Independent Contractor Regulatory Proposal
September 2020

SUMMARY: On September 25, 2020, the US Department of Labor's Wage and Hour Division (WHD) published a notice on a proposed regulation to clarify how to determine whether a worker is an employee or an independent contractor (IC) under the Fair Labor Standards Act (FLSA). There is currently only a 30-day comment period on the proposal with comments due October 26, 2020. Various parties have requested an extension but it is unlikely to be substantially longer if granted at all.

Need for Proposal: The proposal is about giving working Americans the freedom to pick the occupation and flexibility they desire and providing businesses clarity on the characteristics of a *bona fide* independent contractor so they can more easily comply and avoid litigation. Many Americans choose the independent contractor model — including hundreds of thousands of owner-operators in trucking — because of the opportunity it provides and empowerment to choose the conditions (e.g., hours and routes) that suit their lifestyle. Unfortunately, policy makers in prior administrations and currently in some states (e.g., California) have sought to reclassify most independent contractors as employees under the FLSA and/or state wage and hour laws due to a paternalistic view that extending employment benefits is paramount regardless of the intent of parties to the business arrangement. . This proposal is aimed at providing all Americans -- employers, contractors, enforcement personnel and courts -- with a more effective and fair understanding of how those determinations should be made so that true independent contractors are recognized as such under federal law.

Description: The proposal is intended to both streamline and provide direct guidance to regulators and adjudicators by:

- Clarifying the "economic reality" test to better determine whether a worker is in business for himself or herself (independent contractor) or is economically dependent on a putative employer (employee);
- Identifying two "core factors" — specifically the nature and degree of the detailed control over the work and the worker's opportunity for profit or loss based on initiative and/or investment;
- Identifying three other "guideposts" if the two core factors conflict — the amount of skill required, the permanency of the working relationship between the parties, and whether the work is part of an integrated unit of production;
- Specifying that actual practice is more relevant than contractual rights and duties in determining whether a worker is an employee or an independent contractor; and
- Stating that contractual provisions ensuring compliance with legal responsibilities, like safety, should not be considered evidence of control.

Scope of the Rule: Many employers have advocated for using the adoption of the Internal Revenue Code many factor methodology to apply to all areas of law in determining employment status. The US DOL could not adopt that test without congressional action and must use statutory language and the case law precedent under the FLSA (wages and overtime) for any rulemaking in this area. Thus, this proposal does not directly impact workers compensation, unemployment taxes, state or federal payroll taxes, state wage and hour laws, or other employment laws like Title VII. The proposal does try to harmonize decades of court decisions and policy statements by clarifying the number of factors, how they should be interpreted, and how much weight each should be given. The US DOL also chose to

propose a general industry test without attempting to address the nuances of various industries like trucking. The proposal does not preempt state wage and hour laws , though many states follow federal guidance and rules in construing employment classification.

The Good Things:

- The proposal puts the most weight on control and profit and loss factors and avoids the greater subjectivity of many factor balancing tests where outcomes are more uncertain and often depend on the skill of advocates and the preconceptions of adjudicators. If control and profit/loss facts favor independence, then a company will likely prevail in validating the independent contractor relationship with the opposite outcome when the facts do not support such status. If evidence under two core factors conflicts or does not strongly favor one outcome, then the three guidepost factors – skill, permanency and integral nature of the work -- would be considered.
- The proposal adds clarity on control. For example, safety mandates in a contract would not be counted as an indicator of control.
- It adds clarity on profit and loss – lessening the weight put on the amount of a worker's investment and more on their ability to use their abilities and assets to benefit economically.
- It includes guidance when it comes to skill, permanence, and integration. While the guidance is applicable in a general sense to all American businesses, its specific application to trucking will be key to achieving the desired more equitable outcome.

Areas for Possible Improvement: ATA plans to support the proposal generally but believes there are at least two areas where the US DOL could possibly improve the proposal and would appreciate support from state affiliates, ATA members and any independent contractors desiring to participate on these subjects:

- The proposed rule focuses on how the relationship works in real life rather than what is in the contract. The US DOL did this largely because of joint employer status liability where franchisors and staffing agencies' clients have become likely joint employers for having contractual rights to require franchisees and staffing agencies to have brand guideposts for consistency of the product or service even though the provisions may not be enforced. Independent contractor agreements in the trucking industry allow ICs to turn down assignments and subcontract to others. Many ICs choose to provide driving services and a truck to a single motor carrier and take every opportunity offered because that is convenient and profitable for them. While the proposed rule helpfully notes that preventing an independent contractor from exercising contractual rights is a potential sign of their having employee status, ATA expects to note that it should NOT be a sign of employment status if workers independently choose not to exercise such rights, and also that the burden of proof of any alleged coercion should be on the worker or government.

- The proposed rule also needs to take into consideration the impact that other government rules – besides safety -- have on the worker's control or ability for the worker to earn a profit or suffer a loss. For example, the Department of Transportation's Truth-In-Leasing regulations generally require "exclusive possession, control and use" of the vehicle by the motor carrier during the lease though the regulations do not specify the term of the lease and allow for subcontracting through trip lease arrangements. Accordingly, ATA expects to emphasize that contractually required compliance with other state or federal legal obligations should also not be considered as an indication of control for employment status. Similarly, many court decisions under state law

recognize a shipper/customer's right to dictate procedures leading to the desired delivery outcome without such shipper/customer control being attributed to employee status control.

Insight provided to the US DOL in these and other areas should help fine tune the rule to the fairness and clarity of its intent. Please contact ATA VP of Workforce Development Nick Geale (ngeale@trucking.org) if you would like additional information or to provide input.