NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE
275 Seventh Avenue, Suite 1506
New York, NY 10001-6860
Tel: (212) 633-6967
Fax: (212) 633-6371

VIA ELECTRONIC SUBMISSION
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October 26, 2020

Amy DeBisschop
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: Comments on RIN 1235-AA34: Independent Contractor Status Under the Fair Labor Standards Act

Dear Ms. DeBisschop:

The National Center for Law and Economic Justice ("NCLEJ") submits these comments on the Department of Labor's ("Department" or "DOL") Notice of Proposed Rulemaking ("NPRM") regarding the standard for determining who is a covered employee and who is an independent contractor under the Fair Labor Standards Act ("FLSA"). RIN 1235-AA34; Fed. Reg. Vol. 85, No. 187 (Sept. 25, 2020) ("NPRM").

NCLEJ advances economic justice and preserves fundamental rights for low-income families, individuals, communities, and organizations nationwide through impact litigation, policy advocacy, and support for grassroots organizing. We work to ensure that public benefits programs operate efficiently and fairly to serve those who are eligible and in need. Many among those we serve are low-wage workers—often people of color—who benefit from protective workers' rights statutes like the FLSA. Furthermore, because poverty disproportionately affects communities of color, immigrants, low-wage workers, and families headed by women, NCLEJ also advocates for racial justice, immigrant justice, workers' rights, and gender justice.

The DOL seeks to redefine the legal bounds of "employee" under the FLSA, in an attempt to make it more restrictive than intended. Through the guise of simplification, the DOL's NPRM would make it easier for employers to deem workers independent contractors, instead of employees. This would, in effect, deny workers vital benefits like health insurance and protections from unfair and exploitative workplace practices. For these reasons, along with those discussed below, NCLEJ asks the Department to withdraw this proposed rule.

I. Employers have attempted to avoid providing workers with necessary protections by misclassifying them as independent contractors.

According to the DOL itself, "[m]isclassified employees often are denied access to critical benefits and protections they are entitled to by law, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces."[1] Independent contractors are not entitled to these protections or benefits so many employers attempt to label their workers as such in order to avoid additional costs. Many misclassified workers are low-wage workers of color and often do not have the power to negotiate for these rights and benefits.[2] Misclassification is an issue that has led to various DOL interpretations, the creation of state task forces, and heated legal battles in recent years.[3]

While the Obama administration sought to curtail employee misclassification, the Trump administration has aimed to roll back these gains. Previously, the DOL created a Memorandum of Understanding, which was signed by more than half of the states, in an attempt to protect workers against misclassification and to bring employers in compliance with the law.[4] Additionally, the Obama administration published guidance in 2015 that supported an expansive interpretation of the FLSA and its definition of employee.[5] This guidance was withdrawn in 2017 by the DOL under the Trump administration, which later published an opinion letter in April 2019 finding a low-income gig worker to be an independent contractor.[6] The DOL's current proposed rule is in line with the Trump administration's attempts to narrow previous interpretations of the FLSA and to prevent workers from accessing benefits and rights.

Along with the federal government's memoranda of understanding, states have attempted to deal with the issue of misclassification through task forces that aim to bring employers in compliance with the law. As of August 2020, 28 states have created state task forces to deal with the issue of misclassification.[7] Based on trends found from studies based on state data, many misclassified workers make less than their employee counterparts.[8] The attention to worker

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[1] U.S. DEP'T OF LABOR, WAGE & HOUR DIV., *Misclassification of Employees as Independent Contractors*, https://www.dol.gov/agencies/whd/flsa/misclassification (last visited Oct. 21, 2020).

[2] *See* Rebecca Smith, Public Task Forces to Take on Employee Misclassification: Best Practices, at 3, NATIONAL EMPLOYMENT LAW PROJECT (Aug. 2020), https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Public-Task-Forces-Take-on-Employee-Misclassification-Updated-August-2020.pdf (last visited Oct. 21, 2020).

[3] *See generally id.*

[4] U.S. DEP'T OF LABOR, WAGE & HOUR DIV., *Misclassification of Employees as Independent Contractors--State Info.*, https://www.dol.gov/agencies/whd/state/misclassification (last visited Oct. 22, 2020); *see also* Smith, *supra* note 2 at 13 ("Since 2011, 45 states and the District of Columbia have entered into memoranda of understanding, partnership agreements, cooperative agreements, or common-interest agreements with the Department to facilitate state-federal agency information-sharing needed to identify and detect firms misclassifying workers.")

[5] 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 (2015), http://op.bna.com.s3.amazonaws.com/dlrcases.nsf/r%3FOpen%3dtrin-9yfk97.

[6] Jaclyn Diaz & Porter Wells, *Gig Workers Are Contractors, DOL Says in Latest Letter*, Bloomberg Law (Apr. 29, 2019, 10:51 AM), https://news.bloomberglaw.com/daily-labor-report/gig-economy-misclassification-addressed-by-labor-department; *see also* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., WHD Opinion Letter FLSA2019-6 (Apr. 29, 2019), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_04_29_06_FLSA.pdf.

[7] Smith, *supra* note 2 at 4.

[8] See Catherine Ruckelshaus & Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, at 7, NATIONAL EMPLOYMENT LAW PROJECT (Sept. 2017),

misclassification has led some to take their grievances to court.

Low-wage workers have also taken to litigation in order to obtain basic protections under the FLSA like minimum wage from employers who have attempted to deem them independent contractors. Recent high-profile employment law cases like California's *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903 (Cal. 2018), which supported a broader reading of California's constitutional "suffer or permit to work" provision to include delivery drivers, along with lawsuits against Uber and Lyft[9] have laid bare many employers' desires to treat workers as independent contractors. A lot of this work, like the aforementioned examples, has been done in more liberal states like California. But there has been work all across the country.

II. DOL's Notice of Proposed Rulemaking seeks to redefine employee, thus making it easier for employers to deem workers independent contractors.

Under its expansive statutory definitions of employment, the FLSA includes work relationships that were not within the traditional common-law definition of employment. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). The FLSA was passed to "lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions." *Rutherford,* 331 U.S. at 727; *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). The purpose of its broad definitions was to eliminate substandard labor conditions by expanding accountability for violations to include businesses that insert contractors in their structures. *Lauritzen*, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring). *See also Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1915) (Judge Learned Hand noting that employment statutes were meant to "upset the freedom of contract").

The Department's proposed interpretation is contrary to law because it ignores the plain language of the FLSA's definition of "employ," which "includes to suffer or permit to work," 29 U.S.C. §203(g), and ignores 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," it did what state child labor statutes had done: it included within its scope of coverage not only the common-law concept of "employ," but also the very broad concepts of "suffering" or "permitting" work to be done.

Contrary to this vision, DOL's newest NPRM, which aims to redefine longstanding judicial interpretation, will fuel a race to the bottom where employers will be able to reclassify their employees as independent contractors and evade minimum wage, overtime, and child labor laws. Judges will have more material to deny relief to shafted workers with the adoption of this new rule, despite its non-binding nature. While this will harm a broad array of workers, it will inflict the most damage on workers of color who predominate in the low-paying jobs where

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https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf (using, as an example, how a construction worker who would earn $31,200/year before taxes and would earn $10,660.80 if paid as an independent contractor, instead of $21,885.20 if they were paid as an employee.)

[9] Joel Rosenblatt, *Uber, Lyft Hit With Bombshell Driver Ruling as Key Vote Looms*, BLOOMBERG NEWS (Oct. 22, 2020, 11:45 PM), https://www.bloomberglaw.com/product/blaw/document/X4NFKEE4000000?bna_news_filter=true&jcsearch=BNA%252000000175534edef7a9f57bef40150003#jcite.

independent contractor misclassification is common. For these reasons, and because DOL's attempt to rewrite the definition of "employ" under the FLSA is contrary to controlling law, NCLEJ writes in opposition to this NPRM and urges DOL to withdraw this proposed interpretive rule.

III. NCLEJ constituents would be negatively affected by the promulgation of the proposed rule.

There is never a good time to undermine the FLSA and provide employers with a roadmap to degrade the quality of jobs across the country. But it is particularly offensive that the Department seeks to narrow its coverage of employees at a time of national economic peril, in addition to the COVID-19 pandemic. Corporate misclassification of employees as independent contractors is a pervasive practice in the low-wage economy today, and this rule would make it easier for companies to unilaterally impose these arrangements on workers.

NCLEJ partners with worker centers around the country whose members are vulnerable to misclassification. In New York, we work with the National Mobilization Against Sweatshops, the Chinese Staff and Workers Association, and the Flushing Workers Center, centers that organize workers across industries. Many of their members are delivery workers in New York City, whose employers attempt to evade the requirements of the FLSA by claiming the delivery workers are independent contractors. In the Twin Cities, we support the work of Centro de Trabajadores en la Lucha, whose members are construction workers similarly vulnerable to violations of their rights when employers fail to treat them as employees under the FLSA. In Florida and Vermont, we work with farmworkers in dairy and tomatoes whose employers attempt to foist FLSA compliance onto judgment-proof crew leaders and recruiters.

IV. Conclusion

In sum, the DOL should withdraw this proposed rule. Such an interpretation would lead to an arbitrary standard that creates incentives for employers to contract away their legal duties and immunize themselves from responsibility for the workplace conditions they have made. Such a standard would degrade workers' labor conditions, permit wage theft and unlawful child labor, and shift all economic risks to the workers, depriving them of their statutory rights.

It is no coincidence that corporate misclassification is rampant in low-wage, labor-intensive industries, such as delivery services, janitorial services, agriculture, transportation, and home care and housekeeping, as well as in app-dispatched work.[10] Women and people of color, including Black, Latino, and Asian workers, are overrepresented in these occupations.[11] 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-wage, unsafe, and insecure working conditions. And in times of high unemployment like today, individual workers have even less market power than

[10] *See* Ruckelshaus & Gao, *supra* note 8.
[11] *See* 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").

usual to demand fair conditions, especially in jobs that historically have been undervalued; they are forced to accept take-it-or-leave-it job conditions.[12]

NCLEJ appreciates the opportunity to comment on this proposed rule. If you have any questions regarding NCLEJ's comments, you may contact Senior Attorney Leah Lotto (lotto@nclej.org), Staff Attorney Katie Deabler (deabler@nclej.org), Staff Attorney Amy Maurer (maurer@nclej.org), and Penn Law Fellow Jarron McAllister (mcallister@nclej.org). Thank you for your consideration of our comments.

National Center for Law and Economic Justice

[12] *See* Ruckelshaus & Gao, *supra* note 8.