

BEFORE THE  
DEPARTMENT OF LABOR  
WAGE AND HOUR DIVISION

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COMMENTS OF THE  
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.  
INDEPENDENT CONTRACTOR STATUS UNDER THE FAIR LABOR STANDARDS ACT  
IN RIN 1235-AA34: PROPOSED DELAY OF EFFECTIVE DATE

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February 23, 2021

## INTRODUCTION

On January 7, 2021, the Wage and Hour Division of the Department of Labor (“WHD”) issued its final Independent Contractor Status Under the Fair Labor Standards Act Rule (“Independent Contractor Rule” or “Rule”) adding new WHD regulations that revised and clarified the legal standard for determining whether any worker is an employee or independent contractor under the Fair Labor Standards Act (“FLSA”). *See* 86 Fed. Reg. 1168 *et seq.* That Rule interpreted the “economic realities” test long used by the courts and the WHD, instructing that the nature and degree of the worker’s control over the work and the worker’s opportunity for profit or loss carry the greatest weight in determining whether an individual is or is not an independent contractor. Three other noted factors could also be considered, but carried less weight. WHD expected the Rule would “promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy.” *Id.* at 1168.

The Independent Contractor Rule currently has an effective date of March 8, 2021. However, on February 5, 2021, WHD delayed the effective date until May 7, 2021, to allow for additional review and consideration by the new Administration. *See* 86 Fed. Reg. 8326. In the interim, the WHD is seeking comments about its proposal to delay the Rule’s effective date.

The National Motor Freight Traffic Association, Inc. (“NMFTA”) is a nonprofit membership organization headquartered in Alexandria, Virginia, with a membership comprised of approximately 500 motor carriers operating in interstate, intrastate, and foreign commerce, primarily specializing in the movement of less-than-truckload quantities of freight (“LTL”). NMFTA promotes the welfare and interest of its members and the motor carrier industry in general by presenting its members’ position in relevant judicial, regulatory and legislative proceedings. Because a number of NMFTA’s motor carrier members use owner-operator truck

drivers in their day-to-day business operations, and treat those drivers as independent contractors, they are very interested in the WHD's treatment of independent contractor status. As discussed more fully below, they believe that the Independent Contractor Rule, as issued in January, would provide them with all the benefits intended by the Rule, namely giving them a greater degree of certainty as to their truck drivers' status, reducing misclassification litigation between motor carriers and their drivers, and encouraging innovation and efficiency in this critical sector of the economy. Accordingly, they would support making the Rule effective on March 8, 2021 as proposed.

## DISCUSSION

### I. Independent owner-operators play an essential role in trucking.

Owner-operators, treated as independent contractors, have played an essential role in the trucking industry from its inception through the present time. As noted by the Supreme Court in *American Trucking Ass'n, Inc. v. United States*, 344 U.S. 298, 303 (1953), motor carriers, using a variety of business arrangements, "have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands." *See also Leasing Rules Modifications*, Ex Parte No. MC 43 (Sub-No. 12), 47 Fed. Reg. 53858, 53860 (Nov. 30, 1982) ("Prior to the Motor Carrier Act of 1935, motor carriers regularly performed authorized operations in non-owned vehicles. To a large extent, ownership of these vehicles was vested in the persons who drove them, commonly referred to as owner-operators."). The use of such owner-operators allows these carriers to efficiently meet the fluctuating daily and seasonal demands for the transportation services provided. In short, it allows them to adapt their work force to meet the changing needs of the shipping public.

Owner-operator truck drivers also benefit from the arrangement. These drivers exercise substantial control over key aspects of their work and are in business for themselves. Not only do they own and maintain their truck tractors, but they typically determine which loads to accept or reject, where to purchase fuel, eat, and stop for the night, and set their own hours and routes. In some cases, owner-operators also negotiate rates for their services. This independence gives them the opportunity to increase their profits based upon personal initiative and investment.

Given the level of control over work performed, owner-operators can earn more than employee truck drivers. American Truck Business Services, a company that has provided financial assistance and advice to more than 150,000 owner-operators, found that its clients averaged \$65,000 net income in 2018. *See ATBS CEO: Owner-operators should prepare for a 'freight cliff'*, Freightwaves (March 26, 2020), at <https://www.freightwaves.com/news/atbs-ceo-owner-operators-should-prepare-for-a-freight-cliff>. This compares with an average annual wage for heavy and tractor-trailer truck drivers of \$46,850 in 2018 according to the U.S. Bureau of Labor Statistics. *See Occupational Employment Statistics (May 2019)*, at [https://www.bls.gov/oes/current/oes533032.htm#\(1\)](https://www.bls.gov/oes/current/oes533032.htm#(1)).

II. The WHD Independent Contractor Rule provides needed guidance for carriers.

As WHD noted in adopting the Independent Contractor Rule, the FLSA itself does not define the term “independent contractor”, nor does it otherwise indicate what factors must be considered to determine whether a worker is an employee or independent contractor. *See* 29 U.S.C. § 201 *et seq.* Absent such guidance, both the courts and the WHD have developed an “economic realities” test that requires an evaluation of the extent of the worker’s economic dependence on the putative employer. This process involves an analysis of the totality of the circumstances in particular cases.

The problem for motor carriers has been that the test and its component factors have never been clearly explained, nor have they been consistently articulated and applied. Various overlapping five and six factor tests have been applied by different courts, and no particular factors have consistently been found to be dispositive. *See* 86 Fed. Reg. at 1169-1171. The WHD itself issued a Fact Sheet which identifies seven factors that are considered significant, and several other factors that are immaterial. *See* WHD Fact Sheet #13, “Employment Relationship under the Fair Labor Standards Act (FLSA)” (July 2008). The end result in trucking has been uncertainty and sometimes misclassification litigation brought by or on behalf of their drivers.

Because of the common usage of owner-operator truck drivers that motor carriers believe are independent contractors, the WHD’s Independent Contractor Rule offered welcome and needed guidance for their operations. A uniform clearly-stated test that lets motor carriers and drivers know precisely how to structure that relationship is invaluable in eliminating the misclassification litigation that is now prevalent in the industry. Moreover, as stated by the WHD in its commentary, the Rule “will lead to increased precision and predictability in the economic reality test’s application, which will in turn benefit workers and business and encourage innovation and flexibility in the [trucking sector] of the economy.” *Id.* at 1168. Any delay only continues the currently uncertain situation.

### III. The Independent Contractor Rule Correctly Interprets Legal Precedent.

WHD adopted an “economic realities” test to determine a worker’s status as an FLSA employee or an independent contractor, which distinguishes workers in business for themselves, who are independent contractors, from workers who are economically dependent on an employer for work. *Id.* at 1178, 1196. Most importantly, WHD identified two ‘core factors’ -- “The nature and degree of the worker’s control over the work; and the worker’s opportunity for profit or loss based on initiative, investment, or both,” -- that would be most important “because they are the most probative

of whether workers are economically dependent on someone else's business or are in business for themselves." *Id.* at 1171; *see generally* 1179-1190. Three other less probative factors that could also be considered were as follows: "The amount of skill required for the work, the degree of permanence of the working relationship between the individual and the potential employer, and whether the work is part of an integrated unit of production." *Id.* at 1171. The Department also advised that actual practice is more probative than what may be contractually or theoretically possible. *Id.*

The Rule adopted was well within the scope of the WHD's authority, as the Division within the Department of Labor created by the FLSA to administer its provisions and fill gaps left by the law. *See* 29 U.S.C. § 204. The WHD Rule does not depart from prior general interpretations that courts and the WHD have long used, adding clarification only where the law is muddled due to the prior placement of emphasis on diverse factors. The identification of five important factors, combined with the categorization of those factors as to importance, will ensure compliance with the law and uniform treatment of workers. This is especially useful for the many motor carriers that operate in different states or possibly throughout the United States.

#### CONCLUSION

For all the reasons discussed above, NMFTA respectfully requests that the Independent Contractor Rule, as finalized and approved for use effective March 8, 2021, be allowed to take effect at that time. Additionally, NMFTA would ask that the related WHD Opinion Letter 2021-9 withdrawn on January 19, 2021, which found that requiring owner-operator truck drivers to implement mandatory safety measures does not affect their independent contractor status under the FLSA, be allowed to go into effect at the same time. As noted by WHD in the Final Rule, "[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 (as opposed to employment relationships)’’ is qualitatively different than other forms of control and should not be discouraged. *See* 86 Fed. Reg. at 1180, 1183.

Respectfully submitted,



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