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

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

Dear Chairman Kiley and Ranking Member Adams:

Thank you for your interest in recent policy proposals by the U.S. Department of Labor's ("DOL" or "the Department") Wage and Hour Division ("WHD"), including the proposed rule ("2022 Proposed IC Rule") on independent contractor status under the Fair Labor Standards Act (FLSA).¹ The National Employment Law Project (NELP) is a nonprofit research and policy organization with over 50 years of experience advocating for the employment and labor rights of low-paid workers. NELP works to ensure that our nation's labor and employment laws provide meaningful protections, including ensuring that the child labor, minimum wage, and overtime protections of the Fair Labor Standards Act ("FLSA" or "Act") provide the broad coverage that Congress intended.

As experts on the FLSA, NELP supports the 2022 Proposed IC Rule.² Too many corporations mischaracterize their employees as "independent contractors," "self-employed," "partners," or "freelancers," require them to form "limited liability companies"—or simply pay them off the books—as a tactic to shift risk and costs downward onto their workers, and channel wealth upward to investors and CEOs. Increasingly, flashy app-based corporations promise a sham of "flexibility" —e.g., a limited ability to 'choose' when to work that is so mediated and algorithmically controlled that workers have little real choice.³ Similarly, they push a false narrative of "independence" when the workers fundamental to their business have no say over how or what they are paid or over the take-it-or-leave-it contracts imposed on them as a condition of work, and where these workers are plainly *not* running their own individual businesses. And as corporate behemoths peddle these myths, they strip their workers of bedrock employee protections including, but not limited to, the rights to minimum and overtime wages under the FLSA. The spread of independent contractor

¹ *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*, 87 Fed. Reg. 62218 (Oct. 13, 2022).

² See NELP Comment in Support of the 2022 Proposed IC Rule (Dec. 13, 2022), https://www.nelp.org/wp-content/uploads/NELP-Final-Comment-in-Support_USDOL-IC-Rule-2022.pdf.

³ See also *Workers Demand True Flexibility with Full Employment Protections*, NELP (Nov. 18, 2022), available at <https://www.thetruthaboutcwi.com/updates/workers-demand-true-flexibility-with-full-employment-protectionsnbspnbsp>.

misclassification is an urgent issue, depressing the wages and degrades working conditions of millions of workers across the United States. The WHD has ample reason to be concerned, and the 2022 Proposed Rule will provide needed clarity on the scope of FLSA's protections help increase compliance.

Indeed, the WHD should act urgently to replace the flawed and damaging guidance of the 2021 IC Rule put forth by the Trump administration. That guidance is contrary to decades of Supreme Court precedent and the well-established analysis of federal Courts of Appeal. It establishes —for the first time and without support— an entirely new formulation of the well-established economic reality analysis, elevating two factors as more important than others in determining a worker's economic dependence.⁴ In so doing, it enables independent contractor misclassification and encourages bad actor employers seeking to deny wage and hour protections to their workforces. Ostensibly motivated by a need for clarity, the 2021 IC Rule's out-of-left-field concepts only sow doubt and confusion.

The 2022 Proposed Rule, in contrast, better responds to concerns that motivated the 2021 IC Rule, but it is entirely consistent with Supreme Court and circuit precedent. The 2022 Proposed Rule would restore the well-established economic realities analysis, applying the general six factors and considering the totality of the relationship. Its explanations of how each factor informs the ultimate question of whether a worker is in business for themselves or dependent on work in the business of another provide improved clarity and focus. The 2022 Proposed Rule does not simply list a bunch of factors to be weighed willy-nilly, it offers guidance on the role of each factor in the ultimate question of whether a worker is an independent contractor or protected employee. And it is backed by decades of well-established case law that established the framework, and which the WHD is bound to apply.

As NELP has stated, the 2022 Proposed Rule is “a necessary course correction, not a radical sea change.”⁵ It will replace the misguided 2021 IC Rule with guidance that improves the focus and clarity of the economic realities analysis. In so doing, it will also help restore the promise of the FLSA by ensuring that only true independent contractors are exempt, while those who are not in business for themselves — those who are economically dependent on finding work in another business — are protected as employees, consistent with Congress' intent.

Thank you for your time and attention to this matter.

Sincerely,

Sally Dworak-Fisher
Senior Staff Attorney

⁴ 86 Fed. Reg. 1246-47 (sections 795.105(c) and (d)).

⁵ *USDOL's Proposed Independent Contractor Rule is a Restoration, not a Revolution*, NELP (Feb. 3, 2023), available at <https://www.nelp.org/publication/usdols-proposed-independent-contractor-rule-is-a-restoration-not-a-revolution/>.

