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Headquarters
40 Worth Street, 10th Floor
New York, NY 10013
tel: 212.430.5982

info@abetterbalance.org
abetterbalance.org

Southern Office
2301 21st Avenue South, Suite 355
Nashville, TN 37212
tel: 615.915.2417

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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

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

Dear Ms. DeBisschop:

A Better Balance 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").

A Better Balance is a national nonprofit advocacy organization that uses the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. Through legislative advocacy, direct legal services and strategic litigation, and public education, our expert legal team combats discrimination against pregnant workers and caregivers and advances supportive policies like paid sick time, paid family and medical leave, fair scheduling, and accessible, quality childcare and eldercare. We are committed to ensuring that all workers have the rights and protections they need, regardless of how they are classified. Through our free legal hotline, we have heard from workers across the country who have struggled to access their legal rights to essential protections like paid sick time and workplace accommodation because their employers may have wrongfully misclassified them as independent contractors.

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

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care and housekeeping, as well as in app-dispatched work.[1] Women and people of color, including Black, Latino, and Asian workers, are overrepresented in these occupations.[2] 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 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.[3]

This NPRM will fuel a race to the bottom where employers will be able to reclassify their employees as independent contractors and evade minimum wage, overtime, child labor, and workplace leave laws. 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 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, A Better Balance writes in opposition to this NPRM and urges DOL to withdraw this proposed interpretive rule.

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.

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

[1] 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.
[2] 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").
[3] *See* Ruckelshaus & Gao, *supra* note 1.

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business. *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").

DOL is trying to impermissibly narrow this definition by proposing a restrictive interpretation of the long-accepted "economic realities" test. *See U.S. v. Silk*, 331 U.S. 704 (1947). This five-part test has always been interpreted by the Supreme Court in its totality, not weighing any one factor more than another. But now, DOL proposes amending it in a fashion that places undue weight on two factors and then narrows those two factors further—individual control over the work and opportunity for profit or loss. As a result, the Department is proposing to constrict the FLSA's broad coverage in a way that will undermine its statutory intent.

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. 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.

Yet the effects of the proposed interpretive rule would not be limited to undermining the FLSA itself. Instead, the proposed interpretive rule would have much farther-reaching impacts by reshaping coverage in many other pieces of federal, state, and local legislation, which cross-reference to the FLSA and specifically to the definition of employee under the law. More broadly, because of the FLSA's role as a core, foundational labor law, policymakers and courts often look to interpretations of the FLSA for guidance in interpreting or framing other laws and policies, meaning that this significant change to the longstanding understanding of the multifactor test is likely to have a further ripple effect.

In particular, we are concerned about the impact of the proposed interpretive rule on workers' sick time rights. Paid sick time is an essential tool for protecting the health of workers as well as public health by fighting the spread of disease.[4] In the face of the COVID-19 pandemic, this impact has never been more important, with the Centers for Disease Control recommending that the best way to prevent the spread of the coronavirus includes avoiding close contact with people

[4] *See, e.g.,* Vicky Lovell, *Paid Sick Days Improve Public Health by Reducing the Spread of Disease*, Institute for Women's Policy Research (Feb. 2006), available at https://core.ac.uk/download/pdf/71339327.pdf; Tom W. Smith & Jibum Kim, *Paid Sick Days: Attitudes and Experiences*, National Opinion Research Center at the University of Chicago (June 2010), http://www.nationalpartnership.org/research-library/work-family/psd/paid-sick-days-attitudes-and-experiences.pdf.

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who are sick and staying at home while sick.[5] Recognizing this need, Congress passed the Families First Coronavirus Response Act (FFCRA) in March, which provides covered workers with the right to emergency COVID-19 related paid sick leave and emergency paid family leave for COVID-19-related loss of childcare or school closure. Though the law has important limitations and significantly more remains to be done to ensure workers know about and can use their rights under the law, these new protections have had a powerful impact. One study estimated that "states that gained access to paid sick leave through FFCRA saw a statistically significant 400 fewer confirmed cases per day," corresponding to one case prevented per day per 1300 workers who gain access to sick time through the law.[6] Alongside our partners, we fought for and won the passage of the FFCRA and, since its passage, have advocated for the law's strongest implementation and worked to inform workers about their new rights. Through our free legal hotline, we have heard from hundreds of workers with questions about their rights under the FFCRA or who are experiencing problems in using them.[7]

The proposed interpretive rule would directly affect the scope of coverage under the FFCRA, which uses the FLSA definition of "employee."[8] In effect, the new rule would make it harder for workers whose employers claim they are contractors, rather than employees, to access their rights as employees and create increased procedural barriers to challenging their employers' wrongful denial of those rights. This is particularly harmful because many of the workers most at risk of misclassification are essential workers risking their health each day to keep us all safe, like delivery drivers bringing food and groceries and rideshare drivers taking us safely from place to place. Denying these workers their full FFCRA rights by allowing employers to treat them as independent contractors puts not only those workers, but all those they interact with, at greater risk of contracting and spreading COVID-19, undermining the law's purpose. As we have heard firsthand from callers to our clinic, workers are already struggling to understand and use their rights under the law; adding the additional hurdle of a new, narrower, and more complex legal standard for employee status would only make this task harder. While the FFCRA offers some protections for those correctly treated as independent contractors in the form of tax credits, those benefits are not a substitute for the full suite of rights to which covered employees

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[5] *Coronavirus Disease 2019 (COVID-19): Prevention and Treatment*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/about/prevention-treatment.html (last visited Sept. 14, 2020).
[6] Stefan Pichler et al., *COVID-19 Emergency Sick Leave Has Helped Flatten the Curve in the United States*, *Health Affairs* (October 15, 2020), https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00863.
[7] *See Families First: Workers' Voices During the Pandemic*, https://www.abetterbalance.org/ffcra-worker-voices/.
[8] *See* 29 C.F.R. § 826.10(a). The regulations follow clear statutory mandate, as the emergency sick leave provisions directly cross-cite to the FLSA definition of employee, *see* Pub. L. No. 116-127, 134 State. 178 (Mar. 18, 2020), Sec. 5110(1)(a)(i) and (2)(B)(iii)(II), while the emergency family leave provisions amend the FMLA, which cross-cites to the FLSA, *see* Pub. L. No. 116-127, 134 State. 178 (Mar. 18, 2020), Sec. 3102 *et seq.*, codified at 29 U.S.C. § 2612(a)(1)(F) *et seq.*

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are entitled, including protection against retaliation and the right to return to work following leave.

Beyond the FFCRA, thirteen states and over twenty cities and counties have passed their own permanent paid sick time laws,[9] while two states and one county have passed broader paid time off laws that can be used for sick time;[10] many states and cities have also enacted their own emergency sick leave measures in response to the pandemic.[11] Paid sick time rights under these laws are nearly universally limited to employees, making the stakes of employee classification under the law significant.[12] Some of these laws directly cross-reference the FLSA. Even in those that do not, courts and policymakers may look to interpretations under the FLSA for guidance in answering uncertain or unanswered legal questions around employee status, particularly for relatively new laws without their own established bodies of caselaw and interpretation. The proposed interpretive rule therefore runs the risk of undermining workers' rights as employees under these laws as well, harming their health and the health of those around them not only in this pandemic but in the future.

We are equally concerned about the proposed interpretive rule's effect on the Family and Medical Leave Act (FMLA). This foundational law has been used hundreds of millions of times by workers across the country to address their own or a family member's serious health needs, bond with a new child, or respond to the effects of deployment.[13] As the only permanent federal law guaranteeing workers the right to time away from work at these critical junctures, the FMLA is essential to protecting the health and economic security of working families.

Because the FMLA cross-references to the FLSA for its definition of "employee," the proposed interpretive rule would reshape the FMLA's scope of coverage.[14] As with the FFCRA, the new interpretive rule would make it easier for employers to claim that their workers are in fact

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[9] For more information on state and local permanent paid sick time laws, see A Better Balance, *Interactive Overview of Paid Sick Time Laws in the United States,* https://www.abetterbalance.org/paid-sick-time-laws/.
[10] For more information on state and local paid time off laws, see A Better Balance, *Overview of Paid Time Off Laws in the United States,* https://www.abetterbalance.org/resources/overview-of-paid-time-off-laws-in-the-united-states/.
[11] For more information on state and local emergency sick leave measures, see A Better Balance, *Emergency Paid Sick Leave Tracker: State, City, and County Developments,* https://www.abetterbalance.org/resources/emergencysickleavetracker/.
[12] *See* Sherry Leiwant et al., *Inclusive Paid Sick Time and the Nonstandard Workforce (February 2019)*, https://www.abetterbalance.org/resources/report-constructing-21st-century-rights-for-a-changing-workforce-a-policy-brief-series-brief-3/.
[13] *The Family and Medical Leave Act at 22: 200 Million Reasons to Celebrate and Move Forward* (Feb. 2015), National Partnership for Women and Families, https://www.nationalpartnership.org/our-work/resources/economic-justice/fmla/the-family-and-medical-leave-at-22.pdf.
[14] *See* 29 U.S.C. § 2611(3).

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independent contractors and thus not entitled to the FMLA's protections, while making it harder for workers to successfully challenge that classification. As with the FLSA, erecting this additional barrier to use runs directly counter to Congress's purposes in enacting the FMLA, including the stated goal "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."[15]

The Department of Labor should not adopt an arbitrary standard that creates incentives for employers to contract away their legal duties and immunize themselves from responsibility for the workplace conditions they create. Such a standard would degrade workers' labor conditions, permit wage theft and unlawful child labor, interfere with workers' ability to access critically needed leave protections, and shift all economic risks to the workers, depriving them of their statutory rights.

Conclusion

In the midst of an unprecedent public health and economic crisis, our nation should be working to make it easier for workers to take the leave they need to protect themselves and their families and to assert their rights to fair pay and other essential workplace protections. This proposed interpretive rule would take the law in precisely the opposite direction, raising hurdles rather than removing them, creating confusion rather than the clarity, and opening the door to greater employer evasion of their legal obligations. The impacts of this decision will hit especially heavily for low-income workers, workers of color, women, and immigrants. The proposed interpretive rule would undermine decades of well-established case law and interpretation, contrary to both the text and the intent of the FLSA.

We strongly urge the Department to withdraw the proposed interpretive rule in full.

Sincerely,

Molly Weston Williamson
Director of Paid Leave and Future of Work
A Better Balance
mwilliamson@abetterbalance.org
212-430-5982

[15] 29 U.S.C. § 2601(b)(1)