4A's | ADVOCACY TALENT IMPACT
What you need to compete.

December 13, 2022

Submitted via Regulations.gov

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

RE: Comments of the American Association of Advertising Agencies (4A's) to the U.S. Department of Labor on Employee or Independent Contractor Classification Under the Fair Labor Standards Act (87 FR 62218; RIN 1235-AA43)

The American Association of Advertising Agencies ("the 4A's") appreciates the opportunity to provide comments to the U.S. Department of Labor ("DOL") regarding its proposal to revise its analysis for determining employee or independent contractor classification under the Fair Labor Standards Act ("FLSA"). For the purposes of these comments, independent contractor and freelancer are nomenclature that will be used interchangeably.

The 4A's joined more than one hundred and fifty associations, businesses, and stakeholders to file comments submitted by the U.S. Chamber of Commerce, et. al concerning the DOL's Notice of Proposed Rulemaking and Request for Comments Regarding Employee or Independent Contractor Classification under FLSA (the "Proposed Rule"). In addition to some specific concerns outlined below, we wish to reiterate our ongoing support for the extensive recommendations included in those filed comments.

I. Our Industry and Who We Are

The 4A's was established in 1917 to promote and advance the interests of our member agencies and the advertising and marketing industries overall. Today, our organization serves more than 600 member agencies across 1,200 offices, which help direct more than 85% of total U.S. advertising spend.

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Advertising is a significant contributor to the U.S. economy. By providing consumers and business-to-business customers with information on products and services, advertising fuels economic growth through its ability to support competitiveness. 2021 research from the IHS Markit found that advertising contributed $7.1 trillion in business sales activity and supported 28.5 million U.S. jobs in 2020. Advertising and its multiplier effects represent 18.5 percent of U.S. gross domestic product (GDP) and nearly one-fifth of all American jobs in 2020. Furthermore, every dollar of ad spending supported nearly $21 of sales, on average.[1] In addition to directly contributing to the U.S. economy through direct spending, the advertising industry itself is also a major U.S. employer, with over 316,800 American professionals employed in advertising, promotions, and marketing management positions at a median pay of $141,490 per year in May 2020.[2]

Digital advertising is uniquely important because it is the financial foundation of most of the free services that people across the U.S. and the world utilize at little or no cost. News sites, online social networks, email services, weather websites, and video and entertainment platforms are primarily funded through online advertising.

Collaborating closely with their nationwide and global advertiser clients, 4A's members are a critical part of the advertising ecosystem, serving as the creative visionaries and business strategists behind how ads resonate with and effectively reach consumers.

II. How Advertising Agencies Utilize Independent Contractors

According to a Freelance Forward: 2021 report released by Upwork in 2021, 59 million Americans performed freelance work over a twelve-month period, representing 36% of the entire U.S. workforce.[3] The same report finds that 53% of all freelancers provided skilled services such as computer programming, marketing, IT, and business consulting in 2021.[4] It's all

[1] IHS Markit, 2021, The Economic Impact of Advertising on the US Economy 2018 – 2026 , https://aro36532638-my.sharepoint.com/:b:/g/personal/amelendez_capitolcounsel_com/EV5UvewoC1dGs9ZSTvf3eZwB_MjplWrDUMWn381-vH3G9w?e=ZkhRKS. Accessed 21 Sept. 2022.
[2] Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, Advertising, Promotions, and Marketing Managers,
at https://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm (visited October 05, 2021).
[3] Upwork, 2021, *2021 Freelance Forward Economist Report*, https://www.upwork.com/research/freelance-forward-2021. Accessed 10 Dec. 2022.
[4] Upwork, 2021, *2021 Freelance Forward Economist Report*, https://www.upwork.com/research/freelance-forward-2021. Accessed 10 Dec. 2022.

the more evident that this constituency of independent workers makes up a large and expanding contingent of the American workforce, making it increasingly essential for federal labor policies to recognize and protect the flexibility and efficiency that comes with hiring skilled independent contractors for temporary work.

Upholding FLSA worker classification flexibility, particularly for skilled creative contractors, is no exception. These are skilled, professional services jobs, and contrary to public perception that freelancing just equates to lower skilled ‘gig work’, the share of freelancing in art and design is almost double that of transportation. The 2021 Upwork study showed that the percentage of freelancing providing skilled services is up to 53%, an 8 percentage point increase in the past two years.[5]

The rise in the ratio of skilled contractors over unskilled contractors is undoubtedly linked to the growing education level of freelance talent. Interestingly, of the 36% of the overall U.S. workforce who are freelancing, 51% are post-grad workers, whereas only 31% of freelancers have a high school diploma or less.[6] Moreover, freelancing appears to be growing among the most educated while declining among the lowest.[7] The growing skill-bias and education level of freelancing might also imply a reasonable understanding of the costs, benefits, and risks of operating as an independent contractor as opposed to an employee under the FLSA.

Skilled creative freelancing is also a significant employer for women. A 2015 study from the Freelance Union found women are far more likely than men (71% vs. 51%) to freelance in order to pick up extra money, underscoring the persistence of the gender wage gap.[8] They were also more likely to freelance to have schedule flexibility (58% of women vs. 43% of men).[9] 74% of freelancers say that freelancing gives them flexibility to be more available as a caregiver for their family;[10] for remote skilled freelancers, this rises to 81%.[11] Interestingly, freelancers working in design and creative fields also have fairly equitable pay between genders, particularly when

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[5] Upwork, 2021, *2021 Freelance Forward Economist Report*, https://www.upwork.com/research/freelance-forward-2021. Accessed 10 Dec. 2022.

[6] Upwork, 2021, *2021 Freelance Forward Economist Report*, https://www.upwork.com/research/freelance-forward-2021. Accessed 10 Dec. 2022.

[7] Compared to the previous year, in 2021 the share of freelancers who were high school graduates or less declined from 37% to 31%; correspondingly, those freelancers who are postgrads rose from 45% to 51%.

[8] Horowitz, Sara. “Why Are More Women Than Men Freelancing?” *Fast Company*, 11 Mar. 2015, https://www.fastcompany.com/3043455/why-are-more-women-than-men-freelancing. Accessed 13 Dec. 2022.

[9] Horowitz, Sara. “Why Are More Women Than Men Freelancing?” *Fast Company*, 11 Mar. 2015, https://www.fastcompany.com/3043455/why-are-more-women-than-men-freelancing. Accessed 13 Dec. 2022.

[10] In the U.S., volumes of research find that the caregiver role overwhelmingly and disproportionately falls upon women.

[11] https://www.upwork.com/research/freelance-forward-2021

compared to other types of freelancing positions.[12] However, more granularly, women in freelance digital marketing jobs earn a whopping 17% more than men. [13] Women in freelance multimedia production earn 0.3% more than men, and women freelancers in web and graphic design earn 4% more than their male counterparts.[14] Freelance writers actually had the smallest pay gap of about $1 per hour, with a few notable exceptions.[15]

As one of the largest employers of temporary, creative freelance talent, 4A's members rely heavily upon the flexibility of utilizing independent contractors with creative specialities in graphic design, video production and editing, copy writing and editing, web design and development, fashion work (models, hair stylists, and makeup artists), photography, and other creative areas. Recently, the 4A's launched Your Partner Hub[16], a non-partial, searchable database of freelance agency talent. For a paid subscription, Your Partner Hub allows 4A's advertising agency members to search for skilled, creative freelance talent from a pool of over 600+ freelancers. Your Partner Hub also allows agencies to manage pre-existing partners on the site to build custom, plug-and-play freelance talent teams with unique skill sets. Freelancers do not have to pay to have their profile on the 4A's Your Partner Hub.

In the advertising industry, our members routinely find that the best creative freelancers choose to operate as independent contractors as a means of ensuring schedule flexibility and maintaining personal autonomy to establish their own freelance brand. This allows them to choose creative client projects that pair well with their work style, professional interests, design aesthetic, and personal beliefs — all things important to many creatives who view their profession as a direct extension of their artistic identity. Regulators and lawmakers often view freelancing as a last resort, but most freelancers choose to work independently because they prefer it to full-time work and feel they have access to more professional opportunities than they would as full-timers. Certainly unique for skilled creative freelancers, independent contractor classification allows freelancers to retain some control and legal contract leverage over their employer agencies by way of copyright assignment, trademarks and patents, and other intellectual property issues.

[12] ZenBusines, 2022, *The Freelancer Pay Gap: Who Charges the Most as a Freelancer?*, https://www.zenbusiness.com/freelancer-pay-gap/. Accessed 13 Dec. 2022.
[13] ZenBusines, 2022, *The Freelancer Pay Gap: Who Charges the Most as a Freelancer?*, https://www.zenbusiness.com/freelancer-pay-gap/. Accessed 13 Dec. 2022.
[14] ZenBusines, 2022, *The Freelancer Pay Gap: Who Charges the Most as a Freelancer?*, https://www.zenbusiness.com/freelancer-pay-gap/. Accessed 13 Dec. 2022.
[15]ZenBusines, 2022, *The Freelancer Pay Gap: Who Charges the Most as a Freelancer?*, https://www.zenbusiness.com/freelancer-pay-gap/. Accessed 13 Dec. 2022.
[16] https://www.aaaa.org/wp-content/uploads/Your-Partner-Hub-FAQs.pdf

Creative freelancers can partner with agencies on client projects ranging from one off assignments to complex, year-long projects, while still simultaneously engaging with other clients as their schedules and workloads allow. This beneficial work arrangement helps agencies avoid a more permanent and inefficient inflation of their headcount, while also responding to the pricing and staffing needs of the advertisers that hire them for advertising campaigns. One survey of over 400 content marketers across agencies, freelance and in-house,[17] found that 71% of in-house marketers and 68% of agencies are outsourcing their content needs to freelancers.[18]

Agencies' client portfolios and their corresponding service fee arrangements significantly dictate how agencies manage and scale their workforces. In a study conducted in Q4 of 2020 of the distribution of revenue across 71 agencies, the Society of Digital Agencies (SoDA) found that 47% of total agency revenue was derived from Project/ Fixed Fee arrangements, compared to 20% retainer work, and 15% time & materials/ date rate contracts, respectively.[19] Because of the ongoing advertising market shift from long term, agency of record (AOR) work to more short term, pay-as-you-go project-based work, all indicators suggest, barring significant regulatory changes, that independent contractors will play an outsized role in the future of of the advertising industry, as agencies will need to scale their workforces quickly in response to project lifecycles.

Importantly, freelancers afford agencies the ability to flex staff to meet the shifting needs of client work, providing their clients with greater flexibility to meet their ongoing, ever-changing advertising needs. This is especially important during times of economic uncertainty, where advertising clients tend to want more wiggle room in the agreements they're making with agencies, particularly concerning ad commitments, budgets, campaign scheduling and media costs. A fluctuating, project-based industry that requires constant scalability of its workforce is not inherently bad intentioned in its relationship with its workers. Instead, it maximizes independent worker entrepreneurialism and flexibility, creativity and artistic growth, and personal autonomy.

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[17]An in-house marketing group refers to a brand's internal team that focuses on the advertising and marketing of their product or service. The in-house agency is responsible for all of a brand's marketing and advertising tasks including account management, brand management, social media marketing, direct marketing, digital marketing, etc.The in-house agency usually reports to a brand's Chief Marketing Officer. An in-house marketing group sometimes outsources advertising work to advertising agencies.
[18] "Verblio's 2022 Digital Content Survey Results." *Verblio's 2022 Digital Content Survey*, Verblio, 21 Oct. 2022, https://www.verblio.com/digital-content-survey.
[19] Society of Digital Agencies, 2022, *The SoDA Report On the Global Agency Landscape 2022*, https://www.sodareport.com/s/ResearchSummary_GlobalAgencyLandscapeStudy.pdf . Accessed 13 Dec. 2022.

Unfortunately, a lack of regulatory clarity and the near constant political tug-of-war over worker classification criteria in the states, between presidential administrations, and in the courts has already clouded and negatively impacted advertising agency decision making concerning the ongoing use of independent contractors. To help mitigate legal liability and associated business risks for compliance with state and federal independent contractor classification rules, and particularly in light of what appears to be political regulatory partiality toward the classification of workers as employees, many of our member agencies have opted to reclassify some or all of their 1099 independent contractors as part time, W-2 non-benefit workers.

Because workers who are transitioned to part time, W-2 non-benefit status cannot deduct the Internal Revenue Services' (IRS) self-employment tax, the loss of this tax benefit may be a dealbreaker for the retention of certain preferred freelancers who count on the significant business deduction for their budgeting and tax planning purposes.

Moreover, due to the significant employer costs associated with providing retirement benefits,[20] medical benefits, and other employee benefits, transitioning temporary freelance talent to part time W-2 status may also impose limits on the number of project hours given to former independent contractors, impacting both freelancer income potential and agency project efficiencies; agencies may need to transition their preferred part-time employees (former freelancers) off client projects to avoid part-time hour overruns, losing their preferred workers with important historical project knowledge and/or the best client relationships.

Above all else, America's advertising agencies hope that any DOL final rule on independent contractor classification provides clear, practical guidelines for how they can continue to hire independent contractors to execute their routine business operations; this would benefit both agencies and the skilled, creative independent contractors who are looking for high-paying, creative-focused work. Ongoing agency confusion and ever-fluctuating gray zones over classification criteria for independent contractors is already stymieing growth opportunities, particularly for smaller, independent agencies who do not have the resources to withstand costly misclassification litigation or looming state or regulatory enforcement actions.

Proper, functioning, and practical regulatory guardrails and enforcement for worker classification stands to benefit all stakeholders in the advertising ecosystem. Regulatory-induced, near removal of an agencies' ability to employ independent contractors will not directly correlate to one-for-one hiring of new employees in the advertising industry. Instead, failure of the federal independent contractor classification rule to meet the flexibility needs of the modern agency

[20] This is particularly important as it relates to the ERISA 30-hour rule.

workforce would most certainly: 1) Reduce new and existing business opportunities for agencies; 2) Negatively impact the attraction and retention of skilled, creative independent contractor talent to the advertising industry; 3) Increase the cost of advertising for American companies; and 4) Reduce overall economic output and competition in the U.S. economy.

III. Recommendations to DOL Regarding its Proposed Rule

The 2021 Independent Contractor Rule identified five economic reality factors to help inform the analysis of a worker's status as an employee or independent contractor. Two of the five identified factors—the nature and degree of control over the work and the worker's opportunity for profit or loss—were delegated as “core factors” that are the most deterministic and have greater weight in the classification analysis. The 2021 Independent Contractor Rule asserted that if these two core factors point towards the same classification, there is a substantial likelihood that it is the worker's accurate classification.

The 2021 Independent Contractor Rule also identified three less significant non-core factors including the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the employer, and whether the work is part of an integrated unit of production. Per 4A’s members' experiences, the 2021 Independent Contractor Rule’s interpretation of these factors seemingly better reflect the realities of the best utilization of today’s modern independent contractor workforce, as well as practical, commonsensical criteria that real businesses can easily follow, and thus, should be upheld.

The DOL’s recission of the 2021 Independent Contractor Rule is unnecessary as businesses, including agencies, had already begun costly implementation measures for this rule; moreover, the previous rule was not seemingly inadequate in light of DOL’s series of continued, self-acclaimed, successful misclassification enforcement actions since the 2021 Independent Contractor Rule was finalized.

The DOL’s decision to issue the Proposed Rule, almost exclusively reversing the 2021 Independent Contractor Rule’s past changes, is problematic. Under Section 795.105 of the Proposed Rule, “a determination of whether workers are employees or independent contractors under the Act focuses on the economic realities of the workers’ relationship with the employer and whether the workers are either economically dependent on the employer for work or in business for themselves.” The Department’s decision to return to a prior Administration’s totality-of-the-circumstances analysis, in which the economic reality factors are no longer weighted more heavily based on importance, represents a change from the 2021 Independent Contractor Rule that will inevitably bring uncertainty and confusion for advertising agencies and the U.S. business community at large. While the 4A's acknowledges DOL's stated hypothesis that its Proposed Rule will not substantially shift the employee/contractor determination for most workers, the reality is that advertising agencies and their workers will now face the prospect of yet another shift to a new litmus test for how their workers are classified after mere months of a previous standard. The regulatory whiplash here is real, and costly, and should not be taken so lightly by DOL.

A businesses' reclassification review is time-consuming, expensive, and disruptive to business operations, particularly for smaller agencies who do not have the extra funds or staffing readily available to operationalize more worker classification reviews at the mere whims of the federal government. Small independent agencies are the most likely to be disadvantaged if faced with additional obstacles like hiring labor attorneys to indicate how they should apply the revised factors when a worker's circumstances do not match up with the established analyses or hypotheticals connected to the pre-2021 rule or otherwise.

Finally, in no uncertain terms, the 4A's would like to express its ongoing concerns with the "ABC test" enacted in California's A.B. 5 law in 2019. DOL discusses its review of the ABC test as a possible approach in its Proposed Rule, and we wish to discourage federal regulatory alignment with California's overly restrictive worker classification approach. We implore DOL to recognize (1) the impact of California's ABC test on the advertising industry's use of creative skilled talent and that (2) in practice, many agencies subsequently felt pressured into adjusting their operations and practices to avoid undue exposure to California's wage and hour laws at great expense and inefficiency to their business operations.

Beyond the above bigger picture comments, the 4A's recommends that the Proposed Rule be altered to address the following:

A. *Criteria Under "Integral to Business" Factor*

Under the "integral to business" factor, the DOL's Proposed Rule focuses on whether a worker's function itself is "critical, necessary, or central" to the engaging employer's principal business—as opposed to whether the workers themselves are integrated (i.e. an integrated business unit). This appears to bring the new Proposed rule more in line with the "B" prong of California's ABC independent contractor classification test, rather than previous versions of federal independent contractor rules. The Proposed Rule says that “if the [employer] could not function without the service performed by the workers] then the service they provide is integral.”

Given that many skilled, creative freelancers may perform work such as graphic design, video production, content creation, copy editing, etc. for which an agency may itself hire a core contingent of similarly skilled employees to perform, we advocate against this specific change. Instead, the 4A’s urges the DOL to harken back to the 2021 “integrated business unit” interpretation of case law for the Proposed Rule. Agencies routinely bring on skilled creative contractors to address fluctuations in client project work, such as after landing a short-lived, big new client account or to address short term staffing shortages in the event of looming client project deadlines. The DOL’s new interpretation of this criteria factor in the Proposed Rule does not meet the flexibility needed by modern, ever-fluctuating project-based businesses and service companies.

B. *Criteria for “Skill and Initiative” Factor*

Under the “skill and initiative” factor, the Proposed rule cites that in the view of DOL, “the worker’s use of [independent business-like] initiative in connection with any specialized skills”—as opposed to the skills alone—“is more probative of the ultimate inquiry of whether the worker is economically dependent on the business.” This represents a substantial shift in policy from the 2021 Independent Contractor Rule and could be confusing for advertising agencies.

More specifically, the proposed rule does not provide clarity for the pervasive scenario in which workers who desire to be independent contractors choose themselves to be "economically dependent" on work made available to them by one company. In essence, the proposed rule could create uncertainty for agencies that utilize legitimate independent contractor relationships to carry out important business functions, but their freelance talent does not have entrepreneurial drive or take personal initiative to expand their business to working with other agencies or in house marketing shops. More clarification in the final rule, or in subsequent agency written guidance, is needed regarding the level of due diligence required by businesses to ensure their contracted workers are performing work for others (or hope to) and demonstrating initiative toward that end.

C. *Criteria for “Degree of Permanence” Factor*

Specifically for this criteria, the Proposed Rule falls short in its failure to update this factor to the practical, modern reality that companies’ business operations might be improved if independent contractors are able to enter into multiple, long-term contracts with the same employer. 4A's members enthusiastically affirm that agency employers would derive significant, ongoing value from working with the same, preferred creative freelancers over long-term, client-agency life cycles.

For example, a skilled creative freelancer who, over time, develops strong client relations, understands a client's brand and design preferences, and has familiarity with the mechanics of a brands' website, may specifically be requested by an agency's client to return to join an agency's client service team to help rebrand a client's website; however such a freelancer could theoretically be prevented from doing so in light of longstanding contract records that indicate a years-long relationship between an agency and the freelancer.

The Proposed Rule's unwarranted partiality in weighing the permanence factor in favor of employee status simply because a working relationship is "exclusive" or "continuous" is not reflective of the realities of the today's modern business operations; such a regulatory decision thereby unfairly disadvantages independent contractors who have worked hard and garnered enough client trust to continue their jointly beneficial engagement into unknown perpetuity.

Particularly in light of the ongoing effects of the Great Resignation, advertising agencies today often struggle to find enough creative freelance talent solutions that meet their ongoing client project needs. The Proposed Rule's continuance of this impractical, inflexible permanence factoring in assessing contracted freelance workers will only exacerbate this problem, instead of offering practical solutions that benefit both agencies and their contractors.

D. *Other Recommendations*

We strongly urge the DOL to do extensive outreach to America's small businesses, including to small, independent advertising agencies, to help mitigate the impact of this rule change on their workforces and business operations, including through:

1. Creating additional official guidance to better assist small businesses in understanding how to best comply with any final independent contractor rule changes. At a minimum, this should include the creation of an extensive, online web tool to explain final rule changes made by DOL and to elucidate what businesses need to do differently in practice to align with new analyses for determining employee versus contractor status. Other guidance could include written guidance, video tutorials, and/ or extensive FAQ documents. This public resource should help small businesses avoid the incursion of

extensive legal or consultant fees to make typical employee/contractor examinations under the DOL's new regulations.

2. Adding significantly more hypotheticals, examples, and analyses to the text of the Proposed Regulation that better correlates to business uses of independent contractors in the 21st century economy would be beneficial to all parties. Additional examples are needed to help small businesses, including small independent agencies that do not have in-house counsel or large budgets for outside counsel to perform worker classification tests. Model analyses of key use cases, including providing more complex examples that speak to scenarios that use skilled creative contractors, will be valuable to reducing burdens and unknowns.

   For example, DOL should create examples that use video production professionals, web designers, freelance writers, fashion workers, etc. in the guidance; this would harmonize with DOL's stated goals of not trying to upend the existing business climate and ensure that small, independent advertising agencies are able to continue to engage skilled, creative freelancers as needed to execute their ever-fluctuating client project streams.

3. As part of the additional official resources requested above in Other Recommendations 1, we strongly encourage DOL to work with stakeholders to solicit hypotheticals, and to provide official DOL analyses under the unique and leading hypotheticals. As part of this effort, a safe harbor should be created preventing DOL enforcement action for those stakeholders offering complex hypotheticals to DOL for consideration.

IV. Conclusion

The 4A's aligns with DOL's stated intent to "help protect workers from misclassification" while at the same time recognizing that independent contractors serve an important role in the U.S. economy. We also cordially recognize DOL's ongoing goal to provide a consistent approach for those businesses that engage (or wish to engage) independent contractors. We urge the DOL to protect the flexibility and utilitarianism of the freelance business model by ensuring business owners, particularly those that employ skilled, creative contractors, are not harmed in the process of any final rule's implementation; the freelance and 1099 model provides businesses, including advertising agencies, the important flexibility they need to be competitive and thrive in today's economy.

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As part of this effort, we hope the DOL will address our specific concerns raised to the Proposed Rule's changes to the criteria under "Integral to Business" Factor, the criteria for "Skill and Initiative" factor, and the unnecessary rigidity and bias of the Criteria for "Degree of Permanence" Factor.

We thank DOL for their consideration of these comments and those filed by the U.S. Chamber of Commerce et. al.

Sincerely,

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