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"Cutting Corners at the WHD: Examining the Costs to Workers, Small Businesses, and the Economy"

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My name is Rachel Greszler. I am a Senior Research Fellow in Economics, Budgets, and Entitlements at The Heritage Foundation. The views I express in this testimony are my own and should not be construed as representing any official position of The Heritage Foundation.

While little significant labor law has been passed over the past three-quarters of a century, workers, entrepreneurs, and employers continue to deal with mounting workplace regulations that make it harder to work and harder to employ people, drive up costs, limit the goods and services available to Americans, and result in fewer jobs in the U.S. The sheer magnitude of regulations is an enormous burden on workers and employers, and the flip-flopping of policies between administrations creates undue costs on companies and makes it difficult for them to plan for the future.

In my testimony today, I would like to discuss four regulations issued by the Department of Labor's (DOL) Wage and Hour Division (WHD) within the past two years, including: the tipped minimum wage; a minimum wage for federal contractors; the Davis–Bacon Act; and the definition of independent contractors. Across all of these regulations, the DOL's WHD proposed or implemented policies that will arguably provide little economic benefit compared to significant economic consequences, including among the workers that the rules purportedly seek to help.

Agencies Rules Should Provide More Benefits Than Costs

In general, regulatory actions should seek net improvement, maximizing benefits and minimizing costs. Thus, long-standing executive practice typically includes a cost-benefit analysis of the proposed regulation, a regulatory flexibility analysis to assess

particular impacts on small businesses, and an evaluation of potential negative consequences for particular sectors or industries.[1] The law also typically requires agencies to seek public input and conduct consultations with affected stakeholders to help inform the agencies' decision-making process and improve their economic impact analysis.

To help determine the impact of agencies' proposed policies issued through regulation, agencies must use reasoned decision-making, demonstrating rational and logical analysis. The following sections will discuss ways in which the DOL failed to live up to the standards of sound regulatory practice and, thus, proposed and implemented rules that will almost certainly impose far more costs than benefits.

A Minimum Wage for Federal Contractors

On November 22, 2021, the Department finalized a rule, "Increasing the Minimum Wage for Federal Contractors." The rule is based on Executive Order 14026, "Increasing the Minimum Wage for Federal Contractors," which was signed by President Biden on April 27, 2021. The Order and, subsequently, the rule raised the minimum wage paid by employers to workers performing work on or in connection with federal contracts to $15 per hour.[2] The $15 minimum wage marked a 33 percent increase from the previously specified minimum of $11.25 per hour and took effect on January 30, 2022. Per the rule's requirement to apply annual inflation increases, the applicable minimum wage for workers engaged in federal contracts is up to $16.20 per hour in 2023.

According to the Department, this rule could impact up to 461,800 firms that contract with the federal government.[3] It will also impact many workers in those contracting firms and will likely impact government spending, employment levels, prices, and consumer spending.

The Department claims significant benefits from the rule but fails to recognize the basic economic effects of minimum wage increases and bases the rule's implementation on deficient economic analysis.

Inadequate Regulator Analysis of Minimum Wage for Federal Contractors (MWFC). The Department estimated that the MWFC rule would impose $1.7 million in direct costs to private employers for regulatory familiarization and implementation in year one, and $1.7 billion in transfer payments for private employers in year one (and an average of $1.8 billion per year over 10 years). These costs are almost certainly understated.

Moreover, the Department failed to include many significant effects of the MWFC rule, even after significant consequences of the rule were pointed out in public comments.

The MWFC Rule Ignores Spillover Effects. The Department acknowledges the existence of spillover effects and unreasonable does not attempt to quantify them.

The final rule states:

> The Department agrees that there will likely be wage increases for some workers earning above $15 per hour or working on noncovered contracts. However, the

[1]The White House, "Executive Order 13563—Improving Regulation and Regulatory Review," January 18, 2011, https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review (accessed July 13, 2023).

[2]U.S. Department of Labor, Wage and Hour Division, "Final Rule: Increasing the Minimum Wage for Federal Contractors," *Federal Register*, Vol. 86, No. 224, November 24, 2021, pp. 67126–67236, https://www.govinfo.gov/content/pkg/FR-2021-11-24/pdf/2021-25317.pdf (accessed July 13, 2023).

[3]Ibid., p. 67196.

> Department has not quantified this change for several reasons. First, there is uncertainty as to how many workers would receive wage increases and by how much. Second, although contractors may voluntarily raise the wages of such workers to avoid wage compression or maintain fairness, doing so is not a requirement of compliance with Executive Order 14026 or the rule. Additionally, inclusion of potential spillover effects is unlikely to drastically change the Department's findings.[4]

The Department's first reasoning is unjustified because economic research directly cited by the Department provides sufficient basis to perform such an estimate. The CBO's 2019 analysis of a $15 minimum wage included an estimate that for every 10 workers directly impacted by the minimum wage increase, another 5.9 would experience indirect wage increases.[5] The Department's estimate that the MWFC will directly affect 327,300 employees could be multiplied by 0.59 to include an additional 192,530 workers within the same companies who will also have their wages increased.

The Department's second assertion that spillover effects should not be included because they are not mandated by the rule is preposterous. The purpose of requiring a regulatory economic analysis is to consider all the implications of the rule—not just the immediate ones. Moreover, doing as the Department suggests could be done—not increasing other workers' wages—could result in employers being subject to pay equity lawsuits.

Finally, the Department's assertion that potential spillover would have little impact on the Department's findings are without basis as the Department claimed two sentences prior that it did not know what the magnitude of the spillover effects would be.

The MWFC Rule Refutes Consequences of Minimum Wages for Workers. Significant economic research demonstrates that while minimum wage increases can benefit some workers through increased wages, those benefits typically come at the expense of other workers.[6] In some cases, even the workers who receive higher wages are left worse off as a result of minimum wage increases.

For example, a recent study, "Evidence of the Unintended Labor Scheduling Implications of the Minimum Wage," found that a $1 increase in the minimum wage reduced workers' hours by about 21 percent per week as employers hired more workers and reduced everyone's hours so that fewer workers were eligible for health insurance and retirement plans.[7] Employers also significantly increased the irregularity of workers' schedules—creating additional variation in their start times and total weekly hours—as it became more costly to have idle workers on the clock. Overall, the study found:

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[4]Ibid., p. 67211.

[5]Congressional Budget Office, "The Effects on Employment and Family Income of Increasing the Federal Minimum Wage," July 2019, https://www.cbo.gov/publication/55410 (accessed July 13, 2023).

[6]For a review of the economic literature, see Rachel Greszler, "Perspectives from Main Street: Raising the Wage," testimony before the Subcommittee on Oversight, Investigations, and Regulations, Committee on Small Business, U.S. House of Representatives, February 24, 2021, https://smallbusiness.house.gov/uploadedfiles/02-24-21_ms._greszler_testimony.pdf (accessed July 13, 2023).

[7]Quiping Yu, "Evidence of the Unintended Labor Scheduling Implications of the Minimum Wage," McDonough School of Business, Georgetown University, June 16, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3863757 (accessed July 28, 2021).

> For an average worker in a California store in our data, we estimate the net loss of welfare due to their reduction of hours, lower eligibility for benefits, and less consistent schedules (that resulted from a $1 increase in the minimum wage) to be at least $1,590 annually or 11.6% of the worker's total wage compensation.[8]

The Department fails to consider the potential loss of hours, benefits, and the burden of irregular scheduling that could result from the MWFC rule.

The MWFC Unreasonably Assumes Businesses' Concerns Are Mistaken. In response to real concerns expressed by businesses—including many operating on military installations under concessions contracts and/or leases—the Department notes that the comments do not appear to account for the potential increased minimum wages to "reduce absenteeism and turnover in the workplace, improve employee morale and productivity, reduce supervisory costs, and increase the quality of services provided to the Federal Government and the general public." As discussed in the Tipped Minimum Wage rule, higher wages can have positive benefits, but such benefits primarily stem from pay increases that are tied to productivity—not government-mandated pay increases regardless of productivity.

Moreover, the Department fails to provide any estimates of economy and efficiency enhancements that may come from a 33 percent increase in some workers' wages, but such estimates are not difficult to calculate. For example, grocery stores typically operate with a roughly 2 percent profit margin. Raising a single commissary worker's wages from $12.15 per hour to $16.20 per hour as mandated by the rule would require that individual to sell an additional $8,100 worth of groceries in a typical work week. Raising wages for 10 workers would necessitate $81,000 more in sales per week. Since it will be impossible for some businesses to generate enough additional revenues to cover their higher costs, many will likely raise prices.

In a recent analysis, I estimated that increasing the minimum wage to $15 per hour would increase the cost of childcare by 21 percent, on average. Since childcare centers and preschools operate on military bases, military families could be subject to such childcare cost increases. The Department's inferred presumption that those cost increases could be overcome by childcare providers becoming more productive is impractical because childcare is highly regulated and factors like child-to-teacher ratios prevent teachers from becoming more productive (i.e., watching more children).

The MWFC Rule Does Not Consider Disparate Impacts on Contractors in Lower-Cost Areas. By imposing a one-size-fits-all minimum wage across all workers engaged in federal contracts, the economic consequences of the rule will disproportionately harm employers in lower cost areas. For example, a $16.20 minimum wage in Mississippi is equivalent to a $37.21 minimum wage in the District of Columbia.[9] The Department does not consider any difference in impacts across the U.S.

The MWFC Rule Does Not Consider Consequences for Federal Government of Fewer Contractor Options. The MWFC rule could reduce the number of companies that

[8] Ibid.

[9] Author's calculations using data from: Bureau of Labor Statistics, "Occupational Employment and Wage Statistics," May 2022, https://www.bls.gov/oes/current/oessrcst.htm (accessed May 23, 2023). The median hourly wage in DC was $39.87 while the median hourly wage in Mississippi was $17.36. Thus, a $16.20 minimum wage in Mississippi would be equivalent to a $37.21 minimum wage in DC.

seek and choose to do business with the federal government. For companies not already engaged in federal contracts, the MWFC is a barrier to entry because any company that employs workers at wages below $16.20 per hour would face increased costs. For businesses that already engage in federal contracts, the MWFC rule puts them at a disadvantage to other similar companies that are not engaged in federal contracts because they have to pay workers more to perform the same function. That generally means that employers subject to the MWFC rule will have to charge higher prices or provide limited services, both of which will make them less competitive and therefore less willing to engage in federal contracts.

Likely Economic Consequences of Increasing the Minimum Wage for Federal Contractors. The MWFC rule has similar economic effects as minimum wage laws that impose above market wage requirements, except that instead of impacting businesses within a given state or locality, they will impact entities that do business with the federal government and will impose more disparate impacts because the minimum wage increases will be spread among select businesses that span the entire U.S., including low- and high-cost areas. The rule's general economic impacts that the Department failed to adequately consider include:

- Reduced employment in companies engaged in federal contracts;
- Reduced hours, reduced benefits, and increased scheduling irregularity for workers engaged in federal contracts;
- Higher prices for goods and services produced under federal contracts;
- Increased taxpayer costs;
- Reduced federal services; and
- Reduced competition and potentially lower-quality work for federal contracts.

The Department dismissed these potential costs and impacts without an attempt at quantification, despite numerous commenters pointing out the direct impact the rule would have on their businesses or agencies.

The Tipped Minimum Wage

On October 29, 2021, the DOL's WHD published a final rule entitled "Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal." [10] The rule became effective on December 28, 2021.

Federal law, under the FLSA, establishes a minimum wage of $7.25 per hour, including a tipped minimum wage of $2.13 per hour for employees who are also earning tips. For employees receiving the tipped minimum wage, the law requires that their tips plus wages must equal at least $7.25 per hour, meaning an employer must make up the difference between the $2.13 tipped minimum wage and the $7.25 minimum wage if the employee's tips plus $2.13 wage do not exceed $7.25 per hour. States can, and many do, have tipped and minimum wage rates that exceed the federal rates.

The 2021 tip regulations expanded the DOL's authority to assess penalties on employers who violate the FLSA's tip provisions, declared three classifications of work tasks as related to tipped work, and implemented percentage-based and minute-based restrictions on tip-supporting work.

The policies implemented in the tipped minimum wage rule are based on an unreasonable assumption that (1) employers,

[10] *Federal Register*, Vol. 86, No. 207, October 29, 2021, pp. 60114–60158, https://www.govinfo.gov/content/pkg/FR-2021-10-29/pdf/2021-23446.pdf (accessed July 13, 2023).

particularly small businesses, can meaningfully keep track of their tipped employees time down to the minute and second and (2) on an inadequate economic analysis that lacks any meaningful transfer impact, fails to acknowledge potential consequences for workers, and ignores impact of penalties on employers.

Tipped Minimum Wage Rule Imposes Unreasonable—If Not Impossible—Timekeeping Requirements. The tipped minimum wage rule (TMWR) breaks down workers' time into three types of activities: tip-producing, direct tip-supporting, and not part of the tipped occupation. Workers are to receive the tipped minimum wage for tip-producing activities and can receive the tipped minimum wage for tip-supporting activities limited to the lesser of: 20 percent of their total weekly hours or 30-minute increments, and all time spent on activities that are not part of the tipped occupation must be paid at the regular minimum wage.

To understand how this rule would apply, consider the common tipped occupation of restaurant servers. Servers' main job is to take orders and deliver food, but they also perform many other jobs that are necessary to support their tip-generating work both in advance of and following serving customers.

As a server myself for many years in high school and college, I can attest that serving includes many activities outside of directly serving customers, the tasks performed across shifts vary significantly from day to day, and there is a lot of interconnected work that cannot be easily allocated into one of the rule's three buckets.

For example, I typically arrived at work at least an hour before the restaurant opened and stayed an hour after service ended. I performed tasks such as vacuuming the dining room, sweeping the walkway, cleaning the bathroom, rolling silverware, setting tables, filling salt and pepper shakers, making salads, packaging dressings to serve alongside salads, making iced tea and coffee, and cleaning up after service ended. During serving hours, I took orders, delivered drinks and food, cleaned up and reset tables, and various activities often in support of my tipped and non-tipped co-workers, such as helping with the computer and credit card systems, getting items from the walk-in refrigerators and freezers for the cooks, making salads, and delivering orders to fellow servers' tables. I cannot imagine how I could have possibly classified, or how my employer could have tracked down to the minutes and seconds, all of my time into the new rule's three classifications of tip-related work.

In many instances, the same task could fall into two or three of the rule's specified classifications of tip-producing, direct tip-supporting, or not part of the tipped occupation. For example, setting a table during serving time is considered tip-producing, setting a table before service starts is direct tip-supporting, and setting a table at the bar where the server does not serve is not part of the tipped occupation. Moreover, tasks like making salads are deemed not part of the tipped occupation for a server, but applying dressing to the salad is considered tip-producing. Wiping up a spill in the bathroom is not part of the tipped occupation, wiping up a spill in the dining room is direct tip-supporting, and wiping up a spill at or adjacent to the server's customer table is tip-producing. And what about a server who simultaneously delivers meals to her own customers while also dropping off a meal, carried on the same serving tray, to a co-worker's customers—does that count as both tip-producing and not part of the tipped occupation?

Neither workers nor employers want to keep track of the minutia of their work down to 30-second increments and most businesses—especially smaller businesses that make up the

overwhelming majority of those that employ tipped workers—do not have the capacity to implement systems that could track workers' time across hundreds of possible tasks. Other than a sophisticated tracking device containing artificial intelligence, I cannot think of an accurate way employees or employers could track time as required under the proposed rule.

Yet, the final rule brushes aside the many serious concerns expressed by stakeholders' comments, including the impracticality of implementing the rule, and stakeholders' suggestions for more reasonable and feasible alternatives. The Department's stated belief that employers can either assign work so that employees do not exceed the 20 percent or 30-minute limits and their wholly unjustified assertion that "employers can monitor (or even track, if the employer so chooses) such tasks with relative ease, and without needing to account for employees' duties minute-by-minute" implies that they have ignored stakeholders clear examples of why they cannot monitor or track employees activities and why they cannot pre-emptively schedule employees to be on-call to perform non-tipped activities that may or may not arise in the course of operations.

Further, the Department admits that it has no idea how much direct tip-supporting and non-tip producing labor is currently being done by tipped employees, and therefore has no meaningful backing to its chosen percentage and minute caps. It instead selects these values on a whim and without any idea how they will affect employer decision-making.[11]

Inadequate Tipped Minimum Wage Regulatory Analysis. The TMWR implements a policy without adequately considering the potential costs of that policy.

Tipped Minimum Wage Rule Does Not Provide Meaningful Transfer Cost Estimates. In response to criticism that the Department brushed aside consideration of the economic impact of employers transferring more in wages to workers, the final rule essentially replied that it still has no idea what the actual transfers will be because data (like the exact breakdown of workers' tasks and information on how employers will respond) does not exist. Nevertheless, the Department attempted to analyze the impact of the opposite action of one component of the rule, and even then, there are so many uncertainties to render the analysis useless.

As noted in the final rule regarding analysis of something that the rule did not actually impose:

> The Department was unable to determine what proportion of the total tips estimated to have been potentially transferred from these workers were realistically transferred following the replacement of its prior 80/20 guidance with the 2018–2019 guidance. The Department assumes that the likely potential transfers were somewhere between a lower bound of zero and an upper bound of $733 million.[12]

Tipped Minimum Wage Rule Vastly Understates Familiarization and Compliance Costs. The Department estimates that familiarization and regulatory compliance costs will equal $2.4 million. For the reasons discussed in the section on the rule's unreasonable, if not impossible tracking requirements, its familiarization and compliance costs will likely be magnitudes higher.

Tipped Minimum Wage Rule Does Not Consider Potential Consequences for Workers. The economic literature shows that minimum

[11] *Federal Register*, Vol. 86, No. 207, October 29, 2021, p. 60144-45.

[12] Ibid, p. 60148.

wage laws can result in lost jobs[13] and cause workers to have their hours reduced, lose their benefits, and be subject to more irregular and on-demand staffing requirements.[14] The rule neglects these considerations.

Flawed Assumption That Higher Productivity Will Offset Higher Pay. Similar to the MWFC rule, the Department assumes that higher wages will result in increased productivity and efficiencies that will offset increased costs. The Department fails to provide any estimates or examples of how such cost increases could be offset, and it is unreasonable to think that a worker would become three times more productive while doing something like making a salad if they were paid $7.25 per hour instead of $2.13 per hour not accounting for tips.

The Department's example of a bar[15] proves that the productivity point is ridiculous. In the example, a bar that in 2018 added an additional bartender in order to allow each bartender to perform dishwashing duties for more than 20 percent of their work hours will now either pay them $7.25/hour each for that amount of time (which is unlikely to result in tripled efficiency), or else hire a full-time dishwasher and have each bartender perform exclusively bartending duties (or at least lower their other duties according to the rule).

But the Department leaves out the fact that bars are not places of infinite demand: that is, the Department assumes, contrary to basic economics and common sense, that bartenders with an extra 20 percent of work hours freed up will immediately find customers wishing to order drinks. In reality, there are only so many customers in a bar, and the bar in question would likely have to fire the bartender hired in 2018 to pay for a full-time dishwasher. The Department's analysis of the rule is fanciful at best, even according to their own examples.

Moreover, there is not a single mention of the potential penalties assessed on employers and the cost of enforcement actions that could impact workers' compensation and jobs or put companies out of business altogether.

Likely Economic Impact of Tipped Minimum Wage. The primary impact of the TMWR will be to cause confusion, increase costs, and impose timekeeping nightmares on tipped workers and their employers. It will also almost certainly result in significant legal costs and fines and penalties for employers.

While the proposal will likely increase some workers' wages, those wage increases are likely to be relatively small in comparison to workers' tips, and they could be offset by changes in workers' compensation and schedules.

The rule could also result in less cohesive workplaces as employers are likely to prohibit employees from engaging in non-tip-related tasks that they are otherwise willing to perform to help their coworkers and to help the business run smoothly.

Davis–Bacon Act Updates

On March 18, 2022, the DOL's WHD issued a notice of proposed rulemaking, "Updating the Davis-Bacon and Related Acts Regulation."[16] The comment period for this proposal ended on

[13]Congressional Budget Office, "The Budgetary Effects of the Raise the Wage Act of 2021," February 2021, https://www.cbo.gov/system/files/2021-02/56975-Minimum-Wage.pdf (accessed July 13, 2023).
[14]Yu, "Evidence of the Unintended Labor Scheduling Implications of the Minimum Wage."
[15]*Federal Register*, Vol. 86, No. 207, October 29, 2021, p. 60145.

[16]Department of Labor, Wage and Hour Division, "Updating the Davis-Bacon and Related Acts Regulations," Proposed Rule, *Federal Register*, Vol. 87, No. 53, pp. 15698–15805, https://www.govinfo.gov/content/pkg/FR-2022-03-18/pdf/2022-05346.pdf (accessed July 13, 2023).

May 17, 2022, and the rule has not yet been finalized.

The 108-page proposed rule contains more than 50 significant changes to the Davis–Bacon Act (DBA) prevailing wage and benefit regulations, including, but not limited to: changing the process for determining DBA wages; expanding the scope of the DBA to new types of construction and new classifications of workers; increasing the frequency of DBA wage-level adjustments; expanding enforcement activity; and shifting towards a presumption that the DBA applies even where it is not specified beforehand.

Rule Fails to Fix Major Defects in Davis–Bacon Act Practices. The DBA is a federal law that requires that contractors on federally funded construction projects must pay at least the local "prevailing wage" and provide at least the local "prevailing benefits," so as to not drag down local wages as a result of federal construction projects.

Congress passed the DBA in 1931 to preclude non-unionized black and immigrant workers—many of whom migrated to the North to look for work during the Great Depression—from receiving jobs on federal construction projects.[17]

While the DBA no longer aims to discriminate against black workers, it fails to achieve its goal of providing market-based compensation because the Department of Labor substitutes its own contrived, non-scientific definition of "prevailing wages" for the actual market wages. Consequently, a Heritage Foundation analysis found that the DBA drives up the costs of federal construction projects by 10 percent.[18]

The Government Accountability Office[19] and the Office of Inspector General [20] have repeatedly criticized the Department of Labor's Wage and Hourly Division for their survey methodology, including using non-scientific, self-selected, and small samples to estimate wages and allowing 100 percent error rates in surveys.[21]

A sample of the effects of COVID-19 on 100 young and healthy individuals would tell little about the virus's total risks. Similarly, non-scientific samples of construction wages tell little about overall wages.

In direct contrast to scientific statistical analysis, the Wage and Hour Division also

[17]During the 1931 legislative debate over the Davis–Bacon Act, Representative Miles Allgood (D–AL) said, "That contractor has cheap labor colored labor…and it is labor of that sorts [sic] that is in competition with white labor throughout the country." And American Federation of Labor President William Green lobbied for the bill, complaining, "Colored labor is being sought to demoralize wage rates." See Harry Alford and F. Vincent Vernuccio, "U.S. Unions: Uncivil on Civil Rights," Forbes, June 17, 2012, https://www.forbes.com/sites/realspin/2012/06/17/u-s-unions-uncivil-on-civil-rights/?sh=3db71b9b4cde (accessed July 13, 2023), and Walter E. Williams, "How Elite Liberals Have Sold Out the Black Community," Daily Signal, November 15, 2017, https://www.dailysignal.com/2017/11/15/elite-liberals-sold-black-community/.

[18]James Sherk, "Labor Department Can Create Jobs by Calculating Davis–Bacon Rates More Accurately," Heritage Foundation *Backgrounder* No. 3185, January 21, 2017, https://www.heritage.org/sites/default/files/2017-01/BG3185_0.pdf.

[19]Government Accountability Office, "Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey," March 2011, https://www.gao.gov/assets/gao-11-152.pdf (accessed July 13, 2023).

[20]Elliot P. Lewis, Assistant Inspector General for Audit, "Memorandum for Victoria Lipnic, Assistant Secretary for Employment Standards," March 30, 2004, https://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420.pdf (accessed July 13, 2023).

[21]U.S. Department of Labor, Office of the Inspector General, "Inaccurate Data Were Frequently Used in Wage Determinations Made Under the Davis-Bacon Act," Audit Report, March 10, 1997, https://www.oig.dol.gov/public/reports/oa/pre_1998/04-97-013-04-420s.htm (accessed July 13, 2013).

completely ignores non-returned surveys, instead of weighting other responses to create a representative sample. This would be like polling 100 Democrats and 100 Republicans about who they plan to vote for in an upcoming election and—based only on the returned responses of 50 Democrats and 75 Republicans—concluding that the Republican candidate would win.

The result of these non-scientific methods is Davis–Bacon wage rates that do not match reality. In most instances, DBA wages are highly inflated. A 2011 congressional testimony by James Sherk provided examples of market-based and DBA wages, demonstrating, for example, that in Nassau-Suffolk, New York, common DBA wages are 30 percent to 60 percent above market.[22] But in some areas, like Spartanburg County, South Carolina, common DBA wages are about 50 percent to 65 percent below market.[23]

The DOL WHD's generational update to the DBA should have been used to improve upon its calculation of "prevailing wages" and "prevailing benefits." For example, a Heritage Foundation report by James Sherk spells out how the WHD could and should use the Bureau of Labor Statistics' surveys and methodologies that combines local pay data and national occupational "level of work" data to calculate federal employee pay across the U.S.[24]

Instead of adopting better data and wage calculation methods, the proposed DBA rule exacerbates existing flaws. As just one example, the rule proposes to reduce the minimum data standards required to set wages from at least six workers across at least three companies (already a non-credible sample size) to as few as three workers across two companies.

Proposed DBA Disproportionately Harms Small Businesses. The DBA is designed to capture union wages and union benefits, even though only 17.4 percent of construction workers are unionized.[25] Complying with these prevailing wage rates is particularly burdensome for small, non-unionized businesses that do not have the resources to understand and comply with the regulations. In addition to steep legal costs to understand the rules and potential legal fees as well as fines for even inadvertent violations, the wage and benefit rates themselves are often extremely high. For example, prevailing benefit calculations can include fringe benefits (such as health care and pensions) that total more than some construction workers' hourly wages. For example, the DBA requires that sheet metal workers in my home county of Montgomery, Maryland, be compensated with $20.43 per hour worth of fringe benefits (equal to $40,860 per year for 2,000 hours of work).[26]

And it is not just the immediate cost of additional benefits. In some instances, if a construction company and its workers fall under a union contract for the duration of a federally funded construction project, they

[22]James Sherk, "Examining the Department of Labor's Implementation of the Davis–Bacon Act," testimony before the Committee on Education and the Workforce, U.S. House of Representatives, April 14, 2011, https://www.heritage.org/article/testimony-examining-the-department-labors-implementation-the-davis-bacon-act (accessed July 13, 2023).

[23]Ibid. While the *market wages* for carpenters, electricians, and plumbers/pipefitters are 70 percent higher in Nassau-Suffolk, New York, than in Spartanburg County, South Carolina, the Davis–Bacon wages are 487 percent higher for Nassau-Suffolk workers ($43.98/hour) compared to Spartanburg workers ($7.49/hour).

[24]James Sherk, "Labor Department Can Create Jobs by Calculating Davis–Bacon Rates More Accurately."

[25]Bureau of Labor Statistics, "Union Members: 2022," News Release, January 19, 2023, http://www.bls gov/news.release/pdf/union2.pdf (accessed July 14, 2023).

[26]Sam.gov, Wage Determinations: Davis-Bacon Act WD# MD20230085, published January 6, 2023, https://sam.gov/wage-determination/MD20230085/0 (accessed July 10, 2023).

could have millions of dollars in unfunded pension liabilities that unions and employers incurred decades earlier forced onto them. Such liabilities could even bankrupt some small businesses.

Inadequate DBA Regulatory Analysis. As stated by the Department in the proposed DBA update, the rule will have significant economic impact, particularly on construction-sector wages and on federal construction costs:

> The Davis-Bacon Act and now 71 active Related Acts collectively apply to an estimated $217 billion in Federal and federally assisted construction spending per year and provide minimum wage rates for an estimated 1.2 million U.S. construction workers. The Department expects these numbers to continue to grow as Federal and State governments seek to address the significant infrastructure needs of the country, including, in particular, the energy and transportation infrastructure necessary to mitigate climate change. [27]

The proposed DBA update is both deficient in and supposes unreasonable estimates of direct payroll costs, and, among other factors, it largely ignores or wrongly brushes aside significant potential impacts on small businesses, inflation, and taxpayer costs.

Deficient and Unreasonable Payroll Cost Estimates. The proposed rule acknowledges that it would increase some wage and fringe benefit rates and that such rates would raise employer costs, but then states, "Due to data limitations and uncertainty, the Department did not quantify payroll costs (i.e., transfers)."[28]

Nevertheless, the Department provides a retrospective example of what just two of more than a dozen components affecting the wage rate—reimplementation of a 30 percent prevailing wage rate that was overturned 40 years prior [29] and updates to Davis–Bacon rates—would have had on wage and fringe benefit rates.

That analysis finds that the 30-percent rule would have increased affected wages by 4 cents per hour on average and increased affected benefits by $1.42 per hour on average.[30]

The Department's analysis for DBA updates found that hourly wage and benefit rates would have increased by $3.65 per hour.[31]

The analysis stops there—with mere hourly compensation increases lacking the number of affected workers, firms, and any macroeconomic impact. The Department states that its estimates (for the 30 percent rule), "cannot be extrapolated to definitively quantify the overall impact of the 30-percent rule."

Definitively quantifying economic impacts is perpetually impossible because economic impact analyses are, by nature, estimates. Thus, the Department's excuse is unjustified and unreasonable; the proposal should have provided an overall transfer estimate of total transfer costs.

For example, the extra $1.46 per hour increase from the 30-percent rule amounts to an extra $2,920 per year, per worker and the $3.65 per

[27]*Federal Register*, Vol. 87, No. 53, March 18, 2022, p. 15699.

[28]*Federal Register*, Vol. 87, No. 53, March 18, 2022, p. 15780.

[29]Reversing the overturned 30 percent standard *contravenes* the statutory text based on the ordinary definition of the word prevailing. Moreover, there is nothing within the DBA's statutory language that requires the DOL determine a lower threshold for "prevailing," so as to increase the reach of the DBA statute.

[30]*Federal Register*, Vol. 87, No. 53, March 18, 2022, p. 15773

[31]Ibid., p. 15776.

hour increase from the updates amounts to an additional $7,300 per year, per worker. Those figures could have been applied to an estimated number of impacted workers. Doing so would have provided dollar amounts that would have transferred into increased costs for taxpayers and businesses.

This is a shocking amount of cost ignored. For example, if the proposed rule affected even just 10 percent of the 1.2 million construction workers the Department acknowledges have wages set under DBA regulations, the impact of the rule would be $876 million per year.[32]

The Department refutes basic economics by implying that any potential cost increases will not be meaningful because they will be borne by the government, as though the government does not have to extract money from taxpayers or issue new debt in taxpayers' names in order to pay higher costs.

Unjustified and One-Sided Productivity Claims. After effectively waving away the impacts of cost increases—saying DBA rates will both increase and decrease and that the government will bear any net cost increase—the proposed rule then applies an unjustified and one-sided analysis.

The proposed DBA update states, "These higher wages could lead to benefits such as improved government services, increased productivity, and reduced turnover, which are all discussed here qualitatively."[33]

That discussion is one-sided. For starters, the analysis claims positive impacts from higher DBA rates, ignoring the negative impacts from *lower* DBA rates that the proposal acknowledged will also occur.

Moreover, when examining the economic literature, the proposal references conflicting studies and claims the benefits of studies that make its case while ignoring the consequences of a study that contradicts its case.

The Department dismisses a study that found workers in prevailing wage states to be *less* productive than those in non-prevailing wage states:

> "Based on this simple comparison, workers are more productive without prevailing wage laws. However, this is a somewhat basic comparison in that it does not control for other differences between states that may influence productivity (for example, the amount of capital used or other State regulations)."[34]

Then, the proposal claims that a study that was similarly basic and lacking in important controls, but which came to the opposite conclusion that higher wages made workers more productive, was nevertheless likely relevant:

> While this increased worker productivity could be due in part to other factors such as greater worker experience or more investment in capital equipment in higher wage states, the higher wages likely contribute.[35]

Selective application of economic studies to the proposals' analysis is not sound reasoning.

Moreover, while higher wages can result in higher productivity, the primary basis for that increased productivity is performance-based pay systems that directly reward higher output. Guaranteeing workers higher pay regardless of their performance does not have the same positive impact and could actually reduce

[32] 0.10 * 1,200,000 * $7,300 = $876,000,000.
[33] Ibid.
[34] Ibid., p. 15777.
[35] Ibid.

productivity if coupled with the type of unyielding job security that labor unions often provide.

And as the Department's own disclosure notes, the studies it bases its analysis are often not applicable to the specific wage rules in question nor to government mandates (versus voluntary employer decisions):

> The literature cited in this section sometimes does not directly consider changes in the DBRA prevailing wages. Additionally, much of the literature is based on voluntary changes made by firms"[36]

Proposal Rejects Inflation Impact. As noted by the Department, the proposed rule assumes no impact on inflation:

> The Department thus does not believe that any limited net wage increase for the approximately 1.2 million covered workers (less than 1 percent of the total national workforce) will significantly increase prices or have any appreciable effect on the macro economy.[37]

1.2 million workers is not a small number and the Department acknowledges that wages could increase by as much as $7.80 per hour or $15,210 per year and benefits could increase by as much as $11.16 per hour or $21,762 per year.

Moreover, the Department's assumption of little inflationary impact contradicts the fact that inflation played a factor in the Department's 1982 justification for eliminating the flawed 30-percent rule that the Department now seeks to reinstate at a time when inflation is a primary concern for the U.S. economy. Inflationary concerns of the proposed DBA updates are exacerbated by the infusion of federal infrastructure spending through the Infrastructure Investment and Jobs Act, as well as ongoing labor shortages.[38]

Likely Economic Impacts from DBA Updates. The proposed DBA updates—which do not reflect market wage rates—are likely to have significant economic impacts that the Department fails to acknowledge including:

- Drive up federal construction costs (potentially 10 percent or more);
- Increase pressure on non-federal construction costs;
- Exacerbate labor shortages in construction;
- Disadvantage small construction businesses and non-union construction workers;
- Increase inflationary pressure; and
- Impose enormous costs on businesses through compliance and potential legal fees and Department fines and penalties.

Employee or Independent Contractor Classification

On October 13, 2022, the DOL's WHD issued a proposed rule, "Employee or Independent Contractor Classification Under the Fair Labor Standards Act."[39] The comment period for the

[36]Ibid., p. 15776.
[37]Ibid., p. 15705.
[38]Rachel Greszler, "What Is Happening in This Unprecedented U.S. Labor Market? April 2023 Update," Heritage Foundation *Backgrounder* No. 3764, April 27, 2023, https://www.heritage.org/jobs-and-labor/report/what-happening-unprecedented-us-labor-market-april-2023-update.

[39]U.S. Department of Labor, Wage and Hour Division, "Notice of Proposed Rulemaking; Request for Comments," *Federal Register*, Vol. 87, No. 197, October 13, 2022, pp. 62218–62275, https://www.govinfo.gov/content/pkg/FR-2022-10-13/pdf/2022-21454.pdf (accessed July 23, 2023) (hereinafter "proposing release"). See also U.S. Department of Labor Wage and Hour Division, "Notice of Proposed Rulemaking; Extension of Comment

proposed rule ended on December 13, 2022, and the Department has not yet finalized the rule.

The proposed 2022 Independent Contractor (IC) rule: (1) rescinds a 2021 Independent Contractor (IC) rule[40] that provided improved clarity to the definition of an employee under the Fair Labor Standards Act (FLSA); (2) adds investment as a standalone factor to consider in determining worker status; (3) adds additional detail under the factors of scheduling, supervision, price-setting, and the ability to work for others; and (4) alters the definition of whether work is integral to the employer's business.

Multiple definitions of an employee versus an independent contractor exist across federal law. This particular regulation addresses the definition under the Fair Labor Standards Act (FLSA), which governs labor laws such as minimum wages and overtime.[41] Prior to a 2021 IC rule, courts traditionally applied an "economic reality" test, based on a "totality of the circumstances" to determine if an individual is an employee or independent contractor, and courts differed in the number of factors considered and the weight of those factors when determining workers' status. Amid the changing nature of work in America, this led to significant uncertainty and confusion among employers and workers.[42]

A 2021 IC rule provided significant clarity to the definition by specifying five economic reality factors and elevating two factors—the nature and degree of control over the work and the worker's opportunity for profit or loss—as "core" factors that carry greater weight in the analysis.[43]

The 2022 proposed IC rule reverses the clarity provided by the 2021 IC rule and replaces it with an expansive, confusing, and indecipherable definition of an employee that will lead to confusion and contradiction in the courts; make it harder for both employers and workers to understand their work relationships; take away work opportunities and income from workers who desire the flexibility and autonomy of independent work; significantly disadvantage small businesses that use contractors to compete with larger companies;

Periods," *Federal Register*, Vol. 87, No. 206, October 26, 2022, p. 6479, https://www.govinfo.gov/content/pkg/FR-2022-10-26/pdf/2022-23314.pdf (accessed July 23, 2023).

[40] U.S. Department of Labor, Wage and Hour Division, "Independent Contractor Status," Final Rule, *Federal Register*, Vol. 86, No. 4, January 7, 2021, pp. 1168–1248, https://www.govinfo.gov/content/pkg/FR-2021-01-07/pdf/FR-2021-01-07.pdf (accessed July 13, 2023) (hereinafter "the 2021 IC Rule").

[41] In relevant part, 29 USC 203 reads:

> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.
> (e) (1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.
> …(g) "Employ" includes to suffer or permit to work.

The omitted language provides a number of exceptions primarily relating to government.

[42] And, of course, the FLSA definitions of employer and employee are only one among many. Different definitions apply for purposes of the Internal Revenue Code, the National Labor Relations Act, the Civil Rights Act, and so forth. Congress needs to harmonize these various definitions. Still different definitions apply for purposes of various state statutes.

[43] Instead of attempting to classify workers based on five or six different factors with unknown weights applied to each factor, the 2021 IC rule allowed employers and workers to focus on two core factors and specified that if those two core factors point to the same status determination, that status is almost certainly the correct status. Only when those core factors led to opposite status determinations or were inapplicable would workers and employers need to examine the remaining three factors. Moreover, the 2021 IC rule provided illustrative examples of how the analysis would apply across different circumstances.

and limit the availability and increase the price of crucial goods and services across the economy.

Moreover, the rule provides a preposterously low estimate of the cost of regulatory compliance and completely fails to provide an analysis of the economic impact of the proposed rule on small businesses. Consequently, the rule will almost certainly impose far greater costs than benefits for workers and the economy.

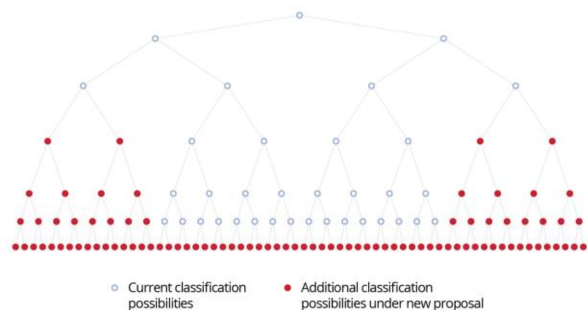
Proposed IC Rule Is Confusing and Imposes Indecipherable IC Definition. Ironically, the proposed rule claims confusion as a basis for implementing an exponentially more confusing definition of an employer. That supposed confusion is, at best, theoretical, and the Department's reasoning is illogical.

The Department specifies that its rationale for rescinding the 2021 IC rule is that the "narrowing of certain economic realities factors [sic]" [44] introduced "confusion and uncertainty"[45] and created "risks to workers."[46]

It also supposes theoretical confusion among the courts,[47] but fails to point to any actual court, employer, or employee that has been confused, including failing to cite increased enforcement actions alleging improper worker classification that would have ensued if greater confusion existed. Moreover, the 2021 IC rule justified its elevation of the two core factors in case law, noting that the application of the 2021 IC rule would have resulted in the same determination in every single appellate decision since 1975.[48]

The Department's claims that both the rescission of the 2021 IC rule and the addition of the new part 795 are clearer and "will provide more consistent guidance to employers" along with "useful guidance to workers" are illogical. Analysis that I provided in a public comment for the 2022 IC rule demonstrated that the 2021 IC rule cut the number of possible combinations of factors leading to a determination in half, from 32 to 18 (demonstrated by the white dots in Fig. 1), with most decided within only two combinations of factors.

Fig. 1: Proposed rule on employer or independent contractor classification under the Fair Labor Standards Act exponentially expands realm of possible worker classifications



In contrast, the 2022 IC rule expands the possible combinations of factors to a minimum of 64 (demonstrated by the red dots in Fig. 1). The consideration of the 2022 IC rule's addition of factors within factors expands possible combinations to 256. The proposed rule's prohibition against any one factor being dispositive results in 15.6 *billion* possible combinations of weights that employers or courts could apply within the proposed rule.

Expanding the rules factors and leaving decisions on which factors should carry the most weight up to employers and courts will almost certainly lead to differing decisions—between employers and courts, and also from one court to another—that harm workers and employers alike.

Proposed IC Rule Will Harm Workers, Businesses, and Consumers. Workers,

[44] *Federal Register*, Vol. 87, No. 197, October 13, 2022, p. 62229.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] *Federal Register*, Vol. 86, No. 4, January 7, 2021, p. 1196–1197.

businesses, and consumers increasingly benefit from independent contractor work, and the modern economy is increasingly reliant on it. Limiting independent work—as this rule would unequivocally accomplish—would hurt (1) workers, (2) businesses, and (3) consumers. As discussed in the section on the rule's deficient economic impact analysis, the Department fails to acknowledge, sufficiently consider, or appropriately estimate these impacts.

IC Rule Hurts Workers. Independent contracting—which includes labels such as contracting, freelancing, gig-work, and self-employment—has become an increasingly popular form of primary work and a new opportunity to earn additional or "on the side" income. Last year, 59 million Americans, spanning all ages and income levels, participated in independent or freelance work.[49] Many independent contractors choose their work for the independence and flexibility it provides, including 32 million workers who say they choose independent contracting because they are unable to work for a traditional employer due to their health or caregiving responsibilities.[50] Independent contractors report greater work–life balance, less stress, better health, and the same or higher incomes.[51]

The proposal claims that occupations with the highest rates of misclassification were disproportionately held by women and/or workers of color, and that the proposed rule change could alleviate inequality among these groups.[52] But the Department cited a 2017 study—four years before the 2021 IC rule went into effect—and provided no evidence of disproportionate misclassification of any group of workers since the 2021 IC rule was enacted.

By making it more difficult to do business with independent contractors—including uncertainty, confusion, and increased legal liabilities and litigation risk—the proposed rule would deprive many workers of their current incomes and limit or eliminate other work opportunities. These losses in income and work opportunities that the proposed rule fails to consider would almost certainly exceed any potential value of FLSA minimum wage and overtime protections directly resulting from the rule.

IC Rule Hurts Businesses, Especially Small Businesses. Independent contractors are utilized by businesses of all sizes to benefit from specialized skills that contractors provide to expand, to meet unexpected demand, and to respond to changing circumstances. A 2021 survey by Gusto (a provider of payroll and HR services used by more than 200,000 small- and medium-sized businesses) found that 62 percent of businesses said that their company's success was dependent on independent contractors or that it would be much harder to have a profitable business without independent contractors, and 90 percent of businesses said they plan to maintain or increase their use of contractors in the future.[53] Businesses' primary

[49] Adam Ozimek, "Freelance Forward Economists Report," commissioned by Upwork, 2021, https://www.upwork.com/research/freelance-forward-2021#:~:text=Upwork%E2%80%99s%202021%20Freelance%20Forward%20survey%20confirms%20the%20finding.,the%20eight%20years%20that%20we%20have%20been%20surveying.?msclkid=af38e75aa94311eca0aa2072597d624b (accessed July 13, 2023).
[50] Ibid.
[51] FreshBooks, "Women in the Independent Workforce—2nd Annual Report, 2019," https://www.freshbooks.com/press/data-research/women-in-the-workforce-2019 (accessed July 13, 2023).
[52] *Federal Register*, Vol. 87, No. 197, October 13, 2022, p. 62230.
[53] Liz Wilke, "Contractor Hiring Surges During the Pandemic. What Does It Mean for the Business Workforce?," Gusto, December 15, 2021, https://gusto.com/company-news/contractor-hiring-surges-during-the-pandemic-what-does-it-mean-for-the-business-workforce (accessed July 13, 2023).

reason for using independent contractors was the flexibility they provide.[54]

The ability of businesses to contract was crucial to helping businesses adapt and protect workers' safety throughout the COVID-19 pandemic. As companies across the U.S. have faced widespread labor shortages, the short-term use of independent contractors has helped keep supply chains moving, and even improved access to vital health care as hospitals have often contracted with medical professionals to temporarily fill open positions.

Independent contracting is particularly important for small businesses. It helps start-ups succeed and helps small businesses compete with larger companies that have the scale to employ specialized workers in-house. Small businesses with four or fewer employees use 6.7 contractors on average,[55] and small businesses with nine or fewer employees experienced the greatest expansion in contractor utilization since the pandemic, including an all-time high rate of contracting.[56]

The proposed rule will make it more difficult for companies to do business with independent contractors, which will make it harder for companies to deal with changing business conditions and surges in demand, will limit companies' ability to develop new and improved business processes, will make it harder to expand into new markets, and will increase the chances of failure for start-ups and small businesses.

Independent Contractor Rule Hurts Consumers. The discussion regarding the definition of employee and independent contractor focuses on workers and employers, but its effects span across the entire economy by way of impacting the availability and the cost of goods and services. Historically, only very wealthy individuals could afford to pay for services such as grocery delivery or personal, on-demand driving. Today, ridesharing apps have made it possible for individuals who cannot afford a car to nevertheless have access to personal transportation.

During the pandemic and beyond, delivery apps made it possible for individuals with health risks and concerns to have prescriptions and groceries delivered to their doorstep. One individual with whom I spoke works exclusively on a gig platform delivery goods. He explained that a lot of the deliveries he makes are to low-income and section 8 housing areas where he frequently delivers groceries and diapers. Restricting independent contracting could, among many other consequences, disproportionately harm lower-income individuals and families who do not own cars.

The spillover effects of the independent-contractor-produced products and services for consumers are significant. For example, a 2021 study using proprietary data from Uber concluded that ridesharing has decreased US alcohol-related traffic fatalities by 6.1 percent and reduced total US traffic fatalities by 4.0 percent. Based on conventional estimates of the value of statistical life the annual life-saving benefits range from $2.3 to $5.4 billion.[57]

[54]Ibid.

[55]"New Paychex Data Shows Independent Contractor Growth Outpaces Employee Hiring in Small Businesses," PR Newswire, January 9, 2019, https://www.prnewswire.com/news-releases/new-paychex-data-shows-independent-contractor-growth-outpaces-employee-hiring-in-small-businesses-300775712.html (accessed July 13, 2023).

[56]Wilke, "Contractor Hiring Surges During the Pandemic."

[57]Michael L. Anderson and Lucas W. Davis, "Uber and Alcohol-Related Traffic Fatalities," National Bureau of Economic Research, NBER Working Paper No. 29071, July 2021, https://www.nber.org/system/files/working_papers/w29071/w29071.pdf (accessed July 13, 2023).

Inadequate Independent Contractor Rule Economic Analysis. The policies proposed in the IC rule fail to consider the full scope of its economic impacts and include low and deficient cost estimates.

Department Vastly Understates Rule Familiarization Costs. The Department estimates that it will take companies only 30 minutes to review the rule, and independent contractors only 15 minutes, and that total one-time regulatory familiarization costs for establishments and contractors will equal only $188.3 million. This is based on preposterously low time estimates (the proposed rule is 57 pages long), low estimates of affected businesses and workers, and arguably relies on low compensation and time-value estimates. It is unreasonable for the Department to pretend that familiarization costs are limited to simply reading the rule rather than figuring out what it demands in day-to-day business. True familiarization costs would be in the billions of dollars.

Proposed IC Rule Fails to Recognize Its Potential Upheaval for Millions of Federal Contractors. The FLSA, with certain specified exceptions, applies to government employees.[58] The federal government has just over two million federal employees[59] and does business with an estimated 5 million federal contractors.[60] The sheer magnitude of the number of federal contractors confirms that many of these individuals are performing work that "is an integral part of" the federal government's operations. Moreover, the federal government exercises both direct and reserved control over these federal contractors, including actions such as President Biden's Executive Order 14026, which established a minimum wage for all workers performing work on or in connection with covered federal contracts[61] and Executive Order 14042 which imposed a COVID-19 vaccine mandate without a testing option on certain federal contractors and subcontractors.

Converting all federal contractors to federal employees would be a non-starter, but losing millions of federal contractors would jeopardize essential government functions, most especially national security. The Department's failure to consider the impact of its proposed rule on the federal government's operations is an inexcusable omission.

Proposed IC Rule Neglects Many Important Cost Impacts. The only cost that the Department includes in its assessment of the proposed rule are the regulatory familiarization costs. Yet, the actual costs will include eight major factors: (1) familiarization of establishments and individual contractors with the rule; (2) the cost of individualized assessment of the economic relationship with each contractor; (3) renegotiation or cancellation of existing contracts (including lost services and lost incomes); (4) the costs of conversion for some independent contractors into employees; (5) the cost of dealing with labor unions and elections (particularly among large gig-economy establishments); (6) the cost of enforcement actions; (7) the costs borne by workers and those engaging them of reduced flexibility and reduced income; and (8) the costs borne by consumers and the broader public in the form of higher prices and reduced availability of goods and services.

[58] 29 U.S. Code § 203(e).

[59] Federal Workforce Data, Office of Personnel Management, Fedscope, Federal Workforce Data, https://www.fedscope.opm.gov/employment.asp.

[60] Paul C. Light, "The True Size of Government Is Nearing a Record High," October 7, 2020 https://www.brookings.edu/blog/fixgov/2020/10/07/the-true-size-of-government-is-nearing-a-record-high/ (accessed July 13, 2023).

[61] Executive Order 14026, "Increasing the Minimum Wage for Federal Contractors," April 27, 2021, *Federal Register*, Vol. 86, No. 82, April 30, 2021, https://www.federalregister.gov/documents/2021/04/30/2021-09263/increasing-the-minimum-wage-for-federal-contractors (accessed July 13, 2023).

The Department's Small Business Analysis Is Preposterous. The proposed rule provides almost no analysis except to state that it could cost $24.97 for "a share" of 6.5 million small establishments or governments to familiarize themselves with the rule, and $5.34 for "some" of the Department's estimated 22.1 million independent contractors to familiarize themselves with the rule.

These estimates assume it will cost businesses only 30 minutes of one compensation, benefits, and job analysis specialist employee's time (failing to note that many small businesses do not employ such workers) and will take independent contractors on 15 minutes of time to familiarize themselves with the proposed rule (the proposed rule is 58 pages alone).

The Department also does not consider the costs of individualized assessment, contract renegotiation, or the impact on small firms that cannot afford to hire employees in lieu of contractors and will therefore be placed at a competitive disadvantage compared to larger firms.

The average small employer who has four or fewer employees relies on 6.7 contractors, on average, to run their business and compete with larger companies.[62] Restricting small businesses' ability to hire contractors would absolutely limit their capacity and could cause some to go out of business entirely.

Department Omits Many Impacts on Workers, Employers, and Consumers. Among the many economic impacts the Department fails to consider are:

- The loss of work, and income, and limits on flexible work opportunities for millions of independent workers.
- Increased costs and reduced output from businesses either having to convert contractors into employees or being unable to provide the same level of products and services.
- Potential business closures and reduced business start-ups.
- The cost of dealing with Department enforcement efforts that will be launched if the proposed rule is promulgated.
- The adverse impact on consumers resulting from higher prices for goods and services, such as reduced access to affordable groceries and diapers, and adverse health impacts from the loss of affordable, on-demand transportation. These costs are likely to amount to many tens of billions of dollars.

The Department's cost estimate is absurdly low and the Department fails to acknowledge the real losses that workers would experience under the regulation it offers, let alone show that those losses are somehow justified by putative gains. For those reasons, the policies included in the proposed IC rule will harm, instead of help, workers and the broader economy.

Conclusion

The DOL's WHD has proposed multiple regulatory policies that would almost certainly

[62] "New Paychex Data Shows Independent Contractor Growth Outpaces Employee Hiring in Small Businesses," PR Newswire, January 9, 2019, https://www.prnewswire.com/news-releases/new-paychex-data-shows-independent-contractor-growth-outpaces-employee-hiring-in-small-businesses-300775712.html (accessed July 13, 2023).

impose far greater costs than benefits. In each of these cases, the Department's regulatory policies are based on flawed and/or deficient economic impact analysis. The consequences of implementing these unreasoned rules will be significant, including:

- **Eliminating** jobs and income opportunities;
- **Restricting** flexible work options;
- **Imposing** enormous compliance costs on employers, particularly small businesses;
- **Reducing** the number of small businesses;
- **Increasing** taxpayer costs and exacerbating federal deficits;
- **Disadvantaging** particular businesses such as those that do business with the federal government;
- **Imposing** unnecessary complexity on workers and employers;
- **Reducing** competition;
- **Increasing** prices; and
- **Restricting** the availability of products and services.

In light of the Department proposing and implementing rules that could impose significant economic harm (based on flawed analysis), Congress should consider legislation to further specify its true intent under the Fair Labor Standards Act and the Davis–Bacon Act, so as to prevent economically destructive interpretations of the laws through regulatory action by the Department of Labor's Wage and Hour Division.

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