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By electronic submission: <http://www.regulations.gov>

Ms. Jessica Looman  
Principal Deputy Administrator  
Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Avenue, NW  
Washington, DC 20210

Re: RIN 1245-AA43 - Employee or Independent Contractor Classification Under the Fair Labor Standards Act: Notice of Proposed Rulemaking and Request for Comments

Dear Ms. Looman:

These Comments are submitted on behalf of the Coalition for Workforce Innovation (“CWI”) and pursuant to the U.S. Department of Labor Wage and Hour Division’s (the “Department” or “DOL”) notice of proposed rulemaking and request for comments regarding *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*, 87 Fed. Reg. 62218 (Oct. 13, 2022) (the “Proposed Rule”).

Upon review under the Administrative Procedure Act (the “APA”), CWI believes that courts must conclude that the Proposed Rule was promulgated in an arbitrary and capricious manner for several reasons, including specifically the Department’s failure to satisfy the Supreme Court’s requirement that an implementing agency’s promulgation of new and different rules upon a change in presidential administrations must examine the relevant data and articulate a rational connection between those facts and the choice made. In addition, CWI believes that reviewing courts will conclude that the Proposed Rule violates that APA because it is not based on a reasonable interpretation of the Fair Labor Standards Act (“FLSA”).

Equally critical, the Department’s 2021 independent contractor rule (the “2021 IC Rule”) was grounded in applicable law, provides a balanced clarity and certainty to the economic realities factors for workers and businesses alike under the FLSA, and ensures that each factor is properly

tailored to address the ultimate determinant of employee or independent contractor status—economic dependence. It focuses the analysis on the two core factors—opportunity for profit or loss and the worker’s control over the work—that are typically outcome-determinative. Clarity brings compliance, certainty, and effective streamlined enforcement of the Act’s obligations. CWI believes that the Proposed Rule, on the other hand, injects uncertainty into the analysis, diverts the factors away from considerations bearing on economic dependence, and fails to account for many of the actual realities of modern work arrangements.

The 2021 IC Rule presents an appropriate, modern embodiment of how economic dependence should be evaluated. The Proposed Rule does not. The 2021 IC Rule offers sound public policy that creates a clearly defined standard benefitting all independent workers, businesses, consumers, workplaces, and the economy generally. The Proposed Rule does not. And, the 2021 IC Rule offers the certainty and guideposts that have long been lacking from the economic realities analysis. The Proposed Rule does not.

Thus, for all the reasons discussed in these Comments, CWI opposes the Department’s Proposed Rule. The Department should not rescind the 2021 IC Rule or take any further action to attempt to affect its application to the independent contractor analysis under the FLSA.

### **STATEMENT OF INTEREST**

The Coalition for Workforce Innovation has brought together diverse stakeholders representing worker advocates, small business start-ups, entrepreneurs, technology companies, and traditional businesses and associations representing companies in the media, transportation, distribution, retail, and service industries. CWI members include: the Retail Industry Leaders Association (“RILA”), the Direct Selling Association (“DSA”), iPSE-U.S., iWorker Innovations, LLC, HUNGRY, nTech Workforce, Wonolo, Hyr Inc., The National Home Delivery Association (“NHDA”), TechNet, The Transportation Alliance (“TTA”), The Customized Logistics and Delivery Association (“CLDA”), Hyer, The National Club Association (“NCA”), the Promotional Products Association International (“PPAI”), Veryable, America’s Newspapers, The Food Industry Association (“FMI”), Transportation Intermediaries Association (“TIA”), the National Limousine Association (“NLA”), and LifeSciHub, all of which have specifically, individually signed on to these Comments.

RILA is a trade association of retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, more than 42 million American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

The Direct Selling Association, or DSA, has served for more than a century as the national trade association for companies that offer entrepreneurial opportunities to individuals who market and sell products and services, typically outside of a fixed retail establishment. The association serves to police, promote, and protect direct selling through advocacy, networking, and education for member executives and salesforce. DSA represents more than 7.3 million active direct sellers and 44.6 million preferred customers and discount buyers that contributed \$42.7 billion in sales to the American economy in 2021. Direct sales increased 6.4% from 2020-2021 and have grown almost 22% since 2019.

iPSE-U.S. is America's first national association focused on "workstyle," not work type. iPSE-U.S. empowers and supports independent workers in a multitude of ways. It has a subscription-based business model. This association provides independent workers with access to bundled benefit packages and other products, as well as a space for workers to belong and have resources that are typically in an employee/employer relationship. iPSE-U.S. provides independent workers with resources to assist them in their economic endeavors.

iPSE-U.S. was founded on the belief of "for the people." Many individuals choose independent work opportunities while others may enter into an independent workstyle because of circumstance. iPSE-U.S. not only gives access to group-rated products, such as healthcare solutions, telemedicine, education, legal assistance, identity theft, and roadside assistance, to name a few. It also provides an independent business network and community that is not normally available to allow independent workers to connect with each other and resources to support their work choices. This is the true "Future of Work" and iPSE-U.S. is for independent workers.

iWorker Innovations, LLC is a national insurance brokerage and association management company that specializes in providing benefit packages and services customized for the self-employed by partnering with the workforce firms and associations who represent them. iWorker Innovations delivers bundled portable benefits that enable the self-employed to thrive.

HUNGRY is a national platform for top local chefs and food delivery services. It began as a tech-enabled platform for office and event catering, connecting clients to chef entrepreneurs, and has rapidly grown into a national platform for top chef-made food production and delivery services that also includes business and event catering, contracted meal delivery services, chef-centric pop-ups, virtual chef experiences, and home meal delivery.

nTech Workforce is a leading staffing service provider with national reach. nTech Workforce bridges the divide between business objectives and capabilities through a portfolio of staffing and human resources services. nTech Workforce takes on difficult talent acquisition challenges to connect the most qualified talent with customers, curate talent ecosystems, cultivate relationships with company alumni, and consult with business leaders to eliminate bottlenecks or close gaps in strategic workforce planning. nTech Workforce's extended workforce strengthens businesses by improving accessibility to business and information technology professionals, and ensuring that the capabilities are in place to meet existing or emerging objectives.

Wonolo is an online platform that connects over 500,000 workers to retail, e-commerce, distribution, fulfillment, and other types of blue collar, frontline jobs throughout the U.S. These "Work Now Locally" opportunities vary widely, from customer service, delivery, and event staffing to food production, warehousing, and manufacturing.

Hyr Inc. is an app-based platform that instantly connects businesses with skilled and experienced gig workers to fill hourly paid shifts. Hyr's marketplace helps hospitality and retail businesses find extra workers, and helps gig workers earn extra money. Gig workers in the Hyr marketplace earn on top of their hourly earnings with a points-based benefits program. Hyr has been deployed to more than 30,000 gig workers and has helped hundreds of businesses fill shifts when they need to most, while decreasing their operation costs and elevating their customer experience.

The National Home Delivery Association, or NHDA, represents the leading home delivery companies specializing in the “white glove” delivery and set-up of appliances, furniture, exercise equipment, and large electronics to homes across the country. NHDA members are national companies, often regionally based, that serve as the logistics intermediary between retailers, both online and “brick and mortar,” and the retailers’ customers. This segment of the logistics industry has estimated annual revenues in excess of \$12 billion. Eighty-seven percent (87.5%) of the actual deliveries to homes are conducted by independent contractors according to a recent industry study conducted by Armstrong and Associates. NHDA members are a vital segment of America’s retail economy.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and fifty-state level. TechNet’s diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over five million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance.

The Transportation Alliance, established in 1917, is the nonprofit trade association that represents organizations providing transportation services for-hire — black car, livery, limousine, non-emergency medical, paratransit, sedan, shuttle and taxicab fleets. The Transportation Alliance’s member organizations operate more than 100,000 passenger vehicles and transport hundreds of millions passengers annually.

The Customized Logistics and Delivery Association, or CLDA, is a non-profit trade association that advances the interests of the customized logistics and delivery industry through advocacy, networking, and education. As an industry thought leader and representative for our members, the CLDA is committed to providing the resources and education for first to last mile carriers to stay educated about industry trends and opportunities.

Hyer, a leading on-demand labor app powering the gig economy, connects workers to businesses in real-time. Delivering temporary staffing to leading retailers, warehouses, hotels, and restaurants in the tap of an app—the Hyer team is continually guided by its vision to Reinvent How Work Gets Done. With a pool of 300,000 independent workers, Hyer enables businesses to secure labor when and where they need it—all while providing workers with the flexibility they crave in today’s changing world.

The National Club Association, or NCA, represents the private club community comprised of golf, country, city, athletic, yacht, and other specialty social and recreational clubs. There are more than 4,000 private clubs in the United States employing more than 350,000 individuals nationwide accounting for \$9 billion in annual payroll.

Founded in 1903, the Promotional Products Association International, or PPAI, serves over 15,000 corporate members of the \$22 billion promotional products industry which is comprised of more than 37,000 businesses, 98 percent of which are small businesses, and a workforce of nearly 500,000 professionals.

Veryable is the on-demand marketplace for manufacturing, logistics, and warehousing labor. Veryable’s flexible labor solution connects businesses with high-quality workers at the click of a button, enabling higher productivity and a competitive edge. For workers, Veryable

provides immediate access to work, the ability to control their own schedule, opportunities to build new skills, and best of all, next-day pay.

America's Newspapers is the voice of the newspaper industry, representing more than 1,600 local newspapers across all 50 states and Canada. America's Newspapers advocates for its members at the local, state, and national levels on issues of critical importance to newspapers, including protection of first amendment rights; support for local journalism; digital equity to provide fair compensation from major tech platforms; and defense of public notices to provide broad distribution of local governmental matters.

The Food Industry Association works with and on behalf of the entire industry to advance a safer, healthier, and more efficient consumer food supply chain. FMI brings together a wide range of members across the value chain – from retailers that sell to consumers, to producers that supply food and other products, as well as a variety of companies providing critical services – to amplify the collective work of the industry. The food industry provides a range of full-time, part-time, seasonal, and flexible workforce opportunities in a diverse variety of careers and serves as an essential employer in every community around the country.

The Transportation Intermediaries Association is the professional organization of the \$232 billion third-party logistics industry. TIA is the only U.S. organization exclusively representing transportation intermediaries of all disciplines doing business in domestic and international commerce. TIA serves as the center of the supply chain between shippers, carriers, government officials, and international organizations.

The National Limousine Association, or NLA, is the trade association dedicated to representing and furthering the national, state, and local interests of the prearranged ground transportation industry. Its membership includes owners and operators of shuttles, sedans, buses, and limousines as well as the associated suppliers, manufacturers, and regional and state associations.

LifeSciHub is a community of independent pharmaceutical research and development experts. According to our research, approximately 4% of the US pharmaceutical R&D workforce decouple from the corporate entity to become independently incorporated independent experts each year. This is due to two factors: after 10 or more years of experience, demand is high but promotions and other traditional corporate benefits are few; M&A activity is so rampant as to make the corporate career path less stable than independent incorporation. As small businesses, these experts all have multiple drug sponsor clients and assume the risk of their own utility rates. And yet, drug sponsor engagement with this incredibly valuable talent pool is severely impacted by fears of worker misclassification risk. In drug development, where talent shortages have a quantifiable impact on human lives and health, it is critical to help businesses embrace and strategically engage the independently incorporated small business workforce.

CWI members support efforts to modernize federal workforce policy to enhance choice, flexibility, and economic opportunity for all workers. CWI supports the adoption of clear, modern definitions of independent contractor status to ensure that opportunities for independent workers are not restricted, and to allow and foster enhanced flexibility for students, parents, small entrepreneurs, and retirees, as well as others who prioritize the flexibility and freedom independent work provides. CWI also supports lowering barriers to work and entrepreneurship for communities

that have traditionally struggled in the job market, including opportunities for immigrants, caregivers, veterans, first-time small business owners and entrepreneurs, and individuals with criminal backgrounds.

CWI educates policymakers on the benefits of independent work and supports policy proposals that protect and empower individuals to choose nontraditional work arrangements. CWI's Principles include ensuring that (1) individuals have the freedom to determine how, when, and where they work; (2) those choosing independent work are treated fairly under the law in terms of access to training, benefits, and certain protections; (3) empowerment of and flexibility for workers will improve economic opportunities for workers and outcomes for organizations; (4) independent work should be applicable across all positions, platforms, and industries; and (5) legal and regulatory consistency in modern workplace policy approaches is vital for broad adoption of independent work.

### COMMENTS

CWI believes that the Department's Proposed Rule should be withdrawn for at least three reasons. First, the promulgation of the Proposed Rule violates the APA. Second, there is no reason to replace the 2021 IC Rule, which is grounded in legal authority and offers a straightforward, commonsense test for evaluating economic dependence. Third, the Proposed Rule, rather than implementing minor tweaks to the 2021 IC Rule, presents a fundamentally different analytical framework devoid of certainty or useful guideposts for stakeholders to follow, while placing unwarranted weight on considerations with no bearing on the economic dependence touchstone. For these reasons, as discussed in greater detail below, the Department's Proposed Rule should be withdrawn.

#### **I. THE DEPARTMENT'S PROMULGATION OF THE PROPOSED RULE VIOLATES THE ADMINISTRATIVE PROCEDURE ACT.**

In at least two ways, the Proposed Rule was promulgated in violation of the APA. First, for numerous reasons, the Rule is arbitrary and capricious. Second, the Rule's failure to properly assess existing judicial precedent applying the "economic realities" test to the FLSA means that the Rule is not based on a reasonable interpretation of the FLSA.

##### **A. The Proposed Rule Is Arbitrary and Capricious.**

As detailed below, under the language of the APA<sup>1</sup> and well-established authority, a proposed rule, once final, may be arbitrary and capricious within the meaning of the APA for several reasons. Of particular applicability here, in *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,<sup>2</sup> the Supreme Court held that the "arbitrary and capricious" standard applies when an existing regulation is rescinded as part of a change in presidential administrations and an agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and

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<sup>1</sup> 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

<sup>2</sup> 463 U.S. 29 (1983).

the choice made.”<sup>3</sup> Conversely, the Supreme Court in *State Farm* made it clear that an agency action also is arbitrary and capricious when the agency relies on factors that it should not have considered and where it offers explanations for new rules that run counter to the evidence before it.<sup>4</sup>

The Supreme Court similarly has repeatedly held that agencies act arbitrarily when they change course without considering the important aspects of the problem addressed by the rule they seek to rescind or change.<sup>5</sup> Failure to do so is a primary indicator of arbitrary decision making under this precedent. Otherwise viewed, when an agency rescinds a prior policy, it must consider the alternatives that are within the ambit of the existing policy.<sup>6</sup>

Furthermore, internal inconsistencies in agency statements point toward a conclusion that the agency action to which they relate is arbitrary and capricious.<sup>7</sup> The agency must also consider costs to regulated parties, as well as the reliance interests of the regulated parties.<sup>8</sup>

As explained below, virtually all of these bases for concluding that the Proposed Rule is arbitrary and capricious are present, and the Proposed Rule therefore is subject to vacatur upon court challenge.

1. *The Proposed Rule Disregards Without Explanation Important Facts Upon Which the 2021 IC Rule Was Premised.*

Agencies are free to reverse policy with a change of administration, but they must, at a minimum, offer good reasons for the change and explain why they are “disregarding facts and

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<sup>3</sup> *Id.* at 45. *See also id.* at 41-43 (noting that an agency rule may be arbitrary and capricious where the agency has “offered an explanation for its decision that runs counter to the evidence before the agency”); *accord Pineros Y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1067 (N.D. Cal. 2018) (a change in presidential administrations does not license an agency to disregard the APA’s requirements); *California v. Bureau of Land Management*, 286 F. Supp. 3d 1054, 1064, 1068 (N.D. Cal. 2018) (agency “must provide . . . a ‘detailed justification’ [ ] to explain why it is changing course” and may not “casually ignor[e]” its previous findings and “arbitrarily chang[e] course”).

<sup>4</sup> *State Farm*, 463 U.S. at 43-45; *see also FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>5</sup> *E.g.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910 (2020); *accord State Farm*, 463 U.S. at 43 (“An agency’s action is arbitrary and capricious . . . where it fails to consider important aspects of the problem. . . .”). In both *DHS* and *State Farm*, the courts struck down sudden agency reversals of direction that failed to address important aspects of the problems dealt with by the rescinded rules.

<sup>6</sup> *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020); *accord Texas v. Biden*, 20 F.4th 928, 991 (5th Cir. 2021), *as revised* (Dec. 21, 2021), *rev’d and remanded on other grounds*, 142 S. Ct. 2528 (2022).

<sup>7</sup> *E.g.*, *Southwestern Elec. Power Co. v. EPA*, 920 F.3d 999, 1030 (5th Cir. 2019) (“[T]he agency’s rationales contradict themselves . . . and therefore cannot stand.”); *Employer Solutions Staffing Grp. II, LLC v. Office of the Chief Admin. Hearing Officer*, 833 F.3d 480, 490 (5th Cir. 2016) (“[A]n agency’s statements are unpersuasive when they are ‘internally inconsistent’ and ‘fail to provide clear direction to regulated parties.’”).

<sup>8</sup> *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *accord Bracken v. Haaland*, 994 F.3d 249 (5th Cir. 2021).

circumstances that underlay or were engendered by the prior policy.”<sup>9</sup> Facts that the Department has disregarded in the Proposed Rule, but that were considered in promulgating the 2021 IC Rule,<sup>10</sup> include the following:

***As the Department acknowledges, independent contractors play an important role in the national economy.***<sup>11</sup> The Proposed Rule pertains to tens of millions of individuals already working as independent contractors who comprise a vast swath of the U.S. economy.<sup>12</sup> Indeed, the Department acknowledges that its estimate of 22.1 million independent contractors *at a given time* “likely” undercounts their representation in the workforce.<sup>13</sup> CWI agrees. The Department’s

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<sup>9</sup> *Encino Motors, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016); *accord id.* at 222 (“[T]he agency must at least ‘display awareness that it is changing position’ and ‘show that there are good reasons for the new policy.’”); *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 719 (D.C. Cir. 2016) (holding that “if a ‘new policy rests upon factual findings that contradict those which underlay [an agency’s] prior policy,’” the[n] the agency “‘must’ provide ‘a more detailed justification’ for its action”); *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (among other things, agency must provide “good reasons” for new policy); *Env’t Def. Fund v. EPA*, 922 F.3d 446, 454 (D.C. Cir. 2019) (“An agency acts arbitrarily and capriciously when it offers inaccurate or unreasoned justifications for a decision”).

<sup>10</sup> In addition to considering substantial data and other evidence, the 2021 IC Rule was promulgated with extensive stakeholder input through an open and transparent process that included telephonic public Stakeholder Briefings with senior DOL officials to provide additional background on it. During those Stakeholder Briefings, senior DOL officials provided explanations and information about both the rulemaking process and the substance of the 2021 IC Rule, giving the public an opportunity to ask questions. CWI was among the hundreds of interested parties who filed comments regarding the proposed 2021 IC Rule by letter dated October 26, 2020, a copy of which can be found at the following link:

[https://img1.wsimg.com/blobby/go/afca31c0-5c41-4b51-a572-dc8f062842f4/downloads/Coalition%20for%20Workforce%20Innovation%20Comments%20\(a.pdf?ver=1603721335013](https://img1.wsimg.com/blobby/go/afca31c0-5c41-4b51-a572-dc8f062842f4/downloads/Coalition%20for%20Workforce%20Innovation%20Comments%20(a.pdf?ver=1603721335013). While generally supporting the proposed 2021 IC Rule, CWI advocated for important clarifications and modifications to enhance certain aspects of it. Some of those comments were accepted by the Department as reflected in the final 2021 IC Rule.

<sup>11</sup> 87 Fed. Reg. at 62225.

<sup>12</sup> *Id.* at 62262.

<sup>13</sup> *Id.* Of note, in 2019 the Bureau of Labor Statistics sponsored a review performed by the National Academies of Sciences, Engineering, and Medicine of the questions asked in the Contingent Worker Supplement (“CWS”) on which the Department relies in forming its independent contractor estimate. *See infra* notes 14, 36. Their 2020 report concluded that “[t]o better measure the changing nature of employment, independent contracting and freelance work ... BLS should test new survey questions to be added to the CWS,” including questions that: (1) “probe into occasional work to supplement household income over a longer reference period”; (2) inquire whether persons “reporting only one job ... did anything for pay beyond their main job over a longer reference period”; and (3) ask “respondents with more than one job ... about information on selected characteristics of the secondary jobs including whether the job is a self-employment or independent contractor arrangement, its hours and earnings, variability in hours, and the main reason for holding the second job.” <https://www.nationalacademies.org/news/2020/07/to-improve-measurement-of-changing-nature-of-employment-bureau-of-labor-statistics-should-add-questions-make-other-changes-to-workforce-survey>. The report further recommended that “the CWS continue to ask questions about independent contractors and platform or app work ... [using] a broad definition of independent contractors to better capture a variety of work arrangements, including informal jobs, in which the individual is not an employee.” *Id.* This report was cited in a BLS “Commissioner’s



methodology for estimating the number of independent workers, based primarily on outdated data from 2017,<sup>14</sup> results in an estimate that is at odds with other, more recent estimates of the independent workforce.

For instance, Freelance Forward’s comprehensive 2021 study of the U.S. independent workforce concluded that “59 million Americans performed freelance work in the past 12 months, representing 36%—or more than one-third—of the entire U.S. workforce.”<sup>15</sup> Some 35% of this population, according to Freelance Forward, are non-temporary workers.<sup>16</sup> Freelance Forward estimated the dollar value of freelancers’ contribution to the economy in 2021 at \$1.3 trillion, up from \$1.2 trillion in 2020.<sup>17</sup> MBO Partners’ December 2021 study, “The Great Realization,” reached a similar conclusion: “After falling by 7% in 2020, largely due to the pandemic, the overall number of independent workers grew sharply in 2021: up 34%, to 51.1 million from 38.2 million in 2020.”<sup>18</sup>

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Corner” blog in August 2020, which concluded, “In the coming months, we will study the report. It will guide us as we consider how to update the Contingent Worker Supplement to reflect the variety of work arrangements in the U.S. labor market.” <https://blogs.bls.gov/blog/tag/independent-contractors/>. CWI concurs that asking questions such as these will result in a more accurate measurement of the entire independent contracting and freelance workforce.

<sup>14</sup> The Proposed Rule relies primarily on the CWS to the 2018 BLS Report (*see infra* note 36) to estimate that independent contractors comprise about 6.9% of the American workforce or 10.6 million persons. 87 Fed. Reg. at 62261. As the Department acknowledges, however, that CWS data *was last updated in 2017*, and includes only those who consider independent contracting their *primary job* and *who worked as contractors during a particular reference week*. *Id.* On its face, then, the CWS study excludes the many workers who engage in independent contracting work to supplement their income or who, for whatever reason, may not have chosen to engage in independent contracting work during the chosen week. There is no logical reason to exclude these individuals. The Department augmented the CWS analysis by using a 2019 study (Lim, et al.) that estimated the number of independent contractors who do not rely on independent contracting as their primary source of income and, including those persons, adjusted its estimate of the independent contractor population upward to 22.1 million persons. *Id.* at 62262. The Department chose not to adjust its estimate of the current number of independent contractors based on a 2021 study, observing that most of the increase in 2021 occurred in the “occasional independent” workers category, described as those who work part-time and regularly, but without set hours.” *Id.* at 62263. There is no persuasive reason for excluding this category of workers from the estimate.

<sup>15</sup> *Upwork Study Finds 59 Million Americans Freelancing Amid Turbulent Labor Market*, UPWORK, available at <https://www.upwork.com/press/releases/upwork-study-finds-59-million-americans-freelancing-amid-turbulent-labor-market> (last visited Nov. 23, 2022). The Upwork study was conducted by an independent research firm, Edelman Data & Intelligence, based on an online survey of 6,000 U.S. working adults over the age of 18 between August 27, 2021, and September 29, 2021. The full study is available at <https://www.upwork.com/research/freelance-forward-2021> (hereinafter “Freelance Forward”).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> MBO PARTNERS, THE GREAT REALIZATION at 7 (2021), available at [https://info.mbopartners.com/rs/mbo/images/MBO\\_2021\\_State\\_of\\_Independence\\_Research\\_Report.pdf](https://info.mbopartners.com/rs/mbo/images/MBO_2021_State_of_Independence_Research_Report.pdf) (last visited Nov. 21, 2022) (emphasis added).

Nearly as significant are these authoritative studies' assessment, based on survey results, of what independent contracting will look like in the very near future. Freelance Future includes the following significant findings:

- “Skilled remote freelancing continued to grow in 2021: 53% of all freelancers provided skilled services such as computer programming, marketing, IT, and business consulting in 2021, up from 50% in 2020. . . . [M]ore professionals are considering freelance work in the future: 56% of non-freelancers say they are likely to freelance in the future.”
- “The number of freelancers who earn more by freelancing than in their traditional jobs continues to grow: 44% of freelancers say they earn more freelancing than with a traditional job in 2021, this is up from 39% in 2020 and 32% in 2019.”
- “[Nine] in 10 freelancers believe that the ‘best days are ahead’ for freelancing; two-thirds (67%) say they are optimistic about their career in 2022, compared to 58% of non-freelancers.”<sup>19</sup>

***The Proposed Rule diminishes the fact that the vast majority of independent contractors want to be independent contractors.*** These facts were taken into consideration in the formulation of the 2021 IC Rule, which cited responses to the 2017 CWS to the Current Population Survey (“CPS”). In that survey, by a ratio of nearly 8 to 1, respondents “resoundingly stated ‘No’” in response to a question asking whether they would prefer to work for someone else, noting the benefits of flexibility and “being [their] own boss/independent” as the primary reasons for their preference.<sup>20</sup> More recent studies reach the same conclusion. For instance, a September 2022 survey of 1,251 app-based workers concluded that 77% either strongly supported or somewhat supported maintaining the current classification of app-based workers as independent contractors.<sup>21</sup> The Freelance Forward study reports that on each of three measures (overall job satisfaction; daily tasks; and work-life balance), freelance workers reported higher job satisfaction than non-freelance workers.<sup>22</sup>

While the Department purports to advance interests of workers that may be folded into the FLSA’s coverage,<sup>23</sup> the Proposed Rule in fact would have the effect of taking this choice away from many workers. For example, in shifting the focus of the opportunity-for-profit-or-loss factor from *opportunity* to the *actual exercise* of those opportunities, the Proposed Rule leaves businesses with the unenviable choice of either trusting that their workers will elect to take advantage of the opportunities available to them (*i.e.*, be “effective” contractors), or reclassifying or even

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<sup>19</sup> Freelance Forward, *supra* note 15.

<sup>20</sup> 86 Fed. Reg. at 1222; *see also id.* at 1226–27 (“The Department agrees with the numerous commenters, including nearly all individual commenters who self-identified as freelancer workers, who asserted that the rule would encourage flexible work arrangements and thereby create meaningful—though not easily measurable—value for workers.”). *Cf.* 87 Fed. Reg. at 62249 & n.387 (discussing flexible arrangements offered in traditional employment settings).

<sup>21</sup> FLEX ASSOCIATION, ATTITUDES OF APP-BASED WORKERS at 3 (2022), *available at* <https://www.flexassociation.org/workersurvey> (last visited Dec. 12, 2022).

<sup>22</sup> Freelance Forward, *supra* note 15.

<sup>23</sup> *See, e.g.*, 87 Fed. Reg. at 62230 (claiming that the Proposed Regulation would “better protect workers”).

eliminating their independent labor altogether to avoid the risk of misclassification. For many independent workers, that may mean losing a source of income altogether.

Moreover, given the Proposed Rule's clear effort at targeting independent workers by shifting the skill factor to "specialized" skills, eliminating the probative value of vehicle investments that have a separate personal use, and dramatically minimizing the probative value of their ability to simultaneously work for multiple companies (including while "multi-apping"), the Proposed Rule, if passed, would require many businesses to evaluate whether they should engage independent workers as employees. And that is not a one-for-one transaction. It would inevitably come with a loss of flexibility in hours worked, a corresponding inability to select in real time among the most profitable jobs potentially available to them, and the increased level of control that attaches when preserving independence is no longer a concern.

***The Proposed Rule disregards recent facts showing that independent contractors earn substantially more than the federal minimum wage of \$7.25 per hour.*** In the 2021 IC Rule, the Department took into account such data. It concluded that "independent contractors tend to earn more per hour."<sup>24</sup> The 2021 IC Rule found that employees earned an average of \$24.07 per hour, while all types of independent contractors earned, on average, \$27.29 per hour.<sup>25</sup> While the Department noted these calculations in the Proposed Rule,<sup>26</sup> it sought to downplay them by relying on 2005 data that, the Department claims, showed no observable difference between independent contractors' and employees' pay when certain factors were regressed, and by deeming "inconclusive" the results of other studies<sup>27</sup>—none of which casts any doubt on more current data, discussed below, showing that independent pay is on average higher than employee pay.<sup>28</sup> The Department's failure to consider and afford appropriate weight to data showing that independent contractors generally earn a higher hourly wage than employees is in violation of the APA.<sup>29</sup>

The Department's failure is further highlighted by the additional studies since the 2021 IC Rule reconfirming that independent contractors earn more than traditional employees. For instance, the Freelance Forward study reports that "[t]he number of freelancers who earn more by freelancing than in their traditional jobs continues to grow: 44% of freelancers say they earn more freelancing than with a traditional job in 2021, . . . up from 39% in 2020 and 32% in 2019."<sup>30</sup> By definition, this takes into account any overtime that could have been earned by an FLSA-covered

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<sup>24</sup> 86 Fed. Reg. at 1219 & n.126 (citing studies, including CWS's regression analysis, concluding that "despite working fewer hours per week than employees, self-employed independent contractors earned more per week on average (\$980 per week compared to \$943 per week)").

<sup>25</sup> 86 Fed. Reg. at 1219.

<sup>26</sup> 87 Fed. Reg. at 62269.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> The Proposed Rule states that "to the extent that the 2021 Rule results in the reclassification or misclassification of employees as independent contractors, the resulting denial of FLSA protections would harm the affected workers." 87 Fed. Reg. at 62230. This conclusion is not supported by available evidence about pay, benefits, and job satisfaction discussed herein, and thus does not satisfy the APA's rule-making requirements.

<sup>30</sup> Freelance Forward, *supra* note 15.

employee, thus seriously challenging the Department's assumption that workers reclassified as employees would benefit from the FLSA's overtime protections.<sup>31</sup>

The Freelance Forward study also reports that “53% of all freelancers provided skilled services such as computer programming, marketing, IT, and business consulting in 2021, up from 50% in 2020” and that “51% of workers with postgraduate degrees are freelancers, up 6% since 2020.”<sup>32</sup> These trends are likely to continue, and make it unlikely that the group of workers whom the Department purports to protect are either low-paid or without bargaining leverage and acumen.

Rather than consider available data and evidence, the Department repeatedly, but with scant factual basis, asserts that minimum wage compliance is an important objective of the Proposed Rule.<sup>33</sup> Indeed, the Proposed Rule again relies on an assertion made in its Notice of Withdrawal of the 2021 IC Rule (discussed below) that CWI pointed out was not supported by the source material the Department cited. Specifically, the Proposed Rule includes, essentially verbatim, a passage appearing in the Notice of Withdrawal concluding that “[i]ndependent contractors are more likely to report earning less than the FLSA minimum wage of \$7.25 per hour.”<sup>34</sup> However, the source referenced, “the 2017 CWS data”—the 2018 Bureau of Labor Statistics (“BLS”) report on “Contingent and Alternative Employment Arrangements” (based on 2017 data)<sup>35</sup>—does not support the Department's conclusion. Instead, it concludes that earnings for independent contractors were roughly similar to those for workers in traditional arrangements (and, notably, that independent contractors “overwhelmingly” (79%) prefer their work arrangement to traditional work arrangements).<sup>36</sup> Moreover, the 2018 BLS report on which the Department relies concludes that the median hourly rate for independent contractors in 2017 was \$21.27 per hour over a 40-hour workweek—\$14.02 more per hour than the FLSA's statutory minimum of \$7.25 per hour—and yet these workers preferred independent contractor work arrangements.<sup>37</sup> In sum, the Department's stated concern in the Proposed Rule about sub-minimum pay is not supported by the report on which it relies.

Neither the purpose nor the language of the FLSA provides for equal pay between “traditional workers” and independent contractors, and to the extent such concerns underly the Proposed Rule, rule-making to achieve that purpose is arbitrary and capricious in violation of the

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<sup>31</sup> 87 Fed. Reg. at 62267.

<sup>32</sup> Freelance Forward, *supra* note 15.

<sup>33</sup> *E.g.*, 87 Fed. Reg. at 62268–69.

<sup>34</sup> Compare 86 Fed. Reg. at 14037 (Notice of Withdrawal), with 87 Fed. Reg. at 62268 (Proposed Rule). Independent contractors' earnings relative to state minimum wage laws provides no basis for rule-making under the FLSA.

<sup>35</sup> Compare 86 Fed. Reg. at 14037 n.145 (Notice of Withdrawal), with 87 Fed. Reg. 62261 n.508 (Proposed Rule).

<sup>36</sup> BUREAU OF LABOR STATISTICS, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS—MAY 2017, USDL-18-0942, at 6 tbls. 11 & 13 (June 7, 2018), available at <https://www.bls.gov/news.release/pdf/conemp.pdf> (“2018 BLS Report”).

<sup>37</sup> *Id.*, Table 13. One reason workers prefer independent contractor work is the additional monetary benefit, beyond hourly pay rates, that they have through the opportunity to write off business expenses. This benefit not available to “W-2” employees. This opportunity is of particular value to couriers, who are able to write off vehicle expenses at the generous IRS rate.

APA. Moreover, the Department’s analysis again ignores that reclassification is not simply a one-for-one exchange. That is, a business does not simply evaluate whether it should pay a worker the same amount as an employee or as an independent contractor. When reclassification occurs, it inevitably results in decreased gross profits (or income) to workers as businesses lose the benefits of the independent work for which they originally bargained (including the need for less control and supervision, and a resulting change in the structure of compensation which may now include other non-monetary benefits) and incur new costs (including in the form of potential overtime premiums and other direct and indirect costs).

The Proposed Rule also takes into consideration the effect of worker classification on employee benefits. Whether workers receive employer-sponsored benefits is outside the FLSA’s text and purview, and is an inappropriate basis for FLSA rulemaking. In any event, while it is true that some employers provide employees with additional compensation in the form of paid vacations, medical/dental/vision benefits, and retirement account contributions, as the Proposed Rule points out,<sup>38</sup> the Proposed Rule observes that “[e]mployees who are misclassified as independent contractors generally do not receive employer-sponsored health and retirement benefits, potentially resulting in or contributing to long-term financial insecurity.”<sup>39</sup> Consideration of employer-sponsored health benefits does not fairly reflect the 2018 BLS Report that the Department cites. According to that Report, “[a]lthough most workers in alternative arrangements did not receive health insurance through their jobs, a large share had health insurance from some source, including coverage from another family member’s policy, through a government program, or by purchasing it on their own.”<sup>40</sup> More specifically, Table 9 of the Report shows that 75.4% of independent contractors and 77% of on-call workers had health insurance from some source, as compared with 84% of “traditional” workers. Of note, the Proposed Rule also does not meaningfully take into account that some businesses who retain independent contractors, such as Unilever, provide certain benefits to them including a pension, health insurance, and sick pay.<sup>41</sup>

The 2021 IC Rule also cited CWI’s Research, “National Survey of 600 Self-Identified Independent Contractors,” conducted in January 2020, which found that 84% of surveyed independent contractors reported having healthcare coverage, 73% reported having a retirement savings plan, and 63% reported receiving paid time off.<sup>42</sup> The Proposed Rule also does not take

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<sup>38</sup> 87 Fed. Reg. at 62267.

<sup>39</sup> *Id.*

<sup>40</sup> 2018 BLS Report, *supra* note 36, at 8.

<sup>41</sup> *Meet the Company that Offers Its Contract Workers Benefits and Job Security*, CNBC, <https://www.cnbc.com/2022/02/25/this-company-offers-its-contract-workers-benefits-and-job-security.html> (last visited Nov. 23, 2022).

<sup>42</sup> 86 Fed. Reg. at 1212 n.77, 1217 n. 113. A copy of CWI’s National Survey is available at <https://rilastagemedia.blob.core.windows.net/rila-web/rila.web/media/media/pdfs/letterstohill/hr/cwi-report-final.pdf> (last visited Dec. 12, 2022). In 2020, CWI commissioned a study by Ankura Consulting Group entitled “Analysis of Literature on Technology and Alternative Workforce Arrangements,” available at <https://img1.wsimg.com/blobby/go/afca31c0-5c41-4b51-a572-dc8f062842f4/downloads/Technology%20and%20Alternative%20Workforce%20Arrangeme.pdf?ver=1603720061504> (and cited in CWI’s comments on the 2021 Rule, *supra* note 10, at 5 n.4). Ankura’s Research and Analysis Report is a comprehensive, current review of research on the impact of technology

into account savings that many independent contractors may experience, such as reduced gas, parking, toll, and other commuter costs, and reduced weekday food costs. In addition, the Proposed Rule does not take into account that classification as an employee for FLSA purposes does not provide workers with any guarantee of additional compensation such as paid vacations and medical/dental/vision benefits or retirement account contributions, as none of these are statutorily-required employee benefits anywhere in federal law — much less under the FLSA.

In sum, by promulgating a regulation that almost certainly would have the effect of drawing more independent workers within the ambit of FLSA-covered employees, the Proposed Rule would not provide most independent contractors with better pay (or benefits), but would deny them the freedom and flexibility to set their own hours and be their own boss—the very reasons most of them prefer to work as independent contractors. In fact, if the Proposed Rule became final, it could result in the loss of an income stream altogether, as companies will need to make difficult staffing decisions. Significantly, the Proposed Rule does not meaningfully explain why the data cited in the final 2021 IC Rule or submitted during the rule-making process should not be considered. This data supports the 2021 IC Rule’s analyses of the economic and non-economic benefits of independent contractor status.

***The Proposed Rule disregards the Department’s own prior survey of appellate decisions confirming the utility of the 2021 IC Rule’s approach without any evidence that the survey was wrong:*** The Proposed Rule also disregards, without serious inquiry, the survey of appellate decisions cited in support of the 2021 IC Rule.<sup>43</sup> That survey, according to the Department just a short time ago, covered every appellate decision dating back to 1975, and found that in every instance in which the “opportunity” and “control” factors tilted toward the same classification, that was the classification that the court applied. Rather than investigate its own research, in the Proposed Rule the Department simply disregards the legal survey because it did not provide citations to or identify the specific cases the Department itself had reviewed.<sup>44</sup> In brushing aside the agency’s own survey, the Department did not identify a single appellate decision contradicting the survey results supporting the 2021 IC Rule.

By failing to consider this information, including its own legal survey, the Proposed Rule violates the APA’s requirement that a rulemaking agency (with enforcement authority) offer good reasons for a change in policy and explain why they are disregarding facts and circumstances on which the prior policy was based. Arbitrariness may be inferred from a “clear error” in judgment such as where an agency has “offered an explanation for its decision that runs counter to the evidence before the agency.”<sup>45</sup>

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on independent workers, staffing agencies, the retail sector, the direct selling industry, and platform companies that match independent workers with potential customers in a wide variety of service and product markets, including ridesharing, food delivery, and freelancers. Among other topics, the Ankura Research and Analysis Report, citing recent literature, corroborated CWI’s research concluding that majorities of independent contractors prefer independent work arrangements to provide them with desired flexibility and the opportunity to “be their own boss.”

<sup>43</sup> See 86 Fed. Reg. at 1194.

<sup>44</sup> 87 Fed. Reg. at 62227–28 (citing the Withdrawal Rule, 86 Fed. Reg. 24309).

<sup>45</sup> *State Farm*, 463 U.S. at 43.

## 2. *The Proposed Rule Does Not Consider Reasonable Alternatives to It.*

Under Supreme Court precedent, when an agency “rescinds a prior policy[,] its reasoned analysis must consider the alternatives that are within the ambit of the existing [policy.]”<sup>46</sup> The Department’s failure to consider available alternatives under the 2021 IC Rule before seeking to withdraw it was the reason that the federal district court in *Coalition for Workforce Innovation v. Walsh*,<sup>47</sup> held that the Withdrawal Rule was arbitrary and capricious in violation of the APA. “[B]y not considering more limited . . . approaches than the total withdrawal of the [2021 IC Rule], the DOL did not take into account important aspects of the problem before it. That omission alone ma[de] the [Withdrawal Rule] arbitrary and capricious.”<sup>48</sup>

In an apparent attempt to remedy that failure, the Proposed Rule sets forth four alternatives that the Department considered and rejected.<sup>49</sup> None of these alternatives was to allow the 2021 IC Rule to continue in effect during a period in which the Department could gather facts and data that actually would enlighten whether the 2021 IC Rule will contribute to the stated “serious problem” of misclassification. In another section of the Proposed Rule, however, the Department noted that it “considered waiting for a longer period of time in order to monitor the effects of the 2021 IC Rule,” but nonetheless decided to move forward with the Proposed Rule on grounds that “retaining the 2021 IC Rule would have a confusing and disruptive effect on workers and businesses alike due to its departure from case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test.”<sup>50</sup>

Whether concerns about confusion and disruption motivated promulgation of the Proposed Rule is called into question by the Department’s decision to enact an entirely new rule that only adds to the claimed confusion, especially where there has been no indication of *actual* confusion resulting from the 2021 IC Rule.<sup>51</sup> Instead, this assertion is just another example of the

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<sup>46</sup> *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (alteration in original) (internal quotation marks omitted); *accord Texas v. Biden*, 20 F.4th 928, 991 (5th Cir. 2021), *as revised* (Dec. 21, 2021), *rev’d and remanded on other grounds*, 142 S. Ct. 2528 (2022).

<sup>47</sup> 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022). The court also struck down the earlier Delay Rule on the grounds that it violated the APA in three ways: (1) by failing to provide an adequate notice-and-comment period; (2) by improperly limiting the scope of comments; and (3) by not calling for a sufficient waiting period before the Delay Rule went into effect. *Id.* at \*7–11. According to the district court, “the pressure for immediacy stem[med] from the change of administration from that of Former President Donald Trump to President Joseph Biden,” which did not justify the Department’s departures from the APA’s rule-making requirements. *Id.* at \*9. As a result of the court’s order vacating both the Delay Rule and the Withdrawal Rule, the 2021 IC Rule was held to be retroactively effective as of March 8, 2021. *Id.* at \*20.

<sup>48</sup> *Id.* at \*19 (citing *Texas v. United States*, No. 6:21-CV-00016, 2021 WL 3683913, at \*50 (S.D. Tex. Aug. 19, 2021)) (internal quotation marks omitted).

<sup>49</sup> 87 Fed. Reg. at 62232.

<sup>50</sup> 87 Fed. Reg. at 62219.

<sup>51</sup> Given that the 2021 IC Rule, like the Proposed Rule, is postured as “interpretive” guidance, nothing would have prevented interpreting courts from commenting on and even considering the framework it presented since its intended effective date of March 8, 2021. Moreover, after the March 2022 ruling in *CWI v. Walsh*, the 2021 IC Rule has been retroactively in effect nationwide since its intended effective date, *i.e.*, March 8, 2021. 2022 WL 1073346, at \*20. Nearly eight months have passed since the *CWI* court’s ruling

Department's factually unsupported assumptions about the effect that the 2021 IC Rule would have. Moreover, as explained in Part III below, CWI vigorously disputes the legal conclusion on which the entire "confusing and disruptive effect" assumption is based: that the 2021 IC Rule "departed from" applicable binding legal precedent.<sup>52</sup>

The most obvious alternative action "within the ambit of the existing policy" is simply to allow the 2021 IC Rule to go into effect and study its results, rather than assume unproven consequences. At a minimum, the Department should have seriously considered the weighted approach adopted in the 2021 IC Rule, given the substantial legal support for it, including the results of the Department's own legal survey. Because the Department never allowed the 2021 IC Rule to go into effect, it cannot and has not traced any misclassification problem to the 2021 IC Rule. Its withdrawal of that rule and promulgation of the Proposed Rule therefore is arbitrary and capricious under the APA.

### 3. *The Proposed Rule Does Not Provide Facts Showing a Need for It.*

Throughout the Proposed Rule, the Department acknowledges that the Rule's primary purpose is to distinguish contractor from employee status *based on existing case law*. According to the Department, it is "appropriate to rescind the 2021 IC Rule and set forth an analysis for determining employee or independent contractor status under the [FLSA] that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule."<sup>53</sup> The Proposed Rule makes clear that this is its primary intent by expressly acknowledging

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(and some 21 months since the 2021 IC Rule's effective date), but the Department presents no evidence that the 2021 IC Rule has, in fact, had a "confusing and disruptive effect" or resulted in employer misclassifications.

<sup>52</sup> 87 Fed. Reg. at 62229.

<sup>53</sup> 87 Fed. Reg. at 62219; *see also id.* at 62220 (the Proposed Rule "provides guidance that is aligned with the Department's decades-long approach (prior to the 2021 IC Rule) as well as circuit case law"). Of note, the Proposed Rule is also at odds with the Department's own current publications describing the applicable legal test for determining independent contractor or employee status under the FLSA. For example, in the following publication, *Misclassification of Employees as Independent Contractors*, available on the Department's website at <https://www.dol.gov/agencies/whd/flsa/misclassification>, the Department has set forth the following factors as evidencing employee status: "working for someone else's business; paid hourly, salary, or by piece rate; uses employer's materials, tools and equipment; typically works for one employer; continuing relationship with the employer; employer decides when and how the work will be performed; and employer assigns the work to be performed." The Department has included the following factors as evidencing independent contractor status: "running their own business; paid upon completion of project; provides own materials, tools and equipment; works with multiple clients; temporary relationship until project completed; decides when and how they will perform the work; and decides what work they will do." *Id.* While the Department's own publication states independent contractors decide when they will perform their work, the Proposed Rule attempts to diminish the significance of a worker setting his own schedule. 87 Fed. Reg. at 62248-49. The Department's own publication does not describe an independent contractor as someone who performs work that is an "integral part" of the employer's business, unlike the Proposed Rule. Relatedly, neither the Proposed Rule nor the Department's current publication describes a method of payment that evidences independence, leaving employers and workers with *no* guidance on this issue. Instead, the above-quoted language focuses only on timing—*i.e.*, "upon completion of the project."



that, if the Rule is struck down or invalidated, the 2021 IC Rule should *still* be vacated so that the independent contractor-employee determination would revert to existing case law.<sup>54</sup> The Department explains that until 2021, it had “primarily issued subregulatory guidance in this area and did not have generally applicable regulations addressing the classification of workers as independent contractors . . . . Should the 2021 IC Rule be rescinded without any replacement regulations, the Department would rely on circuit case law and provide subregulatory guidance for stakeholders through existing documents (such as Fact Sheet #13 and new documents (for example, a Field Assistance Bulletin)).”<sup>55</sup>

These statements raise the obvious question of exactly what regulatory need the Department believes the Proposed Rule is addressing. Given (1) the Department’s stated objective of hewing more closely to existing judicial precedent and (2) its expressed preference for returning to the status quo prior to the 2021 IC Rule, rather than operating under the 2021 IC Rule, the Department could have accomplished its goal by *properly* seeking to withdraw the 2021 IC Rule and complementing it with subregulatory guidance, as it did for many years.<sup>56</sup> Merely seeking to remedy the Department’s prior unsuccessful attempt to withdraw the 2021 IC Rule, however, is not a valid regulatory reason for the Proposed Rule where, as the District Court concluded in *CWI v. Walsh*, the Department had no such valid reason in the first place.

Furthermore, while the Proposed Rule rests on the Department’s stated concern that “the misclassification of employees as independent contractors remains one of the most serious problems facing workers, businesses, and the broader economy,”<sup>57</sup> the Proposed Rule does not demonstrate that any part of this purported “serious problem” flows from or was caused by the 2021 IC Rule—which, as noted above, the Department never gave a reasonable opportunity to go into effect. The Department’s reliance on “the literature” to support its assertion that the prevalence of misclassification is “substantial,”<sup>58</sup> offers no factual or legal basis for concluding that the 2021 IC Rule brought about the alleged problem (or any other problem).<sup>59</sup>

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<sup>54</sup> 87 Fed. Reg. at 62233 (“If the substantive provisions of a new final rule were invalidated, enjoined, or otherwise not put into effect, the Department would not intend that the 2021 IC Rule become operative.”).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* If the Proposed Rule really is “interpretive,” and if the goal of the Proposed Rule really is to provide consistency and clarity for businesses and workers alike, this could much more easily be accomplished through subregulatory opinions or bulletins stating the Department’s position with respect to application of the economic realities test. Such subregulatory action would have been equally beneficial to hiring entities who, facing a classification challenge, can show that they made their classification decision based on it and therefore can avail themselves of the defenses set forth in Sections 258 and 259 of the FLSA.

<sup>57</sup> 87 Fed. Reg. at 62225.

<sup>58</sup> *Id.* at 62226.

<sup>59</sup> In fact, other literature not considered by the Department in the Proposed Rule concludes that the extent of the alleged misclassification problem is overstated. *See, e.g., Ready, Fire, Aim—How State Regulators Are Threatening the Gig Economy and Millions of Workers and Consumers* (U.S. Chamber of Commerce Jan. 2020) (“[The misclassification argument] puts the tail before the dog. . . . Whether a worker is an independent contractor or an employee depends, of course, on whether the worker meets the existing legal definitions. Businesses classify workers by applying existing standards. If those standards show that the worker is an independent contractor, and the business classifies the worker accordingly, no

Of note, in holding that the Department's effort at withdrawing the 2021 IC Rule was arbitrary and capricious under the APA, the court in *CWI v. Walsh* discounted the Department's explanation that full withdrawal was necessary because the 2021 IC Rule did not achieve the goal of providing greater clarity on independent contractor determinations. Instead, it found that the Department's "clarity" explanation was incompatible with the acknowledged "inconsistencies and lack of coherence in the manner in which the economic realities test was applied across the country prior to the [2021] Independent Contractor Rule."<sup>60</sup> The withdrawal of the 2021 IC Rule, the court concluded, "left regulated parties without consistent guidance regarding the proper classification of workers under the FLSA," resulting in a classification decision that was "dependent on the happenstance of geography, *i.e.*, the judicial circuit in which the workers resides or works."<sup>61</sup>

Furthermore, the Department has proffered the Proposed Rule as one that is consistent with, or at least does not contradict, the 2021 IC Rule in various ways.<sup>62</sup> This hardly constitutes a persuasive or sufficient basis for rescinding the 2021 IC Rule in its entirety.

4. *The Proposed Rule Is Based on an Unrealistic Assessment of Its Familiarization Costs to the Business Community.*

In the "Rule Familiarization Costs" section of the Proposed Rule, the Department "assumes that it will take on average about 30 minutes to review the rule as proposed."<sup>63</sup> The Department further assumes that a person holding a "Compensation, Benefits, and Job Analysis Specialist" or comparable position (and only that person) within each of the millions of affected organizations will perform the review at an hourly rate, inclusive of benefits costs, of \$49.94.<sup>64</sup> Thus, the Department allocates each employer a cost of \$24.97 to review and become familiar with the Proposed Rule.

These assumptions are patently unreasonable both as to the amount of time required for "familiarization" with the Proposed Rule, and as to the person or persons within an organization who will be tasked with performing that review. The Proposed Rule is important to businesses' hiring decisions, organizational directives, management structure, financial budgeting, and legal compliance. It defies logic to assume that only 30 minutes would be required to *review*,

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'misclassification' occurs. . . . [U]ltimately, what the critics object to is not how [businesses] are applying existing law. . . . [I]t is the standards themselves that critics object to as flawed.").

<sup>60</sup> 2021 WL 1073346, at \*19 (emphasis added).

<sup>61</sup> *Id.* As Judge Easterbrook explained in his concurring opinion in *Sec'y of Lab. v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (discussed *infra* Part III), the economic realities test "is unsatisfactory both because it offers little guidance for future cases and because any balancing test begs questions about which aspects of 'economic reality' matter, and why." The 2021 IC Rule designated more heavily weighted core factors in accordance with case law, thereby providing clearer guidance to all stakeholders about the outcome of applying the economic realities test in the modern economy. Thus, if the Department had allowed the 2021 Rule to go into effect, it would have very likely ensured *less*, not more, confusion.

<sup>62</sup> *See, e.g.*, 87 Fed. Reg. at 62231 ("As the Department has noted throughout this proposal, there are multiple instances in which this NPRM is consistent or in agreement with the 2021 IC Rule.").

<sup>63</sup> 87 Fed. Reg. at 62265.

<sup>64</sup> *Id.* Each independent contractor is allocated fifteen minutes at an assumed hourly rate of \$21.35, or a cost of a little more than five dollars, to review the Proposed Rule. This assumption is equally unreasonable.

*understand, and give organizational counsel about* – in other words, become familiar with – the Proposed Rule. While a trained person might be able to *simply read* some or all of the text of the Proposed Rule itself in a half hour (*i.e.*, new sections 795.100, 795.105, 795.110, and 795.115), even the most highly skilled and experienced Human Resources professionals (and attorneys) could not *understand* the Proposed Rule, including its lengthy explanatory Preamble, in that amount of time, let alone translate that understanding into specific counsel and advice about the Proposed Rule to be communicated within the organization.

For like reasons, it is equally unreasonable to assume that a relatively low-level compensation and benefits worker earning less than \$50 per hour (including benefits costs) would be tasked with this important assignment. As the Department surely is aware, businesses task their high-level, well-trained human resources workers, in-house attorneys, and outside counsel with this responsibility at an hourly rate well exceeding \$50. Even such highly trained individuals cannot be expected to become familiar with the Proposed Rule in a half hour. Doing so requires, instead, consideration of the 2021 IC Rule and its history, case law discussed in the Proposed Rule’s Preamble, the Department’s extensive commentary about the Proposed Rule, and the deference that may (or may not) be afforded to it by courts. It also requires careful consideration of exactly how the Proposed Rule would affect each hiring entity’s particular array of “traditional” workers and independent contractors in light of their respective fact-specific roles, as a full understanding of the rule ultimately depends on application of a balancing test regarding the facts for each worker.

It is not necessary to estimate the actual number of hours and hourly rates that each business would more realistically spend becoming familiar with the Proposed Rule in order to know that the Department’s estimates and assumptions are unreasonable. This further underscores that the Department’s rule-making was unsupported by facts and is thus arbitrary and capricious under the APA.

##### 5. *The Proposed Rule Is Internally Inconsistent.*

The Proposed Rule reflects several logical and legal inconsistencies reinforcing the conclusion that its promulgation was arbitrary and capricious under the APA. First, the Proposed Rule asserts that the Department declined to adopt the “ABC test” because it “believes it is legally constrained from [doing so] because the Supreme Court has held that the economic reality test is the applicable standard for determining workers’ classification under the FLSA as an employee or independent contractor.”<sup>65</sup> Despite acknowledging that the ABC tests adopted by multiple state courts offered an improper analytical framework, the Department proceeded to adopt a test that echoes the “B” prong of the ABC test and, in other ways, results in a more stringent standard for independent contractor classification than even the ABC test would allow. This internal inconsistency underscores that the Proposed Rule is neither needed nor grounded in demonstrable facts.

Second, the Proposed Rule in some places professes to include “substantive” provisions that, if “invalidated, enjoined, or otherwise not put into effect” would not result in the 2021 IC

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<sup>65</sup> 87 Fed. Reg. at 62271.

Rule “becom[ing] operative.”<sup>66</sup> The Proposed Rule is undergoing the notice-and-comment period required for substantive rules, and it would establish the standard used in DOL’s enforcement efforts. That is, DOL investigators will hold employers to the substance of the Proposed Rule, and violations and penalties will be determined pursuant to it. Elsewhere, however, the Department presents the Proposed Rule as only “interpretive guidance.”<sup>67</sup> Whether the Proposed Rule is “substantive” or “interpretive” could determine the standard of deference courts accord to it.<sup>68</sup> It is not necessary to resolve this inconsistency to conclude that it further reflects arbitrary and capricious rule-making.

Next, while the Department purports to avoid uncertainty and to avoid giving any factor greater weight, the Proposed Rule would cause *both* uncertainty *and* weighting to occur by permitting factors to overlap (without meaningful explanation of what should be done in that situation) and thus permitting facts to be double- and even triple-counted.<sup>69</sup> Furthermore, while the Department claims to focus on economic dependence, the Proposed Rule often fails to provide anything beyond the conclusory statement that its additions are evidence of employee status. For instance, the Proposed Rule states that in applying the “investment” factor, courts should examine the *business’s* investment in its own business.<sup>70</sup> This inquiry says nothing about whether an individual is in business for himself.

The Proposed Rule also purports to look at the totality of the circumstances, but in reality it narrows the test in a way that precludes considerations bearing on independent contractor status. For example, it focuses the “control” inquiry on the control exercised by the business.<sup>71</sup> But that ignores that the essential inquiry is whether the worker is in business for himself, and there are aspects of an individual’s business that go well beyond a single company. Finally, the Proposed Rule inconsistently applies factors in a way that unreasonably supports employee status. For example, it suggests that exclusivity is evidence of employee status, but non-exclusivity is *not* evidence of independent contractor status.<sup>72</sup> In sum, these internal inconsistencies only muddy the classification waters, undercut the Department’s stated purpose for the Rule, and point toward a finding that it is arbitrary and capricious in violation of the APA.

6. *The Proposed Rule Is Inconsistent with Judicial Interpretations, Including Decisions of the Supreme Court.*

Part III below highlights the multiple ways that the Proposed Rule falls short of its stated objective of bringing greater consistency and reliability to independent contractor determinations. One of the Proposed Rule’s greatest failings, from an APA perspective, is that it never explains how the nebulous, unweighted, and unprioritized “totality of the circumstances” approach that it

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<sup>66</sup> *Id.* at 62233.

<sup>67</sup> *Id.* at 62274 (discussing revised 29 C.F.R. § 795.100).

<sup>68</sup> *See Chevron, USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), and *Skidmore v. Swift Co.*, 323 U.S. 134, 138 (1944).

<sup>69</sup> For instance, the Proposed Rule would allow the “exclusivity” of the working arrangement to be considered under both the “control” and “permanence” factors. *See infra* Part III.

<sup>70</sup> 87 Fed. Reg. at 62233.

<sup>71</sup> *Id.* at 62275.

<sup>72</sup> *Id.* at 62244.

seeks to instate will result in the consistency or reliability it claims to advance. Conversely, as noted above, the Proposed Rule does not explain—much less cite specific examples—showing why the structured analysis set forth in the 2021 IC Rule does not lend greater consistency and reliability to them.

Examples of aspects of the Proposed Rule that conflict with applicable Supreme Court authority include: (1) its interpretation of the “integral” factor, which is inconsistent with the Supreme Court’s decisions in *Rutherford Food v. McComb*<sup>73</sup>; (2) its interpretation of the “extent of investment” factor, which is inconsistent with the Supreme Court’s focus in *Bartels v. Birmingham* on whether, “as a matter of economic reality, [the workers] are dependent upon the business to which they render service;”<sup>74</sup> and its shifting of the opportunity-for-profit-or-loss factor from a focus on “opportunity” in *United States v. Silk*<sup>75</sup> to an inquiry into whether that opportunity has been “exercised.”

As the discussion in Part III shows, the Department’s Proposed Rule often opts to deviate in meaningful ways from the ultimate inquiry of *economic dependence*. At times, the Department “cherry-picked” cases supporting its formulations of the independent contracting factors that are out-of-step with the weight of authority, without adequate explanation of how those factors actually bear on economic dependence. Those choices further support a conclusion that the rule-making is arbitrary and capricious under the APA. By uncritically incorporating considerations into the analysis without explaining whether or how they accurately interpret statutory text, the Department engaged in arbitrary and capricious rule-making. “An agency decision cannot be sustained . . . where it is based not on the agency’s own judgment but on an erroneous view of the law.”<sup>76</sup>

In sum, when an agency action “is based upon a determination of law . . . the action may not stand if the agency has misconceived the law.”<sup>77</sup> The agency action is arbitrary and capricious within the meaning of the APA when it is based on the agency’s erroneous conclusion that the action was dictated as a matter of law, when it actually was not.<sup>78</sup> By allowing faulty case law to dictate its approach, without critically examining whether the cases were correctly decided, the Department has failed to engage in “reasoned decisionmaking,” as the APA requires.<sup>79</sup>

## **B. The Proposed Rule Was Improperly Promulgated Under the APA Because It Is Not Based on a Permissible Interpretation of the FLSA.**

In addition to rescinding an agency action on grounds that it was arbitrary and capricious, courts may rescind an action when it is not a permissible interpretation of a statute that the agency

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<sup>73</sup> 331 U.S. 722 (1947).

<sup>74</sup> 332 U.S. 126, 130 (1947).

<sup>75</sup> 331 U.S. 704 (1947).

<sup>76</sup> *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985).

<sup>77</sup> *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

<sup>78</sup> *See Regents of the Univ. of Cal.*, 140 S. Ct. at 1915.

<sup>79</sup> *State Farm*, 463 U.S. at 52.

is responsible for implementing.<sup>80</sup> In *Chevron, USA, Inc. v. Natural Resources Defense Council*,<sup>81</sup> the Supreme Court established a two-step inquiry to guide judicial determinations on this basis. First, the reviewing court must determine whether the statute was ambiguous. If the statute is found to be ambiguous, then the court must examine whether the agency action was “based on a permissible construction of the statute.”<sup>82</sup> Particularly since the Supreme Court’s landmark 2018 decision in *Encino Motorcars, LLC v. Navarro*,<sup>83</sup> courts have cautioned that the FLSA must be interpreted “fairly,” and not for the objective of achieving the broadest remedial purpose “at all costs.”<sup>84</sup>

In the Proposed Rule, however, the Department seeks to stretch the FLSA’s definitional terms beyond any reasonable interpretation of them. This overreach is particularly evident in three areas: (1) the Proposed Rule’s standard for what it means for an independent contractor’s work to be “integral to the hiring entity’s business;” (2) the Proposed Rule’s analysis of independent contractors’ investment relative to the investment of the business for which they perform work; and (3) the Proposed Rule’s treatment of the “opportunity for profit or loss” factor.<sup>85</sup> For all of the reasons set forth in Part III below, a reviewing court would conclude that the Proposed Rule does not represent a reasonable interpretation of the FLSA, and that it therefore violates the APA.

## **II. THE CURRENT INDEPENDENT CONTRACTOR RULE PROVIDES LEGALLY-GROUNDED, NEEDED CLARITY THAT THE PROPOSED RULE WOULD UNDERMINE.**

On January 5, 2021, following an extensive notice-and-comment process that resulted in the filing of 1,825 comments by interested individuals and stakeholders, the Department enacted the 2021 IC Rule—its first-ever rule on independent contractor status. The 2021 IC Rule detailed a balanced approach to and interpretation of the FLSA’s “economic realities” test for determining worker status. It provides much needed guidance to assist parties in how to assess modern-day worker relationships—and, ultimately, to focus on inquiries relevant to the issue of economic dependence—in a dynamic economy defined by constant innovation. The 2021 IC Rule’s guidance helps stakeholders accurately and predictably structure and maintain their relationships to realize the macroeconomic benefits of independent work for independent workers, consumers, and businesses alike.

The 2021 IC Rule followed the appropriate rulemaking process procedurally, including through an open and transparent rulemaking process that included stakeholder briefings, procedural and substantive explanations from senior DOL officials, and an opportunity for the public to ask questions. It reflected consideration of relevant facts, legal authority, and applicable

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<sup>80</sup> See *supra* note 1.

<sup>81</sup> 467 U.S. 837 (1984).

<sup>82</sup> *Id.* at 843.

<sup>83</sup> 138 S. Ct. 1134 (2018).

<sup>84</sup> *Id.* at 1142; see also, e.g., *Dep’t of Labor v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019) (“[A] fair reading of the FLSA, neither narrow nor broad, is what is called for.”); *Catskill Mountains Chapter of Trout Unlimited, Inc.*, 846 F.3d 492, 514 (2d Cir. 2019) (noting Supreme Court’s guidance that “no law pursues its purpose at all costs”).

<sup>85</sup> See 87 Fed. Reg. at 62237–43, 62253–54.

policy considerations, including an assessment of allegedly contrary facts. And it ultimately went into effect on March 8, 2021.<sup>86</sup>

The 2021 IC Rule reaffirms and operationalizes the economic realities considerations set forth in decades-old Supreme Court precedent, including the degree of control, the opportunities for profit and loss, the investment in facilities, the permanence of the relationship, the skill required in the operation, and whether the work performed was part of an integrated unit of production.<sup>87</sup> Since 1947, the Supreme Court has neither again applied nor rejected the application of these factors to determine employee status under the FLSA. Ultimately, as the Department acknowledged, each of these factors have some bearing on the extent of the worker’s “economic dependence” on the potential employer.<sup>88</sup>

In the 2021 IC Rule, the Department harmonized DOL opinions and court decisions in a balanced manner by articulating five overlapping factors, including two core factors, while leaving the worker’s economic dependence as the ultimate touchstone. The first core factor—the worker’s control over the work—provided specific examples of a worker’s control, including setting one’s own schedule, selecting one’s own projects, and having the ability to work for other entities.<sup>89</sup> The 2021 IC Rule also provides that a number of facts upon which legal authority have split, including requiring compliance with laws and regulations, safety standards, contractual deadlines, and quality control standards do not make an individual more or less likely to be an employee.<sup>90</sup>

The second core factor—the worker’s opportunity for profit or loss based on initiative or investment—appropriately acknowledges that investment is only reflective of economic dependence insofar as it sheds light on a worker’s opportunities to generate a profit or loss.<sup>91</sup> The factor further recognizes the reality that many contractors in today’s economy are performing knowledge-based services that require little investment in materials or equipment, yet still offer opportunities for profit and loss through the exercise of business-like initiative (including through managerial skill, business acumen, and judgment).<sup>92</sup>

The 2021 IC Rule acknowledges that, when the two core factors tilt toward the same classification, that is likely the correct classification for the worker.<sup>93</sup> If, however, the factors tilt in opposite directions, the 2021 IC Rule directs the evaluation of three secondary factors, including the amount of skill required for the work, the degree of permanence of the working relationship, and whether the work is part of an integrated unit of production.<sup>94</sup> The 2021 IC Rule further endeavored, to the extent practicable, to ensure that the above factors did not overlap and thus eliminated confusion in how to address the overlap in factual considerations that has developed in

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<sup>86</sup> *CWI*, 2022 WL 1073346, at \*20.

<sup>87</sup> *Silk*, 331 U.S. at 716; *Rutherford Food*, 331 U.S. at 730.

<sup>88</sup> 86 Fed. Reg. at 1246.

<sup>89</sup> *Id.* at 1246–47.

<sup>90</sup> *Id.* at 1247.

<sup>91</sup> *Id.* at 1186–87.

<sup>92</sup> *Id.* at 1188–89.

<sup>93</sup> *Id.* at 1246.

<sup>94</sup> *Id.* at 1247.

the inconsistent—and, in some instances, unwarranted—extensions of the Supreme Court’s seminal articulation of the economic realities factors by lower courts.<sup>95</sup>

Now, fewer than two years after the 2021 IC Rule was implemented, and only a few months after a Texas district court rejected the Department’s rescission of the 2021 IC Rule, the Department attempts to effect a fundamental alteration of that rule, suggesting that the 2021 IC Rule errs in elevating control and the opportunity for profit or loss above other factors and is unsupported by law, and allegedly brings the analysis “closer” to a common-law test.<sup>96</sup> The Department further asserts that no court has, “as a general and fixed rule, elevated any one economic reality factor or subset of factors above others.”<sup>97</sup>

Respectfully, it is simply inaccurate that *no* court has determined, as a general rule, that any core factor should be afforded greater weight in determining whether an individual is an employer.<sup>98</sup> Indeed, the Secretary of Labor has been a party to one such decision this year.<sup>99</sup> And in their analyses of individual liability and joint employment under the FLSA—where the fundamental inquiry remains whether the individual or entity qualifies as the worker’s employer—courts have regularly given primacy to considerations of control.<sup>100</sup> Moreover, several courts have noted that courts often place less weight on other factors in the analysis, including permanence.<sup>101</sup>

The 2021 IC Rule’s elevation of the two core factors serves a commonsense—in fact, definitional—purpose. In an analysis that is fundamentally about economic dependence, it places the focus squarely on the two foundational components of that standard: *economics* (opportunities

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<sup>95</sup> *Id.* at 1174–75.

<sup>96</sup> 87 Fed. Reg. at 62228.

<sup>97</sup> *Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. 1168, 1198 (Jan. 7, 2021).

<sup>98</sup> *E.g., See, e.g., Walsh v. Med. Staffing of Am., LLC*, 580 F. Supp. 3d 216, 229 (E.D. Va. 2022) (“The degree of control a putative employer has over the way an alleged employee’s work is performed is the ‘most important factor’ in making this determination.” (quoting *Smith v. CSRA*, 12 F.4th 396, 413 (4th Cir. 2021))); *Brown v. BCG Attorney Search*, No. 12 C 9596, 2013 WL 6096932, at \*1 (N.D. Ill. Nov. 20, 2013) (“Although several factors are considered in determining whether an individual is an employee or an independent contractor, the employer’s right to control is the most important in making the distinction.”); *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1469 (C.D. Cal. 1996) (“Ultimately Plaintiffs’ most important allegation is that Defendants ‘directly employed plaintiffs . . . and exercised meaningful control over the work performed.’”).

<sup>99</sup> *Walsh*, 580 F. Supp. 3d at 229.

<sup>100</sup> *See, e.g., Stuart v. Resurgens Risk Mgmt., Inc.*, No. 1:11-cv-04251-RWS, 2013 WL 2903571, at \*12 (N.D. Ga. June 12, 2013) (“[E]mployer status under the FLSA is most strongly demonstrated where the individual has control over the policies or conduct that allegedly violates the FLSA.”); *Martin v. Sprint United Mgmt. Co.*, 273 F. Supp. 3d 404, 438 (S.D.N.Y. 2017) (holding, in assessing joint employment that it was “[m]ost important[.]” that the control factor was not satisfied).

<sup>101</sup> *McFeeley v. Jackson St. Ent., LLC*, 47 F. Supp. 3d 260, 272 (D. Md. 2014) (“[C]ourts have found that the lack of permanence factor is ‘entitled to only modest weight in assessing employee status under the FLSA,’ and many courts have placed less emphasis on this element in comparison to the other elements.” (quoting *Hart v. Rick’s Cabaret Int’l, Inc.*, 967 F. Supp. 2d, 901, 920 (S.D.N.Y. 2013))), *aff’d*, 825 F.3d 235 (4th Cir. 2016).



for profit and loss) and *dependence* (control). It is thus wholly unsurprising that, in surveying appellate decisions since 1975, the Department found that in *every* decision it reviewed, when the opportunity and control factors pointed toward the same classification, that was the worker’s ultimate classification.<sup>102</sup>

The Department suggests that its own prior survey of caselaw should be ignored as “not complete” and based on assumptions.<sup>103</sup> But the Department’s claim that the survey was “not complete” is, in reality, a criticism that the Department itself allegedly “did not provide full documentations or citations” detailing its review.<sup>104</sup> Whatever brief solace the Department believes that may afford, it is telling that the Department has failed to cite even a single appellate decision undercutting the survey’s ultimate conclusion.

Similarly, the Department’s characterization of the survey’s conclusion as an “assumption” rings hollow. It made no assumptions at all; instead it simply observed that when the control and opportunity factors point toward the same classification, courts ultimately determine that is the appropriate classification. That is an eminently useful guidepost that the Department has observed bears out across nearly a half-decade of FLSA appellate decisions. The Department’s suggestion that no court *explicitly* elevating both control and opportunity means that those factors necessarily do not have greater weight is a false syllogism. Particularly in light of the extensive body of appellate law bearing out the critical—and, effectively, outcome-determinative—role of the two factors as a practical matter, there is no reason to now remove the benefits of acknowledging that structural reality in the 2021 IC Rule. Backtracking from the clear guidance that the 2021 IC Rule imparts, instead, would inject confusion and uncertainty into the multi-factor test, particularly when—as is the case with the Proposed Rule—the alternative is no guidance from the Department as to how the economic realities factors should be balanced.

Consistent with its goal of certainty, the 2021 IC Rule correctly observed that permitting considerations to overlap among the multiple factors undermines the structural benefits of a multi-factor test.<sup>105</sup> Such overlap creates confusion about how to evaluate a set of facts without affording outsized weight to those facts merely because they tangentially touch on another. And contrary to the Department’s contention that no part of the economic realities test should have a predetermined weight,<sup>106</sup> permitting the double- and (in some instances) triple-counting of particular facts and considerations practically, if not explicitly, affords them artificial, outsized weight in the analysis.

While CWI respectfully disagrees with a number of the Department’s characterizations of whether aspects of the 2021 IC Rule’s individual factors are contrary to law (as discussed below), the 2021 IC Rule properly places the focus of each factor precisely where it should be: on economic dependence. Even were any *individual* aspect of a factor incompletely stated, the proper course of

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<sup>102</sup> 86 Fed. Reg. at 1198.

<sup>103</sup> *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*, 87 Fed. Reg. 62218, 62227 (Oct. 13, 2022).

<sup>104</sup> 87 Fed. Reg. at 62227–28; *Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal*, 86 Fed. Reg. 24303, 24309 (May 6, 2021).

<sup>105</sup> 86 Fed. Reg. at 1174–75.

<sup>106</sup> 87 Fed. Reg. at 62219.

action would be to appropriately modify those limited portions of the 2021 IC Rule, not to rewrite the rule altogether.

The 2021 IC Rule offered long-awaited, and critically needed, official guidance to workers and businesses in the modern economy. It elevated two core factors to assist with the identification of independent contractor and employee analyses in a manner that has been confirmed—even if implicitly—through decades of appellate decisions holding that, when those factors support the same classification, that classification applies. There is no reason for the Department to upend that certainty in favor of a rule that provides no clear guideposts as to how to weigh the factors bearing on the economic dependence inquiry and, in a number of instances, injects new considerations having no bearing on that inquiry.

Consequently, CWI believes that the 2021 IC Rule should be maintained in its current form. Doing so would permit relevant stakeholders to conform their practices to the 2021 IC Rule without operating under the specter of the Department attempting to undo the very rule it only recently passed.

### **III. THE DEPARTMENT’S PROPOSED REVISED FACTORS ARE FLAWED.**

While the merits of the 2021 IC Rule alone warrant the Department’s adherence to it, the numerous issues inherent in the text and commentary of the Department’s Proposed Rule also counsel against adoption of the new proposal. In discussing each factor in turn, the below sections will explain why the Department’s newly revised factors are contrary to or ignore relevant law, are inconsistent with the realities of modern-day independent work, and (in some instances) are even inconsistent with the Department’s own commentary.

#### **A. The Opportunity-for-Profit-or-Loss Factor.**

Since its earliest articulation of the economic realities test, the Supreme Court in *United States v. Silk*, acknowledged that it is whether a worker has “opportunities for profit or loss” that is relevant to independent contractor status.<sup>107</sup> The Department’s Proposed Rule reflects a number of positions that ignore that clear precedent, provide an incomplete view of economic dependence, and ultimately inject uncertainty that does not exist in the 2021 IC Rule.

*First*, the 2021 IC Rule places the focus precisely where *Silk* stated it should be: on whether the worker has an *opportunity* to earn profits or incur losses.<sup>108</sup> The Department’s Proposed Rule, on the other hand, requires consideration of whether the worker *actually exercises* his skill to impact economic success.<sup>109</sup> This distortion of the *Silk* factor is wholly unexplained in the Department’s commentary or Proposed Rule. In fact, the Proposed Rule itself retains a header claiming that the test focuses on the “opportunity” for profit or loss,<sup>110</sup> and the Department’s

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<sup>107</sup> 331 U.S. 704, 716 (1947).

<sup>108</sup> 86 Fed. Reg. at 1247.

<sup>109</sup> 87 Fed. Reg. at 62274.

<sup>110</sup> *Id.*

commentary consistently references “opportunity,” not actual exercise of that opportunity, as the relevant touchstone.<sup>111</sup>

And the focus of *Silk*—and of virtually every court to have analyzed the issue—exists for a commonsense reason: certainty. Whether a worker chooses to exercise the opportunities for profit and loss available to him is fundamentally his own business decision. It is the ability to follow that business judgment—even to his detriment—that is the hallmark of the independence he is afforded.<sup>112</sup>

To provide otherwise would shift the analysis of this factor entirely to the whims of the worker. That is, even when a worker has extensive opportunities for profit or loss, the unilateral decision of the worker to not take advantage of them would result in this factor supporting employment. Such a standard may inform whether the worker is an *effective or successful* independent contractor, but it says nothing about whether he is an independent contractor in the first place. And such a standard would leave businesses wholly incapable of planning their business relationships around this factor, as they would have no means of impacting whether independent contractors take advantage of the opportunities available to them—at least not without separately exercising employer-like control.

In short, the Proposed Rule—contrary to Supreme Court precedent and reason—seeks to write “opportunity” out of the opportunity-for-profit-and-loss factor. It should be rejected on that ground alone.

*Second*, the 2021 IC Rule asks whether an individual may incur profit or losses based on his “exercise of initiative (such as managerial skill or business acumen or judgment).”<sup>113</sup> The Proposed Rule, on the other hand, narrows the inquiry to whether the worker has an opportunity for profit or loss based on “whether the worker exercises managerial skill.”<sup>114</sup> The Proposed Rule, however, provides no clear explanation for why it now narrows considerations of initiative to “managerial skill,” to the exclusion of “business acumen or judgment.” Nor does it provide stakeholders any meaningful guidance as to where it believes the distinction between these terms lies.

To the extent this distinction has any practical significance—and the Department apparently believes it does<sup>115</sup>—it is particularly problematic insofar as the Proposed Rule’s commentary itself acknowledges that “initiative,” “business acumen,” and “judgment” are

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<sup>111</sup> *E.g.*, *id.* at 62237 (“[I]f a worker has no *opportunity* for profit or loss, then that fact suggests that the worker is an employee.”(emphasis added)); *id.* at 62257 (discussing courts’ analysis of whether managerial skill “affect[s] the worker’s *opportunity* for profit or loss” (emphasis added)); *id.* at 62238 (discussing courts “focusing on whether the worker has an *opportunity* to use ‘initiative’ or ‘judgment’ to affect profits or losses” (emphasis added)).

<sup>112</sup> *Cf. C.C.E., Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995) (holding, under the NLRA, that “it is the worker’s retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor”).

<sup>113</sup> 86 Fed. Reg. at 1247.

<sup>114</sup> 87 Fed. Reg. at 62274.

<sup>115</sup> 87 Fed. Reg. at 62257 (describing “managerial skill” as “a *type* of initiative” (emphasis added)).

informative of the opportunity-for-profit-or-loss factor.<sup>116</sup> Because this revision contains no explanation, and potentially impermissibly excludes groups of activities informative of the opportunity-for-profit-or-loss factor,<sup>117</sup> the Department should retain the 2021 IC Rule’s formulation of the standard.

*Third*, the 2021 IC Rule provides that the opportunity-for-profit-or-loss factor cannot be satisfied by simply working “more hours *or faster*.”<sup>118</sup> The Department’s Proposed Rule, however, revises this standard to state that it is insufficient to “work more hours *or take more jobs*.”<sup>119</sup> This proposed language improperly encompasses a significant number of scenarios in which “taking more jobs” reflects managerial skill beyond merely working more hours.

For example, many independent workers today are able to operate on multiple apps or platforms—and even accept multiple jobs—at the same time. While multi-apping, these workers have the ability to determine when and under what circumstances to accept contemporaneous work to maximize their profits. While the driver may choose to work only during a set period of time, he has the freedom to determine the precise calculus of jobs on each platform (including whether to pursue an increased number of jobs on what platform during that period) to increase his earnings. The Department’s commentary even cites authority noting that choosing among “which jobs were most profitable” is evidence of independent contractor status, but the Proposed Rule contains no similar nuance.<sup>120</sup>

A project-focused formulation also ignores that independent contractors have the ability to utilize their own workforces. In such circumstances, the independent contractor—in the nature of a business—maximizes his profits by accepting additional projects that are then performed by his own personnel. The acceptance of additional projects does not necessarily result in additional hours worked by the contractor himself, and instead is an instance of managerial skill impacting the worker’s bottom line. Although the Proposed Rule acknowledges that “mak[ing] decisions to hire others” may be relevant, that statement is in tension with the Proposed Rule’s separate assertion that taking more jobs generally does not reflect the exercise of managerial skill.

The Department’s overbroad language fails to account for the foregoing (and similar) scenarios in which accepting more jobs is reflective of business initiative beyond merely working more hours. CWI respectfully submits that the Department’s proposed language on this point should be withdrawn.

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<sup>116</sup> *E.g., id.* at 62238 (noting that courts “focus[] on whether the worker has an opportunity to use ‘initiative’ or ‘judgment’ to affect profits or losses”); *id.* (noting that the Second Circuit looks to “the extent to which the workers’ business judgment or acumen affects their opportunity for profit or loss”).

<sup>117</sup> *See, e.g., Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 145 (2d Cir. 2017) (noting that the degree to which the worker’s relationship yielded returns was “a function . . . of the business acumen of each worker”).

<sup>118</sup> 86 Fed. Reg. at 1247.

<sup>119</sup> 87 Fed. Reg. at 62274.

<sup>120</sup> *Id.* at 62239 n.272 (quoting *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 304 (5th Cir. 1998)).

*Fourth*, the Proposed Rule provides that “whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed” is relevant to the opportunity-for-profit-or-loss inquiry.<sup>121</sup> While CWI agrees that a worker’s ability to structure the order of jobs he or she accepts—as in the multi-app situation noted above—or to dictate the time of performance may create additional opportunities for profit or loss, CWI disagrees that the converse is necessarily evidence of economic dependence under this factor.

Specific deadlines often exist because of the nature of customer contracts (e.g., delivery deadlines) or the products at issue (e.g., perishables). Thus, workers may have little say in the ultimate deadline of a particular job or project they accept. But that is not to say that they failed to exercise initiative in accepting that job to begin with. Indeed, it would rarely be the case that, in weighing the costs and benefits of potential projects and sources of income available to him, a worker would be unaware of the deadlines and similar sensitivities attendant to individual jobs. His selection—or non-selection—of a job with awareness of those sensitivities is a function of his economic independence.

*Finally*, as discussed in the following sections, the 2021 IC Rule correctly considers matters of skill and investment as part of the opportunity-for-profit-or-loss factor. Given that the Department ultimately ties each of these considerations to the question of whether they impact the workers’ ability to earn a profit or loss, they should remain incorporated in the factor, rather than regarded as standalone considerations. This indiscriminate mixing of determinative factors will only cause more confusion. It makes the Department’s proposed standard harder to apply, strips it of predictive value, and undermines its utility as a rule. Absent useful guidance on how to assess contracting relationships in a way that survives legal challenge, businesses must choose between running the risk of litigation or classifying all workers as employees. Any rule that leaves the regulated community in that position has failed its basic purpose: informing and advising the regulated community. This issue is discussed in greater detail, with respect to the newly proposed skill and investment factors, below.

Because the Proposed Rule departs in significant ways from established precedent, and because the Department has inadequately explained several of its departures from the current rule—either under applicable law or as part of a focus on economic dependence—CWI respectfully requests that the Department withdraw its proposed revisions on this factor.

## **B. Investments by the Worker and the Employer.**

CWI further submits that the Department’s Proposed Rule should not treat “investments by the worker and the employer” as a standalone factor. As courts have recognized, the “investment factor is . . . interrelated to the profit and loss consideration.”<sup>122</sup> “Economic investment, by definition, creates the opportunity for loss, but investors take such a risk with an eye to profit.”<sup>123</sup> Thus, because the investment factor is already sufficiently addressed in the

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<sup>121</sup> *Id.* at 62274.

<sup>122</sup> *E.g., Saleem*, 854 F.3d at 144 n.29; *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1537 (7th Cir. 1987).

<sup>123</sup> *Saleem*, 854 F.3d at 144 n.29.

opportunity-for-profit-or-loss factor, there is no need for it to be addressed again as a standalone factor.<sup>124</sup>

Despite acknowledging that reality in passing the 2021 IC Rule,<sup>125</sup> the Department now asserts that its position was flawed because the rule indicates that an opportunity for profit or loss may be shown through either the exercise of initiative or management of investment in the business. Thus, the Department now reasons, “if either initiative or investment suggests independent contractor status, the other cannot change that outcome even if it suggests employee status.”<sup>126</sup>

But that is not at all what the 2021 IC Rule provides. Instead, the current rule provides that both initiative and investment must be considered, though both are not required.<sup>127</sup> That is, it provides that the satisfaction of either is a *necessary* condition for the opportunity-for-profit-or-loss factor, but not that either is per se *sufficient*. Thus, the 2021 IC Rule simply provides that, in any instance in which initiative and investment point in separate directions, a court should simply engage in a balancing test to determine whether the competing facts, in their totality, suggest that the opportunity-for-profit-or-loss factor supports independent contractor or employment status. To the extent the Department believes there is ambiguity in that regard, the more reasonable course is simply to implement clarifying language, rather than separate out investment into an independent—and redundant—factor.

Even more troubling is that the Department proposes three fundamental shifts that find little to no support in precedent, while tilting the investment inquiry decidedly in favor of employee status in many of the independent work relationships prevalent in today’s economy.

*First*, although the Department does not expressly incorporate it into the Proposed Rule, its commentary suggests that a personal vehicle one “already owns” should generally not be considered a capital or entrepreneurial investment.<sup>128</sup> CWI respectfully submits that generalized statements to this effect are unproductive and inappropriately push the evaluation away from one that assesses the totality of the circumstances.

It is wholly unclear from the Department’s proposal what it means for a worker to “already own[]” a personal vehicle, when assessing workers through the lens of whether they are “in

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<sup>124</sup> *McFeeley v. Jackson St. Ent., LLC*, 825 F.3d 235, 243 (4th Cir. 2016) (“Two of th[e]se factors relate logically to one another: ‘the worker’s opportunities for profit or loss dependent on his managerial skill’ and ‘the worker’s investment in equipment or material, or his employment of other workers.’ . . . The more the worker’s earnings depend on his own managerial capacity rather than the company’s, and the more he is personally invested in the capital and labor of the enterprise, the less the worker is ‘economically dependent on the business’ and the more he is ‘in business for himself’ and hence an independent contractor.”).

<sup>125</sup> 86 Fed. Reg. at 1186–87.

<sup>126</sup> 87 Fed. Reg. at 62240.

<sup>127</sup> 86 Fed. Reg. at 1247 (noting that “the effects of the individual’s exercise of initiative and management of investment are *both* considered,” but that the absence of one would not preclude the opportunity factor from weighing in factor of independent contractor status).

<sup>128</sup> 87 Fed. Reg. at 62241.

business for themselves.”<sup>129</sup> For example, a driver may have owned a vehicle before beginning to work for one client, but have purchased it to facilitate work for another. In that circumstance, the investment demonstrates an ongoing concern of his independent business, even if it was made before the worker took on a project with a particular putative employer. Concluding the vehicle is not a business investment under these circumstances belies logic.

Similarly, evaluating investments solely with regards to timing ignores critical facts bearing on the entrepreneurial nature of business-related expenditures. Workers often buy vehicles with the understanding that they will have down-line impacts on their profits. For example, purchasing vehicles that are most gas-efficient, that maximize seating, or that maximize space for transporting goods may be considerations to varying degrees for ridesharing or other delivery workers, as they attempt to decrease their costs (by minimizing gas expenses) and increase their profits (by improving their ability to transport at a higher volume). That the vehicles may have some personal purpose does not eliminate these entrepreneurial considerations.

CWI respectfully submits that the Department’s discussion of vehicle investments should be withdrawn, and that the weight that each investment is afforded should instead be evaluated under the totality of the circumstances in which each such investment occurred. Indeed, even a number of the cases cited by the Department do not suggest that personal use deprives an investment of any weight in the analysis, but instead, *potentially* “somewhat dilute[s]” it.<sup>130</sup>

*Second*, the Department newly directs that “the worker’s investments should be considered on a relative basis with the employer’s investments in its overall business.”<sup>131</sup> CWI has grave concerns that this addition is inconsistent with law, uninformative to the economic realities test, and ultimately injects nothing but further uncertainty into the analysis.

When the Supreme Court first addressed the investment factor in *United States v. Silk*, it did so only by reference to the *worker’s* investment.<sup>132</sup> Indeed, the Court addressed only the fact that workers “own[ed] their trucks” in its analysis, and it engaged in no inquiry as to the investments that the putative employer made in its own business.<sup>133</sup>

That, of course, makes sense. A worker investing in his own equipment is a sign of his economic independence. But a putative employer investing in its *own* business provides absolutely no insight into whether the worker is economically dependent on that business. Although the Department’s commentary repeatedly provides the conclusory assurance that looking to the employer’s investment in its own business “can be a gauge of the worker’s independence or dependence,”<sup>134</sup> it wholly fails to provide any specific reason why.

Instead, the Department recognizes that a worker’s investment in his business is “rarely” of the same magnitude and scope of a putative employer’s investment in its own business.<sup>135</sup> And

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<sup>129</sup> 87 Fed. Reg. at 62274 (proposed § 795.105(a)).

<sup>130</sup> *Herman*, 161 F.3d at 304.

<sup>131</sup> 87 Fed. Reg. at 62275.

<sup>132</sup> 331 U.S. at 716.

<sup>133</sup> *Id.*

<sup>134</sup> 87 Fed. Reg. at 62242.

<sup>135</sup> *Id.*

despite acknowledging that inherent disparity, the Department provides stakeholders no meaningful guidance on how the relative investments should be weighed, or at what point such investments—which, again, will always be greater for the putative employer, even in an independent contractor relationship—tilt toward employment.

It is hardly surprising that virtually all workers—employees and independent contractors alike—have fewer resources than businesses. That fact, however, does not influence the question of economic dependence for either group. The standard does nothing more than create artificial—and textually unsupported—barriers to the use of independent contractors, depending on nothing more than an entity’s size. A worker is not any more likely to be economically dependent simply because he is smaller (or even many magnitudes smaller) than another entity with which he contracts.

Far from meaningful guidance on how a comparison should be evaluated, the Proposed Rule only provides that “[t]he worker’s investments need not be equal to the employer’s investments, but the worker’s should support an independent business or serve a business-like function for this factor to indicate independent contractor status.”<sup>136</sup> That standard ultimately reduces the analysis to a focus on the worker’s investments and confirms that it is the only consideration actually reflecting the worker’s operation of an independent business.

*Third*, the Proposed Rule requires that, for investments to support independent contractor status, they must be “capital or entrepreneurial in nature.”<sup>137</sup> Nothing in *Silk* or *Rutherford* construed the factor so narrowly. Contrary to the Proposed Rule’s suggestion that “tools and equipment to perform a specific job and the worker’s labor . . . are not evidence of entrepreneurial investment,”<sup>138</sup> such investments are plainly a function of the business-like decisions that contractors must make in choosing between the projects available to them.<sup>139</sup> That is, they may purchase equipment that allows them to complete a particular job more quickly—and thus more profitably—or may bypass projects requiring discrete expenditures that would lower profitability. These are generally not considerations for which employees, who typically have an expectation of reimbursement, have a personal interest. Moreover, limiting investments to those that are “capital or entrepreneurial” would disproportionately impact underserved communities. Indeed, the standard imposes significant barriers for individuals without the financial resources needed for capital and entrepreneurial investments—*i.e.*, it penalizes, and removes freedom in choosing work arrangements, from those without pre-existing financial resources.

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<sup>136</sup> *Id.* at 62275.

<sup>137</sup> *Id.* at 62240.

<sup>138</sup> *Id.*

<sup>139</sup> See, e.g., *Nieman v. Nat’l Claims Adjusters, Inc.*, 775 F. App’x 622, 625 (11th Cir. 2019) (citing investments in a ladder, measuring tools, a laptop, and “tools of the trade” as evidence of independent contractor status); *Carrell v. Sunland Constr., Inc.*, 998 F.2d 330, 333 (5th Cir. 1993) (citing welders’ expenditures in grinders, cutting torches, welding leads, welding hoods, and gloves in the investment analysis).



Thus, the Proposed Rule's creation of an independent "investment" factor should be rejected, and investment should continue to be analyzed as a component of each individual worker's opportunity for profit or loss.

### **C. The Degree of Permanence of the Work Relationship.**

CWI objects to the Department's reformulation of the "permanence of the work" factor insofar as it improperly seeks to dismiss facts bearing on independent contractor status. Specifically, the Proposed Rule newly provides that "[w]here a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers' own independent business initiative, this factor is not indicative of independent contractor status."<sup>140</sup> CWI is concerned that this absolute statement is simplistic; fails to permit an analysis of the totality of the circumstances; and thus in a number of instances will preclude analysis of certain facts solely because of considerations of the *putative employer's* operations, to the exclusion of considerations of whether the *employee* is operating in a manner consistent with his own maintenance of an independent business.

Many types of independent contractor work are often limited or sporadic in duration precisely because such work is needed only for a discrete period of time. Businesses rarely contract for labor beyond the time period for which it is useful. Thus, as is the case with most aspects of the economic realities analysis, "[t]he inferences gained from the length of time of the relationship depend on the surrounding circumstances."<sup>141</sup> The fact that the overall duration of the work may be the function of a company's "operational characteristics" may say something about the business, but on its own, it says nothing about the workers' own economic dependence.

When work occurs on a project-by-project basis, that fact "counsels heavily" in favor of independent contractor status.<sup>142</sup> It is irrelevant that individual projects may be limited in term by operational characteristics of a particular business or by the worker's own choice.<sup>143</sup> Regardless of the reason a particular project ends, the critical question is whether the worker has acted like a business in choosing among those projects that maximize his opportunities for profit. That is particularly true where a worker has no guarantee of receiving future projects from a company.<sup>144</sup> Indeed, courts have acknowledged that considerations such as whether workers held jobs elsewhere and treated limited, project-based seasonal or temporary work as an income supplement, as evidence of independent contractor status.<sup>145</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 387 (5th Cir. 2019); *accord Donovan v. Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984) (holding that the fact that workers may choose to return for subsequent projects "is no more indicative of the employment relationship than when a businessman repeatedly uses the same subcontractors due to satisfaction with past performance").

<sup>142</sup> *Parrish*, 917 F.3d at 387.

<sup>143</sup> *See, e.g., Torres-Lopez v. May*, 111 F.3d 633, 644 (9th Cir. 1997) (holding that thirty-two days of work in harvesting cucumbers weighed against employee status).

<sup>144</sup> *Parrish*, 917 F.3d at 387.

<sup>145</sup> *Donovan*, 736 F.2d at 1117.

Further, the Proposed Rule newly provides that the fact that work is “indefinite” necessarily weighs in favor of employee status.<sup>146</sup> Such an oversimplified standard, however, inappropriately removes any consideration of the surrounding facts. For example, a worker may offer services through a delivery app and then elect to deliver for only a single week, upon determining that other opportunities are more profitable. That worker’s work may have been “indefinite” in that the worker had no predetermined end-date, but nothing about this indefinite relationship bears the hallmarks of employment.<sup>147</sup> On the other hand, a separate worker may work through the same app, but elect to do so for two years. That extended duration alone may look more like employment, but the relevant consideration in both scenarios was not whether the work was indefinite, but rather whether it was “steady and reliable . . . over a substantial period of time.”<sup>148</sup> Indefiniteness does not offer a useful comparison point for economic dependence.<sup>149</sup> Indeed, the indefiniteness of a work relationship is, in many cases, precisely what allows independent contractors to utilize their initiative and increase profits by exploring other projects.<sup>150</sup>

By implementing a per se rule that provides workers are employees any time the duration of their projects, in any part, is the result of operational characteristics or is indefinite, without further inquiry, the Department needlessly precludes consideration of many respects in which independent contractors make project-by-project decisions that impact their ability to increase their profits. Such a narrowing is unjustified, and the Department should not amend the 2021 IC Rule to implement any changes to that effect.

#### **D. The Nature and Degree of Control.**

While CWI agrees with the Department that control is an essential factor in the independent contractor analysis, CWI fundamentally disagrees with the Department’s proposal to formulate that factor in a manner that creates ambiguity and unambiguously slants the considerations under it in favor of employee status.

*First*, in contrast to the 2021 IC Rule, the Proposed Rule shifts the relevant focus from the *worker’s* control to the *business’s* control.<sup>151</sup> That change is misguided. As the Department’s commentary to the Proposed Rule acknowledges, an independent contractor is someone who is “in

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<sup>146</sup> 87 Fed. Reg. at 62275.

<sup>147</sup> *See, e.g., Nassis v. LaSalle Exec. Search, Inc.*, No. 16-cv-9445, 2018 WL 2009502, at \*8 (N.D. Ill. Apr. 30, 2018) (holding that the permanence factor favored independent contractor status despite the “indefinite” relationship” because workers “retained other jobs and could leave and return to [defendant] when convenient”).

<sup>148</sup> *Cromwell v. Driftwood Elec. Contractors, Inc.*, 348 F. App’x 57, 60–61 (5th Cir. 2009).

<sup>149</sup> *See, e.g., Faludi v. U.S. Shale Sols., LLC*, 950 F.3d 269, 275–76 (5th Cir. 2020) (holding that an attorney was an independent contractor, despite that the attorney agreed to work as a consultant for an indefinite period of time).

<sup>150</sup> *See, e.g., Ming Hou v. Hong Kong Chinese Rest., LLC*, No. 3:14-cv-869(AWT), 2018 WL 8731543, at \*3 (D. Conn. Mar. 29, 2018) (holding that, although the agreement “was indefinite and the relationship lasted over a period of years, [because] the Plaintiff was free to come and go as he pleased,” the factor was “neutral”).

<sup>151</sup> Compare 86 Fed. Reg. at 1179 (worker focus), with 87 Fed. Reg. at 62246 (employer focus).

business for himself.”<sup>152</sup> Notably, considerations of a putative employer’s control are necessarily subsumed in the broader consideration of an individual worker’s control. If a putative employer exercises any particular level of control, an analysis of the worker necessarily reveals that he is exercising that control.

The reverse, however, is not necessarily true. An individual worker—particularly one performing multiple projects among multiple entities—may have operations extending beyond a single business. Focusing on the individual’s control ensures that the totality of the worker’s business are evaluated, including control the worker may have over whether to subcontract, how to manage his workforce, whether and how to advertise his services, and whether to prioritize, stagger, or overlap projects. Those considerations are largely lost when the analysis is unduly narrowed to an evaluation of an individual putative employer’s alleged control.

In fact, in its commentary on the manner in which a worker’s ability to work for others should be addressed, the Department acknowledges substantial appellate authority acknowledging a worker’s ability to work for others—and thus develop multiple sources of business—as evidence of independent contractor status.<sup>153</sup> The Department then suggests that it adequately addresses the factor by stating that a business placing a limitation on the ability of workers to work for others, in certain circumstances, absent evidence of an overriding business reason for the limitation, is evidence of employee status.<sup>154</sup>

Not so, and the reason why demonstrates the precise manner in which the shift to an employer-centric focus is misguided. The Proposed Rule finds limitations imposed by the putative employer on the individual performing other work to be evidence of employment.<sup>155</sup> By ignoring the worker’s conduct, however, the proposed control factor provides no allowance for consideration of the fact that a worker may be simultaneously (and in a multi-app situation, potentially at the exact same time) working for others. Yet “when an individual is able to draw income through work for others, he is less economically dependent on his putative employer.”<sup>156</sup>

Similarly, by merely asking whether the putative employer “sets the worker’s schedule,”<sup>157</sup> the Proposed Rule bypasses critical facts that may eliminate the consideration and actually suggest *independence*. For example, in a situation in which the worker determines when and for how long he will work, the mere administrative step of documenting that in a schedule hardly amounts to control. Similarly, where a result or service is perishable or deadline driven, based on the consumer’s desire or the nature of the product or service, it is inappropriate to describe the final

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<sup>152</sup> 87 Fed. Reg. at 62235 (quoting *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008)).

<sup>153</sup> 87 Fed. Reg. 62251–52 (citing and discussing *Razak v. Uber Techs., Inc.*, 951 F.3d 137, 145–46 (3d Cir. 2020) (citing drivers’ ability to driver for other services” as relevant to control); *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1235 (10th Cir. 2018) (citing the ability to “work for other employers” in finding that the control factor indicated independent contractor status); and *Express Sixty-Minutes*, 161 F.3d at 303 (finding that the control factor supported independent contractor status because the “drivers can work for other courier delivery systems”)).

<sup>154</sup> 87 Fed. Reg. at 62252.

<sup>155</sup> *Id.* at 62275.

<sup>156</sup> *Saleem*, 854 F.3d at 141.

<sup>157</sup> 87 Fed. Reg. at 62275.

deadline as evidence of the business setting the worker's schedule (or otherwise, as evidence of control by the business). The Department's proposal omits all nuance from this analysis.

In placing the focus on the putative employer's—rather than on the worker's—control, the Department precludes a true balancing test that weighs the *totality* of a worker's circumstances. To be sure, it weighs all actions of a putative employer that may (at least in the Department's view) suggest employment. But it prevents a counterbalancing of those separate actions by the employee that, separate and apart from its direct interactions with the putative employer, establish he is in business for himself. That narrowing is unjustified, prevents an accurate evaluation of economic dependence, and should be withdrawn by the Department.

*Second*, the Department's commentary indicates that a lack of supervision is not “indicative” of independent contractor status when a result of the “nature of an employer's business or the nature of the work.”<sup>158</sup> Independent contractors, however, are often retained precisely because they perform work that the putative employer does not.<sup>159</sup> And on the spectrum of dependence to independence, a lack of supervision falls squarely on the side of the latter, regardless of the reason for it.

*Third*, insofar as the Proposed Rule states that “technological means of supervision” are *necessarily* relevant to control, CWI disagrees. Critically, the Proposed Rule makes no distinction between technological or other supervision targeted toward the particular goods or services at issue, and supervision targeted toward the direction of the manner in and means by which the worker performs his work. For example, the Proposed Rule ignores that independent distributor or deliverers today deliver products ranging from perishable goods to pharmaceuticals (including controlled substances), for which timely delivery and maintenance of a proper chain of custody are essential. In a very real sense, then, technological monitoring in a number of situations exists not to exercise employer-like control, but to ensure product integrity, compliance with customer and regulatory commitments, and even the safety of the public at large.

Compliance monitoring that stems “from the nature of the goods or services being delivered” is “‘qualitatively different’ from control that stems from the nature of the relationship between employees and the putative employer.”<sup>160</sup> Indeed, “general monitoring related to quality and delivery of services . . . is perfectly consistent with a typical, legitimate contracting arrangement.”<sup>161</sup> While there may certainly be instances in which technological supervision, coupled with some manner of corrective direction about the means and manner of performance

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<sup>158</sup> *Id.* at 62250.

<sup>159</sup> *See, e.g., Silk*, 331 U.S. at 714 (“Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors.”).

<sup>160</sup> *Godlewska v. HDA*, 916 F. Supp. 2d 246, 260 (E.D.N.Y. 2013) (quoting *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 692 (D. Md. 2010)); *accord Hугee v. SJC Grp., Inc.*, No. 13 Civ. 0423(GBD), 2013 WL 4399226, at \*6 (S.D.N.Y. Aug. 14, 2013) (same).

<sup>161</sup> *Zampos v. W&E Commc'ns, Inc.*, 970 F. Supp. 2d 794, 803–04 (N.D. Ill. 2013); *Thornton v. Charter Commc'ns, LLC*, No. 4:12cv479 SNLJ, 2014 WL 4794320, at \*11 (E.D. Mo. Sept. 25, 2014) (same); *accord Zheng*, 355 F.3d at 75 (holding that “contractual warranties of quality and time of delivery” are not evidence of employer-like control).

may evidence employment, the Proposed Rule's current formulation of the issue sweeps far too broadly.

*Fourth*, and related to the above, the Proposed Rule incorrectly states that control may be indicative of employment when “for purposes of complying with legal obligations, safety standards, or contractual or customer service standards.”<sup>162</sup> Again, CWI disagrees. In its commentary, the Department itself acknowledges that its belief is that such considerations will only have relevance “in some instances.”<sup>163</sup> The Proposed Rule itself provides no clear guidance as to what those instances are. Setting aside that the Department's standard wholly fails to provide clarity to stakeholders as to when such considerations “may” (or may not) evidence control, case law overwhelmingly holds that compliance with legal obligations, safety standards, or contractual or consumer standards do not evidence employer control.<sup>164</sup>

And indeed, the foregoing standards say nothing about economic dependence because they would apply equally to those workers while in business for themselves, including had they contracted with the putative employer's customers directly. The Department's language in this regard is further counterintuitive insofar as it would effectively encourage businesses to avoid measures encouraging legal compliance and the safety of both independent workers and the public generally, so that they do not increase their risk of misclassification claims. The Department provides no explanation for how or why this is a desirous end.

*Fifth*, the Proposed Rule directs that considerations of “prices or rates” should be incorporated into the control factor.<sup>165</sup> CWI disagrees. A worker's ability to negotiate or otherwise impact the amounts that he earns for his work is already fully incorporated in the opportunity-for-profit-or-loss factor. Counting it again in the control factor produces only redundancy and confusion. Because viewing pricing and rate issues through the lens of control offers nothing to the analysis that is not already addressed in the opportunity-for-profit-or-loss factor, this revision to the 2021 IC Rule should be withdrawn.

*Finally*, the Proposed Rule removes the portion of the 2021 IC Rule that states the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible.<sup>166</sup> In its place, the Proposed Rule states simply that “reserved control” should be

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<sup>162</sup> 87 Fed. Reg. at 62275.

<sup>163</sup> *Id.* at 62258.

<sup>164</sup> *See, e.g., Parrish*, 917 F.3d at 382 (holding that “safety training and drug testing . . . is not the type of control that counsels in favor of employee status” and that “meeting clients' specifications . . . is consistent with the ‘usual path of an [IC]’” (quoting *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1315 (11th Cir. 2013)) (third alteration in original)) (internal quotation marks omitted); *Senne v. Kansas City Royals Baseball Corp.*, 591 F. Supp. 3d 453, 520 (N.D. Cal. Mar. 10, 2022) (holding that “regulatory and quality-control functions are insufficient”); *Zamos*, 970 F. Supp. 2d at 803 (holding safety and security requirements were not employer-like control); *Taylor v. Waddell & Reed, Inc.*, No. 09cv2909 AJB (WVG), 2012 WL 3584942, at \*5 n.9 (S.D. Cal. Aug. 20, 2012) (“[T]erms of a putative ‘employment’ relationship imposed by legal requirements do not suggest control . . . .”); *Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683, 690 (D. Md. 2010) (holding that a “strict quality control mechanism” does not indicate employment).

<sup>165</sup> 87 Fed. Reg. at 62275.

<sup>166</sup> 86 Fed. Reg. at 1203.

considered.<sup>167</sup> The stated basis for this revision is the Department’s belief that acknowledging the primacy of actual practice “is overly mechanical and does not allow for appropriate weight to be given to contractual provisions in situations in which they are crucial to understanding the economic realities of a relationship.”<sup>168</sup>

That explanation, however, rings hollow. When a contractual provision is truly “crucial,” it will necessarily manifest in the actual experiences of the worker. Tellingly, the Department has not identified a single scenario in which a contractual, but unexercised, right would have more relevance than the parties’ actual practices in assessing a worker’s day-to-day economic realities.

To be clear, the 2021 IC Rule does not provide that unexercised rights are irrelevant. It merely states the obvious: that what the control a putative employer *actually* exercises is more informative than the control it *could* exercise. The 2021 IC Rule’s acknowledgment that actual practice is more significant than potential practice is at the same time as obvious as it is useful as a demarcation for stakeholders evaluating their business relationships. The Department’s proposed removal of the 2021 IC Rule’s discussion of actual practice ignores the obvious and the law,<sup>169</sup> to the detriment of stakeholders seeking certainty in how their work relationships will be evaluated.

In sum, CWI believes that the Department’s revised articulation of the control factor departs from an economic dependence inquiry that assessed the totality of the circumstances, improperly weighs several considerations in a manner that necessarily tilts the factor toward employment, and needlessly ignores the commonsense benefits of the 2021 IC Rule. Thus, CWI opposes the proposed revisions to the 2021 IC Rule.

#### **E. The Extent to Which the Work Performed Is an “Integral Part of the Employer’s Business.”**

CWI also disagrees with the Proposed Rule’s departure from the “integrated unit of production” standard recognized by the 2021 IC Rule, in favor of an “integral part of the employer’s business” standard.<sup>170</sup> The Department suggests that the focus should be placed “on whether the work is critical, necessary, or central to the employer’s business.”<sup>171</sup> Supreme Court precedent and practical considerations, however, dictate otherwise.

In *Rutherford Food*, the Supreme Court, in assessing whether an employment relationship existed, looked to whether the work performed was “a part of the [employer’s] integrated unit of production.”<sup>172</sup> The Supreme Court observed that all of the work “done at one place,” and the workers were “work[ing] alongside admitted employees.”<sup>173</sup> In short, the workers were employees not simply because their work was important, but because they carried on their work as part of “a

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<sup>167</sup> 87 Fed. Reg. at 62275.

<sup>168</sup> *Id.* at 62258.

<sup>169</sup> *See, e.g., Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1312 (5th Cir. 1976) (“It is not significant how one ‘could have’ acted under the contract terms. The controlling economic realities are reflected by the way one actually acts.”).

<sup>170</sup> 87 Fed. Reg. at 62253.

<sup>171</sup> *Id.* at 62254.

<sup>172</sup> 331 U.S. at 729.

<sup>173</sup> *Id.* at 725–26.

series of interdependent steps” with the alleged employer’s employees that “contribut[ed] to the accomplishment of a common objective”—*i.e.*, they were “on the production line.”<sup>174</sup>

*Rutherford* teaches that the courts, in assessing economic dependence, should assess whether the worker is part of an “integrated unit of production.” Although the Department attempts to discount this language from *Rutherford* as a “rigid reading”<sup>175</sup> that “no court uses,”<sup>176</sup> the Department is wrong on both fronts.

Multiple courts, consistent with *Rutherford*, have looked to whether the worker is part of an integrated unit of production, and not simply to whether his work is important to the business.<sup>177</sup> For example, the Eleventh Circuit has drawn out this distinction across multiple decisions assessing employment status under the FLSA. In *Antenor v. D&S Farms*, for example, the Eleventh Circuit looked at whether workers “perform[ed] a routine task that was a normal and integral part of the growers’ bean production process.”<sup>178</sup> Because the workers did, the Eleventh Circuit found them “analogous to employees working at a particular position on a larger production line” and held that the fact supported employee status.<sup>179</sup> In *Layton v. DHL Express (USA), Inc.*, on the other hand, it was undisputed that the drivers performed a “crucial task” on behalf of DHL.<sup>180</sup> But that fact alone did not make them “analogous to employees working at a particular position on a larger production line.”<sup>181</sup> Thus, the Eleventh Circuit declined to find the mere importance of the task supported an employment relationship.<sup>182</sup> Similarly, in *Zheng v. Liberty Apparel Co.*, the Second Circuit directed that the trial court must consider whether the plaintiffs performed a job “that was integral to [the defendant’s] process of production.”<sup>183</sup> The Department’s assertion that courts have not looked to whether workers are part of an integrated unit of production is a false basis for extending *Rutherford* far beyond both its express language and its actual analysis.

Practically, the expansion the Department now proposes also makes little sense. Were the focus to be merely placed on importance to the business, the *Rutherford* Court would have wasted much ink detailing how the workers fit into the employer’s production process itself. Moreover,

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<sup>174</sup> *Id.* at 725, 727, 730.

<sup>175</sup> 87 Fed. Reg. at 62254.

<sup>176</sup> *Id.* at 119.

<sup>177</sup> *See, e.g., Tobin v. Anthony-Williams Mfg. Co.*, 196 F.2d 547, 550 (8th Cir. 1952) (analyzing whether haulers and wood workers were “an integrated part of defendant’s production set-up”); *Green v. Premier Telcom. Servs., LLC*, No. 1:16-CV-0332-LMM, 2017 U.S. Dist. LEXIS 213542 (N.D. Ga. Aug. 14, 2017) (finding as evidence of independent contractor status that, “[w]hile certainly Plaintiff performing his job was integral to [defendant’s] bottom-line, unlike in *Rutherford*, Plaintiff did not perform one step in an integrated system”).

<sup>178</sup> 88 F.3d 925, 937 (11th Cir. 1996).

<sup>179</sup> *Id.*

<sup>180</sup> 686 F.3d 1172, 1180 (11th Cir. 2012).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> 355 F.3d at 72.

whether a worker is in fact important to a business says precious little about whether that worker is *economically dependent* on the business, which is, after all, the relevant inquiry.

Although the Department’s discussion of its proposed “integral part” standard suggests that “a worker who performs work that is integral to an employer’s business is more likely to be employed by the business,” it ultimately admits that is merely an “assumption.”<sup>184</sup> Nothing in the Department’s Proposed Rule provides any explanation of why that would be the case. Indeed, it distorts the inquiry from whether the *worker* is dependent on the business, to whether the *business* is dependent on the worker. While the former may say something about whether the worker is in business for himself, the latter does not.

That is no small part of the reason why, in rejecting the “integral part” standard, the Second Circuit observed that *Rutherford* should not be “interpret[ed] . . . quite so broadly” as the Department now suggests.<sup>185</sup> Indeed, if one were to adopt the Department’s view, “this factor could be said to be implicated in *every* subcontracting relationship, because all subcontractors perform a function that a general contractor deems ‘integral’ to a product or service.”<sup>186</sup> Thus, looking to whether an individual’s work is integral is an inquiry that has “neither significance nor meaning” in evaluating employee status.<sup>187</sup> That is, of course, because “[e]verything the employer does is ‘integral’ to its business—why else do it?”<sup>188</sup>

All tasks—from an architect designing an office building, to an electrician correctly wiring that building, to an HVAC technician properly installing air conditioning and heating for that building—are undoubtedly critical to a business. Indeed, they each play an integral role in ensuring that its workers and customers are able to access and use a locale for conducting business. Those roles, however, sheds no light on whether the workers themselves are economically dependent, in any meaningful way, on a putative employer.

Further, even a number of courts applying the “integral part” standard have noted that any weight that may be afforded under it is substantially diminished when the workers are interchangeable with others.<sup>189</sup> The Proposed Rule fails to address that authority.

Because the Department’s proposed “integral part” standard is contrary to *Rutherford*, ignores authority that places the focus on whether the worker is part of an integrated unit of production, and offers no insight into a worker’s economic dependence, it should not be included in any final rule.

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<sup>184</sup> 87 Fed. Reg. at 62253.

<sup>185</sup> *Zheng*, 355 F.3d at 73.

<sup>186</sup> *Id.*

<sup>187</sup> *Lauritzen*, 835 F.2d at 1541 (Easterbrook, J., concurring).

<sup>188</sup> *Id.*

<sup>189</sup> See, e.g., *Crespo v. Kismey Exec. Limousine Serv., Inc.*, No. 15-5706, 2018 WL 3599738, at \*5 (D.N.J. July 27, 2018) (“not accord[ing the factor] substantial weight” because “Plaintiffs’ work was interchangeable with other drivers”); *Velu v. Velocity Exp., Inc.*, 666 F. Supp. 2d 300, 307 (E.D.N.Y. 2009) (holding that the fact that the driver’s “work [was] interchangeable with the work of other drivers” was relevant in finding independent contractor status).



## F. Skill and Initiative.

As a general matter, CWI agrees with the Department that both skill and initiative may play a role in the independent contractor calculus. CWI fundamentally disagrees, however, that those considerations should be treated as a standalone factor in the economic realities calculus. Where specialized skills are required to perform work, workers unquestionably have taken the initiative to invest time and money into developing those skills. It is those very skills that often create opportunities for profit or, if those skills are mismanaged, for loss.

Today's independent work opportunities encompass a far wider array of individuals who may not possess a "skill" that is a part of a traditional learned profession or trade, but whose success is the culmination of managerial and customer service skills and initiatives and judgment. The opportunity-for-profit-and-loss factor already ensures that the exercise of initiative and utilization of skill each are afforded weight in the independent contractor analysis precisely because the factor ensures that those considerations are tethered to activities reflective of economic dependence. The Department's analysis of skill acknowledges as much, insofar as it directs that skill should be assessed only through the lens of the exercise of "business-like initiative."<sup>190</sup>

Given that understanding, there is little reason for a standalone "skill and initiative" factor. In fact, the Department's use of a standalone skill-and-initiative factor practically, if not explicitly, results in the considerations under that factor being assigned outsized weight. It also undercuts the purposes behind a multi-factored balancing test in the first place. Whereas clearly delineated and distinct factors offer clear guideposts for businesses and workers to follow, overlap and duplication that blur those lines serve only to inject additional confusion and ambiguity as to how factors (and considerations within those factors) should be weighed.

Although the Department asserts that a lack of *specialized* skill is necessarily evidence of independent contractor status, it is hardly clear why that would be the case. Whether an individual lacks skills untethered to his ability to earn a profit or loss says nothing about whether he is *economically dependent* upon a particular business. Independence may exist regardless of whether a worker has a specialized skill. In fact, courts have recognized—and the Wage and Hour Division has previously acknowledged—that courts should look to "whether the worker has the 'skills necessary to locate and manage discrete work projects [that are] characteristic of independent contractors.'"<sup>191</sup>

Many independent workers are able to multi-home—*i.e.*, provide services to multiple clients during the same week, day, or even hour. In that circumstance, workers for rideshare companies and other delivery companies, for example, demonstrate their independence not only by choosing when, whether, where, and how long to work, but may also do so by toggling back and forth between different platforms or accessing other avenues to potential customers to promote

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<sup>190</sup> 87 Fed. Reg. at 62275.

<sup>191</sup> U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FLSA 2019-6, at \*5 (Apr. 29, 2019) (quoting *Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07-0069, 2008 WL 2944661, at \*13 (M.D. Tenn. July 31, 2008)); *id.* at \*9 (acknowledging that "choos[ing] between different service opportunities and competing virtual platforms" is an exercise of skill indicative of independent contractor status (citing *Saleem*, 854 F.3d at 143–44)).

themselves, seek opportunities, and ultimately maximize their profits. Addressing skill only with reference to whether it is specialized fails to acknowledge the other ways in which a worker may exercise skill—through his acumen, initiative, and judgment—to develop an independent business that takes advantage of available flexible work opportunities. Those opportunities are enjoyed by so many workers precisely because of the lack of barriers to entry into these relationships (including not requiring prior development of specialized skills) and the potential profits that skillful management of those opportunities affords. That is the benefit of today’s independent work—it has become so flexible that it allows almost anyone to enter into distribution and other service industries and make it into the opportunity that they design for themselves.

The Department’s effort to create a standalone skill-and-initiative factor unjustifiably tilts towards employment status by narrowing the types of skill that may be required. It is critical that any final rule does not include skill and initiative as separate factors, as doing so offers no additional clarity to—and instead only muddles—the economic dependence inquiry.

### CONCLUSION

On behalf of its members, CWI thanks the Department for providing the opportunity to submit these comments. Respectfully, however, the Department’s Proposed Rule is both substantively and procedurally erroneous. The Proposed Rule marks a significant step back from the 2021 IC Rule enacted just under two years ago. It injects uncertainty into the multi-factor test, fails to acknowledge the realities of independent working relationships today, and ultimately sets forth a standard that is not a proper exercise of the Department’s regulatory power. Thus, the Department should withdraw its Proposed Rule and finally provide the 2021 IC Rule adequate time to promote uniformity and clarity under its more clearly delineated and legally consistent framework.

Respectfully submitted,

THE COALITION FOR WORKFORCE INNOVATION

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