

November 23, 2022

The Honorable Martin J. Walsh  
Secretary  
U.S Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

RIN 1235-AA43

**Re: Employee or Independent Contractor Classification Under the Fair Labor Standards Act Proposed Rule**

Dear Secretary Walsh:

On behalf of the nearly 40,000 members of the American College of Emergency Physicians (ACEP), we appreciate the opportunity to comment on the Employee or Independent Contractor Classification Under the Fair Labor Standards Act Proposed Rule.

Historically, the Department of Labor has used an economic reality test to determine whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (FLSA). Before 2021, the Department conducted a totality-of-the-circumstances analysis, considering multiple factors to make this determination. However, in 2021, the Department under the prior Administration issued a rule that assigned a higher weight to two specific factors, the nature and degree of control over the work, and the worker's opportunity for profit or loss. The Department now believes that the 2021 policy does not fully comply with the FLSA and departs from decades of case law applying the economic reality test. Therefore, the Department is proposing to rescind the 2021 rule and to return to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity.

ACEP appreciates the Department's effort to ensure that there is a fair process for determining whether an individual is deemed an employee or independent contractor. Our overall goal as an organization is to support emergency physicians and ensure that they are treated fairly by their employer and practice in an environment where they can serve their patients to the best of their abilities. As such, we believe it is essential that emergency physicians and other workers receive the benefits they are entitled to as employees of a particular organization. However, we also believe it is important for the Department to recognize the complexity of health care employment structures when issuing its finalized policies. There is a plethora of different ways that health care workers are either employed or contracted to provide services in various health care settings. Since we represent emergency physicians, we can provide you with an example of the complexity of just the emergency medicine (EM) market alone.

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Emergency physicians serve the essential role of strengthening the health care safety net for our communities. They treat all patients who come through our doors, regardless of their insurance status or ability to pay. Given this vital responsibility that EM plays in our health care system, ensuring that emergency departments (EDs) across the country are appropriately staffed so they can provide care 24 hours a day, 7 days a week, 365 days a year is essential.

To meet the needs of communities across the country, emergency physicians work in a variety of employment models. While some are employed directly by hospitals, many are employed by independent entities that contract with the hospital to provide 24/7 ED coverage. These independent entities range in size from small, independent democratic (i.e., owned by the physicians) groups that serve only one or two local hospitals, to larger groups that staff multiple EDs (and sometimes service lines of other specialties) nationwide. In recent years, physician practices, including independent EM practices, have been acquired by hospitals, health systems, and corporate entities (such as private equity and health insurance companies) at a relatively high rate. [A study in Health Affairs](#) found that between 2014 and 2018, there was an 89 percent increase in hospital and health system ownership of physician practices. The pressures of staying financially viable during the COVID-19 pandemic seems to have accelerated this trend even further. According to [a report from the Physicians Advocacy Institute \(PAI\)](#), there was a sharp rise in the number of physician practices being acquired by hospitals and corporate entities throughout 2019 and 2020—especially in the first half of 2020 as the pandemic began. Now, PAI reports that 70 percent of physicians are employed by hospital systems or other private entities—meaning that only 30 percent of physicians practice independently. In addition, some emergency physicians work as locum tenens physicians, traveling around to different hospital systems and filling in gaps as needed. The flexibility to work in different settings and set personal schedules are features that attract some people to emergency medicine.

It is also extremely important to note that we are facing a significant shortage of health care workers across the country. [Recent studies](#) have suggested that a major nursing shortage will persist for the next decade. This shortage has contributed to a significant increase in ED boarding (when patients are placed in a holding pattern while waiting for care or transfer) and overcrowding. ED boarding now poses a significant threat to the well-being of all who live in this country as well as to the preparedness of our nation. ACEP and 34 other organizations recently sent a [letter](#) to President Biden urging the Administration to convene a summit of stakeholders from across the health care system to identify immediate and long-term solutions to this urgent problem. As we try to manage this crisis, we need to maximize the opportunities for individuals to work under different employment and practice arrangements.

***In all, we request that the Department in the final rule specifically address the dynamic health care labor market and perhaps consider creating a stand-alone policy specific to health care that will ensure that health systems and providers have the flexibility to engage in contractual and employment arrangements that will best meet their needs and the needs of their communities.***

We appreciate the opportunity to share our comments. If you have any questions, please contact Jeffrey Davis, ACEP's Director of Regulatory and External Affairs, at [jdavis@acep.org](mailto:jdavis@acep.org).

Sincerely,



Christopher S. Kang, MD, FACEP  
ACEP President