

December 13, 2022

Division of Regulations, Legislation, and Interpretation,
Wage and Hour Division,
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

On behalf of Americans for Tax Reform, we greatly appreciate the opportunity to provide input on the Department of Labor's (DOL) proposed rule on independent contractor classifications under the Fair Labor Standards Act (FLSA).

Americans for Tax Reform (ATR) is a taxpayer advocacy group that believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today. The government's power to control one's life derives from its power to tax. We believe that power should be minimized.

The Department's decision to overturn the 2021 independent contracting rule and institute new, more restrictive regulations on what constitutes independent contractor designations would be economically damaging to both the workers in these contracting agreements and the firms which work alongside them. Further, the proposed rule would jeopardize the economic freedom and self-determination of independent workers across the United States.

The American people have made clear that independent contracting arrangements and other forms of flexibility in the workplace are highly important to them. In 2021, 59 million Americans performed freelance work, representing more than one-third of the total workforce and contributing \$1.3 trillion to the U.S. economy.^{1,2} In surveys, strong majorities of workers say that increased flexibility "would make them feel empowered," while nearly half report desiring better flexibility in specific areas like creating their own schedules or working remotely.³ As a result, estimates indicate that over half of the private workforce will have worked as an independent worker at some point in their lives by 2023.⁴

Independent contractors and other freelancers widely indicate that they are pleased in their current contracting arrangements. According to Bureau of Labor Statistics data, 79 percent of independent contractors prefer their current work arrangement, compared to fewer than one in

¹ "Upwork Study Finds 59 Million Americans Freelancing amid Turbulent Labor Market," Upwork (Upwork Global Inc., December 8, 2021), <https://investors.upwork.com/news-releases/news-release-details/upwork-study-finds-59-million-americans-freelancing-amid>.

² Adam Ozimek, "Freelance Forward Economist Report," Upwork (Upwork Global Inc.), accessed December 9, 2022, <https://www.upwork.com/research/freelance-forward-2021>.

³ Edward Segal, "Flexibility Is the Most Empowering Benefit for Employees: New Poll," Forbes (Forbes Magazine, February 7, 2022), <https://www.forbes.com/sites/edwardsegal/2022/02/04/flexibility-is-the-most-empowering-benefit-for-employees-new-poll/?sh=110cfc938b19>.

⁴ "The State of Independence in America | 2018: The New Normal," MBO partners (MBO Partners, Inc., 2018), https://www.mbopartners.com/wp-content/uploads/2019/02/State_of_Independence_2018.pdf.

ten who would prefer more traditional work arrangements.⁵ Freelancers also reported higher overall job satisfaction, including in areas like work-life balance, than their non-freelancing counterparts.⁶

Similar opinions were found among app-based ridesharing and delivery drivers in California amid the state's 2020 fight over Proposition 22, which affirmed that such drivers should be treated as independent contractors rather than be forced into less flexible work arrangements.⁷ In a survey, 72 percent of the drivers supported California Proposition 22.⁸ Nine in ten drivers said they started driving so that they could have the flexibility of when and where to work, and 68 percent said they would have to stop their work if the state tried to force them into fixed employment arrangements.⁹

If current protections remain, independent contractors say the future looks bright. In 2021, nine in ten freelancers said they believed that the “best days are ahead” for freelancing.¹⁰ 67 percent of freelancers reported being optimistic about their career over the subsequent year, compared to just 58 percent of non-freelance workers.¹¹ In fact, even 56 percent of current non-freelancers say they are “likely” to freelance in the future, showing widespread recognition of the numerous benefits outlined above.¹²

Unfortunately, the Department of Labor today seeks to undermine these flourishing independent contracting arrangements. In 2017, DOL made the prudent decision to rescind the damaging 2015 rule. The 2015 rule made it more difficult for workers to operate as independent contractors by altering employee classifications to the “economic realities” test.¹³ DOL took another positive step in its January 2021 rule, which prioritized the nature and degree of control over work and the individual's opportunity or profit or loss in classification analyses, providing better clarity while in effect granting workers more freedom to be classified as independent contractors.¹⁴

DOL's newly proposed rule would reverse these years of progress in regulatory approaches to worker classification. This rule would reverse the dual-factor emphasis of the 2021 rule, instead

⁵ “Contingent and Alternative Employment Arrangements News Release,” U.S. Bureau of Labor Statistics (U.S. Bureau of Labor Statistics, June 7, 2018), <https://www.bls.gov/news.release/conemp.htm>.

⁶ Adam Ozimek, “Freelance Forward Economist Report,” Upwork (Upwork Global Inc.), accessed December 9, 2022, <https://www.upwork.com/research/freelance-forward-2021>.

⁷ “Text of Proposed Laws: California General Election,” California Secretary of State (2020), pp. 30-39. <https://vig.cdn.sos.ca.gov/2020/general/pdf/topl.pdf>

⁸ Isabelle Morales, “Survey: App-Based Drivers Want to Maintain Independent Contractor Status,” Americans for Tax Reform (Americans for Tax Reform, September 14, 2021), <https://www.atr.org/survey-app-based-drivers-want-maintain-independent-contractor-status/>.

⁹ Ibid.

¹⁰ Adam Ozimek, “Freelance Forward Economist Report,” Upwork (Upwork Global Inc.), accessed December 9, 2022, <https://www.upwork.com/research/freelance-forward-2021>.

¹¹ Ibid.

¹² Ibid.

¹³ U.S. Department of Labor and Wage Division, Administrator's Interpretation No. 2015- 1, Administrator David Weil, July 15, 2015 (“Interpretation No. 2015-1”). <https://s27147.pcdn.co/wp-content/uploads/Administrators-Interpretation-2015.pdf>

¹⁴ U.S. Department of Labor and Wage Division, “Independent Contractor Status Under the Fair Labor Standards Act,” *Federal Register* Vol. 85, no. 187 (September 25, 2020): 60600-60639. <https://www.govinfo.gov/content/pkg/FR-2020-09-25/pdf/2020-21018.pdf>

treating these core factors as equal to less relevant and more subjective factors such as whether work performed by an independent contractor is “central or important” to a business.¹⁵ The rule also seeks to broaden employment determinations to apply in cases of mere theoretical control by “not limiting control to control that is actually exerted.”¹⁶ These broad expansions of the scope of the “economic realities” test would not only reduce the opportunities for workers to classify themselves as independent contractors overall, but would also allow for subjective and unpredictable future determinations by courts and bureaucrats, creating instability.

If implemented, the proposed rule has the potential to cause broad disruptions to the labor market and force Americans out of work. If independent contractors are barred from continuing their current work arrangements, their ability to participate in the economy will be hit from two directions, as moving them to employee status is both economically unfeasible for some businesses and undesirable by most contractors.

On the company side, small businesses would be the most hard-hit. While certain large companies may be able to weather the economic headwinds that new misclassifications of contractors as employees would bring, small businesses are much less able to absorb new labor costs.¹⁷ Many could be forced to shut down if they are forced to cease their collaborations with independent contractors as a result of the proposed rule.

Regardless of company size, however, layoffs would be inevitable. For example, one analysis of California’s attempt to reclassify app-based rideshare and delivery drivers as full-time employees estimated that such a regulatory change would lead to a 76 percent decrease in active drivers across the state.¹⁸

As noted above, fewer than one in ten independent contractors say they would prefer to work as employees instead.¹⁹ 53 percent of freelancers further emphasize that they “would not” go back to a traditional job.²⁰ During an already volatile labor market with considerable labor shortages, the proposed rule could add to the rate of labor mismatches in the market and cause an increase in independent contractors exiting the workforce altogether.

Among app-based rideshare and delivery drivers, 84 percent say that they already have another job and that they consider their driving to be supplemental “part-time work, not a full-time

¹⁵ U.S. Department of Labor and Wage Division, “Employee or Independent Contractor Classification Under the Fair Labor Standards Act,” *Federal Register* Vol. 87, no. 197 (October 13, 2022): 62218-62275. <https://www.govinfo.gov/content/pkg/FR-2022-10-13/pdf/2022-21454.pdf>

¹⁶ *Ibid.*

¹⁷ “NFIB Opposes Dramatic Minimum Wage Hike,” NFIB (National Federation of Independent Business, February 4, 2021), <https://www.nfib.com/content/analysis/economy/nfib-opposes-dramatic-minimum-wage-hike/>.

¹⁸ Brad Williams. 2020. “Impacts of Eliminating Independent Contractor Status for California App-Based Rideshare and Delivery Drivers.” Capitol Matrix Consulting, July. <https://d3n8a8pro7vhm.cloudfront.net/themes/5ef0e34fc294806719977470/attachments/original/1595874822/ab5-impacts-white-paper-final.pdf?1595874822>

¹⁹ “Contingent and Alternative Employment Arrangements News Release,” U.S. Bureau of Labor Statistics (U.S. Bureau of Labor Statistics, June 7, 2018), <https://www.bls.gov/news.release/conemp.htm>.

²⁰ “Gig Economy Statistics: Demographics and Trends in 2022,” TeamStage (Teamstage.io, June 8, 2022), <https://teamstage.io/gig-economy-statistics/>.

job.”²¹ Any regulation which attempts to reclassify these independent contractors as employees would inevitably force an exodus of workers, in many cases cutting out crucial second incomes earned by millions of Americans to support their families.

In June 2022, Americans for Tax Reform signed onto a letter to U.S. Secretary of Labor Marty Walsh and Acting Administrator Jessica Looman alongside 40 other organizations with strong support for maintaining the January 2021 DOL rule on employment status determination under the FLSA and strong opposition to potential restrictive changes under a new rule.²²

“Simply put, while it may benefit narrow special interest groups, rulemaking that diminishes freelance opportunities and turns independent contractors into traditional employees under federal law would be widely unpopular among the individuals it would impact most directly,” the letter argued. “Reducing paths to self-employment will only reduce opportunity and growth in the 21st century.”²³

Regrettably, the proposed rule reflects precisely the concerns that ATR and the other signers expressed back in June.

As the country continues on its path out of the economic devastation of the COVID-19 pandemic, it is essential that worker freedoms and flexibility are protected and that American families are not barred from earning a living through their preferred form of employment or self-employment. With the vast majority of current independent contractors making clear that they would prefer to remain as independent contractors, the DOL should reject the proposed rule changes which would jeopardize the ability of countless workers to continue working for themselves.

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²¹ Isabelle Morales, “Survey: App-Based Drivers Want to Maintain Independent Contractor Status,” Americans for Tax Reform (Americans for Tax Reform, September 14, 2021), <https://www.atr.org/survey-app-based-drivers-want-maintain-independent-contractor-status/>.

²² Brent Gardner et al. Letter to the Honorable Marty Walsh and The Honorable Jessica Looman, June 21, 2022.

https://americansforprosperity.org/wp-content/uploads/2022/07/AFP-DOL-Anticipated-IC-Rule-Letter_07.21.22.pdf

²³ Ibid.