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Amy DeBisschop
Director
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

RE: Comment on Employee or Independent Contractor Classification Under the Fair Labor Standards Act, Regulation Identifier Number (RIN) 1235-AA43, Docket WHD-2022-0003

Dear Director DeBisschop:

The National Association of Convenience Stores ("NACS") appreciates this opportunity to provide comments on the Department of Labor's ("Labor" or the "Department") proposed rule on Employee or Independent Contractor Classification under the Fair Labor Standards Act (the "Proposed Rule"). NACS is concerned that the Proposed Rule changes legal standards for the determination of whether or not a worker is a contractor or an employee in ways that will disadvantage small businesses, create legal uncertainty, harm beneficial contracting relationships, and undermine compliance with other laws.

I. Background on NACS

NACS is an international trade association representing the convenience store industry with more than 1,500 retail and 1,600 supplier companies as members, the majority of whom are based in the United States.

The convenience store and fuel marketing industry has become a fixture in American society and a critical component of the nation's economy. In 2021, the convenience industry employed approximately 2.38 million employees and generated $705.7 billion in total sales, representing approximately 3.1% of U.S. Gross Domestic Product.

The industry, however, is truly an industry of small business. More than 60% of convenience stores are single-store operators. Less than 0.2% of convenience stores that sell gas are owned by a major oil company and about 4% are owned by a refining company.

Members of the industry process more than 160 million transactions every single day. That means about half of the U.S. population visits one of the industry's stores on a daily basis. In fact, 93% of Americans live within 10 minutes of one of our industry's locations. These businesses are particularly important in urban and rural areas of the country that might not have as many large

businesses. In these locations, the convenience store not only serves as the place to get fuel but is often the grocery store and center of a community.

II. Concerns Regarding the Decision to Repeal and Replace the 2021 Rule

The Proposed Rule would replace the rule that the Department published in January 2021. The 2021 Rule provided clear guidance to the industry regarding the determination of independent contractor or employee status. Industries across the nation, including the convenience industry, examined and revised contracts and made changes to operations in response to the 2021 Rule. Now, as the Department acknowledges, the Proposed Rule would upend the 2021 Rule without providing time to gauge how the 2021 Rule would work in practice. There simply has not been time to evaluate the 2021 Rule nor to see how courts would apply its terms.

The Department's decision to replace the 2021 Rule undermines legal certainty and would require businesses to once again examine contractual and employment relationships and undergo restructuring to ensure compliance with a new legal construct. The burdens of these changes will fall hardest on small businesses that typically do not have the legal resources within their organizations to evaluate the Proposed Rule and formulate necessary compliance changes. The Department has dramatically underestimated these costs to small businesses as noted below in this comment letter.

And, the arbitrariness of the Department's decision to change course without any track record under the 2021 Rule cannot be denied. The determination as to whether to make any changes should have waited until the 2021 Rule was implemented, courts had evaluated it, and there had been sufficient experience to determine what, if any, changes were warranted.

III. Concerns Regarding the Proposed Rule

NACS has concerns regarding specific language of several factors the Proposed Rule makes part of the economic reality test for the determination of independent contractor or employee status. Concerns with different factors are laid out in turn below.

a. Nature and Degree of Control[1]

The 2021 Rule provided that actual practice was more important to the analysis of control than reserved rights. That was an appropriate decision as the functioning of a business relationship is more probative of the economic realities of that relationship than an unexercised reserved right. It is also more consistent with case law. In *Parrish* v. *Premier Directional Drilling, L.P.*,[2] *for example, the Fifth Circuit Court of Appeals found that* "[a]lthough requiring safety training and drug testing is an exercise of control in the most basic sense of the word," it was not dispositive.

In *Iontchev* v. *AAA Cab Service, Inc.*,[3] *t*he Ninth Circuit Court of Appeals followed similar reasoning in finding that contractual clauses that primarily made airport rules and regulations applicable to a contractor did not indicate control that would have led to a conclusion that the

[1] Set forth at proposed 29 CFR §795.110(b)(4).
[2] 917 F.3d 369, 382 (5th Cir. 2019).
[3] 685 F. App'x 548, (9th Cir. 2017).

contractor was an employee. Other cases have taken a similar approach over time.

There are many contractual clauses that businesses insist upon including with agreements with contractors in order to ensure that those businesses are not liable for the contractors' failure to follow legal, safety, and other precautions. This is simply a reality of a legal culture in the United States in which litigation is common and businesses that do not carry out a certain task are nonetheless routinely named in lawsuits.

The Proposed Rule ignores this reality. Specific references to "reserved control" in proposed 29 CFR §795.110(b)(4) and citations to the right to discipline and supervise workers should be removed from the Proposed Rule. These items are common and necessary in many instances to avoid liability and, if they are not exercised, should not be deemed to be significant to the independent contractor analysis.

In addition, the inclusion in contracts of obligations to follow relevant laws and regulations should not be part of a determination of control for purposes of the independent contractor analysis. Inclusion of these aspects of the Proposed Rule will have the primary effect of pressuring businesses to remove such provisions from their contracts, undermining overall compliance with laws. This is a particular concern with respect to laws setting workplace safety standards. The Department should not create pressure that undermines contractors' compliance with legal and safety requirements. Unless modified, the Proposed Rule would have that effect.

The references in the explanation to businesses that require workers to be licensed or meet other such legal requirements are similar.[4] The Department should not undermine businesses that want to ensure that workers are properly licensed to perform work. Doing so could lead to problems with work quality and other aspects of work being performed across a broad range of the economy.

b. Investments[5]

While consideration of investments made by a worker is a relevant part of the analysis under the economic reality test, one part of the language of that provision of the Proposed Rule goes too far and would have negative consequences for the economy. Specifically, the following language is harmful, "Additionally, the worker's investments should be considered on a relative basis with the employer's investments in its overall business. The worker's investments need not be equal to the employer's investments, but the worker's investments should support an independent business or serve a business-like function for this factor to indicate independent contractor status."[6] The predictable result of comparing a worker's investments to that of the business with which that worker contracts will be a preference for businesses to seek large contractors. This will systematically disadvantage small businesses and make it difficult for them

[4] See 87 Fed. Reg. 62257.
[5] Set forth at proposed 29 CFR §795.110(b)(2).
[6] It is worth noting that the use of the word "employer" in the Proposed Rule indicates a bias in the analysis. Whether or not a business is an "employer" with respect to a particular worker is the question to be resolved. Just using the word "employer" appears to assume that the business should be found to be just that. This bias in the language recurs at many points throughout the Proposed Rule and should be changed so that decisions as to the status of a business/worker are not prejudged.

to secure business. That outcome could be avoided by removing the language quoted above from the Proposed Rule.

It is also worth noting that the comparison of the size of investments could make it quite difficult for any business to be deemed an independent contractor for some very large businesses simply due to the size of those businesses. That cannot be the right outcome and would contradict case law. Such a counterintuitive outcome should be avoided. A worker does not become an employee simply because the business it contracts with is large rather than small.

c. Integral to the Business[7]

The Proposed Rule's provision indicating that the degree to which a function is integral to a business should weigh in the independent contractor analysis should be removed or revised. Many businesses routinely contract with clearly independent businesses for core functions. That is part of the nature of the modern economy. Using that model does not turn those workers into employees rather than independent contractors. The Department's 2021 Rule had this analysis right by looking at how the worker was integrated into the work of the contracting business as a practical matter. That is more probative of a worker's status than how important a particular function is to the employer.

In addition, the language in the preamble explaining this factor goes too far by stating, "For example, if the employer could not function without the service performed by the workers, then the service they provide is integral."[8] Many businesses could not operate without a great variety of services. It is common, for example, for businesses to contract with an outside service to pick up and haul away waste. While those are clearly independent contractor relationships, businesses could not function without having waste taken away as that would create safety hazards and, eventually, physically block aspects of many businesses' operations. Businesses contract with a very broad range of independent contractors to do things that are necessary to the functioning of their business. If those functions weren't necessary, many of them would be cut to save money. None of that indicates that a contractor's workers are employees of the contracting business. That language and this factor should be rewritten.

Other language attempting to explain and justify this factor in the analysis demonstrates that the factor is simply inappropriate to include. For example, the preamble explains "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."[9] But this turns the analysis completely on its head as the "integral to the business" factor demonstrates the employers economic dependence on the worker – not the other way around. Nothing about how integral a piece of work is to a business indicates that the worker will be economically dependent on the business. Instead, it gives the worker significant bargaining power. By attempting to twist the relationship to make its meaning the opposite of what it actually is, this explanation shows that the "integral to the business" factor is actually not probative of independent contractor status in the way that the

[7] Set forth at proposed 29 CFR §795.110(b)(5).
[8] 87 Fed. Reg. 62253.
[9] 87 Fed. Reg. 62253.

Proposed Rule asserts.

d. Degree of Permanence of the Business Relationship[10]

The degree of permanence of a contractual relationship should not militate in favor of concluding that a worker is an employee in the way that the Proposed Rule asserts. Many contractual relationships are renewed with regularity because that is valuable to the independent contractor. In fact, many contractors value the consistency of a continued relationship and steady revenue to such a degree that they provide significant economic discounts to businesses that are willing to agree to such terms. That is a very common arrangement, for example, for law firms that value consistent and unbroken retainers from their clients. Similarly, businesses contracting for services value those consistent relationships because they typically lead to better performance and minimize the need for instruction from the business regarding the particulars of their needs. The Department should examine these relationships in a complete way, consistent with the longstanding economic reality test, and not merely assume that long-term contractual relationships are an indication of employment status. They are not.

e. Small Business Analysis

Pursuant to the Regulatory Flexibility Act ("RFA"), the Department must minimize any significant burdens imposed on small entities by its regulatory actions.[11] Specifically, the RFA requires the Department to provide an Initial Regulatory Flexibility Analysis ("IRFA") that includes: (1) a description of the reasons why the regulatory action is being taken; (2) the objectives and legal basis for the proposed regulation; (3) a description and estimate of compliance requirements, including any differential for different categories of small entities; (5) identification of duplication, overlap and conflict with other rules and regulations and (6) a description of significant alternatives to the rule.[12]

The analysis of the burdens on small businesses in the Proposed Rule are not adequate and do not meet the requirements of the RFA. The costs that the Proposed Rule assumes small businesses will incur to become familiar with and comply with its terms are not realistic. For example, the Proposed Rule asserts that the costs for businesses to familiarize themselves with the Proposed Rule will be $24.97 for small employers and $5.34 for contractors. That is woefully insufficient. Most businesses will need to hire outside law firms to advise them on the components of the Proposed Rule and its significance for their specific business. The exception to that will typically be for large businesses that have in-house legal departments. Small businesses do not typically have in-house lawyers and must rely on outside counsel.

Counsel to small businesses will not simply need to familiarize themselves with the Proposed Rule, but they will need to audit the businesses' contractual relationships in order to determine whether and how those contracts would need to be rewritten in light of the Proposed Rule. That will take many hours of work by expensive lawyers. The estimates cited by the Department would not pay a single lawyer to review a single contract. This demonstrates that the Department did not engage in a legitimate small business analysis as is required by the RFA. The

[10] Set forth at proposed 29 CFR §795.110(b)(3).
[11] 5 U.S.C. § 601-612, as amended.
[12] *Id.* at § 603.

comment letter submitted by the U.S. Small Business Administration Office of Advocacy provides helpful background on the shortcomings of the cost estimates in the Proposed Rule.

In addition, the regulatory alternatives examined by the Department were not adequate because the Department did not consider the alternative of leaving the 2021 Rule in place. Small businesses across the nation had already incurred significant compliance costs to bring their practices into compliance with the 2021 Rule. Many of those costs have been rendered wasted by the Department's decision to replace the 2021 Rule. Now, small businesses will need to repeat similar processes – and with no guarantee that the Department won't simply reverse itself yet again in the near future. Without examining this clear alternative which would be the best outcome for small businesses, the Department's RFA analysis is inadequate and does not satisfy the requirements of the law.

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As noted, NACS is concerned that the Proposed Rule changes legal standards for the determination of whether or not a worker is a contractor or an employee in ways that will disadvantage small businesses, create legal uncertainty, harm beneficial contracting relationships, and undermine compliance with other laws. We urge the Department to withdraw the Proposed Rule and reexamine the option of leaving the 2021 Rule in place in order to gauge how it works in practice. Alternatively, we urge the Department to make changes to the Proposed Rule as outlined in the specific comments provided to ensure that the analysis of independent contractor status is fair and does not have negative consequences for compliance with other laws.

Sincerely,

Doug Kantor
NACS General Counsel