AMERICAN TRUCKING ASSOCIATIONS

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December 13, 2022

Via electronic submission

Ms. Jessica Looman
Principal Deputy Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Ave., NW
Room S-3502
Washington, DC 20210

RE: RIN 1235-AA43, Notice of Proposed Rulemaking on Employee or Independent Contractor Classification Under the Fair Labor Standards Act

Dear Ms. Looman:

The American Trucking Associations (ATA) strongly opposes the Wage and Hour Division's (WHD or Division) notice of proposed rulemaking (NPRM) referenced above. As we have previously explained in comments and discussions, our industry would be acutely affected by having health and safety contractual provisions between parties change the status of an independent contractor to an employee. The direct consequence will be substantially less safe workplaces throughout the country, including the public highways, without any corresponding benefit to working men and women.

The proposal also suffers from myriad legal, policy and logical infirmities that will result in legal challenges and economic chaos if finalized. For example, the proposal is arbitrary and capricious, *ultra vires* on the statute, vague and ambiguous to the point of no utility to courts or the regulated community, inadequately supported by any evidence—much less substantial evidence, internally inconsistent, unfaithful to Supreme Court jurisprudence, inadequately analyzed for costs and benefits, and noncompliant with the court decision invalidating the most recent attempt to modify this rule.[1]

[1] ATA and many of its state trucking association affiliates are filing comments focusing on the trucking industry and primarily on the safety and health issue. By reference, ATA endorses the comments of the Coalition for Workplace Innovation (available at 12-13-22 Coalition for Workforce Innovation Co.pdf (wsimg.com)) and the US Chamber of Commerce that point out all the specific problems in greater detail. For example, the suggestion that the rule will only require 30 minutes of a nonlawyer to review and guide businesses in complying is seriously inadequate given the proposal itself was almost 200 pages and would affect millions of independent contractors.

EXECUTIVE SUMMARY

If finalized as drafted, the proposal would harm our industry, the independent entrepreneurial men and women who work with our members as owner-operator truck drivers, our nation's supply chain, and most importantly, the general public. In fact, the proposal will only benefit trial lawyers litigating this issue in court by blurring the lines on status so severely that virtually every case has to go to trial.

The proposal, on its face, even contradicts Wage and Hour's stated motivation of "providing additional clarity to workers and employers on the concept of economic dependence." Instead, it expands the test for Independent Contractor (IC) status from two core issues with three additional considerations to six plus a catch-all seventh while also creating subtests that overlap at least conceptually or completely with aspects of other parts of the six or seven tests. That is the opposite of clarity.

Most acutely, however, the blunderbuss approach that WHD has chosen will shock the nation's supply chain. The rule will create chaos for our members and the hundreds of thousands of independent owner-operators with whom they contract and have partnered for eighty years to supply the nation. In particular, the proposed control provision will disincentivize efforts for health and safety, environmental protection, and other legal obligations in all industries but have an especially harmful effect on trucking. Indeed, virtually every motor carrier in our industry has contractual provisions with their ICs requiring adherence to the law, including health and safety, environmental, and taxation standards. As such, the NPRM poses a direct risk to health and safety, the environment, and tax responsibilities among other things and directly or indirectly contravenes congressional actions and a number of your sister agency's requirements at the federal, state and/or local levels. As a result, it must not be finalized as drafted.

BACKGROUND

ATA is the voice of the trucking industry that America depends on most to move our nation's freight. We are a federation with state trucking association affiliates in all 50 states and have been representing the industry for almost 90 years. We represent every industry sector, from less than truckload to truckload, agriculture and livestock, to auto haulers, and from large motor carriers to small mom-and-pop operations.

As the nation's largest trade association representing the trucking industry, ATA is vitally interested in safely expanding the number of professional drivers to meet the demand for freight transportation in our economy, given that the shortage of qualified drivers is at a near-record high of 78,000 in 2022.[2] The already substantial shortage is expected to increase to 160,000

[2] *ATA Driver Shortage Update 2022*, October 25, 2022. Available online at: https://ata.msgfocus.com/files/amf_highroad_solution/project_2358/ATA_Driver_Shortage_Report_2022_Executive_Summary.October22.pdf.

drivers by 2031 if no changes are made.[3] The industry will need to hire roughly 1.2 million new drivers over the next decade to keep pace with growing demand and an aging workforce.[4] Trucks are vital to our economy as they move more than 72 percent of all freight transported in the United States.[5] Trucks moved 10.93 billion tons of freight in 2021.[6] The trucking industry is also one of the country's leading employers, with 7.99 million individuals employed in trucking-related positions in 2021, including 3.49 million drivers.[7] The President and your colleagues at the Departments of Labor and Transportation have been actively working with us and substantially focused on ensuring a pipeline of new drivers is available to maintain the supply chain.[8]

A career as a professional truck driver allows individuals to earn family-sustaining wages without the need to amass the massive debt that often comes with a college degree. Earnings for truck drivers have increased significantly in the last several years. Truck drivers make good salaries, with truckload drivers earning a median amount of $69,687 per year plus benefits, according to the ATA industry survey for 2021.[9] This is an 18 percent increase from 2019.[10] Recent BLS data on weekly earnings in the long-haul trucking sector show that average earnings are $1,198.40 per week or over $62,000 when annualized.[11] The income for independent contractor drivers or owner-operators is even higher at $167,000, according to a recent survey.[12]

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[3] *Id*. Notably, since the U.S. Commercial Driver's License Drug and Alcohol Clearinghouse opened in 2020 at FMCSA, almost 90,000 truck drivers who tested positive for a substance have been prohibited from driving, and of those, over 67,000 had not attempted to return to duty. *See also*, Dr. Todd Simo, *A Look at the FMCSA Drug & Alcohol Clearinghouse Numbers & How it Relates to Year-End Queries*, HR Blog, November 2, 2020. Available online at: https://www.hireright.com/blog/backgroundchecks/a-look-at-the-fmcsa-drug-alcohol-clearinghouse-numbers-how-it-relates-to-year-end-queries.

[4] *ATA Driver Shortage Update 2022*, *supra*.

[5] *American Trucking Trends 2022*, p.4, American Trucking Associations.

[6] *Id*.

[7] *Id*.

[8] *See* FACT SHEET: The Biden-Harris Administration Trucking Action Plan to Strengthen America's Trucking Workforce | The White House.

[9] *2022 ATA Driver Compensation Study Executive Summary*, June 30, 2022. Available online at: https://ata.msgfocus.com/files/amf_highroad_solution/project_2358/ATA_2022_Driver_Compensation_Study_-_Press_Executive_Summary.pdf.

[10] *Id*.

[11] *Employment, Hours, and Earnings from the Current Employment Statistics survey (National), Average weekly earnings of production and nonsupervisory employees, general freight trucking, long-distance tl, seasonally adjusted*, U.S. Department of Labor, Bureau of Labor Statistics, September 2022. Available online at: https://beta.bls.gov/dataViewer/view/timeseries/CES4348412130;jsessionid=AE34706CE9F6C023880E7FE11F660D0C.

[12] *See, e.g., https://www.zippia.com/owner-operator-jobs/salary/*

Truck drivers today are in the literal and figurative driver's seat regarding their jobs and compensation. The labor market for them is tight, resulting in opportunities to move around the industry and obtain sign-on bonuses and increased pay.[13] Given these realities, workforce issues are critical for ATA and its members, and independent contractors are a vital part of that workforce.

THE NPRM IS ARBITRARY AND CAPRICIOUS, CONTRARY TO STATUTORY AUTHORITY, COURT DECISIONS AND GOOD PUBLIC POLICY

With this background, WHD's NPRM contains specific provisions that, if finalized, would be extremely harmful to commercial vehicle drivers, motor carriers, and the motoring public as well as taxpayers, courts, and consumers, without any benefit accruing outside trial lawyers.

First, WHD blithely makes unsubstantiated statements about control under the FLSA that are neither grounded in statute, precedent, or 80 years of practice and actually conflict with various mandates from other governmental bodies generally. Second, although WHD lacks expertise in health and safety the proposal usurps such authority specifically to disincentivize such requirements -- contravening the efforts of sister agencies particularly in highly regulated industries like trucking and the Department's mission "to foster, promote, and develop the welfare…" of workers.[14] Third, WHD's proposal more broadly is *ultra vires* compared to the definition of employment under the FLSA, including eighty years of precedent. The NPRM fails to provide substantial evidence of the need for the change or support for the proposal from a single court case. Instead, the NPRM amounts to cherry-picking cases to create a boundless and amorphous definition that will only lead to clogging the courts, wasting resources, harming individual contractors, employers, the supply chain and as noted even public safety. Lastly, WHD misunderstands the bases of the permanency and integration prongs in its proposal and mischaracterizes their benefits as stand-alone aspects.

A. The Control Prong is Unacceptably Vague and Broad and Contrary to Law and Policy on Safety, Health, Environmental Interests, Consumer Protection, Tax Collection

Wage and Hour's proposal states — categorically but without substantive legal support or specific discussion — that: "[A]n employer's compliance with legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations, for example, **may** in some cases indicate that the employer is exerting control, suggesting that the worker is economically dependent on the employer."[15] WHD then proffers that contracts that require

[13] *The truth about trucking turnover*, American Trucking Associations, March 25, 2022. Available online at: https://www.trucking.org/news-insights/truth-about-trucking-turnover.
[14] *About Us*, U.S. Department of Labor. Available online at: https://www.dol.gov/general/aboutdol.
[15] 87 Fed. Reg. at 62246 (emphasis added).

"compliance with legal, safety, or other obligations…may be evidence that the worker is not in fact in business for themself because they are not doing the entrepreneurial tasks that suggest that they are responsible for understanding and adhering to the legal and other requirements that apply to the work or services they are performing such that they are assuming the risk of noncompliance."[16] Then, the NPRM notes that "[e]mployers may also exercise control in other ways, such as by relying on technology to supervise a workforce, … or restricting a worker's ability to work for others—actions that can exert control without the traditional use of direct supervision, assignment, or scheduling."

These conclusory statements are baffling generally, but also tone-deaf given that many, including our industry, are specifically required to monitor compliance with safety-based rules like limitations on hours of service regulated by the US Department of Transportation's Federal Motor Carrier Safety Administration.[17] There are even safety and consumer protection rules specific to interactions between motor carriers and ICs as to equipment identification.[18] Furthermore, by suggesting broadly that even unexercised but reserved rights in a contract are potential evidence of control,[19] Wage and Hour is also creating a conflict with Internal Revenue Service provisions on independent contractors, myriad state laws, and its sister agency FMCSA on safety as well as the Environmental Protection Agency and state equivalents on

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[16] *Id.* at 62247.

[17] *See e.g.*, Electronic Logging Devices and Hours of Service Supporting Document, 80 Fed. Reg. 78292 (Dec. 16, 2015).

[18] If an IC uses their equipment outside a lease during the time they are also regularly driving for the motor carrier, they have to remove misleading identifications. *See* 49 C.F.R. §376.12(c)(I). Among the other provisions required to be delineated in writing for interactions between ICs and motor carriers are the following: (c) *Exclusive possession and responsibilities;* (d) *Compensation to be specified;* (e) *Items specified in lease;* (f) *Payment period and documentation required*; (g) *Copies of freight bill or other form of freight documentation.*; (h) *Charge-back items;* (i) *Products, equipment, or services from authorized carrier;* (j) *Insurance;* (k) *Escrow funds.* One provision even requires that these provisions be in writing "The lease shall clearly specify the responsibility of each party with respect to the cost of fuel, fuel taxes, empty mileage, permits of all types, tolls, ferries, detention and accessorial services, base plates and licenses, loading and unloading the property onto and from the motor vehicle, Except when the violation results from the acts or omissions of the lessor, the authorized carrier lessee shall assume the risks and costs of fines for overweight and oversize trailers when the trailers are pre-loaded, sealed, or the load is containerized, or when the trailer or lading is otherwise outside of the lessor's control, and for improperly permitted overdimension and overweight loads and shall reimburse the lessor for any fines paid by the lessor;"

[19] It is worth noting that citing unexercised / reserved rights as control is the opposite of the general "economic realities" and actual interactions between the parties that have been the hallmark of Wage and Hour policy and court decisions. *See, e.g., Usury v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1312 (5th Cir. 1976) ("It is not significant how one 'could have' acted under the contract terms. The controlling economic realities are reflected by the way one actually acts.")

environmental compliance responsibilities and even an international tax treaty — the International Fuel Tax Agreement or IFTA.[20]

Since the proposal discussed these concepts without much more than the conclusory statements above and little or no case law support, the regulated community will need much more detail to know what amounts to control. Indeed, since WHD notably used the word "may," we believe it is a necessity to provide specifics as to what does result in control given the myriad possibilities. The below provisions and those referenced in similar comments filed by our state trucking association affiliates — albeit each one different and based on individual state member information—must be addressed. We believe given statements that such provisions "may" create control but are also either required specifically or are part of efforts to ensure compliance with other legal requirements from other regulators that Wage and Hour has a duty to address each one in the context of any final rule. Accordingly, please let us know as to each of these whether the bullet-pointed contract provision conceptually or specifically creates control for purposes of the proposed FLSA test.

- Contracts for leased-on independent owner operators in trucking have a provision complying with Federal Motor Carrier Safety Administration Rules as to exclusive control of the equipment: "**(1)** The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease."[21] Would WHD find it to be control if a carrier had a contract provision reiterating this legal mandate as follows: "Pursuant to 49 C.F.R. §376.12(c)(I), the Carrier shall have exclusive possession, control, and use of the Contractor's equipment for the duration of this Agreement."

- There are also federal rules applying to marking the vehicle as being part of the motor carrier fleet.[22] Would a provision like the following result in control? "Contractor shall have identification markings upon the leased equipment, as designated by Carrier in accordance with requirements of Applicable Law. Contractor will remove, or permit Carrier's removal of, any identification that, in Carrier's judgment, interferes with Carrier's identification marks or are offensive. Contractor shall not place any identification, paint, artwork, logo, or design upon the leased Equipment except that of the Carrier, at any time during the duration of this

[20] IFTA is an agreement between the continental forty-eight US states and Canada's provinces to report fuel use by motor carriers that operate in more than one jurisdiction. Carriers have a license and decals for each qualifying vehicle and must file reports to determine the net tax or refund due and to redistribute taxes from collecting states to those states or provinces that are due taxes. *See* IFTA, Inc. International Fuel Tax Association (iftach.org).
[21] 49 C.F.R. §376.12(c)(I).
[22] 49 C.F.R. §376.12(e).

Agreement. Upon termination of this Agreement, Contractor shall immediately remove and/or paint over all of the Carrier's identification markings."

- Motor carriers also have potential vicarious liability and responsibility to report to FMCSA for any safety violations by drivers, including ICs. [23] Would a provision requiring reporting or termination for failure to report an accident to the motor carrier including the following reference be evidence of control? "i. Contractor's (or driver(s) supplied by Contractor) violation of, or failure to comply with, the requirements of any applicable federal, state, local, and foreign authorities, including, but not limited to, Department of Transportation ('DOT'), state, provincial, or local highway safety, vehicle inspection, traffic, size-and-weight, cargo security, or other laws and regulations ('Applicable Law'); ii. Contractor's (or driver(s) supplied by Contractor) involvement in an 'accident,' as defined in 40 C.F.R. §390.5;"

- As a condition of payment, many carriers require submission of documents showing compliance with tax, weight, safety and other legal requirements, and FMCSA includes even requires that such requirements be delineated in the lease. [24] Would this provision in a contract as a condition of payment be evidence of control? "Completed driver logs, mileage and fuel reports, weight slips, trip manifests, toll receipts, accident reports, daily vehicle condition reports, …. and any other reports required by Applicable Law…."

- In addition to the above specific provisions, most contracts have separate or additional catch-all provisions dealing with other legal requirements for safety and health of the driver and the public, including inspections.[25] Would a provision referencing this requirement evidence control? "Regulatory Compliance and Standards. Contractor acknowledges that Carrier is subject to regulation by the U.S. Department of Transportation, as well as other various federal and state authorities. Accordingly, Contractor shall adhere to and perform the following provisions to aid Carrier in discharging Carrier's legal duties. a. Maintenance and Inspection of Equipment - 49 CFR §396.17. Contractor shall equip and maintain the Equipment in compliance with all Applicable Law. In an effort to ensure compliance with Applicable Law, the Contractor shall make the Equipment available for a DOT inspection at the commencement of this Agreement and will likewise make it available for inspection on an annual basis for the duration. Upon reasonable request of Carrier, the Contractor shall also make the Equipment available to Carrier for inspection by Carrier. To facilitate compliance with applicable law, Contractor shall keep and maintain records of the repair and

[23] See 49 CFR 390.5. "*Employee* means any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler."
[24] 49 CFR 376.12(g).
[25] 49 CFR 396.17.

maintenance on the Equipment, and shall, when requested, promptly forward to Carrier all such records requested on Equipment."

- There are also requirements for driving a commercial motor vehicle that are included in contracts, including having a commercial drivers license, knowledge of and adherence to hours of service rules, medical fitness, and limitations on passengers unless authorized.[26] Would the following provision result in control by the motor carrier? "Driver Qualifications. Contractor shall provide at least one competent driver who has a CDL and is familiar with Applicable Law. The parties agree that the Carrier retains the right to disqualify any driver provided by Contractor if the Carrier determines that the driver is unsafe, uninsurable, unqualified, or may jeopardize the Carrier's business interests in any way. Contractor shall ensure that all of its drivers shall operate the leased equipment in a safe manner to avoid endangering themselves, others, and property. Drivers provided by Contractor must also be willing to submit to the following examinations:

  i. *Medical Examination/or Driver Fitness*- 49 CFR §391.4 1: Contractor acknowledges that all drivers are subject to a complete DOT medical exam prior to being allowed to drive in any capacity whatsoever. Contractor acknowledges that additional testing may be required on a periodic basis and/or to address a driver's medical concern that, in the Carrier's judgment, warrants attention. The costs of such tests will be borne by the Contractor. Drivers who are unable to pass a DOT fitness exam will not be permitted to drive under Carrier's authority.
  ii. *Drug and Alcohol Testing* - 49 CFR §382.I03: As required by Applicable Law, Contractor and its drivers will comply with Carrier's drug and alcohol policy. Violation of the Drug and Alcohol policy shall result in immediate disqualification of the Contractor's driver.[27]

  c. Hours of Service Logs. Contractor shall ensure that all of its drivers comply with federal, and, as applicable, state hours-of-service regulations and nothing in this Agreement is intended to authorize Contractor's drivers to operate beyond the limits established by those regulations. Contractor shall submit to Carrier, on a timely basis, all log sheets and records of the driver(s) supplied by Contractor.

[26] *See* 49 CFR Sections 391.4, 382.103, & 392.60. For example, 392.60 states: "Unless specifically authorized in writing to do so by the motor carrier under whose authority the commercial motor vehicle is being operated, no driver shall transport any person or permit any person to be transported on any commercial motor vehicle other than a bus." When such authorization is issued, it shall state the name of the person to be transported, the points where the transportation is to begin and end, and the date upon which such authority expires.

[27] Carrier drug and alcohol programs are based on statutory and regulatory responsibilities as well as best practices directed by USDOT, available here: Best practices for DOT random drug and alcohol testing.

d. Rider Policy/Passenger Authorization - 49 C.F.R. §392.60(a). Contractor shall not allow its drivers to transport any passenger(s) in Equipment unless authorized to do so by Carrier. Such authorization must be in writing."

- Weight and dimension compliance with state restrictions are also part of most contracts. Would the following provision result in control? "Contractor shall have the duty to determine that all shipments are in compliance with the size-and-weight laws of the states within which the Equipment will travel under this Agreement and shall notify Carrier if the Equipment is overweight or in need of permits prior to commencing the haul."

- There are also trucking-specific tax issues that are commonly included in IC agreements. For example, as a condition of being allowed to drive in most states, carriers and drivers engaged in interstate commerce must apportion their fuel taxes. Would a provision requiring such as the following result in control: "Under the International Fuel Tax Agreement ("IFTA"), an annual fuel tax permit must be obtained, and quarterly fuel taxes must be reported and paid to the IFTA base state, for the Equipment's nationwide operations."

- Federal law also requires that motor carriers have insurance for their IC equipment.[28] Agreements referencing this requirement might read as follows? "Carrier will maintain insurance for the protection of the public pursuant to 49 U.S.C. § 13906 covering the leased Equipment at all times the Equipment is being operated on behalf of the Carrier." Would that create control?

- Agreements also often require individual worker's compensation or occupational illness and accident insurance pursuant to state laws: "Contractor shall, to the extent required or permitted by law, provide worker's compensation insurance coverage for Contractor and those employees of the Contractor that engage in the fulfillment of any portion of this Agreement. The worker's compensation policy shall provide principal coverage in the State of residence."

All these types of provisions are in most IC agreements in the trucking industry because of the referenced statutory, treaty or regulatory requirements, and the carrier's responsibility to monitor compliance. In some instances, carriers require additional health and safety requirements including for example inward and outward event recorders or speed limiters. These improve safety for everyone and decrease deaths and injuries on our highways. They are not necessarily compelled yet but DOT is considering requiring additional safety equipment on all interstate-regulated vehicular traffic, including recently announcing a speed limiter rule process.[29] Some motor carriers also have environmental requirements to comply with state or federal law on such

[28] 49 CFR 13906.
[29] Speed Limiters Notice of Intent | FMCSA (dot.gov).

topics or pending proposals from agencies like the California Air Resource Board[30] or voluntary environmental improvement programs,[31] including disclosure requirements contemplated by pending Securities and Exchange Commission and Federal Acquisition Regulations.[32] All of these obviously would need to include ICs to be complete and compliant.

Given WHD's statement of providing clarity to the regulated community, we believe providing responses to each specific contractual provision – particularly those mandated by or ensuring monitoring of such so as to comply with other federal agencies, state regulators, or international treaties – would be something that WHD has a responsibility to address in the context of the Administrative Procedure Act and your statutory responsibilities under the Fair Labor Standards Act.

B. The Division Should Specifically Defer to Other Federal Agencies that Have Authority to Regulate Workplace Health and Safety.

While ATA doubts the general authority of WHD to determine that any of the types of provisions above result in control, we are particularly dubious of your authority to make safety provisions evidence of control. Other federal regulators, including the Department of Labor's Occupational Safety and Health Administration (OSHA) and the Department of Transportation's Federal Motor Carrier Safety Administration, have direct jurisdiction over the health and safety of our workforce. As such, the WHD should defer to their expertise and not attempt to indirectly regulate workplace health and safety matters by making such provisions evidence of control in the context of the FLSA. The NPRM, in fact, cites no authority to support the notion that the WHD has any role in regulating workplace health and safety nor expertise to do so or that such provisions are the kind of evidence considered dispositive in the context of historic common law questions of control.

Under the Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, FMCSA is responsible for ensuring safety in motor carrier transportation. 49 U.S.C. 113(b). The agency has approximately 1,200 employees dedicated to this task.[33] In carrying out its responsibilities, FMCSA has promulgated safety standards referenced above and more -- covering everything from driver training requirements, 49 C.F.R. Part 380, to hours-of-service limitations, 49 C.F.R.

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[30] CARB Fact Sheet: 2022 Advanced Clean Fleets Regulation - Proposed Drayage Truck Requirements | California Air Resources Board.
[31] *See, e.g.*, Become a SmartWay Carrier Partner | US EPA.
[32] SEC.gov | SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors; Federal Register :: Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk.
[33] Budget Estimates, Fiscal Year 2023, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, p. 17. Available online at: https://www.transportation.gov/sites/dot.gov/files/2022-03/FMCSA_Budget_Estimates_FY23.pdf. FMCSA reported 1,209 full time equivalents (FTE) for Fiscal Year 2022.

Part 395, to precise specifications regarding steps to access a truck cab, 49 C.F.R. 399.207. As noted, there are also specific monitoring requirements for hours of service through the use of electronic logging devices. 49 C.F.R. 395.20, et seq. All of which apply to ICs and employees.

The legal obligations imposed by FMCSA are not voluntary. These are not obligations that can be bargained for by employees as if they were part of the compensation package for those employees. Similarly, these obligations cannot be bargained away in any contract between two or more employers.

Simply put, these legal obligations pre-exist in any employment relationship between an employer and an employee. These legal obligations also pre-exist any contractual relationship between an employer and an independent contractor. Neither employers nor employees nor independent contractors can operate legally unless they comply with these pre-existing legal obligations. In addition to FMCSA's regulations, our industry and employers generally also have the responsibility to comply with OSHA standards.[34] OSHA has approximately 1,850 employees devoted to ensuring safe workplaces.[35] Notably, both agencies also have a history of and regulatory and guidance materials specifically supporting going above and beyond legal requirements to one's employees or another employer's employees.[36] Between FMCSA and OSHA, the subject of workplace safety is well-covered for our industry, and WHD should defer to these agencies.

We also believe WHD's reference to safety as to control failed to consider the fact that there have been many superseding regulatory and statutory actions since the definitions for the FLSA were created in the 1930s. As is known by first-year law students, the more specific and more

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[34] Under the Occupational Safety and Health Act of 1970 (OSH Act), Pub. L. No. 91-596, both employers and employees have legal obligations concerning health and safety issues in the workplace. At a basic level, employers must furnish a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. 654(a)(1). Employers must also "comply with occupational safety and health standards promulgated" by OSHA under the OSH Act. 29 U.S.C. 654(a)(2). Under the OSH Act, employees have a corresponding duty to "comply with occupational safety and health standards and all rules, regulations, and orders published pursuant ***[to the OSH Act] which are applicable to his own actions or conduct." 29 U.S.C. 654(b).

[35] FY 2023 Congressional Budget Justification, Occupational Safety and Health Administration, U.S. Department of Labor, p. 10. Available online at: https://www.dol.gov/sites/dolgov/files/general/budget/2023/CBJ-2023-V2-12.pdf (accessed November 28, 2022). OSHA reported 1,853 FTE for Fiscal Year 2022 and has requested 2,346 FTE for Fiscal Year 2023.

[36] For example, the OSHA Voluntary Protection Programs (VPP) recognize employers and workers in the private industry and federal agencies who have implemented effective safety and health management systems and maintain injury and illness rates below national Bureau of Labor Statistics averages for their respective industries. See, Voluntary Protection Programs, Occupational Safety and Health Administration, U.S. Department of Labor. Available online at: https://www.osha.gov/vpp (accessed December 7, 2022).

recent provision generally overrules the more general and older provision.[37] In that context, Congress and the FMCSA have prioritized safety and health in trucking by mandating various requirements for the industry as well as monitoring of those requirements by motor carriers without regard to independent contractor status.[38] Given that those provisions are more recent than Wage and Hour's 1930s statute and also specific to trucking while also in many instances explicitly state they apply regardless of the relationship between the parties, Wage and Hour's conclusions as to safety and health provisions being indications of control is contradicted either implicitly or explicitly. The same is true of the other provisions referenced above outside safety and health in most instances also.

C. WHD's Proposal Is Arbitrary and Capricious, Far From A Faithful Interpretation Of Case Law Or The Statute, Would Be Impossible To Administer And Useless To The Regulated Community

Despite claiming the NPRM provides clarity and is faithful to the FLSA, it in fact is the opposite. The Proposal expands coverage of the FLSA beyond even the most expansive of prior reading, and only an academic would appreciate a six-part test with cross-pollinating subparts and a catch-all seventh "anything else" prong. In developing the NPRM, WHD has taken the broadest possible version of the economic realities test applied in any court and then expanded it further by cherry-picking court cases where an additional factor or subfactor may have been addressed. This is more akin to a kaleidoscope mechanism which Judge Easterbook criticized: "But 'reality' encompasses millions of facts, and unless we have a legal rule with which to sift the material from the immaterial, we might as well examine the facts through a kaleidoscope. Which facts matter, and why? A legal approach calling on judges to examine all of the facts, and balance them, avoids formulating a rule of decision."[39]

Regardless, the proposal becomes an amorphous blob that fails to comport with any single court decision – much less synergize and update an ancient test to modern times. The NPRM mischaracterizes eighty years of cases to "support" its decision in a manner that only a plaintiff's lawyer could appreciate. Indeed, since none of the cases cited applied the test that Wage and Hour proposes, the critique that the current rule is somehow more unfaithful to the statute or court decisions is risible.

The context of many of the cases is also relevant as is the likely result of WHD's proposed test being retroactively applied. Many of the early cases from the Supreme Court and appellate

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[37] *See, e.g.*, Commonly Applied Rules of Statutory Construction | Colorado General Assembly.
[38] FMCSA regulations specifically exempt the truth in leasing requirements from affecting the IC status: "Nothing in the provisions required by paragraph (c)(1) of this section is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements." 49 CFR § 376.12(c)(4).
[39] *Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring).

courts[40] involved truck drivers and found independent contractor status.[41] But the facts in these same cases would apparently not meet Wage and Hour's new test if applied to them today. This results in a fundamental question: How could WHD's proposal be faithful to the economic realities test if applying it would or could change the results in the seminal cases that created the test? Notably, WHD's responsibility is to provide guidance to the regulated community to ensure that compliance with the law is easily understood by lay persons, including both employers and independent contractors. The proposal fails to provide that guidance and also ignores the strictures of the case law that created the test to begin with.

D. The Integrated Unit of Production Provision is Mischaracterized by WHD NPRM And Not Particularly Easy to Apply, Nor is the Permanence Prong Particularly Helpful for Economic Dependence.

The integrated unit test has historically been a matter of some debate and confusion. The key issue based on the longstanding case law is whether the work is "part of an integrated unit of production."[42] Indeed, this concept is primarily based upon traditional industrial operations in a factory that are not particularly relevant today in most industries and may result in unnecessary confusion and litigation. Indeed, the WHD's proposed suggestion of centrality and importance appears to convolute the B prong in an ABC test with this aspect of the more limited integration test. Indeed, the issue is not whether the work is important or necessary but whether the IC is integrated like in *Rutherford*: working at the slaughterhouse on the production line exclusively with employer equipment, side by side with employees, under direct supervision.

In the trucking industry, for example, many motor carriers supplement their employee driver pool with independent contractors during particular times of the year (e.g., Christmas), or they have both employee drivers and independent contractors year-round with certain routes delegated to independent contractors. This sort of arrangement with both employees and independent contractors has been the case since the beginning of the trucking industry through the present day. The drivers are doing important work but not integrated into a factory-type setting akin to *Rutherford*. Accordingly, the suggestion that independent contractor status is questionable if an independent contractor works in a similar or equivalent job to an employee of the company ignores that decades-old and myriad court decisions allowing just that arrangement. If the independent contractor could refuse a particular assignment or move to a competitor without substantially impacting the overall operations of the original company, then they are not integrated to the degree contemplated under *Rutherford*. Wage and Hour's proposal thus fails to comport with the integration test.

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[40] *E.g., US v. Silk*, 331 U.S. 704 (1947).

[41] Also, it is worth noting that owner-operators make a substantial investment in their trucks. By contrast, much of WHD's proposal is based on recent cases involving exotic dancers where the investment in capital assets is most likely much less substantial.

[42] *Rutherford Food Corp. v. McComb,* 331 U.S. at 730.

ATA also believes the "permanence" prong is redundant, irrelevant and/or counterproductive given its overlap with control. If an IC chooses to have a long-term relationship – much like most Americans might have with their maid service or lawn mower – that has nothing to say about the nature of the relationship as to IC status. That both parties want to maintain that relationship for an extended or indefinite length of time should not be a factor in worker classification absent some sort of coercion preventing alienation or other work by the IC. Indeed, absent evidence of coercion by the entity contracting with the independent contractor to prevent exercise of their rights to pursue other business, the tenure of the relationship should not affect independent contractor status.

CONCLUSION

Trucking has been using independent contractors in our industry legally and legitimately since before the Fair Labor Standards Act was passed. Modern employers in our industry are also doing the right thing by adhering to applicable workplace safety and including monitoring of compliance – in many instances pursuant to a mandate from FMCSA – in their contractual relationships. Some even go beyond what the law requires to make workplaces safer by providing training or equipment as part of their subcontracting to smaller motor carriers or independent contractors. They often do similar things for environmental stewardship and other legal mandates. That is the kind of corporate citizenship that should be rewarded rather than turned into a liability for all concerned by using it as evidence of control for purposes of determining whether the individual is an independent contractor or an employee.

In closing, we strongly urge the Department to reconsider its proposal generally and most importantly, that contract provisions that require adherence to health and safety, environmental, or other duties may be evidence of control. In any rule, the Department should retain the language used in the 2021 final rule and the example and application found in Part 795.115(b)(1) stating that such provisions are not evidence for or against control. If, however, the Department decides to promulgate a final rule as proposed, you must provide specific guidance in the regulatory text to delineate when contract provisions will create an employer/employee relationship under the Fair Labor Standards Act, especially in relation to legal requirements like those outlined herein. Failure to provide that guidance will create havoc in our industry and result in less safe roads for the American people. As noted above, DOL would also violate its own purpose statement in doing so.

Respectfully submitted,
/s/ Nicholas Geale
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