April 28, 2026

Submitted Via Regulations.gov

Re: Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, Dkt. No. WHD-2026-0001, 91 Fed. Reg. 9,932 (Feb. 27, 2026)

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

Dear Mr. Navarrete:

We write on behalf of Americans for Prosperity Foundation ("AFPF"), a 501(c)(3) nonpartisan organization that educates and trains citizens to be advocates for freedom, creating real change at the local, state, and federal levels. AFPF appreciates the opportunity to comment on the U.S. Department of Labor ("DOL") Wage and Hour Division ("WHD") Proposed Rule, titled "Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act" (the "Proposed Rule").[1] AFPF strongly supports liberty of contract. AFPF believes that workers and those that contract with them should be able to freely create work arrangements that work best for them. AFPF supports the Proposed Rule as a meaningful step toward respecting statutory and constitutional limits on DOL's power, as well as restoring clarity and worker flexibility that workers and businesses are legally entitled to.

AFPF also applauds DOL's efforts to rescind and replace the Biden-era Employee or Independent Contractor Classification Under the Fair Labor Standards Act Final Rule (the "2024 Rule").[2] The 2024 Rule fails to give businesses fair notice of their obligations under the Fair Labor Standards Act ("FLSA"), unlawfully expands the statute's sweep beyond the power Congress delegated in defiance of Supreme Court precedent, and arrogates arbitrary power to the DOL, all to the detriment of the workers the regulations are ostensibly designed to help. This flawed approach not only reduces opportunity for worker flexibility and autonomy but hampers entrepreneurship that drives job creation.[3] The 2024 Rule's freewheeling totality-of-the-

[1] 91 Fed. Reg. 9,932 (Feb. 27, 2026).
[2] 89 Fed. Reg. 1638 (Jan. 10, 2024).
[3] AFPF opposed the 2024 Rule, *see* AFPF Comment, RIN 1235-AA43 (filed Dec. 13, 2022), https://www.regulations.gov/comment/WHD-2022-0003-53547, and supported the 2021 Rule, *see* AFPF Comment, RIN 1235-AA34 (filed Oct. 26, 2020), https://www.regulations.gov/comment/WHD-2020-0007-1557.

circumstances test is hopelessly vague, unlawfully slanted toward classifying workers as employees, and harmful to workers and the economy alike. Its purposefully malleable balancing test effectively transforms classification disputes into an arbitrary litigation lottery where any result is possible based on the subjective values of a particular President or DOL personnel, hangs the sword of Damocles over businesses who wish to engage independent contractors, and has a chilling effect on the creation of work opportunities. DOL should definitively reject that flawed and unlawful approach.

Instead, DOL should protect the right and freedom of individuals to choose to work as independent contractors and arrange their work relationships in the manner they determine best meets their needs and desires to the maximum extent permissible under the FLSA, as glossed by binding precedent. In an ideal world, a simple test to distinguish between independent contractors and employees would apply that asks whether the worker supplies his or her services to the putative employer pursuant to a commercial contract. If so, the worker is an independent contractor, and no further inquiry is necessary. Such a test would maximize contract freedom and give effect to the expectations of both sides of the contractual relationship.

But AFPF recognizes DOL is constrained by existing precedent.[4] And AFPF agrees that the degree of control and the worker's opportunity for profit or loss are the core economic reality factors that are most highly probative of whether a worker is an independent contractor. That is so even if the other factors might cut the other way, suggesting an "employee" classification under the FLSA. Restoring emphasis on the core control and opportunity factors also provides greater predictability and clarity to businesses and workers, as well as the WHD employees tasked with making classification determinations; respects due process; and promotes innovative work arrangements that provide greater flexibility and satisfaction for those who voluntarily choose them.[5] For similar reasons, AFPF also supports DOL's proposal to apply this test to the Family and Medical Leave Act ("FMLA") and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA") to provide greater predictability, uniformity, and stability across statutes that the WHD administers and enforces.

I. Innovative Work Arrangements Benefit Workers and the Economy.

AFPF applauds DOL for working to bring greater clarity and certainty to the question of independent contracting, a status that applies to millions of gig economy workers, freelancers, and self-employed entrepreneurs. AFPF believes people should be empowered to earn success and fulfillment through their work and that freedom to choose the kind and type of work they wish to pursue, and under what conditions, is crucial to that empowerment. Policies and rules that support independent contracting help make this possible, as they allow individuals the ability to enjoy flexible working arrangements and to chart their own career success. That means working mothers, fathers, college students, recent graduates, and more can provide valued services in transportation, medical, food delivery, construction, and many other industries, while also tending to other priorities in their lives. DOL should foster freedom of contract and promote the ability of people

[4] *See Hohn v. United States*, 524 U.S. 236, 252–53 (1998); *Rodriguez de Quijas v. Shearson/American Express*, *Inc.,* 490 U.S. 477, 484 (1989); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc*., 490 U.S. 477, 484 (1989) ("If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.").

[5] AFPF strongly opposes so-called ABC tests and agrees with DOL that imposing such a test under the FLSA is beyond the agency's statutory authority and thus ultra vires and unlawful. *See* 91 Fed. Reg. at 9,932.

to offer their time and skills as independent contractors, thereby empowering individuals to direct their own schedules and provide services to a broader range of businesses and customers as they see fit. DOL should protect the right of individuals to provide their services in and through voluntary agreements without restrictions. The greater the freedom of contract, the greater the opportunity workers and businesses have to create flexible work arrangements that meet the needs of workers, businesses, and consumers. And DOL should look to expand the right to work as independent contractors because all involved want that freedom, particularly workers.

Independent contracting is not a recent innovation. On the contrary, "[p]eople have been working independently and providing goods and services to one another for centuries."[6] Today, freedom of contract has empowered tens of millions of workers across a range of industries to support themselves and their families in a way that works for them.[7] To put this in perspective, "there are approximately 70.4 million freelancers in the U.S.," constituting "around 36% of the U.S. workforce[.]"[8] Of those, more than a third "earn[] over $75,000 annually."[9] Indeed, this market is a $1.3 trillion component of economy.[10] Independent contractors are vital contributors in important industries across the entire economy, including healthcare, construction, transportation, and manufacturing.[11] The vast majority "do it because they want to, not because they have no other choice," and "also report being happier, healthier, more secure, and more optimistic about the future than they would be working for someone else."[12]

Independent contracting arrangements are mutually beneficial for both workers and those who contract with them. Freedom of contract benefits workers and their families in several ways. For example, it often offers greater flexibility and the ability to work remotely, fostering work arrangements that allow people to care for their children or other dependent family members.[13] Studies show that most people who choose to be independent contractors prefer that status and the benefits that flow from that arrangement. As the economy evolves, many workers prefer to choose independent work arrangements that allow greater control over work hours and assignments, as well as increased opportunity for profit. Underscoring this, a 2023 U.S. Bureau of Labor Statistics survey found that "independent contractors overwhelmingly preferred their work arrangement

[6] *See* Tammy McCutchen and Alex MacDonald, *Ready,* U.S. Chamber of Commerce, *Fire, Aim: How State Regulators Are Threatening the Gig Economy and Millions of Workers and Consumers*, at 7 (Jan. 2020), https://www.uschamber.com/assets/documents/ready_fire_aim_report_on_the_gig_economy.pdf.
[7] *See generally* Who are independent contractors, and how would the PRO Act limit their opportunity?, Americans for Prosperity (Apr. 7, 2021), https://americansforprosperity.org/blog/who-are-independent-contractors-pro-act/.
[8] Matthew Zane, *How Many Freelancers Are There In The U.S.?* (Feb. 27, 2023) (updated Feb. 7, 2026), https://www.zippia.com/advice/how-many-freelancers-in-the-us/.
[9] *Id.*
[10] *See id.*
[11] *See id.*
[12] Tammy McCutchen & Alex MacDonald, *The War on Independent Work: Why Some Regulators Want to Abolish Independent Contracting, Why They Keep Failing, & Why We Should Declare Peace*, 24 Federalist Soc'y Rev. 165, 170 (2023).
[13] *See* Freelance Forward Economist Report Research, Upwork (Dec. 8, 2021), https://www.upwork.com/research/freelance-forward-2021.

(80.3 percent)," consistent with its findings in prior surveys.[14] Indeed, one study surveying 600 self-identified independent contractors found 94 percent of were satisfied with their arrangement.[15]

On the other side of the ledger, limiting opportunities for independent contracting has several negative effects, such as hampering job creation; harms to competition and consumer welfare, resulting in higher prices; disruptions in vital areas of the economy, "including construction, emergency medicine, financial advice, timber harvesting and transportation"; and reduced worker flexibility.[16] As DOL notes, independent contractors "often prize the autonomy and flexibility their work affords; indeed, many pursue contracting arrangements as a preferred mode of work."[17] Indeed, the independent contractors in *Saleem v. Corporate Transportation Group* made this very point, "emphasizing their freedom as entrepreneurs, and arguing that finding they were employees would jeopardize the future viability of their investment in black car franchises."[18] In short, the creation of barriers and requirements that limit peoples' ability to work as independent contractors undermine the entrepreneurialism and freedom that benefits both individual workers and the wider economy. In many cases, the creation of an employment relationship is neither practicable nor desirable for self-employed workers and the businesses they work with. And as DOL recognizes, government restrictions on the freedom of individuals to choose to be self-employed to contract for their services "may inadvertently limit work opportunities for individuals seeking flexibility due to caregiving responsibilities, education, retirement, geographic constraints, or other personal circumstances."[19]

The proper role of government is to protect rather than inhibit individual freedom, including in the decisions people make about their work arrangements. Unfortunately, past applications of the FLSA by some courts and prior administrations have hindered the free choice of individuals to work as independent contractors. In particular, the disastrous and unlawful 2024 Rule has wrongly and unlawfully undermined economic prosperity, limited consumer choice, burdened both employers and workers, and stands in stark contrast to the ideals of liberty embodied in this country's founding documents. DOL should instead protect the right of individuals to work as independent contractors and ensure its implementation and enforcement of the statutes WHD

[14] U.S. Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements News Release, USDL-24-2267 (Nov. 8, 2024),

[15] Coalition for Workforce Innovation, Project Details: National Survey of 600 Self-Identified Independent Contractors 5 (January 2020), https://rilastagemedia.blob.core.windows.net/rilaweb/rila.web/media/media/pdfs/letters%20to%20hill/hr/cwi-report-final.pdf.

[16] Jeffrey A. Eisenach, *The Role of Independent Contractors in the U.S. Economy*, Navigant Economics ii (December 2010), https://iccoalition.org/wp-content/uploads/2014/07/Role-of-Independent-Contractors-December-2010-Final.pdf.

[17] 91 Fed. Reg. at 9,942–43

[18] 854 F.3d 131, 145 n.33 (2d Cir. 2017) (cleaned up).

[19] 91 Fed. Reg. at 9,943; *see* Jessie O'Brien, *The Back-and-Forth Battle of Defining Independent Contractors*, 89 Mo. L. Rev. 719, 719–20 (2024) (noting "[c]ontracting arrangements offer greater flexibility and independence").

administers does not improperly undermine this fundamental right. The Proposed Rule is a meaningful step in the right direction.

II. The Core Factors Approach Properly Synthesizes Precedent, Fosters Clarity and Predictability, and Promotes Entrepreneurial Opportunity.

The FLSA defines "employee" as "any individual employed by an employer,"[20] and "employ," in turn, is defined to "include[] to suffer or permit to work."[21] It may well be that on a blank slate the best reading of the FLSA's definition "employee," circular and unhelpful as it is, transplants the common law control test from agency law from that old soil to new.[22] That traditional test focuses on "the hiring party's right to control the manner and means by which the [work] is accomplished."[23] It potentially has several advantages over the judicially created "economic realities" test. As DOL recognizes, for example, "[a]dopting a common law control test would create a simpler legal regime for regulated entities interested in receiving services from an independent contractor, thereby reducing confusion, compliance costs, and legal risk for entities interested in doing business with independent contractors."[24] And as DOL notes, "the common law control test considers many of the same factors as those identified in the proposed rule's 'economic reality' test (*e.g*., skill, duration of the working relationship, investments in equipment and hiring helpers, etc.)[.]"[25] However, as DOL also acknowledges, it is not writing on a blank slate.[26] To minimize litigation risk and maximize the benefits to worker flexibility and innovation, the safest course is the synthesis of existing precedent under the "economic reality" framework DOL has proposed, focusing on the two core control and opportunity factors, which in material ways overlap with the common law standard.[27]

As the Supreme Court has observed, "there is in the [FLSA] no definition that solves problems as to the limits of the employer-employee relationship under the Act."[28] But the Court

---

[20] 29 U.S.C. § 203(e)(1).

[21] *Id.* § 203(g).

[22] *See United States v. Hansen*, 599 U.S. 762, 778 (2023) ("When Congress transplants a common-law term, the old soil comes with it."). In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989), the Supreme Court endorsed a general "presumption that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise," *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325 (1992); *see id.* at 323 n.3 ("As in *Reid*, we construe the term ["employee"] to incorporate 'the general common law of agency[.]'").

[23] *Reid*, 490 U.S. at 751. "In determining whether a hired party is an employee under the general common law of agency, [the Supreme Court] have traditionally looked for guidance to the Restatement of Agency." *Id.* at 752 n.31.

[24] 91 Fed. Reg. at 9,969.

[25] *Id*.

[26] *See id.* As DOL has noted, "the Supreme Court relied on the FLSA's purpose and legislative history to interpret the 'suffer and permit' language to encompass a more inclusive definition of employment than that of the common law." 86 Fed. Reg. 1,168, 1,200 (Jan. 7, 2021). Today, that conclusion is questionable. "[L]egislative history is not the law." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018). Simply put, the idea that so-called "remedial statutes should be liberally construed" is a "false notion," and this approach is "today either incomprehensible or superfluous." Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts § 64, pp. 364, 366 (2012). More recent FLSA precedent has rejected this approach, instead giving the statute a fair reading. *See Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 88–89 (2018); *see also Hernandez v. Plastipak Packaging, Inc*., 15 F.4th 1321, 1329–30 (11th Cir. 2021).

[27] AFPF agrees that the final rule should include an explicit severability clause. *See Belmont Mun. Light Dep't v. FERC*, 38 F.4th 173, 187–88 (D.C. Cir. 2022).

[28] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947). Courts have described the FLSA's definition of "employee" as "'circular'" and "unhelpful." *Ndambi v. CoreCivic, Inc.*, 990 F.3d 369, 372 (4th Cir. 2021); *see also Chavez-Deremer v. Med. Staffing of Am., Ltd. Liab. Co.*, 147 F.4th 371, 417 (4th Cir. 2025) (Richardson, J., dissenting)

has also made clear that whatever their precise metes and bounds, the FLSA's "statutory definition[s]" are not boundless and "do[] have [their] limits,"[29] and "[t]he definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees."[30] Indeed, had the 1938 Congress that enacted the FLSA intended to broadly limit independent contractual relationships—something it cannot constitutionally do—it would have clearly said so.[31] It did not. And as the Court has long recognized, "[a]n individual may work for a covered enterprise and nevertheless not be an 'employee'" under the FLSA,[32] including "independent contractors[.]"[33] In other words, the FLSA's "requirements do not apply to true independent contractors[.]"[34]

Under current Supreme Court precedent, the FLSA's reach turns on "'economic reality' rather than 'technical concepts.'"[35] "The focal point" of the economic reality test used to distinguish between employees and independent contractors "is whether the worker is economically dependent on the business to which he renders service or is, as a matter of economic reality, in business for himself."[36] AFPF agrees with DOL that "economic dependence for work rather than economic dependence for income is the proper inquiry" under this test.[37] The concept of economic dependence does not turn on the amount of money a worker earns. Nor is it relevant whether the worker has other sources of income. On the contrary, the focus of this inquiry is instead on whether the worker is more of a nature of a business owner or has the kind of dependence of an employee on an employer. That is precisely why control and the opportunity for profit and loss cut to the heart of the economic realities, as discussed below.

In *United States v. Silk*, the Supreme Court identified five factors to guide the "economic reality" inquiry: "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation."[38] In *Rutherford Food Corp. v. McComb*, the Court also identified whether the work being performed is "part of the integrated unit of production" as a potentially relevant consideration.[39] Of those, the core control and opportunity factors are most probative of the existence vel non of an employment

("FLSA requires that courts distinguish between employees and independent contractors, but the definitions it offers for 'employer' and 'employee' are unhelpful.").

[29] *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 295 (1985) (internal citation omitted).

[30] *Walling v. Portland Terminal Co*., 330 U.S. 148, 152 (1947).

[31] *See West Virginia v. EPA*, 597 U.S. 697, 721–23 (2022). "Some version of this clear-statement rule can be traced to at least 1897, when this Court confronted a case involving the Interstate Commerce Commission, the federal government's 'first modern regulatory agency.'" *Id.* at 740 (Gorsuch, J., concurring) (quoting S. Dudley, *Milestones in the Evolution of the Administrative State*, 3 (Nov. 2020)). There, the Court rejected the ICC's claimed legislative power to set tariff rates for common carriers—"a power of supreme delicacy and importance"—reasoning that "if Congress had intended to grant such a power . . . it cannot be doubted that it would have used language open to no misconstruction, but clear and direct." *ICC v. Cincinnati, N.O. & T.P.R. Co*., 167 U.S. 479, 505 (1897).

[32] *Tony & Susan Alamo Found*., 471 U.S. at 299.

[33] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

[34] *Karlson v. Action Process Serv. & Private Investigation, LLC*, 860 F.3d 1089, 1092 (8th Cir. 2017); *accord Hopkins v. Cornerstone Am.*, 545 F.3d 338, 342 (5th Cir. 2008) ("FLSA applies to employees but not to independent contractors[.]").

[35] *Goldberg v. Whitaker House Co-op., Inc*., 366 U.S. 28, 33 (1961) (citations omitted); *see also Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) ("employees are those who as a matter of economic reality are dependent upon the business to which they render service").

[36] *Schultz v. Capital Int'l Sec., Inc*., 466 F.3d 298, 304 (4th Cir. 2006) (cleaned up).

[37] 91 Fed. Reg. at 9,946.

[38] 331 U.S. 704, 716 (1947). In *Silk*, the Court did not mention "initiative" in connection with the skill factor.

[39] *Rutherford*, 331 U.S. at 729.

relationship and generally dispositive. Where both of those factors tilt toward independent contractor status, that should be the end of the analysis. As DOL correctly recognizes, "[t]he Supreme Court has never required a factor-by-factor analysis" and, in practice "has repeatedly resolved cases by focusing primarily on facts that concern the core factors" of "control over the work and the worker's opportunity for profit or loss based on initiative and investment."[40] *Silk* itself is a perfect example. There, the Court found that the truckers were independent contractors based on "the control exercised" and their "opportunity for profit from sound management" without discussing or reaching the other factors.[41]

The Proposed Rule's structured focus on the actual economic substance of the relationship, with particular emphasis on control and profit opportunity, fosters clarity and predictability, respects voluntary independent contractor arrangements, and promotes freedom of contract. Weighting and ordering the factors to prioritize the control and opportunity factors, while allowing for consideration of other factors when those core factors point in different directions or toward an employment relationship, streamlines and simplifies the analysis and is much more predictable and administrable for all involved.

A. Control Factor

As to the first factor, *Silk* understood the concept of control to mean "the manner of performing service to the industry" and over "how 'work shall be done.'"[42] Courts have long found that "the right to control the manner of doing the work contracted for is the principal consideration in determining whether one is employed as an independent contractor[.]"[43] As one court put it, "[t]hough no single factor is dispositive, the greatest emphasis should be placed on this factor—that is, on the extent to which the hiring party controls the manner and means by which the worker completes his or her assigned tasks."[44] "The power to control a worker clearly is a crucial factor in determining whether an employment relationship exists."[45] This makes sense. When workers substantially control their work, courts almost invariably conclude they are independent contractors.[46] And in some cases, this alone might be dispositive of independent contractor status.

Ignoring case law, the 2024 Rule expanded the object of the control to include "the performance of the work and the economic aspects of the working relationship."[47] That vacuous phrase appears to be cut from whole cloth, finding no support in precedent and misreading *Silk*. Exacerbating that error, the 2024 Rule even suggested that if a business takes measures to ensure compliance with legal and safety obligations that itself may suggest "control" under the FLSA.[48] That, too, defies common sensed and is contrary to precedent. Requiring workers to comply with applicable legal obligations or meet quality control standards does not suggest control pointing

---

[40] 91 Fed. Reg. at 9,947.
[41] *Silk*, 331 U.S. at 719.
[42] *See id.* at 713–14.
[43] *Blankenship v. W. U. Tel. Co*., 161 F.2d 168, 170 (4th Cir. 1947).
[44] *Meyer v. United States Tennis Ass'n*, No. 1:11-cv-06268 (ALC) (MHD), 2014 U.S. Dist. LEXIS 128209, at *18 (S.D.N.Y. Sep. 11, 2014).
[45] *Carter v. Dutchess Cmty. Coll*., 735 F.2d 8, 12 (2d Cir. 1984).
[46] *See, e.g., Parrish v. Premier Directional Drilling, L.P*., 917 F.3d 369, 379–88 (5th Cir. 2019); *Nieman v. Nat'l Claims Adjusters, Inc*., 775 F. App'x 622, 624–25 (11th Cir. 2019); S*aleem*, 854 F.3d at 140–48; *Iontchev v. AAA Cab Serv*., 685 F. App'x 548, 550–51 (9th Cir. 2017); *Barlow v. C.R. England, Inc*., 703 F.3d 497, 506–07 (10th Cir. 2012); *Chao v. Mid-Atlantic Installation Servs*., 16 F. App'x 104 (4th Cir. 2001).
[47] 89 Fed. Reg. at 1,743 (citation omitted).
[48] *Id.*

toward an employee classification.[49] "Consistently the courts have held that regulation imposed by governmental authorities does not evidence control by the employer" suggesting the existence of an employment relationship.[50] This principle extends to requirements imposed by government entities and third-party customers alike; compliance with these requirements is not evidence of control and should be disregarded, as it is not probative of the existence of an employment relationship.[51] The 2024 Rule's theoretical approach is also illogical and counterproductive. As the Fourth Circuit put it: "If any sign of control or any restriction on use of space could convert an independent contractor into an employee, there would soon be nothing left of the former category. Workers and managers alike might sorely miss the flexibility and freedom that independent-contractor status confers."[52]

By contrast, proposed 29 C.F.R. § 795.105(d)(2)(i) correctly recognizes that where a worker "exercises substantial control over key aspects of the performance of the work"—as opposed to total control—this core factor points toward independent contractor status.[53] Proposed § 795.105(d)(2)(i) also accurately reflects that "[r]equiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses" is not probative of control.[54] The example and application in proposed 29 C.F.R. § 795.115(b)(1) reinforces and illustrates this key point.[55] AFPF supports these much-needed improvements.

More broadly, what matters is the actual practice of the workers and those that contract with them—not any theoretical or abstract rights to control those that hire independent contractors might possess. Put another way, "[i]t is not significant how one 'could have' acted under the contract terms. The controlling economic realities are reflected by the way one actually acts."[56] As the Supreme Court has made clear, there are circumstances where a putative theoretical "right to control" is insufficient to transmogrify an independent contractor into an employee.[57] As the Second Circuit noted in *Saleem*, for example, the control factor "turns on" "the actual exercise of control," as opposed to the existence of a theoretical right to control.[58] DOL's proposed focus on the primacy of actual practice of the parties, as opposed to any theoretical or speculative

---

[49] *See Parrish*, 917 F.3d at 382 ("Requiring plaintiffs to undergo safety training and drug testing, when working at an oil-drilling site, is not the type of control that counsels in favor of employee status."); *Iontchev*, 685 F. App'x at 550 ("disciplinary policy" not indicative of control).

[50] *N.L.R.B. v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 922 (11th Cir. 1983); *see Loc. 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 875 (D.C. Cir. 1978) ("Government regulations constitute supervision not by the employer but by the state.").

[51] *See Iontchev v. AAA Cab Inc.*, No. CV-12-00256-PHX-ROS, 2015 WL 1345275, at *6 (D. Ariz. Mar. 18, 2015), aff'd sub nom., 685 F. App'x 548 (9th Cir. 2017); *Carrell v. Sunland Const., Inc.*, 998 F.2d 330, 332–33 (5th Cir. 1993); *Collado v. J. & G. Transp., Inc.*, 2015 WL 1757638, at *5 (S.D. Fla. Apr. 17, 2015); *Clay v. New Tech Glob. Ventures, LLC*, 2019 WL 1028532, at *17 (W.D. La. Mar. 4, 2019) ("[C]ourts routinely hold that quality control and safety standards do not demonstrate the level of control . . . necessary to support employee status.").

[52] *McFeeley v. Jackson St. Entm't, LLC*, 825 F.3d 235, 243 (4th Cir. 2016).

[53] 91 Fed. Reg. at 9,974.

[54] *Id.*

[55] *See id.*

[56] *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1312 (5th Cir. 1976); *see Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1047 (5th Cir. 1987) ("[I]t is not what the operators could have done that counts, but as a matter of economic reality what they actually do that is dispositive.").

[57] *See Bartels*, 332 U.S. at 129–32.

[58] *Saleem*, 854 F.3d at 148 n.37.

contractual possibilities, thus makes sense.[59] By contrast, the 2024 Rule's suggestion that theoretical possibilities can outweigh actual practice for classification purposes under the FLSA[60] is inconsistent with the Supreme Court's emphasis on the "economic reality" of the relationship between worker and business.[61]

Finally, although the ability to work for a business's competitors supports independent contractor status, the opposite is not necessarily true.[62] AFPF does not believe a requirement that the individual work exclusively for the party he or she has contracted with is probative of employee status because there may be valid business reasons why that condition would be imposed as part of a true independent contractual relationship. More broadly, the freedom of two independent parties to reach agreement on terms acceptable to both of them should not be artificially limited by fear that the independent contractor may later be declared an employee.

B. Opportunity for Profit or Loss Factor

As for the opportunity for profit or loss, what matters is just that: the *opportunity* or ability, whatever the actual level of investment or initiative shown by the individual. Where workers have substantial freedom to determine their opportunities for profit or loss, courts typically find they are independent contractors.[63] Even where workers "are not solely in control of their profits or losses," this factor may cut in favor of independent contractor status.[64] That some individual independent contractors might voluntarily choose to show more initiative or invest more should not change the status of those who are not prevented from pursuing those same opportunities but for reasons of their own decide not to do so. A corollary point is that as long as the ability to exercise a right is not frustrated by the business, the individual's voluntary choices regarding whether to exercise their rights are not probative of that worker's status, let alone dispositive. The FLSA must not be interpreted to penalize those individuals who take advantage of the flexibility and entrepreneurial freedom that independent contractor status provides simply because other similarly situated workers do not.

Importantly, DOL's proposed approach reflects that while worker initiative and investment point toward independent contractor status, "the individual does not need to have an opportunity for profit or loss *based on both* for this factor to weigh towards the individual being an independent contractor."[65] Nor is there a particular threshold amount for the investment inquiry to tilt toward independent contractor status. As Judge Easterbrook put it: "Think of lawyers, many of whom do not even own books. The bar sells human capital rather than physical capital, but this does not imply that lawyers are 'employees' of their clients under the FLSA."[66] Instead, the focus should

---

[59] *See* 91 Fed. Reg. at 9,974 (proposed § 795.110).
[60] *See* 89 Fed. Reg. at 1,719.
[61] *See Goldberg*., 366 U.S.at 33.
[62] *See, e.g., Faludi v. U.S. Shale Sols., L.L.C*., 950 F.3d 269, 275 (5th Cir. 2020) (finding plaintiff who "worked exclusively for U.S. Shale during his tenure there, with no other source of income, and that a non-compete clause prohibited him from working for the company's competitors" is independent contractor exempt from the FLSA).
[63] *See, e.g., Parrish*, 917 F.3d at 384-88; *Saleem*, 854 F.3d at 140-48; *Iontchev*, 685 F. App'x at 550–51; *Freund v. Hi-Tech Satellite, Inc*., 185 F. App'x 782, 783 (11th Cir. 2006); *Eberline v. Media Net, L.L.C.,* 636 F. App'x 225, 228-29 (5th Cir. 2016); *Mid-Atl. Installation Servs*., 16 F. App'x at 106-08.
[64] *Chao*, 16 F. App'x at 107.
[65] 91 Fed. Reg. at 9,974 (proposed 29 C.F.R. § 795.105(d)(1)(ii) (emphasis added)).
[66] *Sec'y of Labor, United States Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1540–41 (7th Cir. 1987) (Easterbrook, J., concurring); *see also Faludi,* 950 F.3d at 275 ("Faludi provided his own phone and computer" and "made investments in his continuing education and home office equipment").

be on whether an investment in *any* amount by the worker can produce *either* a profit or be lost. The example and application in proposed 29 C.F.R. § 795.115(b)(2) correctly provides a real-world example to illustrate this key point in an app-based service context where "[t]he opportunity for profit or loss factor favors independent contractor status for the individual, despite the substantial difference in the monetary value of the investments made by each party," explaining that "[w]hile the company may have invested substantially more in its business, the value of that investment is not relevant in determining whether the individual has a meaningful opportunity for profit or loss through his initiative, investment, or both."[67]

Finally, AFPF respectfully suggests that the final sentence of proposed § 795.105(d)(1)(ii) should be removed. That sentence states that "[t]his factor weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster."[68] As written, this sentence is overbroad and could be construed to extend to circumstances where individuals use their initiative, skills, and judgment to perform more efficiently and thus earn greater profit or invest in their own in tools to allow them to achieve this result. Hours worked is not necessarily probative of whether a worker is an independent contractor or employee. And the final two words—"or faster"—are particularly problematic because there is little doubt that efficiency is often a critical way for an independent contractor to incur profit, while inefficiency results in loss. More broadly, this factor's focus is on profit *or* loss, and if a worker is able to earn more by working more efficiently, that tilts toward independent contractor status, not an employment relationship.

C. Ancillary Factors

AFPF believes it is important that the remaining ancillary factors are not weighted equally with the core factors or otherwise tilted against independent workers, as happened in the 2024 Rule, particularly as these may be of limited or no probative value in cases where the core factors point toward the same classification. Nor should these factors be interpreted so as to discourage or limit desirable working arrangements. For example, the 2024 Rule transformed the "permanence of the work relationship" factor into a one-way ratchet invariably tilting toward employee classification.[69] That approach is illogical and unsupported by precedent. More fundamentally, the durability and duration of a business relationship often has limited probative value on the core economic dependence inquiry. Business relationships can be indefinite and continuous by choice, and that is a net positive reflecting a voluntary long-term working relationship of mutual benefit.

As to the skill factor, AFPF believes this factor is often not probative of whether an individual should be classified as an independent contractor or an employee and, at times, does not reflect the economic reality. To be sure, as proposed 29 C.F.R. § 795.105(d)(2)(i) notes, "[t]his factor weighs in favor of the individual being an independent contractor to the extent the work at issue requires specialized training or skill that the potential employer does not provide."[70] But there are many examples, such as those where the independent contractor works in the transportation sector (e.g., delivery drivers), where little or no specialized training is necessary and yet the status of the worker as an independent contractor is not in doubt. In other words, while a worker with special skills is more likely to be an independent contractor, the converse is not true.

---

[67] 91 Fed. Reg. at 9,974.
[68] *Id.* at 9,932.
[69] *See* 89 Fed. Reg. at 1,685–86.
[70] 91 Fed. Reg. at 9,974.

DOL's final rule should reflect that while specialized skill is not necessary to be an independent contractor, it tilts toward independent contractor status.

As to the "integrated unit of production factor," consistent with *Rutherford* and to facilitate ease of administration, the focus of this factor should be on whether a worker is part of a production process analogous to an assembly line, as opposed to whether a worker is simply important or integral to a business.[71] Only in the former case would this factor tilt to employee classification. By contrast, the 2024 Rule bizarrely expanded this concept by untethering it to "units of production" and instead linking it to the broader concept of "integral part."[72] That makes zero sense and is effectively meaningless. That is because "*[e]verything* the employer does is 'integral' to its business—why else do it?"[73] This, too, is contrary to Supreme Court precedent. To the extent this factor is relevant to a classification decision, *Rutherford* makes clear it turns on whether a worker is part of "integrated unit of production,"[74] such as the slaughterhouse boners at issue in that case whose job was to perform task as part of a "series of interdependent steps," *i.e*., "cutting off a section [of beef] for boning."[75]

III. Due Process Requires Fair Notice of Required or Prohibited Conduct.

Additional considerations support rescinding and definitively repudiating the 2024 Rule. Because possible readings of the FLSA raise serious constitutional concerns, additional background principles are relevant. As the Supreme Court stated just last Term, "[s]tatutes . . . should be read, if possible, to comport with the Constitution, not to contradict it."[76] Consistent with this principle, DOL must ensure its rule is not a vague and open-ended regulation the agency can later contort as it sees fit. That is particularly so because the classification decisions under the FLSA implicate core private rights. "It is important for employers to properly classify their workers as employees or independent contractors because they may face civil and criminal penalties if they do not comply with the FLSA's requirements for their employees."[77] Given these stakes, the Constitution requires DOL to respect the due process rights of the companies it regulates. Entities regulated by an administrative agency have a due-process right to fair notice of regulator's requirements.[78] Indeed, the Supreme Court has said in the context of the FLSA, "agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires."[79] Toward this end, the agency bears the responsibility to promulgate clear standards.[80] To provide proper notice, a regulation must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly."[81] Relatedly, regulations

---

[71] *See, e.g., Mednick v. Albert Enterprises, Inc*., 508 F.2d 297, 298 (5th Cir. 1975) (distinguishing between the two).
[72] *See* 89 Fed. Reg. at 1,743; *see Rutherford*, 331 U.S. at 729.
[73] *Lauritzen*, 835 F.2d at 1541 (Easterbrook, J., concurring).
[74] *See Rutherford*, 331 U.S. at 729.
[75] *See id.* at 725–26.
[76] *FCC v. Consumers' Rsch*., 606 U.S. 656, 691 (2025).
[77] *Littman v. United States DOL*, No. 3:24-cv-00194, 2025 U.S. Dist. LEXIS 43744, at *3 (M.D. Tenn. Mar. 11, 2025) (citing 29 U.S.C. § 216). For this reason, the FLRA's scope should be construed consistent with principles of lenity. *See United States v. Universal C.I.T. Credit Corp*., 344 U.S. 218, 221–22 (1952) (applying rule of lenity to FLSA recordkeeping provisions).
[78] *See FCC v. Fox TV Stations, Inc*., 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.").
[79] *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 156 (2012) (cleaned up).
[80] *See Marshall v. Anaconda Co*., 596 F.2d 370, 377 n.6 (9th Cir. 1979); *see also Ga. Pac. Corp. v. OSHRC*, 25 F.3d 999, 1005–06 (11th Cir. 1994) (ascertainable certainty standard).
[81] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see Connally v. Gen. Constr. Co*., 269 U.S. 385, 391 (1926).

must be sufficiently clear and precise so as to not authorize and encourage seriously discriminatory enforcement.[82] Due process requirements are heightened where, as here, civil penalties may be imposed.[83] This means companies should not be subject to civil penalties that are not clearly applicable by either statute or by regulation.[84] And companies must be able to reliably predict how, if at all, government regulations may apply to their conduct, so that they can structure their conduct accordingly, and should not be unfairly surprised by enforcement actions.

The 2024 Rule fails this test on many levels. Its amorphous all-things-considered balancing test coupled with an extra-statutory presumption in favor of employee status hangs the sword of Damocles over businesses, dissuading them from contracting with the very workers the 2024 Rule was supposed to benefit. As DOL now recognizes, "[t]he principal flaw of the 2024 Rule is its failure to provide effective guidance on how different factors in its multi-factor balancing test should be weighed or applied together."[85] This flawed approach makes it "confusing and risky" for those who wish to engage independent contractors, particularly when the various factors tilt in different directions.[86] As one district court put it, "the 2024 Rule's multi-factor test is inherently unpredictable[.]"[87] The Supreme Court has made this same point in other contexts, explaining that "experience has shown . . . open-ended balancing tests[] can yield unpredictable and at times arbitrary results."[88] And AFPF agrees with DOL that yet another harm flowing from the 2024 Rule's "open-ended balancing analysis of six ambiguous elements" is that it "can deter businesses from engaging with bona fide independent contractors or induce them intentionally to unnecessarily classify such contractors as employees."[89]

That is unacceptable. As Judge Easterbrook has observed in the FLSA context: "People are entitled to know the legal rules before they act, and only the most compelling reason should lead a court to announce an approach under which no one can know where he stands until litigation has been completed."[90] A freewheeling, all-things-considered balancing approach "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."[91] By contrast, emphasizing the control and opportunity factors, as DOL proposes to do, not only more accurately reflects economic reality but provides greater certainty for both businesses and workers and fair notice of their obligations.

IV. The Same Core-Factors Economic Realities Standard Should Apply Across Statutes WHD Administers.

Finally, to promote uniformity and clarity across the statutes WHD is responsible for enforcing, as well as for ease of administrability, DOL should apply the same core-factors "economic realities" test to the FMLA and MSPA. "The FMLA provides that the term 'employee' has the same meaning as in the" FLSA,[92] "defin[ing] the term 'employee' by incorporating the

---

[82] *See Fox TV*, 567 U.S. at 252; *Giaccio v. Penn*., 382 U.S. 399, 402–03 (1966) (due process violated if "judges and jurors [may] decide, without any legally fixed standards, what is prohibited and what is not in each particular case").
[83] *See Fox TV*, 567 U.S. at 253–58; *see also FTC v. Wyndham Worldwide Corp.,* 799 F.3d 236, 251 (3d Cir. 2015).
[84] *See, e.g.*, *United States v. Trident Seafoods Corp*., 60 F.3d 556, 559 (9th Cir. 1995).
[85] 91 Fed. Reg. at 9,939.
[86] *See id.*
[87] *Warren v. DOL*, No. 2:24-CV-7-RWS, 2024 U.S. Dist. LEXIS 251364, at *21 (N.D. Ga. Oct. 7, 2024)
[88] *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 572 U.S. 118, 136 (2014).
[89] 91 Fed. Reg. at 9,939.
[90] *Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring).
[91] *Id.* (Easterbrook, J., concurring).
[92] *Hay v. ALH Admin. Servs*., 283 F. Supp. 3d 1273, 1276 (M.D. Fla. 2017) (citing 29 U.S.C. § 2611(3)).

definition found in § 203(e)[.]"[93] The MSPA likewise expressly incorporates the FLSA's definition of "employ."[94] For this reason, and those outlined above, the same core-factors economic realities standard for distinguishing between independent contractors and employees that applies in the FLSA context should also be applied to the FMLA and MSPA.

If you have questions about this comment, please contact us at mpepson@afphq.org or abannan@afphq.org. Thank you for your attention to this matter.

Sincerely,

Michael Pepson
Americans for Prosperity Foundation
4201 Wilson Blvd., Ste. 1000
Arlington, VA 22203
(571) 329-4529
mpepson@afphq.org

Austen Bannan
Americans for Prosperity
4201 Wilson Blvd., Ste. 1000
Arlington, VA 22203
571-215-7573
abannon@afphq.org

[93] *Mendel v. City of Gibraltar*, 727 F.3d 565, 572 (6th Cir. 2013) (Kethledge, J., dissenting) (citing 29 U.S.C. § 2611(3)).
[94] 29 U.S.C. § 1802(5) ("The term 'employ' has the meaning given such term under section 3(g) of the Fair Labor Standards Act of 1938 for the purposes of implementing the requirements of that Act.").