Testimony of
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Public Justice Center

Hearing Before the
United States Congress
House Committee on Education and Labor
Workforce Protections Subcommittee

Misclassification of Employees: Examining the Costs to Workers, Businesses, and the Economy

September 26, 2019

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Chairwoman Adams, Ranking Member Byrne, and members of the Subcommittee: thank you for this opportunity to testify today on the continued importance of the bedrock wage protections for employees under the Fair Labor Standards Act ("FLSA") in today's economy, and the critical question of how to draw the line between employees protected by the Act and independent contractors who are not. The scope of the FLSA, and the related question of who is protected and who is not, significantly impact workers and their families, law abiding employers, and the broader economy. With good jobs increasingly replaced by temporary, part-time, low-wage, and unstable work, the concern for "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being" that motivated the passage of the FLSA is as compelling today as it was in 1938.[1]

My name is Sally Dworak-Fisher, and I am an attorney at the Public Justice Center (PJC), a non-profit organization that uses legal advocacy tools to pursue social justice, economic and racial equity, and fundamental human rights for people who are struggling to provide for their basic needs. Our Workplace Justice Project partners with low-wage workers, community and labor organizations, and fellow advocates to promote justice and equity in the workplace. We litigate in state and federal courts, and we are active in promoting policies to expand the rights and protections of low-wage and vulnerable workers.

As a PJC attorney, I frequently represent low-wage workers in wage-and-hour cases involving violations of the Fair Labor Standards Act. Our clients have included construction workers, restaurant workers, hotel and residential cleaning workers, guest workers, and home health care workers. Too frequently, these hard-working individuals – mothers and fathers, sons and daughters – are not paid the bedrock minimum and overtime wages they have earned, and that they so sorely need. And too frequently, the defendants in our cases deny responsibility for their failures to pay, claiming that they did not "employ" the workers in question because they classified the workers as independent contractors. Yet our clients are *not* in business for themselves; far from being "independent contractors," they often work long hours to advance the business interests of the entity that hired them, have no real power to negotiate their pay, and lack other indicia of operating an independent business.

For example, we regularly see low-wage home health care workers being forced to sign contracts saying they are "independent contractors" even as they are assigned a pay rate and a work schedule by the home care business. We also see workers being paid off the books completely, with no reporting or withholding of the basic payroll taxes or

[1] *See* The Center for Law and Social Policy (CLASP), *The Struggles of Low-Wage Work* ("CLASP Fact Sheet"), 2018, https://www.clasp.org/sites/default/files/publications/2018/05/2018_lowwagework.pdf.

insurance; and we see businesses denying responsibility where they have subcontracted their workforce to a third party. Alarmingly, the low-wage workers we represent also tend to work in high-growth industries with high rates of workplace violations.[2]

The failure to pay basic minimum and overtime wages renders an already-vulnerable population even more vulnerable. Particularly given wage stagnation and the failure to raise the federal minimum wage, workers who are cheated out of an already-low wage are more likely to be unable to meet other basic human needs, like the need for food or housing.[3] And when businesses cheat by misclassifying their employees as independent contractors to avoid paying bedrock wages, they create a race to the bottom by undercutting law-abiding employers who treat their workers as employees. Without robust enforcement of the FLSA, cheating becomes the norm, and undermines Congress's intent to provide basic wage protections to "those who toil, [ ] those who sacrifice a full measure of their freedom and talents to the use and profit of others."[4] Eroding FLSA coverage and protections through independent contractor misclassification also creates ripple effects on the broader economy, diminishing job quality, leaving already financially-strapped families scrambling to make ends meet, and increasing poverty and the need for public benefits.

My testimony will discuss: a) employee status under the Fair Labor Standards Act, including why that statute contains expansive coverage and who is excluded as an independent contractor; b) how businesses use independent contractor misclassification schemes to escape liability and undermine the Act's effectiveness to the detriment of both low-wage workers and law-abiding businesses; c) recent developments related to the question of who is considered an "employee" under state wage laws; and d) the need to recommit to the purposes of the FLSA and renew efforts to combat misclassification.

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[2] *See* CLASP Fact Sheet ("Low-wage work is the fastest growing job sector"); *see also* Nat'l Emp. Law Project, *Holding the Wage Floor* (Oct. 2016), https://s27147.pcdn.co/wp-content/uploads/2015/03/Holding-the-Wage-Floor2.pdf (documenting "sweatshop conditions" in high-growth industries such as janitorial, restaurant, retail, home healthcare). *See also* David Weil, *Examining the Underpinnings of Labor Standards Compliance in Low Wage Industries* (Report to Russell Sage Foundation, 2012), https://www.russellsage.org/sites/default/files/Weil.Final%20Report%202012.pdf.

[3] *See*, Beth Jarosz and Mark Mather, *Low-Income Families: Rising Inequality Despite Economic Recovery*, *in* The Working Poor Families Policy Brief 1-13 (Spring 2018), http://www.workingpoorfamilies.org/wp-content/uploads/2018/04/Spring-2018_WPFP-Policy-Brief.pdf. *See also,* Jeff Stein and Andrew Van Dam, *For the Biggest Group of American Workers, Wages Aren't Just Flat, They're Falling*, Wash. Post, June 15, 2018, https://www.washingtonpost.com/news/wonk/wp/2018/06/15/for-the-biggest-group-of-american-workers-wages-arent-just-flat-theyre-falling/ (noting that four-fifths of privately employed workers experienced wage loss); *see also* Emmie Martin, *The Government Shut Down Highlights a Bigger Issue: 78 percent of U.S. Workers Live Paycheck to Paycheck*, CNBC, Jan. 9, 2019, https://www.cnbc.com/2019/01/09/shutdown-highlights-that-4-in-5-us-workers-live-paycheck-to-paycheck.html.

[4] *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

I. The Fair Labor Standards Act Contains Intentionally Broad Definitions to Effectuate its Purposes.

A. “Employ” means “to suffer or permit” to work

In 1938, amidst the Great Depression, Congress passed the Fair Labor Standards Act out of concern for “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”[5] The purpose of the Act was “to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation. It sought to raise living standards without substantially curtailing employment or earning power.”[6] At the same time, Congress also sought to level the playing field for those businesses disadvantaged by substandard labor conditions, finding that such conditions were “an unfair method of competition.”[7] Broadly speaking, the Act prohibited three substandard labor conditions: 1) paying less than the minimum wage; 2) employing young children; and 3) working employees for more than 40 hours in a week without an overtime premium.[8]

Congress recognized that in order to achieve its humanitarian and fair-competition objectives, the Act must have broad coverage. As the Supreme Court explained:

> The purpose is to raise living standards. This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in costs based upon substandard labor conditions. Otherwise the Act will be ineffective and will penalize those who practice fair labor standards as against those who do not.[9]

Accordingly, Congress purposefully chose language that was unambiguously broader than other labor statutes and that provided protection where the common law did not.

The FLSA defines an “employee” to mean “any individual employed by an employer,”[10] and it defines “employer” to include “any person acting directly or indirectly in the interest of an employer in relation to an employee . . . .”[11] At the heart of each of those definitions is the word “employ,” and it is the definition of “employ” that sets the FLSA apart. “Employ” is defined broadly; it “includes to suffer or permit to work.”[12]

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[5] 29 U.S.C. § 202.
[6] *Powell v. United States Cartridge Co.*, 339 U.S. 497, 510-11.
[7] 29 U.S.C. § 202; *see also Citicorp Indus. Credit v. Brock*, 483 U.S. 27, 36 (1987) (discussing “Congress’ desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions” and ensuring that interstate commerce was not an “instrument of competition in the distribution of goods produced under substandard labor conditions”).
[8] 29 U.S.C. §§ 206, 212, 207.
[9] *Roland Elec. Co. v. Walling*, 326 U.S. 657, 669-70 (1946).
[10] 29 U.S.C. § 203(e)(1).
[11] 29 U.S.C. § 203(d).
[12] 29 U.S.C. § 203(g).

As the Supreme Court has repeatedly noted, the definition of "employ" distinguishes the FLSA from – and renders broader coverage than – both common law and other statutory law. Congress chose a definition "whose striking breadth … stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles" and that definition stands in contrast to other labor or employment statutes.[13] The FLSA is deliberately broader than common law; it "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."[14] Indeed, it is well established that the FLSA's definitions establish such an expansive understanding of employment that a "broader or more comprehensive coverage of employees … would be difficult to frame."[15]

Of note, Congress deliberately incorporated the "suffer or permit" standard that was well-established by child labor statutes in effect in 32 states and the District of Columbia.[16] Those statutes imposed liability on businesses for the work of minors even when those minors were hired and directly employed by third parties considered independent contractors. For example, Massachusetts affirmed a conviction of a restaurateur where the restaurant had hired an independent contractor to provide entertainment, and that contractor in turn hired minors to work in the restaurant after hours.[17] Similarly, in Montana, a corporation that hired an independent contractor to remove equipment from its premises was liable where that contractor hired a minor to perform the removal work.[18]

Indeed, the "suffer or permit" standard broadly held businesses accountable where they had to the opportunity to detect work and the power prevent it from occurring.[19] In Tennessee, a manufacturer "employed" a minor because one of its employees hired the child as a helper, and the manufacturer was aware of the work and did not stop it.[20]

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[13] *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

[14] *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947).

[15] *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945). In fact, Congress created "'the broadest definition that has ever been included in any one act.'" *Id.* at 363 n.3 (quoting statement of drafter of definitions, Senator Black, 81 Cong. Rec. 7648, 7656–57 (1937)). *Accord Tony & Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290, 300 n.21 (1985) (Senator Black's floor statement shows "the comprehensive nature of the Act's definitions").

[16] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 & n. 7 (1947)*; accord Darden*, 503 U.S. at 326.

[17] *Commonwealth v. Hong*, 158 N.E. 759, 759-60 (Mass. 1927).

[18] *Daly v. Swift & Co.*, 300 P. 265, 266–68 (Mont. 1931); *see also Antenor v. D & S Farms,* 88 F.3d 925, 929 n. 5 (11th Cir. 1996) (explaining that language was designed to reach businesses that contracted with third party middlemen to hire and supervise children).

[19] *See* Wage and Hour Div., U.S. Dep't of Labor, Adm'r Interp. No. 2016-1, Joint Employment under the Fair Labor Standards Act 4 (2016). *See also Curtis & Gartside Co. v. Pigg*, 134 P. 1125, 1127–30 (Okla. 1913) (affirming judgment against a manufacturer, which contracted with a father for child's work in non-dangerous conditions only, where a direct employee of the manufacturer nonetheless allowed child to perform the prohibited dangerous work).

[20] *Chattanooga Implement & Mfg. Co. v. Harland*, 239 S.W. 421, 421–23 (Tenn. 1921).

Likewise, in New York, a farm "employed" a minor where one of its drivers hired the child as his assistant.[21]

In sum, the "suffer or permit" standard of the FLSA is intended to prevent substandard labor conditions and unfair competition by guaranteeing minimum and overtime wages to "employees," including in appropriate circumstances those directly employed by middlemen or other third parties, and even those who would not be protected under the common law.

B. Independent contractor status under the FLSA

While Congress deliberately incorporated broad language to further the important humanitarian purposes of the Act, the "suffer or permit" standard was not intended to be limitless. For example, the FLSA is "not so broad as to include those who, without any express or implied compensation agreement, might work for their own advantage on the premises of another."[22] Nonetheless, Congress did not define the class of workers excluded as "independent contractors."

Simply put, independent contractors are individuals who are in business for themselves; they are, *ipso facto*, *not* employees. Unlike employees, independent contractors generally do not provide their labor or work as part of an operation under the common control of a larger business. Rather, they provide "a defined product;" or perform "a distinct activity."[23] A true independent contractor "appears, does a discrete job, and leaves again."[24]

Perhaps an obvious example of an independent contractor is the plumber who is called to an office to fix the workroom sink. Although the plumber is, under the very broadest interpretations "suffered" or "permitted" to perform work in the office, no one would argue that the plumber is an "employee" under the FLSA for those few hours of work. Rather, that plumber is an independent businessperson; they appear, engage in a distinct activity unrelated to the service or goods produced by their client, provide the office with a finished product in the form of a working sink, leave, and bill the office according to rates they generally set themselves. Notably, an independent contractor has the power to determine the basic features of their business relations, such as the rates they charge, how, where, and when the work is performed, and whether and when to seek opportunities for expansion or contraction; moreover, like any business owner, "an

[21] *People v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474, 475–77 (N.Y. 1918); *see also Nichols v. Smith's Bakery, Inc.*, 119 So. 638, 639–40 (Ala. 1928) (reversed judgment for bakery, whose drivers hired children to assist them and who directly paid the children).
[22] *Rutherford Food*, 331 U.S. 722, 728-29 (citing *Walling*, 330 U.S. 148, 152).
[23] *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007).
[24] *Id.*

independent contractor's decisions and actions have significant impacts on opportunities for profits or losses."[25]

In the absence of a statutory definition in the FLSA, federal courts have developed multi-factored analysis designed to assist in answering the ultimate question: "whether the worker is economically dependent on the employer *or in business for him or herself*."[26] Because the common law focuses narrowly on the purported employer's ability to control the worker rather than the worker's economic dependence on the employer or whether the worker is in business for themselves, the common law does not apply in the FLSA context.[27] Rather, courts look to the "economic realities" of the relationship between the worker and the business to answer the question. The factors that federal courts analyze generally include: (1) the extent to which the work performed is an integral or essential aspect of the employer's business; (2) whether the worker has an opportunity for profit or loss depending on their managerial skill; (3) the extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control over the means or manner of the work.[28] No single factor is determinative; each one is analyzed with a totality-of-the-circumstances approach in keeping with Congress's intent to ensure that the FLSA effectively combats substandard employment conditions. "The lived reality of the worker is paramount and supersedes any categorization that a business may have made of its workers, even when the parties have signed a putative independent contractor agreement and the business routinely issues 1099s, rather than W-2s."[29] The existence of a contract is not controlling because "[t]he FLSA is designed to defeat rather than implement contractual arrangements."[30]

The "economic realities" analysis has been used to delineate between employees and workers who are in business for themselves in a variety of contexts, including jobs in the modern economy that offer a worker flexibility over certain aspects of their work. For example, workers at a staffing agency were not independent contractors upon consideration of all the factors, although they were able to work for several different agencies and were a transient workforce.[31] Similarly, nurses assigned work through a

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[25] David Weil, *Lots of Employees Get Misclassified as Contractors: Here's Why It Matters* ("Weil, *Lots of Employees Get Misclassified*"), Harvard Business Review (July 5, 2017), https://hbr.org/2017/07/lots-of-employees-get-misclassified-as-contractors-heres-why-it-matters.

[26] Wage and Hour Div., U.S. Dep't of Labor, Adm'r Interp. 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 2 ("Independent Contractor AI") (2015) (emphasis supplied).

[27] *Id.*

[28] *Id.;* see also *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304-5 (4th Cir. 2006) for discussion of six factor "economic realities" analysis to determine whether a worker is an employee or an independent contractor under the FLSA.

[29] *Guerra v. Teixeira*, Civil Action No. TDC-16-0618, 2019 U.S. Dist. LEXIS 12074, at *17 (D. Md. Jan. 25, 2019).

[30] *Sec'y of Labor, United States Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1544-45 (7th Cir. 1987).

[31] *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1060-61 (2d Cir. 1988). In *Brock*, the Court noted that the transient nature of the healthcare work of the nurse plaintiffs was caused by the nature of the profession and not the workers' success in marketing or managerial skill.

registry were not in business for themselves though they had flexible scheduling and could work for other agencies.[32] The economic realities analysis revealed that "when the nurses *are* available for work they are dependent upon [the registry] to provide it, and when they are working on assignment for [the registry] they are, during those workweeks, employees. . . . ."[33] Indeed, Courts applying the economic realities analysis have found a worker dependent on the business to which they provide their labor in various contexts, such as: home researchers paid on a piece rate with flexible hours;[34] cake decorators who could choose which cakes to decorate;[35] courier drivers;[36] and restaurant workers who could determine, to some extent, their own schedules.[37]

II. Independent Contractor Misclassification Undermines the FLSA, Hurting Workers, Reputable Businesses, and the Public.

A. Independent contractor misclassification is a serious problem

The classification of an individual as an employee or independent contractor is a critical one not only for the individual worker, but for businesses, government, and the general public. Independent contractors lack important workplace protections. Not only are they excluded from the FLSA's minimum wage and overtime protections, they are ineligible for unemployment insurance, or workers' compensation; they are also not shielded by anti-discrimination laws or family and medical leave protections, and they lack the right to collectively bargain to improve conditions. Moreover, businesses are not responsible for paying federal Social Security or payroll taxes or state employment taxes or unemployment insurance taxes for their independent contractors, as they are for their employees.[38] As a result, the financial incentive to misclassify employees as independent contractors is significant: businesses can save as much as 30% of payroll and related taxes they would otherwise pay for an employee.[39] Left unaddressed, independent contractor misclassification causes three major harms:

> First, misclassified workers are deprived of workplace protections and remedies to workplace harms like discrimination and wage theft. Second, businesses that play by the rules compete with businesses taking unfair advantages to their bottom line by skirting taxes. And finally, state and local governments and their constituents are divested of millions of

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[32] *Solis v. A+ Nursetemps, Inc.*, No. 5:07-cv-182-Oc-10PRL, 2013 U.S. Dist. LEXIS 49595 (M.D. Fla. Apr. 5, 2013).
[33] *Id.* at 7.
[34] *Donovan v. DialAmerica Marketing, Inc*.,757 F.2d 1376, 1379 (3d Cir. 1985).
[35] *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989).
[36] *Air Couriers International v. EDD*, 150 Cal. App. 4th 923 (Cal. Ct. App. 2007).
[37] *Doty v. Elias*, 733 F. 2d 720 (10th Cir. 1984).
[38] *See* Independent Contractor AI; *see also* Nat'l Emp. Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* ("NELP, *Misclassification Costs*") (Sept. 2017), https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-on-workers-and-federal-and-state-treasuries-update-2017/.
[39] NELP, *Misclassification Costs*.

> dollars in lost payments to unemployment insurance funds, payroll taxes, and workers' compensation funds.[40]

Unfortunately, recent experience suggests that in many industries, the race to the bottom continues, as companies compete to cut payroll costs via misclassification schemes new and old. In the home health care industry, for example, we find that agencies frequently classify their employees "independent contractors," when the worker is clearly not running their own business. A "contract" rendering the worker liable for self-employment taxes and acknowledging their status as a contractor is required as a condition of work even as the agency sets the worker's hourly pay rate, assigns them to clients, and prohibits them from employment with a competitor agency.

Still other businesses effectively misclassify workers by paying them off the books, meaning they do not include these employees in any payroll treatment at all. Indeed, we have seen workers in the construction industry given boilerplate "contracts" suggesting they are liable for their employment taxes even where they are paid by the hour and treated as an employee.

Worse yet, businesses have gotten creative in other industries: without using the term "independent contractor," they effectively deny FLSA protections through schemes that have the same effect. Some businesses have required employees to form a limited liability corporation or a franchise company-of-one as a condition of getting a job. Too frequently, businesses "contract with workers as owners, franchisees, or partners to explicitly avoid worker projections and tax obligations that come with employee status."[41] Although the business may not use the label "independent contractor," the intent and effect are the same. As the Deputy Commission of the Labor Commission in Utah explained in the wake of a large-scale enforcement action against employers who had misclassified their employees as "owners" in an LLC: "we will see individuals who are clearly employees called independent contractors. Now, we're seeing them called members of LLCs. The beat goes on."[42]

Of concern, some "gig" companies have also "joined powerful corporate allies and lobbyists on a far-reaching, multi-million dollar influence campaign to rewrite worker classification standards for their own benefit . . . ."[43] Uber, Lyft, and Handy, for example, are in the business of providing transportation and housekeeper services to the general public and exert significant power over the workers who provide their

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[40] Anna Deknatel and Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes* ("*ABC on the Books*"), 18 U. Pa. J. L & Soc. Change 53, 55 (2015).

[41] *Id.* at 81.

[42] *Id.* See also Independent Contractor AI, n.2 (noting that "the Department has seen an increasing number of instances where employees are labeled something else, such as 'owners,' 'partners' or 'members of a limited liability company'").

[43] Nat'l Emp. Law Project, *Rights at Risk: Gig Companies' Campaign to Upend Employment as We Know It* ("NELP, *Rights at Risk*") 1 (2019), https://s27147.pcdn.co/wp-content/uploads/Rights-at-Risk-4-2-19.pdf.

companies' essential services. "They impose take-it-or-leave-it non-employee contracts on their workers while setting fee rates, extracting penalties, and dictating when and how workers interact with their customers."[44] However, they have engaged in state-level policy advocacy to create carve-outs that would enable them to claim that their workers are independent contractors.

While working to re-write the rules, some gig companies also deny their workers are employees under current laws. They claim that because the jobs they offer provide "flexibility," their workers must be independent contractors, as if it is impossible to provide flexible work to employees. Yet this is a false dichotomy: flexible work is not incompatible with employee status, as some 'gig' companies and others, including several courts, have recognized.[45] Moreover, any belief that flexibility is truly incompatible with employee status is belied by the extensive efforts to rewrite the rules to legalize misclassification, as well as by the words of Handy's political strategist who asked rhetorically, and tellingly: "What is ultimately a better business decision? To try to change the law in a way you think works for your platform, or to make sure your platform fits into the existing law?"[46]

B. <u>Misclassified workers often labor in industries with low rates of pay</u>

Unfortunately, the workers we see losing their FLSA protections through various misclassification schemes are lower-wage workers who can least afford to be denied minimum or overtime wages. We routinely represent vulnerable home health care workers in our practice. Nationally, 91% of these workers are women, 58% have a high school education or less, 56% are non-white, 24% percent are foreign-born, and 21% percent are single parents.[47] Their median hourly wage in Maryland is just $11, below the living wage for a single adult in Baltimore City. Many are forced to work long hours in multiple jobs to feed their families and pay the rent – and even then, 45% of Maryland home health care workers rely on means-tested public assistance for themselves and their families. We have seen home healthcare workers forced to sign "contracts" as a condition of employment, where they acknowledge that they are responsible for employer-side payroll taxes. Similarly, in the construction industry, we represent misclassified employees who are frequently paid "off the books" without any payroll withholdings at all. Often these construction workers are paid a lump sum based on the number of hours worked; they are not protected from unemployment, not covered by workers'

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[44] *Id.* at 2.
[45] *See* Nat'l Emp. Law Project, *Flexibility and the On-Demand Economy*, June 2016, https://www.nelp.org/publication/flexibility-in-the-on-demand-economy/; Nat'l Emp. Law Project*, Flexible Work Hours and Employee Status*: *The Truth about AB 5*, June 2019, *See also supra* notes 31-37. https://www.nelp.org/publication/flexible-work-hours-employee-status-truth-ab-5/#_ednref5 (highlighting gig companies like Managed Q and other companies such as Hello Alfred and Bird that offer flexibility while classifying workers as employees).
[46] NELP, *Rights at Risk*, supra n. 43 at 3.
[47] Paraprofessional Healthcare Institute, *Facts 5: Home Care Aides at a Glance* (February 2014), http://phinational.org/sites/phinational.org/files/phi-facts-5.pdf.

compensation, and, too frequently, they are informed that their employer simply "does not pay overtime."

Our experience representing misclassified employees is consistent with data and case law reflecting what industries and which workers are most likely to be impacted by misclassification. Misclassification appears common in jobs where the workers performing the labor are not, in fact, independent business owners. Industries where misclassification has been found include: construction,[48] day labor,[49] janitorial and building services,[50] home health care,[51] agriculture[52], poultry and meat processing,[53] delivery,[54] trucking,[55] and home-based work.[56] Indeed, shifts in the way that businesses operate in our economy, sometimes referred to as "fissuring," include the increased

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[48] *See Guerra v. Teixeira*, Civil Action No. TDC-16-0618, 2019 U.S. Dist. LEXIS 12074, at *37 (D. Md. Jan. 25, 2019); Francoise Carré, *(In)dependent Contractor Misclassification* (Econ. Policy Inst., June 8, 2015), https://www.epi.org/publication/independent-contractor-misclassification/ (noting that construction, low-wage in-person services, and light manufacturing stand out as settings in which labor standards violations and misclassification are most common); *Calderon v. J. Younes Constr. Llc & John Younes, LLC*, No. 12 C 3793, 2013 U.S. Dist. LEXIS 87817, at *18 (N.D. Ill. June 23, 2013). *See also* Workers Defense Project, *Building Austin, Building Injustice: Working Conditions in Austin's Construction Industry* (2009), http://www.workersdefense.org/wp-content/uploads/2013/04/Building-_Austn_Report-2.pdf; Francoise Carré, J.W. McCormack, et al., *The Social and Economic Cost of Employee Misclassification in* Construction 2 (Dec. 2004), https://scholarworks.umb.edu/csp_pubs/43/.

[49] *See* Abel Valenzuela and Nik Theodore, *On the Corner: Day Labor in the United States* (Jan. 2006), http://www.coshnetwork.org/sites/default/files/Day%20Labor%20study%202006.pdf.

[50] *See Harris v. Skokie Maid & Cleaning Serv.*, No. 11 C 8688, 2013 U.S. Dist. LEXIS 97117, at *24 (N.D. Ill. July 11, 2013); David Weil, *Enforcing Labour Standards in Fissured Workplaces: The U.S. Experience*, 22 Econ. & Lab. Rel. Rev. 2, 33-54 (July 2011); *Bulaj v. Wilmette Real Estate and Management Co., LLC*, No. 09 CV 6263, 2010 U.S. Dist. LEXIS 112302 (N.D. Ill. Oct. 21, 2010); *Coverall North America, Inc. vs. Commissioner of the Division of Unemployment Assistance*, 857 N.E.2d 1083 (Mass. 2006); *Vega v. Contract Cleaning Maintenance*, 10 Wage & Hour Cases 2d (BNA) 274 (N.D. Ill. 2004).

[51] *See*, *e.g.*, *Lemaster v. Alt. Healthcare Sols., Inc.*, 726 F. Supp. 2d 854, 863 (M.D. Tenn. 2010); *Crouch v. Guardian Angel Nursing, Inc*., 2009 U.S. Dist. LEXIS 103831 (M.D. Tenn. Nov. 4, 2009); *Bonnette v. Cal. Health & Welfare Agcy.*, 704 F.2d 1465 (9th Cir. 1983).

[52] *See Lauritzen*, 835 F.2d 1529.

[53] *See* Wage and Hour Div., U.S. Dep't of Labor, *U.S. Dept' of Labor Uncovers Wage and Child Labor Violations at Mississippi Slaughterhouse* (Sept. 11, 2018), https://www.dol.gov/newsroom/releases/whd/whd20180910-1; U.S. Gov't Accountability Office, GAO-06-656, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification* ("GAO, *Improved Outreach*") 30 (July 11, 2006), *https://www.gao.gov/new.items/d06656.pdf; Heath v. Perdue Farms, Inc.*, 87 F. Supp. 2d 452, 457 (D. Md. 2000).

[54] *See Flores v. Velocity Express, LLC*, 250 F. Supp. 3d 468, 471 (N.D. Cal. 2017); *Ansoumana et al v. Gristedes et al*, 255 F. Supp. 2d 184 (S.D.N.Y. 2003). *See also U.S. Dep't of Labor Investigation Results in Louisiana-Based Transportation Company Paying $25,032 in Back Wages to 24 Employees at Mississippi Branch* (Feb. 14, 2019), https://www.dol.gov/newsroom/releases/whd/whd20190213.

[55] *See* Smith, Bensman, Marvy, "The Big Rig: Poverty, Pollution and the Misclassification of Truck Drivers at America's Ports," (2010), http://nelp.3cdn.net/000beaf922628dfea1_cum6b0fab.pdf; Steven Greenhouse, The New York Times, *Clearing the Air at American Ports,* http://www.nytimes.com/2010/02/26/business/26ports.html.

[56] *See* GAO, *Improved Outreach* at 31.

reliance on outsourcing and subcontracting, which has been shown to erode working conditions and wages.[57]

C. Recent and comprehensive data is lacking

Regrettably, recent federal data measuring the scope of misclassification and its impact on workers, business and government coffers is nonexistent. However, a 2009 report by the Government Accountability Office (GAO) estimated that 15 percent of employers misclassified workers in 1984, to the tune of $2.72 billion in federal tax losses in 2006 dollars.[58] A study commissioned by the U.S. Department of Labor (DOL) back in 2000 found that between 10% and 30% of audited employers misclassified employees, and that a 1% misclassification rate would result in a loss of $198 million to unemployment insurance (UI) trust funds.[59] The IRS, which uses a narrower test based on the common law,[60] estimated in 2009 that misclassification was costing $54 billion in underreporting of employment tax, and $15 billion in unpaid FICA and UI taxes.[61] At the same time, a number of state-level studies suggest that independent contractor misclassification is widespread and depriving not only workers of bedrock wages and workplace protections, but depriving states of critical UI funds, workers' compensation funds and general revenue from income taxes.[62] However, these studies likely undercount the costs of misclassification. Even if they were more current, most studies do not account for the impact of workers being paid off-the-books or in cash.[63]

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[57] *See* Nat'l Emp. Law Project, *Who's the Boss?: Restoring Accountability for Labor Standards in Outsourced Work* (May 2014), https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf.; David Weil, *The Fissured Workplace: Why Work Became So Bad For So Many And What Can Be Done To Improve It* (Harvard University Press, 1st ed. 2014).

[58] GAO, *Improved Outreach* at 2.

[59] Lalith De Silva, *et al.*, *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, Planmatics, Inc., iv (2000), https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf (prepared for the U.S. Department of Labor Employment and Training Administration).

[60] Moreover, Section 530 of the Internal Revenue Act of 1978, 26 U.S.C. § 7436, allows businesses to claim a "safe harbor" under which they can effectively misclassify workers with impunity by claiming that they have been misclassifying them continuously and that misclassification is the norm in the industry. *See* Franco Ordoñez and Mandy Locke, *IRS' 'Safe Harbor' Loophole Frustrates Those Fighting Labor Tax Cheats* (Dec. 14, 2014), https://www.mcclatchydc.com/news/nation-world/national/economy/article24777397.html. The U.S. Treasury has estimated that narrowing that loophole would generate an additional $9 billion dollars in tax revenue over 10 years. *Id.* Similarly, a 2010 Congressional Research Service estimated that modifications to the rule would yield $8.71 billion for FYs 2012-21. GAO, *Improved Outreach* at 30.

[61] Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address Worker Misclassification, Agency-Wide Employment Tax Program and Better Data are Needed* ("Treasury IG, *Better Data Needed*") (Feb 4, 2009), https://www.treasury.gov/tigta/auditreports/2009reports/200930035fr.pdf.

[62] NELP, *Misclassification Costs*.

[63] In 2005, Bear Stearns estimated that the U.S. was losing $35 billion annually due to off-the-books employment. Justich and Ng, "The Underground Labor Force is Rising to the Surface," 3, Bear Stearns Asset Management (2005), https://cdn.factcheck.org/UploadedFiles/Bear_Sterns_20_million_illegal.pdf.

Meanwhile, the financial costs to the worker and the worker's family may be the difference between paying rent and homelessness. Aside from the other loss of rights listed above, misclassified employees lose their right to minimum wage and overtime. This loss of income is often significant, particularly for low-wage workers putting in long hours and struggling to make ends meet. In one typical case, the U.S. Department of Labor's Wage and Hour Division (WHD) recovered roughly $250,000 in unpaid overtime and minimum wages and for 75 workers who were misclassified by a cleaning company, representing nearly three months of earnings.[64] Workers who are misclassified and denied the bedrock wage protections afforded by the FLSA may also be forced to seek public benefits; when they do, the public assumes the cost, effectively subsidizing businesses that cheat. In short, misclassification schemes are denying workers and their families hard-earned wages, undercutting reputable businesses trying to play by the rules, and burdening the public at large through an increasing demand for public services and a decreasing pool of businesses contributing.

III. Some States Apply the "ABC" Analysis to Questions of Employee Versus Independent Contractor Status Under State Wage Laws.

Recently, some states with wage statutes that –like the FLSA– define "employ" as including "to suffer or permit to work" have turned to a tried-and-true analysis for determining whether a worker is an employee or an independent contractor. The analysis is one that is well known and often used to determine whether a worker is a covered employee for the purposes of unemployment insurance – the "ABC" test.[65] The ABC test presumes a worker is an employee unless the employer can prove each of the three prongs of the test. In general, the employer must demonstrate, the employing business must show:

(A) That the individual worker is free from direction and control both under the contract and in the actual performance of it;
(B) That the service performed by the individual is performed outside the usual course of business of the employer; *and*
(C) That the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service at issue.[66]

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[64] Wage and Hour Div., U.S. Dep't of Labor, *US Labor Department obtains judgment against Illinois-based Skokie Maid; more than $500,000 in unpaid wages, damages to be paid to 75 misclassified workers* (May 3, 2012), https://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Midwest/20120503.xml

[65] 24 states have this definition in their unemployment insurance law Alaska, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Maryland, Nebraska, New Hampshire, New Jersey, New Mexico, Nevada, Oklahoma, Rhode Island, Tennessee, Virginia, Vermont, Washington, and West Virginia. Another eight states use a test that includes part "C" in combination with other factors (Colorado, Georgia, Idaho, Minnesota, Oregon, Pennsylvania, South Dakota, and Utah). This is also the law in over ten states' workers' compensation acts: AZ, CA, CO, CT, DE, HI, NH, ND, WI, WA. Massachusetts' minimum wage act and its wage payment law use the ABC test as well. Mass. Gen. Laws ch. 149, § 148b, http://www.mass.gov/legis/laws/mgl/149-148b.htm.

[66] *ABC on the Books* at 65.

The three prongs of the ABC test, each of which must be satisfied, focus specifically on the question of whether in fact an individual worker is in business for herself.

For example, the New Jersey Supreme Court held that the ABC test used in the New Jersey Unemployment Compensation Act governs whether a plaintiff is an employee or independent contractor for purposes of the state's two wage statutes.[67] The question was certified to the state supreme court in a case involving mattress delivery drivers.

New Jersey's Wage-and-Hour Law (WHL) defines "employ" similarly to the FLSA, – ie, "to suffer or permit to work."[68] By regulation, New Jersey had adopted the ABC test of its unemployment insurance code to distinguish between employees and independent contractors. The state's Wage Payment Law (WPL) defines "employee" as "any person suffered or permitted to work by an employer, except that independent contractors and subcontractors shall not be considered employees."[69] However, the WPL was silent on the question of how to distinguish employees from such contractors. In holding that the ABC analysis governed the question of employee status under both statutes, the court interpreted "two complementary statutes to determine and effectuate the intent of the legislature."[70] The court was mindful of the need to further the remedial purposes of those laws.[71] It noted that like the FLSA, "the WPL and WHL address the most fundamental terms of the employment relationship," including the right to timely and predictable payments and protection from unfair wages and excessive hours.[72] Notably, the court declined to apply the "economic realities" framework used by federal courts applying the FLSA. The court found that such a "totality of the circumstances" analysis is likely to produce varying results.[73] "By contrast, requiring each identified factor to be satisfied to permit classification as an independent contractor, the 'ABC' test fosters the provision of greater income security for workers, which is the express purpose of both the WPL and the WHL."[74]

Likewise, the Supreme Court of California held that the "suffer or permit" standard under California wage law required businesses asserting independent contractor status to establish each of the three ABC factors.[75] *Dynamex* involved package delivery drivers who had been classified as employees until the company adopted a new policy and contractual arrangement classifying them as independent contractors. After a lengthy review of prior decisions, the court noted that prior case law "emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social

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[67] *Hargrove v. Sleepy's LLC*, 106 A.3d 449 (2015).
[68] *Id.* at 458 (citing N.J.S.A. § 34:11-56a1(f)).
[69] *Id.* at 456 (citing N.J.S.A. § 34:11-4.1(b)).
[70] *Id.* at 456.
[71] *Id.* at 458.
[72] *Id.* a 463.
[73] *Id.* at 455-6.
[74] *Id.* at 464.
[75] *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th. 903 (2018).

welfare legislation."[76] As in *Hargrove*, the court declined to use the "economic realities" test, noting "the disadvantages, particularly in the wage and hour context, inherent in relying upon a multifactor, all the circumstances standard. . . . "[77] Such disadvantages include the fact that the "lack of an easily and consistently applied standard often leaves both businesses and workers in the dark" and that a multifactor analysis "affords a hiring business greater opportunity to evade its fundamental responsibilities . . . by dividing its work force into disparate categories and varying the working conditions."[78]

These states, whose wage laws were enacted to address the same concerns motivating the FLSA, have adopted an analysis that illuminates what it means to "employ" a worker and how to determine who is an independent contractor. Whether using the "economic realities" analysis of the federal courts or the "ABC" test used in some states, the ultimate question is always the same, however: is the worker in business for himself? Either analysis, properly applied, results in broad coverage for workers "employed" by a business, consistent with the statutory purposes and legislative intent.

IV. Renewed Commitment to Combatting Misclassification, Protecting Workers, and Leveling the Playing Field for Reputable Businesses is Needed.

Businesses have become more creative in finding ways to misclassify employees, denying them bedrock workplace protections while exempting themselves from contributing their share to public coffers. Indeed, the threat of widespread and, in some industries, legalized misclassification appears to have grown in recent years, undermining the effectiveness of the FLSA to the detriment of workers and law-abiding businesses. There is an urgent need to prioritize combatting these developments, beginning with gaining a better understanding of its current scope. As Dr. David Weil, former Wage and Hour Administrator under President Obama and now Dean and Professor at the Heller School of Social Policy and Management at Brandeis University recently explained: "We have already faced decades of flat real earnings and deteriorating labor conditions for much of the workforce and a widening of income inequality for the economy as a whole. Allowing further erosion of employer responsibility in the physical and digital workplaces will only intensify those troubling trends."[79]

A. It is not clear that combatting misclassification remains a priority

Unfortunately, combatting the misclassification of employees as independent contractors is no longer clearly a federal priority. As an initial matter, the DOL took the unusual and step of rescinding the 2015 Administrator's Interpretation that provided guidance on the identification of independent contractors under the FLSA. The rescission potentially

[76] *Id.* at 935.
[77] *Id.* at 956.
[78] *Id*. at 955.
[79] Weil, *Lots of Employees Get Misclassified*.

signals "an intention to move away from addressing worker classification as a fundamental problem worth addressing."[80]

Further, while DOL prioritized combatting misclassification prior to 2016, it is not clear that this remains a priority. For example, in 2011 the DOL had launched an initiative to strengthen and coordinate federal and state efforts to identify and deter employee misclassification. As part of the Department's Strategic Plan to, DOL committed to: target investigations in industries with the most substantial independent contractor abuses; target efforts to recoup unpaid payroll taxes due to misclassification; coordinate with states on enforcement; and develop regulatory changes to identify and target misclassification.[81] Some 45 states had entered into Memoranda of Understanding (MOU), partnership agreements, cooperative agreements, or common interest agreements with the Department to facilitate state-federal agency information sharing needed to identify and detect firms misclassifying workers. However, those agreements have expired for 13 states and currently only 32 states have active agreements.[82] Moreover, the DOL's most recent strategic plan contains no mention of misclassification.[83]

In place of a clear and coordinated effort to combat misclassification now stands a single DOL Opinion Letter responding to a particular company inquiring about its particular relationship with its service providers.[84] Opinion letters do not represent official policy, and they are necessarily limited to the facts as presented by the requesting business. Thus, even assuming the facts as presented by the business are completely and always accurate, an opinion letter only applies to that individual situation. Unfortunately, Opinion Letters may be relied on by other businesses to claim that any misclassification they engaged in was in good faith because they share some similarities. "They are often referred to as 'get-out-of-jail free cards' because they mean that the Labor Department won't initiate enforcement proceedings against a company with a favorable letter."[85] They may also be used to convince state or local legislators that all similar businesses are entitled to an exemption that strips their workers of employee rights under state laws. Opinion Letters were discontinued during the Obama administration. In the words of Dr. Weil, opinion letters are a "capricious tool for settling complicated regulatory questions."[86]

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[80] *Id.* at 5.
[81] *See* U.S. Dep't of Labor, *Strategic Plan, Fiscal Years 2011-2016*, https://upload.wikimedia.org/wikipedia/commons/8/87/United_States_Department_of_Labor_-_Strategic_Plan_Fiscal_Years_2011-2016.pdf.
[82] Although no longer a clear priority for the Department of Labor, its Wage and Hour Division has continued to investigate and resolve cases of misclassification. *See* Wage and Hour Div., U.S. Dep't of Labor, *WHD Press Releases About Misclassification as Independent Contractors*, https://www.dol.gov/whd/media/press/whdprssToc.asp?topic=MIS#CurrentTopic.
[83] *See* U.S. Dep't of Labor, *Strategic Plan, FY 2018-2022,* https://www.dol.gov/sites/dolgov/files/legacy-files/budget/2019/FY2018-2022StrategicPlan.pdf.
[84] U.S. Dept. of Labor Wage and Hour Div., USDOL Opinion Letter, FLSA 2019-6 (Apr. 29, 2019).
[85] Noam Schreiber, *Labor Department Says Workers at a Gig Company are Independent Contractors,* N.Y. Times, Apr. 29, 2019, https://www.nytimes.com/2019/04/29/business/economy/gig-economy-workers-contractors.html.
[86] *Id.*

B. A renewed commitment to combatting misclassification is urgently needed

The need to refocus and recommit to the humanitarian goals of the FLSA, to ensure that businesses that suffer or permit work pay their employees the bedrock minimum and overtime wages to which they are entitled, and to penalize cheating businesses that undercut their competition through misclassification schemes is paramount. Robust enforcement of the FLSA – including enforcement on behalf of the vulnerable workers whose employers seek to misclassify them through schemes old and new – should be a priority.

The Payroll Fraud Prevention Act ("PFPA") represents a critical step in the right direction. The Act would require businesses to properly classify their workers and to keep records of those classifications. Moreover, the PFPA would foster transparency by requiring covered businesses to provide notice to an individual of that individual's classification, along with information regarding how to reach the Department of Labor with questions or concerns and a statement directing individuals to a website with further information. To encourage compliance with the notice requirement, businesses that fail to provide proper notice will be presumed employers under the FLSA, subject to a heavy burden of rebuttal. The PFPA would also both deter misclassification and encourage enforcement by increasing damages to employees who are misclassified and by ensuring that workers who voice complaints or oppose any practice related to their misclassification are protected from retaliation. Moreover, high-violation industries would be subject to targeted audits, which will create compliance incentives in those industries that need it most. Further deterring violations and combatting misclassification, the bill would subject employers to civil penalties of up to $1,100 per violation, and up to $5,000 for willful violations. Finally, the PFPA would require information-sharing such that further action could be taken against cheating businesses to level the playing field for everyone. Specifically, the PFPA would require all divisions within the DOL to report misclassification to the Wage and Hour Division, which could in turn report it to the Internal Revenue Service. In short, the PFPA would go a long way toward creating the culture of compliance that is sorely needed.

Finally, data collection and research on misclassification should be conducted regularly and inform future policy efforts. The data and research conducted by various state governments in response to the recession was piecemeal and incomplete even when it took place. Additionally, federal agency estimates were admittedly dated even when published in 2009, and current, comprehensive data collection is lacking. Regular and current comprehensive research and data on the scope of misclassification – including clear guidance on how to measure it – is necessary to develop informed policy in the future.[87]

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[87] *See* Treasury IG, *Better Data Needed*.

V. Conclusion

The Fair Labor Standards Act and the concerns that motivated it are as compelling and relevant today as they were at the time of passage. Indeed, the need to ensure that the businesses that "suffer or permit" individuals to work for them pay those workers all wages due under the FLSA is critical, particularly as the growth of low-wage, contingent work forces more people to scrape by with unpredictable part-time employment. The good news is that determining whether an individual is protected as an employee is not difficult. The essential question is always whether that individual is running their own business. Relevant factors courts examine under the FLSA typically include: (1) the extent to which the work performed is an integral or essential aspect of the employer's business; (2) the workers have opportunities for profit or loss depending on their managerial skill; (3) the extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control over the means or manner of the work. Some states rely on the "ABC" test when the status of a worker as an employee or independent contractor arises under state wage law. Both analyses provide a method of interpreting the "suffer or permit" language in cases raising the question of whether a worker is an employee or independent contractor, and either analysis, properly applied, will provide broad coverage consistent with the purposes of the statute.

Although the clear intent of the FLSA was to broadly cover workers who would not be covered under the common law, too many businesses still attempt to deny that they "employ" the individuals who work for them. The incentive to do so is compelling, because employees are more expensive than independent contractors, for whom businesses are not required to pay employment taxes, much less minimum wage and overtime wages. It appears that this problem may be worsening, though current data and research on its scope is sorely lacking. Anecdotally at least, businesses seem to be getting more creative with the ways they misclassify, including requiring workers to form their own LLCs or franchises. In some industries, such as home healthcare, it appears that businesses routinely require workers to sign independent contractor contracts as a condition of work. Still others, particularly in the gig economy, are trying to re-write state rules to exempt their workers through legalized misclassification, even as they incorrectly claim those same workers are already exempt because of the "flexible" schedules these businesses offer.

While combatting misclassification of employees as independent contractors was unquestionably a federal priority in years past, it is not clear whether coordinated and strategic enforcement continues. A recent opinion letter issued to a single business based on that business's version of the facts may signal a troubling intent to turn back the clock and strip employee protections, to the detriment of workers, their families, reputable businesses, and the public coffers. Legislation such as the Payroll Fraud Prevention Act of 2019 would raise awareness of the importance of proper classification under the FLSA through better notice and recordkeeping requirements and enhanced penalties, and it would send a strong message that the bedrock protections of the FLSA cannot be ignored

with impunity. Similarly, renewed efforts to collect and analyze data would help provide a more current understanding of developing trends and allow for the creation of proactive measures to address them.

Thank you.