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December 13, 2022

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

RE: Employee or Independent Contractor Classification Under the Fair Labor Standards Act
RIN 1235-AA43

Dear Ms. DeBisschop:

On behalf of the American Society of Travel Advisors, Inc. (ASTA) and the more than 160,000 Americans who work at travel agencies across the country, I am writing to express ASTA's viewpoint with respect to the above-referenced Notice of Proposed Rulemaking (NPRM) proposing to modify Wage and Hour Division regulations to revise its analysis for determining worker classification under the Fair Labor Standards Act (FLSA).¹

Established in 1931, ASTA is the world's leading professional travel trade organization. Our current membership consists of over 17,000 domestic travel agencies, independent travel advisors and supplier companies varying in size from the smallest home-based businesses to traditional brick-and-mortar storefront agencies to the largest travel management companies and online travel agencies such as Expedia. As of 2019, they collectively accounted for an annual payroll output of \$7.1 billion and annual revenues of \$17.7 billion.

For decades, travel agencies have relied heavily on the services of independent contractors (ICs), an arrangement that provides substantial benefits for both workers and agencies in situations where a traditional employment relationship is impractical or uneconomical. Moreover, the prevalence of the IC business model in the industry is on the rise and that trend is only expected to continue. According to our most recent survey data, fully 75 percent of ASTA member agencies reported contracting with at least one IC, and of those who did, the average agency engaged twelve.² All told, nearly 65,000 ICs currently work in our industry – equivalent

¹ [Employee or Independent Contractor Classification Under the Fair Labor Standards Act](#), 87 Fed. Reg. 62218 (October 13, 2022).

² *ASTA 2016 Labor & Compensation Report*, March 2017 at 4.

to roughly 40 percent of its total workforce. As such, ASTA and its members have a significant and particular interest in the outcome of the present rulemaking.

The Department of Labor (“Department” or “DOL”) proposes to withdraw a rule published in January 2021 entitled “Independent Contractor Status Under the Fair Labor Standards Act” (referred to in the NPRM and here as the “2021 IC Rule”), which provided guidance on the classification of independent contractors under the FLSA applicable to workers and businesses in any industry.³

As noted in the NPRM, the 2021 IC Rule identified five economic reality factors to guide the inquiry into a worker’s status as an employee or independent contractor. Two of the five factors, namely, the nature and degree of control over the work and the worker’s opportunity for profit or loss, referred to as “core factors,” are deemed most probative of a worker’s status and therefore carry greater weight in the analysis.⁴ The three non-core factors, *i.e.*, those considered less probative to the analysis, are the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the employer, and whether the work is part of an integrated unit of production.⁵ The 2021 IC Rule further provided that where the two core factors point to the same classification, there is a substantial likelihood that is the accurate classification of the worker.⁶

In addition to withdrawing the 2021 IC Rule, DOL currently proposes to issue new regulations to 29 CFR Part 795 to, among other things, return to a “totality of the circumstances” analysis of the economic reality test in which the evaluated factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity.⁷ The six evaluation factors the Department proposes to include in the new regulations are: (1) opportunity for profit or loss depending on managerial skill; (2) investments by the worker and the employer; (3) degree of permanence of the work relationship; (4) nature and degree of control; (5) extent to which the work performed is an integral part of the employer’s business; and (6) skill and initiative.⁸

The Department maintains that two benefits would result from adoption the rule as proposed. First, it claims that as compared with the approach expressed in the 2021 IC Rule, the proposed analysis for determining worker status promises increased consistency with existing judicial

³ 87 Fed. Reg. at 62219, *citing* 86 Fed. Reg. 1168.

⁴ Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed Reg. 1168 at 1246 (January 7, 2021).

⁵ *Id.*

⁶ *Id.*

⁷ 87 Fed. Reg. at 62260.

⁸ *Id.* at 62274-62275. Additionally, as proposed, the regulations would expressly provide that the six factors would *not* be exhaustive, and that other factors may be considered. *Id.*

precedent and DOL's longstanding guidance.⁹ It adds that, while acknowledging the 2021 IC Rule was promulgated to "significantly clarify to stakeholders how to distinguish between employees and independent contractors under the Act,"¹⁰ if left in place would create additional uncertainty because it is "not clear whether the courts will adopt its analysis."¹¹

While these assertions are arguably correct, the underlying supposition, *i.e.*, that the 2021 IC Rule represents an unwise departure from seven decades of application of a totality of the circumstances analysis,¹² is not particularly compelling given the substantial variation that *already* exists in the application of the test's factors among the federal circuit courts interpreting the FLSA. Indeed, because the FLSA appellate caselaw developed under the totality of the circumstances interpretive framework (to which the Department now seeks to return), is anything but a model of uniformity and consistency, that rationale for withdrawing the 2021 IC Rule is, in our view, not at all persuasive.

For example, in connection with the proposal to treat the investments by the worker and the engaging party as a standalone factor in the economic reality test,¹³ the Department provides an overview of the positions various courts of appeal have taken in analyzing this factor.¹⁴ Before discussing the approaches taken by the majority of federal appellate courts, it begins by noting that both the Second Circuit and the D.C. Circuit do not even identify the worker's investment as a separate factor in the analysis.¹⁵

Likewise, with respect to whether the worker's investment should be evaluated alone or in comparison to the engaging party's investment in its business, DOL notes that while the Fifth, Tenth, Sixth and Fourth Circuits utilize this approach, the Second and Eleventh Circuits do not, while the Eighth Circuit, apparently staking out a position somewhere in between, gives "little weight" to the comparison.¹⁶ Note too that this is a summation of the caselaw of just *one* of the six identified evaluation factors DOL proposes to include in the final rule.

For a variety of reasons well known to the Department, many business models simply cannot function effectively without the flexibility associated with engaging labor on a contract basis.¹⁷

⁹ *Id.* at 62266.

¹⁰ 87 Fed. Reg at 62229, *citing* 86 Fed. Reg. 1168.

¹¹ 87 Fed. Reg at 62229. It is worth noting here that the current proposal is subject to the very same criticism.

¹² *Id.* at 62218

¹³ Proposed §795.110(b)(2).

¹⁴ 87 Fed. Reg at 62240.

¹⁵ *Id.*

¹⁶ *Id.* at 62242.

¹⁷ It should be noted that many reasons cited by businesses, particularly in "gig economy" industries, are wholly unrelated to the well-documented cost differential associated with the engagement of labor on a 1099 rather than W-2 basis. For example, independent contracting enables businesses to respond rapidly to short-term increases in demand or transient gaps in supply by calling on more workers than they could economically maintain as

However, as the foregoing illustrates, the uncertainty which attends application of the totality of the circumstances interpretation undermines confidence among businesses that their classification of their workers will be upheld if challenged in the courts. This in turn stifles the growth, and in some cases threatens the very survival, of scores of industries in which independent contractor relationships predominate.

Plainly, for businesses in industries heavily reliant on the engagement of independent contractors, the decisional inconsistency associated with application of the totality of the circumstances interpretation is anything but academic. Moreover, the divergent caselaw among the federal circuits in interpreting the FLSA represents a particular continuing challenge for those businesses that engage contract workers in multiple states, as many ASTA member travel agencies do.

The proposal advanced by the Department in the NPRM is not the solution to this problem. To the contrary, a return to an unstructured totality of the circumstances interpretive approach where no single factor predominates in the analysis practically ensures that the decades-long confusion among stakeholders and inconsistency among the federal circuits interpreting the FLSA, which the Department readily acknowledges exists, will only continue.

Second, the Department asserts that adoption of the rule as proposed would reduce worker misclassification.¹⁸ We find DOL's articulation of this supposed benefit to be somewhat curious as, contrary to its assertion, adopting a new test to establish worker status (or adopting a different interpretation of an existing test) cannot, strictly speaking, reduce worker misclassification. This is because whether any particular worker is misclassified is a function of the test applied to the specifics of the worker's engagement. There is no objective standard independent of the test itself by which a worker's status can be determined.

It logically follows then that if the Department believes that the totality of the circumstances interpretation of the economic reality test it proposes to adopt here is more restrictive than that set forth in the 2021 IC Rule, as appears to be the case, it is more accurate to state that its adoption will result in a greater number of workers being subject to the protections of the FLSA. Similarly, adoption of a less restrictive test or interpretation will result in fewer workers being covered under FLSA. In other words, applying a different standard to a given set of facts pertaining to a worker's engagement will, at most, affect a *reclassification*. But it cannot identify misclassification, much less serve as a remedy for it.

We respectfully contend that if reducing the incidence of worker misclassification is truly the aim, the Department would be better served focusing its efforts on enforcement in the handful

traditional employees. For an analysis of this advantage, and others, see Eisenach, J. (2010). *The Role of Independent Contractors in the U.S. Economy*, <https://iccoalition.org/wp-content/uploads/2014/07/Role-of-Independent-Contractors-December-2010-Final.pdf>

¹⁸ 87 Fed. Reg at 62266.

of industries where historically this has been a problem.¹⁹ If, on the other hand, the objective is indeed to increase the number of workers entitled to the legal protections associated with employee status, it is incumbent on the Department to transparently state as much and then articulate why it deems that course of action to be desirable or necessary.

DOL acknowledges that the prevalence of misclassification of employees as independent contractors is unclear but speculates that it could be “substantial.”²⁰ However, the Department’s own 2000 study on independent contractors, referenced in the NPRM, indicated that only between 1 and 9 percent of workers were misclassified.²¹ Whatever the case, in the absence of current data and other reliable empirical evidence establishing that misclassification is widespread, implementing a substantial and likely disruptive policy change seems entirely unwarranted.

In contrast to the approach advanced in the current rulemaking, the 2021 IC Rule’s identification of two core factors most probative of the question of the worker’s economic dependence, and therefore entitled to greater weight in the analysis than the other three factors, is both workable and grounded in common sense. In nearly every circumstance, the nature and degree of the individual’s control over the work and the individual’s opportunity for profit or loss were, and remain, rightly entitled to both greater scrutiny and greater weight when determining the classification of the worker.

With respect to the “nature of control” factor, ASTA agrees with 2021 IC Rule’s guidance that this factor weighs in favor of the individual being an independent contractor when he or she exercises substantial control over key aspects of the performance of the work, including but not limited to setting one’s own schedule and/or work hours, by selecting one’s own projects, and the right to render services for others, including but not limited to the engaging party’s competitors.²² The factor weighs in the opposite direction, *i.e.*, toward a determination that the worker is an employee, when these aspects are controlled by the engaging party.²³

The other core factor, the individual’s opportunity for profit or loss, weighs towards the individual being an independent contractor where the individual stands to generate a profit or incur a loss based on the exercise of initiative, such as managerial skill or business acumen or

¹⁹ On this point, the Department acknowledges that misclassification is *not* an across-the-board problem. Rather, there exists a “disparity in occupations affected by misclassification,” with the NPRM naming agriculture, trucking, and housekeeping occupations, among others, as having a high incidence of misclassification. 87 Fed. Reg. at 62627.

²⁰ 87 Fed. Reg. at 62266.

²¹ *Id.* at 62267, citing Lalith de Silva, Adrian Millett, Dominic Rotondi, and William F. Sullivan, “Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs” Report of Planmatics, Inc., for U.S. Department of Labor Employment and Training Administration (2000), <https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

²² 86 Fed. Reg. 1168 at 1246-1247.

²³ *Id.* at 1247.

judgment, or management of his or her investment in equipment, materials and the like.²⁴ Where the individual is unable to affect his or her earnings except by working more hours or working more efficiently, this factor weighs towards the individual being an employee.²⁵

ASTA is particularly supportive of the regulatory guidance in the 2021 IC Rule that states where both of the core factors point to the same classification, whether employee or independent contractor, there is a substantial likelihood that it is the accurate classification for the worker in question.²⁶ This instruction provides courts interpreting the FLSA with greater direction, promising greater consistency in decisions among the federal circuits. This in turn provides businesses and other stakeholders, particularly those operating in multiple states, with the confidence to expand their businesses, resulting in growth of the economy as a whole. A secondary benefit derived from the 2021 IC Rule's elevation of the nature of control element is the reduced likelihood (though not the elimination) of conflicting determinations when the same facts are evaluated under different worker classification tests used by other federal agencies.

In sum, because it recognizes the primacy of the nature of control element and provides essential structure in interpreting the other factors of the worker's engagement which bear on the analysis – which was notably absent previously – we view the interpretive approach embodied in the 2021 IC Rule to be a meaningful improvement over the *status quo ante*. We also believe that, if given time, application of the 2021 IC Rule's interpretive framework by courts deciding FLSA cases will result in greater decisional consistency among the federal circuits as compared with the substantial variation in that regard that currently exists.

It follows then that ASTA believes that withdrawal of the 2021 IC Rule and issuance of new interpretive regulations, as proposed, would be a misguided action that will not result in the achievement of either of the Department's stated objectives. To the contrary, doing so will only result in continued widespread confusion on the part of all stakeholders as to how a worker's status as an employee or independent contractor is evaluated for FLSA purposes by both DOL and the courts. Accordingly, we urge the Department not to withdraw the 2021 IC Rule.

Finally, ASTA would be remiss in its duty to effectively represent its members' interests if it did not take this opportunity to address the longstanding difficulty associated with the continued use of multiple tests at the federal level to determine worker status. Currently, there are at least three such primary tests in use. The Internal Revenue Service (IRS) uses a 20-factor common law based "right of control" test,²⁷ whereas the Department proposes to continue

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 1246.

²⁷ Rev. Rul. 87-41, 1987-1 C.B. 296 (1987).

using some iteration of the economic reality test. Then there is what is known as the “hybrid” test, which incorporates elements of both the common-law test and the economic reality test.²⁸

As noted above, the application of different tests can result in conflicting determinations of a worker’s status. For example, a worker can be deemed an IC for federal tax purposes by the IRS and at the same time be deemed an employee by DOL for FLSA purposes, meaning that a business can be found liable for misclassifying a worker despite taking pains to structure the engagement to satisfy one of the federal tests. The ongoing prospect of inconsistent determinations has had a chilling effect on the growth of businesses in industries reliant on contract workers and has resulted in fewer opportunities for individuals who choose to offer their services as independent entrepreneurs.

The obvious solution to this problem would be the adoption of a single standard to evaluate worker status for all federal purposes. While we acknowledge the Department’s view that it lacks the authority to do so,²⁹ the simplest means to that end would be amendment of the FLSA to replace the economic reality test with the right of control test. This action would also eliminate the hybrid test, so what is now three tests at the federal level would become one.³⁰

For this reason, ASTA, joined by a substantial number of trade associations and stakeholders in other industries, strongly advocated for passage of the *Modern Worker Empowerment Act* (H.R. 1523/S. 526). This legislation, introduced most recently in March 2021, sought to amend the FLSA to create the single standard.³¹ And while the ultimate objective likely will have to be achieved legislatively, we believe that the current rulemaking represents a favorable opportunity for DOL to give due consideration to the need for greater uniformity across federal agencies³² and how that can be at least partially addressed by DOL determining not to rescind the 2021 IC Rule.

²⁸ A discussion of the hybrid test is contained in *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 36-37 (3d Cir. 1983). In *Zippo*, the Third Circuit applied this standard to determine worker status under the Age Discrimination in Employment Act, 29 § U.S.C. 623. *Id.* at 38.

²⁹ 87 Fed. Reg. at 66273.

³⁰ For a detailed analysis of the evolution of the differing standards used to determine worker status at the federal level and the merits of adopting a single standard for all federal purposes, see *Article: The Time Has Come for Congress to Finish its Work on Harmonizing the Definition of “Employee,”* 26 J.L. & Pol’y 439 (2018).

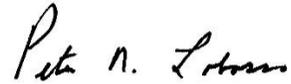
³¹ An earlier but substantively identical bill, the *Harmonization of Coverage Act of 2017* (H.R. 3825) was introduced in the 115th Congress.

³² We note that the Department concedes that creation of a uniform standard would be beneficial to businesses (“[c]odifying a common law control test for the FLSA may create a more uniform legal framework among Federal statutes, in the sense that entities would not, for example, have to understand and apply one employment classification standard for tax purposes and a different employment classification standard for FLSA purposes”), yet nonetheless concludes that doing so would not “otherwise simplify the analysis for the regulated community.” 87 Fed. Reg. at 62270.

Amy DeBisschop
U.S. Department of Labor
December 13, 2022
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Thank you for considering ASTA's views on this important issue. If you or your staff have any questions regarding our comments or the engagement of independent contractors in the travel industry, please do not hesitate to contact me at (703) 739-6854 or plobasso@asta.org.

Sincerely,

A handwritten signature in black ink that reads "Peter N. Lobasso". The signature is written in a cursive style with a large initial 'P'.

Peter N. Lobasso
Senior Vice President & General Counsel
American Society of Travel Advisors, Inc. (ASTA)