

WASHINGTON LEGAL FOUNDATION
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Division of Regulations, Legislation, and Interpretation

Wage and Hour Division

U.S. Department of Labor

Room S-3502

200 Constitution Avenue, N.W.

Washington, D.C. 20210

Re: 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)
(Docket No. WHD-2026-0001)

Dear Sir or Madam:

Washington Legal Foundation (WLF) welcomes the opportunity to comment on the Department's proposed regulations on employee or independent contractor status.¹ WLF is a public-interest law firm and policy center promoting free enterprise, individual rights, limited government, and the rule of law. As part of that mission, WLF commented on prior efforts by the Department to modify these same rules.²

At the outset, WLF acknowledges that providing ironclad guidance here is no easy task. The FLSA offers no clarity on the employee/independent-contractor dichotomy.³ Almost satirically, the statute archly observes that "the term '*employee*' [generally] means any individual *employed* by an *employer*."⁴ That puts all the

¹ 91 Fed. Reg. 9932 (Feb. 27, 2026).

² *E.g.*, *WLF Comment*, "Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date," Wage & Hour Div., U.S. Dep't of Lab., Docket No. WHD-2020-0007-1802 (Feb. 23, 2021).

³ "The Supreme Court has recognized that 'there is in the [FLSA] no definition that solves problems as to the limits of the employer-employee relationship under the Act.'" 91 Fed. Reg. at 9932 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947); brackets in original).

⁴ 29 U.S.C. § 203(e)(1) (emphasis supplied).

pressure on the meaning of the word “employ,” which the statute avers “includes to suffer or permit to work”⁵—archaic language adopted from state statutes regulating child labor.⁶ And “no matter how impenetrable” the FLSA’s definition may be,⁷ the Supreme Court’s binding caselaw defines an “employee” under the FLSA through a non-exhaustive, multifactor balancing test⁸—the “economic reality” standard.⁹

So the Department’s regulations must keep faith with an ambiguously interpreted ambiguous statute. And it’s critical that they do, because everyone agrees that “the Fair Labor Standards Act does not apply in the absence of an employer-employee relationship.”¹⁰ Knowing where the line is matters.

The “two most valuable resources” for both firms and contractors are “their time and their ability to try new things.”¹¹ Unnecessary compliance with federal rules eats away at both, while uncertainty as to the law sandpapers each firm’s ability to “make long-term plans and long-term investments.”¹² A zigzagging legal regime—where successive administrations keep subbing in their own preferred reading of a murky statute—offers the worst of all worlds.¹³

That kind of whiplash governance is also unconstitutional. “A fundamental principle in our legal system is that laws which regulate persons or entities must give

⁵ 29 U.S.C. § 203(g).

⁶ *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

⁷ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024) (quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018)).

⁸ “[W]hen an appellate judge comes up with nothing better than a totality of the circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact finding.” Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180–81 (1989).

⁹ “It is comforting to know that ‘economic reality’ is the touchstone. One cringes to think that courts,” the Department, or employers, must consider the FLSA “on the basis of economic fantasy.” *Sec’y of Lab., U.S. Dep’t of Lab. v. Lauritzen*, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).

¹⁰ *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961) (Whittaker, J., dissenting).

¹¹ Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* 411 (2018).

¹² *Id.* at 258.

¹³ 91 Fed. Reg. at 9936–38 (describing various rulemakings conducted by Department of Labor about this issue).

fair notice of conduct that is forbidden or required.”¹⁴ Such governance legally survived at the sufferance of *Chevron* deference, which gave agencies permission to ping-pong. Under *Chevron*, courts had to bless the novel (or recycled) regulation if it wasn’t obviously wrong.¹⁵

But in *Loper Bright*, the Supreme Court “placed a tombstone on *Chevron* no one can miss.”¹⁶ Agencies can’t toggle back and forth any longer. They must—taking care to also apply binding Supreme Court caselaw—implement “the best reading of the statute” when producing new regulations.¹⁷ If the agency’s reading “is not the best, it is not permissible.”¹⁸

The Department successfully did so here. The agency can’t jettison the caselaw requiring a multifactor standard—and it hasn’t. But the new rules correctly center the “economic reality” analysis on the laborer’s dependence on an employer. That’s intuitive—economic *independence* should be the touchstone when assessing whether a worker is an *independent* contractor. But that’s also likely the best reading of the FLSA’s definition of “employ.” Around the time of the FLSA’s adoption, the legal meaning of “sufferance” and “permission” plainly meant “dependent on another.”¹⁹

From that insight, the heartland inquiries follow. Who has “substantial control over key aspects of the performance of the work”—the employer or the individual?²⁰ Can the individual “earn profits or incur losses based on his or her exercise of . . . business acumen or judgment?”²¹ Or is “the individual unable to affect his or her

¹⁴ *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

¹⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

¹⁶ *Loper Bright*, 603 U.S. at 417 (Gorsuch, J., concurring) (tense altered).

¹⁷ 603 U.S. at 400.

¹⁸ *Id.*

¹⁹ *E.g. NLRB v. Fainblatt*, 306 U.S. 601, 613 (1939) (“If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce . . . the authority of the state over its domestic concerns would exist only by sufferance of the federal government”) (quoting *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935)); *Schneider v. Town of Irvington*, 308 U.S. 147, 161 (1939) (“[T]his court held void an ordinance which forbade the distribution by hand or otherwise of literature of any kind without written permission from the city manager”).

²⁰ Proposed 29 C.F.R. § 795.105(d)(1)(i).

²¹ *Id.* § 795.105(d)(1)(ii).

earnings” other than by simply “working more hours or faster?”²² As the Department’s guidance about non-core factors demonstrates, the answer to those questions won’t always be dispositive—but they often will be. In short, *Loper Bright* scrutiny may be relentless, but the Department’s work should survive it.

Two other aspects of the Department’s proposal merit praise. First, harmonizing the relevant FLSA regulatory definition with the FMLA’s and MSPA’s is just good housekeeping. Both statutes expressly adopted the FLSA’s definition of “employ.”²³ The regulations should do likewise. The Department’s proposal to get rid of potential surplusage is an excellent one.

Second, proposed 29 C.F.R. § 795.115 supplies useful examples of how the Department will practically apply the statutory definition of “employ” when assessing whether a given worker is an employee or an independent contractor. While those examples can’t cover every contingency, each one brightens the lines drawn by the rest of the regulation. That kind of clarity is always welcome.

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The proposed rules rightly interpret and rightly explain. The Department should implement them.

Respectfully submitted,

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²² *Id.*

²³ 29 U.S.C. § 2611(3) (FMLA); 29 U.S.C. § 1802(5) (MSPA).