April 28, 2026

Andrew Rogers
Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Submitted electronically via https://www.regulations.gov

RE: Notice of Proposed Rulemaking, Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act; RIN 1235-AA46; Docket No. WHD-2026-0001

Dear Administrator Rogers:

The CHRO Association (the "Association") welcomes the opportunity to submit the following comments in response to the Wage and Hour Division's ("Department") Notice of Proposed Rulemaking ("NPRM") regarding employee or independent contractor status under the Fair Labor Standards Act ("FLSA"), the Family and Medical Leave Act ("FMLA"), and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA").[1]

The CHRO Association represents the chief human resources officers of more than 350 of the largest corporations doing business in the United States and globally. Collectively, these companies employ more than 10 million employees in the United States — nearly nine percent of the private sector workforce — and 20 million employees worldwide. The Association's member companies are committed to ensuring that laws and policies affecting the workplace are sound, practical, and responsive to the needs of the modern economy.

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[1] Notice of Proposed Rulemaking: Independent Contractor Status under the Fair Labor Contracts Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, 91 Fed. Reg. 9932 (Feb. 26, 2026).

Executive Summary

The Association strongly supports the Department's proposal to rescind the 2024 Rule and readopt, with minor modifications, the analysis promulgated in the 2021 Rule. Worker classification is among the most consequential questions in modern labor and employment law, and the reliability of that analysis directly affects the ability of American businesses to organize their operations, engage specialized talent, manage fluctuations in demand, and compete globally. It also directly affects the ability of millions of workers to choose the working arrangements that best fit their skills, circumstances, and preferences.

The Proposed Rule provides a clearer, more focused, and more consistently applicable framework for determining worker classification. Its emphasis on two "core" factors — control over the work and the opportunity for profit or loss — reflects how federal courts have in practice resolved most classification questions, and its primacy-of-actual-practice provision properly directs the inquiry toward what the parties actually do rather than what contractual language or other circumstances might theoretically permit. The Association similarly supports adopting a uniform standard across the FLSA, FLMA, and MSPA. A single, consistent analysis across federal employment laws that share definitions of employment is long overdue and creates clarity and consistency for all stakeholders.

Finally, the Association strongly advocates for the creation of a safe harbor – or equivalent clarification – which allows employers to voluntarily offer contractors certain benefits (such as healthcare) without converting the contractor into an employee under federal law. More and more states are passing laws and/or are creating pilot programs that enable employers to provide contractors with such benefits, and the federal government should follow their lead in this respect.

The Association Supports the Proposed Rule and Its Two-Factor Approach

The economic realities test, and its two-factor formulation as laid out in the Proposed Rule, provides much needed clarity and consistency to worker classification – a historically murky and inconsistent area of employment law. While several federal circuit courts use some form of the economic realities test, which factors are considered, their number, and the respective weight given to each can vary considerably. In conjunction with varying interpretations, guidance, and rulemakings from the Department of Labor over the years, the result has been a legal framework that provides little predictability for employers, employees and contractors. The Proposed Rule's approach provides a simple, clear framework that distills well-established common law principles of worker classification and decades of precedent applying the economic realities test (in various forms) into two primary factors of focus.

- **Direct, actually exercised control should be dispositive in most cases**

The Department specifically invites comment on whether to further streamline the two-core-factor analysis by considering control first and, where the potential employer exercises the type of control associated with employment, treating that determination as dispositive. If the control factor indicates independent contractor status or is neutral, the analysis would then proceed to opportunity for profit or loss and, if necessary, the remaining factors.

The Association supports this further streamlining. Actually exercised, direct, and immediate control — who sets the schedule, who determines how the work is performed, whether the worker is free to reject assignments, whether the worker may work for others (including competitors), and whether the worker may use his or her own tools, equipment, or vehicles — is typically dispositive of whether a working relationship is one of economic dependence, and therefore an employer-employee relationship.

In the overwhelming majority of cases, when a potential employer exercises the type and degree of control ordinarily associated with employment, no further inquiry is necessary to conclude that the individual is an employee. Conversely, when the worker exercises substantial control over how, when, where, for whom, and on what terms the work is performed, the relationship is almost always one in which the worker is in business for himself or herself. Recognizing that reality in the regulatory text would materially advance the predictability and administrability sought by the Department in this rulemaking (as in 2021).

- **The primacy-of-actual-practice provision is essential**

The Association strongly supports readoption of § 795.110 in its 2021-Rule form. The primacy-of-actual-practice provision is one of the most important features of the 2021 Rule. It appropriately directs the inquiry to what the parties actually do — whether a worker in fact sets his or her own schedule, whether a business in fact exercises discipline or supervision authority reserved by contract, whether a worker in fact works for other companies — rather than to theoretical possibilities drawn from contractual language. The Association's member companies engage independent contractors in countless real-world settings in which contracts necessarily include terms that, if read in the abstract, could be characterized as "potential" control (for example, the right to terminate for breach, the right to insist on compliance with specific deliverables, or the right to substitute another contractor). The proper question is whether those contractual provisions are in fact exercised in a manner indicative of employment.

- **Compliance requirements, health and safety standards, and ordinary contractual terms are not indicia of control**

The Association strongly supports readoption of the 2021 Rule's clarification that requiring a contractor to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality-control standards, or satisfy other terms typical of contractual relationships between businesses does not constitute control indicative of employment. This guidance is essential to the lawful and responsible operation of contingent workforces, and the 2024 Rule's effort to distinguish between compliance "for the sole purpose" of satisfying a specific law and actions that "go beyond" compliance has, in the Association's experience, generated more uncertainty than it resolved.

As a practical matter, every responsible company that engages contractors imposes requirements related to safety (for example, site-specific safety training on an industrial site), data security (for example, compliance with the company's information-security protocols), non-disclosure, anti-harassment, anti-corruption, and the protection of customer and employee data. Such requirements are not imposed to "control" the contractor in the sense relevant for worker classification; they are imposed to protect the company, its employees, its customers, and the contractor. The 2021 Rule's treatment of these requirements is the correct one, and the Association supports its readoption.

The Final Rule Should Be Accompanied by Guidance Supporting Voluntary Benefits and Protections for Contingent Workers

The Association has long advocated for a safe harbor under which companies could extend voluntary benefits, protections, training, insurance, apprenticeship opportunities, and similar offerings to individuals properly classified as independent contractors without thereby creating an employer-employee relationship under the FLSA. That proposal remains timely. The Association's member companies continue to observe that independent contractors — particularly those working in platform-enabled, project-based, or highly specialized roles — often would benefit from access to benefits of the kind historically associated with employment, and that companies are in many cases willing to extend such benefits voluntarily. Under the current legal framework, however, doing so risks being treated as evidence of an employer-employee relationship.

The Association believes the final rule should clarify whether in § 795.110 or in a companion interpretive provision, that a potential employer's voluntary offer or provision of benefits, training, insurance coverage, safety equipment, or similar protections to a properly classified independent contractor is not, by itself, indicative of an employment relationship under the FLSA. Such clarification would meaningfully encourage the extension of benefits and protections to contingent workers, would further the Department's statutory mission of protecting workers, and would in no way impede the Department's ability to address intentional misclassification where it occurs.

Conclusion

The Association strongly supports the Department's proposal to rescind the 2024 Rule and to readopt the 2021 Rule's analysis, with the minor modifications the Department has proposed. The proposed rule would restore a clear, administrable framework grounded in decades of Supreme Court and circuit court precedent; would meaningfully reduce the compliance burden and litigation exposure associated with worker classification; and would continue to protect workers from intentional misclassification.

Respectfully submitted,

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