

AMERICAN PAYROLL ASSOCIATION

December 12, 2022

Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W. - Room S-3502
Washington, DC 20210
www.regulations.gov

Re: NPRM, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, RIN 1235-AA43, 87 *Fed. Reg.* 62218 (Oct. 13, 2022)

Dear Ms. DeBisschop

The American Payroll Association (APA) submits these comments and questions on the U.S. Department of Labor Wage and Hour Division's (WHD) proposed rule, "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" (FLSA) published at 87 *Fed. Reg.* 62218 (Oct. 13, 2022).

The APA's primary concern is regarding overlapping definitions of employee and independent contractor among federal and state agencies. We recognize that the WHD's jurisdiction falls within the FLSA. However, the WHD's interpretation impacts how payroll professionals, and their employers manage compliance of wage and hour and taxation laws not only under the federal laws and regulations but also state and local jurisdiction's laws and regulations. Consideration of these impacts is appreciated.

ABOUT THE APA

Established in 1982, the APA is a non-profit organization serving the interests of more than 20,000 payroll professionals nationwide. One of the APA's core missions is providing representation for payroll professionals at the federal, state, and local levels. This is done primarily through APA's Government Relations Task Force in which members educate government and community leaders about the payroll industry and the best practices associated with paying America's workers.

COMMENTS AND RECOMMENDATIONS

Conflicting Definitions with the Internal Revenue Service

The APA is concerned with the conflicting definitions of employee and independent contractor between the proposed WHD rules and the common law definition used by the Internal Revenue Service (IRS). The table below are the factors. Currently, there are many different “tests” that employers and both agencies use to determine whether an individual falls under the “employee” or “independent contractor” umbrella. In some situations, these tests can yield different results for the same individuals. While aspects of the proposed WHD regulations overlap with the IRS, they are not the same and can leave employers in a grey area. Thus, the APA asks the WHD to better coordinate the definition of an independent contractor with the IRS.

IRS	WHD
The extent to which the worker can realize a profit or loss.	Opportunity for profit or loss depending on managerial skills (NPRM § 795.110(b)(1)).
The extent to which the worker has unreimbursed business expenses.	
The extent of the worker's investment.	Extent to which the work performed is an integral part of the employer's business (NPRM § 795.110(b)(5)).
The extent to which the worker makes his or her services available to the relevant market.	Nature and degree of control (NPRM § 795.110(b)(4)): overview of control factors, scheduling, supervision, setting a price or rate for goods or services, and the ability to work for others.
How the business pays the worker.	
	Degree of permanence of the work relationship (NPRM § 795.110(b)(3)).
	Skill and initiative (NPRM § 795.110(b)(6)).
	Additional factors (NPRM § 795.110(b)(7)).

Conflicting Definitions with States

The APA is also concerned with the conflicting issues that exist between the federal government and state and local jurisdictions (both wage and hour and unemployment taxes).

Since states are responsible for certain aspects of employment regulations (i.e., unemployment taxes on wages paid employees,) they also set forth their own policies on employee versus independent contractor. The ABC test is currently used by 28 states to determine if a worker is an employee or independent contractor, while 16 states use the

IRS' common law test, and the remaining states/territories use variations of the ABC test. With this wide variation within the states, it also leads to some conflicts when determining if a worker is an employee or independent contractor between the states and territories and the federal government. It is possible for the same individual to be categorized as an employee at the federal level and an independent contractor at the state level for the same work.

Again, APA understands different jurisdictions and responsibilities; however, to the extent possible, preempting state definitions would help employers.

SUMMARY

The APA makes the following recommendations:

1. The APA asks that the WHD work with the IRS to clarify the definitions of employee and independent contractor such that they are similar in nature.
2. The APA asks that the WHD require states and other jurisdictions to use its rules to make it consistent across all levels.

Thank you in advance for your consideration. The APA can be reached through Adam Prinzo at 516-761-2919 or aprinzo@americanpayroll.org.

Sincerely,

Adam Prinzo
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For: Government Relations Task Force
Federal Issues Subcommittee
Cochairs Rebecca Harshberger, CPP, and Jon Schausten, CPP