April 27, 2026

Andrew Rodgers, Administrator
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

RE: Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act; Docket No. WHD-2026-0001; RIN 1235-AA50 (91 Fed. Reg. 9932, February 27, 2026)

Dear Administrator Rodgers:

The National Small Business Association (NSBA) submits this comment in response to the Department of Labor's (DOL) proposed rule on Employee or Independent Contractor Status Under the Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA), and Migrant and Seasonal Agricultural Worker Protection Act (MSPA). NSBA is the nation's oldest small-business advocacy organization, representing more than 65,000 members across every state and industry sector. For nearly nine decades, NSBA has served as a nonpartisan voice for the small-business community before Congress, the Executive Branch, and federal agencies supporting efforts that foster the growth, strength, and impact of small businesses.

As small-business champions, NSBA supports the Proposed Rule's effort to establish a clearer, more administrable standard for worker classification grounded in economic reality and actual workplace practice. At the same time, we urge the Department to consider the cumulative toll that repeated, administration-by-administration reversals of classification standards have taken on the small-business community.

The cycle of regulatory whiplash surrounding independent contractor status has imposed real costs, not only in dollars spent on compliance, but in foregone opportunities for businesses and workers alike.

To that end, NSBA strongly encourages the Department to work with Congress to codify the core elements of this Proposed Rule in statute to provide the durable, administration-proof certainty that small businesses deserve, and stands ready to help advance these efforts.

I. Support for the Proposed Rule's Substantive Framework

NSBA agrees with the Department's assessment that the 2024 Rule's six-factor totality-of-the-circumstances test, in which no factor carried greater weight than any other, failed to provide effective guidance on worker classification. A test with no clear hierarchy of factors produced unpredictable outcomes and had a chilling effect on legitimate independent contractor arrangements, increasing both litigation exposure and compliance costs for small firms in industries like construction, consulting, transportation, technology, and the gig economy.

Elevating the nature and degree of control over the work and the worker's opportunity for profit or loss as the two most reliable factors indicating economic dependence and thus, employment status, provides a more structured analytical framework aligned with longstanding Supreme Court precedent on economic dependence. When both core factors point toward the same classification, the resulting presumption offers small businesses the practical guidance they need to make classification decisions with confidence. NSBA also commends the Department's decision to treat actual workplace practice as more probative than theoretical or reserved contractual rights. Clarifying that compliance with legal obligations, health and safety standards, and quality-control requirements does not constitute the type of control indicative of employment is an important distinction, especially for small businesses in regulated industries.

II. The Cost of Regulatory Whiplash

While NSBA endorses the substance of the Proposed Rule, we believe it is critical for the Department to acknowledge and address the broader pattern of instability that has defined independent contractor classification since the start of the 21st century. The independent contractor standard under the FLSA has now been the subject of eight significant regulatory actions across five administrations: 1.) Bush 2008 Fact Sheet #13, 2.) Obama 2015 Administrator's Interpretation No. 2015-1, 3.) Trump 2017 withdrawal of Interpretation No. 2015-1, 4.) Trump 2019 Opinion Letter FLSA2019-6, 5.) Trump 2021 Final Rule, 6.) Biden 2024 Final Rule, 7.) Trump 2025 Field Assistance Bulletin No. 2025-1, and 8.) Trump 2026 Proposed Rule.

For small-business owners, this cycle of reversal represents a fundamental threat to the regulatory predictability on which sound business planning depends.

NSBA's own survey data consistently show that regulatory uncertainty ranks among the top concerns of small-business owners. The 2025 NSBA Small Business Regulations Survey found that the independent contractor rule was identified as burdensome by a significant share of respondents. Critically, only one in ten small businesses have dedicated staff to monitor the regulatory landscape, meaning that each change in classification standards imposes a disproportionate burden on the smallest firms. When the rules shift every few years, small-business owners must invest repeatedly in legal consultations, update contracts and compliance procedures, and reassess existing workforce arrangements.

The consequences of this instability extend beyond compliance costs. Regulatory whiplash discourages small businesses from engaging independent contractors at all, even in arrangements that are clearly lawful under any version of the standard. When business owners cannot be confident that today's compliant classification will remain compliant in two or four years, many choose to avoid the risk entirely. This chilling effect limits opportunities for the very workers who prefer the independence, flexibility, and entrepreneurial potential that contractor status provides. Moreover, the practical impact of any single DOL rule may be limited by circuit courts' own classification case law and the absence of Chevron deference, further underscoring the need for durable, broadly supported standards rather than rules likely to be reversed with each new administration.

III. Conclusion

NSBA supports the Proposed Rule's return to a clearer, more structured classification framework that prioritizes the two most probative factors within the broader economic reality analysis. This framework is more administrable, more predictable, and better aligned with both judicial precedent and the practical realities of modern work arrangements.

At the same time, NSBA urges the Department to recognize that clarity of substance alone is insufficient if the regulatory framework remains vulnerable to wholesale reversal with each change of administration and suggests the Department take concrete steps to ensure lasting stability.

We encourage the Department to work with Congress to codify the core elements of the economic reality test in statute as a legislatively enacted standard that is far more resistant to administrative reversal and can provide long-term certainty no single rulemaking can achieve.

We appreciate the opportunity to comment on this important rulemaking and look forward to working with the Department to achieve worker classification standards that protect workers, support small-business growth, and endure across administrations.

Respectfully,

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