



Comments of the Regulatory Action Center

RE: Independent Contractor Status under the Fair Labor Standards Act

Regulation Identifier Number (RIN): 1235-AA43

December 13, 2022

The Regulatory Action Center at FreedomWorks Foundation is dedicated to educating Americans about the impact of government regulations on economic prosperity and individual liberty. FreedomWorks Foundation is committed to lowering the barrier between millions of FreedomWorks citizen activists and the rule-making process of government agencies to which they are entitled to contribute.

On behalf of our more than 5.7 million activists nationwide, FreedomWorks Foundation appreciates the opportunity to offer these comments regarding the notice and request for comments on the Independent Contractor proposed rule.

The rule provides guidelines for determining whether someone is an employee or independent contractor under the Fair Labor Standards Act (FLSA). Independent contractors are not employees under the FLSA and thus not subject to minimum wage, overtime pay, and recordkeeping requirements.

The 2021 Independent Contractor rule, promulgated in the Trump administration, aimed to bring clarity to the decades-long confusion in determining a worker's status by developing factors that focused on "economic dependence": Does the worker have control over important aspects of the work, e.g., schedule-setting and choosing projects? And does the worker have an opportunity for profit based on initiative or investment? While the rule listed three other factors for consideration, the rule made clear that if the questions of control and opportunity for profit are answered in the affirmative, the worker will almost always be considered an independent contractor.

The proposed rule would bring back uncertainty to the regulated community as to whether a worker is an employee or an independent contractor. The proposed rule would abandon the

[“clear articulation”](#) of the Trump rule, which provided predictability to businesses and encouraged innovation and flexibility in the economy.

DOL now argues that the Trump rule violated the FLSA and case law; that it would cause more confusion than clarity; and that it would harm workers and businesses that properly classify their workers.

Contrary to what DOL now claims, the 2021 rule was a well-reasoned implementation of the “economic reality” test, which Supreme Court decisions have made clear is the test for whether a worker is an employee or independent contractor. The 2021 rule offered extensive guidance to employers and prevented them from having to rely on patchwork, conflicting standards applied in various lower court decisions. As for harm to workers, many independent contractors choose to be independent contractors for various reasons: schedule flexibility, ability to select projects, and the opportunity to increase earnings by their own initiative. Forcing them to become employees not only deprives them of free choice but may also deprive them of their livelihoods.

For evidence that many workers want to be independent contractors, one need look no further than the backlash after California’s anti-independent contractor bill (AB 5) became law. First, California voters adopted Proposition 22, which carved out app-based drivers from the law; and the California legislature enacted AB 2257, which allowed a long list of professions to remain independent contractors. Many of the independent contractors were suffering serious economic harm from AB 5 and were faced with losing their livelihoods or moving out of California. Those who could afford to mount a lobbying campaign to get their professions excluded fared much better than others, who may be equally harmed. This is an egregious example of government picking winners and losers, which the 2021 Independent Contractor rule was designed to avoid by establishing widely-applicable guidelines for determining a worker’s status.

Businesses--particularly small businesses, who have suffered the brunt of the COVID-related economic devastation--may be able to reopen or expand only with the flexibility offered by hiring independent contractors. But in order to do that, businesses need the clear guidance the 2021 rule provided. And workers need not be locked into independent contractor status. According to the most recent Bureau of Labor Statistics [report](#), there are 10.3 million job openings in the United States. Workers who want to be employees rather than independent contractors have ample opportunities for employment. For those who want or need the flexibility or freedom that being an independent contractor allows, however, the government should not stand in the way.

Respectfully submitted,
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