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April 28, 2026

The Honorable Keith Sonderling
Acting Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Comments on RIN 1235-AA46: Employee or Independent Contractor Status under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act

Dear Acting Secretary Sonderling:

We write to urge the Department of Labor (DOL or Department) to withdraw its proposed rule, Employee or Independent Contractor Status under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, RIN 1235-AA46; Fed. Reg. Vol. 91, No. 39 (Feb. 27, 2026) ("Proposed Rule"), which would narrow its interpretation of employee status under the *Fair Labor Standards Act* (FLSA), *Family and Medical Leave Act* (FMLA), and *Migrant and Seasonal Agricultural Worker Protection Act* (MSPA).

These statutes have a broad employment standard that ensures their protections are extended to a wide range of workers. Despite the Proposed Rule's claims to the contrary, the Department's proposal conflicts with the statutory text and congressional intent, as well as controlling law. As a result, the changes in this Proposed Rule would result in more regulatory confusion among stakeholders and provide more opportunities for lawbreaking employers to evade liability for robbing workers of their wages and other basic federal protections.

This Proposed Rule closely tracks a previous rule published in 2021,¹ and while that rule only impacted the FLSA, the arguments against this attack on workers' rights remain the same. Moreover, the expansion of this Proposed Rule's narrowing of the interpretation of employee status to both the FMLA and MSPA exacerbates previous concerns.

¹ Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (finalized on January 7, 2021) (codified at 29 CFR 780, 788, and 795). The Department withdrew this final rule on May 6, 2021, *see* Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 Fed. Reg. 24303 (finalized May 6, 2021) (codified at 29 CFR 780, 788, and 795).

The Department's proposal to narrow its interpretation of employee status directly conflicts with the FLSA, FMLA, and MSPA's texts and congressional intent

The FLSA is the cornerstone of wage and hour protections, ensuring employees earn a minimum wage, receive premium pay for overtime work, and are protected from unlawful child labor. The FLSA defines an “employee” as “any individual employed by an employer”,² and the term “employ” includes “to suffer or permit to work.”³ The FLSA’s definition of employment is also shared by the FMLA,⁴ which provides basic family and medical leave protections for employees, and the MSPA,⁵ which provides protections for migrant and seasonal agricultural workers. The U.S. Supreme Court and Circuit Courts have said that an “entity ‘suffers or permits’ an individual to work if, as a matter of economic reality, the individual is dependent on the entity.”⁶ For decades, the courts and the Department have applied a multi-factor “economic realities” test “to determine whether the worker is economically dependent on the employer (and thus its employee) or is really in business for him or herself (and thus its independent contractor).”⁷

While the articulation of specific factors and the number of factors used slightly varies by court, the following six factors are almost uniformly used in federal Circuit Courts as indicators of economic dependence and are enshrined in current federal regulations: (1) the extent to which the work performed is an integral part of the employer’s business; (2) the worker’s opportunity for profit or loss depending on his or her 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 exercised or retained by the employer.⁸ Courts look at the totality of circumstances, and no single factor should be given undue weight.⁹

In its proposal, the Department seeks to narrow its interpretation of employee status under the FLSA by creating a new test which holds that two factors—the degree of employer control and the employee’s opportunity for profit and loss—are the primary and most probative for determining employee status, while the remaining factors play a secondary role.¹⁰ The Proposed Rule asserts that by focusing on these two “core factors,” the Department will be focused on the “ultimate inquiry” of the economic dependence of the employee on the employer.¹¹ While the

² 29 U.S.C. § 203(e)(1).

³ 29 U.S.C. § 203(g).

⁴ 29 U.S.C. § 2611(1).

⁵ 29 U.S.C. § 1802(5).

⁶ *Antenor v. D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996).

⁷ Wage and Hour Div., U.S. Dept 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* (July 15, 2015), at 2.

⁸ 29 CFR § 795.110.

⁹ *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988).

¹⁰ *Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act*, 91 Fed. Reg. 9932 (proposed Feb. 27, 2026) (to be codified at 29 C.F.R. pt. 500, 795, 825).

¹¹ *Id.*

Department’s proposal claims that focusing on two primary factors does not change the longstanding multifactor test long used by the Department and the courts, raising two factors to principal importance over the others will inevitably undermine the broad definition of employee status established under the FLSA and adopted by the FMLA and the MSPA.

When establishing the broad “to suffer or permit to work” standard under the FLSA, Congress consciously rejected the narrower common law standard of employment, which turns on the degree to which the employer has control over an employee. Congress instead chose an employment definition “whose striking breadth ... stretches the meaning of ‘employee’”¹² and requires the Act’s “application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.”¹³ As the Supreme Court has noted, employment under the FLSA has the “broadest definition that has ever been included in any one act.”¹⁴

Moreover, in passing the FLSA, Congress intended “to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation.”¹⁵ Such a purpose cannot be met with the Department’s narrow control test, which could strip significant portions of the workforce of their employee status and therefore their protections under the FLSA, the FMLA, and the MSPA.

The Department has no statutory authority to narrow coverage under these three statutes or undermine their purposes in this way. Congress has not delegated rulemaking authority to the DOL with respect to the scope of the employment relationship under the FLSA, and by extension, the FMLA and the MSPA. The Department only has interpretive rule or guidance authority on this issue, but such interpretations cannot conflict with the text of or intent behind the FLSA, as this proposal does. If the Department seeks to provide the public with clear guidance, as it purports, it should keep in place its current regulations enacted via its 2024 final rule,¹⁶ which discussed the application of the FLSA’s “suffer or permit” standard and made clear the importance of the broad, multifactor test in determining employee status under the FLSA.

The Department’s proposal could cost workers millions in lost wages and benefits by stripping them of employee status

The misclassification of employees as independent contractors is already a rampant issue,¹⁷ and the Department’s proposal would make it easier for low-road employers to exploit their workers by misclassifying them as independent contractors. A 2000 Department-commissioned study

¹² *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

¹³ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947).

¹⁴ *United States v. Rosenwasser*, 323 U.S. 360, 363 n. 3 (1945) (quoting 81 Cong. Rec. 7,657 (1938) (remarks of Sen. Hugo Black)).

¹⁵ *Powell v. United States Cartridge Co.*, 339 U.S. 497, 510 (1950).

¹⁶ Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (published Jan. 10, 2024).

¹⁷ Lalith De Silva, et al., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, at iii, Planmatics, Inc., Prepared for the U.S. Department of Labor Employment and Training Administration (2000), https://www.dol.gov/sites/dolgov/files/ETA/publications/op_05-00.pdf.

found 10 to 30 percent of firms audited in nine states misclassified at least one of their workers.¹⁸ According to the Internal Revenue Service’s 1984 estimate (the most recent comprehensive misclassification estimate), 15 percent of employers misclassified their employees.¹⁹

Misclassification is most prevalent in industries where employers have a greater financial incentive and leverage to shift costs onto workers or where work is performed in settings where unlawful employment practices are easier to conceal.²⁰ This includes trucking, construction, janitorial services, home health care, and industries that employ large numbers of immigrant workers.²¹

While the Department estimates that “the net impact on total compensation should be small,”²² the data proves otherwise. A recent study found that misclassified workers can be robbed of tens of thousands of dollars in wages and benefits each year.²³ For example, misclassification is estimated to cost the median truck driver as much as \$23,266 per year in wages and benefits.²⁴ Similarly, a typical construction worker could lose as much as \$20,399 per year.²⁵

By narrowing the test to determine employee status, the Proposed Rule takes a less holistic view on establishing whether a worker is an employee, providing less opportunity to properly assess the totality of circumstances that would demonstrate a worker is in fact an employee and not an independent contractor. Employers using the Department’s narrow control test might seek to improperly change their workers’ classification from “employee” to “independent contractor” or hire workers as independent contractors where they would otherwise be classified as employees, misclassifying these workers. The proposal could also undermine child labor standards in the FLSA that keep our nation’s children safe and healthy,²⁶ and the Department provides no consideration of the Proposed Rule’s impact on its ability to combat unlawful child labor.

The Department offers no estimate of the number of workers who would be at risk of misclassification as a result of its proposal but instead focuses on so-called “transfer effects”

¹⁸ *Id.*

¹⁹ U.S. Gov’t Accountability Off., GAO-09-717, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention*, at 10 (2009), <http://www.gao.gov/assets/300/293679.pdf>.

²⁰ Françoise Carré, *(In)dependent Contractor Misclassification*, Econ. Pol’y Inst. (2015), <http://www.epi.org/publication/independent-contractor-misclassification/>.

²¹ *Id.* at 2; see also Franco Ordonez & Mandy Locke, “Immigrants are Most Susceptible to Worker Misclassification,” *McClatchy Washington Bureau* (Sept. 5, 2014), <https://www.charlotteobserver.com/news/business/article9160514.html>.

²² Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, 91 Fed. Reg. 9932 (proposed Feb. 27, 2026) (to be codified at 29 C.F.R. pt. 500, 795, 825).

²³ Ismael Cid-Martinez, Nina Mast, Margaret Poydock, & Valerie Wilson, *Misclassifying workers as independent contractors is costly for workers and states*, Econ. Pol’y Inst. (2026), <https://www.epi.org/publication/misclassifying-workers-as-independent-contractors-is-costly-for-workers-and-social-insurance-systems/>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See, e.g., 29 U.S.C. §§ 203(l), 212.

where some employees will be reclassified as independent contractors.²⁷ The proposal also claims that workers “often prize the autonomy and flexibility [independent contracting] work affords” them and on average receive more compensation than employees in similar roles.²⁸ However, a national study of “independent contractor” digital labor platform workers found that 1 in 7 earned less than the federal hourly minimum wage, and 30 percent of these digital platform workers received a Supplemental Nutrition Assistance Program (SNAP) benefit, compared to 15 percent of employees in comparable service-sector jobs.²⁹

Despite the proposal’s claims, the reality is that the Department’s proposal would lead to more widespread misclassification and more exploitation of workers.

The Department’s proposal could cost our economy billions of dollars while providing low-road employers with an opportunity to exploit their workers

Employers who misclassify their workers can also achieve significant labor cost savings—nearly 30 percent³⁰—by avoiding compliance with minimum wage and overtime obligations as well as payment of employment taxes and workers’ compensation premiums.³¹ This creates a competitive disadvantage for law-abiding businesses that properly classify their workers as employees and comply with FLSA requirements. In passing the FLSA, Congress also sought to eliminate the competitive advantage enjoyed by goods produced under substandard conditions.³² The Department’s proposal would undermine this goal.

This proposal could also impose a significant financial burden for federal, state, and local governments due to billions of dollars in lost tax revenues. According to a 2009 U.S. Government Accountability Office (GAO) report, which includes the most recent comprehensive estimate, the Internal Revenue Service (IRS) estimated that in 1984, roughly 15 percent of employers misclassified 3.4 million workers, costing the federal government \$1.6 billion in lost revenue³³ (\$5.1 billion in 2026 dollars). Nearly 60 percent of this lost revenue was attributable to misclassified workers failing to pay income taxes. Where employers rely on this proposal to misclassify their workers, state and local governments could see reduced revenues.

Misclassification also negatively impacts key labor insurance programs, such as unemployment insurance, workers’ compensation, and disability insurance systems. For example, the 2000

²⁷ Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, 91 Fed. Reg. 9932 (proposed Feb. 27, 2026) (to be codified at 29 C.F.R. pt. 500, 795, 825).

²⁸ *Id.*

²⁹ See Ben Zipperer, Celine McNicholas, Margaret Poydock, Daniel Schneider & Kristen Harknett, *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay*, Econ. Pol’y Inst. (June 2022), <https://www.epi.org/publication/gig-worker-survey/>.

³⁰ National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (Oct. 2020), <https://www.nelp.org/app/uploads/2017/12/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>.

³¹ Carré, *supra* note 20, at 4.

³² 29 U.S.C. § 202(a).

³³ GAO-09-717, *supra* note 19, at 10.

The Honorable Keith Sonderling

April 28, 2026

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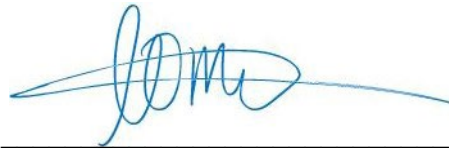
Department-commissioned study found nearly \$200 million in lost unemployment insurance tax revenue per year from 1990-1998 due to misclassification.³⁴ During that time, annually, an estimated 80,000 workers entitled to UI benefits were not receiving them. Just as in the previous rule, the Department fails to quantify or include any analysis on these potential impacts. Additionally, at the state level, social insurance programs can lose hundreds to thousands of dollars annually per misclassified worker, estimated to be as much as \$3,045 per worker in some cases.³⁵

For these reasons, we strongly urge the Department to withdraw its harmful proposal.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Ranking Member



ILHAN OMAR
Ranking Member
Subcommittee on Workforce Protections

³⁴ De Silva, *supra* note 17.

³⁵ Cid-Martinez, *supra* note 23.