NWJP
NORTHWEST WORKERS' JUSTICE PROJECT

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Interpretation
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U.S. Department of Labor, Room S-3502
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**Comments on RIN 1235-AA46: Employee or Independent Contractor Status under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act**

Dear Director Navarrete:

Northwest Workers' Justice Project ("NWJP") submits these comments on the Department of Labor's ("Department" or "DOL") Notice of Proposed Rulemaking ("NPRM") regarding the standard for determining who is a covered employee and who is an independent contractor under the Fair Labor Standards Act ("FLSA"). RIN 1235-AA34; Fed. Reg. Vol. 85, No. 187 (Sept. 25, 2020) ("NPRM").

NWJP is a not-for-profit law firm representing low wage, immigrant, and contingent workers in Oregon and the Pacific Northwest with respect to employment matters. It has extensive experience representing workers in litigation arising under the Fair Labor Standards Act and the Migrant and Seasonal Workers Protection Act, ("AWPA")[1], and has frequently litigated the scope of employment under those statutes. It has frequently participated in Department of Labor rulemaking under the FLSA and AWPA. NWJP also acts as the anchor organization for the Low

[1] Although DOL uses the acronym "MSPA" to refer to the Migrant and Seasonal Agricultural Worker Protection Act, the U.S. Supreme Court has used "AWPA" when discussing the statute. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 640 (1990) and *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 597 (2011). The Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits also refer to the statute as "AWPA." *Howard v. Malcolm,* 852 F.2d 101 (4th Cir. 1988); *Malacara v. Garber,* 353 F.3d 393 (5th Cir. 2003); *Flores v. Rios,* 36 F.3d 507 (6th Cir. 1994); *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403 (7th Cir. 2007); *Dico, Inc. v. Diamond,* 35 F.3d 348 (8th Cir. 1994); *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997;); *Alfaro-Huitron v. Cervantes Agribusiness,*|982 F.3d 1242 (10th Cir. 2020); *Antenor v. D & S Farms*, 88 F.3d 925, 928, n.3 (11th Cir. 1996). Accordingly, farm worker advocates consistently refer to the law as "AWPA."

**Comments of NWJP on RIN 1235-AA46: Employee or Independent Contractor Status Under the FLSA FMLA, and AWPA**

Wage Workers Legal Network, a national network of over 1,000 legal advocates working in forty states and the District of Columbia.

The NPRM at issue in this rule-making is profoundly flawed and would have a significant impact on long-standing worker protections. DOL should withdraw the proposed rule and abandon its intention to rescind the existing rules, which were adopted in 2024 and 1997 and are consistent with judicial precedent and Congress's intention that the FLSA's protections for workers are broadly applicable.

There are many substantive issues with the proposed rules' provisions and the rationale offered by DOL in support of its proposal, which NWJP addresses below. But first, we must note that it is impossible to give full comments on this proposal without considering the closely related analysis of joint employer status. A proposed rule on that topic was published for comment on April 23, 2026, which does not allow for sufficient time to review it before these comments are required to be submitted. We believe it is a procedural error and indication of inadequate and flawed reasoning to attempt to address the rules separately. We request DOL open an additional comment period on these rules to allow additional comments that can analyze the proposed rules together.

1. *The proposed rules are contrary to Congress' intent to protect workers under the FLSA, AWPA, and FMLA.*

Congress enacted the FLSA in 1938 to "correct and as rapidly as practicable to eliminate" "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202. The economic realities test being proposed by the Department would encourage more businesses to avoid their duties under the FLSA by classifying more workers as independent contractors, thereby avoiding paying minimum wage and overtime wages to their workers. This unacceptable result is inconsistent with the FLSA's stated purpose. "Courts have adopted an expansive interpretation of the definitions of 'employer' and 'employee' under the FLSA, in order to effectuate the broad remedial purposes of the Act." *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997) (citations omitted); see also, *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1505-07 (11th Cir. 1993).

Likewise, Congress passed AWPA with a broad scope and remedial purpose in mind. AWPA was adopted in 1983 after Congress acknowledged that its earlier effort to protect agricultural workers—through the Farm Labor Contract Registration Act of 1963—had "failed to reverse the historical pattern of abuse and exploitation of migrant and seasonal farm workers." 1982 U.S.C.C.A.N. 4549. Courts have pointed to this history and the legislation's humanitarian purpose when choosing to construe the Act—and the population of workers it protects—broadly. *Bracamontes v. Weyerhaeuser Co.*, 840 F.2d 271, 276 (5th Cir.), cert. denied, 488 U.S. 854, 109 S. Ct. 141, 102 L. Ed. 2d 113 (1988); s*ee also*, *Morante-Navaro v. T&Y Pine Straw Inc.*, 350 F.3d 1163, 1166 (11th Cir. 2003). Narrowing the scope of workers protected under AWPA would be contrary to the law and harmful to the people it protects.

Nor is narrowing the scope of workers considered to be employees consistent with the Congressional purposes leading to the adoption of FMLA. Among those purposes enumerated by Congress were promoting the stability and economic security of families and the goal of equal employment opportunities for men and women. 29 U.S. Code § 2601(b). Since workers classified as independent contractors are not eligible under FMLA for medical leave, they will continue to suffer the adverse consequences that Congress found they commonly experience, 29 U.S. Code § 2601(a)(3)-(6), and their families will not benefit from the adequate care and family development Congress meant to bestow. 29 U.S. Code § 2601(a)(2).

Although DOL claims that the new rule will not change the outcome of the established economic reality analysis but merely provide clarity, that assertion strains credulity when elsewhere in the NPRM DOL itself predicts more workers will be classified as independent contractors as a result of the proposed rule. 91 Fed. Reg. 9961. Because only employees are protected by FLSA, AWPA and FMLA's minimum standards, increasing the number of independent contractor positions, including re-classifying existing employee positions, is flatly contrary to Congress' intent and far beyond the bounds of acceptable agency action. Misclassification of workers as independent contractors when they are, under long-standing statutory definitions, employees, places heavy burdens on workers. This is especially true for low-wage workers, among whom misclassification is more common and who most need statutory protections.

DOL recognized exactly this in its very recent 2024 rulemaking, *i.e*., that the reclassification or misclassification of employees as independent contractors harms affected workers. 87 Fed. Reg. 62230. DOL further noted that since women and people of color are overrepresented in the low-wage positions where misclassification is more likely, these changes would disproportionately impact such workers. While proposing to change these rules to increase the number of workers classified as independent contractors, DOL does not acknowledge or offer sufficient reasoning to justify imposing this previously recognized harm. DOL has not proffered any analysis of developments over the past two years that require simply ignoring its previous findings and overturning its prior considered opinion.

While DOL touts that its proposed rule will spur economic innovation by making it easier to form independent contractor relationships, Congress has already stated its clear finding that such avoidance of FLSA's minimum standards "burdens commerce" and "constitutes an unfair method of competition." 29 U.S.C. § 202. DOL cannot use its rules and preferred policy positions to override Congress' expressed intent. Although DOL implies workers will be better off as independent contractors, that assertion is unsupported in the NPRM and contrary to the evidence as well as NWJP's experience representing workers who are misclassified as independent contractors.[2]

[2] Ismael Cid-Martinez, Nina Mast, Margaret Poydock, and Valerie Wilson, *Misclassifying workers as independent contractors is costly for workers and social insurance systems*, Economic Policy Institute (April 2026), https://files.epi.org/uploads/319535.pdf.

2. *The proposed rule fails to satisfy its stated primary objective of reducing confusion.*

The proposed rule will create, not reduce, confusion and increase litigation over employment status under the affected statutes. First, the proposed rule is not consistent with the case law and therefore is not a permissible interpretation. This will only leave employers confused about their obligations as they struggle to weigh controlling case law with the proposed interpretive rule. The elevation of two factors to "core" status, which have more probative value than other factors and are "unlikely" to be outweighed by the other factors is in direct violation of the Supreme Court's repeated insistence that no factor is dispositive and there is no such core factor. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (citing *Silk*, 331 U.S. 704, 716 (1947) (denying the existence of a "rule of thumb to define the limits of the employer-employee relationship" and determining employment status based on "the total situation")); *see also Donovan v. DialAmerica Marketing, Inc*., 757 F.2d 1376, 1385-86 (3d Cir. 1985) (reversing decision that workers were independent contractors because lower court "did not apply two other factors [permanence and whether the service is an integral part of the business]," leading to an erroneous conclusion); *Colt & Joe Trucking, LLC v. United States DOL*, No. 24-cv-00391-KWR-GBW, 2025 US Dist LEXIS 4657, *25-26 (DNM Jan. 9, 2025) (calling almost identical 2021 rule "potentially unlawful" because "it is not clear that the FLSA even permits a test that emphasizes two factors.").

The Department dismisses this well-established law[3] and claims that courts have actually been giving some factors more weight while saying no factor is dispositive and all facts must be considered. It offers no evidence that this subjective reading of court opinions is accurate. DOL even admits, without apparent concern, that although the Supreme Court has been clear that the economic realities test is broader than the common law right to control test,[4] under the new proposed framing it may be possible to be an employee under the right to control test and *not* be an employee under the new rules. 91 Fed. Reg. 9950.

The Department's regulations about the scope of employment under the FLSA cannot establish new legal standards; rather, they speak only to the agency's view of the statute and how the agency will seek to enforce it. *See Skidmore v. Swift Co*, 323 U.S. 134, 140 (1944). The regulations being proposed would be interpretive regulations, which are only binding on the courts to the extent that they are found to be persuasive. *Skidmore v. Swift Co*, 323 U.S. 134, 140 (1944); *see also Loper Bright Enters. v. Raimondo*, 603 US 369, 400 (2024) (rejecting the idea that an agency interpretation could be permissible if it "is not the one the court, after applying all relevant interpretive tools, concludes is best."). Given the weight of 80-plus years of case law in the Supreme Court and across the circuits, the likely result will be that the courts will continue to follow their own precedents, not the hastily concocted interpretive regulations that radically

[3] *See also Charles v. Burton*, 169 F.3d 1322, 1331-32 (11th Cir. 1999); *Beliz v. W.H. McLeod & Sons Packing Co*., 765 F.2d 1317, 1328 (5th Cir. 1985); *Usery v. Pilgrim Equipment Co. Inc*., 527 F.2d 1308, 1314 (5th Cir. 1976); *Real v. Driscoll Strawberry Associates, Inc*., 603 F.2d 748, 754 (9th Cir. 1979).

[4] *Rutherford*, 331 U.S. at 729; *see also Reyes v. Remington Hybrid Seed Co., Inc*., 495 F.3d 403, 409 (7th Cir. 2007) (the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under… traditional agency law principles.")

depart both from those precedents and the agency's own, long-held views. *See* Administrator's Interpretation No. 2016–1. But their analysis, and the calculations of litigants, would be muddied by the Department's adoption of a radical new view if this rule change is implemented. This very uncertainty is a sure recipe for a deluge of new litigation to understand whether, and to what extent, the law has shifted. In the process worker protections intended by Congress will be denied or delayed. Employers who want to comply will be caught up in the lack of clarity, and those who would exploit vulnerable workers will no doubt seize the opportunity presented by this confusion to attempt to do so. The economy will suffer.

Second, even if the Department's proposal was a permissible interpretation of the standard, the significant changes will lead to additional lack of clarity due to conflicts between the new test and the long-established version that was in effect during the time period when many states, including Oregon, adopted the economic realities test to determine employment status under their own wage and hour laws. The proposed rule will thus also decrease clarity and increase litigation in state courts on this issue, which is directly opposite of DOL's stated goals in proposing this rule. And in the meantime, we will have different versions of the test determining employment relationships under state and federal law, resulting in potentially different outcomes, a morass that will be bad for employers and workers.

Finally, putting questions of the permissibility of the proposed changes aside, implementing the new rule will also lead to more confusion because the rule itself, as drafted, is confusing. The changes in what the factors include as well as how to apply the two core factors which almost, but not always, determine the outcome will require years of litigation to develop the case law to help inform employers and workers of the bounds of when the factors tip towards which type of relationship. DOL's rationale about the difference between probative value and weighted factors is incomprehensible and will not assist individuals in successful application of the concept. The 80-plus years of case law on the application of the test will be useless as well since courts have never previously identified core factors and thus the decisions do not address how to balance their additional probative value with other factors. To suggest such dramatic changes to a rule in the name of reducing confusion and litigation simply makes no sense and the offered justifications are insufficient to justify the shift.

3. *The proposed rule is a stark departure from over 75 years of agency interpretation.*

DOL first issued a formal interpretation of employment status under the FLSA in 1949, shortly after the Supreme Court's decisions in *Silk* and *Rutherford*. Since that time, the agency interpretation has been consistent in applying the broad tests from those decisions. While the precise terminology has occasionally shifted slightly over the years, the interpretation has been consistent in both its substantive factors and the understanding that the test is a totality of the circumstances test where no one factor is more dispositive than the rest. This interpretation continued through the decades with additional opinion letters. In 1997, the agency adopted the interpretation into regulations for AWPA, which shares FLSA's "suffer or permit" standard for employment. Even as late as 2019, the Trump administration issued an opinion letter that, while

it narrowed the framing of some of the factors to be considered, did not identify any factors as more dispositive that the others.

It was not until 2021, more than 75 years after it first explained its interpretation of the standard, that the agency briefly considered regulations that introduced the concept of core factors before quickly replacing those regulations with the 2024 version, which returned to the longstanding agency interpretation that no one factor is dispositive and all facts must be thoroughly considered.

This proposal thus marks a significant departure and an unprecedented shift in the interpretation of the law, and one that is poorly reasoned, unjustified, and thus unlawful.

4. *DOL did not adequately consider alternatives or potential negative effects of rescinding and replacing the 2024 rules.*

DOL names a number of hypothetical concerns with the 2024 rules, but does not appear to have collected or reviewed any data monitoring the rules' implementation or actual effect. The 2024 rules have been in effect for two years and in that time NWJP staff, frequent practitioners in this area of law, have not identified an increase in confusion or significant changes to the outcomes of employer analysis under those rules compared to the long-standing court precedent establishing the economic realities test. DOL does not cite any alarming outcomes caused by the 2024 rules. The Department announced in 2025 that it would no longer apply those rules. It did so without any legal justification other than its stated intention to rescind them.[5] *See* Field Assistance Bulletin No. 2025-1. DOL did not consider the alternative possibility of waiting longer before proposing changes to allow it the time to do so. DOL identifies no specific reason why urgent action is needed. This failure to consider waiting and monitoring the situation is indicative of flaws in DOL's reasoning.

This is all the more so in the case of the proposed changes to the AWPA rules, which have been in place since 1997 and for which DOL offers no specific rationale beyond the need for consistency with their proposed changes to the FLSA rules. The fact that DOL apparently has identified no problems with the AWPA rules supports leaving the already consistent 2024 FLSA rules in place, not replacing them and then making other changes in the name of consistency. This is particularly true because the language and case citations being removed from the AWPA rules came directly from Congress, which clearly stated its intention for the applicable test. House Report No. 97-885, 97th Cong., 2d Sess., at 7, *reprinted at* 1982 U.S. Code Cong. & Adm. News 4547, 4553.5.

[5] Despite a number of legal challenges referenced in the decision to stop applying the rules, no court had found the 2024 rules unlawful. To the contrary, at least one court found the 2024 rules lawful and the 2021 rules it replaced likely unlawful. *Colt & Joe Trucking, LLC v. United States DOL*, No. 24-cv-00391-KWR-GBW, 2025 US Dist LEXIS 4657, *25-27 (DNM Jan. 9, 2025). Other challenges were dismissed for lack of standing.

DOL goes so far as to announce its intention to rescind the 2024 FLSA rules and 1997 AWPA rules separate from adopting the newly proposed rules, to ensure that even if the new rules are enjoined, these other rules will be withdrawn. Having identified no actual problems that are supported by evidence with the existing rules, and having collected or reviewed no new information since the implementation of the 2024 FLSA rules, DOL instead relies on revisiting information it had when it engaged in the rulemaking that led to the 2024 rules. It suddenly finds various concerns "compelling" when it did not do so when it previously considered them. In the absence of new information, reversing its previous analysis without a thorough explanation is arbitrary and capricious.

While DOL raises some more specific small concerns about what it considers lopsided framing of the 2024 rules, it does not appear to have considered the alternative of making small changes to address those specific concerns by incremental steps, a value it previously identified in its 2020 rulemaking. These small issues do not warrant a wholesale repeal and complete restructuring of the test presented in the rule.

The Department acknowledges some of the burdens on workers classified as independent contractors in its proposal but irresponsibly fails to adequately assess their impact. In addition to losing the protections of the relevant Acts, workers may also lose access to affordable health insurance, unemployment insurance, workers' compensation benefits, and retirement savings. The Department acknowledges some of these losses in general but fails to assess the financial impact on workers in any detail. To the extent any of the Department's assumptions rest on the idea that businesses pay independent contractors more to balance out the increased financial burden, this assumption is unfounded. In NWJP's experience, low-wage workers are frequently misclassified as independent contractors and rarely receive any financial benefit of the relationship. Instead, the additional costs of being treated as if they are in business for themselves leaves them with earnings far below the minimum wage and without protection should injury or illness keep them from working.

*5. Aspects of the analysis under the individual factors are also flawed and inconsistent with long-establish court precedent.*

In addition to the global issues identified above, there are many instances of flawed reasoning, impermissible restrictions, and confusing analysis that undermine the specific language proposed for each factor in the proposed rule.

- Control: The rule purports to exempt from consideration any control that results from or relates to the employer's desire to impose health and safety standards, deadline, quality control measures, anti-harassment policies, and other "similar" types of control. This expands on the current rule's suggestion that employer control necessary to comply with legal standards may not indicate an employment relationship. These additional terms are so vague and broad as to be able to be arguably applied to any type of control a business might wish to exert over an individual and will make it almost impossible to demonstrate control. The rule further states that having deadlines and quality control standards are

common in business but not in employment contracts. This is a patently false assumption – many if not most employers require their employees to meet deadlines and produce quality work. It also demonstrates a kind of circularity in the proposed test that leaves one with no guidance at all in the end: that control that is common in employment relationships is indicative of control and other types of control isn't. The draft language also does not acknowledge the concept of reserved control or the right to control, which is a well-established part of the analysis, even under the more restrictive common law "right to control" test. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 741 (1989).

- Opportunity for Profit/Loss: The rule attempts to combine the traditional profit/loss resulting from business initiative analysis and the analysis about investments in the business. These facts are not necessarily related and by combining them into one factor the Department's proposed rule only confuses the analysis. It also unfairly tips it towards independent contractor status by asserting that a worker is an independent contractor under this mega factor if they have facts that weigh towards independent contractor in either of those categories instead of allowing that mixed facts might cancel each other out. This is a biased and overly mechanical application of the test. *See Antenor v. De & S Farms*, 88 F.3d 925, 932-33 (11th Cir. 1996) ("The purpose of weighing the factors is not to place each in" a specific column, "but to view them qualitatively to assess the evidence of economic dependence.")
- Investment: The proposed rule also instructs one not to compare the investment of the individual with the business, which contradicts existing case law, *Torres-Lopez v. May*, 111 F.3d 633, 643-44 (9th Cir. 1997), but does not offer any guidance for how one should evaluate investment related facts in absence of that method. The existing rule adequately addresses the Department's named concern that when comparing amount of money invested the business will frequently have more money on the table by instructing one to compare the types of investment as well. The current proposed language only confuses.
- Skill: The proposed rule removes language related to the particular relevance of different kinds of skills and language acknowledging that some skilled workers are employees. Removing that language will result in significant confusion about whether workers commonly understood to be employees might not be based on their experience and skill in completing their tasks as employees. This impression is exacerbated by one of the examples provided in the rule which implies that an experienced roofer may be an independent contractor on that ground alone.
- Permanence: The proposed rule removes language clarifying that permanence should be considered in the context of the type of business or industry, such as how the agricultural industry relies heavily on seasonal labor. This concept is well established in the case law, *Charles v. Burton*, 169 F.3d 1322, 1331-32 (11th Cir. 1999); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1328 (5th Cir. 1985); *Usery v. Pilgrim Equipment Co. Inc.*, 527 F.2d 1308, 1314 (5th Cir. 1976); *Real v. Driscoll Strawberry Associates, Inc.,* 603 F.2d 748, 754 (9th Cir. 1979), and its removal decreases rather than increases clarity.

- Integrated Unit of Production: The proposed rule replaces broader language from *Silk* about the importance of considering whether the work is integral to the business of the employer, with more limited language from *Rutherford.* Since those cases were decided the same day, there is no reason to believe the Supreme Court was narrowing the analysis but rather providing an additional framing. By specifically differentiating the two concepts, the rules reduce clarity and open up the possibility of employer manipulation as the employer has ultimate control over the way it divides its workers into units.
- Primacy of actual practice: This proposed rule discounts the impact that a contractual right to control a worker has on their dependence on a business. This is rationally unsound. A right to terminate workers' employment becomes an implicit threat that, of course, makes them more dependent on the business that has that right, regardless of whether a worker ever is terminated.
- Examples: The proposed rule contains examples that inappropriately encourage a mechanical application of the test because they each focus on a single factor not considered in relationship to other facts and factors.

## Conclusion

It is no coincidence that corporate misclassification is rampant in low-wage, labor-intensive industries, such as delivery services, janitorial services, agriculture, transportation, and home care and housekeeping, as well as in app-dispatched work.[6] Women and people of color, including Black, Latino, and Asian workers, are overrepresented in these occupations.[7] All workers who are misclassified suffer from a lack of workplace protections, but women, people of color, and immigrants face unique barriers to economic security and disproportionately must accept low-wage, unsafe, and insecure working conditions. And in times of high economic instability like today, individual workers have even less market power than usual to demand fair conditions, especially in jobs that historically have been undervalued; they are forced to accept take-it-or-leave-it job conditions.[8]

The clients of NWJP are overwhelmingly workers who do not have economic power in the workplace and will be vulnerable to abuse due to these proposed changes if they are implemented. The Department of Labor should not adopt an arbitrary standard that creates incentives for employers to contract away their legal duties and immunize themselves from

[6] Catherine Ruckelshaus & Ceilidh Gao, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, National Employment Law Project (Sept. 2017), https://s27147.pcdn.co/wp-content/uploads/NELP-independent-contractors-cost-2017.pdf.
[7] Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 Minn. L. Rev. 907, 924 (2017) (finding that "seven of the eight high misclassification occupations were held disproportionately by women and/or workers of color").
[8] *See* Ruckelshaus & Gao, *supra*.

responsibility for the workplace conditions they create. Such a standard would degrade workers' labor conditions, permit wage theft and unlawful child labor, and shift all economic risks to the workers, depriving them of their statutory rights.

On behalf of its vulnerable clients, NWJP calls upon the Department to withdraw this unfortunate proposal.

Sincerely,



Bonnie Allen-Sailer
Staff Attorney

D. Michael Dale
Senior Attorney