



July 18, 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 policy activity at the U.S. Department of Labor's ("DOL" or "the Department") Wage and Hour Division ("WHD"), including the proposed rule ("2022 proposed rule") on independent contractor status under the Fair Labor Standards Act (FLSA).¹

Flex members efficiently and effectively provide matching services to customers and businesses looking for access to delivery or transportation, offer flexible earning opportunities to workers, and support economic growth in communities across the United States. Unfortunately, DOL's 2022 proposed rule could undercut the availability of independent jobs for millions of Americans, impacting families and communities throughout this country.

The 2022 Proposed Rule

Flex outlined our concerns with the 2022 proposed rule in a letter to the subcommittee earlier this year and encloses that letter for today's hearing record.² Also enclosed are the comments that Flex submitted to DOL and WHD regarding the proposal.³

If finalized, the 2022 proposed rule would replace DOL's current worker classification rule ("the current rule"), which was carefully developed "to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy"⁴ and became effective only two years ago. The current rule provides a workable and certainty-enhancing classification analysis rubric, bringing a more modern, practical, and predictable approach to the prior interactions of the multi-

¹ 87 FR 62218

² Letter from Flex to Chairman Kiley and Ranking Member Adams ahead of the Subcommittee's April 19 hearing on policies impacting independent work opportunities, including the proposed rule at 87 FR 62218

³ Flex, Comments Regarding RIN 1235-AA43: Employee or independent Contractor Status under the FLSA, December 13, 2022. Available at: <https://www.flexassociation.org/flex-dol-comments>

⁴ 86 FR 1168

factor balancing test, and has not hampered the Department’s ability to bring enforcement actions against bona fide misclassification. In addition, the Department has failed to adequately explore – and has largely outright ignored – the potential adverse economic impacts of its 2022 proposed rule. These impacts could harm vulnerable communities and manifest in a reduction of work and earning opportunities for individuals across the country.⁵

Therefore, DOL should withdraw the 2022 proposed rule and commit to enforcing the current rule, which better reflects the 21st-century economic landscape.⁶

The Value of App-Based Work to Workers and the Economy

Flex supports the subcommittee in its efforts to examine the economic impact that WHD’s regulatory actions would have on individuals and the economy – particularly insofar as those policies would restrict workers’ opportunities to combat inflation and build wealth. Technological innovation has empowered millions of Americans who turn to app-based platforms to create opportunities to live, work, and run their businesses on their own terms. Unfortunately, the 2022 proposed rule ignores the realities of this type of 21st century, technology-driven work.

With this in mind, Flex is committed to ensuring that the voices of app-based workers are fully heard by policymakers. Flex commissioned an April 2023 survey which found that the overwhelming majority of app-based workers prefer their status as independent contractors. The survey also found that app-based work has proven to be an indispensable tool for individuals as they contend with inflationary pressures and pursue other financial goals. In fact, nearly all (85%) of app-based workers say the ability to earn income on app-based platforms has been helpful for dealing with inflation.⁷ This is truly supplemental work: 80% of workers choose to earn on app-based platforms 20 hours or less per week with most – 61% – working 10 or fewer hours per week.⁸

⁵ The 2022 proposed rule promises to inject uncertainty to the Fair Labor Standards Act’s economic dependence analysis, reigniting a problem that the Department successfully addressed two years ago in finalizing the current rule. Various studies indicate that such a rule change could result in the loss of work for many Americans. See, e.g., NERA Economic Consulting, *The Economic Impact of Instacart on the U.S. Retail Grocery Industry Before and During the COVID-19 Pandemic*, September 2021. Available at: <https://www.nera.com/publications/archive/case-project-experience/nera-study-finds-direct-causal-relationship-between-instacart-ad.html>; Beacon Economics, *How Many App-Based Jobs Would be Lost by Converting Rideshare and Food Delivery Drivers from Independent Contractors to Employees in the Commonwealth of Massachusetts?* February 2022. Available at: https://independentmass.org/wp-content/uploads/2022/07/Massachusetts_Drivers_Design-Final.pdf; Chamber of Progress, *The Many Ways Americans Work and The Costs of Treating Independent Contractors as Employees*, April 2022. Available at: <https://progresschamber.org/new-study-finds-millions-could-lose-work-if-u-s-reclassifies-contractors/>

Additionally, vulnerable consumers and the economy generally would be adversely affected. See Caroline George and Adie Tomer, The Brookings Institution, *Delivering to deserts: New data reveals the geography of digital access to food in the U.S.*, May 11, 2022. Available at: <https://www.brookings.edu/essay/delivering-to-deserts-new-data-reveals-the-geography-of-digital-access-to-food-in-the-us/>

⁶ To that end, Flex supports language included in the FY24 Labor, Health and Human Services, Education, and Related Agencies funding bill that would prevent DOL from finalizing the 2022 proposed rule.

⁷ Flex, *Morning Consult Survey on the App-Based Economy*, April 2023. Available at: <https://www.flexassociation.org/national-survey>

⁸ Flex, *Morning Consult Worker Survey*, September 2022. Available at: <https://www.flexassociation.org/workersurvey>

It is also important to note that these benefits are not limited to metropolitan residents. In fact, the majority of app-based earners live and operate in rural and suburban areas.⁹

App-based platforms also play a role in facilitating entrepreneurialism and small business formation. While app-based work provides individuals with the autonomy and flexibility to run their own business using the technology platform(s) of their choice, it also provides a transitional income source for other entrepreneurial endeavors. It should come as no surprise that Rice University found a 7% to 12% increase in entrepreneurial interest after the arrival of rideshare platforms in a community.¹⁰ And recent data from Shipt – an app-based delivery platform – shows that 75% of shoppers and 84% of drivers using the platform have a goal of setting up another small business outside of the Shipt platform.¹¹

Thank you again for your leadership on this issue and holding today’s hearing. Flex looks forward to partnering with policymakers to support the millions of app-based earners who continue to choose independent work and the ability to secure income on their own terms.

Sincerely,

A handwritten signature in blue ink that reads "Kristin Sharp". The signature is written in a cursive, flowing style.

Kristin Sharp
CEO, Flex

⁹ 52% of App-based earners live and operate in rural/suburban areas, Flex, Morning Consult Survey on the App-Based Economy, April 2023, Available at: <https://www.flexassociation.org/national-survey>

¹⁰ John M. Barrios et al., Launching with a parachute: The gig economy and new business formation, Journal of Financial Economics, April 2022, Volume 144, Issue 1, 2022. Available at: <https://www.sciencedirect.com/science/article/abs/pii/S0304405X21005390>

¹¹ Shipt, Small Businesses, Big Impact: How Shipt Helps Entrepreneurs Support their Small Business Dreams, July 13, 2023. Available at: <https://corporate.shipt.com/news/small-businesses.-big-impact-how-shipt-helps-entrepreneurs-support-their-small-business-dreams>