



DIRECT SELLING ASSOCIATION

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October 26, 2020

Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
United States Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Independent Contractor Status Under the Fair Labor Standards Act
(RIN 1235-AA34)

Dear Administrator Stanton:

The Direct Selling Association (DSA) is the national trade association for companies that market products and services directly to consumers through an independent, entrepreneurial salesforce. In 2019, direct selling took place in all 50 states in the United States, generating \$35.2 billion in retail sales. More than six million entrepreneurs in the U.S. sold products or services through the direct selling channel.¹

DSA appreciates the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) regarding independent contractor status under the Fair Labor Standards Act (FLSA). Millions of direct sellers across the United States would be helped if the Department of Labor provided more clarity under federal law.

The Direct Selling Business Model

Direct selling has been an integral part of the United States economy for over 100 years. For each of our member companies, the most valuable asset is the independent, entrepreneurial salesforce, which sell 100% of the goods and services produced by the companies. Unlike many traditional businesses, almost 90 percent of direct sellers choose to work part-time², setting their own schedules for flexibility and work-life balance, deciding how they are going to run their business.

A direct seller's compensation is based on commissions for products and services sold—they do not have territories, quotas, or mandatory hours worked. Fifty-nine percent of direct sellers cite flexibility as a reason for joining, and 61% cite flexibility as a reason they're staying in direct

¹ Direct Selling Association 2020 Growth and Outlook Survey

² Id.

selling.³ In recent DSA research, 77% of Americans said they are interested in flexible, entrepreneurial income earning opportunities and 79% see direct selling as an attractive option for entrepreneurial opportunities.⁴

The Rule Should Clearly Define Direct Sellers as Independent Contractors

Although the NPRM provides helpful guidance using the two factors in the economic realities test that best describe an independent contractor relationship as core factors, we recommend specifically defining direct sellers as independent contractors under the final rule.

The Department of Labor and courts take a case-by-case analysis of all independent contractor arrangements. All member companies provide in their contract with salesforce members that the relationship that the individual is an independent contractor for the company. Courts have found direct sellers to be independent contractors for many years.⁵ However, specific language could help avoid future court challenges which utilize valuable court time and unnecessary expenditures by the parties.

Current federal statute, recently enacted state legislation and federal legislation recognize the unique status of direct sellers as independent contractors. Since 1983, direct sellers have been defined as statutory non-employees under the Internal Revenue Code.⁶ The legislative intent⁷ and interpretations of this statute have applied to a variety of activities of direct sellers over the years.⁸

Using similar language under state statute, A.B. 5 enacted in California earlier this year provided an express exemption for direct sellers, giving them more deferential treatment in determining their independent contractor status. The language was based on California statute and that of 39 other states that define direct sellers as independent contractors.⁹

³ Direct Selling Association 2019 National Salesforce Survey

⁴ Direct Selling Association/IPSOS, 2020 Consumer Attitudes & Entrepreneurship Study

⁵ *Electrolux v. Danaher* 128 Conn. 342 (1941); *Sarah Coventry, Inc. v. Caldwell* 243 Ga. 429 (1979)

⁶ 26 USC § 3508

⁷ See HR Conf Rep No. 97-760, at 1421, *reprinted in* 1982 USCCAN 1190 (1982)

⁸ See e.g. Proposed Treas Reg § 31.3508.1; IRS Audit Technique Guide for Retail Industry, IRS Pub Bo. 4751G (re Feb. 2009); Independent Contractor or Employee? IRS Training Materials No. 3320-102 (Oct. 1996)

⁹ Ala Code Sec 25-4-10(b)(23); AK. STAT. Sec. 23.20.526(a) (21) (1995); ARIZ. REV. STAT. ANN. Sec. 23-617(22) (1983); CAL. UNEMP. INS. CODE Sec. 650; Colorado Rev Stat Sec 8-70-136; DEL. CODE ANN. tit. 19, Sec. 3302(11)(N); FLA. STAT. ANN. Sec. 440.02 (15)(d); O.C.G.A. § 34-8-35; HAW.REV. STAT. Sec. 383-7(21) (1995); IDAHO CODE Sec. 72-1316A (20); ILL. ANN. STAT. ch. 820 Sec. 405/217; Ind. Code ANN. Sec. 22-2-2-3; IOWA CODE ANN. Sec. 96.19 (18)(g)(9)(b); Kansas Statues Sec. 44-703(i)(4)(v); KY Rev. Stat. Ann. Sec. 341.055(21); LA. REV. STAT. ANN. Sec. 23: 1472 (12)(H)(XVIII); Maine Revised Statutes §1043 11(F)(28); MD. CODE ANN. 8-206(b); MICH. COMP. LAWS Sec. 421.43 (r); MINN. STAT. ANN. Sec. 268.035 Subd. 20(30); MISS. CODE ANN. Sec. 71-5-11(I)(15)(p); MO. ANN. STAT. Sec. 288.034 (12)(17); MONT. CODE ANN. Sec. 39-51-204(1)(i); NEB. REV. STAT. ANN. Sec. 48-604(6)(t); NEV. REV. STAT. ANN. Sec. 612.144; N.H. REV. STAT. ANN. Sec. 282- A.9(IV)(s); N.J. STAT. ANN. Sec. 43:21-19 (i)(7)(O); N.C. Gen Stat. Sec 96-1(b)(12)(b)(4); OHIO REV. CODE ANN. Sec. 4141.01(B)(3)(g); OKLA. STAT. ANN. tit. 40, Sec. 1-210(15)(u); OR. REV. STAT. Sec. 657.087; Penn. Stat. Title 43. § 753 (I) (4) (20); R.I. Gen. LAWS Sec. 28-42-7; South Carolina Code of Laws, Section 41-27-260 (18); TENN. CODE ANN. Sec. 50-7-207 (c) (12); TEX. LABOR CODE Sec. 201.070(2); UTAH CODE ANN. 35A-4-205(1)(p); VT. STAT. ANN. tit. 21, Sec. 1301(6)(C)(xxi); VA.

H.R. 3522, which currently has 24 bi-partisan co-sponsors, incorporates the IRS Code language into the Fair Labor Standards Act to clearly define direct sellers as independent contractors. DSA would like to request the final Department of Labor rule take this approach.

Direct Sellers' Unique Place as Independent Business Owners

DSA is grateful the United States Department of Labor put forward the NPRM to more clearly distinguish independent contractors in today's modern economy. The direct selling business model and our utilization of an independent contractor salesforce has been a part of the American economy for more than 100 years - before all technological advancements. Therefore, deserves separate mention.

Thank you for the opportunity to comment. We would be pleased to answer any questions or provide further information as the Wage and Hour Division and Department of Labor sees fit.

Sincerely,

Brian Bennett
Vice President, Government Affairs & Policy