Owner-Operator Independent Drivers Association

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April 12, 2021

The Honorable Martin J. Walsh
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 "Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal" [RIN 1235–AA34]

Dear Secretary Walsh 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.

We oppose the Department's Notice of Proposed Rulemaking (NPRM) to withdraw the final rule titled "Independent Contractor Status Under the Fair Labor Standards Act." The classification of individuals in the trucking industry under FLSA is a complex issue. While it is difficult for any rule to account for every situation or completely clarify this issue, we believe that the final rule set to go into effect on May 7, 2021 would provide some new level of certainty within the trucking industry. The Department's rule as originally proposed in its NPRM left open questions about the rule's effect, but we believe the Department's comments in the final rule adequately addressed these concerns. We also believe that the final rule offers a classification test that appropriately works within the existing criteria used for FLSA classification. We request that the Department make some improvements to the final rule, but it should not move forward with a complete withdrawal.

We support the final rule's clarification that no single factor should be dispositive when determining a worker's classification status. Working arrangements in the trucking industry are extremely diverse, and having any single disqualifying factor or criteria would likely upend the owner-operator model. At the same time, we support the final rule's decision to afford the "control" and "opportunity for profit or loss" factors greater weight in a classification determination. These two factors get to the heart of whether an individual is in business for him or herself. For owner-operators, the other three factors described in the rule, especially the "permanence" and "integrated unit" factors, often do not indicate whether they are in business for themselves.

We also generally support the final rule's clarification that "requiring the individual to comply with specific legal obligations…does not constitute control,"[1] but believe that the Department expanded this provision too broadly in the final rule. This provision is important to leased-on owner-operators because federal regulations impose certain requirements for the leases they enter into with a carrier. Specifically, 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."[2] In other words, a motor carrier retains exclusive possession of an owner-operator's equipment. These requirements could indicate control, and therefore it is important that the classification rule accounts for this.

At the same time, in a change made in the final rule, the Department added an example that expands "specific legal obligations" far beyond the scope of specific legal requirements. The Department referenced a motor carrier that required an owner-operator to use speed-limiting devices, and clarified that these requirements would not constitute control for the purposes of classification. The Department claimed that because speed limiting technology allegedly complies with specific safety regulations, requiring their use should not be considered "control" under the new rule.

The Department has erred significantly in adding this example. Speed limiters have the potential to jeopardize road safety, and they in no way comply with any specific legal mandate. Furthermore, speed limiters directly take control of a truck out of a driver's hands, and have a direct negative impact on an owner-operator's productivity and ability to make business decisions since they can prevent truckers from operating at established speed limits. As written, we believe the final rule would allow carriers to require owner-operators to set their limiters under the posted speed limit. Speed limiters are not part of any federal safety requirement or regulation. DOL is in no position, and has exceeded its jurisdiction, by dictating what they believe would improve road safety.

While requiring the use of speed limiters is harmful enough on its own, we believe this example opens the door for carriers to control their owner-operators in numerous other ways. Allowing a carrier to claim that any requirement they implement is to improve safety would allow them to exert significant control over an individual while basically being exempted from the control factor. For example, if a motor carrier required their owner-operators to attend safety meetings

[1] Wage and Hour Division, *Independent Contractor Status under the Fair Labor Standards Act Final Rule*, 86 Fed. Reg. 1,247 (January 7 ,2021).
[2] 49 CFR § 376.12(c)(1)

and training alongside the motor carrier's employees in the name of safety, the final rule as written would not allow the Department to consider this factor for control. Taking this situation one step further, it seems possible that a motor carrier could limit the times of day an independent contractor could work and the number of jobs they could complete in a month, claiming that they found these restrictions helped to improve safety. Therefore, the Department should remove this example from the final rule, but continue to allow for "specific legal obligations."

We would like to be clear that requirements in a lease agreement for speed limiters or other practices do not necessarily indicate that an individual is an employee or that the requirement constitutes control in a working relationship. Instead, we believe that these factors should be considered alongside all other factors in determining the control that a motor carrier exerts over an owner-operator. The example contained in the final rule would prevent this.

As the Department has proposed withdrawing this rule, we expect there will be calls to replace it with a radical redefinition of "employee" under FLSA. If the Department does consider formulating a new classification system, we are adamantly opposed to the ABC Test as adopted in AB5 by California, or any other similar test. Specifically as to owner-operators in the motor carrier industry, the ABC Test is overly broad, unnecessarily restrictive, and would likely upend the owner-operator business model.

Prong B of the ABC Test is most problematic for leased-on owner-operators because they are performing work that is in the usual course of the hiring entity's business – hauling freight by truck. Because they are unlikely to satisfy Prong B, leased-on owner-operators would be classified as employees if they want to continue working with carriers. Otherwise, these owner-operators will have to obtain their own operating authority, insurance, and incur numerous other expenses in order to operate as a motor carrier.

It is very unlikely that the advocates of the ABC test anticipated that it would effectively eliminate the use of independent contractors in any industry. Perhaps that is why the California legislature has seen fit to exempt about 50 professions and industries from this more stringent test. We believe this demonstrates a significant failure to this one-size-fits all approach.

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. The specific details of an owner-operator's situation can vary greatly from case to case because the trucking industry is incredibly diverse. Very broadly, 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.

Throughout its NPRM to withdraw the Independent Contractor Rule, the Department cites numerous precedents that highlight no single factor is determinative of a worker's status under FLSA. We agree with this assessment, and it is all the more reason why the Department should

not pursue the ABC Test. Under this test, failure to satisfy any single "prong," or criteria, would automatically classify an individual as an employee.

If the Department does withdraw this rule and considers a future rulemaking regarding FLSA, we believe there are misclassification issues that could be addressed. In the trucking industry, the most egregious misclassification is often done through "lease-purchase" or "lease-to-own" agreements. These 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 if the Department does address FLSA classification in any future rulemaking, it should find a solution to remedy these problems.

We believe that classification issues in the trucking industry are best addressed through adjustments to the existing system. We therefore urge the Department to address issues contained in the existing final rule, but oppose its full withdrawal.

Sincerely,

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