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March 11, 2013

By Email (WHDPRAComments@dol.gov)

Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-350
200 Constitution Avenue N.W.
Washington, D.C. 20210

Attention: Karen Livingston
Jonathan Simonetta

Re: Comments to Proposed Information Collection Request
for the Worker Classification Survey, FR-2013-00389
Submitted by Richard J. Reibstein, Attorney

Dear Ms. Livingston and Mr. Simonetta:

Comments have been solicited from the public by the U.S. Department of Labor concerning its proposed data collection for the Worker Classification Survey published in the Federal Register on January 11, 2013.

Attached are Comments by the undersigned, a partner with Pepper Hamilton LLP, who is Co-Chair of Pepper's Independent Contractor Compliance practice, a multidisciplinary group of labor, benefits, and tax lawyers at Pepper. Kindly note that these Comments are being submitted in my individual capacity and not on behalf of Pepper Hamilton or any clients of Pepper Hamilton, and the views expressed in the Comments do not necessarily represent the views of Pepper or any of its clients.

The undersigned advises and represents businesses across the country seeking to enhance their compliance with applicable federal and state laws impacting

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the use and classification of independent contractors. I am also a co-publisher of Independent Contractor Compliance and Misclassification Legal Blog (www.IndependentContractorCompliance.com), which provides timely information, insights, and analysis about the legal and practical issues involved in the use and proper classification of workers treated as independent contractors or paid on a 1099 basis. The blog also serves as a unique resource for employers, consultants, other businesses and law firms seeking information and assistance in this area of the law.

Thank you for the opportunity to submit comments on the DOL's proposed data collection for the Worker Classification Survey.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Richard J. Reibstein", with a stylized flourish at the end.

Richard J. Reibstein

RJR:dw

Attachment

March 11, 2013

COMMENTS BY:

RICHARD J. REIBSTEIN, ESQ., PARTNER WITH PEPPER HAMILTON LLP,¹ AND
CO-PUBLISHER OF INDEPENDENT CONTRACTOR COMPLIANCE AND
MISCLASSIFICATION LEGAL BLOG²

COMMENTS ADDRESSED TO:

AGENCY NAME: U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION AND
SENT TO WHDPRAComments@dol.gov

REGARDING:

PROPOSED INFORMATION COLLECTION REQUEST (ICR) FOR THE WORKER
CLASSIFICATION SURVEY

FR DOC NO: 2013-00389 (CONTROL NO. _____)

PUBLISHED IN THE FEDERAL REGISTER, VOL. 78, NO. 8 (JANUARY 11, 2013)

Introduction

Comments have been solicited from the public by the U.S. Department of Labor concerning its proposed data collection for the Worker Classification Survey published in the Federal Register on January 11, 2013. The DOL has stated on page 3 of 4 in the printed version of the online Federal Register that it is requesting comments in four areas:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

¹ The comments set forth herein do not necessarily represent the views of Pepper Hamilton LLP or its clients. The author of these comments is a Co-Chair of Pepper Hamilton's Independent Contractor Compliance practice, which counsels and advises businesses across the country in enhancing their independent contractor compliance with federal and state laws impacting the classification of workers and other service providers as independent contractors.

² Independent Contractor Compliance and Misclassification Legal Blog, which is available online at www.IndependentContractorCompliance.com, is published by the authors as individuals to provide timely information, insights, and analysis about the legal and practical issues involved in the use and proper classification of workers treated as independent contractors or paid on a 1099 basis; the blog also serves as a unique resource for employers, consultants, other businesses and law firms seeking information and assistance in this area of the law.

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the information collection on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Section I of these Comments contain general comments addressing the areas 2 and 3 of the four areas for which the DOL has requested public input.

Section II of these Comments contain specific comments addressing the proposed “Worker Classification Survey” materials to be used by the survey interviewers, with reference to the pages, sections, and specific questions in the draft interview of workers. Section II also contains specific comments about the draft survey materials for employers and employer representatives.

Section I. General Comments on the “Worker Classification Survey” Materials

As currently drafted, the information to be collected is unlikely to serve the interests of the Department in obtaining information that has “practical utility” because (a) many of the questions as drafted use language that is confusing, imprecise, and subject to more than one interpretation; (b) some of the questions seek information that is not pertinent to the stated purpose of the worker classification study; and (c) some of the questions fail to use classification-neutral wording that can lead to skewed results. It is respectfully submitted that the proposed questions in both the worker interview and the employer interview be modified to (a) use classification-neutral language, (b) clarify language that is confusing, confounding, ambiguous, and imprecise, and (c) eliminate language that is neither meaningful nor pertinent to the issue of worker classification. Using the proposed language without eliminating these flaws in the current drafts would likely produce results that are skewed, meaningless, inaccurate, and without practical utility.

The comments below are also provided to “enhance the quality, utility, and clarity of the information to be collected,” as requested by the DOL. Specific modifications of the currently proposed language are provided below as to 35 different employee survey questions as well as for information provided to employers/employer representatives.

Section II. Specific Comments on the “Worker Classification Survey” Materials

A. The Worker Misclassification Survey (OMB Attachment C Survey)

1. In Item **S-4** on page 2 of the Worker Misclassification Survey (OMB Attachment C Survey), Section A (“Screener & Selection”), the first sentence discusses how the results of the survey will be used, but is couched in terms suggesting that the DOL is only charged with improving things for workers and seeking to balance the interests of both workers and businesses. For the same reason, the second sentence indicates that the DOL’s study is to promote “fair hiring practices” when it is understood, and stated by the DOL, that the purpose of the study is to better understand employees’ understanding of worker classification. Thus, it is respectfully submitted that this question be modified as shown below in the “track changes” to question S-4.

S-4

Results from this survey will be used by the U.S. Department of Labor to improve policies and benefits for American workers and businesses. Information from the survey will help the Department’s efforts to promote fair hiring practices, a better understanding of worker classifications, and access to critical workplace benefits, opportunities and protections. Your answers will remain private and your personal information will not be shared with the U.S. Department of Labor. [SOURCE: NEW]

2. In Item **Intro3** on page 4 of the Worker Misclassification Survey (OMB Attachment C Survey), Part I, Section A (“Screener & Selection”), the question sets forth the reason for the call to the respondent and purports to tell the respondent what the survey results will be used for. However, the words used are likely to create the impression that independent contractor (IC) status is a form of “employment type.” Thus, in the last sentence, the interviewer states that the “Study results will be used by the U.S. Department of Labor to learn what people who work know about their employment type” However, bona fide ICs are not employees and do not have an “employment type.” These words should therefore be changed to “worker classification.” This is one of many words in the survey materials that, unless modified, will create the impression on respondents that, if they are classified as ICs, they are likely to be misclassified. It is recommended that the wording throughout the survey materials be “neutralized” to avoid pre-ordained results that will skew the responses and likely cause the results to show an overstatement of the level of misclassification in the U.S. and/or create doubt in the minds of workers who are bona fide ICs that they have been properly classified.

3. In Item **JOBHOURS** on page 6 of the Worker Misclassification Survey (OMB Attachment C Survey), Part I, Section B (“Determine Main Job”), the question asks whether the worker works more than 35 hours per week at his/her main job. Why the number 35 is used, rather than 40, is not readily apparent. Should it be 40 hours instead of 35, inasmuch as 40 hours per week is when overtime is required under federal law for non-exempt workers?

4. In Item ***QEMPLOYER** on page 7 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 1 (“Employer Self-Report”), the question suggests that one can either be “employed” or “self-employed or working in the family business.” The phrases “self-employed” and “working in a family business” are not the only ways in which ICs view themselves. Many properly classified ICs do not regard themselves as “self-employed or working in a family business.” It is respectfully submitted that it would be better to expand “self-employed” by adding “such as working as an independent contractor, independent consultant, or freelance worker” in the question itself and not just the applicable answers. Otherwise, the question may be confusing or confounding to a worker respondent. See “track changes” below.

***QEMPLOYER**

At your [QMAIN] job, are you employed by a private company or individual, a non-profit organization, by government, or were you self-employed or an independent contractor, consultant, or freelance worker, or working in the family business?

5. In Item ***QSELF_TITLE_2** on page 8 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 1 (“Employer Self-Report”), the choices offered to respondents as to how they usually refer to their work have limited choices that do not include the types of work that many ICs use in their usual vernacular. Other choices should include “Your client” and “Your job.” See “track changes” below. Also, answer #4 should be changed from “The company you work for” to “The company you provide services to” to more accurately state the IC relationship. See “track changes” below. The suggestion that someone “works for” another instead of “providing services to” another is an additional example of language that fails to use neutral language. It is respectfully submitted that, without these types of changes, these questions will likely produce skewed results.

***QSELF_TITLE_2** How do you usually refer to your work at your [QMAIN] job? Do you refer to it as...? [SOURCE: Adapted from Canadian Self-Employment Survey]

1. Your business?
2. Your (professional) practice?
3. Your self-employment?
4. The company you ~~work for~~ provide services to?
5. Your client?
6. Your job?
57. Something else? (SPECIFY)
8. DK (VOL)
9. REF (VOL)

6. Item ***QSELF_NUM** on page 8 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 1 (“Employer Self-Report”), contains imprecise language, is limited, and not likely to be meaningful to many respondents who are asked the question. It asks, “How many clients or jobs did you have in the last 30 days in your [main] job?” One does not “have” clients in the last 30 days; the better question is “How many clients did you provide services to in the past 30 days?” In addition, asking how many “jobs did you have in the past 30 days in your job” is a very confusing question, since the word “job” is used in two different contexts in the same sentence. Further, the “last 30 days” is a very limited question. Many ICs provide services to many different clients over a year or so, but a particular engagement may be more than a month in duration. It is respectfully submitted that a better question would be “How many clients have you provided services to or engagements have you had in the last 12 months?”

7. In Item ***QCORP_3** on page 9 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 1 (“Employer Self-Report”), the question asks “Are you/is your business registered with the state?” This question has nothing to do with any federal law. Many ICs that are properly classified as such may not be registered with the state in which they perform services, and/or they may not be required to do so. This question also introduces needlessly a “fear” element into the survey, and is likely to make a bona fide IC respondent nervous if he/she has not registered his/her business with the state (even if not required to do so). It may have the effect of causing such a respondent to question the purpose of the survey and motives of the interviewer and DOL and provide invalid answers to the remainder of the survey questions.

8. In Item ***QCHANGE_SE** on page 9 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 1 (“Employer Self-Report”), the question “Since beginning this [main] job, have you always been self-employed?” This is an awkward question for a variety of reasons. It is understood to inquire whether the respondent was changed from a W-2 employee to a 1099er, as when a company lays off employees but then retains them as ICs. It is respectfully submitted that it would be more useful to ask: “Were you treated as an employee in this job prior to the time you became an independent contractor?” or something along that line. Awkward questions also produce invalid and skewed responses that lessen the value of the survey results.

9. In Item ***QEMPLOYEE** on page 10 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 1 (“Employer Self-Report”), the question “At your [main] job, are you an employee?” is subject to a host of different meanings. Does it mean, “Are you paid on a W-2 basis?” Or mean, “Even if you are an IC, are you really an employee?” This question, which can be the most key question in the entire survey if construed as meaning the latter, is not susceptible to being asked in only eight words – perhaps the shortest question in the entire survey. If it means the former, then it should be revised accordingly.

10. Item ***QCHANGE_EE** on page 11 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 1 (“Employer Self-Report”), asks a follow-up question to the prior one, and is just as susceptible to more than one meaning. It says: “Since beginning this job, have you always been an employee?” It, too, should be revised accordingly for similar reasons as set forth in 8, above.

11. In Item ***QCERTAIN_SE** on page 12 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 1 (“Employer Self-Report”), the question is “How certain are you that you are SELF-EMPLOYED on your [main] job and not an employee of the company or clients for whom you work?” The term “self-employed” is not defined. Many legitimate ICs do not call themselves “self-employed.” If that term is used, it is respectfully submitted that it should be defined to respondents as including ICs, business owners, and the like. The following question, ***QCERTAIN_EE**, which asks the same question of workers that view themselves as employees, uses the term “independent contractor,” thereby validating the need for re-drafting the preceding question for consistency. More importantly, it is unclear whether the question is asking if the worker is certain about what he/she considers him/herself to be, OR certain about what the IRS, DOL, the company, or clients to whom he/she provides services considers him/her to be.

12. In Item ***QCERTAIN_EE** on page 12 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 1 (“Employer Self-Report”), the question is “How certain are you that you are an EMPLOYEE on your [main] job and not an independent contractor, or temporary worker?” This question can be very confusing to any employee who is working as an employee for a company on a temporary job. Such an employee would be an “employee” and a “temporary worker.” It is respectfully submitted that the value of this question, therefore, would be compromised if it is not re-drafted. In any event, it is unlikely that any respondent will answer this question, once re-drafted, as anything other than “Very certain”. Indeed, any worker who can be treated as a bona fide IC can nonetheless be treated as an employee by the hiring party if paid on a W-2 basis.

13. In Item ***QCONT_1** on page 12 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 1 (“Employer Self-Report”), the question starts out, “Some companies provide employees or their services to other companies or clients under contract.” It then asks, after giving some examples, “Did you work for a company that contracts out you or your services in the last THIRTY DAYS?” The word in the first sentence “employees” should be “workers” because some companies can legitimately provide either employees or ICs to other companies or clients under contract. Also, the fact that there may or may not be a “contract” between the hiring company and a client is meaningless. Thus, the question as to whether the respondent worked for a company that “contracts out” his or her services result in a “Don’t Know” response simply because the respondent may not know if there is a contact between the client and the company he/she may be working with. Finally, the words “work for” are not

consistent with an IC relationship. ICs do not “work for” companies, they provide services to companies (or such company’s clients). Use of the words “work for” should be avoided as they are not neutral; it is respectfully submitted that such words be substituted with the words “work with” or, better yet, “work for or with”.

14. In Item ***QREFER1_X** on page 13 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 1 (“Employer Self-Report”), the question asks “To work at your [main] job, were you REQUIRED to do any of the following?” and then lists such things as “Sign a contract, form or other legal document.” First, many bona fide ICs are not required to sign an IC agreement but rather are asked to do so. Conversely, many bona fide employees are required to sign an employment agreement. In addition, there are many employees who are misclassified as ICs but not required (or asked) to sign an IC agreement. Further, there are many bona fide ICs that are required to sign an IC agreement. This part of the question asking if the respondent was “required” to sign “a contract” is therefore meaningless for purposes of worker classification issues. Second, the “lumping together” of “Sign a contract, form or other legal document” would presumably include a worker who was required to sign a Form W-4, Form W-9, or a confidentiality or HIPAA form. Thus, if the question about a contract is kept, despite its meaninglessness for purposes of worker classification, it should at least be separated from the words, “form or other legal document.” Similarly, if the words “form or other legal document” are kept but made into a separate question, it is respectfully submitted that it should say something like “(other than a tax form such as a W-4 or W-9 or a confidentiality or HIPAA form)”. The value of breaking out these separate types of forms is confirmed by the next question, QSIGN-SP”, which lists a variety of forms and other legal documents.

15. In Item ***QSIGN_SE** on page 14 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 1 (“Employer Self-Report”), the question is “What type(s) of documents did you sign?” The question then lists many documents including “Partnership Agreement”, “Franchise Agreement”, and “Employment Agreement”. For some reason, though, the question appears to omit the key and most common agreement that an IC (a/k/a self-employed worker) would sign: an Independent Contractor Agreement.

16. In Item ***QCCERTAIN_SE** on page 16 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 2 (“Industry – All Respondents”), the question is “Counting ALL LOCATIONS where (your employer/you) operate(s), what is the total number of persons who work for (your employer/you) including you?” It is respectfully submitted that this is yet another question that uses improper and limiting language when referring to ICs (a/k/a those who are self-employed). It should be changed to “. . . what is the total number of persons who work (for your employer/you/*the business you provide services to*), including you?”

17. In Item ***QTEMP_1** on page 16 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 4 (“Permanence”), the question says: “Some jobs are temporary.

They last only for a set number of weeks or months or until the completion of a project. Is your [main] job temporary?" This question uses the term "temporary" in a manner that is contrary to the way most workers view the word "temporary." Further, temporary jobs need not be for a "set" number of weeks or months; they can be for an unspecified but limited duration. For those persons who have worked for a temporary employment agency for years, and are assigned to short-term projects regularly at the clients of the agency, they may answer the question as drafted "yes" absent any clarification of the question. In addition, many ICs provide services to service recipients on a short-term basis, and some on a long-term basis, especially where, for example, a physical therapist provides services to a number of different clients each week. Some regular temporary employees who are sent to do clerical or IT work for one client after another have "temporary" assignments. Further, the IRS has stated: "A temporary relationship is also a neutral fact that should be weighed carefully. An independent contractor will typically have a temporary relationship with a business, but so too will employees engaged on a seasonal, project, or 'as needed' basis." IRS Training Materials, "Independent Contractor or Employee?" at 2-27. This question, as drafted, is not well designed for determining "permanence" of a relationship, and therefore should, it is respectfully submitted, be re-drafted, clarified, or subject to follow up questions regarding why the respondent views his/her job as temporary.

18. In Item ***QTEMP_2** on page 17 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 4 ("Permanence"), the question provides: "Provided the economy does not change and your job performance is adequate, can you continue to work in your current job as long as you wish?" It is respectfully submitted that this question should be re-drafted for many reasons. First, the reference to the economy has no value and is a distractor. In fact, the economy could change and have no significance to the issue of permanence of the work. Second, the issue of job performance being adequate does not mean a job will continue, and few if any workers regard their performance as inadequate. Third, no one hired on an at-will basis as an employee and no IC hired to perform a particular project can "work in your current job as long as you wish." Few if any jobs, whether as an employee or an IC, have job security where the worker can work for as long as he/she wishes.

19. In Item ***QTEMP_PAYA** on page 17 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 2 ("Permanence"), the question asks about who pays the respondent. The introduction to the question, "Even though you told me your [main] job is not temporary," is wholly unnecessary and use of the words "Even though" make it sound as though there is something unusual or contra-indicated. The introductory words in the question, which includes the word "temporary" (which is not very well defined, as noted in item 17, above), should, it is respectfully submitted, be removed.

20. In Item ***QTEMP_1B** on page 17 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 2 ("Permanence"), it says: "Were you hired for a fixed period of time?" However, a fixed period of time can be for someone hired for a day or a week,

or one who signed an employment agreement with a one- or two-year term. It is respectfully submitted that there should be a follow-up question, or available answers, that include information about how short or long the fixed period of time may be.

21. In Item ***QDOCUMENT** on page 24 of the Worker Misclassification Survey (OMB Attachment C Survey), Part II, Section 5 (“Pay”), the question has a number of subparts, but the last one (d.), which states “Did you receive . . . any other tax forms?” could be improved by adding, “such as a W-4 withholding form for employees or a W-9 taxpayer ID form for independent contractors?”

22. In Item ***QBEHAV1** on pages 25-26 of the Worker Misclassification Survey (OMB Attachment C Survey), Part III, Section 1 (“Behavioral Control”), the question states: “On your [main] job, do you report directly to a manager, supervisor, foreman or someone else who regularly oversees or approves HOW you do your work?” This is perhaps the most important question in the survey, yet it is phrased inconsistently with the well-established prevailing state of the law with regard to behavioral control, which has been consistently stated by the courts as whether the hiring party has the right to direct or control the manner and means by which the services are provided. Whether the hiring party “approves how you do your work” may apply even if the hiring party does not direct or control how the services are performed, but expresses approval of the way in which they are performed. Further, the issue of whether the hiring party controls or directs *how* the worker performs the services is distinguished from whether the hiring party controls *what* the worker produces (i.e., the end-product of the services), but these two issues are often confused by many and will likely be lost upon many respondents unless the distinction is drawn to their attention. Therefore, this key question should, it is respectfully submitted, be modified to state in sum and substance: “On your [main] job, do you report to a manager, supervisor, foreman or someone else who regularly oversees your work and directs and controls not only what you do, but also HOW you do your work?”

23. In Item ***QBEHAV1_B** on page 26 of the Worker Misclassification Survey (OMB Attachment C Survey), Part III, Section 1 (“Behavioral Control”), the question states: “Do you need permission to leave your place of work, or can you come and go at will?” Because some bona fide ICs provide services for clients at specific times (e.g., as noted in the prior question, QBEHAV1AA) and cannot come and go at will prior to the completion of the work), this question should, it is respectfully submitted, be modified to add the words in italics at the end of the following: “Do you need permission to leave your place of work, or can you come and go at will, *subject to any client requirements?*”

24. In Item ***QBEHAV2** on pages 26-27 of the Worker Misclassification Survey (OMB Attachment C Survey), Part III, Section 1 (“Behavioral Control”), the question states: “How often does someone tell you how to perform your usual work activities and duties?” “Telling”

someone how to do his/her job is not the same as “directing” someone how to do his/her job. One can be told without being directed. Further, the word “someone” should be defined. “Someone” could range from the worker’s spouse to a client to whom the worker has been sent to perform professional services. Therefore, it is respectfully submitted that the question should be modified for the reasons noted in 22, above, to state in sum and substance: “How often does someone from the company which hired or retained you direct you as to HOW you must perform your usual work activities and duties?”

25. In Item **QBEHAV4** on page 27 of the Worker Misclassification Survey (OMB Attachment C Survey), Part III, Section 1 (“Behavioral Control”), the question states: “Are you required to perform your job duties in a specific location?” This question may be quite meaningful for purposes of misclassification, but is oftentimes meaningless absent the context of why a worker may be required to work at a specific location. A worker performing plumbing work must almost always perform his job duties in a specific location – the place where the plumbing fixture to be repaired or installed is located – and therefore this factor is of no value in determining that worker’s status. But this can be an important criteria in other situations, such as requiring a worker to do his/her work in an office that can just as easily be done at the worker’s home. These are the very considerations that the IRS has discussed in its Training Manual on worker classification, where it noted that location is only meaningful in the context of the job itself. IRS Training Materials, “Independent Contractor or Employee?” at 2-27. Thus, absent follow-up questions setting forth the context of this inquiry about location, this factor in a vacuum is not useful in determining a worker’s classification.

26. In Item ***QBEHAV5** on page 27 of the Worker Misclassification Survey (OMB Attachment C Survey), Part III, Section 1 (“Behavioral Control”), the question states: “Is there a job or procedures manual for the duties you perform?” It is respectfully submitted that the question should be clarified to ensure that the manual being inquired about is a procedures manual about “how” to perform the job, not merely some “job manual”. Thus, the question should be modified to state in sum and substance: “Is there a procedures manual for the duties you perform that tells you HOW to perform the job?” With this modification, the following question, **QBEHAV5A**, which asks the respondent how closely he/she is required to follow “the manual” is rendered meaningful; otherwise, it may provide skewed results.

27. In Item ***QFINAN3** on page 29 of the Worker Misclassification Survey (OMB Attachment C Survey), Part III, Section 2 (“Financial Control”), the question states: “On your [main] job, have you ever invested your own money in the company where you work to support the day-to-day operations?” First, the words “in the company” may be confusing; does it refer to the

company that retains or hires the worker or his/her own company? At a bare minimum, the words “in the company” should be changed to “in the company or your self-employment or business.” Second, the addition of the words “to support the day-to-day operations” narrows the question and would elicit a “No” where, for example, a bona fide IC would spend money to establish his/her own business entity or advertise or market his/her services, which do not relate to “day-to-day operations.” Those final five words should therefore be removed so that the responses are not skewed thereby adversely affecting the value of this question.

28. In Item ***QFINAN4** on page 29 of the Worker Misclassification Survey (OMB Attachment C Survey), Part III, Section 2 (“Financial Control”), the question states: “At your [main] job, do you have the ability to (a) hire additional workers? (b) change the way the business is run?” This question uses the wrong word, “ability.” The correct word is “right” under prevailing court and agency guidance. Further, (a) should add the following underscored words: “hire one or more additional workers or have someone else you select do your work for you on a temporary or longer basis.” The words “hire additional workers” is also likely to be confusing to a bona fide IC respondent, as it can mean hire workers for the respondent’s own IC business or for the business of the client or company for whom the IC is providing services. Similarly, the words “(b) change the way the business is run” can cause similar confusion. It should be reworded to say: “(b) change the way your business is run.” Thus, it is respectfully submitted that the question should be modified to state in sum and substance: “At your [main] job, do you have the right to (a) hire one or more additional workers or have someone else you select do your work for you on a temporary or longer basis? (b) change the way you run your own business.” See “track changes” below.

***QFINAN4**

“At your [main] job, do you have the ability-right to (a) hire one or more helpers or additional workers or have someone else you select do your work for you on a temporary or longer basis? (b) change the way your ~~the~~-business is run?”

29. In Item ***QFINAN5** on page 29 of the Worker Misclassification Survey (OMB Attachment C Survey), Part III, Section 2 (“Financial Control”), the question states: “In the event that the company where you work loses money, would you continue to earn your wage for the work you perform?” This question uses “wage,” a word normally associated with non-exempt employees and not typically associated with ICs word; that word should be modified to “earnings” or “compensation,” both of which apply to exempt and non-exempt workers and ICs. This question is also in need of modification because the words “company where you work” may mean either

an IC's own business or it could mean the company for whom the IC is currently providing services.

30. In Item ***QRELATE1** on page 29 of the Worker Misclassification Survey (OMB Attachment C Survey), Part III, Section 3 ("Emp Relationship"), the question states: "Besides your [main] job, do you perform similar work for others [IF NECESSARY: other companies or businesses]?" This question, it is respectfully submitted, does not address the key inquiry regarding control in a worker classification inquiry. As the courts have made clear, it is not mainly what the worker does but, more importantly, what the worker has the *right* to do. Thus, if a bona fide IC has the genuine right to perform similar work for other companies or businesses but chooses not to exercise that right for business or personal reasons at the time he/she is responding to the question, or for the past x number of months or for some other duration, the fact that he/she chooses not to exercise that right at the present time (or even for a reasonable period of time) is not an indicia of employee status. Rather, it is an indicia of IC status that the worker has such genuine right. Thus, the question should be modified in sum and substance as follows: "Besides your [main] job, do you have the right, if you so desire, to perform similar work for others [IF NECESSARY: other companies or businesses]?" See "track changes" below.

***QRELATE1**

"Besides your [main] job, do you have the right, if you so desire, to perform similar work for others [IF NECESSARY: other companies or businesses]?"

31. In Item ***QRELATE3** on page 30 of the Worker Misclassification Survey (OMB Attachment C Survey), Part III, Section 3 ("Emp Relationship"), the question states: "Do you use your own funds to advertise your services, with a website, flyers, newspapers, business cards or any other way?" This question focuses on expenditures of money for advertising, but ignores the fact that in the digital world today, no funds are required to advertise, have your own website, or even get business cards. Those advertising forms are readily available for free, as are other non-traditional forms of business advertising, promotion, and marketing, such as the use of LinkedIn.TM This question would be better drafted if broken into two related questions. The first question should be, in sum or substance, as follows: "Do you advertise, market, or promote your services on you own website, a hosted website, a business listings site, or on any other site for advertising, marketing, or promotional purposes, or use digital or hard-copy business cards, newspapers, or flyers to advertise, market, or promote your services?" The second question should be, "If so, do you use your own funds to do so?"

32. In Item ***QINTEGRAL** on page 30 of the Worker Misclassification Survey (OMB Attachment C Survey), Part III, Section 3 (“Emp Relationship”), the question states: “Are the duties you perform on your [main] job a part of the regular, day-to-day services or operations of the company where you work? [IF NECESSARY: Is the work you do the same as the work the company does for its customers?]” The purported source of this question is set forth after the question and says: “SOURCE: Adapted from ABC Test”. However, there is no “ABC” test under federal law; only selected states have forms of a statutory test and the “ABC” test and other types of statutory tests use different language than set forth in the proposed QINTEGRAL question. The most typical language is whether the services being performed is “outside the usual course of the business for which such service is performed.” In addition, courts in various states that have enacted an “ABC” test have struggled with those very words, oftentimes coming to different conclusions as to the meaning of what is “outside the usual course of the business.” If different courts construe the words “usual course of business” differently, it is likely that many of the respondents will not have the same understanding of what are the “regular, day-to-day services or operations of the company where you work.” Further, the phrase “of the company where you work” at the end of the question can be extraordinarily confusing to a respondent who is a bona fide IC; does it mean the IC’s business or the client company’s business? Only when the respondent’s actual work and the nature of the business “where [the respondent] works” is fully understood, can a court or agency even begin to determine this part of the “ABC” test. In sum, this question is unlikely to be understood the same way by many respondents, and requires a thoughtful analysis of many factors that cannot be ascertained in a simple question of this nature. Any information derived from this type of question will not only have limited value, but is likely to provide misinformation.

33. In Item ***QINTEGRAL2** on page 30 of the Worker Misclassification Survey (OMB Attachment C Survey), Part III, Section 3 (“Emp Relationship”), the question states: “You have indicated that you are either NOT an EMPLOYEE or NOT SURE if you are an EMPLOYEE. Are there workers at your [main] job who are called ‘employees’ and perform the same duties you do?” This question is incomplete. A business can employ employees and also retain ICs to perform the same duties, but they may do their work completely differently. For example, there may be salespersons who are directed how to do their job, and other salespersons who are bona fide ICs that determine how they will sell the same products. Businesses are not required to only use employees or ICs for the same function, as long as they do not have the right to or exercise direction and control over the manner and means by which the different classes of workers perform their services. It is respectfully submitted that this question, if retained, should be modified to address this fallacy in the manner in which the question is asked, probably in a

multi-part question asking about whether the respondent is directed “how” to perform his/her services and, if so, whether there are other workers called “employees” who are likewise so directed. If not modified, this question is likely to produce skewed results.

34. In Item ***QAGREE** on page 35 of the Worker Misclassification Survey (OMB Attachment C Survey), Part IV (“Knowledge”), the question states: “Earlier you indicated that you are [an employee/self-employed]. Do you agree with this classification or do you think that legally, you should be [self-employed/an employee]?” This question is very similar to question ***QCERTAIN_SE** on page 12. As noted in #11 above, both that question and this one are confusing at best, likely to be understood by some respondents quite differently than others, and of limited utility or value. This question also misstates prior responses by some respondents who said in response to question ***QCERTAIN_SE** they were “NOT SURE/DON’T KNOW” if they were an employee or self-employed; those respondents did not indicate they *are* an employee or self-employed. The question then introduces the term “classification” (which is not defined or a word of common usage), and then asks them if, “legally,” a respondent who is an IC (a/k/a self-employed person) “should” be an employee. The answer to that question, though, is dependent on a host of legal factors that are not explained to the respondent. The question then contains the following answers: “You agree with this classification” OR “You think you should be classified differently” OR “Don’t Know”. However, the classification is what the respondent has classified him/herself as. If, as the question is drafted, the respondent is classifying him/herself, how can the respondent disagree with him/herself? In sum, this question is even less valuable or meaningful than the answer to question ***QCERTAIN_SE** and is likely to be confusing at best to respondents.

35. In Item ***QAGREE_2** on page 35 of the Worker Misclassification Survey (OMB Attachment C Survey), Part IV (“Knowledge”), the question states: “Just to confirm, you have indicated that you are [an employee/self-employed]. Do you agree with this classification or do you think that legally, you should be [self-employed/an employee]?” This is nothing more than a repeat of the prior question. Why it is repeated is unclear, but the effect of the repetition of this confusing question is likely to be, for many respondents, to (a) cause the respondent to answer in a different fashion; (b) create the seeds of doubt in the minds of workers who may be misclassified that they have, as a matter of law, been misclassified; or (c) both of these.

35. In Item ***QTHINK** on page 35 of the Worker Misclassification Survey (OMB Attachment C Survey), Part IV (“Knowledge”), the question states: “Based on your responses to earlier questions, we are unable to determine if you are considered an employee or self-employed. What do you think your legal worker status should be? Should it be: 1. Self-employed 2. Employee 3. Or, something else (SPECIFY) 8. Don’t know.” This question should be modified or eliminated for many reasons. First, it seems contrary to the entire purpose of the study and everything that transpired in the

interview for the interviewer to say at this point that based on the respondent's answers, "we" are "unable to determine if you are considered an employee or self-employed." As noted at the outset of the interview, the purpose was to give the DOL a better understanding of workers' knowledge of the issue of worker classification, not to give a telephonic answer to whether they are an employee or self-employed. Thus, this question would seem to undermine the respondents' faith in the integrity of the interview. Indeed, the interview was not being conducted by the DOL but by a third-party non-governmental survey company that could not give the respondent a determination of their classification. Second, this question is now the fourth time it has been asked in the survey, each in slightly different ways, and each time in a confusing and confounding manner: What do you think you are: employee or self-employed? Do you agree with yourself or legally, should you be something else? Are you certain? What do you think your legal status should be? All of the questions in this series (see # 33-35) seem to be worth re-examining as to whether there is any practical value to the questions being asked.

B. Employer & Employer/Employee Representative Invitation, Project Information Sheet and Interview Guide (In-Depth Interview Materials) (OMB Attachment E)

1. On the Invitation, the purpose set forth in the second paragraph is considerably different than what the Interview Guide says the purpose is. They are also inconsistent with the stated purpose of the study: to "conduct in-depth interviews of employers and employer groups to explore employer knowledge, attitudes, and practices around classifying workers." See page 3 of 4 printed pages of the Federal Register notice.³ That purpose should be set forth in the Invitation and not a different purpose than set forth in the proposed Invitation. See "track changes" in #2 below.

2. Other changes suggested for the Invitation are that the Invitation use neutral language, such as substituting "staffing" for hiring, as set forth in the "track changes" below:

The purpose of this research is to gain a better understanding of the staffing challenges that employers face in the current economic and regulatory environment explore employer knowledge, attitudes, and practices around classifying workers as employees or independent contractors. We want to learn about what factors have been most important to your hiring-staffing decisions in recent years and how the structure of your regular and contingent workforce has evolved. We would like to understand how different types of employers-businesses deal with these challenges and the decisions and strategies they consider when making employment-staffing decisions. The results will help improve the Department's understanding of how their-business considerationspolicies shape and affect employers' hiring and employment-staffing practices of both employees and independent contractors.

³ On the same page, the "period of performance of this evaluation is 30 months ending in March 2014." Thirty months ends not in March 2014 but rather in the second half of 2016. This should, it is respectfully requested, be clarified.

3. On the Project Information Sheet, the paragraph “What will happen to me if I take part?” should use neutral words related to the retention of ICs and hiring of employees. The words selected for use in the draft papers are geared to the use of “employment” vernacular and should be vernacular neutral. The second sentence should be modified as set forth in the “track changes” below:

What will happen to me if I take part?

You will take part in an informal interview with a researcher about your experiences and opinions related to ~~employment-classification of employees and independent contractors~~. The questions will predominantly be about decision factors related to staffing, hiring and employment at your company and across your industry.

4. On the Interview Guide, the purpose of the survey and research should be consistent with the language in the Federal Register, as noted in #1 above. See “track changes” below:

INTRODUCTION AND INFORMED CONSENT

Thank you for agreeing to participate in this research. This project is funded by the U.S. Department of Labor, and under contract with Abt Associates. As we mentioned in the materials we sent you, the purpose of this research is to ~~help the U.S. Department of Labor to learn about employers’ experiences and perspectives on hiring and staffing of employees~~ explore employer knowledge, attitudes, and practices around classifying workers as employees or independent contractors.

C. Worker Classification Information Collection (OMB Part B)

On page 4 of Section 2. of the “Justification” (Part A) indicates that the DOL is having only 16-20 in-depth interviews conducted of employers, employer consultants, and employer representatives. This is woefully inadequate to gain a full understanding of worker classification in the U.S. from the employer/business perspective. Although Abt Associates “anticipates that recruitment will be challenging,” there is no reason not to have as an objective scores of employer/business interviews. The information gathered from only 16-20 representatives of employers/businesses, and to focus on industries that the DOL “has identified as having a higher likelihood of employees being misclassified” is likely to produce highly skewed information and data.

Submitted March 11, 2013 by Richard J. Reibstein, Esq.

Richard Reibstein is an attorney and partner with Pepper Hamilton LLP. He is Co-Chair of Pepper Hamilton’s Independent Contractor Compliance legal practice, which counsels and advises businesses across the country in enhancing their independent contractor compliance with federal and state laws impacting the classification of workers and other service providers as independent contractors. Mr. Reibstein is also co-publisher of the Independent Contractor Compliance and Misclassification Legal Blog (www.IndependentContractorCompliance.com),

which provides timely information, insights, and analysis about the legal and practical issues involved in the use and proper classification of workers treated as independent contractors or paid on a 1099 basis; the blog also serves as a unique resource for employers, consultants, other businesses and law firms seeking information and assistance in this area of the law.

The comments set forth herein do not necessarily represent the views of Pepper Hamilton LLP or its clients.

A handwritten signature in dark ink, appearing to read "Richard J. Reibstein", with a long horizontal flourish extending to the right.