U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2021-9

January 19, 2021

Dear **Name*** and **Name***:

This letter responds to a request from each of you for an opinion letter. The first request asks whether requiring tractor-trailer truck drivers to implement safety measures required by law constitutes control by the motor carrier for purposes of their status as employees or independent contractors under the Fair Labor Standards Act (FLSA). The second request provides a detailed factual scenario and asks, based on that scenario, whether certain owner-operators are properly classified as independent contractors. We conclude that the safety measures do not constitute control for purposes of determining independent contractor status and that the owner-operators are likely independent contractors.

BACKGROUND

A. First request: Is requiring compliance with specific legal obligations or health and safety standards a factor in determining the employee status under the FLSA of an owner-operator driver?

As you state, motor carriers are responsible for ensuring driver compliance with the Federal Motor Carrier Safety Regulations (FMCSRs) in determining whether a driver is an employee or an independent contractor.[1] Federal Truth-in-Leasing regulations also prescribe conditions under which drivers may lease trucks and provide driving services to a carrier, requiring the carrier to assume responsibility for the operation of the equipment.[2] These regulations impose safety requirements for the operation of trucks for which both the driver and the carrier are liable.

You ask whether certain safety requirements directed by a motor carrier are a factor in determining whether an owner-operator is an employee under the FLSA. We summarize below the four scenarios you present.

Scenario 1: The carrier requires drivers to install and use a video-based onboard safety monitoring system. The system has outward and inward facing cameras. This system automatically captures video for a brief period of time when it detects an unsafe event. This video of the conditions inside and outside the truck cab is available for the motor carrier's review. The review may result in mandatory coaching or training. The carrier pays for the equipment and the associated service fees.

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[1] *See* 49 C.F.R. § 350.01 *et seq*.
[2] *See* 49 C.F.R. § 376.12(c)(1).

Scenario 2: The carrier requires drivers to install an onboard safety monitoring system that monitors sensor and engine data. In effect, this system monitors risky driving behaviors such as speeding and turn signal use. The carrier can monitor this data in real time. Unsafe behavior can result in mandatory coaching. This feature is also paid for by the carrier.

Scenario 3: The carrier requires the driver to install and use a GPS-based speed limiter. This device simply sets a maximum speed, which the truck cannot exceed, based on the applicable speed limit. You explain that the newer technology can adjust this speed based on the truck's location. The driver pays for this feature.

Scenario 4: The carrier has mandatory monthly safety meetings and quarterly reviews and requires successful completion of a quarterly online safe-driving course. These are all at the carrier's expense.

B. Second request: Are certain owner-operators employees under the FLSA?

The second request concerns a transportation and logistics provider. The provider employs drivers and also hires drivers who own and operate their own trucks as independent contractors. You ask, given the asserted differences between employee drivers and owner-operator drivers, whether the owner-operators are FLSA employees:

- Employee drivers are provided all required equipment by the provider, including the tractor, and are reimbursed for expenses such as fuel. Owner-operators are required to furnish the tractor and are not reimbursed for their expenses. Owner-operators are responsible for insurance, capital investments, and all other costs related to the tractor.

- Employee drivers' schedules are dictated by the provider, including shifts worked, hours worked, rates of pay, vacation and time-off requests, and the duration and location of "home time." The owner-operators may choose their own jobs through an online portal. They exercise their judgment to choose whether to work and how frequently to work. The owner-operators may choose not to drive for the provider and may work for other employers, including competitors of the provider, through the provider's "trip lease" program.

- Employee drivers must ship the freight specified by the provider between the origin and destination set by the provider and follow the route as determined by the provider. Owner-operators may use the online portal to select which freight they ship and may choose which routes they take. They exercise their judgment to choose jobs based on the origins and destinations, the quantity and type of freight, routes, and the potential revenue that can be generated from choosing to drive a particular route or haul particular freight. The provider also does not guarantee freight for the owner-operator driver to haul. Owner-operators may also use the online portal to assign jobs to their own employee drivers. On average, an owner-operator generates over $100,000 a year in income from the provider, but a skilled owner-operator may generate over $300,000 in a year.

- Employee drivers are required to drive tractors with the provider's logo on them and to comply with the provider's dress code. They are also required to attend orientation and

significant ongoing trainings and meetings regarding the provider's policies and procedures. Owner-operators are not required to do either.

- Owner-operators sign a one-year contract that does not automatically renew and "typical" contracts may be terminated by either party with 15 days' written notice without cause, or immediately for cause.

- The provider ensures that all drivers, whether employees or owner-operators, comply with safety regulations.

As in the first request, every driver is subject to the FMCSRs (and, we assume, the Truth-in-Leasing regulations and local traffic regulations). The provider requires in its contract with each owner-operator that the owner-operator comply with these laws, but it does not require particular safety measures.

GENERAL LEGAL PRINCIPLES

The FLSA's minimum wage and overtime pay obligations apply only to those workers it defines as employees—individuals whom an employer suffers, permits, or otherwise employs to work.[3] The scope of employment under the FLSA is broad, but, as the Supreme Court has pointed out, it was "obviously not intended to stamp all persons as employees."[4] Independent contractors, for example, are not "employees."[5] Over its history, WHD has consistently construed who is an employee under the FLSA to adhere to the Act's definitions and judicial precedent interpreting them. "An employee, as distinguished from a person who is engaged in business for himself or herself, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent upon the business to which he or she renders service."[6]

As reflected by this longstanding interpretation, the touchstone of employee versus independent contractor status has long been "economic dependence."[7] When determining economic dependence, WHD considers five factors derived from Supreme Court precedent, as further explained in a recent final rulemaking that is effective on March 8, 2021:

1. The nature and degree of control over the work;
2. The worker's opportunity for profit or loss based on initiative or investment;
3. The amount of skill required for the work;
4. The degree of permanence of the worker's relationship with the potential employer; and

[3] 29 U.S.C. §§ 206(a), 207(a); *id.* § 203(e)(1), (g).
[4] *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).
[5] *See, e.g.*, *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).
[6] WHD Opinion Letter FLSA2019-6, at 3 (Apr. 19, 2019) (quoting and citing historical opinion letters).
[7] *See, e.g.*, *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379–80 (5th Cir. 2019); *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 138–40 (2d Cir. 2017); *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 806–07 (6th Cir. 2015).

5. Whether the work is part of an integrated unit of production.[8]

As we recently explained, control and opportunity for profit or loss are the two "core factors" that are "the most probative" when determining a worker's status as employee or independent contractor.[9] Where the two core factors point toward the same status, whether employee or independent contractor, there is a substantial likelihood that is the worker's correct status.[10] The three other factors are considered but are more likely to affect the ultimate conclusion when the two core factors point in different directions.[11] Further, "the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible."[12]

We also explained that requiring an individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, or meet contractually agreed-upon deadlines or quality control standards does not constitute control that makes the individual more or less likely to be an employee under the Act.[13]

WHD interprets the Act "neither expansively nor narrowly, but according to conventional canons of statutory construction," and gives it a fair, rather than narrow, reading.[14]

OPINION

Based on the facts provided in the first request, we conclude that the requirements to comply with certain legal, health, and safety obligations are not a factor in determining whether a driver is an employee or an independent contractor under the FLSA. Based on the facts provided in the second request, we conclude that the owner-operators are likely independent contractors.

A. The safety measures described in the first request do not affect the analysis of the control factor.

As we recently explained, "insisting on adherence to certain rules to which the worker is already legally bound" says nothing about whether the worker is an employee or an independent contractor.[15] The rule identifies several requirements that do not factor into whether the

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[8] *See* 29 C.F.R. § 795.105(d) (effective March 8, 2021). *See also Silk v. United States*, 331 U.S. 704, 716 (1947) (listing factors that are "important for decision"); *Rutherford*, 331 U.S. at 729 (analyzing *Silk* factors and also considering that workers were "part of the [defendant's] integrated unit of production).

[9] 29 C.F.R. § 795.105(c).

[10] *Id*.

[11] *Id.*; *see also* 86 FR 1201–02.

[12] 29 C.F.R. § 795.110.

[13] *Id.* § 795.105(d)(1)(i).

[14] *Sec'y of Labor v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019); *see also Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

[15] 86 FR 1182; *see also Parrish*, 917 F.3d at 379 ("although requiring safety training and drug testing is an exercise of control in the most basic sense of the word, … [r]equiring … safety training and drug testing, when working at an *oil-drilling site*, is not the type of control that counsels in favor of employee status."); *Pendleton v. JEVS Human Svcs., Inc.*, 463 F. Supp. 3d 548, 561–62 (E.D. Pa. 2020) (quarterly trainings and oversight to ensure compliance with program regulations demonstrate that the control factor weighs in favor of independent contractor status). *Cf. Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1048 (5th Cir. 1987) (company's requirement that workers attend to establishment around the clock, where state law required only securing the door, evinced control).

individual is, as a matter of economic reality, in business for himself. These requirements include whether the worker is required 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).[16]

Here, as you describe, Congress and federal regulators have placed significant responsibility on motor carriers for their independent contractors' safety performance, distinguishing the trucking industry from many other businesses and industry sectors. This translates to a strong incentive for motor carriers to pursue safety measures and improve regulatory compliance with respect to all of their drivers, employees and independent contractors alike. As you note, the camera- and sensor-based safety systems monitor the driver, some internal components of the vehicle, and some external conditions. The speed limiter prevents the driver only from driving in a way that the law prohibits. The mandatory meetings and trainings educate drivers on their legal obligations to drive safely. And a contractual obligation to comply with safety requirements requires no particular action except what the law already requires. Each of these are the types of legal, health, and safety standards that do not suggest control indicative of employee status.

B. The owner-operators described in the second request are likely independent contractors.

Based on the facts furnished, we conclude that the owner-operators described in the second request are independent contractors under the FLSA. They exercise substantial control over key aspects of their work and have the opportunity for profit or loss based on their personal initiative and investment. Because these two factors align, "the bulk of the analysis is complete," and we "may approach the remaining factors and circumstances with skepticism" as they outweigh the two core factors "only in unusual cases[.]"[17] As two, and possibly all three, of these factors also suggest independent contractor status, this is not such a case.

1. Control.

Owner-operators haul the freight they select and the routes they chart without oversight, and perform their primary task—transporting goods—as they see fit, simply utilizing a virtual platform to identify shipments they want to haul. The platform provider does not manage how owner-operators perform services. The Fifth Circuit found, under similar circumstances where a directional-driller consultant chose how to effectuate a well plan, that the lack of oversight or control over the worker's primary task sufficed for the control factor to weigh in favor of independent contractor status.[18] Furthermore, the owner-operator is permitted to *not* provide services at their discretion, and to determine their quantity of work, and they are free to provide services for competitors; additionally, owner-operators may work any hours or days they choose, so long as they comply with DOT safety regulations. Having full control of one's schedule and being non-exclusive, including working for potential competitors, are facts that usually indicate

[16] *See* 29 C.F.R. § 795.105(d)(1)(i).
[17] *See* 86 FR 1197.
[18] *Parrish*, 917 F.3d at 381.

that a worker exercises substantial control over key aspects of the performance of their work.[19] Therefore, the control factor weighs in favor of finding of independent contractor status.

2. Opportunity for profit or loss based on personal initiative or investment.

The opportunity for profit or loss factor also favors independent contractor status. This factor weighs towards the individual being classified as an independent contractor if he or she has an opportunity for profit or loss based on either or both of (1) the exercise of personal initiative, including managerial skill or business acumen; and (2) the management of investments in, or capital expenditure on, for example, helpers, equipment, or material.[20] As we have explained, this opportunity typically exists where the worker receives additional compensation based, not on greater efficiency, but on the exercise of initiative, judgment or foresight,[21] and a worker's investment in, or capital expenditure on, helpers, equipment, or material to further his or her work is probative of his or her economic independence.[22] The factor suggests employee status if the owner-operators cannot affect their earnings or can do so only by working longer or faster.[23]

As we explained in our recent rulemaking, investment and opportunity for profit or loss should be considered in tandem, rather than separately, because "the individual worker's meaningful capital investments may evince opportunity for profit or loss."[24] We also stated that it is the worker's investments alone, not those investments in comparison to the potential employer's, which matter when considering investment.[25] When evaluating this factor, "it is important to determine how the workers' profits depend on their ability to control their own cost."[26] A "substantial outlay" of financial resources for work-related expenses indicates an independent contractor relationship.[27]

Here, owner-operators strategically determine what freights to select, whether and whom to hire, how to insure their trucks or businesses, and what types of capital investments to make. You indicated that the owner-operators' income varies greatly depending on their management skill, preferences, and judgment in choosing among these and other options, which favors independent contractor status.[28] Owner-operators that drive for the provider must have bought, financed or leased at least one vehicle which you assert may cost over $100,000 if purchased new; some owner-operators own multiple vehicles. Additionally, they are not reimbursed for fuel, fuel taxes, ferry fees, maintenance, repairs, various other taxes, and various other required expenses,

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[19] *See, e.g., Saleem*, 854 F.3d at 146.
[20] *See* 29 C.F.R. § 795.105(d)(1)(ii).
[21] *See* 86 FR 1189 (citing WHD Opinion Letter FLSA2019-6, at 6).
[22] *See* 86 FR 1188.
[23] *See* 29 C.F.R. § 795.105(d)(1)(ii).
[24] 86 FR 1186; *see also Saleem*, 854 F.3d at 144 n.29 ("Economic investment, by definition, creates the opportunity for loss," and "investors take such a risk with an eye to profit.").
[25] *See* 86 FR 1187–88.
[26] *Parrish*, 917 F.3d at 384 (internal quotation marks omitted).
[27] *Saleem* 854 F.3d at 141; *see also Browning v. Ceva Freight, LLC*, 885 F. Supp. 2d 590, 608 (E.D.N.Y. 2012).
[28] *See, e.g., Brennan v. Sand Prod., Inc.*, 371 F. Supp. 236, 238 (W.D. Okla. 1973) ("[h]is profit is affected by his initiative, his industry, his care and ability in driving, his care and maintenance of his vehicle, and the extent of his investment in the vehicle as it relates to load capacity and the hauls he desires to accomplish"); *Browning*, 885 F. Supp. 2d at 608 (worker had "opportunity for both profit and loss when engaging in assignments" with motor carrier).

suggesting that managing expenses and efficient use of resources is key to their earnings. Therefore, the Department finds that the opportunity for profit or loss factor weighs in favor of the owner-operators being independent contractors.

3. Other factors.

This does not quite end our analysis. In unusual circumstances, the probative value of the other three factors—skill required for the work, permanency of the relationship, and integration of the work into a unit of production—may require a contrary finding even if the two core factors point toward the same status. These are not unusual circumstances. To the contrary, these three additional factors all weigh in favor of independent contractor status, thus reinforcing the weight of the two core factors.

Skill: As we recently explained, this factor should focus on the amount of skill required, rather than initiative, which is properly considered under opportunity for profit or loss.[29] The factor "weighs in favor of classification as an independent contractor where the work at issue requires specialized training or skill that the potential employer does not provide."[30] The owner-operators must have a commercial driver's license in addition to business skills for managing the business. The provider does not train them beyond orienting them to the basics of working for your particular business. Courts have found this factor to favor independent contractor status for truckers under similar facts.[31]

Permanence weighs in favor of independent contractor status to the extent the work relationship is by design definite in duration or sporadic, and it weighs in favor employee status to the extent that relationship is instead by design indefinite in duration or continuous.[32] The owner-operators here have one-year contracts that do not automatically renew, and the "typical" contract may be terminated by either party with 15 days' written notice without cause, or immediately for cause.

Integration concerns whether the work is part of an integrated unit of production. The factor suggests an individual is an independent contractor to the extent the work is segregable from the potential employer's production process.[33] Here, the description itself of the potential employer's operations—transportation *and logistics*—suggests that the owner-operators' work is segregable from rather than integrated into the production process. The function of a logistician is to arrange for transportation of goods and materials, not to transport the goods and materials itself; accepting contracts from a logistics provider is a typical function performed by independent trucking companies, and truckers need not also furnish additional logistics services. However, the work of the truck drivers themselves appears to be identical whether the drivers are employees or owner-operators. This suggests that the trucking work itself is integrated into the potential employer's operations—or, at the very least, that the potential employer views it as such. Based on the information furnished in your request, we cannot determine the status to

[29] 86 FR 1191 ("[T]he effect of the worker's initiative is analyzed under the opportunity factor, another core factor that, for the reasons explained above, is usually more probative than the skill factor.").
[30] 29 C.F.R. § 795.105(d)(2)(i).
[31] *See, e.g., Browning,* 885 F. Supp. 2d at 609; *Luxama v. Ironbound Exp., Inc.*, No. 11-cv-2224, 2012 WL 5973277, at *6 (D.N.J. June 28, 2012) (possessing a commercial driver's license is a special skill).
[32] 29 C.F.R. § 795.105(d)(2)(ii).
[33] *Id.* § 795.105(d)(2)(iii).

which this factor points. In these circumstances, however, it is unnecessary for us to do so, for even if this factor suggested employee status, it would not overcome the agreement of the two core factors that the owner-operators are independent contractors.

CONCLUSION

For all of the foregoing reasons, we conclude that the safety measures described in the first request do not affect the analysis of the control factor, and that the owner-operator truck drivers described in the second request are likely independent contractors.

This opinion is based exclusively on the facts you have presented and on your representation that you do not seek this opinion for any party that WHD is currently investigating or for use in litigation that began before your request. This letter is an official interpretation by the Administrator of WHD for purposes of the Portal-to-Portal Act. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."[34]

We trust that this letter responds to your inquiry.

Sincerely,

Cheryl M. Stanton
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b).**

[34] *See* 29 U.S.C. § 259.