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Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Re: Department of Labor Wage and Hour Division Notice Titled, "Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal," RIN 1235-AA34, 86 Fed. Reg. 14027 (March 12, 2021)

To Whom It May Concern:

These comments are submitted on behalf of the Coalition for Workforce Innovation ("CWI") pursuant to the United States Department of Labor, Wage and Hour Division's ("DOL") notice titled, "Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal," published in the Federal Register on March 12, 2021 86 Fed. Reg. 14027 ("Notice of Withdrawal").

CWI has brought together diverse stakeholders representing worker advocates, small business start-ups, entrepreneurs, technology companies, and traditional businesses and associations representing companies in the media, transportation, distribution, retail, and service industries. CWI members support efforts to modernize federal workforce policy to enhance choice, flexibility, and economic opportunity for all workers.

CWI supports the adoption of clear modern guidance with respect to the applicable legal tests of independent contractor status to ensure that opportunities for independent workers are not restricted, and to allow and foster enhanced flexibility for students, parents, small entrepreneurs, and retirees, as well as others who prioritize the flexibility and freedom independent work provides.

CWI also supports lowering barriers to work and entrepreneurship for communities that have traditionally struggled in the job market, including opportunities for immigrants, caregivers, veterans, first time small business owners and entrepreneurs, and individuals with criminal backgrounds.

CWI has a significant interest in ensuring that the rule entitled "Independent Contractor Status under the Fair Labor Standards Act," 86 Fed. Reg. 1168 (January 7, 2021) ("Final Rule") is not withdrawn because it is grounded in applicable law and provides a balanced clarity and

certainty to analysis of the economic realities factors in making worker classification decisions under the FLSA. Thus, for all the reasons set forth below, CWI opposes the DOL's Notice of Withdrawal. The Final Rule is sound public policy that creates a clearly defined standard benefitting all independent workers, businesses, consumers, workplaces, and the economy. CWI urges DOL to cease its efforts to stall, withdraw, and redo the Final Rule.[1]

The Final Rule

On January 7, 2021, the Final Rule on Independent Contractor Status under the Fair Labor Standards Act was published by DOL in the Federal Register. The Final Rule was adopted following a rulemaking process that included publication of a Notice of Proposed Rulemaking on Independent Contractor Status Under the Fair Labor Standards Act ("FLSA") on September 25, 2020 in the Federal Register at 85 Fed. Reg. 60600 ("Proposed Rule"), a 30-day notice and comment period that resulted in the filing of 1,825 comments by interested individuals and stakeholders, and DOL's consideration and incorporation of many of those comments into the Final Rule, as reflected in the Final Rule itself.

The Final Rule followed the appropriate rulemaking process procedurally, including an open and transparent process that included telephonic public Stakeholder Briefings with senior DOL officials to provide additional background on the Proposed Rule and Final Rule. During those Stakeholder Briefings, senior DOL officials provided additional explanations and information regarding both the rulemaking process and the substance of the Proposed Rule and Final Rule, and an opportunity for the public to ask questions.

CWI filed comments by letter dated October 26, 2020 on the Proposed Rule ("CWI Final Rule Comments"). CWI's Final Rule Comments can be found here. CWI's Comments supported the Proposed Rule, with critical clarification and modification. CWI submitted specific recommendations and comments to enhance certain aspects of the Proposed Rule. Some of those recommendations and comments were rejected, and some of those comments were accepted by DOL as reflected in the Final Rule.

CWI's Final Rule Comments included two recent research reports -- a National Survey of 600 Self-Identified Independent Contractors and a robust Analysis of Literature on Technology and Alternative Workforce Arrangements. Both the National Survey and the Research and Analysis Report provide timely support for the Final Rule's modernization of the economic realities test under the FLSA. The National Survey includes survey results of 600 self-identified independent contractors (CWI's Final Rule Comments, Exhibit A, p. 4.). An overwhelming percentage of independent workers surveyed -- 88% -- agree that advances in technology have made it easier for all workers -- regardless of their college education or background -- to find well-paying and satisfying independent work opportunities that fit around their lives, rather than having to fit their lives around their employment (*Id*. at 10).

These independent workers cited the freedom of being your "own boss," flexibility of the relationship in terms of their control over the work performed, and flexibility in hours of work, as

[1] For all of the reasons set forth below, as well as in CWI's Comments and litigation pending in Texas with respect to the Notice of Delay, CWI disagrees that the Final Rule was effectively delayed by DOL's Notice of Delay.

the most important attributes of being an independent worker (*Id*. at 6). Eighty-eight percent (88%) of independent workers surveyed favor regulatory and other reforms that enhance worker mobility and 90% favor affirming the right of individuals to choose an independent style of work (*Id*. at 17). The National Survey's results support the Final Rule's focus on voluntariness and flexibility as hallmarks of independent work and as core elements of economic independence.[2] Ninety-four percent (94%) of all independent workers responded that they were satisfied with their current independent work arrangement (*Id*. at 5).

CWI also submitted a second research report as part of the CWI Final Rule Comments. In 2020, CWI commissioned a study by Ankura Consulting Group entitled Analysis of Literature on Technology and Alternative Workforce Arrangements. The Research and Analysis Report, citing recent literature, finds that firms embracing technology through the use of independent workers "can be an important part of improving business performance, such as by increasing speed to market, increasing organizational agility, improving overall financial performance, and allowing firms to compete in a digital world where increasingly relevant, highly-skilled talent is in short-supply." (CWI's Final Rule Comments, Exhibit B, p. 1 and p. 4, citing SAP Fieldglass and Oxford Economics.) Through technology, new companies are emerging as platforms (or "matchmakers") that connect independent workers with opportunities. These platforms allow independent workers to promote and grow their businesses, increasing opportunities to maximize earnings in their chosen occupation.[3]

In addition to many other research reports and data analyses submitted during the rulemaking process for the Final Rule, CWI also supported and reinforced the findings of Ankura's research and CWI's Survey by research and findings recently published in other independent 2020 research reports. One example is the September 2020 Freelance Forward Study commissioned by Edelman Intelligence for Upwork ("Freelance Forward Study"). The Freelance Forward Study concludes that: (1) the freelance workforce remains an essential pillar of the U.S. economy (with freelancers contributing $1.2 trillion dollars to the U.S. economy in annual earnings; a 22% increase since 2019); (2) freelancers are increasingly high-skilled (50% of freelancers provide skilled services such as computer

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[2] *See also*, Hearing before the Subcommittee on Innovation and Workforce Development of the Committee on Small Business, United States House of Representatives on *The Digital Ecosystem: New Paths to Entrepreneurship*, held on May 9, 2019 available at https://www.congress.gov/event/116th-congress/house-event/109422 (Statement of CWI Member, Hyr, Inc.'s Erika Mozes, Co-Founder and COO of Hyr, Inc., noted that her company helps freelancers schedule their freedom, connecting workers with businesses on a worker-focused platform).

[3] The Research and Analysis Report describes independent workers as a heterogeneous group, noting that while some of these workers engage in independent work as a primary source of income, the research finds most of "the alternative work force is intentionally engaged on a part-time basis." The Research and Analysis Report reviews several studies that show "these workers highly value flexible scheduling to coordinate with their other commitments," and "[m]any of the new work models are lowering barriers to entry and increasing opportunities for workers to earn additional income, while enhancing flexibility in scheduling, volume of work, and location." (Id. at 2.) The Report also points to research that finds the On-Demand Economy "may serve as a valuable income-smoothing tool to help weather negative earnings shocks, serving as a preferable alternative to taking on high-cost credit, becoming delinquent on existing credit, or constraining spending." (Id. and pp. 28-29, citing work by Diana Farrell and Fiona Greig of the JPMorgan Chase Institute.) The authors conclude platforms play a critical role in the modern economy by connecting independent workers to opportunities of their choice.

programming, marketing, IT, and business consulting); (3) freelancing increases earnings potential (75% of independent workers reported earning the same or more pay than their earnings as an employee); and (4) as a result of the pandemic, 58% of traditional employees are increasingly considering independent work in the future. Upwork's Chief Economist noted that "the changing dynamics to the workforce that has occurred during the (pandemic) crisis demonstrate the value that freelancing provides to both businesses and workers." See https://www.upwork.com/i/freelance-forward.

CWI's Final Rule Comments also cited similar survey findings contained in the 2020 Consumer Attitudes & Entrepreneurship Study conducted by Ipsos on behalf of the Direct Selling Association. The Study found 77% of Americans are interested in flexible, entrepreneurial/income-earning opportunities. Interest in entrepreneurial opportunities is highest among younger generations, with 91% of Gen Zers and 88% of Millennials interested in entrepreneurial opportunities. The Study also showed that direct selling and gig work are seen as attractive options for entrepreneurial opportunities. Approximately 80% of respondents viewed direct selling and gig opportunities favorably. See 2020 Consumer Attitudes & Entrepreneurship Study available at: https://www.dsa.org/docs/default-source/research/dsa-ipsos-2020-consumerattitudesinfographic2-27.pdf?sfvrsn=68ddfa5_2.

CWI also cited a recent survey conducted by Wonolo that contained similar findings, especially as one looks at the trending statistics. For example, in September 2019, 49% of workers preferred work opportunities that provided them flexibility to choose their work days. In May 2020, that number jumped to 60%. Similarly, in September 2019, 29% of workers preferred being an independent contractor to being fully employed. In May 2020, that number jumped to 45%. See https://go.wonolo.com/rs/052-CZJ-953/images/Data-report-The-rise-of-blue-collar-gig-workers.pdf.

Opportunities for independent work continue to grow in the United States economy, along with many workers' desire for the flexibility independent work offers. CWI has summarized this research here that it submitted as part of the rulemaking process leading up to the Final Rule to ensure DOL is informed of the nuances of these independent business relationships, as it remains important that the definitions and other relevant language in the Final Rule be understood against these research findings to allow workers and businesses to pursue these mutually beneficial opportunities as the United States economy evolves with technology.

Overall, CWI supported the Proposed Rule and supports the Final Rule because it provides straightforward, balanced guidance to independent workers and businesses to distinguish between employees and independent contractors under the applicable economic realities legal standard that has governed the relationship for over 70 years, ever since the United States Supreme Court adopted it in 1947. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947) (the definition of "to employ" under the FLSA is governed by the economic realities test) and *United States v. Silk*, 331 U.S. 704, 716 (1947) (describing certain factors relevant to determining the economic realities of a worker relationship under the FLSA). See, also, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 - 326 (1992) (the scope of employment under the FLSA is determined by the economic reality of the relationship at issue).

CWI explained during the rulemaking process that the Final Rule is an important step in providing needed clarity to businesses and independent workers in structuring and

maintaining their relationships. Worker relationships and opportunities have changed dramatically over time, fueled by technological improvements that connect people with opportunities to leverage their own capital, expertise, and other resources. The Final Rule's guidance as to application of the economic realities test to worker classifications helps workers and businesses to accurately structure and maintain their relationships and fully realize the macroeconomic benefits of independent work across the economy for the benefit of independent workers, consumers, and businesses.

The Final Rule reflects consideration of relevant facts[4] and statutory and other legal considerations[5] as well as reasoned DOL judgment regarding applicable policy considerations in light of the weight of the available research and data on independent worker opportunities.[6] The Final Rule also reflects citation to and consideration of contrary facts and arguments in the Proposed Rule, and following notice and comment, in the Final Rule.[7] The Final Rule includes an exhaustive description and citations to the hundreds of authorities, facts, data, and other analyses on which DOL relied. The Final Rule is well-grounded in the rulemaking record. Indeed, DOL cited numerous commentators with whom it agreed and those with whom it disagreed, and explained its reasoning throughout the Final Rule.[8] Those citations appear hundreds of times throughout the Final Rule. For example, CWI's Final Rule Comments are cited in the Final Rule a total of 22 times on the following pages: 86 Fed. Reg. 1168 at 1172, 1175, 1181, 1184, 1189 (twice), 1190, 1191, 1192, 1202 (three times), 1206 (twice), 1212, 1217 (twice), 1225, 1232, 1233, 1235, and 1237.

The Final Rule's effective date is March 8, 2021.

Coalition for Workforce Innovation Comments Opposing the Notice of Withdrawal

On March 12, 2021, DOL issued the Notice of Withdrawal and request for comments, seeking to withdraw the Final Rule, which was published on January 7, 2021 with an effective date of March 8, 2021. CWI opposes the Notice of Withdrawal for both procedural and substantive reasons, as set forth below.

I. The Notice of Withdrawal is Procedurally Flawed and Should Be Withdrawn By DOL

The Notice of Withdrawal is procedurally flawed as it has been issued following the effective date of the Final Rule. DOL's attempt to withdraw the Final Rule is ineffective as DOL did not validly delay the effective date to May 7, 2021.

As brief procedural background, CWI notes that a White House Chief of Staff memorandum dated January 20, 2021, "Regulatory Freeze Pending Review," 86 Fed. Reg. 7424 (January 28, 2021) ("Regulatory Freeze Memo"), sought to delay the effective date of all regulations that had been published in the Federal Register but had not yet taken effect, to March 21, 2021. Also, on January 20, 2021, the Office of Management and Budget ("OMB")

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[4] *See, e.g.,* 86 Fed. Reg. 1168 at 1173 - 1175, 1179 - 1196, 1209 - 1234.
[5] *Id.* at 1168 - 1174.
[6] *Id*. at 1172, 1178 - 1179.
[7] *Id.* at 1180 - 1185.
[8] Id. at 1179 - 1196.

published OMB Memorandum M-21-14, Implementation of Memorandum Concerning Regulatory Freeze Pending Review, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/ (last visited April 11, 2021) ("OMB Memorandum"). The OMB Memorandum provided direction to agencies outlining the considerations applicable to their consideration of whether to further postpone the effective date of a regulation beyond March 21, 2021.

On February 5, 2021, DOL issued a notice of proposed rulemaking titled "Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date," 86 Fed. Reg. 1185 ("Notice on Delay Rule") seeking to delay the effective date of the Final Rule to May 7, 2021. The Notice on Delay Rule set February 24 as the comment closing date, only 19 days from the date of the notice, and limited DOL's consideration to "only comments about its proposal to delay the rule's effective date." Notice on Delay, 86 Fed. Reg at 8327. The Administrative Procedure Act, 5 U.S.C. Section 500, 553(d) (1976) ("APA"), requires agencies provide commenters with a minimum of 30 days to submit comments relating to the Notice on Delay Rule. The Notice on Delay Rule sought to delay the Final Rule from its effective date of March 8, 2021 for 60 days, until May 7, 2021. DOL allowed comments on the Notice on Delay Rule restricted to only procedural positions during a short, non-APA compliant, 19-day period -- until February 24, 2021.

CWI opposed the Notice on Delay Rule through Comments filed on February 24, 2021. CWI's Notice on Delay Rule Comments are linked here. CWI commented that the Notice on Delay Rule was inappropriate because it was not timely under the APA, the DOL's delay request was not compliant with the Regulatory Freeze Memorandum, and DOL's delay request did not accurately identify a reason that supports a postponement of the Final Rule.

Just seven days later, on March 4, 2021, DOL issued a notice titled "Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date" ("Delay Rule"), 86 Fed. Reg. 12,535 (March 4, 2021). DOL rejected CWI's three separate procedural positions raised in its Notice on Delay Rule Comments that the Notice on Delay Rule was inappropriate, stating that it intended to delay the Final Rule's implementation until May 7, 2021. "Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date" 86 Fed. Reg. 12535 (March 4, 2021) ("Delay Rule").

In doing so, DOL did not address the untimeliness of the Notice on Delay Rule insofar as it failed to make a good cause showing as to why it did not comply with the APA's 30 day requirement. DOL's notation in footnote 3 of the Delay Rule that it would consider addressing the good cause requirement later, unrelated to the Notice on Delay, is defective as described in CWI's Notice on Delay Rule Comments at page 5 ("To be timely, the Notice on Delay had to have been filed earlier, or have included a basis for a good cause determination to shorten the 30-day waiting period, and also enunciated the basis for the good cause determination in the Notice on Delay. DOL's obligation to set forth a good cause reason to support a rushed determination to extend the effective date of a detailed and necessary regulatory clarification is required."). Commenters on the Notice on Delay were deprived of the opportunity to comment on any purported good cause bases DOL might later assert in connection with its requested delay. For this separate basis, the Notice on Delay (and consequently this Notice of Withdrawal) is defective.

CWI is currently challenging DOL's promulgation of the Delay Rule in the U.S. District Court for the Eastern District of Texas in a lawsuit captioned *The Coalition for Workforce Innovation et. al. v. Marty Walsh, et al.*, Case No. 1:2021cv00130 (March 26, 2021 E.D. Tex.) ("CWI Delay Rule Litigation") on the basis that the Delay Rule is arbitrary, capricious, and contrary to the procedures required by law, as DOL did not provide a meaningful comment period before enacting the Delay Rule and because it did not offer substantive justification for enacting the Delay Rule.

Following the issuance of the Delay Rule, and with the CWI Delay Rule Litigation pending, just eight days later, on March 12, 2021, DOL issued the instant Notice of Withdrawal, seeking to withdraw the Final Rule. The Notice of Withdrawal states, "The Department's proposal to withdraw the [Final] Rule arises in part from a concern regarding the possibility that these changes will cause confusion or lead to inconsistent outcomes rather than provide clarity or certainty as intended." 86 Fed. Reg. 14034. The Notice of Withdrawal states that it: "proposes to withdraw the [Final] Rule in part because it eliminates from the economic realities test several facts and concepts that have deep roots in both the courts' and WHD's application of the analysis." *Id.* The Notice of Withdrawal does not identify the several facts and concepts it believes are missing from the Final Rule. The Notice of Withdrawal further states that it is concerned, as a policy matter, that the Final Rule will result in more workers being classified as independent contractors, and states that some commenters asserted that such a result could have a disproportionate impact on low-wage and vulnerable workers. *Id.*

CWI submits that DOL should allow the CWI Delay Rule Litigation to first determine whether DOL's attempt to delay the effective date of the Final Rule was lawful, before attempting, during that contested delay period, to immediately withdraw the Final Rule. To do otherwise will create more uncertainty and confusion in the application of the economic realities test under the FLSA (given the Notice of Withdrawal is based on DOL's faulty assumption that it did not become effective in March, 2021), while diminishing the precedential value of direction promulgated by DOL and other federal agencies when done without adequate and appropriate comment periods and reference to pending court matters challenging DOL actions that underlie the DOL's alleged bases for the Notice of Withdrawal.

Withdrawing a Final Rule promulgated through the formal rulemaking process, during a delay period that itself is under legal challenge, sets a dangerous precedent that diminishes the precedential value a court will afford future direction coming from the DOL and creates long term uncertainty in DOL guidance, while dampening the interest of stakeholders in providing valuable input to DOL on important issues, like the Final Rule (when the input is ignored and rejected by DOL just months later). Contrary to DOL's stated intention in its Notice of Withdrawal --- to eliminate confusion and eliminate inconsistent outcomes -- the Notice of Withdrawal will do nothing more than cause confusion and inconsistent results, while eliminating the long-promised reform the Final Rule delivered -- clear guidance on independent contractor determinations.

II. <u>The Notice of Withdrawal is Substantively Flawed and Should Be Withdrawn By DOL</u>

CWI also opposes the Notice of Withdrawal for the following substantive reasons: (1) the Notice of Withdrawal ignores the Final Rule's data on independent contractor earnings and other benefits of independent contractor status, relying instead on a mistaken understanding that the economics of independent contractor relationships are not favorable to independent

workers to argue that the Final Rule must be withdrawn; and (2) the Notice of Withdrawal misstates the Final Rule's clarifications and guidance for independent workers and businesses entering into and maintaining independent contractor relationships; the Final Rule is consistent with the factors described in *United States v. Silk,* 331 U.S. at 712.

A. The Notice of Withdrawal's Statistics Do Not Support Withdrawal of the Final Rule, and Ignore More Current Data and Research that Support the Final Rule

The current minimum wage guaranteed to employees covered under the FLSA is $7.25 per hour. While some employers also provide employees with other benefits in addition to an hourly wage, such as paid vacation time, 401k retirement benefits, and/or vision or dental medical benefits, employees are not guaranteed those benefits under the FLSA, or any other law. As a basis for the Notice of Withdrawal, the DOL states that independent workers need the protections of the FLSA's minimum wage safeguards. The Notice of Withdrawal is not based on a solid foundation of data and completely ignores analyses and statistics cited by the Final Rule and CWI.

The Final Rule concludes that "freelancers and contract workers are paid more per hour than traditional employees." *See* Final Rule, 86 Fed. Reg. at 1219 (emphasis added) citing (1) Katz and A. Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995 - 2015" (2018) (utilizing the 2005 CWS and the 2015 RAND ALP) and (2) the DOL's 2017 CWS regression analyses (Final Rule at 1219, footnote 126, "despite working fewer hours per week than employees, self-employed independent contractors earned more per week on average ($980 per week compared to $943 per week)").[9]

The Final Rule states, "The Department found that independent contractors tend to earn more [than employees] per hour: Employees earned an average of $24.07 per hour, self-employed independent contractors earned an average of $27.43 per hour, and other independent contractors earned an average of $26.71 per hour (the average hourly wage is $27.29 when combining the two types of independent contractors)" (*Id.*). The statistics contained in the Final Rule show that the average hourly rate of independent workers far exceeds the minimum wage protection in the FLSA that DOL states supports its desire to withdraw the Final Rule. This is true, even accounting for any additional payroll tax liabilities that independent workers would pay directly. The Notice of Withdrawal ignores these facts. The DOL's policy argument in its Notice of Withdrawal -- that independent workers need the minimum wage protection of $7.25 per hour -- is factually inaccurate.

The Final Rule also cites CWI's Research, "National Survey of 600 Self-Identified Independent Contractors" that was conducted in January of 2020.[10] The survey noted that 84% of the independent contractors surveyed have healthcare coverage, 74% enjoyed wage transparency and prompt payment inherent in their contracting relationship, 73% reported

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[9] The Final Rule cautions that these wage-based comparisons do not take into account either the non-pecuniary benefits of employee and independent worker status, nor employer-provided benefits, if any and potential tax liabilities. 86 Fed. Reg. at 1219.

[10] See Final Rule at footnotes 77 and 113. CWI's survey of independent contractors found that 94% reported that they are satisfied with their current independent contractor arrangement (CWI Final Rule Comments, Exhibit A, p. 5).

having a retirement savings plan, and 63% reported receiving paid time off. An independent worker's coverage under the FLSA will not expand any of these benefits to independent workers, but would allow an employer to supervise and eliminate the freedom the independent worker enjoys over the hours that they work, for example. The Notice of Withdrawal also ignores these supporting materials that were provided during the Final Rule rulemaking process.

The Notice of Withdrawal does not cite, dispute, or discredit the data cited in the Final Rule, or submitted during the rulemaking process for the Final Rule, that supports the Final Rule's analyses of the economic and non-economic benefits of independent contractor status (some of which would be lost if independent workers became employees subject to control by an employer over the manner and means by which they performed services and the hours they worked). Instead, the Notice of Withdrawal states that DOL "is concerned, as a policy matter" that workers currently treated as independent contractors should be protected by the FLSA's minimum wage requirement of $7.25 per hour. Notice of Withdrawal, 86 Fed. Reg. at 14034.

The Notice of Withdrawal states:

> Independent contractors are more likely to earn less than the minimum wage: The 2017 CWS data indicate that independent contractors are more likely to report earning less than the FLSA minimum wage of $7.25 per hour (8 percent for self-employed independent contractors, 5 percent for other independent contractors and 2 percent for employees).

The only source DOL references for the 2017 CWS data is contained earlier on the same page (86 Fed. Reg. 14034) in footnote 145 as follows: "Bureau of Labor Statistics, 'Contingent and Alternative Employment Arrangements--May 2017,' USDL-18-0942 (June 7, 2018), https://www.bls.gov/news.release/pdf/conemp.pdf."[11]

The 2017 CWS data citation does not contain the DOL's referenced statistics. To the contrary, the 2017 CWS data cited at page 8, footnote 145 of the Notice of Withdrawal states:

> Earnings for independent contractors ($851) were roughly similar to those for workers in traditional arrangements ($884) …. . (See table 13.)

The 2017 CWS data also provides an analysis of the non-pecuniary benefits independent contractors value with respect to their non-employee status, and independent workers' overwhelming preference to not be classified as employees:

> Independent contractors overwhelmingly prefer their work arrangement (79 percent) to traditional jobs. Fewer than 1 in 10 independent contractors would prefer a traditional work arrangement. (See table 11.)

2017 CWS Data, page 6.

[11] This Notice of Withdrawal reference is cited here as "2017 CWS data" (see 86 Fed. Reg. at 14037, footnote 145).

Based on the 2017 CWS data citation used by the DOL in the Notice of Withdrawal, the median hourly rate for independent contractors is $21.27 per hour, based on a 40 hour full-time workweek; $14.02 per hour **more** than the FLSA's guaranteed minimum wage **and** these workers prefer being independent workers. DOL's policy concern that independent workers need the FLSA's minimum wage protection is not supported by the citation in the Notice of Withdrawal.

The Notice of Withdrawal cites two other studies, limited to ride-sharing drivers in California and certain low-paying industries in New York State, for the position that "many drivers receive significantly less than the applicable state minimum wages." (Notice of Withdrawal, 86 Fed. Reg. at 14034, with citations in footnote 149). The Notice of Withdrawal does not mention that there is considerable debate amongst companies and scholars as to the applicable average hourly rates of ride-sharing drivers (a point raised in the cited studies). In that regard, in California, one study cited by DOL in the Notice of Withdrawal references the complicated and unresolved legal issues of whether all of the time a driver has an app turned on (but may be watching television or doing errands, as opposed to being engaged to wait for a ride request from a rider) should be counted as time worked, and what expenses are appropriately attributed to this work for purposes of computing net hourly earnings.

While these studies describe numerous other studies that disagree with their findings based on different analytical analyses of expenses and hours worked (a point not referenced by the Notice of Withdrawal), these studies themselves, if accurate, are not relevant, as they are not analyzed with reference to the FLSA's minimum wage rate of $7.25 per hour, the relevant standard currently underpinning the DOL's analysis. In fact, the Reich October 2020 IRLE Working Paper available at http://irle.berkeley.edu/working-papers (last visited April 9, 2021) describes the conflicting and complicated analyses as related to whether or not ride-sharing drivers' average pay is in excess of state or local minimum wage thresholds of, for example, $16.39 (Seattle - 2020) or $12.00 (California - 2020), not the federal minimum wage of $7.25. *Id. a*t page 6. Moreover, the Notice of Withdrawal does not reference any of the contrary data provided to DOL during the rulemaking process that ridesharing drivers' pay exceeds $10.00 per hour, such as the 2019 annual survey of Lyft and Uber drivers, which reported that after expenses, drivers reported they earned on average $12.66 per hour (CWI's Comments on Final Rule, page 14 and Exhibit B, pages 32 - 34).

Finally, the Notice of Withdrawal's characterization of independent contractor work as "more likely to be low-income than those who are primarily employees" is based on an isolated, outdated study entitled "The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage," The Department of The Treasury; Office of Tax Analysis (January 2017) (Notice of Withdrawal at 14034, footnote 117). The Notice of Withdrawal ignores more recent studies that are at odds with that characterization. For example, a 2019 study by the Internal Revenue Service and U.S. Department of Treasury concluded that "The largest share of workers with independent contractor income are those in the top quartile of earnings." "Independent Contractors in the U.S.: New Trends From 15 Years of Administrative Tax Data," IRS/U.S. Treasury (Lim, Miller, Risch, and Wilking) (July 2019) https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf (last visited April 11, 2021).

Numerous recent studies confirm that independent workers believe they are more financially secure as independent contractors and prefer that status to that of a regular

employee.[12] CWI also notes the 2019 FreshBooks - 2nd Annual Report, "Women in the Independent Workforce" ("FreshBooks 2019 Annual Report") https://www.freshbooks.com/press/data-research/women-in-the-workforce-2019 (last visited April 11, 2021) found, "A large majority of self-employed women (73 percent) have realized a better work-life balance as compared to their status as traditional employees, with most earning as much if not more income working for themselves (68 percent)" (FreshBooks 2019 Annual Report, at p. 2).

The Notice of Withdrawal's policy concerns that independent work does not provide workers with the protections of the FLSA are unsupported. The Notice of Withdrawal also disregards other important non-pecuniary benefits of independent work that independent workers value highly that were part of the Final Rule's rulemaking process.

B. The Notice of Withdrawal Misstates the Final Rule's Clarifications Of The Economic Realities Test

The Final Rule reaffirms and operationalizes the economic realities factors set forth in decades-old Supreme Court precedent, and should not be withdrawn. Six factors were identified by the United States Supreme Court in two separate cases issued in 1947 as relevant to whether a worker is economically dependent on a business for whom they provide services: degrees of control; opportunities for profit or loss; investment in facilities; permanence of the relationship; the skill required in the operation; and whether the work performed was part of an integrated unit of production. *United States v. Silk*, 331 U.S. 704, 716 (1947) and *Rutherfood Food Corporation et al. v. McComb*, 331 U.S. 722, 730 (1947). Since 1947, the Supreme Court has not again applied or rejected the application of these factors to determine employee status under the FLSA.

Since 1947, courts and the DOL have applied numerous variations of this multifactor analysis when considering whether a worker is an employee or independent contractor under the FLSA. *See, e.g.,* WHD Opinion Letter (Aug. 13, 1954) (applying six similar economic realities factors described above), WHD Opinion Letter FLSA-795 (Sept. 30, 1964) (describing an independent contractor as one who the Supreme Court has made clear is engaged in a business of his own, and does not follow the usual path of an employee dependent on the business which he serves) and WHD Fact Sheet #13, "Employment Relationship under the Fair Labor Standards Act (FLSA)" (Jul. 2008) (identifying seven economic reality factors, including the degree of independent business organization and operation).

Some courts have described the analysis as drawing upon the Supreme Court precedent with a focus on whether "as a matter of economic reality" the workers are "dependent upon the business to which they render service." *Usery v. Pilgrim Equip. Co.,* 527 F.2d 1308, 1311 (5th Cir. 1976) (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947). The economic realities factors have been described as a non-exhaustive set of factors that shape and guide the inquiry of a worker's status that boils down to "whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in

[12] *See, e.g.,* "State of Independence in America 2019" MBO Partners, 2019; Freelance Forward Study p.3, *supra.*

business for themselves". *Saleem v. Corporate Transportation Group, Ltd.,* 854 F.3d 131,139 (2d Cir. 2017).

For decades, the economic realities test has been firmly rooted in law and regulation. Since *Silk* and *Rutherfood Food*, literally hundreds of federal appellate and district court decisions have accepted, relied upon, and applied the economic realities legal standard to the FLSA determination of the status of a worker as an employee or independent worker. Similarly, sub-regulatory guidance issued by the DOL since 1954 has applied this same test as well.[13]

There can be no debate that the 1947 economic realities legal standard is the test the Final Rule operationalized in its guidance on how to make determinations of independent contractor status under the FLSA. *See, e.g.,* Final Rule at 86 Fed. Reg. 1168 at 1169 - 1171. The Final Rule did what had never been done before by the DOL -- it provided a balanced, modern approach to application of factors first identified as relevant to the determination of employee status under the FLSA in 1947. The Final Rule adopts and explains the application of those factors to various fact situations for determination of the status of a worker as an employee or independent contractor under the FLSA. 86 Fed. Reg. 1168 at 1179.

The Final Rule cites *United States v. Silk* 47 times[14] and *Rutherford Foods* 28 times.[15] Nowhere in the Final Rule are the two core factors described as the sole factors to be considered. The Final Rule does not discount the consideration of the secondary factors altogether, but rather suggests that the core factors are the "most probative of whether workers are economically dependent on someone else's business or are in business for themselves." 86 Fed. Reg. at 1171. The stated purpose of the Final Rule was to provide guidance on how to prioritize and balance different and sometimes competing factors that determine a worker's status under the FLSA.

The six factors from these cases were distilled by the Department of the Treasury as follows:

1. Degree of control of the individual;

2. Permanency of relation;

3. Integration of the individual's work in the business to which he renders service;

4. Skill required by the individual;

5. Investment by the individual in facilities for work; and

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[13] 86 Fed. Reg. 1168 at 1170 - 1171.
[14] The case is cited approvingly in the Final Rule 47 times, on the following pages: 1169 (8 times), 1170 (6 times), 1174 (three times), 1178, 1180, 1186, 1187 (2 times), 1191, 1192, 1194 (3 times), 1196, 1198, 1201, 1202, 1204 (5 times), 1205 (3 times), 1240 (3 times), 1241, 1242, and 1243 (3 times).
[15] The case is cited approvingly in the Final Rule one or more times on the following pages: 86 Fed. Reg. 1168 at 1169, 1170, 1179, 1189, 1193, 1194, 1195, 1196, 1197, 1200, 1201, 1204, 1205, 1208, 1240, 1243, and 1246.

6. Opportunity of the individual for profit or loss.

The Final Rule further distills each of the six factors as five stand-alone factors, with the exception of factor five which is incorporated into the analysis of whether the individual is using his or her own initiative or investment in facilities for work to influence his or her profit or loss. *See* Final Rule, 86 Fed. Reg. at 1169.

The Final Rule appropriately adopted the "economic reality'' test to determine a worker's status as an FLSA employee or an independent contractor, identifying two "core factors:" the nature and degree of the worker's control over the work; and the worker's opportunity for profit or loss based on initiative, investment, or both. The Final Rule further explained it was proposing to emphasize these factors because they are the most probative of whether workers are economically dependent on someone else's business or are in business for themselves. The Final Rule identified three other factors to also be considered, though they are less probative than the core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the individual and the potential employer, and whether the work is part of an integrated unit of production.

The Final Rule further advises that the actual practice is more probative than what may be contractually or theoretically possible in determining whether a worker is an employee or an independent contractor. Final Rule, 86 Fed. Reg. at 1171. The Final Rule explained that it did so to provide the specific guidance needed to ensure compliance and eliminate the existing confusion over how to weigh and balance the various factors for a number of reasons. *Id.* at 1172. The Final Rule described the numerous factors leading to unclear and unwieldy conclusions: ''economic dependence'' is an under-developed and sometimes inconsistently applied test; the test is indefinite in that it makes all facts potentially relevant without guidance on how to prioritize or balance different and sometimes competing considerations; and the various factors exist without structure which often blurs the boundaries of the factors themselves. *Id*. at 1171-1172.

The Final Rule provides clear guidance regarding how workers and businesses should balance the multiple factors and which facts fall within the various and sometimes blurred factors. The Final Rule increases legal certainty in application of the economic realities test, is grounded in and consistent with Supreme Court precedent, and should not be withdrawn.

Conclusion

Overall, the Independent Contractor Final Rule is sound public policy and should not be withdrawn. As set forth above and in the cited sources, the Notice of Withdrawal is fatally flawed under the longstanding criteria set by the APA. Both in the Notice of Delay and Notice of Withdrawal, the DOL cavalierly ignored the strictures of the APA and created its own methodology to stall, withdraw, and redo the Final Rule.

On the merits, the Final Rule fundamentally embraces the complex nuances of the modern workforce. It provides balanced, clear guidance to workers and businesses to ensure that workers have the opportunity to continue to operate as independent workers within clearly articulated rules that embrace both their status as non-employees and the flexibility and opportunities available to them as non-employees, while allowing businesses to engage these workers and provide them with certain guidance, tips, resources, and even non-employee

benefits, without concern that these aspects of the relationship with independent workers will jeopardize their status. Unable to refute these incontrovertible factors, the Notice of Withdrawal ignores long-established legal precedent and current data, and opts to take away necessary guidance for a growing and important segment of our economy. CWI opposes the Notice of Withdrawal, and urges the DOL to leave in place and support the Final Rule.

Respectfully Submitted,

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