Texas Public Policy Foundation

April 12, 2021

Via https://www.regulations.gov/
Division of Regulations, Legislation, and Interpretation,
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW, Room S-3502
Washington, DC 20210

RE: Regulatory Information Number (RIN) 1235-AA34; Comments on 86 FR 14027 (March 12, 2021); Independent Contractor Status Under the Fair Labor Standards Act; Proposed Withdrawal

Ladies and Gentlemen,

In connection with the Notice of Proposed Rulemaking ("NPR") for the referenced RIN, Texas Public Policy Foundation submits these comments.

The final rule titled "Independent Contractor Status under the Fair Labor Standards Act" ("Independent Contractor Rule" or the "Rule") provided much needed clarity for employers, while the proposed withdrawal by the Department of Labor's Wage and Hour Division ("WHD") is neither justified nor supported by the record.

The Withdrawal of the Independent Contractor Rule Will Create Uncertainty and Harm Employers

Withdrawing the Independent Contractor Rule will result in more confusion for employers, a greater administrative burden, especially for small businesses, and less opportunity for independent contractors.

The Independent Contractor Rule offers employers a simpler, more exacting test they can apply when making hiring decisions, while still remaining faithful to the text and intent of the Fair Labor Standards Act ("FLSA").

In designating two core or primary factors, the Independent Contractor Rule offers employers greater clarity. *See* 86 FR 1168, 1172, 1210. Rather than analyzing a non-exhaustive list of six factors, the Independent Contractor Rule allows employers to focus on two core factors regarding how workers should be classified. 86 FR 1168, 1179 (March 12, 2021). If the answers to both point to a certain labor designation, then the employer classification of the worker

according to that designation has a "substantial likelihood" of being correct, as required by the FLSA intended. *See* 85 FR 60600, 60612 (September 25, 2020).

Both the business community and freelance workers supported the Independent Contractor Rule. *See* 86 FR at 1172. The greater clarity offered by the Rule is particularly beneficial to small business owners, who do not have a multitude of attorneys and accountants at the ready to analyze and apply unnecessarily complex and overburdensome balancing tests. *See 86* FR at 1225 (small business owner noting that "the ability to understand and properly determine worker status under the FSLA is paramount for small businesses who cannot afford the cost of litigation."). Indeed, small business owners are particularly reliant on independent contractors.[1]

The Independent Contractor Rule also supports independent workers, who desire to determine their own working standards, hours, and conditions, and the vast majority of independent contractors who commented on the Independent Rule supported it. *Id.* at 1171. For example, Commenter Fight for Freelancers explained that its members value flexibility that comes with working as independent contractors and supported the Rule's "efforts to protect [its members'] classification." *Id.* at 1172.

Accordingly, because withdrawing the Independent Contractor Rule will result in less clarity and a greater administrative burden on employers, especially small businesses, WHD should reconsider its proposed to withdrawal.

<u>WHD Failed to Provide a Clear Basis for the Withdrawal</u>

WHD's proposed withdrawal of the Independent Contractor Rule is largely based on speculation and WHD fails to provide adequate reasoning to support the withdrawal.

The propriety of agency action is judged solely by the grounds invoked by the agency. That basis "must be set forth with such clarity as to be understandable." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

It is well-settled that agencies are free to change their existing policies as long as they provide a "reasoned explanation for the change" based upon specific findings. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). When an agency changes its position, "it need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one" but

[1] *See* "New Paychex Data Shows Independent Contractor Growth Outpaces Employee Hiring in Small Businesses**,"** *Cision PR Newswire*, January 9, 2019, available online at https://www.prnewswire.com/news-releases/new-paychex-data-shows-independent-contractor-growth-outpaces-employee-hiring-in-small-businesses-300775712.html (last accessed April 5, 2021), describing research by Paychex, Inc., showing the growth rate of independent contractor hiring by small businesses "far outpaces the growth rate for employee hiring among small businesses." *See also* Rosenberg, Joyce, "Who is an independent contractor? Gig economy law forces small businesses to rethink staffing," *USA Today*, available online at https://www.usatoday.com/story/money/2019/12/26/small-businesses-brace-new-law-restricting-independent-contractors/2753543001/ (last accessed April 5, 2021), noting that California's proposed law ("ABC Test") making it harder for companies to treat workers as independent contractors "likely will have a greater impact on the many small businesses . . . ."

at the very least it must show its work. *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009). The agency's explanation is sufficient if "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.*

Here, WHD has not shown its work based on specific findings leading to a reasoned conclusion supporting the change. Nor has it affirmatively stated or even implied that withdrawing the Rule is actually better for either employers or employees. Rather, it relies on unsupported speculation and vague hypotheticals. As such, it has failed to comply with the requirements of the Administrative Procedure Act ("APA") because WHD's findings do not support the action taken. *See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Service*, *BLM*, 273 F. 3d 1229, 1236 (9th Cir. 2001) (observing that APA requires agencies to "articulate[] a rational connection between the facts found and the choice made").

WHD premises its withdrawal of the Independent Contractor Rule on 3 primary bases: (A) the rule is allegedly inconsistent with the FLSA's text and purpose, and case law interpreting the FLSA; (B) the possibility that the Rule "will cause confusion or lead to inconsistent outcomes rather than provide clarity or certainty;" and (C) the alleged negative impact the Rule would have on workers. 86 FR 14027, 14031-14035. However, WHD fails to provide *any* findings or explanations to support these purported bases.

A. WHD Makes No Findings that the Rule Is Inconsistent with the FLSA

The first reason WHD proffers for the withdrawal is that it "*questions whether* the Rule is fully aligned with the FLSA's text and purpose or case law describing and applying the economic realities test." 86 FR 14027, 14031 (Emphasis added). The Department of Labor ("DOL") thus proposes to take final action to withdraw the Rule based on a question that it makes no attempt to answer.

Further on, WHD states that, due to the elevation of the two "core factors," it is "concerned that the Rule's approach *may be* inconsistent with the position expressed by the Supreme Court and other federal courts that no single factor in the analysis is dispositive." FR 14027, 14032 (emphasis added). Again, WHD is not actually stating that the Rule's approach is inconsistent with precedent, or even that it is probably inconsistent; rather, that it "may be" inconsistent.

Continuing with its reasoning as to why the Rule *might be* inconsistent with the FLSA, WHD states that it is "concerned that significant legal and policy implications *could* result from making control one of only two factors that would be ascribed greater weight." 86 FR 14027, 14033 (emphasis added). Rather than a "reasoned explanation," WHD speculates about what could happen, as opposed to what will or would be likely happen.

WHD also expresses concern that the "outsized role" of control in the Rule's analysis "may be contrary to the Act's text and case law." *Id.* at 14033. Again, WHD makes no actual finding that the rule is or even likely is inconsistent with the FLSA. The only finding is that the Rule may be inconsistent.

Furthermore, WHD argues that, "[t]o the extent that women and people of color are overrepresented in low-wage independent contractor positions, as some commenters asserted as part of the Independent Contractor Rule rulemaking, this result could have a disproportionate impact on low-wage and vulnerable workers." 86 FR 14027, 14034. This assertion flies in the face of WHD's own research, however, which shows that independent contractors are 65% male. 86 FR 1168, 1211, U.S Census Bureau's Current Population Survey ("CPS") Contingent Worker Supplement ("CWS"). *See Ariz. Cattle Growers' Ass'n* 273 F. 3d at 1236.

B. WHD Makes No Findings that the Rule Decreases Clarity

WHD's second justification for withdrawing the rule is its "concern regarding *the possibility* that these changes will cause confusion or lead to inconsistent outcomes rather than provide clarity or certainty, as intended." 86 FR at 14034 (emphasis added). WHD fails to make an actual determination to support its decision. Instead, it speculates about a "possibility." WHD states:

> Because neither courts nor WHD have previously pre-assigned certain factors a greater weight than other factors or grouped the factors into categories of "core" and "other" factors, it *may* not be clear to courts, WHD, and/or the regulated community how the analysis and weighing of factors would work, and there *could be* inconsistent approaches and/or outcomes as a result.
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> . . . Given that courts and WHD *could* struggle with applying the new concepts introduced by the Rule, the Department *is uncertain* whether the Rule would provide the clarity that it intends.

Id. at 14034 (emphasis added). This is rank speculation rather than making findings of fact, which is especially egregious in light of the fact that it just made a record to support the Rule when it was published three months ago. Moreover, a uniform rule where two core factors provide substantial likelihood of appropriate classification provides greater, not lesser, clarity than assigning weights on an *ad hoc* case-by-case basis.

C. *WHD Withdraws the Rule Based on Speculation, Not Facts*

WHD posits that it "does not believe the Rule fully considered the likely costs, transfers, and benefits that could result," citing the impact a worker's exclusion would have on minimum wage and overtime pay, and "questions whether a rule that could increase the number of independent contractors, effectuates the FLSA's purpose, recognized repeatedly by the Supreme Court, to broadly provide employees with its protections." *Id.* But WHD offers no specific findings to support those bald assertions. Rather, it observes that impacts on workers "can be significant and must be evaluated further." *Id.* Yet the potential impacts were just evaluated by WHD a few months ago. There is a full record supporting the Independent Contractor Rule, along with more than 1800 comments and the agency's responses to these comments. *Id.* at 1171.

Despite such a robust record, WHD's justification for withdrawing the Rule is limited to a conditional, unsupported statement that the impact "can be significant" and "must be evaluated further." WHD's assertion that it needs more time to evaluate the impact of the Independent Contractor Rule does not support withdrawing the rule, especially in light of the thorough evaluation of the Rule made by the agency just a few months ago.

Respectfully submitted,

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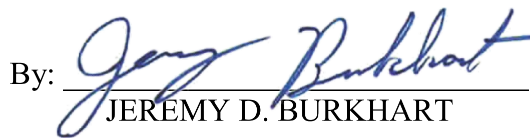
By: 
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