December 13, 2022

Submitted Via Regulations.gov

Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor (DOL)
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Comments on Notice of Proposed Rulemaking, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62,218 (Oct. 13, 2022), RIN 1235-AA43.

We write on behalf of Americans for Prosperity Foundation ("AFPF").[1] AFPF appreciates this opportunity to comment on the Notice of Proposed Rulemaking regarding Employee or Independent Contractor Classification Under the Fair Labor Standards Act (RIN 1235-AA43), as published at 87 Fed. Reg. 62,218 (the "NPRM").

I. Introductory comments.

The NPRM proposes new regulations "to revise its analysis for determining employee or independent contractor classification under the Fair Labor Standards Act (FLSA or Act) to be more consistent with judicial precedent and the Act's text and purpose." 87 Fed. Reg. at 62,218. This rulemaking follows on the heels of the DOL doing exactly the same thing less than two years ago when it issued its 2021 Final Rule on Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021).

For the reasons stated below, we believe the proposed regulations are unnecessary, will create confusion among workers and businesses alike, and arrogate arbitrary decision-making power to the DOL to detriment of the workers the regulations are ostensibly designed to help. We urge the DOL to reject the NPRM and retain the 2021 Final Rule, which brought much-needed clarity and certainty to the standard applied to worker classifications.

[1] *See* AMERICANS FOR PROSPERITY FOUNDATION, https://americansforprosperityfoundation.org/.

II. The policy aims of the DOL's independent contractor standard should be to expand the right and freedom of individuals to choose the kind and type of work they wish to pursue.

Before turning to the specifics of the NPRM, it is appropriate to understand the ends to which the DOL's classification standard should be aiming. What are the appropriate goals for a rule designed to distinguish between an employee and an independent contractor?

The FLSA was enacted to correct and eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). Its intent also was to correct such labor conditions "without substantially curtailing employment or earning power." *Id.* § 202(b).

The focus of the DOL under the FLSA, therefore, must be to enhance the earning potential and well-being of American workers by expanding employment opportunities and fostering the freedom of workers to structure and pursue those opportunities on their own terms. Too often the rights and interests of individual workers are neglected in the face of the entrenched interests and power of corporate employers, labor unions, and government bureaucracy. An appropriate employee versus independent contractor standard should therefore be structured to give individuals the maximum freedom to choose how to arrange their work relationships as they see fit. Freedom to choose the kind and type of work they wish to pursue, and under what conditions, is crucial to worker empowerment and to creating those conditions that will grow both employment opportunity and earning power.

Policy and rules that support and expand independent contracting—as opposed to policy and rules that force a greater number of workers into an unwanted employee status—help make these goals possible. Independent contracting gives individuals the freedom to enjoy flexible working arrangements and to chart their own career success. As independent contractors, working parents, college students, recent graduates, people with disabilities and health conditions, and more can provide valued services in transportation, medical, food delivery, construction, and many other industries, while also tending to other priorities in their lives. Rules that promote the right of people to offer their time and skills as independent contractors empower them to direct their own schedules and provide services to a broad range of businesses and customers, often in situations where there would be no opportunity to earn income as a regular employee of a business.

By the same token, existing workers pursuing self-employment on their own terms and businesses contracting with such workers should not have their arrangements up-ended by a new standard that would change the recent rulemaking on this topic and contradict independent contractor standards as applied by other agencies such as the Internal Revenue Service and the National Labor Relations Board. Misunderstandings and confusion occasioned by reclassifications of work arrangements threaten the livelihoods of millions of workers and simply are not warranted in this instance.

In testimony provided to the U.S. House Committee on Education and the Workforce in June 2018, Jared Meyer, Senior Fellow at the Foundation for Government Accountability, explained that independent contracting creates greater employment opportunities, job satisfaction, and economic efficiencies, goals the FLSA is designed to promote:

> [T]oday, lower transaction costs, driven by advances in technology, have led to more opportunities for firms to use outside workers rather than in-house employees. Independent contractors are the driving force behind this change. Working as an independent contractor allows someone to choose his or her hours and benefit from flexible work arrangements. Across all sectors of the economy, technology creates entrepreneurial opportunities for anyone with productive resources. These resources can be anything from physical or intellectual services (such as handyman jobs, academic tutoring, and legal advice) to the use of property (be it a drill, car, or spare room). . . . Though the employee-employer model of work is still the most common work relationship, further advances in technology and changing worker preferences should lead to steadily-increasing levels of alternative work arrangements.[2]

In establishing and applying its rules governing worker classification under the FLSA, therefore, the DOL should protect the right of individuals to provide their services in and through voluntary agreements without restrictions. The greater the freedom, the greater the opportunity workers and businesses have to create flexible worker arrangements that meet the needs of both workers and those who seek their services. Significantly, even for those workers who see independent contracting as a temporary solution, the economic value of such opportunities can be profound. As Mr. Meyer noted in his congressional testimony, "[t]he value of independent contractor work as supple]mental income cannot be ignored. For the 70 percent of

[2] Jared Meyer, Testimony on Growth, Opportunity, and Change in the U.S. Labor Market, U.S. House of Representatives Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor, and Pensions at 1, (June 21, 2018), https://thefga.org/wp-content/uploads/2018/06/Meyer.EWTestimony.pdf.

Americans ages 18 to 24 who experience an average change of over 30 percent in their monthly incomes, the opportunity to smooth out earnings to meet rent, pay down student loans, or fund a new business venture is a clear benefit of alternative work arrangements."[3]

Perhaps most importantly, a standard favoring independent contractors is proper because workers themselves want the freedom and opportunity to work as independent contractors. In a 2015 report, the U.S. Government Accountability Office explained that 56.8 per cent of independent contractors were "very satisfied" with their jobs compared to just 45.3 per cent of standard full-time employees.[4] A May 2017 survey conducted by the DOL's Bureau of Labor Statistics (released on June 7, 2018) reported that 79 per cent of independent contractors prefer their existing arrangement to traditional employment and that fewer than one in ten independent contractors would prefer a traditional work arrangement.[5] The survey also showed that only 44 per cent of on-call workers and 39 per cent of temporary agency workers preferred their alternative work arrangements,[6] demonstrating that easier access to independent contractor jobs would improve job satisfaction and opportunities even for alternative arrangement workers. And these trends likely will increase, Mr. Meyer concluded in his testimony before Congress, because the younger generation of workers is looking to independent contracting as a preferred option:

> Deloitte's 2018 millennial survey finds that 78 percent of people born from the beginning of to the end of 1994 would consider short-term contracts or freelance work to supplement full-time employment. Furthermore, 57 percent would consider this type of alternative work instead of full-time employment. Beyond the potential for higher income, flexibility and work/life balance are the top reasons why young workers are interested in alternative work arrangements.[7]

These predicted trends in fact have continued. A survey published just last year showed that 59 million Americans—representing 36 percent of the entire U.S. workforce—performed freelance work in 2021, a contribution valued at $1.3 trillion

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[3] *Id.* at 3–4.

[4] U.S. Gov't Accountability Office, *Contingent Workforce* 24 (April 20, 2015), https://www.gao.gov/assets/670/669766.pdf.

[5] U.S. Bureau of Labor Statistics, Dep't of Labor, *Contingent and Alternative Employment Arrangements — May 2017*, https://www.bls.gov/news.release/conemp.htm.

[6] *Id.*

[7] Meyer, *supra* note 2, at 3–4.

to the U.S. economy.[8] A September 2022 poll determined that 77 percent of app-based workers (defined as rideshare drivers, grocery delivery couriers, food delivery couriers, or package delivery couriers) prefer their current classification as independent contractors.[9] Other recent surveys show that workers desire increased flexibility to work remotely, control their work hours, and pursue self-employment—not just in response to pandemic disruptions but because families have shifting needs, demands, schedules, and priorities in the 21st century.[10]

Moreover, as the DOL is no doubt aware, one in five American workers have changed careers since the COVID-19 pandemic began,[11] nearly 50 percent are considering a career change,[12] and more than half of American workers who changed jobs in the past year entered new occupations or fields.[13] Clearly, this is an era where flexibility, including self-employment opportunities, are of tremendous importance to families, businesses, and consumers as they battle inflation, labor shortages, and supply chain disruptions, and seek additional work options despite more than 10 million job openings.[14]

The creation of barriers and requirements that limit the ability to work as an independent contractor undermine the entrepreneurialism and freedom that benefits both individual workers and the wider economy. The proper role of government is to protect rather than inhibit individual freedom, including in the decisions people make about their work arrangements. The creation of a confused and overly complicated regulatory framework undermines economic prosperity, limits consumer choice,

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[8] Upwork, Press Release, *Upwork Study Finds 59 Million Americans Freelancing Amid Turbulent Labor Market* (Dec. 8, 2021), https://investors.upwork.com/news-releases/news-release-details/upwork-study-finds-59-million-americans-freelancing-amid.

[9] Flex Association and Morning Consult, *Attitudes of App-based Workers* (Sept. 2022), https://www.flexassociation.org/workersurvey.

[10] Edward Segal, *Flexibility Is The Most Empowering Benefit For Employees: New Poll* (Feb. 4, 2022), Forbes, https://www.forbes.com/sites/edwardsegal/2022/02/04/flexibility-is-the-most-empowering-benefit-for-employees-new-poll/?sh=1a9ff2518b19; Terry Akman, *Flexibility has emerged as central ingredient in the post-pandemic workplace* (Oct. 17, 2021), Philadelphia Inquirer, https://www.inquirer.com/business/workplace-jobs-wfh-covid-pandemic-return-office-20211017.html; Adam Ozimek, *Freelance Forward Economist Report*, Upwork, https://www.upwork.com/research/freelance-forward-2021 (last visited Dec. 5, 2022).

[11] Jack Caporal, *Here's Why 20% of Americans Have Changed Careers Since the Pandemic Began* (Jan. 4, 2022), The Motley Fool, https://www.fool.com/research/20-percent-americans-changed-careers/.

[12] *Id.*

[13] Kim Parker & Juliana Menasce Horowitz, *Majority of workers who quit a job in 2021 cite low pay, no opportunities for advancement, feeling disrespected* (Mar. 9, 2022), Pew Research Center, https://www.pewresearch.org/fact-tank/2022/03/09/majority-of-workers-who-quit-a-job-in-2021-cite-low-pay-no-opportunities-for-advancement-feeling-disrespected/.

[14] U.S. Bureau of Labor Statistics, Job Openings and Labor Turnover (Nov. 30, 2022), https://www.bls.gov/news.release/jolts.toc.htm.

burdens both businesses and workers, and transfers arbitrary decision-making power to the government, all of which stands in stark contrast to the ideals of liberty embodied in this country's founding documents. Simply put, although it may benefit special interest groups, a rulemaking that diminishes freelance opportunities and turns independent contractors into traditional employees under federal law would be unpopular among and detrimental to the individuals it would impact most directly.

In determining and applying its independent contractor standard, the DOL accordingly should work to protect the right and freedom of individuals to choose to work as independent contractors and arrange their work relationships in the manner they determine best meets their needs and desires. Here, that goal is best met by retaining the existing rule established by the DOL in its 2021 Final Rule.

III. The 2021 Final Rule brought clarity and certainty to the classification of workers as either employees or independent contractors and should therefore be retained.

The DOL's classification standard should bring clarity and certainty to the determination of independent contractor versus employee status, while at the same time maximizing worker freedom to choose between them. That was accomplished in its 2021 Final Rule but will be undermined if the NPRM's proposed rulemaking is adopted. Prior to the 2021 Final Rule, the DOL and the federal courts relied on a multi-factor "economic realities test" to determine whether a worker should be classified as an independent contractor or an employee under the FLSA. The problem with that regime, however, was that the test as implemented lacked clarity, consistency, and rigor. Neither the DOL nor the courts consistently used the same list of factors and no authority had satisfactorily determined how best to mediate between and reconcile the various factors. As the DOL itself explained when it proposed the 2021 Final Rule, "the [then] current multifactor economic reality test suffers because the analytical lens through which all the factors are to be filtered remains inconsistent; there is no clear principle regarding how to balance the multiple factors; the lines between many of the factors are blurred; and these shortcomings have become more apparent in the modern economy. The result is legal uncertainty that obscures workers' and businesses' respective rights and obligations under the FLSA. Such uncertainty is especially acute when it comes to the growing number of more flexible and nimble work relationships." 85 Fed. Reg. 60,600, 60,609 (Sept. 25, 2020).

The current NPRM seeks to deny this point, stating without support that "[t]here is significant and widespread uniformity among the circuit courts in the application of the economic reality test." 87 Fed. Reg. at 62,218–219. But this

statement simply is not true, and the DOL must know it is false because, in promulgating the 2021 Final Rule, it reemphasized the point that the "economic realities test and its component factors have not always been sufficiently explained or consistently articulated by courts or the Department, resulting in uncertainty among the regulated community." 86 Fed. Reg. at 1168. It further explained in detail the discrepancies among the circuit courts in their application of the economic realities test:

> Most courts of appeals articulate a similar test, but application between courts may vary significantly. *Compare, e.g., Sec'y of Labor* v. *Lauritzen,* 835 F.2d 1529, 1534-35 (7th Cir. 1987) (applying six-factor economic reality test to hold that pickle pickers were employees under the FLSA), *with Donovan* v. *Brandel,* 736 F.2d 1114, 1117 (6th Cir. 1984) (applying the same six-factor economic reality test to hold that pickle pickers were not employees under the FLSA). For example, the Second Circuit has analyzed opportunity for profit or loss and investment (the second and third factors listed above) together as one factor. *See, e.g., Brock* v. *Superior Care, Inc.,* 840 F.2d 1054, 1058 (2d Cir. 1988). The Fifth Circuit has not adopted the sixth factor listed above, which analyzes the integrality of the work, as part of its standard, *see, e.g., Usery,* 527 F.2d at 1311, but has at times assessed integrality as an additional factor, *see, e.g., Hobbs* v. *Petroplex Pipe & Constr., Inc.,* 946 F.3d 824, 836 (5th Cir. 2020).

86 Fed. Reg. at 1170. In addition, the DOL explained how the circuits differ in their application of four different factors commonly employed by courts when applying the economic realities test. *Id.* The current NPRM never discusses or seeks to resolve these discrepancies. Without an attempt to mediate between these differences in application, the DOL's stated desire to bring clarity and consistency to worker classification decisions cannot be given credence.

By contrast, the 2021 Final Rule remedied the inconsistent application of the economic reality test by implementing a more focused procedure to determine "whether, as a matter of economic reality, the worker is dependent on an individual, business, or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor)." 86 Fed. Reg. at 1168. This approach was and is consistent with applicable caselaw. *See, e.g., Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998) ("[T]he focal point is whether the individual is economically dependent on the business to which he renders service . . . or is, as a matter of economic fact, in business for himself.") (cleaned up); *Usery* v. *Pilgrim Equip. Co.,* 527 F.2d 1308, 1311 (5th Cir. 1976) (each of the factors "are aids—tools to be used to gauge the degree of dependence of alleged employees on the

business with which they are connected. It is dependence that indicates employee status. Each test must be applied with that ultimate notion in mind.").

The key innovation of the 2021 Final Rule was that it fixed the multi-factor test at five key factors and gave weighted emphasis to the first two of these factors. The reason for this move was that the first two factors—"(1) the nature and degree of the worker's control over the work and (2) the worker's opportunity for profit or loss—are more probative of the question of economic dependence or lack thereof than other factors, and thus typically carry greater weight in the analysis than any others." 86 Fed. Reg. at 1168. This approach makes imminent sense as these two factors most clearly answer the economic dependence question "because they bear a causal relationship with the ultimate inquiry. A worker's control over the work and the opportunity for profit or loss are generally what transforms him or her from being economically dependent on an employer as a matter of economic reality into being in business for him- or herself. This is not so with the other factors." 85 Fed. Reg. at 60,621. Just as importantly, this approach is justified by existing caselaw and economic reality. *See, e.g.*, *Agerbrink v. Model Service LLC*, 787 F. App'x 22, 25–27 (2d Cir. 2019); *Saleem v. Corporate Transp. Group, Ltd.*, 854 F.3d 131, 138–47 (2d Cir. 2017); *Karlson v. Action Process Serv. & Private* Investigation, *LLC*, 860 F.3d 1089, 1095 (8th Cir. 2017); *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1051 (5th Cir. 1987).

Unfortunately, and without any rational basis in fact or law, the current NPRM scraps the 2021 Final Rule and returns to a six-factor test, but it does simply return to the previous economic realities test. Instead, the proposed rulemaking adds new interpretations of the factors, removes emphasis on the two core factors that are most probative of economic dependence, and, worst of all, directs the DOL to make its classification determinations based on theoretical rather than actual control. *See* 87 Fed. Reg. at 62,232–233.

In essence, the current rulemaking is an attempt to reinstitute the discredited Obama-era Administrator's Interpretation No. 2015-1 of July 15, 2015.[15] Although that guidance facially affirmed the use of the economic realities test, "it reflected a far more aggressive interpretation of several of the six 'economic realities' factors than that historically used by courts, and emphasized the agency's position that most

[15] Wage and Hour Division, Dep't of Labor, *Administrator's Interpretation No. 2015-1* (July 15, 2015), https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Documents/AI-2015_1.pdf.

workers should be classified as employees under the FLSA."[16] Like that guidance, the current proposal gives no weight to any one factor and, in fact, does not even limit itself to the six named factors. As proposed new 29 C.F.R. § 795.110(2) states:

> Consistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive, and the weight to give each factor may depend on the facts and circumstances of the particular case. Moreover, these six factors are not exhaustive.

87 Fed. Reg. at 62,274. This rule gives the DOL power to reject the objective facts of a matter and manipulate any evidence available to it to support its favored result, whether that be a classification as an employee or an independent contractor in any particular case. This is a recipe for uncertainty in the face of arbitrary and capricious decision-making by the DOL.

Perhaps most egregiously, the NPRM complicates the control-over-a-worker factor by adding to it such items of routine contractual terms as "scheduling, supervision, price-setting, and the ability to work for others" while at the same time "not limiting control to control that is actually exerted." 87 Fed. Reg. at 62,233. No prior case that we are aware of has ever held that the mere reserved right to control without the actual exercise of control is sufficient to establish an employer-employee relationship. The reason is that control must be significant and sufficient, and the mere reservation of such a right without ever actually exercising control does not meet that standard. Moreover, the rulemaking threatens to destroy the ability of one business to contract with another business on any subject by elevating routine contractual terms that set objectives, basic ground rules, and expectations to indicia of employee status. These routine and common contractual terms—necessary elements in the creation of business relationships and binding agreements between businesses—cast no meaningful light on employer-employee status. *Cf. Browning-Ferris Indus. of California v. NLRB*, 911 F.3d 1195, 1219–20 (D.C. Cir. 2018).

The NPRM compounds the weakness of the regime in place before the 2021 Final Rule and makes it worse. Stakeholders will have no clarity as to what additional factors may be considered in any particular case, how important any one factor may be, whether routine contractual terms necessary for a satisfactory business relationship will suddenly turn into indicia of "control," and no clear guidance as to what the "totality of the circumstances" actually means. The proposed rulemaking increases uncertainty among workers and businesses, grants arbitrary

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[16] *Trump Administration's DOL Rejects Obama-Era Guidance on Independent Contractor Status and Joint Employment* (June 9, 2017), The National Law Review, https://www.natlawreview.com/article/trump-administration-s-dol-rejects-obama-era-guidance-independent-contractor-status.

discretion to the DOL, and improperly will reduce the circumstances where a worker will be considered an independent contractor.

On this later point, the NPRM states that the "proposed rulemaking is not intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves." 87 Fed. Reg. at 62,218. But that is exactly what will happen under the proposal. If implemented, the new rulemaking will put an institutional thumb on the classification scale, forcing a greater number of workers into the employee category against their will and expectation, and it will allow the DOL to impose subjective and arbitrary decision-making in favor of that outcome. Indeed, the proposed new regulations will give almost unlimited discretion to the DOL in making its worker classifications and will make it extremely difficult for anyone to know with certainty how an individual in any particular circumstance should be classified. Such free-willing discretion will inevitably skew the DOL's decision-making, whether deliberately or otherwise, away from the objective facts of the matter and toward favored political ends.

To summarize, the NPRM proposes a regime in which fewer workers will be able to work as independent contractors, a development that ultimately will harm individual workers and the wider economy. It will decrease clarity and increase uncertainty, invariably lead to fewer employment opportunities, and giver greater occasion for arbitrary decision-making by the DOL. The DOL should accordingly reject the proposed rules and retain the 2021 Final Rule.

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Thank you for your time and attention. If we can provide any additional information or otherwise be of further assistance, please do not hesitate to contact us.

Respectfully submitted,

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