October 26, 2020

The Honorable Cheryl M. Stanton
Administrator, Wage and Hour Division
United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Via: regulations.gov

RE: RIN 1235-AA34; Independent Contractor Status Under the Fair Labor Standards Act

Dear Administrator Stanton:

The National Retail Federation (NRF) and the National Council of Chain Restaurants (NCCR) respectfully submit the following comments regarding the above-referenced proposed rule.

A. Introduction

The National Retail Federation (NRF) and the National Council of Chain Restaurants (NCCR) support the proposed rule published by the U.S. Department of Labor (DOL) seeking to clarify the test used under the Fair Labor Standards Act (FLSA) for determining independent contractor status. The proposed rule will provide workers with a greater understanding on independent work and will provide businesses more confidence that they may enter into agreements with bona fide independent contractors without fear of possible future liability under the FLSA for wage, overtime and recordkeeping requirements. These arrangements are both common and vitally important to the ever-changing and highly-competitive retail and restaurant industries.

In today's constantly evolving economy, many workers prefer to choose independent work arrangements that offer greater control over work hours and assignments and increased opportunity for profit. For many workers, these characteristics are integral elements of their full time business model. For others, this flexibility provides important supplementary income streams. At the same time, an increasing number of businesses rely on the expertise and initiative of independent contractors to fulfill needs. The prompt adoption of such a rule will contribute to the preservation and growth of FLSA-covered employment opportunities while also

spurring innovation and entrepreneurship through the gig economy and among others who are in business for themselves.

The DOL's proposed rule benefits all stakeholders, as it creates clear guidelines for when entrepreneurs are properly viewed and treated as independent contractors. It allows both them and their clients and business partners to have the confidence and certainty needed to thrive in a turbulent economy. Therefore, NRF/NCCR encourages the DOL to adopt the independent contractor test as set forth in the Notice of Proposed Rulemaking as published in the Federal Register on September 25, 2020 at 85 Fed. Reg. 60600 (hereinafter "NPRM" or "proposed rule") while including the additional suggestions set forth below.

B. NRF/NCCR

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. The retail industry provides opportunities for lifelong careers, strengthens communities, and plays a critical role in driving innovation. The National Council of Chain Restaurants, a division of the National Retail Federation, is the leading organization exclusively representing chain restaurant companies. For more than 40 years, NCCR has worked to advance sound public policy that serves restaurant businesses and the millions of people they employ. NCCR members include the country's most respected quick-service and table-service chain restaurants.

C. Summary of Proposed Rule

On September 25, 2020, the DOL published an NPRM seeking to clarify the existing test used to determine whether a worker is an employee under the FLSA or an independent contractor.

In the NPRM, the DOL proposes to:

- Adopt an "economic reality" test to determine a worker's status as an FLSA employee or an independent contractor. The test considers whether a worker is in business for themselves (independent contractor) or is economically dependent on a putative employer for work (employee);

- Identify and explain two "core factors," specifically: the nature and degree of the worker's control over the work; and the worker's opportunity for profit or loss based on initiative and/or investment. These factors help determine if a worker is economically dependent on someone else's business or is in business for themselves;

- Identify three other factors that may serve as additional guideposts in the analysis including: the amount of skill required for the work; the degree of permanence of the working relationship between the worker and the potential employer; and whether the work is part of an integrated unit of production; and

- Advise that the actual practice is more relevant than what may be contractually or theoretically possible in determining whether a worker is an employee or an independent contractor.

D. Analysis

1. NRF/NCCR agrees that an economic reality test is the proper test.

The proposed rule uses an "economic reality" test designed to address the ultimate question of whether, as a matter of economic reality, the person is in business for themselves (an independent contractor) or is economically dependent on another (an employee). NRF/NCCR agrees that this is the proper basis for distinguishing independent contractors from employees under the FLSA as articulated by the U.S. Supreme Court. *See Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947); *Tony & Susan Alamo Fdtn. v. Sec. of Labor*, 471 U.S. 290, 301 (1985).

In addition, as is discussed at length in the NPRM, federal courts of appeal and the DOL consistently have looked to "economic reality" as the touchstone for the inquiry. *See* 85 Fed. Reg. at 60603-60604, and citations therein. However, as the DOL's discussion in the NPRM makes painfully clear, there is no single consistent test that has been articulated to direct this inquiry, and this creates an unnecessary level of uncertainty and higher potential for inconsistency for workers and businesses in all industries, including retail and restaurants, thus warranting the articulation of a clearer test through rulemaking.

2. DOL correctly identifies the two core factors as (1) the nature and degree of the worker's control over the work; and (2) the worker's opportunity for profit or loss based on initiative and/or investment.

As the DOL correctly recognizes, existing tests for independent contractor status tend to have a large number of factors which can be nebulous, overlapping, and even irrelevant to the ultimate inquiry. NRF/NCCR believes that DOL has fairly and accurately synthesized the analysis by identifying the two core factors as (1) the nature and degree of the worker's control over the work; and (2) the worker's opportunity for profit or loss based on initiative and/or investment.

NRF/NCCR agrees with the language contained in proposed § 795.105(c) regarding the analysis with respect to these two factors:

> Given the greater weight afforded each of these two core factors, if they both point towards the same classification, whether employee or independent contractor, there is a substantial likelihood that is the individual's accurate classification. This is because other factors, which are less probative and afforded less weight, are highly unlikely, either individually or collectively, to outweigh the combined weight of the two core factors.

a. The "nature and degree of the worker's control over the work" and how that should be interpreted.

NRF/NCCR believes that proposed § 795.105(d)(1)(i) provides an appropriate description of the "nature and degree of the worker's control over the work." Examples in the DOL's proposed regulatory text of an individual's substantial control include setting their own work schedules, choosing assignments, working with little or no supervision, and being able to work for others, including a potential employer's competitors. NRF/NCCR agrees that these are appropriate examples, but also recommends that certain points related to work schedules and quality control/performance standards be highlighted in either the preamble or the rule itself for purposes of clarification.

This request for clarification is addressed to some extent in proposed § 795.105(d)(1)(i), as follows:

> Requiring the individual 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 similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act.

To the extent that the DOL feels that the two items discussed below are implicitly covered by the above quoted language regarding contractual relationships between businesses, then further clarification may not be necessary. However, at a minimum, NRF/NCCR believe that including a section such as proposed § 795.105(d)(1)(i) is crucial to applying this core factor properly.

i. Work Schedules

NRF/NCCR believes that the final rule should emphasize that there may be limits on schedules that are consistent with business relationships that should not be treated as impacting the analysis. For example, an independent contractor might rent space within a retail store to sell goods or services. The ability for that contractor to make sales within that retail space may be limited as a result of the store's operating hours. Similarly, restaurants may enter into contracts

for food delivery services. As a result of the pandemic, this now includes many restaurants where the only options previously were sit-down, drive through, and/or carry out. The delivery service hours will obviously have some limitations based on the restaurant's operating hours. A retailer or restaurant might contract for after-hours cleaning services, which would require the cleaners to perform their work within a certain time period after the store closes and before it re-opens. Although this means that there are limits as to when the cleaning services can be provided, it should not be viewed as an example of a lack of control by the service provider.

As another practical matter, outside services may be needed immediately, and this should not be viewed as a limit on schedules. For example, if an employee tests positive for COVID-19, the employer may need to have the employee's work area deep cleaned and sanitized. The employer will need to have the cleaning and sanitizing completed immediately, but this does not mean the cleaners lack control over their schedules or their assignments. Indeed, many people and many businesses, including retailers and restaurants, enter into contracts for both routine maintenance and emergency repair services, and this does not make them employers of those service providers under the FLSA.

ii. "Quality Control" and "Performance Standards"

As noted in the above-quoted language, proposed § 795.105(d)(1)(i) clarifies, *inter alia*, that requiring an individual to meet contractually agreed-upon quality control standards does not constitute control that makes the individual more or less likely to be an employee under the Act.

NRF/NCCR agrees that this clarification is important, as there is a difference between "control" and "quality control" and/or other performance standards. Like other responsible businesses, a retailer or restaurant often will require its contractors to meet certain standards with respect to the products or services the contractors provide, but this does not mean that the contractors are employees. For example, a retailer or restaurant might contract for delivery services with a requirement that delivery will be completed within a certain period of time and/or that certain safeguards be put in place to ensure that the products are not damaged, that a certain level of customer service is provided, etc. A retailer or restaurant may also require that services be provided in accordance with various safety standards or other legal requirements, and this should not be viewed as a fact that would make employee status more or less likely.

b. The worker's "opportunity for profit or loss based on initiative and/or investment" and how that should be interpreted.

Proposed § 795.105(d)(1)(ii) addresses the second core factor, which is the worker's opportunity for profit or loss. NRF/NCCR agrees that the DOL correctly rejected adopting investment as its own separate factor in the NPRM. NRF/NCCR agrees with the DOL that the analysis of the opportunity for profit or loss may be based on investment, on initiative, or on a combination of both investment and initiative, and it is best to conduct that analysis by including "investment" under the concept of "profit or loss." In today's economy, many people who are in

business for themselves make investments in vehicles, tools, GPS devices, cleaning and safety supplies, and/or other equipment to provide their services. While these investments may be large or small, all can impact the contractor's ability for profit or loss. Also in today's economy, managerial skill and/or business acumen can result in profit or loss even with minimal or no capital investment.

i. Investments May Be Minimal

As DOL notes, a worker's minimal investment in equipment and materials is not probative of economic dependence in the new economy, given that a worker can make significant contributions with very low-cost investments, such as a smartphone, or even equipment and materials they already own for personal use, such as a car. The fact that there is less of a barrier to entry to starting and operating certain businesses should not be a factor in determining independent contractor status.

Even prior to the COVID-19 pandemic, retailers and restaurants were adapting to enhance their presence on the web, on social media, and through e-commerce, and by identifying delivery options and contracting for other services. Now, in the midst of a healthcare crisis and a shaky economy, such arrangements are not just considered best practices or competitive advantages, but are oftentimes necessary requirements to keeping the business afloat. In many cases, independent contractors have faced minimal barriers to entry to provide delivery, social media or other services that have helped connect retailers and restaurants to consumers. Without these independent contractors providing complementary services, many businesses would not have been able to survive and retain their current employees.

ii. "Business Acumen" And "Managerial Skill" as Distinguished from "Skill" in General.

The ability to impact profits or losses also may be dependent on business acumen and managerial skills, regardless of the "skill level" of the work or the level of investment. NRF/NCCR agrees that identifying "business acumen" or "management skill" as part of the profit or loss factor is appropriate and consistent with the FLSA.

iii. "Opportunity" and "Ability" for Profit or Loss.

NRF/NCCR believes that it is important to emphasize that it is the "opportunity" or "ability" to earn profits or incur losses based on investment and/or initiative, as opposed to the actual level of investment or initiative shown by the individual, particularly in situations where a restaurant, retailer or other business may work with multiple independent contractors. This is reflected in various portions of the proposed rule. For example, proposed § 795.105(d)(1)(ii) states that "opportunity to earn profits or incur losses" weighs in favor of an independent contractor relationship, whereas an individual who is "unable to affect his or her earnings" would more likely be an employee.

DOL should further emphasize that the words "opportunity" and "ability" have been used intentionally and cannot be disregarded. As a practical matter, some contractors may engage in greater risk-taking, may make greater investments, or may show greater initiative than others. For purposes of predictability, it is obviously important that a business can treat all similarly situated individuals as independent contractors, as opposed to having some be viewed as employees based on their showing less initiative than others. This discussion also needs to dovetail with proposed § 795.110, which states:

> In evaluating the individual's economic dependence on the potential employer, the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible. For example, an individual's theoretical abilities to negotiate prices or to work for competing businesses are less meaningful if, as a practical matter, the individual ***is prevented*** from exercising such rights. Likewise, a business' contractual authority to supervise or discipline an individual may be of little relevance if in practice the business never exercises such authority.

(emphasis added).

While actual practice is important, the fact that someone might not engage in certain practices or take on certain risks that would further impact the level of profit or loss should not result in a finding that the individual is not an independent contractor, unless that person is prevented from doing so by the entity with whom the individual contracts. For example, while some independent contractors may work hard to skillfully identify the most profitable work opportunities or best methods for limiting operating costs, others may not exercise those options as regularly or adeptly. One independent contractor might feel that marketing through social network platforms is valuable, while another independent contractor providing the same or similar services may still prefer word-of-mouth marketing or other types of referrals. These distinctions should not result in a finding that some similarly situated individuals are independent contractors and others are not.

In a similar vein, DOL should clarify in the final rule what it means to "create work opportunities." The language in the proposed rule is not clear on who creates work opportunities for the worker. There are independent contractors who arguably do not "create opportunities" but rather select from available work opportunities provided to them. Contractors may *increase* the number of opportunities through their efforts, and thus "create" opportunities for themselves. DOL should make clear that the *creation* of opportunities is no more important than the worker's ability to *select* opportunities and the frequency with which they perform work opportunities. In other words, the key question is whether workers are 'more closely akin to wage earners,' who depend on others to provide work opportunities, or 'entrepreneurs,' who create, *select, or manage* work opportunities for themselves.

Finally, DOL should provide additional guidance to the regulated community through concrete examples of what it means to have an opportunity for profit or loss, as it did with other factors set forth in the proposed rule. Relatedly, the proposed rule observes that an individual looks more like an employee if he or she is "only able" to "affect his or her earnings" by "working more hours *or more efficiently*." DOL should delete the phrase "more efficiently" in its description of this factor to promote clarity. Although the Supreme Court in Rutherford stated that the profits to the workers in that case depended upon the efficiency of their work, the Court stated that this was more similar to piecework in this specific context. This does not mean that an individual who is efficient cannot be an independent contractor. To the contrary, a more efficient worker may exhibit the type of "personal initiative" that demonstrates the worker created an opportunity for profit.

3. DOL correctly states that if both core factors point in one direction or the other, then that should guide the analysis, absent highly extenuating circumstances.

NRF/NCCR agrees with DOL's view that if both core factors point in one direction or the other, then that should guide the analysis, absent highly extenuating circumstances. DOL states in its proposal that it considered but decided not to treat this as a rebuttable presumption, and has requested comments on this. NRF/NCCR does not take a position as to whether this should be treated as a rebuttable presumption by the courts. NRF/NCCR does believe that if both of the core factors point in the same direction, then a court may consider only those two factors and end the analysis without examining the three additional possible factors identified by DOL.

4. DOL correctly identifies three other factors that may serve as additional guideposts in the analysis as (1) the amount of skill required for the work; (2) the degree of permanence of the working relationship between the worker and the potential employer; and (3) whether the work is part of an integrated unit of production.

In proposed § 795.105(c)(2), DOL identifies three additional factors that may be considered in addition to the two core factors. These three factors are (1) the amount of skill required for the work; (2) the degree of permanence of the working relationship between the worker and the potential employer; and (3) whether the work is part of an integrated unit of production. DOL correctly recognizes that if both of the core factors point in one direction or the other, then these other three factors are unlikely to change the outcome of the analysis. DOL also states in its proposal that if both factors do not point in the same direction, then other factors may further serve as guideposts. NRF/NCCR agrees that these three other factors have much less significance than the two core factors, but in cases where the core factors point in opposite directions, they could sway the analysis one way or the other.

a. The "amount of skill required for the work" and how that should be interpreted.

Proposed § 795.105(c)(2)(i) states that the skill factor "weighs in favor of the individual being an independent contractor to the extent the work at issue requires specialized training or skill that the potential employer does not provide." It further states this factor "weighs in favor of the individual being an employee to the extent the work at issue requires no specialized training or skill and/or the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job."

NRF/NCCR agrees that the skill factor "weighs in favor of the individual being an independent contractor to the extent the work at issue requires specialized training or skill that the potential employer does not provide." NRF/NCCR also agrees that, to the extent the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job, this factor weights in favor of employment.

However, to the extent that the job might not require a "specialized" training or skill that the employer does not provide, NRF/NCCR believes that this factor does not necessarily support a finding in either direction, particularly if the word "specialized" is intended to modify the term "skill" in addition to the word "training." DOL should focus its inquiry away from the specialization needed to perform a particular task, and instead on whether the potential employer provides the necessary skills or whether the individual cultivates and develops those skills through his or her own entrepreneurial efforts. Doing so would still align with the proposed rule's goal of separating the economically dependent from those who are economically independent. Indeed, it may be advisable to eliminate the word "specialized," as that term obviously can be subject to many different interpretations.

For example, a retailer might employ drivers for certain types of services but might also need contractors to perform the same or similar services. In this type of a situation, there may be a specialized skillset (for example, a CDL) required, but in other instances, it might not. For example, an individual contractor might make home deliveries of items using his or her own personal vehicle and thus would only need a regular driver's license (or might even use a bicycle, which would not require any sort of a driver's license). The fact that many people have regular driver's licenses should not be viewed as in any way negating or reducing the likelihood that a contractor who meets the two core factors will be properly treated as an independent contractor.

NRF/NCCR further recommends that the wording of this factor be changed to "The skill, talent or creativity" associated with the work. For example, a restaurant might enter into agreements with singers or other entertainers to perform at their restaurants. Although there may be several people who are good singers who already work at the restaurant, that does not make the singers who perform at the restaurant into employees. Similarly, an individual who contracts

with a family-friendly restaurant to make balloon animals for customers might not have any extensive training, but still should be treated as an independent contractor.

b. The "degree of permanence of the working relationship between the worker and the potential employer" and how that should be interpreted.

Proposed § 795.105(c)(2)(ii) addresses the degree of permanence of the working relationship. It states:

> This factor weighs in favor of the individual being an independent contractor to the extent the work relationship is by design definite in duration or sporadic, which may include regularly occurring fixed periods of work, although the seasonal nature of work by itself would not necessarily indicate independent contractor classification. This factor weighs in favor of the individual being an employee to the extent the work relationship is instead by design indefinite in duration or continuous.

NRF/NCCR agrees that the "degree of permanence of the working relationship between the worker and the potential employer" can help serve as a guidepost in certain cases and that the language quoted above provides appropriate guidance with respect to this factor. In particular, the fact that a relationship may be longstanding does not necessarily weigh in favor of a finding that an individual is an employee if, in fact, it was not designed to be indefinite in duration or continuous.

For example, an individual may have or may develop a long-term relationship with a restaurant, retailer or other business customer – and may devote a significant amount of time and/or resources to supporting that customer – based on choice, as opposed to any requirements or restrictions imposed by the customer. An individual may make such a choice for any number of reasons, including but not limited to profit potential, geographical convenience, a belief in the customer's social mission, or a personal relationship with the customer's owner or leadership. This cannot and should not weigh in favor of an employment relationship, and instead should be viewed as evidence of an independent contractor relationship. If an individual or the DOL is going to contend that the permanence of the relationship weighs in favor of employment status, the burden should be on that individual or the DOL to provide evidence of the actual restrictions or requirements that the customer imposed that prevented the individual from being in business for themselves.

c. "Whether the work is part of an integrated unit of production" and how that should be interpreted.

Proposed § 795.105(c)(2)(iii) addresses whether the work is part of an integrated unit of production. It states:

> This factor weighs in favor of the individual being an employee to the extent his or her work is a component of the potential employer's integrated production process for a good or service. This factor weighs in favor of an individual being an independent contractor to the extent his or her work is segregable from the potential employer's production process. This factor is different from the concept of the importance or centrality of the individual's work to the potential employer's business.

Based on the Supreme Court's decision in *Rutherford*, NRF/NCCR believes that the above language is appropriate. It should be noted that there will be limited times when this factor will even be applicable in the modern workplace, as *Rutherford* was decided more than 70 years ago. Moreover, the *Rutherford* case involved meat boners who were heavily integrated into the production process and who also were under the constant scrutiny of the employer's president and manager. And as a practical matter, the *Rutherford* court identified the boners as being more like pieceworkers than as individuals whose ability for profit or loss was based on initiative, judgment or foresight. Thus, the *Rutherford* court implicitly, if not explicitly, identified facts weighing in favor of an employee finding based on the two core factors that DOL has identified in the proposed rule. *See Rutherford,* 331 U.S. at 730:

> [T]he workers did a specialty job on the production line. The responsibility under the boning contracts without material changes passed from one boner to another. The premises and equipment of Kaiser were used for the work. The group had no business organization that could or did shift as a unit from one slaughterhouse to another. The managing official of the plant kept close touch on the operation. While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. Upon the whole, we must conclude that these meat boners were employees of the slaughtering plant under the Fair Labor Standards Act.

Whether work is part of an integrated unit of production is less probative and more difficult to apply in the modern economy. In the predominantly industrial economy, performing one task as part of an overall production process—such as one worker in a meat-packing assembly line—likely made the worker more economically dependent on the company, because the worker was confined to performing that one task as dictated by the company. In the current economy, however, a company's process is often easily segregable into multiple independent parts. Workers may possess the autonomy to choose which part of an overall process they want to contribute toward and how to perform that task.

NRF/NCCR recommends adding the inclusion of language, either in the preamble to the final rule or in the final version of § 795.105(c)(2)(iii), that further addresses the meaning and limited applicability of the "integrated unit of production" factor in the modern workplace. DOL

should expressly state that merely serving as a link in the chain of a company's provision of goods or services does not signal that a worker is economically dependent on a company. DOL also should expressly state that even if work is "inter-related," this does not necessarily make it "integrated." Clarifying examples that reflect what should or should not be considered as "production" (and perhaps even using the term "industrial production" as opposed to "production"), that demonstrate what would or would not be considered a "unit of production," and that reflect how modern technology has made and will continue to make processes largely segregable would be of great value to all stakeholders.

The proposed language is irrelevant to workers that are one component of a multi-step process of delivery to the customer/end user. Delivery is distinguishable from "production," and the final rule should state that this factor has no applicability with respect to delivery services or any other aspects of business that fall outside of "industrial production." A specific example of a situation where this factor should not weigh in favor of employment status is where workers are "assigned jobs" through a third-party's "software" that pools all available jobs and then complete the last steps of performing services, autonomously.

Moreover, even with respect to production, considering whether a worker is part of an "integrated unit of production" would be inappropriate for workers who use an app to review potential jobs, select a job suitable to that worker's talents and schedule, and perform the job again as frequently or infrequently as they like.

5. **DOL correctly states that actual practice is more relevant than what may be contractually or theoretically possible.**

As has already been discussed, § 795.110 states that "the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible." However, DOL also states in the preamble to the proposed rule that what may be contractually or theoretically possible also is not irrelevant.

> Importantly, proposed § 795.110 does not suggest that what is contractually or theoretically possible in a work arrangement is irrelevant. Contractual and theoretical possibilities are also part of the economic reality of the parties' relationship, and excluding them outright would not be consistent with the Supreme Court's instruction in *Rutherford Food* to evaluate "the circumstances of the whole activity.''

NRF/NCCR agrees that while written terms of an agreement between the parties may have relevance, terminology that might be similar to that used in an employment agreement should not necessarily be viewed as weighing in favor of an employment relationship. For example, a business might state in an agreement that it has the ability to supervise the work, but if it never does so, that should not have an impact on finding that the first core factor weighs in favor of an independent contractor determination. Similarly, if an agreement were to state that

the individual were to pay rent to the business, but the business never actually required any rent to be paid, then that portion of the agreement could not be used to support a finding of independent contractor status based on the second core factor. *See Rutherford*, 331 U.S. at 725 (contract called for rent to be paid by individual for the boning room, but as a matter of fact, no rent was ever paid).

6. Additional Comments

NRF/NCCR believes that the DOL's proposed rule will create greater clarity and certainty for all stakeholders. DOL's proposed rule also is administratively sound, as it recognizes that the definition of "employ" within the FLSA is broader than the common law control test and instead focuses on economic realities. Furthermore, the DOL's proposed rule also is consistent with U.S. Supreme Court precedent recognizing the definition of "employ" is not unlimited. The proposed rule is entirely consistent with the DOL's June 2017 withdrawal of Administrator's Interpretation 2015-1. While that Administrator's Interpretation similarly stated that the ultimate issue was that of economic dependence under an economic realities test, that document was extremely unwieldy, duplicative, and overbroad in its statements, such that it created a high risk of uncertainty that bona fide independent contractors would not be viewed as independent contractors despite the economic realities.

NRF/NCCR also believes that the use of a so-called "ABC" test that has been adopted by some states with respect to their own state laws is inappropriate, and NRF/NCCR encourages DOL to reject any recommendations that an ABC test be adopted. Such a test would radically rewrite the law and would create economic disruption, as the DOL properly recognizes in its discussion of the ABC test in the NPRM at 85 Fed.Reg. at 6035-36.

As the DOL also expressly recognizes, an ABC test could not be adopted without violating Supreme Court precedent interpreting the FLSA:

> The California Supreme Court explicitly recognized that the ABC test defines "employee'' more broadly than the FLSA when it explained that the ABC test rests on a "standard in California wage orders [that] was not intended to embrace the [FLSA's] economic reality test'' and was instead "intended to provide broader protection than that accorded workers under the [FLSA] standard.'' *Dynamex*, 416 P.3d at 35.153 Moreover, the Supreme Court has stated that the existence of employment relationships under the FLSA "does not depend on such isolated factors'' as the three independently determinative factors in the ABC test, "but rather upon the circumstances of the whole activity.'' *Rutherford Food*, 331 U.S. at 730. Because the ABC test is therefore inconsistent with Supreme Court precedent interpreting the FLSA, the Department concludes it could not adopt the ABC test.

85 Fed.Reg. at 60636

E. Conclusion

NRF/NCCR appreciates the opportunity to submit these comments in support of the DOL's proposed rule and encourages the DOL to adopt a final rule with the clarifications we are recommending. Such a rule will provide greater clarity for all stakeholders, which in turn will reduce the amount of needless and costly litigation under the FLSA. It will promote innovation and entrepreneurship, and will help stimulate the economy. The COVID-19 pandemic has created many additional economic challenges for retailers and restaurants, and the prompt adoption of a final rule that is consistent with the proposed rule will be of great value to NRF/NCCR members.

Sincerely,

David French
Senior Vice President
Government Relations

Of counsel:

Alfred B. Robinson, Jr.
Steven F. Pockrass
James Plunkett
Diane M. Saunders
Kelly S. Hughes

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.