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Via electronic submission at www.regulations.gov

Ms. Jessica Looman
Principal Deputy Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Club for Growth Foundation's Comment on Notice of Proposed Rulemaking, Wage and Hour Division, Department of Labor; Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (Oct. 13, 2022)

Dear Ms. Looman:

This comment has been prepared on behalf of the Club for Growth Foundation. The Foundation is a 501(c)(3) organization dedicated to informing the general public about the many benefits of economic freedom and limited government. The Foundation conducts public policy research, hosts conferences and forums, and produces a variety of publications to keep the public engaged and informed on the most important free-market issues facing our country today.

One of those most important issues is retaining the vibrancy and flexibility of the U.S. employment and contracting market. The United States leads the Organisation for Economic Co-operation and Development (OECD), an international organization of thirty-eight countries, in average wages, with workers paid on average roughly forty-one percent more as workers in Germany, the U.K., Canada, and France.¹ For twenty years, the United States has also enjoyed an unemployment rate typically one to two percentage points lower than the OECD generally, and fully four or five points lower than the OECD's Euro area.²

¹ See OECD, *Average Wages*, <https://data.oecd.org/earnwage/average-wages.htm>.

² See OECD, *Unemployment Rates, OECD – Updated: November 2022*, <https://www.oecd.org/newsroom/unemployment-rates-oecd-updated-november-2022.htm>.

The Club for Growth Foundation is highly concerned whenever government interventions threaten the remarkable performance of the U.S. labor market, which has proven thus far to be the best system in the world for delivering high pay and abundant jobs to workers.

The Labor Department's proposed rule, unfortunately, would do tremendous damage to the U.S. economy and harm all its participants: businesses, consumers, and workers, including women and minorities. Additionally, the rule is counter to the Biden Administration's policies of diversity, equity, and inclusion. Instead of enhancing opportunities, the proposed rule will likely reduce opportunities for women and minorities in the modern economy.³ We urge you to withdraw the proposal.

The proposed rule suffers from two critical flaws.

First, the proposed rule fails to address the principal problem plaguing this area of activity: uncertainty. The rule would replace the Labor Department's streamlined current test with an all-the-circumstances, amorphous, six-factor test. Worse yet, the proposed rule bends each of those factors toward employee status using a host of legally and logically dubious concepts. The only beneficiaries of this proposed test are plaintiffs' lawyers, who will be able to leverage the flexibility of the test to push dubious claims past early judicial gatekeeping and extract settlements.

Second, the proposed rule lacks a reasonable rationale. The Labor Department's current rule on independent contracting is fairly new, having been promulgated at the tail end of the Trump Administration. The Department lacks any data or experience to show that the current rule is not working well. Nonetheless, the Department has, now and previously, evinced a knee-jerk reaction in favor of repeal. The proposed rule's purported reasons for repeal—that the current streamlined regime is *more* confusing, or that the current rule is in tension with the law, or that

³ See, e.g., Katherine Lim et al., *Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data*, IRS.gov (July 2019) ("Women saw more growth in [independent-contractor] income receipt than men"), <https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf>; Liya Palagashvili, *The Gig Economy Is Making the Future of Work Brighter for Women*, *Fortune* (May 13, 2021), <https://fortune.com/2021/05/13/gig-economy-pros-cons-women-careers-unemployment-freelance-independent-contractors/>; M. Keith Chen et al., *Suppliers and Demanders of Flexibility: The Demographics of Gig Work*, UCLA Working Paper at 6–7 (2021), https://www.anderson.ucla.edu/faculty_pages/keith.chen/papers/WP_Flexibility_Supply_and_Demand.pdf; cf. Kim Bojorquez, *Black, Latino Advocacy Groups in Favor of Ride-Hailing Apps*, *Governing* (Aug. 24, 2020), <https://www.governing.com/work/black-latino-advocacy-groups-in-favor-of-ride-hailing-apps.html>; see also Lyft, *Lyft Economic Impact Report 2022* at 5, https://s27.q4cdn.com/263799617/files/doc_downloads/esg/Lyft-Economic-Impact-Report-2022.pdf.

the current rule encourages misclassification of workers—are unconvincing and incorrect.

1. The proposed rule would inject new uncertainty into contracting relationships, harming American workers, consumers, businesses, and economic growth.

The proposed rule’s first critical flaw is its embrace of an open-ended, amorphous test for distinguishing employees from independent contractors. This is in contrast to the current rule, which emphasizes the two core factors of control and opportunity for profit and loss.

The current rule’s two core factors are designated as such because they “drive at the heart of what is meant by being in business for oneself: Such a person typically controls the work performed in his or her business and enjoys a meaningful opportunity for profit or risk of loss through personal initiative or investment.”⁴ Indeed, those two factors seem virtually synonymous with what it means to be an independent businessperson. So, it makes sense that those factors typically matter more than, for instance, the duration of a business relationship or a worker’s level of skill.

It is unsurprising, then, that courts have elevated the importance of those two factors in practice, if not expressly in their reasoning. The preamble to the current rule described how, in the Department’s analysis of court decisions, those two factors invariably align with the legal outcome. If both factors point toward employee status, the courts hold the individual to be an employee; and vice versa when the factors point toward independent-contractor status.⁵

The proposed rule would revert the Labor Department to the old open-ended, unweighted test. That is problematic for several reasons. The first is that it ignores the simple fact that control and opportunity-for-profit *are* so highly probative when determining if someone is economically dependent on an entity for work. Control is the test for determining employee status under the common law,⁶ and for good reason as the employment relationship has its legal underpinnings in the principles of agency law, which themselves define a “servant” as a person subject to another’s control.⁷ It would be odd to say that control, which underpins the concept of employment and agency law generally, should have no more weight than, say, whether the worker bought his own boots. And while the FLSA’s conception of

⁴ 86 Fed. Reg. 1196.

⁵ *See id.* at 1196–98.

⁶ *See, e.g., Darden*, 503 U.S. at 323–24 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989) (footnotes omitted)).

⁷ *See Restatement (Second) of Agency* § 220(1).

employment is concededly broader than the common law's, it is not entirely unmoored from the fundamentals of employment and agency law. The Department faults the current rule as "*closer* to the common law control test,"⁸ but cannot say how close is too close, or just how wide the hedge about the common law must be.

Likewise, opportunity for profit or loss is virtually synonymous with being in business for one's self. At bottom that is what distinguishes an employee from an entrepreneur: by definition, an entrepreneur is a person whose financial fate is determined by the formula of revenue minus expenses, rather than a wage from someone else. It is difficult to imagine a scenario where an inquiry into this factor would *not* be critical to determining whether someone is an employee or independent contractor.

The second problem with the proposed open-ended test is its inherent uncertainty. True, the proposed rule acknowledges a need to sharpen the inquiry and purports to do some of that sharpening. But the six-factor test as proposed is still much duller than the current rule. The proposed rule would provide little guidance to private actors, the Labor Department (including WHD's enforcement staff and the Solicitor's Office), or the courts regarding how the factors should be weighed against each other. And those factors are, *ex ante*, incommensurable. What matters more, that a graphic designer is highly skilled, or that the company pays for her Adobe Illustrator subscription? that a trucker works only occasionally for a logistics company, or that he drives in a convoy with the company's employee truckers? that an accountant keeps his own hours, or that he has only one client? Such inquiries are, in Justice Scalia's phrase, "like judging whether a particular line is longer than a particular rock is heavy."⁹

The proposed rule is thus worse than the current regime. And it is ill-timed. Independent contracting is a growing segment of the economy due to new technologies' miraculous ability to lower transaction costs and the workforce's long-ongoing shift toward knowledge-based work.¹⁰ The literally millions of workers flocking to the new economy (two million in 2020 alone), and the businesses and

⁸ 87 Fed. Reg. 62228 (emphasis added).

⁹ *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). Notice, too, how the natural reaction to these questions is, "Well, let's look at what *really* matters: who tells the worker what to do? does the worker run his own business?"—i.e., we naturally go to the core factors.

¹⁰ See, e.g., McKinsey & Co., *Independent Work: Choice, Necessity, and the Gig Economy* at 12–14 (Oct. 2016), <https://www.mckinsey.com/~/media/mckinsey/featured%20insights/employment%20and%20growth/independent%20work%20choice%20necessity%20and%20the%20gig%20economy/independent-work-choice-necessity-and-the-gig-economy-executive-summary.pdf>.

customers that also benefit thereby,¹¹ need a clearer regime, not one made more uncertain. Notably, the proposed rule in both its preamble and in its economic analysis, utterly fails to consider the ramifications of injecting uncertainty into this rapidly growing area of the economy. Additionally, as previously mentioned, the negative impacts of this uncertainty are heightened by the current poor state of the US economy.

The Labor Department argues ironically that the current rule threatens to introduce uncertainty itself because its refinements to the six-factor test are novel and may not be accepted by all courts, thus fractioning the law which could take “years. . . to sort out.”¹² The Department makes this claim without any experience or data under the current rule. Without supporting experience, the critique is no more than the same argument that could be leveled against virtually any regulation, and one more typically levied by a rule’s detractors than the agency that promulgated it: “it might not receive deference in court.” The Department also exaggerates the prospect of prolonged confusion. For decades, virtually every rule of consequence has been immediately challenged in court by its opponents under the Administrative Procedure Act, and the rule’s fate is decided through that avenue rather than through piecemeal application of deference *vel non* in litigation proceedings. Further, there is no confusion at present given that the Portal-to-Portal Act provides an absolute defense to FLSA claims taken in good-faith reliance on the Wage and Hour Division’s regulations, notwithstanding the regulation is later held invalid by a court.¹³ And finally, the Department ignores that this is an interpretive rule dictating how the Department will enforce the FLSA. The analysis undergirding the current rule suggests that the core factors predict with a high degree of certainty how courts will decide FLSA misclassification cases. Thus, by faithfully applying those core factors in its enforcement activities, the Labor Department should see a high degree of success in the cases it brings, and should rest assured of proper worker classification in the cases it declines. The same can be said for how private parties can govern their affairs in reliance on the rule and the Portal to Portal Act. Legal *outcomes* should become more steady and certain. The Department confuses that result with the process leading to it, conflating inputs with outputs.

The Labor Department similarly argues that the current approach will be difficult to apply: “Rather than weighing all factors against each other depending on the facts of a particular work arrangement, courts and the regulated community must evaluate factors within and across groups in a new hierarchical structure, which will likely

¹¹ See, e.g., Marcin Zgola, *Will The Gig Economy Become The New Working-Class Norm?*, Forbes (Aug. 12, 2021), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/08/12/will-the-gig-economy-become-the-new-working-class-norm>.

¹² See 87 Fed. Reg. 62229.

¹³ See 29 U.S.C. § 259(a).

cause confusion and inconsistency.”¹⁴ This is nonsense—and a pristine example of bureaucratese. “Evaluat[ing] factors within and across groups in a new hierarchical structure” just means “emphasize the most important things.” And that’s a far more predictable rule of decision, imparting far less discretion to unknown agency staff, than “weigh all factors against each other depending on the facts of a particular work arrangement,” which is hardly any rule at all.

Reverting to uncertainty will have bad consequences. Employers will be more hesitant to use independent contractors and instead will turn to alternatives meeting their business needs, such as automation or outsourcing, or taking more drastic measures such as shuttering their businesses because they are unable to earn a profit. Workers will simply have fewer opportunities to work as employees or independent contractors. Women and minorities may well be frozen out of their livelihood.¹⁵ And the public will be denied the economic surplus of lowered transaction costs: better and more goods and services for less money.

Instead, in a new chapter to the oldest story known to Washington DC,¹⁶ the principal beneficiaries of the proposed rule would be plaintiffs’ attorneys—and the Department’s own enforcement staff, which will have maximum discretion. The Labor Department’s proposed formulation would foster extractive litigation. First, its uncertainty would make it easier for enterprising plaintiffs’ attorneys to bring cases based on past conduct. When a legal test is so elastic, the law can be more easily stretched to encompass past actions as at least allegedly illegal. Second, the proposed formulation’s fact-bound indeterminacy would make it easier for dubious claims to elude the judicial gatekeeping of motions to dismiss and motions for summary judgment. Claims that survive those checkpoints are likely to be settled regardless of their merit because of the long-tail risks of going to trial.

¹⁴ 87 Fed. Reg. 62229.

¹⁵ See, e.g., Katherine Lim et al., *Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data*, IRS.gov (July 2019) (“Women saw more growth in [independent-contractor] income receipt than men”), <https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf>; Liya Palagashvili, *The Gig Economy Is Making the Future of Work Brighter for Women*, Fortune (May 13, 2021), <https://fortune.com/2021/05/13/gig-economy-pros-cons-women-careers-unemployment-freelance-independent-contractors/>; M. Keith Chen et al., *Suppliers and Demanders of Flexibility: The Demographics of Gig Work*, UCLA Working Paper at 6–7 (2021), https://www.anderson.ucla.edu/faculty_pages/keith.chen/papers/WP_Flexibility_Supply_and_Demand.pdf; cf. Kim Bojorquez, *Black, Latino Advocacy Groups in Favor of Ride-Hailing Apps*, Governing (Aug. 24, 2020), <https://www.governing.com/work/black-latino-advocacy-groups-in-favor-of-ride-hailing-apps.html>.

¹⁶ See, e.g., Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 289 (1992) (“If public choice has any one key finding, it is that small groups with high stakes have a disproportionately great influence on the political process.”).

Again, all of this would come at a time when our economy is struggling. The last thing that our country, economy, workers, consumers, and businesses need are frivolous lawsuits that increase the cost of doing business, and ultimately higher prices for consumers as businesses pass on the cost of these lawsuits.

2. The proposed rule's rationale is lacking

The Labor Department offers several other reasons for its proposed rule. None are reasonable.

2.1 Lack of data

At the outset, all of the Labor Department's reasons for change are speculative. The Department has offered no information as to the performance of the current rule. It points to no data, no judicial opinions, no pending litigation, no anecdotes, and nothing in its enforcement or compliance-assistance experience suggesting that the current rule is performing poorly, much less worse, than the previous regime. Yet in its regulatory alternatives, the Department did not consider whether to simply see how things go under the current rule.¹⁷ Instead, it seems a *fait accompli* for the Department to rid itself of the current rule. That is problematic. Agencies "must consider the alternatives that are within the ambit of the existing policy."¹⁸ And they "must examine the relevant data and articulate a satisfactory explanation for the action including a rational connection between the facts found and the choice made,"¹⁹ which is hard to do without data or facts.

Indeed, the Department appears to be repeating the error that led to this rulemaking in the first place.²⁰ The district court in *Coalition for Workforce Innovation* faulted the Department for failing to consider alternatives to rescission of the current rule; while the Department has now offered some alternatives, including the text of the proposed rule, it has left out perhaps the most important alternative of all: leaving well enough alone.

2.2 Legality

The Department argues that the current rule's emphasis on two core factors is precluded by the language of the FLSA and case law. Not so. The FLSA's definitions of *employee*, *employer*, and *employ* are vague and by no means, as a matter of their text alone, require an unweighted six-factor test as opposed to any other formulation for

¹⁷ See 87 Fed. Reg. 62230–32.

¹⁸ *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (cleaned up) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

¹⁹ *State Farm*, 463 U.S. at 43 (cleaned up) (quoted source omitted).

²⁰ See *Coalition for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022).

determining who is an FLSA-covered employee. The Department erroneously conflates the breadth of the concept of *employment* under the FLSA with the breadth of the *inquiry* to determine employment.²¹ They are two separate concepts. As for the case law, the Department forgets that this is an interpretive rule “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”²² The Department’s current rule is a reasonable interpretation for these purposes: it analyzes what courts have actually done in practice (rather than simply parrot their legal standard) in formulating and giving notice of its own enforcement framework.

The Department’s critique of that approach is unconvincing. The Department provides not a single counterexample to its earlier analysis that court decisions invariably go the same way as an aligned pair of control and opportunity-for-profit factors. The Department complains about the methodology of that analysis,²³ but it cannot show how it is wrong or—most critically—how it fails to accurately predict outcomes. It is especially rich for the Department to complain that the current rule’s “discussion of the case law review did not provide full documentation or citations, did not make clear what the scope of the review entailed . . . and oversimplified the analysis provided by the courts.”²⁴ But the Department *did* the analysis and could provide this information at any time; that is not a deficiency, if it is one, that justifies the proposed rule.

2.3 Exclusion of certain facts

The Department similarly argues that the current rule wrongly excludes or downplays consideration of certain facts that, in the Department’s view, may be probative of the employment inquiry. These include whether the putative employer requires compliance with legal obligations, deadlines, and quality control terms; the relative investment of the worker and the putative employer; the centrality of the work to the putative employer’s business; and the putative employer’s reserved right or authority to control the work.²⁵ The current rule correctly excludes each of these facts, and the proposed rule would arbitrarily include or emphasize them.

²¹ See 87 Fed. Reg. 62228 (“prioritizing two ‘core factors’ over other factors may not fully account for the Act’s broad definition of ‘employ,’ as interpreted by the courts”; “the Department remains concerned that the outsized role of control under the 2021 IC Rule’s analysis is contrary to the Act’s text and case law interpreting the Act’s definitions of employment”).

²² *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015) (quoted source omitted); see 5 U.S.C. § 553(b)(A).

²³ See 87 Fed. Reg. 62227–28.

²⁴ *Id.*

²⁵ See *id.* at 62228–29.

Compliance requirements. The current rule excludes as nonprobative of the control factor “[r]equiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships).”²⁶ As the current rule states, these requirements are not probative of control because they are typical and standard in business relationships. They are control of a sort (every contract contains a commitment to do or not do something²⁷), but it is not *employment* control. Rather, they are instead simply fundamental terms of economic relations of all sorts. For instance, deadlines prevail in all aspects of life, and requiring the on-time completion of homework, delivery of a cargo container, or arrival for dinner does not make an employee of a student, sea captain, or suitor. The same is true for a business: no business could operate without insisting on timeliness, and doing so does no work to distinguish employees from other parties with which the business interacts. That logic follows for similar provisions. For instance, requiring counterparties to follow the law, operate safely, or meet quality standards are simply basic business terms prevalent in all sorts of third-party relationships. Again, they do no work distinguishing employees from other parties, unless businesses are to more readily tolerate shoddy work or illegal practices from contractors than from their employees. And making such requirements probative of employment would have the perverse effect of discouraging businesses to include them in their contracts, resulting in workplaces that are less safe, less healthy, more prone to illegality and loss, and that offer worse products and services.

Relative investment. The current rule correctly rejects the idea that the putative employer’s and the putative employee’s investment should be compared to one another as part of the employment inquiry.²⁸ It is important to consider the degree of investment the worker has made into his enterprise, to see if he really has an opportunity for profit or loss and thus is in business for himself. But there’s no reason to compare that investment to that of the hiring entity. As the Department explained in proposing the current rule, such a comparison “merely highlights the obvious and unhelpful fact that individual workers—whether employees or independent contractors—likely have fewer resources than businesses”²⁹ This is manifestly correct. The size of the hiring business has no relevance to whether the worker is a contractor or an employee. Consider a talented translator who translates a book, on the same terms and for the same fee, into French for a local college press and into Spanish for a major commercial publishing house. Why should she be considered more likely to be an employee when doing the Spanish work? Of course she shouldn’t

²⁶ 86 Fed. Reg. 1247 (to be codified at 29 C.F.R. § 795.105(d)(1)(i)).

²⁷ See *Restatement (Second) of Contracts* § 2(1) (1981).

²⁸ See 86 Fed. Reg. 1187–88.

²⁹ *Independent Contractor Status under the Fair Labor Standards Act*, 85 Fed. Reg. 60600, 60614 (Sept. 25, 2020).

be, because consideration of that *relative* investment is illogical. The proposed rule would be arbitrary to mandate consideration of this irrelevancy.³⁰

Centrality of the work. The current rule correctly notes that a worker is more likely to be an employee if his or her work is part of the putative employer’s “*integrated production process* for a good or service”; that this is different from the concept of “the importance or centrality of the individual’s work”—what is sometimes called the “*integral part*”—of the putative employer’s business.³¹ This interpretation is more faithful to the Supreme Court case law than the “integral part” factor as it has evolved in some lower courts. The proposed rule nonetheless embraces the “integral part” formulation.

This is problematic not just legally, but because it fundamentally misunderstands the purpose and function of a business. A business stays afloat by selling a product or service for more than it takes to provide it. The business’s principal objective is not to provide employment (though the miracle of the free-market economy is that it provides gainful employment and wide prosperity as a byproduct), but to provide that offering. To do so, the business may use any manner of means for each of its processes: outsourcing, crowdsourcing, automation, reselling, employees, contractors, manufacturers, staffing agencies, professional-services firms, and so on. There is nothing fundamentally requiring, or even probative, that “central,” “important,” “key,” or “integral” work of a business—even assuming those concepts could be reasonably distinguished from “tangential,” “unimportant,” “superfluous,” or “tangential” work—is to be accomplished by employees rather than by any other mode.

The “integral part” concept is problematic for another reason. It overlaps with the “ABC” test, which has caused such terrific problems in California. The “B” in the test states that an independent contractor must perform work that is outside the usual course of the hirer’s business. It is virtually the same as the “integral part” factor erroneously used by some courts and now proposed to be adopted by the Labor Department despite the Department’s disavowal of legal authority to enact an ABC test³² and without any consideration of how doing so may disrupt longstanding contractor relationships.

Reserved right of control. The current rule states, “In evaluating the individual’s economic dependence on the potential employer, the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible.”³³ Actual practice is a better expositor of economic reality than lawyerly hypotheticals

³⁰ See 87 Fed. Reg. 62275 (proposed 29 C.F.R. § 795.105(b)(2)).

³¹ 86 Fed. Reg. 1247 (to be codified at 29 C.F.R. § 795.105(d)(2)(iii)).

³² 87 Fed. Reg. 62231.

³³ 86 Fed. Reg. 1247 (to be codified at 29 C.F.R. § 795.110).

for several reasons. First, the parties' actual course of conduct, including the nonexercise of contractual rights, shows the essence of their relationship, what they value, and their relative bargaining power. Only in a world where lawyers rule supreme would businesses and workers always seek to enforce every subparagraph of their contracts rather than what makes sense for their business goals (hence the prevalence of no-waiver clauses in contracts). *Second*, and again in contrast to lawyer-world, not every worker or hiring entity pays attention to the fine print of their contracts. Especially for smaller operations (on either side), they may simply use templates, or bargain only over key terms, without minute consideration of each semicolon and *wherefore*.

The proposed rule would do away with these commonsense observations on grounds that unexercised contractual possibilities "sometimes reflect and influence the economic realities of the relationship."³⁴ For instance, says the proposed rule's preamble, a reserved right to supervise workers, even unexercised, "may strongly influence the behavior of the worker in [his or her] performance of the work," and this "may be more indicative of the reality of the economic relationship between the worker and the company than the company's apparent hands-off practice."³⁵ Why? Even under this example, a company that does not intervene is surely exercising less control than one that does. And if it is not, then the economic reality is likely either (i) the company is happy with the quality of the services or products coming from the worker without any need for control, or (ii) it is foregoing exercise of the supervisory right for how it could affect the relationship—for instance, the worker might stop the work (demonstrating that he or she is not dependent on the putative employer).

The proposed rule also argues that the current rule's "dismissal of contractual rights as always less relevant than actual practice is inconsistent with the need to consider all facts relevant to the economic realities."³⁶ That's an ironic statement. Prioritizing actual practice over theoretical possibilities *is* considering all the facts. It is being more sensitive to the actual business relationship of the parties, not less.

2.4 Effects on workers

The Labor Department also justifies the proposed rule by arguing that, to the extent the current rule "results in the reclassification or misclassification of employees as independent contractors, the resulting denial of FLSA protections would harm the affected workers."³⁷ The Department provides no data that reclassifying independent contractors as employees (as opposed to correcting misclassification) benefits those workers, nor does that comport with experience. To the contrary, the Department

³⁴ 87 Fed. Reg. 62258.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 62230.

hosted two public forums³⁸ shortly before sending the proposed rule for OIRA review, which were dominated by independent contractors across a wide variety of industries imploring the Department to *not* make them employees. (Notably, the proposed rule says nothing about those listening sessions, much less address the concerns raised.)

That fits with other data. Numerous surveys show that the vast majority of independent workers prefer to remain independent contractors. The flexibility and opportunities for entrepreneurship this provides for women and minorities is especially valuable.³⁹ One company's 2022 Economic Impact Report reveals that 73% of its drivers identify as members of racial and/or ethnic minority groups.⁴⁰ Imposing employee status on these workers against their will would be ruinous and, as shown by the data cited above, may even result in a disproportionate negative impact upon minorities.⁴¹ Another company's analysis reveals that almost 1 million contractors would lose their livelihood were they to be reclassified as employees.⁴² The costs are very real, and would come at a time when Americans are faced with a looming recession and skyrocketing prices for goods and services thanks to 40-year record-high inflation. This is surely not pro-worker. The Department's position is also contrary to the experience of workers in California under AB5, the law that severely restricted independent contracting in that state, for which "there now are more than 100 one-off exemptions."⁴³

³⁸ See U.S. Dep't of Labor, *Misclassification of Employees as Independent Contractors under the Fair Labor Standards Act*, U.S. DEP'T OF LABOR BLOG (June 3, 2022), <https://blog.dol.gov/2022/06/03/misclassification-of-employees-as-independent-contractors-under-the-fair-labor-standards-act>.

³⁹ See, e.g., Katherine Lim et al., *Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data*, IRS.gov (July 2019) ("Women saw more growth in [independent-contractor] income receipt than men"), <https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf>; Liya Palagashvili, *The Gig Economy Is Making the Future of Work Brighter for Women*, Fortune (May 13, 2021), <https://fortune.com/2021/05/13/gig-economy-pros-cons-women-careers-unemployment-freelance-independent-contractors/>; M. Keith Chen et al., *Suppliers and Demanders of Flexibility: The Demographics of Gig Work*, UCLA Working Paper at 6-7 (2021), https://www.anderson.ucla.edu/faculty_pages/keith.chen/papers/WP_Flexibility_Supply_and_Demand.pdf; cf. Kim Bojorquez, *Black, Latino Advocacy Groups in Favor of Ride-Hailing Apps*, Governing (Aug. 24, 2020), <https://www.governing.com/work/black-latino-advocacy-groups-in-favor-of-ride-hailing-apps.html>.

⁴⁰ See Lyft, *Lyft Economic Impact Report 2022* at 5, https://s27.q4cdn.com/263799617/files/doc_downloads/esg/Lyft-Economic-Impact-Report-2022.pdf.

⁴¹ *Id.*

⁴² See Dara Khosrowshahi, *The High Cost of Making Drivers Employees*, Uber Newsroom (Oct. 5, 2020), <https://www.uber.com/newsroom/economic-impact>.

⁴³ CalChamber, *AB 5 Independent Contractor Law: Industry Carveouts Impractical; Workers Need Flexible, Holistic Approach* (Jan. 2022), <https://advocacy.calchamber.com/wp->

To be fair, the Department’s economic analysis states that the proposed rule would result in little reclassification, as opposed to correcting misclassification.⁴⁴ But the Department’s claim is based merely on defining those terms to its liking. According to the Department, the current rule could result in misclassification: its “elevation of certain factors and its preclusion of consideration of relevant facts under several factors, which is a departure from judicial precedent applying the economic reality test, may result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it used to be to classify certain workers as independent contractors rather than FLSA-covered employees.”⁴⁵ And the proposed rule allegedly does the opposite: it “could therefore help prevent this misclassification by providing employers with guidance that is more consistent with longstanding precedent.”⁴⁶ Thus the Department’s claim that the proposed rule would correct misclassification, rather than impose (what it should describe as costly and undesirable) reclassification, rests simply on its changed legal view as to the meaning of those terms.

3. Withdrawal of the proposal

The last two decades have seen technological breakthroughs that have lowered costs, increased the availability of goods and services, and improved opportunities and flexibility for millions of American workers. The Labor Department should be asking how it can foster these benefits for workers and the public, particularly at a time when the US economy is faltering, and American workers, consumers, and businesses are struggling to stay afloat. The Department’s current rule is a step in the right direction, providing a legally sound, yet clear and modern, employment test for our modern economy. In stark contrast to the current rule, the proposed rule would foment confusion and litigation and ultimately discourage innovation and economic expansion. Furthermore, the proposed rule may result in a disproportionate negative impact on minorities, and therefore the Department must thoroughly examine this before it proceeds. For the aforementioned reasons, the proposed rule should be withdrawn.

Sincerely,

HOLLAND & KNIGHT LLP



<content/uploads/2022/02/2022-Business-Issues-Labor-and-Employment-AB-5-Independent-Contractor-Law.pdf>

⁴⁴ See 87 Fed. Reg. 62260.

⁴⁵ *Id.*

⁴⁶ *Id.*

Club for Growth Foundation
Regulatory Comment on IC Proposal
December 12, 2022
Page 14

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On Behalf of the Club for Growth
Foundation