

October 26, 2020

Submitted via <https://beta.regulations.gov/document/WHD-2020-0007-0001>

Amy DeBisschop  
Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor, Room S-3502  
200 Constitution Avenue NW  
Washington, D.C. 20210

## **Comments on RIN 1235-AA34: Independent Contractor Status Under the Fair Labor Standards Act**

Dear Ms. DeBisschop:

The Center for Law and Social Policy (CLASP) submits these comments on the Department of Labor’s (“Department” or “DOL”) Notice of Proposed Rulemaking (“NPRM”) regarding the standard for determining who is a covered employee and who is an independent contractor under the Fair Labor Standards Act (“FLSA”). RIN 1235-AA34; Fed. Reg. Vol. 85, No. 187 (Sept. 25, 2020) (“NPRM”).

CLASP is a national, nonpartisan, anti-poverty nonprofit advancing policy solutions for low-income people. We develop practical yet visionary strategies for reducing poverty, promoting economic opportunity, and addressing barriers faced by people of color.

We have over 50 years’ experience advocating for federal, state, and local policies, including policies that expand labor protections and improve job quality—ensuring a level playing field for workers paid low wages. Good jobs strengthen the economy and enable workers to meet family obligations, save for the future, and move out of poverty. However, many workers paid low wages—particularly workers of color—lack access to living wages, paid sick days, paid family and medical leave, stable work schedules, and other critical labor protections. Many also lack access to health insurance and affordable, high-quality child care that make it possible to attend work. Furthermore, workers struggle to plan financially and attend training programs that lead to better jobs. CLASP works with advocates, government officials, and policymakers to pass laws that improve job quality and to strengthen implementation and enforcement of existing policies.

Workers across the country, especially those who have been historically excluded from labor law protections, are winning dramatic expansions of their rights. Paid sick leave and paid family leave are available in states and cities across the country; domestic workers and farmworkers are winning the right to organize and coverage under wage and hour laws; and “gig” workers who are wrongly classified as independent contractors are fighting for and winning wage and hour protections, unemployment insurance, and the right to organize. These improvements are more important than ever as the nation grapples with Covid-19, catastrophic unemployment, and a growing acknowledgment of the precarity of work.

Instead of supporting these state and local developments and prioritizing the welfare of the nations’ workforce,

the Department of Labor under the Trump Administration is looking to further stack the deck against workers and enable employers to classify more of their workforce as independent contractors with no rights to minimum wage, overtime, or the protections of our child labor laws. This rule could also impact other rights that rely on the FLSA’s definitions of employment, including rights to emergency paid sick days and paid leave under the Families First Coronavirus Response Act (FFCRA). DOL’s mission is “[t]o foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights.” This proposed rulemaking is antithetical to that mission and to the law. For these reasons, CLASP writes in opposition to this NPRM and urges DOL to withdraw this proposed interpretive rule.

### **A. The Urgent Need to Address Misclassification and Protect Access to FLSA Rights**

This moment calls for redoubled efforts to protect employment relationships and challenge misclassification. Traditional enforcement of labor standards laws is becoming less effective because of complex U.S. employment relationships, changing firm and industry structures, resource limitations, and a difficult political climate. Companies are feeling pressured to cut costs and limit liability. This has led to “fissuring” of employment relationships through subcontracting, franchising, and the increased use of fixed-term contracts, temporary staffing agencies, and independent contracting arrangements. Subcontractors and franchisees are pushed to cut costs wherever they can. As a result, low-road practices have become normalized across many sectors and vulnerable workers are afraid to complain.

In the Department’s own words, from the July 15, 2015 Wage and Hour Division Administrator’s Interpretation No. 2015-1, misclassification of employees as independent contractors is increasing, with deleterious effects for workers and the economy overall.

When employers improperly classify employees as independent contractors, the employees may not receive important workplace protections such as the minimum wage, overtime compensation, unemployment insurance, and workers’ compensation. Misclassification also results in lower tax revenues for government and an uneven playing field for employers who properly classify their workers.<sup>1</sup>

The trend of employers increasingly misclassifying workers sets a dangerous precedent with devastating implications for workers and families caught up in the fray. The current economic climate will likely exacerbate these risks. Evidence shows that during the Great recession, minimum wage violations increased as unemployment rose.<sup>2</sup> Noncitizens, Latinx workers, Black workers, and women were more likely to have employers violate their rights than those of citizens, white workers, and men.

Rather than moving to uphold labor standards laws to protect workers, the Department’s NPRM moves to strip protections from whole swaths of the contracted and “gig” workforce—a population that is overwhelmingly Black, brown, and immigrant workers and workers with low-incomes. Work should provide people with economic stability, safety, and the opportunity to contribute to our communities and connect with one another. It should be a place where workers are treated fairly and with respect. Good jobs should enable us to provide for ourselves and our families, and to join together to negotiate for ever higher standards.

Contrary to this vision, DOL’s NPRM will fuel a race to the bottom where employers will be able to reclassify their employees as independent contractors and evade minimum wage, overtime, and child labor laws. While this will harm a broad array of workers, it will inflict the most damage on workers of color who predominate

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<sup>1</sup> [http://www.fissuredworkplace.net/assets/Administrator\\_Interpretation\\_on\\_Misclassification\\_2015.pdf](http://www.fissuredworkplace.net/assets/Administrator_Interpretation_on_Misclassification_2015.pdf)

<sup>2</sup> Fine et al., Maintaining effective U.S. labor standards enforcement through the coronavirus recession, Washington Center for Equitable Growth, Sept. 3, 2020, available at <https://equitablegrowth.org/research-paper/maintaining-effective-u-s-labor-standards-enforcement-through-the-coronavirus-recession/>.

in the low-paying jobs where independent contractor misclassification is common.

## **B. The Department’s Misguided Proposed Rule Would Hurt Workers and their Communities**

There is never a good time to undermine the FLSA and provide employers with a roadmap to degrade the quality of jobs across the country. But it is particularly offensive that the Department seeks to narrow its coverage of employees at a time of national economic peril. The COVID-19 pandemic and economic crisis have devastated the health and economic well-being of millions of families with low incomes.<sup>3</sup> Workers of color, immigrants, young people, women, workers in low wage jobs, and frontline workers are among the hardest hit by these crises. Worse still, significant job losses and reductions in income have deepened racial inequities, and exacerbated poverty and economic hardship for millions.<sup>4</sup> The nation is at a critical juncture in the road to rebuilding the economy. As the economic crisis deepens and Black and Latinx workers face unemployment rates still in the double digits, policymakers and agency staff must make strong investments in good, high-quality jobs and employment pathways. Even before the COVID-19 pandemic and recession, workers paid low wages, workers of color, and immigrant workers were suffering under a discriminatory and unequal labor market. The current crises have only exacerbated and worsened their situation, especially as state and federal protections have expired.

Now is the time to reimagine a more equitable and inclusive economic future for working families by building access to good jobs and the labor protections that underpin them. Instead, the Department has chosen the side of exploitive employers at the expense of workers and families. Corporate misclassification of employees as independent contractors is a pervasive practice in the low-wage economy today, and this rule would make it easier for companies to unilaterally impose these arrangements on workers.

It is no coincidence that corporate misclassification is rampant in low-wage, labor-intensive industries, such as delivery services, janitorial services, agriculture, transportation, and home care and housekeeping, as well as in app-dispatched work.<sup>5</sup> Women and people of color, including Black, Latina/o/x, and Asian workers, are overrepresented in these occupations.<sup>6</sup> All workers who are misclassified suffer from a lack of workplace protections, but women, people of color, and immigrants face unique barriers to economic security and disproportionately must accept low-wage, unsafe, and insecure working conditions. And in times of high unemployment like today, individual workers have even less market power than usual to demand fair conditions, especially in jobs that historically have been undervalued; they are forced to accept take-it-or-leave-it job conditions.<sup>7</sup>

The Department’s proposed Rule could also impact other protections under the law that rely on the FLSA’s standards of employment and are critical for women workers and workers of color, including the Black and Latinx workers being particularly hurt by COVID-19. The FFCRA, for example, provides eligible workers with up to two weeks of paid sick leave for COVID-19 related reasons and twelve weeks (10 of which are

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<sup>3</sup> Rosa M. García and Livia Lam, “Workforce inequalities must be addressed before another economic or health crisis,” *The Hill*, Apr. 2, 2020, <https://thehill.com/opinion/civil-rights/490394-workforce-inequalities-must-be-addressed-before-another-economic-or>

<sup>4</sup> Hannah Matthews, *New Census Data: Anti-Poverty Agenda Must Address COVID-19, Young People, and Systemic Racial Inequities*, CLASP, Sept. 15, 2020, available at <https://www.clasp.org/publications/report/brief/new-census-data-anti-poverty-agenda-must-address-covid-19-young-people-and>.

<sup>5</sup> Catherine Ruckelshaus & Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, National Employment Law Project, Sept. 2017, <https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf>.

<sup>6</sup> Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 *Minn. L. Rev.* 907, 924 (2017) (finding that “seven of the eight high misclassification occupations were held disproportionately by women and/or workers of color”).

<sup>7</sup> See Ruckelshaus & Gao, *supra* note 5.

paid) to care for a child if his or her school is closed or child care provider is unavailable. For the first time in our nation's history, millions of private-sector workers have access to critical paid leave protections. Because the FFCRA's paid sick leave provisions and emergency paid family leave provisions rely on the FLSA's standards of employment, this proposed rule could threaten a critical lifeline for workers at the height of an epidemic. Researchers recently found that FFCRA's emergency paid sick days helped decrease COVID-cases in states where employees gained access to paid sick leave.<sup>8</sup> While the FFCRA provides tax credits for independent contractors for purposes of paid leave, workers also need the right to take leave and protections from retaliation from doing so—rights given to employees under the FFCRA paid leave provisions. Employees misclassified as independent contractors would be denied these rights. Additionally, employees who should have received wage replacement through their employer will no longer be able to do so if reclassified as independent contractors as a result of this rule. This is just one example of the other statutory rights that could be impacted by the Department's proposed interpretation.

If finalized, Economic Policy Institute estimates that this rule would cost workers more than \$3.7 billion annually. The cost to workers is comprised of at least \$400 million in new annual paperwork costs, and a transfer to employers of at least \$3.3 billion in the form of reduced compensation. Further, social insurance funds (Social Security, Medicare, Unemployment Insurance, and Workers' Compensation) would lose at least \$750 million annually in the form of reduced employer contributions. These estimates are conservative—the true impacts could be many times these numbers.

### **C. In Addition to the Harm it Will Cause, the Department's Proposed Rule is Contrary to Law**

The Department's proposed interpretation is contrary to law because it ignores the plain language of the FLSA's definition of "employ," which "includes to suffer or permit to work," 29 U.S.C. §203(g), and ignores U.S. Supreme Court and federal circuit court authority interpreting the Act. When Congress in the FLSA defined "employ" to "include" "to suffer or permit to work," it did what state child labor statutes had done: it included within its scope of coverage not only the common-law concept of "employ," but also the very broad concepts of "suffering" or "permitting" work to be done.

Under its expansive statutory definitions of employment, the FLSA includes work relationships that were not within the traditional common-law definition of employment. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). The FLSA was passed to "lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions." *Rutherford*, 331 U.S. at 727; *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). The purpose of its broad definitions was to eliminate substandard labor conditions by expanding accountability for violations to include businesses that insert contractors in their business. *Lauritzen*, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring). *See also Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1915) (Judge Learned Hand noting that employment statutes were meant to "upset the freedom of contract").

DOL is trying to impermissibly narrow this definition by proposing a restrictive interpretation of the long-accepted "economic realities" test. *See U.S. v. Silk*, 331 U.S. 704 (1947). This five-part test has always been interpreted by the Supreme Court in its totality, not weighing any one factor more than another. But now, DOL proposes amending it in a fashion that places undue weight on two factors and then narrows those two factors further—individual control over the work and opportunity for profit or loss. As a result, the Department is proposing to constrict the FLSA's broad coverage in a way that will undermine its statutory intent.

The Department of Labor should not adopt an arbitrary standard that creates incentives for employers to

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<sup>8</sup> Pichler, Wen, & Ziebarth, COVID-19 Emergency Sick Leave Has Helped Flatten The Curve In The United States, Health Affairs, Oct. 15, 2020, available at <https://doi.org/10.1377/hlthaff.2020.00863>.

contract away their legal duties and immunize themselves from responsibility for the workplace conditions they create. Such a standard would degrade workers' labor conditions, permit wage theft and unlawful child labor, and shift all economic risks to the workers, depriving them of their statutory rights.

#### **D. Conclusion**

Everyone deserves the peace that good jobs, living wages, and comprehensive benefits provide. With economic strain building and a long road to recovery ahead, the need for worker protections and safety protocols to protect worker safety and work-life balance is more critical than ever. CLASP urges the Department to reject the Notice of Proposed Rulemaking regarding the standard for determining who is a covered employee and who is an independent contractor under the Fair Labor Standards Act. The path to recovery requires a roadmap to good jobs and lasting economic security for workers and their families and this NPRM directly challenges the safety of millions of low wage workers by putting their livelihood squarely in the hands of employers more concerned with profits than the well-being of their workforce. Now more than ever, an equitable recovery relies not only on investments in essential worker protections like the full extension of worker rights and protections to independent contractors and gig workers, but also the continued expansion of pandemic-era health and safety protocols, expanded fair workweek laws, minimum hours provisions, paid family and medical leave, and paid sick days.

We appreciate the opportunity to submit this comment.

Sincerely,

**Molly Bashay**

Senior Policy Analyst, Postsecondary Education and Workforce Development  
1310 L St. NW, Suite 900  
Washington, DC 20005  
Phone: (240) 813-0701  
E-mail: [mbashay@clasp.org](mailto:mbashay@clasp.org)

**Tanya L. Goldman**

Senior Policy Analyst/Attorney, Job Quality  
1310 L St. NW, Suite 900  
Washington, DC 20005  
Phone: (202) 906-8074  
E-mail: [tgoldman@clasp.org](mailto:tgoldman@clasp.org)

**Pronita Gupta**

Director, Job Quality  
1310 L St. NW, Suite 900  
Washington, DC 20005  
Phone: (202) 906-8003  
E-mail: [pgupta@clasp.org](mailto:pgupta@clasp.org)