



**Division of Regulations, Legislation, and Interpretation**  
**Wage and Hour Division**  
**U.S. Department of Labor**  
**([submitted electronically](#))**

October 26, 2020

**Proposed Rulemaking: Independent Contractor Status under the Fair Labor Standards Act**

- **Regulatory Information Number (RIN) 1235-AA34**

I submit these comments regarding the U.S. Department of Labor (DOL) proposal on independent contractor status<sup>1</sup> on behalf of the Insights Association (IA), the leading nonprofit trade association representing the marketing research and data analytics industry, and our more than 6,300 members.

IA's members include both marketing research and data analytics companies and organizations, as well as the research and analytics professionals and departments inside of non-research/analytics companies and organizations. They are the world's leading producers of intelligence, analytics and insights defining the needs, attitudes and behaviors of consumers, organizations, employees, students and citizens. With that essential understanding, leaders can make intelligent decisions and deploy strategies and tactics to build trust, inspire innovation, realize the full potential of individuals and teams, and successfully create and promote products, services and ideas.

**1. What is marketing research?**

Marketing research is defined as the collection, use, maintenance, or transfer of personal information as reasonably necessary to investigate the market for or marketing of products, services, or ideas, where the information is not: (i) integrated into any product or service; (ii) otherwise used to contact any particular individual or device; or (ii) used to advertise or market to any particular individual or device. Another legal definition of marketing research, as used at the federal level in the 2012 Research Fairness Act<sup>2</sup> and in amendments passed to a New Hampshire push polling statute in 2014,<sup>3</sup> is "the collection and analysis of data regarding opinions, needs, awareness, knowledge, views, experiences and behaviors of a population, through the development

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<sup>1</sup> <https://www.federalregister.gov/documents/2020/09/25/2020-21018/independent-contractor-status-under-the-fair-labor-standards-act>

<sup>2</sup> H.R. 5915, proposed in 2012, available at <https://www.congress.gov/bill/112th-congress/house-bill/5915>

<sup>3</sup> Title LXIII, Section 664:2 (XVII and XVIII), available at <http://www.gencourt.state.nh.us/rsa/html/LXIII/664/664-2.htm>

and administration of surveys, interviews, focus groups, polls, observation, or other research methodologies, in which no sales, promotional or marketing efforts are involved and through which there is no attempt to influence a participant's attitudes or behavior.”

## **2. Participant incentives**

Our industry uses incentives to encourage participation in some marketing research studies, depending on the needs of those studies and the sample of participants we are trying to reach. The form and amount of reimbursement for study participation depends on such factors as: the length, mode, method and circumstances of the study; and the specialized knowledge, experience, demographics, or background of the participant mix.

The monetary value of the incentive or the form it may take is not determined on an ad hoc or willy-nilly basis, but is instead subject to rigorous fair market value analyses (sometimes by both the end client and by the research company or organization performing the study). The value and form, and whether an incentive is required at all, are generally determined separately for each specific research study. Some studies offer only an entry in a contest/sweepstakes as the incentive. Others provide the participants flexible choices in what kind of incentive they prefer, including different ways to spend “points” received from a given study, or the ability to donate the value of the incentive to charity (sometimes a specific charity of the participants' own choosing). Incentive is inherent in the term, but most people are motivated to participate in research studies for the opportunity to provide their opinion or attitudes, whether that's on who they're going to vote for in an election (and why), the desired course of a public policy, their feelings about a corporate brand, the design of a new smartphone, or changes to their favorite breakfast cereal.

## **3. Marketing research participants receiving incentives are not independent contractors**

Of course, (outside of some small handful of employee satisfaction research studies), those participants receiving incentives are not employed by the organization or company conducting the research – they are independent contractors and should be recognized as such. Their participation is completely voluntary and they may opt out at any time. However, companies that conduct these studies sometimes face cases in which a person receiving a small reimbursement for participating in a single study is misclassified as an employee of the firm conducting the study. This is usually the result of a misguided labor or tax authority, or a misunderstanding on the part of the participant.

Research participants may participate in multiple studies for multiple companies in the same year, or even at nearly the same time, but that participation is not a profession, participants do not carry business cards titling themselves as professional marketing research participants, and participants cannot easily make a living at it. In fact, the insights industry goes to great lengths to prevent individuals from participating in too many research studies (especially with one company in a short period of time). Referred to as “cheater-repeaters” in industry lingo, such participants rush through studies in hopes of quick completion and receipt of an incentive. Instead of representative data, individuals that attempt to make a living this way produce skewed data. Cheater-repeaters also threaten the integrity of insights because they frequently try to get onto panels using fake IDs and data, and similarly provide fake or erroneous responses to questions.

Unfortunately, independent contractor status tests remain focused on simplistic conceptions of work. Labor law and regulation did not develop with marketing research in mind; they were conceived in relation to classic professions like construction workers and travel agents and thus struggle to handle reimbursement for research participation, which is not a profession at all.

Although the industry and function are not the same, the contention in the DOL's 2019 opinion letter on virtual marketplace companies that they "do not fit any 'traditional employment paradigm covered by the Act'"<sup>4</sup> applies even more so to marketing research participants. The 1947 Rutherford Food case similarly made the case that "workers" may be independent contractors when their work does not "in its essence ... follow[] the usual path of an employee."<sup>5</sup> Participation in research is at best a hobby, one entered into only once in a while, with compensation not necessarily even offered, and driven primarily by a participant's interest in the subject to be discussed and the opportunity to provide their input, and have their opinions, attitudes and behaviors shape the products, services, or ideas at issue. Marketing research participation is far outside of the "traditional employment paradigm" and does not conform to "the usual path of an employee."

IA supports DOL's decision to update the FLSA's test, and we understand why DOL may need to eliminate various carveouts. However, we strongly urge the addition of a clarification that marketing research participants receiving incentives are independent contractors, utilizing one of the definitions proffered in section 1.

#### 4. The proposed economic realities test

Absent a specific clarification, a properly balanced economic realities test in federal labor law for determining independent contractor status would be a potentially useful improvement in the classification of marketing research participants receiving incentives.

IA agrees with the DOL proposal that it is most important to determine whether a worker is in business for themselves (independent contractor) or is economically dependent on a putative employer for work (employee), focused on the two proposed core factors – factors which, if properly crafted and explained, should point to a marketing research participant who receives an incentive as being an independent contractor.

Core factor i, the "*nature and degree of the individual's control over the work*," is easily demonstrated for research participants, since participants generally:

- control their own schedule, especially when participating in a study via an online panel, although even focus groups and 1-to-1 interviews can often be flexibly scheduled to the needs of the participant;
- select their own projects for participation that may interest them – although participants may not necessarily be accepted for any/every study that strikes their fancy, participation is voluntary, no one is required to participate, and the failure to choose a specific project will not disqualify the individual from the opportunity to choose another project with that company; and

<sup>4</sup> U.S. Department of Labor Opinion Letter FLSA2019-6. April 29, 2019.  
[https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019\\_04\\_29\\_06\\_FLSA.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_04_29_06_FLSA.pdf)

<sup>5</sup> Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947)

- exercise the ability to work for others, since people may participate in studies for multiple companies/organizations, depending on their interests and availability, and cannot be tied to any exclusivity. At worst, a company or organization may seek to avoid anyone who has participated in a study for any other company/organization, or even their own, in a given time period, in order to try to avoid “cheater-repeaters.”

IA also appreciates that the proposed FLSA regulations specify that requirements for an individual to comply with specific legal obligations, satisfy health and safety standards, 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) does not constitute control that makes the individual more or less likely to be an employee.

Core factor ii, the "*individual's opportunity for profit or loss*," is measured on “the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work.”

In the insights industry, the capital investment/expenditure on the part of a marketing research participant is negligible at best and not at all specific to their participation (e.g., a computer or mobile device with some form of Internet service to respond to an online survey). Companies that demand investment from consumers in order to connect them with survey opportunities are almost uniformly scam artists. As explained in the DOL’s 2019 opinion letter on virtual marketplace companies,<sup>6</sup> “that worker may come to rely on the business to supply those investments in order to perform his or her services.... That reliance could make it more difficult for the worker to pursue other economic opportunities, thereby increasing the worker’s economic dependence.” The lack of such necessary investment on the part of a marketing research participant, no matter which marketing research company or organization conducting a study, in this case argues for them being an independent contractor rather than an employee.

The “profit or loss” part of the factor is problematic for the insights industry in that incentive levels<sup>7</sup> are generally determined prior to the recruitment of any participants for a specific study, without the ability for participants to negotiate or earn their way to greater compensation through skill or acumen, at least as it involves that specific study. However, the 2019 opinion letter further suggested that an individual can “control their profit or loss by ‘toggling back and forth between different’ competing” companies and organizations, which would seem to be part of the “exercise of initiative.” It also highlighted that an individual’s ability to choose “whether or not” to cancel a “job” pointed in favor of independent contractor status, and that is certainly the case for a marketing

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<sup>6</sup> 2019 DOL Opinion Letter

<sup>7</sup> Incentives, which are generally of nominally value. are provided to induce respondents to participate in studies that generally require very little or no commitment of their own resources, other than time. Incentive levels may be more than nominal for focus groups and IDIs, especially if conducted in-person, since those require a greater commitment of time and focus on the part of the respondent. Specialized audiences, like health care professionals or corporate executives, also generally require significantly higher incentive levels, but even those levels don’t at all compare to the pay those professionals make in their normal specialized work.

research participant (since research is voluntary, a participant may opt out at any time, although they may not qualify for the incentive if they do not complete the study).

IA urges DOL to explicitly include in core factor ii a recognition that an individual's ability to select "work" opportunities (in this case, marketing research studies in which to participate), and with the companies or organizations of his or her own choosing, constitutes important evidence of the individual's ability to affect profitability. Only such recognition would allow IA to accept this factor as "core."

As pointed out by the proposal, in cases where the two core factors are not wholly determinative, there are three secondary factors. Only the first two secondary factors are suited to an easy reading of marketing research participants as independent contractors:

- (i) *"The amount of skill required for the work"* points to a participating individual being an independent contractor if "to the extent the work at issue requires specialized training or skill that the potential employer does not provide." An insights company cannot collect relevant data except from its participants. Consumer data provided by the companies' own employees would be biased, likely unrepresentative of a desired population or audience, and extremely limited overall. The "skill," background or expertise of the participants may vary greatly, but it is inherent to them – it cannot be taught by an insights company, and it cannot be created internally by an insights company. For example, it takes no particular skill to respond to an online survey, only certain individuals would fit the desired profile of a consumer who may be in the market to purchase an electric car in the next year, and thus only those kinds of individuals would be useful to consider for participation in a brief study of automobile preferences for Electric Car Manufacturer X.
- (ii) *"The degree of permanence of the working relationship between the individual and the potential employer"* also is an easily-satisfiable factor for a marketing research participant. Except for longitudinal research studies, a research study engagement is by definition "definite in duration or sporadic," usually lasting only a matter of minutes or an hour or two. Longitudinal studies, which are usually conducted for academic or government purposes, track participants over time, but each research interaction in a longitudinal study may be relatively brief and may be separated by months or years. Even individuals who join a panel may spend a half hour responding to a single survey and go another few weeks, months or years before qualifying for and responding to another one. IA urges DOL to include the consideration of "exclusivity" (the ability to work for others) in this factor, since if an individual has a long-term relationship with an entity due entirely to the individual's choice, but not due to the entity imposing any restriction on the individual's ability to work for others, or requiring the individual to work so many hours as to effectively prevent the individual from working for others, this factor should not weigh in favor of employment.
- (iii) *"Whether the work is part of an integrated unit of production"* is a more problematic factor. The 1947 Rutherford Foods case deemed this as "meaning whether the putative independent contractors were integrated into the assembly line alongside the company's employees," which would be relatively simple to determine in the marketing research context, since participants are providing their opinions, attitudes, or behavior for collection or observation, but are not a part of the company's internal process to gain insights from such data. However, as the DOL proposal lays out, courts have tended to interpret this to mean that the work is "integral," or "important" or "central" to a company's business. The DOL opinion letter on virtual marketplace companies warned that "a worker's services are integrated into a business if they form the 'primary purpose'

of that business," which would strongly suggest that this factor points to a marketing research participant being an employee.<sup>8</sup> We agree with DOL that "analyzing the importance or centrality of work may send misleading signals in low-transaction-cost environments that have become more commonplace, which militates in favor of refocusing the integral part factor on integration rather than importance." From that perspective, a marketing research participant is not integrated into the insights company – it is "segregable from the potential employer's production process." However, the application of this factor is unclear. IA appreciates DOL's attempt to simplify the factor test for independent contractor status, but this factor desperately needs some case examples to explain its applicability.

The insights industry requires certainty in the independent contractor status of research participants receiving incentives. We reiterate that the FLSA, like most laws and regulations focused on independent contractor status, did not develop with marketing research in mind, nor is it particularly well suited to evaluate marketing research participation, which cannot be considered a profession.

While it might appear viscerally obvious that marketing research participants are not employees of companies or organizations conducting research studies, the firms that contract with these individuals face troubling challenges to that nonemployee status. The cost of defending against these challenges and the uncertainty they create has a material negative effect on the industry. It also threatens the integrity of the research process and the resulting insights that people, companies, organizations and the governments rely upon every day to be able to learn and understand consumer attitude, behavior and opinion.

In conclusion, we urge DOL to:

- (1) clarify that marketing research participants are independent contractors;
- (2) maintain core factor i;
- (3) expand core factor ii to include a recognition that an individual's ability to select "work" opportunities, and with the companies or organizations of his or her own choosing, constitutes important evidence of the individual's ability to affect profitability;
- (4) maintain secondary factor (i);
- (5) expand secondary factor (ii) to include the consideration of "exclusivity" (the ability to work for others);
- (6) explain the applicability of secondary factor (iii), which is currently unclear, through case examples; and
- (7) provide multiple case examples for each part of the regulation, to reduce confusion and potentially unnecessary litigation and enforcement.

We look forward to assisting the DOL Wage and Hour Division in improving and finalizing this important regulatory proposal.

Sincerely,

Howard Fienberg  
VP Advocacy  
Insights Association

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<sup>8</sup> 2019 DOL Opinion Letter