



675 N Washington St, Ste 490  
Alexandria, VA, 22314

703.739.2782  
askasta@asta.org

ASTA.org  
Travelsense.org  
@ASTAagents

April 12, 2021

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: Department of Labor, Wage and Hour Division  
Independent Contractor Status under the Fair Labor Standards Act; Withdrawal  
RIN 1235-AA34

Dear Ms. DeBisschop:

On behalf of the American Society of Travel Advisors, Inc. (ASTA) and the more than 140,000 Americans who work at travel agencies across the country, I am writing to express ASTA's viewpoint with respect to the above-referenced Notice of Proposed Rulemaking (NPRM). The NPRM would withdraw the final rule titled "Independent Contractor Status under the Fair Labor Standards Act" (the "Rule") which was published on January 7, 2021 and is scheduled to become effective on May 7, 2021.

By way of introduction, ASTA was established in 1931 and is the leading professional travel trade organization in the world. Our current membership consists of approximately 14,000 domestic travel agency and allied travel companies varying in size from the smallest home-based businesses to storefront agencies to the large travel management companies such as Carlson Wagonlit Travel. As of 2019, they collectively accounted for an annual payroll output of \$5.5 billion and annual revenues of \$17.7 billion.

Travel agencies rely heavily on the services of independent contractors (ICs), an arrangement that provides substantial benefits for both workers and agencies in situations where a traditional employment relationship is impractical or uneconomical. Moreover, engagement of ICs in the travel industry is growing. According to our most recent survey data, 75 percent of ASTA member agencies reported using at least one IC, and of those who did, the average agency engaged twelve.<sup>1</sup> All told, an estimated 60,000 ICs work in our industry – equivalent to 29 percent of the total industry workforce.

As a preliminary matter, ASTA shared the prior Administration's view that the current iteration of the multifactor "economic reality" test used to determine worker status under the Fair Labor Standards Act (FLSA) was suboptimal in numerous respects, and this remains the case to date given the action taken earlier this year to delay the Rule's implementation. The notion that workers truly in business for themselves as a matter of economic reality should be classified as independent contractors rather than

---

<sup>1</sup> ASTA 2016 Labor & Compensation Report, March 2017 at 4.

employees seems simple and straightforward. Moreover, as a general principal the concept should be noncontroversial from the perspective of both the worker and the engaging entity.

Unfortunately, however, in practice the analysis is rarely as clear-cut as it ought to be, and the continued use of an unweighted multifactor test contributes significantly to this lack of clarity. The factors which comprise the current iteration of the test are: (1) the extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the amount of the alleged contractor's investment in facilities and equipment; (4) the nature and degree of control by the principal; (5) the alleged contractor's opportunities for profit and loss; (6) the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and (7) the degree of independent business organization and operation.<sup>2</sup>

The longstanding fundamental difficulty with the economic reality test is, of course, that most of the factors are far too subjective in nature to permit consistent application by the federal courts. For example, what constitutes an "integral part" of the engaging party's business?<sup>3</sup> Just how longstanding must an engagement relationship be to satisfy the "permanency" factor? Exactly how much "initiative," "judgment" or "foresight" must be established as required for the success of the worker? And how are those attributes even quantified? Such uncertainties virtually guarantee that reasonable minds can, and often will, reach differing conclusions as to how any one particular factor (let alone all seven) should be evaluated in light of the operative facts.

There are, of course, worker engagements where all of the factors capable of analysis plainly point in one direction, i.e., all indicative of employee status or all indicative of independent contractor status, and in those situations the relative weight accorded to each factor, if any, would have no bearing on the ultimate determination of the worker's status. However, given the number of variables subject to evaluation in any engagement situation, these scenarios are a distinct minority. To the contrary, in many if not most engagements, some factors are indicative of independent contractor status while others suggest the worker is an employee, and it is overwhelmingly cases of this nature that end up being litigated and left to the courts to resolve.

Beyond that, there are other problems with this approach which would remain even if the degree of subjectivity could somehow be mitigated. The Department has repeatedly stated that the factors are not exhaustive – meaning that other things not enumerated can (and therefore at least sometimes should) be considered – and that no single factor will be dispositive as to the determination. Moreover, until the publication of the Rule earlier this year, which the Department now seeks to withdraw, there had been no authoritative guidance as to which factor or factors should predominate when analysis of two or more of them are indicative of a conflicting resolution to the question of the worker's status. Clearly, for businesses in industries heavily reliant on independent contractors – such as the thousands of travel agencies comprising ASTA's membership – the shortcomings of the current scheme are anything but academic.

---

<sup>2</sup> U.S. Department of Labor Wage and Hour Division *Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*. <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf>

<sup>3</sup> To illustrate, the NPRM published in advance of the Rule cited four federal appellate decisions in which the "integral" service factor has been misinterpreted. 85 CFR 60603-60604 (September 25, 2020).

For a variety of reasons, many business models simply cannot function without the flexibility and myriad other benefits associated with engaging labor on a contract basis.<sup>4</sup> However, the intrinsic uncertainty which attends any application of the current test to the circumstances of a particular engagement undermines confidence among businesses that their classification of contract workers will be upheld should it be challenged in the courts. This in turn stifles the growth and, in some cases, threatens the very survival of scores of industries in which independent contractor relationships predominate. As such, it has been evident for quite some time that a substantial overhaul of the economic reality test was sorely needed.

In order to put ASTA's position with respect to the NPRM into the proper context, it is necessary to briefly restate our position with respect to the substantive aspects of the Rule that the Department now proposes to withdraw. In our October 26, 2020 comments to the proposed Rule prior to its publication on January 7, 2021, we stated that while less than ideal, the Rule "represents a meaningful if modest improvement over the status quo." The rationale for our assessment is amplified below, but suffice it to say if the Rule was in our view a modest step forward, logic dictates that the NPRM, which has as its sole object the Rule's withdrawal, can only be considered a corresponding step backward in the quest for a truly workable standard to determine worker status.

As we noted last year, the prior Administration's determination that two "core" factors were most probative of the worker's economic dependence, and therefore entitled to greater weight in the analysis than the others, was a positive one grounded in common sense. These core factors, namely, (i) the nature and degree of the individual's control over the work, and (ii) the individual's opportunity for profit or loss, are rightly entitled to both greater scrutiny and greater weight when determining the classification of the worker in nearly every circumstance one can envision. In contrast, some of the other factors traditionally made part of the analysis are peripheral at best, and at times do not even seem to apply to the particulars of the engagement being evaluated.

With respect to the "nature of control" factor, ASTA agrees with the Rule that this factor weighs in favor of the individual being an independent contractor when he or she exercises substantial control over key aspects of the performance of the work, including but not limited to setting one's own schedule and/or work hours, by selecting one's own projects, and the right to render services for others, including but not limited to the engaging party's competitors. In contrast, the factor weighs in the opposite direction, *i.e.*, toward a finding that the worker is an employee, when these critical aspects of the performance of the work are controlled by the engaging party.

ASTA appreciates that the Rule expressly provides that requiring an individual to comply with specific legal obligations, such as carrying insurance or meeting contractually agreed-upon deadlines, or satisfy similar requirements typical in commercial contracts between business entities does not constitute "control" that makes the individual more likely to be an employee under the FLSA. This was significant from our perspective as most standard contracts used by travel agencies to engage contractors to sell travel require the individual to, among other things, satisfy all licensing and registration requirements imposed by the jurisdiction(s) where the individual does business.

---

<sup>4</sup> It should be noted that many reasons cited by businesses, particularly in "gig economy" industries, are wholly unrelated to the well-documented cost differential associated with the engagement of labor on a 1099 rather than W-2 basis.

The other core factor, the individual's opportunity for profit or loss, weighs towards the individual being an independent contractor where the individual stands to generate a profit or incur a loss based on the exercise of initiative, such as managerial skill or business acumen or judgment, or management of his or her investment in equipment, materials and the like. Where the individual is unable to affect his or her earnings except by working more hours or working more efficiently, this factor weighs towards the individual being an employee. Again, ASTA takes the view that elevating the weight of this factor relative to the others merely reflects common sense, and it is one that can be meaningfully evaluated in the overwhelming number of worker engagements.

ASTA was particularly supportive of the guidance in the Rule that provided where both of the core factors indicated the same classification, as either an employee or independent contractor, there is a "substantial likelihood" that it is the correct classification for the worker in question.<sup>5</sup> This analytical construct provides business owners with a measure of assurance that, absent unusual circumstances, an objective assessment the status indicated by those two factors would not be superseded should assessment of the three non-core factors, singly or collectively, suggest a contrary conclusion with respect to the worker's proper classification.

Beyond the evident rationale that underpins deeming the "control" and "opportunity for profit" factors to be more relevant to the determination of worker status than the non-core factors, ASTA believes that assigning greater weight to *any* factor will necessarily reduce, to some degree, the element of subjectivity inherent in the test. It follows then that should the Rule become effective, one can expect to see greater consistency in federal court decisions in worker classification suits brought on the same or substantially similar facts. This in turn will provide business owners with the clarity not currently present that is needed in order to structure their engagements without an undue risk of inadvertent misclassification.

For the foregoing reasons, ASTA respectfully submits that any speculative benefit which might be derived from withdrawal of the Rule would be substantially outweighed by the well-established negative consequences associated with the continued use of the unweighted multifactor economic reality test in its present form. We therefore urge the Department to not withdraw the Rule at this time, and instead permit the Rule to go into effect as scheduled on May 7, 2021.

While ASTA acknowledges that the Department is not proposing any new regulatory guidance to replace the guidance set forth in the Rule it proposes to withdraw, we nevertheless wish to take this opportunity to express our related longstanding concern as to the propriety of the continued use of multiple tests at the federal level to determine worker status.

Currently, there are at least three such primary tests in use. The Internal Revenue Service (IRS) uses a 20-factor common-law based "right of control" test,<sup>6</sup> whereas, as discussed here, the Department in interpreting the FLSA uses – and likely will continue to use – some iteration of the economic reality test. Then there is what is known as the "hybrid test" which, as the name suggests, incorporates elements of both the common-law test and the economic reality test.<sup>7</sup>

---

<sup>5</sup> 86 FR 1246 (section 795.105(c)).

<sup>6</sup> Rev. Rul. 87-41, 1987-1 C.B. 296 (1987).

<sup>7</sup> A discussion of the hybrid test is contained in *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 36-37 (3d Cir. 1983).

Applying different tests to the same engagement can result in inconsistent determinations of a worker's status. For example, a worker can be deemed an independent contractor by the IRS using its 20-factor test and at the same time be deemed an employee by the Department when applying the economic reality test. Therefore, a business could be found to have misclassified a worker even though it took pains to structure its engagements to ensure that it would satisfy a different federal test.

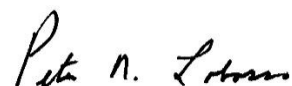
Again, the concern here is anything but academic for those impacted by the current state of affairs. The prospect of inconsistent determinations has had – and continues to have – a chilling effect on the growth of businesses in scores of industries reliant on contract workers. This has resulted in fewer opportunities for individuals who choose to offer their services as independent entrepreneurs and, along with it, diminished growth of the economy as a whole.

An obvious solution to this problem would be to adopt a single standard for use in assessing worker status for all federal purposes. The simplest means to accomplish this would be to revise the FLSA, either legislatively or through regulation, to replace the economic reality test with the right of control test. Doing away with the economic reality test would also eliminate the hybrid test, so what is now three tests at the federal level would become one.<sup>8</sup>

ASTA, joined by a substantial number of trade associations and stakeholders in other industries, has strongly advocated for passage of the *Modern Worker Empowerment Act* (S. 526), legislation that seeks to amend the FLSA to create the single standard.<sup>9</sup> While we await action on this bill in Congress, we believe that the NPRM represents a favorable opportunity for the Department to give due consideration to our concerns and how they might be addressed through the rulemaking process in the future.

Thank you for considering ASTA's views on this important issue. If you or your staff have any questions regarding our comments or the engagement of independent contractors in the travel industry, please do not hesitate to contact me at (703) 739-6854 or [plobasso@asta.org](mailto:plobasso@asta.org).

Sincerely,



Peter N. Lobasso  
Senior Vice President & General Counsel  
American Society of Travel Advisors, Inc. (ASTA)

---

<sup>8</sup> For a detailed analysis of the evolution of the differing standards used to determine worker status at the federal level and the merits of adopting a single standard for all federal purposes, see *Article: The Time Has Come for Congress to Finish its Work on Harmonizing the Definition of "Employee,"* 26 J.L. & Pol'y 439 (2018).

<sup>9</sup> An earlier but substantively identical bill, the *Harmonization of Coverage Act of 2017* (H.R. 3825) was introduced in the 115th Congress.