Independent Work Coalition

April 28, 2026

The Honorable Andrew Rogers
Administrator
Wage and Hour Division
U.S. Department of Labor

Submitted via regulations.gov

**RE: RIN 1235-AA46, Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act**

The Independent Work Coalition (IWC) and the 35 undersigned organizations respectfully submit the following comments regarding the U.S. Department of Labor's (DOL) above-referenced notice of proposed rulemaking (NPRM).

## I. Introduction

IWC comprises a diverse group of associations, businesses, and other stakeholders that support independent work and the millions of Americans who work as independent contractors. IWC is committed to educating policymakers about the important role that independent contractors play across every sector of the economy and advocating for policies that preserve the economic vitality and operational flexibility associated with independent contractor status.

DOL's NPRM would rescind the agency's 2024 final rule on independent contractor status (the 2024 rule)[1] and return the agency's worker classification standard to one where two core factors primarily guide worker classification determinations. The 2024 rule provided little clarity for businesses and workers, invited frivolous litigation, and chilled opportunities for independent work. DOL is proposing to readopt the test it originally set forth in the 2021 final rule,[2] which provides the regulated community with a workable analysis that is practical and easy to apply to the modern economy.

IWC supports the Department's proposal and provides the following comments in response to the NPRM.

## II. The Importance of Independent Contractors to the Economy

Independent contractors have played an important role in every sector of the economy for decades. Businesses of all sizes rely on independent contractors to fulfill a wide range of specialized services and essential tasks. Small and mid-size businesses in particular leverage the skills and expertise of independent contractors to remain competitive and responsive to changing market demands.

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[1] 89 FR 1638, "Employee or Independent Contractor Classification Under the Fair Labor Standards Act," January 10, 2024.
[2] 86 FR 1168, "Independent Contractor Status Under the Fair Labor Standards Act," January 7, 2021.

Today, a growing share of Americans choose to work independently and outside of the traditional employment structure. Some choose independent work for the flexibility, while others do so to pursue their own entrepreneurial endeavors. The number of Americans choosing careers as full-time independent contractors has risen from 13.6 million in 2020 to 27.6 million in 2025, and an additional 37.4 million people report working occasionally as independent contractors. While digital connectivity has played a large role in creating pathways for independent work, individual preferences to exercise autonomy and control over their work and personal lives are driving this trend.[3]

## III. Need for Rulemaking

IWC supports a regulatory environment that preserves the rights of parties to enter into legitimate business-to-business relationships and protects workers from bona fide misclassification. As DOL notes in the preamble, economic dependence is the ultimate inquiry when analyzing whether an individual is an employee or independent contractor under the Fair Labor Standards Act (FLSA), and federal appellate courts have generally utilized a multifactor test as the probative lens for evaluating whether a worker is economically dependent on a business for continued work, analyzing the totality of the working relationship.

This framework can inject significant subjectivity into classification determinations, and as a result, courts have struggled to apply a test consistently and predictably. Observing this, Judge Frank Easterbrook wrote in 1987 that the concept of economic reality "encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why? A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision."[4] With this in mind, DOL was right to promulgate the first generally applicable rulemaking on this topic, finalizing that carefully developed standard in 2021. Unfortunately, the Biden administration replaced that regulation with a policy that codified in regulation the very problems the 2021 rule was designed to address.[5]

## IV. Summary of the Proposed Rule

On February 27, 2026, the Department published an NPRM to rescind the current regulatory framework for determining employee or independent contractor status under the FLSA set forth at 29 CFR Part 795, and replace it with a modified version of the analysis previously published as a final rule on January 7, 2021.[6] The proposed rule would also extend that analysis to worker classification determinations under the FMLA and MSPA through conforming amendments to the regulations governing those statutes.

Specifically, the proposal would:

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[3] MBO Partners, "2025 State of Independence," September 9, 2025.
[4] *Secretary of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987) (Easterbrook, F. concurring).
[5] IWC has expressed opposition to the 2024 final rule in correspondence with U.S. Congress and with the U.S. Department of Labor, discussed in greater detail below (*also, see* "IWC and 27 Organizations Urge U.S. DOL to Withdraw Misguided 2024 Final Independent Contractor Rule," and "47 Business Organizations Send Letter in Support of Legislation to Nullify DOL's Independent Contractor Rule").
[6] 91 FR 9932, "Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act," February 27, 2026.

(1) adopt an economic reality test to determine a worker's status as an FLSA employee or independent contractor;
(2) identify and explain that two core factors: 1) the nature and degree of the worker's control over the work and 2) the worker's opportunity for profit or loss are the most probative indicators of economic dependence and therefore typically carry greater weight in the analysis relative to any other factors;
(3) establish that where both core factors point toward the same classification there is a substantial likelihood that classification is accurate, because the remaining factors are less probative and highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors;
(4) identify three other factors that may serve as additional guideposts, including the amount of skill required for the work, the degree of permanence of the working relationship, and whether the work is part of an integrated unit of production;
(5) provide that actual practice is more relevant than what may be contractually or theoretically possible;
(6) include illustrative examples in the regulatory text; and
(7) revise 29 CFR 500.20(h)(4) and 29 CFR 825.102 and 825.105(a) to incorporate the Part 795 framework for MSPA and FMLA classification determinations.

## V. Comments on the Proposed Rule

### a. IWC Supports Rescission of the 2024 Rule

The 2024 rule narrowed opportunities for independent work by codifying in regulation a test where any of six different factors – and an open-ended seventh factor – could be determinative of employee status. The 2024 final rule established a framework in which factors frequently pointed in different directions, leaving businesses with no guidance on how to assess or resolve those conflicts.

Redundant treatment of concepts like managerial skill and business-like initiative across multiple factors added confusion without analytical value. IWC agrees with the amicus curiae brief filed in the Eastern District of Texas that the rule amounted to a regulatory approach that was fundamentally incompatible with fair notice principles. The open-ended standard created an environment ripe for frivolous litigation, ultimately generating a chilling effect on independent work that was particularly harmful for small businesses and for the individuals who choose to run their own businesses or secure supplemental income as independent contractors.[7]

Additionally, the 2024 rule narrowed the scope of independent contractor status beyond what the law requires. Namely: its comparative investment analysis had no basis in Supreme Court precedent and systematically undermined independent contractor findings; the skill and initiative factor imposed an additional business-like initiative requirement unsupported by case law; and

[7] Brief of Amici Curiae American Hotel & Lodging Association; Associated General Contractors of America, Inc.; Small Business & Entrepreneurship Council; Association of Bi-State Motor Carriers, Inc.; American Bakers Association; Independent Electrical Contractors; National Association of Convenience Stores; and National Association of Realtors ® in Support of Plaintiffs' Motion for Summary Judgment, *Coalition for Workforce Innovation, et al v. Julie A. Su, et al.,* Case No. 21-CV-00130-MAC, filed April 26, 2024.

the integrality formulation, which asked whether work was critical, necessary, or central to the potential employer's principal business, provided no meaningful limiting principle.[8]

b. IWC Supports the Two Core Factor Approach

IWC strongly supports the Department's proposal to readopt the regulatory text from the 2021 rule designating 1) the nature and degree of a worker's control over the work and 2) opportunity for profit or loss as the two core economic reality factors that are most probative to whether an employment or independent contractor relationship exists. The NPRM also includes three additional factors: 3) the amount of skill required for the work; 4) the degree of permanence of the working relationship; and 5) whether the work is part of an integrated unit of production as additional factors that are relevant to worker classification determinations.

As the Department documents extensively in the preamble, federal appellate courts' ultimate worker classification determinations have, without known exception, aligned with the direction in which both core factors pointed. Codifying that judicial practice into the regulatory framework does not distort the economic reality test; rather, it clarifies how courts have applied the test over decades – providing the regulated community with a workable and predictable framework for applying a test to their work relationships.

IWC agrees with the Department's response to critics who have characterized this approach as reducing the analysis to a simple two-factor test. The proposed rule requires consideration of all five enumerated factors and any other relevant considerations, keeping with the underlying objective of examining the totality of a working relationship to arrive at the ultimate determination. The three non-core factors remain relevant guideposts, albeit less probative ones. Sharpening the test around the two core factors is not meant to favor one classification outcome over another, but to provide the regulated community with a workable and predictable framework for applying a test that, left unstructured, generates confusion and uncertainty.

c. Nature and Degree of a Worker's Control Over the Work: Actions Taken in Response to Legal and Regulatory Requirements, Health and Safety Standards, Insurance Requirements, and Contractually Agreed-Upon Quality Control Standards

IWC supports the proposed rule's clarification that requiring a worker to comply with legal obligations, health and safety standards, insurance requirements, and contractually agreed-upon quality control standards does not constitute control indicating employee status. This clarification is essential for IWC members across construction, transportation, food service, logistics, and many other industries where compliance requirements apply broadly to all workers regardless of classification.

Many industries in which independent contracting is prevalent are subject to dense and overlapping state and local regulatory frameworks related to licensing, operational standards, consumer protection, and other policy objectives. As written, the proposed rule does not draw any explicit distinction between federal, state, and local legal obligations. IWC recommends that the Department indicate in the preamble that the proposed rule's treatment of actions taken in

[8] Ibid.

response to legal and regulatory compliance extends to actions taken in response to state and local laws, regulations, ordinances, and mandates.

Moreover, IWC agrees with the Department that the 2024 rule's treatment of actions that go beyond compliance created significant ambiguity that negatively affected business practices that benefit workers and the public. Specifically, the 2024 rule stated "Actions taken by the potential employer that go beyond compliance with a specific applicable Federal, State, Tribal, or local law ... may be indicative of control." Federal, state, and local legal and regulatory frameworks, however, are frequently stated in general and/or principle-based or performance-based terms, leaving businesses to exercise judgment about what implementing measures compliance demands in practice. What the 2024 rule fails to reflect is that not all legal or regulatory obligations carry specific compliance pathways or a bright-line test.

The control analysis should not become a vehicle for scrutinizing reasonable business judgments about what legal and regulatory compliance requires. IWC recommends that the Department include additional preamble language acknowledging that legal and regulatory requirements often are structured in a manner that demands businesses to exercise judgment in determining how to implement them, and that such judgment, where exercised in good faith and oriented toward a compliance purpose, should not itself be treated as probative of control. Accordingly, the Department should also strike the word "specific" from the sentence in proposed §795.105(d)(1)(i) that reads "Requiring the individual to comply with specific legal obligations … does not constitute control that makes the individual more or less likely to be an employee under the Act." Removing the word "specific" will better reflect the realities that businesses face when structuring their operations alongside varying legal and regulatory schemes across jurisdictions while bearing in mind broadly accepted responsibilities to advance the health and safety of the public and their customers.

In that vein, IWC also recommends that the Department supplement the updated drug and alcohol testing illustrative example to address a situation where a business implements requirements under a regulatory framework that does not contain a clear, bright-line compliance test. The example should make clear that where a business reasonably and in good faith structures its requirements to achieve compliance with such a standard, its judgment about what the regulation requires does not reflect evidence of employer-like control. The relevant inquiry should focus on whether the requirements are oriented toward achieving a compliance purpose or toward directing the worker's performance for reasons unrelated to any compliance objective or public health or safety standard.

IWC additionally recommends that the Department add an example addressing quality control and performance standards in a service context, such as a retailer or restaurant requiring a delivery or cleaning contractor to meet specific service or presentation standards without dictating the manner or method of performance. This example would help clarify that results-oriented contractual requirements are distinct from operational control over the worker.

d. Nature and Degree of a Worker's Control Over the Work: The Ability to Work for Others

IWC supports the proposed rule's placement of the exclusivity consideration within the control factor. The Department should clarify in the preamble that the relevant inquiry is whether the worker has the right and practical ability to work for others regardless of whether the worker has exercised that right at any particular point in time. A worker who voluntarily chooses, for their own reasons, to concentrate work with a single client does not become that client's employee. The focus should be on whether the potential employer has taken actions that prevented or discouraged the worker from working for others, not on the worker's individual choices in structuring their business.

e. The Worker's Opportunity for Profit or Loss

IWC supports incorporating investment as a component of this factor rather than treating it as a standalone consideration, consistent with the Supreme Court's analysis in *Silk* and the approach of the Second and D.C. Circuits. IWC also supports limiting the investment inquiry to the individual worker's own investments rather than a comparison against the potential employer's overall capital and supports retention of the existing examples involving the app-based home repair contractor and the construction worker paid a fixed hourly rate.

IWC recommends the Department add an example involving a knowledge-economy worker, such as a freelance marketing consultant, financial services professional, or technology specialist who sets their own rates, markets services to multiple clients, selects which engagements to accept, and invests in tools or professional development to expand their capabilities. Such an example would illustrate that the factor encompasses a broad range of entrepreneurial activity and is not limited to workers who make large physical or capital investments.

f. The Amount of Skill Required for the Work

IWC supports the proposed rule's return to a skill factor focused solely on whether the work requires specialized training or skill that the potential employer does not provide, without the business-like initiative overlay from the 2024 rule. Initiative is more probative of economic independence than skill level; as such, it is appropriately analyzed under the opportunity for profit or loss factor. IWC supports the two new examples involving roofing workers with and without employer-provided training.

IWC recommends the Department add a third example from a non-trades context, such as a software developer, graphic designer, or other knowledge-economy worker who brings specialized technical skills to an engagement without receiving training from the engaging business, to signal that the factor applies with equal force outside the construction industry. IWC also recommends the Department clarify in the preamble that the absence of formally credentialed or licensed skill is not dispositive under this factor, and that skill developed over time through a worker's own independent experience across an engagement or engagements is consistent with independent contractor status and does not indicate the kind of employer-provided training that weighs toward employee status.

g. The Degree of Permanence of the Working Relationship

IWC supports the proposed rule's treatment of permanence, including the clarification that the relevant inquiry is whether the relationship is by design definite or sporadic in duration, not simply whether it has been long-lasting. Parties' voluntary decision to enter a commercial

relationship and renew that arrangement based on mutual satisfaction is not evidence of economic dependence.

IWC recommends the Department add an example illustrating an independent contractor who has worked with the same business on multiple successive projects of defined duration, with no expectation of continued engagement beyond each project. Such an example would address a recurring source of confusion in industries such as construction, information technology, and professional services, where ongoing project-based relationships are frequently mischaracterized as indefinite simply because they have proven mutually beneficial over time.

h. Whether the Work Is Part of an Integrated Unit of Production

IWC strongly supports the proposed rule's return to the integrated unit of production standard from *Rutherford Food* and away from the 2024 rule's "integral part" approach, which analyzed whether the work is "critical, necessary, or central to the potential employer's principal business." The integrated unit concept asks whether the worker is embedded in the potential employer's production process alongside admitted employees, a question with meaningful content that reflects actual economic integration. IWC agrees with the Department that the integral part inquiry, on the other hand, devolves into an assessment of importance that provides little precision for analyzing work arrangements in the modern economy.

IWC supports retention of the existing examples comparing a part-time newspaper editor embedded in the full production process with a freelance journalist whose work is limited to discrete article submissions. IWC recommends the Department add an example from a platform or technology context clarifying that a worker who provides services to end-market consumers through a digital platform is not part of an integrated unit of production of the platform itself. This example would be consistent with the Department's 2019 Opinion Letter on virtual marketplace companies.[9] That guidance was issued in 2019 prior to issuance of the 2021 final rule, and the regulated community would benefit from the Department contextualizing this example under the revised "integrated unit of production" factor.

i. Primacy of Actual Practice

IWC strongly supports reinstatement of the 2021 rule's provision establishing that actual practice is more relevant than what may be contractually or theoretically possible. Reserved contractual rights that are never exercised tell us little about the economic reality of the working relationship. This provision does not create a one-way ratchet against businesses; actual practice cuts in both directions depending on the facts. Reinstating it ensures that the classification analysis is grounded in the real economic relationship between the parties rather than in contractual formalities that may not reflect how the relationship actually functions.

## VI. Conclusion

The IWC urges the Department to promptly issue a final rule based on this NPRM. Doing so will restore a workable approach to worker classification that provides businesses and workers with predictability while providing sufficient protection against bona fide misclassification.

[9] WHD's 2019 opinion letter says "The service providers are not an integral part of [VMC's] referral service; they are consumers of that service from [the VMC]."

Independent Work Coalition

Respectfully submitted,

The Independent Work Coalition
Alliance For Chemical Distribution
American Association of Advertising Agencies (4As)
American Bakers Association
American Hotel & Lodging Association
American Pipeline Contractors Association
American Trucking Associations
Associated Builders and Contractors
Associated General Contractors of America
Association of Bi-State Motor Carriers
CHRO Association (formerly HR Policy Association)
College and University Professional Association for Human Resources
Heating, Air-conditioning, & Refrigeration Distributors International
Independent Bakers Association
Independent Electrical Contractors
International Warehouse Logistics Association (IWLA)
National Association of Convenience Stores
National Association of Home Builders
National Association of Wholesaler-Distributors
National Automobile Dealers Association
National Council of Chain Restaurants
National Federation of Independent Business
National Lumber & Building Material Dealers Association
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
NATSO, Representing America's Travel Centers and Truck Stops
New York New Jersey Foreign Freight Forwarders and Brokers Association
Petroleum Equipment Institute (PEI)
Power and Communication Contractors Association
PRINTING United Alliance
SIGMA: America's Leading Fuel Marketers
Small Business & Entrepreneurship Council
Tile Roofing Industry Alliance
Tree Care Industry Association
United States Hispanic Business Council