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

Re: (RIN) 1235-AA34, Withdrawal of Independent Contractor Rule under the Fair Labor Standards Act (FLSA)

The American Consumer Institute (ACI) respectfully submits comments regarding the Department of Labor's (DoL) proposed withdrawal of the Independent Contractor Status under the Fair Labor Standards Act (29 CFR Parts 780, 788, 795; RIN 1235-AA34).¹

The American Consumer Institute Center for Citizen Research is 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.

Withdrawing the rule finalized on January 7, 2021, could have detrimental effects that could directly affect 59 million Americans who work as independent contractors and are able to earn additional income at trying times when the unemployment rate rose to over 14%.² We are concerned the proposed withdrawal ignores an evolution in the labor

¹ *Federal Register*, "Independent Contractor Status Under the Fair Labor Standards Act," January 7, 2021, <https://www.federalregister.gov/documents/2021/01/07/2020-29274/independent-contractor-status-under-the-fair-labor-standards-act>.

² *Edelman Intelligence and Upwork*, "Freelance Forward 2020," September 2020. Available Online: <https://www.upwork.com/documents/freelance-forward-2020>; Bureau of Labor Statistics, "Unemployment

market and it will prevent independent workers from participating in an employment structure they overwhelmingly approve of.

Before issuing this final rule, the federal government had provided no real guidance to employers or independent workers. This lack of guidance has resulted in states, such as California, to pass legislation that caused irreparable harm to independent workers and small businesses.³

As we emphasized in our previous comments submitted for the proposed rule, DoL's rule provides "much-needed guidance, clarity, and consistency to the classification of workers so that workers can continue to enjoy the benefits and flexibility of gig work arrangements."⁴

I. DoL Should NOT Deny Workers from Participating in an Employment Structure They Overwhelmingly Approve

About 35 percent of the U.S. labor force is now involved in the gig economy. Whether it is by choice or necessity, 59 million workers⁵ receive tangible economic benefits from the gig economy, whether that is driving, dog walking, babysitting, or renting their homes on Airbnb.

Due to the COVID-19 pandemic and the economic lockdowns that ensued, millions of American workers were denied the opportunity to work their traditional jobs. For many, part-time independent work has become crucial to making ends meet. Evidenced in a recent survey, about 74% of gig workers believe gig work is "as important or more important" to their financial security because of COVID-19.⁶

Rate Rises to Record High 14.7% in April 2020," May 13, 2020, https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm?view_full.

³ Independent Women's Forum "Chasing Work: Hear Real Stories of Workers Impacted by Job-Killing Regulations," <https://www.iwf.org/chasing-work-independent-contractors/>.

⁴ *American Consumer Institute* "ACI Supports Final DOL Revisions to Independent Contractor Status," January 6, 2020. <https://www.theamericanconsumer.org/2021/01/aci-supports-final-dol-revisions-to-independent-contractor-status/>.

⁵ Upwork and Freelancers Union, "Freelancing in America: 2019," October 2019, <https://www.freelancersunion.org/resources/freelancing-in-america/>.

⁶ Patrick Tuohey, Lindsey Zea, Owen Parker, and Scott Tuttle, "Communities and the Economy: How Cities Can Benefit from America's Fastest Growing Workforce Trend," *Better Cities Project*, <https://better-cities.org/wp-content/uploads/2021/04/Gig-Economy-Better-Cities-Project.pdf>.

Rather than restricting the ability of independent contractors to work, the DoL should create a regulatory environment that allows Americans to earn additional income and participate in an employment structure they overwhelmingly approve.

Edelman Intelligence and Upwork estimate between September 2019 and September 2020, 59 million American pursued independent contracting work, accounting for 36% of the total U.S. workforce.⁷ Independent work allowed Americans to earn \$1.2 trillion in earnings at a time when the U.S. employment rate rose to a record 14.7%.⁸ What these statistics show is that independent contracting has allowed millions of Americans the ability to earn additional income and allowed for additional economic security. Withdrawing the final rule not only it will deny independent workers from additional income, but it also risks placing millions of Americans into unnecessary economic insecurity.

While one of the central arguments against the employment structure of independent contracting is that it is "exploitative,"⁹ the argument ignores that those participating in the gig economy report significantly higher levels of satisfaction than traditional workers. A 2017 study by the *Bureau of Labor Statistics* found that "79% percent of independent contractors preferred their arrangement over a traditional job."¹⁰

For traditional employees, job satisfaction is only 53.7%.¹¹ Reasons cited for the high satisfaction of independent contractors include flexibility, the ability to work anywhere, and the ability to spend more time with family – all of the things traditional employment does not offer.¹²

The high satisfaction rate among independent contractors has incentivized 3 in 10 full-time employees to leave traditional jobs in favor of full-time independent

⁷ *Edelman Intelligence and Upwork*, "Freelance Forward 2020," September 2020, <https://www.upwork.com/documents/freelance-forward-2020>.

⁸ *Ibid*; Bureau of Labor Statistics, "Unemployment Rate Rises to Record High 14.7% in April 2020." May 13, 2020, https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm?view_full.

⁹ Jeremy Gong, "Ending the 'Independent Contractor' Misclassification Sham." *Jacobin*, September 13, 2019. <https://www.jacobinmag.com/2019/09/uber-lyft-california-assembly-bill-5-independent-contractors-misclassification-gig-workers>.

¹⁰ Bureau of Labor Statistics, "Contingent and Alternative Employment Arrangements News Release," June 7, 2018. <https://www.bls.gov/news.release/conemp.htm>.

¹¹ Robin Erickson, "Happy at Work? Job Satisfaction Increases But Still Only 53.7%" August 30, 2019, *LinkedIn*, <https://www.linkedin.com/pulse/happy-work-job-satisfaction-increases-still-only-537-erickson-phd#:~:text=Here's%20some%20good%20news%20about,the%20survey's%2032%2Dyear%20history>.

¹² Statista, "Main Reasons for Freelance work in U.S. 2019." January 20, 2021, <https://www.statista.com/statistics/530887/top-ten-reasons-for-freelance-work-us/>

contracting.¹³ Rescinding the rule that clarified independent contractors' status would only prevent workers from participating in an employment structure they overwhelmingly approve. No rule should force such a choice on them.

The dichotomy of employees and independent contractors is also out of date.¹⁴ While modernizing labor policy should be a priority, forcing one form of work that is not universally coveted, is not the path forward and without negative ramifications.

Withdrawing the final rule would also ignore shifts in the labor market. In 2002, only about 26.0 million Americans participated in work as independent contractors.¹⁵ In 2019, that number had risen to over 59 million. This exponential growth shows that the twenty first century labor market is moving away from traditional 9AM to 5PM employment and into a new modal that emphasizes flexibility. Rather than slowing this shift, the DoL should be creating a regulatory environment that recognizes and supports this evolution.

Empirical evidence also shows that the growth in alternative work arrangements was driven primarily by women, and that women are more likely than men to be employed in alternative work arrangements.¹⁶ Rescinding the rule would disproportionately target women and limit their opportunity to participate in the economy.

II. The Unintended Consequences of Legislation Pushing ABC Test

When California passed its Assembly Bill 5 (AB-5),¹⁷ codifying the California Supreme Court's Dynamex decision and implementing the stringent ABC test, it was meant to affect only ridesharing drivers, but instead it had numerous unintended consequences for a vast category of independent workers, including freelance writers.

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

¹³ *Edelman Intelligence and Upwork*, "Freelance Forward 2020," September 2020.
<https://www.upwork.com/documents/freelance-forward-2020>.

¹⁴ Arun Sundararajan, "A Safety Net Fit for the Sharing Economy," *The Financial Times*, June 2015,
<https://www.ft.com/content/b1d854de-169f-11e5-b07f-00144feabdc0>.

¹⁵ Will Rinehart and Ben Gitis, "Independent Contractors and the Emerging Gig Economy," American Action Forum, July 29, 2015,
<https://www.americanactionforum.org/research/independent-contractors-and-the-emerging-gig-economy/>.

¹⁶ Palagashvili, Liya and Suarez, Paola, "Employee vs. Independent Worker: A Framework for Understanding Work Differences," March 29, 2021, Mercatus Working Paper Series,
<http://dx.doi.org/10.2139/ssrn.3815977>. Also see Liya Palagashvili and Paola Suarez, "Women as Independent Workers in the Gig Economy," March 29, 2021, Mercatus Working Paper Series,
<http://dx.doi.org/10.2139/ssrn.3815975>.

¹⁷ Cal. 5th 903, 416 P.3d 1, 232 Cal. Rptr. 3d 1, State of California, Assembly Bill 5,
https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5.

accessing extra streams of income and. 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."¹⁸ This prevents the state's workforce from earning extra income and restricts small businesses from accessing the labor needed to grow.

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 forced to lay off most of its freelance writers in California because AB-5 made it impossible for them to be profitable.¹⁹ Unfortunately, SB Nation is just one example out of many.

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.

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

III. Conclusion

While we appreciate the Department's interest in seeking information regarding the withdrawal of the rule, we urge the DoL NOT to withdraw the rule, as it would deny millions of Americans the access to extra income, economic security, and an employment structure they overwhelmingly approve of.

With threats of stagnating wages, inequality, and increased automation on the horizon, a robust gig economy may help mitigate these threats and actually create a larger slice of the pie for all Americans.²⁰ To ensure the gig economy and gig work are sustainable long-term, policymakers should consider implementing a system of portable benefits to allow businesses to sustain their labor force and allow gig workers to choose the

¹⁸ 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/>.

¹⁹ John Ness, "Thank You, California," SBNation, December 16, 2019,

<https://www.sbnation.com/2019/12/16/21024100/thank-you-california>.

²⁰ Justin Azar, "Portable Benefits in the Gig Economy: Understanding the Nuances of the Gig Economy," *Geo. J. on Poverty L. & Pol'y*, 27, 2019), p. 409.

flexibility and autonomy of the gig economy without having to sacrifice precious benefits.²¹ Without such plans in the pipeline, withdrawing the rule is NOT a viable option.

Respectfully Submitted,

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²¹ Ibid, p. 427.