

**Congress of the United States**  
**Washington, DC 20515**

October 26, 2020

The Honorable Eugene Scalia  
Secretary of Labor  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

RE: Comments on the Notice of Proposed Rulemaking, RIN 1235-AA34, Independent Contractor Status Under the Fair Labor Standards Act

Dear Secretary Scalia:

As Members of Congress, we write to urge the Department to withdraw its harmful proposed rule to narrow its interpretation of employee status under the Fair Labor Standards Act of 1938. Not only is this rulemaking unfounded, it is counter to Congressional intent, guaranteed to have devastating effects on the employees impacted by the rule, and will also have scarring effects on state and local governments as well.

The Fair Labor Standards Act (FLSA), which sets minimum wage, overtime, and child labor standards, has a broad employment standard that ensures its protections extend to a wide range of workers. Congress established a broad definition of “employ” to include “to suffer or permit to work.”<sup>1</sup> In using this definition, Congress unmistakably rejected the narrower common law standard of employment, which turns on the degree to which the employer has control over an employee.<sup>2</sup> In fact, employment under the FLSA’s “suffer or permit to work” standard is the “broadest definition that has ever been included in any one act.”<sup>3</sup> For decades, the courts have effectuated Congressional intent to define employment status broadly by applying a multi-factor economic realities test to help determine whether the worker is economically dependent on the potential employer or in business for him or herself.<sup>4</sup> While different courts use slightly different factors, the ultimate question is that of economic dependence.<sup>5</sup>

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<sup>1</sup> 29 U.S.C. 203(g).

<sup>2</sup> “[T]he broad language of the FLSA, as interpreted by the Supreme Court . . . demands that a district court look beyond an entity’s formal right to control the physical performance of another’s work before declaring that the entity is not an employer under the FLSA.” *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2d Cir. 2003).

<sup>3</sup> *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (quoting 81 Cong. Rec. 7,657 (1938) (remarks of Sen. Hugo Black)).

<sup>4</sup> *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985) (the test of employment under the FLSA is economic reality); *Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 33 (1961).

<sup>5</sup> *Antenor v. D & S Farms*, 88 F.3d 925, 932-33 (11th Cir. 1996).

The Department’s proposal to narrow its interpretation of employee status directly conflicts with the FLSA’s text and congressional intent by creating a new test that centers around a control factor.<sup>6</sup> We are deeply concerned that this proposed rule will lead to increased misclassification of vulnerable workers and deprive our state and local governments of much-needed tax revenue. Workers could be misclassified if, based on the Department’s narrow control test, employers improperly change their classification from employee to independent contractor or hire them as independent contractors where they would and should otherwise be classified as employees. The Department’s proposal fails to estimate the number of workers who could be misclassified as independent contractors as a result of its proposal.

In addition, workers misclassified under the Department’s proposal would be at increased risk of wage theft where their employers improperly deny them the FLSA’s minimum wage and overtime protections. The Department’s proposed rule could serve as a “get out of jail free” card for this kind of wage theft.<sup>7</sup> This could lead to significant income losses for workers.

Astoundingly, the Department fails to estimate how much workers would lose in wages under its proposal, as legally required.<sup>8</sup> The Economic Policy Institute estimates at least \$750 million in transfers from social insurance funds to employers each year if this proposal is finalized.<sup>9</sup>

In passing the FLSA, Congress intended “to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation.”<sup>10</sup> Such a purpose cannot be met with the Department’s narrow control test, which could leave out significant portions of the workforce.

Increased misclassification resulting from the Department’s proposed rule could also impose a significant financial burden on the federal government due to billions in lost tax revenues. A 2009 Government Accountability Office report states that the Internal Revenue Service (IRS) estimated that in 1984, roughly 15 percent of employers misclassified 3.4 million workers, costing the federal government \$1.6 billion in lost revenue<sup>11</sup> (\$3.72 billion in 2019 dollars).

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<sup>6</sup> Two factors, the nature and degree of the worker’s control over the work and the worker’s opportunity for profit or loss, are deemed core factors and given undue weight. According to the Department, where the two core factors point toward the same classification, the analysis is virtually complete and the other three factors should be approached with skepticism. Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600, 60612 (proposed Sept. 25, 2020) (to be codified at 29 C.F.R. pt. 780, 788, 795).

<sup>7</sup> The Department notes agency interpretations provide employers with a defense against minimum wage and overtime protections. Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60600, 60610; 29 U.S.C. 259.

<sup>8</sup> Executive Order 13563 requires agencies to “quantify anticipated present and future benefits and costs as accurately as possible”. Exec. Order No. 13563, Improving Regulation and Regulatory Review, 3 C.F.R. § 13563 (2011).

<sup>9</sup> Economic Policy Institute, Comment Letter on Proposed Rule on Independent Contractor Status Under the Fair Labor Standards Act (forthcoming Oct. 26, 2020).

<sup>10</sup> *Powell v. United States Cartridge Co.*, 339 U.S. 497, 510-11.

<sup>11</sup> U.S. General Accounting Office, Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention 10 (August 2009), <http://www.gao.gov/products/GAO-09-717>.

Nearly 60 percent of this lost revenue was attributable to misclassified workers failing to pay income taxes. The remainder of losses came from employers' and workers' failure to pay Social Security and Medicare taxes and employers' failure to pay federal unemployment taxes.<sup>12</sup>

Loss of revenue also negatively impacts key labor insurance programs, such as unemployment insurance, workers' compensation, and disability insurance systems. For example, a 2000 DOL-commissioned study found nearly \$200 million in lost unemployment insurance tax revenue per year through the 1990s due to misclassification at time when, annually, an estimated 80,000 workers entitled to UI benefits were not receiving them.<sup>13</sup>

Increased misclassification from the Department's proposed rule could also deplete state coffers. According to a 2008 study, about \$1.5 billion in payroll is not reported to Michigan's unemployment insurance agency every year. Misclassification costs the state's unemployment insurance trust fund \$17 million each year, and results in an estimated loss of \$20-33 million in state income taxes.<sup>14</sup> This lost revenue could force states to reduce vital services for its citizens and cut state jobs. For example, in Michigan, over 90 percent of General Fund and School Aid Fund revenues, the two funds supported by the state's income tax, are utilized to support state and local education, public safety, and health care services and programs.

The Department fails to estimate how much its proposed rule would cost the federal, state, or local governments in lost revenues. The Department cannot ignore this impact as it considers this proposed rule. Right now, our state and local governments are struggling as a result of the pandemic and the related economic downturn. Michigan is currently projected to lose over \$4 billion in revenue over fiscal years 2021 and 2022 because of COVID. State unemployment trust funds are borrowing to make payments<sup>15</sup>. Adding an additional strain on state budgets at this time is unconscionable.

According to reporting from Bloomberg, the Department seeks to complete this rule before the end of the year.<sup>16</sup> It is astounding that the Department is attempting to push through a rule that would leave workers and state and local governments worse off while providing an inadequate

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<sup>12</sup> *Id.*

<sup>13</sup> Lalith De Silva, et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, Planmatics, Inc., Prepared for the US Department of Labor Employment and Training Administration (2000) 69, <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

<sup>14</sup> Dale Belman and Richard Block, *Informing the Debate: The Social and Economic Costs of Employee Misclassification in Michigan*, Michigan State University (2009), available at <http://ippsr.msu.edu/publications/ARMisClass.pdf>.

<sup>15</sup> [https://www.treasurydirect.gov/govt/reports/tfmp/tfmp\\_advactivitiesched.htm](https://www.treasurydirect.gov/govt/reports/tfmp/tfmp_advactivitiesched.htm)

<sup>16</sup> Ben Penn, *DOL Aims to Fast-Track Worker Classification Rule to 2020 Finish* (July 2, 2020), <https://news.bloomberglaw.com/daily-labor-report/dol-aims-to-fast-track-worker-classification-rule-to-2020-finish>; Ben Penn, *Trump Independent Contractor Rule Stalled by Agency Discord* (Aug. 13, 2020), <https://www.bgov.com/core/news/#!/articles/QF00TCDWRGG1>.

opportunity for the public to weigh in and failing to include required information on how the proposed rule would negatively impact workers.<sup>17</sup>

Right now, more than ever, workers need the wage and hour protections that are critical to supporting the economic security of our local communities. Fast tracking a rule that would exclude workers from minimum wage and overtime protections and hurt local governments during a period of deep economic distress for millions of workers is antithetical to your Department’s mission to “foster, promote and develop the welfare of the wage earners . . . of the United States.”

We strongly urge the Department to withdraw its harmful proposed rule.

Sincerely,



ANDY LEVIN  
Member of Congress

RASHIDA TLAIB  
Member of Congress

DANIEL T. KILDEE  
Member of Congress

DEBBIE DINGELL  
Member of Congress

HALEY STEVENS  
Member of Congress

ELISSA SLOTKIN  
Member of Congress

BRENDA LAWRENCE  
Member of Congress

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<sup>17</sup> The Department has already strayed from rulemaking requirements by providing for only a 30-day comment period, rather than the required 60-day comment period.