



October 26, 2020

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

**Re: (RIN) 1235-AA34, Independent Contractor Status Under the Fair Labor Standards Act (FLSA)**

These comments are submitted on behalf of the American Consumer Institute Center for Citizen Research (ACI), a 501(c)(3) non-partisan, educational, and public policy research organization, with the mission to identify, analyze, and project the interests of consumers in selected legislative and rulemaking proceedings in matters that affect the consumers.

ACI appreciates the opportunity to submit these comments to the Department of Labor and commends the Department's efforts in developing the proposed rule under this NPRM. By establishing clear and consistent standards to determine employee or independent contractor status under the FLSA, the proposal provides the needed clarity around the existing conflicting and confusing laws and interpretations.

More than one in three U.S. workers are engaged in some kind of freelancing, independent contracting, "gig" occupation, or self-employment, either as a primary or secondary job.<sup>1</sup> If the trend continues to grow at its current pace, at least half of the U.S. workers will rely on the gig economy as a sole income. For the millions of workers in this gig economy, this type of employment can mean extra income on the side or an easy way to set their own work schedule. The statutory ambiguity described in this NPRM exposes these workers and their employers to unnecessary vulnerabilities that payroll

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<sup>1</sup> Betterment, "Betterment's 2018 Report: Gig Economy and the Future of Retirement," [https://www.betterment.com/uploads/2018/05/The-Gig-Economy-Freelancing-and-Retirement-Betterment-Survey-2018\\_edited.pdf](https://www.betterment.com/uploads/2018/05/The-Gig-Economy-Freelancing-and-Retirement-Betterment-Survey-2018_edited.pdf).

workers are less susceptible to and could have significant downsides for the economy as a whole.

Take the case of California's Assembly Bill 5 (AB-5), which codifies the California Supreme Court's Dynamex decision and implements the stringent ABC test described in the NPRM for all workers.<sup>2</sup> The ABC test has proven to have significant limitations by failing to provide a clear and applicable standard for industries that depend on independent contracting arrangements. It also fails to provide choices to workers and flexibility to the companies who need independent contractors to manage their business effectively.

Not only has it limited the ability of companies to employ the labor needed to grow, but it has reduced economic opportunities to Californians and prevented many of them from accessing extra streams of income and. And continued ambiguity will continue these trends that will turn negative for the economy as a whole. California's Chamber of Commerce, for example, has echoed worries about the damage that onerous regulations AB-5 have imposed on California's businesses, and warned the legislation would be "detrimental to millions of Californians" and would "eliminate the vast majority of independent contractors in California."<sup>3</sup> This prevents the state's workforce from earning extra income and restricts small businesses from accessing the labor needed to grow.

More specifically, AB-5 has shown that restricting the gig economy can pose significant problems for small businesses, many of whom cannot afford the extra costs of hiring employees.

The Massachusetts Institute for Technology, for example, estimated it costs 1.25 times the base salary of an employee to "cover employment taxes and benefits."<sup>4</sup> While large companies can pay for benefits, payroll taxes and other employee-related expenses, small businesses, which account for more than 7 million California jobs and 99 percent of the state's businesses, are unlikely to initially be in a position to meet these costs, thereby preventing them from hiring the labor needed to grow and compete.

Unfortunately, in California, AB-5 has had very real consequences for the workforce with many companies being forced to end relationships with gig workers. The sports blog SB Nation, for example, was recently forced to lay off most of its freelance writers

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<sup>2</sup> 4 Cal.5th 903, 416 P.3d 1, 232 Cal.Rptr.3d 1; State of California, Assembly Bill 5. [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB5](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5).

<sup>3</sup> California Chamber of Commerce, "Assembly Bill 5 Independent Contractors Need Holistic Approach Reflecting Modern Workforce," January 2020, <https://advocacy.calchamber.com/policy/issues/assembly-bill-5/>.

<sup>4</sup> Joe Hadzima, "How Much Does An Employee Cost?," Boston Business Journal, <https://web.mit.edu/e-club/hadzima/pdf/how-much-does-an-employee-cost.pdf>.

in California because AB-5 made it impossible for them to be profitable.<sup>5</sup> Uber also warned that by restricting gig workers, 158,000 people could lose their jobs.<sup>6</sup>

By forcing businesses to classify gig workers as traditional employees, AB-5 has caused many workers to lose additional income, restricting their economic opportunities and damaging their economic opportunities. The warning from Uber further suggests that even large companies are not immune to the harm of AB-5.

Recognizing the very real damage AB-5 is causing to California's economy, especially in terms of jobs lost and increased costs for small businesses, other states should be wary about limiting access to gig workers. Continued ambiguity will only further trends that are negative for the economy as a whole.

The case of California' Assembly Bill 5 reveals the real economic damage that crackdowns on the gig economy can cause for both employers and employees, and clear and transparent federal guidance, as proposed in the NPRM could help restore the important and declining gig economy.

About 35 percent of the U.S. labor force is now involved in the gig economy. Whether it is by choice or necessity, 57 million workers<sup>7</sup> receive tangible economic benefits from the gig economy, whether that is driving, dog walking, babysitting, or renting their homes on Airbnb. We believe the Department's proposed rule will provide the much-needed guidance, clarity, and consistency to the classification of workers so that work can continue to enjoy the benefits and flexibility of gig work arrangements.

Respectfully submitted,



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<sup>5</sup> John Ness, "Thank You, California," SBNation, December 16, 2019, <https://www.sbnation.com/2019/12/16/21024100/thank-you-california>.

<sup>6</sup> "As California Seeks Injunction on Gig Workers, Uber Says 158,000 Will Lose Jobs," Times of San Diego, June 24, 2020, <https://timesofsandiego.com/business/2020/06/24/as-california-seeks-injunction-on-gig-workers-uber-says-158000-will-lose-jobs/>.

<sup>7</sup> Upwork and Freelancers Union, "Freelancing in America: 2019," October 2019, <https://www.freelancersunion.org/resources/freelancing-in-america/>.