



December 13, 2022

U.S. Department of Labor
Wage and Hour Division
200 Constitution Ave., NW
Washington, D.C. 20210

Re: Employee or Independent Contractor Classification Under the Fair Labor Standards Act NPRM, 87 FR 64749; Regulation Identifier Number (RIN) 1235-AA43

Dear Sir or Madam,

I am writing on behalf of the American Consumer Institute (ACI) in opposition to the proposed rulemaking regarding employee or independent contractor classification, which would roll back the previous administration's looser test and impose a stricter standard that closely resembles the standard applied under California's Assembly Bill 5.¹ This change would have detrimental effects that could directly affect the 53 million Americans who work as independent contractors and are able to earn additional income.²

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 protect the interests of consumers in selected legislative and rulemaking proceedings.

Although the Department of Labor argues in its executive summary that "This proposed rulemaking is not intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves," the evidence in the aftermath of California's Assembly Bill 5 points to the contrary. We are especially concerned that the proposed rule ignores an evolution in the labor market and it will prevent independent workers from participating in an employment structure of which they overwhelmingly approve.

It is ACI's assessment that the proposed rule lacks real guidance to employers or independent workers and will not provide the intended clarity to prevent any misclassification. More specifically, this rule will negatively affect small businesses that often lack the resources to interpret complex and ambiguous regulations, and thus will bear the brunt of the burden imposed by unclear rulemaking, such as this proposed rule.

¹ "AB-5 Worker status: employees and independent contractors," California Legislative Information, Sept. 19, 2019. https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5.

² "53 Million Americans Freelance, New Study Finds," Upwork, last accessed Nov. 14, 2022. <https://www.upwork.com/press/releases/53-million-americans-now-freelance-new-study-finds-2>.

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

About 34 percent of the U.S. labor force is now involved in the gig economy. Whether by choice or necessity, 53 million workers receive tangible economic benefits from the gig economy, whether by driving, dog walking, babysitting, or renting their homes on Airbnb. According to Forbes, more than 50 percent of the American workforce might be freelancing in 2027.

During 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 percent of gig workers believe gig work is “as important or more important” to their financial security because of COVID-19.³

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 of which they overwhelmingly approve.

Currently, independent contractors collectively contribute more than \$715 billion in freelance earnings to the national economy.⁴ These statistics show that independent contracting has allowed millions of Americans the ability to earn additional income and allowed for additional economic security. The proposed rule not only will deny independent workers the 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,”⁵ 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.”⁶

³ 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>.

⁴ “53 Million Americans Freelance, New Study Finds,” Upwork, last accessed Nov. 14, 2022. <https://www.upwork.com/press/releases/53-million-americans-now-freelance-new-study-finds-2>.

⁵ 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>.

⁶Bureau of Labor Statistics, “Contingent and Alternative Employment Arrangements News Release,” June 7, 2018. <https://www.bls.gov/news.release/conemp.htm>.

For traditional employees, job satisfaction is only 53.7%.⁷ 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 things traditional employment does not typically offer.⁸

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 contracting.⁹ The proposed rule 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.¹⁰ While modernizing labor policy should be a priority, forcing one form of work that is not universally coveted is not the path forward and not without negative ramifications.

The proposed rule would also significantly ignore shifts in the labor market. In 2002, only about 26 million Americans participated in work as independent contractors.¹¹ Today, that number has risen to over 53 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 model 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.¹² The proposed 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),¹³ codifying the California Supreme Court's Dynamex decision and implementing the stringent ABC test, it was meant to affect only

⁷ 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>.

⁸ 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/>

⁹ *Edelman Intelligence and Upwork*, "Freelance Forward 2020," September 2020. <https://www.upwork.com/documents/freelance-forward-2020>.

¹⁰ 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>.

¹¹ 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/>.

¹² 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>.

¹³ 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.

ridesharing drivers. 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 for Californians and prevented many of them from accessing extra streams of income. California's Chamber of Commerce, for example, has echoed worries about the damage that onerous regulations like 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."¹⁴ This policy prevents the state's workforce from earning extra income and restricts small businesses from accessing the labor needed to grow.

AB-5 has had tangible 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.¹⁵ 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 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 DoL should be wary about limiting access to gig work. 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 proposed rule, we urge the DoL NOT to deny millions of Americans access to extra income, economic security, and an employment structure of which they overwhelmingly approve. At the very least, we urge commissioners to look closely at the ill effects of AB-5 in California and continue to allow the use of the existing, broader test that aligns with its stated objective of not disrupting the nation's freelance economy.

With threats of stagnating wages, inequality, and increased automation on the horizon, a robust gig economy may help mitigate these threats and create a larger slice of the pie for all Americans.¹⁶ 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 flexibility and autonomy of the gig economy

¹⁴ 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/>.

¹⁵ John Ness, "Thank You, California," SBNation, December 16, 2019, <https://www.sbnation.com/2019/12/16/21024100/thank-you-california>.

¹⁶ 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.

without having to sacrifice precious benefits.¹⁷ Without such plans in the pipeline, the DoL's proposed rule is NOT a viable option, especially for the 53 million Americans who rely on this type of employment.

Respectfully Submitted,

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¹⁷ Ibid, p. 427.