

United States Senate

WASHINGTON, DC

October 22, 2020

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
200 Constitution Ave., NW
Washington, D.C. 20210

Dear Secretary Scalia:

We write in opposition to the proposed rule issued by the Department of Labor (DOL) regarding classification of workers as employees under the Fair Labor Standards Act (FLSA) (85 FR 60600). The rule proposes a misguided test to determine if a worker is an employee under the FLSA. In doing so, it fails to address rampant misclassification of workers as independent contractors and creates incentives for employers in all industries to further misclassify workers who should be protected by the FLSA. As a result, the rule would exclude millions of workers from critical minimum wage and overtime protections, contribute to stagnating wages, and exacerbate economic inequality for American workers, particularly workers of color, and we urge the DOL to rescind it.

The proposed rule is not based in the statutory language of the FLSA and neglects Congress' intent to extend critical protections to workers across the country. Congress enacted the FLSA 80 years ago in response to the "existence...of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."¹ To address these concerns, the Act established crucial wage, hour, and child labor standards to protect workers from mistreatment by their employers. Congress intended these standards to cover workers broadly, which is why the term "employee" is defined as "any individual employed by an employer"; "employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee"; and "employ" is defined to include "to suffer or permit to work."² In fact, the legislative history makes clear that Congress anticipated employers' efforts to get around the law and specifically rejected proposals that would have encouraged employers to modify their business model to avoid the FLSA's standards.³

DOL's rule departs from long-standing case law and the FLSA's blanket protections for workers and instead presents a flawed test that would deny millions of American workers protections under the law. Specifically, the rule focuses on two core factors that purport to determine whether a worker is an employee or an independent contractor: 1) the nature and degree of the

¹ 29 USC §202(a)

² 29 USC §203

³ Kati L. Griffith, "The Fair Labor Standards Act at 80: Everything old is new again," *Cornell Law Review*, Volume 104, Issue 3, 2019. Retrieved from: <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2341&context=articles>

worker's control over the work; and 2) the worker's opportunity for profit or loss.⁴ Although a few other factors are included as possible secondary considerations, the rule's fundamental failings stem from these misguided criteria.

According to the first core factor, workers are independent contractors if they choose their own schedules or assignments and are able to work for other companies, including competitors. This logic is not based in economic reality.⁵ Employers can and do give employees control over their schedules and assignments, and employees are commonly allowed to work other jobs, including for a competitor. In addition, those determinants ignore other critical matters of control that an employer typically exercises or retains the right to, including setting the rate of pay and the manner in which the work must be performed and disciplining workers who do not meet their standards.

The second core factor has similar flaws. It assesses workers' opportunity for profit or loss, but it does not take into account the extent to which employers force workers into situations where they must assume costs and financial risk in order to obtain work, such as requiring them to purchase a franchise or their own equipment, including a vehicle.⁶ Requiring workers to take on financial risk as a condition of employment does not convert an employee into an independent contractor under the FLSA. Furthermore, the rule's treatment of skill and initiative in this factor is incomplete at best.⁷ Just because employees can increase their wages by exercising skill or initiative does not mean they are running a separate, independent business, particularly if they cannot pass along costs to customers. The rule does not include additional, critical considerations of skill and initiative that are necessary to define an employment relationship. By overemphasizing opportunity for profit or loss as a core factor in the test, DOL would encourage employers to push increased risk and debt onto their workers in order to justify their classification as independent contractors. As a result, workers could become trapped in situations where they must incur debts in order to obtain work and must work indefinitely to pay off these debts.

These two core factors are not in line with the congressional intent of the FLSA, the language of the text, or Supreme Court and federal circuit court decisions, and are wholly inadequate in determining whether a worker is an employee. As a result, this proposed rule would increase workers' economic insecurity and exacerbate the racial wealth gap.

An expansive reach of employee status under the FLSA is required by the text itself and essential to upholding workers' rights and protecting them from the increasingly common business model that misclassifies workers, and sometimes entire workforces,⁸ as independent contractors. DOL's own analysis estimates that nearly 19 million American workers, or over 12 percent of all workers, performed work as independent contractors in 2017, the most recent year for which data are available.⁹ More than 10 million of those workers – nearly half – performed this work for their primary jobs.¹⁰ DOL acknowledges, however, that estimates on the number of independent

⁴ Independent Contractor Status under the FLSA, 85 Fed. Reg. 60600 (proposed September 25, 2020) (to be codified at 29 CFR Parts, 780, 788, and 795), 795.105(d).

⁵ Ibid, 795.105(d)(1)(i)

⁶ Ibid, 795.105(d)(1)(ii)

⁷ Ibid.

⁸ Shira Ovide, "Gig Work Is Risky for Apps, Too," The New York Times, Sept. 11, 2020. Retrieved from: <https://www.nytimes.com/2020/09/11/technology/gig-work-business-model.html?searchResultPosition=32>

⁹ Independent Contractor Status under the FLSA, Supplementary Information, VI(C)(1)

¹⁰ Ibid, VI(B)

contractors vary, and other sources point to a higher and growing number.¹¹ The use of independent contractors and worker misclassification,¹² has become more prevalent in health care,¹³ transportation and trucking,¹⁴ construction,¹⁵ and the tech sector.¹⁶

This uptick in workers being classified as independent contractors instead of employees is not because the nature of work has fundamentally shifted; it is an effort by employers to reduce their labor costs by evading the FLSA and other laws at the expense of workers. A report published by the Department of Treasury in 2013 pointed to this motivation and scale: “employers misclassify millions of workers as independent contractors instead of employees...[which] allow[s] employers to avoid paying a significant amount of money in employment taxes.”¹⁷ Cracking down on employers’ misclassification of workers as independent contractors should be one of DOL’s top enforcement priorities. Instead, the proposed rule would legitimize the current trends of rampant misclassification and encourage more corporations to misclassify workers by following this proposed rule’s roadmap.

The loss of employee status has serious financial consequences for workers. DOL’s proposed rule acknowledges that “independent contractors, on average, may be less likely to have health insurance coverage” and admits that the provision of employee benefits such as health insurance, retirement contributions, and paid time off would “decrease with an increase in the use of independent contractors because independent contractors generally do not receive these benefits directly.”¹⁸ DOL incorrectly asserts without supporting citation that companies may raise the wages of employees who subsequently are classified as independent contractors to offset the increase in payroll tax contributions the workers would pay as independent contractors in order to maintain equity with employees’ wages. There is substantial evidence that contradicts this

¹¹ Emilie Jackson, et al., The Department of Treasury Office of Tax Analysis, “The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage,” Working Paper 114, January 2017. Retrieved from: <https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-114.pdf>

¹² Ruckelshaus, Cathy and Ceilidh Gao, “Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries,” National Employment Law Project, September 2017. Retrieved from: <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/>.

¹³ Connolly, Caitlin, “Independent Contractor Classification in Home Care,” National Employment Law Project, December 31, 2015. Retrieved from: <https://www.nelp.org/publication/independent-contractor-classification-in-home-care/>; See also: Paraprofessional Healthcare Institute, “Direct Care Workers in the United States,” September 8, 2020. Retrieved from: <https://phinational.org/resource/u-s-home-care-workers-key-facts-2019/>

¹⁴ Proposed Brief of Amici Curiae National Employment Law Project, American Civil Liberties Union of Northern California, et al. (Economic and Racial Justice Advocates) In Support of Plaintiff and Respondents, People of the State of California v. Uber Technologies, Inc. and Lyft, Inc., Court of Appeal, First Appellate District, Case Nos. A160701 & A160706. See also: Smith, Jennifer, “Trucking Industry Raises Alarms on California Gig Economy Legislation,” The Wall Street Journal, September 12, 2019. <https://www.wsj.com/articles/trucking-industry-raises-alarms-on-california-gig-economy-legislation-11568305134>

¹⁵ U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, “Employed persons by detailed industry, sex, race, and Hispanic or Latino ethnicity.” Retrieved from: <https://www.bls.gov/cps/cpsaat18.htm>

¹⁶ Harnett, Sam, “‘Two-Tiered Caste System’: The World of White-Collar Contracting in Silicon Valley,” KQED, April 19, 2019. Retrieved from: <https://www.kqed.org/news/11741371/two-tiered-caste-system-the-world-of-white-collar-contracting-in-silicon-valley>

¹⁷ Treasury Inspector General for Tax Administration, “Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings,” June 14, 2013. Page 6. Retrieved from: <https://www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf>

¹⁸ U.S. Department of Labor, Wage and Hour Division, “Independent Contractor Status Under the Fair Labor Standards Act,” 85 FR 60600, Published September 25, 2020. Retrieved from: <https://www.federalregister.gov/documents/2020/09/25/2020-21018/independent-contractor-status-under-the-fair-labor-standards-act>

claim. According to the Federal Reserve, when workers' primary source of income is derived from an independent contractor position, they experience more "financial fragility."¹⁹ Independent contractors' wages in low-paid industries lag behind those of their employee counterparts.²⁰ And they are less likely than employees to have health and retirement benefits.²¹

Workers of color are disproportionately represented in industries in which the use of independent contractors and workers' misclassification is increasing.²² By encouraging more employers to classify their workers as independent contractors, this proposed rule would exacerbate the racial wage and wealth gap. Black and brown workers experience more economic insecurity than white workers.²³ This is directly linked to systemic inequities that result in workers of color being paid less than white workers²⁴ and their over-representation in low-wage sectors.²⁵ Lower earnings leave Black and brown workers with much less in retirement savings, if they have any at all.²⁶ Workers of color are also much less likely to have paid leave benefits²⁷ or be able to work remotely.²⁸ The COVID-19 pandemic has brought into sharp relief the acute consequences that inadequate paid sick days, paid leave, and employer-provided health insurance can have on

¹⁹ Board of Governors of the Federal Reserve Systems, "Report on the Economic Well-Being of U.S. Households in 2018," May 2019. Retrieved from: <https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-employment.htm>

²⁰ Moe, Lina, et al. "The Magnitude of Low-Paid Gig and Independent Contract Work in New York State," The New School Center for New York City Affairs, February 2020. Retrieved from: https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e424affd767af4f34c0d9a9/1581402883035/Febl12020_GigReport.pdf; See also: Mishel, Lawrence, "Uber and the labor market," Economic Policy Institute, May 15, 2018. Retrieved from: <https://www.epi.org/publication/uber-and-the-labor-market-uber-drivers-compensation-wages-and-the-scale-of-uber-and-the-gig-economy/>; See also: Husak, Corey, "How U.S. companies harm workers by making them independent contractors," Center for Equitable Growth, July 31, 2019. Retrieved from: <https://equitablegrowth.org/how-u-s-companies-harm-workers-by-making-them-independent-contractors/>

²¹ Appelbaum, Eileen, et al., "Nonstandard work arrangements and older Americans, 2005-2017," Economic Policy Institute, February 28, 2019. Retrieved from: <https://www.epi.org/publication/nonstandard-work-arrangements-and-older-americans-2005-2017/>

²² For statistics on the disproportionate representation of workers of color in app-based industries, see: Bureau of Labor Statistics, "Electronically mediated work: new questions in the Contingent Worker Supplement," Monthly Labor Review, September 2018, Table 4. Retrieved from: <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm>. For statistics on the disproportionate representation of workers of color in the health care, specifically the home health care industry, the construction industry, industrial truck operators and truck drivers, see also: Bureau of Labor Statistics, "Labor Force Statistics from the Current Population Survey," January 22, 2020, Table 11. Retrieved from: <https://www.bls.gov/cps/cpsaat11.htm>.

²³ Board of Governors of the Federal Reserve Systems, "Report on the Economic Well-Being of U.S. Households in 2019," May 2020. Figure 16. Retrieved from: <https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf>

²⁴ U.S. Census Bureau, Current Population Survey, 1968 to 2018 Annual Social and Economic Supplements. Retrieved from: [census.gov/content/dam/Census/library/visualizations/2018/demo/p60-263/figure1.pdf](https://www.census.gov/content/dam/Census/library/visualizations/2018/demo/p60-263/figure1.pdf)

²⁵ Cooper, David, "Workers of color are far more likely to be paid poverty-level wages than white workers," Economic Policy Institute, June 21, 2018. Retrieved from: <https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/>

²⁶ Board of Governors of the Federal Reserve System, FED Notes, "Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances," September 28, 2020. Retrieved from: <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm>

²⁷ U.S. Bureau of Labor Statistics, Monthly Labor Review, "Racial and ethnic disparities in access to and use of paid family medical leave: evidence from four nationally representative datasets," January 2019. Retrieved from: <https://www.bls.gov/opub/mlr/2019/article/racial-and-ethnic-disparities-in-access-to-and-use-of-paid-family-and-medical-leave.htm>

²⁸ Gould, Elise and Heidi Shierholz, "Not everybody can work from home," Economic Policy Institute, March 19, 2020. Retrieved from: <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home/>

workers in alternative work arrangements.²⁹ Those consequences are even greater for Black and brown workers, who disproportionately hold frontline jobs.³⁰ DOL’s proposed rule would worsen these troubling trends of workers economic insecurity and racial inequity.

It is unconscionable that DOL, the agency tasked with enforcing the FLSA, is proposing to exempt millions of workers from the law’s safeguards. By issuing this proposed rule, particularly during a pandemic when millions of workers have lost their jobs and millions more are lacking critical benefits because they are classified as independent contractors, DOL makes clear that its intent with the rule is not to protect workers but to rubber-stamp corporate profit-maximizing schemes responsible for the hollowing out of the American middle class and growing the racial wealth gap. We oppose this rule and urge you to rescind it.

Sincerely,

/s/Sherrod Brown

Sherrod Brown
United States Senator

/s/Patty Murray

Patty Murray
United States Senator

/s/Chris Van Hollen

Chris Van Hollen
United States Senator

/s/Richard Blumenthal

Richard Blumenthal
United States Senator

/s/Edward J. Markey

Edward J. Markey
United States Senator

/s/Jack Reed

Jack Reed
United States Senator

/s/Tammy Baldwin

Tammy Baldwin
United States Senator

/s/Kirsten Gillibrand

Kirsten Gillibrand
United States Senator

/s/Robert Menendez

Robert Menendez
United States Senator

/s/Richard J. Durbin

Richard J. Durbin
United States Senator

²⁹ Tiku, Nitasha, “Gig workers face the spread of the new coronavirus with no safety net,” The Washington Post, March 2, 2020. Retrieved from: <https://www.washingtonpost.com/technology/2020/02/29/gig-workers-face-spread-new-coronavirus-with-no-safety-net/>

³⁰ Associated Press, “People of color, women shoulder front-line work during pandemic,” March 4, 2020. Retrieved from: <https://www.nbcnews.com/news/nbcblk/people-color-women-shoulder-front-line-work-during-pandemic-n1199291>

[/s/Elizabeth Warren](#)

Elizabeth Warren
United States Senator

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Mazie K. Hirono
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