



April 28, 2026

Submitted via <https://www.regulations.gov/document/WHD-2026-0001-0001/comment>

Daniel Navarrete, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

Re: Department of Labor Notice of Proposed Rulemaking, *Employee or Independent Contractor Status under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act* (Feb. 27, 2026), RIN 1235-AA46

Dear Director Navarrete:

Allegheny County, PA, the City of Baltimore, MD, the County of Santa Clara, CA, and the City and County of San Francisco, CA submit this comment in opposition to the Department of Labor’s (“Department” or “DOL”) February 27, 2026 Notice of Proposed Rulemaking (“NPRM”) regarding the status of workers as employees or independent contractors. *See* 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) (RIN 1235-AA46).

The proposed rule improperly narrows the standard for determining which workers are categorized as employees under the Fair Labor Standards Act (“FLSA”) and extends that standard to the Family and Medical Leave Act (“FMLA”) and the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”). If adopted, the proposed rule will lead businesses to increasingly misclassify their workers as independent contractors, resulting in worse pay and benefits for many of our residents. At scale, those individual harms will translate to increased racial inequality across our communities, unfair competition for law-abiding local businesses, and a less resilient workforce that is more dependent on local programs and social services.

For these reasons, as explained below, we strongly oppose the proposed rule and request that DOL withdraw it.

I. The proposed rule will lead businesses to increasingly misclassify their workers as independent contractors in violation of federal, state, and local laws.

The Department should withdraw its proposed rule because it contradicts the text of the FLSA and controlling court precedent and is therefore “not in accordance with law.” 5 U.S.C. § 706(2)(A). As described below, adopting the proposed rule would likely result in more illegal

misclassification of employees as independent contractors, even in local jurisdictions with stronger state or local laws.

A. The proposed rule contradicts statutory text and court precedent, improperly broadening which workers may be categorized as independent contractors.

The NPRM misapplies the plain language of the FLSA—specifically, the statute’s definition of “employ,” 29 U.S.C. § 203(g)—and incorporates that erroneous interpretation into the FMLA¹ and MSPA². The proposed rule thus improperly narrows which workers benefit from the protections of the three federal laws.³

Workers may benefit from the protections of the FLSA if they are “employed,” as defined by the statute. 29 U.S.C. § 203(e).⁴ The FLSA expansively defines “employ” to “include[] to suffer or permit to work.” 29 U.S.C. § 203(g). By design, the FLSA covers work relationships that exceed the traditional common-law definition of employment—instead including the broad concepts of “suffering” or “permitting” someone to work. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947); *see also Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 31 (1961); *Barfield v. New York City Health and Hosps. Corp.*, 537 F.3d 132, 141 (2d Cir. 2008). After quoting the FLSA’s definition of “employ,” however, the NPRM ignores the broader statutory terms of “suffer or permit to work,” which drafters of the FLSA borrowed from preexisting state child labor statutes. *Rutherford Food Corp.*, 331 U.S. at 728; *Nationwide Mutual Ins. Co.*, 503 U.S. at 326.

The proposed rule also contradicts federal court precedent by oversimplifying and otherwise misapplying the controlling test for determining whether a worker is operating as an independent business or an employee, which was established by the Supreme Court in *U.S. v. Silk*, 331 U.S. 704, 716 (1947). That test requires consideration of at least five factors, none of which are controlling: (1) the degree of control exercised by the employer over the workers; (2) the workers’ opportunity for profit or loss and their investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer’s business. *Id.*

The proposed rule improperly elevates two “core factors”—control over the work and opportunity for profit and loss—and deprioritizes the other factors. 91 Fed. Reg. 9973-74. This narrow interpretation contradicts federal precedent that placed focus on the other factors, *e.g.*, *Goldberg*,

¹ 29 U.S.C. § 2611(3).

² 29 U.S.C. § 1802(5).

³ Because the FMLA and MSPA depend on the interpretation of the FLSA’s statutory definitions, the discussion in this comment is largely limited to the text and court interpretations of the FLSA.

⁴ The minimum wage, overtime, and recordkeeping requirements of the FLSA apply to “employees,” 29 U.S.C. §§ 206, 207, 211, and “the term ‘employee’ means any individual employed by an employer,” 29 U.S.C. § 203(e)(1).

366 U.S. at 31, and advised against a rigid application of a test that is meant to be expansive, *see, e.g., Brock v. Superior Care*, 840 F.2d 1054, 1059 (2d Cir. 1988); *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 380 (5th Cir. 2019).

Not only does the proposed rule place undue emphasis on just two factors, it too narrowly construes those two factors. For example, in its discussion of control over work, the proposed rule ignores that modern employers commonly use technology and algorithms to automatically and invisibly track, supervise, and control the conditions of work for supposed independent contractors.⁵

By improperly elevating and misinterpreting two narrow factors, the proposed rule would encourage businesses to misclassify employees as independent contractors. Because the proposed rule conflicts with the text of the FLSA as well as with Supreme Court and circuit court authority interpreting the statute, it constitutes an improper exercise of the Department’s rulemaking authority.

B. The NPRM and proposed rule violate the Administrative Procedure Act.

The proposed rule, if finalized, would violate the Administrative Procedure Act (“APA”) because it is “arbitrary, capricious,” and “otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The NPRM fails to sufficiently explain why the adopted approach is correct, neglecting to provide adequate reasons or “articulate a satisfactory explanation for its action,” *Motor Vehicle Mfrs.’ Assoc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983), including by ignoring the negative impacts on workers, communities, and local governments that are described below. Similarly, the NPRM fails to adequately justify its departure from prior policy, adopted in 2024. *See id.* at 41-42.

The proposed rule contains numerous legal errors, as described above, including clear conflicts with the plain text of the FLSA, controlling U.S. Supreme Court precedent, and federal circuit court interpretations of the statute. *Cf. SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (“[A]n order may not stand if the agency has misconceived the law.”). These legal errors and contradictions to well-established law render the proposed rule “not in accordance with law.” 5 U.S.C. § 706(2)(A).

The Department does not have the power to rewrite the text of the FLSA or change the controlling case law. Thus the proposed rule, if adopted, will inevitably cause confusion about employer legal obligations and worker rights and fuel inconsistent application by courts of the FLSA, FMLA, and MSPA. Given the extent to which the proposed rule contradicts statutory text and court precedent, as described above, courts applying federal law may find the rule unpersuasive and decide not to defer to its weakened standard. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

⁵ Nat’l Emp’t Law Project & P’ship for Working Families, *Remote Control: The Truth and Proof About Gig Companies as Employers* (Oct. 2020), <https://www.nelp.org/app/uploads/2020/10/NELP-PWF-Fact-Sheet-Remote-Control-Truth-Proof-Gig-Companies-Employers.pdf>.

The NPRM’s failure to address, or even acknowledge, this confusion is one of its greatest shortcomings. Instead, the NPRM clings to the illusion that the proposed rule “provides more clarity to interested stakeholders” because it arbitrarily simplifies a court-created multifactor test to two core factors. 91 Fed. Reg. at 9940. But predictability about the Department’s analysis is not helpful to workers and employers if courts rightfully disregard it in favor of a more faithful reading of the statute and longstanding court precedent. The NPRM makes no attempt to explain why a rule that contradicts controlling statute and case law is advisable, or how the negative effects on workers, described below, are compatible with the Department’s core purpose.⁶

C. Adopting the proposed rule will lead to greater numbers of misclassified workers.

Why the federal government would engender to create more confusion for employers and workers alike is perplexing. Confusion about employee status is especially detrimental to local efforts to ensure that our community members receive proper compensation and benefits, that our businesses are treated fairly such that none gain an unfair advantage, and that any misclassification does not lead to significant losses in local government revenues.

Under the test set forth in the proposed rule, greater numbers of workers will be categorized as independent contractors and lose the benefits and protections that employees enjoy under the FLSA, FMLA, and MSPA. Especially in industries that already commonly misclassify their workers—including construction, trucking, janitorial, home care, app-based work, and work via staffing and temporary help agencies⁷—employers will increasingly categorize their workforce as independent contractors. Although the NPRM asserts that the test in the proposed rule “is neither more nor less permissive of independent contractor relationships as compared to the analysis that the Department is currently applying,” it nevertheless acknowledges that “the number of independent contractors could increase by 1 to 3 percentage points” if the proposed rule is adopted. 91 Fed. Reg. at 9961.

Both in jurisdictions where the floor set by the FLSA controls and in local jurisdictions with worker protection laws that exceed that federal baseline, many employers will likely rely on the proposed rule and incorrectly conclude that they may now permissibly classify their workers as independent contractors. The proposed rule change may also embolden unscrupulous employers to cut payroll costs by misclassifying their workers as independent contractors. Conversely, ordinary working people will become even less likely to assert their rights amid increased uncertainty about the contours of those rights. Misclassified workers are often also required to sign arbitration

⁶ 29 U.S.C. § 551 (“The purpose of the Department of Labor shall be to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment.”)

⁷ See Nat’l Emp’t Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (Oct. 2020), <https://www.nelp.org/app/uploads/2017/12/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>.

agreements,⁸ further reducing the likelihood that they will bring an employment claim and attempt to hold their employer accountable for misclassifying them.⁹ Each of these outcomes will lead to hardship for our residents and our systems.

II. The proposed rule will harm our residents, our communities, local businesses, and local governments' ability to provide for our residents.

Businesses that apply the proposed rule's interpretation of the test for employee status will be more likely to classify their workers as independent contractors.¹⁰ The inevitably resulting increase in misclassification will shift costs and economic risk away from employers and onto individual workers, with significant ramifications for communities and local governments.¹¹

A. Misclassified workers will earn lower wages and face greater precarity, negatively impacting the social and economic well-being of our local communities.

Workers classified as independent contractors are stripped of various employee benefits and protections. They earn lower pay and enjoy less stability. At the community level, increased misclassification of employees as independent contractors will exert downward wage pressure across entire industries, worsening racial income inequality and disadvantaging law-abiding local businesses.

1. Misclassification harms individual workers.

Workers newly classified as independent contractors pursuant to the proposed rule will be stripped of federal minimum-wage and overtime protections under the FLSA and the right to job-protected medical leave under the FMLA. Likewise, migrant and seasonal agricultural workers classified as independent contractors will lose the benefit of employment standards related to wages, housing, transportation, disclosures, and recordkeeping. The losses under these laws are significant, but the disadvantages of independent contractor status do not end there.

The NPRM ignores convincing evidence that misclassification as an independent contractor results in lower wages and greater precarity for working people. Studies show that many independent

⁸ See Elizabeth C. Tippet & Bridget Schaaff, "How *Concepcion* and *Italian Colors* Affected Terms of Service Contracts in the Gig Economy," 170 Rutgers U. L. Rev. 459 (2018).

⁹ See Cynthia Estlund, "The Black Hole of Mandatory Arbitration," 96 N.C. L. Rev. 679, 696 (2018) (finding that 98 percent of workers who would otherwise bring a claim against their employer choose to abandon their claims when their only option is private arbitration).

¹⁰ The NPRM acknowledges that businesses are more likely to classify workers as employees under the current rule than they will be under the proposed rule. 91 Fed. Reg. at 9941, 9961 ("[T]his proposed rule could reduce any 'voluntary' employment classification" defined as "situations where businesses classify workers . . . as employees to avoid legal risk (in the event that the business does not satisfy the FLSA's requirements).").

¹¹ As noted above, the NPRM fails to address these negative consequences in its analysis of the proposed rule's costs. See 91 Fed. Reg. at 9961-62, 9964-65.

contractors earn far less than employees performing equivalent jobs.¹² Still more concerning, research reveals that some independent contractors even earn less than the minimum wage, undermining the purpose of wage-and-hour laws.¹³

Not only are misclassified workers more likely to live paycheck to paycheck, but they are also much less likely to have access to social safety net programs that provide stability in difficult times. Independent contractors typically lack access to unemployment insurance during times of job loss, workers' compensation systems for job-related injuries, job-protected or paid leave in times of medical or personal necessity, and employer-provided health care to help avoid serious illness. As a result, a single setback can quickly translate into financial disaster for these workers.

Workers classified as independent contractors are also typically denied the anti-discrimination and anti-harassment protections provided by Title VII of the Civil Rights Act of 1964¹⁴ and most state civil rights laws.¹⁵ Misclassification thus undermines even bedrock civil rights.

2. *Our communities and local economies will suffer as a result of increased worker misclassification.*

The harm of increased misclassification will not be evenly distributed and will instead disproportionately impact workers of color. Across the country, Black and Latinx workers are already segregated into underpaid jobs.¹⁶ This widespread occupational segregation means that workers of color are overrepresented in industries that are especially susceptible to increased misclassification, including construction, trucking, transportation, janitorial services, home care, retail, delivery services, and app-based work.¹⁷ At scale, increased misclassification of employees as independent contractors will exert downward wage pressure across those entire industries.

¹² Ismael Cid-Martinez et al., Econ. Policy Inst., *Misclassifying Workers as Independent Contractors is Costly for Workers and Social Insurance Systems* (Apr. 2026), <https://www.epi.org/publication/misclassifying-workers-as-independent-contractors-is-costly-for-workers-and-social-insurance-systems/>.

¹³ Ben Zipperer et al., Econ. Policy Inst., *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay* (June 2022), <https://www.epi.org/publication/gig-worker-survey/> (finding that 14% of gig workers earned less than the federal minimum wage and 29% earned less than their state's minimum wage).

¹⁴ "Coverage," U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/employers/coverage-0> (last visited Apr. 23, 2026) ("independent contractors[] are not covered by the anti-discrimination laws").

¹⁵ A Better Balance, "Legal Memorandum: Independent Contractors and State Anti-Discrimination Laws" (2020), <https://www.abetterbalance.org/wp-content/uploads/2020/03/Legal-Memorandum-Independent-Contractors-and-State-Anti-Discrimination-Laws.pdf>.

¹⁶ Rebecca Dixon & Amy Traub, Nat'l Emp't Law Project, *Desegregating Opportunity* (May 2024), <https://www.nelp.org/app/uploads/2024/05/Desegregating-Opportunity-May-2024.pdf>; Darrick Hamilton et al., Econ. Policy Inst., *Whiter Jobs, Higher Wages: Occupational Segregation and the Lower Wagers of Black Men* (2011), <https://files.epi.org/page/-/BriefingPaper288.pdf>.

¹⁷ Nat'l Emp't Law Project, *Independent Contractor Misclassification Imposes Huge Costs*, *supra* note 7; Nat'l Emp't Law Project, *America's Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data* (June 7, 2018), <https://www.nelp.org/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/>.

These trends will exacerbate the racial income and wealth inequality that already weakens the social fabric of our communities.¹⁸

Law-abiding local businesses will also be harmed by the proposed rule, which will increase unfair competition through payroll fraud. Misclassification relieves employers of a large portion of payroll costs, including Social Security and Medicare contributions, which are instead shifted to the individual workers.¹⁹ Businesses that properly classify their workers as employees, therefore, are at a competitive disadvantage and can easily be underbid by businesses that engage in independent-contractor misclassification.²⁰ The effect of this unfair competition may be to force law-abiding employers out of business or to incentivize a race to the bottom among employers—both of which would weaken local economies.

B. Misclassifying working people as independent contractors negatively impacts our local governments and their ability to provide for our residents.

If the proposed rule is adopted, the working people in our jurisdictions will be increasingly misclassified as independent contractors, which will result in negative consequences for our local governments.

1. Misclassified workers become more reliant on local services.

Misclassifying workers as independent contractors renders them ineligible for various social insurance programs. As noted above, independent contractors typically lack access to unemployment insurance during times of job loss, workers' compensation systems for job-related injuries, and job-protected or paid leave in times of medical or personal necessity. Without access to these systems and benefits, independent contractors may become more reliant on locally provided safety net services, such as food or housing assistance.

In addition to providing food and housing assistance, many of our jurisdictions either fund or run health clinics that fill gaps for under- or uninsured residents. Independent contractors typically do not receive health care through their employers and are more likely to be uninsured. Therefore, the proposed rule may result in local healthcare systems facing increased uncompensated care costs and greater demand for health clinics.

2. Misclassification weakens the social safety net and deprives local governments of needed revenue.

¹⁸ Aditya Aladangady & Akila Forde, Fed. Reserve Bd., “Wealth Inequality and the Racial Wealth Gap,” *FEDS Notes* (Oct. 22, 2021), <https://www.federalreserve.gov/econres/notes/feds-notes/wealth-inequality-and-the-racial-wealth-gap-20211022.html>.

¹⁹ Cid-Martinez et al., *supra* note 11.

²⁰ Françoise Carré, Econ. Policy Inst., *(In)dependent Contractor Misclassification* (June 8, 2015), <https://files.epi.org/pdf/87595.pdf>.

Classifying workers as independent contractors not only shifts payroll tax burdens from businesses to individual workers, but studies also reveal that misclassification significantly reduces total tax revenue.²¹ Wrongful misclassification deprives social insurance systems of thousands of dollars per worker, per year.²² Federal government estimates, such as from the Government Accountability Office²³ and the Treasury Inspector General for Tax Administration,²⁴ indicate that billions of dollars are lost in total each year from misclassification.²⁵ States also lose revenue for their unemployment insurance and workers’ compensation systems, as well as for their general revenue coffers.²⁶

One significant result of misclassification, therefore, is an underfunded social insurance system that is less able to provide stability in times of economic downturn. A weakened social safety net—most notably, underfunded unemployment insurance trust funds²⁷—will exacerbate local level problems like food and housing insecurity during times of economic crisis, and jurisdictions will experience increased demand for local services.

Additional misclassification will also increase the burden on local government enforcement agencies tasked with protecting workers’ rights. That work will become increasingly important if the proposed rule is adopted. Misclassification resulting from confusion about the effect of a Department rule will be especially acute in states and localities with worker protection laws and tests for employee status that are stricter than the federal baseline. Thus local jurisdictions will need to divert scarce enforcement and other resources to address the increased violations of labor and employment laws that result from misclassification.

Even while demand for local services increases, local governments may experience reductions in available funding for local services as a result of misclassification. When misclassified workers are paid lower wages, as discussed above, one result is lower employment tax revenue. Underpaid

²¹ Cid-Martinez et al., *supra* note 11, at 7.

²² *Id.* at 12.

²³ See U.S. Gov’t Accountability Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* 10 (Aug. 2009), <http://www.gao.gov/new.items/d09717.pdf> (noting \$1.6 billion lost in 1984 dollars).

²⁴ See Treasury Inspector General for Tax Admin., *While Actions Have Been Taken to Address Worker Misclassification, Agency-Wide Employment Tax Program and Better Data are Needed* 2 (Feb. 4, 2009)

(“The IRS conducted a preliminary analysis of Fiscal-Year 2006 operational and program data and found that underreporting attributable to misclassified workers is likely to be markedly higher than the \$1.6 billion [estimate from 1984].”)

²⁵ Nat’l Emp’t Law Project, *Independent Contractor Misclassification Imposes Huge Costs*, *supra* note 7, at 2-3.

²⁶ See, e.g., Pennsylvania Dep’t of Labor & Industry, *Joint Task Force on Misclassification of Employees Annual Report* 21-24 (Mar. 1, 2022), <https://www.pa.gov/content/dam/copapwp-pagov/en/dli/documents/individuals/labor-management-relations/llc/documents/act-85-annual-report-2022.pdf> (estimating up to \$124.6 million lost to Pennsylvania’s general fund in 2019).

²⁷ Nick Gwyn & Jenna Gerry, *Unemployment Insurance Systems Unprepared for Another Recession* (Apr. 18, 2023), <https://www.cbpp.org/research/economy/unemployment-insurance-system-unprepared-for-another-recession>.

workers also pay less sales tax because they are less able to participate in the local economy. In these ways, broader government funding, received either via pass-through state and federal taxes or direct local taxes, is reduced, and local governments are left with fewer resources to build local infrastructure, educate our children, and provide other vital services to our residents.

III. Conclusion

The working people in our jurisdictions deserve to be properly classified by their employers. While individuals who are truly in business for themselves may properly qualify as independent contractors, other workers should receive the protections and benefits of employee status. The proposed rule, however, will increasingly classify working people as independent contractors to the detriment of our communities and local governments.

For the reasons above, we call upon DOL to withdraw the proposed rule.

Respectfully submitted,

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