December 12, 2022

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

Re: Comments on Proposed Rules with respect to Employee and Independent Contractor Classification Under the Fair Labor Standards Act
29 CFR Parts 780, 788, and 795
RIN 1235-AA43

Thank you for the opportunity to provide comments in response to the proposed rules with respect to the analysis for determining employee or independent contractor classification under the Fair Labor Standards Act (FLSA).

UWC–Strategic Services on Unemployment & Workers' Compensation is a national non-profit membership organization representing business with respect to unemployment insurance (UI) and workers' compensation (WC) policy and legislation.

UWC members include national and state employer associations, individual employers, insurance carriers and third-party administrators who are impacted directly or indirectly by determinations under the FLSA.

The classification of individuals as employees or as independent contractors is critical to the proper administration of UI and WC. Classification determines whether individuals are covered by the applicable UI or WC law as potentially eligible for benefits, and whether employers or payers are obligated to finance benefits for individuals through state and federal taxes or under applicable workers' compensation laws and policies.

We submit the following comments for your consideration.

1. **The US Department of Labor is not authorized under the FLSA to adopt rules under which to determine whether individuals are employees or independent contractors for purposes of unemployment insurance or workers' compensation programs.**

The classification definitions for UI are independently determined under the Federal Unemployment Tax Act (FUTA), the Social Security Act (SSA) and state

law enacted in each of the 50 states as well as the District of Columbia, Puerto Rico, and the Virgin Islands (SUTA).

The classification definitions for WC are independently determined for workers' compensation programs under the state constitutions or state statutes in each of the 50 states as well as Puerto Rico, Guam, the District of Columbia, and the Virgin Islands.

The classification definitions are established for federal workers compensation programs through the applicable federal statutory authority (e.g. the U.S. Longshore and Harbor Workers Compensation Act, the Federal Employees Compensation Act, the Black Lung Benefits Act, and others.)

There is no federal statutory authority under which the US Department of Labor may establish definitional requirements for UI or WC through rulemaking authorized under FLSA.

The proposed rule, however, on page 159 includes an assumption that "Although the proposed rule only addresses whether a worker is an employee or an independent contractor under the FLSA, the Department assumes in this analysis that employers are likely to keep the status of most workers the same across all benefits and requirements, including for tax purposes."

The rule goes on to speculate that "In addition to affecting tax liabilities for workers, this proposed rule could have an impact on state tax revenue and budgets. Misclassification results in lost revenue and increased costs for states, because states receive less tax revenue than they otherwise would from payroll taxes, and they have reduced funds to unemployment insurance, workers' compensation, and paid leave programs."

These assumptions and projections with respect to tax revenue and workers' compensation are inconsistent with the application of unemployment insurance and workers' Compensation law.

This language should be removed from the proposed rule.

2. **Applying the proposed analysis for classification of employees and independent contractors for FLSA would create confusion and additional inconsistency between determinations under FLSA and federal and state tax authorities and programs that distinguish between these classifications.**

Tax liability is determined by the Internal Revenue Service and state unemployment insurance law with respect to the definition of "employer" and "wages" paid to employees. The proposed analysis in determining whether an

individual is an employee or an independent contractor in many cases would be inconsistent with federal and state tax law (e.g. income tax, FUTA, SUTA, FICA).

In the decades since the enactment of the FLSA there has been considerable evolution in the development of business entities used to determine tax liability and eligibility for various federal and state programs. Individuals may serve as owners of a business entity while also providing services that may be treated as wages or as income subject to taxation. Business entities include not only independent contractors who may be sole proprietors, but also Limited Liability Companies (LLCs), S Corporations, and Limited Partnerships.

The creation of these business entities make it more difficult to distinguish between "owners" and "employees" . Individuals may or may not be dependent in whole or in part on the "owner" or "owners" of the business entity.

3. **Applying the proposed analysis would impose significant additional expense for employers and payroll companies.**

The definition of terms for information to be reported through payroll reports and for other purposes is already extremely complex. Federal and state laws principally rely on definitional distinctions that are based in large part on a determination of direction or control of services performed by individuals.

The proposed rules are inconsistent with this fundamental guidance provided in common law and statutory definition designed to distinguish whether services are performed as an employee or as an independent contractor.

4. **The proposed rule would result in confusion for workers' and employers in determinations under the applicable UI or WC law.**

A determination of employee or independent contractor status under FLSA is not controlling in determinations under unemployment or workers' compensation law. However, it could be considered some evidence of employment status. A change in FLSA would not only impact substantive determinations under FLSA, but also result in confusion for individuals who assume that their status under FLSA would determine their status in eligibility for unemployment compensation or workers' compensation.

The change in definition would also result in confusion with respect to business reporting obligations and federal and tax liability.

Conclusion

The proposed rulemaking indicates that it is not intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves, but that is exactly what it would do. The replacement of the rules adopted in 2021 with a "totality of circumstances" standard increases rather than decreases confusion for employers and workers. It makes it more difficult to make determinations without the legal certainty of specific statutory factors that can be demonstrated. A "totality of circumstances" standard will result in greater risk for employers, increased litigation, increased audits, and incongruity with definitions for tax and benefit program purposes.

The determination of whether individuals are employees or independent contractors is already extremely complicated. The analysis methodology under current FLSA law is better aligned with the analysis of direction or control which is the primary test in most taxing provisions and program eligibility definitions.

It is also worth noting that a review of the full array of the business entities is needed with respect to the relationship between business entities that may be employers and individuals who may be employees or have ownership interests while also providing services.

Finally, we request that the language on Page 159 with respect to impact on unemployment insurance and workers' compensation and the assumption that determinations under the proposed rule would be the same across all benefits and requirements be removed from the rule.

We appreciate the opportunity to submit these comments.

Sincerely,
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