

December 13, 2022

**Submitted via www.regulations.gov
RIN 1235-AA43**

Ms. Jessica Looman
Principal Deputy Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 2021

**Re: Comments Regarding Employee or Independent Contractor Classification
Under the Fair Labor Standards Act, 87 Fed. Reg. 62218, et seq. (Oct. 13, 2022);
RIN 1235-AA43**

Dear Ms. Looman:

The 25 undersigned forestry associations appreciate the opportunity to submit the following comments on the Department of Labor's (DOL) proposed rule regarding *Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218, et seq. (Oct. 13, 2022); RIN 1235-AA43* ("Proposed Rule").

The National Alliance of Forest Owners (NAFO) is a national advocacy organization advancing federal policies that ensure private working forests provide clean air, clean water, wildlife habitat and jobs through sustainable practices and strong markets. Private working forests are owned by individuals, families, small and large businesses, and Americans who invest in working forests for retirement. NAFO member companies own and manage more than 46 million acres of private working forests. The additional undersigned organizations conduct forestry programs on behalf of their members, representing tens of millions of additional acres of private working forests across the country.

Importance of Private Working Forests & Wood Products

More than one-third of the United States is covered by forests, and 47% of U.S. forests are privately owned working forests – forests owned by families, businesses, and investors.¹ Approximately 90% of the timber harvest for domestic wood and fiber used to make forest products in the U.S. comes from private working forests. These forests also supply a steady, renewable supply of domestically grown wood for lumber, energy, paper, and packaging, providing more than 5,000 items that consumers use every day.

Private working forests support 2.5 million well-paying American jobs, mainly in rural communities², providing \$109 billion in payroll and \$288 billion in sales and manufacturing.

¹ Oswalt, Sonja N.; Smith, W. Brad; Miles, Patrick D.; Pugh, Scott A., coords. 2019. Forest Resources of the United States, 2017: a technical document supporting the Forest Service 2020 RPA Assessment. Gen. Tech. Rep. WO-97. Washington, DC: U.S. Department of Agriculture, Forest Service, Washington Office. 223 p. <https://doi.org/10.2737/WO-GTR-97> Table 11.

² Forest2Market. 2019. The Economic Impact of Privately-Owned Forests in the 32 Major Forested States. Available at https://nafoalliance.org/wp-content/uploads/2018/11/Forest2Market_Economic_Impact_of_Privately-Owned_Forests_April2019.pdf#page=9.

At the same time, private working forests account for 80% of net forest carbon sequestration, removing more carbon from the atmosphere than is emitted by all passenger vehicles in the U.S. each year.³ Private working forests contain nearly half of the carbon stored in all U.S. forests combined. Private working forests are a critical nature-based solution to many of our most pressing environmental and climate challenges.

Research shows that demand for wood products keeps markets strong, which protects private working forests from conversion to other land uses, like development. Keeping these forests intact means keeping their economic and environmental benefits intact too. Through a continuing cycle of planting, growing, and harvesting, active forest management cleans our air and water and provides a rich mosaic of wildlife habitat across the landscape.

Many, if not all, private working forests are in rural communities and rely on a limited workforce that uses a variety of employment models. Some workers are employed directly by forest owners, but many are employed by independent entities that contract with forest owners to provide services ranging from logging and hauling to planting, boundary line maintenance, site prep, fertilizer applications, and other forest maintenance needs. Because these needs are irregular for each individual forest owner, contractors typically support several different owners in their operating region. The Proposed Rule may disrupt or even endanger the shared resources of independently contracted workers in ways that would significantly disrupt the sector and the rural economies and environmental values it supports.

Background on the Proposed Rule

DOL historically used an economic reality test to determine whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA). Before 2021, DOL conducted an analysis of the “totality of the circumstances,” considering multiple factors to make this determination. However, in 2021, under the prior Administration, the DOL issued an Independent Contractor Rule (the 2021 Final Rule) assigned a higher weight to two “core” factors to determine whether an independent contractor was an employee by focusing primarily on two “core” factors: (1) the nature and degree of the worker’s control over the work, and (2) the worker’s opportunity for profit or loss. 29 C.F.R. § 795.105(d)(1).

As DOL stated in a 2021 press release, the two core factors were the most probative to the question of whether a worker is economically dependent on someone else’s business or is in business for themselves.⁴ If both core factors supported the same classification, there would be a “substantial likelihood” that the classification was appropriate. However, if the core factors did not point to the same classification, the 2021 Final Rule also identified three other factors that may serve as additional guideposts for the classification analysis: (3) the amount of skill required for the work, (4) the degree of permanence of the working relationship between the worker and the potential employer, and (5) whether the work is part of an integrated unit of production.⁵

DOL now proposes to rescind the 2021 Final Rule and has proposed a new rule (the Proposed Rule) that returns to a totality of the circumstances analysis of the economic reality test in which

³Oswalt et al, p. 223.

⁴ Press Release, U.S. Department of Labor, U.S. Department of Labor Announces Final Rule to Clarify Independent Contractor Status Under the Fair Labor Standards Act (January 6, 2021), <https://www.dol.gov/newsroom/releases/whd/whd20210106>

⁵ 29 C.F.R. § 795.105(d)(2).

the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. The Proposed Rule examines six factors: (1) the worker's opportunity for profit or loss; (2) investments by the worker and the employer; (3) how permanent the work relationship is; (4) nature and degree of control; (5) whether the work is an integral part of the employer's business; and (6) skill and initiative.⁶

Comments

We welcome the opportunity to comment on the Proposed Rule. Because millions of workers' livelihoods are involved in employment or contracted services to private forest owners, the issue of proper classification of such workers is highly important. NAFO appreciates DOL's effort to ensure there is a fair process for determining whether an individual is deemed an employee or independent contractor. NAFO members believe that workers should be treated fairly by employers and receive appropriate benefits. They also believe it is critically important to protect the entrepreneurialism and associated benefits of the independent contractor model.

NAFO believes the Proposed Rule does not contemplate the realities of how businesses and independent contractors work together in a modern forestry supply chain. Further, NAFO is concerned that the fifth factor in the Proposed Rule – the extent to which the work performed is an integral part of the company's business – would nearly always tilt the analysis in favor of a finding of an employee-employer relationship. **For these and the other reasons provided below, NAFO cannot support the Proposed Rule in its current form.** NAFO urges DOL to clarify the Proposed Rule to prevent **unintended consequences unique to the forest sector that would have an outsized impact on rural economies through a major shift in the forestry workforce.** NAFO further proposes adding a safe harbor provision to provide forestry businesses a clear standard for classifying workers as independent contractors.

1. The Proposed Rule Creates Confusion and Uncertainty By Using an Unnecessarily Broad and Arbitrary Standard to Classify Workers as Employees

The Proposed Rule employs a totality of the circumstances approach which examines six factors that do not have predetermined weights: (1) the worker's opportunity for profit or loss; (2) investments by the worker and the employer; (3) how permanent the work relationship is; (4) nature and degree of control; (5) whether the work is an integral part of the employer's business; and (6) skill and initiative.⁷

This approach will tilt the analysis to classify workers as employees rather than contractors. Indeed, the Proposed Rule notes that the definition of employee set forth in the FLSA, as interpreted by the U.S. Supreme Court, is "the broadest definition that has ever been included in any one act" and that it "stretches the meaning of 'employee'" and is broader than common law definitions "to require its application to many persons and working relationships."⁸

Not only does giving equal weight to all six factors slant the analysis in favor of an employee determination, DOL also proposes a "seventh factor" added to the economic realities test: "Any additional factors [that] may be relevant in determining whether [a] worker is an employee or

⁶ Proposed Rule 29 C.F.R. § 795.110 at 62274–62275.

⁷ Ibid.

⁸ Proposed Rule at 62220 & n.19 (quoting *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326 (1992) and *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–51 (1947)).

independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the employer for work.”⁹This catch-all factor provides DOL a vague and highly discretionary means by which it can determine whether there is something that “indicates” whether a worker is economically dependent on an employer for work without historical precedent or guidance. This type of discretion makes it impossible to reasonably anticipate how DOL will make such determinations and what impact they may have on business operations.

NAFO believes that the return to a totality of the circumstances analysis of the economic reality test in the Proposed Rule will have a negative impact on the forestry sector. Giving equal weight to all six (and possibly even seven) factors under the totality of the circumstances test overlooks the reality of the current American workforce in the forestry sector as discussed in further detail below.

2. The Proposed Rule Will Have Adverse Impacts on Worker Availability in the Forestry Sector and Rural America.

DOL must consider the complexity of the employment structures utilized by the forestry sector when preparing a Final Rule. Two fundamental aspects of the sector are critical for the DOL’s information and consideration: (1) forest owners are facing a significant shortage of workers across the country, due in large part to the scarcity of contractors to fulfill specific functions in the sector; and (2) much of the work in the forestry sector is conducted in rural areas where one contracting business is a “shared resource” that may support all natural resource business in a given community. Private forest owners in rural areas struggle to find sufficient qualified labor to perform critical forest management activities. Because of worker shortages, forestry workers engage forest owners using a flexible range of employment and contract approaches. Implementation of the Proposed Rule would significantly disrupt this flexibility.

a. The Proposed Rule Will Upend the Rural Communities Where the Majority of Private Working Forests are Located and Where Contractors are a Shared Resource.

Forest workers use a variety of employment models to provide needed services to forest owners that reflect the realities of rural economies. Some workers are employed directly by forest owners. Many are employed by independent entities that contract with many multiple forest owners in a region. These independent entities range in size from sole proprietors to large crews with operators, foreman, foresters and managers (1-100 employees). However, smaller numbers (1-15 employees) are most common. The types of work performed is also varied and complex. Workers are either employed or contracted to provide a variety of services. They include:

- tree planters – seasonal, multi-company contracted
- log truck drivers – seasonal and year-round
- rock truck drivers – may be employees or contractors
- timber fallers – frequently multi-company contracted
- small loggers – multi-company contracted
- property line surveyors – multi-company contracted
- inventory crews – multi-company contracted

⁹ 87 FR at 62275 (§795.110(b)(7))

- wildlife biologists – multi-company contracted

The Proposed Rule appears to mandate that contractors such as these, who work for multiple customers concurrently or sequentially, will be required to enter separate employment relationships with multiple competing employers. For instance, a contractor that builds a road to access a harvest site might be needed by a single company sequentially for weeks at a time until the road is complete, and then not needed again for weeks or months. If the contractor were small enough, it could be fully engaged building a road for the forest owner. Would the contractor's employees therefore be considered full-time employees of the forest owner for as long as the road is built? That seems implausible on its face for several reasons: (1) it would require the frequent on-boarding and cessation of numerous employment relationships which would be administratively burdensome for the employing entities; (2) it would limit the flexibility of both the contracting entity and the contractor; and (3) it would encourage a dominant customer to monopolize the time of the worker, thereby cutting out opportunities for the contractor to provide services to competing businesses. If this is not intended, DOL should provide clarification in the final rule.

If individuals such as loggers and truckers were reclassified as employees, NAFO anticipates that its members' businesses would be detrimentally impacted in the following ways:

- Efficiency – The contractor base is set up to be nimbler and more flexible to meet the needs of a broad array of clients. If large forest owners could not access contractors, they might need to own and manage their own fleets of specialized equipment (a log truck cannot haul rocks) and struggle to efficiently allocate workers' time and equipment across a variety of short-duration projects.
- Scalability – By using contractors to manage through business cycles when demand or pricing rises or falls, the entity can scale down its production in the field to fit expectations and can scale up when increased production is needed. Using contractors, the business can scale up or down quickly. This scaling would be difficult if this same work were to be done in-house by employees. This once again could lead to less productive work and have negative downstream impacts.

Moreover, landowner size and location can heavily drive contractor availability, contractor type (corporate, small independent), contractor use (multi-company or sole provider). For instance, 65% of the state of Mississippi by area is forested, with almost 20 million acres of small, medium, and large forestry operations. The state boasts nearly 1,000 logging companies (in a population of less than 3 million) to meet the diverse needs of its dispersed, rural forestry sector.¹⁰ Reclassifying contractors as employees would significantly disrupt the operations of contractors and forest owners alike and likely have disparate impacts based on the size and location of forest ownerships.

b. The “Degree of Permanence” Factor in the Proposed Rule Will Adversely Impact Businesses That Rely on Seasonal Contractors.

DOL is proposing that a lack of permanence, although inherent in certain jobs, such as temporary and seasonal work, is not necessarily an indicator of independent contractor status. This could have a significant adverse impact on employers that rely on temporary or seasonal contractors. As discussed above, private working forest owners utilize multiple independent

¹⁰ Mississippi Forestry and Timber. Mississippi Department of Agriculture & Commerce. <https://www.mdac.ms.gov/forestryandtimber/> Accessed December 6, 2022.

contractors to plant, maintain, and harvest trees. The forestry sector's independent contractors rely on having business opportunities with multiple working forest employers to maximize profits for themselves and/or their workers over time.

The Proposed Rule states that workers are considered independent contractors when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities. The Proposed rule states that this may include regularly occurring fixed periods of work, although the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification. The Proposed Rule further states that, where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers' own independent business initiative, the seasonal or temporary nature of the work is not indicative of independent contractor status.

DOL should clarify that degree of permanence for the types of forestry contractors described in these comments does not necessarily mean the contractors are employees. This need for flexibility is compounded by the reality that working forests are located in rural communities where there is a shortage of workers. Given the scarcity of experienced and qualified contractors, NAFO members want to keep contractors that do the best job and contractors should be able to have the opportunity to maximize their business opportunities as well. Reclassification as employees threatens their ability to do so.

3. The “Integral” Factor in the Proposed Rule Creates Confusion and Would Subsume All the Other Factors.

DOL proposes to abandon the 2021 Final Rule's interpretation of the “integral” factor, which focused on whether a worker “is part of an integrated unit of production” of a business (See Section 1, above). Under the Proposed Rule, this factor now asks whether the worker is “critical, necessary, or central to the employer's business.” This factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the employer's principal business.

This new interpretation makes it impossible to understand or apply the “integral” factor. All work for a business is in some sense “critical, necessary, or central to ... [a] business,” because businesses only hire and use workers for tasks or services that are needed and that add economic value. Although the DOL denies that the Proposed Rule does not adopt nor codify an “ABC test” for the classification determination, the way in which the Proposed Rule defines the “integral” factor certainly evokes the “B” prong of the ABC test. Asking whether the work is “critical, necessary, or central to the employer's principal business” would nearly always result in a “yes” response, particularly in a low-margin business like forestry where every task, project, and cost must ultimately deliver economic value.

This is not how the courts have traditionally analyzed the “integral” factor. To the contrary, courts have held that this factor concerns whether a worker is part of an integrated unit of production, not whether they are economically important to a business operation. If the “integral” factor merely assesses whether the work performed has “economic importance” to the business, it would be impossible to apply it in any consistent or rational way. Moreover, it would effectively subsume virtually every contracting or subcontracting relationship because all subcontractors perform a function that the entity deems “integral” to a product or a service – otherwise, it would not contract with them.

The following examples illustrate tasks that may be critical, necessary, or central to forest owners, some of which require technical specialized skills:

- Seasonal Logging Flux: Logging and certain road construction and road use is curtailed during wet seasons due to access problems, higher costs, and regulatory restrictions to protect water resources. Logging is integral to forest management, but there is a compelling economic logic for landowners, contractors, and workers to conduct seasonal work through contractors so that the workforce can flex around seasonal restrictions and logging need in some regions and certain ownerships rather than seeking to recruit and retain logging employees who are only offered seasonal employment. Contractors are able to employ workers and contract for work in different locations to ensure that they remain busy year-round even while some landowners do not have logging needs.
- Tree planting: Tree planting after timber harvest is essential to sustainable forestry and required by law in most states and, therefore, integral to forest management. However, without exception, the work is performed by employees of specialized contractors. The work is seasonal and tree planting can occur at different times of year for different regions depending on latitude, longitude, elevation, climate, and wet season timing. It is not a year-round full time employment opportunity at any single location. The seasonality of the work provides a compelling economic logic for the use of specialized contractors whose crews move around among different operations and regions to take advantage of optimal planting times that are different for different forests and their respective owners. In addition, many of these contractors use migrant and seasonal labor, which requires specialized knowledge, skill, and registration for recruiting foreign workers, obtaining relevant work visas, and satisfying requirements for Farm Labor Contractors and their regulated recruiting, transportation and housing arrangements.

4. Reclassification of Contractors as Employees Will Negatively Impact Contractors' Ability to Maximize Work Output and Undermine the Contractors' Capital Investment in Their Businesses.

The Proposed Rule would require the investments by the worker to be “entrepreneurial in nature” in order for the factor to support independent contractor classification. Yet, at the same time, it states that “costs borne by a worker to perform their job (e.g., tools and equipment to perform specific jobs and the worker’s labor) are not evidence of capital or entrepreneurial investment and indicate employee status.” This factor of the Proposed Rule is at odds with the realities of the modern economy, particularly in the forestry sector.

Wood procurement within the logging sector is often conducted via an auction process where loggers, mills, brokers and dealers bid against one another for the right to harvest the timber. The high bidder is awarded the timber contract and secures it with a non-refundable down payment, typically a percentage (thousands of dollars) of the bid value. This payment is retained until the timber is harvested within the permit timeline and is subject to forfeiture if the harvest is not conducted. There are further financial penalties for failure to comply with the timber permit harvest requirements. These financial risks are borne by the buyer and not shared by other segments of the supply chain. As an example, during market downturns (i.e., housing industry collapse of 2008) loggers were subject to bankruptcy due to the loss of markets for timber permits purchased based on markets at the time of purchase.

Capital investment in equipment serves as further evidence that contractors in the forestry sector value the autonomy that contractor status allows them, which also benefits the rural

economies they serve. For contractors in the forestry sector, investment in equipment ranges from relatively simple tools (e.g., hand tools) to logging equipment in excess of \$1,000,000. While some contractors may upgrade in smaller ways to satisfy the job they are contracted to perform – handheld data recorders, GPS units, laser hypsometers, etc.

For instance, the typical rule of thumb is that in order to start a logging business, the capital investment is \$2 million for equipment purchase, stumpage purchase, and operating expenses. In the case of timber transportation, an independent trucker will pay \$180,000 for a new truck plus the cost of a trailer (\$50,000). Trucking insurance costs \$5,000-\$15,000 per month per truck. The substantial investment made by a logger or trucker is borne solely by the contractor, who assumes all risk and management of the equipment. This investment clearly demonstrates the independent nature of logging and trucking companies within the forest products industry. Contrary to the Proposed Rule, such significant investments are indicative of the contractors' initiative and entrepreneurial spirit, not just the purchase of basic tools necessary to perform labor. Requiring such contractors to be reclassified as employees would undermine these investments, discourage future capital investments by contractors, and ultimately shrink the pool of contractors qualified to perform necessary services to the forestry sector.

If these contractors were required to be considered employees, presumably the forest owners would need to acquire the equipment representing independent capital investment in addition to bringing on board the contractor's employees. Only the largest of forest owners could afford to make such a substantial investment across their acreage. An unintended consequence of the Proposed Rule could be that it would make small family forests – which often represent a significant “nest egg” for rural families – impossible to maintain or monetize. This outcome would harm rural economies across the country and put at risk the climate mitigation potential of America's forests and forest products sectors.

The Proposed Rule would be detrimental to contractors, because it would eliminate the flexibility they rely on to pursue a livelihood for their businesses and their employees year-round. In a constrained labor market, contractors have competitive strength in providing their services to multiple forest owners. The proposed changes would significantly limit their ability to maximize their work output. It also would increase costs for businesses across all industries and eliminate the flexible schedules that are attractive to workers.

5. If DOL Adopts the Proposed Rule, It Should Include a Safe Harbor Provision for Forestry Businesses.

If DOL adopts the Proposed Rule as currently drafted, NAFO requests that it include a safe harbor provision whereby a forestry business would be permitted to classify a worker as an independent contractor if the following criteria are met:

- i. The parties have a written contract for services;
- ii. The contract is non-exclusive (i.e., the contractor may provide services to other customers);
- iii. The contractor provides their own equipment;
- iv. The contractor determines how the services contracted for are accomplished without operational or field supervision by the client or customer;
- v. The contractor does business as an entity (e.g., S corp., LLC) and not as a natural person or in their individual capacity; and
- vi. The contractor provides workers compensation insurance or offers its own medical and life insurance.

By including such a safe harbor provision, DOL can achieve its goal of protecting those workers who should properly be classified as employees while still recognizing the realities of the modern economy and workforce in the forestry sector.

Conclusion

Privately-owned working forests are critical economic drivers of rural economies and the overall U.S. economy. The Proposed Rule would exacerbate worker shortages in private forestry, undermine the proper and fair use of shared, scarce resources in rural communities, and deprive contractors of their autonomy. While we support the DOL's concern that individuals who truly are dependent upon a specific entity for their economic livelihood be properly classified as employees, there are myriad reasons why application of the Proposed Rule to workers in the forestry sector would lead to incorrect classification and other unintended consequences.

For these reasons, the undersigned organizations request DOL make necessary clarifications to the proposed rule and incorporate a safe harbor provision for the forestry sector responding to the business and rural economic factors unique to working forests. NAFO appreciates the opportunity to comment on the draft rule. Please contact Anne Clawson at AClawson@nafoalliance.org for any follow up questions.

Sincerely,

Alabama Forestry Association
American Loggers Council
Arkansas Forestry Association
Calforests
Empire State Forest Products Association
Florida Forestry Association
Forest Landowners Association
Forestry Association of South Carolina
Georgia Forestry Association
Idaho Forest Owners Association
Maine Forest Products Council
Massachusetts Forest Alliance
Minnesota Forest Industries
Mississippi Forestry Association
National Alliance of Forest Owners
New Hampshire Timberland Owners Association
North Carolina Forestry Association
Oregon Forest Industries Council
Pennsylvania Forest Products Association
Southeastern Lumber Manufacturers Association
Tennessee Forestry Association
Texas Forestry Association
Virginia Forestry Association
West Virginia Forestry Association
Wildlife Mississippi