Coalition for Workforce Innovation

Representative Kevin Kiley (R-CA)	Representative Alma Adams (D-NC)
Subcommittee Chairman	Ranking Member
Subcommittee for Workforce Protections	Subcommittee for Workforce Protections

April 19, 2023

Chairman Kiley & Ranking Member Adams,

On behalf of the Coalition for Workforce Innovation ("CWI") we submit this statement for the record to the United States House of Representatives Education and Workforce Committee, Subcommittee on Workforce Protections (the "Committee") for the hearing entitled "Examining Biden's War on Independent Contractors." We appreciate the Committee exploring independent workers and the current regulatory threats they are facing. This is an important opportunity to highlight the dynamism and value independent work provides to the economy as well as to the individuals who seek this type of work.

CWI's membership represents worker advocates, entrepreneurs, start-ups, businesses, and trade associations that support the modernization of federal workforce policy to enhance choice, flexibility, and economic opportunity for all workers. Our broad and diverse stakeholders showcase healthcare, technology, media, transportation, distribution, and retail sectors where independent workers have gained access to flexible work arrangements that fit their lifestyle. Today's diverse independent workers span all ages and include part-time students, caregivers, and retirees. These individuals are primarily motivated by finding a source of supplemental income or organizing work around their lives and not the other way around. Independent work also serves as a foundation to small businesses and the first step for many new entrepreneurs.

Currently, independent work is being threatened by regulatory pressures from the Department of Labor. If the Department of Labor finalizes the main structure of the Notice of Proposed Rulemaking ("NPRM") released last year, it threatens to undermine the ability individuals to choose to work independently. The NPRM injects uncertainty into the analysis of determining if an individual is an independent contractor, diverts the factors away from considerations bearing on economic dependence, and fails to account for many of the realities of modern work arrangements. The current independent contractor rule presents an appropriate, modern embodiment of how independent work classification should be evaluated. If the Department of Labor should put forward a new rule, it should be one that offers sound public policy and creates

a clearly defined standard benefiting all independent workers, businesses, consumers, workplaces, and the economy generally. The NPRM does not. Instead, like AB-5 in California, it will cause substantial disruption for all stakeholders including independent workers.

For all the reasons set forth in its Comments submitted to the Department of Labor, CWI opposes the Department's Proposed Rule.[1] CWI believes that the Department of Labor should not rescind the current Rule or take any further action to attempt to affect its application to the independent contractor analysis under the FLSA.

Data continues to show that antagonism to independent work is misguided given the available opportunities for those who find work in this way. Report after report highlights the growing popularity of independent work across the economy. Now more than ever, we need a mix of commonsense relief measures and policies that promote and maximize opportunities and flexibility for workers. We must ensure that policies align with the diversity of workers and fit their lifestyles. It's time to create policies that allow independent workers to feel proud of their contribution to the economy, and prove the independent worker's voice is both heard, and respected. Independent work is and will continue to be crucial in helping our economic recovery, but only if lawmakers allow it to be an onramp to economic opportunity and recovery.

CWI is committed to building an economy that works for all types of workers by preserving flexibility and entrepreneurship while protecting against potential abuses. The Department of Labor's attempt to reclassify independent workers as employees fails this mission which is why CWI has strongly opposed the rulemaking. Instead, CWI supports the current rule and has endorsed the Worker Flexibility and Choice Act. This bipartisan legislation introduced in the 117th Congress would protect independent work for those who choose it while providing greater protections and access to benefits than exists under current law. An issue this important should be debated by Congress and not be determined by administrative rulemaking.

To learn more about CWI, please visit www.workforceinnovation.net

Sincerely,

Coalition for Workforce Innovation

[1] In addition to the live link to a full version of CWI's Comments opposing the Department of Labor's recently published NPRM on Independent Contractor status under the FLSA, CWI has set forth as Attachment A a summary of the bases for CWI's position that Department's promulgation of the Proposed Rule was arbitrary and capricious and that the Proposed Rule violates the APA because it is not based on a reasonable interpretation of the FLSA.

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Attachment A

Key Points Of Opposition to the Department of Labor's NPRM on Independent Contractor Status

On December 13, 2022 CWI submitted its Comments regarding the Department of Labor's notice of proposed rulemaking on *Employee or Independent Contractor Classification Under the Fair Labor Standards Act,* 87 Fed. Reg. 62218 (Oct. 13, 2022) (the "Proposed Rule"). Those Comments are linked here. A summary of key points are excerpted here as well:

- The Proposed Rule is arbitrary and capricious for a number of separate reasons.
- First, the Department of Labor is rescinding an existing regulation as part of a change in presidential administrations and has failed to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29 (1983). For example, the Proposed Rule diminishes the fact that the vast majority of independent contractors want to be independent contractors and that independent contractors earn substantially more than the federal minimum wage of $7.25 per hour. The Proposed Rule also disregards the Department's own prior survey of appellate decisions confirming the utility of the 2021 Rule's approach without any evidence that the survey was wrong.
- Second, the Department of Labor has relied on factors that it should not have considered, and has offered explanations for the Proposed Rule that run counter to the evidence.
- Third, the Department of Labor acted arbitrarily in changing course with respect to the regulatory guidance from the Department of Labor, without considering the important aspects of the problem addressed by the rule and by failing to consider other reasonable alternatives to rescinding the 2021 Rule.
- Fourth, the Proposed Rule does not provide facts showing a need for it and a full withdrawal of the 2021 Rule.
- Fifth, the Proposed Rule is based on an unrealistic assessment of its familiarization costs to the business community – the Department of Labor allocates each business a cost of $24.97 to review and become familiar with the Proposed Rule. This assessment is patently unreasonable both as to the amount of time required for "familiarization" with the Proposed Rule, and as to the persons within an organization who will be tasked with performing the review.
- Sixth, the Proposed Rule was improperly promulgated under the APA because it is not based on a permissible interpretation of the FLSA. As the Supreme Court's landmark decision in *Encino Motorcars, LLC v. Navarro,* 138 S. Ct. 1134 (2018) held, the FLSA

must be interpreted "fairly" and not for the objective of achieving the broadest remedial purpose "at all costs." The Proposed Rule stretches the FLSA's definitional terms beyond any reasonable interpretation of them. This overreach is particularly evident in three areas: (1) the Proposed Rule's standard for what it means for an independent contractor's work to be "integral to the hiring entity's business;' (2) the Proposed Rule's analysis of independent contractors' investment relative to the investment of the business for which they perform work; and (3) the Proposed Rule's treatment of the "opportunity for profit or loss" factor. For all of the reasons set forth in CWI's Comment, at pages 22 – 42, a reviewing court would conclude that the Propose Rule does not represent a reasonable interpretation of the FLSA, and that it therefore violates the APA.