NATIONAL WOMEN'S LAW CENTER
Justice for Her. Justice for All.

1350 I STREET NW
SUITE 700
WASHINGTON, DC 20005
202-588-5180
NWLC.ORG

April 28, 2026

Submitted via https://www.regulations.gov/document/WHD-2026-0001-0001/comment

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

Re: 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 Director Navarrete:

The National Women's Law Center submits these comments in opposition to the Department of Labor's ("the Department") proposed rulemaking addressing "independent contractor" and "employee" status under the Fair Labor Standards Act ("FLSA"), the Family and Medical Leave Act ("FMLA") and the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), RIN 1235-AA46; Fed. Reg. Vol. 91, No. 39 (Feb. 27, 2026) ("NPRM"). 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 legal authority interpreting the Act. The proposal poses particular harm to women, people of color, and immigrants in low-paid jobs who need the protections of the FLSA, FMLA, and MSPA the most. We urge the Department to withdraw this proposed 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.

I. Introduction

Workers across the country are struggling to meet basic household expenses due to rising costs and a stagnant minimum wage. For women in particular, poverty rates are high, in part due to the wage gap and to the fact that women make up the majority of the lowest paying job categories.[1] For these workers, FLSA's minimum wage, overtime, equal pay, and breastfeeding protections, along with access to family and medical leave, and, for farmworker women, to MSPA's protections, are critically important. Against this backdrop, Department must adhere to its mission to protect the interests of workers and to improve wages and 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, thus evading responsibility for the working people who create corporate profits and depriving them of the basic protections the FLSA, FMLA and MSPA are intended to guarantee.

It is no coincidence that corporate misclassification is rampant in low-paid, labor-intensive industries, such as manicurist/pedicurists, customer service representatives, home care and housekeeping, janitorial services, and app-dispatched work,[2] among others. Because of occupational segregation and other labor market issues, women, people of color, and immigrants tend to be overrepresented in these occupations,[3] as they are in low-paid jobs more broadly.[4] Misclassification can happen in any occupation. However, because of occupational segregation and other labor market disparities, people of color, women, and immigrants—and people at the intersections of these categories—are more likely to be in occupations where misclassification is common.

The proposed rule's facilitation of increased misclassification will have broad impacts, as discussed in more detail below. 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 and protections against pay discrimination. Weakening the FLSA's test for independent contractor status through this NPRM threatens to take these rights from many workers by making it easier for employers to succeed in misclassifying their workers and depriving them of their workplace rights under FLSA. The same is true for access to leave under FMLA, a right that is particularly important to women given their significant share of

---

[1] *See, e.g., Hard Work Is Not Enough: Women in Low-Paid Jobs*, NWLC (July 2023), f.NWLC_Reports_HardWorkNotEnough_LowPaid_2023.pdf [hereinafter "*Hard Work*"].

[2] *See* Ismael Cid-Martinez, Nina Mast, Margaret Poydock, and Valerie Wilson, *Misclassifying Workers as Independent Contractors Is Costly for Workers and Social Insurance Systems*, Economic Policy Institute (April 15, 2026), https://files.epi.org/uploads/319535.pdf [*hereinafter "Misclassifying Workers"*]; *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.

[3] *See Misclassifying Workers* (noting "because of occupational segregation and other labor market disparities, people of color, women, and immigrants—and people at the intersections of these categories—are more likely to be in occupations where misclassification is common, such as most of the 11 occupations investigated in this analysis"); 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");

[4] *See, e.g., Hard Work, supra* at note 1.

caregiving in our society and the workplace discrimination that they face as a result. And finally, the MSPA protects agricultural workers, about a third of whom are women, and who are particularly vulnerable to workplace abuses. The MSPA was enacted with a broad scope and remedial purpose in mind, and in response to the failure of the Farm Labor Contract Registration Act of 1963[5] and to widespread concern about the living and working conditions of farmworkers.[6] MSPA not only provides oversight of labor contractors but includes multiple other protections, such as enabling workers to enforce their promised working arrangements, including pay, housing, and transportation.[7] Loss of these fundamental protections due to misclassification would be devastating to farmworkers.

II. The proposed rule is contrary to the FLSA's broad "suffer or permit" standard, legal authority, and statutory intent and should not be extended to FMLA and MSPA.

When Congress in the FLSA defined "employ" to "include" "to suffer or permit to work,"[8] 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.[9] This definition is of "striking breadth,"[10] 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."[11]

The Department is now trying impermissibly to narrow this definition by proposing a restrictive interpretation of the long-accepted "economic realities" test. The Department's proposal refers to—but does not follow—the test approved in *U.S. v. Silk*,[12] a Social Security Act case that first established the analysis and factors aimed at determining whether a person is in business for

---

[5] 29 U.S.C. § 1801 ("remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this Act; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers"). See also 1982 U.S.C.C.A.N. 4549 (noting that the Farm Labor Contract Registration Act of 1963 had "failed to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers.").

[6] S*ee* Murrow, E. R., & Rather, D. (2005). *Harvest of shame.* Docurama.

[7] *See* 29 U.S.C. § 1801 et seq.

[8] 29 U.S.C. § 203(g).

[9] See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947). *See also* Bruce Goldstein, et al., Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment, 46 U.C.L.A. L. Rev. 983, 1094–95 (1999).

[10] *Chavez-Deremer v. Medical Staffing of America, LLC*, 147 F.4th 371, 384 (4th Cir. 2025) (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.");

[11] 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)).

[12] *U.S. v. Silk*, 331 U.S. 704 (1947).

themselves and therefore independent, or works instead in the business of another and is dependent on that business for work. None of the factors alone is controlling nor is the list of relevant factors exhaustive.[13] The facts 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]."[14] They also worked for competitor businesses and invested in their own operations.[15] 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,"[16] is integral to FLSA. Indeed, courts have 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] By constricting the multi-factor *Silk* test and placing undue weight on two factors above other equally important factors, the Department's proposed rule contradicts legal authority as well as statutory intent and narrows who is a covered employee under FLSA.

The Department argues that its proposal will bring certainty and predictability to the economic reality test.[19] To the contrary, its proposed test creates more confusion by recognizing the importance of the multi-factor test ("no one factor is determinative"), yet emphasizing two factors as the "primary considerations."[20] Rather than creating clarity, this proposal will result in even more confusion for the regulated community while effectively creating space for employers to misclassify workers and skirt their responsibilities under law.

In addition to impacting FLSA, the Department has proposed that its interpretation of whether workers are employees or independent contractors under FLSA also apply to FMLA and MSPA. These expansions warrant particular scrutiny. The Department failed to engage in cost-benefit analyses of these proposed expansions. Additionally, the Department acknowledges that it declined to extend the 2021 Rule to the FMLA and MSPA at that time because it preferred to

---

[13] *Id.*

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

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

[16] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947).

[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).

[19] 91 Fed. Reg. 9.932, 9939, 9947 (Feb. 27, 2026).

[20] 91 Fed. Reg at 9948.

"proceed incrementally."[21] The Department has not adequately explained what has changed to justify this expansion now, particularly given that the Department received no comments addressing MSPA during the 2024 rulemaking.[22]

This NPRM is contrary to legal authority and undermines Congressional intent for FLSA, the FMLA, and the MSPA and provides employers with a roadmap to degrade the quality of jobs across the country.

III. The proposed rule threatens to undermine workplace protections and increase misclassification, especially for women, immigrants and people of color.

Under the proposed rule, employers will more easily be able to misclassify employees as independent contractors. By elevating two factors above other equally important factors, the proposed rule fails to account for the economic realities of many working relationships and will narrow who is a covered employee under these three statutes. DOL's NPRM will enable misclassification schemes where employers will be able to reclassify their employees as independent contractors and evade their obligations under these laws.

A. Impact of misclassification on workers

Classification as an independent contractor requires workers to forego not only minimum wage, overtime, and equal pay protections, but also rights to other important benefits, such as employer-provided health insurance, paid leave, and retirement contributions.[23] The Department suggests that "independent contractors also tend to receive higher gross earnings than employees to offset tax, benefits, and other expenses;"[24] however, this presumption assumes a degree of bargaining power among workers that is rarely evident in lower-paid positions. Thus, this wage premium is unlikely to materialize for many independent contractors—and especially for people misclassified as independent contractors.[25] The reality for many workers is that being misclassified means significantly lower earnings due to loss of employment benefits and loss of wage protections under FLSA.[26] Indeed, some research reveals evidence of a pay *penalty* for independent contractors: a 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

---

[21] 91 Fed. Reg. 9,944.

[22] 91 Fed. Reg. at 9,938.

[23] *See* 91 Fed. Reg. at 9,968; *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.

[24] 91 Fed. Reg. at 9968.

[25] *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*].

[26] See Ismael Cid-Martinez, Nina Mast, Margaret Poydock, and Valerie Wilson, *Misclassifying Workers as Independent Contractors Is Costly for Workers and Social Insurance Systems*, Economic Policy Institute (April 15, 2026), https://files.epi.org/uploads/319535.pdf

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.[27]

Because of the proposed rule's inclusion of FMLA and MSPA, workers who are misclassified will also be at risk of losing those crucial protections. As discussed in more detail below, FMLA was designed to ensure workers have leave available to attend to critical family caregiving or medical needs without losing their jobs and to minimize sex discrimination impacting women in the workplace. The loss of these protections through misclassification will cause significant harm to workers.

Similarly, through the MSPA, Congress acted to protect farmworkers, some of the most vulnerable and lowest-paid workers in the economy. Our nation's farmworkers face a number of challenges—from the exclusion from key labor rights to the widespread violations of the few labor and employment rights they do possess.[28] Farmworker women face additional challenges, including widespread sexual harassment[29] and reproductive health concerns resulting from exposure to toxic pesticides. Key provisions of MSPA are intended to protect farmworkers from the abuses of farm labor contractors by requiring registration of labor contractors and ensuring that promised working arrangements, such as wages, housing, and transportation, are provided to migrant and seasonal workers, among other provisions. Yet this proposed rule would undermine Congressional intent and legal authority by enabling agribusiness to more easily misclassify farmworkers thus depriving them of these vital protections.

B. The proposed rule will reduce access to protections that are critical for the economic security of women

i. Break time for nursing mothers

Under the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act),[30] which updated the Break Time for Nursing Mothers law, FLSA requires employers of all sizes 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."[31] 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."[32]

---

[27] 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.

[28] *See, e.g.*, Daniel Costa and Philip Martin, "Record-Low Number of Federal Wage and Hour Investigations of Farms in 2022," Economic Policy Institute, August 22, 2023, https://www.epi.org/publication/record-low-farm-investigations/#full-report.

[29] *See, e.g.*, "Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment," Human Rights Watch, May 15, 2012, Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment | HRW.

[30] 29 U.S.C. 218d.

[31] *Id.*(a)(1).

[32] *Id.*(a)(2).

The Department's proposed test threatens to exclude many working mothers by encouraging misclassification of employees as independent contractors and empowering employers to deny responsibility for providing appropriate facilities and adequate break time for nursing parents in their workforce. The PUMP Act recognizes the importance of supporting working parents by requiring a time and place for pumping to help working parents be able to continue nursing their babies. Without access to a clean, private and safe place to express breastmilk, nursing parents can risk infections, as well as a diminished milk supply. Parents may also be forced to wean their babies earlier than is recommended by doctors given the many challenges ensuring an adequate milk supply.[33] Moreover, working parents could be forced to choose between job security and their baby's nutrition if they are not provided the time that they need to pump.

ii. 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.[34] Although the EPA has been in place for more than 50 years, women still face significant pay disparities. Today, women working full-time, year round are typically paid only 81 cents for every dollar paid to men, and the gaps are significantly worse for many women of color.[35] Black women working full time, year round are typically paid only 65 cents for every dollar paid to their white, non-Hispanic male counterparts.[36] For Latinas this figure is only 58 cents, and for Native American women it is 58 cents. And while Asian American, Native Hawaiian, and Pacific Islander women working full time, year round are typically paid 95 cents for every dollar paid to their white, non-Hispanic male counterparts, the wage gap is substantially larger for some subgroups of Asian women.[37] Notably, although the gender wage gap had been gradually narrowing for decades, "the data shows the wage gap widened from women being paid 84 cents for every dollar paid to men in 2022 to 83 in 2023 and has lowered further to 81 cents in 2024, the most recent data available. This widening marks the first statistically significant decline in the wage gap in two decades."[38] With a widening pay gap, the ability to enforce the Equal Pay Act is even more important in the current moment. The EPA is a critical tool for addressing pay discrimination. 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.

iii. Family and Medical Leave Act protections

The FMLA is crucial for working parents and their families—especially for women, who bear an outsized share of caregiving responsibilities in families. This law provides millions of

---

[33] *See, e.g.* Tara Haelle, "Women Who Have to Delay Pumping Risk Painful Engorgement," NPR, Women Who Have To Delay Pumping or Breast-Feeding Risk Painful Engorgement : Shots - Health News : NPR

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

[35] *A Window into the Wage Gap*, NWLC (Jan. 2026), 2026-Window-into-the-Wage-Gap-Factsheet.pdf

[36] *Id.*

[37] *Id.*; *see also* Jasmine Tucker and Sarah Javaid, "Some Asian American, Native Hawaiian, and Pacific Islander Women Lose More Than $1 Million Over a Lifetime to the Wage Gap," (NWLC, March 2024), *AANHPI-wage-gap-3.26.24v1.pdf*

[38] *A Window into the Wage Gap*, supra note 35.

workers the right to take unpaid leave from work without risking their jobs in order to care for a new child, to attend to their own illness, to care for family members who get sick, and to address certain caregiving and other needs arising from having a family member in the military. It is a critical lifeline to those workers who are eligible for and able to take leave, enabling them to fulfill caregiving responsibilities without having to choose between their jobs and their families and to take care of their own serious illnesses.[39] Additionally, the FMLA works to combat gender discrimination in the workplace by ensuring that women are not penalized due to sex-based stereotypes concerning their family and caregiving responsibilities.[40] The Department's proposed rule threatens to exclude even more workers from vital protections under the FMLA by extending its analysis for employment status under FLSA to FMLA.

* * *

The Department of Labor has proposed a test for employment status under FLSA, FMLA and MSPA that is both arbitrary and contrary to law. This rule will create incentives for employers to misclassify their workers and evade their legal responsibility for the workplace conditions they create—thereby leading to degraded labor conditions, especially for women, immigrants 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 rule and urges the Department to withdraw it.

Sincerely,

Adrienne DerVartanian

[39] Employees who take FMLA leave have reported positive impacts not only for themselves but also for the family members to whom they are providing care. *See* DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 2000 UPDATE 4-10–4-11 (Jan. 2001), *available at* http://www.dol.gov/whd/fmla/toc.htm.

[40] *See* 29 U.S.C. § 2601; *see also Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 728-30 (2003).