INTERNATIONAL BROTHERHOOD OF TEAMSTERS

SEAN M. O'BRIEN
General President

25 Louisiana Avenue, NW
Washington, DC 20001

FRED E. ZUCKERMAN
General Secretary-Treasurer

202-624-6800
www.teamster.org

December 13, 2022

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

Re: RIN 1235-AA43, Employee or Independent Contractor Classification Under the Fair Labor Standards Act

Dear Ms. DeBisschop:

The International Brotherhood of Teamsters ("IBT") submits the following comments on the U.S. Department of Labor's ("the Department" or "DOL") proposed rule to modify the Wage and Hour Division ("the Agency") regulations to revise its analysis for determining employee or independent contractor classification under the Fair Labor Standards Act ("FLSA" or "Act") to be more consistent with judicial precedent and the Act's text and purpose.

I. The IBT and Its Interest in This Rulemaking

The IBT is a labor organization founded in 1903. It represents more than 1.4 million hardworking men and women in numerous industries across the United States, Canada, and Puerto Rico. For over a century, the IBT and its members have worked to guarantee workers a living wage and the benefits they deserve, both through negotiating strong collective bargaining agreements ("CBAs") and by supporting employment legislation that lifts all workers.

Several employers are signatories to CBAs with the Teamsters but have business relationships of a competitive nature with other entities and employers who are often not signatories to CBAs. Consequently, these workers are in most circumstances left without any protections that would be afforded to them under the Fair Labor Standards Act as most of these non-signatory entities and employers improperly classify their employees as independent contractors to escape the bare minimum of legal obligations including wages (prevailing or minimum wage), overtime pay, health and safety requirements, record keeping requirements, as well as taxes, workers' compensation, and others. This in turn brings down industry wage rates and working conditions. It also harms unions and employers who don't misclassify their workers,

as they try to negotiate strong CBA's that give workers the rights and protections they deserve while also allowing companies to remain profitable and competitive in their respective markets.

The IBT has a strong interest in ensuring that the proposed rule guards against these serious harms and violations. The current rule conflicts with the intended broad definition and coverage of the Act and adopts an impermissibly narrow test for determining employee status. This makes it easier for various business entities that use a subcontracting model to evade liability under the Act, and thus leave workers in industries such as construction, warehouse, logistics, and others susceptible to wage theft, and minimum wage and overtime violations.

The proposed rule is an opportunity to close this loophole that so many businesses use in order to escape liability, and which helps prevent workers from enjoying the worker protections enshrined in federal law. This is especially crucial as the gig and on-demand economies continue to expand. The proposed rule is a positive step towards more aggressively pursuing employers who misclassify their employees as independent contractors. The IBT wholly supports the proposed rule as well as the return of the totality of the circumstances analysis and economic reality test, which fully comport with longstanding case law and prior departmental guidance.

II. The DOL 2021 Independent Contractor (IC) Rule

During the lame duck period of the Trump Administration in 2021, the DOL issued a final rule on the classification of independent contractors which reduced the number of primary factors the Agency would consider when determining whether a worker is an independent contractor or an employee. The 2021 IC Rule was a departure from long standing Supreme Court precedent as well as the Department's position that no one factor, or subset of factors, should carry more or less weight in every case.

Under the 2021 IC test, the Agency would consider two "core factors"—the nature and degree of control over the work and the worker's opportunity for profit or loss based on initiative and/or investment. Other factors—including the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the potential employer, and whether the work is part of an "integrated unit of production"—would generally *only* be considered when the two "core factors" don't point to the same classification.

III. The Board's Proposed Revisions and the IBT's Rulemaking Recommendations

The Department has proposed to replace the 2021 Trump Administration IC Rule with the economic reality test which emphasizes that the economic reality factors are guides to be used in conducting a totality of the circumstances analysis, where no single factor is dispositive, and the list of factors is not exhaustive. The "ultimate inquiry" in determining whether a worker is an employee or an independent contractor is whether the worker is economically dependent on the employer for work or is in business for themselves. In developing the proposed test, the Department included revisions to each factor that correctly considers the current realities of the workplace while complying with historical legal precedent.

Under the proposed rule, the six economic reality factors are:

1. The opportunity for profit or loss depending on managerial skill.
2. The investments by the worker and the employer.
3. The degree of permanence of the work relationship.
4. The nature and degree of employer control.
5. The extent to which the work performed is an integral part of the employer's business.
6. The worker's use of skill and initiative.

The DOL has requested comments regarding all aspects of each of the factors proposed under the revised economic reality test. Thus, the IBT's comments will focus on assessing each of the proposed factors and the respective guidance offered to support its usage and interpretation.

1. Opportunity for Profit or Loss Depending on Managerial Skill

The 2021 IC Rule weighed the opportunity for profit or loss factor towards a worker being an independent contractor if the individual had an opportunity to earn profits or incur losses based on his or her exercise of managerial skill or management of his or her investments in capital expenditure. The 2021 IC Rule considers *both*, the exercise of initiative and management of investment, under this factor, but the individual does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor. The 2021 IC rule weighs this factor toward an individual being an employee if the individual is unable to affect his or her earnings or is only able to do so by working more hours or working faster. In proposed § 795.110(b)(1), the Department is also considering managerial skill as a factor in the opportunity for profit or loss, but unlike the 2021 IC rule, the Department is considering investment as a separate factor (factor number 2) in the analysis.

The proposed provision provides a non-exhaustive list of relevant facts to consider and states that if a worker has no opportunity for a profit or loss, then that suggests the worker is an employee. The proposed rule also states that some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor. Moreover, proposed § 795.110(b)(1) "more accurately reflects the consideration of the profit or loss factor in the case law and reflects the ultimate inquiry into the worker's economic dependence or independence."[1]

The IBT supports the Department's proposed application and guidance for the "Opportunity for Profit or Loss Depending on Managerial Skill" factor. The current rule places significant weight on a worker's *hypothetical* ability to increase earnings without realizing those opportunities are often not meaningful in the context of certain jobs, and it fails to distinguish between merit bonuses and pay and true entrepreneurial initiative which would be undertaken by a true independent contractor. The IBT also agrees with the Agency's rejection of the proposition that a workers' decision to take additional hours or tasks indicates "managerial skill". Employees should be able to elevate themselves for merit-based bonus or pay without having to lose the protections afforded to them under the Fair Labor Standards Act. Further, the NPRM is keen to

[1] *See* Federal Register, Vol. 87, No. 197, pp. 62237 (Oct. 13, 2022).

point out that simply because a worker earns more or less depending on how much they work, that is not the equivalent of a financial loss.

The DOL should not be persuaded that this will "kill jobs" or prevent skilled people with small business or true entrepreneurs from the freedom and flexibility that comes with being classified as an independent contractor. Nor would it impede the ability of part time work, work outside of a traditional 9 am -5 pm schedule, or contracting work in addition to full time employment. The proposed rule simply allows protection under the law for those workers that truly depend on their employer economically and where their ability to make more money by increasing hours or assignments is not equivalent to managerial skill or initiative such that they should be classified as independent contractors.

2. Investments by the Worker and the Employer

The IBT supports the Department's proposed rule that will treat investment as a standalone factor rather than within the opportunity for profit or loss. This is consistent with Supreme Court precedent as well as prior Department guidance before the 2021 IC Rule.

In proposed § 795.110(b)(2) the Department states that "an investment borne by the worker must be capital or entrepreneurial in nature to indicate independent contractor status."[2] Examples include investments that would support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach, thus suggesting that the worker is in business for themself. Proposed § 795.110(b)(2) further states that costs incurred by the worker to perform their job such as tools and equipment as well as labor are not evidence of capital or entrepreneurial investment and that a worker's investment should be evaluated on a relative basis with the employer's investment.

The example the NPRM gives involves a graphic designer who supplies their own software, computer, drafting tools, drafts and rents a shared workspace which indicate that the designer is in work for themselves and is an independent contractor.[3] The NPRM goes on to state that these types of investments "allow the worker to do more work and extend their market reach."[4] While the IBT agrees that a worker's investment should indeed be a standalone factor, the proposed rule needs more clarity as to what types of investments would indicate that a worker is an independent contractor rather than an employee. I.e., how significant must the investment be in order to be classified as an independent contractor?

The NPRM is clear that the use of a personal vehicle the worker already owns to perform work is generally not an investment that is capital or entrepreneurial in nature. However, without more guidance declaring certain conduct under this factor as specifically indicative of employee status, situations where an employer is able to classify workers as independent contractors and maintain a significant amount of control over the worker's autonomy and other factors exist. Such

---

[2] *Id.* at 62240.

[3] *Id.*

[4] *Id.* at 62243.

a circumstance would thereby allow an employer to evade wage and hour laws and shift responsibility for the associated expenses that come with owning and maintaining a vehicle to the employee, reducing the worker's take-home pay.

As it is currently written, this proposed factor could be misinterpreted as it unintentionally excludes from consideration, many of the conditions workers who work for platform-based companies are subject to. With the 2021 IC Rule, bad actor companies have been given the opportunity to misclassify and mistreat workers and small business owners in several industries across America. The IBT is particularly privy to this unlawful conduct in the Warehouse and Transportation Industries, where companies like Amazon, Sysco, and XPO/STG Logistics openly utilize smaller entities as shields for liability and collective bargaining obligations, while reaping the benefits of controlling every aspect of the smaller entities' operations including the essential terms and conditions of the workforce. By overemphasizing workers' ability to increase earnings through minimal investment or personal initiative, the proposed rule risks inviting employers to engage in further tactics to exclude more of their workers from the FLSA's protections.

3. Degree of Permanence of the Work Relationship

The IBT supports the Department's proposed application and guidance for the "Degree of Permanence of the Work Relationship" factor. The degree of permanence of the working relationship has long been considered a critical factor the "courts and the Department routinely consider. . . when applying the economic reality analysis under the FLSA to determine employee or independent contractor status.[5]" The IBT is in agreement with the Department's effort to further clarify this factor by noting that an indefinite or continuous relationship is consistent with an employment relationship, but that a worker's lack of a permanent or indefinite relationship with an employer is not necessarily indicative of independent contractor status if it does not result from the worker's own independent business initiative.[6] The proposal acknowledges "'[i]ndependent contractors' often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas 'employees' usually work for only one employer and such relationship is continuous and of indefinite duration.[7]" Still, the Department's proposal correctly recognizes that a lack of permanence may be inherent in certain temporary and seasonal jobs. Therefore, a lack of permanence is not always an indicator of independent contractor status because a lack of permanence does not necessarily mean that the worker is in business for themselves instead of being economically dependent on the employer for work.[8]

---

[5] *See* Federal Register, Vol. 87, No. 197, pp. 62218 through 62275 (Oct. 13, 2022). The Department is proposing to modify § 795.105(d)(2)(ii) of the 2021 IC Rule, which describes the "degree of permanence of the working relationship between the individual and the potential employer," and address the permanency factor in proposed § 795.110(b)(3). 86 FR 1192 (citing a variety of circuit case law: *Razak,* 951 F.3d at 142; *Hobbs,* 946 F.3d at 829; *Karlson,* 860 F.3d at 1092–93; *McFeeley,* 825 F.3d at 241; *Keller,* 781 F.3d at 807; *Scantland,* 721 F.3d at 1312).

[6] *See, e.g., Superior Care,* 840 F.2d at 1060–61. This interpretation is consistent with case law analyzing this factor.

[7] *Snell,* 875 F.2d at 811 (citing *Donovan* v. *Sureway Cleaners,* 656 F.2d 1368, 1372 (9th Cir. 1981)); *see also Keller,* 781 F.3d at 807 (same); WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002) (same).

[8] *See* Federal Register, Vol. 87, No. 197, pp. 62243 (Oct. 13, 2022). For example, a typical employee often has an at-will work relationship with the employer and works indefinitely until either party decides to end that work relationship. Conversely, an independent contractor does not seek such a permanent or indefinite engagement with one entity.

The IBT believes the Department should make it explicitly clear in its guidance that when applying this factor, courts must consider that a worker's lack of permanent or indefinite employment status is in many cases not due to the worker's own business initiatives. Otherwise, this factor may easily be manipulated by employers for the purpose of avoiding liability under the FLSA. To this end, guidance should note that high turnover for certain positions or job assignments may reflect more on poor job quality than independent contractor status, and the focus must remain on the degree of permanence of the work, rather than how long an individual has been performing it. Furthermore, guidance should inform courts to be mindful of industries that widely use algorithmic management tools that tends to foster contingent, temporary, and shorter-term work.

As forementioned, the Department also correctly acknowledges that temporary and seasonal jobs' lack of permanence may be inherent, and thus cannot always be an indicator that a worker is in business for themselves as an independent contractor. [9] Accordingly, the proposal revises guidance for this factor to acknowledge that a lack of permanence may be due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ rather than the workers' business initiative, in which case this factor would not weigh in favor of independent contractor classification.[10] Also, and of great importance, the proposal notes the courts' recognition that nonseasonal temporary work is common in certain industries, and that a lack of permanence in these work relationships are also not indicative of independent contractor status.[11] For these reasons, the Department should make sure the final guidance thoroughly details the proper application of this factor for both seasonal and nonseasonal temporary workers.

Moreover, the IBT supports the Department's proposal to include "exclusivity"[12] as an additional consideration under the permanency factor, while noting that working for others and

---

Because of these general characteristics of work relationships, the length of time or duration of the work relationship has long been considered under the ''permanence'' factor as an indicator of employee or independent contractor status.

[9] *Snell,* 875 F.2d at 811 (citing *Donovan* v. *Sureway Cleaners,* 656 F.2d 1368, 1372 (9th Cir. 1981)); *see also Keller,* 781 F.3d at 807 (same); WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002) (same); While '''Independent contractors' often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas 'employees' usually work for only one employer and such relationship is continuous and of indefinite duration."

[10] The Fifth Circuit noted that ''in applying the Silk factors courts must make allowances for those operational characteristics that are unique or intrinsic to the particular business or industry, and to the workers they employ.'' *Mr. W Fireworks,* 814 F.2d at 1054. Holding that the ''proper test for determining the permanency of the relationship'' in such a seasonal industry is ''not whether the alleged employees returned from season to season, but whether the alleged employees worked for the entire operative period of a particular season."

[11] For example, in *Brock v. Superior Care, Inc.,* the Second Circuit found that nurses who were referred by a temporary health-care staffing agency to work for patients, hospitals, and nursing homes on a short-term basis were ''transient'' workers who did not have continuous or permanent work relationships with the staffing agency. *Superior Care,* 840 F.2d at 1060 – 61. Similarly, in *Baker v. Flint Engineering & Construction Co.,* the Tenth Circuit determined that temporary rig welders who worked no more than two months at a time for a gas pipeline contractor exhibited sufficient permanency in their work relationship to indicate employee status because such temporary work was intrinsic in the industry rather than a ''choice or decision'' by the workers. *Flint Eng'g,* 137 F.3d at 1442.

[12] However, although an exclusive relationship is often associated with an employment relationship and a sporadic or project-based non-exclusive relationship is more frequently associated with independent contractor classification,

having multiple jobs in which workers are economically dependent on each employer for work—as compared to a worker who is in business for themself and chooses to market their independent services or labor to multiple entities—does not weigh in favor of independent contractor status.[13] The IBT agrees this analytical approach is appropriate, because working exclusively for a particular employer clearly speaks to the permanence of the work relationship.[14] This is of great importance as many of the workers today are forced to work multiple jobs just to make ends meet.[15] In support, the Department appropriately relies on case law that has determined that the fact that a worker does not rely on the employer as their exclusive or primary source of income is not indicative of whether an employment relationship exists. [16] Additionally, the Department correctly notes that consideration of exclusivity (or the lack thereof) is relevant under both the control and permanency factors.[17] The IBT applauds the Department's recognition that where workers provide services under a contract that is routinely or automatically renewed, courts have determined that this indicates permanence and an indefinite working arrangement associated with employment.[18]

---

courts have explained that simply having more than one job or working irregularly does not remove a worker from employee status and the protections of the FLSA. *See, e.g., Carrell* v. *Sunland Constr., Inc.*, 998 F.2d 330, 332 (5th Cir. 1993) (finding welders to be independent contractors where they worked for multiple employers on a project-by-project basis rather than exclusively for one employer).

[13] *See* Federal Register, Vol. 87, No. 197, pp. 62245 (Oct. 13, 2022). Proposed in § 795.110(b)(3). Permanence factor has commonly addressed whether the work relationship is exclusive and the extent to which the workers work for others. *See, e.g., Parrish,* 917 F.3d at 386–87 (noting that one of the relevant considerations under the permanency factor is whether any plaintiff worked exclusively for the potential employer); *Keller,* 781 F.3d at 807 (noting that ''even short, exclusive relationships between the worker and the company may be indicative of an employee-employer relationship'').

[14] *See, e.g.,* WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002) (considering exclusivity under permanence factor); WHD Op. Ltr., 2000 WL 34444342, at *5 (Dec. 7, 2000) (same); *Scantland,* 721 F.3d at 1319 (noting that ''[e]xclusivity is relevant'' to the permanency of the work relationship).

[15]The 2021 IC Rule correctly noted that a handful of cases improperly conflate having multiple sources of income with a lack of economic dependence on the potential employer. *See* 86 FR 1173, 1178. The 2021 IC Rule characterized such a ''dependence-for-income'' analysis as incorrect and a ''dependence-for-work'' analysis as correct. Id. at 1173. This critique continues to be valid, as is the observation that ''[i]t is possible for a worker to be an employee in one line of business and an independent contractor in another.'' Id. at 1178 n.19.

[16] *Superior Care,* 814 F.2d at 1060; *see also Halferty,* 821 F.2d at 267–68 (''it is not dependence in the sense that one could not survive without the income from the job that we examine, but dependence for continued employment''); *DialAmerica,* 757 F.2d at 1385 (noting that ''[t]here is no legal basis'' to say that work that constitutes a second source of income indicates a worker's lack of economic dependence on a job because the
proper analysis is ''whether the workers are dependent on a particular business or organization for their continued employment''); *Off Duty Police,* 915 F.3d at 1058 (''[W]hether a worker has more than one source of income says little about that worker's employment status. Many workers in the modern economy, including employees and independent contractors alike, must routinely seek out more than one source of income to make ends meet'').

[17] *See, e.g.,* 86 FR 1192 (noting the analysis in *Freund* v. *Hi-Tech Satellite, Inc.,* 185 F. App'x 782, 783–84 (11th Cir. 2006), where the court found that ''Hi-Tech exerted very little control over Mr. Freund,'' in part, because ''Freund was free to perform installations for other companies'' and that ''Freund's relationship with Hi-Tech was not one with a significant degree of permanence . . . [because] Freund was able to take jobs from other installation brokers.'').

[18] *See, e.g., Scantland,* 721 F.3d at 1318 (finding one-year contracts that were automatically renewed to ''suggest substantial permanence of relationship''); *Pilgrim Equip.,* 527 F.2d at 1314 (finding laundry operators' one-year contracts that were routinely renewed indicated employee status); *Acosta v. Senvoy, LLC,* No. 3:16–CV–2293–PK,

Thus, the IBT believes the Department should ensure the final guidance for this factor instructs the courts to coagulate such findings.

4. Nature and Degree of Control

In proposed § 795.110(b)(2), the Department continues to believe that issues related to scheduling, supervision over the performance of the work (including the ability to assign work) and the worker's ability to work for others are relevant considerations, but it proposes to add additional aspects of control. However, in contrast to the 2021 IC Rule, the Department would not elevate control as a "core" factor in the analysis as it should represent just one factor of the economic realities test.

When evaluating this factor, the Department considers: the employer's control, including both *active and reserved* control, over the performance of the work and the economic aspects of the working relationship; whether the employer sets the worker's schedule, supervises the performance of the work, or explicitly limits the worker's ability to work for others; whether the employer uses technological means of supervision (such as by means of a device or electronically); reserves the right to supervise or discipline workers, or places demands on workers' time that do not allow them to work for others or work when they choose; whether the employer controls economic aspects of the working relationship including control over prices or rates for services and the marketing of the services or products provided by the worker; control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control.

The IBT supports the Department's proposal of § 795.110(b)(2), and in particular, the broadening of this factor to include reserved control as well as compliance requirements. This factor takes into account the practical, rather than theoretical, implications of an employer's control over an employee. For example, the 2021 IC Rule suggests that the ability of a worker to set their own schedule is evidence that weighs towards a worker being an independent contractor. However, while a worker's ability to set their own schedule, in *theory*, might demonstrate a lack of control, it would not suggest independent contractor status if, for example, the employer sets limited hours during which the worker may set their schedule, prohibits the worker from working for other customers or on other jobs, or disciplines the worker for declining work assignments. The 2021 IC Rule's factor of control is too narrow and fails to take into account actions employers may take that, in practice, actually limit the workers' control over their schedule and other aspects of their job.

This is also true in the case of remote work regarding the supervision aspect of control. An employer who supervises a remote worker through location monitoring and productivity tracking must be considered. The final rule must take these factors and situations into account, including new technology, the changing landscape of the post-pandemic workforce, and the digital economy.

2018 WL 3722210, at *9 (D. Or. July 31, 2018) (noting that one-year contracts that automatically renew are "evidence that a worker is an employee"); *Solis v. Velocity Exp., Inc.*, No. CV 09–864–MO, 2010 WL 3259917, at *9 (D. Or. Aug. 12, 2010) (the fact that package delivery drivers understood their contracts to be of indefinite duration and that contracts were routinely renewed without renegotiation indicated employee status).

5. Extent to Which the Work Performed is an Integral Part of the Employer's Business

The IBT supports the Department's return to the framing of this factor as whether the worker's work is an ''integral part'' of the employer's business,[19] considering whether the work is critical, necessary, or central to the employer's business.[20] More specifically, the IBT supports the Department's acknowledgement that most courts have adopted a common-sense approach when applying this factor, finding that if the employer could not function without the service performed by the workers, then the service they provide is integral.[21] The Department correctly notes that such workers are more likely to be economically dependent on the employer because their work depends on the existence of the employer's principal business, rather than their having an independent business that would exist with or without the employer.[22] Furthermore, the department correctly notes that if an employer's primary business is to make a product or provide a service, then the workers who are involved in making the product or providing the service are integral.[23]

The IBT recommends that guidance for this factor make explicitly clear the focus of the factor is on the work performed, not the individual worker.[24] To further ensure the focus remains on whether the worker performs work that is central to the employer's business, and not whether the worker possesses some unique qualities that render them indispensable as an individual, the

---

[19] In proposed § 795.110(b)(5). The Department is proposing to eliminate the ''integrated unit'' factor as an enumerated factor and instead to restore the integral factor, understood by courts as being focused on whether the work is critical, necessary, or central to the employer's business. *See* Federal Register, Vol. 87, No. 197, pp. 62254 (Oct. 13, 2022).

[20] In addition, the common law test considers ''whether the work is part of the regular business of the hiring party'' in distinguishing between employees and independent contractors. *Reid*, 490 U.S. at 752; For decades, courts have repeatedly found a worker's performance of work that is integral to the employer's business to be an indicator of employee status. *See Silk,* 331 U.S. at 716 (unloaders were ''an integral part of the business [] of retailing coal''); *Keller,* 781 F.3d 799 at 815 (''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.'').

[21] *See, e.g., Off Duty Police*, 915 F.3d at 1055 (rejecting employer's argument that it was merely an agent between its customers and the officers because the company ''could not function without the services its workers provide''); *McFeeley,* 825 F.3d at 244 (''[E]ven the clubs had to concede the point that an 'exotic dance club could [not] function, much less be profitable, without exotic dancers.' '') (quoting Secretary of Labor's Amicus Br. in Supp. of Appellees at 24); *Capital Int'l,* 466 F.3d at 309 (finding security guards were integral to a business where company ''was formed specifically for the purpose of supplying'' private security); cf. *Johnson v. Unified Gov't of Wyandotte Cnty./Kansas City,* 371 F.3d 723, 730 (10th Cir. 2004) (upholding jury verdict finding independent contractor status for security guards working for government housing authority and noting, with regard to integral factor, that the housing authority ''had functioned for years before and after the program'' under which security guards were hired).

[22] *See, e.g., Brock v. Lauritzen,* 624 F. Supp. 966, 969 (E.D. Wis. 1985), aff'd, 835 F.2d 1529 (7th Cir. 1987) (finding that cucumber harvesters were integral to cucumber farmer's business and were "economically dependent upon Lauritzen's business for their work during the cucumber harvest season").

[23] *See, e.g., Superior Care,* 840 F.2d at 1059 (for business that provided on-demand health care personnel, the nurses provided were themselves integral to the business).

[24] *See, e.g., Montoya v. S.C.C.P. Painting Contractors, Inc.,* 589 F. Supp. 2d 569, 581 (D. Md. 2008) (explaining that ''this factor does not turn on whether the individual worker was integral to the business; rather, it depends on whether the service the worker performed was integral to the business'').

IBT also recommends guidance for the factor highlight examples similar to the "one operator among many at a call center" example in the NPRM.[25] Such examples make clear that an individual worker who performs the work that an employer is in business to provide, but is just one of hundreds or thousands who perform the work, is nonetheless an integral part of the employer's business even if that one worker makes a minimal contribution to the business when considered among the workers as a whole.[26]

6. Skill and Initiative

The IBT supports the Department's proposal for this factor to consider whether a worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative that is consistent with the worker being in business for themselves instead of being economically dependent on the employer;[27] thus proposing to reaffirm the longstanding principle that this factor indicates employee status where the worker lacks specialized skills.[28] Additionally, the Department correctly recognizes that both employees and independent contractors may be skilled workers, so revision is appropriate as the application of initiative in connection with specialized skills must be considered and is useful in answering the overarching inquiry of whether the worker is economically dependent on the employer for work or is in business for themselves.[29]

The IBT believes such an interpretation is proper considering, for example, specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that suggests independent contractor status.[30] For these reasons, the IBT recommends the Department's guidance for this factor clearly instruct against limiting this factor to an evaluation of whether the worker has specialized skills, and also considers whether the worker is exercising business-like initiative in relation to any specialized skills.

---

[25] *See* Federal Register, Vol. 87, No. 197, pp. 62254 (Oct. 13, 2022).

[26] *Id.*

[27] Consistent with the approach of evaluating each factor in the context of the ultimate inquiry of whether the worker is economically dependent on the employer or in business for themself, proposed § 795.110(b)(6) states that the worker should use the specialized skills in connection with business-like initiative for this factor to suggest independent contractor status. *See* Federal Register, Vol. 87, No. 197, pp. 62255 (Oct. 13, 2022).

[28] *See* Federal Register, Vol. 87, No. 197, pp. 62254 (Oct. 13, 2022). Proposed § 795.110(b)(6) states that where the worker brings specialized skills to the work relationship, it is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor instead of an employee.

[29] *See* Federal Register, Vol. 87, No. 197, pp. 62254 (Oct. 13, 2022). Department is proposing to reintegrate initiative into this factor and no longer exclude consideration of initiative when applying this factor, as provided in the 2021 IC Rule; 'the fact that workers are skilled is not itself indicative of independent contractor status.'' *Superior Care,* 840 F.2d at 1060; *Selker Bros.,* 949 F.2d at 1295.

[30] *See* Federal Register, Vol. 87, No. 197, pp. 62256 (Oct. 13, 2022).

The IBT applauds the Department's recognition that several courts have already determined that certain workers including, drivers, security guards, janitors, landscape workers, and call center workers do not require specialized skills.[31] Accordingly, the IBT further recommends that guidance for this factor include specific instruction that asks courts to rely on the previous decisions finding certain occupations do not require prior experience; the workers are dependent on training from the employer to perform the work; or that the work requires no training, and thus are indicators that the relevant worker(s) lack(s) specialized skills. [32]

IV. Conclusion

For the reasons described above and in consideration of our specific recommendations, the IBT supports the Department's overall proposal to replace the 2021 Trump Administration IC Rule with a revised economic reality test that is reconciled with controlling precedent and the text, history, and purposes of the FLSA, to ensure the proposal is effective in combating the further exploitation of workers across the country.

Respectfully submitted,

Sean M. O'Brien
General President

SMO/epa

cc: Ed Gleason., Esq., General Counsel, International Brotherhood of Teamsters.
Willie Burden Jr., Esq., Staff Attorney, International Brotherhood of Teamsters
Emily Pantoja, Esq., Staff Attorney, International Brotherhood of Teamsters

[31] *See, e.g., Off Duty Police,* 915 F.3d at 1055 – 56 (noting that "[t]he skills required to work for ODPS are far more limited than those of a typical independent contractor" in finding that the skill factor weighed in favor of employee status for security guards and traffic control workers); *Walsh* v. *EM Protective Servs. LLC,* No. 3:19–cv–00700, 2021 WL 3490040, at *7 (M.D. Tenn. Aug. 9, 2021) (traffic control officers require "relatively little skill" and security guards require "minimal skill," indicating employee status); *Solis* v. *Int'l Detective & Protective Serv., Ltd.,* 819 F. Supp. 2d 740, 752 (N.D. Ill. 2011) (finding that the "vast majority of the Guards' work . . . did not require any special skills"); *See, e.g., Razak,* 951 F.3d at 147 (noting that it "is generally accepted that 'driving' is not itself a 'special skill'" in determining that the skill factor weighs in favor of employee status); *Iontchev,* 685 F. App'x at 550 ("The service rendered by the [taxi drivers] did not require a special skill."); *Campos* v. *Zopounidis,* No. 3:09–cv–1138 (VLB), 2011 WL 2971298, at *7 (D. Conn. July 20, 2011) ("There is no evidence that Campos's job as a delivery person required him to possess any particular degree of skill.).

[32] *See* Federal Register, Vol. 87, No. 197, pp. 62255 (Oct. 13, 2022) Even if the worker possesses specialized skills, this factor may indicate employee status if the work does not require those skills; *Off Duty Police*, 915 F.3d at 1056 (citing *Keller,* 781 F.3d at 807, 809); *Snell*, 875 F.2d at 811; *see also McFeeley*, 825 F.3d at 244 ("As to the degree of skill required, the clubs conceded that they did not require dancers to have prior dancing experience.").

December 13, 2022

VIA EMAIL (FOIA@nmb.gov) and U.S. MAIL
Mary-Kate Dowling, Esq.
General Counsel
National Mediation Board
1301 K Street, NW, Suite 250 East
Washington, DC 20005

Re: FOIA Request for Materials Relating to Case No. R-7551

Dear Ms. Dowling,

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of any records relating to the matter concerning the Republic Airways Mechanics and Related Employees, assigned National Mediation Board Case No. R-7551, including but not limited to hearing transcripts, correspondence, decisions and any other documents.

My organization, the International Brotherhood of Teamsters, agrees to pay reasonable duplication fees for the processing of this request. I respectfully request that you or your assistant contact me, however, if the fees for copying and retrieval total more than $250.00. I also request that you send the requested documents to me at the address listed above by U.S. Mail or UPS. The IBT will pay for the expense of UPS Overnight Delivery in order to receive these documents more quickly.

If you have any questions or wish to discuss my request in greater detail, please do not hesitate to contact me at (202) 624-7470 or via email at sspanja@teamster.org.

Thank you for your assistance.

Very truly yours,

Stephanie G. Spanja
IBT Staff Attorney

SP/ac

Alexis Charnock

From: no-reply@regulations.gov
Sent: Tuesday, December 13, 2022 10:29 AM
To: Alexis Charnock
Subject: Your Comment Submitted on Regulations.gov (ID: WHD-2022-0003-0001)

You don't often get email from no-reply@regulations.gov. Learn why this is important

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Please do not reply to this message. This email is from a notification only address that cannot accept incoming email.

Your comment was submitted successfully!
Comment Tracking Number: lbm-ddbq-d6d0

Your comment has been sent for review. This process is dependent on agency public submission policies/procedures and processing times. Once the agency has posted your comment, you may view it on Regulations.gov using your Comment Tracking Number.

Agency: WAGE AND HOUR DIVISION (WHD)
Document Type: Proposed Rule
Title: Employee or Independent Contractor Classification under the Fair Labor Standards Act
Document ID: WHD-2022-0003-0001

Comment:
See attached file(s)

Uploaded File(s):
DOL IC Rule 12-12.pdf

For further information about the Regulations.gov commenting process, please visit https://www.regulations.gov/faq.