

# **EPI comment on DOL's proposed rule on “Employee or Independent Contractor Status”**

**Public Comments** • By **Samantha Sanders, Heidi Shierholz, and Valerie Wilson** • April 28, 2026

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**Comments on RIN 1235-AA46: Employee or Independent Contractor Status under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act**

Dear Director Navarrete:

We submit these comments from the [Economic Policy Institute](#) (EPI) on the Department of Labor’s (“Department” or “DOL”) Notice of Proposed Rulemaking (“NPRM”) regarding the standard for determining who is an employee and who is an independent contractor under the Fair Labor Standards Act (“FLSA”), the Family and Medical Leave Act (“FMLA”) and the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”).

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low- and middle-income workers, and assesses policies with respect to how well they further those goals.

We strongly oppose the Department’s rule as proposed. We urge the Department to withdraw this rule and instead allow the long-standing test for determining employee status under the FLSA to stand.

EPI has conducted extensive research and analysis over the years on the harms of worker misclassification. As we have outlined, workers classified as independent contractors have no right to earn the federal minimum wage, or to earn overtime pay. They lose eligibility for unemployment insurance if they lose their work, and to workers’ compensation if they are injured on the job. They are less likely to receive employer-provided job benefits, such as health insurance and retirement benefits. They lose the right to paid sick or family leave in states and localities that extend those rights, and they would lose the right to even unpaid, but job-protected, family and medical leave under FMLA. Workers classified as independent contractors also must assume the full financial cost of Social Security and Medicare contributions, rather than split it evenly with their employer.

[We attach here an April 2026 EPI report<sup>1</sup>](#) estimating the concrete economic costs of misclassification for 11 commonly misclassified types of jobs, among those most likely to be negatively affected by this rule. These include lower-wage, labor intensive jobs such as

call center workers, landscaping workers, janitors and cleaners, home health aides, truck drivers, delivery workers, manicurists, housekeeping cleaners, retail sales workers, security guards, and construction workers. Workers in these and other occupations stand to lose wages, benefits, and the basic labor protections they should be owed under the FLSA.

The FLSA has a plain-language definition of “employ,” which “includes to suffer or permit to work.” This is a deliberately broad definition that was intended to provide the FLSA’s protections to most workers. The NPRM also seeks to once again upend the clear, long-standing “economic reality” test, which examines multiple factors to get to the central issue of worker classification: is the worker *truly* in business for themselves, or do they depend economically on finding work in the business of others, under the control and terms of the employer?

Instead of examining all of the relevant factors in a worker’s situation, the NPRM proposes elevating the factors of the level of control the employer exerts, and the worker’s opportunity for profit or loss, above all others in making a determination about whether someone is truly in business for themselves.

This would fail to account for the economic realities of many working relationships: for instance, would the primary work of the employer be able to get done without the worker? How permanent or exclusive is the work being performed—is there a fixed ending date? Does the worker invest in their own tools and equipment, marketing, or business plan, or is it the employer making those investments? Does the worker rely on the employer for training on how to get the job done? All of these questions fall under the factors that the NPRM would deprioritize—even though they provide important information about whether or not someone is truly in business for themselves, and thus that the employer doesn’t have an obligation to them under the FLSA.

This would narrow the definition of who is a covered employee under these three statutes. DOL’s NPRM will encourage misclassification schemes and a race to the bottom, where employers will be able to reclassify their employees as independent contractors and evade their obligations under these laws. Further, because of occupational segregation and other labor market disparities, people of color, women, and immigrants—and people at the intersections of these categories—are more likely to be in occupations where misclassification is common.

## **An analysis of the proposed rule’s potential costs to workers**

In the proposed rule, the Department egregiously fails to estimate the transfers between employers, workers, and the social insurance system that would occur if this proposal were finalized. The requirements that agencies must follow as a part of the rulemaking process are very clear, and among them is the requirement that agencies must assess all quantifiable costs and benefits “to the fullest extent that these can be usefully estimated.”<sup>2</sup> There is no question that DOL could have produced estimates; in what follows, we show

that it is straightforward to produce estimates using data researchers routinely use and taking a methodological approach that is in the spirit of estimates the Department of Labor undertakes on a regular basis. One plausible explanation for why DOL left out the required estimate is that any good-faith estimate would have shown this rule will result in a substantial transfer from workers and the social insurance system to employers.

, the Department only briefly touches on potential benefits to workers from their proposal. DOL estimates a 1-3% increase in the total number of independent contractors as a result of their proposed rule.<sup>3</sup> However, DOL appears to assume that this increase will come entirely from people who were otherwise not engaging in paid work entering the workforce anew as independent contractors. This means the Department also assumes that there will not be significant reclassification of workers who are currently employees to independent contractor status. Given what we know about the scale of misclassification already occurring under current law, this seems to be, at best, a woefully naive understanding of what employers might do when faced with a weaker standard sanctioned by DOL. Further, our analysis of commonly-misclassified occupations shows that the independent contractor version of paid work actually has less value for the worker than the employee-status version that the same worker could find – in other words, the worker still bears costs because the independent contractor version of the work likely offers lower pay, fewer benefits, and fewer protections.

In this comment we will estimate these transfers from workers and the social insurance system to employers. The basic structure of this analysis is to take (1) the estimated change in the value of a job to a worker if they are classified as an independent contractor instead of an employee, and (2) the estimated change in payments to social insurance funds if a worker is classified as an independent contractor instead of an employee, and then multiply these figures by the estimated number of workers who will shift to independent contractor status if this rule is finalized. This approach will yield the aggregate impact of the rule on workers and on social insurance system coffers.

In a recent publication, EPI estimated (1) and (2) above for workers in lower-wage, labor intensive occupations most likely affected by the rule, such as call center workers, landscaping workers, janitors and cleaners, home health aides, truck drivers, delivery workers, manicurists, housekeeping cleaners, retail sales workers, security guards, and construction workers.<sup>4</sup>

The cost to workers in these occupations of being classified as an independent contractor instead of a payroll employee ranges from \$6,294 annually for retail sales workers (under extremely conservative assumptions), to \$23,266 annually for truck drivers (under less conservative assumptions). Similarly, the annual cost to social insurance funds if a worker is classified as an independent contractor instead of an employee ranges from \$600 for manicurists (again under extremely conservative assumptions), to \$3,046 for construction workers (again under less conservative assumptions).

Given that we do not have a way to determine where the average impact for those affected by the proposed rule falls in those broad ranges, we simply take the lower bound in both cases, to be extremely conservative. **Thus, we assume that the cost to workers is**

**\$6,294 annually, and the cost to social insurance programs is .**

It should be noted that these lower-bound estimates assume that workers classified as independent contractors are paid not just the full regular pay of a W-2 employee, but also are fully compensated for the value of health insurance and retirement benefits. This is, however, highly unlikely in these occupations. The theory that businesses will not be able to pay less in total compensation to workers if their status shifts from employee to independent contractor—that their base pay will rise to make up for a reduction in benefits—is based on the assumption of perfectly competitive labor markets. There is broad and growing evidence that perfect competition is rare, and that most labor markets do not function competitively—particularly low-wage labor markets like those under consideration here, where workers are more likely to lack the power to bargain for higher wages to compensate for their loss of benefits and increase in taxes when they become independent contractors.<sup>5</sup> Further, very low-wage employees whose wage is elevated by the minimum wage could easily see their wage drop when, as independent contractors, they no longer legally must be paid the minimum wage.

## **How will the share of the workforce who are payroll employees and the share of the workforce that are independent contractors change as a result of this rule?**

To begin to answer that question, we need to know how many independent contractors there currently are. There is a great deal of uncertainty around this number (the Department notes that “there are a variety of estimates of the number of independent contractors, and these span a wide range based on methodologies and how the population is defined”).<sup>6</sup> The July 2023 Contingent Worker Supplement finds that there were 11.9 million workers who are independent contractors in their main job. This number, however, drastically underestimates the total number of independent contractors by not including workers who do independent contracting on the side, in addition to a payroll job. The Department makes a correction for this issue and estimates that there are 24.8 million individuals working as contractors at a given time. For the sake of the calculations in this comment, we will limit the analysis to the 11.9 million workers the CWS finds are independent contractors in their main job, since workers who do independent contracting as a side job likely work fewer hours and therefore may lose less than the \$6,294 we are conservatively assuming workers whose status changes as a result of this rule lose annually. It should be noted that this means we are leaving out many millions of independent contractors and our estimates will, as a result, be extremely conservative for this reason as well.

## **How much will independent contracting increase as a result of this rule?**

The Department’s proposal would potentially allow companies to legally argue that workers who are now misclassified as independent contractors, or who are working “off the books,” would be legitimately classified as independent contractors under the narrow

terms of the proposal. As such, one approach would be to use the percentage of workers misclassified or working off the books under current law to estimate the number of workers who could be reclassified as independent contractors under the proposed rule. However, due to severe data constraints, estimates of the share of workers who are misclassified as independent contractors or working off the books are limited. A 2020 paper estimates that between 12.4% and 20.5% of workers in the construction industry are either misclassified as independent contractors or working off the books.<sup>7</sup> Conservatively assuming that the bottom of this range applies more broadly to the lowest-paid quartile of the U.S. labor market, that is **5.1 million low wage workers who may be affected by this rule.**<sup>8</sup> Of course, these are workers who are already not getting the benefit of being a payroll employee, so the economic impacts described above would not apply. However, this exercise does provide a broad sense of the potential scope of workers affected. Further, even these workers lose something of value under this rule given the current enforcement regime, namely the legal right to the wages and benefits they would receive if they were properly classified. We do not attempt to quantify this effect.

To be exceedingly conservative, we will simply assume that there will be an increase as a result of this rule of 5% in the number of workers who are independent contractors in their main job.<sup>9</sup> This translates into an increase of just 595,000 workers who are independent contractors at their main job, given the conservative CWS estimate of 11.9 million workers who are independent contractors in their main job. Multiplying that by our conservative estimate that these workers would lose \$6,294 per year yields **an aggregate loss to workers of over \$3.7 billion annually.** Further, **social insurance funds would lose at least \$357 million annually** (595,000 times \$600) in the form of reduced employer contributions, meaning this rule also results in a transfer of at least \$357 million annually from social insurance funds to employers.<sup>10</sup>

The NPRM would also have ripple effects in lost benefits and protections that employees are entitled to under other statutes. The proposed rule would also extend the weakened definition of employee status to the Family and Medical Leave Act (FMLA) and the Migrant and Seasonal Worker Protection Act (MSPA). Farm workers are already among the most vulnerable, low-paid workers in the U.S., and often face challenges at worksites including poor workplace safety conditions. If farm employers and farm labor contractors have the ability to offload more of their basic responsibilities under MSPA, more farm workers will be at risk of classification as independent contractors and lose even their basic rights under MSPA<sup>11</sup>, such as to be paid on time or have their working conditions disclosed. More workers would also be at risk of losing access to the right to take job-protected, unpaid family and medical leave under FMLA, which also references the definition of “employee” under the FLSA to determine eligibility for FMLA coverage. The National Partnership for Women and Families has estimated that 15 million workers took advantage of FMLA leave in 2025 alone.<sup>12</sup> Protections for break time for nursing mothers—recently expanded under the PUMP Act—are also tied to FLSA employee status. Losing the right to take job-protected time off for illness or the birth of a child, the right to take a break to pump milk, the right to know when you will be paid and to be paid on time—these all specifically conflict with DOL’s stated interest in improving flexibility and satisfaction for workers. This is false flexibility.

## The reality of flexible work

The Department focuses on “flexibility and satisfaction” as important non-pecuniary attributes that workers may trade income to receive. However, it is difficult to imagine that there are a meaningful number of workers who would get more satisfaction from doing the same job for substantially less compensation as an independent contractor than for substantially more compensation as a payroll employee. Many workers indeed may value flexibility, but notably, employers are able to provide a huge amount of flexibility to payroll employees if they choose to; the “inherent” tradeoff between flexibility and payroll employment is greatly exaggerated. Workers also highly value other factors, like income stability, which are much less prevalent among independent contractors and are not taken into account here.

In 2024, EPI published a report reviewing the available research and survey data on worker preferences regarding flexibility, stability, and predictability.<sup>13</sup> While workers do often prefer flexibility and control over their own schedules, they also want stable, full-time work with predictable pay and benefits.

Employers often incorrectly claim that the FLSA prevents flexible scheduling, but employers control scheduling decisions and can organize work schedules to meet FLSA’s requirements. Employers have long been able to provide flexible schedules and comply with wage and hour laws, and flexible schedules have been negotiated by employers and unions in compliance with the law. Scheduling decisions are the employer’s prerogative (in negotiation with their workers’ union, if there is one), and they can and do set and change schedules in accordance with production demands. Independent contractor status is hardly needed for employers to provide their workers with flexibility.

In conclusion, we urge DOL to withdraw this rule as proposed. The Department should not be in the business of weakening labor protections standards, and should instead seek to vigorously enforce laws against misclassification.

Sincerely,

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## Endnotes

1. Ismael Cid-Martinez et al., *Misclassifying workers as independent contractors is costly for workers and social insurance systems*, Economic Policy Institute, April 2026.
2. Maeve P. Carey, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process*, Congressional Research Service, December 9, 2014.
3. 91 Fed. Reg. 9967.
4. Ismael Cid-Martinez et al., *Misclassifying workers as independent contractors is costly for workers and social insurance systems*, Economic Policy Institute, April 2026.
5. Alan Manning *Monopsony in Motion: Imperfect Competition in Labor Markets* (Princeton, NJ: Princeton University Press, 2003); Anna Sokolova and Todd Sorensen, *Monopsony in Labor Markets: A Meta-Analysis*, Washington Center for Equitable Growth, February 2020; Arindrajit Dube, Jeff Jacobs, Suresh Naidu, and Siddharth Suri, “Monopsony in Online Labor Markets,” *American Economic Review: Insights* 2, no. 1 (March 2020): 33-46, <https://www.aeaweb.org/articles?id=10.1257/aeri.20180150>.
6. 91 Fed. Reg. 9962.
7. Russell Ormiston, Dale Belman, and Mark Erlich, *An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry*, Institute for Construction Economics Research, January 2020.
8. Data from the Current Population Survey from the Bureau of Labor Statistics find that there were 163.0 million workers in the U.S. in the first quarter of 2026; 5.1 million = 163.0 million \* .25 \* .124.
9. A 5% increase is a conservative assumption, given that the Department is proposing to amend the five-part economic realities test—which has always been interpreted by the Supreme Court in its totality, not weighing any one factor more than another—in a way that will place undue weight on two factors and then narrows those two factors further, making it more likely that workers will be classified as independent contractors and as a result likely leading to a substantial increase in the number of independent contractors.
10. Some might argue that social insurance funds wouldn't be hurt by not having employers pay into unemployment insurance and workers' compensation because independent contractors aren't eligible for those benefits. However, low-paid independent contractors who lose their contracts and are without work, or get hurt on the job, will be likely to need to depend on safety net programs to survive, so the social insurance system as a whole would still be depleted.
11. Wage & Hour Division, U.S. Department of Labor, “[Fact Sheet #35: Joint Employment and Independent Contractors Under the Migrant and Seasonal Agricultural Worker Protection Act](#),” revised January 2020.
12. National Partnership for Women & Families. 2026. *Key Facts: The Family and Medical Leave Act* (fact sheet), January 2026.
13. Margaret Poydock, Lynn Rhinehart, and Celine McNicholas, *Flexible Work: What Workers, Especially Low-Wage Workers, Really Want And How Best To Provide It*, Economic Policy Institute, July 2024.