



April 19, 2023

The Honorable Kevin Kiley  
Chairman  
Subcommittee on Workforce Protections  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Alma Adams  
Ranking Member  
Subcommittee on Workforce Protections  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Kiley and Ranking Member Adams:

Thank you for holding today's hearing on policies impacting independent work opportunities, including the U.S. Department of Labor's ("DOL" or "the Department") proposed rule ("2022 proposed rule") on independent contractor status under the Fair Labor Standards Act (FLSA).

I write on behalf of Flex<sup>1</sup> to call attention to the 2022 proposed rule and urge Members of Congress to exercise caution in pursuing actions that could harm the millions of consumers who rely on the services provided by our member companies, and the millions of earners who turn to app-based platforms every day to create opportunities to live, work, and run their businesses on their own terms.

### **2022 Proposed Rule**

The Department is currently considering a 2022 proposed rule that would make substantive changes to the guidance governing worker classification under the FLSA. DOL's current worker classification rule (the "current rule") — the first ever notice-and-comment rulemaking to provide a generally applicable interpretation of independent contractor status under the statute — became effective only two years ago. This current rule was carefully developed "to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy."<sup>2</sup>

More than 1,800 individuals and organizations submitted comments on the current rule and the Department reported that the "overwhelming majority" of comments from independent

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<sup>1</sup> Flex is the voice of the app-based economy, representing America's leading app-based rideshare and delivery platforms and the people who count on them. Our member companies — DoorDash, Grubhub, HopSkipDrive, Instacart, Lyft, Shipt, and Uber — help provide access to crucial goods and services to customers safely and efficiently, offer flexible earning opportunities to workers, and support economic growth in communities across the country.

<sup>2</sup> 86 FR 1168

contractors supported its adoption.<sup>3</sup> Flex agrees with that “overwhelming majority” of independent contractors that the current rule — which has not hampered the Department’s ability to bring enforcement actions against bona fide misclassification — provides a more workable and certainty-enhancing classification analysis rubric, bringing a more modern, practical, and predictable approach to the prior interactions of the multi-factor balancing test.

Unfortunately, the 2022 proposed rule ignores the economic realities of technology-driven work in the 21<sup>st</sup> century – and the views of the “overwhelming majority” of the very workers the rule purports to serve – making it inconsistent with the underlying principle governing worker classification under the FLSA.<sup>4</sup> Furthermore, national policies that narrow opportunities for independent work across the economy would displace 1.5 million workers – those unable to work as traditional employees – from the labor force, costing an estimated \$31.4 billion in earnings.<sup>5</sup> Simply put, policies that would restrict workers’ opportunity to combat inflation and build wealth would be irresponsible and rob millions of Americans of their economic agency.

Flex submitted comments on the 2022 proposed rule and enclosed those, along with a summary of those comments, for the Committee and hearing record.<sup>6</sup>

### **About App-Based Work**

App-based platforms have transformed the landscape of today’s workforce and have made independent work opportunities accessible to more people than ever before. There are nearly 10 million unfilled jobs across the United States, yet nearly 23 million people continue to choose a new economic path where they have the means to determine where, when, how often – and with which platforms – they want to earn income.

App-based work has drawn a diverse array of people – including parents, caregivers, veterans, students, and entrepreneurs – to our members’ platforms, and these earning opportunities have brought countless workers off the economic sidelines. Platform work has increased the earning power of individuals in ways that make sense for themselves and their families, which is particularly critical during a time of inflationary pressure.

At the same time, the app-based economy supports economic growth in communities across the United States and has become crucial in meeting important community needs by facilitating safe transportation options, supporting individuals with disabilities or illnesses, and providing

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<sup>3</sup> 86 FR 1168, 1171-72.

<sup>4</sup> As established by the U.S. Supreme Court, that inquiry is whether the workers “as a matter of economic reality are dependent upon the business to which they render service.” *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947).

<sup>5</sup> Chamber of Progress, [The Many Ways Americans Work and The Costs of Treating Independent Contractors as Employees](#) (Apr. 2022), (hereinafter “Chamber of Progress study”). An additional 1.1 million workers engage in some form of independent work in addition to holding an employment-based role – and such a policy would cost these individuals a total of \$9.7 billion in supplemental income. Id.

<sup>6</sup> Flex, Comments Regarding RIN 1235-AA43: Employee or independent Contractor Status under the FLSA, December 13, 2022, <https://www.flexassociation.org/flex-dol-comments>.

access to food and other essentials. Examples abound of app-based platforms helping communities tackle food insecurity,<sup>7</sup> aiding food banks,<sup>8</sup> providing more equitable healthcare,<sup>9</sup> and recovering from natural disasters.<sup>10</sup>

### Listen to App-Based Earners

Flex is committed to ensuring that the voices of app-based workers and their communities are fully heard by policymakers. To that end, Flex commissioned the first national poll of app-based workers last fall.<sup>11</sup> The survey found that ***the vast majority (77%) of app-based workers prefer to remain independent contractors***, preserving the flexibility and freedom to earn on their own terms. The survey also found that:

- 8 in 10 spend 20 hours or fewer per week with app-based platforms (with most—61%—working 10 or fewer hours a week).
- More than 84% are satisfied with app-based platforms.<sup>12</sup>

Thank you again for your leadership on this issue and holding today’s hearing. Misguided regulatory interventions could increase costs and negatively impact those who turn to app-based platforms to earn extra income, especially in a time of economic uncertainty and significant inflationary pressures. Instead, policymakers should partner with Flex to pursue common-sense policies that support the millions of app-based earners who continue to choose independent work and the ability to secure income on their own terms.

Sincerely,



Kristin Sharp  
CEO, Flex

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<sup>7</sup> David Downey, California city first in US to partner with DoorDash to deliver food to hungry households, The Mercury News (Nov. 3, 2022), <https://www.mercurynews.com/2022/11/03/riverside-joins-with-doordash-to-deliver-food-to-hungry-households/>.

<sup>8</sup> Instacart, Instacart Launches Community Carts, Enabling Online Grocery Donations to Food Banks Nationwide in Just a Few Taps (Nov. 29, 2022), <https://www.prnewswire.com/news-releases/instacart-launches-community-carts-enabling-online-grocery-donations-to-food-banks-nationwide-in-just-a-few-taps-301688299.html>.

<sup>9</sup> Walgreens, Partners with DoorDash and Uber Health to Provide Free Paxlovid Delivery (Oct. 25, 2022), <https://news.walgreens.com/press-center/news/walgreens-partners-with-doordash-and-uber-health-to-provide-free-paxlovid-delivery.html> (noting that “[f]ree delivery will help accelerate access to COVID-19 treatment for communities across America with a focus on underserved populations.”).

<sup>10</sup> Lyft, Disaster Response, <https://www.lyft.com/blog/posts/help-after-hurricane-ian> (noting Lyft is providing “access to free and discounted rides to help those affected [by Hurricane Ian] in Florida move to designated shelters and critical resources.”).

<sup>11</sup> Flex, New Morning Consult Poll Shows 77% of App-Based Workers Prefer to Remain Independent Contractors, Oct. 24, 2022, <https://www.flexassociation.org/post/mcworkersurvey>.

<sup>12</sup> This is echoed by Pew Research Center’s survey findings. Pew Research Center, The State of Gig Work in 2021 (Dec. 8, 2021), <https://www.pewresearch.org/internet/2021/12/08/americans-experiences-earning-money-through-online-gig-platforms/> (“[M]ost gig platform workers say they have had a positive experience with these jobs...” (hereinafter “Pew Research Center Survey”).