Docket No. WHD-2020-0007

COMMENTS

of

WASHINGTON LEGAL FOUNDATION

to the

WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

Concerning

INDEPENDENT CONTRACTOR STATUS UNDER THE FAIR LABOR STANDARDS ACT; WITHDRAWAL

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED AT 86 FED. REG. 14,027 (MARCH 12, 2021)

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Submitted Electronically (http://www.regulations.gov)
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200 Constitution Ave. NW
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Re: Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal, Docket No. WHD-2020-0007

Ms. DeBisschop:

On behalf of Washington Legal Foundation, please consider this comment responding to the invitation for comments at 86 Fed. Reg. 14,027 (Mar. 12, 2021). WLF appreciates the opportunity to weigh in on whether the Department of Labor should withdraw the Final Rule, *Independent Contractor Status Under the Fair Labor Standards Act*, 86 Fed. Reg. 1168 (Jan. 7, 2021). As explained below, DOL should not withdraw the Final Rule.

Last year, DOL published a proposed rule—*Independent Contractor Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 60,600 (Sept. 25, 2020). After carefully considering over 1,700 comments, DOL published the Final Rule earlier this year. Then, mere weeks before the March 8, 2021 effective date, DOL invited comments on whether it should delay the Final Rule's effective date. *Independent Contractor Status Under The Fair Labor Standards Act: Delay of Effective Date*, 86 Fed. Reg. 8,326 (Feb. 5, 2021). It then delayed the rule. *Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Delay of Effective Date*, 86 Fed. Reg. 12,535 (Mar. 4, 2021). DOL now seeks to withdraw the rule before it takes effect. As described below, DOL should not go down that path. Rather, it should allow the Final Rule to take effect immediately.

I. WLF's Interest

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF defends free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears before federal tribunals supporting economy-boosting employment rules. *See, e.g.*, *In re Velox Express, Inc.*, 2019 WL 7584332 (N.L.R.B. Sept. 30, 2019); *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881 (2019); *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

WLF also regularly submits comments to federal regulatory agencies, including DOL, on proposed rulemaking. *See, e.g.*, WLF Comment, *In Re Standards For Determining Joint-Employer Status* (June 25, 2019); WLF Comment, *In Re FTC Study Of Digital Technology Market Merger Review*, (Nov. 19, 2018).

WLF's Legal Studies Division, WLF's publishing arm, often produces and distributes articles on legal issues related to DOL regulations. *See, e.g.*, Nathaniel M. Glasser *et al.*, *Joint Employment Liability: What Administrative Agencies' Rule Revisions Mean For Employers*, WLF LEGAL BACKGROUNDER (Mar. 6, 2020); Stephen T. Melnick, *Courts Deliver Mixed Bag On Federal Law's Preemption Of State Independent Contractor Standards*, WLF LEGAL OPINION LETTER (Mar. 1, 2019); Michael J. Lotito, *Predictable, Uniform Standard Needed For Who Is A Joint Employer*, WLF LEGAL BACKGROUNDER (May 19, 2017).

II. Withdrawing the Final Rule Will Harm the Economy Because of Regulatory Uncertainty.

WLF strongly supports providing guidance on independent-contractor status through notice-and-comment rulemaking rather than sub-regulatory documents. Rulemaking is important on this issue because DOL's past sub-regulatory guidance conflicts with federal court decisions and the FLSA's plain language. *See* 86 Fed. Reg. at 1171 (discussing Administrator's Interpretation No. 2015-1). Rulemaking is particularly warranted given the upheaval in this area over the past six years.

For the past six months—since the Proposed Rule was published—regulated entities have been busy preparing for the Final Rule's implementation. *See, e.g.*, Charles Read, *Changing Independent Contractor Rules Explained*, Forbes (Dec. 2, 2020), https://bit.ly/3av4wSt. Many companies spent significant capital anticipating the impending change. For

example, companies bought more inventory and leased more space so that they could use independent contractors to expand their businesses. They did so in the midst of the worst economic downturn in years and uncertainty about whether or when the economy would return to normal. It has yet to do so.

Withdrawing the Final Rule will cause even more uncertainty. What should companies planning to expand their businesses by hiring independent contractors do now? Risk an FLSA action if they proceed as planned? Or waste the time, energy, and money they spent in preparing for the Final Rule's effective date?

Many smaller companies will risk FLSA liability in the hopes that no one challenges the independent-contractor classifications. They will risk liability because doing otherwise would cause immediate bankruptcy. Larger, established companies may decide the risk is not worth it. Those companies will see rented space go unfilled and inventory go to waste. Again, during an unprecedented economic downturn, this is not what the regulated community needs.

No, in these trying times the regulated community needs certainty. In fact, that is why DOL issued the Final Rule. *See* 86 Fed. Reg. at 1168 (DOL issued the Final Rule "to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy"). Experts agree with DOL that this regulatory certainty is important to economic growth.

The then-Chairman of the Federal Reserve testified before Congress that regulatory uncertainty hurts economic growth. *See* Senate Budget Committee, *Testimony of Chairman Ben Bernanke*, YouTube (Feb. 7, 2012), https://bit.ly/380rMXv (starting at 4:30). The IMF's chief economist has echoed those sentiments. KR Srivats, *Policy certainty, structural reforms are key to growth: IMF's Gita Gopinath*, The Hindu Business Line (Dec. 20, 2019), https://bit.ly/3n0eM8x. Others agree. *See* Leonard J. Kennedy & Heather A. Purcell, *Wandering Along the Road to Competition and Convergence-the Changing CMRS Roadmap*, 56 Fed. Comm. L.J. 489, 547 (2004); *Administrative Law—Judicial Review of Treasury Regulations—Federal Circuit Invalidates A Treasury Regulation Under State Farm for Lack of Contemporaneous Statement of Justification—Dominion Resources, Inc. v. United States,* 681 F.3d 1313 (Fed. Cir. 2012)*,* 126 Harv. L. Rev. 1747, 1754 n.46 (2013).

DOL's discussion of this regulatory uncertainty is risible. The Final Rule included a laundry list of examples and then walked through how applying the

Final Rule to those examples would result in a specific outcome. Withdrawing the Final Rule gets rid of those examples. So what's left? DOL's answer is "trust us." The politically unaccountable bureaucrats in Washington "know" how to decide if someone is an independent contractor or employee. So too do Article III judges.

But the problem is that the current regulatory framework is unpredictable. Many decisions depend on what federal judicial circuit a company is located in or which DOL employee is reviewing a case. That is why the regulated community and freelancers rejoiced when DOL promulgated the Final Rule. They no longer had to guess at a worker's classification. Yet DOL wants to tell the regulated community to "trust" it and the federal courts.

Freelancers understand this dynamic and how withdrawing the Final Rule will cause them economic hardship. When DOL proposed the Final Rule, over 95% of non-Uber freelancers supported the Final Rule. Dane Steffenson, *et al.*, *DOL Simplifies Independent Contractor Analysis in Final Rule*, Littler Mendelson P.C. (Jan. 7, 2021), https://bit.ly/2QSIQbO (citation omitted). DOL should not eliminate their chance to earn a living by withdrawing the Final Rule.

III. DOL'S Considering Distributional Consequences Is Arbitrary And Capricious.

DOL did not meaningfully consider the mountain of evidence supporting the Final Rule. Rather, in proposing to withdraw the Final Rule, DOL relies on a presidential directive to consider "the distributional consequences of regulations." 86 Fed. Reg. at 14,035 (citation omitted). DOL, however, cannot consider distributional consequences in the manner implied.

DOL appears to believe that it should withdraw the Final Rule if it changes the distribution of benefits between workers and companies. An example, however, shows the absurdity of this construction. Assume that workers and companies currently share $100 billion—each receiving $50 billion. But after the Final Rule, the parties share $200 billion—the companies receiving $102 billion and workers receiving $98 billion. This would be a distributional change from 50/50 to 51/49.

No sane person would say that this "hurts" the workers. The workers would see a 96% increase in combined salaries and benefits. But the notice of proposed withdrawal appears to argue that rejection of the Final Rule may still be appropriate because of this minuscule distributional change. This

understanding of distributional consequences turns cost-benefit analysis on its head. At a minimum, DOL should start anew and properly consider the costs and benefits of the Final Rule viewed through the correct lens.

* * *

Withdrawing the Final Rule invites an economic calamity. It will further impede a return to normal. And this roadblock to economic growth comes without any benefits. DOL should stay the course and allow the Final Rule to take effect.

Respectfully submitted,

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