December 12, 2022
The Honorable Martin Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue NW
Washington D.C., 20210

**RE: Notice of proposed rulemaking: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (RIN 1235-AA43)**

Dear Secretary Walsh:

We at the America First Policy Institute (AFPI) write you regarding the Department of Labor (Department) October 13, 2022, Notice of Proposed Rulemaking (NPRM) titled Employee or Independent Contractor Classification Under the Fair Labor Standards Act. In summary, we oppose the finality of this rule as it will disincentivize entrepreneurship and stifle innovation and opportunity in a modern market-based economy. The proposed rule will eliminate critical economic opportunities for American workers at a time when we should be expanding career pathways, not limiting them.

As you are aware, in 2020, under 85 FR 60600, President Donald J. Trump's Department of Labor revised and clarified the agency's interpretation of independent contractors under the Fair Labor Standards Act (FLSA).[1] This ruling held that "independent contractors are workers who, as a matter of economic reality, are in business for themselves as opposed to being economically dependent on the potential employer for work." The lack of dependence was the key factor in determining their classification as contractors rather than employees. We want to take this opportunity to comment on why overturning this current rule would be disastrous for the American economy and why your agency should avoid attempts to disallow American workers from navigating their paths to success.

AFPI's Interest

AFPI is a 501(c)(3) non-profit, nonpartisan research institute. AFPI exists to conduct research and develop policies that put the American people first. Our guiding principles are liberty, free enterprise, American military superiority, foreign-policy engagement in the American interest, freedom of conscience, and the primacy of American workers, families, and communities in all we do. In AFPI's view, it is the mandate of policymakers to advance and serve these policy interests above all others. AFPI aims to help restore American workers to their proper place, which is at the center of governance and policy. The class of Americans who made our Republic the greatest Nation on Earth deserves to be heard, valued, and in charge. One of AFPI's core priorities is workforce development modernization and the creation of multiple pathways to family-sustaining careers, which AFPI considers the American gig economy. That is AFPI's public policy interest in this regulation. These comments explain why this rule is bad policy, contrary to the law, and should not be adopted.

[1] https://www.federalregister.gov/documents/2020/09/25/2020-21018/independent-contractor-status-under-the-fair-labor-standards-act

The Previous Rule**:** Independent Contractor Status Under the Fair Labor Standards Act

In 2020, the Trump Administration proposed and ultimately finalized a rule to support the American worker, which established an economic reality test to make an appropriate determination of their independent contractor status. This rule focuses on the individual's economic dependence on the hiring entity. This approach sought to make a clear distinction as to whether these individuals are in business for themselves and thus should be deemed as independent contractors. This rule emphasized two of the five factors previously used to make this determination: the individual's control over work and the opportunity for profit/loss.[2] That approach was supported by significant caselaw, initially set forth by a United States Supreme Court case that stated, *"[t]here may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees*." *Rutherford Food v McComb,* 331 U.S. 722, 729, 67 S. Ct. 1473, 91 L.Ed. 1772 (1947). The courts have continued to follow this approach, excluding independent contractors from the definition of "employee" under the FLSA. *See, e.g., Saleem* v. *Corporate Transp. Group, Ltd.,* 854 F.3d 131, 139-40 (2d Cir. 2017). The *Saleem* court ruling further expanded on this analysis in that an individual categorized as an independent contractor does not work with an employer's permission but rather is in business for himself. *See Saleem,* 854 F.3d at 139.

The Trump-era rule also sought to apply to a modern economy, including accounting for changes such as the development of a knowledge versus industrial economy and shorter job tenures amongst individuals. As to the former, independent entrepreneurs make decisions about work and their capital investments and are not necessarily dependent on a traditional wage system attached to the physical labor required in previous economies—they are becoming entrepreneurial with their skill sets. Concerning the latter, individuals could easily stay in those same positions for decades. In contrast, current data shows that today's individuals often spend significantly less time in roles (e.g., Bureau Labor and Statistics shows medium tenure of 2.2 years in hospitality positions since 2014).

We note that the Department has highlighted that the replacement of this approach will essentially remove "control" and "profit" decision-making as the primary considerations in the employee versus independent contractor analysis but rather give them equal weight amongst other factors. This approach is not only in direct conflict with the case law but serves to undermine the critical rationale as to the freedom and opportunity one seeks when becoming an entrepreneur in the first place. If the Department can put its thumb on the scale for any reason, how can entrepreneurs direct their business rationally? Regulations that interfere with the natural tenets of free-market capitalism, which dictate that individuals act with a profit motive, create market chaos and unpredictability for businesses.

Reasons to Withdraw the Proposed Rule

[2] In *United States* v. *Silk,* 331 U.S. 704 (1947), the Court identified five factors as "important for decision": "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation[,] and skill required in the claimed independent operation." *Id.* at 716.

The proposed rule undercuts much of the well-documented legal and policy rationale for the current rule, and the proposed rule should not be implemented for reasons including but not limited to the following:

- Contrary to the representations in the Department's press release,[3] the proposed rule undercuts established legal precedents as set forth above;

- The proposed rule stymies entrepreneurship and innovation as individuals may be treated as employees, thereby extinguishing the independence one receives when one fulfills the American dream of owning one's own business;

- The proposed rule stretches across individuals engaged in countless industries, which will unnecessarily place a substantial, but presently unknown, regulatory burden on the entire economy during a historically difficult inflationary period;

- The proposed rule unfairly penalizes those engaged in various knowledge-based industries who seek autonomy and flexibility in their working hours and content by forcing employers to provide benefits and a minimum wage for their services;

- The proposed rule limits the expertise that multiple small businesses may receive from a single expert consultant, for example, which may be uniquely situated to address their particular concerns, thereby limiting market competition; and

- While the rationale for the proposed rule touts access to various economic benefits for individuals, the market has already adopted separate private insurance programs for independent contractors to utilize.

Finally, we should note that California recently implemented a regulatory approach comparable to the proposed rule. That policy resulted in much of the same adverse economic impacts already discussed, including limited use of critical independent contractors because companies could not afford to alter their status to full-time employees.[4] As the states are often viewed as the *laboratories of democracy*, this experiment has already failed. Adopting the proposed rule at the federal level would exponentially multiply these negative economic consequences throughout the Nation.

We appreciate the opportunity to comment on this role and urge the Department to withdraw this flawed proposal.

Sincerely,

Jessica Hart Steinmann
General Counsel
America First Policy Institute

[3] https://www.dol.gov/newsroom/releases/WHD/WHD20221011-0
[4] https://thehill.com/opinion/finance/3677431-california-has-a-terrible-labor-law-the-biden-administration-wants-to-take-it-national/