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WHERE JOBS GO TO DIE:

The Department of Labor's Proposed Rule on Independent Contractors

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Executive Summary

Independent contractors are essential to our economy. They are used constantly by businesses for a wide variety of functions, from accounting, to translation, to writing, to consulting, to selling products. And they are used every day by regular people: independent contractors fix our appliances, walk our dogs, take care of our kids, and drive us home.

Independent contractor work has grown rapidly over the last twenty years, due largely to changes in technology that have made it easier for willing workers to connect with willing buyers. It has grown especially fast for women, who prize the flexibility of independent work, and it offers more economic opportunities for lower-income and minority Americans. The growth of independent contracting has been a good thing for workers, businesses, consumers, and the economy as a whole.

The U.S. Department of Labor, however, recently issued a proposed regulation that could undo much of this progress. The proposed regulation would return the Department to an amorphous, six-factor, all-the-facts-and-circumstances test for distinguishing independent contractors from employees. That matters greatly because employees, unlike independent contractors, come with significant compliance burdens and legal risks, and as a practical matter the worker and the business lose the flexibility that is so critical to an independent-contractor relationship. Thus,

regulatory changes that may turn independent workers into employees, or create substantial uncertainty about working relationships, will discourage workers, businesses, and consumers from using independent workers at all and put them at risk of extractive lawsuits. And that will harm everyone involved, at a time when the US economy is faltering, and American workers, consumers, and businesses are struggling to stay afloat. Furthermore, these proposed changes are being thrust by the Labor Department upon independent contractors against their will, and data suggests that the proposed rule may have a disproportionate impact on minorities, which would be contrary to the Biden Administration's push for diversity, equity, and inclusion. Therefore further research is needed.

The proposed rule is deeply flawed and should be withdrawn because:

1. It will inject new, unwelcome uncertainty into contracting relationships. The Department's current test, introduced by the Trump Administration, emphasizes two key factors to distinguish independent contractors from employees. The proposed rule would change that to six factors with no predetermined guidance or weight to them. That is an open invitation to plaintiffs' lawyers and wide enforcement discretion.

2. The Department has no data on the current rule's performance, yet the Department appears committed at all costs to repealing it. That is not how purportedly evidence-based, data-driven federal agencies are supposed to do their jobs.

3. The Department seeks to revise the independent-contractor test by tilting it toward employee status in arbitrary ways. For instance, the Department now states that requiring a worker to follow basic safety standards or meet deadlines is indicative of employee status. That betrays a gross ignorance of modern business practices and will encourage businesses to simply not require their contractors to meet basic standards.

4. The Department never seriously considers how its proposal will harm workers, including women and minority workers whom data suggests may be disproportionately impacted by the proposed rule. In survey after survey, the vast majority of independent contractors say they do not want to be employees. And research suggests that businesses would not change contractors to employees; they would simply just not use them at all, which from one company's estimates, could result in the loss of approximately one million jobs in that one company alone.

The proposed rule is rare. Most federal regulations involve a balancing of interests, with some groups benefiting and others burdened by a legal change. This is the unique rule where everybody is harmed and nobody is helped: workers, businesses, consumers, and the economy as a whole will be worse off. The American people can little afford this damage with a recession looming and record inflation devouring income and savings. The proposed rule should be withdrawn.

Introduction

The U.S. Department of Labor recently proposed a new rule to distinguish employees from independent contractors.[1] The proposed rule would ostensibly return the Labor Department to an amorphous and vastly inferior, New Deal-inspired test for distinguishing independent contractors from employees. That regression alone would unnecessarily burden millions of modern businesses and workers, effectively denying these workers the right to work and constraining or denying these businesses the ability to operate and contribute to economic growth. This alone is harmful, but it is all the more troubling and inappropriate considering the poor state of the economy, with inflation at 40-year highs and a recession looming.

Additionally, the Labor Department's proposed rule is counter to the Biden Administration's progressive policies of diversity, equity, and inclusion. Instead of enhancing employment opportunities, the Labor Department's regressive proposed rule would reduce opportunities for women and minorities in the modern economy.[2]

The proposed rule suffers from two critical flaws. Each flaw demonstrates how this purportedly pro-worker proposal is not so and would leave everyone worse off. Each flaw also demonstrates how the rule is truly arbitrary and capricious, both in the legal sense[3] and in the practical sense—it is extraordinary how the proposed rule evinces faith that lawyerly argument is the best method for deciding economic questions of vast importance.

The proposed rule's first flaw is its failure 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 would be able to leverage the flexibility of the test to push dubious claims past early judicial gatekeeping and extract settlements.

The proposed rule's second flaw is its lack of 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 the current rule encourages misclassification of workers—are unconvincing and incorrect. The proposed rule should be withdrawn.

1. *See* Employee or Independent Contractor Classification under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (Oct. 13, 2022).

2. *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 Advoacy 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.

3. 5 U.S.C. § 706(2)(A).

1. A brief history of federal regulation of independent contractors

The legal distinction between employees and independent contractors is long-running and important. Each classification has its own mix of benefits and burdens for both the individual and its business counterparty. Employees typically receive minimum-wage and overtime protections, lesser tax obligations, and various legal protections and benefits. But employees also owe duties to their employer, typically enjoy less flexibility, and depend on someone else for their income. In contrast, independent contractors typically have the freedom to work where, how, and for whom they want. They do not receive many of the protections typical to the employment relationship, but they do not shoulder its burdens either, and enjoy the prospect of potentially greater financial rewards. Finally, businesses need to know which of their worker counterparties are employees versus independent contractors. Employers have their own calculus for when to use each: employees are, obviously, essential and desirable to almost any enterprise—but they also come with less flexible costs as well as compliance burdens, tax obligations, and legal risks. Meanwhile, independent contractors can be more desirable in certain contexts for a variety of reasons: for instance, to rapidly flex and contract in areas of need, to provide specialized skills, to grow the business, and to implement incentive structures that work less well with employees.

The line can be blurry between employees and independent contractors. Thus, numerous local, state, and federal laws contain tests to distinguish the two. Sometimes these tests are found in statutory law itself, described in implementing regulations, or developed by judicial decisions.

The Labor Department's proposed rule addresses the distinction between employees and independent contractors for purposes of the federal Fair Labor Standards Act (FLSA). The FLSA requires covered employers to pay covered employees the federal minimum wage and overtime, and protects covered employees from related retaliation. The FLSA itself offers little help for deciding who is an employee. "The Act's circular definition of 'employee'—'any individual employed by an employer'—is unhelpful."[4]

The Supreme Court addressed the employee–contractor distinction in a series of cases from 1944 to 1947 under three different federal statutes, including the FLSA.[5] The upshot of these cases is the Supreme Court's emphasis that "economic reality" rather than the "technical concepts" of the common law should control whether workers are employees,[6] with the ultimate question being whether workers are "dependent upon the business to which they render service."[7] The Supreme Court applied six factors in the 1947 FLSA case, which since the 1970s and 1980s have been widely adopted, adapted, and sometimes set adrift of their Supreme Court mooring by courts and the Labor Department.

Here is one simplified formulation of the test:

1. The putative employer's degree of control over the work;

2. The putative employee's opportunity for profit and loss;

4. *Ndambi v. CoreCivic, Inc.*, 990 F.3d 369, 372 (4th Cir. 2021) (Wilkinson, J.)

5. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *Bartels v. Birmingham*, 332 U.S. 126 (1947); *United States v. Silk*, 331 U.S. 704 (1947); *NLRB v. Hearst Pubc'ns, Inc.*, 322 U.S. 111 (1944).

6. *Silk*, 331 U.S. at 712–14; *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324–25.

7. *Bartels*, 332 U.S. at 130.

3. The putative employee's investment in equipment or materials for the work;

4. Whether the work rendered requires special skill;

5. The degree of permanency of the working relationship; and

6. Whether the work rendered is an integral part of (or an integrated unit of production within[8]) the alleged employer's business.

Since the early years of the twenty-first century, advances in technology, communication, and business organization have lowered transaction costs for work.[9] The resulting explosion of flexible and freelance work is changing the nature of the American workforce.[10] One 2015 estimate described a global GDP boost of $2.7 trillion by 2025.[11]

That was the backdrop for the Labor Department's first significant attempt at regulating this area. In 2015, the Department's Administrator of the Wage & Hour Division, David Weil, issued a document styled as an "Administrator's Interpretation."[12] The document, issued without notice and comment, read the FLSA broadly to likely encompass many modern workers within its definition of employment. It was not received kindly by the business community; so unkindly, in fact, that in 2022 President Biden's nomination of Weil to his old post failed on a bipartisan basis on the Senate floor.[13]

The Trump Administration's Labor Department withdrew the "Administrator's Interpretation" and, after notice and comment, promulgated the Department's first-ever regulation addressing independent contractors.[14] The Department explained at length how the courts have sometimes been inconsistent in how they describe the independent-contractor test and in the results they reach; how the test is ambiguous and confusing; and how those shortcomings are more apparent in the modern economy and hamper innovation.[15] Thus the Department promulgated an innovative test that emphasized two core factors—the putative employer's control and the putative employee's opportunity for profit and loss. The regulation also contains helpful examples and explanations adapted to the modern economy.[16]

Less than two months into the Biden Administration, the Labor Department proposed to withdraw the independent-contractor rule.[17] Less than two months later, it issued a final rule purporting to effect that

8. See the discussion in Independent Contractor Status under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1193–96 (Jan. 7, 2021).

9. *See* Seth Oranburg & Liya Palagashvili, *Transaction Cost Economics, Labor Law, and the Gig Economy*, 50 J. Leg. Studies S219 (2021).

10. *See id.* at S220.

11. James Manyika et al., *A Labor Market that Works: Connecting Talent with Opportunity in the Digital Age*, McKinsey Global Inst. (June 2015), https://www.mckinsey.com/~/media/mckinsey/featured insights/employment and growth/connecting talent with opportunity in the digital age/mgi online talent_a_labor_market_that_works_executive_ summary_june 2015.pdf.

12. U.S. Dep't of Labor, Administrator's Opinion No. 2015–1, "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).

13. *See* Senate Committee on Education & Labor Republicans, *Biden's Radical Nominee David Weil: What They're Saying*, E&L Blog (Jan. 13, 2022), https://republicans-edlabor.house.gov/news/documentsingle.aspx?DocumentID=408012; Kimberly A. Strassel, *Biden's PRO Enforcer*, Wall St. J. (July 15, 2021), https://www.wsj.com/articles/president-joe-biden-pro-act-david-weil-union-progressive-labor-nominee-11626384645; Nick Niedzwiadek & Eleanor Mueller, *Moderate Dems Hand Biden His First Nomination Vote Defeat*, Politico (Mar. 30, 2022), https://www.politico.com/news/2022/03/30/david-weil-wage-hour-nom-senate-00021860.

14. *See* 86 Fed. Reg. 1168.

15. *See id.* at 1173–75.

16. *See id.* at 1246–48 (to be codified at 29 C.F.R. part 795).

17. *See* 86 Fed. Reg. 14027 (Mar. 12, 2021).

withdrawal.[18] In March 2022, this withdrawal rule was vacated by a federal court,[19] in effect reinstituting the Trump-era rule, which remains the rule today while the litigation on appeal is stayed pending further rulemaking.

Apparently about that time, the Labor Department began work on its new proposed rule for independent contractors. After its initial drafting by the Department, the rule remained under White House review for an atypically lengthy time, nearly three months,[20] before clearing review and being published on October 13, 2022.[21] Comments on the proposed rule were due on December 13, 2022.[22]

2. 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. Compare the current rule to its proposed revision in Table 1.

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."[23] 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.[24]

The proposed rule would revert the Labor Department to using an 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

18. *See* 86 Fed. Reg. 24303 (May 5, 2021).
19. *See Coalition for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022).
20. *See* Rebecca Rainey, *DOL Independent Contractor Rule Redo Under White House Review*, Bloomberg Law (July 6, 2022), https://news.bloomberglaw.com/daily-labor-report/dol-independent-contractor-rule-redo-under-white-house-review; Rebecca Rainey, *Independent Contractor Rule Redux Clears White House Review*, Bloomberg Law (Sept. 29, 2022), https://news.bloomberglaw.com/daily-labor-report/independent-contractor-rule-redux-clears-white-house-review.
21. *See* 87 Fed. Reg. 62218.
22. *See* 87 Fed. Reg. 64749.
23. 86 Fed. Reg. 1196.
24. *See id.* at 1196–98.

TABLE 1 | CURRENT VS. PROPOSED RULE

Current Rule	*Proposed Rule*
The six factors "are not exhaustive, and no single factor is dispositive. However, the two core factors [control and opportunity for profit or loss] . . . are the most probative . . . , and each therefore typically carries greater weight in the analysis than any other factor. Given these two core factors' greater probative value, if they both point towards the same classification . . . there is a substantial likelihood that is the individual's accurate classification. This is because the other factors are less probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors."[1]	The six factors "should guide an assessment of the economic realities of the working relationship and the question of economic dependence. 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. . . . [A]dditional factors may be considered."[2]

1. 86 Fed. Reg. 1246 (to be codified at 29 C.F.R. § 795.105(c)).
2. 87 Fed. Reg. 62274 (proposed 29 C.F.R. § 795.110(a)(2)).

work. Control is the test for determining employee status under the common law,[25] and for good reason as the employment relationship has its legal underpinnings in the principles of agency law, which themselves define a "servant"—a legal term meaning an employee—as a person subject to another's control.[26] It would be odd to say that control, which underpins the concept of employment generally, should have no more weight than, say, whether the worker bought his own boots. And while the FLSA's conception of 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,"[27] 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. The test would provide little guidance to private actors, the Labor Department, or the courts regarding how the factors should be weighed against each other. Furthermore, this test would place far too much discretion in the

25. *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)
26. *See Restatement (Second) of Agency* § 220(1).
27. 87 Fed. Reg. 62228

hands of agency employees. And the 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."[28]

The proposed rule is thus no improvement to, and in fact is significantly 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.[29] The literally millions of workers flocking to the new economy (two million in 2020 alone), and the businesses and customers that also benefit thereby,[30] 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."[31] 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: "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.[32] 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 will govern their affairs in reliance on the rule and the Portal to Portal Act. Legal

28. *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.

29. *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.

30. *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.

31. *See* 87 Fed. Reg. 62229.

32. *See* 29 U.S.C. § 259(a).

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 cause confusion and inconsistency."[33] 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.

So who benefits from this amorphous formulation? Not employers, who 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. Not workers, who will simply have fewer opportunities to work as employees or independent contractors. Not women and minorities, who will be frozen out of their livelihood.[34] And not the public, which 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,[35] the principal beneficiaries of the proposed rule would be plaintiffs' attorneys. 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.

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

33. 87 Fed. Reg. 62229.

34. *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 Advoacy 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.

35. *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.").

3. The proposed rule's rationale is lacking

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

3.1 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.[36] 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."[37] 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,"[38] which is hard to do without data or facts.

3.2 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 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.[39] They are two separate concepts. As for the case law, the Department forgets that this is an interpretive rule, that is (and to simplify), a rule "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[40] 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,[41] but it cannot show how it is wrong or—most critically—how it fails to accurately predict outcomes. And 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

36. *See* 87 Fed. Reg. 62230–32.

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

38. *State Farm*, 463 U.S. at 43.

39. *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").

40. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015); *see* 5 U.S.C. § 553(b)(A).

41. *See* 87 Fed. Reg. 62227–28.

provided by the courts."[42] 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.

3.3 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.[43] The current rule correctly excludes each of these facts, and the proposed rule would arbitrarily include or emphasize them.

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)."[44] 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 something[45]), 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.[46] 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

42. *Id.*
43. *See id.* at 62228–29.
44. 86 Fed. Reg. 1247 (to be codified at 29 C.F.R. § 795.105(d)(1)(i)).
45. *See Restatement (Second) of Contracts* § 2(1) (1981).
46. *See* 86 Fed. Reg. 1187–88.

and unhelpful fact that individual workers—whether employees or independent contractors—likely have fewer resources than businesses . . . ."[47] This is obviously 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 be, because consideration of that relative investment is illogical. The proposed rule would be arbitrary to mandate consideration of this irrelevancy.[48]

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.[49] 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 costs 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 "unimportant," "superfluous," or "tangential" work—is to be accomplished by employees rather than by any other mode. Under this logic, the robots that build cars for automobile manufacturers are more likely to be employees than the manufacturer's accountants; the algorithms of a search-engine business than its marketing team; the granite supplier for a home-goods reseller than its sales force.

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 test[50] and without any consideration of how doing so may disrupt longstanding contractor relationships.

Reserved right of control. The current rule holds, "In evaluating the individual's economic dependence on the potential employer, the actual practice of the parties involved is more relevant than what may

47. *Independent Contractor Status under the Fair Labor Standards Act*, 85 Fed. Reg. 60600, 60614 (Sept. 25, 2020).
48. *See* 87 Fed. Reg. 62275 (proposed 29 C.F.R. § 795.105(b)(2)).
49. 86 Fed. Reg. 1247 (to be codified at 29 C.F.R. § 795.105(d)(2)(iii).
50. 87 Fed. Reg. 62231.

be contractually or theoretically possible."[51] Actual practice is a better expositor of economic reality than lawyerly hypotheticals 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."[52] 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."[53] 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."[54] 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.

3.4 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."[55] 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 hosted two public forums[56] shortly before sending the proposed rule for OIRA[57] review, which were dominated by

51. 86 Fed. Reg. 1247 (to be codified at 29 C.F.R. § 795.110).
52. 87 Fed. Reg. 62258.
53. *Id.*
54. *Id.*
55. *Id.* at 62230.
56. *See* U.S. Dep't of Labor, *Misclassification of Employees as Independent Contractors under the Fairr 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.
57. The Office of Information and Regulatory Affairs, part of the White House's Office of Management and Budget.

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. As previously discussed, 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.[58] Imposing employee status on these workers against their will would be ruinous. One company's analysis reveals that almost 1 million contractors would lose their livelihood were they to be reclassified as employees.[59] Now imagine that tremor rippling throughout the economy and across all businesses, 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 and for which "there now are more than 100 one-off exemptions."[60]

To be fair, the Department's economic analysis states that the proposed rule would result in little reclassification, as opposed to correcting misclassification.[61] 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."[62] 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."[63] 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.

58. *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.

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

60. CalChamber, *AB 5 Independent Contractor Law: Industry Carveouts Impractical; Workers Need Flexible, Holistic Approach* (Jan. 2022), https://advocacy.calchamber.com/wp-content/uploads/2022/02/2022-Business-Issues-Labor-and-Employment-AB-5-Independent-Contractor-Law.pdf.

61. *See* 87 Fed. Reg. 62260.

62. *Id.*

63. *Id.*

4. A better path forward

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. The proposed rule would replace it with a test from the 1940s, but reconfigured at every node to foment confusion and litigation, and ultimately to discourage innovation and economic expansion. The proposed rule should be withdrawn.