

CLASP

Policy solutions that work for low-income people

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Comments on RIN 1235-AA46: Employee or Independent Contractor Status under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act

Dear Director Navarrete:

The Center for Law and Social Policy submits these comments on the Department of Labor’s (“Department” or “DOL”) Notice of Proposed Rulemaking (“NPRM”) regarding the standard for determining who is an employee and who is an independent contractor under the Fair Labor Standards Act (“FLSA”), the Family and Medical Leave Act (“FMLA”) and the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”), RIN 1235-AA46; Fed. Reg. Vol. 91, No. 39 (Feb. 27, 2026).

All three statutes define “employ” as “to suffer or permit to work”, a strikingly broad definition of employment. Congress defined employment expansively to ensure that business owners were responsible for minimum labor standards for workers in their businesses. DOL’s attempt to narrow the definition of “employ” under these statutes is contrary to controlling law and will create confusion and enable more evasion of baseline worker protections. For the reasons stated below, the Center for Law and Social Policy writes in opposition to this NPRM and urges DOL to withdraw this proposed rule.

Established in 1969, The Center for Law and Social Policy, otherwise known as CLASP, is a national, non-partisan, non-profit, anti-poverty organization that advances policy solutions for people with low incomes. With deep expertise in a wide range of programs and policy ideas, longstanding relationships with anti-poverty, child and family, higher education, immigration, workforce development, and economic justice stakeholders, and over 50 years of history, CLASP works to amplify the voices of directly-impacted workers and families and help public officials design and implement effective programs. CLASP seeks to improve job quality for low-income workers. That includes increasing wages and providing access to paid sick days, paid family and medical leave, and stable work schedules. Quality jobs enable individuals to balance their work, school, and family obligations – promoting economic stability as well as career advancement.

Across the country, corporations misclassify the workers powering their businesses as “independent contractors,” “self-employed,” or “freelancers” even though these workers are not in business for themselves. Corporations do this to shift the risks and costs of the business onto their workers, while channeling wealth to investors and CEOs. When they engage in a rigged practice, corporations depress wages and working conditions and shed responsibility for their workers while maintaining control over key decisions – such as where, how, and for how much money workers perform their jobs. The result is that the very conditions that the Fair Labor Standards Act was designed to combat—conditions “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,” 29 U.S.C. § 202(a)—flourish.

Independent contractor misclassification is a persistent problem in many growing industries where the work is poorly-paid, labor intensive, and high risk, including home care, janitorial, trucking, delivery, construction, personal services, hospitality and, more recently, in app-dispatched jobs. It is no coincidence that Black, immigrant, and women workers of color—who face discrimination and occupational segregation that limits their job opportunities—are overrepresented in these jobs.

Misclassification has real-world consequences. Studies show that the earnings of independent contractors in poorly-paid occupations lag behind their employee counterparts^[1], and some of these so-called independent contractors do not even earn the federal minimum wage. Misclassification makes already difficult jobs much worse and exacerbates racialized income and wealth inequities.^[2]

By elevating two factors above other equally important factors, the Trump administration’s test fails to account for the economic realities of many working relationships and will narrow who is a covered employee under these three statutes. DOL’s NPRM will enable misclassification schemes and a race to the bottom where employers will be able to reclassify their employees as independent contractors and evade their obligations under these laws. While this will harm a broad array of workers, it will inflict the most damage on women and workers of color who predominate in the low-paying jobs where independent contractor misclassification is common.

This NPRM undermines the broad coverage Congress intended under FLSA, the FMLA, and the MSPA and it provides employers with a roadmap to degrade the quality of jobs across the country.

Fair Labor Standards Act

Soon after the FLSA’s enactment in 1938, the Supreme Court set forth a multi-factor “economic realities” test for independent contractor status under the law. In *Rutherford Food Corp. v. McComb*, the Court emphasized the need to consider “the circumstances of the whole activity” rather than “isolated factors.”^[3] The Supreme Court and circuit courts have repeatedly affirmed a multi-factor approach to the determination.^[4] Federal circuit courts have been explicit that no one factor of the test is more controlling of the outcome than the others and that the weight of each factor varies with the specific facts of particular cases.^[5]

Since the Supreme Court’s decision in *Rutherford*, the Department of Labor’s Wage and Hour Division (“WHD”), which is charged with enforcing the minimum wage and overtime provisions of the FLSA, has

consistently applied a multi-factor economic realities test. In 1949, WHD issued an opinion letter which laid out a six factor test for the employee versus independent contractor determination.^[6] It emphasized that no single factor is controlling and that the test must be made based on evidence of the day-to-day relationship between the worker and the principal.^[7] Subsequent WHD discussions of the test in regulations and subregulatory guidance have emphasized that no one factor is more important than the others.^[8]

This longstanding commitment to a multi-factor approach, supported by past WHD practice and repeatedly affirmed by controlling judicial precedent, was briefly upended in 2021. WHD issued a new regulation that explained that there were two “core factors” of the economic realities test: the degree of control and the worker’s opportunity for loss or profit. Litigation ensued and the 2021 rule never took effect.

Not only is it appropriate under relevant WHD and judicial precedents, the multi-factor, “totality of the circumstances” approach is necessary for the WHD to enforce the FLSA in a manner consistent with the statute in a modern economy. Congress enacted the FLSA to “eliminate low wages and long hours and free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers.”^[9] When companies attempt to misclassify their workers as independent contractors – which is occurring with increased frequency as workplaces “fissure”^[10] – to avoid FLSA coverage, they subvert the objectives of the law. This severely impacts workers without FLSA coverage. They experience lower wages, less protections, no employer benefits (retirement, health insurance etc.), which gravely impacts their overall economic security. WHD is right to develop a test that effectively prevents these maneuvers and promotes the overall purposes of the FLSA.

Workplace Fissuring, Gig Work, and Temporary Workers

Due in part to the advent of modern technologies, companies across the United States’ economy have developed novel organizational models that rely on less traditional notions of what constitutes a workplace. Before the 1980s, the American economy was characterized by companies that, for the most part, directly employed the workers who completed all tasks associated with the business.^[11] A hotel company, for example, would employ everyone from the front desk staff to the hotel maids, from the entertainers to the room service workers.

Beginning in the 1980s, in response to investor pressure, companies sought to outsource bigger and bigger portions of their workforces to other entities and to workers themselves.^[12] This helped companies offload costs and liabilities associated with employment, including minimum wage and overtime obligations under the FLSA. The hotel company would, for example, contract with a cleaning company, which in turn might contract with small businesses or individual workers acting as independent contractors, to complete cleaning tasks. As another example, an online retailer might outsource final-mile delivery to workers in business for themselves as independent contractors. The result of these changes in the organizational structure of many companies throughout the economy was termed by economist and former WHD Administrator David Weil as the “fissured workplace.”^[13] In the “fissured workplace,” the lead companies

that consumers pay for goods or services are frequently not the same companies that employ the people who make or deliver them. However, through a variety of organizational forms and managerial and technological methods, the lead companies maintain significant control and de facto integration with the business(es) that produce goods or provide services. As of 2025, 9.69 million workers in the U.S. are independent contractors or gig workers.^[14] However, tax records show the number of workers listing non-traditional income is much higher, reaching upwards of 70 million people when including informal, occasional and side-gig work in 2025.^[15]

The proliferation of independent contracting, gig work, and worker misclassification has imposed significant harm on workers in low-wage industries and has undermined federal and state labor protections. The 2017 Bureau of Labor Statistics (BLS) Contingent Worker Supplement to the Current Population Survey, which measures workers in alternative work arrangements, estimated that 14 percent of gig workers earned less than the federal minimum wage and 29 percent earned less than the applicable state minimum wage. Indeed, gig workers face economic insecurity and rely heavily on public benefits. According to the BLS, 30 percent of gig workers used SNAP within a month of the survey, which is twice the rate of employee-designated service sector workers.^[16] The rule perpetuates how governments are subsidizing corporations by not paying their workers enough and promoting their poverty.

Similar to gig workers, temporary workers are facing precarious employment when employed by staffing agencies, outsourced public contracts or for short-term events. This type of employment is characterized by its short-term nature, and lacks the standard employee-employer relationship. Thousands of employers are using subcontracted work to extract short-term labor from workers, and often use staffing agencies as intermediaries.^[17] Temporary workers often perform the same type of work as those in similar positions who were hired directly.^[18] The key difference lies in their working conditions; temp workers often work for less pay and fewer benefits and have little to no job security. Similar to independent contractors, temp workers would be excluded from rights under the Fair Labor Standards Act if the definition of “employee” is limited to this rule. This rule would severely degrade the labor conditions, pay, and protections of an estimated 13-16 million workers who find work via staffing agencies each year.^[19] In fact, a CLASP analysis in New Orleans, focusing on Mardi Gras clean up workers found that the workers are disproportionately Black, Latino, and immigrants, as is the case for independent contractors across the country.^[20]

Fair Labor Standards Act: The Case of Farmworkers

A comment on WHD’s decision to withdraw the 2021 rule that discussed farmworker working arrangements demonstrates how important a multi-factor test – rather than a test focused on two “core factors” – is to ensure the WHD can navigate varied work arrangements in its enforcement of the FLSA.^[21] Texas Rio Grande Legal Aid lamented that the consideration of two “core factors” would relegate the remaining factors to secondary status. Included in these secondary factors were: “whether the services rendered required special skills and whether they are an integral part of the putative employer’s business.” Both factors, the comment explained, often weighed heavily in favor of employee status for farmworkers. De-emphasizing them in favor of the “core factors,” the comment warned, would make it more difficult to determine the status of farmworkers and incentivize farm operators to adopt more “[e]xploitative” working arrangements like sharecropping or share-farming.^[22]

Migrant and Seasonal Agricultural Worker Protection Act

Applying the proposed two-factor test for independent contractors under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) would be detrimental to workers in the agricultural industry and to the agricultural industry at large.

Established in 1982, the MSPA provides employment-related protections to migrant and seasonal agricultural workers. The law replaced the Farm Labor Contractor Registration act, which omitted the responsibilities and obligations of agricultural employers to assure that migrant and seasonal agricultural workers receive important transportation, housing, and employment protections. Under MSPA, every non-exempt farm labor contractor, agricultural employer, and agricultural association who “employs” workers must:

- Provide written disclosure of the terms and conditions of employment;
- Post information about worker protections at the worksite;
- Pay workers the wages owed when due and provide an itemized statement of earnings and deductions;
- Comply with terms of any working arrangement made with the workers; and
- Make and keep for three years payroll records for each employee.^[23]

The MSPA defines whether the worker or farm labor contractor is “economically dependent” upon that person then that individual is an employee. Given that the NPRM applies the proposed rule explicitly to MSPA, agriculture and seasonal workers stand to lose employment protections related to their worksite. Similar to the FLSA case for farmworkers, limiting the definition of “employee” to omit “whether the services rendered required special skills and whether they are an integral part of the putative employer’s business,” would severely degrade the protections of agricultural and seasonal workers under MSPA. This rule would allow employers to pay lower wages, lower worksite protections, and degrade job quality. Due to the immigration enforcement in 2026, the agricultural industry is already experiencing labor shortages. This NPRM would only further aggravate the growth of the U.S. economy and agriculture industry.

Family Medical Leave Act

The proposed change to the FLSA’s interpretation of “employee” would have significant downstream consequences for programs that rely on this interpretation to determine eligibility. Chief among these is the Family and Medical Leave Act (FMLA). By increasing the likelihood of worker misclassification as independent contractors, who are ineligible for FMLA, the NPRM risks narrowing the pool of workers able to access FMLA rights and protections.

Already, FMLA has limited reach. Its strict eligibility requirements, which include hours worked, length of tenure, and employer size, exclude almost half (44 percent) of the country’s workforce.^[24] These exclusions disproportionately harm workers of color as Asian American, Black, Hispanic, multiracial, Native American, and Pacific Islander workers are less likely to be eligible for FMLA than their white counterparts.^[25]

Workers who lose FMLA eligibility would no longer be guaranteed up to 12 weeks of job-protected leave to care for a new child, address their own serious health condition, care for an ill family member, or manage needs related to a family member's military deployment, as well as up to 26 weeks of job-protected leave to care for an injured service member.

In addition, affected workers would no longer have the right to continued employer-sponsored health coverage during leave, nor guaranteed restoration to the same or an equivalent position with comparable pay, benefits, and working conditions upon return. They would also lose critical protections against employer interference, retaliation, or discrimination related to taking leave.

These protections are essential for workers, and without them, workers are left with few options to navigate stressful, major life events. Evidence shows that fear of job loss and retaliation already prevents millions of workers from taking needed leave. For instance, in 2025 2.5 million workers who were ineligible for FMLA did not take needed leave because of these concerns.^[26]

Workers themselves have echoed these barriers in surveys and interviews. A 2018 survey by the Department of Labor's Wage and Hour Division and Abt Associates found that the fear of job loss was the second most common reason workers did not take needed leave.^[27] More recent qualitative studies from the Center for Law and Social Policy have found that fears of retaliation often prevented young workers from taking needed time off and frequently left Southern workers uncomfortable or afraid to ask or take needed leave.^[28]

The proposed change would impact workers in states that lack a state paid family and medical leave program, and adversely impact workers in states that do have programs, such as New York and Connecticut but rely on FMLA for critical protections. For example, workers in New York who take leave to address a serious illness or injury rely on FMLA to ensure job protection and the continuation of essential benefits while on leave. Similarly, while workers in Connecticut may receive job protection under the Connecticut Family and Medical Leave Act (CTFMLA), that law does not guarantee continuation of employer-sponsored health insurance during leave.^[29] As a result, the proposed change would create gaps in protection that leave workers vulnerable to job loss and disruptions in health coverage, making leave incredibly inaccessible.

This evidence underscores a broader consequence: further limiting eligibility for FMLA jeopardizes the physical, mental, and economic well-being of workers and risks their attachment to the labor force. When workers lack access to paid family and medical leave, or other job-protected forms of leave like FMLA, they often are forced either to leave the workforce entirely or to work through serious caregiving or medical needs. Neither outcome is sustainable for workers or beneficial for employers.

For these reasons, CLASP urges the DOL to withdraw this proposed rule. Any revision to federal labor standards should expand, not restrict, access to fundamental workplace protections that support the health and economic security of workers and their families.

Conclusion

Several millions of U.S. workers will be impacted by this rule, with 10-30% of employers misclassifying their workers.^[30] For example, 2.1 million workers are misclassified in the construction industry alone.^[31] The Department of Labor should not narrow the definition of employee and create incentives for employers to 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.

Sincerely,

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ENDNOTES

[1] An Economic Policy Institute analysis of 11 commonly misclassified jobs estimates that workers classified as independent contractors in these jobs lose out on thousands of dollars per year in income and job benefits relative to their employee counterparts. John Schmitt, Heidi Shierholz, Margaret Poydock & Samantha Sanders, *The Economic Costs of Worker Misclassification*, ECON. POL'Y INST (Jan. 25, 2023), <https://www.epi.org/publication/cost-of-misclassification/>

[2] A national study of digital labor platform workers (classified as independent contractors) found that 1 in 7 earned less than the federal hourly minimum wage, and 30 percent of digital platform workers received a Supplemental Nutrition Assistance Program benefit, compared to 15 percent of employees in comparable service-sector jobs. Ben Zipperer, Celine McNicholas, Margaret Poydock, Daniel Schneider & Kristen Harknett, *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay*, ECON. POL'Y INST. (Jun. 2022), <https://www.epi.org/publication/gig-worker-survey/>.

[3] 331 U.S. 722, 730 (1947)

[4] See, e.g., *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326 (1992); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (explaining the Supreme Court's mandate that "employees are those who as a matter of economic realities are dependent upon the business to which they render service.")

[5] See, e.g., *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311-12 (11th Cir. 2013)

[6] Proposed Rule at 62222

[7] *Ibid.*

[8] See, e.g., Administrator's Interpretation No. 2015-1, "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors" (AI 2015-1).

[9] *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976)

[10] David Weil, *The Fissured Workplace: How Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2014) and more recently, Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, *The Russell Sage Foundation Journal of the Social Sciences* 5(5):147-165 (Dec. 2019), https://www.researchgate.net/publication/337038671_Understanding_the_Present_and_Future_of_Work_in_the_Fissured_Workplace_Context.

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*

[14] United States Census Bureau. How Many Americans are Self-Employed in the U.S.? <https://carry.com/learn/self-employed-americans>

[15] Staffing Industry Analysts. September 2025. The Number of Independent Workers Rises Again: MBO partners. <https://www.staffingindustry.com/news/global-daily-news/number-of-independent-workers-rises-again-mbo-partners>

[16] Bureau of Labor Statistics (BLS). 2018. Contingent and Alternative Employment Arrangements - May 2017. (News Release) June 7, 2018.

[17] National Employment Law Project, February 3, 2022. Survey of Temp Workers Spotlights Widespread Industry Abuses: Poverty Pay, Permatemping, Wage Theft, Unsafe Conditions. <https://www.nelp.org/survey-of-temp-workers-spotlights-widespread-industry-abuses-poverty-pay-permatemping-wage-theft-unsafe-conditions/>

[18] *Ibid.*

[19] *Ibid.*

[20] Lulit, Shewan, February 11, 2026, *The Exploitative Mechanisms of Precarious Work*. The Center for Law and Social Policy. <https://www.clasp.org/publications/report/brief/exploitative-precarious-work-national-insights-new-orleans/>.

[21] Comment by Texas Rio Grande Legal Aid on DOL's Proposed Rule, Independent Contractor Status Under the Fair Labor Standards Act 2, 85 Fed. Reg. 60600, (Sept. 25, 2020), <https://www.regulations.gov/comment/WHD-2020-0007-1720>.

[22] As another example, the Seventh Circuit carefully applied the multi-factor test to determine that migrant farmworkers harvesting pickles were employees under FLSA. See generally *Sec'y. of Labor, U.S. Dept. v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987).

[23] U.S. Department of Labor, Wage and Hour Division, Fact Sheet #35 Joint Employment and Independent Contractors Under the Migrant and Seasonal Agricultural Worker Protection Act, <https://www.dol.gov/agencies/whd/fact-sheets/35->

[mspa-joint-employment.](#)

[24] Scott Brown, Jane Herr, Radna Roy, and Jacob Alex Klerman, “Employee and Worksite Perspective of the Family and Medical Leave Act: Results from the 2018 Surveys,” Abt Associates, prepared for the U.S. Department of Labor, July 2020, https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHI_FMLA2018PB1WhoIsEligible_StudyBrief_Aug2020.pdf.

[25] “Key Facts: The Family and Medical Leave Act,” National Partnership for Women and Families, February 2025, <https://nationalpartnership.org/report/fmla-key-facts/>.

[26] “Key Facts: The Family and Medical Leave Act,” National Partnership for Women and Families.

[27] Brown, Herr, Roy, and Klerman, “Employee and Worksite Perspective of the Family and Medical Leave Act.”

[28] Nat Baldino, Carmen McCoy, Kathy Tran, and Madison Trice, “Young Workers Speak Out: New Perspectives on the Needs for Paid Leave,” Center for Law and Social Policy, A Better Balance, and National Collaborative for Transformative Youth Policy, February 2025, <https://www.clasp.org/wp-content/uploads/2025/02/young-people-paid-leave-new-02112025.pdf>; Diane Harris, “Inaccessible and Costly: Southern Workers’ Experiences with Paid Leave,” Center for Law and Social Policy, April 2026, <https://www.clasp.org/publications/report/brief/southern-workers-paid-leave-costly/>.

[29] A Better Balance, “Interactive Overview of Paid Family and Medical Leave Laws in the United States,” Accessed April 27th, 2026, <https://www.abetterbalance.org/family-leave-laws/>.

[30] National Employment Law Project, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, October 2020. <https://www.nelp.org/insights-research/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020/>

[31] The Century Foundation, Up to 2.1 Million U.S. Construction Workers Are Illegally Misclassified or Paid Off the Books, November 2023. <https://tcf.org/content/report/up-to-2-1-million-u-s-construction-workers-are-illegally-misclassified-or-paid-off-the-books/>