AMERICANS FOR PROSPERITY FOUNDATION

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Submitted Via Regulations.gov

The Honorable Eugene Scalia
Secretary
United States Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

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: Comments on Notice of Proposed Rulemaking, Independent Contractor Status under the Fair Labor Standards Act, 85 Fed. Reg. 60,600 (Sept. 25, 2020), RIN 1235-AA34.

Dear Secretary Scalia and Ms. DeBisschop:

We write on behalf of Americans for Prosperity Foundation ("AFPF"), a 501(c)(3) nonpartisan organization that educates and trains citizens to be advocates for freedom, creating real change at the local, state, and federal levels.[1] AFPF appreciates this opportunity to comment on the Department's Notice of Proposed Rulemaking regarding Independent Contractor Status under the Fair Labor Standards Act, as published at 85 Fed. Reg. 60,600 (the "NPRM").

I. Introductory Comments.

The NPRM proposes new regulations to clarify the Department's interpretation of independent contractor status under the Fair Labor Standards Act ("FLSA"). The stated purpose of the new regulations is "to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy." 85 Fed. Reg. at 60,600.

AFPF applauds the Department's efforts to bring greater clarity and certainty to the question of independent contracting, a status that applies to millions of gig economy workers, freelancers, and self-employed entrepreneurs. This effort is long overdue and much needed. AFPF believes people should be empowered to earn success and fulfillment through their work

[1] *See* AMERICANS FOR PROSPERITY FOUNDATION, https://americansforprosperityfoundation.org/.

and that freedom to choose the kind and type of work they wish to pursue, and under what conditions, is crucial to that empowerment. Policy and rules that support independent contracting help make this possible, as they allow individuals the ability to enjoy flexible working arrangements and to chart their own career success. That means working mothers, fathers, college students, recent graduates, and more can provide valued services in transportation, medical, food delivery, construction, and many other industries, while also tending to other priorities in their lives. The Department should foster freedom of contract and promote the ability of people to offer their time and skills as independent contractors, thereby empowering individuals to direct their own schedules and provide services to a broader range of businesses and customers as they see fit.

In testimony provided to the U.S. House Committee on Education and the Workforce in June 2018, Jared Meyer, Senior Fellow at the Foundation for Government Accountability, explained that independent contracting should be supported, as it creates greater opportunities, job satisfaction, and economic efficiencies:

> In the 20th century, the financial and time costs were too high for many firms to benefit from contracting out work. Everything from finding the right provider and coming to an agreement on cost, to determining quality and enforcing contracts, carried higher costs than they do today. . . . But today, lower transaction costs, driven by advances in technology, have led to more opportunities for firms to use outside workers rather than in-house employees. Independent contractors are the driving force behind this change. Working as an independent contractor allows someone to choose his or her hours and benefit from flexible work arrangements.
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> Across all sectors of the economy, technology creates entrepreneurial opportunities for anyone with productive resources. These resources can be anything from physical or intellectual services (such as handyman jobs, academic tutoring, and legal advice) to the use of property (be it a drill, car, or spare room). . . . Though the employee-employer model of work is still the most common work relationship, further advances in technology and changing worker preferences should lead to steadily-increasing levels of alternative work arrangements.[2]

In establishing and applying its rules governing independent contractor status, the Department therefore should protect the right of individuals to provide their services in and through voluntary agreements without restrictions. The greater the contract freedom, the greater the opportunity workers and businesses have to create flexible worker arrangements that meet the needs of both workers and consumers. And the Department should look to expand the right to work as independent contractors because people want that freedom. In a 2015 report, the Government Accountability Office explained that 56.8 per cent of independent contractors were

[2] Jared Meyer, Testimony on Growth, Opportunity, and Change in the U.S. Labor Market, U.S. House of Representatives Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor, and Pensions at 1, (June 21, 2018), https://thefga.org/wp-content/uploads/2018/06/Meyer.EWTestimony.pdf.

"very satisfied" with their jobs compared to just 45.3 per cent of standard full-time workers.[3] A 2017 survey conducted by the Department's Bureau of Labor Statistics reported that 79 per cent of independent contractors prefer their existing arrangement to traditional employment.[4] By contrast, only 44 per cent of on-call workers and 39 per cent of temporary agency workers preferred their alternative work arrangements,[5] demonstrating that easier access to independent contractor jobs would improve job satisfaction and opportunities even for alternative arrangement workers.[6] Further, the need for flexible work arrangements has only increased as a result of COVID-19.

On the other hand, the creation of barriers and requirements that limit peoples' ability to work as independent contractors undermine the entrepreneurialism and freedom that benefits both individual workers and the wider economy. The proper role of government is to protect rather than inhibit individual freedom, including in the decisions people make about their work arrangements. Unfortunately, past applications of the FLSA by both courts and prior administrations has led to a confused regulatory landscape that hinders rather than promotes the free choice of individuals to work as independent contractors. The confused and overly complicated regulatory framework undermines economic prosperity, limits consumer choice, burdens both employers and workers, and stands in stark contrast to the ideals of liberty embodied in this country's founding documents. The Department accordingly should work to protect the right of individuals to work as independent contractors and should enshrine in its new regulations its institutional support for such a status by ensuring its employment determinations do not improperly undermine this right.

II. Comments on the Economic Reality Test.

AFPF concurs with the Department that new regulations are needed to clarify independent contractor status in large part because the existing test under the FLSA lacks clarity, consistency, and rigor. As the NPRM summarizes, "the Department believes the current multifactor economic reality test suffers because the analytical lens through which all the factors are to be filtered remains inconsistent; there is no clear principle regarding how to balance the multiple factors; the lines between many of the factors are blurred; and these shortcomings have become more apparent in the modern economy. The result is legal uncertainty that obscures workers' and businesses' respective rights and obligations under the FLSA. Such uncertainty is

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[3] U.S. Gov't Accountability Office, *Contingent Workforce* 24 (April 20,2015), https://www.gao.gov/assets/670/669766.pdf.

[4] Bureau of Labor Statistics, Dep't of Labor, *Contingent and Alternative Employment Arrangements — May 2017*, at 6, https://www.bls.gov/news.release/pdf/conemp.pdf.

[5] *Id.* at 3.

[6] *See also* Meyer, *supra* note 2, at 3-4 ("Deloitte's 2018 millennial survey finds that 78 percent of people born from the beginning of to the end of 1994 would consider short-term contracts or freelance work to supplement full-time employment. Furthermore, 57 percent would consider this type of alternative work instead of full-time employment. Beyond the potential for higher income, flexibility and work/life balance are the top reasons why young workers are interested in alternative work arrangements. The value of independent contractor work as supplemental income cannot be ignored. For the 70 percent of Americans ages 18 to 24 who experience an average change of over 30 percent in their monthly incomes, the opportunity to smooth out earnings to meet rent, pay down student loans, or fund a new business venture is a clear benefit of alternative work arrangements.").

especially acute when it comes to the growing number of more flexible and nimble work relationships." 85 Fed. Reg. at 60,609.

Ideally, this uncertainty and lack of clarity could be remedied by applying a simple test that asks whether the worker supplies his or her services to the putative employer pursuant to a commercial contract. If so, the worker is an independent contractor and no further inquiry is necessary. Such a test would maximize contract freedom and give effect to the expectations of both sides of the contractual relationship.

However, recognizing that the Department is constrained by existing case law, AFPF supports the NPRM's proposal to clarify the economic reality test for determining if a worker is an independent contractor or an employee for purposes of the FLSA. AFPF agrees that the goal of the inquiry should be to determine whether, as a matter of economic reality, the worker is "in business for him- or herself (independent contractor) or is economically dependent on a potential employer for work (employee)." *Id.* at 60,610; *c.f., Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998) ("[T]he focal point is whether the individual is economically dependent on the business to which he renders service . . . or is, as a matter of economic fact, in business for himself.") (cleaned up).

To help answer that inquiry, the NPRM proposes a five-factor test, with weighted emphasis on the first two factors: "the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss." 85 Fed. Reg. at 60,600. As the NPRM discusses, weighting the first two of the factors is a novel approach, but APPF believes it makes imminent sense and is justified by existing case law and economic reality.[7] The Department is correct that these two core factors "drive at the heart of what it means to be an independent contractor who is in business for oneself and are the most relevant factors in virtually every case." *Id.* at 60,620. AFPF, however, urges the Department to go one step further. To make the test easier to apply and to ensure greater consistency in its application, no further inquiry should be required if the analysis of these two factors support the same conclusion, whether that be an independent contractor or an employee. Only if these two factors support opposite conclusions should it be necessary to invoke the additional factors identified in the NPRM.[8]

Specific comments on each of the proposed factors follow.

A. The Control Factor.

With respect to the control factor, the first of the two core factors, the NPRM proposes to codify the following provision at 29 C.F.R. §795.105(d)(1)(i):

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[7] *See, e.g., Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1051 (5th Cir. 1987); *Saleem v. Corporate Transp. Group, Ltd.*, 854 F.3d 131, 138-47 (2d Cir. 2017); *Agerbrink v. Model Service LLC*, 787 F. App'x 22, 25-27 (2d Cir. 2019); *Karlson v. Action Process Serv. & Private* Investigation*, LLC*, 860 F.3d 1089, 1095 (8th Cir. 2017).

[8] "The two core factors drive at the heart of the economic dependence question because they bear a causal relationship with the ultimate inquiry. A worker's control over the work and the opportunity for profit or loss are generally what transforms him or her from being economically dependent on an employer as a matter of economic reality into being in business for him- or herself. This is not so with the other factors." 85 Fed. Reg. at 60,621. AFPF concurs.

> This factor weighs towards the individual being an independent contractor to the extent the individual, as opposed to the potential employer, exercises substantial control over key aspects of the performance of the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer's competitors. In contrast, this factor weighs in favor of the individual being an employee under the Act to the extent the potential employer, as opposed to the individual, exercises substantial control over key aspects of the performance of the work, such as by controlling the individual's schedule or workload and/or by directly or indirectly requiring the individual to work exclusively for the potential employer. Requiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act.

AFPF agrees with the NPRM's clarification that requiring an individual "to comply with specific legal obligations, satisfy health and safety standards, carry insurance, [etc.]" should not and does not constitute evidence of control and thus does not make an individual more or less likely to be an employee. AFPF would add that any government-imposed obligation on an entity in its relationships with those who provide it services also should be noted as not indicative of control.

In addition, although the ability to work for a putative employer's competitors supports independent contractor status, the opposite is not necessarily true. AFPF does not believe a requirement that the individual work exclusively for the putative employer is probative of either status because there may be valid reasons why a party would contract with an independent contractor with that condition imposed as part of the contractual relationship. The freedom of two independent parties to reach agreement on terms acceptable to both of them should not be artificially limited by fear that the independent contractor may later be declared an employee.

B. Opportunity for Profit and Loss Factor.

With respect to the opportunity for profit and loss factor, the second of the two core factors, the NPRM proposes to codify the following provision at 29 C.F.R. §795.105(d)(1)(ii):

> This factor weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work. While the effects of the individual's exercise of initiative and management of investment are both considered under this factor, 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. This factor weighs towards the

> individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or more efficiently.

This provision adopts the Second Circuit's innovation of combing into a single factor "opportunity for profit or loss "and "investment" rather than treating these factors separately. AFPF agrees with this approach, as it better encompasses both traditional independent contractors who often make significant capital investment in their business and many independent contractors in today's changing environment who are able to perform their services with minimal capital investment.

One additional consideration that falls under this heading is the ability to identify and select new business opportunities and potential customers, which is a hallmark of an independent contractor in business for himself and is a key consideration of that business' ability to earn a profit. To a certain extent, this consideration overlaps with the control factor, but that is simply further evidence that where these two core factors point in the same direction, no further inquiry using the other factors is required.

C. Other Factors.

The NPRM outlines three additional factors that are less probative of the employee versus independent contractor question but nevertheless are designed to help answer the question, at least in certain circumstances. AFPF expresses its support for the second and third of these factors as written and explained in the NPRM.

However, with respect to the first of these additional factors—the amount of skill required for the work (to be codified at 29 C.F.R. § 795.105(d)(2)(i))—AFPF believes this factor should be eliminated from the economic reality test as unhelpful to answering the question of whether an individual should be classified as an independent contractor or an employee. As formulated, the factor looks to any specialized training or skill necessary to the performance of the work, but there are numerous instances where the same individual, possessing the same skills or specialized training, could work as either an independent contractor or an employee. An attorney, for example, could work as a lawyer for a law firm or as in-house counsel to a company, in which case the attorney would be classified as an employee. Alternatively, the attorney could contract his work to that same law firm or company on a temporary or individual project basis, and in that case would most likely be acting as an independent contractor. The specialized training and skills needed to work as an attorney, in other words, would be the same in both situations and yet have nothing to do with whether the attorney was an employee or an independent contractor is any particular instance.

In addition, although the NPRM explains that "the 'skill required' factor weighs in favor of classification as an independent contractor where the work at issue requires specialized training or skill that the potential employer does not provide," 86 Fed. Reg. at 60, 615, there are many examples, such as those where the independent contractor works in the transportation sector (delivery, Uber, etc.) where little or no specialized training is necessary and yet the status of the worker as an independent contractor is not in doubt.

The NPRM explains that, although some courts have included the concept of "initiative" under this heading, the proposal for this factor excludes that consideration: "Notably, this factor would not include a consideration of 'initiative' (or the related concepts of judgment and foresight) because facts related to initiative are considered as part of the control and opportunity for profit or loss factors." *Id,* at 60,615. AFPF agrees that consideration of initiative, judgment, foresight, and so on are better handled under the two core factors of control and opportunity for profit and loss. But once those considerations are relocated to those two core factors, there is nothing left over worth retaining under the heading of a "skill" factor. As such, AFPF believes the skill factor is an empty category that should be eliminated altogether from the economic reality test.

III. The Department's Approach To Defining Independent Contractors for Purposes of the FLSA Should Apply Wherever the Department References the FLSA.

The NPRM explains that, "[i]f this proposed rule were finalized, it would contain the Department's sole and authoritative interpretation of independent contractor status under the FLSA. . . . The Department considered making similar revisions to its regulation addressing independent contractor status under the [Migrant and Seasonal Agricultural Worker Protection Act (MSPA)] in 29 CFR 500.20(h)(4), but is [] proposing not to make such revisions at this time, as explained further below. The Department invites comments on the need for conforming edits to these or similar provisions." *Id*. at 60,605.

The Department's stated purpose in addressing the definition of independent contractors through the NPRM is to "clarify[] and sharpen[] a test that has become less clear and consistent through decades of case-by-case administration in the courts of appeals." *Id.* "The Department believes that stakeholders would benefit from clarification. As such, the Department is proposing to promulgate a clearer and more consistent standard for evaluating whether a worker is an employee or independent contractor under the FLSA." *Id.* at 60,604.

To further the Department's goal of clarification, simplification, and consistency, AFPF believes the same criteria used in the NPRM to define independent contractors for purposes of the FLSA also should apply to the MSPA, and to any other provision that references the FLSA. As the NPRM notes, the "MSPA incorporates [the FLSA] definition [of 'employ'], and it asks 'whether or not an independent contractor or employment relationship exist under the Fair Labor Standards Act.'" *Id*. at 60,604. Thus, the intent of Congress in enacting the MSPA was to incorporate the FLSA definition of employ and employee—and hence, by implication, its treatment of independent contractors. To effectuate Congress' intent, and to promote the Department's goal of clarity and consistency, the Department should create a unified approach under these two statutes, and extend that same approach to any other legislation or regulation that refers back to the FLSA for its definition of employ and employee.

IV. The Department's Analysis Justifies the Proposed Rule and Is of Sufficient Rigor.

AFPF also has reviewed the Department's analyses developed pursuant to Executive Order 12866, Executive Order 13563, and the Regulatory Flexibility Act. We think the analyses support the proposed rulemaking, uses the best, if limited, available evidence, and is of sufficient quality to justify finalization of the rule. Insofar as there are data or methodological limitations in the NPRM, AFPF believes they would tend towards an overstatement of regulatory familiarization costs and an understatement of cost savings, including from pre-filing litigation costs avoided through greater clarity. We agree with the Department's decision to not quantify potential changes in the aggregate number of independent contractors. AFPF concurs that the Department has adequately analyzed potential alternatives as well as selected the least burdensome option under the Unfunded Mandates Reform Act of 1995.

The Department requested comments "on the possible impacts resulting from the COVID-19 pandemic as it relates to the composition of the labor market, the share and scope of independent contractors in the workforce, and any associated wage effects." 85 Fed. Reg. at 60,623. Although AFPF does not believe COVID-19-related insights need to fundamentally alter the Department's analysis, polling[9] as well as commentary from Americans for Prosperity[10] and the Heritage Foundation[11] suggests that the pandemic has underscored the need and urgency for greater clarity in establishing independent contractor status.

V. Effective date.

The NPRM is addressing an important area of law that will affect millions of workers. The clarity and certainty that these new regulations will bring to the question of independent contractor status should be put into effect as soon as possible. AFPF therefore believes the Department, pursuant to its authority under 5 U.S.C. § 553(d)(2) and/or (3), should add a statement to its final rule that will make the rule effective immediately upon publication in the Federal Register.

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Thank you for your time and attention. If we can provide any additional information or otherwise be of further assistance, please do not hesitate to contact us.

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[9] Upwork, *Freelance Forward 2020* (Sept. 2020), https://www.upwork.com/documents/freelance-forward-2020.

[10] Americans for Prosperity, *Department of Labor's independent contractor rule reduces workplace uncertainty* (Sept. 28, 2020), https://americansforprosperity.org/department-of-labors-independent-contractor-rule-reduces-workplace-uncertainty/.

[11] Rachel Greszler, *How a Rise in Independent Work Is Benefitting Women* (Sept. 30, 2020), https://www.heritage.org/jobs-and-labor/commentary/how-rise-independent-work-benefitting-women; Rachel Greszler, *Defining 'Contractor' Status Would Provide Some Relief for Struggling Workers and Small Businesses* (Sept. 23, 2020), https://www.heritage.org/jobs-and-labor/commentary/defining-contractor-status-would-provide-some-relief-struggling-workers.

Respectfully submitted,

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