



## **Competitive Enterprise Institute Letter In Opposition To Withdrawal of Independent Contractor Status Final Rule**

On behalf of the Competitive Enterprise Institute (CEI), I respectfully submit the following comments in response to the Department of Labor (DOL) Wage and Hour Division's (WHD) proposed rule "Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal."

Founded in 1984, the Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on regulatory policy from a pro-market perspective.

CEI supports implementation of DOL's final rule Regulatory Information Number (RIN) 1235-AA34, and opposes DOL's decision on March 12, 2021 to withdraw the final rule prior to its May 7, 2021 implementation (citation 86 FR 14027, document number 2021-05256). CEI believes this update to the FLSA is necessary in light of the changing nature of the economy and the workforce and emerging industries that use app-based technology. CEI opposes withdrawing the rule as unnecessary and ill-advised, and urges DOL to reconsider.

The final rule advances the intent of Congress, which passed the FLSA in 1938 to address the issue of overwork and the lack of a federal minimum wage, not to manage employer-employee work arrangements. President Franklin Roosevelt, urging the FLSA's passage in his 1938 State of the Union address, said, "We are seeking, of course, only legislation to end starvation wages and intolerable hours; more desirable wages are and continue to be the product of collective bargaining."<sup>1</sup>

### **The Need for a Clear Definition of Employee vs. Contractor**

This existing language of the Fair Labor Standards Act contains no clear definition of an employer/employee relationship. Instead, the Department of Labor has used a multi-factor test based on several indicators that apply in a given case. Even then, there is no set number for how many factors must apply. Thus, determinations are ultimately subjective—a situation ripe for unequal applications of the law. Absent Congress updating the law to clarify when a worker is an employee, it is appropriate for the Labor Department to update its definitions to keep pace with the changing realities of the U.S. economy and its workforce.

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<sup>1</sup> Howard D. Samuel, "Troubled passage: the labor movement and the Fair Labor Standards Act," *Monthly Labor Review*, December 2000, <https://www.bls.gov/opub/mlr/2000/12/art3full.pdf>.



The Competitive Enterprise Institute believes the Department’s proposal to winnow the existing six-factor test based on *United States v. Silk*, 331 U.S. 704 (1947) to a core two-factor test focusing on the employer’s degree of control and the workers’ opportunities for profit or loss is well reasoned and appropriate. Specifically, it addresses uncertainty regarding the alleged employer’s degree of control over the nature of work, the permanency of the employer’s relationship with the worker, the skill required for the worker’s task, the investment in the facilities for work, and the worker’s opportunities for profit or loss.

Furthermore, the two-factor test better recognizes the changes in the workforce and economy over the last two decades. Broad access to the Internet has sparked a vast expansion in short-term contractual employment, commonly known as “gig economy” work. This growth has occurred at the individual, grassroots level. Workers have many more opportunities to sell their labor than ever before and to do so under the circumstances of their choosing and for the period of time they prefer. To continue to be able to operate in this freelance manner, they need the option of being classified as contractors. The Department’s proposal that enforcement of the FLSA maintain the six-factor test would perpetuate existing confusion over the extent of an individual worker’s ability to sell his or her labor in this manner.

The final rule’s core two-factor test would signal to other agencies that updates are needed to reflect changes in the workforce. The Census Bureau, for example, defines workers as belonging to one of three classes:

1. Public sector employees;
2. Private sector workers, defined as those regularly employed by a for-profit or non-profit entity; and
3. The self-employed, defined as the owner of business, professional practice, or farm.

None of the three categories accounts for gig economy workers. In any event, individual states would still have the option to enact their own rules or laws that go beyond the federal limits.

Until the end of the 20<sup>th</sup> century, to be a “freelancer” indicated belonging to a relatively small number of professions, usually related to the performing arts or mass media, such as working as an actor, photographer, or journalist. The ability to secure work in these fields was itself a challenge, requiring workers to have connections to the entities that provided the work or a reputation that drew offers their way. This situation created a barrier for entry in those fields. Merely having talent did not guarantee work—hence the term “starving artist”—and many people never opted to try as a result.

That situation no longer strictly applies. Access to the Internet has reduced the bar for entry to work as a freelancer, which has resulted in an accelerating trend toward such work across multiple fields. *Forbes* reported in December 2019 that 34 percent of the U.S. workforce—

about 57 million people—had earned income through freelancing. That was up from 53 million people in 2015.<sup>2</sup>

However, the same article noted that while the total number of people working as freelancers had grown, it had fallen marginally as a percentage of workforce, having been 35 percent in 2015. That indicates that freelance work was growing along with the economy and not displacing existing jobs. In the same survey, 60 percent of respondents said they worked freelance by choice, not necessity, and that only 50 percent saw it as a long-term career option. To use the colloquial terminology, the data show that more people were earning extra income from their side hustles.

### **Freelancing as an Economic Boost**

Since the COVID-19 outbreak, people have turned to freelancing to earn money when they were prevented from earning through their previous employment. CNBC reported in September that the number had increased to 59 million, or 36 percent of the workforce. Many workers cited the advantage of flexible schedules as a crucial, especially given the added responsibility of minding children while schools were closed. Adam Ozimek, chief economist for Upwork, told CNBC, “The changing dynamics to the workforce that has occurred during the crisis demonstrate the value that freelancing provides to both businesses and workers.”<sup>3</sup>

The ridesharing company Uber reported in September that just 9 percent of its California drivers were online for at least 40 hours a week. Those full time-equivalent drivers accounted for a quarter of the total Uber trips in the state. The largest group was drivers who were online for 25 hours or less, accounting for 42 percent of trips. Thus, the majority of the driving is being done by people who are not using the app-based service as a full-time job, even though there is no barrier to them doing so if they wished.<sup>4</sup>

California came to the forefront of the controversy when its legislature passed the AB5 law in late 2019. It strictly limited the circumstances under which workers could be classified as contractors. The law was adopted on the premise that in most instances contractors were really

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<sup>2</sup> Jon Younger, “The Last Five Years of ‘Freelancing in America’: What’s Changed?” *Forbes*, December 22, 2019, <https://www.forbes.com/sites/jonyounger/2019/12/22/the-last-five-years-of-freelancing-in-america-whats-changed/?sh=3e2aed0e3f3c>.

<sup>3</sup> Lori Ionno, “A snapshot of the \$1.2 trillion freelance economy in the U.S. in the age of Covid-19” CNBC, September 15, 2020, <https://www.cnbc.com/2020/09/15/a-snapshot-of-the-1point2-trillion-freelance-economy-in-the-us-in-2020.html>.

<sup>4</sup> Libby Mishkin, “Which drivers do the most trips?” Medium, September 25, 2020, <https://medium.com/uber-under-the-hood/which-drivers-do-the-most-trips-9c475e99e071>.

employees who were being denied state and federal protections such as overtime, as required under the FLSA.

AB5 seems to have been directed primarily at app-based ridesharing companies Uber and Lyft. As a labor reporter for the *Washington Examiner*, I contacted many rideshare drivers via an online social media platform known as UberPeople.net. Most drivers requested anonymity because they often spoke critically of Uber's practices. In my experience, even drivers who did rideshare work full time and were critical of the company did not consider themselves employees and were wary of efforts to classify them as such.<sup>5</sup> Many drivers expressed concerns that being classified as employees would obligate the companies to schedule its drivers' hours to comply with the FLSA. The freedom to choose when and for how long to drive was the key attraction for workers using the app-based service and they did not wish to lose it.

"If Uber/Lyft start scheduling work hours, that will be a huge problem for many drivers," Kathy, an L.A.-based driver, told me in a September 2019 story for the *Examiner*. "[W]hat is a full-time employee with Ride Share? Is that 40 hours with [passengers] in the car or 40 hours of logged-on time or a set eight-hour day? Big, no, huge difference."

Another common concern was that complying with minimum wage requirements would likely require rideshare companies to pay drivers for time spent waiting for fares and the time spent driving to get passengers. That would give the companies a strong incentive to cut down on the number of drivers available to reduce wait times. That would likely mean fewer drivers overall, with driving no longer an option for some.

"The great thing about ridesharing jobs was that you could work as part-time, as full-time, or as overtime. People need the flexibility," David Hogberg, a Maryland-based rideshare driver, told me. He said he drove on random nights and weekends when he needed, but did not consider it his primary job and did not intend to make a career out of it. It was just a convenient way to earn additional money to cover bills while he pursued other career interests. If he did not have complete autonomy to set his own schedule, he said, he would not drive and would have to find other short-term work.

The two-factor test in the DOL's final rule would have likely increased the options for this type of work by making it easier for companies to offer it. Maintaining the six-factor FLSA test would merely affirm the status quo under which drivers like Hogberg worked, leaving them no better off.

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<sup>5</sup> Sean Higgins, "Fed up ridesharing drivers nevertheless have questions about California legislative fix," *Washington Examiner*, September 12, 2019, <https://www.washingtonexaminer.com/policy/economy/fed-up-ridesharing-drivers-nevertheless-have-questions-about-california-legislative-fix>.

Also notable was the frequency with which drivers work with multiple app services simultaneously. Drivers contacted through the UberPeople.net platform commonly reported that they also drove for the competing app-based rideshare service Lyft. It is difficult to think of any circumstance in which an employer, as the term is currently defined under the FLSA, would allow an employee to split his or her work week between two or more direct competitors. A worker's ability to sell her labor to two economic competitors simultaneously should be a clear indicator that the worker has the degree of control associated with being a contractor as defined under the FLSA.

One rideshare driver noted to me that the online "matchmaking" technology that connects consumers and service providers was not overly complicated. Therefore, other competitors using the same business model for app-based ridesharing as Uber and Lyft are likely to emerge. Those companies will be in competition not just for consumers but for drivers as well. For drivers to maximize their leverage to sell their labor and bid up its price, they need the flexibility of being classified as contractors, which affords them the ability to quickly shift the selling of that labor toward different buyers.

### **Other Benefits**

The expansion of freelancing activity through app-based services also benefits the public. This extends beyond the obvious one of greater consumer choice. Mothers Against Drunk Driving (MADD) endorsed California's Proposition 22, which rolled back the provisions of the state's AB5 law that applied to app-based ridesharing companies.<sup>6</sup> On October 14, MADD President Helen Witty warned that if AB5 went into full effect, it could limit the availability of those services, adversely affecting public safety. "Fewer rideshare drivers in California could mean more people choosing to get behind the wheel when they're under the influence, rolling back the substantial gains that have been made over the past 10 years, in part due to the growth of ridesharing," she said.

### **DOL's Concerns Regarding the Rule**

The Department identifies three main concerns regarding the final rule to justify its withdrawal:

- 1- The rule is too narrow because it uses only two core factors to determine independent contractor status;
- 2- The rule still does not provide sufficient clarity regarding independent contractor status; and,

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<sup>6</sup> Helen Witty, "An Open Letter to Californians: Vote Yes on Proposition 22" Mothers Against Drunk Driving, October 12, 2020, <https://www.madd.org/press-release/an-open-letter-to-californians-vote-yes-on-prop-22/>.

3- The rule will not be economically beneficial to workers.

The Department also argues that withdrawal will not be disruptive because it has not yet taken effect.

The Department's concerns lack sufficient weight to justify withdrawing the final rule. Regarding the narrowness of the final rule, DOL objects to not giving all six current factors used to determine independent contractor status equal weight. Focusing on two factors would "improperly narrow the application of the economic realities test." DOL argues that courts have emphasized that determinations must consider "the totality of the circumstances."

However, the Department concedes that while the final rule emphasizes two core factors, it includes five economic realities factors and requires that "all circumstances must be considered." The determining factor that the final rule would have dropped from the current six was the worker's "investment" in the work activity. The final rule argued that this factor was "duplicative" of another current factor, the worker's "opportunity for profit or loss." The final rule would retain "opportunity for profit or loss" and make it one of the core factors.

Thus, the underlying determining factors would remain the same under both rules. The Department's objection to the final rule boils down to the elevation of two factors above the rest. DOL offers no meaningful analysis as to why those two factors are not more indicative. DOL merely states that this would be, "inconsistent with the position, expressed by the Supreme Court and federal courts of appeals, that no single factor in the analysis is dispositive." But again, the final rule does not prevent courts from weighing all factors. It merely offers guidance, as a rulemaking should.

DOL's second concern regarding the final rule is "that the possibility that these changes will cause confusion or lead to inconsistent outcomes rather than provide clarity or certainty, as intended." The Department contends that having the courts focus on two core factors will result in more confusion and disparate outcomes than having them focus on six separate factors. This analysis contradicts DOL's concern that the final rule is "improperly narrow."

Increasing the number of factors that must be given equal weight would lead to more inconsistent outcomes in the courts and elsewhere. DOL also contends that "this more limited articulation has not generally been applied by courts or WHD and would thus be unfamiliar to employers, workers, courts, and WHD." This argument does not bear scrutiny. All rule changes are initially unfamiliar and require courts and others to adjust. That is the nature of a rulemaking. It is not a rationale for leaving the rules unchanged when they become outdated. It is difficult to imagine DOL accepting unfamiliarity as a reason to halt any of its proposed future rulemakings.



Finally, DOL “does not believe the Rule fully considered the likely costs, transfers, and benefits that could result from the Rule.” The only evidence cited by DOL for these likely costs was an analysis by the nonprofit Economic Policy Institute (EPI). However, DOL concedes that the final rule “discussed its disagreements with various assumptions underlying EPI’s estimate and explained its reasons for not adopting the estimate.” DOL does not indicate how the final rule erred in rejecting the EPI estimate. Instead, it merely states, “These impacts can be significant and must be evaluated further.”

CEI made its own case for the final rule previously in this comment.

## **Conclusion**

The Fair Labor Standards Act lacks a clear definition of the employer-employee relationship. At the same time, the Department’s use of a six-point test derived from *Silk* is too subjective and fails to account for changes in the economy and technology.

CEI believes the Department’s final rule—which focuses on workers’ control over their labor and their opportunity for profit or loss as the core factors to determine the existence of an employer/employee relationship or a contractor-based one—is appropriate, timely, and necessary. The final rule would provide clarity as to when the FLSA’s rules apply, helping to ensure that employees get the protections under the law, while allowing entrepreneurs who prefer alternate work arrangements that enable them to sell labor to continue to do so.

CEI believes that withdrawing the rule will create uncertainty within the economy, especially within the newly emerging and broadly popular sector that uses app-based services. Withdrawal of the rule will perpetuate existing regulatory confusion over how the FLSA applies to emerging industries and alternate work arrangements, limiting opportunities for workers, employers, and consumers.

Before of the above considerations, the Competitive Enterprise Institute urges the Department of Labor to allow the rule to go into effect.

Respectfully submitted,

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