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October 26, 2020

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
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) which would update the multifactor test used to determine whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA).

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 over 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 (CWT). 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.¹ All told, an estimated 40,000 ICs work in our industry – equivalent to 29 percent of the total industry workforce.

As a preliminary matter, ASTA shares the view of the Department that the current iteration of the multifactor "economic reality" test is suboptimal in numerous respects. The notion that workers truly in business for themselves as a matter of economic reality should be classified as independent contractors rather than employees seems simple and straightforward. Moreover, as a general principal the concept seems rather unobjectionable from the perspective of the worker as well as the engaging person or entity.

¹ ASTA 2016 Labor & Compensation Report, March 2017 at 4.

Unfortunately, however, in practice the analysis is rarely as clear-cut as one would hope. Certainly, there are the simple cases where all or nearly all of the factors plainly point in one direction or the other, but 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.

The specific factors identified by the courts in the cases interpreting the FLSA over the years has only contributed to the confusion. 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.²

With the exception of the “right of control” element, the difficulty with the use of these factors is that they are overly subjective in nature and as written do not lend themselves to an entirely consistent application by the federal courts, and this is the case even where the factual circumstances of the engagement are the same. For example, what constitutes an “integral part” of the engaging party’s business?³ 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.

Beyond that, there are other problems with this approach which would remain even if the degree of subjectivity could somehow be mitigated. DOL 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, there is no consistent guidance as to which of the 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 engaging ICs – such as the thousands of travel agencies comprising ASTA’s membership – the shortcomings of the current scheme are anything but academic.

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.⁴ However, the intrinsic uncertainty which attends any application of the current test to the circumstances of a particular engagement undermines confidence among businesses that classification of their contract workers will be upheld if

² 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>

³ To illustrate, the NPRM cites four federal appellate decisions in which the “integral” service factor has been misinterpreted. 85 CFR 60603-60604 (September 25, 2020).

⁴ 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.

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 is sorely needed.

Taken as a whole, ASTA believes that the NPRM represents a meaningful if modest improvement over the status quo. That being said, we wish to amplify our views with respect to certain specific provisions of the proposed rule as they relate to businesses and workers in the travel industry.

To begin, the Department's identification of two "core" factors that are deemed most probative of the question of the worker's economic dependence, and therefore entitled to greater weight in the analysis than the other three, is a positive one grounded in common sense. As we elaborate below, 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 every circumstance. In contrast, some of the other factors traditionally made part of the analysis at times do not even seem to apply to the particulars of the engagement being evaluated.

ASTA is particularly supportive of the instruction that where both of the core factors point to the same classification, whether employee or independent contractor, there is a substantial likelihood that it is the correct classification for the worker in question.⁵ As noted, given that the other factors are less probative and automatically afforded less weight in the analysis, it is highly unlikely that they could, even collectively, outweigh the combined weight of the two core factors. To provide stakeholders with even greater certainty, ASTA would recommend addition of a statement to the final rule to the effect that "absent extraordinary circumstances, the classification indicated by the two core factors when they are in agreement will be dispositive as to the worker's status irrespective of what evaluation of the three non-core factors, either singly or collectively, may indicate."

With respect to the "nature of control" factor, ASTA agrees with the NPRM 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 aspects are controlled by the engaging party.⁶

ASTA appreciates that the NPRM specifically states that requiring the 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.⁷ This is 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.

⁵ 85 CFR 60618 (September 25, 2020).

⁶ *Id.* at 60612-60613.

⁷ *Id.* at 60613.

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.⁸ While ASTA is in agreement with this general approach, we suggest that the regulations expressly recognize that workers in many service industries may make only a minimal investment in equipment or materials and in such situations this consideration, by itself, should not be taken to weigh in favor of employee status.

Turning to the first of the three other factors, namely, the amount of skill required for the work, this factor weighs in favor of the individual being an independent contractor where the work at issue requires specialized training or skill that the engaging party does not provide. The factor weighs in favor of employee status where the contracted work does not require specialized training or skill and/or where the individual depends on the engaging party to equip him or her with the needed training or skills.⁹

Here we wish to make two points that we ask be reflected in the text of the final rule. First, the rule ought to expressly acknowledge that possession of special skill by the engaged individual is not always present in a *bona fide* independent contractor relationship, and in such situations the factor should not weigh in favor of employee status where it can be shown that the worker exercises initiative which demonstrates he or she is not economically dependent on the engaging party. For this reason, ASTA disagrees with the Department that the element of initiative should be either disregarded or considered separately from the skill factor.

We also wish to stress that where skills are required for the performance of the contracted work, ASTA believes that the provision of those skills by the engaging party should not weigh in favor of employee status if the individual has the freedom, both under the contract and in fact, to acquire those skills from a source other than the engaging party. In such cases, the engaging party may, as a convenience to the individual, make skill training available, and where obtaining it from the engaging party is strictly voluntary, *i.e.*, not an express condition of the engagement, it ought to be considered, at most, a neutral factor.

The second of the non-core factors to be considered under the NPRM is the degree of permanence of the working relationship between the individual and the potential employer. To the extent the work relationship is by design definite in duration or sporadic, the individual is more likely to be found to be an independent contractor. Conversely, this factor weighs in favor of the individual being an employee to the extent the work relationship is instead by design indefinite in duration or continuous.¹⁰

The Department proposes to sever consideration of exclusivity, *i.e.*, the obligation to not render services to others, from this factor, asserting that it would avoid needless duplication and confusion. ASTA urges the Department to reconsider its position on this point. Consideration of only the length of the working

⁸ *Id.* at 60613-60614.

⁹ *Id.* at 60615.

¹⁰ *Id.* at 60616.

relationship without exclusivity will, in many cases, falsely indicate the existence of an employer-employee relationship. A worker may elect to render services to a single business entity over a long period of time for any number of reasons that have nothing whatsoever to do with any contractual constraints on rendering services to others. Indeed, such long-term relationships are common in the travel agency industry despite the fact that very few agencies impose exclusivity requirements on its 1099 workers. As such, where the worker's engagement is not exclusive, the permanence of the relationship should not weigh in favor of employment.

The third and final factor to be considered is whether the work is part of an integrated unit of production. This factor weighs in favor of the individual being an employee to the extent his or her work is a component of the potential employer's integrated production process for the good or service in question, while it weighs in favor of the worker being an independent contractor to the extent his or her work is segregable from the potential employer's production process.¹¹

ASTA supports the inclusion of this factor into the updated test provided that the final rule makes plain that this factor is distinct from the concept of the importance or centrality of the individual's work to the engaging party's business. As noted in the NPRM, a number of federal courts have conflated the two concepts, causing unnecessary confusion in the process. Further, we agree that insofar as arguably everything a business chooses to do is in some respect integral to its operation (otherwise it wouldn't be done), a focus on the importance of the individual's work is of dubious value in assessing the degree of the worker's economic dependence on the hiring entity.¹²

To summarize, ASTA believes the update to the economic reality test outlined in the NPRM represents a modest yet meaningful step forward. To the extent that the final rule includes additional guidance, particularly with respect to the greater weight accorded to the core factors, it should provide our membership and other stakeholders with greater clarity in assessing their engagements, which in turn should minimize the likelihood of inadvertent worker misclassification.

That being said, it is respectfully submitted that the NPRM also represents something of a missed opportunity insofar as it fails to address the longstanding difficulty associated with 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,¹³ 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.¹⁴

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 DOL when applying the economic reality test. This in turn means that a business could be found to have misclassified a worker even though it took pains to

¹¹ *Id.*

¹² *Id.*

¹³ Rev. Rul. 87-41, 1987-1 C.B. 296 (1987).

¹⁴ A discussion of the hybrid test is contained in *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 36-37 (3d Cir. 1983).

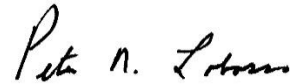
structure its engagements to ensure that it would satisfy a less restrictive federal test. The prospect of inconsistent determinations has had a chilling effect on the growth of businesses in industries reliant on contract workers which has resulted in fewer opportunities for individuals who choose to 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.¹⁵

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* (H.R. 4069 / S. 2973), legislation that would amend the FLSA to create the single standard.¹⁶ While these bills remain pending in Congress, we believe that the NPRM represents a favorable opportunity for DOL to give due consideration to our concerns and how they might be addressed through the rulemaking process.

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.

Sincerely,



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

¹⁵ 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).

¹⁶ An earlier but substantively identical bill, the *Harmonization of Coverage Act of 2017* (H.R. 3825) was introduced in the prior Congress.