

March 7, 2024

Dear Member of Congress,

The undersigned organizations write urging you to support H.J. Res 116 and S.J. Res 63. These Congressional Review Act resolutions will nullify the U.S. Department of Labor’s (“DOL”) recently finalized regulation (the “new rule”)<sup>1</sup> that sets the enforcement standard DOL will use for determining whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (“FLSA”). The new rule is confusing, difficult to apply, and will invite unnecessary litigation and uncertainty for the tens of millions of workers that derive income as independent contractors.

### **The New Rule Is Unnecessary**

The new rule will replace the current worker classification rule (the “2021 rule”), which became effective only three years ago. The 2021 rule established a guidance standard based on a review of decades of court decisions which found that courts had consistently relied on two core factors when deciding worker classification issues under the FLSA. Carefully developed “to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy,”<sup>2</sup> the 2021 rule provided a workable classification analysis rubric that was practical, predictable, and easy to apply to our modern economy. At the same time, the 2021 rule has not hampered DOL’s ability to bring enforcement actions and protect workers from bona fide misclassification.

### **The New Rule will Cause Confusion, Invite Unnecessary Litigation, and Harm Small Businesses**

DOL’s new rule will abandon the two core factors of the 2021 rule and adopt a test where any of six different factors could be determinative of employee status—an approach that injects subjectivity and uncertainty into worker classifications. The new rule will result in confusion and invite frivolous litigation that could ultimately have a chilling effect on independent work opportunities and entrepreneurship generally. This will be particularly problematic for small businesses that rely on independent contractors.

### **The New Rule Seeks to Limit Independent and Flexible Work Opportunities**

The reality is that today, there are over 9 million job openings across the country. Yet, millions of Americans continue to exercise their choice to work as independent contractors and run their own businesses. In fact, survey after survey find that independent contractors prefer to maintain their independent status.<sup>3</sup> With this in mind, we are particularly concerned that DOL’s final rule

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<sup>1</sup> 89 FR 1638, [Employee or Independent Contractor Classification Under the Fair Labor Standards Act](#), January 10, 2024.

<sup>2</sup> 86 FR 1168, [Independent Contractor Status Under the Fair Labor Standards Act](#), January 7, 2021.

<sup>3</sup> See, e.g., MBO Partners, *State of Independent in America, 2023* (“In 2023, 77% of independent workers reported being very satisfied with independent work, and 78% plan to continue working independently.”); Upwork, [Freelance Forward Economist Report](#), 2021 (“As freelance work continues to grow, 78% of those participating in this work say that schedule flexibility is a key reason for continuing this work, and 68% also cite ‘career ownership’ as a top draw”); Flex, Morning Consult, [Attitudes of App-Based Workers](#), September 2022 (finding 77% of app-based workers support maintaining their classification as independent contractors); American Transportation Research Institute, [“Owner-Operators / Independent Contractors in the Supply Chain,”](#) December 2021 (noting that 73% of

is the latest workforce-related regulatory intervention by the federal government that stands against the preferences of workers and instead, could very well undermine them—and our country’s economy.<sup>4</sup>

Therefore, Congress should reject DOL’s final rule and instead advance policies that support independent work opportunities as well as the individuals who choose to pursue them. We urge support of this resolution and thank you for your continued leadership on this important issue.

Sincerely,

4A's - the American Association of Advertising Agencies  
Alliance for Chemical Distribution (ACD)  
American Foundry Society  
American Hotel & Lodging Association  
American Trucking Associations  
Argentum  
Associated Builders and Contractors  
Associated Equipment Distributors  
Associated General Contractors of America  
Association of Bi-State Motor Carriers  
Construction Industry Round Table  
Financial Services Institute, Inc.  
Flex Association  
FMI – The Food Association  
Global Cold Chain Alliance  
Heating, Air-conditioning, & Refrigeration Distributors International  
HR Policy Association  
Independent Electrical Contractors  
International Franchise Association  
International Warehouse Logistics Association (IWLA)  
Lanca Sales, Inc.  
National Association of Convenience Stores

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independent truck drivers expected they would experience a significant decrease in job satisfaction if they were reclassified to a company driver).

<sup>4</sup> See, e.g., the National Labor Relations Board’s recently finalized regulation that would expand the standard for determining when two or more employers are jointly responsible for a group of employees – a policy move that will create widespread confusion for business operations and threaten contractual relationships across the country. ([88 FR 73946](#)); Additionally, see, e.g., DoL’s notice of proposed rulemaking that would increase the minimum salary an employee must receive to qualify as a “white collar” employee exempt from federal overtime pay requirements under the FLSA. The proposal would lead to a reduction in opportunities for flexible and remote work, career development, and part-time work; result in an earnings decrease for some workers; and have an outsized impact on employers and workers in rural and other low-cost areas. ([88 FR 62152](#)). Moreover, see, e.g., the National Labor Relations Board’s decision in *The Atlanta Opera*, which reinstates a classification test that has been rejected by the U.S. Court of Appeals for the DC Circuit and would narrow opportunities for independent work. ([372 NLRB No. 95, 2023](#)). Finally, the Federal Trade Commission has signaled interest in, among other things, worker classification issues, a space in which they do not have jurisdictional history or expertise. See, e.g., U.S. Chamber of Commerce, “[The FTC Wades Into Employee Classification But Agency Lacks Expertise](#),” February 8, 2024.

National Association of Electrical Distributors  
National Association of Home Builders  
National Association of Mutual Insurance Companies  
National Association of Professional Insurance Agents  
National Association of Wholesaler-Distributors  
National Council of Chain Restaurants  
National Demolition Association (NDA)  
National Federation of Independent Business (NFIB)  
National Lumber & Building Material Dealers Association  
National Public Employer Labor Relations Association  
National Ready Mixed Concrete Association  
National Restaurant Association  
National Retail Federation  
NATSO, Representing America's Travel Plazas and Truckstops  
New York New Jersey Foreign Freight Forwarders and Brokers Association Inc.  
Shipping Association of New York and New Jersey  
SIGMA: America's Leading Fuel Marketers  
Small Business & Entrepreneurship Council  
TechNet  
The Transportation Alliance  
Tile Roofing Industry Alliance  
Truck Renting and Leasing Association  
U.S. Chamber of Commerce  
Virginia Trucking Association  
Workplace Solutions Association