December 13, 2022

Jessica Looman
Principal Deputy 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, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 FR 62218 (RIN: 1235-AA43)

Dear Ms. Looman:

The American Hotel & Lodging Association ("AHLA") writes in opposition to the Wage and Hour Division's ("WHD") above-referenced Notice of Proposed Rulemaking, Employee or Independent Contractor Classification under the Fair Labor Standards Act ("NPRM" or "Proposed Rule"). The Proposed Rule would create significant uncertainty among the regulated community – employers, employees, and bona fide independent contractors alike. AHLA, therefore, urges the agency to abandon the NPRM and instead affirm the current independent contractor standard established under the agency's 2021 Final Rule[1], Independent Contractor Status under the Fair Labor Standards Act ("2021 Final Rule"), which provided clear guidance for the regulated community to understand and apply.

Serving the hospitality industry for more than a century, AHLA is the sole national association representing all segments of the U.S. lodging industry, including hotel owners, REITs, chains, franchisees, management companies, independent properties, state hotel associations, and industry suppliers. The lodging industry is vital to the nation's economic health, employing nearly 2 million employees and generating $155.5 billion in annual sales from 4.9 million guest rooms.

By shifting the independent contractor standard away from the clear policies implemented in 2021, the WHD will subject the regulated community once again to confusion and uncertainty, resulting in increased litigation and costs for businesses and independent contractors as well as a decrease in opportunities for flexible work arrangements that many individuals truly want and need. AHLA urges the WHD to abandon this proposal and affirm the current worker classification test as established under the 2021 Final Rule.

The Hospitality Industry's Reliance on Independent Contractors

[1] 86 FR 1168

AHLA surveyed its members to garner a better understanding of how the hospitality industry utilizes independent contractors. Responses demonstrated that the hospitality industry engages independent contractors to fill critical needs that arise at properties. For example, respondents said they use independent contractors for positions related to social media, marketing, website design and maintenance, interior design, and small project or preventative facility maintenance. One member also indicated they used independent contractors to consult at properties and for event decoration. Thus, independent contractors are critical to AHLA members and the hospitality industry.

Steps to limit opportunities for individuals to work as independent contractors, therefore, will impact the industry's ability to maintain operations and make it more difficult for hotels across the country to serve their customers and communities. At a time when America's hotels continue to recover from the historically devastating COVID-19 economic crisis and face critical workforce shortages that have left the industry with over 115,000 unfilled positions, a new, imprecise independent contractor rule that restricts access to independent contractors and limits their flexibility would create significant uncertainty for the industry and protract the industry's recovery even further.

Policy Changes Established under the Proposed Rule

Prior to implementation of the 2021 Final Rule, DOL struggled to provide a clear and consistent interpretation of the worker classification test under the Fair Labor Standards Act ("FLSA"). As the 2021 Final Rule identified, the regulated community was dealing with "confusion around the meaning of economic dependence," a "lack of focus in the multifactor balancing test," "confusion and inefficiency due to overlapping factors," and an interpretation of the standard that was no longer applicable to the modern economy. The 2021 Final Rule rectified these shortcomings by:

- clarifying that "economic dependence" turns on whether a worker is in business for themself or is economically dependent on a putative employer for work;
- designating two of the factors – nature and degree of the worker's control over their work and the worker's opportunity for profit or loss – as "core factors" and giving them extra weight in the analysis due to their being the most probative of a worker's economic dependence;
- eliminating overlap between the factors and thereby establishing that specific elements of the contractual relationship are part of the analysis for specific factors; and
- establishing that the actual practices in a contractual relationship are more probative than what may be contractually or theoretically possible.

Unfortunately, WHD is now considering reversing these changes in the NPRM, which would seriously and negatively impact our members' confidence in their ability to understand and appropriately apply the worker classification test.

The NPRM lists six factors to consider when determining whether a worker is economically dependent on a putative employer:

1. opportunity for profit or 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
6. skill and initiative

The NPRM proposes to weigh all factors equally with none having more weight than any others. The NPRM, in other words, eliminates the 2021 Final Rule's designation of core factors as being more probative in the worker classification determination, even though the "core factors" analysis is based on the relevant case law.

The NPRM creates an overlap between the different factors, allowing the same aspects of a contractual relationship to be analyzed under multiple factors. Additionally, the Proposed Rule reverts to the "integrated unit" factor (as opposed to the 2021 Final Rule's "integral part of the employer's business" factor) and reestablishes the standalone investment factor separate and apart from the opportunity for profit or loss factor. Finally, the NPRM eliminates the 2021 Final Rule's focus on the actual practices of the parties, emphasizing that contractual or theoretical ability to control terms and conditions of employment should be considered in the worker classification analysis.

The Hospitality Industry's Concerns with the WHD's Proposed Rule
AHLA is deeply concerned with the policy changes listed above. As explained in further detail in this section, all of these changes will create significant uncertainty, instability, and confusion for the regulated community and contractual relationships across the economy. AHLA urges the WHD to reconsider the NPRM in order to ensure the regulated community continues to have clarity and sufficient guidance on worker classification determinations.

The Designation of Core Factors Provides a Critical Focus for the Economic Realities Test
Prior to the 2021 Final Rule's implementation, the economic realities test as interpreted by DOL lacked focus. All factors were considered equally weighted and equally important, leaving businesses and workers with the difficult burden of trying to understand which elements of their contractual relationship would be more important in the determination. This created significant confusion for the regulated community. As the 2021 Final Rule explained, "The test's lack of

guidance leads to uncertainty regarding 'which aspects of 'economic reality' matter, and why.'"[2] The 2021 Final Rule rectified that problem by analyzing the case law specifically identifying two factors – nature and degree of control and opportunity for profit or loss – as core factors that courts have historically given more weight than the other non-core factors.

While all factors should be considered and are important in assessing the work relationship, the 2021 Final Rule was correct in designating two core factors. This policy helped provide focus for the analysis and was consistent with court precedent. Workers and businesses alike understood which elements of the contractual relationship were more important in the worker classification determination, allowing them to more easily identify which classification was appropriate for the worker or workers in question.

Additionally, the two factors designated as core factors in actuality should carry more weight, as they are more probative of a worker's economic dependence than the other non-core factors. A worker's control over their work and their opportunity for profit or loss based on their decisions, skill, and insight clearly provide the most evidence of whether that individual is in business for themself and not economically dependent on a putative employer. DOL's prior approach, on the other hand, ignored the fact that workers' economic dependence largely rests on these core factors. As the 2021 Final Rule identified, non-core factors were "highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors."

This focus was especially useful when the various factors all pointed towards different classifications for a particular worker or workers. For example, when analyzing a specific worker, if three of the factors lean towards independent contractor status but the other three indicate employee status, what is the appropriate classification for the worker? With core factors designated, the worker and putative employer could look directly at the two core factors – those that are more informative of the worker's economic dependence – and understand which elements of the contractual relationship should be given more weight and which classification is, therefore, more appropriate. Under the current Proposed Rule, however, there is no answer provided to this common dilemma. Even the courts have not provided a clear answer on how the regulated community should evaluate conflicting factors. The 2021 Final Rule explained, "Even where many facts and factors support both sides of the classification inquiry, courts have not explained how they balanced the competing considerations."[3] Employers and workers are left to guess which direction to follow. Core factors at least provided some idea of how to weigh competing elements of the worker classification test.

Unfortunately, the WHD is considering eliminating this critical element of the analysis in its rule. This change will once again leave the regulated community in the precarious position of

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[2] *Id. at* 1173 (citation omitted)
[3] *Id.*

speculating on which factors in their specific circumstances matter more in any given worker classification determination.

Overlapping Factors Will Create Confusion
The 2021 Final Rule identified and rectified the issue that certain elements of the contractual relationship were analyzed under several different factors. As the 2021 Final Rule cautioned, "A multifactor test is a useful framework for determining FLSA employment in part because it organizes the many facts that are part of economic reality into distinct categories, thus providing some structure to an otherwise roving inquiry. However, *this benefit is lost if the lines between those factors blur.*"[4]

The 2021 Final Rule provided several examples of duplicative analysis that were resolved by the Final Rule. For example, a worker's ability to affect their profits through their own initiative was analyzed under both the opportunity for profit or loss factor and the skill factor. However, a worker's use of on-the-job initiative was considered under the control factor as well. The control factor also weighed the exclusivity of the relationship and the putative employer's ability to compel attendance, but these elements were also considered under the permanence and integral part factors. These duplicative analyses created a convoluted standard that the regulated community could not easily navigate.

The 2021 Final Rule clarified which aspects of the contractual relationship fell under which factor, rather than forcing putative employers and workers to consider the same elements of the contractual relationship under multiple factors. The 2021 Final Rule's policy was clear and appropriate, and the WHD should maintain this approach.

"Integrated" Factor Provides More Insight than "Integral" Factor
The NPRM restores the factor that analyzes whether a worker is integral to the putative employer's business. Under the 2021 Final Rule, this factor focused instead on whether the worker was integrated into the putative employer's unit of production.

The NPRM's approach is misguided, ambiguous, and extremely broad, as it would essentially call into question almost all contractual arrangements that aren't fully outside the scope of the business. Elements of operations may be integral to a business, but that does not mean the worker in question is an employee of the putative employer. In today's economic environment, businesses contract out numerous aspects of their operations to other entities, whether they be larger companies or independent contractors. This can include information technology, social media, or customer service operations. These examples are vital elements of any business' operations; they protect the entity's property, reputation, and relationship with customers as well as customers' payment information and privacy. They, as well as many other outsourced services, are vital in today's world, but that does not mean the individuals who provide these services are employees of the

[4] *Id. at* 1174 (emphasis added)

hiring entity. That simply means these individuals have the knowledge and expertise that other companies and the public generally value and wish to utilize.

Worker's Investment Should Not Be Compared to that of the Putative Employer
The WHD should reconsider its changes to the worker's investment factor. AHLA believes the factor should be combined with the opportunity for profit or loss factor, as was done in the 2021 Final Rule, but if the WHD decides to maintain it as a separate factor, at the very least it should eliminate the requirement that a "worker's investment be evaluated in relation to the employer's investment in its business."[5] This comparison is illogical.

As the NPRM itself acknowledges, a "worker's investment need not be (and rarely ever is) of the same magnitude and scope as the employer's investment."[6] Comparing the two investments provides no insight into the economic dependence of a worker. A business is more likely to have more numerous and/or significant investments than an independent contractor. It is nonsensical to assume that because an independent contractor invests less into their independent business than a larger company, they must be economically dependent on that company. Independent contractors and their businesses come in many shapes and sizes, but the Proposed Rule punishes those smaller entities, especially those just opening their doors, making them far less likely to have or need substantial operations. The Proposed Rule as currently drafted disincentivizes independent contractors from starting their own business and penalizes larger businesses for using smaller entities. The risks associated with working together will threaten the independent contractor's position as an independent business owner and impose potentially significant liability on the larger company.

Moreover, as currently drafted, the factor is nearly impossible to understand and implement. How do employers both compare the investments but not the investments' magnitude and scope? This circular logic creates additional confusion for the regulated community. Employers and independent workers will be forced to predict how to apply such an ambiguous analysis.

The NPRM Does Not Provide Guidance on its Open-Ended "Additional Factors"
The NPRM allows "additional factors" beyond the six listed to be considered in the worker classification determination, but the WHD does not explain or provide a list of these factors. As long as an element of the contractual relationship "in some way indicate[s] whether the worker is in business for themself, as opposed to being economically dependent on the employer for work,"[7] it can be included in the economic realities test.

This ambiguity forces putative employers and workers to essentially guess what elements of their contractual relationship will eventually be considered in the analysis by a court or the WHD.

[5] 87 FR 62241
[6] *Id. at* 62242
[7] *Id. at* 62275

Different courts will have different interpretations of what constitutes an appropriate "additional factor" or when the threshold for triggering independent contractor status under that factor is met, leaving the regulated community with the nearly impossible task of monitoring court precedent to understand what will be considered relevant by their respective court. This is extremely difficult for even well-resourced entities, but it will be a herculean task for any small businesses or independent workers that work in multiple jurisdictions covered by multiple courts.

Actual Practices Should Be More Relevant to the Determination

The 2021 Final Rule emphasized that the actual practices of a business relationship are more relevant than contractual or theoretical possibilities. As the Supreme Court held, "'economic reality' rather than 'technical concepts' is to be the test of employment" under the FLSA,[8] and the 2021 Final Rule explained, "Affording equal relevance to reserved control and control that is actually exercised—by either party—would ignore the Supreme Court's command to focus on the "reality" of the work arrangement, *Silk*, 331 U.S. at 713, which places a greater importance on what actually happens than what a contract suggests *may* happen."[9] A worker's economic dependence is more fully understood by examining the actual practices of the worker and putative employer, not the potential possibilities under the contract.

Importantly, and contrary to what many of the rule's critics claimed, the 2021 Final Rule clearly explained that contractual or theoretical possibilities of a work arrangement are not immaterial to the worker classification determination. The WHD clarified that "unexercised powers, rights, and freedoms are not irrelevant in determining the employment status of workers under the economic reality test; such possibilities are merely *less* relevant than powers, rights, and freedoms which are actually exercised under the economic reality test."[10] Contractual arrangements are relevant in the analysis, but more weight should be given to actual practices. How relationships between workers and businesses are actually executed is far more germane when determining a worker's economic dependence.

The WHD Underestimated the Cost of the Proposed Rule

The WHD seriously underestimated the cost this rulemaking will have on the regulated community and the economy. The Proposed Rule suggests entities will need 30 minutes to read, understand, and implement the rulemaking, while independent contractors will only need 15 minutes. This is a serious misrepresentation of the time drain this NPRM will have. The rule is 184 pages and delves into legal concepts and court precedent that take time to absorb. The regulated community, but particularly smaller businesses, independent contractors, and workers – many of whom may not have significant resources to devote to understanding the Proposed Rule or the legal knowledge to understand its complexities – will need significantly more time to read, understand and analyze the NPRM and assess their operations or contractual arrangements to determine how they will be

[8] *Whitaker House*, 366 U.S. at 33
[9] 86 FR 1204 (emphasis in original)
[10] *Id.* (emphasis in original)

impacted. They will possibly need even more time to adjust their arrangements in response to the policy changes in order to avoid unintended (and potentially catastrophic) liability.

In order to understand their risks under this Proposed Rule, entities may need to hire legal counsel. The costs of such legal assistance will be substantial. In order for counsel to understand the entity's situation and make any necessary changes, they will need to conduct an analysis or risk assessment of an entity's contractual arrangements or operations, which will take several hours, days, or weeks to complete, depending on the number and complexity of those arrangements. This is an expense that smaller entities and independent contractors may not have, especially in this economic environment with historic inflation, supply chain disruptions, and workforce shortages. These entities cannot easily divert such significant resources. The hospitality industry specifically is still recovering from the COVID-19 pandemic, and any such expenditures could prove disastrous.

Furthermore, the NPRM as currently drafted is so ambiguous and overly broad that it will undeniably result in considerably more litigation. Confusion will abound as to how to apply the new standard and its factors, and the only option for interested parties will be to resolve the issue in court. This is in no one's best interest. Entities do not have or want to spend resources on litigation; workers and independent contractors will wait months or years to get answers; the courts will use scarce resources to answer the question of a worker's classification. These consequences could all be avoided by providing a clear, easy to understand standard that answers the ambiguities that have plagued the regulated community for years – as was done by the 2021 Final Rule. At the very least, WHD must do a more thorough analysis of costs.

Conclusion

The Proposed Rule is ambiguous, overly broad, and misguided. It will create uncertainty and confusion for the regulated community. The 2021 Final Rule, on the other hand, provided needed clarity on and focus for the worker classification test, and it resolved the most pressing problems with the standard. Importantly, it has not yet been tried and tested in the courts. AHLA, therefore, urges the WHD to abandon this NPRM, affirm the current standard, and allow the regulated community and the courts to implement the policy changes established by the 2021 Final Rule.

Thank you for the opportunity to comment on this Proposed Rule. AHLA looks forward to working with you on this issue moving forward.

Sincerely,

Chirag Shah, Senior Vice President Federal Affairs & Policy Counsel