Rio Grande Foundation

Liberty, Opportunity, Prosperity
New Mexico

December 13, 2022

Ms. Amy DeBisschop
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave., N.W.
Washington, DC 20210

RE: Comments on U.S. Department of Labor, Wage and Hour Division, "Employee or Independent Contractor Classification Under the Fair Labor Standards Act," RIN 1235-AA43

Dear Ms. DeBisschop,

On behalf of the Rio Grande Foundation (RGF), I am submitting comments regarding the Department of Labor's (DOL) proposed rule entitled, "Employee or Independent Contractor Classification under the Fair Labor Standards Act," which was published in the Federal Register on October 13.[1] The proposal would create a new, confusing test for determining employment status to the detriment of the tens of millions of American workers who view the "gig economy" and other independent contractor relationships as a lifeline for their families and livelihoods.

RGF has a significant interest in the DOL's proposal that would convert tens of thousands of New Mexico small business owners and workers into employees. It is estimated that such reclassifications will result in a loss of direct income for approximately 3.4 million American workers.[2] Founded in 2000, the RGF is committed to ensuring economic freedom for all New Mexicans and we are very concerned about the impact this proposal would have on our state.

New Mexico is among the poorest states in the country. Transparency, accountability, and innovation have been stifled by heavy-handed government policies and over-regulation. DOL's proposal would only add another level of regulatory complexity and uncertainty for the tens of thousands of New Mexico small business owners who are growing the state's economy and providing good jobs to its citizens. As the state tries to regain its economic footing after Covid-19, regulations like the DOL proposed rule would force many small business owners to close and discourage other New Mexicans from joining their ranks.

---

[1] 87 Fed. Reg. 62,218 (Oct. 13, 2022).
[2] Robert Shapiro and Luke Stuttgen, "The Many Ways Americans Work and The Costs of Treating Independent Contractors as Employees," https://progresschamber.org/wp-content/uploads/2022/04/The-Many-Ways-Americans-Work-Chamber-of-Progress-Shapiro-Sonecon.pdf (Filed on Nov. 7, 2022 with the Comments of the Chamber of Progress).

Post Office Box 40336
Albuquerque, New Mexico 87196
www.RioGrandeFoundation.org
Phone: (505) 264-6090
Fax: (505) 213-0300

Latest estimates indicate there are 158,844 small businesses in New Mexico, making up 99 percent of all businesses in the state.[3] And independent contractors make up six percent of the state's employment.[4]

With its proposed rule, DOL would significantly expand the number independent contractors who would be reclassified as employees. According to an economic analysis from the Chamber of Progress, the proposed rule would result in approximately 4.4 million workers being involuntarily reclassified as employees.[5] These 4.4 million reclassified contractors would experience net income losses ranging of $35.2 to $55 billion based on the state of the economy.[6] Importantly, "[m]uch of those job and income losses would be borne by very vulnerable people unable to work as regular employees in traditional offices or factories, because they are disabled, suffer from a chronic illness, or care for elderly parents, spouses, or children."[7]

The Breadth of DOL's Proposed Rule Would Lead to Significant Confusion for Businesses and Workers

DOL's proposal would require businesses and workers to perform a "totality-of-the-circumstances" analysis of the "economic realities" six-factor test that has been associated with independent contractor classification. That test considers: (1) the extent to which the work performed is an integral part of the employer's business; (2) the worker's opportunity for profit or loss; (3) the nature and extent of the worker's investment in his/her business; (4) whether the work performed requires special skills; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer. In addition to this six-factor test the Department says that "additional factors" also may be relevant to the analysis "if the factors in some way indicate whether the worker is in business for themself, as opposed to being economically dependent on the employer for work."[8]

And each of these factors is very broad. For example, when explaining the second factor regarding whether the work performed is integral to the business, DOL says, it will consider "whether the work is *critical, necessary,* ***or*** *central* to the employer's business."[9] Exactly what business owner in America contracts with or employs a worker to perform a function that is not critical, necessary, or central to the business? For example, in an economy that relies on information and the internet, every business needs information technology support to function. Does that now mean, under DOL's proposal, that this entire class of independent contractors must be reclassified as employees?

---

[3] U.S. Small Business Administration Office of Advocacy, 2021 Small Business Profile, New Mexico, https://cdn.advocacy.sba.gov/wp-content/uploads/2021/08/30143117/Small-Business-Economic-Profile-NM.pdf (last visited Dec. 10, 2022).
[4] Shapiro and Stuttgen (n. 2).
[5] Id.
[6] Id. at 29
[7] Id.
[8] Proposed §795.110.
[9] 87 Fed. Reg. at 62,253 (Emphasis added.)

Most business owners, particularly smaller businesses that do not have in-house human resources or legal staff, are not going to be able to perform the "totality-of-the-circumstances" analysis of the "economic realities" six-factor test and have any confidence they would survive a DOL employee classification audit. Moreover, to the extent a worker is still considered an independent contractor after doing DOL's complicated "analysis," would considering the amorphous "additional factors" convert that worker to an employee?

RGF is hard-pressed to understand who could be classified as an independent contractor if this proposal is promulgated.

DOL's Proposed Rule Is Redundant

DOL just did this. In January 2021, DOL conducted a comprehensive rulemaking regarding employee status.[10] The agency considered thousands of comments and it worked hard to update employee classification laws so that they better matched the realities of worker preferences for more flexibility and businesses operations in the twenty-first century. Instead of letting the 2021 rule take effect, however, DOL withdrew it.[11]

While no rule is perfect, the 2021 Final Rule arguably provided the most clarity that the federal government has given to date regarding how to determine whether a worker is an independent contractor. Among other things, the 2021 Final Rule focused on the degree of control exercised by the employer and the worker's opportunity for profit or loss. It would have ensured workers receive proper compensation and give businesses more confidence regarding their worker classifications.

RGF believes DOL should withdraw its proposed rule and reinstate the 2021 Final Rule. If DOL moves forward with its confusing new "economic realities test" we are concerned that, at best, businesses will be forced to spend thousands of dollars in legal fees to ensure they are properly classifying their workers. At worst, the uncertainty the proposed rule would introduce into such classifications will result in significant job and income losses for millions of American workers.

Thank you for your consideration of these comments. If I can provide additional information or answer any questions you might have, please contact me.

Best regards,

Paul J. Gessing, President

---

[10] 86 Fed. Reg. 1168 (Jan. 7, 2022).
[11] 86 Fed. Reg. 24303 (May 6, 2022).