



April 22, 2026

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

Comments submitted on NPRM: Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act (RIN 1235-AA46)¹

The Insights Association (IA), the leading nonprofit trade association for the insights, market research and analytics industry, submits these comments regarding independent contractor status as it relates to research subjects, on behalf of our nearly 10,000 members.

In the course of market research, members of the public are often asked to provide opinions or feedback in surveys, focus groups, and similar settings and receive nominal honoraria for their participation, referred to as “incentives.” Research subjects are not “workers” and are not providing “services” under any reasonable interpretation of these words, but the binary nature of labor law requires them to be classified, if at all, as independent contractors of the party soliciting their feedback or opinion.

This Department of Labor (DOL) proposal is subject to interpretation that research subjects participating in market research, if they receive an incentive for participation, could instead be classified as employees of the companies or organizations conducting such research. This would be the wrong result and was presumably not the intention.

To resolve this issue, **IA respectfully requests that DOL specifically clarify within the rule that research subjects participating in market research are independent contractors, not employees.**

1. Who We Are

IA’s members are the world’s leading producers of intelligence, analytics and insights defining the needs, attitudes and behaviors of consumers, organizations and their employees, students and citizens. With that essential understanding, leaders can make intelligent decisions and deploy strategies and tactics to build trust, inspire innovation,

¹ <https://www.federalregister.gov/documents/2026/02/27/2026-03962/employee-or-independent-contractor-status-under-the-fair-labor-standards-act-family-and-medical>

realize the full potential of individuals and teams, and successfully create and promote products, services and ideas.

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 individual or device.²

Another legal definition of market research, 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 Subjects and Market Research Incentives

Incentives are offered in various forms 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 being sought. 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.⁵

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.” This is not “work” in any traditional sense. Research subjects are, at best, pursuing a hobby, one enjoyed only once in a while, with compensation not necessarily even offered. A research subject is not under the control of the researcher in any way remotely resembling a principal-worker relationship (where the principal gives instruction as to what the worker is to do and has recourse if that task is not completed or is not completed well); to the

² This is the basic definition adapted for federal privacy legislation in the U.S. House Energy & Commerce Committee in 2022 and 2024.

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>

⁵ The monetary value of the incentive or the form it may take is not determined on an ad hoc or haphazard 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).

contrary, the research subject is free to complete the task (i.e., provide an answer or opinion) in any way desired, or even not at all; participation is completely voluntary, and subjects may opt out at any time.

Research subjects may participate in multiple studies for numerous 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. Fortunately, our industry has developed a myriad of quality control measures (including algorithmic tools) that screen and detect for such conduct, thereby maintaining industry standards.

In any case, unlike an ordinary/traditional “worker,” a research subject is not solely or even primarily motivated by monetary incentives. A bigger driver for market 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 clearly do not describe a traditional (or even non-traditional) worker.

Nevertheless, laws and regulations still apply: when research subjects receive incentives for being research subjects they are independent contractors.

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’”⁶ applies even 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.”⁷ Participation in research is, at most, an occasional activity and often involves no compensation. When incentives are offered, participation is primarily driven by interest in the subject matter and the opportunity to provide input and have their opinions, attitudes and behaviors shape the products, services, or ideas at issue. Market research participation is far outside of the “traditional employment paradigm” and does not conform to “the usual path of an employee.”

⁶ 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

⁷ Rutherford Food Corp. et al. v. McComb, Wage and Hour Administrator, 331 U.S. 722 (1947)

<https://www.govinfo.gov/app/details/USREPORTS-331/USREPORTS-331-722>

IA supports the Department's decision to update the FLSA's test, and we understand why various carveouts may need to be eliminated, but clarification in our case is still necessary.

Therefore, IA strongly urges that the rule include a clarification that such research subjects 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.)

3. California Specifically Recognizes Research Subjects as Independent Contractors

While the terminology is clunky and state-specific, California -- despite applying one of the strictest worker-classification regimes -- has explicitly recognized research subjects as independent contractors.

The California Labor Code was amended with IA's assistance in 2021 as part of A.B. 1561⁸ to define a research subject participating in market research (referred to in the Code as "data aggregators") and ensure that research subjects would be classified at worst as independent contractors when receiving any incentives.

Section 2782 of the Labor Code now states that the ABC test in the Dynamex case does *"not apply to the relationship between a data aggregator and a research subject, and instead the holding in Borello shall apply, if all of the following conditions are satisfied: (1) The research subject is free from control and direction with respect to the substance and content of the feedback. (2) The nature of the feedback requested requires the research subject to exercise independent judgment and discretion. (3) The research subject has the ability to reject feedback requests, without being penalized in any form by the data aggregator."*

"Data aggregator" in Section 2782 is "a business, research institution, or organization that requests and gathers feedback on user interface, products, services, people, concepts, ideas, offerings, or experiences from research subjects willing to provide it."

"Research subject" in Section 2782 is "any person who willingly engages with a data aggregator in order to provide individualized feedback on user interface, products, services, people, concepts, ideas, offerings, or experiences, and does not engage solely for the purposes of completing individual tasks, except as the tasks relate to providing such feedback."

4. The Proposed Economic Realities Test

Even absent a specific clarification, a properly balanced economic realities test in federal labor law for determining independent contractor status could be a potential improvement in the classification of research subjects 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

⁸ https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1561

putative employer for work (employee), focused on the two proposed core factors – factors which, if properly crafted and explained, should point to a research subject 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 subjects, since they 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 participants;
- select their own projects for participation that may interest them – although research subjects won't 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 or organization; and
- exercise the ability to work for others, since people may participate in studies for multiple companies or organizations, depending on their interests and availability, and cannot be tied to any exclusively. At worst, a company/organization may seek to avoid anyone who has participated in a study for any other company or organization, or even their own, in a given time period, 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 research subject 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 to connect them with survey opportunities are almost uniformly scam artists. As explained in the DOL's 2019 opinion letter on virtual marketplace companies, "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 research subject, no matter which insights company or organization is conducting a study, in this case argues for them being an independent contractor.

The “profit or loss” part of the factor is problematic for the insights industry in that incentive levels⁹ 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 research subject (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, studies or panels to join), 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 research subjects 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 research subjects. 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 organization, and it cannot be created internally by an insights company. For example, while 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-satisfied factor for a research subject. 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

⁹ Incentives, generally of nominal value, are provided to induce participation in studies that generally require very little or no commitment of their own resources, other than time. Incentive levels may be higher for focus groups and in-depth interviews (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 compare to the pay those professionals make in their normal specialized work.

a longitudinal study may be relatively brief and 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 the Labor Department 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 case¹⁰ 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 insights context, since research subjects 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. 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 research subject 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.

5. Conclusion: DOL should specifically clarify that research subjects receiving incentives for participating in market research 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 some uncertainty around the classification of research subjects under the proposed economic realities test, IA is concerned that DOL’s proposal could lead to the

¹⁰ Rutherford Food Corp. et al. v. McComb, Wage and Hour Administrator, 331 U.S. 722 (1947) <https://www.govinfo.gov/app/details/USREPORTS-331/USREPORTS-331-722>

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, 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 materially negative effect on the industry and it is not clear how those costs may change should DOL adopt these regulations as drafted. More importantly, the uncertainty around research subjects' status 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 from and make decisions regarding consumer and citizen attitude, opinion and behavior.

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

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

Sincerely,

Howard Fienberg
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