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April 28, 2026

Submitted Electronically via www.regulations.gov

Andrew B. Rogers
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, 29 CFR Parts 500, 795, and 825, RIN 1235-AA46

Dear Administrator Rogers:

I. INTRODUCTION AND INTEREST OF THE COMMENTER

The Wisconsin Institute for Law & Liberty (“WILL”) respectfully submits this comment in support of the Department of Labor’s (“the Department” or “DOL”) proposed rule regarding employee or independent contractor status under the Fair Labor Standards Act (“FLSA”), the Family and Medical Leave Act (“FMLA”), and the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”).¹ WILL is a nonprofit, nonpartisan legal center in Milwaukee, Wisconsin, strongly dedicated to free markets and private enterprise, as these principles empower Americans to prosper through their own initiative, ingenuity and entrepreneurship. DOL’s proposed rule will allow thousands of Wisconsinites to pursue work that fits their lifestyles, thereby providing more economic opportunities for Wisconsinites to flourish.

II. INDEPENDENT CONTRACTORS IN WISCONSIN

Millions of Americans affirmatively choose to work as independent contractors. The reasons are simple—independence, flexibility, making one’s own schedule, having control over how work is completed, and freedom to experiment. Here, in Wisconsin, over 300,000 workers take advantage of this work arrangement. And make no mistake, “gig workers **want** to be independent.”² (emphasis added). In fact, Bureau of Labor Statistics data from 2023 show that 80.3 percent of independent contractors prefer their

¹ Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, 91 Fed. Reg. 9932 (Feb. 27, 2026).

² Erik Gunn, “Backers Push Evers to Sign Bill Declaring Gig Drivers Independent Contractors,” *Wisconsin Examiner*, (July 30, 2025), [available here](#).

work arrangement³—a preference that is only growing as the economy changes. Some studies suggest that the gig economy is growing three times faster than the traditional workforce.⁴ However, while the workforce has shifted toward a growing reliance on independent contractors, federal regulations have largely sought to hinder this transformation—until DOL’s rulemaking in 2021 and now. The Department’s proposed rule to rescind an outdated Biden-era rule that limited independent contractor status and replace it with a rule that brings clarity to the *employee vs. independent contractor* analysis, is good for workers and businesses alike. The rule meets the moment by aligning federal regulations with the realities of today’s workforce.

III. THE 2024 RULE LACKS PREDICTABILITY

The regulatory framework for independent contractor classifications under the FLSA has been subject to significant changes in the last five years. In January of 2021, the Department promulgated a final rule providing workable, practical guidance on how the Wage and Hour Division would determine whether a worker was an employee or an independent contractor under the FLSA. The rule clarified that the Department would primarily consider two core factors—the nature and degree of control over the work and the worker’s opportunity for profit over loss⁵—while identifying three additional “non-core” factors: the skill required for the work, the permanence of the working relationship, and whether the work is part of an integrated unit of production.⁶ The 2021 Rule provided that if the two core factors pointed toward the same classification, there was a “substantial likelihood” that it was the worker’s accurate classification, and that it was “highly unlikely” the three non-core factors could outweigh the combined probative value of the core factors.⁷ Such a test—that gives greater weight to two factors—results in streamlined analysis and allows employers and workers alike to better predict and define their relationship.

However, upon entering office, the Biden administration delayed and withdrew the 2021 Rule,⁸ and ultimately rescinded it and replaced the analysis with a totality of the circumstances test codified at 29 C.F.R. Part 795 (the “2024 Rule”).⁹ The 2024 Rule eliminated the two core-factor framework, expanded the analysis to consider six factors that “are not exhaustive[,]” and stated that undefined “additional factors” could be relevant if they “in some way indicate” economic dependence.¹⁰ Furthermore, the 2024 Rule stated that “no one factor is necessarily dispositive” and “the weight to give each

³ 91 Fed. Reg. 9932, 9943 (Feb. 27, 2026).

⁴ Sara Braun, “The gig economy is growing 3x faster than the traditional workforce, and Gen Z is leading the charge,” *Fortune*, (Apr. 16, 2025), [available here](#).

⁵ Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1,168 (Jan. 7, 2021).

⁶ *Id.* at 1,246-48.

⁷ *Id.* at 1,247.

⁸ Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62,218 (Oct. 13, 2022).

⁹ Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1,638 (Jan. 10, 2024) (effective Mar. 11, 2024).

¹⁰ 29 C.F.R. 795.110(a)(2), (b)(7).

factor may depend on the facts and circumstances of the particular relationship.”¹¹ Unlike the 2021 Rule, which provided clear guidance, the 2024 Rule leaves employers and workers guessing how the federal government will classify their relationship for FLSA purposes—long after that relationship has been established. The Department is correct to criticize the 2024 Rule for requiring “critiques afterward” rather than “guidance ahead of time.”¹² More concerning still, the 2024 Rule’s ambiguity and susceptibility to interpretive flexibility invite the federal government to intervene post hoc to classify an independent contractor as an employee. This uncertainty obstructs innovative business arrangements and interferes with market dynamics.

A regulatory framework that provides clearer weighting of the most probative factors—such as the 2021 Rule’s core-factor approach, or a similarly structured test—better serves businesses’ and workers’ legitimate need for predictability.

A. As Justice Antonin Scalia Warned Decades Ago, “Totality of the Circumstances” Tests Generally Fail to Promote Consistency and Predictability

Independent workers and the businesses who hire them need certainty that the current multifactor test simply does not provide. Justice Antonin Scalia identified, nearly four decades ago, the problem with totality of the circumstances tests. Key among his concerns was that these so-called tests fail to promote judicial consistency and predictability.

The fact is that when we decide a case on the basis of what we have come to call the “totality of the circumstances” test, it is not *we* who will be “closing in on the law,” in the foreseeable future, but rather thirteen different courts of appeals—or, if it is a federal issue that can arise in state court litigation as well, thirteen different courts of appeals and fifty state supreme courts. To adopt such an approach, in other words, is effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue... This last point suggests another obvious advantage of establishing as soon as possible a clear, general principle of decision: predictability.¹³

To be sure, Justice Scalia also acknowledged that the legal profession will inevitably have some totality of the circumstances tests and balancing tests “forever[.]” and admitted he would “probably write some of the opinions that use them.”¹⁴ But he urged that such tests “**be avoided where possible.**”¹⁵ (emphasis added). Consistent with that wise guidance, WILL strongly supports the Department’s proposed rule, which moves away from a totality-of-the-circumstances approach that can be interpreted in

¹¹ 29 C.F.R. 795.110(a)(2).

¹² NPRM § II.A (“Concerns That the 2024 Rule Fails to Provide Needed Clarity”), citing *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1299 (7th Cir. 1996).

¹³ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

¹⁴ *Id.* at 1187.

¹⁵ *Id.*

countless ways depending on whichever decisionmaker—whether investigator, administrative law judge, or district judge—first considers the case.

B. If a Worker Chooses Independent Contractor Status, the Presumption Should Favor It

In promulgating this proposed rule, the Department is once again recognizing that independent work is not inherently a disfavored status from which workers require government “protection.” On the contrary, a growing sector of workers want independence from the traditional employee-employer model. This is why millions of Americans, and hundreds of thousands of Wisconsinites, affirmatively choose to work as independent contractors, freelancers, and gig workers. These workers value the flexibility, autonomy, and entrepreneurial opportunity that independent contracting provides—including the ability to set their own schedules, work for multiple clients, and build their own businesses.

Despite these benefits, both state and federal policies continue to deny workers the ability to choose their working arrangement. A classification framework that tilts toward finding employment relationships—as the 2024 Rule did by expanding the considerations under each factor and declining to provide weighting guidance—risks converting voluntary independent arrangements into mandated employment relationships. Such a policy displaces the judgment of millions of entrepreneurial-minded individuals and businesses with the government’s own view of what constitutes appropriate working arrangements. Even worse, such policies lead many employers to feel that they have no other choice than to terminate their contracts, which negatively affects employment.

For example, when California implemented the ABC test—which creates a strong presumption that workers are classified as employees unless three elements are met¹⁶—businesses immediately terminated their contracts with freelancers across industries. Vox Media, which had ironically been a proponent of the law implementing the ABC test, cut ties with hundreds of freelance journalists.¹⁷ Most infamously, ride-share companies like Uber and Lyft questioned whether they could continue to operate in the state, while drivers vocalized their preference for classifying as independent contractors.¹⁸ As a result, Californians passed Proposition 22, which carved app-based rideshare and delivery drivers out of the ABC test and declared them independent contractors by statute.¹⁹ California’s implementation of a strict ABC test provides a real-

¹⁶ Cal. Lab. Code § 2275(b)(1).

¹⁷ “Freelance Journalists File Suit Calling AB5 Unconstitutional,” *San Francisco Examiner*, (Dec. 18, 2019), [available here](#).

¹⁸ Tran Nguyen, “Uber and Lyft Drivers Remain Independent Contractors in California Supreme Court Ruling,” *Associated Press*, (July 25, 2024), [available here](#).

¹⁹ Cal. Bus. & Prof. Code § 7451.

world example of how tests that presume employment status can place significant strain on business relationships and lead to unemployment.

The Department should recognize that worker protection and worker freedom are not inherently in tension, and that policies providing greater flexibility can support both values. For example, in 2025, Wisconsin's Senate and Assembly passed legislation that would have allowed app-based drivers to enroll in portable benefit accounts to help cover paid leave, retirement, and health care costs.²⁰ Although the Governor vetoed the legislation, proposals like this demonstrate that independent work can be paired with sound policy to support workers across different arrangements. In a changing economy, a one-size-fits-all approach to business relationships no longer makes sense.

IV. UNIFORMITY ACROSS THE FLSA, FMLA, AND MSPA IS GOOD REGULATORY POLICY

Finally, WILL supports the Department's decision to address independent contractor classification across the FLSA, FMLA, and MSPA in a single rulemaking. Workers, employers, and small businesses should not be required to navigate multiple classification standards across statutes administered by the same agency. A unified, coherent framework would decrease compliance complexity and promote consistent enforcement. Wisconsinites already must navigate multiple tests to determine whether a worker is an employee or independent contractor when determining matters of tax law (IRS), labor and pay standards (NLRA and FLSA), unemployment insurance, and worker's compensation. The administrative costs of maintaining separate and potentially conflicting classification regimes across statutes are borne ultimately by workers and consumers. At the very least, the Department should have the same test for all of the programs it administers.

V. CONCLUSION

For the foregoing reasons, the Wisconsin Institute for Law & Liberty supports the Department's proposed rule to revise the independent contractor classification framework under the FLSA, FMLA, and MSPA. The proposed rule offers a more predictable and workable standard for the millions of businesses and workers who must determine their classification status under federal labor law. WILL urges the Department to finalize its proposed rule by returning to a version of the 2021 Rule which respects the freedom of workers to choose independent contractor arrangements and does not force workers into a classification they do not want. Wisconsinites, like workers across the county, want flexibility and the freedom to choose when and how they work.

WILL appreciates the opportunity to submit this comment and is available for further dialogue on these matters.

²⁰ 2025 Wis. Assembly Bill 269.

Respectfully submitted,

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