



THE BUCKEYE INSTITUTE

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Amy DeBisschop
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

Submitted via: <https://www.regulations.gov/document/WHD-2022-0003-0001>

RE: RIN 1235-AA43, 87 Fed. Reg. 62218 (Oct. 13, 2022), Department of Labor Proposed Rule, “Employee or Independent Contractor Classification Under the Fair Labor Standards Act.”

Dear Ms. DeBisschop:

The Buckeye Institute submits this comment on the Department of Labor (DOL) proposed rule, “Employee or Independent Contractor Classification Under the Fair Labor Standards Act.”

Founded in 1989, The Buckeye Institute is an independent research and education institution—a think tank—based in Columbus, Ohio, whose mission is to advance free-market public policy in the states. Our chief concern is that proposed rule to will further restrict the economic flexibility of Ohio workers while shifting market power from employees to employers.¹

Understanding Independent Work in 2022

Even before the pandemic shifted the types of jobs the modern workforce desired, independent contracting was on the rise. From 2005 to 2015, independent contractors rose from 6.9 percent to 8.4 percent of the workforce.² Rising with the onset of the coronavirus pandemic, more than 50 million workers in the United States are now classified as independent contractors.³ The nature of the independent work has changed. Commonly understood as Uber drivers, rideshare employees, and other “gig” workers, independent contractors’ role in the U.S. economy is becoming much more integrated and widespread. Less than 10 percent of independent contractors work in the so-called gig-economy and the fastest growing occupations were in software app and website development,⁴ accompanying a dramatic rise in white-collar gig-work.

¹ U.S. Department of Labor, 29 CFR 780, 29 CFR 788, 29 CFR 795, RIN 1235-AA43, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, *The Federal Register*, Volume 87, Number 197 (October 13, 2022), p. 62,218-62,275.

² Lawrence F. Katz and Alan B. Krueger, **The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015**, National Bureau of Economic Research working paper 22667, September 2016.

³ Scott Lincicome, **Taking the ‘Free’ out of ‘Freelance’**, Cato Institute, November 2, 2022.

⁴ *Ibid.*

But gig-work and white-collar app developers are not the only independent contractors. In Ohio, for example—home to 86,000 truck drivers—we estimate that over 12,000 truckers would qualify as independent contractors and be adversely affected by the proposed rule.⁵

Rule Will Restrict Worker Flexibility and Shrink the Labor Market

As The Buckeye Institute detailed in *Policy Solutions for More Innovation: Modernizing Ohio's Policies to Seize New Economic Opportunities*, economic dynamism rests on access to talented labor pools and the economic flexibility to adjust to changing market conditions. The DOL proposed rule will make both worse. By making it more difficult to classify as an independent contractor, the rule will actively discourage independent contracting and freelance occupations. And by making it more expensive and more difficult to undertake independent work, this rule will shrink the available labor pool for employers.

By denying workers the flexibility to determine the employment arrangements that work best for them, the rule will also force independently contracted workers into a type of employment they do not prefer and have repeatedly rejected. Knowing the tradeoffs of classifying as an employee versus an independent contractor, many workers opt for independent work. As the Cato Institute's Scott Lincicome has demonstrated, 87 percent of full-time independent contractors are happier with independent work, nearly three-quarters of all independent workers plan to keep working in independent work in the future, and nearly 70 percent saw their job as more secure than traditional employment.⁶

Many workers today value the freedom to set their own work schedule. But the proposed rule mistakenly undervalues this flexibility and will likely require many independent contractors to reduce their work hours to maintain their preferred schedule, and inhibit others from taking a part-time second job. Under the rule, employers will likely insist that workers maintain hours that benefit the employer instead of the employee. That insistence will push workers out of the labor market, which will be especially harmful to states like Ohio that already have fewer workers now than they did before the pandemic.

Recommendation:

- 1) The Department of Labor should maintain the rule that took effect in March 2021.

Thank you for your time and attention.

Sincerely,
Logan Kolas
Economic Policy Analyst at the Economic Research Center
The Buckeye Institute

⁵ Bureau of Labor Statistics, "**Occupational Employment and Wages May, 2021**", March 31, 2022.

⁶ Scott Lincicome, **Taking the 'Free' out of 'Freelance'**, Cato Institute, November 2, 2022.