Women's Law Project

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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 Women's Law Project ("WLP") submits these comments in opposition to the Department of Labor's ("DOL") Notice of Proposed Rulemaking ("NPRM") proposing the adoption of a standard for determining who is a covered employee that will deprive workers of protections to which they are entitled under the Fair Labor Standards Act ("FLSA"). RIN 1235-AA34; Fed. Reg. Vol. 85, No. 187 (Sept. 25, 2020) ("NPRM").

The WLP is a non-profit, legal advocacy organization based in Pennsylvania that seeks to advance the legal, social, and economic status of all people regardless of gender through impact litigation, public policy advocacy, community education, and individual counseling. We prioritize advocacy to improve the economic status of women, particularly women of color, with an emphasis on low wage workers. We work to close the pay gap through advocacy to eradicate sex discrimination in wages, raise the minimum wage, and eliminate barriers that impede women's economic equality, including lack of paid leave and accommodations for pregnant and parenting workers as well as sexual harassment. These economic barriers disproportionately impact women of color.

We oppose the proposed rule because it is inconsistent with the objectives of the FLSA. By narrowing the test for "employee," the proposed rule will reduce the number of workers who benefit from the minimum wage, overtime, anti-discrimination protections, and lactation accommodations of the FLSA. It does so without recognizing the true economic realities of low-income workers or reducing harmful misclassification.

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It is particularly alarming to see the DOL pursue a strategy that will harm workers at this time. Workers have been succeeding in misclassification claims[1] and the proposed rules will have a negative impact on that progress. At the same time, the impact of the pandemic on workers, particularly low wage workers, women, and people of color, has been devastating to their finances and their health. The impact of this rule on already financially hurting workers could not come at a worse time.

A. The Proposed Rule Is Inconsistent With the FLSA's Underlying Policies and Definitions.

The FLSA was adopted to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . without substantially curtailing employment or earning power" and to ensure "all our able-bodied working men and women [receive] a fair day's pay for a fair day's work." 29 U.S.C. §202. The intent of the FLSA was to "lessen, so far as seemed then practicable . . . subnormal labor conditions." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947); *Secretary of Labor v. Lauritzen*, 835 F.2d 1529 at 1545 (7th Cir. 1987) (Easterbrook, J., concurring). Some scholars describe laws like the FLSA as intended to address the imbalance of power between employer and employee.[2]

The plain language of the FLSA's definitions reflects an interest in protecting a wide swath of workers. The term "employ" "includes to suffer or permit to work," 29 U.S.C. §203(g). The term "employee" means any individual employed by an employer and "employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee." *Id*. at §203(d) and (e)(1). When Congress adopted these definitions, 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.

Under its expansive statutory definitions of employment, courts interpreting the FLSA have included work relationships that were not within the traditional common-law definition of employment. *See e.g*., *Rutherford*, 331 U.S. at 729 (holding that slaughterhouse boners were employees even though they owned their own tools and were paid per hundredweight which they divided among themselves, because their work followed the usual path of an employee and was part of an integrated unit of production, highlighting the importance of considering circumstances of the whole activity rather than isolated factors); *see also Lauritzen*, 835 F.2d at 1532 (holding that migrant farm workers were employees even though they were compensated through a portion of the proceeds from the sale of the pickles that each worker harvested).

The proposed rule undermines the intent of the FLSA by narrowing the definition of "employee" in a way that will increase the classification of workers as independent contractors which will inappropriately deprive these workers of FLSA protections necessary to their financial stability. Instead of allowing the application of the five-part "economic realities" test to continue to be applied as a balancing test to be considered in the totality of the circumstances, the proposed

[1] Michael H. LeRoy, *Misclassification under the Fair Labor Standards Act: Court Rulings and Erosion of the Employment Relationships*, 2017 U. Chi. Legal F. 327, 338-339.
[2] Naomi B. Sunshine, *Employees As Price-Takers*, 22 Lewis & Clark L. Rev. 106, 108 (2018).

rule ranks the factors and gives greater weight to two factors identified as most probative—individual control over the work and opportunity for profit or loss—and reducing the value accorded to three factors—skill, permanence, and integration—without adequate explanation.[3]

In this framework, the objective of identifying truly independent contractors—workers who have a financially independent business—is lost.[4] The wealth of considerations taken into account to assess control is reduced to selection of one's schedule and ability to work for others, even though jobs with flexible schedules are also likely to include employer monitoring and control of performance subject to penalties as well as employer control of pay and pricing of product, factors unmentioned in the NPRM but highly probative in today's gig employee context.[5] Similarly, the second core factor identified by DOL is the opportunity for profit or loss, which is an elusive category, not a decisive one. For low-income individuals any "opportunity" written into a contract is unlikely to be real or taken up.[6] This factor "ignores any inequality of bargaining power between worker and employer as well as workers' economic vulnerability."[7]

The DOL's proposal will constrict the FLSA's broad coverage in a way that will undermine statutory intent. The harm already caused by the expansion of independent contractor classifications beyond financially autonomous businesses to encompass low wage workers without the means to replace the income and benefits lost to them by reclassification will be exacerbated by this rule.[8]

B. The Proposed Rule Deprives Workers of Access to The Equal Pay Act as a Remedy for Wage Discrimination.

By narrowing the definition of employee, the proposed rules will reduce the number of workers who can benefit from the Equal Pay Act, which is an integral part of the FLSA at 29 U.S.C. §206(d). Incredibly, the DOL proposed rule is silent as to the impact of the proposed regulation on worker access to the Equal Pay Act. An employer classification of a worker as an independent contractor under the FLSA is also likely to negatively impact access to additional federal, state, and local anti-discrimination laws that also exclude independent contractors, such as Title VII of the Civil Rights Act of 1963, the Americans with Disabilities Act, the Age Discrimination in Employment Act as well as rights accorded under the National Labor Relations Act, the Occupational Safety and Health Act, and the Family and Medical Leave Act.

The Proposed Rule will allow employers to *openly* discriminate against workers labeled as independent contractors because of their sex, religion or disability without fear of accountability. Sex discrimination, barred as to wages by the Equal Pay Act, is a systemic problem that persists

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[3] Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. Ill. U. L. Rev. 379, 417 (2019).
[4] *Id.* at 409-411 (discussing the ABC test and the origins of independent contractors as financially autonomous).
[5] Sunshine, *supra* note 2, at 130.
[6] *See, e.g., id.* (explaining that theoretical profit or loss might come down simply to "exposure to increases in gas prices").
[7] *Id.*
[8] John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving from a Common Law* Standard, 14 Hastings Bus. L.J. 1, 13 (2018).

in the form of large pay gaps between men and women, with larger gaps for people of color. Based on the annual median earnings of white men, white women made 77 percent, African American women made 61 percent, and Latina women made 53 percent of white men's total earnings.[9]

The prevalence of workplace discrimination demands the availability of statutory remedies, particularly for women. Workplace discrimination is generally more likely to affect women – specifically women of color. In a 2017 study, 53 percent of African American women, 40 percent of Latina women, and 40 percent of white women reported experiencing discrimination at work, compared to 22 percent of men.[10]

The number of complaints filed with the EEOC also reflects the need for statutory remedies. Although these complaints include only the numbers of individuals who were aware of the discrimination and able to challenge the discrimination without fear of reprisal and loss of livelihood, and do not include the Equal Pay Act lawsuits that have been filed, the numbers are compelling. In 2019, 1,117 Equal Pay Act charges were filed: 950 of these individuals asserted wage discrimination, 258 individuals asserted terms and conditions of employment discrimination, and 237 individuals asserted discriminatory discharge from employment.[11] There were 25,532 sex-based discrimination complaints in 2019; 1,973 of these individuals claimed discriminatory wages was an issue they faced.[12]

Wage discrimination on the basis of sex is particularly persistent in those jobs likely to be misclassified as independent contractors. In 2017, female personal care aides made 7.9 percent less than male personal care aides, female truck drivers made 27.0 percent less than male truck drivers, and female janitors and building cleaners made 16.2 percent less than male janitors.[13] This wage gap is consistent across the board, but is especially prevalent in low-wage jobs likely to be misclassified as independent contractors.[14] The proposed rule, if implemented, will deprive workers of access to remedies available to combat sex-based and wage discrimination.

C. The Proposed Rule Deprives Workers of Access to Lactation Accommodations and to the Public Health Benefits Arising from Lactation and Breastfeeding.

Employees reclassified as independent contractors pursuant to the Proposed Rule would also be deprived of the right to lactation accommodations currently codified at 29 U.S.C. §207(r) of the FLSA. This provision requires employers to provide "reasonable break time for an employee to express breast milk" and "[a] place, other than a bathroom, that is shielded from view and free

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[9] Ruqaiijah Yearby, *Internalized Oppression: The Impact of Gender and Racial Bias in Employment on the Health Status of Women of Color*, 49 Seton Hall L. Rev. 1037, 1043 (2019).
[10] *Id.* at 1049.
[11] U.S. Equal Employ. Opportunity Comm'n, *Equal Pay Act Charges FY 1997 – FY 2019*, https://www.eeoc.gov/statistics/equal-pay-act-charges-charges-filed-eeoc-includes-concurrent-charges-title-vii-adea-ada; U.S. Equal Employ. Opportunity Comm'n, *Bases by Issue (Charges filed with EEOC) FY 2010 – FY 2019*, https://www.eeoc.gov/statistics/bases-issue-charges-filed-eeoc-fy-2010-fy-2019.
[12] U.S. Equal Employ. Opportunity Comm'n, *Sex-Based Charges (Charges filed with EEOC) FY 1997 – FY 2019*, https://www.eeoc.gov/statistics/sex-based-charges-charges-filed-eeoc-fy-1997-fy-2019; LeRoy, *supra* note 11.
[13] Inst. For Women's Policy Research, *The Gender Wage Gap by Occupation 2017 and by Race and Ethnicity*, at 3-4 (2018), https://iwpr.org/wp-content/uploads/2020/08/C467_2018-Occupational-Wage-Gap.pdf.
[14] *See id.* at 2-4 ("Women earn less than men in each of the largest occupations for women.").

from intrusion from coworkers and the public, which may be used by an employee to express breast milk." 29 U.S.C. §207(r).

Denying these protections to employees misclassified as independent contractors would be detrimental to public health. Lactating employees who do not receive workplace accommodations are at risk of plugged ducts and serious infections of breast tissue.[15] Workplace lactation accommodations are also necessary for lactating employees—particularly those who may work long shifts—to continue producing breast milk for their children. Lactation and breastfeeding are associated with medical, economic, and social benefits for both mothers and children. For the child, breastfeeding is associated with lower risks of infectious diseases; infant mortality and Sudden Infant Death Syndrome (SIDS); and chronic conditions such as obesity, diabetes, and childhood leukemia and lymphoma.[16] For the mother, breastfeeding is associated with lower rates of postpartum depression; lower rates of child abuse and neglect; lower rates of chronic conditions, such as cardiovascular disease, diabetes, breast cancer, and ovarian cancer; and money saved that she might have otherwise spent on commercial formula.[17] For these reasons, among other health benefits, the American Academy of Pediatrics recommends that mothers breastfeed exclusively for six months and that breastfeeding should continue for "at least the first year and beyond," for "as long as mutually desired by mother and child."[18]

Losing access to lactation accommodations pursuant to the Proposed Rule due to misclassification of employees as independent contractors could result in grave public health consequences.

D. Instead of Reducing Misclassification, the Proposed Rule Encourages Misclassification.

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. Between 10 to 30 percent of employers misclassify their employees as independent contractors, which translates to several million potentially misclassified workers across the country.[19] In Pennsylvania, an estimated 9 percent of workers are misclassified as independent contractors.[20] Notably, of the eight jobs in which

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[15] *See generally* Sharon Mass, *Breast Pain: Engorgement, Nipple Pain and Mastitis*, 47 Clinical Obstetrics & Gynecology 676 (2004), https://journals.lww.com/clinicalobgyn/Citation/2004/09000/Breast_Pain__Engorgement,_Nipple_Pain_and_Mastitis.21.aspx

[16] *See* Am. Acad. of Pediatrics Section on Breastfeeding, *Breastfeeding and the Use of Human Milk*, 129 Pediatrics 827, 827-32 (2012), http://pediatrics.aappublications.org/content/pediatrics/129/3/e827.full.pdf.

[17] *See id.* at 831-32; U.S. Dep't of Health & Human Servs., *The Surgeon General's Call to Action to Support Breastfeeding* 3 (2011), https://www.ncbi.nlm.nih.gov/books/NBK52682/pdf/Bookshelf_NBK52682.pdf.

[18] Am. Acad. of Pediatrics Section on Breastfeeding, *supra* note 16, at 835.

[19] Nat'l Emp't L. Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* 2 (July 2015), https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Costs.pdf.

[20] Sheller Center for Social Justice, *Shortchanged: How Wage Theft Harms Pennsylvania's Workers and Economy*, Temple University Beasley School of Law (June 2015), https://www2.law.temple.edu/csj/cms/wp-content/uploads/2015/09/Wage-Theft-Report.pdf.

workers are most often misclassified as independent contractors, seven demonstrate overrepresentation of women or people of color in the workforce.[21] More generally, women and people of color are overrepresented in the low-wage workforce,[22] where misclassification is common.[23]

Misclassification allows employers to avoid the responsibilities of an employer-employee relationship and strips workers of valuable workplace protections.[24] Some so-called gig work is the result of employers engineering subcontract scenarios or other coercive schemes that hide the bottom line that workers are employees working 40 hours a week for one company.[25] While all workers suffer without workplace protections, women and people of color are disproportionately affected. These groups are more likely to be forced to accept unfair and unsafe working conditions due to economic insecurity and limited market power, a situation that is only exacerbated by the high unemployment and economic downturn of today. It is clear that, based on these realities, women and people of color will be disproportionately affected by the proposed rule.

Conclusion

DOL's proposed rule, if adopted, will encourage employers to misclassify employers as independent contractors in order to avoid minimum wage and overtime obligations and liability for discrimination. The impact will land squarely on low-income people, primarily women and people of color, who lack the resources to run financially independent businesses. This result runs afoul of the objective of the FLSA to ensure workers are provided with a standard of living that safeguards their health and well-being. We urge DOL to withdraw this proposed interpretive rule.

Respectfully,

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[21] Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 Minn. L. Rev. 907, 924 (2017), https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf.
[22] National Women's Law Center, *Low Wage Jobs are Women's Jobs* (August 2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/08/Low-Wage-Jobs-are-Womens-Jobs.pdf; Lori Latrice Martin, *Low-Wage Workers and the Myth of Post-Racialism*, 16 Loy. J. Pub. Int. L. 405 (2015).
[23] Catherine Ruckelshaus & Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, National Employment Law Project (Sept. 2017), https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf.
[24] David A. Pratt, NYU Review of Employee Benefits and Executive Compensation §10.06 (2016).
[25] Leroy, *supra* note 1 at 343.