

October 26, 2020

Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division, U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210
Via Electronic Filing at <http://www.regulations.gov>

RE: Independent Contractor Status Under the Fair Labor Standards Act, Notice of Proposed Rulemaking and Request for Comments; Docket ID No. WHD-2020-0007 (September 25, 2020)

Dear Ms. DeBisschop:

The National Association of Chemical Distributors (NACD) submits the following comments in response to the notice of proposed rulemaking and request for comments published by the U.S. Department of Labor (DOL), Wage and Hour Division (WHD) regarding Docket No. WHD-2020-0007, Independent Contractor Status Under the Fair Labor Standards Act.

About NACD

NACD is an international association of nearly 430 chemical distributors and their supply-chain partners. NACD members represent more than 85% of the chemical distribution capacity in the nation and generate 90% of the industry's gross revenue. NACD members, operating in nearly every U.S. state through more than 3,000 facilities, are responsible for 75,000 direct and indirect jobs in the United States. NACD members are predominantly small regional businesses, many of which are multi-generational and family owned.

NACD members meet the highest standards in safety and performance through mandatory participation in NACD Responsible Distribution®, the association's third-party-verified environmental, health, safety, and security program. Through Responsible Distribution, NACD members demonstrate their commitment to continuous performance improvement in every phase of chemical storage, handling, transportation, and disposal operations.

NACD Supports the Notice of Proposed Rulemaking Addressing Independent Contractor Status Under the Fair Labor Standards Act

NACD would like to convey its support for WHD's notice of proposed rulemaking (NPRM) addressing independent contractor status under the Fair Labor Standards Act (FLSA). Chemical distributors, like all logistics-based companies, rely on a mix of employed and contracted labor that reflects the dynamic nature of the industry. Whether it is for warehousing, sanitization, or transportation work, many companies choose to contract rather than hire labor because contracting enables companies to adjust their labor force based on demand. In the case of independent drivers, contracting enables them to maximize the amount of time they spend working and control the circumstances of their work.

Based on an economic analysis of the NPRM's impact conducted by John Dunham & Associates, it is estimated that 5,897 contract workers would be subject to this rule within the chemical distribution industry. It is also estimated that the industry would see \$116,882 in net annual

discounted benefits should the NPRM be finalized. This rule would result in approximately 860 tons of increased sales, which in turn would increase demand for jobs such as truck drivers, clerks, and warehouse staff in the chemical distribution industry alone.

NACD supports the use of long-established test methods for determining a contractor relationship that reflect the widely varying applications of independent contractors. Under the FLSA, the term, “employ” means “to suffer or permit to work.”¹ The DOL noted in the NPRM that the courts have long interpreted that to “suffer or permit” someone to work, i.e. to be an employee of theirs, required an evaluation of that worker’s economic dependence on a potential employer.² The DOL also noted that as it currently stands, most courts use five or more overlapping factors to determine worker classifications, to which this NPRM seeks to codify into five distinct factors.³ This NPRM clarifies what it means to “suffer or permit” someone to work by evaluating their economic dependence via the ‘economic reality’ test. The test, which heavily weighs two core factors in a worker classification decision and has three remaining factors that can add probative value, clarifies under the FLSA who is considered an employee or an independent contractor.

The DOL proposes that the first two core factors should be the following: 1.) The nature and degree of the individual’s control over the work, and 2.) The individual’s opportunity for profit or loss. These factors weigh the most in determining a worker’s status. If the two core factors point to opposing classifications, the following three remaining factors in the economic reality test provide probative value: 3.) the amount of skill required for the work, 4.) the degree of permanence of the working relationship between the individual and the potential employer, and 5.) whether the work is part of an integrated unit of production.

NACD supports the DOL’s proposed economic reality test to clarify further the ‘suffer or permit’ language under the FLSA’s definition of ‘to employ.’ NACD agrees with the DOL that this test, as opposed to the other regulatory options explored in the NPRM, will be the least stringent and constraining on the American economy.

Conclusion

NACD appreciates the DOL’s efforts to establish a fair economic reality test for determining worker classification under the FLSA. Thank you for the opportunity to comment on this critical issue. If you have questions or need additional information, please do not hesitate to contact me.

Sincerely,



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¹ 85 FR 60600

² Ibid.

³ Ibid.