



December 13, 2022

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

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RE: Notice of Proposed Rule: Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 FR 62218 (RIN 1235-AA43)

On behalf of the National Restaurant Association (“Association”), we appreciate the opportunity to submit our comments to the Department of Labor (“DOL”) in response to the Notice of Proposed Rulemaking: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (“FLSA”) (“Proposed Rule”).

Founded in 1919, the National Restaurant Association is the nation's largest trade association representing and supporting the restaurant and foodservice industry. Its mission is to advance and protect industry interests through national, state, and local advocacy. As the nation's second-largest private sector employer, the restaurant and foodservice industry is the lifeblood of the American economy.

As the voice of one of the largest groups of employers in the country, the Association encourages and supports agency guidance that is clear, concise, and easy to follow by businesses of all sizes. Accordingly, the Association supported the DOL’s 2021 Final Rule: Independent Contractor Status Under the Fair Labor Standards Act (“2021 Final Rule”)<sup>1</sup>. The 2021 Final Rule promoted clarity by highlighting two core factors most determinative of independent contractor status. In reverting to a “totality of circumstances” approach based on a multifactor test, the Proposed Rule would generate significant uncertainty for employers and independent contractors across sectors. Therefore, Restaurants oppose the new independent contractor standard and strongly suggest that the DOL withdraw the Proposed Rule.

### **Core Determinative Factors**

Over the past few decades, courts and agencies have made varying determinations regarding employee versus independent contractor status. While courts generally have followed the economic realities test in defining independent contractor status, there had been no consistency in its application, resulting in a haphazard patchwork of rulings that provided the regulated community

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<sup>1</sup> 86 FR 1168

with no uniform guidance. The DOL published the 2021 Final Rule after analyzing relevant case law and considering thousands of public comments, including those offered by the Restaurant Law Center and the Association.

In looking to provide a basis for the consistent application of independent contractor status, the 2021 Final Rule modified the economic realities test and specifically identified two core factors based on a worker's economic dependence and likely determinative of independent contractor status:

1. The nature and degree of the individual's control over the work;
2. The individual's opportunity for profit or loss.

These two core factors directly responded to the DOL's correct assessment that the economic realities test suffers from a lack of focus in making proper independent contractor determinations. The 2021 Final Rule provided a discernable standard that could be applied with relative ease across varying circumstances by narrowing the scope through which independent contractor status was determined.

Given the evolution of today's workplace, a simple test for the determination of independent contractor status is vital. The COVID-19 Pandemic upended many industries – including the foodservice and restaurant industries – and led to an increase in flexible work arrangements, in addition to the number of workers classified as 'self-employed.' As the recovery from COVID-19 progresses, the changing nature of the industry calls for clear-cut guidelines to easily determine compliance for the regulated communities.

### **Totality of Circumstances**

While the 2021 Final Rule created a clear standard by which the regulated community could easily determine independent contractor status, the Proposed Rule, unfortunately, accomplishes the exact opposite. By reverting to a “totality of circumstances” approach, the DOL will reintroduce inconsistency into the determination process – evidenced by the contradictory court opinions regarding independent contractor status prior to the enactment of the 2021 Final Rule.

The six economic reality test factors, as defined in the Proposed Rule, are both exceedingly complex and subjective. Further, many elements defined within the factors are duplicitous. Many of the factors are included as components of other factors, for example, the opportunity for profit or loss and the ability to set a price or rate for goods and services.

Ultimately, the "totality of circumstances" approach, as defined in the Proposed Rule, leads to ambiguity. Should all six factors outlined in the Proposed Rule be weighted equally, it will be difficult for employers and independent contractors to accurately determine classification status. This was not the case with the 2021 Final Rule, which assigned greater weight to the aforementioned two core factors.

### **Additional Factors**

In addition to the six proposed economic reality test factors, the Proposed Rule allows for the consideration of "additional factors" in the determination of independent contractor status without defining what those additional factors might be. In combining the "totality of circumstances" approach with possible consideration of yet-to-be-determined "additional factors," one can only conclude that the Proposed Rule will create mass confusion, especially as the DOL offers little guidance to the regulated community on how to interpret the overly broad and nonexclusive factors.

### **Cost**

The Proposed Rule differs from the 2021 Final Rule in many ways, the most burdensome being the complex, multifaceted approach taken by the DOL, which departs from the previously clear, concise, and easy-to-follow determinative test. We wholeheartedly disagree with the DOL's assumptions that the compliance costs associated with the Proposed Rule will be minimal and that it will take relevant parties under 30 minutes to read and understand. For most employers and independent contractors, determining independent contractor classification will only be possible through engaging outside expertise and legal counsel.

Nine in ten restaurants are small businesses. The potential cost of compliance with the Proposed Rule will be prohibitive for most small businesses, especially those in the foodservice and restaurant industry who operate on thin margins and struggle to remain solvent amid inflationary pressures and increased supply chain constraints.

### **Conclusion**

The Proposed Rule is overly ambiguous and onerous. In reverting to a "totality of circumstances" approach, the DOL guarantees an inconsistent determination of independent contractor status that will lead to increased costs and subsequent litigation. In contrast, the 2021 Final Rule provided employers and independent contractors with clear and concise guidance for determining independent contractor status. We urge the DOL to reinstate the 2021 Final Rule and provide certainty for all.

Sincerely,



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