



December 13, 2022

Secretary Martin J. Walsh
U.S. Department of Labor
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Docket RIN: 1235-AA43

**Re: Comment of Independent Women's Forum, Center for
Economic Opportunity, and Independent Women's Law Center
Seeking Withdrawal of Proposed Independent Contractor Rule**

Dear Secretary Walsh:

In 2021, after careful research and consideration, the Department of Labor adopted a rule designed to bring clarity to the chaos of the analyses federal courts and the Department had used to determine a worker's status as either an employee or an independent contractor under the Fair Labor Standards Act (FLSA or the Act). *See Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. 1168 (Jan. 7, 2021) (the 2021 Rule). The 2021 Rule provided welcome relief for the tens of millions of independent contractors who simply sought to ascertain their status under the law with confidence and maintain economic freedom working for themselves.

Now, almost two years later, the Department proposes to act as if the 2021 Rule never existed and seeks to enforce an entirely new set of regulations for determining employment under the Act. But the Department offers no credible justification for its about-face, glossing over the very real conflicts the courts of appeals have had in applying the so-called economic reality test, and pointing to no actual problems parties or courts have encountered with the 2021 Rule. The Department also ignores the uncertainty that will be caused by its new proposal and the significant costs the proposed rule will impose on companies and individuals who will be wrongly forced to change their way of work under ambiguous new requirements. The Department should withdraw the proposed rule and leave the 2021 Rule in place.

The Independent Women’s Forum, Center for Economic Opportunity, and Independent Women’s Law Center

The Center for Economic Opportunity (CEO) and Independent Women’s Law Center (IWLC) are both projects of Independent Women’s Forum (IWF), a non-profit, non-partisan 501(c)(3) organization founded by women to foster education and debate on legal, social, and economic policy issues. CEO’s goal is to advocate for common-sense policy solutions, grounded in data, to expand workplace choice, freedom, and opportunity and thereby improve the lives of women and workers. IWLC supports IWF’s mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for equal opportunity, individual liberty, and the rights of women and girls.

IWF, CEO, and IWLC strongly oppose the proposed rule and submit these comments to highlight specific problems with the notice of proposed rulemaking entitled “Employee or Independent Contractor Classification Under the Fair Labor Standards Act,” set forth at 87 Federal Register 62,218 (Oct. 13, 2022) (the proposed rule).

IWF, CEO, and IWLC believe the Department’s proposed rule is fundamentally flawed and should be withdrawn in its entirety for multiple reasons: (1) the Department fails to recognize that America is a nation of independent contractors and wrongly seeks to limit this beneficial working arrangement; (2) the proposed rule will create great uncertainty about employment status under the FLSA; and (3) the Department has ignored significant costs the proposed rule will impose on independent contractors and the companies that rely on them.

I. The Department Ignores That America Is a Nation of Independent Contractors.

To begin, the proposed rule is inherently flawed in its view of independent contracting as an arrangement used primarily to burden workers and deceive the government. *See, e.g.*, 87 Fed. Reg. at 62,225 (claiming that “the misclassification of employees as independent contractors remains one of the most serious problems facing workers, businesses, and the broader economy”). In fact, this is a nation of independent contractors, and tens of millions of Americans—especially women—cherish the autonomy and flexibility this form of work offers. Yet the proposed rule would reclassify millions of workers, depriving them of these advantages and potentially driving them out of the workforce entirely. The Department has provided no evidence that these drastic changes are necessary to prevent misclassification, or even that widespread misclassification actually occurred under the 2021 Rule. The proposed rule should be withdrawn.

A. American Workers—Particularly Women—Value Independent Contracting’s Flexibility and Improved Quality of Life.

America’s economy has long depended on independent contractors. In recent years, moreover—and particularly since the pandemic—this mode of work has increased sharply in popularity. Self-employment is at its highest level in over a decade.¹ In 2021, the number of independent contractors grew from 38.2 million to 51.1 million, a 34% increase from the year before.² This trend is likely to continue, as 56% of traditional workers say they are likely to freelance in the future,³ and 17% of traditional workers say they will “probably” or “definitely” move to be independent in the next two to three years.⁴ In addition, as the Bureau of Labor Statistics has reported, 79% of independent contractors prefer working that way, compared to only

¹ Adam Ozimek, *Freelance Forward Economist Report*, Upwork, <https://tinyurl.com/mrybzau3> (last visited Dec. 11, 2022).

² MBO Partners, *11th Annual State of Independence: The Great Realization* 7 (Dec. 2021), <https://tinyurl.com/3bkwk5fs> (last visited Dec. 12, 2022) [hereinafter “*The Great Realization*”].

³ Ozimek, *supra* note 1.

⁴ *The Great Realization*, *supra* note 2, at 21.

9% who would rather have a traditional job.⁵ In fact, nearly half of freelancers say that *no* amount of money would convince them to surrender the benefits of independent contracting for a traditional employment arrangement.⁶

The increased popularity of independent contracting can be explained by a host of benefits offered by independent work: flexibility, autonomy, the ability to work remotely, control over one's career, increased income, and improved well-being. Independent contractors overwhelmingly report that their independent status improves their quality of life: 87% say they are happier, and 78% say they are healthier, because of their independent work arrangement.⁷ Many independent contractors attribute their improved well-being to the flexibility of their work, stating that “[f]reelancing gives me flexibility to address my personal mental or physical health needs.”⁸ Indeed, a majority of freelancers state that due to personal circumstances such as health issues and childcare needs, they could not work for a traditional employer on an ongoing basis.⁹ Freelancing affords them the flexibility necessary to remain in the workforce.

That flexibility is particularly important to women. In a recent survey, 83% of working women said they “crave flexibility over stability,” and 92% said they are likely or very likely to prioritize flexibility over stability.¹⁰ For women who are

⁵ Ozimek, *supra* note 1.

⁶ *Id.*

⁷ *The Great Realization*, *supra* note 2, at 12.

⁸ Ozimek, *supra* note 1. Indeed, the autonomy provided by independent contracting was critical during the pandemic for many workers with health concerns: “Being my own boss, no one can force me right now into being in an unsafe situation. . . . No one can force me to go into court and possibly expose myself to COVID-19 without proper PPE. That’s a big issue right now with interpreters. As my own boss, I can say I don’t feel safe, and I don’t want to do it.” Independent Contractor Profile of Katerina Borghi, in *Chasing Work: Independent Contractors, Hear real stories of workers impacted by job-killing regulations*, Indep. Women’s Forum, <https://www.iwf.org/katerina-borghi/>; <https://www.iwf.org/chasing-work-independent-contractors/> (last visited Dec. 12, 2022).

⁹ Ozimek, *supra* note 1.

¹⁰ Jocelyn Gafner, *Flexibility Over Stability: Women and Gig Work During COVID-19*, INDEED (Mar. 8, 2022), <https://tinyurl.com/htdmhhh4> (last visited Dec. 12, 2022). Although some surveys may ask respondents to choose between flexibility and stability, it is important to note that independent contractors need not sacrifice one

caregivers, such flexibility is critical. As the pandemic revealed, when work is incompatible with caregiving responsibilities, women are frequently driven from the workforce altogether: In a single month in 2020, 865,000 women left the labor force, an exodus attributable to an “ongoing caregiving crisis.”¹¹ In contrast, approximately 74% of freelancers say that their work arrangement gives them the flexibility needed to be caregivers. The flexibility afforded by independent contracting is thus an essential element of women’s labor force participation. Without it, many women would not be able to participate in the economy at all.¹²

All of this leads to our first set of requests:

Please clarify whether the Department, in evaluating a worker’s status under the FLSA, will consider whether the worker intended to be an independent contractor and benefits from that classification.

for the other. When asked, two out of three independent contractors state that they are *more* secure than traditional workers. *The Great Realization*, *supra* note 2, at 13; see *Chasing Work: Independent Contractors, Hear real stories of workers impacted by job-killing regulations*, Indep. Women’s Forum, <https://www.iwf.org/chasing-work-independent-contractors/> (last visited Dec. 12, 2022) [hereinafter “*Chasing Work*”] (noting that independent contractors “have the freedom to develop a relationship with more than one company, which can create additional financial security, since they don’t have to rely entirely on any one entity for their income”).

¹¹ Courtney Connley, *More than 860,000 women dropped out of the labor force in September, according to new report*, CNBC (Oct. 2, 2020, 2:45 PM), <https://tinyurl.com/542t3wre>.

¹² See, e.g., Independent Contractor Profile of Marguerite Kusuhara, in *Chasing Work*, *supra* note 10, <https://www.iwf.org/chasing-work-marguerite-kusuhara/> (last visited Dec. 12, 2022) [hereinafter “McDaniel Profile”] (independent entertainment contractor explaining “I know I can’t work a regular job because I am a caregiver. [My husband is] legally blind and hard of hearing, had a stroke and even with all of that, I was able to balance work [as an independent contractor].”); Independent Contractor Profile of JoBeth McDaniel, in *Chasing Work*, *supra* note 10, <https://www.iwf.org/chasing-work-jobeth-mcdaniel/> (explaining that independent contracting gave freelance journalist “more time to stay with my dad when he was dying There’s not a W-2 job out there that would have allowed any of that”).

Please explain whether the Department has estimated the financial contributions independent contractors make annually to the national economy.

Please estimate the number of contractors who will leave the workforce if they are reclassified as traditional employees, and whether that will disproportionately affect women.

B. The Proposed Rule Is Not Necessary to Prevent Misclassification.

The Department also asserts that the proposed rule should be adopted because it “could help reduce the occurrence of misclassification.” 87 Fed. Reg. at 62,266. There is no question that misclassification, when it actually does occur, is wrong. But the Department offers no evidence that misclassification is truly a problem under the 2021 Rule. Indeed, the Department admits that “[t]he prevalence of misclassification of employees as independent contractors is unclear.” *Id.* And the study on which the Department relies to argue that there *might* be misclassification is from 2020. *Id.* at 62,266 & n.553. That was before the 2021 Rule was adopted and offered companies and workers clear guidance regarding their status under the law. *Id.* at 62,266. Furthermore, the Department overlooks that contractor status typically is not something that is mistakenly or nefariously forced on individuals but rather the type of work a significant majority of contractors choose due to its unique benefits, as discussed above.

What is more, the Department acknowledges that the proposed rule will itself result in at least some “workers who are properly classified as independent contractors” being misclassified “as employees.” 87 Fed. Reg. at 62,260 (explaining that the Department does not believe independent contractors will be misclassified only “for the most part”). Even if the Department is correct that some workers are currently being misclassified, the Department provides no basis for concluding that: (1) the alleged misclassification of employees under the 2021 Rule is greater than the misclassification of independent contractors that will admittedly occur under the proposed rule, or (2) that the alleged misclassification under the 2021 Rule was to the detriment of the workers involved.

Nor has the Department explained why an entirely new rule—and all its attendant switching costs—is necessary to address the allegedly occurring misclassification. To the extent the Department believes employers are deliberately

trying to cheat the system in classifying workers as contractors, rather than employees, it provides no reason to believe a new rule will prompt those dishonest employers to have a change of heart. Furthermore, the Department has investigative authority over any case in which misclassification is alleged to have occurred. That authority, guided by the 2021 Rule, should more than suffice to address whatever errors are being made.

All of this leads to our second set of requests:

Please clarify how many workers the Department estimates are miscategorized as independent contractors under the 2021 Rule and how the Department has reached that conclusion.

Please identify the number of workers the Department believes were intentionally misclassified by companies and the industries where the misclassifications occurred.

Please estimate the number of independent contractors the Department believes will be miscategorized as employees under the proposed rule and explain how the Department has reached that conclusion.

Please explain why the Department believes an entirely new rule is necessary to address misclassification and why the Department's investigative authority and the clarity of the 2021 Rule are not enough to address this issue.

II. The Proposed Rule Will Create Great Uncertainty Over Workers' Employment Status.

A second major deficiency of the proposed rule is its total failure to clarify the test for employment under the FLSA. Although the Department asserts that the proposed rule will "provide more consistent guidance to employers," 87 Fed. Reg. at 62,220, the proposed rule would in fact make the distinction between independent contractor and employee inscrutable.

A. The Proposed Rule Is Contrary to Precedent in at Least Six Circuits.

The Department claims that the 2021 Rule should be withdrawn because it “would have a confusing and disruptive effect on workers and businesses . . . due to its departure from [prior] case law.” 87 Fed. Reg. at 62,219. The Department insists that, “[g]iven the substantial uniformity among the circuit courts in the application of the economic reality test prior to the 2021 IC Rule, . . . rescinding the 2021 IC Rule would provide greater clarity than retaining” it. 87 Fed. Reg. at 62,232.

The Department is fundamentally mistaken, however, in its assertion that there was a “consistent” body of case law governing the economic reality test in the first place. 87 Fed. Reg. at 62,218–19, 62,226; *see id.* at 62,232. By the Department’s own admission in this rulemaking, courts applying the economic reality test under the FLSA have divided over:

- “[T]he number of factors considered,” *id.* at 62,219.
- “[H]ow the factors are framed,” *id.*
- Whether to “treat the worker’s opportunity for profit or loss and the worker’s investment as a single factor,” *id.* at 62,235.
- Whether to “expressly consider a sixth factor, whether the work is an integral part of the employer’s business,” *id.*
- Whether a “worker’s investment must be capital in nature for it to indicate independent contractor status,” *id.* at 62,241.
- Whether to “compare the worker’s investment in the work to the employer’s investment in its business,” *id.* at 62,242.
- Whether to consider the “exclusivity” of the working relationship “(or lack thereof) under the control factor rather than the permanence factor,” *id.* at 62,245.
- Whether “compliance with legal obligations or quality control may be relevant evidence of control,” *id.* at 62,247.
- Whether “scheduling control by the worker [is] indicative of an independent contractor relationship,” *id.* at 62,248.
- Whether to “consider[] the worker’s initiative when evaluating the skill factor,” *id.* at 62,256 n.473.

It should come as no surprise, therefore, that businesses and workers have repeatedly petitioned the Supreme Court to clarify the definition of employee under the FLSA.¹³ Although it may be broadly true that courts apply an “economic reality” test under that Act, any uniformity on this point is at such a high level of generality that it provides little concrete assistance to companies and workers who must determine their status based on the specific factors over which the courts have divided. Contrary to the Department’s claims, this is not an area of the law where the courts of appeals are in “substantial uniformity.” The Department’s proposed withdrawal of the 2021 Rule will not result in any sort of consistency under the law but rather return it to the chaos that reigned before the 2021 Rule was adopted and clarified the analysis.

The Department further defends its hasty rejection of the 2021 Rule on the ground that, “if left in place, it is not clear whether courts would adopt its analysis.” 87 Fed. Reg. at 62,229. But that objection is equally, if not more, applicable to the proposed rule. By the Department’s own admission, its new rule departs from decisions that have been issued by the Second, Fourth, Fifth, Sixth, Eleventh, and D.C. Circuits. *See, e.g.*, 87 Fed. Reg. at 62,235 (Second, Fifth, and D.C. Circuits); *id.* at 62,242 (Eleventh Circuit); *id.* at 62,256 n.473 (citing cases from Fourth and Sixth Circuits).

The Department does not explain why it believes those courts will adopt the proposed rule when the Department doubts whether courts will adopt allegedly new concepts from the 2021 Rule. In fact, parties have been operating under the 2021 Rule for almost two years now, and the Department has pointed to no case law suggesting the courts have rejected it or found it too confusing to apply. Nor has the Department explained how companies and workers in the Second, Fourth, Fifth, Sixth, Eleventh, and D.C. Circuits—almost half of the courts of appeals in this country—should analyze their working relationships under the admittedly conflicting demands of the proposed rule and governing precedent.

¹³ *See, e.g.*, Pet. for Writ of Cert., *Shin v. Uni-Caps, LLC*, 139 S. Ct. 125 (2018) (No. 17-1628) (mem.), 2018 WL 2688285; Pet. for Writ of Cert., *Freeman v. Key Largo Volunteer Fire & Rescue Dep’t, Inc.*, 571 U.S. 818 (2013) (No. 12-1231) (mem.), 2013 WL 1462046; Pet. for Writ of Cert., *Liberty Apparel Co. v. Ling*, 563 U.S. 975 (2011) (No. 10-1086) (mem.), 2011 WL 772376; Pet. for Writ of Cert., *Cornerstone Am. v. Hopkins*, 129 S. Ct. 1635 (2009) (No. 08-1014) (mem.), 2009 WL 344623.

All of this leads to our additional requests:

Please clarify how the Department can deem a body of case law with so many conflicting opinions to be “consistent.”

Please clarify whether the Department will subject parties to the analysis and requirements of the proposed rule when those parties operate in jurisdictions where that rule departs from circuit precedent.

Please explain why the Department believes its proposed rule will be immune to the uncertainty and litigation the Department claims justifies rejecting the 2021 Rule.

B. The Department’s Proposed Test Is Ambiguous and Difficult To Apply.

Even apart from its departure from precedent, the proposed rule fails to satisfy the Department’s purported goal of providing certainty for the businesses and workers that must apply it.

One key reason the 2021 Rule was welcomed by American companies and workers was because it provided clarity to the determination of who is an independent contractor and who is an employee. The 2021 Rule did so by focusing on two core factors of the economic reality test: (1) the nature and degree of control over the work; and (2) the worker’s opportunity for profit or loss. *See* 87 Fed. Reg. at 62,219 (describing 2021 Rule). By explaining and primarily relying on these two core factors, the 2021 Rule clarified the most important part of the economic reality test, giving businesses and workers the confidence to move forward in their economic relationships.

The proposed rule, in contrast, (1) abandons that easily applicable test in favor of new interpretations of less significant economic reality factors, and (2) will allow the Department to make highly subjective determinations that will be exceedingly difficult for businesses and workers to predict. For example, the proposed rule places new emphasis on whether work performed is “central or important” to a potential employer’s business. 87 Fed. Reg. at 62,271. “Importance” is a highly subjective determination, however, and workers attempting to analyze this factor have no way of knowing how the Department will evaluate their work under the proposed rule. The example of tomato farming provided by the proposed rule is particularly

unhelpful in this regard: It suggests the factor would weigh in favor of employment status for an individual who picks tomatoes, but independent contractor status for an accountant who provides “non-payroll accounting support,” such as filing an annual tax return. *Id.* at 62,254. Those examples plainly fall at opposite ends of the spectrum. What about contractors who work in the middle ground—the accountant who does provide payroll accounting support, or the truck driver who transports the tomatoes? The ambiguity of this factor would give the Department wide leeway to rule in whatever direction it wants in every case.

The same is true of the proposed rule’s focus on a potential employer’s “theoretical ability to control” work performed rather than “control that is actually exerted.” *Id.* at 62,233, 62,258. As an initial matter, it is strange that the Department’s proposed application of the economic *reality* test is focused on *theoretical* possibilities of control. But even accepting the Department’s focus on theory, the proper application of this factor is far from clear. The proposed rule states both that (1) “[i]t is often the case that the actual practice of the parties is more relevant to the economic dependence inquiry than contractual or theoretical possibilities,” and (2) “in other cases the contractual possibilities may reveal more about the economic reality than the parties’ practices.” *Id.* at 62,258. In truth, the only aspect of the Department’s explanation of this factor that is consistent is the Department’s apparent inclination to use it to find employee status in every case. *See id.* (providing examples of both theoretical freedom and theoretical ability to control and stating both suggest employee status). The same is true of the Department’s new concentration on price-setting, scheduling, and “the ability to work for others.” *Id.* at 62,275. These factors—like the rest of the proposed rule—will lead to subjective, unpredictable interpretations of the law that offer businesses and workers little concrete guidance.

We therefore respectfully request:

Please clarify how the Department will consistently and objectively determine whether certain work is “central” to a business, whether work is “important” to a business, and whether work must be “central,” “important,” or both to suggest employee status.

Please provide examples of work that the Department would not deem “central” or “important” to a business, including work that may be performed for a company multiple times over the course of a year.

Please provide examples of theoretical control (and lack of control) the Department believes would suggest independent contractor, rather than employee, status.

III. The Department Underestimates The Costs Of The Proposed Rule.

Finally, the Department fundamentally errs in analyzing the costs of its proposed rule, which will place a great burden on companies and workers alike. Initially, the Department underestimates the “regulatory familiarization” costs posed by the new rule. Next, the Department fails to consider the costs the proposed rule will impose on companies and workers who are required to—or due to the uncertainty of the proposed test, determine they have no choice but to—change their mode of operation from independent contracting to employment.

A. The Department Underestimates “Regulatory Familiarization” Costs.

First, the Department errs in its assessment of the “regulatory familiarization costs” posed by the proposed rule. 87 Fed. Reg. at 62,266. The Department assumes that companies will rely on “a Compensation, Benefits, and Job Analysis Specialist” or similar staff member to review the new regulation, and that this analyst will be paid approximately \$50 per hour and need only 30 minutes to review the rule. *Id.* As explained above, however, the proposed rule conflicts with judicial precedent governing nearly half of the circuits and provides little guidance as to how the Department will apply several amorphous factors. Sorting out the proper response to these conflicting and ambiguous requirements will likely require legal services that cost more than the \$25 the Department imagines a compensation specialist will be paid for his or her half-hour of work.

The Department is similarly mistaken in assuming that “each independent contractor will spend” only “15 minutes to review the regulation.”¹⁴ Independent

¹⁴ 87 Fed. Reg. at 62,266; *see, e.g.*, Independent Contractor Profile of Aaron Gayden, *in Chasing Work*, *supra* note 10, <https://www.iwf.org/chasing-work-aaron-gayden/> (last visited Dec. 12, 2022) (independent contractor explaining how difficult it was “trying to figure out how to get compliant” when state law governing independent contracting changed; advisors “didn’t know what to do or how to guide people through the process of becoming compliant,” which resulted in him “receiv[ing] so much conflicting information”).

contractors, too, will likely need legal advice to navigate the inconsistent and uncertain requirements of the proposed rule, at much more than the \$21.95 per hour the Department believes the contractors' review will cost.

We accordingly request:

Please estimate what the costs of applying the new rule will be for companies and independent contractors that seek legal review.

Please address whether the Department will create a safe harbor from administrative penalty or prosecution for:

- (1) Companies that have acted in good faith by relying on the advice of “a Compensation, Benefits, and Job Analysis Specialist” or similar staff member who has spent a half hour reviewing the company’s compliance with the proposed rule; and***
- (2) Independent contractors who have in good faith spent 15 minutes reviewing the rule or “summaries of the key elements of the rule change” published by the Department and other groups.***

B. The Department Fails To Consider the Costs of Switching Business Models.

Next, the Department’s cost-benefit analysis is necessarily flawed because it wholly fails to consider the costs imposed on companies and contractors who: (1) are required to switch business models as a result of the proposed rule, or (2) incur penalties after wrongfully being deemed employees under the proposed rule.

The Department acknowledges that the proposed rule will result in at least some “workers who are properly classified as independent contractors” being “reclassified as employees.” 87 Fed. Reg. at 62,260 (explaining that the Department does not believe workers will be misclassified only “for the most part”). But the Department fails to consider what the ramifications will be for those companies and workers who are misclassified.

Indeed, although the Department laments that it is unable to adopt a so-called “ABC test” that “presumptively considers all workers to be employees,” *id.* at 62,231, that test had devastating consequences for workers and businesses in California,

where it was adopted. People lost their ability to work as independent contractors overnight, and companies concerned with the significant costs and regulatory burdens they would incur should their workers be deemed employees were forced to sever ties with those workers entirely.¹⁵ The same will be true under the proposed rule. This is particularly problematic for small businesses, which tend to rely on independent contractors to operate because “their smaller size prevents them from being able to employ all the in-house workers they want to work with to help their business[es] succeed.”¹⁶ Under the proposed rule, small companies or new enterprises that are unable to add employees to their benefits and payroll will either have to operate without those independent contractors—and potentially shut down entirely—or face steep penalties when those contractors are misclassified as employees.¹⁷

¹⁵ See, e.g., Independent Contractor Profile of Sophia Aguirre, in *Chasing Work*, *supra* note 10, <https://www.iwf.org/chasing-work-sophia-aguirre/> (last visited Dec. 12, 2022) (describing sign language interpreter who “found her income slashed” after the passage of the California law and explaining that, “since the implementation of [that law], agencies view independent contractors differently: ‘Instead of being an asset to them, we’re a liability.’”); Independent Contractor Profile of Lisa Rothstein, in *Chasing Work*, *supra* note 10, <https://www.iwf.org/chasing-work-lisa-rothstein/> (last visited Dec. 12, 2022) (independent contractor explaining that the new California law “hurts me both ways. It’s hard to be hired and it’s hard to hire anybody.”); Eli Rosenberg, *Can California Rein in Tech’s Gig Platforms? A Primer on the Bold State Law that Will Try.*, Wash. Post. (Jan. 14, 2020, 1:32 PM), <https://tinyurl.com/37brnaur> (last visited Dec. 12, 2022) (explaining, that after California changed its law governing employment, “Vox Media opted to end its relationship with hundreds of writers and editors in California instead of reclassifying the workers”).

¹⁶ Rachel Greszler, *Defining “Contractor” Status Would Provide Some Relief for Struggling Workers and Small Businesses*, Heritage Found. (Sept. 23, 2020), <https://tinyurl.com/4h5nxfcx> (last visited Dec. 12, 2022); see Independent Contractor Profile of David Higbee, in *Chasing Work*, *supra* note 10, <https://www.iwf.org/chasing-work-david-higbee/> (last visited Dec. 12, 2022) (bandleader of small group explaining that it is “not sustainable to suddenly make every band member an employee. Unless you are a major touring act or have major backing, it’s just not feasible”).

¹⁷ See, e.g., McDaniel Profile, in *Chasing Work*, *supra* note 12 (describing freelance journalist who was “working on a book and wanted to produce an accompanying podcast” with the assistance of independent contractors but concluded, after seeking legal advice about the new California law, that she “can’t do it” because “the risks are too high”).

The costs to independent contractors who are misclassified as employees are even more devastating. As noted above, a study done by the Bureau of Labor Statistics confirmed that “[i]ndependent contractors overwhelmingly prefer their work arrangement (79 percent) to traditional jobs.”¹⁸ In fact, many workers who operate as independent contractors would be *unable* to work as an employee: according to one 2019 report, 46% of the 57 million Americans who engage in freelance work said that they were “unable to work a traditional job because of factors such as their personal health or disability, or their family circumstances.”¹⁹ That number has only increased over the pandemic, with a 2021 survey finding that “55% of freelancers and 59% of skilled remote freelancers indicat[e] that because of personal circumstances, they would be unable to work for a traditional employer.”²⁰ Again, flexibility in job performance is especially important for working mothers, who may depend on the autonomy contracting provides to work at all. For these workers, misclassification will result not merely in a changed business model but a total loss of income.²¹

Even for those workers who are able to make the switch from contracting to employment, the proposed rule has unfortunate financial consequences. Contractors who become employees will likely “lose [tax] deductions for a home office, health

¹⁸ News Release USDL-18-0942, Bureau of Lab. Stat., U.S. Dep’t of Lab. *Contingent and Alternative Employment Arrangements—May 2017* (June 7, 2018), available at <https://www.bls.gov/news.release/pdf/conemp.pdf> (last visited Dec. 12, 2022).

¹⁹ Greszler, *supra* note 16.

²⁰ Ozimek, *supra* note 1; see Statement of Rachel Greszler, Heritage Found. Rsch. Fellow, Millions of Missing Workers Leave Economy Languishing (Nov. 4, 2022), <https://tinyurl.com/2p94bsj3> (last visited Dec. 12, 2022) (“32 million people who performed independent work in 2021 said that they are unable to work for a traditional employer”).

²¹ Alternatively, independent contracting mothers who cannot afford to lose their income may be forced to give up their caregiving responsibilities—a decision that also comes with significant economic and familial costs. See, e.g., Eric Bettinger, Torbjørn Hægeland & Mari Rege, *Home with Mom: The Effects of Stay-at-Home Parents on Children’s Long-Run Educational Outcomes*, 32 J. Lab. Econ. 443, 463 (2014) (concluding that children’s educational performance improved when at least one parent was at home); Megan R. Gunnar et al., *The Rise in Cortisol in Family Daycare: Associations With Aspects of Care Quality, Child Behavior, and Child Sex*, 81 Child Dev. 851, 866 (2010) (National Institute of Child Health study finding that children who were cared for at home experienced lower levels of stress and aggression than those who spent a large amount of their days in daycare).

insurance, training, essential equipment, and other expenses.”²² Furthermore, although the Department questions whether contractors earn more than employees do on an hourly basis, according to the Department’s Employment Cost Index, benefits typically make up 31 percent of compensation costs.²³ If independent contractors are reclassified as employees, their take-home cash pay might well decline in that amount.²⁴ And given that many of these contractors may have access to benefits elsewhere—for example, through coverage from other work or family members—these workers are losing income without any corresponding gains.

All of these costs are exacerbated by the uncertainty of the new rule, which will undoubtedly have a chilling effect on independent contracting. Many contractors who might not ultimately be misclassified under the proposed rule will nonetheless be compelled to switch business models—or leave the workplace entirely—for fear that they *could* be misclassified under the ambiguous new regulation. Indeed, as explained above, companies and workers have no way of knowing how the Department or federal courts will apply the proposed rule, particularly in jurisdictions where the Department’s rule does not match judicial precedent. The very real potential for misclassification, combined with the uncertainty of precedent and steep penalties for misclassification, will force at least some companies and workers into a prophylactic business change.²⁵

The chilling effect of the proposed rule will thus undermine not only individuals’ economic freedom but also the spirit of entrepreneurship in America generally, all during a period in which rampant inflation has already placed a huge strain on Americans’ pocketbooks. Now, of all times, is not the occasion to make it more difficult for businesses and independent contractors to succeed. The

²² McDaniel Profile, in *Chasing Work*, *supra* note 12.

²³ News Release USDL-22-1892, Bureau of Lab. Stat., U.S. Dep’t of Lab., *Employer Costs for Employee Compensation—June 2022* at 6 tbl.1 (Sept. 20, 2022), available at <https://www.bls.gov/news.release/pdf/ecec.pdf> (last visited Dec. 12, 2022).

²⁴ Diana Furchtgott-Roth, *If You Like Your Uber, Can You Keep Your Uber?*, Heritage Found. (Oct. 18, 2022), <https://tinyurl.com/mwbb97t2> (last visited Dec. 12, 2022).

²⁵ See Independent Contractor Profile of Kevin Barnard, in *Chasing Work*, *supra* note 10, <https://www.iwf.org/chasing-work-kevin-barnard/> (last visited Dec. 12, 2022) (independent contractor explaining that, even though his field was exempted from the restrictions of a new state law limiting contracting, a previous client still refused to hire him because of “the risk of legal action and fines”).

Department should not permit its unwarranted distrust of independent contracting relationships to drive it to abandon the 2021 Rule, which finally provided companies and independent contractors with much-needed certainty under the law.

All of this prompts our final requests:

Please estimate the costs of changing business models for those independent contractors who do so as a result of the proposed rule and for the businesses that rely on these contractors.

Please estimate the number of true independent contractors who will lose work from businesses that are fearful of violating the proposed rule and unable to hire them as employees. Please further estimate the economic losses those independent contractors and businesses will incur.

Please estimate the costs of leaving the workforce entirely for those contractors who are unable to work as employees and the impact that will have on the businesses that rely on those contractors.

Please explain how, if at all, the Department has considered the loss of caregiving availability the proposed rule will inflict on families of independent contracting mothers who are forced to become employees as a result of the proposed rule. Please estimate the non-economic costs the loss of a caregiver will impose on these American families.

Please estimate the lost earnings for contractors who are forced into employment situations where they lose tax deductions and their salary is lowered to accommodate benefits they do not need.

* * *

For these reasons, IWF, CEO, and IWLC respectfully request that the Department withdraw the proposed rule.

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