#KnowTheDifference

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Via Regulations.gov

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Jessica Looman
Principal Deputy Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Re: Proposed Rule, Employee or Independent Contractor Classification Under the Fair Labor Standards Act (RIN 1235-AA43)

Dear Ms. Looman:

Real Women in Trucking appreciates the opportunity to comment in support of the Department of Labor's (Department) Proposed Rule on Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA), 87 Fed. Reg. 62218 (Oct. 13, 2022) (to be codified at 29 CFR pts. 780, 788, 795). The Proposed Rule would rescind a rule promulgated in 2021 (the 2021 Rule) and replace it with the traditional six-factor test to assess the economic reality of a worker's classification. We support this rulemaking, which we anticipate will reduce misclassification in the trucking industry.

Real Women in Trucking is a non-profit group formed by seasoned female commercial-motor-vehicle drivers who saw the need for authentic representation for women in the trucking industry. It is a member-based organization that includes both seasoned female drivers and entry-level candidates. The organization encourages ethical corporate business practices and improved industry standards, including compensating workers for all work performed, and treating people of all genders equally when it comes to hiring, training, paying, and promoting motor vehicle drivers. Women truck drivers are at particular risk of wage theft from skimming and working uncompensated hours. They are also susceptible to exploitation by being misled into lease-purchase truck arrangements as well as discrimination, retaliation, sexual harassment, and assault.

In our comments below, we discuss the frequency with which truck drivers are misclassified as independent contractors, the resulting harm, and the ways in which the Proposed

Rule would provide essential clarity on driver classification. Based on our members' experiences, we are confident that, if properly implemented, the rule will reduce misclassification, especially because it recognizes the significance of employee capital investments (such as trucks), acknowledges that performing (or being free to decline) additional work alone does not meet the standard for being able to affect profit and loss, and revises and improves its functional approach to the control factor, including scheduling.

We respectfully suggest that any final rule provide more specific examples of how it would apply to truck drivers, including by explicitly addressing the widespread practice of drivers leasing trucks directly from the companies for which they haul, which makes those drivers economically dependent. One method to do so would be to incorporate the Seventh Circuit's recent opinion in *Brant v. Schneider National, Inc*., 43 F.4th 656, 665 (7th Cir. 2022), which applies the traditional six-factor economic reality test to misclassified truck drivers.

I. Truck drivers are frequently misclassified as independent contractors, with harmful consequences.

As the Department is aware, worker misclassification is pervasive.[1] It is especially significant in trucking. According to one study, 23% of truck drivers in California are classified (or misclassified) as independent contractors.[2] The problem is acute in port trucking. A 2010 report by the National Employment Law Project (NELP) found that 82% of port truckers are classified as independent workers, of which an estimated 80% are misclassified.[3]

Misclassification hurts drivers, including our members. As NELP has explained, port trucking firms that succeeded after the deregulation of the trucking industry uniformly hired drivers as contractors and required them to own and operate their own trucks.[4] Doing so is profitable because it "provides companies with a contingent workforce paid by the load, rather than hourly. The companies have no responsibility for workers' compensation or unemployment

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[1] *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, National Employment Law Project (NELP), 2-5 (Oct. 2020), https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020 (summarizing research regarding frequency of worker misclassification).

[2] Ratna Sinroja et al., *Misclassification in California: A Snapshot of the Janitorial Services, Construction, and Trucking Industries*, U.C. Berkeley Lab. Ctr. 4 (Mar. 2019), https://laborcenter.berkeley.edu/misclassification-in-california-a-snapshot-of-the-janitorial-services-construction-and-trucking-industries/.

[3] Rebecca Smith et al., *The Big Rig: Poverty, Pollution, and the Misclassification of Truck Drivers at American Ports*, NELP (2012) [hereinafter *The Big Rig*] (attached).

[4] *Id.* at 16.

insurance taxes. They obtain drivers' services without paying for health care or retirement plans."[5] Further enhancing their profits, "the industry has shifted liability for most operational costs – truck purchases, fuel, insurance, taxes, maintenance – from themselves to the drivers," in significant part by leasing trucks directly to drivers and taking payments out of the driver's pay.[6]

Pervasive misclassification has driven down wages for all drivers,[7] especially misclassified drivers. Their hours are long, and their wages are low. A comprehensive review of surveys of port drivers showed they worked an average of 59 hours a week.[8] For these drivers, independent contractors reported average net incomes 18 percent lower than employee drivers, and they were two-and-a-half times less likely than employee drivers to have health insurance and almost three times less likely to have retirement benefits.[9] These figures represent net earnings after truck expenses and do not include tax burdens, a fact that further widens the gap between independents and employees because independent contractors must pay the employer's portion of Social Security, Medicare, and similar taxes as well as their own.

Compounding these problems, drivers are frequently required or encouraged to lease their trucks from the companies. Their lease payments come out of their wages, significantly reducing their take-home pay. These drivers may also be financially responsible for truck repair costs, which results in either further reduced net pay or deferred maintenance. Such deductions mean that some drivers receive wages below the minimum wage.[10] As NELP concluded based on the comprehensive survey of port truck drivers, "[i]ndependent contracting is the principle means through which trucking firms make drivers responsible for all truck-related costs and liabilities including purchase, fuel, taxes, insurance, maintenance, and repair."[11]

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[5] *Id.*

[6] *Id.*; *see also* Brett Murphy, *Rigged: Forced into Debt. Worked Past Exhaustion. Left with Nothing.*, USA Today (June 16, 2017), https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/ (describing the harmful practice of leasing trucks directly to drivers) (attached).

[7] *The Big Rig*, *supra* note 4, at 16 (citations omitted) ("As the port trucking industry adopted the independent contractor model after deregulation, drivers' wages fell precipitously. Wages fell 15-20 percent in the four years after the Motor Carrier Act passed, and by 30 percent from 1980 to 1995.").

[8] *Id.* at 19.

[9] *Id.* at 19.

[10] *See* Third Amended Complaint at 19-20, *Cervantes v. CRST Int'l, Inc.*, 1:20-cv-00075-CJW-KEM (N.D. Iowa Oct. 23, 2020) (alleging that after a week's worth of driving, a driver actually owed the company money); Murphy, *supra* note 7.

[11] *The Big Rig*, *supra* note 4, at 19.

Commercial trucking remains, in some ways, heavily regulated, including with respect to preventive maintenance, safety standards for trucks themselves and for hours worked, and emissions controls. But drivers who are misclassified are more likely to drive non-compliant trucks and violate safe driving requirements. Research into the experience of port truck drivers nationwide who, as mentioned, are especially likely to be misclassified, found that "economic pressures encourage widespread evasion of safety regulations."[12] As the report explains:

> Federal regulations limit drivers to 60 hours in any seven-day period and require at least 10 hours rest after a driver has been on duty for 14 hours or driven for 11 hours. [A] survey of Southern California drivers found that 10 percent of drivers report working 72 or more hours in a typical week and that hours of service regulations are "typically violated by drivers." In New York and New Jersey, 14 percent of drivers reported working on average more than 14 hours per day. In Oakland, 22 percent of drivers reported working thirteen or more hours per day. Some reported typical days as long as 16 hours. The rush to deliver loads also puts pressure on drivers to haul cargo on unsafe chassis, the separate frame and wheels that hold cargo containers. [Researchers] found that half of all drivers had been offered an unsafe chassis in the previous month, and that 22 percent reported that they had "taken the chassis on the road." Similarly, [other researchers] reported that 12 percent of drivers had taken an unsafe chassis on the road the last time they were offered one. "This would mean that 10,000 unsafe chassis leave the port making freight deliveries every year." …
>
> The misclassification of drivers in port trucking can be directly linked to safety violations and the environmental and public health crises at the nation's ports. The literature on the industry describes how economic pressures encourage widespread evasion of safety regulations. Drivers commonly use dangerous and illegal equipment. Safety limits on working hours and vehicle weights are routinely ignored. Industry observers have concluded that low-wage independent contractors bear the industry's capital expenses by owning and operating the only equipment they can afford – the oldest diesel trucks on the road. The environmental and public health crises surrounding the nation's ports are a direct result of the industry's adoption of misclassification as a business model.[13]

Similarly, researchers at UC Berkely, focusing on the interaction between misclassification and pollution controls, found that economic pressures encouraged widespread noncompliance with environmental controls:

> Drivers that meet the legal standard to be classified as employees but are misclassified as independent contractors earn very low wages and must finance expensive vehicles with high interest loans to comply with clean vehicle rules. As a result of the capital barriers contractors face, this segment of the trucking

[12] *Id.*
[13] *Id*. at 7, 19 (citations omitted).

> industry has the lowest compliance rates with California's current clean vehicle regulations, with compliance rates of 61% with the landmark Truck and Bus Rule, compared to 83% for large firms that directly employ truck drivers. Non-compliant trucks in the contractor segment represent 44% of all non-compliant trucks, a significantly greater share than their share of all operating trucks.[14]

Our members' experiences are consistent with these findings. Misclassification happens at companies that are often committing other labor abuses. Drivers can become trapped in these unsafe, noncompliant situations. Drivers who lease trucks directly from the freight company are under intense economic pressure to continue working for those companies and driving the leased truck. As such, they find it difficult to resist pressure to work unsafe hours or drive unsafe, polluting trucks they cannot afford to repair.[15] Regulators may issue citations to these drivers, further pushing the drivers to seek work with disreputable companies, since reputable companies may decline to hire drivers with multiple citations. As we have observed, since these drivers have limited choices, they move from one misclassified job to the next. These misclassified drivers have less economic security and cannot rely on retaliation protections the FLSA would provide for complaints.

Finally, the Department observes that "[t]o the extent that women and people of color are overrepresented in low-wage positions where misclassification as independent contractors is more likely, [reducing misclassification] could have a disproportionate impact on these workers."[16] Trucking is one of the few industries with high rates of misclassification in which women are not overrepresented. But truckers are disproportionately people of color and immigrants.[17] Reducing the misclassification of these drivers will, accordingly, reduce racial economic inequality.

For more detailed information on the ways in which misclassified drivers are economically exploited, with resulting harms to the drivers, their families, the industry as a whole, and truck emissions, please see the attached articles:

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[14] Sam Appel & Carol Zabin, *Truck Driver Misclassification: Climate, Labor, and Environmental Justice Impacts*, U.C. Berkeley Lab. Ctr., (Aug. 22, 2019), https://laborcenter.berkeley.edu/truck-driver-misclassification/.

[15] *See*, *e.g.*, Murphy, *supra* note 7.

[16] 87 Fed. Reg. at 62230.

[17] Ratna Sinroja et al., *Misclassification in California: A Snapshot of the Janitorial Services, Construction, and Trucking Industries*. U.C. Berkeley Lab. Ctr. (Mar. 11, 2019), https://laborcenter.berkeley.edu/misclassification-in-california-a-snapshot-of-the-janitorial-services-construction-and-trucking-industries/.

- Sam Appel & Carol Zabin, *Truck Driver Misclassification: Climate, Labor, and Environmental Justice Impacts*, U.C. Berkeley Lab. Ctr. (Aug. 22, 2019), https://laborcenter.berkeley.edu/truck-driver-misclassification/.
- Ratna Sinroja et al., *Misclassification in California: A Snapshot of the Janitorial Services, Construction, and Trucking Industries*, U.C. Berkeley Lab. Ctr. (Mar. 11, 2019), https://laborcenter.berkeley.edu/misclassification-in-california-a-snapshot-of-the-janitorial-services-construction-and-trucking-industries/.
- Brett Murphy, *Rigged: Forced into Debt. Worked Past Exhaustion. Left with Nothing*., USA Today (June 16, 2017), https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/.
- Rebecca Smith et al., *The Big Rig: Poverty, Pollution, and the Misclassification of Truck Drivers at American Ports*, NELP (2012), https://s27147.pcdn.co/wp-content/uploads/2015/03/PovertyPollutionandMisclassification.pdf.

II. The Proposed Rule's six-factor economic reality test will reduce driver misclassification, but additional clarification with respect to truck drivers would be helpful.

Misclassification in trucking is caused primarily by exploitative employers. But, in our experience, it is also caused by the many variations in working arrangements between drivers and companies, making it difficult to identify a bright line rule. At one end of the spectrum are owner-operators who operate under their own authority (a motor carrier's permission to operate a commercial motor vehicle for-hire), own or independently lease or finance their truck, and are registered on their International Registration Plan (IRP) plate (a vehicle registration agreement between states). These operators book their own freight from a free-market load board and negotiate the rate for the freight directly. They carry their own insurance. These drivers are independent contractors.

At the other end of the spectrum are drivers who operate trucks leased directly from the freight company (or a corporate partner of the company). If they cannot make the lease payments or lose their jobs, they also lose their trucks. These drivers operate under the company's authority and access insurance and other compliance requirements through the company. These drivers are permitted to carry loads only for the company, cannot negotiate rates, have little control over scheduling, and may be subject to forced dispatch. They should be considered employees but are frequently misclassified.

While these two scenarios are clear, many drivers have working arrangements in the grey area between them. They may, for example, own their own truck and negotiate their own loads but rely on a company for their operating authority and other compliance requirements. Others may have the formal ability to set their own schedule and work for others, but because of conditions imposed by the company, they are functionally unable to do so. Unscrupulous employers take advantage of uncertainty about classification status in these grey areas and the economic pressure drivers face to find work.

The Proposed Rule helps provide much needed clarity for the industry. Its recognition that there are numerous factors to consider in whether an employee is economically dependent is reflective of our experience. For example, we have observed drivers believe that they are independent contractors based on a supposed bright line rule (e.g., the formal ability to accept or decline a load from a company with which they typically work), even though when considering their situation as a whole, they are economically dependent on the company and likely misclassified. The Proposed Rule's repeated emphasis on the practical application of the various factors provides helpful guidance for the industry.

We discuss below the six factors of the economic reality test in the Proposed Rule and their application in the trucking industry, and we provide suggested opportunities for additional clarification and application to our industry. In particular, we encourage the Department to incorporate the Seventh Circuit's recent opinion in *Brant v. Schneider National, Inc*., 43 F.4th 656, 665 (7th Cir. 2022), which applies the traditional six-factor economic reality test to misclassified truck drivers, into the final rule. The court's analysis is consistent with many of our members' experiences and the factors discussed in the Proposed Rule. Incorporating *Brant* into the Department's analysis would provide additional specificity with respect to trucking, in addition to the Proposed Rule's general helpful guidance.

A. Opportunity for profit or loss depending on managerial skill.

The Proposed Rule clarifies that a worker who has the power to make key business decisions that affect their opportunity for profit or loss is more likely to be an independent contractor than a worker who does not have power over these decisions.[18] The proposed provision that "decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to … take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor" is particularly important for our drivers.[19] We have observed drivers accept misclassification because of their belief that flexibility around what jobs to perform for a company means they are not employees. There is also a widespread misunderstanding that the ability to take time off when desired indicates that a driver is an independent contractor. Accordingly, the Proposed Rule's clarification is helpful.

Relevant to this factor, a key consideration is whether the driver subscribes to a free-market load board (e.g., an online marketplace where truck owner-operators, shippers, and freight brokers can post and find loads). Drivers who subscribe to such boards exercise managerial skills to impact profit or loss by their selection of loads. Through these marketplaces,

[18] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. at 62274-5 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pt. 795.110(b)(1)).

[19] *Id.*

they can put together a sequence of jobs most likely to be profitable because they can bid or negotiate rates and select appropriate freight and efficient routes. These drivers typically sign a rate contract directly with the freight brokers. By and large, they are appropriately considered independent contractors, consistent with the analysis in the Proposed Rule.

Other drivers, however, have access only to a company's internal load board, which does not provide an opportunity to negotiate rates over the jobs offered. Those drivers have very little ability to impact profit or loss beyond the number of jobs they select. But the appearance of choice can result in driver misclassification.

Similarly, a driver cannot exercise managerial control to impact profit or loss via load selection if they do not have enough information to make informed decisions about their loads or are constrained by their economic dependence on their employer.[20] The Proposed Rule's addition of relevant facts to consider under this factor (the ability to negotiate rates, control over job selection and timing, and whether the worker engages in efforts to expand their work) provides helpful context to differentiate between these scenarios.[21] The Department could provide further clarity for drivers by explicitly discussing the functioning of free market load boards as an opportunity to control profit or loss (unlike internal load boards).

Also relevant to this factor (as well as the control factor) is whether the drivers can freely choose what route to take and what fuel stops they will use, decisions that impact the profitability of a load or series of loads.[22] What matters here is whether this choice is meaningful or illusory—as the Proposed Rule explains, the key is whether the worker can "meaningfully negotiate the order and/or time in which the jobs are performed…"[23] Some drivers are so constrained by other requirements (e.g., strict pick-up and delivery time requirements, limited locations where they can purchase fuel using corporate credit) that "[a]s a practical matter, [they] ha[ve] no choice with respect to the route."[24]

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[20] Port drivers in particular frequently have this experience, namely waiting in line to receive a container, without knowing its contents or destination. *See also Brant*, 43 F.4th at 669.

[21] *Id.*

[22] The degree of control that drivers have over route choice varies too, making the Proposed Rule's practical approach essential. *See* Yichen Sun et al., Route Choice Characteristics for Truckers, 2354 Transportation Research Record 115 (Jan. 1, 2013), https://toledo.net.technion.ac.il/files/2014/05/TRR_TruckRouteChoice_13.pdf.

[23] 87 Fed. Reg. at 62238.

[24] *Brant*, 43 F.4th at 668.

B. Investments by the worker and the employer.

The Proposed Rule helpfully makes clear that a true independent contractor should be making significant investments in the business. These must be capital or entrepreneurial investments, as opposed to tools that a worker is required by a business to have in order to perform a job. In this regard, the Proposed Rule explains that "although a worker's investment need not be on par with the employer's investment, it should support an independent business for this factor to indicate independent contractor status."[25]

Treating investment as a standalone factor is an improvement compared to the 2021 Rule. This factor is especially important for our members. Truck drivers who are true owner-operators—and are appropriately considered independent contractors—typically own their own trucks. While a single tractor trailer is a relatively small investment compared to the fleets of trucks owned by some firms, when wholly owned or independently financed, it is sufficient to support a personal trucking business, and thereby meets the standard discussed in the Proposed Rule. This type of investment gives our members the ability to keep their truck if they decide to stop working for any particular company, and accordingly some measure of economic independence. Adding this as a unique factor recognizes the significant economic independence that drivers who invest in their own trucks have and accordingly improves the classification analysis.

Those drivers who do not invest in their own trucks are much less likely to be economically independent. The key element here is whether the driver has independent control over the financing or lease of the truck. Our members who lease their vehicles from the freight company for which they work are typically dependent on that company both for work *and* for continued access to the truck itself, despite the payments made on it. Payment for the truck lease as well as additional costs, such as insurance and fuel, are taken out of the driver's pay. For these company-leased trucks, the driver is not building equity in the vehicle, so the vehicle should not qualify as an investment under this factor. Instead, because under the terms of these agreements, drivers may lose the trucks if they miss a payment, quit, or are fired, they are even more economically dependent on the company. These drivers should be classified as employees because of this significant dependence. Notably, lease payments for the truck and other costs are taken out of the driver's wages, which can lead to below-minimum-wage rates (making these drivers especially in need of FSLA protections).[26]

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[25] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. at 62242 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pt. 795.110(b)(2)).

[26] Murphy, *supra* note 7.

Notably, in a decision that is consistent with the Department's proposed analysis of this factor, and the experience of some of our members, the Seventh Circuit recently rejected an argument that leasing a corporate truck was the kind of investment that could make a worker an independent contractor.[27] As the court explained, the company

> offered its truck leases with no down payment required, no payments during the first weeks of work, and no out-of-pocket investment by the drivers. Even the security deposit for the truck was deferred and paid in installments. [The driver] was totally dependent on [the company's] credit to operate, and he leased his truck back to [the company] under the Operating Agreement. This level of dependency on [corporate] credit and provision of equipment weighs in favor of employee status.[28]

Employer-leased trucks can be a source of confusion for drivers with respect to their classification status, however. Following a comprehensive investigation of port drivers, USA Today explained, "[m]any drivers thought they were paying into their truck like a mortgage. Instead, when they lost their job, they discovered they also lost their truck, along with everything they'd paid toward it."[29] When drivers do not understand or are misled about the terms of their lease agreements, they may not realize the degree to which they are economically dependent on the company and, accordingly, that they may be misclassified.

We encourage the Department to finalize this provision as proposed and to add additional examples in the final rule that employer-sponsored leases for work equipment, including for trucks, are not investments of the kind that weigh in favor of independent contractor classification.

C. Degree of permanence of the work relationship.

The Proposed Rule appropriately recognizes that a worker whose work relationship is indefinite in duration or continuous or who is performing a job that is regularly required (even if the individuals hired turn over) is more likely to be an employee than a worker whose work relationship is definite in duration, project-based, or sporadic.[30] It also explains that independent contractors may have "regularly occurring fixed periods of work" with the same employer, which is analogous to repeatedly carrying loads for the same client, a circumstance common to our drivers.

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[27] *Brant*, 43 F.4th at670.

[28] *Id*.

[29] Murphy, *supra* note 7.

[30] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. at 62243-46 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pt. 795.110(b)(3))

The Proposed Rule provides helpful clarification that the relevant question in those circumstances is whether the "lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries … rather than the workers' own independent business initiative…."[31] The inclusion of this factor as well as the more detailed explanation, compared to the 2021 Rule, is a positive development. Many of our drivers who are economically independent regularly carry loads for the same companies at rates the drivers and the companies previously negotiated—but are truly able to carry loads for others as well. This experience is meaningfully different from drivers who carry loads for the same company and have only a limited ability to accept loads from others due to constraints imposed by the company. As the Proposed Rule recognizes, the key difference is the former driver's ability to exercise independent business initiative. This change will promote clarity in our industry.

D. Nature and degree of control.

The Proposed Rule makes clear that an entity that controls key aspects of the work is likely an employer. This is a helpful and clarifying update from the 2021 Rule, which narrowed the consideration to an employer's actual instances of exercised control. Key aspects of the work for this factor, all of which are relevant to our members, include the ability to set prices or rates for loads, to limit the driver's ability to work for others, to supervise the driver (including through technology that surveils the worker and tracks productivity), and to set the driver's schedule.[32] However—and especially important to our members—the Proposed Rule clarifies that a driver's ability to set their own schedule, by itself, provides only minimal evidence that a worker is an independent contractor, particularly when the hiring entity exerts other types of control.

First, as the Department observes, a driver's ability to set or negotiate a rate for a load contributes to economic independence and is accordingly relevant to control.[33] In the trucking industry, this applies to drivers who access jobs via subscription to a free-market load board and negotiate their own rates to book loads. In such circumstances, they will typically sign a rate contract directly with brokers and receive a copy of the original contract. The Proposed Rule provides helpful clarity that these drivers are likely independent contractors.

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[31] *Id*.

[32] *Id.*; Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. at 62246-55 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pt. 795.110(b)(4)).

[33] 87 Fed. Reg. at 62250.

Further, as the Department discusses, scheduling is a key component of control and the question of economic dependence.[34] We applaud the Department's decision to broaden its framing of the scheduling element from the 2021 Rule and to focus on whether apparent scheduling flexibility actually provides for economic independence or whether the worker is still functionally dependent.[35] This approach is consistent with the experience of our members. By its very nature, trucking provides most drivers with some ability to control their schedules, namely when to drive. But many of these drivers have very little actual economic independence, given other indicia of control exercised by their employers. The Proposed Rule's emphasis on whether apparent scheduling flexibility is constrained by economic reality is accordingly well considered.[36]

Relatedly, there are companies that advertise "non-forced dispatch" for drivers and treat those drivers as independent contractors given the appearance that they can decline certain loads. But in practice after a driver declines a load more than once or twice, some of the companies will retaliate, functionally limiting the drivers' actual flexibility.[37] Other companies limit the amount of home time a driver may take or badger them to leave home time early. Those drivers do not have meaningful control over their schedules, making them economically dependent. The Department's decision to avoid a formalist approach to scheduling analysis should capture these kinds of scenarios and is consistent with our members' experience and the case law.[38]

We also observe that owner-operators who are independent contractors will, at times, agree to a rate contract that provides for pickup and delivery dates. Nothing in the Proposed Rule's analysis of scheduling would make required compliance with those dates indicative of an employment relationship. The key is whether the driver was free to accept or decline those loads in the first instance.

Next, as the Department observes, the ability to work for others is key to whether a driver is economically dependent or not.[39] Especially important is the Department's emphasis that both

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[34] 87 Fed. Reg. at 62248.

[35] *Id*.

[36] 87 Fed. Reg. at 62249.

[37] *See*, *e.g*., *Brant*, 43 F. 4th at 669 (while the driver's contract permitted him to haul for other carriers, it was practically impossible, making this element not probative of independent contractor status).

[38] *Id.* at 668 (concluding that even though the driver's operating agreement permitted scheduling flexibility, the practical inability to do so was indicative of control by the company).

[39] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. at 62246-62255 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pt. 795.110(b)(4)).

direct prohibitions on working for others and indirect barriers are relevant to this factor.[40] Our members have experienced working arrangements where they may nominally be permitted to carry loads for a third party, but this flexibility is not available in practice. In situations such as these, drivers are likely employees.[41]

We wish to emphasize that the experience of drivers leasing trucks directly from the freight companies, discussed above in the investment factor, is highly relevant to control too. Those drivers are so dependent on the continued relationship with the company—without it they could lose the trucks on which they had been making lease payments—that they typically have no actual control over their work and are entirely economically dependent on the company.[42]

We encourage the Department to address this situation explicitly in the final rule. Drivers whose lease payments are taken out of their payments are effectively required to take enough jobs to cover those payments, otherwise they risk losing their trucks.[43] These drivers lose control over the ability to accept or decline jobs, to work for others, or to manage their own schedules.

Finally, supervision, including with respect to safety and legal compliance, is an important element of control, as the Proposed Rule emphasizes.[44] This is a nuanced issue for our members, however, in part because of the time-consuming nature of compliance in our industry, including maintaining operating authority, insurance coverage, international fuel tax agreements, and logbooks, among other requirements. Many of our members who are economically independent decide to lease on to an established carrier, operating under that carrier's authority (instead of the driver's own authority) and taking advantage of the compliance-related options provided by that carrier. Those members don't view themselves as employees, nor are they necessarily economically dependent on the carrier. Instead, in our view, they are using their independent judgment to delegate time-consuming compliance work to a carrier with whom they frequently contract, in a manner that is typical of the exercise of decision-making power with respect to a small business.[45] So long as the drivers retain the option to manage their own

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[40] *Id*.

[41] *Brant*, 43 F.4th at 669-70 (where the corporate practice for approving and monitoring trips made for other carriers was "so complex and onerous that Drivers could not, as a practical matter, carry loads for anyone other than" the corporation, the control factor favored finding employee status).

[42] For a detailed discussion of how these drivers are exploited see Murphy, *supra* note 7.

[43] Murphy, *supra* note 7.

[44] 87 Fed. Reg. at 62246-48.

[45] *See*, *e.g. Moba v. Total Transp. Servs. Inc.*, 16 F. Supp. 3d 1257, 1265 (W.D. Wash. 2014) (where freight company offered commercial insurance to drivers, but drivers were free to reject that offer, it was not indicative of employee status).

compliance and the other elements of control (scheduling, working for others, setting rates, etc.) are within the driver's control, a driver's decision to arrange for the carrier to complete compliance paperwork should not be indicative of an employment relationship.[46] The Proposed Rule addresses control "implemented by the employer" for compliance purposes, which suggests that a driver's decision to have a company manage certain compliance requirements, if freely made, is not indicative of employer control.[47] We respectfully request that the Department provide clarification in this respect in the final rule.

E. Whether the work performed is an integral part of the employer's business.

The Department's decision to include this factor as one of the six relevant factors and to change its emphasis to whether the work is an "integral part" of the employer's business, rather than "an integrated unit of production," is well considered.[48] Many of our members drive for companies that haul freight or are large producers (e.g., agro-business corporations) that manage their own transportation and distribution of their products. Under the 2021 Rule, those drivers could be treated as independent contractors because the transportation they provide is "segregable from the potential employer's production process."[49]

That definition does not reflect the economic reality of our drivers' experiences. The trucking services our members provide are integral to the businesses—as the Department explains, these corporations "could not function without" transport of the freight.[50] Accordingly, for most drivers, this factor will weigh in favor of employee status, which will help reduce misclassification. And because, as the Department notes, there will be cases where this factor does not align with the ultimate result,[51] it should not prevent truly independent drivers from continuing to operate as independent contractors.

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[46] The Department takes a similarly nuanced approach in the explanation that "if an employer requires workers to provide proof of insurance required by state law, that is less probative of control; if an employer mandates what insurance carrier workers must use, that is more probative of control." 87 Fed. Reg. at 62248.

[47] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. at 62246-62255 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pt. 795.110(b)(4)).

[48] 87 Fed. Reg. at 62253.

[49] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. at 62253 (current 29 C.F.R. § 795.105(d)(2)(iii)).

[50] *Id*.

[51] *Id*. at 62254.

F. Skill and initiative.

The Proposed Rule explains that a true independent contractor is likely to have specialized skills *and* use those skills to exercise "business-like initiative." On the other hand, a worker who does not use specialized skills or is dependent on training from their hiring entity is likely to be an employee.[52]

All commercial truck drivers are doing specialized, skilled work while driving.[53] The Proposed Rule provides useful additional clarification, however, that only those drivers who *also* exercise skills related to operating an independent business are likely independent contractors.[54] Relevant to trucking, drivers that are economically independent often exercise specialized skills related to booking and scheduling their own loads and managing compliance requirements and paperwork (such as obtaining an IRP plate in their own name, driving under their own authority, or managing trucking-specific tax obligations). This work contributes to the driver being able to operate independently from a company, which this factor's emphasis on the skills related to the exercise of business initiative appropriately reflects.[55]

We would also appreciate the Department clarifying that, although truck driving typically is not classified as "skilled" labor in other contexts, it requires sufficient skill that, when combined with business-like initiative, drivers are appropriately considered independent contractors.[56] We believe this clarification is consistent with the Department's analysis of this factor.

III. Conclusion.

Thank you for your consideration of our comments. We encourage the Department to finalize the Proposed Rule promptly, including the additional points of clarification we have addressed. If you have any questions, please contact our counsel for submission of this comment, Robin Thurston, Democracy Forward Foundation, rthurston@democracyforward.org.

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[52] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. at 62254-57 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pt. 795.110(b)(6)).

[53] *Brant*, 43 F.4th at 671 ("Commercial truck-driving requires skills beyond those of automobile drivers....").

[54] 87 Fed. Reg. at 62237-40.

[55] As we noted, in the discussion of the control factor, a driver's decision to delegate compliance management to a freight company does not necessarily indicate employment status; we would consider it neutral. But a driver who manages compliance on her own is likely an independent contractor.

[56] *Brant*, 43 F. 4th at 672 (skill required to drive commercial trucks is less relevant to the economic reality test than other elements of the skill analysis).

Sincerely,

Desiree Ann Wood
President/Truck Driver
REAL Women in Trucking.