



### **Comments of the Regulatory Action Center**

RE: Independent Contractor Status under the Fair Labor Standards Act; Withdrawal

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The Regulatory Action Center at FreedomWorks Foundation is dedicated to educating Americans about the impact of government regulations on economic prosperity and individual liberty. FreedomWorks Foundation is committed to lowering the barrier between millions of FreedomWorks citizen activists and the rule-making process of government agencies to which they are entitled to contribute.

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On behalf of our activists nationwide, FreedomWorks Foundation appreciates the opportunity to offer these comments regarding the notice and request for comments on the withdrawal of the Independent Contractor rule.

The Department of Labor (DOL) published the rule on January 7, 2021, with the original effective date of March 8, 2021. In February, the effective date was delayed by 60 days, to May 7, 2021. The rule provides guidelines for determining whether someone is an employee or independent contractor under the Fair Labor Standards Act (FLSA). Independent contractors are not employees under the FLSA and thus not subject to minimum wage, overtime pay, and recordkeeping requirements.

The rule aimed to bring clarity to the decades-long confusion in determining a worker's status by developing factors that focused on "economic dependence": Does the worker have control over important aspects of the work, e.g., schedule-setting and choosing projects? And does the worker have an opportunity for profit based on initiative or investment? While the rule listed three other factors for consideration, the rule also made clear that if the questions of control and opportunity for profit are answered in the affirmative, the worker will almost always be considered an independent contractor.

DOL delayed the effective date to provide time to consider the rule's "significant and complex" issues, and now proposes to withdraw it entirely, arguing that the rule violates the FLSA and case law; that it will cause more confusion than clarity; that it will harm workers; and that withdrawal would not be disruptive because the rule hasn't taken effect.



Contrary to what DOL now claims, this rule is a well-reasoned implementation of the “economic reality” test, which Supreme Court decisions have made clear is the test for whether a worker is an employee or independent contractor. If the rule is allowed to take effect, it will provide extensive guidance to employers and prevent them from having to rely on a patchwork of conflicting standards applied in various lower court decisions. As for harm to workers, many independent contractors choose to be independent contractors for various reasons: schedule flexibility, ability to select projects, and the opportunity to increase earnings by their own initiative. Forcing them to become employees not only deprives them of free choice but may also deprive them of their livelihoods.

For evidence that many workers want to be independent contractors, one need look no further than the backlash after California’s anti-independent contractor bill (AB 5) became law. First, California voters adopted Proposition 22, which carved out app-based drivers from the law; then the California legislature enacted AB 2257, which allowed a long list of professions to remain independent contractors. Many of the independent contractors were suffering serious economic harm from AB 5 and were faced with losing their livelihoods or moving out of California. Those who could afford to mount a lobbying campaign to get their professions excluded fared much better than others, who may be equally harmed. This is an egregious example of government picking winners and losers, which DOL’s Independent Contractor rule was designed to avoid by establishing widely-applicable guidelines for determining a worker’s status.

Finally, although the Independent Contractor rule hasn’t taken effect, withdrawing it and not replacing it with any guidelines serves neither workers nor employers. Our economy is in distress. Many workers are unemployed, and unemployment funds as well as state treasuries are severely strained. The focus needs to be on getting workers back to work, and “gig” jobs may be the fastest way to accomplish this. Businesses--particularly small businesses, who have suffered the brunt of the COVID-related economic devastation--may be able to reopen or expand only with the flexibility offered by hiring independent contractors. But in order to do that, businesses need the guidance provided by this Rule. Withdrawing it will only exacerbate uncertainty and needlessly delay economic recovery.

Respectfully submitted,

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