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**Comments on RIN 1235-AA34:  
Independent Contractor Status Under the Fair Labor Standards Act.**

Dear Ms. DeBisschop:

The National Employment Law Project (“NELP”) submits these comments on the Department of Labor’s (“Department” or “DOL”) Notice of Proposed Rulemaking regarding the standard for determining who’s a covered employee and who’s an independent contractor under the Fair Labor Standards Act (“FLSA”). RIN 1235-AA34; Fed. Reg. Vol. 85, No. 187 (Sept. 25, 2020) (“NPRM”).

NELP is a nonprofit research and policy organization with over 50 years of experience advocating for the employment and labor rights of low-wage workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation’s labor and employment laws, and that all employers comply with those laws, including the child labor, minimum wage and overtime protections of the Fair Labor Standards Act (“FLSA” or “Act”). NELP has litigated directly on behalf of subcontracted workers called “independent contractors,” submitted amicus briefs in numerous independent contractor cases, testified in Congress regarding the importance and scope of the FLSA’s employment coverage, and is an expert in independent contractor misclassification, its magnitude, and its impacts. NELP and our constituents have a direct and sustained interest in a fully-enforced FLSA, an act that is particularly relevant to the workers earning lower wages who comprise a disproportionate and growing share of the workforce and who are struggling to make ends meet in today’s economy. We appreciate the opportunity to comment on the proposed regulations.

Our comments will address six primary points:

1. Whether a worker is an “employee” covered by the FLSA or an “independent contractor” without protections is a key consideration for millions of workers and businesses, and is especially important in today’s economy marked by high unemployment and misclassification abuses.
2. The DOL’s proposed interpretation is contrary to the FLSA because it ignores and misinterprets the statutory terms “suffer” and “permit,” which take the scope of employee coverage well beyond this rule’s proposed test. 29 U.S.C. §203(g).
3. The proposed rule misapplies and improperly limits well-established Supreme Court and Circuit Court tests for independent contractor v. employee coverage, elevating two narrow “core” factors, while interpreting others nearly out of existence.
4. The FLSA’s coverage is not determined by common-law employment relationships, and this proposed interpretation is narrower than even the common law.
5. It is a pervasive practice in low-wage jobs for companies to label their workers “independent contractors.” The DOL’s proposed test would leave behind workers in high-growth sectors with high rates of wage theft, contrary to the purposes of the FLSA.
6. The proposed interpretation will negatively impact public coffers and businesses who will not be able to compete unless they too call their workers “independent contractors.”

## I. Introduction

Work should be a place to learn, contribute, and connect. In return for their labor, people should have fair pay, ample benefits, and the right to come together with coworkers to negotiate for safe and healthy conditions. A good job enables a person to provide for him/herself and family, and to join with employers and coworkers to ensure that communities thrive together. For decades, however, too many businesses have chosen not to live up to these values. Corporations have imposed take-it-or-leave-it contracts on their workers, putting them outside of the workplace protections and tax requirements that apply only to employees and employers.<sup>1</sup> Too many companies mischaracterize their employees as “independent contractors,” “self-employed,” “partners,” or “freelancers,” require them to form “limited liability companies”—or simply pay them off the books—as a tactic to shift risk and costs downward onto workers, while channeling wealth upward to investors and CEOs. When they engage in this sham practice, companies attempt to shed responsibility for their workers, but often maintain strict controls over when, where, how, and for how much money workers perform their jobs. The practice has been especially prevalent in construction, retail, janitorial, home care, trucking, delivery services, transportation, and other low-wage industries where people of color have historically worked. More recently, well-capitalized online platform or “gig” companies have joined the trend.

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<sup>1</sup> Catherine Ruckelshaus, *Independent Contractor v. Employee: Why Misclassification Matters and What we can do to Stop It*, (National Employment Law Project, 2016), available at <https://www.nelp.org/publication/independent-contractor-vs-employee/>; See, also, e.g., Rebecca Smith and Sarah Leberstein, *Rights on Demand: Ensuring Workplace Standards in the On-Demand Economy*, (National Employment Law Project, Sept. 2015), <https://s27147.pcdn.co/wp-content/uploads/Rights-On-Demand-Report.pdf>

In most instances, an individual performing labor or services for another should be covered as an employee under our employment laws, unless the person operates an independent business, with specialized skill, capital investment, and the ability to set prices to one's customers and engage in arms-length negotiations over the terms of a job. In key industries in our economy, however, independent contractor misclassification is prevalent and has become standard operating practice for companies looking to save on payroll costs, outbid competitors, or avoid workplace regulations. Workers' rights organizations, cities, and states have taken a variety of approaches to address this problem, including passing new laws that assess higher penalties for misclassification, enforcing more expansive tests defining who is an "employee," and addressing misclassification with sector-specific laws. As we note below, over the course of a decade, more than half of the states have formed interagency task forces, often with the federal government, to take on companies that illegally misclassify their workers. In 2018 and 2019 alone, there was a resurgence of task forces, with a total of eight new or revitalized task forces. The Department's proposed rule represents a dramatic sea-change in these efforts and undercuts longstanding federal interpretations of employee coverage.

Unchecked, independent contractor misclassification can cause long-term damage to the economy and workers. This rule would create incentives for more employers to unilaterally impose independent contractor arrangements on workers who should be classified as employees, with all the rights and benefits attaching to employee status.

The FLSA is intended to cover workers broadly. As stated by the Department in its 2015 Administrator's Interpretation on independent contractor coverage, most workers are "employees," under FLSA.<sup>2</sup> Under its expansive statutory definitions of employment, the FLSA includes work relationships that were not within the traditional common-law definition of employment. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). The U.S. Congress passed the FLSA during the Great Depression under conditions similar to those the U.S. faces today, to guard against employer exploitation of workers, and to "lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions," *Rutherford*, 331 U.S. at 727, *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). The purpose of its broad definitions was to eliminate substandard labor conditions by expanding accountability for violations, to include businesses that insert contractors in their business. *Lauritzen*, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring). *See also Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1915) (Judge Learned Hand noting that employment statutes were meant to "upset the freedom of contract").

The Department's proposed interpretation misapplies the plain language of the FLSA's definition of "employ," which "includes to suffer or permit to work," 29 U.S.C. § 203(g), and is contrary to U.S. Supreme Court and federal circuit court authority interpreting those terms. Instead, the interpretation describes a set of narrow "core" factors taken from a cramped version of the narrowly-scoped common law, which is not the test for employment coverage under the FLSA, and in so doing prevents a consideration of factors that the Supreme Court has always deemed critical

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<sup>2</sup> U.S. Department of Labor Administrator's Interpretation 2015-1, *The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors*, [https://www.blr.com/html\\_email/ai2015-1.pdf](https://www.blr.com/html_email/ai2015-1.pdf).

to determining whether an employment relationship exists. The proposed interpretation could strip wage and hour protections from scores of workers in sectors prone to independent contractor misclassification, including construction, trucking, delivery, home care, personal care, agricultural, and janitorial and building service. Furthermore, the proposed interpretation would effectively exclude most of the nearly 3 million workers in the United States who are hired through a staffing or temporary help agency,<sup>3</sup> where workers are permitted to accept an assignment or not.

If finalized in its proposed form, this standard would violate the Administrative Procedure Act (“APA”). 5 U.S.C. § 706(2)(A). It would not be “in accordance with law,” as it conflicts with controlling Supreme Court precedent and circuit court precedent. The NPRM is also arbitrary and capricious because it fails to adequately explain the Department’s shift from the controlling Supreme Court and widely accepted circuit tests, and its own interpretations, one as recent as mid-2019. The Department’s proposal will thus create confusion because it creates an entirely new set of questions that employers, workers and the courts will struggle to untangle, at a time when coverage of and compliance with the FLSA should be widespread and well-understood. The Department also failed to afford more than a paltry 30 days for stakeholders to comment on the significant and radical proposal, despite many requests, including NELP’s, for an extension.<sup>4</sup>

The DOL proposes that the rule be the “sole and authoritative interpretation of independent contractor status under FLSA”. See 85 Fed. Reg. at 60600-60601. However, courts will only defer to this type of interpretation if it has the “power to persuade.” *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *United States v. Mead Corp.*, 533 U.S. 218 (2001). As explained below, this NPRM fails that test.

Further, the DOL will narrow FLSA coverage of employees at a time of national economic peril, when our country is beset by the COVID-19 pandemic and high unemployment, when workers do not have a say in take-it-or-leave-it “independent contractor” job offers. Companies that require their workers to work as “independent contractors” should not be able to skirt the Act simply because they have attached this label to the job. The DOL should not adopt a standard that would legally sanction currently illegal arrangements and create incentives for employers to contract-away their legal duties and immunize themselves from responsibility for the workplace conditions they create. Such a standard would degrade these workers’ labor conditions, permit wage theft and unlawful child labor, and shift all economic risks to the workers, depriving them of their statutory rights.

The proposed interpretation would also adversely affect business that will not be able to compete with others unless they too call their workers independent contractors, as employers using independent contractors can save upwards of 30% of payroll costs by switching from employee arrangements. This in turn costs the public billions of dollars in unpaid taxes and premiums.

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<sup>3</sup> U.S. Bureau of Labor Statistics, Current Employment Statistics, 2019.

<sup>4</sup> See, e.g., “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>

## II. DOL’s proposed interpretation is contrary to the FLSA because it ignores the statutory terms “suffer” and “permit,” which take the scope of employee coverage well beyond the proposed test.

The statutory terms “to suffer or permit to work” as interpreted by the U.S. Supreme Court are binding on the DOL. The statute’s definition of “employ”—“employ includes to suffer or permit to work” at 29 U.S.C. §203(g)—is extremely broad.<sup>5</sup> Its meaning was well-known when adopted by Congress in 1938, and the same language in child labor laws had been used regularly to hold business owners liable where children had been hired and employed by others, including separate independent businesses and contractors. The NPRM cites but then largely ignores these broad statutory terms by purporting to embed them in narrow common-law considerations.

When Congress in the FLSA defined “employ” to “include” “to suffer or permit to work,” it did what state child labor statutes had done: it included within its scope of coverage not only the common law concept of “employ,” but also the very broad concepts of “suffering” or “permitting” work to be done. The “suffer or permit to work” definition of “employ” in section 203(g) of the FLSA was taken from state child labor statutes that existed in most states and had been applied for many years before the FLSA was adopted in 1938. *Rutherford Food Corporation v. McComb*, 331 U.S. 722, 728 (1947); *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 326 (1992); Bruce Goldstein et al, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983, 1089-90 (1999).<sup>6</sup> This definition is of “striking breadth,” the broadest ever used to encompass employment relationships, and includes relationships not considered “employment” under common law agency principles. *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 141 (2d Cir. 2008). This breadth in coverage was necessary to accomplish the FLSA’s goal, as stated by the Supreme Court:

Th[e] Act seeks to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation. . . . This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in costs based on substandard labor conditions.<sup>7</sup>

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<sup>5</sup> Even judges who have expressed frustration with the factors of the economic reality test have acknowledged that “[t]he language of the statute is the place to start[.]” noting that “to suffer or permit” is “the broadest definition ever included in any one act.” *Sec’y of Labor, United States Dep’t of Labor v. Lauritzen*, 835 F.2d 1529, 1543 (7th Cir. 1987) (Easterbrook, J., concurring).

<sup>6</sup> See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) (“Where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.”); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (“It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”); *Sekhar v. United States*, 570 U.S. 729, 733 (2013) (quoting Justice Frankfurter, “if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.” Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947)).

<sup>7</sup> *Roland Electric Co. v. Walling*, 326 U.S. 657, 669-70 (1946). See also *Tony & Susan Alamo Foundation v. Sec’y of Labor*, 471 US 290, 296 (1985) (quoting *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950));

Congress ensured “sufficiently broad coverage” by including coverage terms from state child labor laws, designed to reach businesses that used independent contractors who illegally hired and supervised children.<sup>8</sup> The history and functions of the “suffer or permit” language in the child labor laws show how broad the language is meant to be and what relationships it is intended to encompass. *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1543 (7th Cir. 1987) (Easterbrook, J., concurring). Most importantly, the FLSA’s broad language of “employ” is used to ensure the FLSA’s minimum wage and overtime protections just as it is used broadly to enforce FLSA’s child labor provisions.<sup>9</sup> *See also, Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961) (Maine homeworkers who were part of a formal cooperative were “employees” of the co-op and not “independent contractors” because the workers were suffered or permitted to work by the cooperative.)

The DOL’s proposed interpretation fails to apply the “suffer or permit to work” language of section 203(g) and narrows the test for employee to a meaning it did not have in 1938. Its new interpretation conflicts with the statute and with Supreme Court and federal circuit authority.

### **III. DOL’s Proposed Test for Covered Employees Directly Contradicts the Supreme Court and Circuit Court Decisions by Failing to Use the *U.S. v. Silk* Test.**

The DOL’s proposal cites the approved test in *U.S. v. Silk*, 331 U.S. 704 (1947), a Social Security Act case that first established the five-factor test aimed at determining whether a person is in business for themselves and therefore independent, or works instead in the business of another and is dependent on that business for work:

- (1) the degree of control exercised by the employer over the workers;
- (2) the workers’ opportunity for profit or loss and their investment in the business;
- (3) the degree of skill and independent initiative required to perform the work;
- (4) the permanence or duration of the working relationship, and
- (5) the extent to which the work is an integral part of the employer’s business. *Id.* at 716.

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*Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (quoting *Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2<sup>nd</sup> Cir. 1984); *Brock v. Superior Care*, 840 F.2d 1054 (2<sup>nd</sup> Cir. 1988).

<sup>8</sup> *Antenor et al. v. D & S Farms*, 88 F.3d 925, 934 (11<sup>th</sup> Cir. 1996) (citing *Rutherford*, 331 U.S. at 728); *Darden*, 503 U.S. at 322-24.

<sup>9</sup> Section 212 (c). “No employer shall employ any oppressive child labor in commerce...” *See, e.g., Curtis & Gartside Co. v. Pigg*, 134 P. 1125, 1130 (Okla. 1913) (“[i]t positively prohibits the employment of children of this age to do this character of work, and then, in order to shut off the avenues of artifice, just as positively prohibits their being permitted or suffered to do such work.”); *Commonwealth v. Hong*, 158 N.E. 759, 759-60 (Mass. 1927); *Daly v. Swift & Co.* 300 P. 265, 268 (Mont. 1931); *Gorcynski v. Nugent*, 80 N.E. 2d 418 (Ill. 1948); *Purtell v. Philadelphia & Reading Coal & Iron Co.*, 256 Ill. 110, 111 (1912); *Vida Lumber Company v. Courson*, 112 So. 737, 738 (Ala. 1926); *Nichols v. Smith’s Bakery*, 119 So. 638, 640 (Ala. 1928); *People, ex rel. Price, v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25 (1918) (New York appeals court concluded that the corporation’s failure to discover and prevent the employment of a child by one of its drivers was “sufferance” of the child’s work, resulting in its violation of the child labor law).

None of these enumerated factors is controlling nor is this list complete, according to the Supreme Court. Notably for this proposed rule, the coal workers in *Silk* found to be employees provided their own tools, and while some came more often, many came to the worksite intermittently, and “work[ed] only when they wish[ed] to work,” *Id.* at 716-718. They worked for competitor businesses (“they may and did haul for others when they pleased”) and invested in their own operations (“They pay all the expenses of operating their trucks”). *Id.* at 705. The Supreme Court also noted of the coal workers: “They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer’s trade or business.” *Id.* at 718. None of those factors alone was determinative. The economic reality of the coal workers’ work, by the totality of the circumstances, evinced that the workers were employees.

The Supreme Court has held that “[a]ll [its] interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme.” *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2409 (2015). Therefore, the conclusion of the Supreme Court in *U.S. v. Silk*, 331 U.S. 704 (1947), adopted in the FLSA case *Rutherford Food Corporation v. McComb*, 331 U.S. 722, 728 (1947), that any employment analysis must examine “the circumstances of the whole activity,” has been part of the FLSA’s scheme since 1947.

All federal Circuits analyzing the scope of FLSA coverage to employees use the *Silk/Rutherford* test or some variation, with some adding factors deemed relevant to the ultimate question of whether the worker is truly running a separate business.

The Department itself has publicly used the *Silk* test, pronouncing as recently as 2019 that it was the test for FLSA’s coverage, and now fails to provide adequate reasons for changing its longstanding test today. *See, e.g., The Application of the Fair Labor Standards Act’s “Suffer or Permit” Standard in the Identification of Employees Who Are Misclassified as Independent Contractors* (July 15, 2015)<sup>10</sup> (describing a six-factor test based on *Silk*); U.S. Department of Labor Opinion Letter (April 29, 2019) (describing a nearly-identical six-factor test based on *Silk*).<sup>11</sup>

By now proposing a restrictive interpretation of the economic reality test that places undue weight on two narrow and newly-defined factors—individual worker control over the work, and opportunity for profit or loss—the Department is constricting FLSA’s broad coverage in a way that will undermine its statutory intent and legal precedent.

The Supreme Court recognized in *Silk* that the Social Security Act—and the Fair Labor Standards Act with it<sup>12</sup>—was intended to be “an attack on recognized evils in our national economy.” 331 U.S. at 712. The Court cautioned that “a constricted interpretation of the phrasing [of “employee” under the statute] would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at

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<sup>10</sup> [https://www.blr.com/html\\_email/ai2015-1.pdf](https://www.blr.com/html_email/ai2015-1.pdf)

<sup>11</sup> [https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019\\_04\\_29\\_06\\_FLSA.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_04_29_06_FLSA.pdf)

<sup>12</sup> The rationale underlying the Social Security Act applies to the Fair Labor Standards Act, as both are “social legislation of the 1930’s of the same general character[.]” *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1949).

the expense of the benefits sought by the legislation.” *Id.* The Department’s current NPRM is attempting to do exactly that. By constricting the multifactor *Silk* test and placing unprecedented weight on two newly narrowed factors, the Department’s new rule will contradict the broad statutory intent and invite employers to create new structures to escape FLSA’s coverage.

After *Silk*, discussed above, the Supreme Court considered the issue of employee status directly within the FLSA in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). The Court confirmed that “the determination of the [employer-employee] relationship does not depend on . . . isolated factors but rather upon the circumstances of the whole activity.” *Id.* at 730. The Court then, in sequential order, considered that “the workers did a specialty job[,]” the “responsibility under the boning contracts . . . passed from one boner to another[,]” the employer provided the premises and equipment used by the workers, and the workers “had no business organization that could or did shift as a unit from one slaughterhouse to another.” *Id.* Only after first analyzing those factors did the Court consider the *employer’s* right to control (“The managing official of the plant kept close touch on the operation”), and the opportunity for profit or loss (“profits to the boners depended upon the efficiency of their work”). *Id.*

It runs counter to Supreme Court precedent for the Department to argue that control by the *worker* and one’s opportunity for profit or loss (narrowly defined) so clearly predominate the economic reality test factors.

Further, in *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961), the Supreme Court found workers of a cooperative to be employees under the FLSA. The factors emphasized by the Supreme Court were neither the employer’s control over the work of the homeworkers nor the workers’ opportunity for profit or loss. Instead, the critical factors, largely ignored by the Department in its NPRM, were: whether another party gave the workers an opportunity to work; whether the workers could sell their products or services “on the market for whatever price they command”; whether they were regimented under one organization, providing the goods or services the organization desired and receiving the compensation dictated by the organization; and whether management could fire them for substandard work or failure to obey its regulations. *Id.* at 31. The two factors that the Department now wants to dictate the outcome of employee status simply are not those of *Whitaker House*, nor are the *Whitaker House* considerations emphasized in the NPRM.<sup>13</sup>

Similarly, federal appellate courts have consistently held that the FLSA economic reality test is broad. Every federal Court of Appeals that has looked at the issue of employee status under FLSA has said that the test is meant to be expansive, rather than reduced to two narrow super-factors.<sup>14</sup> As the Second Circuit has identified, the “nonexclusive and overlapping set of factors” helps to “ensure that the economic realities test mandated by the Supreme Court is sufficiently comprehensive and flexible to give proper effect to the broad language of the FLSA.” *Zheng*, 355

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<sup>13</sup> The current DOL’s proposal prohibits consideration of most of the *Goldberg* Supreme Court-identified factors, and additional key qualities inherent in running a separate business, including: whether the person can pass along increased costs of a business to one’s customers, whether can set the price for one’s services, whether one has a business office, cards, or advertises. The DOL has no authority to so restrict settled law.

<sup>14</sup> See, e.g., *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985) (“courts should examine the circumstances of the whole activity”) (quotation marks omitted) (citing *Donovan v. Sureway Cleaners*, 656 F.2d 1368 (9th Cir. 1981));



F.3d at 75-76. Further, federal courts have counseled against a rigid approach to FLSA’s economic reality test. *See, e.g., Brock v. Superior Care*, 840 F.2d 1054, 1059 (2d Cir. 1988) (“[T]he test concerns the totality of the circumstances, . . . and mechanical application of the test is to be avoided.”); *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 380 (5th Cir. 2019) (“[O]bviously, the [economic reality test] factors should not be applied mechanically.”) (internal quotation marks omitted). The Fifth Circuit has noted, while applying the economic reality test in the Age Discrimination in Employment Act context, which has the same statutory terms for employment coverage, “[i]t is impossible to assign to each of these factors a specific and invariably applied weight.” *Hickley v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983).

Recent circuit cases applying the FLSA economic reality test have considered all six factors,<sup>15</sup> not simply, as the Department argues, “focus[ing] their analysis on just the most relevant facts and factors to the case, thereby achieving efficiency and clarity.” The Department claims, without citation, that recent court opinions “focus” on control and opportunity for profit or loss. 85 Fed. Reg. at 60619. In reality, courts that “focus” on those factors do so only because those factors are listed first and second in the particular circuit’s economic reality test, and the courts proceed through the reasoning in order of the numbered factors. If that were the factor-weight indicator, it may be said that the Sixth Circuit chooses to “focus” on permanency, degree of skill required, and investment because that circuit’s case law itemizes the six economic reality factors in that order. *See Donovan v. Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984); *see also Keller v. Miri Microsystems, Inc.*, 781 F.3d 799, 807 (6th Cir. 2018).

Courts have also criticized attempts to emphasize one factor over the others, as the DOL now seeks to do. The Second Circuit has held that the right to control by the employer is only one factor in the economic reality test, and that a “full inquiry into the true economic reality is needed.” *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 13–14 (2d Cir. 1984) (reversing district court decision that focused exclusively on control in FLSA employee dispute); *accord Watson v. Graves*, 909 F.2d 1549, 1554 (5th Cir. 1990) (“the second circuit stated that the degree of control exercised . . . is only one factor in determining employee status under FLSA”). The Third Circuit has reversed decisions that “misapplied and *overemphasized* the right-to-control factor[.]” *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1385-86 (3d Cir. 1985) (reversing decision that homeworkers were independent contractors because lower court “did not apply two other factors [permanence and whether the service is an integral part of the business],” leading to an erroneous conclusion under the FLSA) (emphasis added).

Further, the NPRM not only constrains the multifactor test to heavily weigh two factors, but it considers those factors in ways that are contrary to precedent. The NPRM cites “setting his or her own work schedule, choosing assignments, working with little or no supervision, and being able to work for others, including a potential employer’s competitors” as examples of an individual’s “substantial control” over their work. 85 Fed. Reg. at 60639. Yet this would ignore the many decisions in which workers who were found to be employees under FLSA had the ability to set their

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<sup>15</sup> *See, e.g., Hobbs v. Petroplex*, 946 F.3d 824 (5th Cir. 2020); *Franze v. Bimbo Bakeries USA, Inc.*, 2020 U.S. App. LEXIS 29401 (2d Cir. 2020); *Razak v. Uber Techs., Inc.*, 951 F.3d 137 (3d Cir. 2020); *Parrish* (5th Cir.); *Eberline* (5th Cir.); *Verma v. 3001 Castor, Inc.*, 937 F.3d 221 (3d Cir. 2019); *Nieman v. Nat’l Claims Adjustment* (11th Cir. 2019).

own schedule,<sup>16</sup> choose their assignments,<sup>17</sup> work with little or no supervision,<sup>18</sup> and work for others.<sup>19</sup>

The Department argues that its NPRM will bring “clarity” and “efficiency” to the economic reality test. 85 Fed. Reg. at 60620. In fact, its newly narrowed two-factor test creates more confusion by reidentifying relevant factors, re-describing the relevant facts to consider under long-standing tests, and failing to explain its new departure.

#### **IV. The FLSA’s coverage is not determined by common-law employment relationships, and the DOL’s proposed interpretation is narrower than even the common law.**

The NPRM narrows the FLSA test for employee coverage to something even more circumscribed than the common-law test, and does not allow for a fact-finder to determine the critical aspects of an employment relationship as required by the statute and longstanding and established Supreme Court and Circuit case law.

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<sup>16</sup> See, e.g., *Razak v. Uber Techs., Inc.*, 951 F.3d 137 (3d Cir. 2020) (reversing summary judgment and finding disputed issues of material fact about plaintiffs UberBLACK drivers’ classification even where it is undisputed that drivers are free to choose their work schedule); *Walling v. Twyeffort, Inc.*, 158 F.2d 944 (2d Cir. 1946) (holding that workers who set their own schedules were employees under FLSA); *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989) (holding that cake decorators were employees of bakery and noting that although the decorators had some flexibility in their work schedules, choice of hours, and which cakes to decorate, flexibility over work hours is common to many businesses and was not, alone, significant); *Doty v. Elias*, 733 F.2d 720 (10th Cir. 1984) (noting that waiters’ relatively flexible work schedules, alone, did not make the workers independent contractors rather than employees); *Hill v. Cobb*, No. 3:13-CV-045-SA-SAA, 2014 WL 3810226 (N.D. Miss. Aug. 1, 2014) (holding that workers were employees even though they had no specific hours or schedule and could “come and go as [they] pleased”).

<sup>17</sup> See, e.g., *Donovan v. Tehco, Inc.*, 642 F.2d 141 (5th Cir. 1981) (holding that a worker was an employee where he could choose job assignments he wanted); *Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07-0069, 2008 WL 2944661 (M.D. Tenn. July 31, 2008) (holding that nurses were employees, even though they could accept or reject shifts).

<sup>18</sup> See, e.g., *Walling v. Twyeffort, Inc.*, 158 F.2d 944 (2d Cir. 1946) (finding tailors to be employees even though they were not supervised); *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376 (3d Cir. 1985), cert. denied, 474 U.S. 919 (1985) (noting that homeworkers are consistently found to be employees under FLSA even though they are typically subject to little supervision and control) *McComb v. Homeworkers’ Handicraft Coop.*, 176 F.2d 633 (4th Cir. 1949) (holding homeworkers to be employees under FLSA, and the fact that they were paid on a piece work basis and worked from their own homes without supervision or direction from the bag companies did not take them from under the Act); *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748 (9th Cir. 1979) (finding strawberry pickers employees under FLSA where the employer exercised little direct supervision over the farmworkers).

<sup>19</sup> See, e.g., *United States v. Silk*, 331 U.S. 704, 707 (1947) (holding truckers are employees under the FLSA where “[t]hey may and did haul for others when they pleased”); *Walling v. Twyeffort, Inc.*, 158 F.2d 944 (2d Cir. 1946) (holding tailors were employees even though they did tailoring work for other companies occasionally); *McLaughlin v. Seafood, Inc.*, 867 F.2d 875, 876 (5th Cir. 1989) (holding seafood backers, pickers, and peelers were employees of a seafood processing plant where the workers moved frequently from plant to plant and from employer to employer, and noting that “[e]ven if the freedom to work for multiple employees might provide some kind of safety net, unless worker possessed specialized and widely-demanded skills, that freedom was hardly the same as true economic independence”).

**A. The Restrictive Common Law Control Factors Cannot be the Test, Because FLSA’s Definition of “Employ” Is Far Broader Than the Common Law.**

The Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992) distinguished the broad definition of “employ” in the FLSA from undefined uses of the term “employed” in other federal statutes, limiting the narrow common law scope of such term to situations where Congress has not expressed its intention to go beyond the common law. *Id.* at 322-23.

The definition of “employee” in the FLSA evidently derives from the child labor statutes, see *Rutherford Food, supra*, at 728, 67 S.Ct., at 1475, and, on its face, goes beyond its ERISA counterpart. While the FLSA, like ERISA, defines an “employee” to include “any individual employed by an employer,” it defines the verb “employ” expansively to mean “suffer or permit to work.” 52 Stat. 1060, § 3, codified at 29 U.S.C. §§ 203(e), (g). *Id.* at 326.

As described above, the FLSA’s definitions of employment are broad. The “suffer or permit to work” definition of employment is “the broadest definition that has ever been included in any one act.” *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting statement of Sen. Hugo Black, 81 Cong. Rec. 7657 (1938)). As the Supreme Court recognized, in enacting these expansive terms Congress sought to make business owners responsible for minimum labor standards for workers for whom they could easily disclaim responsibility at common law. The Supreme Court in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S.Ct. 639, 91 L.Ed. 809 (1947), said: “This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.” The Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) notes the unique definitions in the FLSA, rejects the common-law standard for that Act, and requires that it be applied broadly.

The Department’s two “core” common-law factors are restricted even more tightly than the common law: the first looks at substantial control by the *individual worker*, as opposed to *right to control* by an *employer*, and the second (opportunity for profit and loss) is defined with two considerations that many courts disregard as irrelevant: the worker’s ability to set his own schedule by selecting his own projects, or through an ability to work for others. 85 Fed. Reg. at 60639.

As the Department states in its 2015 Administrator’s Interpretation, the “control” factor, for example, should not be given undue weight,” (at p. 3), and “the ‘control’ factor should not play an oversized role in the analysis of whether a worker is an employee or an independent contractor. All possibly relevant factors should be considered, and cases must not be evaluated based on the control factor alone. See, e.g., *Superior Care, Inc.*, 840 F.2d at 1059.”

1. *Even the common-law test looks to “right” to control by the employer, and FLSA coverage does not stop at the common-law boundary.*

The common-law concept of “employ” is narrower than FLSA’s “suffer or permit” concept. While the FLSA was designed to eliminate goods produced under substandard conditions, including with child labor, the common law definition of master/servant was not to offer protection to employees, but rather, to determine whether the master was liable to third parties for a servant’s negligent acts.<sup>20</sup> Thus, the common-law test for employment, and, accordingly, for tort responsibility, was whether the alleged “employer” had the “right to control the manner and means by which the product is accomplished.” *Reid*, 490 U.S. at 751-52; where the alleged master had the right to control details of the servant’s work and the work was performed negligently, it was fair to hold the master accountable.

Certain factors were considered at common law to determine the existence of this relatively narrow employment relationship.<sup>21</sup> Some courts use these same factors to determine the “strikingly broad” scope of FLSA coverage.<sup>22</sup> This similarity suggests that application of some of the commonly-used “economic reality” factors may have focused too much attention on the right to control, a hallmark of common-law employment, rather than on whether the work is “suffered or permitted” by the business owner.<sup>23</sup> Because the common-law definition of employment is also included within the FLSA statutory definition, the factors relating to control are relevant and useful if they are present in the relationship; *their absence, however, says little about whether the work was suffered or permitted.*<sup>24</sup>

By contrast, courts interpreting child labor statutes that used the “suffer or permit” language adopted in FLSA frequently held businesses accountable even when none of the common-law control factors were present.<sup>25</sup> Thus, the common-law test of the right to control has never limited the scope of FLSA accountability. The broader scope of responsibility under the FLSA reaches those who suffer or permit workers to work, in addition to those who control the workers under the narrower common-law test.

Common-law agency principles are used to determine whether sufficient right to control resides in a putative employer. These vicarious liability principles were intended to deter torts and distribute liability to those who had the right to control the servant. These principles were referenced in a non-exhaustive list in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989), and many of these are relevant under FLSA’s broader scope:

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<sup>20</sup> *Lauritzen*, 835 F.2d at 1544.

<sup>21</sup> *Reid*, 490 U.S. at 751-752, 503 U.S. at 323.

<sup>22</sup> In common-law cases, courts consider factors including whether the putative employer: (1) hires and fires the worker; (2) withholds taxes; (3) controls the manner in which the work is performed; (4) the skill required, and (5) the duration of work, among others. *See Reid*, 490 U.S. 730, 751-752 (1989).

<sup>23</sup> “[The degree of supervision of the work], like the growers’ control over the workers, has more to do with common-law employment concepts of control than with economic dependence. Indeed, the ‘suffer or permit to work’ standard was developed in large part to assign responsibility to businesses which did *not* directly supervise the activities of putative employees.” *Antenor v. D & S Farms*, 88 F.3d 925, 933-935 (11<sup>th</sup> Cir. 1996).

<sup>24</sup> “[T]he . . . control factors should weigh little, if anything, in the ultimate [FLSA] joint employment determination.” *Lopez v. Silverman*, 14 F. Supp. 2d 405, 419 (S.D.N.Y. 1998). *See also Antenor*, 88 F.3d at 933-35.

<sup>25</sup> “Thus when one engages an independent contractor to perform certain work and the contractor employs infants in violation of the statute, the one engaging the contractor will be held to have violated the law in permitting the infant to do the work.” *Bernal v. Baptist Fresh Air Home Soc’y*, 87 N.Y.S. 2d 458, 464 (App. Div. 1949), *aff’d*, 300 N.Y. 486 (1949) *Sheffield Farms*, 121 N.E. 474 (N.Y. 1918).

We consider the hiring party's *right to control* the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party (emphasis added).

2. *The Department's first-time assertion that an employer's "bona fide" and "quality" control considerations are irrelevant is vague, confusing, and contrary to law.*

The Department's proposed rule 29 C.F.R. § 791.105(d)(1)(ii) at 85 Fed. Reg. 60639 attempts to take away consideration of certain employer controls based on the source of the control. But this is nonsense: if legislators or regulators have placed an obligation on employers to comply with certain laws, that makes the worker less independent and more dependent on that employer, and this should be accorded weight.

The proposed language includes undefined vague terms, including a "specific legal obligation," a "health and safety standard," and a "quality control standard." Potentially any workplace rule could create disagreement over its status. This uncertainty is compounded by the Department's inclusion of catch-all language covering "other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships)." In other words, a workplace requirement will support a finding of "employment" if it is "typical of employment relationships." This proposed language is entirely circular. And the Department offers no explanation for how such circularity "clarifies and sharpens" existing law.

In seeking to justify the proposed § 791.105(d)(1)(ii), the Department cites to three court opinions: *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042 (5th Cir. 1987); *Iontchev v. AAA Cab Service, Inc.*, 685 Fed. Appx. 548 (9th Cir. 2017); and *Chao v. Mid-Atlantic Installation Services, Inc.*, 16 Fed. Appx. 104 (4th Cir. 2001). See 85 Fed. Reg. 60613, two of which (*Iontchev* and *Mid-Atlantic*) are "unpublished" and "non-precedential." None of the three opinions support a rule that "control" becomes irrelevant to the economic reality analysis if attributable to "specific legal obligations," "health and safety standards," or "quality control standards." Specifically, in *Mr. W Fireworks*, the Fifth Circuit held that the defendant company's requirement that plaintiffs work after ordinary business hours favored plaintiffs' employee status *notwithstanding* the company's attempt to link plaintiffs' work schedules to state regulatory requirements. See 814 F.2d at 1048. As such, the Court never endorsed (or even suggested) a rule that workplace requirements associated with government regulations are irrelevant to the "control" analysis.

The Department's two non-precedential opinions are equally unpersuasive. In *Iontchev*, the Ninth Circuit merely noted that the defendant company's "disciplinary policy primarily enforced the Airport's rules and regulations governing the Drivers' cab operations and conduct." 685 Fed. Appx.

at 550. Likewise, in *Mid-Atlantic*, the Fourth Circuit merely noted that the defendant company's practice of "'backcharging' [cable] installers for failing to comply with various local regulations or with technical specifications" did not weigh in favor of employment status. 16 Fed. Appx. at 106. Crucially, however, neither court suggested that such facts rendered the disciplinary policy (in *Iontchev*) or the back-charging practice (in *Mid-Atlantic*) irrelevant to the control analysis.

In fact, the Department's proposed § 791.105(d)(1)(ii) contradicts judicial opinions specifically addressing whether the "control" factor of the economic realities test excludes workplace requirements attributable to external requirements such as "specific legal obligations," "health and safety standards," or "quality control standards." Most notably, in *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308 (11th Cir. 2013) the Eleventh Circuit cogently explained:

Knight also argues that its quality control measures and regulation of schedules stemmed from "the nature of the business" and are therefore not the type of control that is relevant to the economic dependence inquiry. We disagree. *The economic reality inquiry requires us to examine the nature and degree of the alleged employer's control, not why the alleged employer exercised such control.* Business needs cannot immunize employers from the FLSA's requirements. *If the nature of a business requires a company to exert control over workers to the extent that Knight has allegedly done, then that company must hire employees, not independent contractors.*

721 F.3d at 1316 (emphasis supplied); *see also Amponsah v. DirecTV, LLC*, 278 F. Supp. 3d 1352, (N.D. Ga. 2017) (applying *Scantland* and rejecting defendant's argument that "strict installation standards and quality metrics" were irrelevant to analysis because such requirements "were aimed at customer satisfaction, not control of Plaintiffs"); *Molina v. South Florida Express Bankserv, Inc.*, 420 F. Supp. 2d 1276, 1284 n. 24 (M.D. Fla. 2006) (rejecting defendant's argument that quality control standards required by customers are irrelevant and observing: "The Defendant's reasoning is circular. Any employer's business is, in essence, directed by the needs of its customers.").

Outside of the Eleventh Circuit, courts have similarly rejected arguments that external requirements imposed by the defendant company's customers are irrelevant to the right to control factor. For example, in *Benion v. LeCom, Inc.*, 336 F. Supp. 3d 829 (E.D. Mich. 2018), Comcast contracted with LeCom Communications, Inc. ("LeCom") to install cable in the homes of Comcast customers. LeCom, in turn, assigned the cable installation work to plaintiffs and treated them as independent contractors. When plaintiffs filed an overtime FLSA lawsuit against LeCom, LeCom asserted that workplace requirements attributable to Comcast (LeCom's customer) were irrelevant to the "control" factor. *See* 336 F. Supp. 2d at 852-53. The district court disagreed, citing *Scantland*, and explained that "similar blame-shifting arguments have been rejected by other courts." *Id.* at 853; *see also Flores v. Velocity Express, LLC*, 250 F. Supp. 2d 468, 480-86 (N.D. Cal. 2017) (finding that "control" factor favored employment status based on various job requirements imposed on defendant by customers); *Crouch v. Guardian Angel Nursing, Inc.*, 2009 U.S. Dist. LEXIS 103832, \*59 (M.D. Tenn. Nov. 4, 2009) (rejecting defendant's contention "that because a certain amount of supervision is mandated by the state or by the home health agencies with which they contract, it somehow does not count toward the quantification of the degree of control exercised.").

The above opinions reflect the basic principle that, under the FLSA's economic reality test, the defendant company's "control" over the worker must be assessed without regard to the reasons underlying control.

**B. Opportunity for profit or loss is much broader than the Department's proposal.**

The Department argues that opportunities for profit or loss and one's investment in work are duplicative, and that workers can have an opportunity for profit or loss through their personal initiative. 85 Fed. Reg at 60639. This cramped analysis of the profit or loss factor is contrary to law and to common sense. Opportunities for profit or loss are driven by production decisions of the firm, figuring out how to make managerial decisions that impact the bottom line (profit), setting prices, deciding on product or service variety, setting quality and service standards, and deciding on market expansion or contraction. Investment of capital, on the other hand, concerns longer-term decisions regarding the returns one gets from putting capital into an asset, activity, or item in the hope that it will eventually generate income or appreciate in value.

True independent contractors running their own business will face many managerial decisions that will affect their profitability. That profitability impacts whether it makes sense for them to make an initial investment in a business or expand at some later point (i.e. invest additional resources to expand in pursuit of greater gains). Although the two factors are linked, they are hardly duplicative and separately serve as useful indicia of an entity's status under the FLSA, as the Supreme Court's tests note.

As the Supreme Court has stated in *Goldberg v. Whitaker*, "The members are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates." 366 U.S. 28, 29 (1961).

**C. "Integral to the business" is an important Supreme Court factor that cannot be narrowed.**

The interpretive rule seeks to relegate the concept of "whether the work is part of an integrated unit of production" to a secondary matter. This is directly contrary to the test set forth in the Supreme Court's *Rutherford Food v. McComb*, *supra*. Moreover, the economic arguments are circular and poorly supported.

The Department's proposal (at Fed. Reg. 60639) sheds little light on what integration includes or does not include. In contrast, the Department's 2015 AI at p. 4 found that the integration factor was paramount: "the factor of integration into the business of another should be weighed heavily and in fact is ultimately the test. If the work is integrated this leads to the conclusion that the worker is not independently running a business."

**V. In many fast-growing industries, independent contractor misclassification has become a deeply entrenched practice that can permit employers to avoid their legal duties to workers and degrade labor conditions in many jobs where Black and immigrant workers predominate.**

The Department's proposed test would narrow worker access to FLSA protections, and this threatens to degrade wages across industries and occupations. Long-standing misclassification-prone sectors like construction and home care, emergent misclassification-prone app-based work, and staffing and temporary help agency work—where workers may have some choice over work assignments but control little else about their work—are all susceptible.

Over 21.4 million construction, trucking, delivery, home care, personal care, agricultural, and janitorial and building service workers,<sup>26</sup> 1.6 million labor platform workers,<sup>27</sup> and 3 million staffing and temporary help agency workers<sup>28</sup> could see their wages directly or indirectly<sup>29</sup> eroded due to the proposed DOL test. Furthermore, as labor platforms continue to provide workers in retail<sup>30</sup> and food service,<sup>31</sup> the 16.9 million workers in those major employment sectors could experience wage erosion under the DOL's proposal. The same goes for 16.4 million workers in warehousing, manufacturing, and call center work, where subcontracting to staffing and temporary help is especially widespread and would be encouraged by the DOL's proposal.

Of the 6 million jobs the U.S. Census Bureau projects will be added to the U.S. labor market between 2019 and 2029, at least 30 percent (1.83 million) are in misclassification-prone construction, trucking, delivery, home care, personal care, and janitorial and landscaping sectors.<sup>32</sup> Minimum wage and overtime protections are critical to ensuring the basic security and quality of these jobs, and the DOL's proposed rule could strip scores of workers in growing sectors of these safeguards.

Corporate misclassification of workers as independent contractors is persistent and on the rise in low-wage sectors. Because workers in nonstandard or contingent jobs generally suffer wage penalties, fewer benefits, elevated safety risk, and less job security, employer accountability is

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<sup>26</sup> NELP analysis of 2020 Current Population Survey Annual Social and Economic Supplement microdata.

<sup>27</sup> Bureau of Labor Statistics, U.S. Department of Labor, *Electronically mediated work: new questions in the Contingent Worker Supplement*, Monthly Labor Review, Sep 2018; <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-thecontingent-worker-supplement.htm>

<sup>28</sup> Bureau of Labor Statistics, U.S. Department of Labor, Current Employment Statistics, 2019.

<sup>29</sup> David Cooper & Teresa Kroeger, Economic Policy Institute, Employers steal billions from workers' paychecks each year 2, 9 (2017), <https://www.epi.org/files/pdf/125116.pdf>.

<sup>30</sup> Josh Constine, "How Jyve secretly raised \$35M & built a \$400M retail gig economy," TechCrunch, 24 January 2019, available at <https://techcrunch.com/2019/01/24/jyve-jobs/>.

<sup>31</sup> Richard Morgan, "Apps have turned restaurant work into a gig-economy hustle. Here's how one cook chases a paycheck" The Washington Post, 25 February 2020, available at [https://www.washingtonpost.com/lifestyle/food/apps-have-turned-restaurant-work-into-a-gig-economy-hustle-heres-how-one-cook-chases-a-paycheck/2020/02/24/1f02ee5c-54a8-11ea-9e47-59804be1dcfb\\_story.html](https://www.washingtonpost.com/lifestyle/food/apps-have-turned-restaurant-work-into-a-gig-economy-hustle-heres-how-one-cook-chases-a-paycheck/2020/02/24/1f02ee5c-54a8-11ea-9e47-59804be1dcfb_story.html).

<sup>32</sup> U.S. Bureau of Labor Statistics, Long-Term Occupation Employment Projections, 2019-2029, available at <https://www.bls.gov/emp/tables/emp-by-detailed-occupation.htm>.



paramount.<sup>33</sup> Independent contractor misclassification degrades wages and working conditions, facilitates violations of the FLSA, and drives growing racial income inequality.

Contrary to the Department's statement that employers will pay more to hire independent contractors instead of employees, thereby offsetting loss of wages and tax payments made by employers, and that a high percentage (80% as estimated by DOL) of independent contractors have health benefits, Fed. Reg. at 60626-27, there is no evidence that employers have paid an "earnings premium" in low-wage jobs, or that workers in those jobs have equal access to health benefits.

There is, however, evidence that independent contractors without wage protections fall behind their employee counterparts. While the federal hourly minimum wage has not increased since 2009, real wage growth for low-wage workers in the U.S. in recent years has been tied to state-level minimum wage increases.<sup>34</sup> A New York study of independent contractors in industries including construction, retail, and personal care found that, within occupations, the wages of workers classified as independent contractors have fallen well behind their employee counterparts, who have benefited from the state's rising minimum wage. In New York's construction industry, minimum wage increases helped to raise inflation-adjusted annual earnings of employees by 28.5 percent between 2013 and 2018, compared to an increase of just 7.6 percent for independent contractors in the sector. In the state's retail trade industry, minimum wage increases contributed to a 20.2 percent increase in inflation-adjusted annual earnings for employees, compared to an 11.5 percent increase for independent contractors. In New York's personal care industry, minimum wage increases helped to raise inflation-adjusted annual earnings of employees by 24.5 percent between 2013 and 2018, compared to a *decline* in earnings of 3.9 percent for independent contractors in the sector.<sup>35</sup>

The last decade has seen the emergence of labor platform companies like Uber that straddle the technology and various service sectors. Most of these companies use technologies to dispatch workers and control their work—for example, unilaterally setting fee rates, dictating when and how workers interact with customers—while imposing take-it-or-leave-it independent contractor agreements on their workers. Operational in sectors already prone to independent contractor misclassification, like delivery, labor platform companies are also emerging in sectors like retail<sup>36</sup>

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<sup>33</sup> *America's Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data*, NELP, June 7, 2018, available at <https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/>.

<sup>34</sup> James A. Parrott and Michael Reich, "An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment," Report for the New York City Taxi and Limousine Commission, Jul 2018, <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a3aaa0e2e72ca74079142/1530542764109/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jul1.pdf>.

<sup>35</sup> James A. Parrott and Michael Reich, "An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment," Report for the New York City Taxi and Limousine Commission, Jul 2018, available at <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a3aaa0e2e72ca74079142/1530542764109/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jul1.pdf>.

<sup>36</sup> Josh Constine, "How Jyve secretly raised \$35M & built a \$400M retail gig economy," TechCrunch, 24 January 2019, available at <https://techcrunch.com/2019/01/24/jyve-jobs/>.

and food service,<sup>37</sup> in which the majority of the workforce has been engaged as payroll employees. Digital labor platform companies have come under fire for independent contractor misclassification and wage theft: wildcat strikes over unlivable wages and benefits,<sup>38</sup> campaigns over tip-stealing,<sup>39</sup> and a spate of legal claims brought by public agencies<sup>40</sup> and workers<sup>41</sup> related to misclassification and wage theft suggest that wage protections are critical to ensuring livable compensation for platform workers.

Staffing agency and temporary help jobs are already substandard—staffing and temporary help agency employees experience wage and benefit penalties relative to their direct-hire counterparts<sup>42</sup>—and lowest-bidder dynamics in the business-to-business contracting process place downward pressure on labor standards. If stripped of a wage floor, staffing and temporary help agency workers would face acute risk of poverty wages.

Government data shows that independent contractors are more likely than payroll employees to be uninsured and to rely on Medicaid. Independent contractors are nearly twice as likely as payroll employees to be uninsured; in 2020, 18.6 percent of independent contractors (unincorporated self-employed workers) are uninsured compared to 9.7 percent of payroll employees. Moreover, independent contractors are 55 percent more likely than payroll employees to rely on Medicaid—12.2 percent of independent contractors rely on Medicaid, compared to 7.4 percent of payroll employees.<sup>43</sup> A New York study of independent contractors in low-wage sectors found that over one quarter (27 percent) rely on Medicaid, which is twice the rate for all workers in New York; and 20 percent are uninsured, compared to 8 percent of all New York workers.<sup>44</sup>

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<sup>37</sup> Richard Morgan, "Apps have turned restaurant work into a gig-economy hustle. Here's how one cook chases a paycheck" The Washington Post, 25 February 2020, available at [https://www.washingtonpost.com/lifestyle/food/apps-have-turned-restaurant-work-into-a-gig-economy-hustle-heres-how-one-cook-chases-a-paycheck/2020/02/24/1f02ee5c-54a8-11ea-9e47-59804be1dcfb\\_story.html](https://www.washingtonpost.com/lifestyle/food/apps-have-turned-restaurant-work-into-a-gig-economy-hustle-heres-how-one-cook-chases-a-paycheck/2020/02/24/1f02ee5c-54a8-11ea-9e47-59804be1dcfb_story.html).

<sup>38</sup> Sarah Holder, "Why L.A.'s Ride-Hail Drivers Went on Strike," Bloomberg CityLab, 26 Mar 2019, available at <https://www.bloomberg.com/news/articles/2019-03-26/inside-l-a-uber-and-lyft-drivers-25-hour-strike>; Alana Samuels, "What the Uber IPO Strike Says About American Inequality," Time, 10 May 2019, available at <https://time.com/5584829/uber-ipo-driver-strike/>.

<sup>39</sup> Kevin Roose, "After Uproar, Instacart Backs Off Controversial Tipping Policy," The New York Times, 6 Feb 2019, available at <https://www.nytimes.com/2019/02/06/technology/instacart-doordash-tipping-deliveries.html>.

<sup>40</sup> California Department of Industrial Relations, "Labor Commissioner's Office Files Lawsuits against Uber and Lyft for Engaging in Systemic Wage Theft," 5 Aug 2020, available at <https://www.dir.ca.gov/DIRNews/2020/2020-65.html>; Massachusetts Office of the Attorney General, "AG Healey: Uber and Lyft Drivers are Employees Under Massachusetts Wage and Hour Laws," 14 Jul 2020, available at <https://www.mass.gov/news/ag-healey-uber-and-lyft-drivers-are-employees-under-massachusetts-wage-and-hour-laws>.

<sup>41</sup> <https://www.nelp.org/publication/gig-companies-facing-dozens-lawsuits-workplace-violations/>

<sup>42</sup> Laura Padin and Maya Pinto, "Lasting Solutions for America's Temporary Workers," National Employment Law Project, August 2019, available at <https://s27147.pcdn.co/wp-content/uploads/Lasting-Solutions-for-Americas-Temporary-Workers-Brief.pdf>.

<sup>43</sup> NELP analysis of 2020 Current Population Survey Annual Social and Economic Supplement microdata.

<sup>44</sup> James A. Parrott and Michael Reich, "An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment," Report for the New York City Taxi and Limousine Commission, Jul 2018, available at <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a3aaa0e2e72ca74079142/1530542764109/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jul1.pdf>.

As a group, workers of color—Black, Latinx, Asian/Pacific Islander, and Native American—are overrepresented in misclassification-prone construction, trucking, delivery, home care, agricultural, personal care, ride-hail, and janitorial and building service sectors by over 36 percent; they comprise just over a third of workers overall, but between 55 and 86 percent of workers in home care, agricultural, personal care, and janitorial sectors.<sup>45</sup> In digital labor platform work, Black and Latinx workers are overrepresented by 45 percent—more than in traditional misclassification-prone sectors.<sup>46</sup> Because independent contractor misclassification often comes with a wage and benefit penalty, as noted above, the practice perpetuates growing racial income and wealth inequality and health disparities in the U.S. Rooting out independent contractor misclassification and guaranteeing proper and broad FLSA coverage is a critical racial justice matter.

If finalized in its present form, even the Department assumes that its interpretation will increase the number of workers who will be called “independent contractors,” (Fed. Reg. at 60626-7) and it will create incentives for companies to restructure and outsource to individuals the labor-intensive parts of their business to avoid liability for the workers who they suffer or permit to work.

**VI. The proposed interpretation will negatively impact public coffers and businesses who will not be able to compete unless they too call their workers “independent contractors.”**

Businesses, especially those in high-bid industries, will be substantially adversely affected by the proposed rule, as they will not be able to compete with companies that call their workers “independent contractors.” Companies that misclassify can save as much as 30% or more on payroll costs, and in construction, janitorial, delivery and other labor-intensive sectors, that percentage difference can make or break a contract win.<sup>47</sup>

DOL’s new interpretation will both license misclassification under the FLSA and encourage more employers to convert their workforce to independent contractors resulting in loss of minimum wage and overtime pay under this rule. This will be disastrous for worker protections under other laws, and for the already-astronomical amounts of money lost to state and federal social insurance programs like workers’ compensation, unemployment compensation, and Social Security.<sup>48</sup>

Federal studies and audits in at least thirty-one states find that up to 42% of employers already misclassify their workers as independent contractors.<sup>49</sup> States find from hundreds of thousands to tens of millions of dollars in unpaid unemployment and workers compensation premiums annually

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<sup>45</sup> NELP analysis of 2020 Current Population Survey Annual Social and Economic Supplement microdata.

<sup>46</sup> Bureau of Labor Statistics, U.S. Department of Labor, “Electronically mediated work: new questions in the Contingent Worker Supplement,” *Monthly Labor Review*, Sep 2018, <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-thecontingent-worker-supplement.htm>.

<sup>47</sup> See, e.g., Ruckelshaus, *Independent Contractor v. Employee*, *supra*.

<sup>48</sup> *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, National Employment Law Project (October 2020) <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020/>

<sup>49</sup> *Id.*

due to independent contractor misclassification, impoverishing state funds and foisting costs on law-abiding employers. In California, nine out of ten businesses audited by that states' Labor Enforcement Task Force were found to be out of compliance by at least one agency in 2017-2018. Two out of five were violating the employment laws administered by every agency involved in the task force.<sup>50</sup> In Tennessee during a one-year period ending in October 2018, the Employee Misclassification Education and Enforcement Fund unit assessed 26 penalties against employers for misclassifying their employees, for a total assessment amount of \$3,029,963.29. The Uninsured Employers Fund unit assessed 234 penalties against employers for not maintaining workers' compensation insurance from September 2017 through October 2018, for a total assessment amount of \$2,730,269.60.<sup>51</sup> In Wisconsin, the Department of Revenue estimated that potentially \$91.2 million in personal income tax revenue was forgone in 2019 due to misclassification, with \$50.7 million lost in business taxes from the construction industry alone each year. In 2018, 44% of audited employers were found to be misclassifying workers; in 2019, the state assessed nearly \$57 million in unpaid unemployment insurance premiums.<sup>52</sup>

## VII. Conclusion

NELP joins workers who are fighting for increased pay and economic security in denouncing unjust rules that would lay the groundwork for sweatshop conditions as this proposal would. NELP stands ready to fight this harmful proposal, which would impact Black and immigrant workers the most due to decades of segregation into the lowest-paid jobs. NELP calls on the Department of Labor to withdraw this misguided rule that does the bidding of corporations, rather than striving to protect the workers who should be at the center of DOL's mission and every action.

Sincerely,

Catherine K. Ruckelshaus  
Judy Conti  
Rebecca Smith  
Brian Chen  
Maya Pinto

National Employment Law Project

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<sup>50</sup> *California Labor Enforcement Task Force Biennial Report to the Legislature*, CALIFORNIA DEP'T OF IND. REL. (Mar. 2019), <https://www.dir.ca.gov/letf/LETf-Legislative-Report-2019.pdf>.

<sup>51</sup> *Annual Report of Employer Coverage Compliance*, BUREAU OF WORKERS' COMPENSATION, (Feb. 1, 2019), <https://www.tn.gov/content/dam/tn/workforce/documents/injuries/2019ComplianceAnnualReport.pdf>.

<sup>52</sup> Task Force on Payroll Fraud and Worker Misclassification Report, WISCONSIN DEP'T OF WORKFORCE DEVELOPMENT, (Mar. 2020), <https://dwd.wisconsin.gov/misclassification/pdf/2019-2020-misclassification-task-force-report.pdf>.