

USDOL's Proposed Independent Contractor Rule Is a Restoration, Not a Revolution

Big corporations, trade associations, and their front groups are waging an assault on the U.S. Department of Labor's proposed independent contractor rule under the Fair Labor Standards Act (FLSA). The proposed rule would replace a 2021 Trump administration rule that improperly narrowed longstanding FLSA protections with a broader interpretation that courts and the USDOL have used for decades. Millions of working people depend on the FLSA's protections; the proposed rule simply restores those well-established protections and honors the law's intent.

The proposed rule is a necessary course correction, not a radical sea change.

The Fair Labor Standards Act (FLSA) Primarily Protects Low-Paid Workers.

The FLSA generally sets a federal minimum wage (currently \$7.25 per hour) for covered employees, requires an overtime wage (currently \$10.88) for hours over 40 in a week, and prohibits child labor. Covered workers denied FLSA's bedrock protections can claim a violation. However, **professionals, executives, and administrative employees** are exempt from both minimum wage and overtime protections under the FLSA, as are **highly compensated employees**. Thus, the FLSA—and the FLSA's independent contractor rule—has no applicability to many employment relationships, and certainly not high-income and salaried employees, much less high-income independent contractors.

The USDOL's Proposed Rule Restores the Status Quo. Contrary to the claims of big business, lobbying groups, and their misinformed members, the USDOL's proposed independent contractor rule is a simple and necessary course correction that:

- Restores the multi-factor analysis developed by the U.S. Supreme Court and applied for decades by appellate courts, and the USDOL itself;
- Clarifies that the ultimate question is whether workers are running their own business (and therefore are independent contractors) or dependent on finding work in the business of another;
- Helpfully explains *how and why* each factor in the “**economic realities**” analysis helps to answer the question of whether workers are truly in business for themselves; and
- Clarifies that all factors are considered, rejecting the out-of-left-field elevation of two “core” factors in the approach used by the Trump rule.

The Trump Rule Threatened to Strip Millions of Workers of FLSA Protections. The Trump rule limited the scope of FLSA coverage, leaving millions of workers without its bedrock minimum wage, overtime, and child labor protections. The rule contradicted the broad statutory language and purported to elevate—for the first time in history—two “core” factors as more probative in determining whether a

worker is exempt as an independent contractor. Worse, one of those factors—control—focused on *exercised* control, not the *right* to control, making FLSA coverage narrower than the common law, contrary to Congressional intent. The loss of protection for millions of hardworking people is clear:

- More than 21 million people work in home care, janitorial, agricultural, construction, trucking, delivery, and personal care occupations.¹ At high risk of independent contractor misclassification,² they are most impacted by a loss of minimum and overtime wages.
- As a group, workers of color—Black, Latinx, Asian/Pacific Islander, and Native American workers—are overrepresented in misclassification-prone occupations.³
- At least 1.6 million workers work for digital labor platforms in several job sectors,⁴ which use technology to control the work, unilaterally set prices, and impose take-it-or-leave-it independent contractor agreements on workers.

Independent Contractors Prior to the Trump Rule Remain Independent Contractors Under the Proposed Rule. Because the proposed rule is a reinstatement of the well-established “economic realities” analysis, people who were running their own businesses prior to the Trump rule will remain independent contractors under the proposed rule. As the proposed rule recognizes, independent contractors are those who have the power to make decisions about the key elements of their business. That was true before the Trump rule, and it remains true under the proposed rule.

The USDOL’s proposed independent contractor rule will properly ensure FLSA protections for low-paid employees by restoring a well-established analysis focused on whether a worker is running an independent business. True independent businesspersons have nothing to fear.

Endnotes

¹ NELP analysis of 2020 Current Population Survey Annual Social and Economic Supplement microdata. For underlying data, see *CPS Annual Social and Economic Supplement*, U.S. Census Bureau, <https://data.census.gov/mdat/#/search?ds=CPSASEC2022>.

² Several low-wage occupations have high rates of misclassification. See U.S. Dep’t. of Labor, Wage and Hour Div., <https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries>. *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NAT’L EMP. L. PROJECT at 5 (Oct. 2020), <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>.

³ NELP analysis of March 2022 Current Population Survey Annual Social and Economic Supplement microdata. For underlying data, see *CPS Annual Social and Economic Supplement*, U.S. Census Bureau, <https://data.census.gov/mdat/#/search?ds=CPSASEC2022>.

⁴ See U.S. Bureau of Lab. Statistics, *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, Monthly Labor Review (Sept. 2018), <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm> (last visited Dec. 6, 2022).