



April 22, 2026

Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor, Room S-3502  
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 | RIN 1235-AA46**

Independent Women's Center for Economic Opportunity (CEO) and Law Center (IWLC) submit the following comment in support of the [proposed rule](#). Independent Women is a non-profit, non-partisan 501(c)(3) organization founded by women to foster education and debate on legal, social, and economic policy issues. The CEO's goal is to advocate for common-sense policy solutions, grounded in data, to expand workplace choice, freedom, and opportunity.

**Background**

In early 2021, the Department of Labor adopted [a rule](#) (proposed in 2020) designed to clarify the analyses federal courts and the Department had used to determine a worker's status under the Fair Labor Standards Act (FLSA). Employing an economic realities test, the Department identified two factors (the nature and degree of control over the work and the individual's opportunity for profit or loss) as "core" factors that signal whether or not an individual is an "employee" or in business for oneself. The 2021 rule provided welcome relief for the [tens of millions](#) of independent contractors who sought to ascertain their status under the law and maintain economic freedom from working for themselves.

Under a different administration, the Department overturned the 2021 rule and, in 2024, finalized an entirely new set of regulations for determining employment under the FLSA. The [2024 rule](#) relied on an economic test that included six factors (and additional ones as needed): (1) opportunity for profit or loss depending on managerial skill; (2) investments by the worker and the potential employer; (3) degree of permanence of the work relationship; (4) nature and degree of control; (5) the extent to which the work performed is an integral part of the potential employer's business;

and (6) skill and initiative. None of the factors carried greater weight than the others, and the rule did not clarify how each factor should be considered against others.

Greater complexity from the 2024 rule led to uncertainty for independent contractors and the businesses that employ them, creating a [chilling effect](#) for these arrangements. The new rule imposed significant compliance costs on businesses and forced individuals—who would be forced to change their way of work under ambiguous new requirements—into limbo as the rules were challenged in the courts.

In 2026, the Department introduced a [new rule](#) that would rescind the 2024 rule and largely reinstate the 2021 rule. It would establish an economic realities test, distinguishing employees from independent contractors under FLSA by focusing on two “core” or primary factors—the nature and degree of the individual's control over the work and the individual's opportunity for profit or loss.

We believe this is a reasonable and flexible standard for which workers can be classified as independent contractors and will provide much-needed clarity for workers, firms, and judges.

### **The proposed rule recognizes that American workers value independent contracting over traditional employment for the flexibility.**

Flexibility is the primary motivation for individuals to choose independent contract work over W-2 employment. [72.9 million Americans](#)—42% of the U.S. workforce—freelance nationwide. Two out of three independent workers (63%) indicate their independence is fully by choice. They determine when, where, for whom, and how much they work. They can supplement their regular income or earn a livelihood from independent contracting.

Independent contracting allows freelancers the flexibility to balance other priorities, such as raising children, caregiving for spouses and aging parents, managing their own health issues, pursuing entrepreneurship and education, or relocating to new areas.

For some freelancers, independent contracting keeps them attached to the workforce. According to a 2019 report by Upwork and the Freelancers Union, [46%](#) freelancers said they depended on contract work because their personal circumstances prevented them from working in traditional jobs. Without such work arrangements, these workers would have to drop out of the labor force entirely, leading to dire consequences.

This is the case for wedding florist and event planner [Monica Wyman](#). A mother of three young children, Wyman started working for a florist and eventually opened her

own business. The flexibility of working for herself enabled Wyman to contribute to her family's finances while still being the primary caregiver for her children. During multiple, multi-year battles with cancer and other health issues, she was able to ramp up and down her employment.

Because of the sporadic nature of her work, Wyman hired other mothers as independent freelancers ahead of big events. "I would rotate in different moms who I knew wanted a few hours here and there. It worked really well for all of us," she **explained**. "These are women who need the flexibility." If Wyman could not be self-employed as an independent contractor, she would not have been able to earn income and care for her family while tending to her health condition. She also could not offer flexible contract work to other mothers.

Freelancers not only survive but thrive through independent contracting. They express greater job satisfaction and **other nonfinancial benefits** than those who work as traditional employees: 86% report being happier; 67% feel more secure; and 73% are optimistic about their careers.

The gig economy is a subset of the larger independent contracting universe. App-based work opportunities use technology to connect workers with "gigs," which carry no guarantee of future employment. Workers may have specialized skills, training, experience, and education—or perhaps none of those at all—but enter into contractual agreements to do work for a hiring entity. Individuals have long engaged in freelance work, but technology facilitates these transactions digitally.

A large majority of gig workers are employed part-time, earning supplemental income. According to the Flex Association, only **one in ten** gig workers earns primary income through gig work, and three in ten (30%) rely on app-based earnings for 30% or more of their income.

In the gig sector, flexibility is uniquely valued, even over higher earnings. Some **77%** of app-based workers want to remain Independent contractors, while only 13% would prefer to be classified as employees.

By narrowing the definition of independent contracting, the 2024 rule effectively limited opportunities for independent work that are beneficial for workers. However the proposed DOL rule **establishes** that among benefits including cost savings, greater certainty, and reduced litigation, this rule would also contribute "expanding labor force participation among groups that highly value flexibility (e.g., caregivers, students, older workers); supporting continued labor market attachment during periods when traditional employment is infeasible and enhancing efficiency by better aligning heterogeneous worker preferences with available work arrangements."

## **The proposed rule would have an outsized positive impact on women's workforce outcomes.**

Women increasingly choose independent contracting over traditional employment primarily for flexibility. This is a trend that only grows stronger.

Economists have analyzed the growing trend of alternative work arrangements in the U.S. In a [paper](#) published by the National Bureau of Economic Research, researchers found that women are now more likely than men to be employed in alternative work. From 2005 to 2015, the percentage of women who were employed in an alternative work arrangement rose from 8.9% to 17%, nearly double, compared to a more modest 2.4% increase for men.

[Internal Revenue Service data](#) also demonstrates that the growth in independent contracting from 2001 to 2016 was attributed to women. Independent contracting is growing more popular among females, both relative to female employees and to male independent contractors. The majority of female independent contractors earn supplemental income to traditional W-2 employment earnings. However, the largest growth in female contractors was among women who were working independently as their primary source of income, who tended to be primary earners in their households, and who earned lower incomes (at the bottom of the income distribution).

IRS data also confirms that female independent contractors are more likely to have children than employees.

Female ICs are also older on average than employees, suggesting that seasoned professionals or women in pre-retirement find contracting a good option to stay in the labor force.

Take, for example, **Dori Lerner**, a semi-retired transcriptionist from California, who became a freelancer in this field because it offered her more work opportunities than people her age typically find. "Transcription allowed me to stay at home, be my own boss, and control my workflow and whom I work with," Dori [explained to Independent Women](#). After the Great Recession, opportunities in her previous line of work disappeared. So, Dori found that transcription work could supplement her retirement benefits on her schedule. With low barriers to entry, she had the freedom and ability to work for multiple agencies.

Among industries, there have been [large increases](#) of female independent contractors in the fast-growing professional services and healthcare industries, and other service industries. Women have also dominated the aggregate growth of contractors in health care, social assistance, and educational services, the fastest-growing sectors.

Women are driven by flexibility. **Nine out of ten** female workers who shifted from full-time employment to independent contract work said they did so to prioritize flexibility over stability. In the gig economy, flexibility is even more valued. According to a 2018 survey, flexibility is important to **94%** of working women. Furthermore, 61% of these women prefer an independent relationship with their chosen companies versus working for that company as an employee.

The proposed two-factor economic realities test in the proposed DOL rule creates a clear and concise standard that female workers can easily ascertain their employment status. Under this standard, independent contractors, from hairdressers to babysitters, and writers to delivery drivers, can confidently continue in the flexible and fulfilling careers that allow them to stay in the workforce.

### **The proposed rule addresses the uncertainty about employment status under the FLSA.**

Beyond the economic benefits, this rulemaking is about restoring clarity and discipline to the law governing independent work. The Department's proposed rule appropriately restores a legal framework aligned with longstanding judicial interpretations of FLSA and the economic realities test, as articulated by the Supreme Court. Courts have consistently emphasized that the ultimate inquiry is whether a worker is economically dependent on an employer or operates an independent business.

The 2024 Rule moved away from that clarity. By elevating a multi-factor balancing test in which no factor carried greater weight, it introduced significant uncertainty into the analysis. Rules are meant to provide guidance that can be understood and applied in real time, not after years of litigation.

The proposed rule corrects this problem by recognizing that certain factors are more probative of whether an individual is in business for himself or herself. Prioritizing these factors brings needed discipline to the analysis while still allowing consideration of other relevant facts. This approach better reflects judicial doctrine and provides a workable standard that individuals and businesses can actually apply.

Independent Women's Law Center's experience underscores the real-world consequences of the 2024 Rule's uncertainty. As an organization that regularly engages independent contractors and fellows to perform discrete, project-based work, IWLC was required to undertake a time-intensive and resource-heavy review of its workforce classifications to ensure compliance. This process involved revisiting existing agreements, reassessing roles under a multi-factor framework with no clear weighting, and consulting outside counsel to evaluate risk across different categories

of work. Faced with indeterminate standards, IWLC was forced to divert organizational resources toward legal compliance rather than mission-driven work, while also adopting more conservative practices to mitigate the risk of misclassification. The result was increased legal costs, administrative burden, and reduced flexibility in structuring lawful independent work relationships. Rather than providing clarity, the 2024 Rule introduced ambiguity that required significant expenditure of time and resources to navigate, burdens that fall particularly hard on nonprofit organizations operating with limited capacity.

In short, a classification standard should be clear enough to guide conduct, not so ambiguous that it forces workers and businesses to operate in legal uncertainty and forced litigation. The proposed rule moves the law back toward that principle and allows lawful independent work to function as intended.

### **The rule prevents the hardship of overly restrictive classification standards**

Increasingly, states have sought to adopt classification standards that reduce independent contracting opportunities, to the detriment of their freelance and overall workforce. The proposed rule would serve as a standard for states to follow.

In California, Assembly Bill 5 (AB5) was passed in 2019. That law implemented a rigid ABC test, which begins from the position that all workers are employees and have to prove otherwise. The law effectively reclassified much of the state's independent workforce. Proponents of the law assumed that businesses would hire their contracted workforce as employees and absorb the estimated 30% labor cost increase. AB5 did not lead to a growth in traditional employment as policymakers claimed. Instead, the law spawned the loss of income, contracts, and livelihoods for freelancers. Self-employment fell by 10.5%, and overall employment fell by 4.4%, according to [research](#) by Liya Palagashvili and others at the Mercatus Center. The group Freelancers Against AB5 compiled a list of personal stories from [600 professions](#) impacted by AB5. Entire occupations disappeared, and freelancers were forced to leave the state.

Take, for example, **Jennifer O'Connell**, a California writer, yoga instructor, and career-reinvention coach. She built a career writing for outlets like The Washington Times and teaching yoga classes, even certifying yoga studios globally online. However, AB5 did not allow her to keep working independently. [She explained to Independent Women](#), "There are a lot of things about the law that don't work. The odds are stacked against the majority of creative people like writers and artists whose work involves collaboration with other artists."

After AB5 took effect, her 1099 work, which comprised about three-quarters of her income, was slashed. "Take my yoga work, I do lectures on anatomy or I help with a

portion of training. A mom-and-pop studio can't hire me and put me on payroll for a one or two-hour lecture that I do once per month. That's wiped out so much work. A lot of studios have shut their doors because of AB5 and COVID-19." After three years, she and her family fled California and moved to Alabama, which offered more amenable labor policies for freelancers. O'Connell is an opponent of the 2024 DOL rule because it would nationalize the hardship of AB5.

The proposed rule takes a different approach to the stringent ABC test in California's AB5. It does not assume all workers are employees, nor does it create high hurdles to prove that one is in business for themselves. This removes the uncertainty and confusion of the 2024 rule, which had the same effect of chilling flexible work arrangements as AB5 had.

Independent Women's Center for Economic Opportunity and Independent Women's Law Center support the proposed 2026 rule and look forward to it being finalized expeditiously.

Respectfully submitted,



Patrice Onwuka  
*Vice President for Economic Policy  
Independent Women*



Beth Parlato  
*Senior Legal Counsel  
Independent Women's Law Center*