December 12, 2022

Ms. Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave., N.W.
Washington, DC 20210

RE: Comments on U.S. Department of Labor, Wage and Hour Division, "Employee or Independent Contractor Classification Under the Fair Labor Standards Act," RIN 1235-AA43

Dear Ms. DeBisschop:

On behalf of the Goldwater Institute, I am submitting comments regarding the Department of Labor's (DOL) proposed rule entitled, "Employee or Independent Contractor Classification under the Fair Labor Standards Act," which was published in the Federal Register on October 13.[1] The proposal would significantly restrict who may be classified as an "independent contractor" and, as a result, prevent millions of Americans from enjoying the flexibility and freedom that comes from working as an independent contractor rather than an employee.

Founded in 1988 in Arizona with Senator Barry Goldwater's blessing, the Institute is a nonprofit free-market public policy, research, and public interest litigation organization dedicated to advancing the principles of limited government, economic freedom, and individual liberty. We're committed to empowering all Americans to live freer, happier lives, and we accomplish tangible results for liberty by working in state courts, legislatures, and communities nationwide to advance, defend, and strengthen the freedom guaranteed by the constitutions of the United States and the fifty states.

The Goldwater Institute was a key supporter of 2016 revisions to Arizona employment law that established a procedure for declaring independent business status.[2] DOL's proposed rule violates principles of federalism and significantly undermines Arizona's state law, which has been instrumental in helping clarify the relationship between employers and workers and reducing the risk of misclassification in our state.

[1] 87 Fed. Reg. 62,218 (Oct. 13, 2022).
[2] Approved as House Bill 2114, A.R.S. §§ 23-1601 and 23-1602, https://www.azleg.gov/legtext/52leg/2r/laws/0231.PDF

DOL's Proposed Rule Would Force Millions of Americans Out of the Labor Force

DOL's proposal is antithetical to trends in the modern economy and the desires of American workers. The internet has opened the door for all manner of alternative work arrangements between businesses and workers. Web designers, computer programmers, digital marketers, dog walkers, Uber drivers and customer service agents all can be connected and work through apps. As a result, the demand for independent contractors has increased and the number of workers wanting to independently contract has also grown.[3] In Arizona, independent contractors make up 6.8 percent of the state's workforce.[4]

If DOL's proposed rule is promulgated, it is estimated that 4.4 million people will be involuntarily reclassified, resulting in a loss of direct income for approximately 3.4 million American workers.[5] Tragically, many of those job and income losses will be most felt by Americans who cannot work a traditional job due to a disability, chronic illness, or because they are caring for a child, spouse, or parent.[6]

The DOL Proposed Rule Departs from Legal Precedent and Creates an Unworkable Standard for Classifying Workers

First, the proposal creates a broad new definition of "economic dependence," that does not focus on the amount of income earned or whether the independent contractor has other income streams.[7] This definition conflicts with the Supreme Court's holdings in (1) *Bartels v. Birmingham* that "employees are those who as a matter of economic reality are dependent upon the business to which they render service"[8] and (2) *Tony & Susan Alamo Foundation v. Secretary of Labor*, where the Court found that an employee is someone who is "entirely dependent" on their employer.[9]

In addition to ignoring legal precedent, DOL's overbroad definition of "economic dependence" is unworkable and would hurt the more than 1.14 million Americans who freelance on the side, while also holding regular jobs.[10] These workers could be saving for college for their children, a new house, or just a nice family vacation. Such a broad, all-inclusive definition would result in these Americans losing this precious extra income.

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[3] Robert Shapiro and Luke Stuttgen, *The Many Ways Americans Work and The Costs of Treating Independent Contractors as Employees*, Sonecon (filed Nov. 7, 2022 with the Comments of the Chamber of Progress) at 10. https://progresschamber.org/wp-content/uploads/2022/04/The-Many-Ways-Americans-Work-Chamber-of-Progress-Shapiro-Sonecon.pdf
[4] *Id.* at 24.
[5] *Id.* at 2-3.
[6] *Id.* at 29.
[7] Proposed § 795.105(g).
[8] *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947).
[9] *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985).
[10] Shapiro and Stuttgen, at 29.

Second, one of the six factors DOL says must be considered is the extent to which the work performed is "integral" to the employer's business. Proposed § 795.110(b)(5) says, [t]his factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the employer's principal business." This definition also contradicts legal precedent. Whether work is integral to the business has traditionally meant whether it is "part of the integrated unit of production."[11]

Legal precedent aside, it is hard to conceive of any business paying any person for work that is not "critical, necessary, or central" to the business. Businesses need websites developed, a social media presence, IT support, and even office cleaning. These are all business needs, but they also are services for which contract help is appropriate or warranted. This overly broad factor would result in reclassifying virtually every independent contractor into an employee.

Third, DOL adds what can only be characterized as a "catch all" factor. Proposed § 795.110(b)(7) provides that undefined "additional factors" also may be relevant to the analysis "if the factors in some way indicate whether the worker is in business for themself, as opposed to being economically dependent on the employer for work." To the extent an employer has concluded its economic dependence analysis and finds that the worker is indeed an independent contractor, this final consideration could ostensibly swallow the rule. Without further clarification on what potential "additional factors" should be considered, how can an employer have confidence she will not be cited for worker misclassification?

Fourth, the DOL proposed rule is not needed, and the agency has not shown that it is. In January 2021, the agency finalized an independent contractor rule that provided a needed update to employee classification considering the dramatic changes in the economy over the last thirty or more years. Rather than a six-factor plus test, like currently proposed, it was relatively straightforward and got to the heart of the matter by focusing on the degree of control exercised by the employer and the worker's opportunity for profit or loss.

The bottom line is that DOL's proposed rule for classifying employees is unworkable. Such a vague and complicated test will be particularly problematic for the 611,097 Arizona small business owners who make up 99.5 percent of all the businesses in our state.[12] Small business owners lack the resources of larger businesses to analyze complex regulations and come up with a compliance plan for the business. They do not have lawyers or human resource professionals in-house to help them navigate complex regulatory regimes, like this one. Instead, they will be forced to pay outside consultants to help them understand DOL's rule if promulgated. Ironically, given the breadth of the agency's proposal, it is unclear whether certain of these consultants could be considered "employees" of the very businesses they are helping.

[11] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).
[12] *2021 Small Business Profile*, U.S. Small Business Admin. Office of Advocacy, at ep.13 (Last visited, Dec. 12, 2022).

Conclusion

Workers and small businesses alike should be allowed to freely choose the type and terms of their business arrangements. Not everyone wants to work a typical nine-to-five job for an established company. Many choose to blaze new trails as entrepreneurs or supplement their income with a side-gig or simply work for themselves. Freelance writers, online influencers, rideshare and delivery drivers, direct sales workers, and countless others stand to be harmed by the proposed independent contractor rule.

For the reasons set forth above, the Goldwater Institute respectfully requests that DOL withdraw this proposed rule and reinstate the 2021 Final Rule.

Thank you for your consideration of these comments. Please contact me if you have any questions or if I can provide you with additional information.

Sincerely,

Jonathan Riches
Vice President for Litigation
Goldwater Institute