows for the consideration of other relevant factors, and provides guidance on the relative weight that should be accorded various factors in balancing the economic reality test. FMI finds this restructuring as justifiable and beneficial to independent contractors, employees and employers in assessing classifications.

III. Proposed Rule and Comments

A. Economic Reality Test

Proposed section 795.105(b) adopts the economic reality test as the basis for distinguishing between an independent contractor who is an individual in business for themselves versus an employee who is economically dependent upon an employer that suffers or permits that individual to work. FMI endorses the proposal to apply the economic realities test for determining whether a worker is an employee or independent contractor. In the preamble of the NPRM, US DOL/WHD observes that the common law standard is too restrictive when compared to the definitions of "employ", "employee" and "employer" in the FLSA. Traditional agency law principles are the touchstone of common law and focus exclusively on "the hiring party's right to control the manner and means by which the worker accomplishes his or her task." 85 Fed. Reg. at 60601. The preamble cites several Supreme Court decisions in which the Court described the FLSA standard, which is based upon the definition of employ as "suffer or permit to work", as more inclusive or broader than common law agency principles. The preamble further recognizes that this FLSA standard is not without limits and that "federal courts of appeals have uniformly held, and the Department has consistently maintained, that independent contractors are not 'employees' for purposes of the FLSA." 85 Fed. Reg. at 60601. The Department also discusses its consideration of the common law test in part VI, section G. It concluded the law foreclosed the adoption of the common law test.

Another option considered by the Department is the "ABC" test which the State of California legislature has adopted based upon a California Supreme Court decision. Under this test, workers are presumed to be employees unless a worker can satisfy a 3-prong test to be

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classified as an independent contractor. This test requires: (1) a worker be free of control and direction of a putative employer with respect to the performance of the work pursuant to a contract for performing the work and in fact; (2) the work performed by a worker be outside the normal scope of the putative employer's control; and (3) the worker customarily engages in an independent business, occupation, or trade of the same nature as is the work performed. While this ABC test would result in most workers being classified as employees, FMI agrees with the Department that the FLSA also precludes the adoption of this test. In addition, this test is not without controversy since the California legislature recently has enacted several exemptions from the ABC test in response to a backlash against it. See generally 85 Fed. Reg. at 60635-60636. In addition, Proposition 22 to override the bill passed by the California legislature to codify the ABC test is on the November, 2020, ballot in California.

FMI agrees with the Department's analysis of the question of economic dependence and its clarification that "the key question is whether workers are "more closely akin to wage earners," who depend on others to provide work opportunities, or 'entrepreneurs' who create work for themselves." (citation omitted) 85 Fed. Reg. at 60611. FMI agrees that a worker who renders certain services to a potential employer is an independent contractor when that worker is an entrepreneur in a particular line of business in which they provide that type of service or activity.

B. Economic Reality Test Factors

Proposed section 795.105(c) clarifies that while the factors of the economic reality test are not exhaustive and no one factor is dispositive, there are two (2) core factors that are more probative in determining whether an individual is an economically-dependent employee or an independent contractor who, as a matter of economic reality, is in business for themselves. FMI endorses this proposal because it clarifies that two (2) core factors – the nature and degree of an individual's control over the work and an individual's opportunity for profit or loss – provide the regulated community with guidance as to which factors are more significant and hence are accorded greater weight in balancing the economic reality test factors. In addition, US DOL/WHD has explained why these two (2) core factors are more important:

> Given the greater weight afforded each of these two core factors, if they both point towards the same classification, whether employee or independent contractor, there is a substantial likelihood that is the individual's accurate classification.
>
> *Proposed section 785.105(c). 85 Fed. Reg. at 60639.*

Proposed section 785.105(d) identifies not only the two (2) core factors as noted above, but also enumerates three (3) other factors of a refined and streamlined economic reality test. The core factors are more probative of the existence of an independent contractor because they focus on an individual's ability to control their own work and to earn profits or risk losses as opposed to being an employee who is economically dependent upon the employer for work.

The three (3) other non-core factors of the refined economic reality test 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

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of production. The NPRM notes that these factors are accorded less weight and are less probative because it is extremely doubtful that any one of them or the three collectively would outweigh the weight of the two core factors when an analysis of them lead to the same classification.

1. Core Factors: Nature and Degree of Control Over Work and Opportunity for Profit or Loss

The Department's articulation of the first core factor is the nature and degree of an individual's control over the work to be performed. To the extent that the individual worker "exercises substantial control over key aspects of the performance of the work", in contrast to a potential employer, suggests that the factor would weigh toward independent contractor. Proposed section 795.105(d)(1)(i) at 85 Fed. Reg. at 60639. Indicia of substantial control identified in the NPRM include: the ability to work for others, including possible competitors of a potential employer; the discretion of an individual to choose the projects they perform; and the ability to set their own work schedules. Likewise, the NPRM clarifies that the imposition by a potential employer that an individual worker comply with certain contractual or legal obligations, meet certain safety and health standards, have insurance, satisfy quality control standards or meet established deadlines do not convert a worker who is an independent contractor into an employee. Finally, US DOL/WHD proposes to incorporate the factor of the exclusivity of the relationship into the core control factor. See 85 Fed. Reg. at 60603.

The second core factor of the NPRM combines multiple, yet interrelated considerations of the multi-factor economic reality test. Not only does it include the factor of an individual's opportunity for profit or loss based upon business acumen, managerial skill, or personal initiative, but it also encompasses the factor of an individual's investment in employees, equipment, facilities, materials, and/or technology to perform their work. FMI further agrees with the Department's proposal for this second core factor. In the last sentence of proposed section 795.105(d)(l)(ii), FMI recommends that US DOL/WHD clarify the statement an individual is more likely an employee when they can affect their earnings by working more efficiently. For example, this should be used to describe or apply to an employee who is compensated on a piece rate basis. An independent contractor, who is motivated by an entrepreneurial spirit and is in business for themselves, may be incentivized also to work efficiently in order to complete more jobs or assignments for more business entities in order to generate more revenue or earnings which hopefully translates into greater profits. The fact that an independent contractor works efficiently in order to affect their profits, i.e., earnings, should not be confused with a piece-rate employee who works more efficiently to affect, i.e., increase, their earnings.

FMI again acknowledges that the proposed economic reality test restructures and recalibrates the multi-factor test developed through many court decisions as well as US DOL/WHD guidance. Nonetheless, it welcomes this articulation as a step to give better guidance and more instruction to both employers and workers so that they can make more informed and accurate classification decisions. FMI would request that the DOL provide examples of this particular factor to show how it would plan to utilize it if included in the final rule.

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2. Other Probative Factors

The first of the three (3) non-core factors is the amount of skill required for the work. In the preamble to the NPRM, the Department writes that this factor was articulated in a 1947 case by the Supreme Court in which it identified five factors for differentiating between an employee and independent contractor. It also describes the expansion of this factor by some courts, and even the Department, to include whether an individual exercises "initiative" or discretion. The NPRM would restore the focus of this factor – the amount of the skill required – to that intended by the Supreme Court and would exclude from consideration any notion of foresight, initiative or judgement. The rationale for this reordering of this factor is that the "facts related to initiative are considered as part of the control and opportunity for profit or loss factors." 85 Fed. Reg. 60615.

Again, FMI supports the Department's emphasis of the skill factor based upon its original articulation by the Supreme Court. However, FMI believes that the proposed description of this factor in section 795.105(d)(2)(i) is too restrictive. The focus of this factor, as stated in proposed section 795.105(d)(2)(i), is upon "the extent the work at issue requires specialized training or skill that the potential employer does not provide." 85 Fed. Reg at 60639. The amount of skill required should not turn exclusively on whether the skill or training is so specialized that the potential employer does not provide it. While that fact alone may support an independent contractor relationship based upon a consideration of the core factors, it is possible that a business entity may contract with an independent contractor for performing work that does not require specialized training or skill. It is quite possible that a putative employer does not employ workers to perform work not requiring specialized skill or training. Thus, US DOL/WHD should clarify that because a business entity contracts with a putative employee to perform work not requiring specialized skill is not, in and of itself, sufficient to overcome an independent contractor recommendation based upon the core factors.

The second non-core factor is the degree of permanence of the working relationship between the individual and putative employer. The preamble to the NPRM clarifies that consideration of this factor should not be infiltrated by considerations of the exclusivity of the working relationship; rather, exclusivity considerations play a role in the core control factor. As contained in proposed section 795.105(d)(2)(ii), the hallmark of this non-core factor is the extent to which "the work relationship is by design definite in duration or sporadic." 85 Fed. Reg. at 60639. FMI agrees with US DOL/WHD's proposal and the articulation of how this non-core factor should be balanced.

The last factor is whether the work is part of an integrated unit of production and proposed section 795.105(d)(2)(iii) explicitly guides that this non-core factor does not encompass "the concept of the importance or centrality of the individual's work to the potential employer's business." 85 Fed. Reg. at 60639. As traced in the preamble, this factor was enunciated in another 1947 decision of the Supreme Court and subsequent iterations of this factor used the word "integral." The use of the word integral instead of integrated permitted considerations of centrality or importance of the work performed to a business, as opposed to the work being integrated or merged into the operations of a business, to be weighed as part of this factor which undermined its probative value. The focus of the proposed language for this non-core factor is "on whether an individual works in circumstances analogous to a production line," but the

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preamble is quick to note that this non-core factor can apply equally to the production of a good or service. 85 Fed. Reg. at 60618.

While FMI appreciates the Department's attempt to clarify this non-core factor, it believes that it still poses challenges for the 21st century economy. Thus, FMI offers the following example:

> The grocery business has undergone and continues to adapt to changing consumer needs and preferences, as well as business environments. This is particularly true over the last eight months or so during the COVID-19 pandemic as mentioned previously. While most grocers have their own online ordering channels, some use independent contractors whose websites accept online orders. Further, some grocers use their own employees to fill online orders while others use, and even some consumers may use, a concierge or personal shopper entity. Finally, once orders have been placed and filled, some orders may be delivered to a consumer by a non-grocer employee. Thus, some may describe the integrated unit of this process as the sale of groceries to a consumer that requires the coordination of interdependent activities that culminates in the consumer receiving their grocery order. However, for example, a delivery driver who is an independent contractor may pick-up and deliver a consumer's grocery order. While this is the final stop in the integrated process (and an important step no less), it should not serve as a basis to claim that the delivery work is part of an integrated unit such that the delivery driver could claim to be an employee.

While the two core factors of control and profit or loss would suggest an independent contractor in this scenario, it nonetheless presents a scenario that could arise given the language of this factor. Thus, should US DOL/WHD finalize this factor as proposed, FMI recommends that it use an example similar to the one described above to highlight that a personal shopper or delivery driver could be classified as an independent contractor even though they perform work that is part of the integrated unit. Also, in its preamble, US DOL/WHD cites WHD Opinion Letter FLSA2019-6. FMI recommends that US DOL/WHD summarize that letter as another example to illustrate how the core factors would support an initial independent contractor classification and that consideration of the non-core factors would not outweigh the core factors.

IV. Conclusion

For these and other reasons, FMI supports the independent contractor NPRM and encourages the Department to finalize it with appropriate revisions in light of this and other comments. It believes that the restructured economic reality test articulated in the NPRM, while not without some risks, will be positive for employers, employees and independent contractors by providing greater certainty and predictability.

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As an industry with a "critical infrastructure workforce"[2] that continues to operate in even the most challenging of times during this pandemic, we've seen firsthand the need for regulatory clarity as we look to ensure our members can provide the essential goods and services expected by communities in all corners of the country. FMI thanks the Department for the opportunity to share the views and input of its members and is certainly willing to provide any additional feedback if requested.

Regards,

Matthew Viohl
Manager, Labor Policy & Sustainability
FMI – The Food Industry Association

[2] As established by the Cybersecurity & Infrastructure Security Agency's "Guidance on the Essential Critical Infrastructure Workforce."