Owner-Operator Independent Drivers Association

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The Honorable Eugene Scalia
Secretary
United States Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Amy DeBisschop, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
United States Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Docket # WHD-2020-0007-0001, "Independent Contractor Status under the Fair Labor Standards Act" [RIN 1235-AA34]

Dear Secretary Scalia and Director DeBisschop:

The Owner-Operator Independent Drivers Association (OOIDA) represents over 150,000 owner-operators leased to motor carriers, small-business motor carriers with their own operating authority, and employee truck drivers that collectively operate more than 240,000 individual heavy-duty trucks. Therefore, we are in a unique position to offer an important perspective on Fair Labor Standards Act (FLSA) classification issues within the trucking industry.

As written, the Department's proposal unfortunately fails to clarify the classification of owner-operators under FLSA. While we appreciate the Department's efforts to work with and "sharpen" the existing test for FLSA classification, we believe the proposal leaves important questions unanswered and could have unintended consequences for independent owner-operators.

The trucking industry is incredibly diverse, and the Department's Notice of Proposed Rulemaking (NPRM) presents many questions that are often omitted from current discussions about worker classification. Instead, we have seen most of the focus on the classification of workers in the "gig economy." The owner-operator model predates recent developments in app-based work opportunities, and the Department must consider this long history before finalizing any classification rule.

Background

The owner-operator model has a well-established history and has provided millions of truckers the opportunity to be true independent contractors and small-business entrepreneurs. An independent owner-operator typically owns or leases their equipment, generally controls the terms of their work, and can increase their earnings through the sound management of their business. Independent owner-operators do not depend on any single business or motor carrier for their work or continued operation of their business. This description generally describes those owner-operators that are "in business for themselves." While the majority of owner-operators are in business for themselves and properly classified as independent contractors, there are also many motor carriers that misclassify drivers to take advantage of them.

The specific details of an owner-operator's situation can vary greatly from case to case because the trucking industry is incredibly diverse. There are two types of owner-operators. Some owner-operators obtain their own authority to operate as a motor carrier. Other owner-operators work with a carrier under a contractual lease agreement, where a trucker leases his or her equipment to a motor carrier and generally operates the equipment for jobs available through the carrier.

Owner-operators with their own authority generally offer a straightforward case of an independent contractor who is in business for him- or herself. These owner-operators seek out their own work or jobs, control their schedule, make investments in their equipment, are responsible for managing business and regulatory matters, and have the ability to provide their services to different businesses or clients without restriction. In essence, they are a one-truck motor carrier. Because these owner-operators have their own authority, they do not need to depend on any one carrier or business for work, but can work with brokers or directly with clients to get jobs. So long as a driver with their own authority isn't contractually beholden to or dependent on a specific business, they should almost always be classified as an independent contractor.

Owner-operators can also choose to work with a carrier by leasing their equipment to the carrier. In these situations, a trucker who owns or leases their equipment enters into a contract with a motor carrier for the purpose of leasing and operating their equipment. In this arrangement, a trucker leases their equipment to a carrier, and as part of the lease, agrees to operate that equipment under the motor carrier's authority.

A properly executed lease agreement recognizes the independence of the owner-operator by allowing them to choose their jobs (or not accept any at all), control how they will complete their work, and end their relationship with a carrier according to the terms of their negotiated lease. Independent leased-on owner-operators also have the ability to negotiate the rate for work included in their lease, and they can negotiate other compensation during their work with the carrier. Under these leases, a trucker is usually responsible for maintenance of their equipment and managing the business aspects of their operation. When done right, traditional lease arrangements offer truckers control over their work and the opportunity for profit or loss. When a leased-on owner-operator fits this description, they are in "business for themselves" and should be classified as an independent contractor. There are thousands of truckers who currently fit this

model, and any FLSA classification system must continue to regard them as independent contractors.

Federal regulations impose certain requirements for these leases, which must be taken into consideration for worker classification. Regulations require a lease contract to specify that the "lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease."[1] In other words, a motor carrier retains exclusive possession of an owner-operator's equipment. The regulations also state that the equipment exclusivity requirement is not "intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee,"[2] but it is not clear that this reference to "employee" necessarily includes employee classification under FLSA.

Federal leasing regulations also prohibit a carrier from requiring the lessor (owner-operator) to purchase or rent any products, equipment, or services from the carrier as a condition of entering into the lease arrangement.[3] This requirement, when included and practiced as part of a lease agreement, helps ensure that owner-operators have control over business decisions.

The federal leasing regulations are intended to govern owner-operator motor carrier agreements, and whether or not a motor carrier complies with these rules should be a determinative factor in whether the driver is an independent contractor.

While these are examples of owner-operators who are generally independent contractors, there are certainly some owner-operators who are misclassified as independent contractors. In trucking, this is generally done through "lease-purchase" agreements which are schemes where motor carriers lease a truck to a driver with the promise of fair compensation, future ownership of the truck, and "independence" from traditional employer-employee requirements. The most problematic lease-purchase schemes are generally those that require the lessor (truck driver) to lease their truck to the motor carrier when the motor carrier and lessee are effectively the same entity. In essence, employers are able to lease a truck to a driver, which the driver leases back to the motor carrier in return. Lease-purchase schemes can only be described as indentured servitude – drivers are paid pennies on the dollar, will likely never own the truck, and have zero independence. In these situations, there is no opportunity for a driver to make a profit. Lease-purchase schemes are the most egregious form of worker misclassification in trucking, and any final rule should weigh in favor of classifying these drivers as employees or outright prohibit this flawed model.

We appreciate the Department's effort to offer a classification test that attempts to work within the existing criteria for FLSA. We also appreciate that the Department's proposal seeks to consider the full context of a worker's circumstances, instead of automatically applying a broad classification. Small-business truckers oppose any radical departure from current practice that would upend their business model and potentially put them out of work. While the existing criteria for FLSA classification is not perfect, it has generally allowed owner-operators to run their businesses independently and offered some, yet insufficient, recourse against

[1] 49 CFR § 376.12(c)(1)
[2] 49 CFR § 376.12(c)(4)
[3] 49 CFR § 376.12(i)

misclassification. Unfortunately, as it is written, we do not believe that the Department's proposal will lead to greater clarity for classifying owner-operators under the FLSA.

OOIDA submits the following comments in response to the Department's NPRM to revise its interpretation of independent contractor status under the FLSA:

As detailed below, we believe that the proposal leaves open questions about how owner-operators, especially leased-on owner-operators, who are currently independent contractors would be classified under the economic reality test. While we agree with the Department that the two main factors, control and opportunity for profit or loss, should be given greater weight, we believe the NPRM doesn't offer clear enough guidance for examining these two factors.

We also agree with the Department's approach to give less weight to the remaining three factors. For owner-operators, these remaining three factors, especially the "permanence" and "integrated unit" factors, often do not indicate whether they are in business for themselves. But we again believe that there is ambiguity on these three factors in the NPRM that would not produce a clear answer given the diverse conditions in the trucking industry. Furthermore, the Department offers no guidance on how these three factors should be balanced against one another.

Control Factor

We agree with the Department that an individual who has substantial control over the terms of their work is likely to be an independent contractor. If an individual is able to exercise discretion over the performance of work, set their own schedule, select their projects, or work for other businesses, then we generally believe that this individual is likely to be an independent contractor.

The Department's proposal should be clearer on how to determine whether an individual has substantial control over their work. The proposal mentions specific criteria, such as schedule setting, project selection, and the ability to work for others, but offers no guidance on how these issues should be weighed against each other. Does the department intend that a worker must satisfy all of the criteria that it mentions in order to be an independent contractor, or is there some other balance when evaluating this factor? For example, if an individual is able to negotiate rates, control their scheduling, accept or decline jobs, and control performance of work, but is effectively required to work for a single business during a period of time, how would the determination be made? While the NPRM says that "no single factor [of the economic reality test] is dispositive,"[4] it does not offer the same clarification when considering the details within a single factor.

One criteria of the "control" factor that is particularly important for owner-operators is the exclusivity of a working arrangement. Existing case law suggests that the exclusivity of the relationship between a driver and hiring business should remain relevant but not determinative of employee status. The exclusivity of the driver's relationship with a hiring entity has never, standing alone, precluded the finding of independent contractor status. This is true of two of the

[4] Wage and Hour Division, *Independent Contractor Status under the Fair Labor Standards Act NPRM*, 85 Fed. Reg. 60,639 (September 25, 2020).

cases discussed by the Department in its NPRM, *United States v. Silk*, 331 U.S. 704 (1947) and *Herman v. Express Sixty-Minutes Delivery Service, Inc.*, 161 F.3d 299 (5th Cir. 1998). More recently, in *Franze v. Bimbo Bakeries USA, Inc.*, No. 19-2275-cv, 2020 WL 5523548, at *2 (2d Cir. Sept. 15, 2020), the Second Circuit held that delivery drivers were independent contractors despite a non-compete provision that prevented the drivers from driving routes and carrying products for competing companies. *Id.* According to the court, "[i]f there were fewer facts demonstrating Bimbo's lack of influence . . . the non-compete clause—combined with the fact that [the drivers] solely carried Bimbo's products—might be of more consequences." *Id.* Similarly, in *Nichols v. All Points Transport Corp.*, 364 F.Supp.2d 621, 633 (E.D. MI. 2005), the district court held that although the company "maintains exclusive 'possession, control and use over' the leased equipment and drivers are not permitted to haul for other companies while their contract remains in effect," the drivers were still independent contractors because "they are free to end their exclusive deal at any time." *Id*; *see also Express Sixty-Minutes Delivery Service*, 161 F.3d at 306 (explaining that in *Silk* the "contract was terminable at any time by either party"). The "exclusive nature of the business relationship is not [ ] determinative." *Id.*

An interpretation of the "control" factor that focuses solely on exclusivity is contrary to prevailing case law, and would run counter to the decisions the Department cites in support of its proposed rule. It is, at best, one of several considerations within the "control" factor. Instead, the Department should prioritize the ability of drivers to set their own schedule, including not working at all, and the ability to terminate any agreement with a carrier without limitations on subsequently working for competing carriers.

The courts have also taken another factor into account to evaluate the exclusivity of the driver's relationship with the hiring entity: is the driver tied to the truck or is the driver free to hire assistants or substitute drivers? In *Franze*, the Second Circuit emphasized "the ability to hire others to run the business is evidence of the type of 'considerable independence and discretion' that supports a finding of independent contractor status." 2020 WL 5523548, at *1 (quoting *Saleem v. Corporate Transportation Grp., Ltd.*, 854 F.3d 131,143 (2d Cir. 2017)). The ability to hire other assistants or substitute drivers was also taken into account by the Supreme Court in *Silk*, 331 U.S. at 719, and *FedEx Home Delivery v. N.L.R.B.*, 563 F.3d 492, 499 (D.C. Cir. 2009). There are many owner-operators who have the ability to hire other drivers to operate their equipment. This is just another way in which truckers who work exclusively with one carrier for a period of time have control over their work and are operating their own business.

We have additional concerns about the "exclusivity" factor as it relates to leased-on owner-operators. As described earlier, federal regulations require that an owner-operator leases his or her equipment exclusively to a carrier for the duration of the lease. Even though existing regulations state that this requirement shouldn't impact employee classification, it isn't clear how this reference to "employee" extends to FLSA classification. We understand that the Department's proposal provides a clarification that "requiring the individual to comply with specific legal obligations…does not constitute control,"[5] but it is not exactly clear how this would be interpreted by courts in light of the newly proposed test.

[5] Ibid.

There are some examples of owner-operators who do not have control over their work, such as those who operate under "forced dispatch." Under forced dispatch, a driver is basically told what loads to take and when they must take them, and he or she lacks the ability to decide what work would be best to take. Forced dispatch should weigh in favor of employee status.

Opportunity for profit or loss

We believe there is significance in evaluating a worker's ability to make a profit or loss when determining their FLSA status. A successful owner-operator is able to make a profit through their knowledge of the industry, investment in and maintenance of equipment, negotiating compensation, and making wise decisions about what jobs to take, among other factors. When these characteristics are present, they should favor an owner-operator being classified as an independent contractor. While we agree that the opportunity for profit or loss is important to examine generally, the Department should make improvements to this criteria in the NPRM to ensure that truckers are properly classified.

We believe that this factor should be clarified in order to eliminate misclassification in the trucking industry. As described earlier, some predatory motor carriers use lease-purchase agreements to trap drivers in an unprofitable relationship. In these situations, drivers sign agreements where they are essentially making lease payments back to the carrier for whom they work. Under lease-purchase agreements, drivers are often not allowed to end their lease or take their truck to drive with another carrier until they have finished paying off the truck. In other words, they can only work for that single carrier while they are paying off the lease. Carriers misclassify these drivers as independent contractors.

The Department should also modify its NPRM to clarify that any requirement that a worker must purchase services or equipment from the business for which they work should weigh in favor of employee status, as is already addressed in federal leasing regulations for the trucking industry. These are not the types of business investments that indicate independence or control over decision-making.

At the same time, the mere fact that an individual purchases equipment or services from a business they work with **does not** necessarily indicate an employee relationship. There are many owner-operators who choose to make purchases from the business they are leased to because it is a good deal. For example, an owner-operator may be able to get a group discount on their tires if purchased through the carrier they are leased to. Owner-operators who freely make these choices are making their own business decisions, which indicates both control over and investment in their business.

We are also concerned that the timeline for determining profit or loss is not clarified in the NPRM. Motor carriers that take advantage of drivers through a lease-purchase agreement are likely to argue that a driver's opportunity for profit is merely a few years in the future, and that this full timeline must be considered. This is a fallacy. OOIDA has worked with far too many drivers who are never able to realize independence or profitability after entering into a lease-purchase.

Skill

Owner-operators generally have the necessary specialized training, skills, licensing, and certifications before they begin work as an independent contractor. Typically, a trucker will gain years of experience in the industry working as an employee driver before starting as an owner-operator. At this point, they have the specialized licenses, training, and other experience to operate their own business, and further skills training is not provided by the businesses with which they are working.

Permanence

For owner-operators, there is not necessarily any connection between the period of time that a driver is engaged with a business for work and their status as an independent contractor. An owner-operator may work with a single business for an extended period of time because it is in the trucker's interest. During this time, they still exercise control over their work and the operation of their own business.

We would argue that an owner-operator can be an independent contractor even if they are in a long-term or automatically renewing lease. Just because an owner-operator has a lease with one carrier for an extended period of time does not mean that they can only work for that carrier, or that they are dependent on that carrier for work.

Integrated Unit

We agree with the Department that the importance of an individual's work to a business should not be determinative of employee status. This is especially important for owner-operators. Owner-operators perform work that is important or arguably at the core of what a motor carrier does – namely transporting goods. The fact that an owner-operator performs work that is important for the motor carrier has no bearing on whether they are in business for themselves. As previously explained, owner-operators can have all the characteristics typical of a business. Therefore, the importance of their work to a business should in no way dictate whether they are an employee or independent contractor.

However, we have questions and concerns with the Department's formulation of the "integrated unit" factor. In the trucking industry, independent owner-operators offer their services directly to carriers or businesses for the transportation of goods. It is not clear whether courts would determine that the work of an owner-operator is part of a businesses' integrated process or service, or whether they are undertaking a distinct job. Because courts have generally interpreted "integral" to mean importance, there is a lack of precedent to determine how the new "integrated" meaning may be interpreted.

The analysis of the integrated unit factor may vary depending on the situation in which a trucker operates, even though the trucker may be performing the exact same service. For example, an owner-operator could transport a trailer from one point to another for a carrier, and that trailer could later be moved by an employee of the carrier to complete the larger job. In this scenario, we believe it could be argued that the owner-operator is an integrated part of a carrier's services

and therefore an employee. This situation may be similar to the Department's description of "an integrated process that requires the coordinated function of interdependent subparts towards a specific unified purpose."[6] The next day, that same owner-operator could transport a trailer along the same route for the same carrier, but the trailer is not moved or handled by the carrier after that. In this case, it seems more likely that the owner-operator would be an independent contractor.

Given this ambiguity, we support the Department's proposal to give the "integrated unit" factor diminished weight. The first two factors are much more likely to point to whether a trucker is in business for themselves, and the "integrated unit" factor is only useful when examined in conjunction with the "core" criteria.

Rejection of the ABC Test

We support the Department's rejection of the "ABC Test" as adopted in AB5 by California. This test is overly broad, unnecessarily restrictive, and could potentially completely upend the owner-operator business model. This test would assume that all workers are employees unless they can demonstrate that they meet specific criteria. The California legislature has seen fit to exempt about 50 professions and industries from this more stringent test, which we believe demonstrates the failures of this approach.

The push to enact AB5 and the ABC Test in California was largely an effort to address issues in the "gig economy" and new work arrangements available through phone-based applications. The debates on this legislation mostly ignored the long history of the owner-operator model and the benefits that truckers have enjoyed through their ability to operate as an independent contractor. As a result, some owner-operators in the state have already seen disruptions to their business. The Department must separate the history of the owner-operator model from new work arrangements to avoid these unintended consequences.

Prong B of the ABC test, which requires that the worker performs work outside the usual course of the hiring entity's business, is most problematic for owner-operators. As already discussed, the mere fact that an individual performs work that is important or central to a business's work does not indicate whether that individual is economically dependent on that business. If an owner-operator has control over all aspects of their work and has the opportunity to increase earnings based on their business acumen or investments, then they are likely in business for themselves.

The presumption of a worker as an employee is also problematic. While California's classification law does provide for a limited business-to-business exemption, we believe it would be difficult, if not impossible, for independent owner-operators to satisfy each and every one of these criteria. If an owner-operator is unable to meet this high standard, then they are automatically an employee.

[6] Ibid., pg. 60,618

Impact on number of independent contractors in the trucking industry

Given the questions and uncertainties outlined above, it is unclear what impact this NPRM would have on the number of independent contractors in the trucking industry. If the Department moves forward with this proposal without clarification, it will undoubtedly create confusion among our members about whether they can continue to operate as independent contractors.

Cost Savings

We are skeptical that this proposal would lead to cost savings for owner-operators, especially since the Department assumes these savings will result from greater certainty and less litigation. If anything, we expect that there may be an increase in litigation as various entities seek to define the new test factors through the courts.

Conclusion

OOIDA has long advocated for a classification structure that offers truckers the opportunity for true independence to operate their own small businesses, while protecting them against carriers that seek to take advantage of them through misclassification. This is a difficult task, given the diverse nature of the industry and the ability for carriers and truckers to enter into many different types of working arrangements.

We are concerned that some portions of the Department's NPRM push true independent owner-operators toward classification as an employee and other aspects of the proposal do not recognize certain conditions under which motor carriers control their drivers and should support an employee determination. Adopting OOIDA's recommendations to the NPRM would help provide greater clarity for truckers if the Department moves forward with this rulemaking.

Sincerely,

Todd Spencer
President & CEO
Owner-Operator Independent Drivers Association, Inc.