



December 13, 2022

Ms. Jessica Looman
Principal Deputy Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Comments Regarding Employee or Independent Contractor Classification Status Under the Fair Labor Standards Act, 87 Fed. Reg. 62218, *et seq.* (Oct. 13, 2022); RIN 1235-AA43

Dear Ms. Looman:

The National Small Business Association submits the following comments regarding a proposed rule that would significantly reduce the ability of many business owners to operate as independent contractors under the Fair Labor Standards Act. In turn, millions of small businesses that utilize the services of these contractors will be significantly impacted.

The current rule—which was adopted by the Department as recently as 2020 and went into effect on March 8, 2021—utilizes a standard that defines two clear and understandable core factors for determining whether someone is an employee or running an independent business: 1) the opportunities individuals have to control the nature of their work and 2) their ability to have a profit or loss based on their own investment and initiative. Not only are those standards simple, clear, and meaningful, but they go to the core of what it means to run a business: risk and control.

The current (2021) rule provided clarity, uniformity, and simplicity to a system that can often be confusing and arbitrary, allowing all parties to benefit from appropriate business relationships. Particularly given its recent enactment, the move by the Department to rescind the current rule is unwarranted and unsupported by the evidence.

In contrast to the current rule, the proposed rule creates uncertainty and ambiguity—it is clear that the only answer that will never be questioned or scrutinized by the Department of

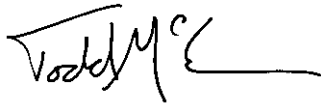
Labor is the determination that an individual is an “employee,” regardless of the nature of the work. That mindset is fundamentally anti-small business and will lead to inefficiency and economic pain for millions of small businesses and independent contractors.

The proposed standard would use a multi-factor “economic realities” test that considers six key factors of the working relationship to determine whether the worker is truly in business for themselves. Importantly, these factors are not weighted according to importance, nor is any direction given to small businesses in making determinations should factors point in different directions. In addition, the Department of Labor reserves the right to utilize “other factors” in making a determination of status.

The ambiguity and lack of clarity creates a scenario where a contracting entity could rarely feel confident that it has correctly classified a worker as an independent contractor. A business that wants to reduce or eliminate risk could only do so by choosing employee status, even if the work is more appropriately classified as that of an independent contractor, and even if that contractor status is desired by both parties.

Accordingly, on behalf of the National Small Business Association and interests of the millions of small businesses it represents, we ask that the Department withdraw the current proposed rule. The new rule will throw into confusion and doubt millions of productive and mutually beneficial independent contractor relationships. The Department has shown no evidence as a basis for rescinding a recent rule that has not yet been given an opportunity to work. The Proposed Rule should be withdrawn.

Yours truly,

A handwritten signature in black ink, appearing to read "Todd McCracken". The signature is stylized with a large, sweeping initial "T" and "M".

Todd McCracken
President and CEO