



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

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Comments submitted on NPRM: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (RIN: 1235-AA43)

I submit these comments regarding the U.S. Department of Labor (DOL) proposal on independent contractor status¹ on behalf of the Insights Association (IA), the leading nonprofit trade association for the market research and data analytics industry, and our more than 6800 members.

In particular, the DOL proposal, as drafted, is subject to interpretation that participants in surveys, focus groups, and other market research activities may be classified as employees of the research companies, which is the wrong result and presumably not the intention of the proposal. **To resolve this issue, IA respectfully requests that DOL clarify within the proposal that research subjects participating in market research are independent contractors, not employees.**

IA's members include both market research / data analytics companies and organizations, as well as research/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 market research?

Market 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 (iii) used to advertise or market to any particular

¹ <https://www.federalregister.gov/documents/2022/10/13/2022-21454/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act>

individual or device.² Another legal definition of market research, as used at the federal level in the 2012 Research Fairness Act³ and in amendments to a New Hampshire push polling statute in 2014,⁴ is “the collection and analysis of data regarding opinions, needs, awareness, knowledge, views, experiences and behaviors of a population, through the development 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. Research subject incentives

Our industry provides incentives of various kinds to some (but not all) research subjects to encourage their participation in insights studies, depending on the needs of those studies and the sample of research subjects we are trying to reach. This has been the case since the inception of market research many decades ago. The form and amount of incentive for research subjects depends on a variety of factors, including: 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 study. Some studies offer only an entry in a contest/sweepstakes as the incentive; some offer just the product/service being evaluated. A survey in a mobile game might offer an in-game benefit. Others provide the research subjects with 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 input.

3. Research subjects receiving incentives are not employees

Research subjects do not seek to share their opinions as “a job” or proxy for employment, but rather because they wish to share their opinions and have an impact (and maybe have some fun as well).

Research subjects receiving incentives are not employed by the organization or company conducting the research – they are, if subject to any legal status at all, independent contractors; accordingly,

² This is the basic definition of market research used in the American Data Privacy and Protection Act (ADPPA) (H.R. 8152) that passed the House Energy & Commerce Committee in July 2022, available at <https://www.congress.gov/bill/117th-congress/house-bill/8152>

³ H.R. 5915, proposed in 2012, available at <https://www.congress.gov/bill/112th-congress/house-bill/5915>

⁴ Title LXIII, Section 664:2 (XVII and XVIII), available at <http://www.gencourt.state.nh.us/rsa/html/LXIII/664/664-2.htm>

they should be recognized as such. Their participation is completely voluntary and they may opt out at any time. However, market researchers that conduct these studies unreasonably must worry that a research subject receiving an incentive for participating in a study could be misclassified as an employee of the company or organization conducting the study.

Participation in market research is not a “job,” hourly or otherwise. Respondent participation in a market research project makes someone a research subject, not an employee. Being a research subject is not meant or represented to be a dependable source of income to support an individual or family. Incentive recipients do not constitute a “workforce.”

Research subjects may participate in multiple studies for a myriad of 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 market research participants, and participants cannot plausibly 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” or “professional respondents” 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; they derail the insights process and are often disqualified from taking additional surveys for that very reason. Cheater-repeaters / professional respondents also threaten the integrity of insights because they frequently try to get onto panels using fake IDs and data, and similarly provide erroneous responses to questions.

Viewed from the lens of our industry, independent contractor status tests, including the economic realities test proposed by DOL in this Fair Labor Standards Act (FLSA) rulemaking, remain focused on overly simplistic conceptions of work. Labor law and regulation did not develop with research subjects 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 extremely different, the contention in DOL’s 2019 opinion letter on virtual marketplace companies that they “do not fit any ‘traditional employment paradigm covered by the Act’”⁵ applies much more so to research subjects. 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.”⁶

Market research participation is far outside of the “traditional employment paradigm” and does not conform to “the usual path of an employee.” Participation in research is at best a hobby, one enjoyed only once in a while, with compensation not necessarily even offered. (Arguably, a research subject is not even providing a service, either to the research company or organization, or the end client commissioning the study.) Unlike an ordinary “worker” in the traditional sense, a research subject is not solely or even primarily motivated by monetary incentives. A bigger driver for market

⁵ 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

⁶ Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947)

research participation is the opportunity for research subjects to provide their opinions or attitudes on who they are going to vote for in an election (and why), the desired course of a public policy, their feelings about a corporate brand, the need for new medicines, the design of a new smartphone, or changes to their favorite breakfast cereal. Through their participation, they get to influence or impact the future course of products, services and ideas. The foregoing motivations do not describe the traditional (or even non-traditional) worker contemplated by these proposed regulations.

IA understands DOL's desire to formalize the FLSA's test, but we strongly urge the addition of a clarification that market research participants receiving incentives are independent contractors, utilizing one of the definitions proffered in section 1 of these comments (or fall outside the rubric of the regulation altogether as not being "workers" or service providers in any real sense.)

4. Comments on § 795.105 and its relevance to research subjects

Per § 795.105, "A determination of whether workers are employees or independent contractors under the Act focuses on the economic realities of the workers' relationship with the employer and whether the workers are either economically dependent on the employer for work or in business for themselves."

On the face of it, a research subject should pass this test. One would be unlikely to find a research subject potentially "dependent" on a market research company or organization for the "work" of being a research subject, since most incentives for participation in studies, if any, are small (and some are even difficult to assign a monetary value).

However, § 795.105 makes a research subjects' status harder to determine, by demanding that "economic dependence does not focus on the amount of income earned, or whether the worker has other income streams."

This further emphasizes the need for DOL to clarify in these rules that research subjects are independent contractors.

5. Comments on the economic reality factors (§ 795.110) and their relevance to research subjects

(b)(1) "Opportunity for profit or loss depending on managerial skill."

The suggested sub-factors proposed by DOL include three factors which would fail to properly capture a research subject:

- "whether the worker determines or can meaningfully negotiate the charge or pay for the work provided" -- Incentives for participation vary depending on the needs of the study, but are almost never negotiable by research subjects themselves (except insofar as certain studies will allow a research subject to choose between a couple of set forms for their incentive, or that offer "points").

- “whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work” – As discussed in section 3 of these comments, a research subject’s attempt to market or advertise their services as a research subject would flag that individual as a “cheater-repeater” or “professional respondent.” Such an individual would thus reduce or eliminate their chances at participating in any market research studies, not improve them.
- “whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space” – Such acquisitions are immaterial to most research subjects’ participation in a study, unless one considers important the ownership or usage of a computer, mobile device, phone line, or similar items and services that are common in daily life in this country and not specific to being a research subject. The opposite circumstance can sometimes be the case also, such as with an in-home user testing (IHUT) study, where the research company or organization would provide the research subject with the product or service to be tested instead of the research subject needing to acquire it on his or her own. Further, purchasing a specific new consumer product would not be driven by the individual’s intention to participate in a research study about that product, anymore than an individual’s decision to buy a television set would be motivated by the possibility at some point of being a research subject who could agree to have their viewing habits passively monitored.

Unfortunately, DOL states that “[s]ome decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.”

A research subject would only qualify as an independent contractor via the “profit or loss” factor of the economic realities test if a court decided to emphasize one subfactor -- “whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed.” Such “jobs” would be “studies” -- research subjects usually have significant leeway in order and timing, and participation is voluntary.

(b)(2) “Investments by the worker and the employer.”

This factor of the economic realities test, according to DOL, “considers whether any investments by a worker are capital or entrepreneurial in nature” and discounts an individual’s mere investment in the tools of the “job.” Unfortunately, any investments by a research subject under this calculus would be more than dwarfed by investment by a research company or organization conducting the study.

Research subjects would most likely fail this factor.

(b)(3) Degree of permanence of the work relationship

This factor of the economic realities test, per DOL’s proposal, “weighs in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships. This factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services

or labor to multiple entities. This may include regularly occurring fixed periods of work, although the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification. Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers' own independent business initiative, this factor is not indicative of independent contractor status.”

A research subject, depending on the kind of study in which the individual participates, may struggle to satisfy this factor. For example:

- In the case of passive measurement, a research subject may agree to a lengthy period of monitoring of their behavior, such as what TV shows they watch and when, that requires no active participation from the research subject for days or months at a time. However, the relationship between the research subject and the market research company or organization may continue for a long time, and may be regularly renewable rather than fixed.
- In the case of a member of a panel, a research subject maintains an ongoing relationship with a market research company or organization, and will occasionally receive invitations to participate in various kinds of studies, depending on the research subject’s demographics and answers to various questions and the sample needs of the studies, once in a while, once a week, once a month, or even just a couple of times a year. Research subjects 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. It is entirely optional for the research subject to accept an invitation – there is no penalty for saying no, except for losing the potential opportunity for some form of participant incentive associated with that particular invitation.
- In the case of participation in a longitudinal study (usually conducted for academic or government purposes), research subjects are tracked over time, but each research interaction in a longitudinal study may be relatively brief and may be separated by months or years. The exact duration of the relationship in a longitudinal study is often unknown.

(b)(4) “Nature and degree of control.”

This factor of the economic realities test, which “considers the employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship,” can also be problematic for research subjects.

Granted, a market research company or organization does not “explicitly limit” a research subject’s ability to participate as a research subject in studies conducted by other companies or organizations.

However, while a company or organization cannot really set a research subject’s schedule, it can certainly limit the timeframe for completion of the research subject’s participation in a given study, or, in the case of such methods as focus groups or in-depth-interviews, it can set limitations on the time/location/mode of participation.

Another one of the aspects of this factor is if the “employer... supervises the performance of the work.” This aspect will vary dramatically: a research subject responding to a mail survey suffers no

recognizable supervision, but a focus group participant is under constant supervision during the focus group (which is usually recorded in some fashion), and respondents to an online survey may be monitored for their attentiveness to the survey. Such supervision aims primarily for quality control, but, for example, a research subject that tends to rush through survey responses or take an excessive amount of time between each page of an online survey may be less likely to be invited to participate in a future study. This could be considered a form of “discipline” of the “worker” under DOL’s rules.

Considering a market research company or organization’s control over “economic aspects of the working relationship, including control over prices or rates for services and the marketing of the services or products provided by the worker,” is yet another problematic aspect of this factor. As IA discussed in our comments on factor (b)(1), incentives for a research subject’s participation in a study vary depending on the needs of the study, but are almost never negotiable by research subjects themselves (except insofar as certain studies will allow a research subject to choose between a couple of set forms for their incentive, or that offer “points”). Further, “the marketing of the services or products provided by the worker” in the case of a research subject’s input into insights would certainly be controlled by the market research company or organization conducting the study, not the research subject him or herself.

The final aspect of this factor also fails a research subject, since most concerns about “complying with legal obligations, safety standards, or contractual or customer service standards” would fall on the market research company or organization, not on the research subject.

Most of the aspects of this factor present significant landmines for proper classification of research subjects as independent contractors.

(b)(5) “Extent to which the work performed is an integral part of the employer's business.”

This factor of the economic realities test “considers whether the work performed is an integral part of the employer's business.” According to DOL, this factor is centers on “whether the function” performed by the individual “is an integral part... critical, necessary, or central to the employer's principal business.”

DOL explains in the proposal that, if an employer cannot “function without the service performed by the workers, then the service they provide is integral,” suggesting that these “workers are more likely to be economically dependent on the employer because their work depends on the existence of the employer's principal business, rather than their having an independent business that would exist with or without the employer. Courts also look at whether the work is important, critical, primary, or necessary to the employer's business. In most cases, if an employer's primary business is to make a product or provide a service, then the workers who are involved in making the product or providing the service are integral.”

It is inarguable that input from research subjects is integral to the insights business. Consumer data provided by the company or organization’s own employees would be biased, likely unrepresentative of a desired population or audience, and extremely limited overall.

Therefore, research subjects fail this factor.

(b)(6) “Skill and initiative.”

This factor of the economic realities test looks at “whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative” and may be “dependent on training from the employer to perform the work.”

The “skill,” background or expertise of research subjects may vary greatly, but it is inherent to them – it cannot be taught by an insights company or organization, nor can it be created internally. While it takes no particular skill to respond to an online survey, for example, 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.

6. The right moves for the FLSA

Since the enactment of the FLSA in 1938, and the emergence of the economic realities test in U.S. Supreme Court interpretation of it, court decisions have been all over the map in their versions of the economic realities test and the factors involved (as well as which ones should be emphasized and which deemphasized) in determining if an individual is an independent contractor or an employee.

Because of all that uncertainty in the courts, the DOL proposal here could make independent contractor status determinations even more chaotic, not less. DOL's proposed test would either be ignored, followed, or partially melded into a court's pre-existing approach.

The proposed six-factor test in this DOL proposal would materially expand the scope of employee status under the FLSA.

Instead of replacing the 2021 FLSA regulations, if DOL insists on removing them, DOL should ask Congress to finally fix the inconsistencies in federal law and harmonize the FLSA in statute with the common law test for independent contractor status used in most other federal laws.

7. Conclusion: DOL should clarify that research subjects receiving incentives for participating in market research studies are independent contractors.

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

Thanks to the uncertainty around the classification of research subjects under the proposed economic realities test, IA is concerned that DOL's proposal could lead to the misclassification of research subjects as employees, an outcome that DOL can't possibly have intended.

While it might appear viscerally obvious that research subjects are not employees of companies or organizations conducting market research studies, the firms that contract with these individuals face troubling challenges to that nonemployee status, which will only be heightened by DOL's proposed FLSA regulations. The cost of defending against these challenges and the uncertainty they create has a material negative effect on the industry and will likely grow significantly should DOL adopt these regulations. More importantly, this threatens the integrity of the research process and the resulting insights that people, companies, organizations and governments rely upon every day to be able to learn and understand consumer and citizen attitude, opinion and behavior.

Therefore, IA urges DOL to clarify that research subjects receiving incentives for participation in market research studies are independent contractors.

Sincerely,

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