On behalf of the Wisconsin Joint Enforcement Task Force on Payroll Fraud and Worker Misclassification, we write to express concerns with the proposed regulatory changes related to Independent Contractor Status under the Fair Labor Standards Act (FLSA). Our Task Force was called together by Governor Tony Evers to examine the growing problem of worker misclassification in Wisconsin and the cost of such misclassification to our state. Most of that cost comes from the lack of tax revenue for unemployment insurance, workers compensation insurance, and other state benefit programs intended to protect workers. When workers require assistance, the statutory and economic infrastructure built up over decades to protect workers is not set up to support the needs of this growing non-employee workforce.

We believe that the proposed regulatory changes will not reduce misclassification or accompanying litigation. More importantly, we believe that the proposal would leave many low-wage workers without protections offered by the FLSA. With no minimum wage or overtime required, low-wage workers would be subject to increased exploitation. Moreover, the proposed rule and comments seem to encourage the use of non-employee workers without addressing the lack of protections for such workers. With no clear protection from workers compensation or unemployment insurance, non-employee workers are left vulnerable to injury and unemployment, with the cost of their injuries and unemployment shifting directly to the state.

As we read the proposal, the new "economic realities test" would be codified in rule. This test builds from a line of court decisions that describe a six-factor test designed to decide "whether the individual is, as a matter of economic reality, in business for himself." *Parrish v. Premier Directional Drilling, L.P.,* 917 F.3d 369, 380 (5th Cir. 2019). As with most such tests, designed to be applied on a case-by-case basis, with no one factor being determinative, there is room for interpretation among courts and within the Wage and Hour Division (WHD), as indicated in the Notice of Proposed Rulemaking.

Unfortunately, the proposal really does very little to quell concerns that it would lead to less litigation and misclassification. It articulates a five-factor test to determine a worker's status. That test focuses on whether a worker is economically dependent upon an employer for work or is truly in business for themselves. As with the various court versions of the test, the WHD's proposed rule emphasizes that actual practice is key to the assessment of independent contractor status. What the parties state in a contract or what may be theoretically possible under a work arrangement is of little relevance if it differs from the reality of their working relationship. Economic dependence is the ultimate inquiry. In applying this proposed test, the two most important factors are:

- **Who exercises substantial control over key aspects of work performance?** Where the worker sets their own schedule, selects projects, and retains the ability to work for an employer's competitors, this factor will weigh in favor of independent contractor status. In contrast, where the employer sets the schedule, controls the workload, and requires the worker to perform work exclusively for that employer, this factor will weigh in favor of employee status.

- **Does the worker have an opportunity for profit or loss?** If the worker can earn more or lose profits based upon their own managerial skills or business acumen, for example by hiring helpers or choosing particular equipment or materials, this factor will weigh in favor of independent contract status. If the worker is unable to affect their earnings or is only able to do so by working more hours or working more efficiently, this factor will weigh in favor of employee status.

Other factors to be considered in assessing independent contractor versus employee status under the FLSA still include (1) the amount of skill required for the work, (2) the permanence of the working relationship between the parties, and (3) whether the work performed by the individual is a component of the employer's integrated production process for a good or service. The proposal is to narrow the test to these 5 factors, rather than 6 or more as used in other tests also referred to as "economic reality tests." We fail to see how this meaningfully reduces the likelihood of misclassification or litigation on that issue.

In our view, the proposal is aimed not at reducing misclassification, but at making it easier for employers to classify workers as "independent contractors," thus, denying them access to fair pay, overtime, health insurance, and other benefits afforded to employees. Independent contractors generally do not qualify for unemployment insurance and workers' compensation – the main form of recourse for workers who get laid off or sick or injured on the job. As more workers are classified as non-employee workers, a greater percentage of our workforce works without protections that have been developed over the last century. The result is not cost savings to employers, but cost shifting to individuals, families, and taxpayers.

Contrary to the Department of Labor's narrative that the proposed regulation will "reduce worker misclassification, reduce litigation, increase efficiency, and increase job satisfaction and flexibility," we believe that the proposed regulation may actually increase misclassification and related litigation, and lead to a more fractured worker-employer relationship.

Thank you for the opportunity to comment.

Sincerely,