



Disclaimer: This opinion letter was withdrawn on January 26, 2021. This withdrawal is an official ruling of the Wage and Hour Division for purposes of the Portal-to-Portal Act, 29 U.S.C. § 259, and Opinion Letter FLSA2021-8 may not be relied upon as a statement of agency policy as of the date of withdrawal.

FLSA2021-8

January 19, 2021

Dear **Name***:

This letter responds to your request for an opinion from the Wage and Hour Division (WHD) on whether certain distributors of a manufacturer's food products are employees or independent contractors under the Fair Labor Standards Act (FLSA or Act). We conclude based on the facts you have furnished that the distributors are independent contractors.

BACKGROUND

Your request concerns a manufacturer of perishable food products that sells its products to distributors for resale. You furnished us with nearly ten single-spaced pages of facts regarding the distributors and the manufacturer-distributor agreement. We recount the most relevant ones.

A. The basics of the distribution agreement.

The manufacturer contracts with distributors to resell its products to retailers. Each distributor serves a geographic area called a primary territory. The distributor agrees to use its "best efforts to develop the full sales potential" of the territory, serve customers "consistent with good industry practice," and "maintain the established reputation and goodwill" of the manufacturer's products. It is not, however, required to sell to particular customers, nor does it have minimum purchase requirements. Distributors can enter into distribution agreements for more than one territory. Distributors do not pay for the distribution rights granted by the agreement.

The contract is not exclusive for either party. The manufacturer contracts with multiple distributors, does not grant exclusive rights in a territory to any one distributor, and may engage in direct sales to retailers (that is, may bypass the distributors). A distributor can distribute other goods, including those of the manufacturer's competitors, and for at least some distributors, the manufacturer's products make up less than half of their annual sales volume. Indeed, distributors can sell within another distributor's territory; you state that "it is not unusual for a distributor to sell to a customer that a distributor in another territory has decided not to do business with (or to a customer that refuses to do business with another distributor)."

The manufacturer must "provide the distributor specific compensation" if it changes the distributor's primary territory in a way that reduces the distributor's sales, though you do not state the specifics to us. The manufacturer may not, without the distributor's consent, change the primary territory to reduce the distributor's weekly sales by more than 15 percent. The manufacturer cannot cancel the agreement except for breach or other good cause. It must give the distributor 30 days to cure (10 days if the breach is of an obligation to pay). It can cancel immediately only in instances such as the distributor's bankruptcy, fraud, or conviction of a felony. The distributor can cancel the agreement by reasonable written notice.

B. Distributors' business operations.

A distributor is not required to assume a particular business form. However, corporate and LLC distributors must underwrite their financial obligations with a personal guaranty, and those distributors are not allowed to add owners without the manufacturer's consent. Additionally, such a distributor must obtain the manufacturer's consent to assign, sell, or transfer its interest in the distribution agreement.

Each distributor is responsible for furnishing its own delivery vehicles and warehouse space, among other business expenses. However, just as a distributor may resell other companies' goods, it may store or deliver other companies' products in the same vehicles and warehouses it uses for the manufacturer's products.

Some actions by a distributor are required by the agreement. First, the distributor must have vehicle and general business liability insurance at minimum specified levels with the manufacturer as an additional insured. Second, you state that the distributor's warehouse facilities are subject to federal and state sanitation requirements, and regulations require that the warehouse be registered with the FDA. The manufacturer has the right to inspect the warehouse periodically. You also state that the distributor's warehouse is "subject to access, location, and sanitation requirements," but, putting aside the requirements that you do identify, you do not say whether these are general legal obligations applying to all warehouses (or food-storage facilities) or are required by the agreement.

Distributors may organize and operate their businesses as they see fit. They are free to set their own schedules; as described in Background ¶ D, they need not even be available to accept deliveries from the manufacturer. A distributor may hire others to assist them with their work, and may do so without the manufacturer's consent. You state that these workers are hired, controlled, directed, and terminated by the distributor, not the manufacturer. You explain that "some distributors are essentially 'absentee owners'" and "not actively involved in the day-to-day operations."

C. The distribution business.

The income the distributors derive from the relationship is the profit on the resale of goods. Distributors purchase products from the manufacturer and resell them to retailers. The purchase is irrevocable; damaged or unsold products may not be returned. There is no minimum purchase requirement. Distributors are not required to purchase products every week or to purchase particular products, although the manufacturer may offer certain incentives. The manufacturer furnishes suggested wholesale and retail prices for each product, but it does not require distributors to resell at any particular price. The distributor must pay for the products in full within seven days of receipt. The manufacturer and distributor settle their accounts every week; the manufacturer pays the distributor if the centralized billings (discussed in Background ¶ D) exceed the cost of the products purchased that week, and the distributor pays the manufacturer the remaining purchase price if they do not.

D. What the manufacturer furnishes.

You state that the manufacturer makes available to the distributors several optional items and programs (though you do not note whether it is required to do so by the distribution agreement):

- The manufacturer discounts its prices for distributors that participate in the manufacturer's promotions, but distributors are not required to participate.
- The manufacturer discounts its prices for distributors that display the manufacturer's logo or advertisements on their vehicles, but distributors are not required to do so. You state that most do not.
- The manufacturer makes available to distributors clothing with its branding, but they are not required to wear it. Some do, and some do not.
- The manufacturer suggests marketing and promotional techniques, but distributors are not required to use them.
- The manufacturer offers "centralized billing" (essentially purchasing distributors' "valid sale invoices" and the connected payables and credit risk), but distributors may handle their own billing (and retain their own credit risk).
- The manufacturer furnishes each distributor with a lock the distributor can use to secure a warehouse (and which the manufacturer's drivers can open to deliver goods to the distributor), but the distributor can use its own lock (and deny such warehouse access to drivers).
- The manufacturer makes available a two- to three-week orientation program for new distributors, but they are not required to attend it.

Finally, you state that the manufacturer makes available a smartphone and tablet app that distributors may use on their own devices "to submit their product orders" and "invoice their customers." But you do not say whether the app is the exclusive method by which they can do so.

E. Contact with the manufacturer.

A manufacturer's employee called a company rep is assigned to a geographic area containing several distributors. Company reps are each distributor's primary contact with the manufacturer and are responsible for furnishing many of the items and services described above and may furnish other sales assistance. Distributors are not required to accept any of the manufacturer's services or assistance that the company rep offers. Company reps also promote the manufacturer's brands and products to retailers that may operate in the distributor's territory. A distributor is not required to take advantage of sales opportunities created by company reps, nor is it required to resell products to a retailer that would like to carry them. Company reps offer to meet with each distributor at least once per year, but the distributor is not required to take the

meeting. Some distributors, you state, choose to have limited, or even no, contact with company reps.

GENERAL LEGAL PRINCIPLES

The FLSA’s minimum wage and overtime pay obligations apply only to those workers it defines as employees—individuals whom an employer suffers, permits, or otherwise employs to work.¹ The scope of employment under the FLSA is broad, but, as the Supreme Court has pointed out, it was “obviously not intended to stamp all persons as employees.”² Independent contractors, for example, are not “employees.”³ Over its history, WHD has consistently construed who is an employee under the FLSA to adhere to the Act’s definitions and judicial precedent interpreting them. “An employee, as distinguished from a person who is engaged in business for himself or herself, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent upon the business to which he or she renders service.”⁴

As reflected by this longstanding interpretation, the touchstone of employee versus independent contractor status has long been “economic dependence.”⁵ When determining economic dependence, WHD considers five factors derived from Supreme Court precedent, as further explained in a recent final rulemaking that is effective on March 8, 2021:

1. The nature and degree of control over the work;
2. The worker’s opportunity for profit or loss based on initiative or investment;
3. The amount of skill required for the work;
4. The degree of permanence of the worker’s relationship with the potential employer; and
5. Whether the work is part of an integrated unit of production.⁶

Control and opportunity for profit or loss are the two “core factors” that are “the most probative” when determining a worker’s status as employee or independent contractor.⁷ Where the two core factors point toward the same status, whether employee or independent contractor, there is a substantial likelihood that is the worker’s correct status.⁸ The three other factors are considered but are more likely to affect the ultimate conclusion when the two core factors point in different directions.⁹ Further, “the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible.”¹⁰

¹ 29 U.S.C. §§ 206(a), 207(a); *id.* § 203(e)(1), (g).

² *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

³ *See, e.g., Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

⁴ WHD Opinion Letter FLSA2019-6, at 3 (Apr. 19, 2019) (quoting and citing historical opinion letters).

⁵ *See, e.g., Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 379–80 (5th Cir. 2019); *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 138–40 (2d Cir. 2017); *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 806–07 (6th Cir. 2015).

⁶ *See* 29 C.F.R. § 795.105(d) (effective March 8, 2021). *See also Silk v. United States*, 331 U.S. 704, 716 (1947) (listing factors that are “important for decision”); *Rutherford*, 331 U.S. at 729 (analyzing *Silk* factors and also considering that workers were “part of the [defendant’s] integrated unit of production”).

⁷ 29 C.F.R. § 795.105(c).

⁸ *Id.*

⁹ *Id.*; *see also* 86 FR 1201–02.

¹⁰ 29 C.F.R. § 795.110.

WHD interprets the Act “neither expansively nor narrowly, but according to conventional canons of statutory construction,” and gives it a fair, rather than narrow, reading.¹¹

OPINION

Based on the facts you have furnished, we conclude that the distributors are independent contractors for purposes of the FLSA.

A. Core factors.

1. Control.

The control factor suggests independent contractor status to the extent that the distributor, as opposed to the manufacturer, “exercises substantial control over key aspects of the performance of the work.”¹² These include setting the work schedule; choosing assignments; working with little or no supervision; and being able to work for others, including a potential employer’s competitors.¹³ The worker need not be solely in control of the work for this factor to suggest independent contractor status.¹⁴ Based on the facts provided in this case, each aspect identified above suggests independent contractor status.

a. Schedule.

Distributors are free to set their own schedule to the point of not needing to be present to accept shipments from the manufacturer and refusing meetings with the company rep. Indeed, they may refuse to participate in company reps’ meetings with retailers, refuse to participate in the manufacturer’s suggested marketing, and refuse to participate in the manufacturer’s promotions. Distributors decide the beginning and end of their workdays, including when they make sales calls, how often they make them, and in what order, for their own independent business reasons; the manufacturer does not dictate their schedule. And though it would not be a recommended business practice, a distributor could even stop doing business with a retailer that wanted the distributor to operate on a different schedule.

b. Choosing assignments.

Distributors have almost complete discretion to choose assignments. Though each distributor is assigned a territory in which to operate, it may choose the customers it serves in that territory and may even sell to customers outside its territory. They may enter into distribution agreements for additional territories. Distributors may solicit new customers, or not; they may expand service to existing customers, or not; and they may discontinue serving particular customers, or not. They are not required to purchase the manufacturer’s products in any given week. There is no minimum purchase size. Their only “assignment” under the distribution agreement is the

¹¹ *Sec’y of Labor v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019); *see also Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

¹² 29 C.F.R. § 795.105(d)(1)(i).

¹³ *Id.*; *see also Saleem*, 854 F.3d at 147.

¹⁴ *See Parrish*, 917 F.3d at 381–82.

obligation to use their “best efforts” to maximize sales in their territory, furnish appropriate customer service, and uphold the manufacturer’s reputation.

c. Supervision.

The distributors organize and operate their businesses largely free from supervision by the manufacturer: no one from the manufacturer is monitoring the distributors in any consistent way; distributors control the terms of their customer relationships; distributors do not have to personally perform the services; and they determine major aspects of their businesses, including vehicles, facilities, equipment, whether to engage employees (including hiring and firing them and setting the terms and conditions of their employment), and whether to have a uniform and branding requirement—all without the manufacturer’s consent. Distributors can refuse to participate in the manufacturer’s marketing and promotions, and they can refuse to meet with the manufacturer’s company rep—all without repercussions from the manufacturer. As you note, some distributors themselves are essentially absentee owners with little active participation in the day-to-day business of the distributorship.

The manufacturer places some requirements on the distributors’ operations by, for example, requiring particular insurance coverage that lists the manufacturer as an additional insured; retaining the right to inspect warehouses; and, in some cases, requiring a personal guarantee to underwrite a distributor’s financial obligations and requiring the manufacturer’s consent to changes in a distributor’s ownership. Because you do not state whether they are required by the distribution agreement or not, it is also possible that the manufacturer supervises the distributor by requiring particular methods of ordering and invoicing; requiring the distributor to conform to particular health and safety standards; and locate their warehouses in particular areas. However, many of the foregoing requirements are typical of contractual relationships between businesses (as opposed to employers and employees) and do not constitute control that makes the distributors more or less likely to be employees under the Act.¹⁵ Any remaining supervision by the manufacturer is limited and outweighed by the distributors’ own supervision over the work.

d. Opportunity to work for others.

Distributors can—and many do—work with others. The distribution agreements are not exclusive. As you state, several distributors also distribute the manufacturer’s competitors’ products, and some distributors realize less than 50 percent of their sales from the manufacturer’s products.

2. Opportunity for profit or loss.

The opportunity for profit or loss factor suggests independent contractor status to the extent the distributor has one or both of:

¹⁵ See 29 C.F.R. § 795.105(d)(1)(i) (“Requiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, 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 under the Act.”).

- the opportunity to earn profits or incur losses based on its exercise of initiative (such as managerial skill or business acumen or judgment); and
- management of its investment in or capital expenditure on, for example, helpers or equipment or material to further its work.¹⁶

The factor suggests employee status if the distributors cannot affect their earnings or can do so only by working longer or faster.¹⁷ Based on the facts furnished, the opportunity for profit or loss factor suggests independent contractor status.

As we explained in our recent rulemaking, investment and opportunity for profit or loss should be considered in tandem, rather than separately, because “economic investment, by definition, creates the opportunity for loss,” and “investors take such a risk with an eye to profit.”¹⁸ We also explained that it is the worker’s investments alone, not those investments in comparison to the potential employer’s, which matter when considering investment. “Comparing their respective investments does little more than compare their respective sizes and resources,” and such a comparison “does not illuminate the worker’s economic dependence or independence.”¹⁹ After all, “[l]arge corporations can hire independent contractors, and small businesses can hire employees.”²⁰

The only compensation distributors receive related to the manufacturer’s products is the difference between the purchase price and the sales price. The distributors have discretion to determine: which and how many products to purchase; which customers to solicit, serve, or no longer serve; the prices that they seek to charge; what types of vehicles and storage space to invest in; and which assistants, if any, (and technology) to employ to assist them. Their investments in this regard are substantial and are capital in nature as they indicate a business beyond distributing just the manufacturer’s products. They have discretion in pursuing or declining marketing plans, promotional or placement deals, and billing arrangements, including the amount of advice and billing and marketing assistance that they accept from the manufacturer. Poor decisions on these various fronts have economic consequences on the distributors; wise decisions on those fronts increase the distributors’ profits. In short, a distributor’s income is driven not solely by the number of hours the distributor works or how fast it works; it is driven by the management of investments and the exercise of initiative, managerial skill, and business acumen.

B. Other factors

This does not quite end our analysis. In unusual circumstances, the probative value of the other three factors—skill required for the work, permanency of the relationship, and integration of the

¹⁶ *See id.* § 795.105(d)(1)(ii).

¹⁷ *See id.*

¹⁸ 86 FR 1186, *quoting Saleem*, 854 F.3d at 145 n.29 (cleaned up).

¹⁹ 86 FR 1188.

²⁰ *Karlson v. Action Process Serv. & Private Investigation, LLC*, 860 F.3d 1089, 1096 (8th Cir. 2017), *quoted in* 86 FR 1188.

work into a unit of production—may require a contrary finding even if the two core factors point toward the same status. These are not unusual circumstances.

Skill is roughly neutral. It suggests employee status when the work “requires no specialized training or skill” or the worker depends on the potential employer for “skills or training necessary to perform the job.” It suggests independent contractor status when the work “requires specialized training or skill that the potential employer does not provide.”²¹ On the one hand, the manufacturer offers orientation, training, and continued assistance to the distributors, but on the other hand, they may freely decline it. Some of the distributors’ tasks do not seem to require much, if any, specialized training or skill, but others are more complicated, if not necessarily specialized, tasks that the distributor is required to perform without assistance from the manufacturer. Based on the facts furnished, this factor does not point strongly toward employee or independent contractor status.

Permanence may slightly weigh in favor of employee status. A worker is more likely to be an employee when the work relationship is “by design indefinite in duration or continuous” and more likely to be an independent contractor when it “is by design definite in duration or sporadic.”²² We infer from your statements regarding the distributors’ tendencies to expand into new territories and their growth through recruiting new customers that at least some distributors tend to have continuous relationships with the manufacturer. The agreement’s limits on the manufacturer’s ability to terminate also suggest an indefinite or continuous relationship. We cannot say that a distributor’s ability to end the relationship by reasonable written notice suggests status either way. You did not furnish information regarding the actual lengths of the relationships between the distributors and the manufacturer and the reasons for those lengths, which is also relevant to the permanence factor.²³ However, even if that information favored employee status, it would not change our ultimate conclusion that these distributors are independent contractors.

Integration suggests that the distributors are independent contractors. As we stated in our recent rule, this factor analyzes not whether the distributors’ work is important to the manufacturer’s business, but whether it “is segregable from the [manufacturer]’s production process.”²⁴ The distributors play no role in the production of the manufacturer’s perishable food products; instead, they purchase and resell those products. The distributors have almost unlimited rights to exclude the manufacturer from every aspect of their operations. The distributors work in their own facilities and vehicles, to which they can deny the manufacturer access. Finally, a distributor may refuse to serve a retailer that wants to sell the manufacturer’s products—even if the manufacturer wants the retailer to do so. In sum, the distributors are consumers of the manufacturer’s products rather than integrated into its production process, and they negotiate with the manufacturer over the terms and conditions of those purchases as motivated by their own business considerations. These facts suggest that the distributors’ businesses are segregated from the manufacturer’s production of its goods.

²¹ 29 C.F.R. § 795.105(d)(2)(i).

²² *Id.* § 795.105(d)(2)(ii).

²³ *See* 86 FR 1192–93.

²⁴ 29 C.F.R. § 795.105(d)(2)(iii).

CONCLUSION

We conclude based on the facts you furnished that the distributors are independent contractors. Both of the core factors, control and opportunity for profit or loss, point to independent contractor status, and the non-core factors do not indicate a reason to disagree with that conclusion.

This opinion is based exclusively on the facts you have presented and on your representation that you do not seek this opinion for any party that WHD is currently investigating or for use in litigation that began before your request. This letter is an official interpretation by the Administrator of WHD for purposes of the Portal-to-Portal Act and may be relied upon in accordance with section 10 of that Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is “modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.”²⁵

We trust that this letter responds to your inquiry.

Sincerely,



Cheryl M. Stanton
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**

²⁵ See 29 U.S.C. § 259.