



December 13, 2022

By Electronic Submission to 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: DOL Docket No. WHD-2022-0003, RIN 1235-AA43
Employee or Independent Contractor Classification Under the Fair Labor Standards Act

Dear Ms. Looman:

TechServe Alliance ("TechServe") submits these comments in response to RIN 1235-AA43 concerning the Department of Labor (DOL) Wage and Hour Division's Proposed Rule on Employee or Independent Contractor Classification under the Fair Labor Standards Act ("Proposed 2022 Rule.")

At this time, we reassert our support for the 2021 Final Rule, which clarified worker classification for the IT/Engineering staffing industry. If the DOL finalizes the Proposed 2022 Rule, we urge the agency to incorporate more examples of independent contractor/employee status that pertain to knowledge workers¹, including but not limited to, IT and engineering consultants who offer their services as independent contractor firms.

TechServe Alliance is the national trade association representing IT and engineering staffing firms dedicated to advancing excellence and ethics. TechServe represents hundreds of companies and serves as the industry's voice before policymakers and the national and trade press. Our members are U.S.-based businesses providing just-in-time talent that builds critical systems and infrastructure for America's corporations, government, and other organizations. These companies include IT and engineering staffing firms, which supply clients with on-site consultants to support their IT and engineering projects, and IT solutions firms, which take on client projects and deliver a complete solution. Approximately 84% of our members generate less than \$30 million in annual revenue and qualify as a "small business" under the most recent Small Business Administration (SBA) guidelines.

¹ "Knowledge workers" are essential for the modern economy and include IT/engineering consultants, scientists, and similar experts in various fields.

TechServe Supports 2021 Final Rule as Applied to IT/Engineering Staffing Industry

This Notice of Proposed Rulemaking (NPRM) seeks to withdraw the 2021 Final Rule and reestablish the seven-part economic realities test. However, TechServe Alliance continues to support the 2021 Final Rule as it applies to the IT and engineering staffing industry.

The 2021 Final Rule allows our firms to engage in-demand, highly skilled IT and engineering professionals who offer their services as independent contractor firms without fear of reclassification penalties under various federal statutory frameworks. In our April 2021 comment letter on the proposed withdrawal of the 2021 Final Rule, we urged DOL to work with the Small Business Administration and address industry nuances if DOL moved to replace the 2021 Final Rule. Unfortunately, the Proposed 2022 Rule restores uncertainty and fails to include industry-specific examples of what differentiates employees from independent contractors who are knowledge workers; knowledge workers in IT typically form their own consulting firm.

Proposed Seven-Factor Economic Reality Test Restores Uncertainty, Does Not Provide Clarity

The harm to high-tech firms and workers caused by the lack of certainty for technical services firms contracting with individual independent contractor firms is more than theoretical; accessing the talent of IT and engineering independent contractors is critical to business competitiveness. This uncertainty is even more difficult by the continued technical talent shortage: as of August 2022, there were more than 800,000 open positions in IT-related roles. The worker shortage in IT continues unabated, with a 2.3% unemployment rate for IT professionals as of the end of Q3 of 2022. Source: TechServe Alliance; BLS.

The proposed regulations include the history of the FLSA independent contractor regulation, relevant case law, and industry-specific examples of who must be classified as an employee and who might qualify as an independent contractor. The NPRM includes examples of graphic designers, landscapers, a cook, healthcare workers, and farm workers. In response to DOL's request for comments on this issue, we urge DOL to provide examples of how knowledge workers would be eligible for independent contractor status.

The Final Rule, if Adopted, Must Include Real World Examples for Knowledge Workers

DOL notes that “[r]eal world examples [for analyzing the economic reality test] provide valuable information to the general public and regulated parties and help succinctly explain relevant issues in the analysis.”² DOL plans to include these examples in the preamble of the Final Rule if adopted.

The seven-factor, totality of the circumstances test is a highly subjective analysis, and we strongly agree with DOL that more guidance would be helpful. The Final Rule should be instructive in addressing specific questions arising from varying interpretations of the FLSA based on industries. The preamble should include a variety of examples for knowledge workers, including high-skilled IT professionals.

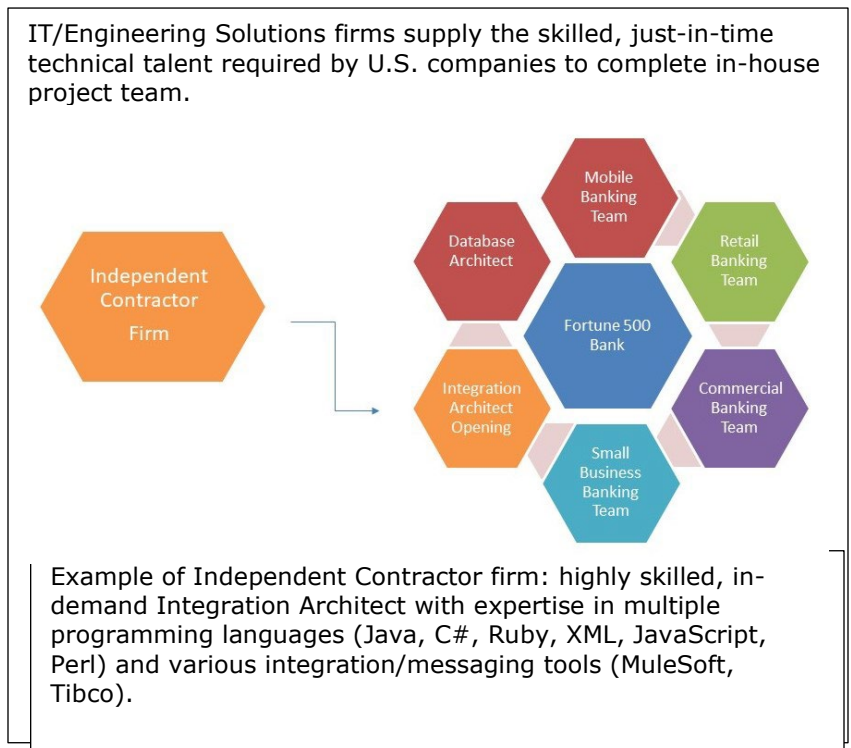
² Department of Labor, Wage and Hour Division, Notice of Proposed Rulemaking, “Employee or Independent Contractor Classification Under the Fair Labor Standards Act,” 87 Fed.Reg. 62218 at 62259 (October 13, 2022).

TechServe Urges DOL to Include Preamble Examples for IT/Engineering Staffing Industry

TechServe urges DOL to carefully consider our real-world examples, detailed below, of how IT/Engineering Solutions Firms utilize highly skilled technical talent, many of whom work for their own independent contractor firms.

IT/Engineering Solutions Firm seeks the services of a Software Integration Architect to complete a project team to upgrade the bank's software:

- Firm seeks the services of a highly qualified IT professional to meet a temporary need on an IT project team.
- IT professional is an entrepreneur independent contractor firm.



IT professionals often choose to operate their own businesses by providing services as independent contractor firms. They are typically highly educated, highly skilled professionals with very marketable skill sets. Virtually all IT professionals have a four-year degree, and many have advanced degrees, they stay current with recent developments, and they are constantly improving their highly sought-after skills.

Most independent contractors in the IT and engineering staffing industry earn above-average wages; individual independent contractor firms may earn over \$200,000 in annual revenue. Working as an independent contractor also allows them to establish tax-preferred retirement and other benefit plans that follow them from project to project.

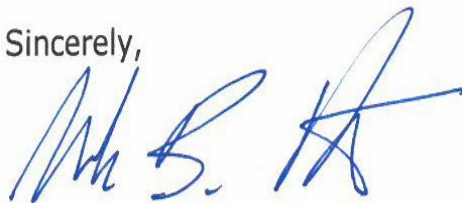
TechServe urges DOL to review all comments on the Proposed 2022 Rule carefully and provide examples to guide industries and individuals on this complex issue. For example, IT independent contractor firms typically work with IT/engineering staffing firms in the following ways, which supports their independent contractor status:

1. **Opportunity for Profit or Loss Depending on Managerial Skill:** The IT independent contractor ("IT IC") is an entrepreneur who negotiates their contracts and terms of work; may accept or reject an offer of a proposed project; engages in business development; networks; advertises via social media such as LinkedIn; and can work remotely or at the end-client site during business hours. Given reasons such as security concerns and the opportunity to collaborate with other project team members, the need to work at the end-client site should not be a factor weighing against IC status. In DOL's example, a landscape worker required to work at their client's site still qualifies as an IC.
2. **Investment:** The IT IC typically has their own office, whether home-based, virtual, or shared; equipment to run their business which could include desks, computers, internet, and telephone. However, end clients may require the IT IC to use the company's computer for security reasons. In addition, the IT IC invests in continuing education to stay current with emerging developments in their skills.
3. **Permanence:** IT ICs have multiple clients, serial in nature, as they often work on one engagement at a time due to the intensity of the project. The IT IC next works with another staffing firm on the project of a different end client that needs their particular skills. The IT independent contractor firm has a non-exclusive relationship with each staffing firm.
4. **Control:** IT ICs typically set their schedules, perform their highly skilled work independently, negotiate their own contracts and set their own fees, and work for other staffing firms or end-clients.
5. **Integral Part of the Business:** IT professionals operating as an IC often provide the missing link on a project or provide much-needed services for an end client that might be a bank, hospital, telecommunications company, or other business. DOL should recognize the importance of the highly skilled nature of IT IC entrepreneurs and how they choose to provide their services in the modern economy and not give weight to the subjective determination of whether it is an integral part of the end client's business.
6. **Skill and Initiative:** Highly skilled and educated IT ICs provide their expertise in working with staffing firms and their clients. By demonstrating a high degree of proficiency in the services they offer, they have the opportunity to generate new business opportunities.
7. **Other Factors:** DOL does not propose to "include the worker's degree of business organization or operation as a seventh factor." We urge DOL to consider the degree of independent business formalization (incorporation, licenses, taxes) in analyzing IT IC status as part of the totality of the circumstances test.

Conclusion

TechServe Alliance urges DOL to carefully review and consider these comments, which reflect the different ways work is performed in a modern economy. Our industry asks for clarity in a Final Rule to ensure that IT professionals operating as independent contractors are appropriately recognized as such under the Fair Labor Standards Act. Thank you for your consideration.

Sincerely,



Mark B. Roberts
Chief Executive Officer