



December 13, 2022

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: RIN #1235-AA43: Employee or Independent Contract Classification Under the Fair Labor Standards Act

Dear Secretary Walsh:

The Pennsylvania Homecare Association (PHA) represents nearly 700 home health, hospice and homecare agencies that provide in-home care to patients and consumers across the Commonwealth. Our members employ tens of thousands of employees as direct care workers, home health aides, therapists, nurses, and more. They also engage independent contractors to fill a wide range of roles in fulfilling their critical missions. On behalf of our members, we appreciate the opportunity to provide comments on the proposed rule to revise the analysis for determining employee or independent contractor classification under the Fair Labor Standards Act (FLSA).

PHA supports the Department's goal of protecting workers from misclassification. We also urge the Department to provide clear, consistent guidance on classification issues and recognize the critical role that independent contractors play in the provision of home-based care.

Clarifying Guidance and Examples

It is essential for the Department to provide both employers and workers with clear, consistent guidance on employee classification. The employee/independent contractor analysis is complicated, and the proposed economic realities test has the potential to create confusion, without additional clarification. We ask the Department to consider the following.

Control. Under the proposed rule, when an employer exercises direct control over a worker's ability to work for others, such as by prohibiting other work by contract, this indicates employee status. However, the proposal also says that "the mere fact that an employer allows workers to work for others does not transform an employee into an independent contractor." It notes that indirect control is relevant as well, and the example provided is when an employer controls a worker's schedule by requiring work most days a week without the ability to refuse work.

We ask the Department to provide additional examples relating to the application of the indirect control concept, including some that support employee status and others that support contractor status. In addition, because there is always the "potential" for control, we urge the Department not to incorporate this concept without additional explanation and examples.

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Compliance with Legal Obligations. Under the rule as proposed, “when an employer, rather than a worker, controls compliance with legal, safety, or other obligations, it may be evidence that the worker is not in fact in business for themselves because they are not doing the entrepreneurial tasks that suggest that they are responsible for understanding and adhering to the legal and other requirements that apply to the work or services they are performing such that they are assuming the risk of noncompliance.”

The home-based care industry is heavily regulated, including a wide range of requirements performed by independent contractors that could be misconstrued as employee status. Independent contractors can be engaged for field work, including nurses, physical therapists, occupational therapists, speech therapists, and social workers.

Caregivers and others must follow many regulations, rules, licensing requirements, plans of care, and more, and all stakeholders would benefit from further guidance and examples to help with the analysis of how this factor would apply across the range of work and services relating to the provision of healthcare services.

We ask the Department to provide additional examples of what would indicate employment, and alternatively indicate independent contracting, on the issue of requiring compliance with state or federal requirements established as an indicator of control.

Striking a Balance and Allowing for Flexibility. Businesses and independent contractors enter into contractual arrangements for many reasons, including a desire for flexibility and the need for a specialty service for a limited period. Skilled clinical expertise is a good example where this occurs.

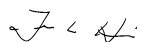
We urge the Department to establish a balance in its final rule. In addition to providing additional guidance on worker classification, it should also support independent contractor arrangements that are beneficial to and supported by all parties involved.

Home-based care and other healthcare providers across the country have long-faced a chronic workforce shortage, and COVID-19 only exacerbated this staffing crisis. It is critically important that providers have flexibility to meet the needs of the individuals they serve.

PHA supports the Department’s goal of protecting workers from misclassification, while at the same time recognizing that independent contractors serve and should continue to serve an important role in home-based care.

Thank you for your consideration. Please contact me at thenning@pahomecare.org if we can provide any additional information.

Sincerely,



Teri L. Henning, CEO