December 13, 2022

Jessica Looman
Principal Deputy Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: Notice of Proposed Rulemaking, Independent Contractor Status under the Fair Labor Standards Act, 2022-21454

Dear Ms. Looman:

The HR Policy Association welcomes the opportunity to submit the following comments[1] for consideration by the Wage and Hour Division of the U.S. Department of Labor in response to the published Notice of Proposed Rulemaking ("NPRM") and Request for Comments regarding independent contractor status under the Fair Labor Standards Act ("FLSA" or "Act').[2]

HR Policy is a public policy advocacy organization that represents the most senior human resources officers in more than 400 of the largest corporations doing business in the United States and globally. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. The Association's member companies are committed to ensuring that laws and policies affecting the workplace are sound, practical, and responsive to the needs of the modern economy.

Executive Summary

The ever-evolving nature of work and the economy requires nimble, surgical legal regimes that continuously reflect the practicalities of the modern workplace. Rules governing the modern workplace and its various relationships should provide protections for workers where necessary without restricting or impeding continued innovation and flexibility.

The Department's proposed rule on independent contractor status, is, unfortunately, a sledgehammer in the place of a much-needed scalpel. Rather than a well-tailored rule that targets intentional misclassification and adequately addresses the novel issues presented by the

[1] The Association is also a signatory to comments filed by the U.S. Chamber of Commerce. The Association offers these additional comments in its individual capacity to further address specific aspects of the proposed rule on behalf of its member companies.
[2] Notice of Proposed Rulemaking: Independent Contractor Status under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (Oct. 13, 2022).

emergence of the gig or platform economy, the proposed rule is a full broadside against the independent contractor classification in general. The proposed rule's formulation of the economic realities test involves interpretations of the test's factors that are exceedingly broad and would in practice most often inappropriately tip the balance towards employee status. Further, the proposed rule places no limit on the factors to be considered when determining employee or independent contractor status, leaving companies in the dark on whether they have properly classified an individual. The practical result of such a broad rule would be a significant restriction of the scope of independent contractor status in general, to the detriment of American companies and workers alike.

The Association urges the Department to instead consider adopting a more nuanced, middle ground approach to solving the misclassification problem as well as issues raised by the gig economy.[3] Specifically, the Association advocates for the adoption of a safe harbor under which companies could offer benefits, opportunities, and protections for their contingent workforces, without unnecessarily and unexpectedly creating an employer-employee relationship. This approach would incentivize companies to extend certain benefits already offered to their own employees to independent contractors. This approach would also provide needed protections for gig workers, while continuing to enable individuals to enjoy the flexibility, among other advantages, if they so choose.[4] Further, such an approach would in no way impede the Department's ability to target intentional misclassification nor encourage companies to engage in such unlawful activity.

Finally, any final rule in this area should also attempt to foreclose, to the extent possible, expensive and protracted litigation – especially class-action litigation – that has been expanding in this area. Ambiguous and open-ended standards should be avoided pursuant to this objective, and any final rule should include specific examples of what does and does not constitute employer-employee relationships.

- **The overly broad scope of the rule is an ill-fitting "solution" that mischaracterizes the misclassification problem**

The broad scope of the rule is erroneously premised on an incorrect understanding or characterization of both the role of contractors in the American economy and the issue of misclassification of workers. The Association does not question the fact that worker misclassification does occur and that individuals may be deprived of rights and benefits crucial for their livelihood. To the extent that companies intentionally misclassify individuals as contractors instead of employees and deprive them of the specific suite of rights and benefits afforded employees, such bad actors should be held accountable under the FLSA. Further, the Association understands that the gig economy and gig workers present a particularly unique economic reality that blurs the line between "employee" and "independent contractor" – particularly under current law – and that gig workers in certain circumstances and situations are in need of greater protections and benefits.

[3] At a minimum, the Department or Congress should establish a task force to study and report on the options and benefits of a establishing an "independent worker" classification under the FLSA.

[4] The Association believes consideration should be given to the concept of self-identification classification and urges Congress and the Department to analyze this approach.

The Association would submit, however, that such realities are not necessarily indicative of the role of independent contractors in the economy in their entirety, nor, correspondingly, of their usage by companies. The vast majority of American companies, including Association members, utilize contractors for a variety of purposes, including to manage the ebbs and flows of labor supply and demand, to rapidly hire highly specialized workers with specialized skills for short term projects, or to fill service gaps outside of a company's core competencies (e.g., security services, cleaning services), to name a few examples – none of which involve attempting to avoid liability under the FLSA or other labor and employment laws, or to deprive individuals of rights or benefits. Similarly, many individuals prefer to maintain their status as independent contractors – and do not wish to become employees of a particular company – for a variety of reasons, including most often the flexibility to choose their own schedules, projects, or jobs that best suit their skill sets, demands, or work-life balance. Individuals also may choose to be contractors to further their own entrepreneurial pursuits, and/or because they desire to expand their skillset and can earn more money on their own rather than being tied to one employer. Again, none of these reasons or motivations involve a company's desire to prevent such individuals from being employees for the purposes of avoiding coverage of applicable statutes and employer benefit plans.

Just as the gig economy does not comprise the entirety of the American economy – in fact, approximately 9% of the American workforce participated in gig work in 2021, contributing about 5.7% of the U.S. GDP[5] – the very small minority of companies who intentionally misclassify individuals does not represent the entirety of American companies. Any regulation that is attempting to combat misclassification and remedy novel issues presented by the evolution of the gig economy – which the Department's proposed rule is ostensibly attempting to do – should be appropriately tailored for exactly those purposes, rather than a broadside against the role and usage of independent contractors in the economy as a whole.

Unfortunately, the proposed rule represents the latter – an overly broad regulation that is intended to restrict the overall scope of independent contractor status in general, regardless of context. The proposed rule's formulation of the economic realities tests includes frameworks for each factor that in nearly every case improperly tip the balance towards favoring employee status, regardless of the practicalities of the working arrangement in question. In particular, the proposed rule's "control factor" takes an inappropriately expansive view of company control over work performed, such that de minimis, reserved, or unexercised control over an individual's work is considered indicative of an employer-employee relationship. Further, the proposed rule establishes that the factors of its formulation of the economic realities test are not exhaustive, and that the Department may consider "additional factors" that "may be relevant" going forward on a case-by-case basis. Deliberately leaving the test for determining independent contractor status open-ended and subject to additional unarticulated revision makes the scope of the rule theoretically infinite and leaves companies to speculate whether their classification of an individual as an employee or an independent contractor is "correct" under the FLSA.

The practical result of the proposed rule's breadth and its significant restriction on the scope of independent contractor status will be the conversion of thousands of individuals from

[5] Chris Kolmar, *23 Essential Gig Economy Statistics 2022: Definitions, Facts, and Trends of Gig Work*, ZIPPIA (Sep. 22, 2022), https://www.zippia.com/advice/gig-economy-statistics/#:~:text=What%20percentage%20of%20the%20economy,5.7%25%20of%20the%20U.S.%20GDP.

independent contractors to employees under the FLSA, regardless of the individual's own intent. Such an approach would also impose significant cost to both American companies and American workers. Instead of crafting a rule that is appropriately tailored to target the true scope and nature of the misclassification problem in the American economy, the Department instead proposes a rule that needlessly narrows the scope of independent contractor status in general. While there may in fact be some individuals classified as independent contractors that should instead be classified as employees, the Department's proposed rule mistakes this premise for one in which more individuals should be classified as employees rather than independent contractors.

- **A worker classification rule should empower companies to provide benefits and opportunities to contractors without unnecessarily and unexpectedly creating an employer-employee relationship under the FLSA**

Instead of a prescriptive rule that broadly restricts the scope of independent contractor status under federal law, without taking into account the realities and practicalities of the modern workplace, an independent contractor regulation should appropriately target intentional misclassification while also allowing companies to provide needed benefits and opportunities to individuals – without such actions needlessly and unexpectedly creating an employer-employee relationship. The Department's proposed rule would disincentivize companies from extending benefits, protections, and opportunities to independent contractors and further discourage innovation of different types of work arrangements between employers and individuals. Under the broad scope of the proposed rule, such actions would be considered evidence of an employer-employee relationship, even if neither party wishes such a relationship to exist.

An independent contractor status rule should instead incentivize companies to provide benefits to their contingent workforce, and as noted above, to experiment with various arrangements between employers and individuals. The Association understands that the evolution of work, and the rise of the gig economy in particular, has created an economic reality in which individuals, who while seeking to remain independent contractors, nevertheless need certain protections and benefits that might otherwise only be given to full-time employees. Accordingly, the Association firmly believes that the law should allow for legally classified contractors to be afforded certain protections, benefits, and opportunities without unnecessarily and unexpectedly creating an employee-employer relationship. Indeed, the Association has long advocated for such an approach to any regulation of the definition of independent contractor status.[6]

Specifically, the Department should consider establishing a safe harbor approach within the FLSA under which companies are empowered to provide benefits such as health care, defined contribution retirement plans, health and safety training, insurance, apprenticeships, career development, tuition reimbursement, minimum wage, and others to their independent contractors without creating an employer-employee relationship under federal law. Such a safe harbor would incentivize companies to extend these types of benefits, protections, and opportunities that they offer their full-time employees to their contingent workforce, and accordingly to the benefit of

[6] See, e.g., HR POLICY ASSOCIATION, WORKPLACE 2020: MAKING THE WORKPLACE WORK: CHIEF HUMAN RESOURCE OFFICERS ON TRENDS SHAPING THE WORKPLACE, THE OUTDATED POLICIES THAT GOVERN IT – AND THE WAY FORWARD 18 (2017). The Association's Workplace 2020 Report, published in 2017, similarly advocated for safe harbors that would enable employers to provide certain benefits such as health care and defined contribution retirement plans, among others, to both their own employees and their contingent workforce, without the latter losing independent contractor status.

all independent contractors. This approach was recently championed – by both gig employers and organized labor – in the state of Washington, which highlights both the approach's feasibility as well as its benefits for all stakeholders, but most significantly for gig workers and independent contractors in general.[7]

At the absolute minimum, an independent contractor status rule should recognize that simply requiring independent contractors to comply with various federal state and local laws in the course of their work for a company or requiring certain basic safety and health requirements – to safeguard both the contractor, a company's employees, or an company's property – are not indicative of an employer-employee relationship under the FLSA.

The adoption of this type of safe harbor represents a common sense, middle-ground approach to the issues presented by the increasing number of independent contractors, gig employers, and gig workers in the American economy, without unnecessarily destroying or significantly restricting the independent contractor classification that provides flexibility and other benefits increasingly sought by many individuals. Further, such an approach in no way impedes the Department's ability to target intentional misclassification where it exists, or encourages companies to engage in such unlawful behavior.

- **An independent contractor rule should attempt to provide as much clarity as possible to minimize the need for expensive and protracted litigation**

Legal disputes over the status of an individual's legal classification have significantly increased over time. Part of this trend of increased litigation trend is the filing of class-action lawsuits against companies. Such litigation imposes considerable costs on our economy and can deter the implementation and innovation of new relationships between individuals and employers. Accordingly, as much clarity as possible should provided in any final rule. Pursuant to this objective, specific examples should be included of what type of work arrangements constitute or do not constitute employee or independent contractor status. As noted above, ambiguous and open-ended standards in any final rule should be avoided.

Sincerely,

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[7] *See, e.g.*, Tina Bellon, *Washington Governor Signs Uber, Lyft Driver Pay Guarantee into Law*, REUTERS (April 1, 2022), https://www.reuters.com/business/autos-transportation/washington-gov-signs-state-wide-uber-lyft-driver-pay-guarantee-into-law-2022-04-01/.

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