INTERNATIONAL FRANCHISE ASSOCIATION

April 28, 2026

**Via Electronic Submission: https://www.regulations.gov**

The Honorable Andrew B. Rogers
Administrator
Wage and Hour Division
Division of Regulations, Legislation, and Interpretation
United States Department of Labor
200 Constitution Avenue N.W., Rm. S-3502
Washington, D.C. 20210

**Re: RIN 1235-AA46; Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act**

Dear Administrator Rogers:

The International Franchise Association ("IFA") respectfully submits the following comments in response to the U.S. Department of Labor's ("DOL" or "Department")Notice of Proposed Rulemaking concerning the standard for determining employee or independent contractor status under the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and Migrant and Seasonal Agricultural Worker Protection Act (MSPA), published in the Federal Register at 91 Fed. Reg. 9932, RIN 1235-AA46 (February 27, 2026) (the "Proposed Rule").

IFA has a strong interest in promoting clear, consistent, and legally sound worker-classification standards that:

(1) align with longstanding statutory and judicial precedent;

(2) distinguish legitimate independent contractor relationships from unlawful misclassification; and

(3) preserve the economic and legal independence that is foundational to the franchise business model.

IFA therefore supports DOL's Proposed Rule on the independent contractor standard under the FLSA, FMLA, and MSPA, and urges its adoption via final rule, subject to addressing the concerns raised in this comment (the "Comment"). All interested parties – including the regulated franchise businesses and employer community, those who work for them, and other stakeholders – seek clarity and predictability. The Proposed Rule provides both. The Proposed Rule is balanced and reasonable, it aligns with established caselaw, it complies with the Administrative Procedures Act, and it would clarify the Department's regulations on this important issue.

## I. About IFA

IFA is the world's oldest and largest organization representing franchising worldwide. Celebrating over 55 years of excellence, education and advocacy, IFA works through its government relations and public policy, media relations and educational programs to protect, enhance and promote franchising.

IFA's members include franchise companies in over 300 different industries, individual franchisees, and companies that support those franchise companies in marketing, law, technology, human resources, business development, and operations. Franchising serves as an engine for economic growth, contributing an estimated $907.3 billion in economic output and providing an estimated 8.8 million direct jobs in 2025 across the more than 830,000 franchised establishments operating in the United States.[1] Franchising reflects 3% of U.S. GDP with growth expected to outpace the rest of the U.S. economy. As a cornerstone of small business success, franchising drives innovation, job creation, and prosperity in every corner of the country.

Franchising business is small business. Franchised businesses are projected to exceed 832,000 franchised establishments operating in the U.S., with 64% of franchisees being first-time business owners, 85% of franchisees living where they operate their business.[2] Franchising offers a path to entrepreneurship to a diverse group of Americans, and the businesses these franchisees build tend to have higher sales and more employees than non-franchised ventures. Franchised businesses are locally owned, which keeps resources in the local community through supply chains and charitable giving. In a survey of 2,900 franchisees commissioned by IFA and conducted by Oxford Economic, it was discovered that 82% of franchisees own and operate only 1 location, 94% of establishments surveyed employ less than 50 employees, 47% of franchised brands operate 25 units or less, and fast food represents less than 1/4 of franchise establishments.[3] Pay progression, job retention, and part-time to full-time transitions are better among workers at franchised businesses compared with non-franchised businesses, with franchisees also offering benefits at greater rates than, and pay on par with, comparable non-franchise businesses.[4]

IFA's members have shared their lived experiences with the DOL's past interpretations of the standard for determining employee or independent contractor status. They shared the time and financial costs they have incurred to monitor the changing rules and evaluate their working relationships. Indeed, the availability, quality, and cost of labor has been identified by franchisor executives as the number one business challenge faced in franchising.[5] IFA is therefore uniquely informed about and able to share the experiences of its members.

## II. The Nature of the Franchising Model

In its simplest form, franchising is a business where a company franchisor licenses its brand, systems, and trademarks to an independently owned and operated company called a franchisee in exchange for a fee. "Franchising is a method of marketing goods and services" that depends upon

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[1] Alka Sinha, Khadija Cochinwala & Jin Wang, 2026 FRANCHISING ECONOMIC OUTLOOK 4, (INT'L FRANCHISE ASS'N 2026), https://www.franchise.org/franchising-economic-outlook/.

[2] Oxford Economics, The Value of Franchising (Int'l Franchise Ass'n January 2026), https://www.franchise.org/wp-content/uploads/2026/01/IFA_ValueOfFranchisingFINAL.pdf.

[3] *Id*.

[4] *Id*.

[5] FRANdata, 2025 Annual Franchisor Survey (Int'l Franchise Ass'n 2025), https://www.franchise.org/wp-content/uploads/2025/02/2025-Franchisor-Survey_For-IFA-review-FINAL.pdf. The survey included responses from 171 senior executives representing franchisors and franchise portfolio companies that own 229 franchise brands from 24 different industries with franchise units ranging from less than 10 to 9,500. Together, the respondents represented nearly 20% of all domestic franchised businesses.

the existence of the franchisor's control over a trademark, other intellectual property or some other commercially desirable interest sufficient to induce independently owned and operated companies called franchisees into paying to participate in the franchisor's system by distributing goods or services under the franchisor's trademark or name.[6] The franchisor provides a proven business model and ongoing support, while the franchisee invests capital and personnel to run the location. It is a bilateral relationship benefiting both entities.

There are often two principal explanations given for the popularity of franchising as a model. One is that it "was developed in response to the massive amounts of capital required to establish and operate a national or international network of uniform product or service vendors, as demanded by an increasingly mobile consuming public."[7] The other is that "franchising is usually undertaken in situations where the franchisee is physically removed from the franchisor, and thus where monitoring of the performance and behavior of the franchisee would be difficult."[8] These two motivations are consistent with a business model in which the licensing and protection of the trademark rests with the franchisor and the capital investment and direct management of day-to-day operations of the retail outlets are the responsibility of the franchisee, which owns, and receives the net profits from, its individually-owned franchise unit.

As it finalizes the independent contractor status rule, the DOL should keep in mind the other federal statutes that provide the rules of doing business by the franchising method. Indeed, franchising is already a "heavily regulated" method of doing business,[4] as it is governed by the Lanham Act, Franchise Rule and multiple joint employment tests.

### A. Requirements Under Federal Trademark Law

It is typical in franchising that a franchisor will license, among other things, the use of its name, its products or services, and its reputation to its franchisees. Consequently, it is commonplace for a franchisor to impose standards on its franchisees, necessary under the federal Lanham (Trademark) Act to protect the consumer. These standards allow franchisors to maintain the uniformity and quality of product and service offerings and, in doing so, to protect their trade names, trademarks and service marks (collectively the "Marks"), the goodwill associated with those Marks, and most importantly, the protection of the consumer.

The Lanham Act, the federal law regulating trademarks, service marks, and unfair competition, mandates that owners of trademarks must "maintain[] sufficient control of the licensee's use of the mark to assure the nature and quality of goods or services that the licensee distributes under the mark."[9] Moreover, because the Lanham Act provides that a trademark can be deemed "abandoned"

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[6] Joseph H. King, Jr., Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees, 62 Wash. & Lee L. Rev. 417, 420-21 (2005)

[7] Kevin M. Shelley & Susan H. Morton, "Control" in Franchising and the Common Law, 19 Fran. L. J. 119, 121 (1999-2000).

[8] Paul H. Rubin, The Theory of the Firm and the Structure of the Franchise Contract, 21 J. Law & Econ. 223, 226 (1978).

[9] 15 U.S.C. § 1064(5)(A).

when "any course of conduct of the owner . . . causes the mark . . . to lose its significance,"[10] franchisors have a strong incentive to control the nature and quality of the good or services sold by their franchisees. As a result, franchisors are compelled to establish and monitor brand standards and provide global oversight of their franchisees.

Likewise, it is imperative that franchisees protect their franchisors' brands, and the trademark value of those brands. A franchisee, functioning as an independent operator under license to use the franchisor's Marks and system, is trusted and relied upon (by the franchisor) to protect the trademark value in implementing brand standards, and exercising day-to-day management over the operation, given that the franchisor is not present at every individual franchise location. Because franchising requires the collective use by franchisees and franchisors of Marks, all stakeholders affiliated with a brand collectively share risks and rewards. For example, if a franchisee fails to take adequate steps to protect the brand or otherwise engages in an action that injures the brand's reputation, the damage inflicted on the brand impacts all the brand's stakeholders, including all other franchisees and the consuming public. With that being the case, it is essential to franchising that all the stakeholders understand the expectations for brand protection standards and take all necessary action to ensure that those standards are met. Furthermore, these rights and obligations are enunciated in well-drafted franchise agreements and reviewed in advance under a prescribed set of mandated disclosures.

The ability of a customer to identify a certain level of quality and uniformity in the products or services offered by disparate franchisees within a system has led to the steady, enduring growth of franchising. A patron may enter a chain restaurant in New York, Mexico City, or Hong Kong and expect and receive virtually the same food. The uniformity and quality of products offered under a single brand is a prime factor in the success of the franchising concept. Without uniform standards, franchisees could build and operate units in whatever dissimilar fashions they choose, resulting in different buildings, uniforms, products, consumer service standards, and supply chain issues which could raise health concerns, ultimately causing the destruction of the reputation of the brand and the franchisor's concept as a whole.[11]

### B. Requirements Under the Federal Trade Commission Franchise Rule

The Federal Trade Commission (FTC) authorizes and regulates the sale of franchises in the U.S., and it defines a "franchise" in part as "any continuing commercial relationship or arrangement" whereby the franchisor promises that the franchisee "will obtain the right to operate a business that is identified or associated with the franchisor's trademark...."[12]

In 1978, the FTC published the Franchise Rule, which provides prospective purchasers of franchises information they may use to weigh the risks and benefits of a franchise investment, and requires franchisors to provide potential franchisees with specific items of information about the offered franchise, its officers, and other franchisees. Importantly, the Franchise Rule mandates that

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[10] 15 U.S.C. §1127.

[11] See Shelley & Morton, supra note 7, at 121

[12] 16 C.F.R. §436.1(h)(1) (the "Franchise Rule")

a franchisor "exert a significant degree of control over the franchisee's ***method of operation***."[13] This control stands in stark contrast to control over the franchisee's manner of performance, which is often highlighted as an indicia of an employment relationship under various state and other independent contractor laws.

A franchisor's exercise of control over a franchisee is commonly manifested through written contract and expressly limited to creating and enforcing brand standards. Brand standards typically include, among other things, requirements to comply with all applicable laws. Franchisors do not exercise day-to-day management over the business operations or employees of its franchisees. Yet, many independent contractor laws require businesses to classify workers as employees unless they are "free from control*"* and direction while performing their work. Taken in a literal sense, this requirement would ignore the realities of the franchise model. So, the related yet potentially conflicting "control" requirements of the FTC's Franchise Rule and the Lanham Act must be viewed as preemptive.[14] The FTC's franchise-specific rule should guide, and where necessary, prevail, over more generally applicable wage and hour laws.

### C. Requirements Under the Joint Employment Doctrine

Franchising is also subject to joint employment tests under multiple federal and state laws. Under the FLSA, for one example, courts around the country have articulated different tests, most of which purport to apply the Department's previous joint employer regulation. The number of different standards and factors employed in each test by various courts has bewildered and frustrated employers seeking to operate franchise businesses efficiently and profitably, without inadvertently creating joint employment. By way of examples only, the Second Circuit has applied a six-factor test in *Zheng v. Liberty Apparel Co.,* while the Third Circuit applied four different factors in *Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, the Fourth Circuit utilized a different six-factor test in *Salinas v. Commercial Interiors, Inc.,* while various cases in the Seventh Circuit have applied "economic realities" tests (that are indeterminate in nature), and the Eleventh Circuit recently applied an eight-factor test in *Freeman v. Key Largo Volunteer Fire and Rescue Dept., Inc.*

Most recently, the Department issued an opinion letter describing when "horizontal" joint employment will require separate legal entities to be treated as a single employer for purposes of overtime under the FLSA. FLSA 2025-05 (Sept. 30, 2025) (citing *Chao v. A-One Medical Services, Inc.*, 346 F.3d 908, 917–18 (9th Cir. 2003)). IFA appreciates that DOL sought to provide this guidance to the regulated community. While the joint employer standard and analysis form the most relevant and appropriate test for the franchise community, thoughtful rulemaking related to the independent contractor standard will help avoid muddying the determination of "control" relevant to franchising. It would also avoid creating two different theories of liability from which plaintiffs could pick and choose the most favorable test to achieve their desired outcome.

Indeed, if the control which franchisors asserted to protect their brands were used against them to successfully argue the establishment of an employment relationship of any kind (joint-employment

[13] 16 C.F.R. §436.1(h)(2) (emphasis added).

[14] *Patel et al v. 7-ELEVEN, INC. et al*, (D. Mass. 2020), 1:17-cv-11414-NMG

or employment of the franchisee), the franchise business model would be destroyed.[15] And of course, control beyond encouraging legal compliance, quality control, or promoting desired societal effects may demonstrate control that already indicates a joint- employment relationship.[16]

While franchisees retain substantial control over the day-to-day operations of implementing the business model, making employment decisions, setting employee wages, accepting the full risks associated with running a business (as well as the uninhibited profits), it would be unreasonable to adopt a labor theory that opens the door for a disgruntled franchisee to argue a retroactive employment relationship had existed throughout his or her ownership and direction of the business.

## III. DOL Guidance Is Needed and the Proposed Rule Faithfully Implements the Supreme Court's "Economic Reality" Framework.

The complexity, uncertainty, unpredictability, and sheer number of state and federal independent contractor tests have long slowed growth across all industries, including franchising. Independent contractor status is a bewildering legal doctrine, and its tests are badly in need of simplification across the country. There are multiple tests under federal law (which in the case of the FLSA can be interpreted in multiple different ways depending on circuit) and dozens of tests under state law, ranging from "ABC" or "AB" tests to "economic realities" to "common law" tests. For a single state operator, they may still face different tests under federal wage and hour law, state wage and hour law, state workers' compensation law, federal tax law, state tax law, and state unemployment compensation law (to name just a few).

Only recently has the scope of independent contractor legislation started to creep into the franchising space and threaten entrepreneurship. Some of the more employee friendly laws could undermine the permissibility of the federally approved franchise business model, as defined by the FTC Franchise Rule, which in turn could threaten to convert all franchise relationships under those laws into employment relationships. Under the FTC Franchise Rule, however, a franchise relationship is not an employment relationship. The Department is taking an important first step in bringing clarity and predictability to the FLSA economic reality test as it relates to franchise businesses.

The Department correctly grounds the proposed regulation in the Supreme Court's longstanding interpretation of the FLSA's broad "suffer or permit" standard.[17] As the Department explains, the proposed analysis draws directly from decades of federal judicial precedent applying an "economic reality" test to determine whether a worker is in business for themselves. This approach is

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[15] FRANdata, *Franchise Business Economic Outlook 2020* (2019) (prepared for the International Franchise Association).

[16] *C.f. Orozco v. Plackis*, 757 F.3d 445 at 449-51 (5th Cir. 2014) (holding that there was insufficient evidence to legally find that the potential joint employer supervised and controlled workers' schedules, pay rates, or other conditions of employment, where the potential joint employer advised a franchisee on how to increase profitability, including a review of employees schedules, and the franchisee then adjusted workers' hour and pay, where the decision as to whether or how workers' schedules and pay would be adjusted was still up to the franchisee)

[17] As noted in the Proposed Rule, the FMLA and MSPA expressly adopts the FLSA's definition of "employ" and thus incorporates the "suffer or permit" standard for determining the scope of employment relationships. 29 U.S.C. §§2611(3) (FMLA), 1802(5) (MSPA).

consistent with seminal Supreme Court decisions such as *Rutherford Food Corp. v. McComb*, which recognized that no single factor is determinative and that the inquiry must focus on the "circumstances of the whole activity". By rescinding prior regulatory frameworks that elevated or de-emphasized particular factors through administrative fiat, the Department appropriately restores the analytical balance reflected in federal case law.

For franchised businesses, alignment with judicial precedent and consistency is essential. Courts adjudicating wage-and-hour collective actions already apply this framework, and regulatory consistency reduces uncertainty, litigation risk, and compliance costs. IFA provides the following additional feedback regarding the proper articulation of the "economic realities" test.

### A. The Final Rule Should Reject "Economic Dependence" as "The Ultimate Inquiry" as It Is Not Consistent with Supreme Court Precedent, Can Be Present in Employment and Contractor Relationships, Appears to at Times Be Used Interchangeably With "Economic Realities," and Therefore Creates Unnecessary Confusion.

After recounting the Supreme Court's 1947 and 1961 FLSA precedent creating the "economic reality" totality of the circumstances test, including the *Rutherford Food Corp. v. McComb*[18] and *Goldberg v. Whitaker House Cooperative*,[19] *Inc*., the Proposed Rule states that "the ultimate inquiry focuses on an individual's 'economic dependence' for work." 91 Fed. Reg. 9932 at 9933. The Supreme Court, however, has not mentioned "economic **dependence**" as a consideration. Instead, the Court's analysis of the employee question has consistently focused on the "economic **realities**" of the relationship.

The Proposed Rule cites multiple circuit court cases for the proposition that "courts have recognized that the heart of the inquiry is whether "'as a matter of economic reality' the workers are 'dependent upon the business to which they render service.'" *Id*. at 9935.[20] The Proposed Rule also reiterates the 2021 Rule's explanation that "'[e]conomic dependence is not conditioned reliance on an alleged employer for one's primary source of income, for the necessities of life.'" *Id*. (*quoting Brock v. Mr. W Fireworks, Inc*., 814 F.2d 1042, 1054 (5th Cir. 1987)). Rather, courts have framed the question as "'whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves.'" *Id*. (*quoting Saleem*, 854 F.3d at 139).

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[18] 331 U.S. 722, 728 (1947) (holding that boners that worked on a production line using the company's equipment were employees under the FLSA).

[19] 366 U.S. 28, 33 (1961) (holding homeworkers were employees under the FLSA).

[20] Citing *Usery v. Pilgrim Equip. Co*., 527 F.2d 1308, 1311 (5th Cir. 1976) (quoting *Bartels*, 332 U.S. at 130 and *citing Mednick*), and *Mednick v. Albert Enters., Inc*., 508 F.2d 297, 299–300 (5th Cir. 1975); *Saleem v. Corporate Transp. Grp., Ltd*., 854 F.3d 131, 139–40 (2d Cir. 2017); *Chavez-DeRemer v. Med. Staffing of Am., LLC*, 147 F.4th 371, 397 (4th Cir. 2025); *Parrish v. Premier Directional Drilling, L.P*., 917 F.3d 369, 379 (5th Cir. 2019); *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015); *Iontchev v. AAA Cab Serv., Inc*., 685 F. App'x 548, 551 (9th Cir. 2017); *Dole v. Snell*, 875 F.2d 802, 804 (10th Cir. 1989); *Scantland v. Jeffry Knight, Inc*., 721 F.3d 1308, 1311 (11th Cir. 2013). Although these courts refer to economic dependence, they do not directly cite Supreme Court precedent to support their articulations. In failing to do so, their use creates confusion regarding the source of this articulation as well as how it differs from the Supreme Court's economic realities articulation.

While it is true that circuit courts and the 2021 Rule have to various degrees expressed the economic realities test in the context of economic dependence, such an articulation does more to confuse the analysis than it does to advance resolution of the ultimate question in many situations. The reason, as observed in the 2021 Rule, is because "all workers, whether employees or independent contractors, are dependent on others." 91 Fed. Reg. 9932 at 9946. The unreliability of this articulation is further highlighted by workers that choose (for whatever reason) not to work for more than one other party. Under an economic dependence articulation of the standard, there is a heightened and unnecessary risk that such a worker could be perceived to be an employee – potentially for no reason other than their purported "dependence" on the source of work.

This risk would also be present franchising. Franchisees can be viewed in some ways as economically dependent upon the franchisor for use of their brand and operational models. Yet franchisees are wholly independently owned and operated, they decide how to run their business, franchisors have limited to no input on (and therefore no control over) myriad area's of the franchisee's operations, franchisee's hire and fire their own employees, they solely and independently contract with other parties, and they have the opportunity for profit or loss.

The Proposed Rule provides explanatory guidance that "economic dependence for work rather than economic dependence for income is the proper inquiry." It proposes adding language to the end of proposed § 795.105(b) that ''Though both employees and independent contractors are dependent on others in some sense, economic dependence in this context means the dependence that a typical employee has on an employer for work, ***as opposed to an individual who has more of the nature and character of a business owner who has a separate business***. Economic dependence does not focus on the amount of income the worker earns, or whether the worker has other sources of income.'' 91 Fed. Reg. 9932 at 9946 (emphasis added). IFA strongly supports the inclusion of the emphasized language in proposed § 795.105(b). IFA respectfully submits, however, that continuing to highlight economic dependence as the "ultimate inquiry" is unnecessarily confusing. Under such an articulation, franchisors are still susceptible to an argument that franchisees depend on the franchisor business or organization for their continued operations, employment, and success. The ultimate inquiry of the multi-factor economic realities test is whether a worker is in business for themselves (and, therefore, is an independent contractor). Where the worker is in business for themselves, as are franchisees, turning to an economic dependence analysis is unnecessary and confusing.

Analyzing the economic "dependence" as the "ultimate inquiry" is therefore not consistent with the Supreme Court cases that have addressed the FLSA and articulated an "economic realities" test. Economic dependence can be present in both employee and contractor relationships, and it therefore should not be included as a consideration in the final rule. At a minimum, even if it were to be included in any final rule, IFA asks the Department to expressly state that the economic reality of the typical franchisor and franchisee relationship reflects an independent contractor relationship where the franchisee is not economically dependent upon the franchisor for purposes of the FLSA.

### B. The Final Rule Should Make Clear That Compliance with Legal Obligations Is Not Indicative of Control.

It has long been recognized that a requirement or regulation placed on a worker's activities that is imposed by and consistent with a legal requirement does not reflect or constitute the type of

"control" over the worker by an alleged employer that is relevant to the economic realities test or indicative of an employment relationship. *See*, *e.g.*, *Pendleton v. JEVS Human Servs.*, 463 F.Supp.3d 548, 553-56, 561-63 (E.D. Pa. 2020); *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 382 (5th Cir. 2019) (requiring safety training and drug testing at drilling site "is not the type of control that counsels in favor of employee status" where requirements are "consistent with the Occupational Safety and Health Act"); *Moreau v. Air France*, 356 F.3d 942, 951 (9th Cir. 2003) (control exercised to "ensure compliance with various safety and security regulations" is "qualitatively different" from control indicative of employee status); *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F.Supp.2d 901, 916 (S.D.N.Y. 2013) ("where a club implements regulations to assure compliance with law, those regulations are not evidence of the club's control").

Consistent with this precedent, the Department has emphasized that compliance with legal obligations is not indicative of an alleged employer's control of a worker. The 2021 Rule unambiguously provided that "[r]equiring the individual to comply with specific legal obligations ... does not constitute control that makes the individual more or less likely to be an employee." 86 Fed. Reg. 1168, 1247 (Jan. 7, 2021). Similarly, the 2024 Rule provided that "[a]ctions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control." 29 C.F.R. § 795.110(b)(4). When adopting the 2024 Rule, the Department emphasized that its position aligned "with **existing** judicial precedent and the Department's **longstanding** guidance." 89 Fed. Reg. 1638, 1639 (Jan. 10, 2024) (emphasis added). The Department explained that its approach was "well-supported by the [existing] case law" and would "align ... with the analysis presently applied by courts." *Id*. at 1655.

The Department's 2024 Rule was quickly tested in court. In *Razak v. Uber Technologies, Inc.*, the plaintiffs (black car transportation providers) contracted with Uber to obtain access to its proprietary technology platform (the "Uber App") so that they could receive trip requests from riders who used the Uber App to request transportation services. No. 16-573, 2024 WL 3584324 (E.D. Pa. July 30, 2024). The plaintiffs claimed that they were "misclassified" as independent contractors. Not surprisingly, one of the critical issues in the case was Uber's alleged right to control the manner in which the plaintiffs' work was to be performed. *Id*. at *2, citing the "economic realities" factors enumerated in *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376 (3d Cir. 1985). As evidence of alleged control, the plaintiffs argued that Uber subjected them to a long list of "infractions" that could result in loss of access to the Uber App. *Id*. at *9.

Applying the 2024 Rule approximately six months after it took effect, the *Razak c*ourt determined that "the vast majority" of the so-called "infractions" identified by plaintiffs were merely existing legal requirements imposed by the Philadelphia Parking Authority (PPA). *Razak*, 2024 WL 3584324, at *9-10, citing 29 C.F.R. § 795.110(b)(4). The court concluded that "the PPA, rather than Uber, set most of the rules governing Plaintiffs' working environment." *Id*. at *10. Stated differently, the requirements that plaintiffs offered as evidence of "control" were "in actuality Uber's attempts to comply with local law." *Id*. Because those requirements were required by the PPA, the court correctly held that they were "impermissible considerations" when assessing the "right to control" factor. *Id*. at *9-10. After considering the other "economic realities" factors, the court entered judgment in favor of Uber. *Id*. at *10-12.

On appeal, former Acting Secretary of Labor Julie Su filed a brief as *amicus curiae* in support of the *Razak* plaintiffs. Contradicting the 2021 Rule and the 2024 Rule, the former Acting Secretary inexplicably argued that requirements intended to comply with legal obligations ***can be*** viewed as evidence of control. *See* Sec'y of Lab. Brief, filed in Case No. 24-2638 at Doc. 32 (Jan. 13, 2025), at 9-10. The former Acting Secretary argued that *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308 (11th Cir. 2013), supported her contention that actions taken by an alleged employer that are consistent with legal compliance can be indicative of control. Sec'y of Lab. Brief at 10. In *Scantland*, however, there was substantial evidence of control that had nothing to do with legal compliance. 721 F.3d at 1313-14 (workers were required to report at specific times, were assigned routes, and were prohibited from working for others). Indeed, the Department had already distinguished *Scantland* in its 2021 Rule, emphasizing that "[i]f the reason for a requirement applies equally to individuals who are in business for themselves and those who are employees [such as in the case of legal compliance], imposing the requirement is not probative." 86 Fed. Reg. 1168, 1183 (Jan. 7, 2021); *see id*. (expecting all workers to "comply with the law" is "not probative of whether the worker is an employee or independent contractor"). In short, *Scantland* did not support the former Acting Secretary's position that legal compliance can be evidence of control.

Not surprisingly, the Secretary of Labor eventually withdrew the misguided *amicus* brief. *See* Sec'y of Lab. Notice of Withdrawal, filed in Case No. 24-2638 at Doc. 63 (Aug. 15, 2025). Nonetheless, the fact that the former Acting Secretary would take a position as *amicus* in private litigation that contradicts the Department's own longstanding guidance demonstrates the urgency of the Proposed Rule and the need for the Department to take an unequivocal position on the issue of legal compliance as not indicative of control.

The Proposed Rule seeks "to readopt guidance from the 2021 Rule advising that when a potential employer places certain compliance requirements on an individual, it 'does not constitute control that makes the individual more or less likely to be an employee under the Act.'" 91 Fed. Reg. 9932 at 9955 (citing 86 Fed. Reg. 1168, 1247 (Jan. 7, 2021)). Specifically, "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)." *Id*. (citations omitted).

While the 2024 Rule is generally consistent with the 2021 Rule in recognizing that legal compliance is not indicative of control, the 2024 Rule inadvertently injected potential ambiguity into the analysis. The 2024 Rule states that actions taken by an alleged employer for the "sole purpose" of complying with the law are not indicative of control. 29 C.F.R. § 795.110(b)(4). The "sole purpose" language could be interpreted to impose a "motive" element to the assessment, in which the alleged employer's "purpose" for imposing the requirement are a relevant consideration. Such a condition would be nonsensical. For example, a rule imposed in a franchise agreement on independently owned and operated franchisees—"they and their employees must obey all traffic laws"—would be a prototypical example of why expecting legal compliance is not indicative of control. That conclusion should not be vulnerable to attack even if the alleged employer was motivated to impose the rule for reasons in addition to legal compliance (e.g., to promote community goodwill and protect brand integrity). To be sure, the rulemaking associated with the 2024 Rule did not include any discussion of the "sole purpose" phrase or suggest that it was inserted to require consideration of the potential employer's motivations. We respectfully urge the

Department to make clear that the potential employer's motivation is not relevant when the alleged requirement is consistent with an existing law that already governs the worker's conduct.

IFA supports the Department's proposal to restore the 2021 Rule's articulation and guidance of this principal that legal compliance is not evidence of control, and would propose including two additional examples related to franchisors and franchisees:

1. Where a franchisor contracts via franchise agreement with an independently owned and operated franchisee that requires the franchisee to comply with legal requirements, brand standards, and operational requirements, this does not constitute control that would make it more or less likely for franchisor to be an employee under the FLSA.

2. Where the franchisee contracts with an independent worker and requires the worker to comply with legal requirements as well as the franchise agreement brand standards and operational requirements, this does not constitute control that would make it more or less likely for the franchisee to be an employer under the FLSA.

### C. The Final Rule Should Make Clear That Directing the ***Manner of Performance*** Is the Critical Criterion Indicative of Employer Control.

As the U.S. Court of Appeals for the Third Circuit explained, "[e]very job, whether performed by an employee or by an independent contractor, has parameters and expectations." *Carpenter v. Pepperidge Farm, Inc.*, 2024 U.S. App. LEXIS 11409, *5-6 (3d Cir. May 10, 2024). Merely setting "parameters and expectations" for the performance of a job is not itself evidence of control. Contracting entities often identify and set the time and place of performance, but it is the direction of ***the manner in which the work is performed*** that is indicative of a worker's relationship with an employer. Indeed, "only an employer can both set parameters and expectations and direct the time, place, ***and manner in which an employee accomplishes them***." *Id*. (emphasis added); *see also Chao v. Mid-Atlantic Installation Servs., Inc*., 16 F.App'x 104, 106 (4th Cir. 2001) (specifications and quality control exist in any subcontractor relationship); *Saleem v. Corp. Transp. Group, Ltd*., 854 F.3d 131, 136 (2d Cir. 2017) (concluding that drivers were independent contractors despite "manuals setting out certain standards of conduct" including dress codes, cleanliness requirements, and prohibitions on harassing customers). Even when a requirement imposed by a prospective employer might go beyond existing legal requirements, it is not necessarily probative of control. Certainly, a franchisor contracting party should be entitled to end a relationship with an independently owned and operated franchisee contractor who breaches a franchise agreement by failing to meet brand standards without converting the contractor into an employee.

IFA strongly supports the Department's rejection of any categorical or presumptive approach that would conflate franchise brand standards with employment control. As the Department recognizes, the "nature and degree of control" factor must be evaluated in context and must focus on control over the *manner and means* of work performance—not legitimate brand-protection, training, or compliance requirements. This distinction is particularly critical in regulated industries such as home care, where franchisors may impose system-wide standards related to patient safety, quality assurance, and regulatory compliance. Treating such standards as evidence of employment would improperly penalize compliance-oriented business models and undermine public policy goals.

The Proposed Rule correctly clarifies that operational requirements designed to ensure uniformity, quality, and legal compliance do not, standing alone, establish an employment relationship. This clarification helps preserve the independence of franchisees as separate small businesses while allowing franchisors to maintain brand integrity. IFA therefore suggests the Final Rule should make clear that control indicative of an employment relationship is most clearly defined by directing the manner of performance, and that input into the parameters and expectations, including time and place of performance, are not indicative of an employment relationship. The Department should make clear that if a requirement applies equally to individuals who are in business for themselves and those who are employees (such as in the case of legal compliance), imposing the requirement is not probative on the question of control.

### D. The Proposed Rule Correctly Pushes Back on the 2024 Rule's Explanation of the "Permanence" and "Integration" Factors – The Final Rule Should Expressly State That the Franchise Relationship Does Not Reflect the Type of Permanence And "Integration" Indicative of an Employee Relationship.

The 2024 Rule's analysis of the ''permanence'' factor, 29 CFR 795.110(b)(3), is another example of the concern and confusion created for a franchise relationship. The operative text of the 2024 Rule advises that ''[t]his factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration, continuous, or exclusive of work for other employers,'' while it ''weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple entities.'' In response, the Proposed Rule correctly observes, "[t]here is no corresponding language in the other direction, categorically discounting industries where lengthy professional relationships between businesses and independent contractors might be commonplace. The result is a factor framed in a way that may indicate the existence of an FLSA employment relationship when permanence exists but unnecessarily require additional considerations to indicate independent contractor status when permanence does not exist." 91 Fed. Reg. 9932 at 9941. This precisely highlights the issue with the permanence factor for franchising, and why the final rule should expressly state that the economic realities of the franchise relationship, despite its common permanence, does not reflect an employment relationship.

Another factor identified is the extent to which the work performed is an integral part of the potential employer's business. For reasons similar to those identified related to "permanence," IFA proposes that DOL further provides in the final rule that franchisees are not part of the franchisor's integrated production process. A franchisor is not in the business of providing services to the end consumer. Rather, the core business of a franchisor is limited to developing and marketing a business model and providing business support to franchisees, thus ensuring the strength of the brand. Even so, as the Proposed Rule notes, the 2024 Rule departed from *Rutherford Food's* guidance and may unreasonably frustrate finding independent contractor status for the simple reason that "[i]n some sense, all work performed is in some way necessary to" the other entities business. Indeed, the integral factor can ''effectively subsume'' all independent contractors into employment status because businesses do not pay employees or independent contractors to engage in work that is not in some sense critical or necessary to their operations. Without further clarity, there is an unnecessary risk that an argument can be made that a franchisee's work is "critical, necessary, or central to" the franchisor's principal business. This has been a common argument

raised in the frequent gig economy litigation. For example, in *Razak et al v. Uber Technologies, Inc.*, the plaintiffs argued that Uber drivers are a necessary and essential part of Uber's business as a transportation company. *Razak v. Uber Techs., Inc*., No. CV 16-573, 2018 WL 1744467, at *19 (E.D. Pa. Apr. 11, 2018) ("Uber drivers are an essential part of Uber's business as a transportation company"), *vacated and remanded*, 951 F.3d 137, 147 (3d Cir. 2020) (finding that whether drivers' services are integral to the service Uber renders is a disputed material fact that should be resolved by a fact finder), *amended*, 979 F.3d 192 (3d Cir. 2020). The extensive litigation around issues like this demonstrates the need for additional clarity. Again, IFA suggests that the final rule should expressly state that the economic realities of the franchise relationship, despite any purported necessity of the franchisee to the franchisor and vice versa, does not reflect an employment relationship.

## IV. While Actual Practice Can Differ from Contractual Expectations, Contracts Provides Contemporaneously Created Evidence Reflecting the Parties' Expectations at Time of Inception of the Relationship – As Opposed to Their View of the Relationship After Conflict Arises.

The Proposed Rule explains a desire to elevate actual practice of the parties over any contractual or theatrical possibilities. 91 Fed. Reg. 9932 at 9957. While IFA recognizes there are situations where the contractual terms differ or vary from the practical reality, it suggests the Proposed Rule provides short shrift to important evidence reflecting the expected realities of the parties' relation that was created at the time of the inception of the relationship and before either side became tainted by conflict or bias. By doing so, the Department impliedly telegraphs to courts and parties that their contracts do not matter and should not be considered.

The Proposed Rule states that "the primacy of actual practice is derived from the Supreme Court's holding that 'economic reality; rather than 'technical concepts' is to be the test of employment." 91 Fed. Reg. 9932 at 9957. This language from *Rutherford Foods*, however, does not in any way state that a contract between two parties should be completely disregarded. The better reading is that a contract between entities is one part of the economic reality. "Though an employer's self-serving label of workers as independent contractors is not controlling," such a designation in an agreement with the worker is certainly pertinent to "the parties' beliefs about the nature of the relationship." *Saleem*, 854 F.3d at 141 (internal citations omitted). Where companies enter contracts that expressly identify the nature of the relationship as independent contracting parties and that expressly disclaim employment and the right to control, that intention should not be lightly disregarded. More to the point, when a contract expressly delegates to one party or another the absolute right to control certain aspects of the work, that contractually binding aspect of their relationship is indisputably part of the economic realities of the relationship. That aspect is also less susceptible to manipulation by improper motives or poor performance, thereby at times making it more reliable than actual practice.

This issue is particularly important in franchising where franchisors and franchisees enter into carefully drafted franchise agreements that are designed to comply with federal and state laws applicable to franchisors while simultaneously establishing brand standards and other operational oversight of franchisees. To the extent these documents are wholly disregarded by the parties, jettisoning the agreement from the economic reality analysis may be appropriate. However, in most instances in franchising, the franchise agreement is the best evidence of the economic realities of

the parties. Therefore, IFA would propose clarifying in the final rule that if the parties entered into a contract, it is relevant (even if not dispositive) to the economic realities analysis.

## V. The DOL's Companion Joint Employer Proposed Rule Further Supports Finalization of the Independent Contractor Rule and Reinforces That Brand Standards and Franchise Business Practices Do Not Constitute Employer Control.

On April 23, 2026, the DOL also published a companion Notice of Proposed Rulemaking on joint employer status under the FLSA, FMLA, and MSPA (the "Joint Employer NPRM"), RIN 1235-AA48, 29 CFR Parts 500, 780, 791, and 825. The two rulemakings are deeply complementary. The Joint Employer NPRM addresses when two or more businesses are jointly and severally liable as co-employers of the same workers; the Proposed Rule addresses when a worker is an employee at all rather than an independent contractor. Together, they map the complete landscape of employer liability exposure for the franchise community. IFA respectfully submits that the policies expressed in the Joint Employer NPRM reinforce and amplify the arguments for finalizing the Proposed Rule in a form that addresses IFA's concerns set forth in this Comment and ensures consistency across the DOL's final independent contractor rule and final joint employer rule with respect to the franchise model.

### A. The Joint Employer NPRM Confirms That the Franchise Business Model Does Not, By Itself, Indicate Any Employment Relationship.

Proposed § 791.125(a) of the Joint Employer NPRM states categorically: "Operating as a franchisor or entering into a brand and supply agreement, or using a similar business model, does not make joint employer status more or less likely under the Act." The preamble reinforces the Department's "longstanding position that certain business models—such as the franchise model—do not themselves indicate joint employer status under the FLSA," and explains that the proposed vertical joint employment analysis "is not intended to make franchisors or businesses in any similar business model more or less likely to be joint employers than other types of businesses." The same logic applies with equal force here. If operating a franchise system does not make a franchisor more likely to be a joint employer of a franchisee's employees, even more so it cannot make the franchisee more likely to be an employee of the franchisor. The Department should carry that principle through to the Independent Contractor final rule by expressly confirming, as IFA requests elsewhere in this Comment, that the economic reality of the franchisor-franchisee relationship reflects an independent contractor relationship rather than an employment relationship.

### B. The Joint Employer NPRM Confirms That Brand Standards, Quality Control Requirements, and Legal Compliance Obligations Are Not Indicative of Control.

Proposed §§ 791.125(b) and (c) of the Joint Employer NPRM provide that neither contractual requirements to comply with "general legal obligations" or health and safety standards, nor requirements to meet quality control standards to ensure "the consistent quality of the work product, brand, or business reputation," make joint employer status more or less likely. The preamble expressly includes within this safe harbor "mandating compliance with the FLSA or other similar laws; or institute anti-harassment policies; requiring background checks; or requiring employers to establish workplace safety practices and protocols." It further includes "requiring

morality clauses, or requiring the use of standardized products, services, or advertising to maintain brand standards."

These are precisely the same categories of franchisor oversight that IFA addresses in this Comment. The Department should ensure that the final independent contractor rule is consistent with the Joint Employer NPRM on this critical point by making equally explicit that: (1) requiring compliance with legal obligations does not constitute "control" under the FLSA economic reality test; (2) imposing brand standards, quality control, and uniformity requirements does not constitute control over the manner and means of a franchisee's work; and (3) providing sample employment handbooks, operational materials, and training resources—all expressly addressed in proposed § 791.125(d) of the Joint Employer NPRM—does not indicate any employment relationship. Regulatory consistency across both rulemakings is essential to avoid the anomaly of the same franchisor conduct being deemed neutral for joint employment purposes while simultaneously being treated as evidence of control in an independent contractor analysis.

**C. The Joint Employer NPRM's Illustrative Franchise Example Should Be Incorporated by Reference or Mirrored in the Independent Contractor Final Rule.**

Proposed § 791.125(e)(3) of the Joint Employer NPRM contains an illustrative example involving a global hospitality franchisor ("Franchisor A") that provides a franchisee ("Franchisee B") with proprietary software, a sample employment application, a sample employee handbook, sample operational plans, business plans, and marketing materials, while the franchise agreement expressly states that Franchisee B is "solely responsible for all day-to-day operations, including hiring and firing of employees, setting the rate and method of pay, maintaining records, and supervising and controlling conditions of employment." The Joint Employer NPRM concludes that "none of the facts described in this example make it more or less likely that Franchisor A is a joint employer of B's employees." This is exactly the paradigm case for the independent contractor analysis as well. IFA respectfully requests that the Department add a parallel illustrative example to the independent contractor final rule at proposed § 795.115 that is modeled on this franchise scenario and that reaches the same conclusion: a franchisor that provides brand, operational, and compliance support to a franchisee, while the franchisee retains full day-to-day operational control, does not exercise the kind of control over the manner and means of the franchisee's business operations that is indicative of an employment relationship under the FLSA. The two rulemakings should speak with one voice on the fundamental character of the franchise relationship.

**D. The Department Should Ensure Regulatory Harmony Between the Joint Employer NPRM and the Independent Contractor Final Rule to Prevent Inconsistent Treatment of Identical Franchisor Conduct.**

IFA is concerned about the potential for regulatory incoherence if the two rulemakings are finalized without explicit cross-referencing. A franchisor that provides a sample employee handbook to a franchisee is expressly protected under proposed § 791.125(d) of the Joint Employer NPRM: such conduct does not make joint employer status more or less likely. But without a parallel provision in the independent contractor rule, a plaintiff could argue that the same handbook provision is evidence of the franchisor's "control" over the franchisee's business operations under the economic reality test. This would create an untenable result: the franchisor is simultaneously protected from joint employer liability and exposed to an argument that it is the franchisee's

employer. The Department can and should prevent this outcome by including parallel provisions or cross-referencing the Joint Employer NPRM's franchise-protective provisions in the preamble to the independent contractor final rule, and by adding franchise-specific guidance and examples to proposed § 795.115 as IFA recommends.

The Joint Employer NPRM also expressly recognizes that the Department's enforcement practice has been that when investigating a typical franchisee for potential FLSA violations, "the Department does not seek recovery from the franchisor as a joint employer simply because it has a franchise arrangement." The independent contractor final rule should reflect the same enforcement philosophy: the mere existence of a franchise relationship, including the standard indicia of brand oversight, operational guidance, and compliance requirements that are inseparable from every franchise system, does not transform the franchisor-franchisee relationship into an employment relationship. Consistent administration of the FLSA across both rules is not only legally sound—it is essential to the predictability and stability that the franchise community and the broader independent contracting economy require.

## VI. Conclusion

For the reasons set forth above, IFA supports the Department's Proposed Rule, subject to the requested modifications, and urges the Department to finalize the NPRM, thereby rescinding the 2024 Rule and ceasing the confusion it created. Prompt action will clarify the economic reality of the franchisor-franchisee relationship, reduce unnecessary burdens caused by frivolous legal and other challenges, and better serve the regulated community and workers alike. A final independent contractor rule is essential to franchising – a model that promotes small business and creates a pathway for individuals who wish to start their own businesses, create jobs, and maximize their participation in the American economy.

IFA appreciates the Department's engagement on this important issue, thanks the Department for considering the experiences of IFA's members, and welcomes the opportunity to provide the Department with any additional information it may deem useful.

Respectfully Submitted,

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