

**Congress of the United States**  
Washington, DC 20510

December 13, 2022

[WHD-2022-0003](#)

The Honorable Martin J. Walsh  
Secretary  
Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

Dear Secretary Walsh:

On October 13, 2022, the Department of Labor’s (DOL) Wage and Hour Division published its Notice of Proposed Rulemaking entitled “*Employee or Independent Contractor Classification Under the Fair Labor Standards Act*” (“proposed rule”), which would rescind and replace the independent contractor rule adopted in 2021 by the Trump Administration. In its place, DOL proposes a six-factor economic reality test to determine whether a worker is “economically dependent” on a company under a totality of the circumstances. We oppose this proposed rule as it is unclear, overly restrictive, and unsuitable for workers who are seeking flexibility as they pursue opportunities as independent contractors.

The *Fair Labor Standards Act* (FLSA) establishes minimum wage, overtime pay, and recordkeeping standards for covered employers and employees. A worker who performs services for an entity as an independent contractor is not an employee and therefore is not covered by the FLSA. However, the FLSA does not define “independent contractor.” For more than 80 years, businesses and workers relied on decisions by the courts and opinion letters from DOL for guidance on the definition of independent contractor.<sup>1</sup> For example, under the Obama Administration, DOL released an Administrator’s Interpretation (AI) letter providing guidance regarding the application of the economic realities factors to determine whether a worker is an employee or an independent contractor.<sup>2</sup> This guidance outlined six economic reality factors, all of which must be considered to determine whether the worker is economically dependent on the business; no one factor is considered determinative. DOL inappropriately used the guidance to assert broadly and incorrectly that “most workers are employees under FLSA’s broad definitions.”<sup>3</sup> The AI letter was later withdrawn by Secretary Acosta for failing to provide even

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<sup>1</sup> Eugene Scalia, *Labor Secretary: Clarity for ‘Gig Workers’ – Proposed Rule Simplifies Definition for Contractors, Businesses*, Fox Business, Sept. 22, 2020, <https://www.foxbusiness.com/economy/labor-secretary-gig-workers-rule-contractors-businesses>.

<sup>2</sup> Wage and Hour Division, *Administrator’s Interpretation No. 2015-1*, July 2008, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf>.

<sup>3</sup>Ibid.

the most basic procedural due process for stakeholders in accordance with the *Administrative Procedure Act*.<sup>4</sup>

In 2021, the Trump Administration made history by adopting a rule that clarified and simplified independent contractor classification under the FLSA. Rulemaking, as opposed to opinion letters, allowed the public to comment on the proposed rule. The 2021 rule highlighted how the “economic realities test and its component factors have not always been sufficiently explained or consistently articulated by courts or the Department, resulting in uncertainty among the regulated community.”<sup>5</sup> Instead, the rule emphasizes two “core factors”: a worker’s control over his or her work and his or her opportunity for profit or loss.<sup>6</sup> If these factors are not clear, the rule includes three “guidepost” factors.<sup>7</sup> By adopting a clearer and more transparent test, the rule encouraged innovation and flexibility in the economy. This rule brought welcome clarity to businesses and workers, but the Biden Administration almost immediately delayed its effective date and later withdrew it until a court ruled in March 2022 that DOL violated the *Administrative Procedure Act* which finally allowed the rule to go into effect.<sup>8</sup> Now DOL is proposing to rescind and replace the 2021 rule without demonstrating good reasons for abandoning this clear test and before application of it in any court decisions.

In fact, DOL’s new proposal is far less clear than the 2021 rule and is largely a return to the Obama-era multifactor test that was restrictive, overly complex, and inconsistently applied. The six economic factors the proposed rule delineates as determining the employment status of an individual are: (1) *Opportunity for profit or loss depending on managerial skill*; (2) *Investments by the worker and the company*; (3) *Degree of permanence of the work relationship*; (4) *Nature and degree of control*; (5) *Extent to which the work performed is an integral part of the company’s business*; and (6) *Skill and initiative*.<sup>9</sup> The proposed rule explains that no one factor is “dispositive, and the weight to give each factor may depend on the facts and circumstances of the particular case.” Finally, additional unnamed factors may be considered, yet the proposed rule fails to afford stakeholders clarity as to what those factors may be.<sup>10</sup> The proposed rule’s economic reality test would result in uncertainty among workers and businesses and would greatly reduce the circumstances under which a worker will be classified as an independent contractor.

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<sup>4</sup> U.S. Department of Labor, “[U.S. Secretary of Labor Withdraws Joint Employment, Independent Contractor Guidance](#).” June 7, 2017.

<sup>5</sup> Wage and Hour Division, *Independent Contractor Status Under the Fair Labor Standards Act*, 86 FR 1168 (proposed Sept. 25, 2020) (codified at 29 CFR 780, 788 and 795), <https://www.federalregister.gov/documents/2021/01/07/2020-29274/independent-contractor-status-under-the-fair-labor-standards-act>.

<sup>6</sup> Tammy McCutchen & Dane Steffenson, *DOL Releases Proposed Regulation on Independent Contracting*, Littler, Sept. 22, 2020, <https://www.littler.com/publication-press/publication/dol-releases-proposed-regulation-independent-contracting>.

<sup>7</sup> *Ibid.*

<sup>8</sup> Maury Baskin et al., *Federal Court Decision Protects Independent Contractor Status*, Littler, Mar. 15, 2022, <https://www.littler.com/publication-press/publication/federal-court-decision-protects-independent-contractor-status>.

<sup>9</sup> Wage and Hour Division, *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*, 87 FR 62218 (proposed Oct. 13, 2022), <https://www.federalregister.gov/documents/2022/10/13/2022-21454/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act>.

<sup>10</sup> *Ibid.*

While DOL laments that it cannot adopt an “ABC” test due to legal constraints, the proposed rule goes nearly as far with restrictive definitions and examples.<sup>11</sup> The rule argues that theoretical control is enough to give DOL the ability to make employment determinations. According to the Institute for the American Worker, “such a broad interpretation would have a chilling effect on self-employment, putting conceivably all independent contracting work in jeopardy.”<sup>12</sup> The proposed rule also states that an individual using his or her own car and having the ability to work for multiple entities are not indicative of his or her status as an independent contractor. Additionally, according to the rule, a company’s ability to set prices for goods or services provided by the worker can be indicative of employee status.<sup>13</sup> These provisions clearly target on-demand companies and workers who have thrived in the twenty-first century “gig economy.”

The independent contractor proposed rule would have immediate and long-term disruptive effects on millions of workers and thousands of businesses at a time when the economy is facing high inflation rates. A study by Upwork estimates that 59 million Americans performed freelance work in 2021 and contributed \$1.3 trillion to the U.S. economy.<sup>14</sup> Small and large businesses in hospitality, healthcare, education, agriculture, transportation, construction, finance, law, housing, entertainment, and more utilize independent contractors to meet their needs. This allows businesses to have a dynamic workforce while giving workers the autonomy and flexibility they prefer. It is clear the proposed rule’s attempt to restrict this flexibility for businesses and workers will be disruptive.

The proposed rule is also overwhelmingly unpopular. Our offices have heard from various individuals and groups worried that this proposed rule will destroy the flexibility and entrepreneurial opportunity that comes with being an independent contractor. Studies and surveys show that independent contractors prefer to remain independent by huge margins. The 2018 Bureau of Labor Statistics Contingent Worker Survey found that less than one out of every 10 independent contractors would prefer traditional employment status.<sup>15</sup> A Morning Consult poll found that 77 percent of app-based workers prefer to remain independent contractors and that 80 percent work using app-based platforms for 20 or less hours per week.<sup>16</sup> An MBO Partners survey found a vast majority of independent workers say they are happier and healthier

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<sup>11</sup> The ABC test is used to determine a worker’s status as an employee or independent contractor. There are several different iterations of the ABC test. The most prominent is the version adopted by the Supreme Court of California and later codified by the California legislature. Under California’s ABC test, a worker is presumed to be an employee, unless the hiring entity can establish that: A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact. B) The person performs work that is outside the usual course of the hiring entity’s business. C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

<sup>12</sup> Austen Bannan, *Independent Contracting – Proposed Department of Labor Rule*, Institute for the American Worker, Oct. 14, 2022, <https://i4aw.org/resources/independent-contracting-proposed-department-of-labor-rule/>.

<sup>13</sup> Gregory Hoff, *DOL Releases Independent Contractor Proposed Rule*, HR Policy Association, Oct. 14, 2022, <https://www.hrpolicy.org/insight-and-research/resources/2022/hr-workforce/public/10/dol-releases-independent-contractor-proposed-rule/>.

<sup>14</sup> Adam Ozimek, *Freelance Forward Economist Report*, UPWORK, <https://www.upwork.com/research/freelance-forward-2021> (last visited Nov. 7, 2022).

<sup>15</sup> See U.S. Bureau of Labor Statistics, *Contingent and Alternative Employment Arrangements* (June 7, 2018), <https://www.bls.gov/news.release/pdf/conemp.pdf>.

<sup>16</sup> Flex Association and Morning Consult, *Attitudes of App-based Workers*, Sept. 2022, <https://www.flexassociation.org/workersurvey>.

as independent contractors.<sup>17</sup> One study found that 68 percent of new freelancers say that “Career Ownership” is a top draw, and 78 percent cited “schedule flexibility” as a key reason for freelancing. In fact, independent contracting work is so attractive that fifty-six percent of non-freelancers say they are likely to freelance in the future.<sup>18</sup>

Individuals such as ride-share and delivery drivers, financial advisors, direct sellers, truckers, and franchisees view their independent contractor status as enabling the pursuit of the American Dream. Innovations and on-demand companies have opened doors for these individuals to make their own hours and pursue other economic opportunities. The proposed rule would damage this model and hurt their livelihood.

We urge DOL not to move forward with its proposed rule for determining independent contractor classification due to this negative impact on workers and businesses, the test’s lack of clarity, and the devastating consequences for the U.S. economy. The proposed rule will jeopardize millions of individuals’ independent contractor status under the FLSA. Instead, DOL should maintain the 2021 rule, which was designed for the modern economy and brought clarity to workers and businesses.

Sincerely,



Mike Braun  
U.S. Senator



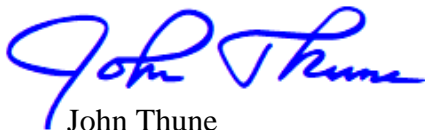
Virginia Foxx  
Member of Congress



Richard Burr  
U.S. Senator



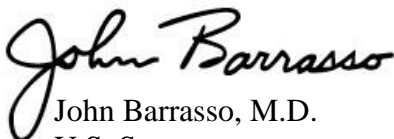
Joe Wilson  
Member of Congress



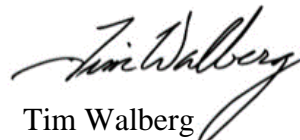
John Thune  
U.S. Senator



Glenn “GT” Thompson  
Member of Congress



John Barrasso, M.D.  
U.S. Senator



Tim Walberg  
Member of Congress

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<sup>17</sup> *State of Independence Report*, MBO Partners, Dec. 2021, <https://www.mbopartners.com/state-of-independence/>.

<sup>18</sup> *Ibid.*

*Bill Cassidy, M.D.*  
Bill Cassidy, M.D.  
U.S. Senator

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Glenn Grothman  
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*Bill Hagerty*  
Bill Hagerty  
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Elise M. Stefanik  
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Rick W. Allen  
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Jim Banks  
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*James Comer*  
James Comer  
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Richard Shelby  
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M. Michael Rounds  
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