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November 21, 2022

U.S. Department of Labor
Wage and Hour Division
200 Constitution Ave., NW
Washington, D.C. 20210

Re: Employee or Independent Contractor Classification Under the Fair Labor Standards Act NPRM, 87 FR 64749; Regulation Identifier Number (RIN) 1235-AA43, Submitted Electronically

Dear Sir or Madam,

I am writing on behalf of the R Street Institute (R Street) to oppose the proposed rulemaking regarding employee or independent contractor classification, which would make it more difficult for companies to classify their workers as independent contractors for wage-and-hour purposes. The rule would roll back the previous administration's looser test and impose a stricter standard that closely resembles the standard applied under California's Assembly Bill 5.¹

R Street is a nonprofit public policy organization focused on advancing limited, effective government in a variety of policy areas, including commercial freedom. We have done extensive work on independent contracting, especially as it applies to ride-sharing companies. As our Sacramento, California-based Western region director, I have closely monitored the effects of AB 5's attempted ban on many forms of independent contracting and the state's application of a stringent "ABC Test" to contracting decisions.²

The U.S. Department of Labor argues, in its executive summary, that, "This proposed rulemaking is not intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves." Based on California's experiences, however, it is clear that changing the contracting standard as proposed will disrupt a variety of businesses. This will harm not just ride-share

¹ "AB-5 Worker status: employees and independent contractors," California Legislative Information, Sept. 19, 2019. https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5.

² Employment Development Department, "Employment Status: ABC Test," State of California, last accessed Nov. 14, 2022. https://edd.ca.gov/en/Payroll_Taxes/ab-5.



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companies, but potentially millions of American workers. Currently, 53 million Americans work as independent contractors in myriad industries.³

In 2018, the California Supreme Court issued its *Dynamex Operations West v. the Superior Court of Los Angeles* decision.⁴ Known as *Dynamex*, the case centered on a same-day delivery service that had converted nearly its entire workforce from permanent employees to independent contractors. The court found that the company had misclassified these drivers and denied them their protections under the state's wage-and-hour orders. Its decision overturned three decades of labor law.

Most significantly, the court imposed the aforementioned ABC Test. For a company to classify its workers as contractors, all three conditions must be met: a) the worker must not be under the direction and control of the employer; b) the worker must not be involved in the company's usual course of business; and c) the workers must have evidence of being in business for themselves—such as operating an LLC or proprietorship.⁵ In other words, a delivery company would be free to hire a contractor to make plumbing repairs at its headquarters but not to work as a driver.

After the decision, in 2019, the California Legislature passed—and Gov. Gavin Newsom signed—AB 5, which codified the court's ruling. It was the intent of the Legislature to “ensure workers who are currently exploited by being misclassified as independent contractors ... have the basic rights and protections they deserve under the law, including a minimum wage, workers' compensation if they are injured on the job, unemployment insurance, paid sick leave, and paid family leave.”⁶

The original legislation exempted numerous professions—typically those with the most boisterous lobbies—from the law's protections. For instance, AB 5 exempted groups including insurance agents, lawyers, direct salespeople, certain licensed healthcare professionals, doctors, dentists, barbers, real estate agents and investment advisers.⁷ However, the law had immediate repercussions in the many industries that lawmakers had not exempted.

³ “53 Million Americans Freelance, New Study Finds,” Upwork, last accessed Nov. 14, 2022.
<https://www.upwork.com/press/releases/53-million-americans-now-freelance-new-study-finds-2>.

⁴ *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, Supreme Court of California, April 30, 2018. <https://law.justia.com/cases/california/supreme-court/2018/s222732.html>.

⁵ Employment Development Department. https://edd.ca.gov/en/Payroll_Taxes/ab-5.

⁶ “AB-5 Worker status: employees and independent contractors.”
https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB5.

⁷ Stephen Fishman, “Exempt Job Categories Under California's AB5 Law,” NOLO, last accessed Nov. 14, 2022.
<https://www.nolo.com/legal-encyclopedia/exempt-job-categories-under-californias-new-ab5-law.html#:~:text=AB5%20makes%20an%20exception%20for,%2C%20lyricists%2C%20composers%2C%20and%20p roofers>.



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For instance, *The Orange County Register* reported that AB 5 “has resulted in widespread job losses for freelance writers, photographers, sign-language interpreters and other moderate-income Californians who could not carve out exemptions for their particular industries.”⁸ The job losses came at a particularly bad time, as the state was in the midst of the COVID-19 lockdowns, and many Californians faced a loss of their main sources of income as state officials urged them to stay at home.

The law also threatened many of the artistic endeavors that enrich our lives. “We received more than 120 responses from artists across California – jazz and classical musicians, directors of arts nonprofits, magicians, costume designers, actors, a burlesque dancer and freelance food stylist, among others,” reported the *Los Angeles Times*.⁹ “The overwhelming majority said AB5 is hurting their careers. Many are unsure how to comply with the law. Others are cutting back on programming or canceling services because of the cost required to convert independent contractors to employees.”

In response to the blowback, the Legislature added many more exemptions. The newly exempted groups covered many of those who had felt the law’s initial impact: photographers, freelance writers, cartographers, translators, insurance inspectors, most musicians, youth sports coaches and real estate appraisers. In total, the Legislature exempted 100 industries.¹⁰ Only an ill-conceived law would need to exempt nearly every group from its provisions.

Based on legislators’ defense of the law, their prime target was clearly ride-share drivers for companies such as Uber, Lyft and DoorDash. The industry helped qualify a measure on the November 2020 ballot that exempted ride-share drivers from AB 5 and provided them with various portable, job-related

⁸ The Editorial Board, “Newsom ignores Assembly Bill 5 blowback at his own peril,” *The Orange County Register*, Feb. 20, 2020. <https://www.ocregister.com/2020/02/20/newsom-ignores-assembly-bill-5-blowback-at-his-own-peril>.

⁹ Makeda Easter, “The AB5 backlash: Singers, actors, dancers, theaters sound off on freelance law,” *Los Angeles Times*, Feb. 12, 2020. <https://www.latimes.com/entertainment-arts/story/2020-02-12/how-ab5-is-impacting-california-readers-in-the-performing-arts>.

¹⁰ Michael S. Kun, “California Adds More Exemptions to Controversial Independent Contractor Statute,” *Wage and Hour Defense Blog*, Sept. 8, 2020. <https://www.wagehourblog.com/2020/09/articles/california-wage-hour-law/california-adds-more-exemptions-to-controversial-independent-contractor-statute>.



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benefits. Voters approved Proposition 22 by wide margins—59 percent to 41 percent.¹¹ An Alameda County court later invalidated the measure, but it remains tied up in court.¹²

Legislators did not exempt the trucking industry from AB 5, which has exacerbated the ongoing backup at the ports of Long Beach and Los Angeles. Under AB 5's ABC Test, the state largely banned the use of owner-operators rather than employee truckers. Over the summer, more than 100 owner-operators conducted a strike at the Port of Oakland, tying up cargo deliveries at one of the West Coast's largest ports.¹³ Their main complaint was AB 5, which threatens to put them out of business.

In their zeal to help some workers get more benefits, lawmakers ignored the impact of their law on other workers. They failed to acknowledge what many surveys have shown: Most independent contractors prefer these flexible working arrangements.¹⁴ Truck drivers generally prefer to be owners rather than employees.¹⁵ Polls also show that ride-share drivers overwhelmingly prefer their status, which enables them to use these driving jobs as fill-in work as they pursue other professional and educational opportunities.¹⁶

R Street believes that workers and employers should generally be free to hammer out their own employment arrangements and that efforts by legislators to impose a one-size-fits-all standard on the economy will always result in unforeseen, negative consequences. The workplace has changed dramatically in the past few decades, and policymakers need to allow the marketplace to sort matters

¹¹ Sara Ashley O'Brien, "Prop 22 passes in California, exempting Uber and Lyft from classifying drivers as employees," CNN Business, Nov. 4, 2020. <https://www.cnn.com/2020/11/04/tech/california-proposition-22/index.html>.

¹² Brian Melley, "Bay Area Judge Rules Uber, Lyft-Backed Prop. 22 Is Unconstitutional," KQED, Aug. 21, 2021. <https://www.kqed.org/news/11885905/bay-area-judge-rules-uber-lyft-backed-prop-22-is-unconstitutional>.

¹³ Eliyahu Kamisher, "Trucker blockade ends at Oakland Port, protesters see no movement on labor law," *The Mercury News*, July 25, 2022. <https://www.mercurynews.com/2022/07/25/trucker-blockade-ends-at-oakland-port-protesters-see-no-movement-on-labor-law>.

¹⁴ Judith A. Chevalier, "Gig Workers Value their Flexibility... a Lot," *Yale Insights*, April 16, 2019. <https://insights.som.yale.edu/insights/gig-workers-value-their-flexibility-lot>.

¹⁵ Tyson Fisher, "Study suggests owner-operators more satisfied with job than company drivers," *Land Line*, Dec. 8, 2021. <https://landline.media/study-suggests-owner-operators-more-satisfied-with-job-than-company-drivers>.

¹⁶ J. Edward Moreno, "Uber poll: Drivers 'overwhelming support' independent contractor status," *The Hill*, Aug. 25, 2020. <https://thehill.com/policy/technology/513506-uber-poll-drivers-overwhelmingly-support-independent-contractor-status>.



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out in a mostly voluntary manner. Gig work actually is declining—and a strong case can be made that our nation does not have enough available contracting work.¹⁷

In the end, AB 5 caused economic and personal disruptions without noticeable gain. It is no surprise that some employers, such as Vox Media, Inc., pulled out of the California market rather than accept the higher costs and lack of flexibility.¹⁸ For those not exempted, the ABC Test imposed costly new workarounds—e.g., pushing workers to pay to create LLCs.¹⁹ The inflexible test, based on an antiquated vision of the American workplace, threatens the business models of California’s most innovative, tech-oriented businesses. Quashing innovation does not benefit workers.

As misguided as AB 5 has been, it was at least a product of the legislative process. The U.S. Department of Labor’s attempt to achieve a similar goal through the less-democratic regulatory process is more troublesome. R Street acknowledges that this current rulemaking is more limited than AB 5, but the supporters of the rule hope that its approval will spread throughout the federal government—and ultimately will accomplish through regulatory fiat what most state legislatures are rightly unwilling to do on their own.

R Street urges commissioners to look closely at the ill effects of AB 5 in California and continue to allow the use of the existing, broader test that aligns with its stated objective of not disrupting the nation’s freelance economy.

Thank you for your consideration.

Sincerely,

Steven Greenhut

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¹⁷ Nick Zaiac, “6 Charts that Debunk the Gig Economy (2020),” R Street Institute, March 4, 2020.

<https://www.rstreet.org/2020/03/04/6-charts-that-debunk-the-gig-economy-2020>.

¹⁸ Suhauna Hussain, “Vox Media cuts hundreds of freelance journalists as AB 5 changes loom,” *Los Angeles Times*, Dec. 17, 2019. <https://www.latimes.com/business/story/2019-12-17/vox-media-cuts-hundreds-freelancers-ab5>.

¹⁹ Michelle Cheng, “Independent contractors are already finding ways to work around AB5,” *Quartz*, Jan. 30, 2020. <https://qz.com/1793028/california-workers-are-setting-up-more-llcs-after-ab5>.