

October 26, 2020

By electronic submission: <http://www.regulations.gov>

The Honorable Cheryl Stanton
Administrator, Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

RE: RI 1235-AA34--Independent Contractor Status under the Fair Labor Standards Act: Notice of Proposed Rulemaking and Request for Comments

Dear Administrator Stanton:

The Society for Human Resource Management's (SHRM) mission is to create better workplaces where businesses and workers thrive together. Our 300,000+ HR and business executive members impact the lives of more than 115 million workers and their families. Our members, many of whom are experts in talent acquisition, understand that in order to recruit and retain the best talent, especially during these challenging economic times, they must offer a myriad of employment options that provide the 21st century worker the autonomy necessary to make the best decisions for them and their families. To that end, independent work is not only valuable, but necessary to compete in today's global marketplace

Independent work is here to stay. While every generation is choosing independent work, nearly 50% of Generation Z and 44% of Millennials engage in some form of independent work.¹ Workers of every generation recognize that independent work provides opportunities for enhanced autonomy, flexibility, and work/life integration. Certain workers in traditional freelance, consultant, contractor, direct sellers, and other decades-old industries have long flourished in independent relationships. As the modern economy provides new opportunities for these and other workers to engage and expand their economic opportunities with enhanced flexibility and freedom, the modern workplace must be allowed to meet this worker demand and provide greater economic opportunities for all. The modern workplace also needs specificity and uniformity in the ability to determine whether a worker is or is not an employee under the Fair Labor Standards Act (FLSA).

Regulations that embrace these modern work relationships reflect today's workplace and economic opportunities available to workers who prefer the flexibility and freedom of providing work as non-employees to multiple businesses in a way that allows them meaningful self determination as to their work opportunities. Developing and communicating to businesses and workers rules that promote a positive business environment encourages innovation and allows workers to be provided certain information, guidance, and resources by businesses. This benefits work, workers and the workplace.

To that end, SHRM respectfully submits the following comments in response to the U.S. Department of Labor Wage and Hour Division's (the "WHD" or the "Division") notice of proposed

¹ The 2020 Freelance Forward Study commissioned by Edelman Intelligence for Upwork found that 30% of Generation X and 26% of Baby Boomers engaged in some form of independent work. See Freelance Forward Study, (published September 2020), available at <https://www.upwork.com/i/freelance-forward>.

rulemaking and request for comments regarding Independent Contractor Status under the Fair Labor Standards Act (the “FLSA” or the “Act”), 85 Fed. Reg. 60600 (Sept. 25, 2020) (the “Proposed Rule”).

I. SUMMARY OF MAIN POINTS

SHRM supports the Division’s interpretation of the economic realities test, specifically the focus on a framework whereby a worker’s status is determined by assessing the two Core Factors first, followed by consideration of additional, tie-breaking factors. However, as detailed below, SHRM suggests the Division consider revisions to the Additional Factors to better reflect the essence of independent work and further suggests additional illustrative examples as guidance to businesses and workers.

SHRM recommends that the Final Rule make clear that the Core Factors should serve as the main focus for an assessment of whether a worker is an employee. The Proposed Rule states that if the Core Factors point in the same direction (either that the individual is an independent contractor or an employee), there is a “substantial likelihood” that the worker has that status. This, however, does not promote enough consistency to meet the demands of the modern workplace. Independent workers and businesses require ease of analysis that sets clear expectations on worker status.

SHRM asks that the Proposed Rule be revised to ensure that if the Core Factors indicate the same status of the worker, no further analysis is necessary; Additional Factors should only be consulted to break a tie between the Core Factors. By increasing the weight of the Core Factors, workers and businesses will have clear expectations and stable ground on which to build workplace relationships.

SHRM asks that the Proposed Rule also be revised to reflect the realities of contract negotiation. Independent workers want flexibility and freedom to be in business for themselves. As such, these workers freely understand and negotiate their arrangements with businesses with the understanding that this flexibility is built into the relationship. For this reason, **SHRM recommends the Proposed Rule be revised to acknowledge that workers often bargain for rights that they never exercise, but their choice not to exercise that right should not be used to further constrain their flexibility.** Put another way, an independent worker should not be found to be an employee simply because they choose not to exercise a right they bargained for and retain.

SHRM believes the Proposed Rule should be revised to make clear that businesses may provide trainings and protocols as well as benefits that enhance the workplace for all workers without the risk of becoming an independent worker’s employer. These policies can have an overall positive impact on the workplace and workers, regardless of whether a worker is an employee or an independent worker. Outdated or irrelevant notions of control should be removed so all can benefit from a positive workplace.

Cultivating a positive workplace culture is a key priority for American businesses. Workplace culture translates directly to worker engagement, commitment, satisfaction, health, safety, and overall business success.² With a majority of Americans believing there is a “crisis”

² See SHRM Foundation’s Effective Practice Guideline Series (2016), Creating a More Human Workplace Where Employees and Business Thrive (Nov. 7, 2019 11:17 AM)

of incivility,³ organizations need the freedom to maintain standards of civility and respect, unhampered by outdated precedent that has permitted incivility, disrespect, and even racial and gender slurs to go unchecked in the workplace. Likewise, all workers, whether independents or employees, deserve workplaces free from discriminatory, offensive, abusive, and profane behavior and language.

Safety and anti-harassment trainings are examples of beneficial trainings that some businesses forgo with respect to independent workers, at the risk of being deemed to have exerted control over these workers. Likewise, businesses that utilize independent workers see real risk in offering benefit packages to these workers. A Final Rule that makes clear businesses can provide training and benefits without creating an employment relationship is key to a thriving, modern workplace.

SHRM also submits for the record: SHRM's 2019 White Paper entitled, "Want Your Business To Thrive? Cultivate Your External Talent," attached hereto as Exhibit A; "External Workforce Insights 2018: The Force Reshaping How Work Gets Done", SAP, 2018, attached hereto as Exhibit B; and "The Gig Economy and Alternative Work Arrangements", Gallup, 2018 attached hereto as Exhibit C.

II. SHRM RESEARCH AND FINDINGS ON THE BEHAVIOR AND PREFERENCES OF INDEPENDENT WORKERS AND BUSINESSES' INCREASING RELIANCE ON INDEPENDENT WORK

In April 2019, SHRM and SAP SuccessFactors collaborated to conduct a research study of independent contractors, employees, managers, and human resources professionals on the subject of independent contractor classification and the benefits of independent work for businesses and workers alike. Specifically, the research surveyed 940 independent contractors (referred to as "external workers"), 350 employees (referred to as "internal workers"), 424 managers who work with external workers,⁴ and 1,175 human resource professionals in a broad variety of sectors, industries, organizational sizes, and geographic areas in the United States. ("Want Your Business To Thrive? Cultivate Your External Talent," attached hereto as Exhibit A, p. 6, 10-11.)

The primary concern voiced by human resources professionals is the need for clarity and specificity around independent contractor classification. Nearly three-quarters of human resources professionals reported that they are somewhat concerned, concerned, or very concerned about the legal landscape of external work, with 11% reporting that they are very concerned. (Ex. A, p. 39.) When asked what was the biggest issue or challenge that they would like to see resolved related to external workers, many human resources professionals cited legal ambiguity regarding the use and management of external workers as their greatest concern.

The current legal climate regarding independent work is exceedingly unclear and, at times, contradictory. This ambiguity has caused organizations to shy away from providing

<https://www.shrm.org/foundation/ourwork/initiatives/building-an-inclusive-culture/Documents/Creating%20a%20More%20Human%20Workplace.pdf> ("SHRM Guideline Series").

³ SHRM Study, Dori Meinert, (Mar. 20, 2017) How to Create a Culture of Civility, (Nov. 7, 2019, 10:35 AM) <https://www.shrm.org/hr-today/news/hr-magazine/0417/pages/how-to-create-a-culture-of-civility.aspx> ("SHRM Civility Study").

⁴ Independent contractors, employees, and managers were sourced from National Opinion Research Center's (NORC's) national representative AmeriSpeak® Panel.

training to external workers due to ambiguity in interpretation of the Internal Revenue Service (IRS) guidelines stating that periodic or ongoing training about procedures and methods is strong evidence that the worker is an employee. Yet the Occupational Safety and Health Administration (OSHA) rules make staffing agencies and host employers jointly responsible for maintaining a safe work environment for temporary workers—including ensuring that OSHA's training requirements are fulfilled.

SHRM's research shows that business and human resources professionals broadly avoid providing training, like safety and process training, to external workers. Forty-eight percent of human resources professionals reported providing training for all external workers, while thirty-eight percent reported providing training for only some of their workforce, and eleven percent indicated that they didn't provide any training for any external workers. (Ex. A, p. 26.)

It is no surprise, then, that SHRM's research found businesses want flexibility when they engage with independent contractors. Though it is often speculated that organizations turn to external workers to save money, less than 20% of human resources professionals indicated that their organization uses external workers to save money. Instead, some of the most commonly cited reasons for utilizing external workers were access to specialized talent with specific skills or expertise (48%) and staffing specific projects and initiatives (48%). (Ex. A, p. 12.)

Companies highlighted the desire to offer benefits to independent workers in order to attract talent. Managers and human resources professionals, when asked to speculate on which benefits might attract external workers to their organizations, believed workers would want health care and paid time off benefits (Ex. A, p. 27.) Though independent workers often receive healthcare from an entity other than the businesses they engage with, health care was still the top benefit these workers cited as likely to motivate them to work for a company. (*Id.*) However, within the current legal landscape, businesses are hesitant to offer or otherwise pay for benefits out of fear that they cannot do so without creating legal risk. See “When Gig Workers Want Benefits, Should You Offer Them?”, SHRM, July 25, 2019, available at <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/when-gig-workers-want-benefits-beware-the-risks.aspx>.

Aside from these concerns expressed by businesses and human resources professionals, the survey also studied independent worker motivations and experiences with external work. The survey embraced the wide variety of independent work, by surveying workers engaged in a broad range of external work types including:

- Independent contract work - workers who find customers or companies either online or in person who pay them directly to fulfill a contract or provide a product or service;
- Online task contract work - workers who are paid for doing tasks done entirely online and the companies they contract with coordinate payment for the work;
- Service delivery contract work - workers who are paid for performing short in-person tasks or jobs for customers who they meet through a website or mobile app;

- On-call contract work - workers who are paid for doing work where they are prequalified and placed in a pool of people who can be called on “on an as needed basis” to cover specific work shifts or assignments;
- Subcontractor work - workers who are paid by a company that contracts services out to other organizations; and
- Temporary work - workers who are paid by a temporary service or staffing agency that contracts time out to other organizations to perform temporary tasks and jobs.

(Ex. A, p. 6.) About half of these workers reported working with a contract company or agency who places them in roles/assignments (49%), while half (50%) found their external work through some other means. The broad range of external work and the means through which workers obtain such work, by itself, supports the Proposed Rule’s call for a consistent focus on the core elements of independent work.

The survey found independent workers hold a variety of reasons for engaging in external work. Almost one in five workers in the survey said they preferred external work, and 45% explained that they saw advantages in both types of work but just happened to be doing external work. The most commonly cited reasons for becoming an external worker were "being able to set my own schedule" (49%), "choosing how many hours I work" (40%), and "choosing my work location" (33%). (Ex. A, p. 18.)

Furthermore, according to the survey, the majority of independent workers do not choose external work simply because they have no other options. Rather, nearly half of all external workers surveyed reported that "this is just the type of work I'm doing right now," and among the 11% of external workers who selected “other,” the most common open-ended responses were "for supplemental income" and "to do something I enjoy." Temporary workers were the only group for whom "I'd prefer an internal job" was selected at the same frequency as "this is just the kind of work I'm doing right now." (Ex. A, p. 7.) Workers engaged in independent contract work were the most likely to report a preference for external work.

Relatedly, the survey suggests that external work can lead to internal work. Nearly 90% of human resources professionals reported that their organizations, at least sometimes, convert external workers to internal employees. Ultimately, SHRM’s research is consistent with the Proposed Rule’s emphasis on self-determination and flexibility as central to economic independence.

Worker and business preference for independent work is on the rise for many of the reasons cited in SHRM’s research. SHRM’s findings are supported by further research conducted by SAP and Gallup. In 2018, SAP conducted a survey of 800 senior executives, including C-suite leaders, chief procurement officers, and chief human resources officers, and found that businesses are becoming more and more reliant on an external workforce.⁵ The study found that businesses are spending nearly 44% of all workforce spending on external workers, that 65% of businesses say the external workforce is important or very important to operating at full capacity to meet market demands, and that 68% of businesses say the external

⁵ See SAP Study at <file:///S:/Departments/Government%20Affairs/Issues/Diversity%20and%20Inclusion/2020/EO%20in%20EI%20training/SAP-Fieldglass-External-Workforce-Insights-2018.pdf>

workforce is important or very important to developing or improving products and services. (Ex. B, p. 4.) Likewise, Gallup found in a 2018 study⁶ that 36% of all U.S. workers participate in the so-called “gig economy” in some capacity, while finding that 29% of all U.S. workers have some sort of alternative work arrangement as their primary job, including a quarter of all full-time works and roughly half of all part-time workers. (Ex. C, p. 2.)

Independent work is here to stay and because it is a growing and essential part of the economy businesses and workers require clarity and consistency regarding the legal status of their relationship. Likewise, businesses and workers will benefit from the certainty provided by the Proposed Rule in that it will allow businesses to engage with independent workers in ways that benefit the workforce and society as a whole, including worker and customer safety training and anti-harassment training. SHRM submits these comments to aid the Division in understanding the make-up and nature of independent work and to ensure the Proposed Rule reflects the desires of workers and businesses for safety, flexibility, and compliance.

III. COMMENTS

A. The Economic Realities Of A Worker’s Relationship With A Company Are Best Determined By Prioritizing The Nature And Degree Of Control Over The Work And The Worker’s Opportunity For Profit And Loss Over All Other Factors.

The modern workplace needs specificity and uniformity in the ability to determine whether a worker is or is not an employee under the FLSA. Currently, the business community and workers are left applying numerous factors in a variety of ways that is mired in uncertainty and, therefore, unnecessary risk. As the Division sets forth clearly in the Proposed Rule, a proper reading of whether a worker is an employee of a business turns on “whether the individual is or is not, as a matter of economic fact, in business for himself.” Proposed Rule at 60603 (quoting *Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. 1981).) Over time, however, courts have grown reliant on “economic dependence” tests that lack key guidance on which factors predominate, resulting in “inconsistent approaches and results.” (See Proposed Rule at 60605 (collecting cases).)

For this reason, SHRM supports the Division’s prioritization of key factors in the Proposed Rule. By emphasizing which factors should be the most important in a court’s analysis, the Proposed Rule will bring uniformity and certainty to worker-business relationships. And while such uniformity and certainty could result from other, more restrictive employee/independent contractor tests,⁷ the Proposed Rule best balances the need for guidance and consistency with the existing movement toward more external work and, therefore, provides a more reliable and stable ground for businesses and workers to engage economically.

⁶ The Gallup study is attached as Exhibit C.

⁷ SHRM points to the Division’s analysis regarding various alternative regulatory solutions including various test applied by different jurisdictions throughout the country. For instance, the Proposed Rule is correct that California’s so-called ABC test may be “more structured,” however it is out of step with existing work relationships and, if adopted widely, would have “disruptive economic effects.” (See Proposed Rule at 60636 and fns. 150-152 (collecting articles regarding the effects of an ABC test on flexible work arrangements).)

To this end, SHRM proposes additional clarifications in the Proposed Rule to ensure consistency in the application of the Proposed Rule and to ensure that the Proposed Rule best reflects the myriad external work relationships in today's workplaces.

1. The Final Rule should make clear that the Core Factors are determinative of whether a worker is an independent contractor or an employee, unless one of the Core Factors indicates a different status than the other.

It is essential to consistency and certainty that an emphasis on Core Factors is clear and widely understood. The Proposed Rule offers an approach where the Core Factors pointing in the same direction (i.e. both saying the worker is an independent contractor or both saying the worker is an employee) shows there is a "substantial likelihood" the worker is either an independent contractor or an employee. (Proposed § 795.105(c).) While this would be an improvement in "clarity and predictability on the economic realities test," SHRM believes this less-structured approach, where the Core Factors are not decisive regarding a worker's status, could result in less consistent rulings across jurisdictions and could grow to de-emphasize the importance of the Core Factors.

Indeed, the Proposed Rule itself makes clear that the various outgrowths of the economic realities test began from the same root—economic dependence—and "a lack of focus" from courts in balancing multiple factors. (See Proposed Rule at 60605-06.) Accordingly, SHRM recommends the Final Rule adopt a structured approach to the Core Factors by making them decisive in the determination of a worker's legal status and that other factors should only be consulted as tie-breakers in the event the two Core Factors point to opposite determinations.

2. With regard to parties' "actual practice," SHRM recommends the Final Rule state that the relevant inquiry is whether a worker's contractual right or remedy was available and that the worker had the opportunity to exercise that right.

The Proposed Rule states that "the actual practice of the parties involved . . . is more relevant than what may be contractually or theoretically possible." (Proposed Rule at 60622.) A focus on "practice" as opposed to the contractual "rights," of the parties, however, unnecessarily de-emphasizes voluntariness of the contract itself and places ambiguity over parties' negotiations. If a worker negotiates for an actual right within the contract and the business does not prevent the exercise of that right, the fact that the worker never exercised this bargained-for right should not be given more weight than the right itself.

The worker-business relationship thrives when it has clear expectations at the outset; it is essential for the worker to understand what results they have contracted to produce and it is essential for both parties to understand their rights and remedies. Because businesses engaged with independent workers necessarily build flexibility and independence into their contracts, businesses expect workers to differ in what rights they choose to exercise. It is essential to a worker's independence and flexibility to choose for themselves which rights they will enforce. For example, a contract may permit the worker to perform services for more than one business. Worker A exercises that right and does so. In contrast, Worker B, although she also has that right, chooses not to do so based on her own needs. That Worker A and B operate differently - which is all but guaranteed as independents - should not affect the nature of their relationship with the business. If a relationship's legal status can be unsettled by a worker declining to exercise an otherwise available right, independents will have no certainty or control over their own choices; businesses likewise will not be able to rely on their negotiated terms and will

instead be forced to anticipate numerous ad hoc differences in rights and remedies between workers that are otherwise the same.

B. The Nature and Degree of a Worker’s Control Over the Work is an Appropriate Core Factor, but the Proposed Rule Should Make Clear Businesses Can Provide Training, Auditing, and Benefits Without Becoming an Employer.

Central to independent work is flexibility, often found in the ability of the worker to determine their own schedule, the selection of projects, what kinds of work will be provided, and the method for achieving the business’s desired results. To this end, the Proposed Rule is correct in emphasizing the ability of the worker to reject opportunities without negative consequences as evidence of worker control. Likewise, the Proposed Rule is correct in rejecting the notion that the mere occasional presence of putative supervisors is evidence of control. (See cases cited in Proposed Rule at 60612, fn. 35).

Importantly, the Proposed Rule appropriately finds that a worker can still maintain independent status even if they are “not solely in control of the work.” (Proposed Rule at 60612-13 (quotations and citations omitted).) Accordingly, the Proposed Rule prioritizes the proper inquiry: the degree of self-determination present in the worker’s work, not simply whether all aspects of the work are within their discretion.

However, the Proposed Rule should adopt certain revisions in order to best reflect the interests of workers and others, and to provide the protections and benefits all workers should have in the modern workplace.

1. The Final Rule should make clear that the provision of workplace trainings, auditing, and benefits are not indicia of business control.

The analysis regarding control should be focused on only those aspects of control that are relevant to the actual work performed. The Final Rule, then, should explicitly state that the parties’ implementation of compliance and auditing measures are not evidence of a business’s control over a worker’s work. SHRM supports the Proposed § 795.105(d)(1)(i) recognition that contracting parties should be able to build compliance with, for example, specific legal obligations, satisfy health and safety standards, and the carrying of insurance into the contractual relationship. However, the Final Rule must emphasize that all workers, regardless of their formal employment status, should be able to benefit from the training, resources, and positive workplace practices as those who are directly employed in the same workplace. Prohibiting this type of workplace enhancement due to outdated concerns essentially freezes the Fair Labor Standards Act in 1938 when it was first passed.

The Final Rule should clarify that businesses may provide important workplace information, training, and other forms of protections designed to improve the work environment for all workers without becoming an employer of a worker. Ultimately, this is sound public policy because it incentivizes companies to set basic lawful standards, provide fundamental resources, trainings, and information, and ensure the existence of proper safety measures for all workers in the workplace regardless of whether the workers are employees. Companies that are concerned that all workers receive certain resources, trainings, and compliant pay and other practices should not be penalized for these proactive pro-worker, pro-workplace, and pro-employer affirmative acts that benefit all in the workplace, including especially all workers,

whether or not they are employed by the workplace in which they provide services or are provided these resources.

Similarly, the Final Rule should state that the provision of information or other supporting measures relating to various benefits and resources are not indicia of control. As the Proposed Rule reasons with regard to trainings and audits, the provision of benefits is not relevant to the control over the work performed by the worker, rather it is another workplace enhancement. Benefits can be used by businesses to attract talented workers in an ever increasingly competitive labor market. Regardless of whether a business believes it should provide benefit information and other supporting measures to independent workers, the Proposed Rule should not discourage that pro-worker opportunity.

In order to illustrate this point, SHRM offers four examples.

i. COVID-19 Safety Measures.

Perhaps nothing has proven this point better than the grave challenges businesses have faced with COVID-19. For instance, during the initial stages of the pandemic, essential businesses knew that they had to provide face coverings and protective personal equipment to their employees, but it was unclear whether they could do the same for non-employee workers without creating independent contractor compliance risks. Companies should not be discouraged from protecting the entire workplace from COVID-19 due to such concerns.⁸

Even OSHA guidelines make clear that COVID-19 is an issue for the workplace as a whole and not just for employers and employees. OSHA COVID-19 guidance even advised businesses to “[t]alk with companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies.” See OSHA Guidance on Preparing Workplaces for COVID-19 at 11, available at <https://www.osha.gov/Publications/OSHA3990.pdf>. Businesses should be assured there will not be additional liability when protecting all the workers they work with regardless of their employment status.

Likewise, states have issued guidance requiring businesses that use external workers to provide protective equipment to independent contractors.⁹ Absent clarity in the Final Rule, businesses are arguably left in the proverbial Catch-22 in other states that have not so explicitly regulated the workplace. Further, can providing personal protective equipment, cleaning, or other COVID-19 safety precautions to independent workers, allowed or required by a state order, provide evidence of employment under the Act? Do businesses open themselves up to liability claims by following these state orders or guidance?

⁸ See generally Allen Smith, COVID-19 Safety Plans Can Reduce Return-to-Workplace Fears, Society for Human Resource Management, <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-safety-plans.aspx> (June 22, 2020).

⁹ See New York State Empire State Development, Frequently Asked Questions (FAQ) on New York Forward and Business Reopening, at FAQ 18, <https://esd.ny.gov/nyforward-faq>. New York State has also recognized this concern in their reopening documents by mandating that employers have the same policies for their employees and contractors. See New York State Department of Health, INTERIM GUIDANCE FOR OFFICE-BASED WORK DURING THE COVID-19 PUBLIC HEALTH EMERGENCY, at 3, <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/offices-interim-guidance.pdf> (defining “employees” to generally include “the office-based businesses/tenants and their employees and/or contractors.”).

Especially now, amidst a pandemic, businesses should be incentivized (even if only to remove potential liability) to improve the safety and wellbeing of their employees and non-employees alike.

ii. Mandatory Workplace Sexual Harassment Trainings.

Providing anti-discrimination trainings and anti-harassment trainings are a positive development in the workplace and public policy should encourage these types of trainings. After all, no worker should be subjected to discrimination or sexual harassment in the workplace. To this end, some states have implemented measures requiring businesses to provide sexual harassment training to their external workforce. See e.g., NYC Commission on Human Rights, Stop Sexual Harassment in NYC Act Frequently Asked Questions, <https://www1.nyc.gov/site/cchr/law/sexual-harassment-training-faqs.page>.

Businesses should be permitted to institute preventive measures on an *organizational* level without concern that trainings provided to independent contractors will create an employment relationship. Indeed, studies have found with regard to gender harassment, for example, “when it occurs, it is virtually always in environments with high rates of uncivil conduct.” See National Academies of Sciences, Engineering, and Medicine 2018. *Sexual Harassment of Women: Climate Culture, and Consequences in Academic Sciences, Engineering and Medicine*, Washington, D.C. The National Academies Press. (<https://doi.org/10.17226/24994>) (“NAS Study”). In its 2016 comprehensive study on sexual harassment in the workplace, the Equal Employment Opportunity Commission (EEOC) observed that “organizational *culture* is one of the key drivers of harassment.” U.S. Equal Emp. Opportunity Comm’n, *Select Task Force on the Study of Harassment in the Workplace* (June 2016), at 54. (“EEOC 2016 Report”). Organizations should be permitted to create and maintain positive cultures for all workers, regardless of their status, without risk of upending their relationships with independent workers. In the same way, independent workers should be able to benefit from working with and in businesses that maintain positive workplace cultures. These workers are no less deserving of these benefits and no less at risk for the harms that befall those who work in toxic workplaces.

The Final Rule should encourage these efforts and other voluntary efforts to provide such training and other information, while removing the potential risk that these pro-worker policies and practices will result in a reclassification of the worker as an employee. Businesses must have the freedom to promulgate and enforce policies that further and maintain civil, respectful, inclusive, and diverse workplaces and specifically prohibit all forms of offensive, vulgar conduct and harassment that is based on a person’s protected status—including their race, sex, age, and religion.

iii. Auditing Service Provider Policies and Practices.

Companies have a strong interest in auditing service provider policies and practices around pay practices, documentation of employees’ immigration status, and safety measures in the workplace (amongst other legal compliance issues) to confirm compliance with applicable laws. The Final Rule should allow businesses to take reasonable steps to ensure that contractors are in compliance with all applicable laws, including federal and state wage and hour, immigration, and other laws, through audits and other practices, without opening themselves up to becoming an employer. Businesses should not be punished for these pro-workplace steps to ensure contractor compliance with the law.

iv. Offer of Benefits Like Healthcare or Savings

Workplaces aim to attract and retain key talent. In the current landscape, there is far too much risk associated with providing benefits to independent workers. Rather, businesses are often advised to avoid benefits altogether. See “When Gig Workers Want Benefits, Should You Offer Them?”, SHRM, July 25, 2019, *available at* <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/when-gig-workers-want-benefits-beware-the-risks.aspx>.

Ultimately, benefits are just another form of compensation. Just as paying an independent contractor at an hourly rate, in lump sums, or on a project-basis should not impact the employment status of the worker, offering additional benefits should not alter the relationship either. Nothing about the manner or means of work is dictated by how the worker will be paid. Similarly, nothing about the manner or means of work is dictated by also offering health insurance, bonuses, or retirement savings.

Given the prevalence of independent work, the modern workplace would suffer if businesses were effectively barred from providing workplace enhancements that all workers should enjoy like healthcare or retirement savings. While it is true that some businesses may choose not to provide benefits to independent workers out of fear it could hinder their ability to retain permanent employees, these are choices businesses should be free to make to best attract the talent that they need while also accommodating workplace models that allow for greater worker flexibility.

In addition, The Final Rule should make clear that a worker’s opportunity to perform similar services for multiple businesses weighs in favor of independence, regardless of whether the worker exercises that right. Employees, generally, are immobile; they usually work for one employer or business. See *Sec’y of Labor, U.S. Dep’t of Labor v. Lauritzen*, 835 F.2d 1529, 1542 (7th Cir. 1987) (“The usual argument that workers are ‘dependent on employers ... is that they are immobile.”) (Easterbrook, J., concurring); see also *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1442 (10th Cir. 1998) (stating that, generally speaking, “[e]mployees’ usually work for only one employer”) (quoting *Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989).)

However, the opposite is true for independent workers; mobility is reflective of their control over their work. See *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 141-143 (2d Cir. 2017) (holding a worker’s opportunity or ability to simultaneously provide services to multiple entities, including competitors, demonstrates “considerable independence”) (quoting *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015) (“If a worker has multiple jobs for different companies, then that weighs in favor of finding that the worker is an independent contractor.”); *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998) (noting fact that “[t]he drivers can work for other courier delivery systems” supported independent contractor status); *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 171 (2d Cir. 1998) (affirming finding of independent contractor status when, inter alia, the worker “was allowed to sell merchandise on behalf of other companies”); *Freund v. Hi-Tech Satellite, Inc.*, 185 Fed.Appx. 782, 784 (11th Cir. 2006) (per curiam) (affirming district court’s finding that worker’s ability “to take jobs from” competitors, and to “take as many or as few jobs as he desired,” supported district court’s conclusion that there was not a “significant degree of permanence” in the relationship at issue).)

The ability to perform work for similar businesses, especially competitors, is evidence of independence, particularly the initiative of the worker to control their own work. Workers have

different reasons for how they structure their relationships with one or multiple businesses. Workers may provide themselves more freedom by working with multiple businesses whom they can source for work at their choosing, while other workers may find leverage in negotiating terms between multiple businesses. Many workers enter into relationships with multiple businesses to optimize their freedom and work opportunities. Ultimately, a worker's opportunity to work for other businesses is indicative of their freedom to be in business for themselves, regardless of whether they choose to do so.

Central to this factor is not whether the worker actually chooses to work for several businesses, but whether the nature of the relationship is such that the worker can provide services to others. Some workers may choose to work with only one business for myriad reasons, while other workers may choose to work for numerous businesses at the same time. The freedom to exercise a right is not undermined by choosing not to exercise the right; indeed, entailed in the freedom to choose is the freedom to make no choice at all. Accordingly, SHRM asks the Division to give equal weight to this consideration regardless of whether the worker actually exercises the right to work for others.

2. The Final Rule should include the following additional illustrations regarding worker control.

Worker control is ultimately about the manner and means through which the end-result is achieved. Accordingly, SHRM offers the following illustrations of worker independence to be included in the Final Rule:

- The worker's use of other contractors or service providers to either perform the entirety of the work, only subparts, or as support for the worker's performance (like administrative assistances, legal compliance, or financial services);
- The worker's ability to interface with customers or clients directly and without oversight for the duration of the service provided regardless of whether the business served to broker or initiate the relationship between the worker and customer;
- The worker's control over the manner of work performed including the sequencing of events or the equipment, supplies, or tools utilized; and
- The worker's control over when work will be performed where the bargained-for result does not specify a deadline for completion.

SHRM also recommends the Final Rule use the following as examples when business control is not present:

- The business's right to enforce provisions of the contract;
- The business utilizes employees to perform services that would otherwise be performed by the independent contractor in the event the independent contractor fails to perform;
- Control as to the timing of final results, such as deadlines;

- The business's communication or provision of customer specifications regarding the results desired;
 - The business's communication or provision of customer feedback and reviews regarding work performed; and
 - The business provides guidance regarding best practices that are not mandatory but that the business has found provides greater ease of performance or customer satisfaction.
- C. The Opportunity for Profit or Loss is an Appropriate Core Factor, but the Proposed Rule Should Eliminate the "Skill Required" Additional Factor and Incorporate It Into This Factor.**

The worker's opportunity for profit or loss based on initiative or investment, the Proposed Rule's second Core Factor, is an appropriate Core Factor. (See Proposed Rule at 60613). SHRM, however, asks that the Final Rule contain the following revisions to the Proposed Rule as well as the following additional illustrations.

"Skill Required" should not be an Additional Factor, but should instead be incorporated into the Opportunity for Profit or Loss Core Factor. To the Proposed Rule's discussion of a worker's business acumen as indicia of the worker's ability to impact their profit or loss, see Proposed Rule at 60613-14, the Final Rule should state that business acumen may cover a broad range of subjects including sales, customer service, marketing, distribution, communications, and other professional, trade, technical, and other learned skills, as well as other unique business abilities and acumen, including acumen that impacts a worker's ability to profitably run their own independent business.

For this reason, SHRM recommends that the Final Rule reject "skill required" as a stand-alone factor. Instead, "skill required" should be appropriately analyzed under the second Core Factor, the individual's opportunity for profit or loss. Analyzing "skill" as a stand-alone factor risks de-prioritizing essential hallmarks of independent work -- flexibility and freedom to provide services -- that do not necessarily entail specialized training or education.

As an initial matter, the Division itself has found that specialized skills are irrelevant to determining whether a worker is in business for themselves. See *e.g.*, WHD Opinion Letter FLSA 2019-6 (April 29, 2019) (holding that ridesharing drivers were independent contractors under the Act, and their exercise of managerial discretion and lack of training weighs in favor of independent contractor status). Accordingly, the Final Rule should reject the inclusion of factors that the Division itself contends hold very little, if any, weight.

Additionally, an emphasis on "skill required" to perform the work does not match the real-world experience of independent workers. Indeed, most independent workers do not emphasize their skills as the main reasons they engage in independent work. Rather, when asked to select among the top three reasons for becoming an independent worker, only 17% of independent workers said they did so because the type of work they do is mostly done by independent workers. (Ex. A, p. 18.) These workers instead explained they became independent workers because of the freedom it afforded them in terms of scheduling, hours, and location of work. Accordingly, the fact that they maintained a special skillset was not determinative of the reason they sought out independent work, and there is

no reason the Final Rule should adopt rulemaking inconsistent with the voluntary decisions of independent workers.

As SHRM's research shows, independent work encompasses a broad range of work-types, each of which contains varying levels of skills and abilities depending on the results requested through each worker's arrangement. (Ex. A, p. 6.) Many types of workers, like consultants, designers, drivers, artists, actors, photographers, and technology specialists likely do not possess certifications or degrees that would be indicia of so-called skilled work. Rather, these workers may be self-taught or have learned "on the job." Likewise, an independent worker's skill may actually be their expertise in using a platform or the techniques they acquired from understanding their own profit and loss. For example, rideshare drivers are able to provide services to multiple clients by moving back and forth on different apps that are open at the same time. A factor prioritizing skill over these workers' acquired acumen in choosing when, whether, where, and how long to work undermines the initiative exercised by these workers in promoting themselves and seeking opportunities.

3. The Final Rule should include the following, additional illustrations regarding worker opportunity for profit or loss.

The Final Rule should provide more clarity to workers, businesses, and courts by way of additional examples of worker investment and initiative that impact profit and loss, as follows:

- The worker's decisions in choosing amongst opportunities offered that impact profit and loss;
- The worker's losses suffered from receipt of customer complaints where the worker's results were below customer or contractual expectations;
- The worker's decisions in avoiding liquidated damages charges or indemnification obligations in the parties' agreement;
- The worker's own decision-making on whether to use other workers or services as helpers or substitutes as well as the use of related labor or specialties to assist in either the services provided, the tools and equipment used, or the maintenance of the worker's business structure;
- The worker's acumen regarding the delivery of services/products that result in enhanced profits through tips and other incentives;
- The worker's decision-making regarding the details and means by which they obtain supplies, tools, and equipment for use in their business, including choices regarding from whom to purchase these goods, how much of the goods are obtained at any one time, the quality of the goods, and the negotiated prices regarding said goods; and
- The worker's decision-making regarding investment in skills they deem necessary to achieve the desired results from their work, including education, certificates, or classes;

Additionally, SHRM also proposes that the Final Rule include the following explicit statements regarding facts that do not support a finding of dependency:

- Workers may experience financial losses as a result of cancellations of their service or the provision of service that does not meet customer expectations when the worker has flexibility to choose between work opportunities; and
- Even if the business sets the price of goods provided by the worker, that does not negate the worker's initiative when the worker controls the amount of time, when, and where they provide the services as well as the amount of the same service they chose to provide.¹⁰

D. The Following Revisions Would Strengthen The Proposed Rule's Additional Tie-Breaking Factors.

1. The Permanence Factor Should Focus on Whether the Relationship is Intended to be Indefinite; Otherwise the Factor Should be Eliminated.

The Proposed Rule's interpretation of permanence of the relationship factor does not speak to the independence or voluntariness of the business-worker relationship in any meaningful way and will, instead, promote instability in contracting. Accordingly, SHRM asks the Division to either revise the permanence factor as set forth below or eliminate it entirely.

SHRM asks that the Proposed Rule be revised to find a lack of permanence when independent workers and businesses enter into one or more contracts of a specific duration regardless of whether said contracts or terms are repeated or sporadic and regardless of whether performance relevant to the contract is sporadic within a specified term. A term of a specific duration, regardless of whether it is continuous with other specific terms, is evidence of independence. A relationship of indefinite duration, however, does not exist simply because parties have continued to contract with each other over a series of defined terms. Indefiniteness is determined by the absence of any term whatsoever. To this end, the Proposed Rule improperly focuses on the length of the relationship in the discussion of the permanence factor. (See Proposed Rule at 60615 - 60616 (stating an employment relationship may be found if the relationship is "continuous.")).

It is simply good public policy to encourage businesses to continue contracting with independent workers who provide good service without running the risk of creating a relationship the parties never intended. Workers and businesses require the freedom to enter into longer-term contracts or repeatedly renewed contracts without a finding of employment status. Indeed, the freedom to independently contract would be severely undermined if continued and repeated service based on a history of expected or stellar performance could render an otherwise fruitful relationship into one of control and economic dependency.

As written and reasoned, the Proposed Rule is unclear on how courts resolve the "permanence" issue when a worker and business have a seemingly continuous relationship but the work within that relationship is sporadic. For example, how would the rule determine permanence when a contract term is longer but the work performed pursuant to that contract is sporadic? Would the work be "regular" or "continuous"? (See Proposed Rule at 60621.)

¹⁰ See, e.g. WHD Opinion Letter FLSA2019-6 at 9 - 10.

SHRM recommends the Final Rule make clear that work is not permanent, regular, or continuous when a worker stops or starts at will or takes on as many projects as the worker pleases within a long-term contract. Flexible work within a lengthy relationship is a sign of independence rather than dependence. Indeed, the fact that a worker does not appear to rely on a single relationship is the very antithesis of dependence.

Because a focus on permanence either confuses or undermines the nature of and public policy benefits of independent work, SHRM suggests that the relationships between workers and businesses that respect the contracting structure and contain elements of independent business relationships should be considered in a revised Additional Factor that looks at the relationship of the parties. In codifying this Additional Factor, the Division should consider the following: (1) the existence of a written agreement between the parties; (2) a specific term to that agreement, whether in terms of years or specific beginning and end dates; (3) an agreement that states the rights and obligations of both parties; (4) an agreement that is subject to negotiation and an agreement that is entered into voluntarily by both parties; and (5) an agreement that allows for the workers to choose as many or as few projects as desired.

2. The Integrated Unit Factor Should Be Eliminated or Revised To Reflect The Emergence and Existence of Platforms as Marketplaces

The Final Rule should explicitly state that multi-sided platform companies that connect customers with potential independent workers are distinct entities that are not engaged in the work the independent worker performs. Platforms must be recognized as operating outside of an “integrated unit” involving the worker and not as “hiring” the independent worker. While the Proposed Rule properly rejects an analysis focused on whether the worker’s services are “integral” to a business, specific guidance is needed to ensure that it does not unnecessarily disrupt independent relationships that may form subparts of a specific unit and reflect the impact of technological change on consumer preferences and worker demand for expanded, flexible economic opportunities.

First, platforms are not part of an integrated unit with the worker who provides the actual service. A ridesharing platform, for example, provides a market for drivers and riders to find each other, but if a rider accepts a ride request and transports the rider, that is not part of one continuous integrated process, and one does not employ the other. Instead, these are distinct functions: the platform provides the match and the driver performs the transportation service via a platform and is not part of an integrated unit or production line. This distinction has long been recognized by the courts, agencies, and in academia. *See, e.g., Ohio v. American Express Co.*, 138 S.Ct. 2274, 2280, 585 U.S. — (2018) (discussing two-sided transaction platform); *see also* David S. Evans, *Matchmakers: The New Economics of Multisided Platforms* (2016); Hagiu, Andrei and Julian Wright, “Multi-sided platforms” *International Journal of Industrial Organization* 43, no. 1 (2015): 162-174 (hereafter, Hagiu and Wright (2015)), pp. 162-163.

Second, regulators have consistently recognized the distinctions between platforms and integrated units. As an initial matter, the Division itself recognizes these distinctions. Recently, the Division reiterated the position it has held “[f]or more than 40 years” that matchmaking services can exist without creating an employment relationship, finding that nurse or caregiver registries are not employers when they “match” people who need caregiving services with caregivers who provide the services. *See* Field Assistance Bulletin No. 2018-4, “Determining whether nurse or caregiver registries are employers of the caregiver,” (July 13, 2018).

In April 2019, the Division issued an Opinion Letter finding that a company was not the employer of service providers in consideration of “an online and/or smartphone-based referral service that connects service providers to end-market consumers to provide a wide variety of services, such as transportation,” as well as other services “that uses objective criteria to match consumers to service providers.” See FLSA2019-6 (April 29, 2019) (the “Opinion Letter”). Specifically, the Division found a lack of employment status because the company “does not receive services from service providers, but empowers service providers to provide services to end-market consumers. The service providers are not working for [the company]’s virtual marketplace; they are working for consumers through the virtual marketplace. They do not work directly for [the company] to the consumer’s benefit; they work directly for the consumer to [the company]’s benefit.” *Id.* at 7.¹¹

The Final Rule should make clear that these platform companies are not “intermediary companies,” whose operations with the worker providing services terminate at the point of connecting the independent worker to consumers, and do not extend to the independent worker’s actual provision of services. (Proposed Rule at 60617.) To eliminate any confusion, an explicit expression that the platform is not analogous to a production line is recommended in the Final Rule.

SHRM agrees with the Proposed Rule that analysis concerning the “integrated unit” factor should not focus on the “importance of services” provided, *see id.*, however, the Proposed Rule’s newly framed inquiry centered on an “integrated production process” is not helpful to assessing a worker’s independence and will likely lead to litigation without the clarifications sought here.

Alternatively, the Division should consider a replacement factor that has been utilized in state laws to accommodate different forms of external work. Specifically, the Division should consider including the phrase, “or, alternatively, that the worker is performing work, the majority of which is performed off the physical premises of the business.” Such phrasing provides insight into whether the work is actually integrated into the business unit and de-emphasizes a vague notion of “importance” that the worker’s services may provide.


IV. CONCLUSION

SHRM urges the Department to adopt the Proposed Rule subject to the suggested changes provided above. The Proposed Rule is necessary to provide certainty and consistency to businesses and workers. Independent work is an integral part of the US economy. Therefore, it is imperative that neither the business community or workers be hindered by outdated and restrictive rules and regulations.

¹¹ Aside from the Division, the National Labor Relations Board (“NLRB”) Office of General Counsel (“OGC”) concluded that rideshare drivers were independent contractors when they “provid[ed] personal transportation services using [a company’s] app-based ride-share platform were employees... or independent contractors” and concluded that the drivers were independent contractors. See NLRB Office of General Counsel Advice Memorandum (April 16, 2019) (the “OGC Advice Memorandum”).

The Proposed Rule will promote efficiency, flexibility, and freedom for all participants in the economy. SHRM appreciates the opportunity to offer these comments on the Proposed Rule.

Sincerely,

A handwritten signature in cursive script that reads "Emily M. Dickens". The signature is written in black ink and is positioned above the printed name and title.

Emily M. Dickens
Chief of Staff, Head of Government Affairs & Corporate Secretary