



November 28, 2022

Ms. Amy DeBisschop  
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

**RE: Comments on RIN 1235-AA43: Employee or Independent Contractor Classification Under the Fair Labor Standards Act, submitted via <https://www.regulations.gov>.**

Dear Ms. DeBisschop:

On behalf of our 38 million members and all older Americans nationwide, AARP is pleased to submit these comments on the Department of Labor’s (“Department” or “DOL”) Notice of Proposed Rulemaking (“NPRM”) regarding the standard for determining who is a covered employee and who is an independent contractor under the Fair Labor Standards Act (“FLSA”) (RIN 1235-AA43, Fed. Reg. Vol. 85, No. 187 (Oct. 13, 2022)). The Department’s proposed rule is a sensible return to a multi-factor “totality of the circumstances” analysis of the economic realities test consistent with the DOL’s past regulation and prevailing court precedent.<sup>1</sup>

Misclassification of employees as independent contractors continues to be a persistent challenge in this country.<sup>2</sup> The rule currently in effect (the “2021 IC Rule”) elevates two core factors as presumptive of an independent contractor relationship: (1) a worker’s control over their work, and

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<sup>1</sup> See, e.g., *United States v. Silk*, 331 U.S. 704 (1947) (distinguishing employees from independent contractors by looking at multiple factors related to the performance of the work); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (Stating in reference to the meaning of employment, “We think . . . that the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity.”), *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) (adopting the multi-factor common law agency test and explaining that “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive”) (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)). See also, *Berger v. Nat’l Collegiate Athletic Ass’n*, 843 F.3d 285, 290 (7th Cir. 2016) (“[S]tatus as an employee for purposes of the FLSA depends on the totality of circumstances rather than on any technical label[.]”) (internal citations and quotation marks omitted); *Safarian v. Am. DG Energy Inc.*, 622 F. App’x 149, 151 (3d Cir. 2015) (“[T]he [question of misclassification] arises because the parties structured the relationship as an independent contractor, but the caselaw counsels that, for purposes of the worker’s rights under the FLSA, we must look beyond the structure to the economic realities.”)

<sup>2</sup> See National Employment Law Project (NELP) Policy Brief, “Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries” (October 2020) at <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>. According to the National Employment Law Project, the number of misclassified workers are at high levels. For instance, an estimated 368,685 workers in Illinois; 104,792 in Maine; between 125,725 and 248,206 in Massachusetts; 704,785 in New York; between 54,000 and 459,000 in Ohio. In California, nine out of 10 businesses inspected between 2017 and 2018 were found to be out of compliance by at least one agency.

(2) their opportunity for profit or loss. AARP has previously commented that the 2021 IC Rule improperly constricts the definition of an employee and portends a “race to the bottom” in which some employers will be able to misclassify employees as independent contractors and evade minimum wage, overtime, and other FLSA protections. AARP remains concerned that the current rule undermines the rights and opportunities of older workers under the FLSA and other federal and state laws.

AARP believes that an equal consideration of the proposed rule’s six non-exclusive factors – without any factor taking precedence – better reflects the many types of work arrangements that have emerged in the labor economy over the past decade, while reinforcing the fact that workers – employees and contractors alike – deserve equitable treatment under the law.

### **The Rapid Growth of Older Workers in the Economy**

Older workers are a rapidly growing segment of the U.S. workforce. By 2029, workers age 45 and over are expected to approach 45% of the total working population.<sup>3</sup> As of 2019, older workers comprised 37.8% of all hourly workers age 16 or older.<sup>4</sup> Older adults also comprise an increasing share of the gig economy workforce. A survey conducted by the ADP Research Institute found that 20% of self-identified gig workers were over the age of 55.<sup>5</sup> When accounting for 1099-MISC workers, the 55 plus age group rose to 30% and almost 40% of the older workers in the gig economy considered themselves retired.<sup>6</sup>

### **The Impact of Employee Misclassification on Older Workers**

Misclassification can have a harmful impact on older workers and, as the Department has acknowledged, it can disproportionately affect women and minorities. It is well understood that misclassification results in losses for the worker, law-abiding employers, and the federal government alike. This leads to an unfair shift of the employer’s obligations to the misclassified worker who must individually bear the cost for essential needs such as health care, life and disability insurance, and retirement benefits. Because older workers can experience higher living costs compared to their real, often fixed income, misclassification of their employment not only harms their ability to provide for themselves and their families but also cheats them out of wages and benefits that they otherwise would be entitled to receive as employees.<sup>7</sup>

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<sup>3</sup> See News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, September 1, 2020 at 3 (Chart 3), <https://www.bls.gov/news.release/pdf/ecopro.pdf>.

<sup>4</sup> See “Characteristics of minimum wage workers, 2019,” BLS Reports, U.S. Bureau of Labor Statistics, U.S. Dep’t of Labor, April 2020 (Report 1085) (Chart 7), <https://www.bls.gov/opub/reports/minimum-wage/2019/home.htm>. Workers age 45 and above represent a substantial but smaller share—20.2%—of those at or below the prevailing federal minimum wage. *Id.*

<sup>5</sup> See Ahu Yildirmaz Mita Goldar Sara Klein, ADP Research Institute, “Illuminating the Shadow Workforce: Insights Into the Gig Workforce in Businesses” (February 2020) at <https://www.adp.com/-/media/adp/resourcehub/pdf/adpri/illuminating-the-shadow-workforce-by-adp-research-institute.ashx>

<sup>6</sup> *Id.*

Misclassifying older workers as independent contractors also deny them critical federal protections attendant to the employment relationship, including rights and guarantees under the *Age Discrimination in Employment Act of 1967* (ADEA), the *Older Workers Benefit Protection Act* (OWBPA), the *Social Security Act*, the *Americans with Disabilities Act* (ADA), the *Family and Medical Leave Act* (FMLA), *Title VII of the Civil Rights Act of 1964*, the *Consolidated Omnibus Budget Reconciliation Act* (COBRA), the *Employee Retirement Income Security Act of 1974* (ERISA), along with corresponding state employment laws. Without these and other applicable legal protections, older workers are vulnerable to age discrimination, under-funded retirement and pension plans, reduced Social Security and Medicare payments, and increased financial pressure in the event of a serious health condition, disability, or job loss.

The need for reform is highlighted by the challenges faced by workers and businesses in the gig economy. Alternative work arrangements can offer new and innovative opportunities for older workers. However, there are often subtle and varied aspects related to the manner and means of work that can denote an employment relationship, particularly with alternative work arrangements, such as those popular in the gig economy. There is no official definition of a gig job, and there is no consensus on the type of alternative work arrangements that fall within the gig economy.<sup>8</sup> For example, while the BLS surveyed the working age population engaged in alternative work arrangements using criteria such as short-term and web-based jobs, the agency only counted those who self-identified as an independent contractor, independent consultant, or freelance worker. The agency did not include part-time workers or workers who contract for supplemental income. Yet many older workers and retirees take gig jobs on a full-time, part-time, or intermittent basis to earn a primary or supplemental source of income, and this can change based on the needs of the individual and opportunities in the market.

While some gig workers desire independent contractor status and are classified appropriately as independent contractors, with such a wide range of job opportunities available and the various business models being created, it remains important to exercise vigilance.<sup>9</sup> As different business models arise in the contemporary labor market, it is imperative that companies properly classify their workforce by taking account of all circumstances surrounding the work relationship. It is precisely because work arrangements are more varied and complex in today's economy that no one factor should be controlling or exclusive to others. AARP believes the proposed rule better addresses the multifaceted nature of employment (and independent contractor) relationships by

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<sup>7</sup> *Id.* at FN 2. As NELP reported in its Policy Brief, *supra*, “One government expert calculated that a construction worker earning \$31,200 a year before taxes would be left with an annual net compensation of \$10,660.80 if paid as an independent contractor, compared to \$21,885.20 if paid properly as an employee.”

<sup>8</sup> See “Working in a Gig Economy” by Elka Torpey and Andrew Hogan (May 2016) at <https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm>.

<sup>9</sup> See “Measuring the Gig Economy: Current Knowledge and Open Issues,” by Katharine G. Abraham, John C. Haltiwanger, Kristin Sandusky, and James R. Spletzer (March 2, 2017) at <https://aysps.gsu.edu/files/2016/09/Measuring-the-Gig-Economy-Current-Knowledge-and-Open-Issues.pdf>. (“Although there has been a great deal of interest in the growth in non-traditional work arrangements in the U.S. labor market, the ensuing discussion has not always fully recognized the considerable heterogeneity in these arrangements.”)

restoring the analysis to an unweighted multi-factor test rather than elevating two “core factors” above all others. This broader test allows for businesses and workers to continue to make informed choices without compromising the statutory rights and protections of the FLSA.

### **Conclusion**

Compared to the 2021 IC Rule, which narrows the definition of an employment relationship, AARP believes the proposed rule strikes a better balance by returning to an unweighted multi-factor test and applying a “totality of the circumstances” approach to distinguishing an independent contractor from an employee. AARP supports this positive step towards deterring companies from misclassifying their employees and increasing compliance with the FLSA. This is especially important to protect older adults who are contributing significantly to the sustainability of the workforce and the growth of our nation’s economy.

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a long horizontal flourish extending to the right.

David Certner  
Legislative Counsel and Legislative Policy Director  
Government Affairs