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Comments on RIN 1235-AA43: Employee or Independent Contractor Classification Under the Fair Labor Standards Act.

Submitted at: https://www.regulations.gov/commenton/WHD-2022-0003-0001

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 to revise the Wage and Hour Division's guidance[1] on who is a covered employee and who is an independent contractor under the Fair Labor Standards Act ("FLSA").[2] NELP supports the revisions as necessary and consistent with the FLSA's text, purposes, and judicial precedent.

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 receive the 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

[1] The proposed regulation is interpretive guidance that will provide a "practical guide to employers and employees" to explain how the DOL will apply the FLSA in the performance of its duties as the agency charged with administering and enforcing the act. *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944); 29 U.S.C. §§ 204, 211(a), 212(b), 216(c), 217. It will be published among other interpretive rules in 29 C.F.R. Subchapter B, "Statements of General Policy or Interpretation Not Directly Related to Regulations." For the purposes of this Comment, NELP uses "guidance," "rule," or "regulation" interchangeably.

[2] *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*, 87 Fed. Reg. 62218 (Oct. 13, 2022).

and scope of the FLSA's employment coverage, and is an expert in independent contractor misclassification, its magnitude, and its impacts. NELP and its 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 rule.

Our comments address the following points:

1. Independent contractor misclassification is a serious problem adversely impacting U.S. workers, businesses, and public coffers. The practice depresses the wages of millions of workers, facilitates wage theft, and grows racial wage gaps. It also disadvantages law-abiding businesses and depletes government funds.
2. The FLSA is a powerful and nimble antidote to independent contractor misclassification.
3. It is imperative that the flawed 2021 guidance ("2021 IC Rule") be replaced.
4. The proposed rule better responds to concerns that motivated the 2021 IC Rule and is consistent with Supreme Court and circuit precedent. Its explanations of how each factor informs the ultimate question of whether a worker is in business for themselves or dependent on work in the business of another provide improved clarity and focus.
5. The final rule can be improved. It should begin with statutory definitions and explain that the analysis is applied in light of the FLSA's broad definitions. It should clarify that most workers are employees under the FLSA. Certain factors should be sharpened to better focus the analysis, and helpful explanations from the commentary should be added to the text of the final rule.

I. Independent contractor misclassification is a serious problem adversely impacting U.S. workers, businesses, and public coffers.

Work should provide opportunities to learn, contribute, and connect. In return for their labor, people should be compensated fairly and with benefits that enable them to live fully, protected by the right to come together with coworkers to ensure safe and healthy working conditions. A good job enables a person to provide for themselves and their family and to take time for rest, leisure, and care; it allows coworkers and employers to work together to ensure that their communities thrive. 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.[3] Too many companies

[3] Catherine Ruckelshaus, *Independent Contractor v. Employee: Why Misclassification Matters and What we can do to Stop It*, NAT'L EMP. L. PROJECT (May 2016), https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf. *See also, e.g.*, Rebecca Smith & Sarah Leberstein, *Rights on Demand*: *Ensuring Workplace Standards in the On-Demand*

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 shed responsibility for their workers, but often maintain control over where, how, when, and for how much money workers perform their jobs.[4] The result is that the very conditions that the FLSA was designed to combat—conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," 29 U.S.C. § 202(a)—flourish absent effective enforcement.

The consequences for workers, responsible businesses, and public coffers are severe.

A. Independent contractor misclassification depresses the wages of millions of workers, facilitates wage theft, and grows racial wage gaps.

Either directly or indirectly, all workers in the United States feel the impacts of independent contractor misclassification. Over 21 million people work in misclassification-plagued construction, trucking, delivery, home care, personal care, agricultural, and janitorial and building service occupations in the U.S.[5] At least 1.6 million workers work for digital labor platforms like Uber,[6] companies that use digital technologies to dispatch workers and control their work—for example, unilaterally setting fee rates, dictating when and how workers interact with customers—and often impose take-it-or-leave-it independent contractor agreements as a condition of work. And corporations are actively campaigning to strip FLSA protections from workers across every industry and occupation.[7]

Economy, NAT'L EMP. L. PROJECT (Sept. 2015), https://s27147.pcdn.co/wp-content/uploads/Rights-On-Demand-Report.pdf.

[4] *See* Catherine Ruckelshaus, et al., *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work*, NAT'L EMP. L. PROJECT (May 2014), https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf.

[5] NELP analysis of 2020 Current Population Survey Annual Social and Economic Supplement microdata. For underlying data, *see CPS Annual Social and Economic Supplement*, U.S. Census Bureau, https://data.census.gov/mdat/#/search?ds=CPSASEC2022.

[6] *See* U.S. Bureau of Lab. Statistics, *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, Monthly Labor Review (Sept. 2018), https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm (last visited Dec. 6, 2022).

[7] Maya Pinto, et al., *How the Coalition for Workforce Innovation is Putting Workers Rights at Risk*, NAT'L EMP. L. PROJECT (Jul. 19, 2022), https://s27147.pcdn.co/wp-content/uploads/The-Truth-About-CWI-Report.pdf; *On the Anti-Worker Worker Flexibility and Choice Act*, NAT'L EMP. L. PROJECT (Aug. 2, 2022), https://www.thetruthaboutcwi.com/updates/wfca (last visited Dec. 6, 2022); Josh Eidelson, *The Gig Economy is Coming for Millions of American Jobs*, BLOOMBERG (Feb. 17, 2021), https://www.bloomberg.com/news/features/2021-02-17/gig-economy-coming-for-millions-of-u-s-jobs-after-california-s-uber-lyft-vote (last visited Dec. 6, 2022); Richard Morgan, *Apps have turned restaurant work into a gig-economy hustle. Here's how one cook chases a paycheck*, WASHINGTON POST, (Feb. 25, 2020), https://www.washingtonpost.com/lifestyle/food/apps-have-turned-restaurant-

Of the 8.3 million jobs the U.S. Census Bureau projects will be added to the U.S. labor market between 2021 and 2031, at least 41 percent (3.4 million) are in industries that are prone to misclassification such as construction, transportation and material moving, food service, home care, personal care, and janitorial and landscaping sectors.[8] Minimum wage and overtime protections are critical to ensuring the basic security and quality of these jobs.

Research shows that many so-called independent contractors (also called "self-employed") earn significantly less than their employee counterparts. In contrast to the few high-earning professionals, "low- and middle-wage workers who become self-employed see lower take home pay than they could have expected if they remained just as wage earners."[9] In fact, nearly ten percent of independent contractors earn less that the federal minimum wage of $7.25 per hour.[10] The U.S. Department of the Treasury's analysis confirms that "workers who earn their living outside the formal employee-employer relationship earn less, are less likely to have health insurance coverage, or to participate in or contribute to a retirement account."[11] Their earnings are startlingly low, with more than 40% of digital labor platform workers and others who rely primarily on self-employment earning less than $20,000 per year.[12] Indeed, the average Uber driver's wage is just $9.21 per hour after deducting fees and expenses, putting them in the lowest ten percent of wage earners, and earning lower than the minimum wage in the three largest cities.[13]

Lower wages for contractors plague other industries as well. For example, a construction worker earning $31,200 before taxes would net only $10,660.80 as an independent

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work-into-a-gig-economy-hustle-heres-how-one-cook-chases-a-paycheck/2020/02/24/1f02ee5c-54a8-11ea-9e47-59804be1dcfb_story.html (last visited Dec. 6, 2022).

[8] *See* U.S. Bureau of Labor Statistics, *Long-Term Occupation Employment Projections*, 2021-2031, https://www.bls.gov/emp/tables/emp-by-detailed-occupation.htm (last visited Dec. 6, 2022).

[9] Corey Husak, *How U.S. Companies Harm Workers by Making Them Independent Contractors*, WASH. CTR. FOR EQUITABLE GROWTH at 3 (Jul. 2019), https://equitablegrowth.org/wp-content/uploads/2019/09/IB-Independent-Contracting.pdf. *See also* Corey Husak, OFF. OF REVENUE ANALYSIS, D.C. GOV'T, *The Self-Employment Income Drop* (Dec. 12, 2022) (finding that roughly 60 percent of self-employed tax filers were in the lowest income bin, earning $1-22,000 per year, with common occupations including drivers, janitors, home/office cleaners or hair stylists), https://ora-cfo.dc.gov/blog/self-employment-income-drop (last visited Dec. 13, 2022).

[10] Karla Walter & Kate Bahn, *Raising Pay and Providing Benefits for Workers in a Disruptive Economy*, CTR. FOR AM. PROGRESS at 37 (Oct. 2017), https://www.americanprogress.org/wp-content/uploads/2017/10/GigEconomy-report.pdf.

[11] Emilie Jackson, et al., *The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage*, OFFICE OF TAX ANALYSIS WORKING PAPER 114 at 22 (Jan. 2017), https://home.treasury.gov/system/files/131/WP-114.pdf.

[12] *Id*. at 34, Table 6.

[13] Lawrence Mishel, *Uber and the Labor Market: Uber Drivers' Compensation, Wages, and the Scale of Uber and the Gig Economy*, ECON. POL'Y INST. at 13 (May 15, 2019), https://files.epi.org/pdf/145552.pdf.

contractor, but nearly double that—$21,885.20—as an employee.[14] Likewise, the median wage of port truckers driving an average of 59 hours a week was just $28,783 per year for independent contractors compared with $35,000 for employees.[15] Such low earnings raise serious questions about whether these workers are truly running their own independent businesses and lawfully excluded from the FLSA's bedrock wage protections. With up to 95 percent of workers who claim to be misclassified found to be employees after investigation, millions of workers are likely suffering poverty wages and degraded working conditions in part because they are classified as independent contractors.[16]

Employers who misclassify their workers as independent contractors deprive them of the FLSA's wage guarantees. As a result, misclassification also facilitates wage theft, with employers annually cheating workers out of billions of *minimum wage* dollars alone.[17] Misclassification-prone agricultural, retail, food service, hotel, construction, janitorial, landscaping, and beauty and nail salon industries have been recognized by the DOL as sites where wage theft—non-compliance with the FLSA—is highly prevalent.[18]

Independent contractor misclassification by companies is also strikingly racialized, occurring disproportionately in occupations in which people of color, including Black, Latinx, and Asian workers, are overrepresented. As a group, workers of color—Black, Latinx, Asian/Pacific Islander, and Native American workers—are overrepresented in construction, trucking, delivery, home care, agricultural, personal care, ride-hail, and janitorial and building service occupations by over 40 percent; they comprise just over a third of workers overall, but between 47 and 91 percent of workers in these occupations.[19] In digital labor platform work, Black and Latinx workers are overrepresented by 45

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[14] *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT'L EMP. L. PROJECT at 5 (Oct. 2020), https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf [hereinafter *Misclassification Huge Costs*].

[15] Rebecca Smith, et al., *The Big Rig Overhaul: Restoring Middle-Class Jobs at America's Ports Through Labor Law Enforcement*, NAT'L EMP. L. PROJECT at 12 (Feb. 2014), https://www.nelp.org/wp-content/uploads/2015/03/Big-Rig-Overhaul-Misclassification-Port-Truck-Drivers-Labor-Law-Enforcement.pdf. *See also* Sarah Leberstein & Catherine Ruckelshaus, *Independent Contractor v. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It*, NAT'L EMP. L. PROJECT (May 2016), *https://www.nelp.org/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf*.

[16] *Misclassification Huge Costs*, *supra* n. 14, at 3 (citing Lalith DaSilva et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, PLANMATICS, INC., PREPARED FOR U.S. DEP'T OF LAB. EMP. AND TRAINING ADMIN. (2000), https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.).

[17] David Cooper & Teresa Kroeger, *Employers steal billions from workers' paychecks each year*, ECON. POL'Y INST. (May 10, 2017) https://files.epi.org/pdf/125116.pdf.

[18] U.S. Dep't. of Labor, Wage and Hour Div., https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries.

[19] NELP analysis of March 2022 Current Population Survey Annual Social and Economic Supplement microdata. For underlying data, *see CPS Annual Social and Economic Supplement*, U.S. Census Bureau, https://data.census.gov/mdat/#/search?ds=CPSASEC2022.

percent—more even than in more traditional misclassification-prone sectors.[20] Because independent contractor misclassification often comes with the wage and benefit penalties noted above, this corporate practice perpetuates growing racial income and wealth inequality and health disparities in the U.S. The practice reinforces occupational segregation along lines of race and gender, and it fosters a second-tier workforce of workers of color in precarious jobs stripped of bedrock employment protections.[21] Combatting corporations' illegitimate use of "independent contractors" by clarifying the scope of FLSA's bedrock protections is a racial and gender justice issue.

B. Corporate misclassification of employees as independent contractors disadvantages law-abiding businesses and depletes government coffers.

Misclassification of employees as independent contractors causes negative ripple effects in the community. Cheating businesses make it more difficult for law-abiding businesses to compete. The practice, as the United States Treasury Inspector General found, "plac[es] honest employers and businesses at a competitive disadvantage."[22] Businesses that misclassify their employees pocket between 20 to 40 percent of payroll costs they would otherwise incur for unemployment insurance, workers compensation premiums, the employer share of social security, and health insurance premiums.[23] They pressure their competition to shed labor costs, creating a "race to the bottom" where firms try to remain competitive by following suit.[24] A 2010 study estimated that misclassifying employers shift $831.4 million in unemployment insurance taxes and $2.54 billion in workers' compensation premiums to law-abiding businesses annually.[25] Over time, fewer honest businesses can compete.[26]

Government funds also pay an enormous price when employees are misclassified as independent contractors. Conservative estimates suggest that the federal and state governments lose billions of dollars per year in unreported payroll taxes and unemployment insurance contributions.[27] A 2009 report by the Government Accountability

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[20] *See* U.S. Bureau of Lab. Statistics, *Electronically Mediated Work*, *supra* n. 6 (noting over-representation of Black and Latinx workers).
[21] *See, e.g.*, Veena Dubal, *The New Racial Wage Code*, 15 HARV. L. & POL. REV. 511 (2022) (arguing that gig-worker carve outs are made possible by and reproduce racial subjugation).
[22] Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success* at 1 (2018-IC-R002: Feb. 20, 2018), https://www.tigta.gov/sites/default/files/reports/2022-02/2018IER002fr.pdf.
[23] Françoise Carré, *(In)Dependent Contractor*, ECON. POL'Y INST. at 5 (Jun. 8, 2015), https://files.epi.org/pdf/87595.pdf.
[24] *See* David Weil, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 139-41 (2017).
[25] *See* Douglas McCarron, *Worker Misclassification in the Construction Industry*, 57 BNA Construction Labor Report 114 (April 7, 2011). *See also* Michael P. Kelsay, *Cost Shifting of Unemployment Insurance Premiums and Workers' Compensation Premiums*, Dep't of Econ., Univ. of Mo., Kan. City 5-6 (Sept. 12, 2010).
[26] *See* Weil, *supra* n. 24.
[27] *Misclassification Huge Costs*, *supra* n. 14, at 2-3. *See also* Carré, *supra* n. 23, at 2.

Office estimates that independent contractor misclassification cost federal revenues $2.72 billion in 2006.[28] Additionally, the Treasury Inspector General for Tax Administration estimates that misclassification contributed to a $54 billion underreporting of employment tax and losses of $15 billion in unpaid FICA taxes and UI taxes.[29] State-level task forces, commissions, and research teams have also used agency audits along with unemployment insurance and workers' compensation data to document the huge impact of independent contractor misclassification. These state reports suggest that at least 10 to 30% of employers misclassify employees as independent contractors.[30] In just one recent example, Pennsylvania's Joint Task Force estimated that the state lost up to $124.5 million in general revenues due to misclassification, with nearly 400,000 misclassified employees deprived of workplace protections in that state alone.[31]

II. The FLSA is a powerful and nimble antidote to independent contractor misclassification.

Fortunately, the FLSA is a nimble and powerful bulwark against independent contractor misclassification. The Act expansively defines "employ" to include "to suffer or permit to work," 29 U.S.C. § 203(g), and "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).[32] As the Supreme Court has noted, "A broader or more comprehensive coverage of employees . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945). The Supreme Court "has consistently construed the Act liberally to apply to the furthest reaches consistent with congressional direction, recognizing that broad coverage is essential to accomplish the [Act's] goal. . . ." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (internal quotation and citation omitted).

These intentionally broad and unique definitions enable the FLSA to protect workers in relationships that were not within the 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 the 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).

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[28] *See* U.S. Government Accountability Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* (Aug. 2009), http://www.gao.gov/new.items/d09717.pdf (noting $1.6 billion lost in 1984 dollars).

[29] Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address Worker Misclassification, Agency-Wide Employment Tax Program and Better Data Are Needed*, (February 4, 2009) (on file with authors).

[30] Rebecca Smith, *Public Task Forces Take on Employee Misclassification: Best Practices*, NAT'L EMP. L. PROJECT at 3 (Aug. 2020), https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Public-Task-Forces-Take-on-Employee-Misclassification-Updated-August-2020.pdf.

[31] *Joint Task Force on Misclassification of Employees Annual Report*, PENNSYLVANIA DEP'T. OF LABOR & INDUS. (Mar. 1, 2022), https://www.dli.pa.gov/Individuals/Labor-Management-Relations/llc/Documents/Act%2085%20Annual%20Report%202022.pdf.

[32] The definition of "employee" at 29 U.S.C. section 203(e) references the other two.

Intentionally adopting definitions from child labor laws common in many states, Congress sought to eliminate substandard labor conditions by expanding accountability for violations, including for businesses that insert contractors in their business. *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring) ("FLSA was designed to defeat rather than implement contractual arrangements."). *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 "suffer or permit" language from the child labor laws imposed liability if an employer had the opportunity to detect work being performed illegally and the ability to prevent it from occurring. *See, e.g.*, *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25, 29-31 (N.Y. 1918).*

These expansive definitions enable the FLSA to respond flexibly to emerging trends and technological advancements across industries. The text of the statute has always been the starting point for determining the question of employee coverage, regardless of the kind of workforce.[33] The economic realities analysis is applied through the lens of the Act's broad statutory definitions to determine whether an individual may be fairly excluded from the FLSA's bedrock protections. The analysis, developed through decades of case law, simply asks whether a worker is running their own business or dependent on finding work in the business of another. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008). The approach is applicable to new work arrangements and economic developments. As the Department has recognized, properly "applying the economic realities test in view of the expansive definition of 'employ' under the Act, most workers are employees under the FLSA."[34]

III. It is imperative that the Department replace the flawed 2021 IC Rule.

It is critical for the Department to rescind and replace in its entirety the 2021 IC rule. As explained more fully in NELP's October 26, 2020, comments in opposition[35], the current

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[33] *See, e.g.*, *McFeeley v. Jackson St. Ent., LLC*, 825 F.3d 235, 240 (4th Cir. 2016) (exotic dancers); *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013) (cable technicians); *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) (life insurance sales agents); *Baker v. Flint Eng'g & Const. Co*., 137 F.3d 1436, 1440 (10th Cir. 1998) (skilled rig welders); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) (temporary staffing agency workers); *Martin v. Selker Bros.*, 949 F.2d 1286, 1293 (3d Cir. 1991) (gas station operators); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058 (2d Cir. 1988) (health-care personnel for referral agency); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (laundry operators).

[34] 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* (Jul. 15, 2015), https://www.blr.com/html_email/ai2015-1.pdf [hereinafter "2015 AI"].

[35] NELP Comments in Opposition to Notice of Proposed Rulemaking, *Independent Contractor Status Under the Fair Labor Standards Act*, RIN 1235-AA34, 85 Fed. Reg. 60600 (Oct. 26, 2020), submitted at https://www.regulations.gov/comment?D=WHD-2020-0007-0001. *See also* 86 Fed. Reg. 1168, *Independent Contractor Status Under the Fair Labor Standards Act*, RIN 1235-AA34, Final Rule (Jan. 7, 2021) (noting NELP's opposition).

DOL guidance is an anti-worker misapplication of a longstanding legal test that increases risks to low-wage workers and sows confusion regarding proper coverage of FLSA protections. Further, it departs from decades of case law established by the United States Supreme Court and federal Courts of Appeal.[36] By setting forth an entirely new formulation of the multifactor economic reality test, elevating two factors (control and opportunity for profit or loss) as "core" factors above others, and asserting that the two core factors have "greater probative value" in determining a worker's economic dependence,[37] the 2021 IC Rule misapplies and improperly limits the analysis and virtually lays down a roadmap for bad actor employers seeking to deny wage and hour protections to their workforce. In so doing, it undermines Congress's intent to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202.

By departing from decades of federal case law on the scope of the Act's protections, and by downplaying relevant facts of an employment relationship in the analysis, the 2021 IC Rule not only narrows and constricts FLSA coverage, it creates more confusion for employers and workers alike.[38] The effects, over time, will be serious; the negative consequences discussed *supra*, Section I, will be exacerbated.

That the Department has, even under the current rule, investigated egregious cases of misclassification does not alter the fact that the 2021 IC Rule's approach contradicted the FLSA's purpose and text and decades of case law. If anything, recent DOL investigations of misclassification—*even under a legally incorrect standard that is incredibly permissive to employers seeking to dodge compliance*—underscores the pervasive and dramatic degree to which employers are denying workers their FLSA protections.

Given its legal deficiencies and contradiction with the Act's statutory purpose, the 2021 IC Rule merits neither adherence, agency deference, nor smallest persuasive effect. If it aimed to reduce confusion, it accomplished only the opposite. That guidance introduced out-of-left-field concepts that contravene foundational Supreme Court precedent, undermine the purpose of the Act, and imperil workers meant to be covered by the country's bedrock wage protection laws.

IV. The proposed guidance improves the focus and clarity of the economic realities analysis.

Notwithstanding its abrupt departure from longstanding legal precedent and its failure to advance the statutory goals of the FLSA, the 2021 IC Rule raised some legitimate issues regarding how to analyze "economic dependence" and the lack of focus in the multifactor

[36] NELP Opposition Comments at 5-6.
[37] 86 Fed. Reg. 1246-47 (sections 795.105(c) and (d)).
[38] 87 Fed. Reg. 62225 (noting that elevation of certain factors and limits on consideration of relevant facts may result in misapplication of the analysis and may have conveyed that the rule makes it easier to classify certain workers as independent contractors rather than protected employees).

economic realities test. But where the 2021 IC Rule identified—yet failed to address—valid concerns, the proposed guidance offers a superior framework to address those issues.

Most importantly, to address confusion that can stem from a multifactor balancing test, the commentary to the proposed rule clarifies how each of the factors (described in more detail below) informs the economic dependence analysis, i.e., *how and why* each factor helps to answer the question of whether a worker is truly in business for themself. NELP agrees with the Department that this approach helps to "provide the further development of the concept of economic dependence."[39] By sharpening the focus of each factor, the proposed rule provides greater clarity, which will encourage employer compliance and reduce misclassification while still enabling true independent contractors to run their businesses as they see fit.

A. Proposed § 795.110(b)(1) – Opportunity for profit or loss depending on managerial skill

NELP agrees with the DOL's decision to explicitly tie the opportunity for profit or loss to a worker's *managerial skill*, not their ability to work longer. By focusing on a person's business acumen, the proposed rule appreciates that independent contractors have the power to make economic decisions affecting their bottom line, in their own interest. It better targets relevant questions, such as whether a worker can determine or meaningfully negotiate pay, freely accept or decline jobs, or meaningfully negotiate the order and/or time in which jobs are performed, among other considerations.[40] The guidance appropriately suggests that this factor would weigh in favor of independent contractor status for a freelance writer who has the power to negotiate the price of her projects in an arms-length transaction, but not for a home care worker who signs a contract with take-it-or-leave it pay terms or for an app-based worker whose pay is set by the company's black box algorithm.

Significantly, the guidance appropriately recognizes that a worker's decision to simply work more hours or take more jobs does not reflect the exercise of managerial skill, and hence would not suggest independent contractor status. Such a decision may reflect qualities of tenacity or hustle, but it does not reflect one's ability to skillfully manage their own business venture. Simply working more hours to earn more money—at the same or similar rate of pay set by the employer—reflects economic dependence, not a decision based on an analysis of the likely impact on the bottom line issues of profit or loss.

B. Proposed § 795.110(b)(2) – Investment

The proposed rule appropriately returns investment as a standalone factor, rather than packaging it with the opportunity for profit or loss factor, as did the 2021 IC Rule. Though related to profit and loss, assessing investment as a standalone factor is appropriate because investments are a clear criterion of entrepreneurship.

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[39] 87 Fed. Reg. 62226.

[40] 87 Fed. Reg. 62237, section 795.110(b)(1).

The proposed guidance helpfully looks at the *nature* of the investment, which goes to the heart of a worker's economic (in)dependence. The distinction between investments that are "capital or entrepreneurial in nature," on the one hand, and "costs borne by the worker simply to perform their job," on the other, identifies the critical difference between whether the money spent by the worker is actually a business *investment*—something capital or entrepreneurial in nature—and not simply a *cost of doing business* (tools and equipment to perform a specific job).[41]

True businesses—whether a small business owner seeking only to sustain profit margins or a large, sophisticated corporation looking to expand market share—make capital investments. Capital investments matter because they indicate an entity's ability to make forward-looking business decisions in their own economic interest. A true independent contractor is well-positioned to make capital expenditures and investments in their own business *as a prospective business decision*, based on the likely impact on profit or loss.

Conversely, costs to perform a job do not reflect the nature of a worker's independence. For instance, as the proposed rule notes, the use of a personal vehicle that the worker *already owns* to perform work is generally not a capital investment. This is important as more businesses, seeking to avoid reimbursement of work expenses by misclassifying workers as independent contractors, virtually mandate the use of a worker's personal vehicle—even as they retain control over the work. In these situations, the use of personal vehicles does not suggest the workers are running their own businesses; it suggests they are at the mercy of the demands imposed to work in the business of another.

C. Proposed § 795.110(b)(3) – Permanence

NELP agrees with the Department's proposed additional guidance on the permanence factor. As the proposed guidance notes, the focus on the permanence of a given work relationship, as with other factors, is whether it results from the worker's own business initiative and decision-making power. A worker whose work relationship is indefinite or continuous or who is performing a job that is regularly required by the business is more likely to be an employee than a worker who performs work that is definite in duration, project-based, or sporadic. *See, e.g.*, *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007), *as amended* (Aug. 30, 2007) (Easterbrook, J.) (suggesting independent contractors perform "a distinct activity" such as plumbing repairs, where the worker "appears, does a discrete job, and leaves again").

But, as the proposed rule notes, permanence is "not limited solely to the length or definiteness of the work relationship."[42] The *nature* of the work's permanency—specifically, whether and how a worker exercises independence in deciding the permanency of the work relationship—is a key consideration. For example, in seasonal industries or temporary work, many workers may have an impermanent work

[41] 87 Fed. Reg. 62240, section 795.110(b)(2).
[42] 87 Fed. Reg. 62244.

relationship, but the industry-specific operational characteristics may predominate over a worker's ability to exercise "choice or decision" in the permanency of the work relationship.[43] Therefore, the *lack* of a permanent relationship does not indicate independent contractor status if it is not the result of the worker's own business initiative.

NELP also agrees with the Department's clarification, consistent with circuit authority, that working multiple jobs does not necessarily favor independent contractor status. Across all kinds of low-wage industries, particularly in services such as transportation, delivery, or home care, many workers juggle multiple jobs with multiple hiring entities not as an exercise of their own business judgment but as a necessity to cobble together a living wage in an underpaying economy.

D. Proposed § 795.110(b)(4) – Nature and degree of control

As the Department recognizes, the true independent contractor controls, and has the right to control, all important business decisions—what good or service to sell and at what price, what capital investments to make to grow the business, how to market the goods and services, who to hire, and how to go about doing the work. The proposed rule appropriately focuses the "control" inquiry on what the facts suggest about whether a worker is running an independent business. It considers whether the employer controls or has the right to control, even if unexercised, "meaningful economic aspects of the work relationship such that the control indicates that the worker does not stand apart as their own business. . . ."[44]

Specific indicia of this right to control are lifted up in the commentary. The proposed guidance correctly recognizes that price-setting by an employer is a form of control indicative of an employment relationship. Entrepreneurs use business acumen to set prices for goods and services at a rate that enables them to make a profit. Conversely, without the power to set prices for goods or services, a worker will likely be economically dependent on an employer for work, and if she wants to increase earnings, her only option is to work longer, harder, or more jobs. The power to set prices is particularly important in today's economy. For example, drivers for ride hail companies like Uber and Lyft have no ability to set prices for the rides they provide to the companies' customers; they are instead at the mercy of pay set unilaterally by a black-box company algorithm.[45] Driver pay is decoupled from customer fares, such that a driver cannot make business decisions about what to

[43] *Baker v. Flint Eng'g & Const. Co.*, 137 F.3d 1436, 1442 (10th Cir. 1998)
[44] 87 Fed. Reg. 62246.
[45] Dara Kerr, *Secretive Algorithm Will Now Determine Uber Driver Pay in Many Cities*, THE MARKUP (Mar. 1, 2022), https://themarkup.org/working-for-an-algorithm/2022/03/01/secretive-algorithm-will-now-determine-uber-driver-pay-in-many-cities (last visited Dec. 6, 2022).

charge customers in order to increase pay or make a profit.[46] The same is true for app-based delivery workers for companies like GrubHub, DoorDash, Shipt, and Amazon Flex.[47]

Likewise, the proposed guidance appropriately downplays the importance of scheduling flexibility, recognizing "that the ability to set one's own schedule provides only minimal evidence" that a worker is in business for themselves.[48] This common-sense approach recognizes that businesses can offer employees scheduling flexibility if they choose.[49] Skepticism towards scheduling flexibility is also warranted given businesses' propensity to offer it in theory, while pressuring workers to perform when and where the business demands. For example, while owner-operator truckers may in theory have control over their own schedules, they often need to work full-time in order to pay vehicle costs, insurance, other overhead, and eke out a living.[50] For many on-demand and app-based workers, so-called flexibility is monitored, mediated, supervised, and carefully managed by big-brother type behavioral nudges that allow the companies to control when, how long, and how they work.[51] As courts have recognized, the question "is whether a [worker's] freedom to work when she wants and for whomever she wants reflects economic independence, or whether those freedoms merely mask the economic reality of

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[46] Faiz Siddiqui, *You May Be Paying More for Uber, But Drivers Aren't Getting Their Cut of the Fare Hike*, WASHINGTON POST (Jun. 10, 2021), https://www.washingtonpost.com/technology/2021/06/09/uber-lyft-drivers-price-hike/ (last visited Dec. 6. 2022).

[47] *See, e.g.*, Brody Ford, *DoorDash Drivers Game Algorithm to Increase Pay*, BLOOMBERG (Apr. 6, 2021), https://www.bloomberg.com/news/articles/2021-04-06/doordash-workers-are-trying-to-game-the-algorithm-to-increase-pay (last visited Dec. 6, 2022); Ashlie D. Stevens, *After Algorithm Shift, UberEATS Couriers Without Cars Report Dwindling Wages*, SALON (Jul. 15 2022), https://www.salon.com/2022/07/15/after-algorithm-shift-uber-eats-couriers-without-cars-report-dwindling-wages/ (last visited Dec. 6. 2022); *Data Shows Shipt's "Black-Box" Algorithm Reduces Pay of 40% of Workers*, COWORKER.ORG (Oct. 15, 2020), https://www.salon.com/2022/07/15/after-algorithm-shift-uber-eats-couriers-without-cars-report-dwindling-wages/ (last visited Dec. 6. 2022).

[48] 87 Fed. Reg. 62248

[49] *Workers Demand True Flexibility with Full Employment Protections*, NAT'L EMP. L. PROJECT (Nov. 18 2022), https://www.thetruthaboutcwi.com/updates/workers-demand-true-flexibility-with-full-employment-protectionsnbspnbsp (last visited Dec. 6, 2022).

[50] See *Dun Nam Ly v. J.B. Hunt Transport, Inc.*, Case No. 2:19-cv-01334-SVW-SS at *13 (C.D. Cal. Complaint, Jun. 3, 2019) (truckers are "expected to work at least 10 hours per day, five days per week . . . "); *Brant v. Schneider National, Inc.*, 43 F. 4th 656, 668 (7th Cir. 2022) (explaining that, despite contractual right to the contrary, trucker had "no real ability to exercise choice over his schedule," a factor which weighed in favor of employee status). *See also* Steve Viscelli, THE BIG RIG: TRUCKING AND THE DECLINE OF THE AMERICAN DREAM (2016).

[51] *See* Rebecca Smith, *Flexibility in the On-Demand Economy*, NAT'L EMP. L. PROJECT at 4 (Jun. 2016), https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Flexibility-On-Demand-Economy.pdf ("In the end, a job with Uber or other on-demand companies comes with roughly the same degree of freedom as a job with a staffing agency or as a substitute teacher or day laborer: while a worker is ostensibly free to decide not to work on a particular day, she may not get a call the next time she wants to work, and she may be short on cash at the end of the month.").

dependence." *Reich v. Priba Corp.*, 890 F. Supp. 586, 592 (N.D. Tex. 1995) (citing *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 300–02 (5th Cir. 1975)).

The proposal to update the analysis of supervision, particularly noting the availability of remote or technology-based supervision, is also helpful. Many businesses today manage their workforces with monitoring systems that track productivity, location, and attendance. Indeed, one of the country's largest companies remotely tracks workers down to the minute, disciplining them for "time off task."[52] Businesses have also turned to smartphone apps to manage their workforce. Grocery stores that used to hire employees to deliver food to customers' homes increasingly contract with companies like Instacart and Getir, who in turn hire workers to do the same job through smartphone apps as independent contractors.[53] The same is true for restaurant workers, many of whom used to be hired directly by a restaurant to deliver food, but who now do the same work for GrubHub or UberEats—this time ostensibly without benefits or the right to minimum wage and overtime.[54] When technology enables companies that have always used employee labor to suddenly switch to an independent contractor model, a close look is warranted. The updated analysis of supervision in the proposed rule will ensure that supervision is analyzed regardless of the medium used to accomplish it.

In stark contrast to the 2021 IC Rule's impermissibly narrow focus on the "Primacy of Actual Practice," the proposed rule further clarifies that the employer's *right* to control the worker is important, not just whether control is actually exercised. This approach recognizes that contractual provisions can be powerful silencers; a right that is never exercised may be more significant evidence of control than a right that is routinely ignored. At the same time, the proposed rule also clarifies that whether a worker is truly free to work for others requires an examination of the facts on the ground; businesses may place demands on time or monetary penalties that effectively preclude a worker from seeking other work.

Finally, the proposed rule recognizes control exercised for purposes of legal compliance, quality control, or customer demands may be relevant. Control exercised for whatever reason is relevant; it suggests that the hiring entity is the one with the power to ensure that the standards demanded are met, and conversely that the worker is not operating a business that can negotiate such standards or assume the risks of non-compliance.

E. Proposed § 795.110(b)(5)- Skills & Initiative

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[52] Lauren Kaori Gurley, *Internal Documents Show Amazon's Dystopian System for Tracking Workers Every Minute of Their Shifts,* VICE MOTHERBOARD (Jun. 2, 2022), https://www.vice.com/en/article/5dgn73/internal-documents-show-amazons-dystopian-system-for-tracking-workers-every-minute-of-their-shifts (last visited Dec. 6, 2022).

[53] Sapna Maheshwari, *It's Hard Work to Make Ordering Groceries Online So Easy*, N.Y. TIMES (Jun. 4, 2021), https://www.nytimes.com/2021/06/04/business/online-groceries-pickers-instacart.html (last visited Dec. 6, 2022).

[54] Scott Absher, *The Threat of Third-Party: Why Restaurants Should Think Twice About Outsourcing Delivery*, HOSPITALITY TECHNOLOGY (Jan. 2, 2019), https://hospitalitytech.com/threat-third-party-why-restaurants-should-think-twice-outsourcing-delivery (last visited Dec. 6, 2022).

NELP agrees with the Department's decision to revise the "skills" factor to also include an analysis of whether the worker uses those skills in connection with "business-like initiative."[55] The focus of the inquiry should be not just on whether the worker uses specialized skills, but whether a worker uses those specialized skills to "contribute to business-like initiative that is consistent with the worker being in business for themself."[56] The revised approach appropriately refocuses the analysis on the question of whether the worker is running an independent business or is dependent on their employer for business.

Under the 2021 IC Rule, the Department's guidance restricted the analysis to a narrow consideration of whether the job was skilled or unskilled.[57] But, as the proposed rule points out, many workers clearly performing services as employees do work that is highly skilled.[58] Landscapers, welders, and janitors may use specialized skills to cull trees, fuse aluminum, and clean ceiling vents, and in many work arrangements are clearly employees under the FLSA. But if those skills are not being used in connection with the exercise of business-like initiative, then they do not suggest independent contractor status.

The Department's framing helpfully resolves potential problems associated with considering "skills" in a vacuum, which could render the factor vulnerable to manipulation by employers who may generate job descriptions for "skilled work," while maintaining power over business decisions.

F. Proposed § 795.110(b)(5) – Integral

The Department's proposed guidance of the integral factor focuses on whether the worker's work is an integral part of—meaning critical, necessary, or central to—the employer's business. NELP agrees that "if the [hiring entity] could not function without the service performed by the workers, then the service they provide is integral."[59] The 'integral' factor recognizes that a worker who performs tasks or services that are critical to the mission of the hiring entity—tasks or services that the entity markets to its client or consumer base—is not likely to be independently determining how, whether, or when to perform the work or at what price. [60]

The integral factor is closely related to the FLSA's "suffer or permit" standard; an employer clearly suffers or permits workers to perform tasks that are within the usual course of—integral to—its business. As the Department explained in its 2015 AI, the statutory

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[55] 87 Fed. Reg. 62255.
[56] 87 Fed. Reg. 62254.
[57] 86 Fed. Reg. 1247.
[58] The Department correctly notes that "both employees and independent contractors may be skilled workers." 87 Fed. Reg. 62256.
[59] 87 Fed. Reg. 62253.
[60] The integral factor echoes the second prong of the 'ABC' test, which looks to whether the work performed is 'outside the usual course of business' of the hiring entity. *See, e.g.*, *Hargrove v. Sleepy's LLC*, 612 F. App'x 116, 118 (3d Cir. 2015) (noting second 'B' prong looks to "whether work is outside the usual course of the business for which such service is performed. . . .").

language was intended to "bring within the scope of employment workers integrated into an employer's business."[61] It recognizes a simple truth: workers are more likely employees under the FLSA if "they perform the primary work of the alleged employer." *Donovan v. DialAmerica Mktg. Inc.*, 757 F.2d 1376, 1385 (3rd Cir. 1985). It is consistent with the Supreme Court's analysis in *U.S. v. Silk*, 331 U.S. 704, 718 (1947), which found the workers were employees because, *inter alia*, they were an "integral part of" and "did work in the course of the employer's trade or business."

The approach also makes intuitive sense because businesses need employees—not other independent businesses—to provide the services and products they market so that they can maintain quality control and positive customer association with their name. *See Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1319 (11th Cir. 2013) (finding that the alleged employer's "concern with the quality of the services it provides" through its technicians showed that the technicians were an integral part of the business).

The proposed rule further correctly notes that the relevant inquiry is whether the *work* performed is integral, not whether the worker performing the work is indispensable. *See, e.g., Baker v. Flint Engineering & Constr. Co.*, 137 F.3d 1436, 1443 (10th Cir. 1998) (noting that the integral factor focuses on "whether workers' *services* are a necessary component of the business") (emphasis supplied). NELP appreciates and supports this clarification because all too often employers, particularly employers in low-wage industries where misclassification is common, churn through workers who are performing the integral tasks.

V. The proposed guidance could offer more clarity.

Although the proposed guidance is both necessary and well supported by case law, there are several ways the final rule should be improved to provide a more focused analysis. As a general matter, while the commentary in the proposed rule helpfully focuses the analysis of each factor, the text of the proposed rule risks being overly succinct. The Department should consider, in addition to the specific changes suggested below, incorporating more of its helpful analysis from the commentary in the text of the final rule.

A. The FLSA's definitions include most workers as employees, as DOL has noted.

NELP urges that the text of the final rule reference the expansive statutory definitions of "employ," 29 U.S.C. § 203(d), and "employer" 29 U.S.C. § 203(g).[62] As noted *supra*, Section 2, these expansive definitions are the starting point of any analysis. The Department should clarify, as it did in the 2015 AI, that "The Economic Realities Factors Should Be Applied in View of the FLSA's Broad Scope of Employment and 'Suffer or Permit' Standard."[63] It should affirmatively state in the text of the final rule, as it has in the past, that "applying the economic realities test in view of the expansive definition of 'employ' under the Act, most

[61] 2015 AI, *supra* n. 34, at 3.
[62] The current text only briefly references the definition of "employee." 87 Fed. Reg. 62274.
[63] 2015 AI, *supra* n. 34, at 2.

workers are employees under the FLSA."[64] Stating that most workers are employees under the FLSA at the outset of the text of the final rule will provide additional clarity for workers, businesses, and administrators by offering a text-based lens through which to apply the economic realities analysis. That analysis has been developed through decades of judicial interpretations, but it is necessarily guided by the more expansive statutory text. The Department's failure to elevate the intentionally broad text misses an opportunity to provide further clarity and risks an atextual and unduly narrow interpretation of the FLSA's scope.

Finally, but relatedly, the Department acknowledges in the commentary that the "FLSA applies to an extremely broad scope of employment relationships, and only workers who are in business for themselves are excluded from its coverage as independent contractors."[65] It should include that statement in the text of the final rule.

B. <u>The limits of the 'control' factor should be emphasized to avoid confusion with common law; other changes should be made to provide more clarity</u>.

While the proposed guidance corrects many of the problems with the 'control' factor in the 2021 IC Rule, it does not go far enough. The final rule should point out that the 'control' factor is furthest removed from the statutory "suffer or permit" language, and that an absence of control is not particularly telling given that language.[66] Moreover, the right to control includes unexercised control as well as control that is performed indirectly via an intermediary, and the Department should state this clearly in the text of the final rule. Further, given the FLSA's intent to expand coverage to workers who would not be employees under the common law control test, *see Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992), the Department should take special care to emphasize the limits of this factor in the text of the final rule. Simply removing control as a 'core factor' status is insufficient particularly given the potential for confusion with the common law's focus on control.

The text of the final rule should also include the commentary's focus on "whether the employer retains control over meaningful economic aspects of the work relationship" such that it is likely that "the worker does not stand apart as their own business."[67] It should include all the subtopics –scheduling, supervision, price-setting, and the ability to work for others– with explanations from the commentary. With respect to supervision, the Department should also clarify that a lack of direct supervision may still support a finding of an employer's right to control if an employer can simply exert control when it deems it in the employer's interest to do so.

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[64] *Id.*
[65] 87 Fed. Reg. 62237.
[66] In this regard, the ABC test, which considers whether a worker is "free from control" both in fact and under any contract, provides an approach more consistent with the FLSA's text.
[67] 87 Fed. Reg. 62246.

Additionally, the final rule should go further than the proposed rule; it should recognize that control that is exercised for legal compliance and quality control *is* – not "may be" – relevant. As the Eleventh Circuit has stated: "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." *Scantland*, 721 F.3d at 1316. The Department should explain that if a government agency or other entity looks to the hiring entity for compliance, that fact alone suggests that the hiring entity has the requisite control to demand compliance.

At a minimum, the Department should reorder the pertinent facts listed in the text of final rule. The proposed rule text states *as the first fact to consider* whether an employer sets the schedule, threatening to give that factor outsized importance, contrary to the Department's earlier statement that the ability to set one's own schedule provides only minimal evidence that a worker is an independent contractor.[68] The text of the rule itself should be clear that the power to decline work and maintain a flexible schedule is not alone persuasive evidence of independent contractor status. More indicative of whether a worker is running an independent business is the extent to which the potential employer sets prices or limits the ability to work for multiple clients; these latter facts should be highlighted earlier in the final rule. The Department should also delete its suggestion that the analysis is relative, – i.e., that more control by the employer weighs toward employee status while more control by the worker weighs toward independent contractor status.[69] The analysis is qualitative, and statements suggesting a relative weighing of control invite an unnecessary contest that threatens to overshadow the purpose of the factor.

Finally, the final rule should specifically identify *algorithmic control* as a form of technological control that would weigh in favor of employee status. While updated references to technology are helpful, more specificity on this type of control is warranted. Over the last decade, companies have shown how they can use algorithmic management effectively to maintain control while shedding their legal obligations to their workers.[70] Uber and Lyft use surge pricing and push notifications sent to drivers' phones to move them towards certain high-demand locations and to keep them on the platform longer than they might be otherwise.[71] And retail workers often experience dramatic changes in the hours they are asked to work from one week to the next, as retail companies use algorithms monitoring real-time data, like changes in foot traffic, to set labor demand.[72]

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[68] 87 Fed. Reg. 62248–49.
[69] 87 Fed. Reg. 62275.
[70] Alexandra Mateescu & Aiha Nguyen, *Explainer: Algorithmic Management in the Workplace*, DATA & SOC'Y (Feb. 2019), https://datasociety.net/wp-content/uploads/2019/02/DS_Algorithmic_Management_Explainer.pdf.
[71] *Id.* ("Ridehail platforms use a wide array of practices to incentivize workers to drive certain hours, to travel to "surge" areas where there is higher passenger demand, or to continue."). *See also Duy Nam Ly,* Case No. 2:19-cv-01334-SVW-SS at *13 ("[plaintiff truckers] are required to either purchase or rent an on-board computer from J.B. Hunt for dispatch and tracking purposes. That on-board computer tracks every movement on Plaintiffs' and Class Members' trucks, even when they are not performing work for J.B. Hunt.").
[72] Mateescu & Nguyen, *Explainer*, *supra* n. 70, at 10.

Employer control over the work, even if exercised by algorithmic management on a smartphone, is probative evidence of an employment relationship.

C. 'Integral' *and* 'integrated unit of production' should both be part of the analysis.

To provide further clarity on this factor, the DOL should recognize that the question of integration is not an either/or proposition. Whether the work is integral such that the business could not offer its goods or services without it (such as a nail salon technician at a nail salon) is important to consider for the reasons explained *supra*, Section IV.F. However, it does not define the outer limits of this factor. As the Supreme Court has recognized, whether the work is part of an 'integrated unit of production' also informs whether the worker is more likely to be an employee or independent contractor. *Rutherford*, 331 U.S. at 729. The Department has also suggested as much, recognizing that the FLSA's language was intended to "bring within the scope of employment workers integrated into an employer's business."[73] Work that is incorporated into the business organization as a unit—such as drywall finishers for an interior commercial construction business—is more likely to be performed by a unit of employees of that business than by individual drywall business owners. This inference holds because it is less likely that a commercial construction business will negotiate what it will pay drywallers at arm's length with several individual drywall businesses than it will hire a crew or unit of drywallers; employing a crew is more efficient and enables the business to better estimate its costs for the jobs it bids on. Looking to whether there is an 'integrated unit' also broadens the inquiry in a way that better appreciates business outsourcing of entire departments.

Relatedly, the final rule should recognize that a business's economic decision to subcontract out integral aspects of its work, even entire units or departments, has no bearing on whether the workers performing such work are properly classified as employees of the firm or not. NELP notes that many businesses tout industry standards and modern outsourcing as a justification of classifying workers as independent contractors. The Department should clarify that popular outsourcing practices and related business decisions to contract away important functions are not *ipso facto* evidence of legitimate independent contractor relationships. To the contrary, they may be evidence of widespread misclassification.

D. The investment factor analysis should be sharpened.

Though the guidance on this factor is helpful, DOL should further clarify that the investment analysis is related to profit and loss: an expenditure can only be a business investment where it impacts profit and loss. Clarifying the relationship between these factors will help identify situations (like the personal vehicle example noted in Section IV.B) where a corporation may be transferring the cost of doing business to its workers, who are required to make expenditures that are not independent decisions impacting their businesses' profits or losses.

[73] 2015 AI, *supra* n. 34, at 3.

Additionally, while NELP agrees with the Department that the investment factor analysis should consider the worker's investment relative to the employer's investment, the rule should offer further clarification. NELP recommends clarifying that the comparison of investments must be qualitative. It should analyze whether the parties are making investments to increase profits to ensure that the relative investments analysis remains tethered to whether they are capital or entrepreneurial. Relatedly, the DOL should clarify that investments made by a worker that reflect *a contractual demand by the hiring entity, rather than an independent business investment decision or meaningful negotiation between business parties,* should not weigh towards independent contractor status. Without this clarification, hiring entities may misclassify workers as independent contractors and require or pressure them, as a condition of receiving work, to make expenditures that appear large in comparison to an undercapitalized hiring entity—such as a fly-by-night subcontractor or labor broker—to avoid accountability.

E. <u>The permanence factor should include further clarifications</u>.

The Department should further clarify that an individual's tenure is not always indicative of an impermanent role. The text of the final rule should note that what is more probative is whether the *role* or *position* that a particular individual holds in a business is long-term, regular, or indefinitely required. High turnover of individuals in a particular position does not mean that the position or role itself is not long-term; it could indicate that the job is not economically sustainable for the worker, or that it is too dangerous for the worker. Additionally, the Department should note that employers may manipulate the permanence of a work relationship—even short of an imposed exclusivity requirement addressed by the proposed rule. If an employer can fire or terminate the worker and the worker lacks power to influence that permanence, the factor should weigh in favor of employee status.

VI. Conclusion

The proposed guidance is a necessary and vast improvement over the flawed 2021 guidance. It is consistent with precedent and the Department's guidance prior to its the 2021 IC Rule. The proposed rule better responds to the calls for clarity and focus that animated the 2021 rule by explaining *how* each factor helps answer the essential question of whether a worker is in business for themselves and not dependent on finding work in the business of another. It provides helpful updates regarding how economic developments and technological advances are factored into the analysis, consistent with the FLSA's intentionally broad and nimble scope. Yet the final rule could offer even more clarity and focus. The Department should recognize the breadth of the statutory definitions in the final rule and provide additional focus as recommended above. NELP appreciates the opportunity to submit this comment.

Sincerely,

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