

United States Senate

WASHINGTON, DC 20510

October 19, 2022

The Honorable Marty Walsh
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Secretary Walsh:

We write to commend the Department of Labor's Wage and Hour Division for undertaking a critical rulemaking on the misclassification of workers under the Fair Labor Standards Act (FLSA). This proposed rule will protect workers and high-road employers by ensuring that employees are not being misclassified as independent contractors and denied critical benefits and labor protections. This rule will help restore the promise of the FLSA, consistent with Congress's intent to ensure the broad coverage needed to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."

This new rule will give clarity to employers and workers who have lacked legal certainty since a new test was proposed in late 2020.¹ The previous administration promulgated a rule weeks before leaving office meant to make it easier for corporations to escape the responsibility to pay their workers a minimum wage, overtime and other related benefits. This new, untested standard has been mired in Administrative and judicial limbo ever since, causing confusion for the Department, employers and workers.

The current rulemaking is especially important because it will affect workers' access not just to wage and hour protections, but potentially to the entire worker safety net. Employers typically adopt the same classification for a worker under each of the following employment laws, so in addition to being denied the foundational protections of the FLSA, which include the right to a minimum wage, a 40-hour workweek and overtime pay beyond 40 hours, misclassified workers are also generally denied the right to:

- employer-provided health insurance under the Affordable Care Act;
- take collective action and form a union under the National Labor Relations Act;
- protected time off and maintenance of health insurance around the birth of a child or for other health reasons under the Family and Medical Leave Act;
- a safe workplace, as guaranteed under the Occupational Safety and Health;
- protection from discrimination under the Employment Non-Discrimination Act; and
- unemployment insurance under the Social Security Act, except for the brief periods covered by Pandemic Unemployment Assistance.

¹ Wage and Hour Division, "Independent Contractor Status under the Fair Labor Standards Act, Notice of proposed rulemaking and request for comments" 25 September, 2020, <https://www.regulations.gov/document/WHD-2020-0007-0001>

Clarifying the definition of an independent contractor under the FLSA has an impact on this entire suite of worker protections which our nation has established over the past century, because employers typically use the same classification for workers under every law.

Research establishes that independent contractors are compensated less than their FLSA-protected counterparts.² For example, U.S. Department of the Treasury economists have found that workers who make most of their earnings through self-employment have lower average annual earnings than those who make all or most of their earnings through employment relationships. Over half make less than \$20,000.³ Similarly, a study by the Center of American Progress estimated that almost 10 percent of independent contractors make less than the federal minimum wage.⁴ This rulemaking rightfully casts a wary eye on corporate attempts to say that these low-income workers are actually small business people not deserving of a minimum wage and overtime.

The misclassification of employees as independent contractors is a widespread problem. Though the Department of Labor has not attempted to quantify misclassification for two decades, state-level audit studies show that between 10 and 20 percent of employers misclassify workers. The most hard-hit workers are employed in fields like construction,⁵ transportation⁶ and home care, which are often already known for precarious working conditions.⁷ States have taken notice of the problem of misclassification. Since 2007, 29 states have commissioned task forces to examine this problem.⁸ The Department's rulemaking will aid in this growing effort.

Independent contractor misclassification also disadvantages law-abiding businesses. As the United States Treasury Inspector General found, independent contractor misclassification "plac[es] honest employers and businesses at a competitive disadvantage." Businesses that misclassify their employees pressure their competition to follow suit, creating "a race to the

² Annette Bernhardt, Christopher Campos, Allen Prohofsky, Aparna Ramesh, and Jesse Rothstein, "Independent Contracting, Self-Employment, and Gig Work: Evidence from California Tax Data" NBER Working Paper No. 30327, 2022 https://www.nber.org/system/files/working_papers/w30327/w30327.pdf

³ Emilie Jackson, Adam Looney, and Shanthi Ramnath "The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage" Office of Tax Analysis Working Paper 114, January 2017, US Treasury, <https://home.treasury.gov/system/files/131/WP-114.pdf>

⁴ Karla Walter and Kate Bahn, "Raising Pay and Providing Benefits for Workers in a Disruptive Economy" Center for American Progress, <https://www.americanprogress.org/issues/economy/reports/2017/10/13/440483/raising-pay-providing-benefitsworkers-disruptive-economy/>

⁵ Françoise Carré and Randall Wilson. 2004. The Social and Economic Costs of Employee Misclassification in Construction. (Massachusetts) 2004. Report of the Construction Policy Research Center, Labor and Worklife Program at Harvard Law School, and Harvard School of Public Health.

⁶ Rebecca Smith, David Bensman and Paul Alexander Marvy "The Big Rig: Poverty, Pollution, and the Misclassification of Truck Drivers at America's Ports" 2011 <https://teamster.org/wp-content/uploads/2018/12/povertypollutionandmisclassification.pdf>

⁷ Caitlin Connolly, "Independent Contractor Classification in Home Care" National Employment Law Project, December 2015. <https://www.nelp.org/publication/independent-contractor-classification-in-home-care/>

⁸ Pennsylvania Department of Labor & Industry, "Worker Misclassification Task Force Releases Annual Report With 15 Unanimous Recommendations For General Assembly" <https://www.media.pa.gov/Pages/labor-and-industry-details.aspx?newsid=660>

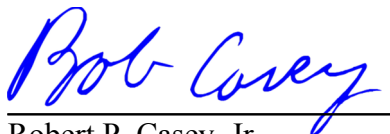
bottom” where firms remain competitive similarly misclassifying their employees.⁹ Compounding the situation, “free-riding” businesses pass their unemployment insurance and workers’ compensation costs to those that play by the rules. A 2010 study estimated that misclassifying employers shift \$831.4 million in unemployment insurance taxes and \$2.54 billion in workers’ compensation premiums to law-abiding businesses annually.¹⁰ The new rule will level the playing field by clarifying the scope of employee coverage under the FLSA.

Additionally, this rule will play an important role in supporting true independent contractors. Independent contractors are a vital part of the economy, performing irreplaceable services as skilled tradespeople, professionals and small business owners. These workers deserve the freedom and independence to practice their craft and run their business affairs as they see fit, with the power to make decisions about capital investments to improve profits, set their own prices, and meaningfully negotiate the terms and conditions of their projects. However, without clear rules governing contractor relationships, many businesses can strip contractors of their independence. This new rule will ensure that individual contractors are able to negotiate the terms of their business relationships on more equal footing with the larger corporations who otherwise would have unequal power in these interactions.

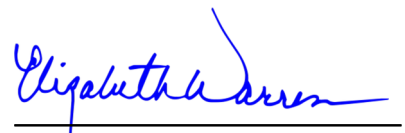
Under your leadership, the Department of Labor has been fulfilling its mission to champion working Americans and their rights in the workplace. Widespread misclassification has lowered wages and denied workers the overtime pay and benefits they are entitled to under the law. Lax misclassification standards reward unscrupulous employers who skirt the law, hurting law-abiding businesses and creating a race to the bottom. This rulemaking will level the playing field for employers, protect the independence of genuine contractor relationships and protect the pay and benefits that workers deserve.

Thank you for your consideration. We look forward to working with the Department of Labor to support the Department’s efforts to clarify which workers are independent contractors under the FLSA.

Sincerely,



Robert P. Casey, Jr.
United States Senator



Elizabeth Warren
United States Senator

⁹ Treasury Inspector General for Tax Administration, *Additional Actions Are Needed to Make the Worker Misclassification Initiative with the Department of Labor a Success* 1 (Feb. 20, 2018), <https://www.treasury.gov/tigta/ierereports/2018reports/2018IER002fr.pdf>.

¹⁰ Michael P. Kelsay, *Cost Shifting of Unemployment Insurance Premiums and Workers’ Compensation Premiums*, Univ. of Mo., Kan. City 5-6 (Sept. 12, 2010).