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Comments on RIN 1235-AA34: Independent Contractor Status Under the Fair Labor Standards Act

Dear Ms. DeBisschop:

On September 22, 2020, the U.S. Department of Labor ("DOL") announced that it was opening for public comment a revised interpretation for determining whether workers are "employees" or "independent contractors" under the Fair Labor Standards Act ("FLSA"). While seemingly innocuous, the question of whether a worker is an employee or an independent contractor significantly impacts a worker's access to hard-fought rights to employment-related benefits and protections. For example, "employees" are entitled to overtime and minimum wage guarantees, employer tax contributions to social security and unemployment insurance, and workers' compensation coverage. "Independent contractors" are not entitled to these benefits. "Employees" may expect sick leave, healthcare coverage, and paid vacation time from their employers. "Independent contractors" generally will not have these benefits from the companies to whom they provide services. "Employees" are protected from race, sex, disability, and religious discrimination or retaliation for complaining of unfair wages or working conditions. "Independent contractors" have little recourse if they are subject to workplace discrimination or unfair working conditions. “Employees” who are not paid correctly may be entitled to liquidated damages and attorney’s fees when they sue to recover those wages. “Independent contractors” who are not paid correctly have a much harder time recovering that pay because the cost of hiring a lawyer may be greater than the amount they are trying to recover. The North Carolina Department of Labor only has jurisdiction over employees and will not be able to assist independent contractors in wage disputes. While the DOL's proposed new interpretation only applies to the FLSA, this interpretation could impact other state and federal laws that afford "employees" the above benefits and protections. Unfortunately for workers, DOL's new rule benefits companies by making it easier for them to classify workers as independent contractors. Such a broad and far-reaching interpretation could have seriously detrimental and long-term effects on American workers and public resources.

The FLSA is a federal law that was first enacted in 1938. Among other things, the FLSA specifically sets the federal minimum wage for every hour worked, mandates that employers pay employees time-and-a-half for every hour worked over forty (40) in a workweek, and requires that employers keep records of the hours worked by their employees, but not independent contractors. Since then, a patchwork of tests and rules were created to determine whether workers are employees or independent contractors under the FLSA. In 1947, the U.S. Supreme

Court provided a basic framework for distinguishing between employees and independent contractors by creating a 5-factor test (known as the "Economic Realities Test") in which no single factor predominates. In the ensuing decades, the thirteen U.S. Courts of Appeals expanded on this framework by creating additional factors and emphasizing others. These expanded frameworks vary among the circuits. A worker with the same job title and duties may be classified as an employee in New York but might be classified as an independent contractor in North Carolina. In response, businesses, workers, and the legal community have called for greater clarity and consistency to distinguish between employees and independent contractors.

During the Obama era, the DOL attempted to provide some clarification to the standard. The Obama DOL stated that it would evaluate practical considerations in their totality to determine if a worker was an employee or an independent contractor. For example, under the Obama DOL rule, the agency looked at whether the worker ran their own independent business or if the worker was economically dependent on the employer. In 2015, the DOL issued informal guidance that the DOL would start with a presumption that workers were employees. In 2017, under the Trump administration, the DOL explicitly rescinded this presumption, which many Trump administration officials viewed as unfairly favoring workers over businesses.

Around this same time, America saw an enormous growth of the "gig" economy in the U.S. Companies using a gig economy business model (such as Lyft or Uber) benefited financially from classifying their workers as independent contractors. In response many states, such as California, enacted new laws expanding the traditional definition of an employee under their wage and hour laws. These new laws made it harder for businesses to classify their workers as independent contractors and deny them benefits and wage protections. Some of these new state laws prompted lawsuits against companies like Uber, Lyft, and Postmates to reclassify independent contractor workers. Undoubtedly in response to the recently enacted state laws like California's, DOL's new rule seeks to implement "pro-business" policies by ensuring that fewer American workers are classified as employees.

How does DOL's new rule make it easier for businesses to classify workers as independent contractors? In its 159-page proposal, the DOL explicitly rejected the old standard instead choosing to limit the pathway for "employee" classification. Rather than value each of the five traditional employment control factors equally to determine the classification, DOL's new proposed rule would give greater weight to just two factors. Those factors are 1) "the nature and degree of the worker's control over the work" and 2) the worker's opportunity for profit or loss." The current DOL is explicit in its belief that its new interpretation "could result in increased use of independent contractors." This new interpretation signals that the DOL would likely approach future investigations of misclassification from the employer's perspective.

This new interpretation has real financial consequences for American workers. Under the current DOL rule, from 2009 to 2015, the DOL secured nearly $1.6 billion in back wages for more than 1.7 million workers across the country**.** In fiscal year 2015 alone, the DOL helped more than 240,000 workers recoup nearly $247 million they had rightfully earned. That's an average of more than $1,000 per worker. The current DOL's proposed change will dramatically decrease the opportunity for workers to recoup back wages rightfully owed them.

Additionally, it is disturbing that this rule change attempt by the Trump Administration is designed to permanently affect DOL policy even after the 2020 election. Unlike the 2015 Obama era guidance, the DOL's new proposed rule could not be withdrawn. This alarming prospect is being pursued at warp speed. While most federal regulation changes are typically afforded a 60-90-day public comment period, the DOL has only allotted a 30-day comment period, ending on 10/26/20, for the public to learn about and respond to this enormous change.

N.C.- NELA is the North Carolina affiliate of the National Employment Lawyers' Association. N.C.-NELA members strongly oppose this proposed change. We are attorneys who regularly represent workers in state and federal court and before administrative agencies on employment claims, including wage theft. This proposed rule change will adversely affect workers regarding every term and condition of their engagement/employment, from wages to unemployment to discrimination charges.

The public should also be aware that this rule will adversely affect federal, state, and local governments by reducing their tax revenue from state and federal unemployment insurance taxes, local income tax, FICA and Medicare withholding. In some cases, state unemployment systems could be almost bankrupted by this precipitous loss of revenue. Further, "gig workers" are less likely to have medical insurance or workers' compensation, thereby putting states and localities on the hook for unpaid medical expenses at public hospitals, for medically unemployable workers needing state benefits, and for vocational rehabilitation dollars to put them back to work.

In sum, we oppose the rushed and ill-conceived proposed DOL rule change that will negatively impact workers' rights and local government resources and place an undue burden on the public safety net.

We appreciate you considering our concerns.

Sincerely,

NC-NELA