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April 28, 2026

Submitted via <https://www.regulations.gov/document/WHD-2026-0001-0001/comment>

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Comments on RIN 1235-AA46: Employee or Independent Contractor Status under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act

Dear Director Navarrete:

The National Employment Law Project (“NELP”) submits 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”), the Family and Medical Leave Act (“FMLA”) and the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”), RIN 1235-AA46; Fed. Reg. Vol. 91, No. 39 (Feb. 27, 2026) (“NPRM”).

NELP is a nonprofit research and policy organization with over 55 years of experience advocating for the employment and labor rights of low-wage workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation’s labor and employment laws, and that all employers comply with those laws. NELP has litigated directly on behalf of subcontracted workers called “independent contractors,” submitted amicus briefs in numerous independent contractor cases, testified in Congress regarding the importance and scope of the FLSA’s employment coverage, and is an expert in independent contractor misclassification, its magnitude, and its impacts. NELP and our constituents have a direct and sustained interest in fully-enforced federal laws, particularly given that workers earning lower wages comprise a disproportionate and growing share of the workforce and are struggling to make ends meet in today’s economy. We appreciate the opportunity to comment on the proposed regulations.

Our comments will address five primary points:

1. The DOL's proposed rule is contrary to the FLSA, the FMLA and the MSPA because it ignores key statutory terms, which take the scope of employee coverage well beyond this rule's proposed test.
2. The proposed rule contradicts Supreme Court and circuit court precedent.
3. The proposed rule elevates and defines two "core" factors in ways that will broaden who is considered an independent contractor beyond what the statutory language and Supreme Court precedent permit.
4. The proposed rule will enable independent contractor misclassification, a deeply entrenched practice that degrades wages and working conditions, particularly in fast-growing, low-paying and labor violation prone occupations where Black and immigrant workers predominate.
5. The proposed rule will negatively impact public coffers, and businesses will not be able to compete unless they too call their workers "independent contractors."

I. Introduction

True independent contractors are people who are in business for themselves. As such, they make all of the important decisions about how to run their business. They determine what goods or services to sell, engage in arms-length negotiations over the price and other terms of those goods and services, make capital investments to grow their business, and build a customer base.

For decades, however, corporations have mislabeled the workers powering their businesses as "independent contractors," "self-employed," or "freelancers" even though these workers are not in business for themselves. Through take-it-or-leave-it work contracts, these corporations dictate most of the terms of the work, while misclassifying workers as non-employees, thus putting them outside of the workplace protections and tax requirements that apply only to employees and employers.¹ When they engage in this sham practice, corporations shed responsibility for their workers, but often maintain strict controls over when, where, how, and for how much money workers perform their jobs. The practice has been especially prevalent in construction, retail, janitorial, home care, trucking, delivery services, transportation, and other low-wage industries where people of color have historically worked.

More recently, well-capitalized online platform or "gig" corporations have joined the trend. These corporations have harnessed technology—including digital surveillance, algorithms, and automated

¹ Catherine Ruckelshaus, *Independent Contractor v. Employee: Why Misclassification Matters and What we can do to Stop It*, (National Employment Law Project, 2016), available at <https://www.nelp.org/publication/independent-contractor-vs-employee/>; See, also, e.g., Rebecca Smith and Sarah Leberstein, *Rights on Demand: Ensuring Workplace Standards in the On-Demand Economy*, (National Employment Law Project, Sept. 2015), <https://s27147.pcdn.co/wp-content/uploads/Rights-On-Demand-Report.pdf>.

decision-making systems—to set pay, assignment offerings, and other working conditions and to supervise performance in more exacting ways than a human boss could, even as these corporations disclaim responsibility as employers.² Classifying workers who are hired and supervised through online platforms or “apps” as independent contractors began in the taxi and delivery industries, but it is now spreading to other sectors, including healthcare and temporary staffing.³

In most instances, an individual performing labor or services for another should be covered as an employee under our employment laws. In key industries in our economy, however, independent contractor misclassification is prevalent and has become standard operating practice for companies looking to save on payroll costs, outbid competitors, or avoid workplace regulations. Workers’ rights organizations, cities, and states have taken a variety of approaches to address this problem, including passing new laws that assess higher penalties for misclassification, enforcing more expansive tests defining who is an “employee,” and addressing misclassification with sector-specific laws. As we note below, over the course of a decade, more than half of the states have formed interagency task forces, often with the federal government, to take on companies that illegally misclassify their workers. In 2018 and 2019 alone, there was a resurgence of task forces, with a total of eight new or revitalized task forces. The Department’s proposed rule will undermine these efforts and undercut longstanding federal interpretations of employee coverage.

Unchecked, independent contractor misclassification can cause long-term damage to the economy and workers. This rule would create incentives for more employers to unilaterally impose independent contractor arrangements on workers who should be classified as employees, with all the rights and benefits attaching to employee status.

The FLSA, the FMLA and the MSPA are intended to have very broad coverage. The FLSA defines “employ” as “to suffer or permit to work”, a definition that “sweeps in almost any work done on the employer’s premises, potentially any work done for the employer’s benefit or with the employer’s acquiescence.” *Sec’y of Labor v. Lauritzen*, 835 F.2d, 1529, 1543 (7th Cir. 1987, J. Easterbrook, concurring). Under its expansive statutory definition of employment, the FLSA includes work relationships that were not within the traditional common-law definition of employment. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). As stated by the Department in its 2015 Administrator’s Interpretation on independent contractor coverage, most workers are “employees,” under FLSA.⁴ This definition of employ was included in the FMLA and MSPA as well. 29 U.S. Code § 2611(3); 29 U.S. Code § 1802(5).

² Lena Simet & Amos Toh, *The Gig Trap: Algorithmic, Wage and Labor Exploitation in Platform Work in the US*, Human Rights Watch (2025), https://www.hrw.org/sites/default/files/media_2025/05/us_gigeconomy0525web_0.pdf.

³ Terri Gerstein, More People are Being Classified as Gig Workers. That’s Bad for Everyone, N.Y. TIMES, Jan. 28, 2024; Chiu Secures \$4.5 Million Settlement for Delivery Drivers Misclassified by WorkWhile, City Attorney of San Francisco (Jan. 21, 2026), <https://sfcityattorney.org/chiu-secures-4-5-million-settlement-for-delivery-drivers-misclassified-by-workwhile>/<https://www.sfcityattorney.org/2025/01/17/chiu-secures-third-judgment-against-staffingcompany-misclassifying-its-workers/>; Katie Wells & Funda Ustek Soilda, Uber for Nursing: How an AI-Powered Gig Model is Threatening Health Care, Roosevelt Institute, Dec. 17, 2024, <https://rooseveltinstitute.org/publications/uber-for-nursing/>.

⁴ U.S. Dep’t of Labor, Wage and Hour Division, Administrator’s Interpretation No. 2015-1, July 15, 2015.

The U.S. Congress passed the FLSA during the Great Depression under conditions similar to those the U.S. faces today, to guard against employer exploitation of workers, and to “lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions.” *Rutherford Food Corp.*, 331 U.S. at 727; *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). The purpose of its broad definitions was to eliminate substandard labor conditions by expanding accountability for violations, to include businesses that insert contractors in their business. *Lauritzen*, 835 F.2d at 1545 (Easterbrook, J., concurring); *see also Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914) (Judge Learned Hand noting that employment statutes were meant to “upset the freedom of contract”).

The Department’s proposed interpretation misapplies the FLSA’s definition of “employ” and is contrary to Supreme Court and federal circuit court authority interpreting those terms. Instead, the interpretation elevates and misapplies two “core” factors taken from a cramped version of the narrowly-scoped common law, which is not the test for employment coverage under the FLSA, and in so doing prevents a consideration of factors that the Supreme Court has always deemed critical to determining whether an employment relationship exists. The proposed interpretation could strip wage and hour protections from scores of workers in sectors prone to independent contractor misclassification, including construction, trucking, delivery, home care, personal care, agricultural, and janitorial and building service.

If finalized in its proposed form, this standard would violate the Administrative Procedure Act (“APA”). 5 U.S.C. § 706(2)(A). It would not be “in accordance with law,” as it conflicts with controlling Supreme Court precedent and circuit court precedent. The NPRM is also arbitrary and capricious because it fails to adequately explain why the Department is abandoning its 2024 FLSA independent contractor rule, which is based squarely on Supreme Court precedent and widely accepted circuit court tests. The Department’s proposal will thus create confusion because it creates an entirely new set of questions that employers, workers and the courts will struggle to untangle, at a time when coverage of and compliance with the FLSA should be widespread and well-understood.

Further, the proposed rule will narrow FLSA, MSPA and FMLA coverage at a time when employers are increasingly using automated decision-making systems and other types of artificial intelligence technology that obscure the ways they set and control the conditions of work for workers integrated into their operations. The DOL should not adopt a standard that does not adequately account for the ways these tools influence and control worker behavior.

The proposed interpretation would also adversely affect businesses that will not be able to compete with others unless they too call their workers independent contractors, as employers using independent contractors can save upwards of 30% of payroll costs by switching from employee arrangements. This in turn will cost the public billions of dollars in unpaid taxes and premiums.

II. The DOL’s proposed interpretation is contrary to the FLSA, the FMLA and the MSPA because it ignores statutory terms, which take the scope of employee coverage well beyond this rule’s proposed test.

The definition of “employ” used in the FLSA, FMLA, and MSPA—“employ includes to suffer or permit to work” at 29 U.S.C. § 203(g)⁵—is extremely broad.⁶ Its meaning was well-known when adopted by Congress in 1938, and the same language in child labor laws had been used regularly to hold business owners liable where children had been hired and employed by others, including separate independent businesses and contractors. The NPRM cites but then largely ignores these broad statutory terms by purporting to embed them in narrow common-law considerations.

When Congress defined “employ” to “include” “to suffer or permit to work,” it did what state child labor statutes had done: it included within its scope of coverage not only the common law concept of “employ,” but also the very broad concepts of “suffering” or “permitting” work to be done. The “suffer or permit to work” definition of “employ” in section 203(g) of the FLSA was taken from state child labor statutes that existed in most states and had been applied for many years before the FLSA was adopted in 1938. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983, 1089-90 (1999).⁷ This definition is of “striking breadth,” the broadest ever used to encompass employment relationships, and includes relationships not considered “employment” under common law agency principles. *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 141 (2d Cir. 2008). This breadth in coverage was necessary to accomplish the FLSA’s goal, as stated by the Supreme Court:

Th[e] Act seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation. . . . This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in costs based upon substandard labor conditions.⁸

⁵ Both the FMLA and the MSPA define the term “employ” via cross-reference to the FLSA’s definition of “employ.” 29 U.S.C. § 2611(3); 29 U.S.C. § 1802(5).

⁶ Even judges who have expressed frustration with the factors of the economic reality test have acknowledged that “[t]he language of the statute is the place to start[.]” noting that “to suffer or permit” is “the broadest definition ever included in any one act.” *Sec’y of Labor, U.S. Dep’t of Labor v. Lauritzen*, 835 F.2d 1529, 1543 (7th Cir. 1987) (Easterbrook, J., concurring) (citation omitted).

⁷ See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) (“[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.”); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (“It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”); *Sekhar v. United States*, 570 U.S. 729, 733 (2013) (quoting Justice Frankfurter, “if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”). *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

⁸ *Roland Electric Co. v. Walling*, 326 U.S. 657, 669-70 (1946); see also *Tony & Susan Alamo Foundation v. Sec’y of Labor*, 471 U.S. 290, 296 (1985) (quoting *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950)); *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (quoting *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984); *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988).

Congress ensured “sufficiently broad coverage” by including coverage terms from state child labor laws, which were designed to reach businesses that used independent contractors who illegally hired and supervised children.⁹ The history and functions of the “suffer or permit” language in the child labor laws show how broad the language is meant to be and what relationships it is intended to encompass. *Lauritzen*, 835 F.2d at 1543 (Easterbrook, J., concurring). Most importantly, the FLSA’s broad language of “employ” is intended to ensure broad coverage under the FLSA’s minimum wage and overtime protections just as it is used broadly to enforce FLSA’s child labor provisions.¹⁰ See also, *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961) (Maine homeworkers who were part of a formal cooperative were “employees” of the co-op and not “independent contractors” because the workers were suffered or permitted to work by the cooperative.).

The DOL’s proposed interpretation fails to apply the “suffer or permit to work” language of section 203(g) and narrows the test for employee to a meaning it did not have in 1938.

III. DOL’s proposed test contradicts Supreme Court and circuit court precedent.

The DOL’s proposal cites the approved test in *U.S. v. Silk*, 331 U.S. 704 (1947), a Social Security Act case that first established the five-factor test aimed at determining whether a person is in business for themselves and therefore independent, or works instead in the business of another and is dependent on that business for work:

- (1) the degree of control exercised by the employer over the workers;
- (2) the workers’ opportunity for profit or loss and their investment in the business;
- (3) the degree of skill and independent initiative required to perform the work;
- (4) the permanence or duration of the working relationship, and
- (5) the extent to which the work is an integral part of the employer’s business. *Id.* at 716.

None of these enumerated factors is controlling nor is this list complete, according to the Supreme Court. Notably for this proposed rule, the coal workers in *Silk* found to be employees provided their own tools, and while some came more often, many came to the worksite intermittently, and “work[ed only] when they wish[ed to] work.” *Id.* at 706. They worked for competitor businesses (“[t]hey may and did haul for others when they pleased”) and invested in their own operations (“[t]hey pay all the expenses of operating their trucks”). *Id.* at 707. The Supreme Court also noted of

⁹ *Antenor v. D & S Farms*, 88 F.3d 925, 934 (11th Cir. 1996) (citing *Rutherford*, 331 U.S. at 728); *Darden*, 503 U.S. at 322-24.

¹⁰ 29 U.S.C. § 212(c) (“No employer shall employ any oppressive child labor in commerce...”). See, e.g., *Curtis & Gartside Co. v. Pigg*, 134 P. 1125, 1130 (Okla. 1913) (“It positively prohibits the employment of children of this age to do this character of work, and then, in order to shut off the avenues of artifice, just as positively prohibits their being permitted or suffered to do such work.”); *Commonwealth v. Hong*, 158 N.E. 759, 759-60 (Mass. 1927); *Daly v. Swift & Co.*, 300 P. 265, 268 (Mont. 1931); *Gorczynski v. Nugent*, 80 N.E.2d 418 (Ill. App. Ct. 1948); *Purtell v. Philadelphia & Reading Coal & Iron Co.*, 256 Ill. 110, 111 (1912); *Vida Lumber Co. v. Courson*, 112 So. 737, 738 (Ala. 1926); *Nichols v. Smith’s Bakery*, 119 So. 638, 640 (Ala. 1928); *People, ex rel. Price, v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25 (1918) (New York appeals court concluded that the corporation’s failure to discover and prevent the employment of a child by one of its drivers was “sufferance” of the child’s work, resulting in its violation of the child labor law).

the coal workers: “They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business.” *Id.* at 717-18. None of those factors alone was determinative. The economic reality of the coal workers’ work, by the totality of the circumstances, evinced that the workers were employees.

The Supreme Court has held that “[a]ll [its] interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme.” *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015). Therefore, the conclusion of the Supreme Court in *U.S. v. Silk*, 331 U.S. 704 (1947), adopted in the FLSA case *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947), that any employment analysis must examine “the circumstances of the whole activity,” has been part of the FLSA’s scheme since 1947.

All federal circuits analyzing the scope of FLSA coverage to employees use the *Silk/Rutherford* test or some variation, with some adding factors deemed relevant to the ultimate question of whether the worker is truly running a separate business. The Department itself has publicly used the *Silk* test, pronouncing in 2019 that it was the test for FLSA’s coverage. *See, e.g., The Application of the Fair Labor Standards Act’s “Suffer or Permit” Standard in the Identification of Employees Who Are Misclassified as Independent Contractors* (July 15, 2015)¹¹ (describing a six-factor test based on *Silk*); U.S. Department of Labor Opinion Letter (April 29, 2019) (describing a nearly-identical six-factor test based on *Silk*).¹²

The Supreme Court recognized in *Silk* that the Social Security Act—and the Fair Labor Standards Act with it¹³—was intended to be “an attack on recognized evils in our national economy.” 331 U.S. at 712. The Court cautioned that “a constricted interpretation of the phrasing [of “employee” under the statute] would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.” *Id.*

After *Silk*, discussed above, the Supreme Court considered the issue of employee status directly within the FLSA in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). The Court confirmed that “the determination of the [employer-employee] relationship does not depend on . . . isolated factors but rather upon the circumstances of the whole activity.” *Id.* at 730. The Court then, in sequential order, considered that “the workers did a specialty job[,]” the “responsibility under the boning contracts . . . passed from one boner to another[,]” the employer provided the premises and equipment used by the workers, and the workers “had no business organization that could or did shift as a unit from one slaughter-house to another.” *Id.* Only after first analyzing those factors did the Court consider the employer’s right to control (“The managing official of the plant kept close touch on the operation.”), and the opportunity for profit or loss (“profits to the boners depended upon the efficiency of their work”). *Id.*

¹¹ <https://www.nelp.org/app/uploads/2018/05/Administrators-Interpretation-2015.pdf>.

¹² <https://s3.amazonaws.com/cdn.orricks.com/files/2019042906FLSA.pdf>.

¹³ The rationale underlying the Social Security Act applies to the Fair Labor Standards Act, as both are “social legislation of the 1930’s of the same general character[.]” *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1949).

Further, in *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961), where the Supreme Court found workers of a cooperative to be employees under the FLSA, the factors emphasized by the Court were neither the employer's control over the work of the homeworkers nor the workers' opportunity for profit or loss. Instead, the critical factors, largely ignored by the Department in its NPRM, were: whether another party gave the workers an opportunity to work; whether the workers could sell their products or services "on the market for whatever price they can command"; whether they were regimented under one organization, providing the goods or services the organization desired and receiving the compensation dictated by the organization; and whether management could fire them for substandard work or failure to obey its regulations. *Id.* at 31-32. The two factors that the Department now wants to dictate the outcome of employee status simply are not those of *Whitaker House*, nor are the *Whitaker House* considerations emphasized in the NPRM.¹⁴

The Supreme Court has also distinguished the broad definition of "employ" in the FLSA from the narrower common law definition in other federal statutes.

The definition of "employee" in the FLSA evidently derives from the child labor statutes, see *Rutherford Food, supra*, at 728, 67 S.Ct., at 1475, and, on its face, goes beyond its ERISA counterpart. While the FLSA, like ERISA, defines an "employee" to include "any individual employed by an employer," it defines the verb "employ" expansively to mean "suffer or permit to work." 52 Stat. 1060, § 3, codified at 29 U.S.C. §§ 203(e), (g). *Id.* at 326.

Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 322-23 (1992). The Court has emphasized that the FLSA's "suffer or permit to work" definition of employment is very broad – "the broadest definition that has ever been included in any one act." *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting statement of Sen. Hugo Black, 81 Cong. Rec. 7657 (1938)). "This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947).

The Department's NPRM runs counter to these Supreme Court precedents. By proposing a restrictive interpretation of the economic reality test that places undue weight on two narrowly-defined factors—individual worker control over certain aspects of performance of the work, and the individual worker's opportunity for profit or loss—the Department is narrowing the FLSA test for employee coverage to something even more circumscribed than the common-law test and is constricting FLSA's broad coverage in a way that will undermine its statutory intent and legal precedent.

¹⁴ The current DOL's proposal prohibits consideration of most of the *Goldberg* Supreme Court-identified factors, and additional key qualities inherent in running a separate business, including: whether the person can pass along increased costs of a business to one's customers, whether one can set the price for one's services, whether one has a business office, cards, or advertises. The DOL has no authority to so restrict settled law.

Similarly, federal appellate courts have consistently held that the FLSA economic reality test is intended to be expansive, rather than reduced to two narrow super-factors.¹⁵ As the Second Circuit has stated, the “nonexclusive and overlapping set of factors” helps to “ensure that the economic realities test mandated by the Supreme Court is sufficiently comprehensive and flexible to give proper effect to the broad language of the FLSA.” *Barfield*, 537 F.3d at 143 (citations omitted). Further, federal courts have counseled against a rigid approach to FLSA’s economic reality test. *See, e.g., Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) (“[T]he test concerns the totality of the circumstances, . . . and mechanical application of the test is to be avoided.”); *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 380 (5th Cir. 2019) (“[O]bviously, the [economic reality test] factors should not be applied mechanically.”) (internal quotation marks omitted). The Fifth Circuit has noted, while applying the economic reality test in the Age Discrimination in Employment Act context, which has the same statutory terms for employment coverage, “[i]t is impossible to assign to each of these factors a specific and invariably applied weight.” *Hickley v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983). While considering all six economic reality factors, the Sixth Circuit has focused on permanency, degree of skill required, and investment in part because that circuit’s case law itemizes the six economic reality factors in that order. *Donovan v. Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984); *see also Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015).

Circuit courts have also criticized attempts to emphasize one factor over the others, as the DOL now seeks to do. The Second Circuit has held that the right to control by the employer is only one factor in the economic reality test, and that a “full inquiry into the true economic reality is necessary.” *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 13–14 (2d Cir. 1984) (reversing district court decision that focused exclusively on control in FLSA employee dispute); *accord Watson v. Graves*, 909 F.2d 1549, 1554 (5th Cir. 1990) (“the second circuit stated that the degree of control exercised . . . is only one factor in determining employee status under FLSA”). The Third Circuit has reversed decisions that “misapplied and *overemphasized* the right-to-control factor[.]” *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1384–86 (3d Cir. 1985) (reversing decision that homeworkers were independent contractors because lower court “did not apply two other factors [permanence and whether the service is an integral part of the business],” leading to an erroneous conclusion under the FLSA) (emphasis added).

IV. The proposed rule elevates and defines two “core” factors in ways that will broaden who is considered an independent contractor beyond what the statutory language and Supreme Court precedent permit.

The Department’s two “core” common-law factors are defined in ways that will broaden who is considered an independent contractor beyond what the statutory language and Supreme Court precedent permit. The first looks at substantial control by the *individual worker*, as opposed to *right to control* by an *employer* and focuses on types of control that are not particularly relevant to whether an individual is operating an independent business, while excluding other types of control that are relevant. The second (opportunity for profit and loss) conflates two different factors—

¹⁵ *See, e.g., Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985) (“courts should examine the circumstances of the whole activity”) (quotation marks omitted) (citing *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981)).

opportunity for profit or loss and capital investments—into one factor and places too much emphasis on a worker’s initiative, when in fact managerial skill should be the central inquiry.

A. Even the common-law test looks to “right” to control by the employer, and FLSA coverage does not stop at the common-law boundary.

The common-law concept of “employ” is narrower than FLSA’s “suffer or permit” concept. While the FLSA was designed to eliminate goods produced under substandard conditions, including with child labor, the common law definition of master/servant was not to offer protection to employees, but rather, to determine whether the master was liable to third parties for a servant’s negligent acts.¹⁶ Thus, the common-law test for employment, and, accordingly, for tort responsibility, was whether the alleged “employer” had the “right to control the manner and means by which the product is accomplished.” *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

Certain factors were considered at common law to determine the existence of this relatively narrow employment relationship.¹⁷ Some courts use these same factors to determine the “strikingly broad” scope of FLSA coverage.¹⁸ This similarity suggests that application of some of the commonly-used “economic reality” factors may have focused too much attention on the right to control, a hallmark of common-law employment, rather than on whether the work is “suffered or permitted” by the business owner.¹⁹ Because the common-law definition of employment is also included within the FLSA statutory definition, the factors relating to control are relevant and useful if they are present in the relationship; *their absence, however, says little about whether the work was suffered or permitted*.²⁰

By contrast, courts interpreting child labor statutes that used the “suffer or permit” language adopted in FLSA frequently held businesses accountable even when none of the common-law control factors were present.²¹ Thus, the common-law test of the right to control has never limited the scope of FLSA accountability. The broader scope of responsibility under the FLSA reaches those who suffer or permit workers to work, in addition to those who control the workers under the narrower common-law test.

¹⁶ *Lauritzen*, 835 F.2d at 1544.

¹⁷ *Reid*, 490 U.S. at 751-752; *Darden*, 503 U.S. at 323.

¹⁸ In common-law cases, courts consider factors including whether the putative employer: (1) hires and fires the worker; (2) withholds taxes; (3) controls the manner in which the work is performed; (4) the skill required, and (5) the duration of work, among others. *See Reid*, 490 U.S. 730, 751-752.

¹⁹ “[The degree of supervision of the work], like the growers’ control over the workers, has more to do with common-law employment concepts of control than with economic dependence. Indeed, the ‘suffer or permit to work’ standard was developed in large part to assign responsibility to businesses which did *not* directly supervise the activities of putative employees.” *Antenor v. D & S Farms*, 88 F.3d 925, 933-35 (11th Cir. 1996).

²⁰ “[T]he . . . control factors[] should weigh little, if anything, in the ultimate [FLSA] joint employment determination.” *Lopez v. Silverman*, 14 F. Supp. 2d 405, 419 (S.D.N.Y. 1998); *see also Antenor*, 88 F.3d at 933-35.

²¹ “Thus when one engages an independent contractor to perform certain work and the contractor employs infants in violation of the statute, the one engaging the contractor will be held to have violated the law in permitting the infant to do the work.” *Bernal v. Baptist Fresh Air Home Soc’y*, 87 N.Y.S. 2d 458, 464 (App. Div. 1949), *aff’d*, 300 N.Y. 486 (1949); *Sheffield Farms*, 121 N.E. 474 (N.Y. 1918).

Common-law agency principles are used to determine whether sufficient right to control resides in a putative employer. These vicarious liability principles were intended to deter torts and distribute liability to those who had the right to control the servant. These principles were referenced in a non-exhaustive list in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989), and many of these are relevant under FLSA's broader scope:

[W]e consider the hiring party's *right to control* the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party (emphasis added).

B. The NPRM's first core factor emphasizes three types of control (ability to set work schedule, select work projects, and work for others) that are not particularly relevant to how control is exercised by hiring entities in the modern economy.

The NPRM focuses on three types of control as indicative of independent contractor status: ability to set work schedule, ability to select projects, and ability to work for others. Emphasizing these indicia of control ignores the many decisions in which workers were found to be employees under FLSA and had the ability to set their own schedule,²² choose their assignments,²³ or work for others.²⁴

Furthermore, focusing on three types of control (ability to set work schedule, select work projects, and work for others) downplays other types of control that are more relevant to how control is reserved or exercised by hiring entities. Control over economic conditions—such as a worker's ability to set or meaningfully negotiate the rate for her services or a worker's ability to determine the type and amount of capital investments for the business—are directly relevant to whether an individual is operating an independent business.

²² See, e.g., *Donovan v. Tehco, Inc.*, 642 F.2d 141 (5th Cir. 1981) (holding that a worker was an employee where he could choose job assignments he wanted); *Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07-0069, 2008 WL 2944661 (M.D. Tenn. July 31, 2008) (holding that nurses were employees, even though they could accept or reject shifts).

²⁴ See, e.g., *United States v. Silk*, 331 U.S. 704, 707 (1947) (holding truckers are employees under the FLSA where "[t]hey may and did haul for others when they pleased"); *Walling v. Twyeffort, Inc.*, 158 F.2d 944 (2d Cir. 1946) (holding tailors were employees even though they did tailoring work for other companies occasionally); *McLaughlin v. Seafood, Inc.*, 867 F.2d 875, 876-77 (5th Cir. 1989) (holding seafood backers, pickers, and peelers were employees of a seafood processing plant where the workers moved frequently from plant to plant and from employer to employer, and noting that "[e]ven if the freedom to work for multiple employers may provide something of a safety net, unless a worker possesses specialized and widely-demanded skills, that freedom is hardly the same as true economic independence").

And, in the modern economy where employers can use technology to surveil, supervise, and manipulate workers, a focus on these three types of control misses the sophisticated yet nuanced ways that corporations set or control the material terms of the work. Our recent report explains the rise of “Bossware” technology, tools used to monitor, manage, and evaluate workers, including productivity trackers, webcam monitoring, wearable devices, and algorithms and apps used for wage-setting.²⁵

Much of this technology was pioneered by ridehail and delivery corporations that use digital labor platforms or “apps” to manage workers, even as they classify the workers as independent contractors.²⁶ Some of these corporations use geolocation data to track workers’ progress on rides and deliveries, match workers with particular rides or deliveries, and customize the amount paid to workers for each ride or delivery.²⁷ They also collect large quantities of data from workers and use this data to engage in “dynamic wage-setting”—fluctuating wages in real time based on demand, time of day, and other factors invisible to workers, which confuses workers about their true earnings and ultimately depresses wages for a sizeable portion of the workforce.²⁸ Even the scheduling flexibility touted by ridehail and delivery corporations as evidence of workers’ independence is limited by gamification techniques and reward systems that operate as behavior nudges, prompting workers into staying on the app for longer periods of time and to accepting more or particular jobs.²⁹ None of this reserved or exercised control is acknowledged in the NPRM.

C. The Department’s assertion that an employer’s compliance control considerations are irrelevant is vague, confusing, and contrary to law.

The Department’s proposed rule attempts to take away consideration of certain employer controls based on the source of the control. But this is nonsense: if legislators or regulators have placed an obligation on employers to comply with certain laws, that makes the worker less independent and more dependent on that employer, and this should be accorded weight.

The proposed language includes undefined vague terms, including a “specific legal obligation,” a “health and safety standard,” and a “quality control standard.” Potentially any workplace rule could create disagreement over its status. This uncertainty is compounded by the Department’s inclusion of catch-all language covering “other similar terms that are typical of contractual relationships

²⁵ Irene Tung, Paul Sonn, Maya Pinto, Sally Dworak-Fisher & Josh Boxerman, *When ‘Bossware’ Manages Workers: A Policy Agenda to Stop Digital Surveillance and Automated-Decision-System Abuses*, National Employment Law Project, July 15, 2025, at 11 <https://www.nelp.org/insights-research/when-bossware-manages-workers-digital-surveillance-automated-decision-system-abuses/>

²⁶ Human Rights Watch, *The Gig Trap: Algorithmic, Wage and Labor Exploitation in Platform Work in the US*, at 1, 133 https://www.hrw.org/sites/default/files/media_2025/05/us_gigeconomy0525web_0.pdf.

²⁷ *Id.* at 45.

²⁸ *Id.* at 133.

²⁹ Jackie Davalos and Drake Bennett, *Gamification Took Over the Gig Economy. Who’s Really Winning?*, BLOOMBERG, May 27, 2022, <https://www.bloomberg.com/news/features/2022-05-27/how-uber-and-lyft-gamify-the-gig-economy>; Radiolab, *Gigaverse*, Aug. 26, 2022 (interviewing app-based delivery workers who became addicted to checking their phones constantly for “deals” on the apps). Uber adopted Uber Eats Pro, a rewards system where delivery workers earn “points” for certain deliveries that can be converted to discounts on goods and services. <https://www.uber.com/us/en/deliver/uber-pro/>.

between businesses (as opposed to employment relationships).” In other words, a workplace requirement will support a finding of “employment” if it is “typical of employment relationships.” This proposed language is entirely circular. And the Department offers no explanation for how such circularity “clarifies and sharpens” existing law.

In seeking to justify the proposed rule, the Department cites to three court opinions: *Parrish v. Premier Directional Drilling LP*, 917 F.3d 369 (5th Cir. 2019); *Iontchev v. AAA Cab Service, Inc.* 548 (9th Cir. 2017); and *Chao v. Mid-Atlantic Installation Services, Inc.*, 16 Fed. Appx. 104 (4th Cir. 2001). *Iontchev* and *Chao* are “unpublished” and “non-precedential.” None of the three opinions support a rule that “control” becomes irrelevant to the economic reality analysis if attributable to “specific legal obligations,” “health and safety standards,” or “quality control standards.”

In *Parrish*, the Fifth Circuit, in analyzing whether drilling consultants on an oil rig were misclassified, noted that mandated safety protocols – drug testing and safety training – were not persuasive evidence of control because these protocols are typical when working on oil drilling sites. *Id.* at 382. The other *Silk* factors also weighed in favor of independent contractor status.

The Department’s two non-precedential opinions are equally unpersuasive. In *Iontchev*, the Ninth Circuit merely noted that the defendant company’s “disciplinary policy primarily enforced the Airport’s rules and regulations governing the Drivers’ cab operations and conduct.” 685 Fed. Appx. at 550. Likewise, in *Chao*, the Fourth Circuit merely noted that the defendant company’s practice of “‘backcharging’ [cable] installers for failing to comply with various local regulations or with technical specifications” did not weigh in favor of employment status. 16 Fed. Appx. at 106. Crucially, however, neither court suggested that such facts rendered the disciplinary policy (in *Iontchev*) or the back-charging practice (in *Chao*) irrelevant to the control analysis.

In fact, the Department’s proposed rule contradicts judicial opinions specifically addressing whether the “control” factor of the economic realities test excludes workplace requirements attributable to external requirements such as “specific legal obligations,” “health and safety standards,” or “quality control standards.” Most notably, in *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308 (11th Cir. 2013) the Eleventh Circuit cogently explained:

Knight also argues that its quality control measures and regulation of schedules stemmed from “the nature of the business” and are therefore not the type of control that is relevant to the economic dependence inquiry. We disagree. *The economic reality inquiry requires us to examine the nature and degree of the alleged employer’s control, not why the alleged employer exercised such control.* Business needs cannot immunize employers from the FLSA’s requirements. *If the nature of a business requires a company to exert control over workers to the extent that Knight has allegedly done, then that company must hire employees, not independent contractors.*

721 F.3d at 1316 (emphasis supplied); see also *Amponsah v. DirecTV, LLC*, 278 F. Supp. 3d 1352, 1360 (N.D. Ga. 2017) (applying *Scantland* and rejecting defendant’s argument that “strict installation standards and quality metrics” were irrelevant to analysis because such requirements “were aimed at customer satisfaction, not control of Plaintiffs”); *Molina v. South Florida Express Bankserv, Inc.*, 420 F. Supp. 2d 1276, 1284 n. 24 (M.D. Fla. 2006) (rejecting defendants argument

that quality control standards required by customers are irrelevant and observing: “The Defendant’s reasoning is circular. Any employer’s business is, in essence, directed by the needs of its customers.”).

Outside of the Eleventh Circuit, courts have similarly rejected arguments that external requirements imposed by the defendant company’s customers are irrelevant to the right to control factor. For example, in *Benion v. LeCom, Inc.*, 336 F. Supp. 3d 829 (E.D. Mich. 2018), Comcast contracted with LeCom Communications, Inc. (“LeCom”) to install cable in the homes of Comcast customers. LeCom, in turn, assigned the cable installation work to plaintiffs and treated them as independent contractors. When plaintiffs filed an overtime FLSA lawsuit against LeCom, LeCom asserted that workplace requirements attributable to Comcast (LeCom’s customer) were irrelevant to the “control” factor. *See* 336 F. Supp. 2d at 852-53. The district court disagreed, citing *Scantland*, and explained that “similar blame-shifting arguments have been rejected by other courts.” *Id.* at 853; *see also Flores v. Velocity Express, LLC*, 250 F. Supp. 3d 468, 480-86 (N.D. Cal. 2017) (finding that “control” factor favored employment status based on various job requirements imposed on defendant by customers); *Crouch v. Guardian Angel Nursing, Inc.*, No. 3:07-cv-00541, 2009 WL 3737887, at *20 (M.D. Tenn. Nov. 4, 2009) (rejecting defendants’ contention “that because a certain amount of supervision is mandated by the state or by the home health agencies with which they contract, it somehow does not count toward the quantification of the degree of control exercised.”).

The above opinions reflect the basic principle that, under the FLSA’s economic reality test, the defendant company’s “control” over the worker must be assessed without regard to the reasons underlying control.

D. The Department’s interpretation of the second core factor—opportunity for profit or loss—is not indicative of true independent contractor status.

The Department argues that opportunities for profit or loss and one’s investment in work are duplicative, and that workers can have an opportunity for profit or loss through their personal initiative. This analysis of the profit or loss factor is contrary to law and to common sense. Opportunities for profit or loss are driven by production decisions of the firm and figuring out how to make managerial decisions that impact the bottom line (profit). These decisions include setting prices, deciding on product or service variety, setting quality and service standards, and deciding on market expansion or contraction. Investment of capital, on the other hand, concerns longer-term decisions regarding the returns one gets from putting capital into an asset, activity, or item in the hope that it will eventually generate income or appreciate in value. Although the two factors are linked, they are hardly duplicative and separately serve as useful indicia of an entity’s status under the FLSA, as the Supreme Court’s tests note.

Furthermore, the proposed rule—which describes this factor as “the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment)—elevates the word “initiative”, a vague word that may encompass activities not indicative of self-employment. Initiative is defined as “the ability to use your judgment to make decisions and do things without needing to be told what

to do.”³⁰ Initiative is a common and often-valued quality in employees, as well as self-employed persons. The 2024 independent contractor rule—which describes this factor as the “opportunity for profit or loss depending on managerial skill . . . including initiative or business acumen or judgment” — emphasizes the necessary and specific characteristic (managerial skill).³¹

V. Independent contractor misclassification has become a deeply entrenched practice that degrades wages and working conditions, particularly in fast-growing, low-paying and labor violation prone occupations whether Black and immigrant workers predominate.

The Department’s proposed test would narrow worker access to FLSA protections and degrade work quality across industries and occupations. But the impact is likely to be greatest in misclassification-prone sectors where, due to a lack of worker bargaining power, the work is difficult, dangerous and low-paying. These sectors include construction, trucking, delivery, home care, personal care, agricultural, and janitorial and building services, as well as app-dispatched work—where workers may have some choice over work assignments but control little else about their work. Misclassification threatens to make these already difficult and dangerous jobs worse.

Minimum wage and overtime protections are critical to ensuring the basic security and quality of these jobs, and the DOL’s proposed rule could strip scores of workers in growing sectors of these safeguards. Over 21.4 million construction, trucking, delivery, home care, personal care, agricultural, and janitorial and building service workers,³² 1.6 million labor platform workers,³³ and 3 million staffing and temporary help agency workers³⁴ could see their wages or work quality directly or indirectly³⁵ eroded due to the proposed DOL test. Furthermore, as digital labor platforms expand to sectors like retail³⁶ and food service,³⁷ the 16.9 million workers in those major employment sectors could experience wage and work quality erosion under the DOL’s proposal. The same goes for 16.4 million workers in warehousing, manufacturing, and call center work,

³⁰ Initiative, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/initiative>.

³¹ Employee or Independent Contractor Classification under the Fair Labor Standards Act, Fed. Reg. Vol. 89, No. 7, Jan. 10, 2024, <https://www.federalregister.gov/documents/2024/01/10/2024-00067/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act>.

³² NELP analysis of 2020 Current Population Survey Annual Social and Economic Supplement microdata.

³³ Bureau of Labor Statistics, U.S. Department of Labor, *Electronically mediated work: new questions in the Contingent Worker Supplement*, Monthly Labor Review, Sep 2018; <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-thecontingent-worker-supplement.htm>

³⁴ Bureau of Labor Statistics, U.S. Department of Labor, Current Employment Statistics, 2019.

³⁵ David Cooper & Teresa Kroeger, Economic Policy Institute, Employers steal billions from workers’ paychecks each year 2, 9 (2017), <https://www.epi.org/files/pdf/125116.pdf>.

³⁶ Josh Constine, “How Jyve secretly raised \$35M & built a \$400M retail gig economy,” TechCrunch, 24 January 2019, available at <https://techcrunch.com/2019/01/24/jyve-jobs/>.

³⁷ Richard Morgan, “Apps have turned restaurant work into a gig-economy hustle. Here’s how one cook chases a paycheck” The Washington Post, 25 February 2020, available at https://www.washingtonpost.com/lifestyle/food/apps-have-turned-restaurant-work-into-a-gig-economy-hustle-heres-how-one-cook-chases-a-paycheck/2020/02/24/1f02ee5c-54a8-11ea-9e47-59804be1dcfb_story.html.

where subcontracting to staffing and temporary help is especially widespread and would be encouraged by the DOL's proposal.

It is no coincidence that Black, immigrant, and other workers of color—who face discrimination and occupational segregation that limits their job opportunities—are overrepresented in misclassification-prone industries. As a group, workers of color—Black, Latinx, Asian/Pacific Islander, and Native American—are overrepresented in construction, trucking, delivery, home care, agricultural, personal care, ride-hail, and janitorial and building service sectors by over 36 percent; they comprise just over a third of workers overall, but between 55 and 86 percent of workers in home care, agricultural, personal care, and janitorial sectors.³⁸ In digital labor platform work, Black and Latinx workers are overrepresented by 45 percent—more than in traditional misclassification-prone sectors.³⁹ Because independent contractor misclassification often comes with a wage and benefit penalties, as discussed below, the practice perpetuates growing racial income and wealth inequality and health disparities in the U.S.

Contrary to the Department's statement that independent contractors have higher gross earnings than employees, a growing body of research indicates that the earnings of many independent contractors (particularly in low-paying occupations) lag behind the earnings of employees in the same occupations.

- A study by the New School that analyzed the incomes of independent contractors in 11 low-paying misclassification prone industries—including construction, transportation, and retail industries—in New York found that these independent contractors are paid half to two-thirds of what employees receive in the same industries.⁴⁰
- A study of tax filings of employees and independent contractors in DC from 2010 to 2018 found that a majority of independent contractors (about 60 percent) earn under \$22,000 per year. Some of the most common occupations for independent contractors in this income range are janitors, drivers, and hairstylists.⁴¹
- A study by the University of California-Berkeley found that California construction workers misclassified as independent contractors suffered a 33 percent wage penalty relative to their employee counterparts.⁴²

³⁸ NELP analysis of 2020 Current Population Survey Annual Social and Economic Supplement microdata.

³⁹ Bureau of Labor Statistics, U.S. Department of Labor, "Electronically mediated work: new questions in the Contingent Worker Supplement," Monthly Labor Review, Sep 2018, <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-thecontingent-worker-supplement.htm>.

⁴⁰ Lina Moe and James A. Parrott, The (Low) Wages of Misclassification: What One in 10 New York Workers Face, NEW SCHOOL CTR FOR NEW YORK CITY AFFAIRS (Jun. 2022), <https://www.centrernyc.org/urban-matters-2/thelow-wages-of-misclassification-what-one-in-10-new-york-workers-face>.

⁴¹ Corey Husak, The Self-Employment Income Drop, OFFICE OF REVENUE ANALYSIS OF WASHINGTON, D.C. (Dec. 2022), <https://ora-cfo.dc.gov/blog/self-employment-income-drop>.

⁴² Ken Jacobs and Kuochih Huang, The Public Cost of Low-Wage Jobs in California's Construction Industry, UNIVERSITY OF CALIFORNIA-BERKELEY LABOR CTR (Jun. 2021), <https://laborcenter.berkeley.edu/the-publiccost-of-low-wage-jobs-in-the-us-construction-industry/>.

- A national study of digital labor platform workers found that one in seven earned less than the federal hourly minimum wage, and 30 percent of digital platform workers received a Supplemental Nutrition Assistance Program benefit, compared to 15 percent of employees in comparable service-sector jobs.⁴³
- A 2026 study by the Economic Policy Institute of 11 commonly misclassified jobs analyzed the cost of independent contractor status to these workers. It found that workers classified as independent contractors in these jobs, which include landscapers, truck drivers, home health aides, janitors, and nail salon workers, lose out on thousands of dollars per year in income and job benefits relative to what they would earn as an employee. A typical truck driver misclassified as an independent contractor, for example, loses between \$14,000 and \$23,000 per year in income and job benefits.⁴⁴

The disparity in incomes between independent contractors and employees is especially stark in localities that have raised their minimum wage. A study of New York independent contractors found that, within occupations, independent contractor wages lagged behind those of employees who benefitted from the state's rising minimum wage. In New York's construction sector, minimum wage increases helped to raise inflation-adjusted annual earnings of employees by 28.5 percent between 2013 and 2018, compared to an increase of just 7.6 percent for independent contractors in the sector. In the state's personal care sector, minimum wage increases helped to raise inflation adjusted annual earnings of employees by 24.5 percent between 2013 and 2018, while independent contractors in the sector saw earnings decline by 3.9 percent.⁴⁵

Government data also shows that independent contractors are more likely than employees to be uninsured and to rely on Medicaid. Independent contractors are nearly twice as likely as payroll employees to be uninsured; in 2020, 18.6 percent of independent contractors (unincorporated self-employed workers) are uninsured compared to 9.7 percent of payroll employees. Moreover, independent contractors are 55 percent more likely than payroll employees to rely on Medicaid—12.2 percent of independent contractors rely on Medicaid, compared to 7.4 percent of payroll employees.⁴⁶ A New York study of independent contractors in low-wage sectors found that over one quarter (27 percent) rely on Medicaid, which is twice the rate for all workers in New York; and 20 percent are uninsured, compared to 8 percent of all New York workers.⁴⁷

⁴³ Ben Zipperer, Celine McNicholas, Margaret Poydock, Daniel Schneider & Kristen Harknett, National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay, ECON. POL'Y INST. (Jun. 2022), <https://www.epi.org/publication/gig-worker-survey/>.

⁴⁴ Economic Policy Institute, *Misclassifying Workers as Independent Contractors is Costly for Workers and Social Insurance Systems*, April 15, 2026, <https://www.epi.org/publication/misclassifying-workers-as-independent-contractors-is-costly-for-workers-and-social-insurance-systems/>.

⁴⁵ Lina Moe, James A. Parrott & Jason Rochford, The Magnitude of Low-Paid Gig and Independent Contract Work in New York State, NEW SCHOOL CTR FOR NEW YORK CITY AFFAIRS (Feb. 2020), <http://www.centernyc.org/the-magnitudeof-low-paid-gig-and-independent-contract-work-in-new-york-state>.

⁴⁶ NELP analysis of 2020 Current Population Survey Annual Social and Economic Supplement microdata.

⁴⁷ James A. Parrott and Michael Reich, "An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment," Report for the New York City Taxi and Limousine Commission, Jul 2018, available at

For many independent contractors, their poverty-level incomes, coupled with their exclusion from employment-related social insurance programs like unemployment insurance and employment-related benefits like paid leave, health insurance, and workers' compensation, means that their lives are incredibly precarious; they live paycheck to paycheck, one accident or illness away from financial disaster, and without the means to take a break from work or retire. As the Department notes, the proposed rule, if finalized in its present form, is likely to increase the number of workers who will be called "independent contractors",⁴⁸ thereby degrading the wages and work quality for even more working people.

VI. The proposed interpretation will negatively impact public coffers and businesses, which will not be able to compete unless they too call their workers "independent contractors."

Businesses, especially those in high-bid industries, will be substantially adversely affected by the proposed rule, as they will not be able to compete with companies that call their workers "independent contractors." Companies that misclassify can save as much as 30% or more on payroll costs, and in construction, janitorial, delivery and other labor-intensive sectors, that percentage difference can make or break a contract win.⁴⁹

Federal studies and state audits suggest that between 10 and 30 percent of employers misclassify at least one worker as an independent contractor.⁵⁰ States find from hundreds of thousands to tens of millions of dollars in unpaid unemployment and workers compensation premiums annually due to independent contractor misclassification, impoverishing state funds and foisting costs on law-abiding employers. In California, nine out of ten businesses audited by that states' Labor Enforcement Task Force were found to be out of compliance by at least one agency in 2017-2018. Two out of five were violating the employment laws administered by *every* agency involved in the

<https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a3aaa0e2e72ca74079142/1530542764109/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jul1.pdf>.

⁴⁸ The NPRM estimates that the proposed rule will increase the number of independent contractors by 1 to 3 percentage points, but the Department "assumes that this increase would occur through new labor force entry rather than through the reclassification of existing employees." The Department appears to be asserting that its rule will increase the number of independent contractors without at all impacting the number of workers classified as employees – an assertion that is illogical on its face. In making this assumption, the NPRM relies on a non-peer reviewed study finding that a California law that adopted the ABC test for employment classification reduced independent contracting without increasing employment. This study is not persuasive evidence of the NPRM's impacts for a few reasons, the most obvious being that it is analyzing a different employment test – the ABC test – which was rejected in this NPRM and the 2024 FLSA independent contractor rule as the appropriate test for employment under the FLSA. Moreover, even if California's number of independent contractors dropped because some employers engaged in state-shopping (hiring workers in states with more permissible employment tests than California in order to classify their workers as independent contractors), that type of conduct is obviously not possible at the federal level.

⁴⁹ See, e.g., Ruckelshaus, *Independent Contractor v. Employee*, *supra*.

⁵⁰ *Public Task Forces Take on Misclassification: Best Practices*, National Employment Law Project, Aug. 2020, at 3, <https://www.nelp.org/app/uploads/2020/02/Policy-Brief-Public-Task-Forces-Take-on-Employee-Misclassification-Updated-August-2020.pdf>.

task force.⁵¹ In Tennessee during a one-year period ending in October 2018, the Employee Misclassification Education and Enforcement Fund unit assessed 26 penalties against employers for misclassifying their employees, for a total assessment amount of \$3,029,963.29. The Uninsured Employers Fund unit assessed 234 penalties against employers for not maintaining workers' compensation insurance from September 2017 through October 2018, for a total assessment amount of \$2,730,269.60.⁵² In Wisconsin, the Department of Revenue estimated that potentially \$91.2 million in personal income tax revenue was forgone in 2019 due to misclassification, with \$50.7 million lost in business taxes from the construction industry alone each year. In 2018, 44% of audited employers were found to be misclassifying workers; in 2019, the state assessed nearly \$57 million in unpaid unemployment insurance premiums.⁵³

DOL's new proposed rule will both license misclassification under the FLSA and encourage more employers to convert their workforce to independent contractors, which will starve federal and state governments of the revenue necessary to fund critical social insurance programs and make it more difficult for law-abiding employers to compete. This will be disastrous for worker protections under both FLSA and other laws, and for the already-astronomical amounts of money lost to state and federal social insurance programs like workers' compensation, unemployment compensation, and Social Security.

VII. Conclusion

NELP calls on the Department of Labor to withdraw this misguided rule that does the bidding of corporations rather than protecting the workers who should be at the center of DOL's mission and every action.

Sincerely,

Cassandra Gomez
Laura Padin
National Employment Law Project

⁵¹ *California Labor Enforcement Task Force Biennial Report to the Legislature*, CALIFORNIA DEP'T OF IND. REL. (Mar. 2019), <https://www.dir.ca.gov/letf/LETf-Legislative-Report-2019.pdf>.

⁵² *Annual Report of Employer Coverage Compliance*, BUREAU OF WORKERS' COMPENSATION, (Feb. 1, 2019), <https://www.tn.gov/content/dam/tn/workforce/documents/injuries/2019ComplianceAnnualReport.pdf>.

⁵³ Task Force on Payroll Fraud and Worker Misclassification Report, WISCONSIN DEP'T OF WORKFORCE DEVELOPMENT, (Mar. 2020), <https://dwd.wisconsin.gov/misclassification/pdf/2019-2020-misclassification-task-force-report.pdf>.