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

**RE: Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date, RIN 1235-AA34**

Dear. Ms. DeBisschop:

The HR Policy Association (“HRPA” or “Association”) submits the following comments for consideration by the U.S. Department of Labor (“Department”) in response to the published Notice of Proposed Rulemaking (“NPRM”) and Request for Comments regarding the delay of the effective date of the Department’s rule entitled Independent Contractor Status Under the Fair Labor Standards Act (“Rule”).<sup>1</sup>

HR Policy is a public policy advocacy organization that represents the chief human resource officers of more than 380 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States – nearly 9 percent of the private sector workforce. Since its founding, one of HRPA’s principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

HR Policy respectfully recommends that the Department rescind its proposal to delay the effective date of the Rule and instead proceed with its enactment as originally scheduled on March 8, 2021.

The Department’s stated purpose for delaying the effective date of the Rule is to “allow [the Wage and Hour Division] additional opportunity for review and consideration of the new rule.” Such an additional period is not necessary, as the Rule was given sufficient review and consideration through the notice and comment rulemaking process, as well as approval by the Office of Management and Budget’s Office of Information and Regulatory Affairs, prior to its publication as a Final Rule in January of 2021. Indeed, more than three months elapsed between publication of the Proposed Rule on September 22, 2020 and publication of the Final Rule on January 7, 2021. A delay of the effective date by two months for additional review is therefore unnecessary.

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<sup>1</sup> Notice of Proposed Rulemaking: Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date, 86 FR 8326 (Feb. 5, 2021).

Further, the Department's stated purpose for delaying the effective date of the Rule is inconsistent with the administration's own criteria for delaying the effective dates of final rules already published but not yet implemented, as memorialized in [Memorandum M-21-14](#). The Department's stated purpose – to allow additional opportunity for review and consideration – is not derived from any failure of the Rule to meet any of the eight criteria articulated in the above mentioned memorandum. The Department's proposed delay of the effective date explicitly acknowledges the memorandum's framework as guiding its proposed decision to delay, and then inexplicably departs from such guidance in justifying its decision. The Rule in fact satisfies each of these eight criteria, and thus by the administration's own framework does not require delay of its effective date.

As noted in the Association's comments filed during the Proposed Rule's original notice and comment period, the Rule is a much-needed clarification to an area of labor and employment law that has lacked consistent and uniform judicial and regulatory interpretation for decades. Independent contractor workers have become an increasingly critical part of the country's economy as employers rely on such workers to provide a significant scope of work and support for their operations, making the clarification provided by the Rule all the more necessary.

The Rule provides a clear and concise interpretation of independent contractor worker status under the FLSA that both promotes the classification's continued importance to the American economy and provides much needed stability to classification jurisprudence, in a manner that protects both workers and employers.

Specifically, the Association supports the Rule's incorporation of the economic realities test to define independent contractor status, and the Rule's straightforward interpretation of "economic dependence," with the key inquiry being whether an individual is economically dependent on the business to which he/she renders service, or is in business for himself/herself. This interpretation flows naturally from the text of the FLSA, is supported by caselaw, and provides both employers and workers a clear and concise determination of a worker's status that is based on the actual control exercised by either party in the relationship.

Simply put, the Rule provides a sufficient solution to the issue of clarifying independent contractor worker status under the FLSA in a manner that benefits all stakeholders. The Rule provides a clear and straightforward federal test for determining worker status, and undoing this much needed clarification provided in the Rule will only lead to continued inconsistency and prolonged uncertainty for American workers and employers.

Relatedly, the Association understands the unique challenges posed by the growing gig economy and supports providing adequate protections for gig workers. Such protections can be achieved by allowing businesses to provide certain benefits such as health care and defined contribution retirement plans to both their own employees and their contingent workforce, without the contingent workforce losing independent contractor worker status that provides flexibility that is beneficial for all stakeholders.<sup>2</sup> The Association strongly recommends that the Department consider this approach while retaining the Rule, as opposed to undergoing a protracted regulatory

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<sup>2</sup> The Association has previously advocated for this kind of safe harbor in its [Workplace 2020 Report](#), published in 2017.

rewrite of a significant area of labor and employment law for the second time in less than 12 months. Undoing the clarification provided in the Rule benefits neither workers nor employers.

For the reasons stated above, the Association respectfully recommends that the Department withdraw its proposal to delay the effective date of the Rule and proceed with its enactment on March 8, 2021.

Sincerely,

/s/ G. Roger King

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