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Comments on Worker Classification Proposed Rule for FLSA Purposes RIN 1235-AA43

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U.S. Department of Labor
Wage and Hour Division
Legislation and Interpretation
Division of Regulations
Room S-3502
200 Constitution Ave, NW
Washington DC 20210

Electronic Submission

Re: Comments on Worker Classification Proposed Rule for FLSA Purposes
RIN 1235-AA43

Dear Secretary Walsh,

We appreciate the opportunity to comment on the Department of Labor's recent proposal. Samantha Prince is an Assistant Professor of Law at Penn State Dickinson Law whose research and teaching has focused on worker classification, entrepreneurship, and app-based work. Taylor Haberle and Lauren Stahl, who have researched and have interest in these areas, join in these comments.

We write in our individual capacities to support the Department of Labor's proposal to rescind the 2021 rule that improperly narrowed the definition of workers covered under the Fair Labor Standards Act ("FLSA") and to reinstate the economic realities test. The currently proposed rule is a meaningful improvement, as it will provide workers and hiring entities with the guidance to which they are accustomed regarding worker classification. But it is not without its limits and should be a temporary solution.

Current Proposal

The current proposal which reinstates the economic realities test will crucially provide hiring entities with much-needed guidance and stability. The 'economic realities' test is consistent with Supreme Court precedent and reasonably comports with the Internal Revenue Service ("IRS")'s twenty-factor 'right-to-control' test. For this reason, it provides stability and some level of predictability for hiring entities and workers. The test has evolved over the years since 1947, and there is a profusion of precedent to provide guidance.

The Department's promulgation and subsequent withdrawal of the 2021 independent contractor rule created significant confusion and uncertainty. This area of the law and its discourse was further complicated by the Eastern District of Texas' decision to vacate the Department's withdrawal of the 2021

rule.[1] This regulatory quandary has been a disservice to workers and hiring entities alike. Small businesses, which disproportionately hire independent contractors, are severely ill-equipped to navigate this rapidly changing landscape.[2] Workers may also experience a heightened risk of misclassification when the Department rapidly alters its guidance. A return to the economic realities test provides a stable and well-understood benchmark.

The proposed rule is also a significant improvement from the 2021 independent contractor test. The 2021 test conceivably harmed companies that played by the rules, while advancing employers that took shortcuts that are allowed under the rule to misclassify their workers. The two probative factors of the 2021 test, control over work and opportunity for profit & loss, were inadequate measures of the true economic relationship between employer and worker.[3] The current proposal allows the Department to consider a wider range of facts and circumstances. Furthermore, the economic realities test is commonly understood, and there is significant case law to establish the boundaries of what constitutes an independent contractor. While imperfect, this should yield a more accurate classification of workers in the short term.

ABC Test

Other alternatives considered by the Department during the rulemaking process are inadequate. Notably, the Department considered adopting the ABC test. This standard has been adopted by at least twenty states and garners the support of many policy experts.[4] The test shows promise as a relatively straightforward approach that relies on three elements that must be met in order for a worker to be classified as an independent contractor. Adaptation of the test would also lead to the classification of many marginalized workers as employees because it presumes employee status unless the test's elements are proven.[5]

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[1] *Coalition for Workforce Innovation* v. *Walsh*, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022).

[2] *New Paychex Data Shows Independent Contractor Growth Outpaces Employee Hiring in Small Businesses*, https://www.prnewswire.com/news-releases/new-paychex-data-shows-independent-contractor-growth-outpaces-employee-hiring-in-small-businesses-300775712.html.

[3] *See* Samantha J. Prince, *The Shoe Is About to Drop for the Platform Economy: Understanding the Current Worker Classification Landscape in Preparation for a Changed World*, 52 UNIV. MEM. L. REV. 627, 677 (2022). SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3942057

[4] *See* Congressional Research Service, *Worker Classification: Employee Status Under the National Labor Relations Act, the Fair Labor Standards Act, and the ABC Test* (Apr. 20, 2021). https://crsreports.congress.gov/product/pdf/R/R46765/1; Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs in Round Holes*, 31 A.B.A. J. LAB. & EMP. L. 53, 60 (2015); *An Uber Ambivalence: Employee Status, Worker Perspectives, & Regulation in the Gig Economy* 5 (Legal Stud. Rsch. Paper Series, Working Paper No. 381, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3488009.

[5] Samantha J. Prince, *The AB5 Experiment – Should States Adopt California's Worker Classification Law?*, 11 AM. U. BUS. L. REV. 43 (2022). SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801265

Still, its usage results in "both over- and under-inclusiveness."[6] Over-inclusivity has led state legislatures to create broad occupational exemptions.[7] California's ABC test, by example, contains well over 100 occupational exemptions. And when there are exemptions to the ABC test, another test has to be implemented to test the exempted occupations—they are not automatically found to be independent contractors. This all gets complicated and is in large measure an issue with California's use of the ABC test.[8]

The federal adoption of the ABC test would almost certainly involve similar carveouts. Because these exemptions often include the most at-risk workers, the value of the rule is greatly diminished. Furthermore, the effects and effectiveness of the ABC test are not yet fully understood. The number of states using the ABC test proliferated due to its simplicity and presumption of employment; however, it is likely not the appropriate test for the Department or other federal agency's use.

In addition, there are numerous states that have chosen not to utilize the ABC test. For instance, in 2020, Virginia legislature considered whether to adopt the ABC test or the IRS twenty-factor test, and it chose the IRS test—a test that weighs factors but does not presume employment status. Other states recently adopted the IRS test as well. For now, the Department should retain the flexibility of using factors, such as those considered by the economic realities test, when considering a workers' classification.

Beyond the Economic Realities Test

Moving forward, the Department should consider a test that more thoughtfully considers the true economic reality of the worker/employer relationship, particularly when addressing app-based work. We suggest that this goal may be best accomplished by considering rules proposed by other jurisdictions.[9] The European Commission is currently considering a package of rules that aims to determine the nature of the relationship "primarily by the facts relating to the actual performance of work, taking into account the use of algorithms in the organization of platform work, irrespective of how the relationship is classified in any contractual arrangement that may have been agreed between the parties involved."[10] The proposed platform worker test includes five factors, and a worker is presumed to be an employee if at least two factors are met.[11] The EU Directive on Platform work looks at the labor relationship at a far more granular

[6] Tanya Goldman & David Weil, Who's Responsible Here? Establishing Responsibility in the Fissured Workplace (Inst. for New Econ. Thinking, Working Paper No. 114, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551446.
[7] Assemb. B. No. 5, § 2 (Cal. 2020) (adding LABOR CODE § 2750.3; effective Jan. 1, 2020).
[8] Prince, The AB5 Experiment *supra* note 5.
[9] For additional proposals, see Prince, The Shoe Is About to Drop for the Platform Economy *supra* note 3.
[10] Valerio De Stefano, *The EU Commission's proposal for a Directive on Platform Work: an overview* (Italian Labor Law e-Journal, 2022).
[11] The directive states that an app-based company controls the performance of work if two of the following are met: (1) effectively determining, or setting upper limits for the level of remuneration; (2) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work; (3) supervising the performance of work or verifying the quality of the results of the work including by electronic

level, including "the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks, or to use subcontractors or substitutes."[12]

This "primacy of facts" rule would require hiring entities and regulators to consider the substance of the relationship, instead of the form. Crucially, the EU rule urges members to look past the contractual agreement and instead examine how the work is actually performed and delivered. This is particularly relevant with app-based workers. Furthermore, the proposed EU rule includes more definitive and measurable factors than the economic realities test. For example, the EU directive asks whether "the person performing platform work [must] respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work," versus the Department's "nature and degree of control." Granted, the Department has provided voluminous guidance as to what constitutes "nature and degree of control;" however, this is precisely the problem with the test. In the current proposal, the Department names at least a dozen different considerations to examine when weighing just this one factor. This laundry list of intra-factor considerations makes it extremely challenging for hiring entities to reach a proper classification even when they act in good faith. And it certainly opens the door for abuse when hiring entities act improperly or illegally.

There are other international alternatives, as well. The United Kingdom utilizes a three-level system of worker classification, including an intermediate category of workers "who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else."[13] The intermediate category falls somewhere between a self-employed individual and an employee. These workers are entitled to some protections, including minimum wage, holiday pay, and participation in pension benefits.

The adoption of a similar system could result in a satisfactory compromise that reduces much of the controversy surrounding workers that hover in the 'grey area' of our binary employee/independent contractor system. Workers would secure the most essential benefits of employment, while still affording hiring entities some flexibility and cost-savings. Furthermore, a non-binary employment law system is not unprecedented in the United States. Current federal law already creates an intermediate class of workers, as it exempts workers in certain industries from specific rights and protections. Tipped employees do not enjoy the standard federal minimum wage, railroad workers are exempted from ERISA, and students on work study are excepted from Social Security. Still, if the Department considers creating an intermediate or additional category of worker, it needs to ensure that the benefits/protections required under such a category do not further perpetuate worker inequities including racial and gender inequalities.[14] The

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means; (4) effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes; (5) effectively restricting the possibility to build a client base or to perform work for any third party.

[12] *Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work*, at 8, COM (2021) 762 final (Dec. 9, 2021), https://ec.europa.eu/social/BlobServlet?docId=24992&langId=en.

[13] Uber BV v. Aslam [2021] UKSC 5, [71]–[72] (UK).

[14] Prince, The Shoe Is About to Drop for the Platform Economy *supra* note 3.

creation of an intermediate category could also open the door for new kinds of abuse if not implemented properly.

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While we currently support the immediate reinstatement of the economic realities test, we contend that the test is insufficient over the long haul. This test fails to adequately protect workers as they navigate the modern economy and app-based work. The economic realities test is inconsistent with the true spirit of the FLSA, as it permits courts and hiring entities to reach preordained conclusions when classifying workers. We urge the Department of Labor to only use the economic realities test as a temporary solution and to ultimately adopt a test that more thoroughly considers a worker's economic dependence upon their employer.

Respectfully,

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