

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS



Statement for the Record of Elizabeth Milito
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**United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections**

***Cutting Corners at WHD: Examining the Cost to Workers,
Small Businesses, and the Economy.***

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Good afternoon, Chairman Kiley, Ranking Member Adams, and members of the House Education and the Workforce Committee.

On behalf of the National Federation of Independent Business (NFIB), I appreciate the opportunity to submit for the record this testimony for the Subcommittee on Workforce Protections hearing entitled, *"Cutting Corners at WHD: Examining the Cost to Workers, Small Businesses, and the Economy."*

My name is Beth Milito, and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy organization, advocating on behalf of nearly 300,000 small business owner members in Washington, D.C., and all 50 state capitals. NFIB's mission is to promote and protect the right of our members to own, operate, and grow their businesses. NFIB proudly represents small businesses nationwide from every industry and sector.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

Small businesses appreciate the opportunity to discuss the effects of burdensome regulations and red tape, particularly when the businesses face economic headwinds including stubbornly high inflation, supply chain disruption, and pervasive workforce shortages.¹

Small businesses were encouraged by President Biden's comments in 2021 when he stated "[s]mall businesses are the engines of our economic progress; they're the glue and the heart and soul of our communities. But they're getting crushed."²

NFIB wholeheartedly agrees with President Biden—small businesses are the engines of economic progress. We also agree that small businesses are getting crushed. NFIB believes that the Department of Labor (DOL) has contributed to this by ignoring the needs of small businesses when promulgating rules.

If the question is, how should Congress and the President respond to the challenges facing small businesses? We believe legislators should look to the example laid by the Democratic-led 96th Congress and President Jimmy Carter. In

¹ William C. Dunkelberg and Holly Wade, *NFIB Small Business Economic Trends*, NFIB Research Center, June 2023, <https://strgnfibcom.blob.core.windows.net/nfibcom/SBET-June-2023.pdf>.

² *Remarks by President Biden on Helping Small Businesses*, Feb. 21, 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/22/remarks-by-president-biden-on-helping-small-businesses/>.

1980, President Carter and Congress recognized the disproportionate impact of federal regulations on small businesses and unanimously approved the Regulatory Flexibility Act (RFA). Upon signing the RFA into law, President Carter stated, “[t]his bill adds another piece to the far-reaching regulatory reform record that we and the Congress are building.”³ The President continued, “[s]mall businesses are crucial to a competitive, healthy, and productive economy. However, regulations often impose heavier burdens on small organizations than on big ones. The RFA recognizes that regulations need not be uniform to be effective. It requires agencies, whenever appropriate, to tailor their rules to the size and resources of those affected.”⁴

The intent of the RFA was clear – when promulgating regulations, federal agencies must consider and minimize the impact of rules on small business. However, in the 40-plus years since the RFA became law, agencies have found ways to disregard or bypass many of the RFA’s requirements. In fact, NFIB’s Small Business Legal Center recently analyzed the Small Business Administration (SBA) Office of Advocacy’s comment letters to federal agencies from January 2021 to January 2023 and found significant noncompliance with the RFA.⁵ In these letters, Advocacy highlighted 28 instances where agencies failed to adequately examine the economic costs of regulations.⁶ Advocacy noted that agencies often improperly certify that rules will not have a significant economic impact on a substantial number of small entities.⁷ Advocacy also found agencies disregard RFA requirements to examine alternatives to regulation or the indirect costs of regulations.

DOL’s Rulemaking Fails to Consider Small Business Impacts

Over the last several years, DOL has habitually failed to properly consider the impact its rules may have on small businesses. The below rules are four major examples of DOL’s lack of compliance:

³ The American Presidency Project “Regulatory Flexibility Act Statement on Signing S. 299 Into Law, UC Santa Barbara, <https://www.presidency.ucsb.edu/documents/regulatory-flexibility-act-statement-signing-s-299-into-law>.

⁴ *Id.*

⁵ Rob Smith, *The Regulatory Flexibility Act: Turning a Paper Tiger Into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking*, National Federation of Independent Business Small Business Legal Center, May 2023, <https://strgnfibcom.blob.core.windows.net/nfibcom/NFIB-RFA-White-paper.pdf>.

⁶ *Id.*

⁷ *Id.*

- **Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 32818**
 - *“Advocacy is concerned that the DOL’s certification that the rule will not have a significant economic impact on a substantial number of small entities lacks an adequate factual basis. DOL improperly certified this proposed rule because it omitted some and underestimated other compliance costs of this rule for small employers.”⁸*
- **Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 38816**
 - *“In this proposed rule, DOL has provided an Initial Regulatory Flexibility Analysis (IRFA), indicating that the proposed rule will have a significant economic impact on a substantial number of small entities. However, the agency has also provided a certification that the rule will not have such an impact. As the agency itself has provided evidence of the rule’s impact, the certification under Section 605 lacks a factual basis and is invalid.”⁹*
- **Updating the Davis-Bacon and Related Acts Regulations, 87 Fed. Reg. 15698**
 - *“Advocacy is concerned that DOL’s Initial Regulatory Flexibility Analysis is deficient. DOL needs to publish a more accurate analysis of the expanded number of new small businesses that may now be covered and subject to compliance costs under the DBRA. DOL severely underestimates these compliance costs at under \$100 per small business annually. Due to the problems with this IRFA, DOL cannot meaningfully consider significant and less burdensome alternatives to the proposed rule that would meet the agency’s objectives. Advocacy recommends that DOL reassess the number of small businesses covered and the compliance costs from this regulation in a new Initial Regulatory Flexibility Analysis. Additionally, DOL should consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts on small entities.”¹⁰*
- **Employee or Independent Contractor Under the Fair Labor Standards Act (FLSA), 87 Fed. Reg. 62218**
 - *“Advocacy is concerned that DOL’s Initial Regulatory Flexibility Analysis is deficient for this rule. DOL significantly underestimates the economic impacts of this proposed rule on small entities at less than \$25 annually*

⁸ Major L. Clark III, Deputy Chief Counsel, Office of Advocacy, U.S. Small Business Administration, Letter to U.S. Department of Labor, August 20, 2021, <https://advocacy.sba.gov/wp-content/uploads/2021/08/Final-Advocacy-Comment-Letter.-Tip-Credits.pdf>.

⁹ Major L. Clark III, Deputy Chief Counsel, Office of Advocacy, U.S. Small Business Administration, Letter to U.S. Department of Labor, August 27, 2021, <https://advocacy.sba.gov/wp-content/uploads/2021/08/Advocacy-Comment-Letter-Minimum-Wage-For-Federal-Contractors.pdf>.

¹⁰ Major L. Clark III, Deputy Chief Counsel, Office of Advocacy, U.S. Small Business Administration, Letter to U.S. Department of Labor, May 17, 2022, <https://advocacy.sba.gov/wp-content/uploads/2022/05/SBA-Advocacy-Davis-Bacon-Act-Comment-Letter.pdf>.

per business. Small businesses told Advocacy that they are very confused on how to classify their workers and comply with DOL's regulations. DOL's proposed rule may be detrimental and disruptive to millions of small businesses that rely upon independent contractors as part of their workforce. Independent contractors who may also be small businesses also believe that they may lose work because of this rule.”¹¹

NFIB's white paper found the Department of Labor failed to comply with RFA at the second highest rate of any agency, behind the Environmental Protection Agency (EPA). By disregarding the RFA, agencies like DOL ignore the intent of Congress and impose onerous one-size-fits-all regulations on small businesses. The result is a massive expansion of the regulatory costs and burdens faced by regulated entities. In fact, since January 2021, the Biden Administration has imposed more than \$375 billion in regulatory costs and added almost 228 million hours of paperwork burdens on businesses.¹²

These unprecedented burdens are crushing small businesses. Unfortunately, there does not appear to be a regulatory slowdown in sight. In fact, just last week we learned that DOL is moving forward with a proposed rule on overtime exemptions. Until Congress enforces the intent of laws like the RFA, agencies like DOL will continue to understate the actual cost of their regulations and saddle small businesses with onerous burdens and costs.

Recommendations to Ensure Rulemaking Accounts for Small Business

Congress should require the DOL to consider small businesses more seriously during the regulatory process. NFIB encourages Congress to enact the following policy changes to ensure that DOL considers the unique needs of small businesses:

1. **Publish less burdensome alternative rules for small businesses.** The RFA requires agencies to consider less burdensome alternative rules for small entities. DOL has proven that it is not seriously considering less burdensome alternatives for small businesses. By requiring DOL to publish less burdensome alternatives, rather than just simply considering them, DOL can help small employers who usually do not have dedicated compliance staff.

¹¹Major L. Clark III, Deputy Chief Counsel, Office of Advocacy, U.S. Small Business Administration, Letter to U.S. Department of Labor, December 12, 2022, <https://advocacy.sba.gov/wp-content/uploads/2022/12/Comment-Letter-DOL-Independent-Contractor-508c.pdf>.

¹² Dan Goldbeck, *Ceiling Fan Proposal Blows Through Unexceptional Week Energy*, American Action Forum, June 26, 2023, <https://www.americanactionforum.org/week-in-regulation/ceiling-fan-proposal-blows-through-unexceptional-week/>.

2. **Impose statutory penalties on DOL for failing to conduct retrospective reviews, including a requirement that would make a rule cease to be effective if a review is not conducted in a timely manner.** Section 610 of the Regulatory Flexibility Act (RFA) requires that federal agencies review each rule that has or will have a significant economic impact on a substantial number of small entities within ten years of publication of the final rule. These periodic rule reviews are a mechanism for agencies to assess the impact of existing rules on small entities and to determine whether the rules should be continued without change, or should be amended or rescinded, consistent with the objectives of applicable statutes.
3. **Require DOL to consider the indirect or downstream effects of rules.** When conducting rulemakings, DOL is not required to consider the indirect effects that regulations may have on small businesses. By requiring DOL to explore the indirect effects of regulations, DOL will more accurately assess the total economic impact on small businesses.
4. **Require DOL to meet with a panel of affected small business owners before promulgating rules.** These panels which are currently in use by EPA, OSHA, and the CFPB will help to give regulators a true understanding of the small companies they are attempting to regulate and will expose them to the potentially unforeseen effects of a regulatory proposal.

While these recommendations will not fix all that is wrong with the regulatory process at DOL, they are a good starting point and will require bureaucrats to at least pause and think about the real-world impact of regulations. It may make agencies stop and think about the small employer of five who does the payroll in-house and is solely responsible for complying with DOL regulations. This small employer views new regulatory burdens far differently than a large employer with dedicated compliance staff.

I appreciate your time and attention to these concerns. Thank you for the opportunity to testify today on behalf of small businesses.