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Wage and Hour Division
U.S. Department of Labor
Room S-3502
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Submitted via www.regulations.gov

RE: RIN 1235-AA34, Independent Contractor Status Under the Fair Labor Standards Act

Dear Ms. DeBisschop:

The National Women's Law Center opposes the Department of Labor's ("the Department") proposed rulemaking that attempts to rewrite the definition of "employ" under the Fair Labor Standards Act ("FLSA" or "the Act"). The Department's proposed test to distinguish between employee and independent contractor status ignores the plain language of the FLSA's definition of "employ" and contravenes U.S. Supreme Court and federal circuit court authority interpreting the Act—and it would especially harm people working in low-paid jobs who need the protections of the FLSA the most. We urge the Department to withdraw this proposed interpretive rule.

Since 1972, the National Women's Law Center ("the Center" or "NWLC") has worked to remove barriers based on gender, to open opportunities for women and girls, and to help women and their families lead economically secure, healthy, and fulfilled lives. The Center advocates for improvement and enforcement of our nation's employment and civil rights laws, with a particular focus on the needs of women with low incomes and their families, women and girls of color, and others who face historic and systemic barriers to equality and economic security.

Today, in the midst of a devastating recession induced by the COVID-19 pandemic, millions of people—disproportionately women and people of color—are out of work.[1] Many previously held low-paying service sector jobs and now find themselves in a still more precarious economic position, with even less bargaining power as they search for new employment.[2] Against this backdrop, it is critically important that the Department adhere to its mission to protect the interests of "the wage earners, job seekers, and retirees of the United States," not their corporate employers, and to "improve working conditions," not accelerate a race to the bottom. Yet the Department's proposed rule would make it easier for companies to unilaterally impose independent contracting arrangements, evading responsibility for the working

[1] *See generally Women on the Front Lines: Tracking Women's Employment in the COVID-19 Crisis,* NAT'L WOMEN'S LAW CTR. (NWLC), https://nwlc.org/resources/women-on-the-front-lines-tracking-womens-employment-in-the-covid-19-crisis/. *See also, e.g.,* Chad Stone, *Robust Unemployment Insurance, Other Relief Needed to Mitigate Racial and Ethnic Unemployment Disparities*, CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 2020), https://www.cbpp.org/sites/default/files/atoms/files/8-5-20econ.pdf; Bureau of Labor Statistics, *The Employment Situation – September 2020,* U.S. DEP'T OF LABOR 2, 7 (Oct. 2020), https://www.bls.gov/news.release/pdf/empsit.pdf (showing higher unemployment rates for Black, Latinx, and Asian workers than for white workers).

[2] *See, e.g.*, *Tracking the COVID-19's Recession's Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and (last updated Oct. 21, 2020) (showing lowest-paying industries accounted for 50 percent of jobs lost from February to September 2020).

people who create corporate profits and depriving them of the basic protections the FLSA guarantees. While this will harm a broad range of workers, it will inflict the most damage on women and people of color who predominate in the low-paying jobs where independent contractor misclassification is common—including the people cleaning homes and buildings, caring for children and elderly individuals, delivering groceries, and providing other essential services that are protecting the public health and keeping our economy afloat during the pandemic.

I. The proposed rule is contrary to the FLSA's broad "suffer or permit" standard, Supreme Court authority, and statutory intent.

As the Department explained in its 2015 Administrator's Interpretation (AI) on independent contractor coverage, "most workers are employees under the FLSA."[3] To identify those workers who are in fact not employees but independent contractors under the Act, the central inquiry—as the Department affirms both in the 2015 AI and the present NPRM, along with extensive prior guidance—is whether, as a matter of economic reality, the worker is economically dependent on the employer (and thus an employee) or in business for him- or herself (and thus an independent contractor).[4] But while the Department correctly frames the question, the skewed version of the "economic realities" test it puts forward in this rulemaking is not designed to correctly answer it—and it is inconsistent with both the FLSA's definition of "employ" and with decades of U.S. Supreme Court and federal circuit court authority interpreting the Act.

When Congress in the FLSA defined "employ" to "include" "to suffer or permit to work," [5] it included within its scope of coverage not only work relationships that aligned with the traditional common-law definition of employment, but also those that fell within the very broad concepts of "suffering" or "permitting" work to be done.[6] This definition is of "striking breadth,"[7] by design: as the Supreme Court described in *Roland Electric Co. v. Walling,* the purpose of the FLSA—i.e., "to eliminate substandard labor conditions, including child labor, on a wide scale throughout the nation"—"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."[8]

The Department is trying to impermissibly narrow this definition by proposing a restrictive interpretation of the long-accepted "economic realities" test. The Department's proposal cites—but does not follow—the test approved in *U.S. v. Silk*,[9] a Social Security Act case that first established the analysis aimed at determining whether a person is in business for themselves and therefore independent, or works instead in the business of another and is dependent on that business for work. The factors considered by this test include:

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[3] U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who are Misclassified as Independent Contractors (July 15, 2015), https://www.blr.com/html_email/ai2015-1.pdf.

[4] *See id.* and Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60,600, 60,604 n.5 (proposed Sept. 25, 2020) (to be codified at 29 C.F.R. pts. 780, 788, 795).

[5] 29 U.S.C. § 203(g).

[6] See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947).

[7] *Barfield v. N.Y.C. Health & Hosps. Corp.,* 537 F.3d 132, 141 (2d Cir. 2008) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992)). The "suffer or permit to work" definition of employment is "the broadest definition that has ever been included in any one act." *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting 81 CONG. REC. 7657 (1937) (statement of Sen. Hugo Black)). *See also Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947) ("This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category."); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 325-26 (1992) (noting the unique definitions in the FLSA, rejecting the common law standard for that Act, and requiring that it be applied broadly).

[8] 326 U.S. 657, 669-70 (1946). *See also Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (quoting *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 516 (1950)); *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (quoting *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984)); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058 (2d Cir. 1988).

[9] 331 U.S. 704 (1947).

(1) the degree of control exercised by the employer over the workers;

(2) the workers' opportunity for profit or loss and their investment in the business;

(3) the degree of skill and independent initiative required to perform the work;

(4) the permanence or duration of the working relationship, and

(5) the extent to which the work is an integral part of the employer's business.[10]

None of these enumerated factors alone is controlling nor is this list of relevant factors exhaustive, according to the Supreme Court.[11] The fact of *Silk* itself make this clear. Notably, the coal workers in *Silk* found to be employees provided their own tools, and many came to the worksite intermittently, "work[ing] when they wish[ed]."[12] They also worked for competitor businesses and invested in their own operations.[13] None of those factors alone was determinative. The economic reality of the coal workers' work, by the totality of the circumstances, demonstrated that the workers were employees.

The conclusion of the Supreme Court in *Silk*, adopted in the FLSA case *Rutherford Food Corp. v. McComb*, that "the determination of the [employer-employee] relationship does not depend on . . . isolated factors but rather upon the circumstances of the whole activity,"[14] has been part of the FLSA's scheme since 1947.[15] All federal circuits analyzing which workers are covered by the FLSA use the *Silk/Rutherford* test or some variation, with some adding factors deemed relevant to the ultimate question of whether the worker is truly running a separate business.

Every federal Court of Appeals that has looked at the issue of employee status under FLSA has said that the economic reality test is meant to be expansive.[16] Courts have also criticized attempts to emphasize one factor over the others. For example, the Second Circuit has held that the right to control by the employer is only one factor in the economic reality test, and that a "full inquiry into the true economic reality is necessary,"[17] while the Third Circuit has similarly reversed decisions that "misapplied and *overemphasized* the right-to-control factor."[18]

The case law thus provides no support for the approach the Department takes in this rulemaking, which arbitrarily narrows the factors to be considered in the determination of employment status and gives undue weight to two of them, largely reducing the economic realities test to two narrow super-factors: individual control over the work and opportunity for profit or loss. As a result, the Department is proposing to constrict the FLSA's broad coverage in a way that breaks from binding precedent and will undermine its statutory purpose.

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[10] *Id. a*t 716.

[11] *Id.*

[12] *Id.* at 706, 716-18.

[13] *Id*. at 707 (noting the workers "may and did haul for others when they pleased" and "pay all the expenses of operating their trucks").

[14] 331 U.S. 722, 730 (1947).

[15] The Supreme Court has held that "[a]ll [its] interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015).

[16] *See*, *e.g.*, *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985) ("[C]ourts should examine the circumstances of the whole activity . . . .") (quotation marks omitted) (citing *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981)); *Brock v. Superior Care*, 840 F.2d 1054, 1059 (2d Cir. 1988) ("[T]he test concerns the totality of the circumstances, . . . and mechanical application of the test is to be avoided."); *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 380 (5th Cir. 2019) ("[O]bviously, the [economic reality test] factors should not be applied mechanically.") (internal quotation marks omitted).

[17] *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 13–14 (2d Cir. 1984) (reversing district court decision that focused exclusively on control in FLSA employee dispute); *accord Watson v. Graves*, 909 F.2d 1549, 1554 (5th Cir. 1990) ("[T]he second circuit stated that the degree of control exercised . . . is only one factor in determining employee status under FLSA").

[18] *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1384-86 (3d Cir. 1985) (reversing decision that homeworkers were independent contractors because lower "court did not apply two other factors [permanence and whether the service is an integral part of the business]," leading to an erroneous conclusion under the FLSA) (emphasis added).

This is a substantial and inadequately explained departure from the Department's own AI in 2015, which stated: "the FLSA covers workers of an employer even if the employer does not exercise the requisite control over the workers, assuming the workers are economically dependent on the employer," and "the "control" factor should not play an oversized role in the analysis of whether a worker is an employee or an independent contractor."[19] Moreover, under the Department's proposal, the "control" factor is not only given outsized importance, but the concept of control itself is impermissibly narrowed. As discussed above, the FLSA's "suffer or permit to work" standard classifies a broader range of work arrangements as employer-employee relationships than the common law definition of "employ," and thus the common-law test has never limited the scope of FLSA accountability. Yet even the common law test for employment considers whether the alleged "employer" has the "*right* to control the manner and means by which the product is accomplished."[20]

The proposed rule, however, defines control more narrowly than the common law, the reverse of the broader coverage contemplated by the "suffer or permit to work" standard. In *Community for Creative Non-Violence v. Reid,* the Supreme Court referenced a non-exhaustive list of common law factors to determine an employer's "right to control," including the skill required for the work; the source of the requisite tools; the location of the work; the duration of the relationship between the parties; the extent of the hired party's discretion over when and how long to work, and their role in hiring and paying assistants; whether the work is "part of the regular business of the hiring party," and "whether the hiring party is in business"; whether the hiring party has the right to assign additional projects to the hired party; and the method of payment, provision of employee benefits, and tax treatment of the hired party.[21]

The Department's proposal bars consideration of many of these factors.[22] Instead, the Department restricts its factors even more tightly than the common law, by focusing on control over work exercised by the *individual worker*, as opposed to the *right to control* by an *employer*, and defining control primarily with reference to considerations that are often disregarded as irrelevant by the courts. Namely, the NPRM cites "setting his or her own work schedule, choosing assignments, working with little or no supervision, and being able to work for others, including a potential employer's competitors" as examples of an individual's "substantial control" over their work. Yet this would ignore the many decisions in which workers who were found to be *employees* under FLSA had the ability to set their own schedules,[23]

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[19] U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who are Misclassified as Independent Contractors (July 15, 2015), https://www.blr.com/html_email/ai2015-1.pdf (also affirming that "[t]he 'control' factor, for example, should not be given undue weight," and "all possibly relevant factors should be considered, and cases must not be evaluated based on the control factor alone.").

[20] *Cmty. for Creative Non-Violence v. Reid,* 490 U.S. 730, 751-52 (1989).

[21] *Id.*

[22] *See* 85 Fed. Reg. 60,600, 60,612-13, 60,639 (Sept. 25, 2020) (to be codified at 29 C.F.R. pts. 780, 788, 795).

[23] *See*, *e.g.*, *Razak v. Uber Techs., Inc.*, 951 F.3d 137 (3d Cir. 2020) (reversing summary judgment and finding disputed issues of material fact about plaintiffs UberBLACK drivers' classification even where it is undisputed that drivers are free to choose their work schedule); *Walling v. Twyeffort, Inc*., 158 F.2d 944 (2d Cir. 1947) (holding that workers who set their own schedules were employees); *Hill v. Cobb*, No. 3:13–CV–045–SA–SAA, 2014 WL 3810226 (N.D. Miss. Aug. 1, 2014) (holding that workers were employees, even though they had no specific hours or schedule and could "come and go as [they] pleased"); *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989) (holding that cake decorators were employees of bakery, when the decorators had some flexibility in their work schedules as well as choice of hours and which cakes to decorate, because flexibility over work hours is common to many businesses and was not, alone, significant); *Doty v. Elias*, 733 F.2d 720 (10th Cir. 1984) (holding that the waiters' relatively flexible work schedules, alone, did not make the workers independent contractors rather than employees); *Hill v. Cobb*, No. 3:13–CV–045–SA–SAA, 2014 WL 3810226 (N.D. Miss. Aug. 1, 2014) (holding that workers were employees even though they had no specific hours or schedule and could "come and go as [they] pleased").

choose assignments,[24] work with little or no supervision,[25] and work for others.[26] The Department's proposed test also ignores factors that are highly relevant to the inquiry into whether one is in fact in business for oneself, such as whether the individual can pass along increased costs of a business to their customers, set the price for their services, and/or has a business office, cards, or advertises. And it explicitly dismisses factors such as "[r]equiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms,"[27] when courts have regularly rejected arguments that external requirements imposed by the defendant company's customers are irrelevant to the right to control factor.[28] The NPRM thus narrows the FLSA test for employee coverage to something narrower than the common-law test, and does not allow for a fact-finder to determine the critical aspects of an employment relationship as required by the statute and established Supreme Court and Circuit case law.

As the Supreme Court recognized in *Silk*, the Social Security Act—and the Fair Labor Standards Act with it, as the Court has made clear[29]—was intended to be "an attack on recognized evils in our national economy."[30] The Court cautioned that "a constricted interpretation of the phrasing [of "employee" under the statute] would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation."[31] The Department's current NPRM is attempting to do exactly that. By constricting the multi-factor *Silk* test and placing unprecedented weight on two newly-narrowed factors, the Department's new rule will contradict the broad statutory intent and invite employers to create new structures to escape FLSA's coverage.

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[24] *See e.g.*, *Wilson v. Guardian Angel Nursing, Inc*., No. 3:07-0069, 2008 WL 2944661 (M.D. Tenn. July 31, 2008) (holding nurses were employees, even though they could accept or reject shifts); *Donovan v. Techo, Inc*., 642 F.2d 141, 143-44 (5th Cir. 1981) (holding worker was an employee, even though he could choose job assignments).

[25] *See, e.g.*, *Walling v. Twyeffort, Inc*., 158 F.2d 944, 947 (2d Cir. 1947) (finding tailors to be employees even though they were not supervised); *Donovan v. DialAmerica Marketing, Inc.,* 757 F.2d 1376, 1386 (3d Cir. 1985), *cert. denied,* 474 U.S. 919 (1985) (noting that homeworkers are consistently found to be employees under the FLSA even though they "are generally subject to little supervision and control by an alleged employer"); *McComb v. Homeworkers' Handicraft Coop.,* 176 F.2d 633, 637 (4th Cir. 1949) (holding homeworkers to be employees under FLSA, notwithstanding that they were paid on a piece work basis, and worked from their own homes without supervision or direction from the bag companies); *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 756 (9th Cir. 1979) (finding strawberry pickers employees under FLSA where the employer exercised little direct supervision over the farmworkers).

[26] *See*, *e.g.*, *United States v. Silk*, 331 U.S. 704, 707 (1947); *Walling*, 158 F.2d at 947 (holding tailors were employees even though they did tailoring work for other companies occasionally); *McLaughlin v. Seafood, Inc*., 867 F.2d 875, 877 (5th Cir. 1989) (holding seafood backers, pickers, and peelers were employees of a seafood processing plant, though the workers moved frequently from plant to plant and from employer to employer, and noting that "[e]ven if the freedom to work for multiple employers may provide something of a safety net, unless a worker possesses specialized and widely-demanded skills, that freedom is hardly the same as true economic independence").

[27] 85 Fed. Reg. 60639.

[28] *See, e.g., Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1316 (11th Cir. 2013) (explaining that the "economic reality inquiry requires us to examine the nature and degree of the alleged employer's control, not why the alleged employer exercised such control," and if "the nature of a business requires a company to exert control over workers to the extent that Knight has allegedly done, then that company must hire employees, not independent contractors"); *Amponsah v. DirecTV, LLC*, 278 F. Supp. 3d 1352, 1360 (N.D. Ga. 2017) (applying *Scantland* and rejecting defendant's argument that "strict installation standards and quality metrics" were irrelevant to analysis because such requirements "were aimed at customer satisfaction, not control of Plaintiffs"); *Flores v. Velocity Express, LLC*, 250 F. Supp. 2d 468, 480-86 (N.D. Cal. 2017) (finding that "control" factor favored employment status based on various job requirements imposed on defendant by customers); *Crouch v. Guardian Angel Nursing, Inc.*, 2009 U.S. Dist. LEXIS 103832, *59 (M.D. Tenn. Nov. 4, 2009) (rejecting defendants' contention "that because a certain amount of supervision is mandated by the state or by the home health agencies with which they contract, it somehow does not count toward the quantification of the degree of control exercised.").

[29] The rationale underlying the Social Security Act applies to the Fair Labor Standards Act, as both are "social legislation of the 1930's of the same general character." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1949).

[30] 331 U.S. at 712.

[31] *Id.*

The Department argues that its proposal will bring "certainty" and "predictability" to the economic reality test.[32] In fact, its proposed test creates more confusion by reidentifying relevant factors, re-describing the relevant facts to consider under long-standing tests, and failing to explain its departure from established precedents. The incredibly narrow proposed test leaves out many work relationships that are well within the long-understood scope of the FLSA's employment relationship. It impermissibly contravenes the intent of the Act and longstanding precedent, and will effectively permit employers to skirt their responsibilities under law.

II. The proposed rule threatens to undermine job quality and increase misclassification, especially for women and people of color.

Classification as an independent contractor requires workers to forego not only minimum wage and overtime protections, but also rights to important benefits, often including unemployment insurance and workers' compensation as well as employer-provided health insurance, retirement contributions, and more.[33] "In theory," as the Department explains, "companies would likely have to pay more per hour to independent contractors than to employees because independent contractors generally do not receive employer-provided benefits and have higher tax liabilities."[34] This theory, however, presumes a degree of bargaining power among workers that is rarely evident in lower-paid positions, especially during a recession; thus, in reality, this wage premium is unlikely to materialize for many independent contractors—and especially for people misclassified as independent contractors.[35]

Indeed, the Department's own analysis of 2017 Contingent Worker Supplement (CWS) data cited in the NPRM showed no statistically significant difference between hourly earnings of independent contractors and employees (after controlling for certain differences in worker characteristics such as race, sex, occupation, and education level).[36] Moreover, the Department did find that 2017 CWS data indicate that independent contractors are more likely than employees to report earning less than the federal minimum wage and to work overtime hours.[37] And further research reveals evidence of a pay *penalty* for independent contractors: a recent study in New York, for example, found that, within occupations, the wages of workers classified as independent contractors have fallen well behind their employee counterparts, who have benefited from the state's rising minimum wage. In New York's personal services sector—a sector dominated by women—minimum wage increases helped to raise inflation-adjusted annual earnings of employees by 24.5 percent between 2013 and 2018, compared to *a decline* in earnings of 3.9 percent for independent contractors in the sector.[38]

Even in its sparse analysis, the rulemaking record thus provides evidence of the consequences of misclassification for working people who are not, in fact, "in business for themselves": being stripped of FLSA protections without any additional compensation in exchange. Yet the test set forth in the proposed rule will make it easier for employers to claim that people who perform work for an employer upon whom they are economically dependent, and who lack meaningful flexibility, entrepreneurial opportunity, and

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[32] 85 Fed. Reg. at 60,600, 60,612.

[33] *See* 85 Fed. Reg. at 60,627-28. *See also, e.g.,* Sarah Leberstein & Catherine Ruckelshaus, *Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It*, NAT'L EMPLOYMENT LAW PROJECT (NELP) 3 (May 2016), https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf.

[34] 85 Fed. Reg. at 60,628.

[35] *See, e.g.*, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NELP 7 (Sept. 2017), https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf [hereinafter *Independent Contractor Misclassification*].

[36] 85 Fed. Reg. at 60,629.

[37] 85 Fed. Reg. at 60,630.

[38] Lina Moe, James A. Parrott & Jason Rochford, *The Magnitude of Low-Paid Gig and Independent Contract Work in New York State*, NEW SCHOOL CTR. FOR NEW YORK CITY AFFAIRS, (Feb. 2020), https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e424affd767af4f34c0d9a9/1581402883035/Feb112020_GigReport.pdf.

autonomy, are nonetheless independent contractors. And women and people of color face a particularly high risk of being forced to give up basic labor protections just to get or keep a job.

It is no coincidence that corporate misclassification is rampant in low-paid, labor-intensive industries, such as delivery services, janitorial services, agriculture, transportation, and home care and housekeeping, as well as in app-dispatched work.[39] Women and people of color, including Black, Latinx, and Asian American and Pacific Islander (AAPI) workers, are overrepresented in these occupations,[40] as they are in low-paid jobs more broadly.[41] In home care, for example, Black women, Latinas, and other women of color make up the majority of the workforce;[42] median wages are just over $12 per hour;[43] and employers often view classifying their workers as independent contractors as a strategy to achieve "attractive financial returns," notwithstanding numerous court decisions affirming that home care workers are employees.[44] All workers who are misclassified suffer from a lack of workplace protections, but women, people of color, and immigrants face unique barriers to economic security and disproportionately must accept low-paid, unsafe, and insecure working conditions. And in times of high unemployment like today, individual workers have even less market power than usual to demand fair conditions, especially in jobs that historically have been undervalued and therefore underpaid.[45]

The proposed rule threatens to exacerbate these harms by allowing employers to take advantage of economic trends, technological developments, and lax regulation to shirk responsibility for ever larger numbers of workers. The last decade has seen the emergence of digital labor platform companies, like Uber, that straddle the technology sector and various service sectors. The vast majority of these companies use digital technologies to dispatch workers and closely control their work—for example, unilaterally setting fee rates, dictating when and how workers interact with customers—while imposing take-it-or-leave-it independent contractor agreements on their workforce.[46] Operational in sectors already prone to independent contractor misclassification, like delivery, digital labor platform companies are also emerging in sectors like retail[47] and food service,[48] in which the majority of the workforce historically has been engaged as payroll employees. According to the latest estimates, labor platform workers comprise only a small share (about one percent) of the U.S. workforce.[49] But in many cities, that share is likely larger: a recent analysis found that if Uber classified its drivers as employees, it

[39] *Independent Contractor Misclassification*, *supra* note 35.

[40] Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 924 (2017) (finding that "seven of the eight high misclassification occupations were held disproportionately by women and/or workers of color").

[41] *See, e.g., When Hard Work Is Not Enough: Women in Low-Paid Jobs*, NWLC (Apr. 2020), https://nwlc.org/resources/when-hard-work-is-not-enough-women-in-low-paid-jobs/.

[42] *Direct Care Workers in the United States*, PHI 6 (Sept. 8, 2020), *available at* https://phinational.org/national-resource-center/resource/direct-care-workers-in-the-united-states-key-facts/.

[43] *Id.* at 9.

[44] *Independent Contractor Misclassification in Home Care*, NELP 1-3 (May 2015), https://s27147.pcdn.co/wp-content/uploads/Home-Care-Misclassification-Fact-Sheet.pdf.

[45] *See Independent Contractor Misclassification*, *supra* note 35.

[46] *See generally* Rebecca Smith & Sarah Leberstein, *Rights On Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy*, NELP (Sept. 2015), https://s27147.pcdn.co/wp-content/uploads/Rights-On-Demand-Report.pdf.

[47] Josh Constine, *How Jyve Secretly Raised $35M & Built a $400M Retail Gig Economy,* TECHCRUNCH (Jan. 24, 2019, 12:01 PM), https://techcrunch.com/2019/01/24/jyve-jobs/.

[48] Richard Morgan, *Apps Have Turned Restaurant Work into a Gig-Economy Hustle. Here's How One Cook Chases a Paycheck*, WASH. POST (Feb. 25, 2020, 8:00 AM), https://www.washingtonpost.com/lifestyle/food/apps-have-turned-restaurant-work-into-a-gig-economy-hustle-heres-how-one-cook-chases-a-paycheck/2020/02/24/1f02ee5c-54a8-11ea-9e47-59804be1dcfb_story.html.

[49] U.S. Dep't of Labor, Bureau of Labor Statistics, *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, MONTHLY LABOR REV. (Sept. 2018), https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-thecontingent-worker-supplement.htm.

would be the single largest private-sector employer in New York City.[50] In digital labor platform work, Black and Latinx workers are overrepresented by 45 percent—more than in traditional misclassification-prone sectors.[51]

The Department's proposal to re-envision the FLSA's economic realities test discards many factors relevant to the determination of whether an individual is economically dependent upon an employer and selectively grants excessive weight to others, including control over one's schedule and ability to work for more than one company. In so doing, the Department is unlikely to help courts or employers accurately assess whether an individual is in fact in business for his- or herself, but is highly likely to help Uber and many other corporations increase their power and profits by continuing to misclassify their workforces as independent contractors.

III. The proposed rule will reduce access to FLSA protections that are particularly important for women.

While most commonly associated with minimum wages and overtime pay, the Fair Labor Standards Act also contains provisions that are centered on ensuring that women are treated equally at work, including employer obligations to accommodate breastfeeding workers, protections against pay discrimination, and new rights to paid sick days and paid leave. Because these protections are granted to employees under the FLSA, weakening the FLSA's test for independent contractor status through this NPRM threatens to make it significantly more difficult for working women to assert their rights under these provisions.

A. *Break time for nursing mothers*

Without access to a clean, private and safe place to express breastmilk, nursing mothers can face painful infections and illness, as well as a diminished milk supply, while their babies can be forced to wean earlier than is recommended by doctors.[52] The Affordable Care Act thus amended the FLSA to require employers to "provide reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk.'" Employers are also required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."[53]

These protections, however, are only guaranteed to employees who are not exempt from overtime pay under the FLSA.[54] Millions of women of childbearing age are already excluded from the break time provisions as a result.[55] The Department's proposed test threatens to exclude many more by encouraging misclassification of employees as independent contractors and empowering employers to deny responsibility for providing appropriate facilities and adequate break time for nursing mothers in their workforce.

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[50] James A. Parrott & Michael Reich, *An Earnings Standard for New York City's App-Based Drivers: Economic Analysis and Policy Assessment, Report for the New York City Taxi and Limousine Commission*, NEW SCHOOL CTR. FOR N.Y.C. AFFAIRS (July 2018), https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a3aaa0e2e72ca74079142/1530542764109/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jul1.pdf.

[51] U.S. Dep't of Labor, Bureau of Labor Statistics, *supra* note 50.

[52] *See* Wage & Hour Div., *Fact Sheet #73: Break Time for Nursing Mothers under the FLSA,* U.S. DEP'T OF LABOR, (Apr. 2018), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs73.pdf.

[53] *See id.*

[54] *See* 29 U.S.C. §§ 207(r), 213.

[55] Morris, et al., *Exposed: Discrimination Against Breastfeeding Workers*, CTR. FOR WORKLIFE LAW, 25-28 (2018), https://www.pregnantatwork.org/wp-content/uploads/WLL-Breastfeeding-Discrimination-Report.pdf; Heidi Shierholz, *Millions of Working Women of Childbearing Age Are Not Included in Protections for Nursing Mothers*, ECON. POLICY INST.: WORKING ECON. BLOG (Dec. 10, 2018), https://www.epi.org/blog/break-time-for-nursing-mothers/.

B. *Equal Pay Act protections*

The Equal Pay Act of 1963 (EPA), which is part of the FLSA and is administered and enforced by the EEOC, makes it illegal for employers to pay unequal wages to men and women employees who perform substantially equal work in the same establishment.[56] Although the EPA has been in place for more than 50 years, women still face significant pay disparities. Today, women typically make only 82 cents for every dollar made by men, and the gaps are significantly worse for many women of color.[57] Black women working full time, year round typically make only 63 cents for every dollar paid to their white, non-Hispanic male counterparts.[58] For Latinas this figure is only 55 cents, for Native Hawaiian and Pacific Islander women it is 63 cents, and for Native American women it is 60 cents. And while Asian women working full time, year round are typically paid 87 cents for every dollar paid to their white, non-Hispanic male counterparts, the wage gap is substantially larger for some subgroups of Asian women.[59] Pay discrimination between men and women doing equal work is a significant driver of these gaps.[60]

The EPA is a critical tool for addressing pay discrimination. Unlike Title VII, it does not require workers to prove intentional discrimination; the burden is on the employer to defend a pay disparity between men and women. But pay discrimination is very difficult to detect and challenge because pay information is frequently cloaked in secrecy, whether by custom or (often illegal) employer prohibition. Pay secrecy helps create and perpetuate wage gaps and pay discrimination, and makes it more challenging for workers to pursue successful claims and redress pursuant to the EPA.

The EPA regulations explicitly require the application of the economic realities test and not the control test to determine employee status.[61] Nevertheless, courts have taken various approaches to determining employee status in EPA claims, to the detriment of workers.[62] Making it more difficult to prove employee status under the FLSA raises a significant risk of hindering victims of pay discrimination in their efforts to hold their employers accountable for violations of the EPA.

C. *Paid sick days and paid leave under the Families First Coronavirus Response Act*

Paid sick days and paid family and medical leave are essential to enable working people to care for themselves and their families without sacrificing their paychecks—especially for women, who bear an outsized share of caregiving responsibilities in families. And these benefits take on heightened importance in a public health crisis, as Congress recognized in passing the Families First Coronavirus Response Act (FFCRA) in March.[63] The FFCRA provides eligible workers with up to two weeks of job-protected paid sick days for COVID-19 related reasons and up to 12 weeks of job-protected leave (10 of which are paid) to care for children whose school, child care provider or usual source of care is unavailable. These provisions provide many working people across the U.S. with a right to paid leave for

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[56] The Equal Pay Act of 1963, 19 U.S.C. § 206, https://www.eeoc.gov/laws/statutes/epa.cfm.

[57] *The Wage Gap: Who, How, Why, and What to Do*, NWLC (Sept. 2020), https://nwlc.org/wp-content/uploads/2019/09/Wage-Gap-Who-how.pdf.

[58] *Id.*

[59] *Id.*

[60] *See, e.g., id.* and Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends and Explanations* (Nat'l Bureau of Econ. Research Working Paper No. 21913, Jan. 2016), https://www.nber.org/system/files/working_papers/w21913/w21913.pdf.

[61] 29 C.F.R. § 1620.8.

[62] Although the EPA is a part of the Fair Labor Standards Act, many EPA claims are brought in conjunction with claims alleging other employment law violations, such as pay discrimination under Title VII. As such, courts evaluating these claims determine whether an employment relationship exists for the purposes of all claims brought, and thus may conflate the various employee status tests or only engage in an employee status analysis under one statute. *See, e.g., Hill v. Emergency Dental*, 2006 WL 1888657 (D. Neb. July 7, 2006) (only engaging in the Title VII employment status analysis where plaintiff brought both Title VII and EPA claims); *Carter v. Werner Enterprises, Inc.*, 2007 WL 9735940 (D.S.C. June 12, 2007) (using a "hybrid" test combining the factors considered under both statutes).

[63] Pub. L. No. 116-127, 134 Stat. 178 (2020).

the first time—but they also contain carve-outs and exemptions that have denied these protections to many more who need them.[64]

The Department's proposed rule threatens to exclude even more workers from vital protections under the FFCRA, which relies on the FLSA's definition of employment. While the FFCRA allows true independent contractors to claim tax credits to replace pay lost as a result of taking leave for covered reasons, only employees are guaranteed the right to take leave and protection from retaliation from doing so. Moreover, as a practical matter, a tax credit is more challenging to access than continued paychecks from one's employer—especially for people working in low-paid jobs who are newly (mis)classified as independent contractors and may not be aware of their employment status. Encouraging employers to classify a greater share of their workforce as independent contractors is thus likely to leave more working people without access to paid sick days or paid leave to care for their families during a devastating pandemic.[65]

IV. The Department of Labor has not met its responsibility to estimate the impact of its proposal or allow a robust public comment process.

Despite the Department's concessions that its proposal will likely encourage employers to classify a greater share of their workforce as independent contractors, it fails to provide sufficient economic analysis to quantify the costs of its proposal to working people. In so doing, the Department violates its responsibility as an executive agency to quantify costs and benefits of proposed regulations wherever possible[66]—and abandons its duty to the American public to ensure a transparent regulatory process that is fair, reasonable, and consistent with the law. The Economic Policy Institute, which conducted the type of analysis that the Department claims it cannot, estimates (conservatively) that, if finalized, this rule will cost workers more than $3.7 billion annually—due primarily to a transfer to employers of at least $3.3 billion in the form of reduced compensation, along with at least $400 million in new annual paperwork costs. Moreover, social insurance funds (Social Security, Medicare, Unemployment Insurance, and Workers' Compensation) would lose at least $750 million annually in the form of reduced employer contributions.[67]

The Department's failure to include a quantitative analysis of the costs and benefits of the proposed rule in its NPRM runs counter to standard practice and multiple rulemaking authorities. This failure alone could render the Department's actions arbitrary and capricious, in light of its duties to both consider and publicize the likely effect of the proposed rule on working people.[68] It is all the more galling given that the

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[64] *See generally* NWLC & Nat'l Partnership for Women & Families, *Expanding Paid Sick Days and Paid Family & Medical Leave in Response to COVID-19*, NWLC (April 2020), https://nwlc.org/wp-content/uploads/2020/04/paid-fmla-fs-1.pdf.

[65] The FFCRA emergency leave provisions are currently set to expire on December 31, 2020. The COVID-19 pandemic has no such expiration date. Congress and the president should extend and expand the FFCRA protections in light of the ongoing public health crisis, or employees and independent contractors alike will suffer. *See* NWLC & Nat'l Partnership for Women & Families, *supra* note 64.

[66] *See* Exec. Order 13,563, at § 1, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 21, 2011) ("[E]ach agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."); *see also* Exec. Order 12,866, at §§ 1(a), 1(b)(6), 6(a)(3)(C), *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993); White House Office of Mgmt. and Budget, Circular A-4, at 18-27 (Sept. 17, 2003).

[67] Heidi Shierholz, *EPI Comments on Independent Contractor Status Under the Fair Labor Standards Act,* ECON. POL'Y INST. (Oct. 26, 2020), https://www.epi.org/publication/epi-comments-on-independent-contractor-status-under-the-fair-labor-standards-act/.

[68] *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (explaining that "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy'") (quoting *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009)); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

Department is rushing this rule with a 30-day comment period,[69] allowing inadequate time for independent review, analysis, and feedback.[70]

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The Department of Labor has proposed a test for employment status under that FLSA that is both arbitrary and contrary to law. Like numerous recent rules promulgated by the Department and other agencies under the current administration, this proposal reflects a strategic effort to use the rulemaking process to weaken the ability of working people to hold employers accountable for illegal and exploitative behavior. It will create incentives for employers to contract away their legal duties and immunize themselves from responsibility for the workplace conditions they create—and will thereby degrade labor conditions, especially for women and people of color, shifting ever more economic risks to workers and depriving them of their statutory rights.

For these reasons, the National Women's Law Center opposes the proposed interpretive rule and urges the Department to withdraw it. Please do not hesitate to contact Julie Vogtman, Director of Job Quality & Senior Counsel (jvogtman@nwlc.org/202.588.5180), if you have questions or require additional information regarding these comments.

Sincerely,

Emily Martin
Vice President, Education & Workplace Justice

Julie Vogtman
Director of Job Quality & Senior Counsel

[69] The Department has already strayed from rulemaking requirements by providing for only a 30-day comment period, rather than the required 60-day comment period. Under section 2(b) of Executive Order 13563, Improving Regulation and Regulatory Review, the Department must "afford the public a meaningful opportunity to comment . . . with a comment period that should generally be at least 60 days."

[70] According to recent reports, the Department is attempting to finalize this rule before the end of the year. Ben Penn, *DOL Aims to Fast-Track Worker Classification Rule to 2020 Finish*, BLOOMBERG LAW (Jul. 2, 2020, 5:46 AM), https://news.bloomberglaw.com/daily-labor-report/dol-aims-to-fast-track-worker-classification-rule-to-2020-finish.