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Amy DeBisschop  
Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

**Re: Proposed Rule Regarding Independent Contractor Status Under the Fair Labor Standards Act, 84 Fed. Reg. 60,600 (September 25, 2020), RIN 1235-AA34**

Dear Director DeBisschop:

On behalf of the Restaurant Law Center (the “Law Center”) and the National Restaurant Association (the “Association”), we appreciate the opportunity to submit our comments on the Notice of Proposed Rulemaking (the “Proposed Rule”) issued by the Wage and Hour Division (“WHD”) and published in the Federal Register on September 25, 2020, to revise its interpretation of independent contractor status under the Fair Labor Standards Act (the “FLSA”).

We generally support the approach taken in the Proposed Rule. However, we have some suggestions that we believe would provide additional clarity to enable businesses, employees, and individual entrepreneurs to more easily determine whether an individual is properly classified as an independent contractor, in particular the individuals who provide services to support the restaurant industry.

The Law Center is a 501(c)(6) legal entity launched in 2015 with the expressed purpose of promoting laws and regulations that allow restaurants to continue growing, creating jobs and

contributing to a robust American economy. The Law Center’s goal is to protect and advance the restaurant industry and to ensure that the views of America’s restaurants are taken in consideration by giving them a stronger voice in the regulatory process and in the courtroom.

The Law Center regularly pursues cases and submits regulatory comments on issues of importance to the restaurant industry, such as the Proposed Rule. For example, to prevent future unnecessary and costly litigation, the Law Center finds that it is especially important that WHD’s Final Rule governing individuals’ classification as employees or independent contractors under the FLSA provide clear guidance that informs business owners, as well as individuals that support these businesses, what the law allows and requires.

Founded in 1919, the Association is the largest trade association representing the restaurant and foodservice industry (the “Industry”) in the world. The Industry is comprised of over one million restaurants and other foodservice outlets employing approximately 10 percent of the U.S. workforce. Restaurants are job creators and the nation’s second-largest private sector employer. Despite the size of the Industry, small businesses dominate the sector, and even larger chains are often collections of smaller franchised businesses. Thus, the Association would like WHD’s Final Rule to be clear for businesses of all sizes.

WHD’s proposed amendment of 29 C.F.R. to add §795.100 through §795.115 is a significant step in the right direction, insofar as it defines the “core” factors that should be used in determining independent contractor status, thereby reducing uncertainty for the regulated community amid a seemingly haphazard patchwork of court rulings on the matter. Moreover, its clarification of the “integrated” factor of the economic reality test is significant, in that its renewed focus on an “integrated unit of production” inquiry better reflects the nature of work in our

contemporary economy and is more consistent with Supreme Court precedent. Additionally, WHD's express statement, set forth in proposed 29 C.F.R. §795.110, that it is "the actual practice of the parties involved" that matters rather than a theoretical ability to exert control, further underscores that the analysis is to be grounded in economic reality rather than a formalistic examination of theoretical possibilities.

The Proposed Rule, however, would benefit from a more precise articulation of the "Other factors" to be considered alongside the stated core factors. We suggest additional language in the Final Rule that would better effectuate the Department's stated purpose of "encourag[ing] innovation and flexibility in the economy." Our comments focus on three main provisions of the Proposed Rule that we believe, in final form, can best enable the Industry to fulfill a crucial role in creating economic opportunity for non-employee entrepreneurs.

### **Amount of Skill Required**

The restaurant industry, including small, non-franchise restaurants, benefit from utilizing the services of independent contractors for such functions as delivering food, repairing equipment, cleaning the facility or equipment, marketing and social media support, and other auxiliary roles for which dedicated staff (*i.e.*, employees) are either unfeasible or are not routinely required. Many of these services, however, are performed by individuals who do not possess what is traditionally considered to be "specialized training or skill." As the Background to the Proposed Rule notes, courts have tended to interpret this factor of the economic reality test to favor classifying such

individuals as “employees,” leaving them unable to benefit from the opportunities afforded by the growing entrepreneurial economy.<sup>1</sup>

There is little reason, however, to prevent individuals who wish to use their general skills (even if those skills are not specialized) from owning and operating their own businesses and benefiting from the fruits of their efforts. In placing greater significance on initiative and business judgment (which is, of course, a “skill”) and analyzing initiative as part of the core factors of the economic reality test, the Proposed Rule takes an important step toward addressing this concern.

If the skill factor is to remain as a separate factor, however, instead of focusing on whether the skill required is “specialized,” more relevant is whether the proposed employer has made a significant investment in equipping an individual with the necessary training to acquire the skill necessary for the work.<sup>2</sup> The extent to which an individual relies on the proposed employer for *training* needed to perform the work is more relevant to “the amount of skill required for the work.”

Indeed, the Proposed Rule recognizes the significance of training. Its proposed text at 29 C.F.R. §795.105(d)(2)(i), for example, describing “the “amount of skill required for the work” factor, states: “This factor weighs in favor of the individual being an independent contractor to the extent the work at issue requires specialized training or skill that the potential employer does not

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<sup>1</sup> See *Robles v. RFJD Holding Co., Inc., dba Emaculate Reflections*, 2013 U.S. Dist. LEXIS 77524 (S.D. Fla. June 3, 2013) (“As other courts have found, cleaning services such as those provided by Plaintiffs require no special skills.” Rejecting the Defendants’ contention that restaurant cleaning in particular requires specialized skills, the court held “this factor weighs in favor of finding employee status.”); *Flores v. Velocity Express, LLC*, 250 F.Supp.3d 468, 490; 2017 U.S. Dist. LEXIS 62124 (N.D. Cal. April 24, 2017) (“An individual does not need to have any particular level of education, specialized training, or special license to be a driver for Velocity... Because Plaintiffs’ services do not require a special skill, this factor [ ] weighs in favor of employee status.”)

<sup>2</sup> See *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 809 (6th Cir. 2015) (“If ... the company provides all workers with the skills necessary to perform the job, then that weighs in favor of finding that the worker is indistinguishable from an employee.”); *Hughes v. Family Life Care Inc.*, 117 F. Supp. 3d 1365, 1372 (N.D. Fla. 2015) (“The relevant inquiry [for the skill factor] is whether [the worker] is dependent upon [the company] to equip her with the skills necessary to perform her job.”).

provide. This factor weighs in favor of the individual being an employee to the extent the work at issue requires no specialized training or skill and/or the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job.” But given that courts have equated “specialized” to mean a skilled trade or profession, rather than customized to a task for which an employer has trained an individual, we submit that a more forceful pronouncement is required in the language of the Final Rule.

We respectfully suggest that WHD revise the provision (striking the text noted below **in red** accordingly) to read: “This factor weighs in favor of the individual being an independent contractor to the extent the work at issue requires **specialized** training or skill that the potential employer does not provide. This factor weighs in favor of the individual being an employee to the extent **the work at issue requires no specialized training or skill and/or** the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job.”

Alternatively, we suggest removing proposed section 795.105(d)(2)(i) from the Final Rule. As Section 795.105(c) notes, where the two core factors “both point towards the same classification . . . there is substantial likelihood that that is the individual’s accurate classification.”

Adding a separate “skills” factor does not add much clarity to the analysis and it unnecessarily discriminates against individuals who operate businesses that do not require advanced degrees. In *United States v. Silk*, 331 U.S. 704 (1947), for example, the U.S. Supreme Court held that one group of truck drivers who were responsible for making retail deliveries of coal, and a separate group of truck drivers who were primarily transporting household furniture, were both properly classified as independent contractors.

These are arguably job that are less “skilled” and elevating this factor as a separate factor identified in the regulations (as opposed to simply including it in the additional unidentified factors) may deny workers who operate businesses performing lower-skilled work the benefits of entrepreneurship, permitting such benefits only to those performing allegedly highly specialized skills with academic degrees. Doing so ignores the “economic reality” of the relationship and focuses, instead, on a factor that has very little, if any, relevance to whether an individual is operating as an independent contractor.

An individual who purchases a distribution route with the right to sell products from a supplier to a set of customers, for example, and who can grow the route and then resell it for a profit, is an independent contractor even though that individual spends his or her day driving a truck, selling product, and loading and unloading product.<sup>3</sup> Yet an individual with an advanced degree is just as likely to be an employee rather than an independent contractor.

There is no empirical analysis cited in the NPRM that supports the proposition that businesses providing services requiring lower-skilled work are any less entrepreneurial than those providing services requiring advanced degrees. We agree with the NPRM that “[e]mployers can ‘suffer and permit’ both skilled and non-skilled work as employees, 29 U.S.C. 203(g), and federal courts of appeals have routinely held that the presence of specialized skills does not mean a worker is an independent contractor if the worker lacks control over the work, an opportunity for profit or loss, or both.” FR 606021.

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<sup>3</sup> See *Franze v. Bimbo Bakeries USA, Inc.*, 2020 U.S. App. LEXIS 29401 (2d Cir Sep. 15, 2020).

## **Integrated Unit of Production**

The Law Center and the Association agree that the language at 29 C.F.R. § 795.105(d)(2)(iii) of the Proposed Rule analyzing “integration” by examining whether the individual is part of the proposed employer’s “integrated production process” instead of whether an individual’s role is “central to the proposed employer’s business” is preferable because this construction is more consistent with the Supreme Court’s analysis in *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). But because even this purported clarification still contains language that will continue to cause confusion, we suggest that the “integration factor” should no longer be used as a factor in assessing independent contractor status. It provides little help in identifying whether an individual is properly classified as an independent contractor, and simply muddies the water.

As the WHD explains in the Background to the Proposed Rule, this factor is “now typically articulated by many courts of appeal as whether the service rendered is “integral,” which courts in recent decades have mistakenly applied as meaning “important” or “central to the potential employer’s business.”<sup>4</sup> But simply because an individual provides a service or produces a product that is “important” or “central” to the business, does not mean that the individual who provides such a service or product is an employee. Businesses rely on many independent businesses that provide services that are “central” or “important” to the business.

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<sup>4</sup> See *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 815 (6th Cir. 2015) (“The more integral the worker’s services are to the business, then the more likely it is that the parties have an employer-employee relationship”); See, for example, *Hall v. DIRECTV, LLC*, 846 F.3d 757, 775 (4<sup>th</sup> Cir., January 25, 2017) (Satellite installation technicians performed work that was an integral part of the potential satellite television company’s business; “absent Plaintiffs’ work installing and repairing DIRECTV satellite systems, DIRECTV would be unable to convey its product to consumers.”)

Restaurants, for example, require regular maintenance of dishwashers, stoves, and other kitchen equipment to operate, as well as a clean interior and exterior environment, such as windows, not to mention third-party suppliers of particular types of food or specialty items (*e.g.*, desserts or bread may be provided off-premises by third-party vendors). Third-party companies that regularly service kitchen equipment, clean the interior and exterior of the restaurant, and provide food items are important to the operation of the restaurant, but individuals and companies who provide such services are nearly all independent businesses.

Further, while delivery work and overnight custodial services would be clearly “segregable” under this provision as currently proposed, this factor should be flexible enough to accommodate catering staff, pastry chefs, individuals who provide marketing and social media services or other individuals who may not be spatially or occupationally segregable, but for whom it would not make sense for small restaurants to retain on staff but whose services they might utilize on an independent contractor basis.<sup>5</sup> The Final Rule should provide examples to clarify “segregable from the production process.”

Additionally, the NPRM explains that this factor is directed at individuals who work on a “production line.” *See* FR 606618 (“Proposed 795.105(d)(2)(iii) thus focuses the ‘integrated unit’ factor on whether the individual works in circumstances analogous to a production line.”) Accordingly, to the extent DOL retains this factor, the proposed regulation should be modified to

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<sup>5</sup> The ability to contract for the services of these entrepreneurs is of particular benefit to the significant number of small businesses that comprise the Industry. Citing the benefits of independent contracting in their in-depth policy analysis, Steven Cohen and William B. Eimicke, Professors of Professional Practice in International and Public Affairs, Columbia University School of International Affairs (SIPA) note: “Operating a successful business no longer requires companies to employ every type of worker necessary to deliver their good or service to end users.” (Independent Contracting Policy and Management Analysis. New York: August 2013, at 83.) Available at [http://www.columbia.edu/~sc32/documents/IC\\_Study\\_Published.pdf](http://www.columbia.edu/~sc32/documents/IC_Study_Published.pdf) (visited October 23, 2020).

add a sentence explaining that this factor is relevant only in cases involving individuals who perform work at the purported employer's location, and in a way that is analogous to a production line worker.

### **Other Relevant Factors**

WHD's effort to streamline the legal test by highlighting two primary factors informing the economic reality analysis and three non-core factors is commendable, particularly as the test has become unwieldy in the hands of courts. Correctly, the Proposed Rule acknowledges that these five factors are "not exhaustive and no single factor is dispositive." We expect that in light of the Proposed Rule identifying two core factors and three non-core factors, this statement, however, will be largely ignored by courts, and the analysis will inevitably always focus only on the five factors identified. Indeed, in some factual circumstances, other factors may prove to be *more* relevant than the WHD's stated non-core factors. For example:

- a. Whether the individual files tax returns and deducts business expenses, taking advantage of the tax code.<sup>6</sup>
- b. Whether the individual operates his or her business through a corporate entity.<sup>7</sup>

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<sup>6</sup> *Deboissiere v. Am. Modification Agency*, 2010 U.S. Dist. LEXIS 113776, at \*3 (E.D.N.Y. Oct. 22, 2010) (citing *Gagen v. Kipany Productions, Ltd.*, 27 A.D.3d 1042, 812 N.Y.S.2d 689 (3d Dept. 2006)); *Browning v. CEVA Freight, LLC*, 885 F. Supp. 2d 590 (E.D.N.Y. 2012) ("the Plaintiffs all sought significant tax benefits associated with their independent contractor status in connection with CEVA" which "further weighs heavily in favor of independent contractor status"); *Landaeta v. N.Y. & Presbyterian Hosp., Inc.*, No. 12 CIV. 4462 JMF, 2014 U.S. Dist. LEXIS 27677, at \*5 (S.D.N.Y. Mar. 4, 2014) ("Plaintiffs' tax filings are plainly relevant to the independent contractor versus employee inquiries").

<sup>7</sup> Some courts reject the notion that operating through a corporate entity is indicative of independent contractor status when the proposed employer requires the individual to operate as a corporate entity as a condition of the contractual relationship. *See, e.g., Cummings v. Energy Int'l Servs., LC*, 271 F. Supp. 3d 1182 (E.D. Cal., September 20, 2017). However, "[i]t is simply good business practice for a company to require their independent contractors to be incorporated entities or LLCs to ensure that these contractors are legitimate small businesses that will pay taxes and report appropriate income." (Cohen and Eimicke, at 67.)

c. Whether the individual understood and signed an Independent Contractor Agreement.<sup>8</sup>

d. Whether the services provided by the individual must be self-performed, or if the individual hires his or her own employees to assist in the work.<sup>9</sup>

e. Whether the individual holds himself or herself out to the public as an independent contractor.<sup>10</sup>

In order to provide the employer community and the courts with greater certainty as to the meaning of the Rule’s caveat that its five enumerated factors are not exhaustive, it would be helpful to specify in the Final Rule the additional factors that courts have found relevant to the inquiry.

## **Conclusion**

The FLSA was passed in 1938. The nation’s economy, however, has changed significantly since then. But the law has simply not kept up. Technology has fueled much of the change, and further advancements in technology will continue to change the nature of the services provided by

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<sup>8</sup> The Proposed Rule rightly clarifies that the “Primacy of actual practice” controls over “what may be contractually... possible.” (29 C.F.R. § 795.110 cite) However, the act of willfully executing an Independent Contractor Agreement, particularly one reached through arm’s length bargaining, remains a useful indicator of an individual’s sense of his own entrepreneurialism and the parties’ understanding of their business relationship — regardless of the specific contractual terms reached. *See Imars v. Contractors Mfg. Servs., Inc.* 165 F.3d 27, 1998 U.S. App. LEXIS 21073, at \*6 (6th Cir. August 24, 1998) (“Although the existence of an explicit contractual arrangement is not dispositive, such a contract may be probative of the nature of the economic relationship between the parties.”)

<sup>9</sup> *Bennett v. Unitek Global Servs., LLC*, 2013 U.S. Dist. LEXIS 128350, at \*18-19 (N.D. Ill. September 9, 2013) (The parties’ agreement entitled installation technician contractors to hire their own technicians and the Plaintiffs had retained five employees and were continuing to accept applications. That the Defendant required the Plaintiffs’ employees to follow its procedures did not suggest economic dependence and was “entirely consistent” with a contractor relationship); *Gate Guard Services LP v. Solis* (S.D. Tex. February 13, 2013) (Oilfield gate attendants were entitled to hire relief workers to cover their gate assignments; the right of control factor therefore weighed in favor of independent contractor status).

<sup>10</sup> *Wangen v. City of Fountain*, 255 N.W.2d 813, at \*816 (Minn. S. Ct., June 10, 1977); (“[A] skilled artisan holds himself out to the public as an independent businessman willing to work for anyone and performs a job within the scope of his expertise, independent of any detailed supervision, only in extraordinary circumstances can he be considered an employee”); *Max Trucking, LLC v. Liberty Mut. Ins. Corp.*, 2014 U.S. Dist. LEXIS 104509 (W.D. Mich., July 31, 2014) (finding that drivers were employees for workers compensation purposes because none of the drivers “holds himself out to the public as a trucking business”).

individuals and the relationship between individuals who provide such services and those businesses who need these services, creating jobs, entrepreneurial opportunity and economic freedom. The law must be written to permit the economy to grow and to permit working people to thrive, whether in a traditional employee-employer setting, or as independent contractors who are responsible for using their own initiative and desire to chart their own path to the American Dream.

“The economic benefits of independent contracting ... are substantial,” Jeffrey A. Eisenach, Managing Director and Principal, Navigant Economics LLC and Adjunct Professor, Antonin Scalia Law School at George Mason University, found in his 2010 study, *The Role of Independent Contractors in the U.S. Economy*.<sup>11</sup> “Policies that make it more difficult for workers and firms to enter into such arrangements would thus result in slower economic growth, lower levels of employment and job creation, and lower consumer welfare overall.”

Eisenach found that independent contracting benefits the entrepreneur and the business community alike. “It provides a means for firms to acquire labor in cases where the fixed costs of an employment relationship would be prohibitive; it serves as a means for workers to move into and out of the workforce, and as a transitional mechanism for laid-off workers to find new jobs; and, it provides a first-step on the ladder to starting a small business, and creating jobs for others.” The restaurant industry is proud to play a similar role in creating economic opportunity.

By promulgating a formal rule defining “independent contractors” for the first time since enactment of the FLSA (save for workers in the agriculture and forestry industries), the Department of Labor finally is addressing a growing segment of the American workforce that increasingly fuels

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<sup>11</sup> Available at <https://www.aei.org/articles/the-role-of-independent-contractors-in-the-us-economy/> (visited October 23, 2020).

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the nation's economy and will do long into the future. Entrepreneurship is an American virtue and our laws should be written and interpreted to fully unleash its potential. We commend the Department of Labor for doing so.

On behalf of the Restaurant Law Center and the National Restaurant Association, we thank you for this opportunity to submit our comments.

Respectfully,



Angelo Amador, Esq.  
Executive Director – Restaurant Law Center  
Senior Vice President & Regulatory Counsel  
National Restaurant Association  
M: (202) 492-5037  
E-mail: [aamador@restaurant.org](mailto:aamador@restaurant.org)



Shannon L. Meade, Esq.  
Deputy Director – Restaurant Law Center  
Vice President, Public Policy  
National Restaurant Association  
T: (202) 331-5994  
E-mail: [smead@restaurant.org](mailto:smead@restaurant.org)



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