
Docket No. WHD-2020-0007-1802

COMMENTS

of

WASHINGTON LEGAL FOUNDATION

to the

**WAGE AND HOUR DIVISION,
DEPARTMENT OF LABOR**

Concerning

**INDEPENDENT CONTRACTOR STATUS UNDER
THE FAIR LABOR STANDARDS ACT:
DELAY OF EFFECTIVE DATE**

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED
AT 86 FED. REG. 8,326 (February 5, 2021)

John M. Masslon II
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

February 23, 2021

WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

February 23, 2021

Submitted Electronically (<http://www.regulations.gov>)
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division, U.S. Department of Labor
200 Constitution Ave. NW
Room S-3502
Washington, DC 20210

**Re: Independent Contractor Status Under the Fair
Labor Standards Act: Delay of Effective Date,
Docket No. WHD-2020-0007-1802**

Sir or Madam:

On behalf of Washington Legal Foundation, please consider this comment responding to the invitation for comments at 86 Fed. Reg. 8,326 (Feb. 5, 2021). WLF appreciates the opportunity to weigh in on whether the Department of Labor should delay implementation of the Final Rule, *Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. 1168 (Jan. 7, 2021). As explained below, DOL should not delay implementation of the Final Rule. Delay would upend the regulatory certainty critical to economic growth.

Last year, DOL published a proposed rule—*Independent Contractor Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 60,600 (Sept. 25, 2020). After carefully considering over 1,700 comments, DOL published the Final Rule earlier this year. Then mere weeks before the March 8, 2021 effective date, DOL invited comments on whether it should delay the Final Rule's effective date.

The only explanation offered for the proposed delay of the Final Rule's effective date is that the new administration is reviewing the Final Rule. But this is immaterial under the Administrative Procedure Act. After a rule is published, notice-and-comment rulemaking is necessary to change that rule.

This notice-and-comment rulemaking process is critical to regulated entities. It ensures that they can plan for upcoming regulatory changes and begin transitioning to the new rule. The proposed delay, however, goes against these basic administrative-law principles. DOL should therefore not delay the Final Rule's effective date.

I. Interests of WLF

WLF is a nonprofit, public-interest law firm and policy center based in Washington, DC, with supporters nationwide. WLF devotes much of its resources to defending free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears before federal tribunals supporting economy-boosting employment rules. *See, e.g., In re Velox Express, Inc.*, 2019 WL 7584332 (N.L.R.B. Sept. 30, 2019); *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (2019); *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

WLF also regularly submits comments to federal regulatory agencies, including DOL, on proposed rulemaking. *See, e.g.,* WLF Comment, *In Re Standards For Determining Joint-Employer Status* (Jan. 14, 2019); WLF Comment, *In Re FTC Study Of Digital Technology Market Merger Review*, (Nov. 19, 2018).

WLF's Legal Studies Division, WLF's publishing arm, often produces and distributes articles on a wide array of legal issues related to DOL regulations. *See, e.g.,* Nathaniel M. Glasser *et al.*, *Joint Employment Liability: What Administrative Agencies' Rule Revisions Mean For Employers*, WLF LEGAL BACKGROUNDER (Mar. 6, 2020); Stephen T. Melnick, *Courts Deliver Mixed Bag On Federal Law's Preemption Of State Independent Contractor Standards*, WLF LEGAL OPINION LETTER (Mar. 1, 2019); Michael J. Lotito, *Predictable, Uniform Standard Needed For Who Is A Joint Employer*, WLF LEGAL BACKGROUNDER (May 19, 2017).

II. Delaying Implementation of the Final Rule Will Harm the Economy Because of Regulatory Uncertainty.

For the past five months—since the Proposed Rule was published—regulated entities have been busy preparing for the Final Rule’s implementation. *See, e.g.*, Charles Read, *Changing Independent Contractor Rules Explained*, Forbes (Dec. 2, 2020), <https://bit.ly/3av4wSt>. Delayed implementation is not as simple as continuing under current DOL guidance. Many companies spent significant capital anticipating the impending change. For example, companies have bought more inventory and leased more space so that they could use independent contractors to expand their businesses. They did so in the midst of the worst economic downturn in years and uncertainty about whether or when the economy would return to normal. It has yet to do so.

Delaying implementation of the Final Rule will cause even more uncertainty. What should companies planning to expand their businesses by hiring independent contractors do now? Risk an FLSA action if they follow the Final Rule’s guidance? Or waste the time, energy, and money they spent in preparing for the March 8, 2021 effective date?

Many smaller companies will risk FLSA liability in the hopes that DOL does not reverse its decision to follow the FLSA’s plain text. They will risk liability because doing otherwise would cause immediate bankruptcy. Larger, established companies may decide the risk is not worth it. Those companies will see rented space go unfilled and inventory go to waste. Again, during an unprecedented economic downturn, this is not what the regulated community needs.

No, in these trying times the regulated community needs certainty. In fact, that is why DOL issued the Final Rule. *See* 86 Fed. Reg. at 1168 (DOL issued the Final Rule “to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy”). Experts agree with DOL that this regulatory certainty is important to economic growth.

The then-Chairman of the Federal Reserve testified before Congress that regulatory uncertainty hurts economic growth. *See* Senate Budget Committee, *Testimony of Chairman Ben Bernanke*, YouTube (Feb. 7, 2012), <https://bit.ly/380rMXv> (starting at 4:30). The IMF’s chief economist has echoed

those sentiments. KR Srivats, *Policy certainty, structural reforms are key to growth: IMF's Gita Gopinath*, The Hindu Business Line (Dec. 20, 2019), <https://bit.ly/3n0eM8x>. Others agree. See Leonard J. Kennedy & Heather A. Purcell, *Wandering Along the Road to Competition and Convergence—the Changing CMRS Roadmap*, 56 Fed. Comm. L.J. 489, 547 (2004); *Administrative Law—Judicial Review of Treasury Regulations—Federal Circuit Invalidates A Treasury Regulation Under State Farm for Lack of Contemporaneous Statement of Justification—Dominion Resources, Inc. v. United States*, 681 F.3d 1313 (Fed. Cir. 2012), 126 Harv. L. Rev. 1747, 1754 n.46 (2013).

It is also troubling that DOL provided only 19 days for comments on the proposed delay. This attempt at stifling well-founded concerns should not become DOL's new normal. All stakeholders should have adequate time to offer thoughtful comments that DOL reviews before making final decisions.

DOL is rushing to finish the Final Rule's delay before it takes effect on March 8, 2021. But that is reason not to delay the rule; it is a reason to move forward with the Final Rule. Every day that passes without regulatory certainty is another day the regulated community cannot plan for its future.

* * *

The proposed delay to the Final Rule's effective date invites an economic calamity. It will further impede a return to normal. And this roadblock to economic growth comes with no legal rationale for why delay is necessary. DOL should stay the course and allow the Final Rule to take effect on March 8, 2021.

Respectfully submitted,

John M. Masslon II
SENIOR LITIGATION COUNSEL

Cory L. Andrews
GENERAL COUNSEL & VICE
PRESIDENT OF LITIGATION