NAIFA
National Association of Insurance and Financial Advisors

October 26, 2020

Submitted Electronically – www.regulations.gov

Ms. Cheryl Stanton
Administrator, Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-3502
Washington, DC 20210

RE: Proposed Rule on Independent Contractor Status Under the Fair Labor Standards Act – RIN 1235-AA34

Dear Ms. Stanton:

The National Association of Insurance and Financial Advisors ("NAIFA") appreciates this opportunity to comment on the Department of Labor's ("Department") proposed interpretation dictating which workers can qualify for independent contractor status under the Fair Labor Standards Act ("FLSA").[1] NAIFA supports your efforts to formalize existing interpretations, provide greater certainty for the regulated community, and promote opportunities for creating innovative work arrangements. More detailed responses to the Department's request are below.

ABOUT NAIFA

Founded in 1890 as The National Association of Life Underwriters ("NALU"), NAIFA is the oldest, largest and most prestigious association representing the interests of insurance professionals from every Congressional district in the United States. Our mission – to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members – is the reason NAIFA has consistently and resoundingly stood up for agents and called upon members to grow their knowledge while following the highest ethical standards in the industry.

[1] U.S. Department of Labor, Wage and Hour Division, Notice of Proposed Rulemaking and Request for Comments, *Independent Contractor Status Under the Fair Labor Standards Act,* 85 Fed. Reg. 60600 (Sept. 25, 2020) [hereinafter Proposed Rule].

BACKGROUND ON THE PROPOSED INDEPENDENT CONTRACTOR CLASSIFICATION

Across the country, at the federal and state level, legislatures are debating proposals that would presumptively classify *all* workers as employees under the so-called "ABC Test."[2] Under the ABC Test, workers will qualify as independent contractors *only if* they affirmatively satisfy *three* conditions (i.e., they are free from the control and direction of the hirer under the contract and in fact; they perform work outside the usual course of the hiring entity's business; *and* the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed). As the Department notes in the proposed rule, adoption of such a test is too restrictive and could result in a large-scale reclassification of many independent contractors as employees under the FLSA.

In response, the Department's proposal seeks to clarify and codify the circumstances under which a worker will qualify as an "employee" or an "independent contractor" under the FLSA by adopting existing interpretations to which courts and DOL have long adhered. Specifically, under the proposed rule, the central inquiry will turn on whether, "as a matter of economic reality," the individual is economically dependent on the potential employer for work (i.e., a worker economically dependent on the potential employer for work will qualify as an employee, while workers in business for themselves will be classified as independent contractors).

In undertaking this analysis, the Department would enshrine a set of five factors – based on judicial decisions the Department's interpretations and opinions – to determine the degree of economic independence in a given relationship, including:

- The nature and degree of the worker's control over the work.
- The worker's opportunity for profit or loss.
- The amount of skill required.
- The permanence of the working relationship.
- The so-called "integrated unit factor" (i.e., whether a worker is a "component of a potential employer's integrated production process, whether for goods or services").

The first two factors would be considered "core factors" and afforded greater weight in the analysis, as the Department finds them to be more probative of the question of economic dependence "because the ability to control one's work and to earn profits and risk losses strikes at the core of what it means to be an entrepreneurial independent contractor as opposed to a 'wage earner' employee."[3] The relevance of the three remaining factors will therefore be secondary and the extent of their relevance will vary depending on the circumstances.

COMMENTS REGARDING THE PROPOSED RULE

The majority of NAIFA's members – insurance producers, broker dealer representatives, and/or independent registered investment advisors – are independent contractors who provide vital financial benefits and insurance services to consumers across the country.

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[2] *See e.g.,* Protecting the Right to Organize Act of 2019 (H.R. 2474), https://www.congress.gov/bill/116th-congress/house-bill/2474; California AB 5, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5 (adopting a presumption that a worker who performs services for a hirer is an employee).

[3] Proposed Rule, *supra* note 1, at 60612.

For our members to continue to serve their communities, however, they must be able to maintain their ongoing status as independent contractors with certainty. As such, NAIFA and its members strongly support the Department's efforts to codify the "economic reality" test and provide clarity, guidance, and consistency in the classification of workers, while ensuring that such a test is not unduly restrictive or disruptive to the economy.[4]

Specifically, NAIFA agrees that the two "core factors" proposed by the Department – the nature and degree of control over their own work and the opportunity for profit or loss – should be central to the classification analysis. In considering NAIFA's membership, an examination of these two factors indicates that existing and ongoing independent contractor relationships would not be in danger of reclassification.

For instance, insurance producers – who may opt to operate their own businesses while engaging in substantial contractual relationships with one or more insurance companies – will often work with insurance companies to jointly set forth the terms of their relationship to ensure that the producer can maintain their independence, sell a diverse array of products on behalf of multiple insurance companies, and retain the right to direct or control their work and opportunity for profit or loss. Similarly, NAIFA members who are jointly licensed as insurance producers and broker-dealer representatives and/or independent registered investment advisors may own and operate their own small business, maintain flexibility over their business model and their product offerings, and exert independent control over their business operations.

These models – which are predicated on such independent contractor arrangements – leave NAIFA members in control of their own client base and profit streams; the vendors with which they partner; and their own staff, resources, facilities, and equipment. As such, under an analysis of the proposed rule's "core factors," NAIFA members engaging in these essential relationships would presumably continue to qualify as independent contractors.

In conducting this analysis, however, NAIFA and its members want to ensure that, under the secondary factors, existing long-term and critical independent contractor relationships – which are common in the insurance and financial advisor services industry – are not undermined. In particular, with respect to the permanence and integrated unit factors articulated under the proposed five-part test, NAIFA supports the Department's interpretation in the preamble that "workers can often have long-term working relationships and still qualify under the FLSA as independent contractors"[5] and that individuals that offer "discrete, segregable services" to individual clients or customers would indicate classification as an independent contractor.[6]

Again, we greatly appreciate the opportunity to provide comments and applaud the Department's efforts to formalize the "economic reality" test for classification as an independent contractor, thereby providing greater certainty for NAIFA members and the employment community as a whole. Please do not hesitate to contact Diane Boyle, NAIFA's Senior Vice President of Government Relations, at dboyle@naifa.org; or Michael Hedge, NAIFA's Director of Government Relations, at mhedge@naifa.org, if you require further information or answers to any questions.

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[4] Proposed Rule, *supra* note 1, at 60636.

[5] Proposed Rule, *supra* note 1, at 60621.

[6] Proposed Rule, *supra* note 1, at 60618.

Sincerely,

Kevin Mayeux
Chief Executive Officer
NAIFA