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December 13, 2022

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

Submitted via regulations.gov

**RE: RIN 1235-AA43: Employee or Independent Contractor Classification under the
Fair Labor Standards Act**

Dear Ms. DeBisschop,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 230 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, we write in support of the Department of Labor's ("Department" or "DOL") proposed rule on employee or independent contractor classification under the Fair Labor Standards Act ("FLSA"). The Leadership Conference stands against racial, gender, and economic injustice in all arenas, including the workplace.

The prior administration's Department of Labor finalized a rule narrowing the scope of whom the Department considers an employee under the FLSA. That rule contravenes longstanding statutory definitions and Supreme Court precedent, which has recognized that the breadth and unique history of the FLSA means that most workers are employees and therefore entitled to the law's protections. In doing so, the existing rule enables employers to classify more and more of their workers as independent contractors, stripping them of their rights to minimum wage, overtime, and the protections of our child labor laws. We applaud the Department for proposing to undo this attack on workers and replace it with a rule that is consistent with the text and purpose of the FLSA, and which advances racial, gender, and economic equity for working people.

Racial, gender, and economic equity

While the implementation of the proposed rule will improve workplace standards for a broad array of workers, it will especially help people of color and immigrants who face unique barriers to economic security and often must accept low-wage, unsafe, and insecure working conditions, including work in industries where misclassification is common, such as delivery

services, janitorial services, agriculture, transportation, and home care and housekeeping, as well as in app-dispatched work.¹

Online gig platforms are a prominent example of employers that often rely on workers currently classified as independent contractors. A Pew study conducted in August 2021 found that Hispanic adults are more likely than other racial and ethnic groups to have done gig work. 30 percent of this group have at some point earned money through an online gig platform, compared with 20 percent of Black adults, 19 percent of Asian adults, and only 12 percent of White adults. Among gig workers, non-White workers were more likely to report juggling multiple gig jobs and more than twice as likely to report often feeling unsafe on the job.² Further, an analysis published by the Seton Hall Law Review found a “dramatic gender gap in platform-facilitated online work” where the average hourly rate for women was 37 percent lower than for men, despite a similar number of overall hours worked.³

A May 2020 study by the Economic Policy Institute directly compared the experiences of gig workers to similarly situated service sector employees. 14 percent of gig workers reported average hourly earnings less than the federal minimum wage of \$7.25 per hour — no employees earned less than minimum wage — and 26 percent of gig workers earned less than \$10 per hour, compared with 11 percent of service employees. Further, a whopping 29 percent of gig workers earned less than their state’s minimum wage. These low wages contribute to economic insecurity for workers: compared to service sector employees, gig workers were more likely to be unable to afford food, pay utility bills, and access health care. And because of their classification as independent contractors, gig workers lacked the legal recourse to combat wage theft.⁴

The six-factor economic reality test

The proposed rule sets up a six-factor economic reality test, which asks the critical question of whether workers are genuinely in business for themselves, or if they depend on finding work through the business of others. The DOL lays out an explanation of how each factor is analyzed, which will provide clarity to workers and to businesses. Importantly, the proposed rule makes it clear that the vast majority of workers are not in business for themselves, and are therefore covered by the rights and protections of the FLSA.

- Opportunity for profit or loss depending on managerial skill

The rule clarifies that a worker with the power to make key business decisions that affect the opportunity for profit or loss is more likely to be an independent contractor than a worker who does not have power

¹ Charlotte S. Alexander. “Misclassification and Antidiscrimination: An Empirical Analysis.” *Minnesota Law Review*. 2017. <https://www.minnesotalawreview.org/wp-content/uploads/2017/02/Alexander.pdf>.

² Risa Gelles-Watnick and Monica Anderson. “Racial and ethnic differences stand out in the U.S. gig workforce.” *Pew Research Center*. December 15, 2021. <https://www.pewresearch.org/fact-tank/2021/12/15/racial-and-ethnic-differences-stand-out-in-the-u-s-gig-workforce>.

³ Arianne Renan Barzilay Anat Ben-David. “Platform Inequality: Gender in the Gig-Economy.” *Seton Hall Law Review*. February 16, 2017. <https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1588&context=shlr>.

⁴ Ben Zipperer, Celine McNicholas, Margaret Poydock, Daniel Schneider, and Kristen Harknett. “National survey of gig workers paints a picture of poor working conditions, low pay.” *Economic Policy Institute*. June 1, 2022. <https://www.epi.org/publication/gig-worker-survey>.

over those decisions. These decisions could include what to charge for their work, whether to hire others, and what investments to make in their business, such as whether to purchase advertising, rental space, or equipment. A worker's ability to impact their pay by working more hours or taking more jobs does not show the exercise of managerial skill indicating independent contractor status.

This is an important distinction. For example, a person who works as an independent consultant might negotiate higher rates of pay for themselves with various employers as their reputation and expertise grow, invest in office space or specialized software, travel to conferences to build relationships with potential clients and cultivate new opportunities, or make other decisions to impact the direction of their business. This worker is more likely to be properly classified as an independent contractor. On the other hand, a worker who simply provides labor and is compensated at a rate determined by the employer — i.e., if the only way to earn more is to work more — is more properly classified as an employee.

- Investments by worker and employer

A true independent contractor should make significant capital or entrepreneurial investments in their business, especially relative to the entity that hired them. The rule clarifies that tools or equipment which a business requires a worker to have in order to perform the work are not the same as capital and entrepreneurial investments designed to extend business reach. For example, a construction business might require workers to bring their own hand tools, but the cost of this equipment is far exceeded by the investment made by the company in large machinery and building materials.

This makes sense for rideshare drivers as well. As the rule states, “use of a personal vehicle that the worker already owns to perform the work — or that the worker leases to perform work — is generally not an investment that is capital or entrepreneurial in nature.” A rideshare company's primary entrepreneurial and capital investments are in their platforms — the apps and algorithms that organize their business, and the human and physical capital required to create them and keep them running — and these investments are several orders of magnitude greater than the costs of maintaining a vehicle. Further, once a driver has the required equipment, there generally aren't opportunities to make additional investments that would meaningfully change the conditions or outcomes of their work, meaning that the driver is functioning as an employee rather than as an independent business.

- Degree of permanence

A worker whose work relationship is indefinite in duration or continuous or who is performing a job that is regularly required — even if the individuals hired turn over — is more likely to be an employee than a worker whose work relationship is definite in duration, project-based or sporadic. However, if a worker's sporadic, non-permanent relationship with an employer is due to the nature of the job, such as seasonal or temporary work, rather than the worker's independent business decision, this factor should weigh toward employee status.

A critical distinction here is between the type of time-limited or project-based work that an independent contractor, who is directing their own business, might agree to with another business, versus an employee

with flexible hours. Any employer can offer flexible hours to their employees, and a worker does not need to be an independent contractor to have flexibility over their time at work.

- Nature and degree of control

The proposed rule clarifies that an entity which has the ability to control key aspects of the work is likely an employer. This updates the existing rule, which narrowed the consideration to an employer's actual instances of exercised control. Key aspects of the work for this factor include the ability to set prices or rates for the worker's goods or services, limit the worker's ability to work for others, supervise the worker – including through technology that surveils the worker and tracks productivity, and set the worker's schedule. However, a worker's ability to set their own schedule, by itself, provides only minimal evidence that a worker is an independent contractor, particularly when the hiring entity exerts other types of control.

- Integral part of the business

This factor considers whether the work performed is an essential aspect of the business – that is, whether the work is critical to the primary service or product that the business provides. The proposed rule states that a worker whose work is integral to the business is more likely to be an employee than a worker performing a peripheral function. Businesses hire workers to enable them to provide the services and products they offer, and they enter into contracts with other independent businesses to provide discrete or peripheral tasks or finished products.

A business that delivers groceries to consumers could not function without workers to acquire, organize, and transport the goods to their destination. Those workers, just like the workers that build, maintain, or manage the algorithm or app by which the work is organized, are core to the day-to-day operations of the business. On the other hand, that business might hire an independent graphic designer to create an updated logo. It makes sense to consider the workers that deliver groceries or maintain the app employees, while the graphic designer in this scenario could be a contractor.

- Skill and initiative

The proposed rule says that a true independent contractor is likely to have specialized skills and use those skills to exercise business-like initiative. On the other hand, a worker who does not use specialized skills or is dependent on training from their hiring entity is likely to be an employee. The proposed rule cites to court decisions finding that the work of security guards, janitors, drivers, landscape workers, and call center workers do not require specialized skills.

Furthermore, if the worker has specialized skills but does not use those skills to build an independent business, this would suggest the worker is an employee. The proposed rule's analysis of this factor is helpful because we believe that all work is skilled work in the colloquial sense of the term, and elevating the question of whether a worker can exercise initiative as well as skill better answers the question of whether a worker is in business for themselves. A plumber who undertakes repair jobs as assigned by a

plumbing business is functionally acting as an employee, despite their specialized skills, and is unable use their initiative to change the conditions or outcomes of their work.

In sum, the proposed rule's six-factor economic reality analysis is a sensible, totality-of-the circumstances approach that takes into account all relevant aspects of the worker's relationship with the hiring entity, is not easily manipulated by employers, and is well-supported by Supreme Court and circuit court precedent. If the proposed rule becomes final, it will ensure that our federal minimum wage, overtime and child labor standards apply to all people who work for someone else — regardless of who they are, what they do for a living, or how they obtain their work.

Thank you for your consideration of our views. Please contact Josh Boxerman, senior policy analyst, at boxerman@civilrights.org or Chanel Sherrod, government affairs program manager, at sherrod@civilrights.org with any questions.

Sincerely,



Jesselyn McCurdy
Executive Vice President for Government Affairs