

March 8, 2024

The Honorable Bernie Sanders  
U.S. Senator  
332 Dirksen Building  
Washington, D.C. 20510

The Honorable Virginia Foxx  
U.S. Representative  
2462 Rayburn House Office Building  
Washington, DC 20515

The Honorable Bill Cassidy  
U.S. Senator  
455 Dirksen Building  
Washington, D.C. 20510

The Honorable Robert C. Scott  
U.S. Representative  
2328 Rayburn House Office Building  
Washington, DC 20515

Dear Members of Congress,

On January 10, 2024, President Biden's Department of Labor (DOL) under Acting Secretary Julie Su published a [final rule](#) significantly amending how the DOL determines employment status under the Fair Labor Standards Act (FLSA). On behalf of the undersigned organizations and a [70 million](#) strong freelancing workforce in America, we urge you to consider how this economically damaging rule, which demonstrates administrative overreach, will impact American workers.

Tens of millions of Americans earn income as self-employed workers across a broad spectrum of industries including transportation, construction, health care, education, entertainment, finance, legal work, housing, agriculture, and more. Additionally, many independent contractors start and run small businesses that employ [tens of millions](#) of additional workers that fuel the economy of countless American communities in all 50 states.

These self-employment pathways not only lead to increased income for many workers, but they also provide the [additional flexibility](#) needed to raise children as well as deal with personal and family health issues. Traditional employment often makes it prohibitively difficult to adequately address these competing priorities. Look no [further](#) than the 12 million women-owned businesses in the U.S. for victims, 90 percent of which are non-employer businesses. It's no wonder a Bureau of Labor Statistics (BLS) [survey](#) showed that "fewer than 1 in 10 independent contractors would prefer a traditional work arrangement."

The new Biden DOL rule will end many self-employment and small business careers by improperly classifying many independent contractors as employees against their will. Just as concerning, this rule contains new confusing and subjective criteria for determining employment status, which will have a chilling effect on businesses and individuals that will decline to form new productive relationships because they are unable to navigate regulatory requirements rife with gray areas. Many small businesses and even charities may struggle to keep operating, unable to use contractors for limited services anymore or to afford to hire traditional employees without stable, permanent roles for them.

[Issues](#) with the rule include:

- De-emphasizing a focus on the core factors of the "nature and degree of control over the work" and the "worker's opportunity for profit and loss," instead claiming to equally

consider six factors, many of which have subjective definitions and emphasis points that have never previously been used.

- Emphasizing strong consideration of not just evidence of direct control but even reserved or theoretical control, imposing a chilling effect on businesses and workers who are fully committed to compliance but unable to navigate unpredictable DOL regulatory oversight.
- Diminishing the value of certain types of earnings, initiative, and investment when considering the independent status of a worker in order to give DOL greater ability to restrict contracting.

DOL argues that this new rule is “more consistent with judicial precedent and the Act's text and purpose” and focuses on adding new criteria to existing “economic realities” test factors. Instead, the rule constitutes a shift towards more restrictive, confusing criteria with interpretations left to the whims of agency bureaucrats that undermine the right to earn a living as a self-employed worker.

It is well documented that President Biden and Acting Secretary Su are strong supporters of destructive “ABC tests” such as the one Acting Secretary Su helped implement in California while serving as the state’s Secretary of Labor. Recent research from the Mercatus Center now [indicates](#) that the Assembly Bill 5 law in California that instituted an ABC test is now associated with an over 10.5% drop in self-employment and an overall 4.4% drop in employment in affected industries, foreshadowing the type of harm this new rule may impose on employment across America.

Acting Secretary Su’s support of California’s law restricting independent contracting undoubtedly played a significant role in Congress choosing to reject her nomination to become Secretary of Labor. Congress can now reject her attempt to foist this regulation with a similar intent onto the American people.

In order to prevent the lost economic opportunity and flexibility American families enjoy from self-employment careers, the Congressional Review Act can stop the implementation of this very damaging rule. We hope that Congress will fight to protect independent contracting in America.

Sincerely,

Paul Teller  
Executive Director  
Advancing American Freedom

Rachel Oglesby  
Director  
Center for the American Worker  
America First Policy Institute

Emily Paulsen  
President  
American Society of Journalists and Authors

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