

DELAY OF THE INDEPENDENT CONTRACTOR RULE WOULD UNDERMINE CLARITY AND HARM ECONOMIC RECOVERY

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Independent Contractor Status under the Fair Labor Standards Act: Delay of Effective Date

Agency: US Department of Labor, Wage and Hour Division

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Following a request from the Biden administration, the US Department of Labor (DOL) has proposed to delay implementation of the rule entitled “Independent Contractor Status Under the Fair Labor Standards Act” from March 8, 2021, until May 7, 2021.¹ We are grateful for the opportunity to submit a comment to the DOL about the proposed delay. The Mercatus Center at George Mason University is dedicated to advancing knowledge about the effects of regulation and policy on society. Accordingly, our comment seeks to aid the DOL as it considers the impact of delaying this rule.

This public interest comment is offered in support of the aforementioned rule because, as we argue later, it has a positive impact on workers. Therefore, we recommend that the DOL exercise its option to opt out of the delay requested by the administration.

The DOL has stated that the primary purpose of the rule entitled “Independent Contractor Status under the Fair Labor Standards Act,” published at 86 Fed. Reg. 1168 on January 7, 2021, is to reduce uncertainty and increase the predictability of outcomes in the economic realities test for independent contractors. The DOL recognizes that its existing guidance on the issue is indefinite, unstructured, and inconsistently applied, leading to considerable uncertainty as to whether a

1. Ronald A. Klain, “Regulatory Freeze Pending Review,” White House, January 20, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/>; Independent Contractor Status under the Fair Labor Standards Act: Delay of Effective Date, 86 Fed. Reg. 8326 (proposed February 5, 2021) (to be codified at 29 C.F.R. pts. 780, 788, 795).

particular worker might be classified as an independent contractor or an employee, especially in the modern economy where work relationships have evolved.² The greater clarity offered by the new rule will reduce the expected costs perceived by employers as they consider whether to pursue particular business plans, because the risk of litigation over worker status and the potential regulatory reclassification of workers is costly and disruptive to business operations. Uncertainty inhibits economic activity, meaning that implementation of the rule will enable increased business creation and expansion, leading to faster job growth.

Delaying this new rule in particular—after it has been published in the *Federal Register*—would undermine the DOL’s own goal by creating legal *uncertainty* for workers and businesses alike. Workers and businesses are likely to interpret the proposed delay as evidence of legal instability—an outcome that is the opposite of what the DOL desires. Although we understand that any new administration wishes to review pending regulations proposed under the previous administration, we encourage the DOL to exclude this rule from the requested delay—which is allowed by President Biden’s order—owing to its critical importance to the economic recovery from the COVID-19 recession.³

The determination of whether a worker is an employee or independent contractor directly affects which employment regulations apply to their professional relationships, affecting workers’ rights, employers’ responsibilities, and thus the rules that motivate particular business structures. These issues are intrinsically related to the desirability of work, types of compensation, cost of labor and management, and many other factors.⁴ Importantly, neither employment nor independent contracting are better or worse than the other; they are simply suited to different environments and goals. Over the past year, as the pandemic has reordered the economy, the flexibility of independent contractors has proven particularly valuable to maintaining the flow of goods and services.

Indeed, several research studies confirm many anecdotal observations that, after the loss of a job, some individuals turn to independent work as a temporary safety net until they can find full-time employment in their prior profession.⁵ In a 2017 paper published in the *American Economic Review*, Lawrence Katz and Alan Krueger find that workers who “suffered a spell of unemployment are 7 to 17 percentage points more likely than observationally similar workers to be employed in an alternative work arrangement when surveyed 1 to 2.5 years later.”⁶ Using IRS tax data to understand the income trends of both traditional freelancers and workers in the online platform economy, a study published in *AEA: Papers and Proceedings* finds that individuals turn to

2. Independent Contractor Status under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1172–75 (January 7, 2021).

3. Klain, “Regulatory Freeze Pending Review,” January 20, 2021.

4. See our previous research: Liya Palagashvili, “Four Recommendations for Analyzing the Department of Labor’s Proposed Rule on Employees vs. Independent Contractors” (Public Interest Comment, Mercatus Center at George Mason University, Arlington, VA, October 26, 2020); Michael D. Farren and Trace E. Mitchell, “Exploring the Consequences of Worker Reclassification Proposals” (Public Interest Comment, Mercatus Center at George Mason University, Arlington, VA, October 26, 2020), 14.

5. Lawrence F. Katz and Alan B. Krueger, “The Role of Unemployment in the Rise in Alternative Work Arrangements,” *American Economic Review* 107, no. 5 (May 2017): 388–92; Andrew Garin et al., “Is New Platform Work Different Than Other Freelancing?,” *AEA Papers and Proceedings* 110 (May 2020): 157–61; Dmitri K. Koustas, “What Do Big Data Tell Us about Why People Take Gig Economy Jobs?,” *AEA Papers and Proceedings* 109 (May 2019): 367–71; Tito Boeri et al., “Solo Self-Employment and Alternative Work Arrangements: A Cross-Country Perspective on the Changing Composition of Jobs,” *Journal of Economic Perspectives* 34, no. 1 (2020): 170–95.

6. Katz and Krueger, “The Role of Unemployment.”

both types of independent contracting opportunities in order to smooth temporary income shocks after they have faced income declines or unemployment.⁷ It is important to understand that these outcomes have occurred in the context of the uncertainty imposed by the previous economic realities test on employers and workers. This means that if the DOL's proposed rule is allowed to take effect, similar research would likely showcase more economic stability for workers.

The greater clarity provided by the DOL's rule is critically needed now, as there are nearly 10 million fewer payroll jobs than existed at this time last year. The rule will foster increased demand for independent contracting jobs by enabling employers to more readily develop post-pandemic business plans. This will accelerate near-term job growth for both independent contractors (directly) and employees (indirectly). The K-shaped nature of the recent recession reinforces the urgency of economic recovery, since lower-income service workers have been disproportionately burdened with the pandemic's economic costs.

In summary, the DOL should exercise the option provided by the current administration for keeping rules of critical importance and allow the rule to take effect on March 8, 2021. A delay risks stifling the conditions needed for a swift economic recovery for those who need it most.

7. Garin et al., "Is New Platform Work Different Than Other Freelancing?"