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February 24, 2021

Ms. Amy DeBisschop
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave. NW
Washington, DC 200210

Re: Department of Labor Wage and Hour Division Notice Titled "Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date," RIN 1235-AA34, 86 Fed. Reg. 8326 (February 5, 2021)

Dear Ms. DeBisschop:

These Comments are submitted on behalf of the Coalition for Workforce Innovation ("CWI")[1] 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: Delay of Effective Date" published in the Federal Register on February 5, 2021 ("Notice on

[1] 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 DOL's Final Rule on Independent Contractor Status under the Fair Labor Standards Act ("Final Rule") is not delayed because it provides clarity and certainty to worker classification decisions for the benefit of independent workers and businesses.

Delay"). The Notice on Delay stated that "WHD will consider only comments about its proposal to further delay the rule's effective date."[2]

The Final Rule provides a modern, balanced approach to and interpretation of the Fair Labor Standards Act's ("FLSA") well-established economic realities legal standard for determining worker status. The Final Rule's discussion and guidance assists parties in applying the longstanding economic realities legal test to current day worker relationships under the FLSA in today's dynamic and constantly evolving economy where innovation and adaptation is both necessary and constant. CWI strongly supports the Final Rule. Its implementation should not be delayed.

CWI opposes the Notice on Delay from the Final Rule's current effective date of March 8, 2021 to May 7, 2021 for the following three procedural reasons: (1) DOL's delay request is not timely under the Administrative Procedure Act ("APA"); (2) DOL's delay request is not compliant with OMB's Regulatory Freeze Memorandum M-21-14 "Implementation of Memorandum Concerning Regulatory Freeze Pending Review"[3] instructing agency heads on compliance with the Chief of Staff memorandum issued on January 20, 2021 ("OMB Memo"); and (3) DOL's delay request does not accurately identify a reason that supports a further postponement of the Final Rule's effective date. CWI provides the following background and support for its procedural challenges to the Notice on Delay.

BACKGROUND

The "Final Rule on Independent Contractor Status under the Fair Labor Standards Act" was published by the DOL on January 7, 2021 in the Federal Register. The Final Rule was adopted following a rulemaking process that included publication of a Proposed Rule on September 25, 2020 in the Federal Register, at 85 Fed. Reg. 60600, a 30-day notice and comment period that resulted in the filing of 1,825 comments by interested individuals and stakeholders, and consideration and incorporation of many of those comments into the Final Rule, as reflected in the Final Rule itself. CWI filed comments by letter of October 26, 2020 on the DOL's NPRM on Independent Contractor Status Under the Fair Labor Standards Act ("Proposed Rule") (RIN 1235-AA34) ("CWI Comments"). CWI's 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 the DOL as reflected in the Final Rule.

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[2] The Final Rule was published on January 6, 2021. The effective date of the Final Rule is March 8, 2021. A Chief of Staff memorandum issued on January 20, 2021, "Regulatory Freeze Pending Review" ("Regulatory Freeze Memo") seeks to delay the effective date of the Final Rule to March 21, 2021. CWI opposes any delay of the effective date of the Final Rule, set for March 8, 2021.

[3] The OMB Memo is available at: https://www.whitehouse.gov/wp-content/uploads/2021/01/M-21-14-Regulatory-Review.pdf last viewed February 21, 2021.

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. *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 *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).

For decades, the economic realities test has been firmly rooted in law and regulation. Since *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.[4]

There can be no debate that the economic realities legal standard is the test the DOL applied to the determination of independent contractor status under the FLSA in the Final Rule. *See, e.g.,* IC Final Rule at 86 Fed. Reg. 1168 at 1169 - 1171. The Final Rule adopts, as proposed, the economic reality test to determine whether an individual is an employee or independent contractor under the FLSA. 86 Fed. Reg. 1168 at 1179. The IC Final Rule cites *Rutherford Foods* 28 times.[5]

CWI noted 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 followed the appropriate rulemaking process procedurally, including an open and transparent rulemaking process that included telephonic public Stakeholder Briefings with senior DOL officials to provide additional background on the DOL's 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.

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[4] 86 Fed. Reg. 1168 at 1170 - 1171.

[5] 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.

The Final Rule reflects: consideration of relevant facts[6] and statutory and other legal considerations[7] as well as reasoned DOL judgment regarding applicable policy considerations.[8] The Final Rule also reflects citation to and consideration of contrary facts and arguments in both the Proposed Rule, and following notice and comment, in the Final Rule.[9] The Final Rule includes an exhaustive description and citations to the hundreds of authorities, facts, data and other analyses on which the DOL relied and is well-grounded in the rulemaking record. Indeed, the DOL cited numerous commentators with whom it agreed and those with whom it disagreed, and explained its reasoning throughout the Final Rule.[10] Those citations appear hundreds of times throughout the Final Rule. For example, CWI's 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.

On January 20, 2021, the Biden Administration issued a Memorandum for the Heads of Executive Departments and Agencies entitled "Regulatory Freeze Pending Review." The Regulatory Freeze Memo states that it is delaying the Final Rule's effective date to 60 days from the date of issuance of the Regulatory Freeze Memo (or Sunday, March 21, 2021).[11] That same day, the OMB Memo was issued setting forth the considerations applicable to agencies considering whether to further postpone the effective date of a regulation beyond March 21, 2021.

On February 4, 2021, the DOL issued the Notice on Delay. The DOL solicited comments through midnight on February 24, 2021 -- just twelve days before the Final Rule's effective date (and also less than 30 days prior to March 21, 2021 (the date by which the Regulatory Freeze Memo seeks to delay the Final Rule)).

COMMENTS

I. The Notice on Delay of the Final Rule is Untimely Under the APA.

Subsection 553(d) of the Administrative Procedure Act requires the DOL to publish any final delay rule with substantive effect not less than 30 days before the delay rule's effective date. 5 U.S.C. § 553(d) (1976). An agency may avoid the Section 553(d) notice obligation "for good cause found and published with the rule." *Id*. CWI notes that the good cause exception in the APA is not perfunctory and is a necessary prerequisite for an agency to attempt to delay final implementation of a finally adopted regulation. Yet here, glaringly, the Notice on Delay has not acknowledged, much less addressed the good cause requirement in the Notice on Delay. No attempt was made by the DOL to show good cause for the proposed delay of the rule.

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[6] *See, e.g.,* 86 Fed. Reg. 1168 at 1173 - 1175, 1179 - 1196, 1209 - 1234.
[7] *Id.* at 1168 - 1174.
[8] *Id*. at 1172, 1178 - 1179.
[9] *Id.* at 1180 - 1185.
[10] Id. at 1179 - 1196.
[11] Whether the Regulatory Freeze Memo effectively delays the Final Rule or other rules is beyond the scope of this Comment.

The Notice on Delay is, therefore, untimely. The comment closing date is February 24, and the effective date of the Final Rule is March 8, 2021 (less than 30 days later).[12] DOL cannot escape the APA's timeliness requirements. The DOL did not address or publish grounds to waive the APA's Section 553(d) notice obligation in the Notice on Delay Rule. And it cannot do so now, in a final rule to be published less than 30 days before the current effective date of the Final Rule. 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. Exceptions to the provisions of Section 553 are "narrowly construed and only reluctantly countenanced." *American Federation of Government Employees, AFL-CIO v. Block*, 665 F. 2d 1153, 1155-56 (D.C. Cir. 1981) (citation omitted). See, also, *Department of Homeland Security, et. al. v. Regents of the University of California*, 591 U.S. __, 140 S. Ct. 1891 (June 18, 2020) (under the APA, an agency must provide reasoned analysis for its actions; court struck down the Department of Homeland Security's decision to wind down DACA given it did not consider relevant factors, and thus its decision was arbitrary and capricious).

As a result, the Notice on Delay is untimely under the APA, and the Final Rule should be effective on March 8, 2021.

II. The Notice on Delay is Deficient in that it Fails to Comply with the OMB Memorandum.

The OMB Memorandum published on January 20, 2021 by Acting Director Robert Fairweather directs agency heads on how to comply with the Regulatory Freeze Memo issued the same day. Specifically, the OMB Memorandum sets forth eight factors an agency should consider in determining whether to further postpone the effective dates of the rules for 60 days and reopen the rulemaking processes, including whether:

(1) the rulemaking process was procedurally adequate;

(2) the rule reflected proper consideration of all relevant facts;

(3) the rule reflected due consideration of the agency's statutory or other legal obligations;

(4) the rule is based on a reasonable judgment about the legally relevant policy considerations;

(5) the rulemaking process was open and transparent;

[12] CWI notes that even if the Final Rule were not effective until March 21, 2021, the comment closing date of February 24 is still less than 30 days before this date.

(6) objections to the rule were adequately considered, including whether interested parties had fair opportunities to present contrary facts and arguments;

(7) interested parties had the benefit of access to the facts, data, or other analyses on which the agency relied; and

(8) the final rule found adequate support in the rulemaking record.

None of these factors was discussed or considered in the Notice on Delay. Yet, as demonstrated above at pages 2 - 4, and set forth in detail throughout the Final Rule, all of these considerations were expressly met. As a result, the Notice on Delay is inconsistent with the OMB Memorandum and should be withdrawn.

III. The Notice on Delay is Substantively Incorrect and Internally Inconsistent; the Final Rule Does Not Articulate a New Legal Standard.

The Notice on Delay states it is issued to allow the DOL further time to consider the new legal standard for employee and independent contractor status under the FLSA set forth in the Final Rule. 58 Fed. Reg. at 8327. The Notice does not describe the "new legal standard" it is referring to that DOL asserts is within the Final Rule. The Notice on Delay does not even mention the economic realities test which is the test that forms the foundation of the Final Rule. The economic realities test is not a new legal standard, as described above at pages 3-4; it has been the guiding legal standard for determinations of employee or independent contractor status under the FLSA, as established by United States Supreme Court precedent, Circuit, and District Courts, and DOL sub-regulatory guidance since 1947.

There can be no real dispute or controversy that the Final Rule's adoption of the economic realities legal standard is consistent with longstanding judicial precedent as well as longstanding sub-regulatory DOL guidance. Note that at one point, even the DOL acknowledged in the Notice on Delay that the legal standard contained in the Final Rule had already been the one "employers and workers are already familiar with" as the WHD and courts had already been applying this legal standard (which by all logic then, could not be new). Therefore, DOL's inconsistent assertion that the Final Rule "would adopt a new legal standard for determining employee and independent contractor status under the FLSA," without more, cannot form the basis for postponing the Final Rule's effective date by 60 days.

CONCLUSION

The Notice on Delay is substantively unnecessary and procedurally deficient as described above. CWI urges the DOL to withdraw its Notice on Delay for all the reasons set forth above, and not postpone the effective date of the IC Final Rule past March 8, 2021.

Respectfully Submitted,

The Coalition for Workforce Innovation,

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