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To: Amy DeBisschop
Director, Division of Regulations, Legislation and Interpretation
Department of Labor
Wage and Hour Division
VIA REGULATIONS.GOV

From: The R Street Institute, rstreet@rstreet.org

Re: Independent Contractor Status Under the Fair Labor Standards Act, Regulatory Information Number (RIN) 1235-AA34

These comments are submitted on behalf of the R Street Institute, a non-profit public policy research institution—a “think tank”—based in Washington, D.C. with offices around the country. R Street stands for free markets and limited, effective government. As an organization, we have long supported efforts to make work more flexible, accessible, energizing and conducive to human flourishing.¹ We have played a role in calling for more flexible and dynamic ways of working. We commend the Department for its work and thought put into this NPRM and for its effort to create clarity in the ever-growing haze of conflicting and confusing laws and interpretations. The rule is a step in the right direction for American workers and work providers alike. In this context, we offer two major comments:

The rules, as proposed, provide much needed clarity for work providers and workers alike and could help ease the significant and problematic ongoing decline in the availability of gig and independent contractor work.

A wide variety of part-time, independent contractor, “gig,” and self-employment options have historically played a significant role in the economy allowing people who cannot find, cannot perform, or do not want traditional full-time jobs to earn a living. These types of work provide a safety net for many who are between full-time jobs, a way to get started for those who lack skills needed for full time work and, most importantly, flexibility for those who need it. In recent years, these types of employment options, along with contingent employment, business startups and employment by very small firms have all become less

¹ Eli Lehrer. “The Future of Work,” *National Affairs*, Spring 2016,
<https://www.nationalaffairs.com/publications/detail/the-future-of-work>

common.² Other measures that might correlate with the availability of gig work, like part-time work and average tenure at the same job, track the economic cycle and show few clear long-term trends.³ These changes—a decline in the availability of gig and contingent work—have had real costs. In particular, they have correlated with declining workforce participation for the population relative to the 1980-2000 period and a continuous decline in workforce participation for men during the entire period for which data is available.⁴ These trends mean fewer people earning for themselves and supporting their families. This, in turn, has contributed to growing income inequality.

While the reasons for the decline in the availability of gig and independent contractor work are complex, it is quite plausible to believe that the tangle of case law and statutory ambiguity described in the NPRM have a great deal to do with it. Already, because of ambiguity, many job providers who would rather provide “gigs” and would have people eager to take them are instead being encouraged to search for W-2 employees. While this may be good for people who want this type of work, it may have significant downsides for the economy as a whole and, most particularly, the growing percentage of men who neither work nor undertake significant family/home/community responsibilities.

And state policies—many of them outside of the Department’s purview—are making things worse. Most prominently, the State of California has, for all intents and purposes, statutorily abolished the idea of independent contractors in many cases with a state-level statute which requires massive numbers of workers to become “employees” whether or not they want to.⁵ The law, Assembly Bill 5, codifies the California Supreme Court’s *Dynamex* decision and implements the stringent ABC test described in the NPRM for all workers.⁶ Continued ambiguity will, in turn, continue trends that are negative for the economy as a whole. We think this law is bad public policy and not a model for the country but fear that it is more likely to become one through case law and legislation if clarity is not restored. Clarity as to the meaning of existing laws could help revive an important and declining economic engine provided by contract and gig work.

While still modest in their overall impact, new forms of gig work on app-based platforms are different from what came before. As such, it would be desirable to create a “third status” for some “gig” workers. While many changes implied by this status will require legislation, the department should

² Nick Zaia. “Six Charts that Debunk the Gig Economy,” The R Street Institute, 2020. <https://www.rstreet.org/2020/03/04/6-charts-that-debunk-the-gig-economy-2020/> and Bureau of Labor Statistics. “Contingent and Alternative Employment Arrangements, May 2017” <https://www.bls.gov/news.release/pdf/conemp.pdf>

³ We would urge the Department to revisit its analysis of average job tenure since 1947 and control for overall unemployment rate and gender composition of the labor force; it appears highly likely to us that nearly all declines in average job tenure can be explained by these factors. If past trends hold, furthermore, the current recession is likely to correlate with significant increases in average job tenure.

⁴ Eli Lehrer and Catherine Moyer. “Putting Men Back to Work,” *National Affairs*, Fall 2017. <https://www.nationalaffairs.com/publications/detail/putting-men-back-to-work>

⁵ Steven Greenhut. “It’s up to voters to save rideshare and delivery services from Assembly Bill 5,” *The Orange County Register*, Aug. 20, 2020, <https://www.ocregister.com/2020/08/21/its-up-to-voters-to-save-rideshare-and-delivery-services-from-assembly-bill-5/>

⁶ 4 Cal.5th 903, 416 P.3d 1, 232 Cal.Rptr.3d 1; State of California, Assembly Bill 5. https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5

use this rulemaking as an opportunity to provide additional guidance and discussion that helps to lay the groundwork for such a status.

Contrary to hype in the media and elsewhere, new technology has not resulted in shifts in the nature of work significant enough to be visible in economy-wide data. While a relatively small number of high-profile companies making innovative use of technology have attracted significant attention, a major national study of bank deposits shows that only a bit more than one percent of the labor force earns on these platforms in a given year and that most do so only briefly.⁷ That said, these platforms are both large and different from other ways that people have historically done gig and contingent work. Uniform branding and widespread access to their products along with their sheer scale means that those who work with them as contractors do have a distinctly different daily experience than, say, a plumber who gets business mostly by word-of-mouth and search engine advertising. As such, the language of the FLSA as currently written and interpreted by this rulemaking may not fit the actual needs of these workers or those who provide work to them. This practical disconnect is embedded in current law which will require legislative changes in the long run. We believe these should involve the creation of a “third status” that is neither an employee nor a fully independent contractor and offers both high levels of flexibility and some of the prerequisites associated with a full-time job.⁸

Moreover, many policies we believe could be desirable as part of a third status including, for example, benefits contributions from platforms for gig workers in certain situations, would certainly require statutory changes. Nonetheless, the Department should explore ways where it can otherwise adjust this rule to meet realities and modestly help forward the emergence of a third status in a limited way. In particular, the rulemaking might be improved by outlining some explicit safe harbors for certain practices which could wrongly be interrupted elsewhere to somehow create an employee relationship that neither workers nor job providers want. Specifically, the Department may want to consider expanding on its discussion of the Fifth Circuit’s holdings in *Parrish*, 917 F.3d 369 to make explicit (and perhaps provide examples of) cases where the provision of certain work-related benefits, testing, insurance or training would not, by themselves establish an employer-employee relationship under FLSA. It may also want to investigate guidance associated with this rulemaking or elsewhere to clarify that allowing advisory participation of “gig” workers in corporate decision making or the existence of procedures for reporting sexual harassment while working does not, by itself, create an employer-employee relationship. In other rulemaking, we would also urge the department to investigate that certain civil rights and labor protections might be extended to specific classes of gig workers.

⁷ JP Morgan-Chase Institute. “The Online Platform Economy in 2018,” September 2018. <https://institute.jpmorganchase.com/institute/research/labor-markets/report-ope-2018.htm#finding-5> .

While it is the best we know of, it is worth noting this study probably overestimates participation in the gig economy: it is limited to findings from customers of one major bank that has most of its branches and customers in high population density areas and lacks any significant physical presence in significant areas of the country. Since many common gig jobs are most attractive in areas with high population density, it is probable that the actual share of the workforce getting gig platform app payments is lower than the study suggests.

⁸ Lehrer, 2016, *supra*.

Conclusion

We support the thrust of this NPRM and believe that it will provide much needed clarity that may help to revive a type of work relationship that has experienced a worrying decline in recent years. Many of the most needed changes will be statutory in nature. But, with the right efforts, the Department can use this rulemaking to provide needed clarity and set the stage for innovative, rewarding, wealth-creating and productive work arrangements.

Respectfully Submitted,

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