

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2561 Rayburn House Office Building
Washington, DC 20515-6515

January 18, 2024

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Dear Acting Secretary Su:

The House Committee on Small Business (the Committee) writes to express our deep concern over the Department of Labor’s (DOL) finalization of the rule titled “Employee or Independent Contractor Classification Under the Fair Labor Standards Act.”¹ This rule will make it harder for businesses to classify workers as independent contractors (IC)—which in turn will decrease flexibility and employment opportunities resulting in lost earnings for millions of Americans.² Further, the rule disproportionately impacts small businesses—particularly in construction, trucking, and health care sectors.³ It seems that the DOL failed to properly consider small entities in this rule.

As outlined by the Small Business Administration’s Office of Advocacy (Advocacy), this rule threatens the livelihood of many small business owners by re-implementing a confusing multifactor analysis to determine whether a worker is an IC or an employee.⁴ As a result, businesses are less likely to hire gig workers with a fear of increased misclassification lawsuits.⁵ Instead of using the “core factors” set forth in the 2021 IC rule, this final rule rescinds the 2021 rule and returns to a totality-of-the-circumstances analysis of the economic reality test which harms both small entities and ICs.⁶

¹ Employee or Indep. Contractor Under the Fair Labor Standards Act, 89 Fed. Reg. § 1638 (Jan. 10, 2024) (to be codified at 29 C.F.R. §§ 780, 788, 795).

² Chris Marr and Rebecca Rainey, *Labor Department Cements Rule Change on Gig Worker Status (1)*, BLOOMBERG LAW (Jan. 9, 2024).

³ Leah Shepherd, *DOL’s Rule Narrows Scope of Independent Contractor Classification*, SHRM (Jan. 10, 2024); Chris Marr and Rebecca Rainey, *Labor Department Cements Rule Change on Gig Worker Status (1)*, BLOOMBERG LAW (Jan. 9, 2024).

⁴ Employee or Indep. Contractor Under the Fair Labor Standards Act, 87 Fed. Reg. § 62218 (Oct. 13, 2022) (comment from Major Clark, III, *et al.*, Deputy Chief Counsel, SBA Office of Advocacy (Dec. 12, 2022)).

⁵ Leah Shepherd, *DOL’s Rule Narrows Scope of Independent Contractor Classification*, SHRM (Jan. 10, 2024).

⁶ Employee or Indep. Contractor Under the Fair Labor Standards Act, 89 Fed. Reg. § 1638 (Jan. 10, 2024) (to be codified at 29 C.F.R. §§ 780, 788, 795).

This rule impacts over 22 million ICs and threaten their status.⁷ Many ICs who will be forced to be classified as employees under the new rule would no longer be able to operate as their own small business. With that, they lose the unique freedom of being a small business and the ability to innovate, adapt, and improve to survive and grow. These factors could prevent small businesses from hiring employees if the costs are too prohibitive. Businesses utilizing ICs are concerned that the rule will make it harder to hire, which is particularly concerning given today's labor shortages.⁸ In fact, according to Advocacy, the only way employers would have certainty is by classifying their workers as employees requiring additional costs for benefits and wages.⁹

The DOL's final rule as written, fails to provide adequate analysis and consideration of small entities. We therefore urge the DOL to delay the rule from coming into effect until DOL provides proper consideration of small entities.

To schedule the delivery of your response or ask any related follow-up questions, please contact Committee on Small Business Majority Staff at (202) 225-5821. The Committee on Small Business has broad authority to investigate "problems of all types of small business" under House Rule X. Thank you in advance for your cooperation with this inquiry.

In God We Trust,



Roger Williams
Chairman
Committee on Small Business

cc: The Honorable Nydia M. Velasquez, Ranking Member
Committee on Small Business

⁷ Employee or Indep. Contractor Under the Fair Labor Standards Act, 87 Fed. Reg. § 62218 (Oct. 13, 2022) (comment from Major Clark, III, *et al.*, Deputy Chief Counsel, SBA Office of Advocacy (Dec. 12, 2022)).

⁸ *Id.*

⁹ See generally Chris Marr and Rebecca Rainey, *Labor Department Cements Rule Change on Gig Worker Status (1)*, BLOOMBERG LAW (Jan. 9, 2024); Employee or Indep. Contractor Under the Fair Labor Standards Act, 87 Fed. Reg. § 62218 (Oct. 13, 2022) (comment from Major Clark, III, *et al.*, Deputy Chief Counsel, SBA Office of Advocacy (Dec. 12, 2022)).