



December 13, 2022

Ms. Amy DeBisschop  
Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor, Room S-3502  
200 Constitution Avenue NW  
Washington, DC 20210

By electronic submission: <http://www.regulations.gov>

**RE: RIN 1235-AA34--Employee or Independent Contractor Classification under the Fair Labor Standards Act; Notice of Proposed Rulemaking, 87 Fed. Reg. 62218 (Oct. 13, 2022)**

Dear Ms. DeBisschop:

The News/Media Alliance (“N/MA” or the “Alliance”) submits these comments to the Department of Labor (“the Department” or “DOL”) in response to its Notice of Proposed Rulemaking and Request for Comments regarding *Employee or Independent Contractor Classification under the Fair Labor Standards Act*, 87 Fed. Reg. 62218 (Oct. 13, 2022) (the “Proposed Rule”).

N/MA is a nonprofit organization headquartered in Washington, D.C., representing the news and magazine media industries, and empowering members to succeed in today’s fast-moving media environment. N/MA advocates for news organizations and magazine publishers on a broad range of current issues affecting them and their readers.

N/MA’s members represent nearly 2,000 diverse news and magazine publishers in the United States and internationally, ranging from the largest news and magazine publishers to small, hyperlocal newspapers, and from digital-only and digital-first outlets to print newspapers and magazines. In total, N/MA’s membership accounts for nearly 90 percent of the daily newspaper circulation in the United States and includes nearly 100 magazine media companies with more than 500 individual magazine brands on topics including news, culture, sports, lifestyle, and virtually any other interest. Its members’ workforces include employees in virtually all areas of its business from administrative to editorial staff, employee supervisors and managers, and other specific department specialties. In addition, historically and today, N/MA



members have also contracted with freelancers, distributors,<sup>1</sup> and other independent workers to provide various services to its readers.

N/MA submits these Comments to provide the DOL with specific data and analyses that support a change of position by the DOL as to its proposed rescission of the Department's 2021 independent contractor rule (the "2021 IC Rule"). N/MA also submits these Comments to set forth errors in the DOL's interpretation of relevant factors and its formulation of the analysis to be used in assessing these factors under the economic realities test in the Proposed Rule. The Proposed Rule does not provide more clarity or understanding to workers and businesses as to whether workers are properly classified as independent workers or employees under the FLSA.

N/MA urges the DOL not to rescind the 2021 IC Rule, and separately, not to replace the 2021 IC Rule with the analyses contained in the Proposed Rule. The Proposed Rule violates the APA because it is not based on a reasonable interpretation of the FLSA and was promulgated in an arbitrary and capricious manner as described below. The 2021 IC Rule was grounded in applicable law, provides a balanced clarity and certainty to the economic realities factors under the FLSA, and should remain in effect.

## COMMENTS

### **1. Independent Workers Are Critical Components of the National Workforce and of N/MA Members' Workforces**

Independent contracting is advantageous to workers, businesses, consumers, and the United States economy.<sup>2</sup> Independent contracting has been an integral part of the national economy and workforce since the nation's founding in 1776. Today's IRS Form 1099 which N/MA members and other businesses provide to independent workers who earn in excess of \$600 per calendar year dates back to 1918, following the passage of the War Revenue Act of 1917. Indeed, in the news and magazine media industry, independent contractor freelance writers and photographers have always been accorded certain special protections. During the second session of the first U.S. Congress, the Copyright Act of 1790 was passed which created a set of rights exclusive to authors who copied, printed and sold their works to others.

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<sup>1</sup> The FLSA specifically excludes employees engaged in the delivery of newspapers from the coverage of Sections 206, 207, and 212 of the Act. 29 U.S.C. Section 213(d). As a result, N/MA has not addressed, in detail, the application of the Proposed Rule to newspaper delivery contractors.

<sup>2</sup> Cohen, Steven and Eimicke, William, *Independent Contracting Policy and Management Analysis* available at [www.columbia.edu/~sc32/documents/IC\\_Study\\_Published.pdf](http://www.columbia.edu/~sc32/documents/IC_Study_Published.pdf) at 83 - 83 (last visited Dec. 2, 2022) (hereinafter "ICPMA").



Nationally, as of 2020, over 59 million workers have chosen to provide services in the American workforce as independent contractors.<sup>3</sup> Earlier this year, Secretary of Labor Marty Walsh observed in remarks during the U.S. Conference of Mayors: “In addition to retirements, we are also seeing more people go into business for themselves. In 2021, the number of self-employed workers grew by over 7 percent.”<sup>4</sup> Similarly, LendingTree reported earlier this year that individuals filing paperwork to start a new business in the United States increased 25 percent between 2019 and 2020.<sup>5</sup> Independent workers create their individual businesses in hundreds of distinct, varied professions, including, but not limited to: accounting, acting, auditing, bartending, bookkeeping, coaching, comedy, computer programming and analysis, copy editing, court reporting, distribution, event planning, golf, graphic artistry, legal services, general journalism, information technology, marketing, language translation, singing, teaching, trucking, photography, music, proofreading, securities dealing, stenography, transcription, and many more.

Independent work is here to stay. Today’s modern economy and work relationships have been forever changed by worker preferences for flexibility, autonomy, and freedom as well as technological advancements that lower barriers to entry in the creation of small businesses to replace or supplement traditional employee jobs. Those technological advancements include the Internet, multi-sided platforms, and handheld mobile devices, to name a few. These changes have further cemented and expanded the desirability and opportunity for independent work throughout the national economy, and N/MA members’ businesses.

Traditional employee-employer arrangements continue to be less favored by workers and businesses as they do not provide some elements of the work relationship desired by both contracting parties.<sup>6</sup> For example, there is no mechanism in an employee-employer relationship for a worker to leverage the use of capital goods that may serve dual personal and business purposes for the worker (allowing the worker to both capitalize and leverage his own investment, as well as obtain tax preferences relating to the investment’s purchase).

Freelance work presents many other advantages to independent workers. Freelancers pick and choose their work opportunities, including how and when to perform them, and are “their

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<sup>3</sup> *Upwork Study Finds 59 Million Americans Freelancing Amid Turbulent Labor Market*, UPWORK, available at <https://www.upwork.com/press/releases/upwork-study-finds-59-million-americans-freelancing-amid-turbulent-labor-market> (last visited Nov. 23, 2022). The Upwork study was conducted by an independent research firm, Edelman Data & Intelligence, based on an online survey of 6,000 U.S. working adults over the age of 18 between August 27, 2021, and September 29, 2021. The full study is available at <https://www.upwork.com/research/freelance-forward-2021> (hereinafter “Freelance Forward”).

<sup>4</sup> U.S. Department of Labor, *Remarks of Labor Secretary Martin J. Walsh to U.S. Conference of Mayors* (January 21, 2022) <https://www.dol.gov/newsroom/speech/20220121> (last visited Dec. 5, 2022).

<sup>5</sup> Delfino, Devon et. al., *Metros Where Entrepreneurship Boomed Amid The Coronavirus Crisis* <https://www.lendingtree.com/business/small/entrepreneurship-boom-study/> (January 3, 2022) (last visited Dec. 5, 2022).

<sup>6</sup> *Id.*



own boss” with a greater degree of flexibility and control over their work, business structure, volume of work and compensation. Overall, these advantages favor independent work.

Independent contracting can provide the freelancer a competitive edge in pricing for a variety of reasons. Freelancers often work without incurring certain costs, without restraint by a company’s current employee wage structures, and allowing the worker to obtain upfront their full fees or compensation with immediate use of those funds (without the deduction of expense and taxes).

It is likely, as DOL intends and has pre-ordained in its proposed analysis, that the Proposed Rule will result in companies hiring more employees in place of contracting with independent workers. These new employees will more likely than not lose the benefits of independent work described above, with their new employee status likely carrying the restraints of non competes and other limitations.

Independent contractors working throughout the United States and the world often provide N/MA members with trusted, credible, relevant, diverse, and specialized services and content for the benefit of consumers of the news and magazines published by its members. Limitations on N/MA’s members’ use of such content by narrowing independent contractor opportunities will necessarily damage independent workers’ livelihoods and the products and services provided by N/MA’s members to consumers.

The Proposed Rule should be rescinded. It ignores industry customs and standards in both the newspaper and magazine media industries as well as in other industries that have a longstanding substantial practice of utilizing independent contractors. Here, specifically, the Proposed Rule ignores the aforementioned longstanding practice of a substantial segment of the publishing industry to use freelancers to provide various types of editorial content. In so doing, the Proposed Rule ignores the benefits of independent contractor status, inappropriately placing DOL’s thumb on the scale of employee status for any workers who provide important content and services to companies and who in turn enjoy beneficial long term relationships with them.<sup>7</sup>

## **2. N/MA Urges the DOL Not To Rescind the Existing Independent Contractor Rule**

On January 5, 2021, the Department enacted the 2021 IC Rule. The 2021 IC Rule was promulgated following consideration of 1,825 comments submitted by interested individuals and stakeholders. It considered relevant facts, legal authority, and applicable policy considerations,

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<sup>7</sup> For example, the Proposed Rule tags long term or consistent business relationships as inconsistent with independent contractor status, as well as relationships in which a worker provides an important skill or product to a company. Neither of these constructions of relevant economic realities factors is appropriately construed in the Proposed Rule, and would negatively impact existing productive and desirable independent worker relationships.



including an assessment of allegedly contrary facts. It is the Department's first-ever rule on independent contractor status.

The 2021 IC Rule reaffirms and operationalizes the economic realities set forth in decades-old Supreme Court precedent, including the degree of control over the manner and means by which the work is performed, the opportunities for profit or loss, the investment in facilities, the permanence of the relationship, the skill required in the operation, and whether the work performed was part of an integrated unit of production. *United States v. Silk*, 331 U.S. 704 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947).

The 2021 IC Rule reviewed and harmonized hundreds of DOL opinion letters and court decisions in a balanced manner by articulating five overlapping factors, including two core factors. The first core factor is the worker's control over the manner and means by which the work is performed. The 2021 IC Rule provided specific examples of a worker's control, including setting one's own schedule, selecting one's own projects, and having the ability to work for other entities. 86 Fed. Reg. at 1246 - 47. The 2021 IC Rule also stated that facts such as requiring compliance with laws and regulations, safety standards, contractual deadlines, and quality control standards do not make an individual more or less likely to be an employee. *Id.* at 1247.

The second core factor is the worker's opportunity for profit or loss based on initiative or investment. This core factor appropriately acknowledges that investment reflects economic dependence insofar as it sheds light on a worker's opportunities to generate a profit or risk a loss. *Id.* at 1247. Importantly, the factor also recognizes that today's economy includes many contractors, such as freelancers who are performing knowledge-based services that may require little investment in materials or equipment, yet still offer opportunities for profit and loss through the worker's exercise of business initiative (including through managerial skill, business acumen, and professional judgment). *Id.* at 1188 - 89.

Under the 2021 IC Rule, when the two core factors tilt toward the same worker classification, that is likely the correct classification for the worker. *Id.* at 1246. If, however, the two factors tilt in opposite directions, three other identified secondary factors are to be evaluated, 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 union of production. *Id.* at 1247. The 2021 IC Rule further ensured that the above factors did not overlap and thus eliminated confusion in how to address the overlap in factual considerations that had developed in the case law.<sup>8</sup> *Id.* at 1174 - 75.

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<sup>8</sup> Overlap among the multiple factors undermines the structural benefits of a multi-factor test, creating confusion about how to evaluate a set of facts without affording outsized weight to those facts merely because they tangentially touch each other.



The 2021 IC Rule is a balanced approach to interpretation of the FLSA’s economic realities test for determining employee or independent contractor status. It provides much needed guidance in assessing modern-day worker relationships -- and, ultimately, to focus on inquiries relevant to the issue of economic dependence -- in a dynamic economy defined by continual innovation.

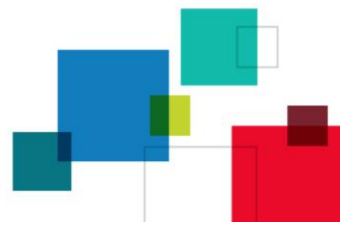
Yet now, only a few months after a Texas district court rejected the Department’s early 2021 attempts to withdraw and rescind the 2021 IC Rule, reinstating the 2021 IC Rule, the Department attempts to again eliminate the 2021 IC Rule, asserting that it erred in elevating control and the opportunity for profit or loss above the other factors, without legal support. 87 Fed. Reg. at 62228. The Department is wrong. Courts have determined that as a general rule, certain factors should be afforded greater weight in determining whether an individual is an employer (including the first case cited in footnote 10, below, where the Secretary of Labor is a party).<sup>9</sup>

N/MA further disagrees with the Department’s characterizations of whether aspects of the 2021 IC Rule’s individual factors are contrary to law (as discussed subsequently). The 2021 IC Rule places the focus of each of the economic realities factors precisely where it should be: on economic dependence. And, if as the Department contends, any part of the analysis of a factor that is contained in the 2021 IC Rule is inaccurately or incompletely stated, the appropriate course of action under the Administrative Procedures Act would be to appropriately modify those limited portions of the 2021 IC Rule, as opposed to rescinding and rewriting the Rule completely. Rescinding the clear guidance that the 2021 IC Rule imparts will inject confusion and uncertainty into the multi-factor test, particularly when -- as here -- the alternative proposed by the Department is no guidance as to how the economic realities factors should be balanced.<sup>10</sup>

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<sup>9</sup> See, e.g., *Walsh v. Med. Staffing of Am., LLC*, 580 F. Supp. 3d 216, 229 (E.D. Va. 2022) (“The degree of control a putative employer has over the way an alleged employee’s work is performed is the ‘most important factor’ in making this determination.” (quoting *Smith v. CSRA*, 12 F.4th 396, 413 (4th Cir. 2021)); *Brown v. BCG Attorney Search*, No. 12 C 9596, 2013 WL 6096932, at \*1 (N.D. Ill. Nov. 20, 2013) (“Although several factors are considered in determining whether an individual is an employee or an independent contractor, the employer’s right to control is the most important in making the distinction.”); *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1469 (C.D. Cal. 1996) (“Ultimately Plaintiffs’ most important allegation is that Defendants ‘directly employed plaintiffs . . . and exercised meaningful control over the work performed.’”).

<sup>10</sup> N/MA also respectfully submits that the Department’s attempt to rescind the 2021 IC Rule through the Proposed Rule is arbitrary and capricious under the APA because the Department failed to examine the relevant data and provide an appropriate explanation of the appropriate connection between the underlying facts and the agency’s regulatory decision. See, e.g., *Karpova v. Snow*, 497 F.3d 262, 268 (2d Cir. 2007). Whereas here, since the change in presidential administrations in early 2021, the Department has engaged in numerous attempts to rescind the 2021 IC Rule, it “must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). Here, the Proposed Rule disregards the significant data showing that the vast majority of independent contractors desire this classification as well as that independent



Therefore, N/MA believes that the 2021 IC Rule should be maintained in its current form. Doing so will permit stakeholders to conform their practices to the guidance, which has, since its inception, been diminished by the Department's prior attempts to remove it, without an opportunity to determine its effectiveness as balanced official guidance to workers and businesses in the modern economy.

### **3. The NPRM Erroneously Analyzes Relevant Factors Under the Economic Realities Test**

- a. A Worker's Right to Control the Manner and Means by Which They Provide Services Should be Recognized as a Significant Core Factor in the Economic Realities Test; The Proposed Rule Misapprehends and Distorts this Factor and Should, Therefore, be Substantially Revised.

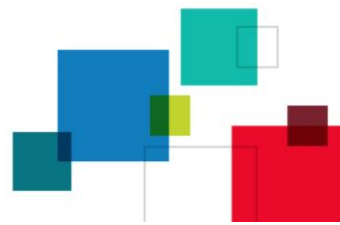
N/MA members have considerable concern with respect to the Department's analysis and interpretation of the right to control factor in the Proposed Rule. While the Department acknowledges in the Proposed Rule that the right to control the manner and means by which the work is completed is an essential factor in the analysis of whether a worker is an independent contractor or an employee under the FLSA, it has stripped the factor from its prominence in the analysis as a primary or core factor. As set forth above, in the 2021 IC Rule, and numerous court cases analyzing the economic realities test, a worker's right to control the manner and means by which a worker provides services is, and should remain, a primary consideration in the Department's discussion of the right to control factor. Similarly, as detailed below, the Department has misconstrued the appropriate interpretation of the right to control factor. N/MA urges the Department to revisit its discussion of the right to control factor, consistent with N/MA's comments.

First, in contrast to the 2021 IC Rule, the Proposed Rule shifts the relevant focus from the worker's right to control the manner and means by which the work is performed to the purported employer's control. Compare the analysis of the right to control at 86 Fed. Reg. at 1179 (describing the focus on the worker's right to control) with the Proposed Rule at 87 Fed. Reg. at 62246 (describing the focus on the employer's right to control). The Proposed Rule's focus is misdirected.

As an example, an individual such as a freelancer may perform multiple projects among multiple separate (and sometimes competing) entities. Courts have recognized that the opportunity to provide services to multiple entities at the same time, whether exercised or not, is indicative of the lack of control by an entity over the worker. *See, e.g., Acosta v. Pentagon*

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contractors earn substantially more than the federal minimum wage of \$7.25 per hour, that the 2021 IC Rule's survey of appellate decisions has not been debunked by the Department, and finally, that the Department did not consider a more limited reasonable alternative to the maintain in part the 2021 IC Rule.



*Contractors Corp.*, 884 F.3d 1225, 1235 (10th Cir. 2018) (the worker’s ability to “work for other employers” cited in favor of the worker’s right to control, indicating independent contractor status). When the right to control focuses on the worker’s control, the totality of the worker’s business is appropriately evaluated, including control over whether the worker subcontracts any part of the work necessary to complete a project, whether and how the worker may advertise their services, and whether the worker determines to prioritize, stagger, or overlap projects from multiple entities. These considerations are largely lost in the Department’s analysis of control which is narrowed to an evaluation of an individual putative employer’s alleged control, as it prevents a counterbalancing of these separate actions by the worker, resulting in an inaccurate evaluation of the right to control and the issue of economic dependence of a worker on one contracting entity.<sup>11</sup>

Second, the Proposed Rule misinterprets the right to control the manner and means of a worker’s work factor in stating that an entity’s lack of supervision is not indicative of a lack of control when that lack is a result of either the nature of an employer’s business or the nature of the work. 87 Fed. Reg. at 62275. This turns the control factor upside down by effectively ignoring a lack of putative employer control, which is unquestionably a key factor in assessing independence. Knowledge based workers, including professionals such as freelance writers, editors, photographers, and videographers, are often retained, throughout the publishing practice, because of their unique artistic and other talents and expertise, as well as their ability to function without supervision.

It is unreasonable for the Proposed Rule to state that if the nature of the work performed can be performed without supervision, and in fact is, then that lack of exercise of control is not a factor favoring independence. Freelance writing, photography or editing, for example, is exactly the type of work that is often performed without supervision by the putative employer. There is no basis for the Proposed Rule’s diminishing of the relevance of a lack of supervision over work performed by contractors that it describes as not being exercised because of “the nature of the work.” This is an example of the Department attempting to eliminate a critically relevant, core fact to the right to control factor in the economic realities test, by minimizing the fact as irrelevant based on its vague and nebulous, undefined subjective Department view that supervision is not exercised because of the nature of the work. To the contrary, work that does not require supervision by the hiring entity is exactly the type of work that should be recognized

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<sup>11</sup> Contrary to the Proposed Rule’s suggestion, the worker’s right to work for others is not adequately addressed in review of whether the purported employer limits the worker’s ability to do so (absent a business reason for the limitation). By ignoring the worker’s conduct, the Department’s interpretation of the control factor provides no consideration that the worker may in fact be simultaneously working for others. Yet, cases make clear that this important factor confirms the worker is not economically dependent on one purported employer. *See, e.g., Saleem v. Corporate Transportation Group, Ltd.*, 854 F.3d 131, 141 (2d Cir. 2017).





as more likely to result in a determination of a lack of control over the manner and means by which the work is performed, and indicative of independence.

Third, the Proposed Rule incorrectly states that control may “in some circumstances” be indicative of employment when “for purposes of complying with legal obligations, safety standards or contractual or customer service standards.” 87 Fed. Reg. at 62275. The Proposed Rule does not provide clear guidance as to those circumstances, providing no guidance on a critically important factor. Notwithstanding its lack of clarity, more importantly, the Proposed Rule is directly at odds with case law that overwhelmingly holds that compliance with such legal obligations and other standards are not evidence of control. *See, e.g., Parrish*, 917 F.3d 369, 381 (5th Cir. 2019) (holding “safety training and drug testing . . . is not the type of control that counsels in favor of employee status” while also noting that “meeting clients’ specifications . . . is consistent with the ‘usual path of an [independent contractor]” (quoting *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1315 (11th Cir. 2013) (internal quotation marks omitted); *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683 (D. Md. 2010) (holding that a “strict quality control mechanism” does not indicate employment).

Instead, universal journalistic standards of ethics and laws governing the publishing of written materials, as well as legal, regulatory, safety, and industry standards, ensure quality and consistency in product, on critical aspects of the services and results provided by independent workers, for the benefit of readers and all consumers. Compliance with safety rules applicable to the work performed by independent workers is for the benefit of the workers. Companies operating in states with local standards imposing training and other obligations on entities that engage independent workers in the areas of respectful workplace are for the benefit of the workers, other employees and the general public. The Proposed Rule’s guidance in this regard effectively encourages putative employers to avoid measures encouraging compliance by independent workers with legal and other applicable standards of performance generally, because their doing so risks misclassification claims under the Proposed Rule.

Fourth, the Proposed Rule improperly includes consideration of the facts relating to the price or rates paid to independent workers. But those facts already are accounted for when assessing whether the worker has the opportunity to influence his or her profits and losses. By adding price and rate to the control factor the Department is improperly double counting those facts.

Finally, the Proposed Rule eliminates the 2021 IC Rule’s statement that “the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible.” 86 Fed. Reg. at 1188. In so doing, the Proposed Rule turns the economic realities test into a focus on economic possibilities. Contractual provisions that are truly important necessarily manifest in the actual experiences of the worker. The Department has failed to identify any scenarios in which a contractual, but unexercised right would be more relevant than the parties’



actual practices in assessing a worker's day-to-day economic realities. N/MA urges the Department to return to the 2021 IC Rule's focus on the realities of the worker's relationship, recognizing, as does the 2021 IC Rule, that unexercised contractual rights are not irrelevant, they are simply not as informative as the actual experience of the parties.

N/MA urges the Department to revise the Proposed Rule consistent with the above comments, focusing on the totality of the circumstances in which the worker retains the right to control the manner and means by which the work is performed, appropriately recasting its analysis of various considerations that under the Proposed Rule currently weighs the right to control factor toward employment. In its current form, N/MA opposes the Proposed Rule's interpretation of the right to control factor.

b. Worker Investment Should Not Be a Stand-Alone Factor and Should Not be Measured in Relation to the Purported Employer's Business Investment.

N/MA members submit that the Department has inappropriately separated and repeated the relevance of a worker's own investment as both a standalone factor as well as in the factor of whether the worker experiences the opportunity for profit or loss. In addition, N/MA members urge the Department to revise its interpretation of a worker's investment separate and apart from investments made by the entity engaging the independent worker.

First, courts have recognized that investment by a worker is fundamentally interrelated to the analysis of another factor — whether the worker has the opportunity for profit or loss. *E.g.*, *Saleem*, 854 F.3d at 144, n. 29 and *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1537 (7th Cir. 1987). Investment by a worker in their own business creates an expense, which by definition creates an equation whether the worker may experience loss or profit depending on the worker's net profits. That investment may be in physical assets such as a computer, camera, or vehicle; services such as internet services; and/or an investment in training, education, or experience in a chosen field of endeavor such as writing and photography. All of these investments are part of the worker's profit or loss equation and should be considered as such by the Department. And, as the Proposed Rule does with respect to the factors of the exercise of initiative or management that impact a worker's profit or loss, investment by a worker in services, learning, equipment and other areas should also be considered as part of the costs of doing business that a worker experiences, and factored into the profit or loss equation.

Second, the Department inappropriately tilts the investment inquiry in favor of employee status. First, in the commentary to the Proposed Rule, the Department states that a personal vehicle already owned by a worker should generally not be considered a capital or entrepreneurial investment. 87 Fed. Reg. at 62241. There is no support for the Department's position, that disadvantages workers who purchase or use existing equipment to their benefit in independent work opportunities and gain the benefit of doing so through not just the fees they



earn for that work, but also, as an independent businessperson, in taking advantage of their right to claim such equipment as a business expense for federal and other tax purposes. The IRS draws no such distinction as the Department attempts to do in its analysis of capital or other goods used by independent workers to provide their services. The Department's commentary is illogical. Consider the photographer who purchases more sophisticated special camera equipment expecting that he or she will use it in their work. The fact that it was purchased prior to an engagement and perhaps is also used for personal photography interests of the photographer does not detract from the worker's investment decision to use the equipment for the independent work opportunity. That the equipment may have a secondary personal purpose does not eliminate the worker's entrepreneurial considerations.

Third, and equally important, N/MA urges the Department not to consider a worker's investment on a relative basis with the purported employer's investments in its overall business as set forth in the Proposed Rule. 87 Fed. Reg. at 62275. N/MA submits that to do so is inconsistent with long standing Supreme Court precedent in *United States v. Silk*, 331 U.S. at 716. The Supreme Court addressed the investment of the worker as part of the economic realities test only by reference to the worker's investment. *Id.* When the Supreme Court discussed the investment of the workers it described the workers' ownership of their own trucks, without reference to any investments made by the putative employer in its own business. *Id.*

N/MA submits that the Supreme Court's approach must govern the lens through which a worker's investment is viewed. A worker investing in his or her own equipment is a sign of the worker's economic independence, in that it demonstrates the worker's focus on their business as an ongoing concern. A putative employer's level of investment in its own business provides no insight into whether the worker is economically dependent on that business, as the work and investment made by the worker may be in an entirely different area of services than that even performed by the putative employer. While the Department notes the inherent disparity in its analysis, it fails to provide stakeholders any meaningful guidance on how the relative investments should be weighted toward independence or employment.

N/MA requests that the Department's identification of investment as a separate factor be withdrawn, and that its discussion of investment as part of a worker's opportunity for profit or loss be revised so as not to diminish that investment by virtue of when it was made or its size vis-a-vis the purported employer's investment.

- c. A Worker's Profit or Loss Should Be Assessed as a Function of the Worker's Opportunity to Impact the Profits and Costs of their Business.

As the Supreme Court first described in its articulation of the economic realities test in *United States v. Silk*, it is whether a worker has "opportunities for profit or loss" that is relevant to independent contractor status. 331 U.S. at 716 (1947). In a number of areas, the Proposed



Rule’s positions ignore *Silk* and interject uncertainty into the analysis of the opportunity for profit or loss that is absent from the 2021 IC Rule.

First, it is critical to state that this factor is whether the worker has the opportunity for profit or loss. In contrast, the focus of the Proposed Rule’s interpretation of this factor is on whether the worker actually exercises this opportunity to impact his or her economic success. 87 Fed. Reg. at 62274. This is a distortion of the *Silk* factor and is inconsistent with other language in the Proposed Rule that includes a header describing the factor as the “opportunity for profit or loss.” *Id.* A focus on a worker’s later decisions with respect to investments in the worker’s business creates uncertainty as to the nature of relationship. Where a worker has extensive opportunities for profit or loss, whether or not the worker chooses to take advantage of them, the opportunity is indicative of whether or not the worker is operating independently of the purported employer.

Second, N/MA urges the Department to consider whether the worker has the opportunity to incur profit or loss based on the worker’s “exercise of initiative (such as managerial skill or business acumen or judgment)” as set forth in the 2021 IC Rule. 85 Fed. Reg. at 1247. Instead, the Department narrows the inquiry to whether the worker’s opportunity for profit or loss is based on the worker’s exercise of managerial skill to the exclusion of business acumen or judgment. 87 Fed. Reg. at 62274. At the same time, inconsistently, the Department has included within the commentary to the Proposed Rule references to initiative, business acumen, and judgment as informative of the opportunity for profit or loss factor. *See, e.g., id.* at 62238. N/MA urges the Department to clearly state that business acumen and judgment can be bases for a worker’s opportunity for profit or loss.

Third, N/MA urges the Department to remove its comment that the opportunity for profit or loss factor cannot be satisfied by “tak[ing] more jobs.” 87 Fed. Reg. at 62274. Whereas, “taking more jobs” or additional projects often reflects managerial skill beyond merely working more hours, today many types of independent workers operate on multiple apps or platforms — and/or in other ways accept multiple projects or jobs — at the same time. Freelancers are but one example of this method of doing business for independent workers. While engaging with multiple potential customers through either an app or other platform offering opportunities for work, independent workers determine when and under what circumstances to accept contemporaneous projects to maximize their profits. Freelancers have the opportunity to work on different projects at the same time toward longer term deadlines or completion dates.

Finally, N/MA submits that the 2021 IC Rule appropriately considered skill and investment as part of the opportunity for profit or loss factor. Because each of these facts are tied directly to the question of whether they impact the workers’ ability to earn a profit or loss, they should remain incorporated in the factor, rather than standalone considerations.



For all of the foregoing reasons, N/MA respectfully requests that the Department substantially revise the Proposed Rule’s interpretation of the opportunity for profit or loss factor.

- d. Integration is a Function of Whether the Worker is Integrated into the Business as the Work is Performed, Not Whether the Results Provided by the Worker are Important to the Business.

The Proposed Rule defines a worker’s integration into a business, a definition that makes a worker therefore more likely to be an employee, by whether their work is important to the business. 87 Fed. Reg. at 62254. The Proposed Rule’s interpretation is illogical, inappropriately restrictive of independent workers and businesses, unreasonably expansive, and inconsistent with Supreme Court and other precedent interpreting the integration factor. Every day, independent workers provide essential services and products such as articles and photographs to N/MA’s members for the benefit of the worker, readers, and members. If the Department’s interpretation were correct, the Department would relegate the work that independent workers perform to only those functions that are not important to businesses.

Would the Department conclude that because freelancers provide content to N/MA’s members’ publications that the freelancers, who may never work alongside of, or with, other member employees, nevertheless be integrated into the member’s business? This interpretation lacks any basis in the law, and would be disruptive of longstanding, vibrant, and mutually rewarding independent worker relationships with N/MA members and other relationships between independent workers and other businesses throughout the country and across industries. N/MA urges the Department to revise its interpretation of this factor to its correct focus — on whether the actual work performed by the independent worker is integrated into the business — a focus that looks to how the worker performs the work, not the importance of the work.

The Supreme Court in *Rutherford Food* assessed whether an employment relationship existed by looking to whether the work performed was “a part of the [employer’s] integrated unit of production.” 331 U.S. at 729. *Rutherford* instructs that in assessing economic dependence, one must assess whether the worker is part of an “integrated unit of production.” *Id.* at 725 - 727, 730. The Supreme Court observed that the workers were part of an integrated unit of production where all of the work they performed was “done at one place,” and the workers were “work[ing] alongside admitted employees.” *Id.* The workers were integrated into the purported employer’s business not because their work was important but because they carried on their work as part of “a series of interdependent steps” with the alleged employer’s employees “that contribut[ed] to the accomplishment of a common objective” — they were “on the production line.” *Id.*



Following *Rutherford*, courts have looked to whether the worker is part of an integrated unit of production, and not simply to whether their work is important to the business.<sup>12</sup>

For example, the Eleventh Circuit has drawn out this distinction across multiple decisions assessing employment status under the FLSA. In *Antenor v. D&S Farms*, 88 F.3d 925, 937 (11th Cir. 1996), for example, the Eleventh Circuit looked to whether workers “perform[ed] a routine task that was a normal and integral part of the growers’ bean production process.” *Id.* Because the workers did, the Eleventh Circuit found them “analogous to employees working at a particular position on a larger production line” and held that the fact supported employee status. In *Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1180 (11th Cir. 2012) on the other hand, it was undisputed that the drivers performed a “crucial task” on behalf of DHL. But that fact alone did not make them “analogous to employees working at a particular position on a larger production line.” Thus, the Eleventh Circuit declined to find that the mere importance of the task supported an employment relationship. Similarly, in *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71 (2d Cir. 2003), the Second Circuit directed that the trial court must consider whether the plaintiffs performed a job “that was integral to [the defendant’s] process of production.”

Beyond the Department’s erroneous analysis of the “integral part” factor, N/MA notes that practically, the expansion of the factor to include anyone providing important services to the business makes little sense. The Department provides no explanation with respect to a stated “assumption” that it is more likely that the worker would be an employee. 87 Fed. Reg at 62253. The Department’s assumption is wrong. That a worker’s contribution to a business is important says nothing about whether the worker performs the work in a way that the worker is integrated into the workplace or workforce of the purported employer as in *Rutherford Food*, and nothing about whether the worker is economically dependent on the business—the relevant inquiry under the FLSA’s economic realities test.

The Proposed Rule’s interpretation of the factor of whether a worker is integrated into a business is fatally flawed and should be revised consistent with the above comments.

- e. The Specialized Skill and Initiative Factor Should be Considered Within the Factor of Opportunity for Profit or Loss, and Should also Consider Management, Customer Service, Professional, and other Special Skills of A Worker.

As described above, under the opportunity for profit or loss factor, a worker’s opportunity to use specialized skills and initiative to affect their profit or loss, such as

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<sup>12</sup> See, e.g., *Tobin v. Anthony-Williams Mfg. Co.*, 196 F.2d 547, 550 (8th Cir. 1952) (analyzing whether haulers and wood workers were “an integrated part of defendant’s production set-up”); *Green v. Premier Telcom. Servs., LLC*, No. 1:16-CV-0332-LMM, 2017 U.S. Dist. LEXIS 213542 (N.D. Ga. Aug. 14, 2017) (finding as evidence of independent contractor status that, “[w]hile certainly Plaintiff performing his job was integral to [defendant’s] bottom-line, unlike in *Rutherford*, Plaintiff did not perform one step in an integrated system”).



management, customer service, professional, and other special skills should all be expressly recognized as evidence of worker independence. The opportunity for profit or loss factor already ensures that the exercise of initiative and utilization of skill each are afforded weight in the economic analyses test under the FLSA. Consideration of skill and initiative as a stand-alone factor creates confusion and ambiguity, and results in the considerations under that factor being provided outsized weight in the totality of the circumstances analysis. Thus, N/MA requests that the Department consider management, customer service, professional and other special skills of a worker once, in connection with an analysis of the worker’s opportunity for profit or loss.

- f. The Permanence of the Relationship Factor Should Not Disregard the Provision of Sporadic Services By a Worker Where Sporadic Services are Reflective of Particular Service Providers or Industries.

Freelancers vary in terms of the length of time during which the worker might enjoy a relationship with a publisher, as well as the volume of work the worker provides to any particular entity or purported employer. Sporadic, long term relationships are common in the publishing industry, and does not and should not equate to evidence of dependence of the worker on one publisher. Moreover, the longer the relationship, the more likely it is that independent workers enjoy the relationship and find it benefits them, including from a financial standpoint. The Proposed Rule effectively punishes freelancers and publishers who have established a productive, working relationship. A repeat relationship evidences a strong, healthy and mutually agreeable relationship between freelancer and publisher. Why penalize the independent worker and the publisher or other contracting entity by holding it against the worker’s independence the length of time the worker has a relationship with the entity.

Similarly, the Proposed Rule newly provides that “[w]here a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers’ own independent business initiative, this factor is not indicative of independent contractor status.” 87 Fed. Reg at 62275.

N/MA submits that many types of independent contractor work are limited or sporadic in nature because such work is by nature project-based, or only needed for a discrete period of time. When independent work occurs on a project-by-project basis, that fact “counsels heavily” in favor of independent contractor status. *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 387 (5th Cir. 2019). Courts conclude that a worker’s opportunity to return for subsequent projects “is no more indicative of the employment relationship than when a businessman repeatedly uses the same subcontractors due to satisfaction with past performance.” *Id.* at 387. Similarly, N/MA submits that the Proposed Rule’s oversimplified standard that indefinite work necessarily also weighs in favor of employee status fails to take into account relevant considerations for the parties’ agreement to an indefinite term contract. *See, e.g., Nassis v. LaSalle Exec. Search, Inc.*, No. 16-cv-9445, 2018 WL 2009502, at \*8 (N.D. Ill. Apr. 30, 2018)



(holding that the permanence factor favored independence despite the indefinite relationship with the worker where the workers “retained other jobs and could leave and return to [defendant] when convenient”).

The Proposed Rule’s per se rule providing that workers are employees any time the duration of their project is indefinite, or they return for more projects, without further inquiry is unnecessarily narrow and precludes consideration of many aspects of independent contractor relationships that are project based engagements which allow workers to impact their profits and entire business model. As a result, N/MA urges the Department to revisit the permanence factor and remove the unjustified narrowing of its options for independent work.

### CONCLUSION

On behalf of its members, N/MA urges the Department not to withdraw the 2021 IC Rule in light of the above considerations. In addition, separately, N/MA urges the Department not to implement the Proposed Rule in light of the significant concerns set forth above.

Respectfully submitted,



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