



December 13, 2022

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

Dear Ms. DeBisschop:

On behalf of the National Association of Insurance and Financial Advisors (NAIFA), thank you for the opportunity to provide comments on the proposed Department of Labor (DOL) changes to the Fair Labor Standards Act (FLSA) regulations pertaining to the distinction between “employee” and “independent contractor” for purposes of determining wages and other pay under the FLSA.

Role of Independent Contractors in the Insurance Industry

Founded in 1890 as The National Association of Life Underwriters (“NALU”), NAIFA is the oldest, largest, and most prestigious association representing the interests of insurance professionals from every Congressional district in the United States. Our mission – to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members – is the reason NAIFA has consistently and resoundingly stood up for agents and called upon members to grow their knowledge while following the highest ethical standards in the industry.

The majority of NAIFA’s members – insurance producers, broker dealer representatives, and/or independent registered investment advisors – are independent contractors who provide vital financial benefits and insurance services to consumers across the country. It is estimated that independent contractors account for at least one of every seven insurance agents, financial advisors, and securities agents.

Financial professionals have the freedom to choose from many affiliation models and can decide whether they wish to engage in an employee model or an independent contractor model. Many of



NAIFA's members are independent contractors and small business owners. They choose to be an independent contractor financial professional, rather than an employee of their carriers, because it gives them the ability to focus on establishing and growing a small business that is focused on their clients and their employees, and to build equity for themselves and their families.

There are over 130,000 independent contractors who own and operate financial advisory and insurance brokerage firms, employing more than 330,000 employees.¹ Many of these business owners are able to build equity in the firms they own. Removing the option to work as independent contractors would severely disrupt these businesses and eliminate many of these jobs.

Between 2015 and 2019, independent contractors in the financial services sector created approximately 54,000 new businesses and 174,000 new jobs, all or most of which would not have existed if independent contracting were prohibited.

Independent contractor-operated financial advisors and insurance agencies account for approximately 27% (\$47 billion) of the output of the financial advisory and insurance brokerage industries. Reducing the supply of these services would harm consumers, including by reducing financial literacy and harming their ability to accumulate wealth and save for retirement.²

NAIFA's independent members have full control over their schedule, employees, benefits, and more, giving them the same responsibility as other business owners. They also have control over the types of financial products they recommend and sell, the number of clients they serve, and the amount of time they spend performing professional duties. This enables them to create a practice that serves their community and clients, helping American investors save for the future. In a survey of NAIFA members, approximately 95% of respondents indicated they wished to remain independent contractors under existing regulations.

Independent insurance producers, brokers, and financial advisors have a long history of being independent contractors and not employees for purposes of determining the applicability of federal and state wage and benefit provisions. These professionals are typically highly trained, highly educated, highly regulated professionals who want to own their own small businesses and assume the risks and rewards of doing so. They maintain their own offices, purchase their own insurance, hire employees, pay employment taxes, and purchase workers' compensation insurance for their employees. They enter into written agreements with insurance companies

¹ Bureau of Labor Statistics, "Occupational Employment and Wages, May 2021: 41-3021 Insurance Sales Agents" (March 31, 2022) <https://www.bls.gov/iag/tgs/iag52.htm>

² Ibid



and/or independent broker-dealers that carefully set forth the terms of their independent contractor status.

The independent contractor/statutory employee model is the distribution model that most insurance companies and producers adhere to within the industry. This working model is essential to providing consumers with the greatest protection and access to insurance products.

The Proposed Rule

In January 2021, DOL published a rule titled “Independent Contractor Status Under the Fair Labor Standards Act” (2021 IC Rule), providing guidance on the classification of independent contractors under the FLSA applicable to workers and businesses in any industry. Under the adopted 2021 Independent Contractor Rule, often referred to as the Economic Realities Test, DOL and the courts determined whether a worker is an employee or an independent contractor by focusing primarily on five “core” factors: (1) the nature and degree of the worker’s control over the work, (2) the worker’s opportunity for profit or loss, (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.

DOL previously stated that the first two factors are the most indicative of whether a worker is economically dependent on someone else. If the first two factors supported the same determination, a substantial likelihood existed that the classification was appropriate. This threshold introduced much-needed clarity to determining appropriate worker classification.

DOL’s newly proposed rule reverses the progress and clarity laid out by the 2021 rule. The proposal adopts six primary factors in determining the classification of a worker: (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.

This approach could increase the tendency to misclassify independent insurance agents and financial advisors as employees rather than contractors – resulting in significant financial exposure, penalties and fines to independent insurance professionals and small business owners.

NAIFA believes that DOL’s proposed definition of employee in sections 795.105 and 795.110 wrongly construes the scope of FLSA coverage and would thus misclassify many independent insurance agents and brokers as employees. DOL’s proposed definition of what it means for a worker to be “economically dependent” sweeps far too broadly and must be clarified to conform to FLSA text and precedent.

DOL’s proposal abandons the 2021 Rule’s definition of “economic dependence,” which was grounded in precedent, without any clear explanation. The 2021 Rule clarified that “economic



dependence” is not mere dependence on a business, since “all workers—employees and independent contractors alike—are economically dependent on others to some degree.”³ This important clarification of the scope of coverage is absent from DOL’s proposal. Instead, DOL puts forward a new, overly broad definition of “economic dependence” declaring that a worker is an employee if they are merely “economically dependent” on a business in a small or inconsequential way.⁴ DOL must acknowledge this significant deviation from the 2021 Rule and explain why that change is more consistent with the FLSA’s text and federal precedent.

Recommendations

NAIFA recommends providing an exemption or carve-out of the proposed rule to maintain the integrity and functionality of existing insurance commerce and financial advisement. We want to stress the importance of ensuring that any regulatory changes continue to fully recognize the independent contractor status of independent insurance producers, brokers, and financial advisors.

NAIFA also believes that failing to provide a carve-out for the insurance industry from the proposed rule could create a slippery slope argument that has the potential to alter the way independent insurance producers, brokers, and advisors are viewed by legislatures and the judiciary.

Regulatory action that redefines the relationship shared between insurance producers, independent broker dealers and independent financial advisors with the insurance industry would have an adverse effect on everyone.

Creating a new standard that does not exempt independent insurance producers, brokers or financial advisors from worker reclassification under this proposed “totality of circumstances test” or the similar “ABC” test severely limits the scope of insurance products consumers would have access to as well as the general distribution of insurance products and investment advice, thereby limiting consumers’ ability to protect themselves and their loved ones.

Many of these insurance professionals have relationships with multiple insurance companies and financial institutions, which could make altering the existing Economic Realities Test and reclassifying them as ‘employees’ problematic. The current independent-contractor relationship ensures consumers have the greatest access to products, services, and advice.

Independent contracting plays an essential role in the financial services and insurance industry, especially in customer-facing occupations such as licensed financial advisors, brokers, and

³ Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600, 60611 (Sept. 25, 2020); see 2021 Rule, 86 Fed. Reg. at 1178.

⁴ NPRM, 87 Fed. Reg. at 62233, 62259, 62274.



insurance agents. Independent insurance agents constitute 17.1% of the entire insurance agent labor force while independent financial advisors account for 11.4% of the total number of advisors.⁵

Independent insurance producers and independent financial advisors are vital to ensuring that millions of Americans have access to important financial benefits. These professionals are deeply rooted in their communities and are best positioned to understand the needs of consumers. To reclassify and force them into an employment relationship drastically limits not only their autonomy, but the availability of products they can provide their clients.

In summary, NAIFA appreciates the well-intended efforts at DOL to reduce employee misclassification. However, the proposed rule is misguided in its broad inclusion of the insurance industry. Many of the rule's provisions would fundamentally change the way independent insurance agents, financial advisors, and brokers operate and could result in a mass exodus of insurance professionals that operate on a 1099 model leaving the industry. We ask that DOL either reconsider the proposal by limiting the number of factors that independent contractors are evaluated on or providing a carve-out for professionals working within the insurance industry to ensure they may continue serving their clients in the most effective way possible.

If you have any questions or require additional information, please contact NAIFA's Director of Government Relations, Michael Hedge, at mhedge@naifa.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence Holzberg".

Lawrence Holzberg, LUTCF, LACP
President
National Association of Insurance and Financial Advisors

⁵ U.S. Bureau of Labor Statistics, "Current Population Survey: Contingent Worker and Alternative Employment Arrangements May 2017" (available at <https://www.census.gov/data/datasets/time-series/demo/cps/cps-suppl-cps-repwgt/cpscontingent.html>).