

December 13, 2022

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

Re: Wage and Hour Division Proposed Rule: Employee or Independent Contractor Classification Under the Fair Labor Standards Act [RIN 1235-AA43]

Submitted via [www.regulations.gov](http://www.regulations.gov).

Dear Ms. DeBisschop:

We appreciate this opportunity to provide comment on the proposed rule, “Employee or Independent Contractor Classification Under the Fair Labor Standards Act.”<sup>1</sup>

### **Proposed Rule Summary**

The proposed rule (1) rescinds a 2021 Independent Contractor (IC) rule<sup>2</sup> that provided improved clarity to the definition of an employee under the Fair Labor Standards Act (FLSA); (2) adds investment as a standalone factor to consider in determining worker status; (3) adds additional detail under the factors of scheduling, supervision, price-setting, and the ability to work for others; and (4) alters the definition of whether work is integral to the employer’s business.

The Fair Labor Standards Act (FLSA) definitions of employer, employee and employ are largely circular and provide little meaningful guidance as to whether a worker should be classified as an employee or an independent contractor.<sup>3</sup> The courts have applied an “economic reality” test, based on a “totality of the circumstances” to determine if an individual is an employee or

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<sup>1</sup> U.S. Department of Labor, Wage and Hour Division, “Notice of Proposed Rulemaking; Request for Comments,” *Federal Register*, Vol. 87, No. 197, October 13, 2022, pp. 62218-62275, <https://www.govinfo.gov/content/pkg/FR-2022-10-13/pdf/2022-21454.pdf> (hereinafter ‘proposing release’). See also U.S. Department of Labor Wage and Hour Division, “Notice of Proposed Rulemaking; Extension of Comment Periods,” *Federal Register*, Vol. 87, No. 206, October 26, 2022, p. 6479, <https://www.govinfo.gov/content/pkg/FR-2022-10-26/pdf/2022-23314.pdf>.

<sup>2</sup> U.S. Department of Labor, Wage and Hour Division, “Independent Contractor Status,” Final Rule, *Federal Register*, Vol. 86, No. 4, January 7, 2021, pp. 1168-1248 <https://www.govinfo.gov/content/pkg/FR-2021-01-07/pdf/FR-2021-01-07.pdf> (hereinafter ‘the 2021 IC Rule’).

<sup>3</sup> In relevant part, 29 USC 203 reads:

(d) “Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e) (1) Except as provided in paragraphs (2), (3), and (4), the term “employee” means any individual employed by an employer.

...

(g) “Employ” includes to suffer or permit to work.

The omitted language provides a number of exception primarily relating to government.

independent contractor.<sup>4</sup> Prior to the 2021 IC rule, courts differed in the number of factors considered and the weight of those factors when determining workers' status under the rule. Amid the changing nature of work in America, this led to significant uncertainty and confusion among employers and workers.<sup>5</sup>

The 2021 IC rule provided significant clarity to the definition by specifying five economic reality factors and elevating two factors—the nature and degree of control over the work and the worker's opportunity for profit or loss—as “core” factors that are the most probative and carry greater weight in the analysis. By specifying that these two factors carry greater weight than the others, the 2021 IC rule provided greater clarity for employers and substantially simplified the process of determining employee and independent contractor status. Instead of attempting to classify workers based on five or six different factors with unknown weights applied to each factor, the 2021 IC rule allowed employers and workers to focus on two core factors and specified that if those two core factors point to the same status determination, that status is almost certainly the correct status. Only when those core led to opposite status determinations or were inapplicable would workers and employers need to examine the remaining three factors. Moreover, the 2021 IC rule provided illustrative examples of how the analysis would apply across different circumstances.

The proposed rule reverses the clarity provided by the 2021 IC rule and replaces it with an expansive, confusing, and indecipherable definition of an employee that will lead to confusion and contradiction in the courts; make it harder for both employers and workers to understand their work relationships; take away work opportunities and income from workers who desire the flexibility and autonomy of independent work; significantly disadvantage small businesses that use contractors to compete with larger companies; and limit the availability and increase the price of crucial goods and services across the economy.

Moreover, the rule provides a preposterously low estimate of the cost of regulatory compliance indicated through reading and interpreting the rule, and completely fails—as required—to provide an analysis of the economic impact of the proposed rule on small businesses.

### **The Department's Rational for Rescinding 2021 Independent Contractor Rule is, At Best, Theoretical**

The proposed rule includes two actions—rescinding the 2021 IC rule and adding a new part 795—that the department intends to operate independently of one another:

”[The 2021 IC rule] rescission would operate independently of the new content in any new final rule, as the Department intends it to be severable from the substantive proposal

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<sup>4</sup> See, e.g., *United States v. Silk*, 331 U.S. 704 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *Bartels v. Birmingham*, 332 U.S. 126 (1947); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748 (9th Cir. 1979); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308 (5th Cir. 1976); *Saleem v. Corporate Transp. Group, Ltd.*, 854 F.3d 131 (2d Cir. 2017); *Karlson v. Action Process Serv. & Private Investigation, LLC*, 860 F.3d 1089. (8th Cir. 2017).

<sup>5</sup> And, of course, the FLSA definitions of employer and employee are only one among many. Different definitions apply for purposes of the Internal Revenue Code, the National Labor Relations Act, the Civil Rights Act and so forth. Congress needs to harmonize these various definitions. Still different definitions apply for purposes of various state statutes.

for adding a new part 795. For the reasons set forth in this NPRM, the Department believes that rescission of the 2021 IC Rule is appropriate, regardless of the new content proposed in this rulemaking.”<sup>6</sup>

The Department specifies that its rationale for rescinding the 2021 IC rule is that the “narrowing of certain economic realities factors”<sup>7</sup> introduced “confusion and uncertainty”<sup>8</sup> and created “risks to workers.”<sup>9</sup> The proposed rule states:

“The Department believes that retaining the 2021 IC Rule would have a confusing and disruptive effect on workers and businesses alike due to its departure from case law.”<sup>10</sup>

The Department also supposes theoretical confusion among the courts:

“It is not clear whether courts would adopt [the 2021 IC rule’s] analysis—a question that could take years of appellate litigation in different Federal circuits to sort out.”<sup>11</sup>

But the Department fails to point to any actual court, employer, or employee that has been confused. Such confusion is unlikely in light of the fact that courts will accord Chevron deference to a DOL rule interpreting the FLSA.<sup>12</sup> To the extent that the 2021 IC Rule and the case law conflict, the rule would govern.

The Department fails to provide any evidence of confusion among workers and employers. If such confusion existed, there would presumably be more enforcement actions alleging improper worker classification. Most importantly, the Department’s primary rationale for alleging that the 2021 IC rule added confusion is illogical. The Department states:

“For example, courts and regulated parties now must grapple with what it means in practice for two factors to be ‘core’ factors and entitled to greater weight. In addition, they must determine, in cases where the two “core” factors point to the same classification, how ‘substantial’ the likelihood is that they point toward the correct classification if the other factors point toward the other classification.”<sup>13</sup>

The courts do not have to grapple with what it means in practice to be “core” factors and entitled to greater weight because the 2021 IC rule specifies what “core” means and justifies the 2021 IC rule’s reasoning behind elevating those two factors, to “improve the certainty and predictability of the economic reality test by focusing the test on two core factors.”<sup>14</sup>

The 2021 IC rule explains that the two “core” factors “are the most probative of whether workers are economically dependent on someone else’s business or are in business for themselves.”<sup>15</sup> And

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<sup>6</sup> Proposing release at p. 62233.

<sup>7</sup> Proposing release at p. 62229.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Proposing release at p. 62229.

<sup>11</sup> Proposing release at p. 62229.

<sup>12</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and its progeny.

<sup>13</sup> Proposing release at p. 62229.

<sup>14</sup> *Federal Register*, Vol. 86, No. 4, January 7, 2021, at 1196.

<sup>15</sup> *Federal Register*, Vol. 86, No. 4, January 7, 2021, at 1171. ([2020-29274.pdf \(govinfo.gov\)](#))

it specifies that “substantial” means that if the two core factors align, the other factors should be considered secondary and “unlikely” to result in a different determination:

“If both proposed core factors point towards the same classification—whether employee or independent contractor—there is a substantial likelihood that is the individual’s correct classification. This is because it is quite unlikely for the other, less probative factors to outweigh the combined weight of the core factors. In other words, where the two core factors align, the bulk of the analysis is complete, and anyone who is assessing the classification may approach the remaining factors and circumstances with skepticism, as only in unusual cases would such considerations outweigh the combination of the two core factors.”<sup>16</sup>

The proposed rule claims that the 2021 IC rule’s alleged confusion and uncertainty stem from its “departure from case law,”<sup>17</sup> but the 2021 IC rule justified its elevation of the two core factors in case law, noting that the application of the 2021 IC rule would have resulted in the same determination in every single appellate decision since 1975:

“The NPRM presented a remarkably consistent trend based on the Department’s review of the results of appellate decisions since 1975 applying the economic reality test. Among those cases, the classification favored by the control factor aligned with the worker’s ultimate classification in all except a handful where the opportunity factor pointed in the opposite direction. And the classification favored by the opportunity factor aligned with the ultimate classification in every case. These two findings imply that whenever the control and opportunity factors both pointed to the same classification— whether employee or independent contractor—that was the court’s conclusion regarding the worker’s ultimate classification. In other words, the Department did not uncover a single court decision where the combined weight of the control and opportunity factors was outweighed by the other economic reality factors. In contrast, the classification supported by other economic reality factors was occasionally misaligned with the worker’s ultimate classification, particularly when the control factor, the opportunity factor, or both, favored a different classification.”<sup>18</sup>

Given this case law history, it is arbitrary and capricious for the Department to base its rescission of the 2021 IC rule on the assumption that the 2021 IC rule will add confusion and uncertainty, and lead to inconsistent court decisions when its application to prior case law would have resulted in the exact same determinations.

At the end of the day, it is simply impossible to imagine how the 2021 rule could have caused confusion. It relied on the same factors as present in existing case law, but whereas existing case law failed to prioritize among the factors, the 2021 rule gave some prioritization guidance. Even if one incorrectly believes that this guidance is somewhat confusing on account of its novelty, it cannot be less clear than *no* prioritization guidance.

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<sup>16</sup> Proposing release at p. 62229.

<sup>17</sup> Proposing release at p. 62229.

<sup>18</sup> *Federal Register*, Vol. 86, No. 4, January 7, 2021, at 1196-97.

## **The Proposed Rule is Unequivocally More Confusing and More Ambiguous Than Either the 2021 IC Rule or the Pre-2021 IC Rule Definitions**

While the 2021 rule is consistent with the outcomes of prior case law and therefore does not cause confusion by departing from case law, it represents a serious improvement over the case law from the perspective of workers and employers. That is because, before the 2021 rule, the central importance of the control and opportunity factors was evident to lawyers familiar with the case law but not to the employers (many of them small and without sophisticated legal counsel) and workers themselves. The 2021 rule gave millions of workers and employers access to sound guidance that previously was reserved for sophisticated employers able to retain specialized employment counsel. The proposal would backtrack on that important development.

The Department's claims that both the rescission of the 2021 IC rule and the addition of the new part 795 are clearer and "will provide more consistent guidance to employers" along with "useful guidance to workers" are illogical

In general, the pre-2021 IC rule was based on an unweighted or equally-weighted assessment of five factors. The 2021 IC rule is based on a weighted assessment of five factors, with two factors elevated to core status and with additional specificity provided within the five factors. The proposed rule is based on an unweighted assessment of six factors and includes more expansive and unpredictable considerations within the six factors.

A simple permutation tree provides a helpful, top-level assessment of the level of specificity and clarity of the proposed rule compared to the 2021 IC rule and compared to the pre-2021 IC rule. A permutation tree considers the various outcomes of determinations that could stem from the factors considered. For example, if A represents employee status and B represents independent contractor status, a test that considers two factors will have four potential combinations: AA, AB, BA, and BB. Each additional factor adds an exponential number of possible outcomes.

Assuming for initial simplification that all factors are equally weighted and that the determination of each factor is independent of the determination any other factor, the pre-2021 IC rule generally allowed for 32 different combinations of determinations,<sup>19</sup> with either employee or independent contractor being the indication in a majority of the factors.

The 2021 IC rule reduces the possible combinations of determinations to 18 because no further determination is needed when the two core factors align (all possible combinations beginning with AA or BB need no further permutations). In all 18 cases, the determination is clear by way of one determination being indicated in a majority of the factors.

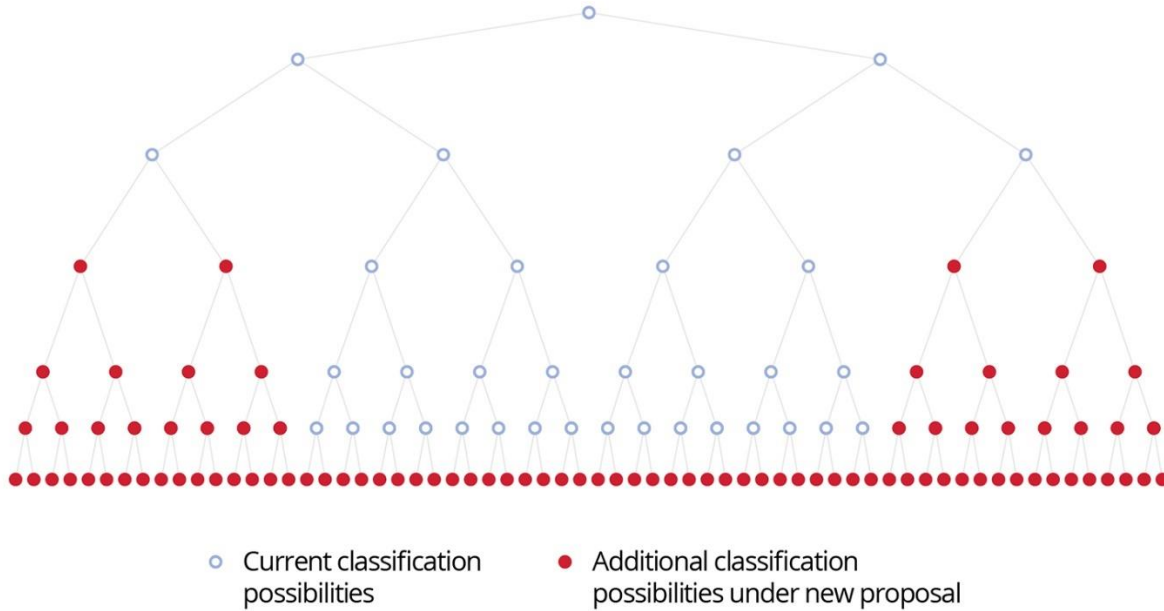
The proposed rule, which adds a sixth factor and has no weighting of the factors, results in 64 combinations of determinations. Half of those instances will be unclear determinations, with three of the factors indicating employee status and three indicating independent contractor status.

Figure 1 below shows the current realm of possible worker classification in blue circles and the additional realm of possible classifications added by the proposed rule in red circles.

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<sup>19</sup> Most courts considered five factors, though some considered an additional sixth factor.

**Fig. 1:** Proposed rule on employer or independent contractor classification under the Fair Labor Standards Act exponentially expands realm of possible worker classifications



This basic analysis does not factor in the proposed rule’s addition of factors-within-factors, such as adding non-exercised control to the control factor and adding initiative to the skills factor. If, for example, those two considerations were considered as separate factors, the possible outcomes would expand to 256.

Moreover, this description and graphic depiction of possible outcomes does not factor in the proposed rule’s elimination of any guidance on weights, specifying, “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.”<sup>20</sup>

The impact of this is to vastly expand the realm of possible and defensible classifications. Under the 2021 IC rule, the requirement that the two core factors must have greater weighting than the other three provides a possible range of weighting between 21 percent and 50 percent for each of the two core factors. Considering that the three remaining factors will almost certainly sum to 49 percent or less, each of their potential weights can range from 0 to 16 2/3 percent if the three factors are given equal weight, or from zero to 49 percent if one or more of the three non-core factors are given low or no weight.

Compared to these limited-range weights, the proposed rule says that no one factor is dispositive (thus no factor can exceed 50 percent) and the particular weights will depend on the circumstance. Applying the permutation tree above, 50 possible weights (assuming weights must

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<sup>20</sup> Proposing release at p. 62274.

equal whole numbers and not fractions of whole numbers) across 6 factors results in 15.6 *billion* possible combinations of weights that employers or courts could apply within the proposed rule. And this, of course, ignores the subcategorization inherent in the description of the six factors.

The proposed rule vastly expands the possible interpretations and outcomes of workers' status. Expanding the rules factors and leaving decisions on which factors should carry the most weight up to employers and courts will almost certainly lead to differing decisions—between employers and courts, and also from one court to another—that harm workers and employers alike.

### **Rule Creates Inconsistency Within Workplaces and Across Employers**

The elimination of weighting combined with vague and sometimes unknown factors creates a situation in which the rule would result in two workers performing identical jobs for the same employer to be classified differently. The rule provides an example that a graphic designer who has purchased their own equipment, rented office space, and invested in marketing their services would be classified as an independent contractor based on the worker's level of investment, but it is unclear if all of those factors—the equipment, office space, and marketing—are required. If the company contracted with an individual who provided the exact same services while working from home and without having spent money marketing their services—factors that are typically unknown to the employer—the proposed rule would likely determine that they lacked investment and thus must be classified as an employee.

### **Rule's Addition of Initiative to Skills and Initiative Renders Skills Factor Irrelevant**

The proposed rule adds “initiative” to the factor of “skills and initiative,” reasoning that:

“Considering only whether the worker has technical or specialized skills is not necessarily probative of the ultimate inquiry of economic dependence or independence because, as explained above, employees and independent contractors often both have specialized skills, and thus evaluating those skills is not particularly distinguishing.”<sup>21</sup>

After relegating the skills factor to relative unimportance, the Department elevates the initiative factor, specifying that:

“consideration of the worker's initiative in connection with any specialized skills better assesses the economic realities of the work relationship and is more helpful in distinguishing between employees and independent contractors.”<sup>22</sup>

And the proposed rule provides further directive:

“When evaluating the skill factor, the focus should be whether the worker uses any specialized skills to exercise business-like initiative.”<sup>23</sup>

This could mean that an individual who possesses highly specialized skills, but does not use business-like initiatives such as marketing, and the development of interpersonal relationships,

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<sup>21</sup> Proposing release at p. 62256.

<sup>22</sup> Proposing release at p. 62256.

<sup>23</sup> Proposing release at p. 62257.

may not be able to be an independent contractor. The proposed rule provides an example to demonstrate that being a “highly skilled welder” is not sufficient to meet the skill and initiative test. Rather, the welder would have to “[use] these skills for marketing purposes, to generate new business, and to obtain work from multiple companies.”<sup>24</sup>

In today’s digital world, it can be easy for skilled individuals to obtain contract-based work using little or no initiative. For example, medical professionals may serve as “relief” doctors, nurses, or veterinarians and they exercise highly-specialized skills, but if they obtained the work simply by responding in the affirmative when asked if their information could be included in a directory of relief providers, this would likely not constitute “business-like initiative.” Moreover, medical relief providers—in stepping in for a day, a week, or a month—would likely not be considered an employee under the 2021 IC rule because it specifies that workers must be “part of an integrated unit of production” of the employer’s business. By nature, individuals who are stepping in to temporarily perform a job are not part of an integrated unit of production. The proposed rule says that individuals are employees if “the work performed is an integral part of the employer’s business.”

### **The Rule Could Make the Federal Government the Employer of Millions of Federal Contract Workers**

The FLSA, with certain specified exceptions, applies to government employees.<sup>25</sup> The federal government has just over two million federal employees<sup>26</sup> and does business with an estimated 5 million federal contractors.<sup>27</sup> The sheer magnitude of the number of federal contractors confirms that many of these individuals are performing work that “is an integral part of” the federal government’s operations. Moreover, the federal government exercises both direct and reserved control over these federal contractors, including actions such as President Biden’s Executive Order 14026, which established a minimum wage for all workers performing work on or in connection with covered federal contracts<sup>28</sup> and Executive order 14042 which imposed a COVID-19 vaccine mandate without a testing option on certain federal contractors and subcontractors.

Converting all federal contractors to federal employees would be a non-starter, but losing millions of federal contractors would jeopardize essential government functions, most especially national security. The Department’s failure to consider the impact of its proposed rule on the federal government’s operations is an inexcusable omission.

### **The Proposed Rule Will Be to the Detriment of Workers, Businesses, and Consumers Alike**

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<sup>24</sup> Proposing release at p. 62257.

<sup>25</sup> 29 U.S. Code § 203(e).

<sup>26</sup> Federal Workforce Data, Office of Personnel Management <https://www.fedscope.opm.gov/employment.asp>.

<sup>27</sup> Paul C. Light, “The true size of government is nearing a record high,” October 7, 2020

<https://www.brookings.edu/blog/fixgov/2020/10/07/the-true-size-of-government-is-nearing-a-record-high/>

<sup>28</sup> Executive Order 14026, “Increasing the Minimum Wage for Federal Contractors,” April 27, 2021, *Federal Register*, Vol. 86, No. 82, April 30, 2021 <https://www.federalregister.gov/documents/2021/04/30/2021-09263/increasing-the-minimum-wage-for-federal-contractors>.



Workers, businesses, and consumers increasingly benefit from independent contractor work, and the modern economy is increasingly reliant on it. Limiting independent work—as this rule would unequivocally accomplish—would hurt (1) workers, (2) businesses, and (3) consumers.

### **1. Independent Contractor Work is On the Rise Because Workers Desire It.**

Independent contracting—which includes labels such as contracting, freelancing, gig-work, and self-employment—has become an increasingly popular form of primary work and a new opportunity to earn additional or “on the side” income. Last year, 59 million Americans, spanning all ages and income levels, participated in independent or freelance work.<sup>29</sup>

During the pandemic, independent contracting was a lifeline to many, with 12 percent of the entire workforce starting independent work in 2020. Independent work is growing because people want it. They report greater work-life balance, less stress, better health, and the same or higher incomes.<sup>30</sup>

While flexibility is a difficult job feature to quantify, a study of over 1 million Uber drivers estimated workers’ willingness to provide labor based on varying levels of job flexibility.<sup>31</sup> Plausible estimates are that workers value Uber’s on-demand platform at amounts equal to between 38 percent and 50 percent of their earnings, or \$150 per week on average.<sup>32</sup> According to the Uber study, the average Uber driver works 16.1 hours a week with the fully-flexible platform, would work 7.7 hours if they had to commit to a daily schedule, would work only 2.9 hours if they had to commit to a weekly schedule, and would not work at all if they had to commit to a monthly schedule typical of taxicab drivers that perform the same job as Uber drivers but are classified as employees.

The unwillingness or inability of many workers to participate in the labor market at all without independent contracting work extends far beyond the Uber platform. More than half of freelancers—32 million workers—say they are unable to work for a traditional employer.<sup>33</sup> The option to be one’s own boss, to choose what work to do, and what hours to do it is extremely valuable, particularly to women, caregivers, parents, and older Americans.

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<sup>29</sup> Adam Ozimek, “Freelance Forward Economists Report,” commissioned by Upwork, 2021, <https://www.upwork.com/research/freelance-forward-2021#:~:text=Upwork%E2%80%99s%202021%20Freelance%20Forward%20survey%20confirms%20the%20finding,the%20eight%20years%20that%20we%20have%20been%20surveying.?msclkid=af38e75aa94311eca0aa2072597d624b>.

<sup>30</sup> FreshBooks, “Women in the Independent Workforce—2nd Annual Report, 2019,” <https://www.freshbooks.com/press/data-research/women-in-the-workforce-2019>.

<sup>31</sup> M. Keith Chen, Judith A. Chevalier, Peter E. Rossi, and Emily Oehlsen, “The Value of Flexible Work: Evidence from Uber Drivers,” National Bureau of Economic Research Working Paper 23296, March 2017, <http://www.nber.org/papers/w23296>

<sup>32</sup> Rachel Greszler, “The Value of Flexible Work Is Higher Than You May Think,” Heritage Foundation Backgrounder No. 3246, September 15, 2017 <https://www.heritage.org/sites/default/files/2017-09/BG3246.pdf>.

<sup>33</sup> Adam Ozimek, “Freelance Forward Economists Report,” commissioned by Upwork, 2021, *supra*.

Independent contractors overwhelmingly prefer their status as independent workers and do not want to give up the flexibility and autonomy that comes with being an independent contractor. According to various data collections and surveys:

- 79 percent of independent contractors prefer their independent status while only 9 percent would prefer to be traditional employees.<sup>34</sup>
- Most independent contractors that believe they make the same (18 percent) or more money (44 percent) freelancing than with a traditional job. This percentage saying the made more increased significantly with the establishment of the 2021 IC rule, rising from 39 percent in 2020 to 44 percent in 2021.<sup>35</sup>
- Subsequent to the finalization of the 2021 IC rule, the percentage of independent worker providing skilled services increased from 50 percent to 53 percent. This is the opposite of what the proposed rule cautions would happen—that the number of unskilled workers classified as independent contractors would rise—as a result of the 2021 IC rule’s de-emphasis of the skills factor to one of the three non-core factors.
- More than half of independent workers say that no amount of money would cause them to go back to traditional employment.<sup>36</sup>

According to FreshBooks’ Women in the Independent Workforce Annual Report, women’s share of self-employed work and small business ownership jumped from about 25 percent in 2012 to 34 percent in 2019.<sup>37</sup> The Census Bureau reports 1.1 million female-owned businesses and another 10.6 million self-employed.<sup>38</sup> An additional 24 million women perform independent contract work. These independent workers are not just Uber drivers and part-time Instacart shoppers. These are yoga instructors, language interpreters, artists and musicians, product consultants, journalists and editors, and Etsy shop owners.

The overwhelming majority of women who moved from traditional employment to independent work say they have a better work-life balance (73 percent) and earn as much or more as when they were formally employed (68 percent). Moreover, most say that the greater flexibility and autonomy has resulted in less stress (59 percent) and better health (57 percent).<sup>39</sup>

The proposed rule mentions a study that found that occupations with the highest rates of misclassification were disproportionately held by women and/or workers of color, and states that, “The misclassification of these workers as independent contractors deprives them of the minimum

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<sup>34</sup> BLS, “Contingent and Alternative Employment Arrangements Summary,” Economic News Release, June 7, 2018, [https://www.bls.gov/news.release/conemp.nr0.htm#:~:text=Independent%20contractors%20overwhelmingly%20prefer%20their,79%20percent\)%20to%20traditional%20jobs](https://www.bls.gov/news.release/conemp.nr0.htm#:~:text=Independent%20contractors%20overwhelmingly%20prefer%20their,79%20percent)%20to%20traditional%20jobs).

<sup>35</sup> Adam Ozimek, “Freelance Forward Economists Report,” commissioned by Upwork, 2021, *supra*.

<sup>36</sup> *Ibid*.

<sup>37</sup> FreshBooks, “Women in the Independent Workforce—2nd Annual Report, 2019,” <https://www.freshbooks.com/press/data-research/women-in-the-workforce-2019>.

<sup>38</sup> Andrew W. Haite, “Number of Women-Owned Employer Firms Increased 0.6% From 2017 to 2018,” U.S. Census Bureau, March 29, 2021, <https://www.census.gov/library/stories/2021/03/women-business-ownership-in-america-on-rise.html>.

<sup>39</sup> FreshBooks, “Women in the Independent Workforce—2nd Annual Report, 2019,” *supra*.

wage and overtime protections that could alleviate some of this inequality.”<sup>40</sup> The study that the Department cites to justify that claim is from 2017, which was four years before the 2021 IC rule went into effect. The Department provides no evidence of disproportionate misclassification of any group of workers since the 2021 IC rule was enacted.

The effect of the proposed rule will be to make it more difficult for employers to do business with independent contractors. Some of the proposed rule’s changes function like parts of California’s ABC test, which has wreaked havoc on independent contractors in California. For example, individuals such as graphic designers and videographers have lost regular business contracts because companies have been told they cannot do business with those individuals in California. Moreover, individuals like Monica Wyman have struggled to keep their businesses afloat. Monica was a stay-at-home mom who started her own floral business in 2009. She hired friends—fellow moms who wanted flexible work—as contractors to help out with events like weekend weddings. After California’s AB5 law passed that created a new and expansive definition of who is an employee, Monica was unable to hire contract help, including people to fill in for her when she was battling cancer. Monica said, “I don’t even have words to explain how bad this has been for our family...I’m at this crossroads where I’m thinking I’m going to have to dissolve my business and close my doors.”<sup>41</sup>

By making it more difficult to do business with independent contractors—including uncertainty, confusion, and increased legal liabilities and litigation risk—the proposed rule would deprive many workers of workers of their current incomes and limit or eliminate other work opportunities (see cost estimates section). These losses in income and work opportunities that the proposed rule fails to consider would almost certainly exceed any potential value of FLSA minimum wage and overtime protections directly resulting from the rule.

The proposal fails to acknowledge the real losses that workers would experience under the regulation it offers, let alone show that those losses are somehow justified by putative gains. For that reason, the proposal if finalized would be arbitrary and capricious.

## **2. Independent Contracting Helps Businesses Expand their Capabilities and Is Crucial to Helping Small Businesses Grow and Compete.**

Independent contractors are utilized by businesses of all sizes to benefit from specialized skills that contractors provide, to expand, to meet unexpected demand, and to respond to changing circumstances. A 2021 survey by Gusto, a provider of payroll and HR services used by more than 200,000 small- and medium-sized businesses, found that 62 percent of businesses said that their company’s success was dependent on independent contractors or that it would be much harder to have a profitable business without independent contractors, and 90 percent of businesses said

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<sup>40</sup> Proposing release at 62230.

<sup>41</sup> Kelsey Bolar, “Uber, Lyft Escape California’s Crackdown—but Law Will Continue to Devastate Gig Economy,” National Review, November 8, 2020, <https://www.nationalreview.com/2020/11/uber-lyft-escape-californias-crackdown-but-law-will-continue-to-devastate-gig-economy/>.

they plan to maintain or increase their use of contractors in the future.<sup>42</sup> Businesses' primary reason for using independent contractors was the flexibility they provide.<sup>43</sup>

The COVID-19 pandemic is an example of how independent contractors—such as IT professionals, app-based delivery services, website and app developers, and installers of workplace safety infrastructure—helped businesses adapt and allowed many companies that might otherwise have failed to stay in business and even grow. Moreover, as companies across the U.S. have faced widespread labor shortages, the short-term use of independent contractors has helped businesses fill the gaps in ways that have helped keep supply chains moving, and even improved access to vital health care as hospitals have often contracted with medical professionals to temporarily fill open positions.

Independent contracting is particularly important for helping start-ups succeed and for helping small businesses compete with larger companies that have the scale to employ specialized workers in-house. Small businesses with four or fewer employees use 6.7 contractors on average.<sup>44</sup> The Gusto survey mentioned above also found that small businesses with nine or fewer employees experienced the greatest expansion in contractor utilization since the pandemic, with their rates of contractor use at an all-time high.<sup>45</sup>

The proposed rule will make it more difficult for companies to do business with independent contractors, which will make it harder for companies to deal with changing business conditions and surges in demand, will limit companies' ability to develop new and improved business processes, will make it harder to expand into new markets, and will increase the chances of failure for start ups and small businesses.

### **3. Consumers of All Ages and Income Levels Benefit From Independent Contracting.**

The discussion regarding the definition of employee and independent contractor focuses on workers and employers, but its effects span across the entire economy by way of impacting the availability and the cost of goods and services. Historically, only very wealthy individuals could afford to pay for services such as grocery delivery or personal, on-demand driving. Today, ridesharing apps have made it possible for individuals who cannot afford a car to nevertheless have access to personal transportation.

During the pandemic and beyond, delivery apps made it possible for individuals with health risks and concerns to have prescriptions and groceries delivered to their doorstep. One individual to whom one of the undersigned, Rachel Greszler spoke, works exclusively on a gig platform

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<sup>42</sup> Liz Wilke, "Contractor Hiring Surges During the Pandemic. What Does It Mean for the Business Workforce?," Gusto, December 15, 2021, <https://gusto.com/company-news/contractor-hiring-surges-during-the-pandemic-what-does-it-mean-for-the-business-workforce>.

<sup>43</sup> Ibid.

<sup>44</sup> "New Paychex Data Shows Independent Contractor Growth Outpaces Employee Hiring in Small Businesses," PR Newswire, January 9, 2019, <https://www.prnewswire.com/news-releases/new-paychex-data-shows-independent-contractor-growth-outpaces-employee-hiring-in-small-businesses-300775712.html>.

<sup>45</sup> Liz Wilke, "Contractor Hiring Surges During the Pandemic. What Does It Mean for the Business Workforce?"

delivery goods. He explained that a lot of the deliveries he makes are to low-income and section 8 housing areas where he frequently delivers groceries and diapers.

The spillover effects of the independent-contractor-produced products and services for consumers are significant. For example, a 2021 study using proprietary data from Uber concluded that:

“ridesharing has decreased US alcohol-related traffic fatalities by 6.1% and reduced total US traffic fatalities by 4.0%. Based on conventional estimates of the value of statistical life the annual life-saving benefits range from \$2.3 to \$5.4 billion.”<sup>46</sup>

The economic analysis in the proposing release entirely fails to consider the impact of the proposed rule on persons other than employers, employees or contractors. The adverse impact on consumers and others is likely to amount to many tens of billions of dollars.

### **Proposed Rule Fails to Provide Sufficient Costs Estimates and Likely Violates Multiple Required Cost Considerations**

The proposed rule states that OIRA has determined the proposed rule to be a “significant regulatory action” that is economically significant. The rule is subject to multiple requirements, including a reasoned determination that the rules benefits justify its costs, that it is tailored to impose the least burden on society, and that the agency has considered alternative approaches and selected those that maximize net benefits.

**Department Vastly Understates Rule Familiarization Costs.** The Department assumes that it will take a “Compensation, Benefits, and Job Analysis Specialist” 30 minutes on average to review the rule, with the reviewer’s effective hourly rate equal to \$49.94. The Department estimates that there are 8,049,229 establishments and governments, and that 34.7 percent of them engage with independent contractors and will review the rule. Thus, the proposed rule states, “Total regulatory familiarization costs to businesses in Year 1 are estimated to be \$70.3 million ( $\$49.94 \times 0.5 \text{ hour} \times 2,817,230$ ) in 2021 dollars.”

The Department assumes that regulatory familiarization costs for individuals will include 22.1 million independent contractors each spending 15 minutes to review the rule. With their time valued at \$21.35 per hour, the proposed rule asserts that “regulatory familiarization costs to independent contractors in Year 1 are estimated to be \$118 million ( $\$21.35 \times 0.25 \text{ hour} \times 22.1 \text{ million}$ )” and estimates that total one-time regulatory familiarization costs for establishments and contractors equal \$188.3 million.

This is a massive understatement. True regulatory familiarization costs could easily be in the billions of dollars. For starters, no compensation specialist, attorney, or other individual reviewing the rule on behalf of a business establishment will be able to read the rule and the proposing release, compare it to existing rules, consider the implications for the business and communicate to necessary individuals within the company and with whom the company contracts within 30 minutes.

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<sup>46</sup> Michael L. Anderson and Lucas W. Davis, "Uber and Alcohol-Related Traffic Fatalities," NBER Working Paper 29071, July 2021 [https://www.nber.org/system/files/working\\_papers/w29071/w29071.pdf](https://www.nber.org/system/files/working_papers/w29071/w29071.pdf).

The proposing release itself is 57 pages long and averages about 1,000 words per page. Even individuals with very high rates of reading and comprehension (400 words per minute) will take 142.5 minutes to read just the proposing rule. Assuming the department's other estimates for the number of establishments and the average hourly compensation (which is vastly understated for the types of professionals that will be needed to read and comprehend the rule), reading the proposing rule alone would cost at least \$334 million ( $\$49.94 \times 2.375 \text{ hour} \times 2,817,230$ ).

Moreover, individualized assessments will be required for each contractor and some employees, adding millions of hours in employers' time. Ergo, mere familiarization is just the beginning of the costs that will be incurred. Similarly, no individual contractors will be able to read the rule and proposing release, compare it to existing rules, and consider the implications of the rule for their own actions within 15 minutes.

The Department's estimated costs of regulatory familiarization for independent contractors are even more understated. The Department asserts that there are only 22.1 million independent contractors in the U.S., but acknowledges the recent growth in independent contracting and states that, "It is likely that this figure is still an underestimate of the true independent contractor pool."<sup>47</sup>

The Department claims to have conducted an inconclusive search for better data:

"The Department conducted a search for more recent data to indicate any trends in the number of independent contractors since 2017. The findings are inconclusive but generally do not indicate an increase."

Incongruously, the Department then cites more recent data indicating an increase but inappropriately ignores the increase for purposes of its calculations.

"the 2021 report shows a large increase [in the number of independent contractors] from 2020, enough that the number of independent workers in 2021 is larger than the 2017 number. However, this increase occurs only in the 'occasional independent' workers category, described as those who work part-time and regularly, but without set hours. Comparing the number of part-time and full-time independent workers yields similar values in 2017 and 2021, so the Department believes that no adjustments are needed to the 2017 estimate of 22.1 million independent contractors."

The rule does not exempt any subset of independent contractors, such as those who are "occasional independent" or "part-time," so it should include the entire universe of independent contractors in the U.S. Contrary to the rule's assertion that the data "do not indicate an increase," in independent contracting, multiple surveys suggest that the true number of independent contractors is two- to three times what the Department includes in its estimates.

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<sup>47</sup> See proposing release at p. 62262.

The Freelancing in America 2021 report estimates that 59 million Americans participated in independent contract or freelance work in 2021.<sup>48</sup> The McKinsey & Company’s spring 2022 American Opportunity Survey found that 58 million Americans report that they perform independent work.<sup>49</sup> A Credit Summit report estimated that 70.4 million Americans participated in independent contracting or freelance work in 2022.<sup>50</sup>

Taking the lower of those two estimates of 59 million independent contractors, generously assuming that they can all read and comprehend at very high rates of 400 words per minute and review the proposing release in 142.5 minutes (instead of the Department’s assumption of 15 minutes), and applying the Department’s average hourly compensation estimates, the regulatory familiarization costs for independent contractors will equal \$3.0 billion ( $\$21.35 \times 2.375 \text{ hour} \times 59.0 \text{ million}$ ), which is 25 times the Department’s estimate of \$118 million.

In total, one component of the costs of the proposed rule—reading the proposing rule documents—will likely exceed \$3 billion, compared to the Department’s estimated \$188.3 million. The Department’s neglectfully understated familiarization costs fail to provide an adequate analysis of whether the rule provides a reasoned determination that its benefits exceed its costs.

**Department Neglects to Include Many Important Cost Impacts.** The only cost that the Department includes in its assessment of the proposed rule are the regulatory familiarization costs. Yet, the actual costs will include eight major factors (1) familiarization of establishments and individual contractors with the rule; (2) the cost of individualized assessment of the economic relationship with each contractor; (3) renegotiation or cancellation of existing contracts (including lost services and lost incomes); (4) the costs of conversion for some independent contractors into employees; (5) the cost of dealing with labor unions and elections (particularly among large gig-economy establishments,<sup>51</sup> (6) the cost of enforcement actions; and (7) the costs borne by workers and those engaging them of reduced flexibility and reduced income; and (8) the costs borne by consumers and the broader public in the form of higher prices and reduced availability of goods and services. Items (7) and (8) are discussed briefly above.

Contracts throughout the economy will have to be renegotiated because employers will not want to do business with independent contractors if there is a chance they will be subject to a misclassification lawsuit or enforcement action.

Under the proposed rule, businesses will likely convert some independent contractors into employees, but that includes costs for the employer and worker, and has potential government budget implications. For example, the proposed rule says that if employers choose to provide

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<sup>48</sup> Adam Ozimek, “Freelance Forward Economists Report,” commissioned by Upwork, 2021.

<sup>49</sup> McKinsey & Company, “Freelance, Side Hustles, and Gigs; Many More Americans Have Become Independent Workers,” August 23, 2022, <https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/future-of-america/freelance-side-hustles-and-gigs-many-more-americans-have-become-independent-workers>.

<sup>50</sup> Credit Summit, “What You Need to Know About Gig Work: Key Statistics, Demographics & Facts,” Gig Economy Statistics, Demographics & Facts, August 2022, [https://mycreditsummit.com/gig-economy-statistics/#\\_How\\_Much\\_Do\\_Gig\\_Workers\\_Make\\_](https://mycreditsummit.com/gig-economy-statistics/#_How_Much_Do_Gig_Workers_Make_).

employee benefits (something that is not required under the FLSA or the proposed rule) there will be potential compensation gains and wage losses:

“the value of these benefits could average more than \$15,000 annually for full-time independent contractors and almost \$6,000 annually for part-time independent contractors. This example transfer estimate could be reduced if there is a downward adjustment in the worker’s wage rate to offset a portion of the employer’s cost associated with these new benefits.”<sup>52</sup>

Regarding government tax revenues, the proposed rule says:

“To the extent workers were incorrectly classified due to misapplication of the 2021 IC Rule, that could lead to reduced tax revenues.”<sup>53</sup>

The Department only considers that the proposed rule could increase tax revenues and does not consider how it could decrease them. For example, the scenario described above, in which a worker receives more in benefits and less in wages would result in a loss in tax revenues to the federal government because benefits such as health insurance and retirement contributions (which the proposed rule assumes will increase) are either not taxed (health and other insurances) or tax-deferred (qualified retirement accounts) but wages (which the proposed rule assumes will decrease) are taxed. More of something that is not taxed and less of something that is taxed will lead to lower tax revenues.

The rule’s inclusion of average benefits shows that it is possible to quantify potential tax reductions, but the Department neglected to do so. If, in the example provided by the Department, a worker who was reclassified as an employee as a result of the proposed rule were to receive \$10,000 in health insurance (exempt from both income and FICA taxes) and \$5,000 in retirement contributions (exempt from income taxes until distributions are made far in the future and then usually taxed at a lower tax rate), and their employer were to reduce their wages by \$12,000 to partially offset the \$15,000 increase in benefits, FICA tax revenues would decline by \$1,488,<sup>54</sup> and federal Medicare payroll tax revenues would decline by \$348.<sup>55</sup> If this reclassification were to happen for 5 million workers, that would cause a \$7.47 billion decline in FICA, or Social Security and Medicare revenues would decline by \$1.74 billion<sup>56</sup> Assuming an average marginal federal income tax rate of 20 percent, the income tax revenue lost would be \$2,400 and the total income tax revenue lost would be approximately \$12 billion.<sup>57</sup> It is arbitrary and capricious for the Department to consider only the potential benefits and not the consequences of these—and many other—very significant and quantifiable costs of the proposed rule.

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<sup>52</sup> Proposing release at p. 62267.

<sup>53</sup> Proposing release at p. 62268.

<sup>54</sup> 12.4 percent of \$12,000.

<sup>55</sup> 2.9 percent of \$12,000.

<sup>56</sup> 5,000,000 times \$12,000 times 12.4 percent equals \$7.44 billion (FICA). 5,000,000 times \$12,000 times 2.9 percent equals \$1.74 billion (Medicare).

<sup>57</sup> 5,000,000 times \$12,000 times 20 percent equals \$12 billion.



The Department's failure to include these costs violate Executive Order 13563,<sup>58</sup> which requires agencies to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs."<sup>59</sup> The Department's assessment failed the "reasoned determination" test because it neglects to consider many costs and fails to provide an explanation for excluding such costs.

The Department similarly violates Executive Order 13563, which requires agencies to propose or adopt a regulation "that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits."<sup>60</sup>

The Department fails to consider many burdens that the rule would impose on society, including workers, businesses, and individual consumers.

The Department considers potential compensation gains associated with overtime pay for newly-classified employees, but does not consider two of the most direct impacts of the rule, which will be for many workers who are currently independent contractors to (1) lose their income opportunities or (2) be converted to employees subject to minimum wage and overtime regulations.

First, as the previously cited study of Uber drivers found, the median Uber driver would not drive at all if they were subject to a taxicab schedule typical of employees.<sup>61</sup> The roughly 32 million independent contractors who say they are unable to work for a traditional employer because of their own health conditions or their role as caregivers of children or family members are among those who would likely drop out of the labor force entirely if independent contracting were not an option. If just 20 percent of these individuals lose the ability to work because the proposed rule's change in worker classification, that would cause a 6.4 million decline in the labor force. This would be especially problematic now as the labor force is already about 3 million workers lower than the pre-pandemic level.<sup>62</sup> A decline in labor force participation would further exacerbate current labor shortages that have been contributing to the slowdown in economic activity.

Second, independent workers who are reclassified as employees will become subject to overtime regulations and minimum wage laws. Overtime regulations will cause employers to control workers' total hours and limit their flexibility. The Department fails to consider the lost incomes and the value of flexibility associated with those changes. As the study of Uber drivers found,

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<sup>58</sup> Which, in turn, by its terms supplements Executive Order 12866 of September 30, 1993.

<sup>59</sup> The White House, "Executive Order 13563—Improving Regulation and Regulatory Review," January 18, 2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

<sup>60</sup> Ibid.

<sup>61</sup> M. Keith Chen, Judith A. Chevalier, Peter E. Rossi, and Emily Oehlsen, "The Value of Flexible Work: Evidence from Uber Drivers."

<sup>62</sup> Rachel Greszler, "What Is Happening in This Unprecedented U.S. Labor Market: July 2022 Update," Heritage Foundation *Backgrounder* No. 3716, <https://www.heritage.org/sites/default/files/2022-07/BG3716.pdf>.

some workers value flexibility at 40 percent of their earnings, and people tend to work more hours—and thus earn higher incomes—when they are in control of their schedules.<sup>63</sup>

The proposed rule’s potential to significantly reduce labor force participation and total earnings could also lead to a decline in federal and state income tax revenues, a decline in Social Security and Medicare revenues; an increase in welfare costs; and an increase in federal deficits and debt.

The Department neglects to consider any negative societal implications of the reclassification of large numbers of workers. To the extent that the proposed rule drives up costs for employers and reduces the labor supply, it will increase prices and reduce the availability of goods and services for consumers.

**The Department’s Small Business analysis is preposterous.** The Small Business Regulatory Enforcement Fairness Act of 1996 requires agencies to assess the impact of a regulation on a range of small businesses entities.<sup>64</sup> The proposed rule provides almost no analysis except to state that it could cost \$24.97 for “a share” of 6.5 million small establishments or governments to familiarize themselves with the rule, and \$5.34 for “some” of the Department’s estimated 22.1 million independent contractors to familiarize themselves with the rule. Small businesses rely disproportionately on contractors as a way of expanding their capabilities and providing the same services as larger companies that are able to employ specialized workers such as graphic designers, media specialists, accountants, data analysts, and lawyers full-time in-house. The average small employer who has four or fewer employees relies on 6.7 contractors, on average, to run their business and compete with larger companies.<sup>65</sup> Restricting these small businesses’ ability to hire contractors would absolutely limit their capacity and could cause some to go out of business entirely. Thousands of individuals—many of whom were small business owners—submitted comments to the 2021 IC rule that provided evidence of the benefits of that rule—and thus the costs of rescinding it—for small businesses. The Department has access to those comments and has failed to include any potential impact on small businesses as a result of the proposed rule, other than a cost of \$5.34 to \$24.97 for regulatory familiarization.

The Department does not consider the cost by many businesses around the country of dealing with unionization efforts and union elections.<sup>66</sup> These costs are likely to run in the hundreds of millions of dollars. The Department does not consider the costs of individualized assessment, contract renegotiation or the impact on small firms that cannot afford to hire employees in lieu of contractors and will therefore be placed at a competitive disadvantage compared to larger firms.

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<sup>63</sup> M. Keith Chen, Judith A. Chevalier, Peter E. Rossi, and Emily Oehlsen, “The Value of Flexible Work: Evidence from Uber Drivers.”

<sup>64</sup> Public Law 104–121 (March 29, 1996)

<sup>65</sup> “New Paychex Data Shows Independent Contractor Growth Outpaces Employee Hiring in Small Businesses,” PR Newswire, January 9, 2019, <https://www.prnewswire.com/news-releases/new-paychex-data-shows-independent-contractor-growth-outpaces-employee-hiring-in-small-businesses-300775712.html>.

<sup>66</sup> The FLSA is not directly applicable to union elections and collective bargaining, but employers who desire consistency in their classification of workers across various federal laws will tend to classify workers the same for purposes of the FLSA and the National Labor Relations Act (NLRA). Businesses that are classified as employers of employees under the NLRA are subject to the potential costs of labor union organization, elections, and collective bargaining.

Lastly, the Department does not even consider the cost of dealing with Department enforcement efforts that will be launched if the proposed rule is promulgated.

There is no doubt that the Department's cost estimate is absurdly low, unreasoned, and constitutes a violation of its duty to make good faith estimates under the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act.

## **Conclusion**

The board should withdraw the proposed rule and leave in place the existing rule that has functioned well to respect workers desires for increasing flexibility and autonomy, to enable new income opportunities, to allow small businesses to grow and thrive, and to provide clarity to employers and employees alike.

The rule is premised on the contention that the 2021 IC Rule caused confusion in the courts but the proposing release acknowledges that there are no such cases. The proposed rule is premised on the contention that the 2021 IC Rule caused confusion among employers and employees but the proposing release provides no evidence of such confusion. Furthermore, a logical decision tree analysis demonstrates that the opposite is true. For these reasons the proposed rule is arbitrary and capricious.

The proposed rule violates Executive Orders 13563 and 12866, the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act. The economic analysis that is provided is demonstrably false, patently absurd, ignores massive costs and revenue effects and incorrect by two orders of magnitude. It contains no meaningful considerations of alternatives.

Respectfully submitted,

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<sup>67</sup>This comment is submitted in my personal capacity, with my title provided for informational purposes only.

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