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March 15, 2021

To: Clients and Friends

From: David F. Dulock

Subject: Proposed Withdrawal of Independent Contractor Status Under the Fair Labor Standards Act (FLSA) Rule

In the March 12, 2021 issue of the *Federal Register* (86 FR 14027), the Wage and Hour Division (WHD) of the Department of Labor published a notice of proposed rulemaking (NPRM), with a request for written comments, proposing to withdraw the final rule titled "Independent Contractor Status under the Fair Labor Standards Act" (the Rule) published on January 7, 2021. The Rule is the subject of our memorandum dated January 25, 2021 posted on the firm website: https://www.bmandg.com/.

You may submit written comments, identified by Regulatory Information Number (RIN) 1235–AA34, on the NPRM by either of the following methods:

- *Electronic Comments:* Submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Address written submissions to Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW, Washington, DC 20210.

Written comments must be submitted on or before April 12, 2021.

The WHD's reasons for proposing to withdraw the Rule are explained in the NPRM, which are summarized below:

A. The Rule's Standard Has Never Been Used by Any Court or by WHD, and Is Not Supported by the FLSA's Text or Case Law.

The WHD is concerned that the Rule is in tension with the language of the FLSA as well as the position, expressed by the Supreme Court and in appellate cases from across the Circuits, that no single factor is determinative in the analysis of whether a worker is an employee or independent contractor and, as such, questions whether the Rule's "core factor" approach is supportable.

In light of the Supreme Court directive to consider as employment relationships under the FLSA a broader scope of relationships than those where the employer sufficiently controls the work, the outsized role that control would have if the Rule's analysis were to apply may be contrary to the FLSA's text and case law.

The WHD is concerned that the Rule's treatment of the economic reality factors in §795.105(d) of the Rule would improperly narrow the application of the economic realities test—*i.e.*, "an employee, as distinguished from a person who is engaged in a business of his own, is one who as a matter of economic reality follows the usual path of an employee and is dependent on the business which he serves."

The Rule eliminates from the economic realities test several facts and concepts that are important in the courts' and WHD's application of their analysis. For this reason, the WHD is also concerned that the Rule's approach is inconsistent with the court-mandated

totality-of-the-circumstances approach to determining whether a worker is an employee or an independent contractor.

As a policy matter, the WHD is concerned that the Rule's narrowing of the analysis would result in more workers being classified as independent contractors not entitled to the FLSA's protections, contrary to the FLSA's purpose of broadly covering workers as employees.

B. Whether the Rule Would Provide the Intended Clarity.

One of the Rule's primary stated purposes is to clarify how to distinguish between employees and independent contractors under the FLSA. But because the Rule would make numerous changes to an economic realities test that courts and the WHD are familiar with applying, courts and the WHD could struggle with applying the Rule's new concepts. Thus, the WHD is uncertain whether the Rule would provide the clarity that it intends.

C. The Costs and Benefits of the Rule, Particularly the Assertion That the Rule Will Benefit Workers as a Whole.

The WHD does not believe the Rule fully considered the likely costs, transfers (from workers to employers), and benefits that could result from the Rule. This is premised in part on WHD's experience with cases involving the misclassification of employees as independent contractors. The consequence for being classified as an independent contractor is that the worker is excluded from the protections of the FLSA. Without the protections of the FLSA, workers need not be paid at least the federal minimum wage for all hours worked and are not entitled to overtime compensation for hours worked over 40 in a workweek.

The WHD also questions whether a rule that could increase the number of independent contractors effectuates the FLSA's purpose, recognized repeatedly by the Supreme Court, to broadly provide employees with its protections.

D. Withdrawal Would Not Be Disruptive Because the Rule Has Yet to Take Effect.

The WHD has not implemented the Rule. Courts have not applied the Rule. Affected parties are functioning under the existing law and should not be negatively affected by continuing to do so.

E. Effect of Proposed Withdrawal.

Title 29 CFR Part 795 will not take effect. The text of §§ 780.330(b) and 788.16(a) will remain unchanged. Withdrawal of the Rule would allow WHD an additional opportunity to consider legal and policy issues relating to the FLSA and independent contractors.

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