



**CLUB
MANAGEMENT
ASSOCIATION
OF AMERICA**



December 7, 2022

Ms. Amy DeBisschop
Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour
Division
U.S. Department of Labor
200 Constitution Avenue NW, Room S-3502
Washington, DC 20210

RE: Regulatory Information Number (RIN) 1235-AA43

Dear Director DeBisschop:

On behalf of the Club Management Association of America and the National Club Association, we respectfully submit the following comments regarding the proposed regulations to revise the analysis for determining employee or independent contractor classification under the Fair Labor Standards Act (FLSA).

We recognize the significant role independent contractors have in the delivery of goods and services in all sectors of the economy. We believe federal and state labor laws and regulations should provide a more stable and predictable standard by which to determine employment status and worker classification.

We provide the following comments on the proposal that we deem critical to the consideration of changes to the analysis of determination:

1. The proposed rule is much too subjective and will be difficult to operationalize in practice
2. The proposed rule is weighted toward defining workers as employees
3. The proposed rule is overly complicated and burdensome to employers

Concerns

Through the adoption of a “Totality-of-the-Circumstances” approach, the Department of Labor (Department) will introduce too much subjectivity to the determination process. Employers and independent contractors need clear and easy-to-understand guidelines in order to comply with the regulation and meet their obligations to those with whom they are engaged in employment relationships and independent contractor agreements.

The six economic reality test factors themselves are complex, multifaceted, and sometimes overlapping. Each factor includes multiple subjective elements for consideration that are not distinct from other factors. For example, the opportunity for profit or loss, the exclusivity of the

work relationship, and the ability to set prices/rates for goods and services are mentioned in multiple factors.

Further, without the prioritization of core factors as in the 2021 Independent Contractor rule, all six factors exhibit significant weight towards the determination resulting in a classification of employee vs. independent contractor.

Beyond the six factors outlined in the proposed rule, the Department also proposes the consideration of “additional factors” if they indicate that the worker may be in business for themselves in a “totality-of-the-circumstances” approach. This approach is defined as the “the necessity of considering all facts that are relevant to the question of economic dependence or independence, regardless of whether those facts fit within one of the enumerated factors.”

The Department further clarifies in the proposed rule that it does not see the six enumerated factors as a checklist where all must point to the same determination. It cites specifically:

It is to be expected that not every factor will “align” with the ultimate result in many cases. With a multifactor analysis, it is common that some factors will indicate one result while others will say another. This difference shows that courts correctly weigh the factors against each other. A factor pointing in a different direction from other factors in any one case is not evidence that a factor is not useful in the run of situations.

While we appreciate the intent of the proposed rule to provide a comprehensive approach to determination, it will be difficult to operationalize in practice, leaving employers and independent contractors in our industry without the necessary clarity required to make good faith decisions. Employers and independent contractors will be left to theorize and draw their own conclusions based on the summation of the facts, resulting in inconsistencies and unintentional misclassification.

Such complexity will be difficult for both employers and regulators to interpret, creating significant variance in enforcement. It is likely that case-by-case determinations would vary widely from region to region, despite the evaluation of similarly situated individuals and relevant facts.

The establishment of six complex factors, the consideration of additional factors, and the totality approach will make the determination process overly complicated. Given the complexity and subjectivity of these determinations, employers will likely need to engage outside expertise and legal counsel on each individual situation, incurring significant expense to ensure compliance.

The Department itself has estimated that the proposed rule would cost impacted employers and independent contractors approximately \$188.3 million. Many clubs utilize independent contractors to enhance and/or augment their seasonal and intermittent programming needs.

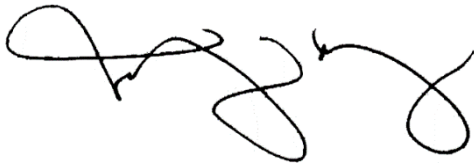
The proposed regulations would unfairly harm thousands of professionals engaged in our industry, including golf, racquet/tennis, fitness/spa/wellness, and other professionals. These certified, licensed, and/or trained professionals deliver specialized services to members/customers/guests while seeking the flexibility that independent contractor agreements provide for the cultivation of their business at multiple facilities and locations. The proposed regulations would add additional requirements that limit their economic opportunities.

Additionally, our industry is dependent on seasonal weather patterns and usage. Complex regulations impact smaller operations more substantially and the unique market realities and flexibility needs of small and seasonal operations should be considered.

Summary

As an industry that acts as a valuable employer in many communities across the country with more than 350,000 (full-time, part-time, and seasonal) employees and providing \$9 billion in annual payrollⁱ, our organizations have provided these comments with the goal of serving as a resource for the Department. Employers and independent contractors need clear and easy-to-apply guidelines to meet their obligations as outlined in the proposed rule. We respectfully request the Department to review these comments and create a more balanced and simplified determination approach.

Sincerely,



Jeff Morgan, FASAE, CAE
President & CEO
Club Management Association of America
1733 King Street
Alexandria, VA 22314
cmaa.org



Joe Trauger
President & CEO
National Club Association
1680 Duke St Ste. 420
Alexandria, VA 22314
nationalclub.org

ⁱ CMAA 2019 Economic Impact Study