Owner-Operator Independent Drivers Association

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December 13, 2022

The Honorable Marty 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-2022-0003, "Employee or Independent Contractor Classification under the Fair Labor Standards Act" [RIN 1235-AA43]

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.

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. There has been increasing confusion and litigation resulting from various attempts to broadly define workers as employees over the past decade, most notably California's AB5. The Department of Labor's unresolved efforts regarding FLSA classification of employees or independent contractors have also failed to yield any long-term clarity for small-business truckers. We would support a final rule that protects a business model that has benefitted truckers for decades. However, any final rule must address shortcomings included in this proposal that could misclassify drivers and jeopardize their ability to work as independent contractors.

As with nearly all other classification proposals in recent years, it is difficult for us to determine the full implications of the Department's Notice of Proposed Rulemaking (NPRM) and what it

would mean for professional drivers and owner-operators. We do know truckers are tired of the seemingly endless parade of new classification rules coming from legislators and regulators that have largely disregarded their concerns and preferences. The trucking industry is incredibly diverse, and the owner-operator model predates recent developments in app-based work opportunities. The Department must consider this history before finalizing any classification rule.

We support the Department's stated approach that seeks to examine all aspects of a working relationship and makes clear that no one factor is dispositive. We also support the Department's stated intent to follow decades-long practices for classification under the FLSA. This has let owner-operators to work as independent contractors and we generally support policies that allow truly independent owner-operators to continue to do so. We also support the Department's decision to remove one of the "examples" that was included in the final version of the 2021 Independent Contractor Rule.

With that said, the success or failure of this proposal will depend on its specifics and how it is implemented and interpreted. We have concerns that some of the details offered in the Department's proposal depart from practices that have long been considered indicative of independent contractor status.

The proposal's goal to examine the totality of the circumstances and clarifying that no one factor should receive more weight than any other can be helpful in examining the extremely diverse working arrangements in the trucking industry, but by its nature, this approach could be seen as lacking clear direction or guidance. Therefore, it is important that the Department address questions and concerns that we will identify in these comments.

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 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 most 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 federal authority granted by the U.S. Department of Transportation (DOT) to haul freight in interstate commerce as a motor carrier. Others 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 motor carrier 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 directly contract with brokers or with shippers to get jobs. So long as a driver with their own DOT 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 when and 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 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. Given the NPRM's stated intent to adhere to decades of practice and the FLSA's compatibility with independent contractors in trucking, this should strongly indicate that most owner-operators should not see any changes under this rulemaking.

Federal regulations impose certain requirements for these leases, which must be taken into consideration for worker classification. See generally, 49 CFR Part 376. 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] As we will discuss later, explicit and specific legal obligations, especially this one that includes a disclaimer that it does not affect classification status, must not be an indication of control in the Department's proposal.

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

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 classifying the driver as an independent contractor. These rules recognize the importance of the owner-operator to the trucking industry and were promulgated to strengthen, support, and preserve this economic model in the trucking industry.

While these are examples of owner-operators who are generally independent contractors, there are certainly some owner-operators who are misclassified as independent contractors. One blatant example of misclassification in trucking are "lease-purchase" 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 a properly functioning classification rule would not allow the drivers in such agreements to be classified as independent contractors.

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

As a general matter, the Department should make clear that workers are unlikely to be reclassified as a result of this rule, especially for industries and business models that are well-established. If it is the Department's intent that this rule should uphold practices that were in place for years before the 2021 Independent Contractor Rule, then we believe any final rule should confidently state that most workers would not see a change.

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.

[3] 49 CFR § 376.12(i)

We believe that cases from trucking can demonstrate the nuances of the industry. For example, in situations where a worker is required to 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. 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 profitable 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 and skill. We believe that the NPRM's totality-of-the-circumstances approach should be able to distinguish between these types of situations. In other words, it is critical that the rule advance an approach that looks at the specifics of each situation to determine if the actions demonstrate whether someone is "in business for themselves."

We believe that the 2021 Rule may have opened additional opportunities for truckers to fall prey to lease-purchase schemes by stipulating that an individual only needed to exhibit exercise of initiative or management of investment for the factor to weigh towards the individual being an independent contractor.[4] The formulation of the factor may have dismissed predatory leasing arrangements because an owner-operator otherwise exercised some initiative in the management of their work. The evaluation of such arrangements must also include how the motor carrier interacts with the owner-operator to implement the agreement in practice. We support the NPRM's approach of looking at all factors.

Investment

We have significant concerns with the Department's discussion of the investment factor, and it must provide clarification or changes to ensure that independent owner-operators are not improperly designated as employees. These positions are consistent with long-standing practice and case law.

The NPRM states that "costs borne by a worker to perform their job (*e.g.,* tools and equipment to perform specific jobs and the workers' labor) are not evidence of capital or entrepreneurial investment and indicate employee status." OOIDA is concerned that this statement might be construed as saying that the purchase or financing of equipment like a truck or trailer does not weigh in favor of independent contractor status since this equipment is used to complete a job. At the same time, the Department also cites *Cromwell v. Driftwood Electrical Contractors, Inc.* as an example of a case where a substantial investment in trucks, tools, and equipment weighed in favor of independent contractor status. Here, the Department must better clarify between the "tools and equipment" that are used by a worker to perform specific jobs and may not indicate independent contractor status with the "capital and entrepreneurial" investments that do. However, that distinction is defined and the typical owner-operator's capital investments are

[4] 86 FR 1247.

significant and entrepreneurial in nature. Therefore, they should weigh in favor of independent contractor status.

Owner-operators invest significant money in their operations, especially in their trucks. The most recent data available shows that the average cost for a used Class 8 tractor is over $90,000.[5] This is clearly a much more significant investment than the gloves or other items that the Department cites in the NPRM.

Providing a truck is at the core of the owner-operator model, and there are specific federal regulations that govern the lease of these trucks by workers to motor carriers. As already mentioned, these regulations provide the opportunity for workers to be independent contractors in these arrangements. Given that federal regulations already provide a framework for these types of investments to be part of an independent contractor relationship (see 49 CFR Part 376), it would be a mistake for the Department's classification rules to mean that such substantial owner-operator investments in their equipment weigh in favor of employee status.

As the Department suggests, however, the investment factor should not alone determine the outcome of the economic reality test. Looking at another common aspect of trucking involving investment, there are instances where an owner-operator may pull a trailer that is provided by the carrier. There are even situations in which an owner-operator with their own authority (i.e., a one-truck motor carrier) will pull another company's trailer. There are still many owner-operators that provide their own trailer, including truckers that invest in equipment not commonly owned by carriers. An owner-operator may choose a type of equipment, such as a refrigerated trailer with a drop deck, that is more expensive but less common, and offers them a greater opportunity for profit.

The economic reality test must look beyond the fact that a worker is making an investment and determine how or why these decisions are made. It is impossible to categorically state that using a different company's trailer, or even one that the owner-operator provides, is indicative of employee or independent contractor status. In addition to being a large capital investment, these investments may involve management decisions or business skill.

Aside from the size of the investment in their equipment, owner-operators who have their own truck can have the ability to decide what carriers they would like to contract with. In other words, investment in this equipment enables them to operate like an independent business capable of moving from one business to another, while negotiating better rates or working terms.

We also object to the NPRM's requirement to examine a worker's investment in relation to the alleged employer. Motor carriers range in size from a single truck to a fleet of thousands. Owner-operators currently work as independent contractors with carriers across this spectrum. We don't believe there is much value in examining a worker's relative investment. If all other factors are equal, it doesn't make sense that an owner-operator would be an independent contractor if they are working with a three-truck carrier but then be judged differently if they go to work for a carrier with hundreds or thousands of trucks. If the driver is performing the same work, has the same control over their work, exercises the same skill, and so on, their relative investment should

[5] https://www.ttnews.com/articles/used-class-8-prices-continue-slide-june-remain-high

not determine if they are in business for themselves and should have no bearing on their classification status.

The Department must address all these concerns to ensure any final rule does not wrongly deny owner-operators the ability to work as an independent contractor.

Permanence of a work relationship

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. Again, we would argue that each individual case must be examined in its totality.

Many owner-operators work with a single carrier for an extended period of time, but may do so for very different reasons. The question is whether the owner-operator is in a long-term relationship with a motor carrier because it has been an economically healthy and profitable relationship, or rather, is the owner-operator so indebted or economically reliant upon the motor carrier that they cannot extricate themselves from the relationship? For example, some may be exercising managerial discretion in staying with a carrier that allows them to maximize their profits, whereas another may be effectively prevented from leaving a carrier because of a predatory lease-purchase agreement. We ask that the Department make clear that these underlying factors must be examined, not just the superficial appearance of the arrangement or contract.

Nature and Degree of Control

Generally speaking, independent owner-operators exercise significant control over their work in a way that indicates that they are in business for themselves. This includes the ability to determine their schedule and complete their work free of supervision.

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 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.*

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 NPRM's requirement that factors related to control should not be excluded as irrelevant only because they are required by legal obligations.[6] As mentioned earlier, there are federal regulations that govern certain terms of an owner-operator's lease with a carrier, and one of these requirements is that the carrier shall have exclusive possession, control, and use of the equipment for the duration of the lease.[7] The regulations go on to state that these requirements are not "intended to affect whether the … driver … is an independent contractor or an employee of the authorized carrier lessee. *An independent contractor relationship may exist when a carrier lessee complies with* [the leasing regulations] *and attendant administrative requirements"* (emphasis added).[8] As Congress explained when it authorized this regulatory scheme, the carrier's right and duty to control the owner-operator's vehicle (and the requirement of the motor carrier to maintain public liability insurance for the operation of the vehicle) was for the express purpose of ensuring the carrier's responsibility for the public safety. See Amendments to the Interstate Commerce Act, Public Law 84-95; H.Rep. No. 84-2425, reprinted in 1956 U.S.C.C.A.N. 4304, 4309; see also *White v. Excalibur Ins. Co.* , 599 F.2d 50, 52 (*citing Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc.*, 423 U.S. 28 (1975)); *Am. Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, (1953); *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972). The intent of these regulations was not to change the independent contractor nature of the relationship.

[6] 87 FR 62247
[7] 49 CFR 376.12 (c)(1)
[8] 49 CFR 376.12 (c)(4)

An interpretation of the "control" factor that focuses solely on exclusivity is contrary to prevailing case law. 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. We believe the totality-of-the-circumstances approach the Department has proposed should be able to account for this, but given the NPRM's extensive discussion of exclusivity, we believe it is important to stress this point.

More broadly, the trucking industry operates in a highly regulated environment. With its diversified nature, it falls under the jurisdiction of numerous federal and state agencies, including:

- Federal Motor Carrier Safety Administration (FMCSA)
- Pipeline and Hazardous Materials Administration (PHMSA)
- Substance Abuse and Mental Health Services Administration (SAMHSA)
- National Highway Safety and Transportation Administration (NHTSA)
- Federal Highway Administration (FHWA)
- Food and Drug Administration (FDA)
- All 50 states have their own specific regulations which can and do impose requirements for intrastate trucking.

Owner-operators are subject to numerous obligations as a result. For example, nearly all trucks are required to have an electronic logging device (ELD), or if hauling hazardous materials, Tyvek suits. The fact that a lease agreement addresses these requirements or stipulates that the driver provides this equipment does not necessarily weigh in favor of employee status. The fact that a federal or state regulations impose specific requirements does **not** necessarily indicate business exercising control over a worker. As previously mentioned, an experienced owner-operator will be familiar with the regulations and understand that this needs to be provided to operate legally.

The Department must clarify that compliance with a **specific** legal obligation should not be considered as a factor related to control, especially when there is a regulation that states this factor is not determinative of an employee or independent contractor relationship. Entering in to a lease that complies with federal regulations can be just as much of a decision made by the owner-operator as it is the business they're working with. In fact, it would be evidence of bad business operations if an owner-operator failed to understand and comply with the law.

At the same time, we support the Department's decision to repeal the example included in the 2021 Rule that expanded "specific legal obligations" far beyond the scope of specific legal requirements, which had the effect of excluding important factors from consideration under the control factor. In this example, the Department said that if a trucking company requires an owner-operator to use a speed limiter, this requirement would be to "comply with specific legal

obligations and to ensure safety, and thus under § 795.105(d)(1)(i) would not constitute control that makes the owner-operator more or less likely to be an employee under the Act."[9]

The Department erred significantly in adding this example. Speed limiters have the potential to jeopardize road safety, and in no way comply with any specific regulatory 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.

While promoting speed limiters is harmful enough on its own, we believe this example opened 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 authorize 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 and training alongside the motor carrier's employees in the name of safety, the 2021 Rule would not allow the Department to consider this fact at all. Similarly, a motor carrier may be able to claim that the use of an ELD is required by the safety rules, but any use of that device to control the driver for purposes other than compliance with the Hours-of-Service rules should not be exempted from classification consideration.

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 Department's totality-of-the-circumstances must support this approach.

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 to take. Forced dispatch should weigh in favor of employee status.

Extent to which the work performed is an integral part of the employer's business

The fact that an owner-operator performs work that is important for the motor carrier should not determinative of whether they are in business for themselves. As previously explained, owner-operators can have all the characteristics typical of an independent, entrepreneurial business whose success is based on the owner-operator's decisions separate from that of the motor carrier. Therefore, the "integral part" rule should not be as simplistic as the tomato farm example provided in the NPRM. When so many other factors supporting an owner-operator's independence are present, the importance of their work to a business should in no way dictate whether they are an employee or independent contractor. An August 2022 decision by the U.S. Court of Appeals for the Tenth Circuit provides a good example of how the "integral part" analysis may weigh in favor of employee classification, but under "the six-factor "economic realities" test under the totality of the circumstances" the drivers were classified independent

[9] 86 FR 1247

contractors. *Merrill v. Harris*, No. 21-1295, 2022 WL 3696669, at *14 (10th Cir. Aug. 26, 2022), *citing Baker v. Flint Engineering & Construction Co.*, 137 F.3d 1436, 1440-41 (10th Cir. 1998).

Skill and Initiative

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. The final rule must explain that the examination of a worker's skill must extend to all of the individual's responsibilities, not just the appearance.

The NPRM states that "numerous courts have found that driving is not a specialized skill, indicating employee status."[10] However, both the *Razak* and *Campos* cases cited to in the NPRM were focused on automobile driving, not the driving of a commercial motor vehicle. The discussion surrounding this point makes it unclear whether the Department believes the driving skills required for a Class A Commercial Drivers License (CDL) are not specialized. The knowledge and skill required to obtain this license and safely operate an 80,000-pound truck far exceed the "routine life skills" that the Department cites. Therefore, to the extent the final rule establishes specifically or explains by example that driving is not a skilled job, OOIDA urges the Department to recognize and acknowledge that driving truck is a specialized skill.

We also believe it is important that the concept of managerial skill is considered alongside other factors of the proposed test. To take one example, truckers have numerous options about how they purchase fuel. They can purchase fuel at market price or become members of a fuel card program that offers them discounts at different fuel retailers. Many owner-operators make decisions on which fuel card program to use, or whether to use one at all, based on the geographic location of their operations and types of discounts offered, among other factors.

In addition to purchasing fuel, owner-operators make many decisions about their truck's specifications and how they tailor their equipment to meet the demands of their operating model. Tire size, gear and rear-end ratios, engine size, transmission, and other decisions are made by an operator and are an example of management skills as they manage their cost of operations to be successful. They continually evaluate their operations in order to make the most efficient use of their equipment.

To relate this to the Department's discussion of the investment factor, it is difficult to say that the purchase of fuel is simply an investment to complete a particular job without examining whether a worker is exercising a business-making decision. If an owner-operator has purchased a fuel card that gives them a discount in their operating area, which ultimately benefits them by reducing their costs, this is evidence that the worker is acting as an independent business. This is in contrast to an employee driver that uses a company card for fuel without regard for how their decision affects their, or their employer's, earnings.

[10] 87 FR 62255

For these reasons, it is critical that the Department clarify that conducting the economic realities test must look beyond the surface to see if a worker is exercising business skills or managerial decisions. The NPRM makes multiple references to the need to assess all factors, but for example, under the discussion of investment, the Department seems to dismiss investments expedient to perform a particular job as not indicative of independence.[11] While the purchase of fuel may seem to be an investment only to complete a job, how these decisions are made can be the difference between a successful and unsuccessful business. The NPRM cautions against conducting an analysis of the economic reality factors like a checklist, and it is critical that *all* factors and circumstances of each case are fully examined to avoid doing this.[12]

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 is creating difficulties and confusion for the owner-operator business model. This test assumes 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.

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.

We believe the Department is correct in its assessment that the ABC Test is not consistent with the history of the FLSA because it establishes independently determinative factors.

Need to address FLSA Overtime Exemption

While drivers benefit from being properly classified, these benefits are limited because of an outdated provision in the FLSA. The FLSA contains an exemption that denies employee truck drivers guaranteed overtime pay.[13] Drivers are most frequently paid by the miles they drive, which means they don't have to be paid for all the hours they spend working, e.g. waiting to be

[11] 87 FR 62241
[12] 87 FR 62236
[13] 29 USC § 213(b)(1)

loaded or unloaded, or stuck in traffic. As a result, shippers, receivers, and others throughout the supply chain have little to no incentive to compensate and respect all of a driver's time.

To improve compensation and working conditions for employee drivers, this exemption should be repealed. While this policy change is outside the scope of this rulemaking and the Department's discretionary authority, we believe it is important to highlight as the Department considers its policy priorities more broadly. The Department of Transportation recommended that this exemption be repealed in a report assessing the supply chain[14], and we urge the Department to support this policy as it considers ways to help workers.

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.

Any final rule must address the concerns we have outlined above to ensure that independent owner-operators can continue to use a business model that has benefitted truckers for decades as well as ensure that drivers are protected from misclassification.

Sincerely,

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

[14] U.S. Department of Transportation, Supply Chain Assessment of the Transportation Industrial Base: Freight and Logistics, pg. 85. https://www.transportation.gov/sites/dot.gov/files/2022-03/EO%2014017%20-%20DOT%20Sectoral%20Supply%20Chain%20Assessment%20-%20Freight%20and%20Logistics_FINAL_508.pdf