Pennsylvania
Department of Labor & Industry

The Office of
Minnesota Attorney General Keith Ellison
helping people afford their lives and live with dignity, safety, and respect • www.ag.state.mn.us

April 27, 2026
Via Federal eRulemaking Portal

Keith E. Sonderling
Acting Secretary
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Daniel Navarrete
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Re: Notice of Proposed Rulemaking, *Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act*, 91 Fed. Reg. 9932 (Feb. 27, 2026), RIN 1235-AA46

Dear Acting Secretary Sonderling and Director Navarrete:

We write on behalf of the Commonwealth of Pennsylvania's Department of Labor & Industry and Minnesota Attorney General, joined by the States of Arizona (Attorney General), California (Attorney General), Colorado (Attorney General), Connecticut (Attorney General), District of Columbia (Attorney General), Hawai'i (Attorney General), Illinois (Attorney General), Commonwealth of Massachusetts (Attorney General), Michigan (Attorney General), Minnesota (Department of Labor and Industry), New Jersey (Attorney General), New York (Attorney General), Oregon (Attorney General; Bureau of Labor & Industries), Rhode Island (Attorney General), Vermont (Attorney General), Washington (Attorney General, Dep't of Labor & Industries), as well as the Philadelphia Office of Worker Protections and Minneapolis Department of Civil Rights (collectively, States and Cities) to oppose the U.S. Department of Labor's ("USDOL" or "Department") Notice of Proposed Rulemaking ("NPRM") entitled *Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act*, 91 Fed. Reg. 9932 (Feb. 27, 2026) ("proposed rule" or "proposal"). This proposed rule would unjustifiably strip federal minimum wage, overtime pay, and other essential worker protections under several statutes for workers across the United States. The States and Cities strongly oppose this proposal to rescind the current regulations and revert to the novel 2021 "core factor" analysis, which contravenes decades of established case law and the humanitarian purposes underlying these laws.

The experiences of the undersigned state Attorneys General, state labor departments, and municipal agencies in enforcing labor laws make clear that adopting the proposed rule would harm the very people these statutes are meant to protect. The proposed rule would also make state labor law enforcement more difficult and create confusion for law-abiding employers who will be forced to navigate a federal regulatory scheme that varies significantly from the case law in their state and local jurisdictions.

Additionally, the proposal, if finalized, fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[1] First, the proposed rule is contrary to law because it contravenes the statutory texts and purposes of the Fair Labor Standards Act ("FLSA"), Family and Medical Leave Act ("FMLA"), and Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), along with established court precedent as to the definition of "employee" and independent contractor status under these statutes. Second, finalizing the proposed rule would be arbitrary and capricious because USDOL fails to provide a reasoned explanation for its flip-flopping and proposed return to its short-lived 2021 rule. Instead, USDOL sets forth unsupported assertions that the reinstatement of the 2021 independent contractor test—which conflicts with decades of judicial precedent and the remedial purposes of the FLSA, FMLA and MSPA—will promote certainty for stakeholders. The proposed rule would do the opposite, creating conflict with federal and state precedent and longstanding Departmental practice. For these reasons, USDOL should not finalize this proposed rule.

I. The Proposed Rule Would Increase Misclassification of Workers and Make Law Enforcement More Difficult.

a. The States and Cities are interested parties with expertise in labor and employment issues.

The undersigned States and Cities enforce laws that protect workers against wage theft, unfair treatment, exploitation, and discrimination. State attorneys general and labor departments investigate and prosecute violators of wage and hour laws. To receive almost all statutory protections as a worker—from minimum wage and overtime protections, to paid leave, to unemployment and worker's compensation—a worker must qualify as an "employee."[2] Accordingly, states, either through their labor departments or attorneys general offices, must almost always first determine whether a worker is an employee or independent contractor as a

[1] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (quotation omitted).

[2] Some recent municipal worker protection laws extend coverage to workers other than "employees." *See, e.g*., NYC Administrative Code §§ 20-1501–1524, 20-563.2, and 20-563.6 (applying protections to app delivery workers); Seattle Municipal Code §§ 8.37, 8.39, and 8.40 (applying protections to "app-based workers").

preliminary matter when enforcing state labor standards.[3] States vary in how they define an "employee" for the purposes of their state worker protection laws. While some states have enacted their own statutory tests, including the three-prong ABC test,[4] many states depend on the FLSA and use the same economic reality test that federal courts use under that Act's definition.[5]

---

[3] *See, e.g.*, *Steinke v. P5 Sols., Inc*., 282 A.3d 1076, 1088 (D.C. 2022) ("We conclude as a matter of law that Mr. Steinke was not an employee but was instead an independent contractor during the relevant time period, bringing him outside the ambit of the [District of Columbia Wage Payment and Collection Law]"); *Dep't of Lab. & Indus. v. Workers' Comp. Appeal Bd*. (Lin & E. Taste), 647 Pa. 28, 35 (Pa. 2018) ("[w]hether one's status is that of an employee or independent contractor 'is a crucial threshold determination that must be made before granting workers' compensation benefits.'") (internal citations omitted). *See also* Press Release, New Jersey Dep't of Labor and Workforce Development, *New Jersey DOL and Attorney General Announce Landmark $7 Million Settlement with PDX North, Inc. in Worker Misclassification Case* (Mar. 12, 2026), available at https://www.nj.gov/labor/lwdhome/press/2026/20260312_pdx.shtml (distribution company agreed to pay $7 million to resolve longstanding worker misclassification violations involving its delivery drivers); Press Release, The Office of Minnesota Attorney General, *Attorney General Ellison wins restitution for workers that gig-work company misclassified* (Dec. 19, 2024), available at https://www.ag.state.mn.us/Office/Communications/2024/12/19_AriseVirtualSolutions.asp (gig work company agreed to pay over $300,000 in restitution to workers to resolve allegations that company misclassified its workers in violation of Minnesota minimum wage, overtime, and rest break laws); Press Release, Office of the Attorney General of Massachusetts, *AG's Office Issues $6.2 Million in Citations Against National Delivery Service Company Over Employee Misclassification Violation* (Mar 30, 2023), available at https://www.mass.gov/news/ags-office-issues-62-million-in-citations-against-national-delivery-service-company-over-employee-misclassification-violations (issuing $6.2 million in citations against employer for employee misclassification and other labor violations, affecting 968 employees).

[4] As the proposed rule discusses, the ABC test enacted in a number of states presumes that an individual is an employee, unless each of three criteria are met: (A) the individual is free from the potential employer's control or direction in performing his work, both under a contract for the performance of such work and in fact; (B) the work performed by the individual is outside the usual course of the potential employer's business; and (C) the individual is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the potential employer. 91 Fed. Reg. 9970. The following states utilize a version of the ABC test to determine whether a worker is an employee or independent contractor: California, Connecticut, Delaware, the District of Columbia (construction industry only), Illinois (construction industry only), Iowa, Maryland (construction and landscaping industries only), Massachusetts, Nebraska, New Jersey, New York (construction industry only), and Vermont. Pennsylvania uses a variation of the ABC test in the construction industry. Colorado, Maine, New York, North Carolina, and Virginia use their own multi-factor tests, distinct from both the economic reality test and the ABC test.

[5] The following states generally use the multifactor economic reality test to determine whether a worker is an employee or independent contractor: the District of Columbia, Illinois, Maryland, Michigan, Pennsylvania, Rhode Island, and Washington.

The Department contends that the 2024 multifactor economic reality test, which mirrored the decades-old economic reality test used by courts around the country, fails "to provide effective guidance," and that its proposal to return to the 2021 rule will set forth a "familiar and clear analysis drawn from established case law."[6] However, as many of the signatories on this letter previously informed the Department, instituting an economic reality test with two "core factors" would depart from the statutory text and purpose of the FLSA, and decades of judicial precedent, instilling confusion and uncertainty among states and workers.[7]

Due to the sudden discrepancy between state and federal tests created by the proposed rule, more employers would classify workers as independent contractors, even where that may run counter to state law tests. The Department's proposed rule may encourage unscrupulous employers to take advantage of the resulting confusion from this rule change and the new differences between state and federal law in states that have relied on the longstanding economic reality test, seeking to reduce costs and thus classifying more workers as independent contractors.[8] Even for employers seeking to operate in good faith and who have some sophistication, the rule would likely cause many to depart from well-established practices that remain required by law in much of the country and to spend time and resources trying to figure out exactly what is required as a result of this rule proposal. In states that had analyzed state laws under the same analysis as USDOL prior to this rule, state enforcement agencies and worker advocates may have to spend considerable resources explaining that state and federal laws are no longer analyzed using the same analysis if this proposal is finalized. In all states, especially those with more worker-protective tests than the economic reality test such as the ABC test, this proposed rule would require public education and increased enforcement by state agencies, creating significant cost increases for regulatory agencies. States and Cities will also suffer increased burdens on social safety net programs from the resulting increase in worker misclassification.

---

[6] 91 Fed. Reg. 9939.

[7] *See* State Officials, Comment Letter on USDOL Proposed Rule on Independent Contractor Status Under the Fair Labor Standards Act, (Oct. 26, 2020), available at https://www.regulations.gov/comment/WHD-2020-0007-1711.

[8] *See, e.g.*, Int'l Labour Org., *Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects*, at 161-163, (Nov. 16, 2016), available at https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_534326~2.pdf (explaining that employers are incentivized to classify workers as independent contractors because workers in nonstandard employment are often cheaper for employers because of lower wages or savings on benefits); Robert Habans, *Exploring the Costs of Classifying Workers as Independent Contractors: Four Illustrative Sectors*, UCLA INSTITUTE FOR RESEARCH ON LABOR AND EMPLOYMENT, at 12 (Dec. 2015) ("… estimates suggest that employers escape between 29 and 39 cents in taxes and benefit costs per dollar of payment for work" when classifying workers as independent contractors rather than employees), available at https://irle.ucla.edu/wp-content/uploads/2016/03/IndependentContractorCost_20151209-1-2.pdf.

b. Misclassification harms workers, law-abiding employers, and States and Cities, highlighting the need for a flexible, totality-of-the-circumstances test.

Alternative work arrangements, including the use of independent contractors, temporary workers, and staffing agency workers, have become more prevalent in the modern economy, enabled in part by rapid changes in technology. The proposed rule acknowledges "several types of changes" in the modern economy, including "societal transition from a predominantly industrial-based to a more knowledge-based economy and shorter job tenures among employees."[9] The rule fails, however, to explain how its more rigid test is able to adequately capture all of the workers who are "suffered or permitted" to work[10] under federal law in today's economy.

Recent state data on misclassification demonstrates the alarming extent of this issue:

- A 2022 Pennsylvania report found that 48,939 employers annually misclassified at least one employee, and that in total, 259,000 employees were misclassified.[11]
- In Minnesota, an estimated 22% of randomly audited employers in 2018 misclassified at least one employee, and 12% of the audited employers misclassified a majority of their employees. Employers in some industries—retail trade, construction, and accommodation and food services—misclassified workers at a disproportionately high rate compared to the industry's share of total employees.[12]
- The Michigan Unemployment Insurance Agency's 2025 Annual Report indicates that the more than 12,000 misclassified workers were identified across $3 billion employer wages audited.[13]

Misclassifying employees as independent contractors is detrimental to workers, law-abiding employers, and the States and Cities. First, misclassified workers are denied basic protections such as timely payment of wages, accurate recordkeeping and job disclosures, pay stubs, paid leave, and reimbursement for expenditures that primarily benefit the employer

[9] 91 Fed. Reg. 9942.

[10] 29 U.S.C. § 203(g).

[11] PA Dep't of Labor & Indus., *Joint Task Force on Misclassification of Employees: Final Report*, at 12 (Dec. 1, 2022), available at https://www.pa.gov/content/dam/copapwp-pagov/en/dli/documents/individuals/labor-management-relations/llc/documents/act-85-final-report.pdf.

[12] Minnesota Office of the Legislative Auditor, *Worker Misclassification: 2024 Evaluation Report*, at 14-17 (Mar. 2024), available at https://www.auditor.leg.state.mn.us/ped/pedrep/2024-worker-misclassification.pdf.

[13] Michigan Unemployment Insurance Agency, *Annual Report 2025*, at 15, available at https://www.michigan.gov/leo/-/media/Project/Websites/leo/Documents/UIA/Publications/Annual-Report-2025.pdf.

(including uniforms, travel expenses, training and education).[14] Misclassified workers also suffer suppressed wages and are more vulnerable to wage theft.[15] Second, employers that intentionally misclassify workers operate with an unfair competitive advantage over law-abiding employers, since the former substantially save on operating costs, including payroll, taxes and insurance premiums.[16] Lastly, the States suffer significant administrative burdens from the loss of tax revenue, which exacerbates the added costs of providing public welfare and conducting enforcement actions.[17]

Despite evidence that independent contractors experience increased rates of wage theft and suppression,[18] the Department asserts, without comprehensive economic analysis, that increased independent contractor arrangements can result in higher base earnings for workers (*i.e.*, the "earnings offset"). *See* 91 Fed. Reg. at 9968 ("[I]ndependent contractors also tend to receive higher earnings than employees to offset tax, benefits, and other expenses"). In today's economy, however, the higher earnings that a worker may appear to receive as an independent contractor often do not offset the lost employment benefits and the associated tax liabilities, operating costs, long-term economic investments, and the cost of insurance.[19]

In addition to the cost of increased public education and enforcement, misclassification results in lost revenue and added administrative burdens for the States. Misclassification causes states to lose a substantial amount of tax revenue that would otherwise be paid through payroll taxes, and funds paid into unemployment and workers' compensation insurance, and paid leave

---

[14] Independent contractors are also often ineligible for unemployment compensation or workers' compensation, although states may use different tests for employee status under these programs than those used for wage-and-hour protections. *See, e.g.*, 43 P.S. § 753(*l*)(2)(B).

[15] Françoise Carré, *(In)dependent Contractor Misclassification,* Econ. Pol'y Inst. (June 8, 2015), https://files.epi.org/pdf/87595.pdf.

[16] *Id.* at 2. ("Law-abiding firms that pay their taxes and properly classify their workers as employees face a competitive disadvantage and may feel pressured to cut corners with their workers' employment status if they wish to remain competitive.").

[17] Nat'l Emp. L. Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (Oct. 2020), available at https://www.nelp.org/app/uploads/2017/12/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf.

[18] Carré, *supr*a note 15.

[19] Adewale A. Maye, Daniel Perez, & Margaret Poydock, *Misclassifying workers as independent contractors is costly for workers and states,* Econ. Pol'y Inst. (Jan. 22, 2025), https://www.epi.org/publication/misclassifying-workers-2025-update/ (examining the net value of jobs for W-2 employees compared to misclassified independent contractors based on the costs of taxes, social insurance funds, health insurance and retirement benefits).

programs.[20] States also experience downstream financial impacts from misclassification, like public healthcare coverage expenses, and hospital costs for the uninsured since independent contractors are not provided benefits like health insurance, and often lack appropriate workers' compensation coverage.[21] The proposed rule would also result in added expenses for the States whose independent contractor standard depends on the federal standard, since they would need to invest time and resources into training agency employees and educating the public about the proposed rule's departure from what has been the legal standard for several decades. Similarly, the States with more protective misclassification laws (*i.e.,* laws that make it more likely that a worker is classified as an employee), may experience increased costs to state regulatory agencies from an uptick in complaints alleging misclassification under state law.

Many states document the impact of misclassification on their economies. For example, Pennsylvania estimates that from 2021 to 2022, it was deprived of approximately $91 million in revenue to the Unemployment Compensation Trust Fund and over $380,000 in losses to the Uninsured Employers Guarantee Fund because of worker misclassification.[22] In a 2025 financial audit, the Department of Labor & Industry discovered 21,801 misclassified or unreported workers, and $6.3 million in underreported unemployment taxes.[23]

Lastly, misclassification hurts law-abiding employers. Employers that properly classify employees and run their businesses in accordance with wage and hour laws operate at a competitive disadvantage when competing for the same work with employers that skirt the law.[24]

---

[20] *See, e.g.,* Pa. Dep't of Lab. and Indus., *Joint Task Force on Misclassification of Employees: Final Report,* at 12 (Dec. 1, 2022), https://www.pa.gov/content/dam/copapwp-pagov/en/dli/documents/individuals/labor-management-relations/llc/documents/act-85-final-report.pdf (estimating a range of $6.4 to $124.5 million in lost revenue to the Commonwealths' General Fund in 2019 due to misclassification); North Star Pol'y Action, *Safety Net Snags: The Effect of Payroll Fraud on Minnesota Workers and Taxpayers,* at 5 (Sep. 19, 2024), https://northstarpolicy.org/safety-net-snags/ (approximating Minnesota's tax revenue losses between $506 million to $1.3 billion from payroll fraud and worker misclassification in 2019).

[21] Nat'l Emp. L. Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (Oct. 2020), https://www.nelp.org/app/uploads/2017/12/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf.

[22] Pa. Dep't of Lab. and Indus., *Joint Task Force on Misclassification: Final Report,* at 12 (Dec. 1, 2022), https://www.pa.gov/content/dam/copapwp-pagov/en/dli/documents/individuals/labor-management-relations/llc/documents/act-85-final-report.pdf.

[23] Pa. Dep't of Lab. and Indus., *Actuarial Evaluation 2025: Financial Operations of the Pennsylvania Unemployment Compensation Program*, at 19 (2025), https://www.pa.gov/content/dam/copapwp-pagov/en/dli/documents/cwia/products/actuarial-evaluation/actuarialevaluation.pdf.

[24] *See* Dale Belman, et al., Inst. for Constr. Emp. Rsch., *Worker Misclassification Disadvantages Honest, Law-Abiding Contractors: A Project-Based Analysis* (June 2025), https://iceres.org/wp-

Businesses that pay the proper taxes and insurance premiums effectively subsidize the businesses that do not comply with the law. And because contractor labor is often significantly cheaper than employees due to the reduced legal obligations, businesses have a strong financial incentive to redesign jobs to fit the contractor framework. This risks accelerating a "race to the bottom" in labor standards—driving down wages and benefits offerings. In short, misclassification undermines fair market competition.

II. The Proposed Rule Is Contrary to Law.

a. The proposed rule's elevation of two "core factors" contradicts the FLSA and the case law interpreting it.

The proposed rule violates the FLSA by attempting to re-introduce the 2021 rule's improperly narrow reading of the definition of "employee," contrary to the Supreme Court's clear instruction that this term "must not be interpreted or applied in a narrow, grudging manner." *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944). Although the FLSA does not explicitly define "independent contractor," it defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d), "employee" as "any individual employed by an employer," 29 U.S.C. § 203(e), and "employ" "includes to suffer or permit to work," covering a wide range of employment arrangements, 29 U.S.C. § 203(g). The FLSA's use of "suffer or permit" was derived from state laws regulating child labor, rather than the common law agency test.[25] Thus, as courts and the Department have both consistently recognized, the FLSA was intended to cover workers broadly, including those who would not have been covered in the traditional common-law definition of employment.[26] In a 2015 Administrator's Interpretation on independent contractor coverage, the Department aptly noted

---

content/uploads/2025/08/ICERES-Research-Brief-Worker-Misclassification-June-2025-FINAL.pdf.

[25] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 n.7 (1947).

[26] *United States* v. *Rosenwasser,* 323 U.S. 360, 362, 363 n.3 (1945) (under the FLSA, "the term 'employee' had been given 'the broadest definition that has ever been included in any one act.'") (quoting 81 Cong. Rec. 7657 (statement of Senator Black)); *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326 (1992). The FMLA and MSPA incorporate these FLSA definitions. *See* 29 U.S.C. § 2611(3) (FLSA) and 29 U.S.C. § 1802(5) (MSPA). Like the FLSA, the FMLA and MSPA implement a broad, remedial purpose, centering the protection of workers. *See, e.g.*, *Stekloff v. St. John's Mercy Health Sys*., 218 F.3d 858, 862 (8th Cir. 2000) ("the FMLA's provisions should be interpreted to effect its remedial purpose"); *Hodgens v. Gen. Dynamics Corp*., 144 F.3d 151, 164 (1st Cir. 1998) ("we must consider the fact that the FMLA is a remedial statute," the purpose of which is "to help working men and women balance the conflicting demands of work and personal life."); *Bracamontes v. Weyerhaeuser Co*., 840 F.2d 271, 276 (5th Cir. 1988) ("the MSPA is remedial in nature and must be read broadly"); H. Rep. No. 97-885, 97th Cong., 2d Sess., 1982 (identifying the purpose in enacting MSPA as "to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers").

that "applying the economic realities test in view of the expansive definition of 'employ' under the Act, most workers are employees under the FLSA."[27]

For decades, the Department has used a flexible, multifactor balancing test analyzing the "economic reality" of the worker to determine whether a worker is a covered employee under the FLSA, rather than an independent contractor.[28] Beginning with two seminal Supreme Court cases in 1947, *Silk* and *Rutherford*, courts and the Department have consistently balanced a version of the following economic reality factors to determine whether a worker is an employee under the FLSA: the nature and degree of the employer's control over the work; the permanency of the worker's relationship with the employer; the degree of skill, initiative, and judgment required for the work; the worker's investment in equipment or materials necessary for the work; the worker's opportunity for profit or loss; whether the service rendered by the worker is an integral part of the employer's business; and the degree of independent business organization and operation.[29] The Department has long reiterated that the ultimate inquiry is whether the worker is economically dependent on the employer or truly in business for themself.[30]

From the economic reality test's very origins, the Supreme Court has recognized that the determination of an employment relationship under the FLSA depends not on "isolated factors but rather upon the circumstances of the whole activity."[31] The economic reality test is not "formalistic or simplistic," nor "technical," but instead requires consideration of the totality of the circumstances.[32] For decades the circuit courts have accordingly applied the economic reality test as a flexible, totality-of-the-circumstances test, under which no one factor is dispositive or controlling.[33]

---

[27] 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 (July 15, 2015). AI No. 2015-1 was withdrawn on June 7, 2017. *See* News Release 17-0807-NAT, *U.S. Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance* (Jun. 7, 2017), available at https://www.dol.gov/newsroom/releases/opa/opa20170607.

[28] *See, e.g.*, USDOL, WHD Fact Sheet #13 (July 2008), available at https://www.dol.gov/sites/dolgov/files/WHD/fact-sheets/whdfs13.pdf.

[29] *United States v. Silk*, 331 U.S. 704, 716 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729-30 (1947).

[30] *See, e.g.*, 86 Fed. Reg. 1246; 89 Fed. Reg. 1648.

[31] *Rutherford*, 331 U.S. at 730.

[32] *Usery v. Pilgrim Equip. Co., Inc.*, 527 F.2d 1308, 1311 (5th Cir. 1976); *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (internal citation omitted); *Rutherford*, 331 U.S. at 730.

[33] *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) (citations omitted) ("No one of these factors is dispositive; rather, the test is based on a totality of the circumstances."); *Silk,* 331 U.S. at 716 (explaining that "[n]o one [factor] is controlling" in the economic reality test). *See also Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1312 (11th Cir. 2013) ("No one of these

Shirking decades of circuit court precedent applying this totality-of-the-circumstances test, in 2021 the Department published a final rule setting forth a different version of the economic reality test, which elevated two factors—control, and opportunity for profit or loss—as two "core" factors.[34] The Department deemed these two factors as having greater probative value than the test's other factors, and explained that these two factors alone could be determinative of a worker's employee or independent contractor status.[35] Although that rule was withdrawn in 2021,[36] and the Department set forth a final rule in 2024 replacing the "core factor" test with a true multifactor balancing test,[37] the Department now seeks to re-introduce the 2021 "core factor" test.

By narrowing the analysis to just two "core factors," this proposed rule would permit courts to improperly conclude that a worker is an independent contractor by disregarding other factors that may indicate otherwise, contravening the FLSA's legislative intent to protect workers broadly and more inclusively than the common law. Moreover, this proposed rule diverges from decades of the Department's historical practice and interpretations by federal appellate courts. As the Department noted in its 2024 rule,[38] when proposing its 2021 rule, the Department did not identify a single case in which any court had elevated a single economic reality factor over another.[39] Once again in its current proposal, the Department fails to identify any such case. An economic reality

---

considerations can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor—economic dependence.") (citations omitted).

[34] 86 Fed. Reg. 1246-47 (§ 795.105(c) & (d)).

[35] 86 Fed. Reg. 1246.

[36] 86 Fed. Reg. 24303.

[37] 89 Fed. Reg. 1638. As the Department's proposal recognized at the time of this proposal, there were five lawsuits pending challenging the 2024 rule. In May 2025, the Department published Field Assistance Bulletin No. 2025-1 advising that while this litigation is pending and the Department contemplates reconsidering the 2024 rule, the Department "will enforce the FLSA in accordance with [the 2008 version of Fact Sheet #13]." USDOL, Wage and Hour Division, Field Assistance Bulletin No. 2025-1, *FLSA Independent Contractor Misclassification Enforcement Guidance* (May 1, 2025), available at https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2025-1.pdf. As described above, this fact sheet sets forth a multi-factor balancing test for determining independent contractor status that does not elevate any so-called "core factors."

[38] 89 Fed. Reg. 1650 ("Moreover, the Department is not aware of any court that has, as a general rule, elevated any one economic reality factor or subset of factors above others, despite receiving several comments suggesting that there was such case law. The 2021 IC Rule did not cite or rely on any particular decision where a court announced such a general rule predetermining the weight of some of the economic reality factors. Further, the Department has examined cases raised by commenters in support of the core factor analysis and none stand for the proposition that a predetermined elevation of any factor or set of factors is appropriate under the economic reality analysis for worker classification under the FLSA.").

[39] *See* 91 Fed. Reg. 9933-9936.

test that elevates two factors as "core factors" defies decades of circuit court precedent and would render the economic reality test untenably inflexible.[40] For these reasons, the Department's proposal is contrary to law.

b. A further "streamlined" rule that prioritizes analyzing control above all other factors is also unlawful.

The Department further requests comment about an alternative employment test that first analyzes the control factor and then only "if necessary" considers the remaining factors of the economic reality test.[41] This proposal also runs contrary to the entirety of case law considering employment under the FLSA, obliterates the economic reality test, and contradicts the Department's own legal analysis in the proposed rulemaking.

The FLSA requires an employment standard that considers overall economic dependence and the activity as a whole. As mentioned above, the Supreme Court made clear that determining employment under the FLSA requires analyzing "the circumstances of the whole activity," rather than "isolated factors." *Rutherford*, 331 U.S. at 730; *see also Silk*, 331 U.S. at 716, 719 (denying the existence of "a rule of thumb to define the limits of the [employer-employee] relationship" and determining employment status based on "the total situation"). The Supreme Court adopted the multi-factor economic reality test for FLSA, which was part of the expansive social legislation of the New Deal. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723-24 (1947).

In applying the economic reality test set out by the Supreme Court, courts of appeals have further clarified that no single factor is determinative as the analysis relies on the totality of circumstances. *See, e.g., Keller v. Miri Microsystems LLC,* 781 F.3d 799, 807 (6th Cir. 2015) ("No one factor is determinative."); *Baker v. Flint Eng'g & Constr. Co*., 137 F.3d 1436, 1441 (10th Cir. 1998) ("None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach."); *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 380 (5th Cir. 2019) (stating that it "is impossible to assign to each of these factors a specific and invariably applied weight") (quoting *Hickey v. Arkla Indus., Inc*., 699 F.2d 748, 752 (5th Cir. 1983) (applying economic realities test in Age Discrimination in Employment Act case)); *Martin v. Selker Bros*., 949 F.2d 1286, 1293 (3d Cir. 1991) ("It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive."); *Scantland v. Jeffry Knight, Inc*., 721 F.3d 1308, 1312 n.2 (11th Cir. 2013) (the relative weight of each factor "depends on the facts of the case") (quoting *Santelices v. Cable Wiring*, 147 F. Supp. 2d 1313, 1319 (S.D. Fla. 2001)).

As such, the Supreme Court and the courts of appeals have made clear that one factor cannot be prioritized above all others. The ultimate inquiry is whether someone is economically dependent or in business for themselves, not whether any particular factor is met. *See, e.g., Scantland,* 721 F.3d at 1312 (11th Cir. 2013) (the economic reality factors "serve as guides, [and]

---

[40] 89 Fed. Reg. 1649. *See also McFeeley* v. *Jackson Street Ent., LLC,* 825 F.3d 235, 241 (4th Cir. 2016) ("While a six-factor test may lack the virtue of providing definitive guidance to those affected, it allows for flexible application to the myriad different working relationships that exist in the national economy.").

[41] 91 Fed. Reg. 9949.

the overarching focus of the inquiry is economic dependence"). Proposing a rule that first analyzes control and only "if necessary" considers any other factor directly contradicts the Supreme Court's instruction that the proper test requires analyzing "the circumstances of the whole activity," rather than "isolated factors." *Rutherford*, 331 U.S. at 730. The Department's alternative proposal to prioritize control strays even further from precedent than the two "core factors" proposal and would fundamentally upend application of the economic reality test. Furthermore, the Department will create further uncertainty and invite litigation by rejecting the long-standing precedent of the economic reality test that individuals and employers have relied on for decades.

Prioritizing control above other factors would revert the analysis back to agency principles of common law that the Supreme Court rejected. In adopting the economic reality test, the Supreme Court specifically rejected common law principles of agency that focused on control and instead adopted a broader test for determining employment under FLSA. *See e.g. Walling* v. *Portland Terminal Co.,* 330 U.S. 148 (1947). The Court held that common law principles were no longer controlling because "[t]his Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." *Walling* v. *Portland Terminal Co.,* 330 U.S. 148, 150-51 (1947). Courts have further held the common law test was inappropriate due to its "limiting concepts of control and supervision." *Antenor v. D & S. Farms,* 88 F.3d 925, 929 (11th Cir. 1993) (citing *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947)). The Supreme Court has since reaffirmed that because of FLSA's broad language, FLSA covers some employees who might not qualify as employees under traditional agency principles. *Nationwide Mutual Insurance Co.* v. *Darden,* 503 U.S. 318, 326 (1992). The Department now proposes reverting the employment determination to the very analysis that has been expressly rejected. This proposed analysis is contrary to law.

Finally, the Department purports to reject prioritizing control while simultaneously requesting comment on whether the Department should prioritize control. This demonstrates the Department's legally unsound approach in this rulemaking, as the Department expressly acknowledges that it is "legally constrained" from adopting the common law test—which prioritizes control—to determine employment under FLSA.[42] Indeed, the Department recites FLSA caselaw demonstrating that the Supreme Court rejected common law principles of agency emphasizing control, and instead adopted the economic reality test. However, in the same instance, the Department seeks comment on a "streamlined" test that prioritizes control. This is the very analysis the Department recognizes it is legally required to reject, and the Department should not depart from that requirement here.

c. The proposed rule's specific factors inappropriately exclude relevant considerations.

In addition to the flaws described above, the Department's proposed approach as to the test's specific factors also defies established precedent and the purpose of the FLSA. The Department's selective articulation of several specific factors contravenes their longstanding application by courts and would improperly narrow the inquiry into a worker's status, leading to misclassification of employees as independent contractors.

[42] 91 Fed. Reg. 9969.

First, the Department proposes to readopt the articulation of the "control" factor from its 2021 rule, rejecting the 2024 rule's consideration of reserved control, control mediated by technology, and control over economic aspects of the work relationship.[43] Instead, the proposed rule would again emphasize "the actual practice of the parties" more than "what may be contractually or theoretically possible."[44] The Department justifies this change as providing greater clarity, when in fact this change conflicts with judicial precedent, and introduces additional uncertainty to stakeholders rather than creating any clarity.[45] Additionally, while the proposed rule purports to better reflect modern workplaces, in reality it ignores the importance of employers' reserved control using modern technology for intense surveillance and algorithmic control of workers. As the Department recognized in the 2024 rule, an employer can exercise control in the workplace in a variety of ways—i.e., forms of reserved control like surveillance and algorithms—that are probative of employee status.[46] Encouraging courts to ignore these practices undercuts the intent of the FLSA to cover workers broadly.

The Department's attempt to reinstate the 2021 rule's control factor contradicts precedent in a second way, by improperly focusing on the worker's control over certain aspects of the work, rather than on the employer's control over the worker, in contrast to well-established precedent.[47] The case law is clear: the appropriate focus under the economic reality test for this factor must be on the employer's control over the worker, not the worker's control over elements of the work.[48] The 2024 rule aligned with this precedent by emphasizing that the relevant consideration is "the employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship."[49] In its current proposal, the Department explains that it has

---

[43] 91 Fed. Reg. 9950.

[44] 91 Fed. Reg. 9957.

[45] The proposed rule's focus on "actual practice" suffers from the same flaw as the Department's previous joint employment rule, which was vacated in *New York v. Scalia*, 490 F. Supp. 3d 748, 786-787 (S.D.N.Y. 2020) (vacating DOL's final rule regarding the definition of "joint employment" under the FLSA, discussing the rule's requirement that a putative joint employer must "actually exercise" control as, read generously, equivalent to the common law standard, while the FLSA definitions broadened the common law conception).

[46] 89 Fed. Reg. 1693.

[47] *See* 91 Fed. Reg. 9950 (articulating the first economic reality factor as "the nature and degree of control over the work").

[48] *See, e.g.*, *Scantland*, 721 F.3d at 1316 (analyzing "control over workers" by the alleged employer); *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 141 (2d Cir. 2017) (finding that the employer "exercised minimal control over [p]laintiffs" in two respects and that a "lack of control, while not dispositive, weighs in favor of independent contractor status) (internal citations omitted)); *Usery*, 527 F.2d at 1312–13 (finding that "[c]ontrol [of the worker over their work] is only significant when it shows an individual exerts such a control over a meaningful part of the business that [the worker] stands as a separate economic entity.").

[49] 89 Fed. Reg. 1743.

purposely described the control factor "in a general manner to encompass various different types of control," suggesting that its control factor provides a "more straightforward and focused explanation."[50] Instead, the proposed rule's control factor would contradict the circuit courts' interpretation of this factor, causing confusion among stakeholders who have long relied on that interpretation and its incorporation in the 2024 rule.

Next, adding to the confusion that would result from this rule is the Department's decision to collapse certain factors into each other, such that important and distinct factors like investment and initiative are considered only as part of the "opportunity for profit or loss" factor.[51] In the 2024 rule, the Department explained that a separate "investment" factor was consistent with the Department's approach prior to the 2021 rule, and with the approach of most courts, which treat investment as its own consideration.[52] In its current proposed rule, the Department acknowledges the robust body of case law in which courts considered investment as a separate factor in the economic reality test,[53] but does not justify its decision to diverge from this body of case law, or address the confusion that would result from that divergence, except to offer, without support, that its approach would provide "greater explanation and clarity."[54]

The Department does the same with the "initiative" factor, inappropriately folding it into the "opportunity for profit or loss" analysis on the asserted basis of providing greater clarity.[55] The Department acknowledges that this approach deviates from a majority of circuit court interpretations,[56] yet gives no meaningful analysis to justify its decision to do so. As the Department explained in its 2024 rule, analyzing worker initiative under more than one factor where appropriate is consistent with the Supreme Court's endorsement of the economic reality test as a totality-of-the-circumstances approach, but to remove the initiative factor entirely from the multifactor analysis is a bridge too far.[57] Thus, the Department's proposed articulation of the

---

[50] 91 Fed. Reg. 9951.

[51] 91 Fed. Reg. 9952.

[52] 89 Fed. Reg. 1676, 1679 ("Almost all of the federal courts of appeals consider investments as a separate factor.") (citing *Donovan v. DialAmerica Mktg., Inc.,* 757 F.2d 1376, 1382 (3d Cir. 1985); *McFeeley v. Jackson Street Ent., LLC,* 825 F.3d 235, 241 (4th Cir. 2016); *Hobbs v. Petroplex Pipe & Constr., Inc.*, 946 F.3d 824, 829 (5th Cir. 2020); *Acosta v. Off Duty Police Servs., Inc.,* 915 F.3d 1050, 1055 (6th Cir. 2019); *Brant v. Schneider Nat'l,* 43 F.4th 656, 665 (7th Cir. 2022); *Walsh v. Alpha & Omega USA, Inc.,* 39 F.4th 1078, 1082 (8th Cir. 2022); *Driscoll,* 603 F.2d at 754; *Acosta v. Paragon Contractors Corp.,* 884 F.3d 1225, 1235 (10th Cir. 2018); *Scantland,* 721 F.3d at 1311).

[53] 91 Fed. Reg. 9953.

[54] *Id.*

[55] 91 Fed. Reg. 9954.

[56] *Id.* at 9953.

[57] 87 Fed. Reg. 62257.

"opportunity for profit or loss" factor as a catch-all for both the "initiative" and "investment" factors is inconsistent with FLSA's purpose and its judicial precedent.

Finally, the Department proposes to readopt the 2021 rule's "integrated unit" factor, which considers whether the work is part of an integrated unit of production.[58] While the Department cites *Rutherford* for this, the Department previously explained that this represents an improperly rigid reading of *Rutherford*, does not reflect Supreme Court precedent, and under well-established circuit court precedent, the relevant inquiry is whether a worker's work is an integral part of the business.[59] Again, the Department has not sufficiently justified its divergence from decades of circuit court precedent and its own interpretation, citing only a need for clarity when, in practice, this divergence would impede clarity.

d. The proposed rule's expansion of this novel analysis to the FMLA and MSPA is without substantive explanation.

The Department provides an insufficient explanation for why it declined to apply the 2021 and 2024 rules to the Family and Medical Leave Act and the Migrant and Seasonal Agricultural Worker Protection Act but is nevertheless electing to do so now. With respect to the MSPA, the 2021 rule stated, "the Department does not see a compelling need to revise 29 CFR 500.20(h)(4), as we are unsure whether application of the six factor economic reality test described in that regulation has resulted in confusion and uncertainty in the more limited MSPA context similar to that described in the FLSA context."[60] And the proposed rule recognizes that "[t]he Department did not address the FMLA in the 2021 or 2024 Rules."[61] Now, however, the Department evidently perceives a "compelling reason" to adopt the modified 2021 rule with respect to both statutes, and yet it fails to state what that reason is. While the proposed rule asserts that applying the new rule to the FMLA and MSPA promotes "uniformity," it offers no explanation of what has changed since 2021 or 2024 that now requires a one-size-fits-all-statutes rule.[62]

---

[58] 91 Fed. Reg. 9955.

[59] 89 Fed. Reg. 1707, 1709 (explaining that "no federal court of appeals has adopted [this reading] as the standard for this factor in the decades since *Silk* and *Rutherford.*"). *See also Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989) (explaining "many courts have examined whether or not the type of work performed by the alleged employees is an integral part of the business" and concluding that the work performed by cake decorators is "obviously integral to the business of . . . selling cakes which are custom decorated"); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1537-38 (7th Cir. 1987) ("It does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business . . . .").

[60] 86 Fed. Reg. 1168, 1177.

[61] 91 Fed. Reg. 9932, 9944 n. 130.

[62] *Id.* at 9943.

As the proposed rule explains, the FMLA and the MSPA incorporate the broad definition of "employ" used by the FLSA.[63] However, there is no requirement that the same criteria be applied and weighed in precisely the same manner across all three statutes. Indeed, the FMLA and the MSPA have unique structures and provisions that require reasoned consideration before the Department mandates a uniform approach.

The FMLA adopts the FLSA's definition of "employ,"[64] but there are key differences between the FMLA and the FLSA that must be considered in the rulemaking process. First, the FMLA institutes requirements beyond the economic reality criteria to determine employee eligibility, such as employment by the applicable employer for at least twelve months and having worked 1,250 hours during that period.[65] The FMLA also provides its own exclusions limiting the range of eligible employees.[66] These provisions and their impact on any proposed changes to the definition of "employ" should be considered as part of a reasoned rulemaking process. Second, while both the FLSA and MSPA allow joint employment, existing FMLA regulations apply a unique primary and secondary employer structure, which may complicate the employee/independent contractor analysis.[67] The Department provides no consideration of how the extension of this test to the FMLA would impact these already-existing policies or any reliance interests that have developed around them.

Moreover, textual and procedural issues prevent an automatic extension of FLSA regulations to the MSPA without additional consideration. First, the MSPA incorporates the FLSA definition of "employ" "for the purposes of implementing the requirements of that Act;" that is, only for the purposes of implementing the FLSA.[68] This language indicates that there are limits on the applicability of the FLSA definition to the MSPA—limits that the proposed rule fails to address. Furthermore, regulations governing the definition of "employ" under the MSPA already exist and have not been rescinded.[69] Those regulations do not include the identification of "core" factors or guidance on weighing the various factors that are present in the 2021 Rule or the proposed rule.

In *F.C.C. v. Fox TV Stations, Inc.*, the Supreme Court explained that, under the APA, an agency seeking to alter an existing rule "must show that there are good reasons for the new

---

[63] For MPSA *see* 29 U.S.C. § 1802(5) ("The term 'employ' has the meaning given such term under section 3(g) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(g)) for the purposes of implementing the requirements of that Act."). For FMLA *see* 29 U.S.C. § 2611(3) ("The terms 'employ', 'employee', and 'State' have the same meanings given such terms in subsections (c), (e), and (g) of section 203 of this title.").

[64] 29 U.S.C. § 2611(3).

[65] *Id.* at § 2611(2)(A).

[66] *Id.* at § 2611(2)(B).

[67] 29 C.F.R. § 825.106.

[68] 29 U.S.C. § 1802(5).

[69] 29 C.F.R. § 500.20(h)(1)-(4).

policy."[70] This proposed rule offers no such reasons; rather, it merely states, without any supporting evidence, that "[f]ailing to make conforming edits to the MSPA regulation risks confusing agricultural employers, agricultural associations, and farm labor contractors."[71] This statement constitutes unsubstantiated speculation and fails to consider what new sources of confusion would arise, including the confusion that would flow from the Department abruptly changing course on a longstanding policy.

III. The Proposed Rule Is Arbitrary and Capricious, Because the Department Has Not Provided Adequate Justification for its Departure From the 2024 Rule.

a. USDOL lacks data to support its proposed rule.

USDOL's proposal arbitrarily rescinds the 2024 rule and, in its place, reinstates a previously withdrawn, novel test for whether a worker is an employee or an independent contractor. As discussed above, departing from decades of precedent, USDOL's test inappropriately selects two factors as "core" factors, shifts the focus from whether the employer controls the worker to whether the worker controls the work, and eliminates important considerations in its articulation of individual factors. The Department fails to provide empirical evidence or reasoning in support of its change in position, and offers no explanation for how the proposed rule accounts for the evolving employment landscape and technological advancements empowering new methods of employer control over workers.

Under *State Farm*, the Supreme Court requires that an agency "examine the relevant data and articulate a satisfactory explanation for its action."[72] The *State Farm* Court rejected an agency's explanation as arbitrary where "there [was] no direct evidence in support of the agency's finding."[73] Where an agency fails to reflect upon contrary evidence or treats contrary evidence in a conclusory fashion, the proposed rule will not survive judicial scrutiny.[74] Courts have found that "a complete failure to . . . grapple with contrary evidence . . . disregard[s] entirely the need for reasoned decisionmaking."[75] Additionally, an agency may not "depart from a prior policy *sub silentio* or simply disregard" what it previously said.[76] Instead, agencies presenting a change in its

---

[70] 556 U.S. 502, 515 (2009). *See also Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) ("[T]he APA . . . mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.").

[71] 91 Fed. Reg. at 9943.

[72] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

[73] *Id*. at 52.

[74] *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008) (finding conclusory dismissal of empirical data on a critical factor in the decision lacking a reasoned explanation).

[75] *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017).

[76] *Fox*, 556 U.S. at 515.

interpretation of a statute, regulation, or judicial precedent must offer "good reasons" for making such a change.[77]

As described above, the Department's proposed rule would rescind its 2024 final rule setting forth the six-factor economic reality test interpreting the FLSA's "suffer or permit" definition that aligns with decades of judicial precedent. As such, the Department is required to set forth "good reasons" for changing its position. The Department has failed to do so—it makes no reference to any changed conditions or data since its 2024 rulemaking that would justify reintroducing a contrary interpretation of the FLSA.

Instead, the Department relies on unreasonable estimates of the rule's effects and altogether ignores potential harm to states and workers from the mass reclassification of employees to independent contractors that this rule may cause. The Department admits that its rule "could lead to an increase in the number of independent contractor arrangements due to some degree of reclassification."[78] However, the Department makes only an arbitrary attempt to quantify the increase in workers classified as independent contractors that this rule would produce.

By its own terms, the Department repeatedly bases its estimate that "the number of independent contractors could increase by 1 to 3 percentage points if this proposal were finalized" on "labor market studies of flexible work" in general—a term which includes more than specifically independent contracting—and on a study of the effects of California's Assembly Bill 5.[79] The Department's reliance on a study of the effects of California's Assembly Bill 5 is misplaced, since that bill introduced an entirely different test (the ABC test) from what the Department is proposing here.[80] The ABC test's effects on the reclassification of workers cannot be generalized to the implementation of the Department's proposed "core factor" test, since the two tests rely on entirely different factors and entirely different burdens. Additionally, the Department fails to address any contradictory empirical estimates finding that a greater increase in reclassification would occur under this rule than the Department predicts, including, for example, the Economic Policy Institute's finding that there would be an increase of at least 5% in

---

[77] *Id*.

[78] 91 Fed. Reg. 9967-68.

[79] 91 Fed. Reg. 9961 (citing Liya Palagashvili et al., *Assessing the Impact of Worker Reclassification: Employment Outcomes Post-California AB5*, Mercatus Working Paper (2024), https://www.mercatus.org/research/working-papers/assessing-impact-worker-reclassification-employment-outcomes-post).

[80] California Assembly Bill No. 5 establishes that a worker is an employee rather than an independent contractor unless the "hiring entity demonstrates that all three of the following conditions are satisfied: (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact. (B) The person performs work that is outside the usual course of the hiring entity's business. (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." Assem. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019), *as repealed and replaced by* Assemb. B. 2257, 2019–2020 Leg., Reg. Sess. (Cal. 2020).

the number of workers classified as independent contractors if the 2021 test were finalized.[81] The Department's failure to produce a reasoned estimate of the changes in classification that would result from this rule is arbitrary and capricious.

The Department's unreliable estimate of the increase in reclassification to independent contractor status is particularly alarming because the Department does not acknowledge the harm posed to those workers whose status will change because of this rule. The Department recognizes that its rule may cause "a transfer in federal tax liabilities from employers to workers" and decreases in "employer-provided benefits," but does not attempt to quantify those transfers, claiming instead that "the net impact on total compensation should be small in either direction."[82] Claiming without support that "independent contractors . . . tend to receive higher gross earnings than employees," the Department instead predicts that any increased compensation to workers reclassified as independent contractors under this rule would offset workers' losses in employer-provided benefits, meaning that this rule would merely result in workers receiving "remuneration in a different form."[83] The Department does not adequately provide support for its assertion that independent contractors specifically receive a premium for their status, citing only general literature "relevant to substitution among forms of remuneration."[84] Indeed, this assertion contradicts up-to-date findings that independent contractors often earn less than they would have earned if classified as employees.[85] The Department fails to consider any contrary effects related to or evidence of misclassification that would result because of this rule, which is indicative of a flawed rulemaking.

In addition to insufficiently quantifying tax and benefits transfers from employers to workers, the Department neglects to consider *any* costs of its proposed rule to the states. Indeed, the Department fails to consider the foreseeable administrative and enforcement costs its proposed rule would impose on states as enforcers of state labor laws. For example, workers will file wage and hour complaints following a reclassification as a result of this rule, increasing states' enforcement activities. Additionally, in states that have traditionally relied on federal

---

[81] Economic Policy Institute, Comment Letter on USDOL Proposed Rule on Independent Contractor Status Under the Fair Labor Standards Act (Oct. 26, 2020), available at https://www.regulations.gov/comment/WHD-2020-0007-1642.

[82] 91 Fed. Reg. 9968.

[83] *Id*.

[84] *Id*.

[85] *See generally* Ben Zipperer et al., *National survey of gig workers paints a picture of poor working conditions, low pay*, ECONOMIC POLICY INSTITUTE (June 1, 2022), available at https://www.epi.org/publication/gig-worker-survey/; Robert Habans, *Exploring the Costs of Classifying Workers as Independent Contractors: Four Illustrative Sectors*, UCLA INSTITUTE FOR RESEARCH ON LABOR AND EMPLOYMENT, at 12 (Dec. 2015) (finding that "[e]ven where contractors do not earn significantly less by the hours than employees, it is unlikely that differential rates of compensation for independent contractors and employees are sufficient to cover the savings in costs of benefits and taxes by employers"), available at https://irle.ucla.edu/wp-content/uploads/2016/03/IndependentContractorCost_20151209-1-2.pdf.

interpretations of the FLSA, states may incur costs to clarify for employers that the state will continue to apply the longstanding economic reality test—not USDOL's new attempt at re-articulating that rule. In states with laws that are more worker-protective than the economic reality test, labor enforcement agencies would likely have to engage in public outreach to help ensure that businesses are not confused about their obligations. The Department unreasonably fails to address these costs.

b. The asserted bases for the proposed rule lack sufficient support.

The Department's stated basis for its proposed rule is to "facilitate the more accurate and predictable classification of individuals, with a familiar and clear analysis drawn from established case law that is more amenable to the modern economy and fully effective in preventing the misclassification of employees."[86] Specifically, the Department repeatedly emphasizes the need for clarity, citing the 2024 rule's balancing test as "confusing and risky."[87] Instead, if finalized, the rule's divergence from precedent will only *lead to* confusion, rather than create any clarity.

First, as described above, creating greater alignment with precedent is not an accurate description of the basis of this rule, since the proposed test departs from decades of Supreme Court and circuit court precedent. The Department claims that businesses have no guidance or means of predictable application of the 2024 rule's factors, and thus may be pressured to "unnecessarily classify bona fide independent contractors as employees,"[88] when in fact businesses have decades of case law and previous Departmental guidance upon which they can rely for interpretation of the 2024 rule's factors. Additionally, the Department sets forth no evidence that bona fide independent contractors were misclassified as employees under a multifactor economic reality balancing test, either as a specific result of the 2024 test or during the decades in which the Department and courts utilized the multifactor economic reality test. Instead, as described above, the States and Cities' experiences highlight the more likely and substantiated risk of misclassification—which the Department fails to address throughout its proposed rule—is the risk that employers, incentivized by cost savings, will misclassify bona fide employees as independent contractors.

Additionally, the Department fails to describe how its proposal responds to the modern economy. Rather than acknowledge changes in society, technology, and conventional workplace relationships, when describing the need for improved compatibility with the modern economy, the Department again refers to the proposed rule's purported added clarity, which it claims is especially important for "practices which might be novel and innovative."[89] The Department's failure to discuss the gig economy, changes in technology, and their impacts on workplace dynamics, undercuts the Department's assertions that the proposed rule serves the modern economy. Indeed, each of these changes highlights the need for a flexible test, like the one set forth in the 2024 rule, and the Department fails to grapple with the fact that this test has survived decades of technological

[86] 91 Fed. Reg. 9939, 9950, 9951, 9953.

[87] *Id.*

[88] 91 Fed. Reg. 9941.

[89] 91 Fed. Reg. 9942.

changes, and whose rescission cannot be justified by vague references to changes in the workforce now.

Finally, though the Department asserts that one of the purposes of the proposed rule is to more thoroughly prevent "the misclassification of employees," the Department improperly focuses on only one type of misclassification: the labeling of workers who are truly independent contractors as employees. As described in Part I, states and workers are much more likely to experience and suffer because of the opposite: improper classification of workers who are truly employees as independent contractors, unlawfully depriving them of their rights under practically all worker protection statutes. Indeed, the Department does not attempt to quantify or even acknowledge any increase in improper classification of employees as independent contractors that may result because of this rule, even though it narrows the analysis in favor of independent contracting, and unscrupulous or unsophisticated employers may take advantage of the confusion which may arise from this rule to misclassify their workers and incur certain savings. Misclassification of workers creates serious harm to workers and the states and cities in which they reside and the Department's failure to address this concern is arbitrary and capricious.

IV. Conclusion

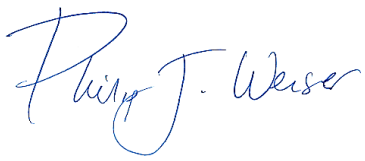
If finalized, the Department's attempt to reintroduce its 2021 test for independent contractor status would contravene the purposes of the FLSA, FMLA, and MSPA, and long-standing judicial precedent interpreting same. The proposed rule is both contrary to law and arbitrary and capricious. The Department fails to justify its change in position from the 2024 rule and consequently fails to grapple with the realities of today's economy and the widespread problem of misclassification. Instead, the Department has once again proposed a test that favors independent contractor status, leaving workers across the country vulnerable to wage and hour violations without recourse. For these reasons, the States and Cities urge the Department to withdraw this proposed rule.

NANCY A. WALKER
Secretary
Pennsylvania Department of Labor & Industry

KEITH ELLISON
Attorney General
State of Minnesota

KRISTIN K. MAYES
Attorney General
State of Arizona

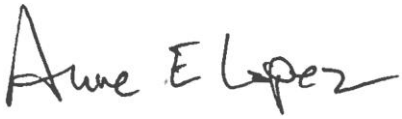
ROB BONTA
Attorney General
State of California



PHILIP J. WEISER
Attorney General
State of Colorado

WILLIAM TONG
Attorney General of Connecticut

BRIAN SCHWALB
Attorney General of the District of Columbia

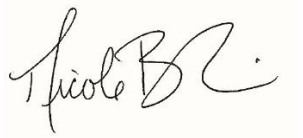


ANNE E. LOPEZ
Hawai'i Attorney General

KWAME RAOUL
Attorney General
State of Illinois

ANDREA JOY CAMPBELL
Massachusetts Attorney General

DANA NESSEL
Michigan Attorney General



NICOLE BLISSENBACH
Commissioner
Minnesota Department of Labor and Industry

JENNIFER DAVENPORT
Attorney General of New Jersey

LETITIA JAMES
New York Attorney General

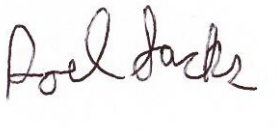
DAN RAYFIELD
Attorney General of Oregon

CHRISTINA E. STEPHENSON
Labor Commissioner
Oregon Bureau of Labor & Industries

PETER F. NERONHA
Attorney General
State of Rhode Island

CHARITY R. CLARK
Attorney General
State of Vermont

NICK BROWN
Washington Attorney General



JOEL SACKS
Director
Washington Department of Labor & Industries

ALISON L. STOHR
Director, Office of Worker Protections
City of Philadelphia - Department of Labor

BRIAN WALSH
Minneapolis Department of Civil Rights
Labor Standards Enforcement