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**Re: Comments Regarding DOL’s Notice of Proposed Rulemaking on the Employee or Independent Contractor Classification Under the Fair Labor Standards Act, RIN 1235-AA43**

Dear Ms. De-Bisschop:

The Center for Law and Social Policy (“CLASP”) and Governing for Impact (“GFI”) submit this comment on the Department of Labor’s (“DOL” or “Department”) notice of proposed rulemaking “Employee or Independent Contractor Classification Under the Fair Labor Standards Act” RIN 1235-AA43; Fed Reg. Vol. 87, 62218 (Oct. 13, 2022) (“Proposed Rule”). CLASP is a national, nonpartisan, nonprofit advancing anti-poverty policy solutions that disrupt structural, systemic racism and remove barriers blocking people from economic justice and opportunity. With deep expertise in a wide range of programs and policy ideas, longstanding relationships with anti-poverty, child and family, higher education, workforce development, and economic justice stakeholders, and over 50 years of history, CLASP works to amplify the voices of directly-impacted workers and families and help public officials design and implement effective programs. CLASP also seeks to improve job quality for low-income workers. That includes increasing wages and providing access to paid sick days, paid family and medical leave, and stable work schedules. Quality jobs enable individuals to balance their work, school, and family obligations – promoting economic stability as well as career advancement. GFI works to ensure that the federal government works more effectively for everyday working Americans.

We appreciate the opportunity to comment on the proposed regulations and we write in support of the Proposed Rule. The Proposed Rule will clarify the Wage and Hour Division’s (“WHD”) approach to determining whether a worker is an employee or an independent contractor for the purposes of the Fair Labor Standards Act (“FLSA”). The approach set forth in the Proposed Rule is consistent with the DOL’s past practice and Supreme Court precedent since the early days of FLSA enforcement.

Our comment is generally supportive of the DOL’s Proposed Rule and specifically applauds the Department’s decision to affirm its use of the multi-factor “economic realities” test and to explicitly discuss the impact of worker surveillance technology on a determination of “control” for the purposes of the “economic realities” test. Our comment is summarized as follows:

1. The Proposed Rule’s use of the six factor economic realities test accurately reflects the statutory test and is properly designed for the modern economy.

- a. The six factor test is in line with Department practice and judicial precedent.
- b. The longstanding multi-factor test is necessary to fulfill the FLSA's statutory objectives in a diverse, modern economy.

2. The Proposed Rule correctly considers worker surveillance in its discussion of control reserved or exerted through supervision.

- a. Companies use a variety of technologies to surveil workers.
- b. Worker surveillance is common throughout the economy.
- c. The Proposed Rule appropriately includes surveillance in its discussion of control through supervision.
- d. Surveillance enables the same type of control as traditional supervision methods.

**1. The Proposed Rule's use of the six factor economic realities test accurately reflects the statutory test and is properly designed for the modern economy.**

The Fair Labor Standards Act ("FLSA"), which mandates minimum wage and overtime laws for employees, defines "employee" as anyone who is "suffer[ed] or permit[ted] to work" by an employer.<sup>1</sup> An "employer," in turn, is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee."<sup>2</sup> The statute itself does not define independent contractors to be excluded from FLSA's coverage, but judicial precedent has made this exclusion clear. As described below, the Supreme Court has repeatedly affirmed both that FLSA's definition of "employee" is very broad (more so than the common law of agency test or the definition present in other legislation) and that independent contractor status for the purposes of FLSA exclusion should be determined based on the economic realities of the relationship between employer and worker.

DOL's Proposed Rule for distinguishing between employees and independent contractors for the purposes of enforcing the FLSA represents a return to the traditional multi-factor test for independent contractor status and is necessary for FLSA enforcement in the modern economy.

- a. The six factor test is in line with Department practice and judicial precedent.

Soon after the FLSA's enactment in 1938, the Supreme Court set forth a multi-factor "economic realities" test for independent contractor status under the law. In *Rutherford Food Corp. v. McComb*, the Court emphasized the need to consider "the circumstances of the whole activity" rather than "isolated factors."<sup>3</sup> The Supreme Court and circuit courts have repeatedly affirmed a multi-factor approach to the determination.<sup>4</sup> Federal circuit courts have been explicit that no one factor of the test is more controlling of the outcome than the others and that the weight of each factor varies with the specific facts of particular cases.<sup>5</sup>

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<sup>1</sup> 29 U.S.C. § 203(e)(1), 203(g).

<sup>2</sup> 29 U.S.C. § 203(d).

<sup>3</sup> 331 U.S. 722, 730 (1947).

<sup>4</sup> See, e.g., *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326 (1992); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (explaining the Supreme Court's mandate that "employees are those who as a matter of economic realities are dependent upon the business to which they render service.").

<sup>5</sup> See, e.g., *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311-12 (11th Cir. 2013).

Since the Supreme Court's decision in *Rutherford*, the Department of Labor's Wage and Hour Division ("WHD"), which is charged with enforcing the minimum wage and overtime provisions of the FLSA, has consistently applied a multi-factor economic realities test. In 1949, WHD issued an opinion letter which laid out a six factor test for the employee versus independent contractor determination.<sup>6</sup> It emphasized that no single factor is controlling and that the test must be made based on evidence of the day-to-day relationship between the worker and the principal.<sup>7</sup> Subsequent WHD discussions of the test in regulations and subregulatory guidance have emphasized that no one factor is more important than the others.<sup>8</sup>

This longstanding commitment to a multi-factor approach, supported by past WHD practice and repeatedly affirmed by controlling judicial precedent, was briefly upended in 2021. WHD issued a new regulation that explained that there were two "core factors" of the economic realities test: the degree of control and the worker's opportunity for loss or profit. Litigation ensued and the 2021 rule never took effect.

DOL correctly notes the regulatory confusion that the 2021 rule caused and seeks to return to the longstanding multi-factor test in this Proposed Rule.

- b. The longstanding multi-factor test is necessary to fulfill the FLSA's statutory objectives in a diverse, modern economy.

Not only is it appropriate under relevant WHD and judicial precedents, the multi-factor, "totality of the circumstances" approach is necessary for the WHD to enforce the FLSA in a manner consistent with the statute in a modern economy. Congress enacted the FLSA to "eliminate low wages and long hours and free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers."<sup>9</sup> When companies attempt to misclassify their workers as independent contractors – which is occurring with increased frequency as workplaces "fissure"<sup>10</sup> – to avoid FLSA coverage, they subvert the objectives of the law. WHD is right to develop a test that effectively prevents these maneuvers and promotes the overall purposes of the FLSA.

Due in part to the advent of modern technologies, firms across the United States' economy have developed novel organizational models that rely on less traditional notions of what constitutes a workplace. Before the 1980s, the American economy was characterized by firms that, for the most part, directly employed the workers who completed all tasks associated with the business.<sup>11</sup> A

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<sup>6</sup> Proposed Rule at 62222.

<sup>7</sup> *Id.*

<sup>8</sup> *See, e.g.*, Administrator's Interpretation No. 2015-1, "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors" (AI 2015-1).

<sup>9</sup> *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (internal quotations omitted) quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727, 67 S. Ct. 1473, 1475, 91 L. Ed. 1772 (1947).

<sup>10</sup> *See generally*, David Weil, *The Fissured Workplace: How Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2014) and more recently, Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, *The Russell Sage Foundation Journal of the Social Sciences* 5(5):147-165 (Dec. 2019),

[https://www.researchgate.net/publication/337038671\\_Understanding\\_the\\_Present\\_and\\_Future\\_of\\_Work\\_in\\_the\\_Fissured\\_Workplace\\_Context](https://www.researchgate.net/publication/337038671_Understanding_the_Present_and_Future_of_Work_in_the_Fissured_Workplace_Context).

<sup>11</sup> *Id.*

hotelier, for example, would employ everyone from the front desk staff to the hotel maids, from the entertainers to the room service workers.

Beginning in the 1980s, in response to investor pressure, firms sought to outsource bigger and bigger portions of their workforces to other entities and to workers themselves.<sup>12</sup> This helped firms offload costs and liabilities associated with employment, including minimum wage and overtime obligations under the FLSA. The hotelier would, for example, contract with a cleaning company, which in turn might contract with small businesses or individual workers acting as independent contractors, to complete cleaning tasks. As another example, an online retailer might outsource final-mile delivery to workers in business for themselves as independent contractors. The result of these changes in the organizational structure of many firms throughout the economy was termed by economist and former WHD Administrator David Weil as the “fissured workplace.”<sup>13</sup> In the “fissured workplace,” the lead companies that consumers pay for goods or services are frequently not the same companies that employ the people who make or deliver them. However, through a variety of organizational forms and managerial and technological methods, the lead companies maintain significant control and de facto integration with the business(es) that produce goods or provide services.

Significantly, firms across the economy have increased their use of independent contractors, and the share of American workers with independent contractor income has increased 22 percent since 2001.<sup>14</sup> The Census Bureau estimated in 2017 that at least 10.6 million workers, or 6.9 percent, are independent contractors.<sup>15</sup> For a variety of reasons, this is widely considered to be an underestimation.<sup>16</sup> For example, using tax data, Abraham et. al. estimated that close to 12 percent of workers are classified as independent contractors.<sup>17</sup>

The proliferation of independent contracting, gig work, and worker misclassification has imposed significant harm on workers in low-wage industries and has undermined federal and state labor protections. The 2017 Bureau of Labor Statistics (BLS) Contingent Worker Supplement to the Current Population Survey, which measures workers in alternative work arrangements, estimated that 14 percent of gig workers earned less than the federal minimum wage and 29 percent earned less than the applicable state minimum wage. Indeed, gig workers face economic insecurity and rely heavily on public benefits. According to the BLS, 30 percent of gig workers used SNAP within a month of the survey, which is twice the rate of employee-designated service sector workers.

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Katherine Lim, et. al., *Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data 1*, Internal Revenue Service, (Jul. 2019), <https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf>.

<sup>15</sup> Proposed Rule at 62261.

<sup>16</sup> *Id.*

<sup>17</sup> Abraham, Katharine G., John C. Haltiwanger, Kristin Sandusky, and James R. Spletzer. 2021. “Measuring the Gig Economy: Current Knowledge and Open Issues.” In *Measuring and Accounting for Innovation in the Twenty-First Century*, Carol Corrado, Jonathan Haskel, Javier Miranda, and Daniel Sichel, eds. Chicago: University of Chicago Press, pp. 257–298; Abraham, Katharine G. and Susan N. Houseman. “What Do We Know About Alternative Work Arrangements in the United States?” 2021. Report prepared for the U.S. Department of Labor. <https://research.upjohn.org/reports/271>.

Accordingly, 1 in 5 gig workers could not afford enough to eat and 31 percent of gig workers could not afford to pay the full amount of their utility bills in the month prior to the survey.<sup>18</sup>

Independent contracting—both in legitimate forms and via misclassification—occurs through a wide variety of working arrangements. Some independent contractors are in business for themselves, such as an attorney or auto mechanic who hangs a shingle and operates a practice on their own. Some workers classified as independent contractors are assigned and paid for tasks via an intermediary organization or business such as a staffing agency, third-party manager, or subcontractor. Others work in the gig economy and accept tasks from individual customers or from companies in search of a good or service via platforms.<sup>19</sup> Still others are more traditional freelancers, undertaking specialized or professional work for specific customers on a project-by-project basis.

Such a diversity of arrangements and the roles and responsibilities they create for the provider and user of that work demands a flexible, comprehensive approach to determining whether a worker is a *bona fide* independent contractor or is actually, based on a comprehensive understanding of the relationship’s “economic realities,” an employee.<sup>20</sup> This underlies why the WHD and courts have, for decades, applied the multifactor test in assessing whether or not an employment relationship exists under the FLSA.

A comment on WHD’s decision to withdraw the 2021 rule that discussed farmworker working arrangements demonstrates how important a multi-factor test – rather than a test focused on two “core factors” – is to ensure the WHD can navigate varied work arrangements in its enforcement of the FLSA.<sup>21</sup> Texas Rio Grande Legal Aid lamented that the consideration of two “core factors” would relegate the remaining factors to secondary status. Included in these secondary factors were: “whether the services rendered required special skills and whether they are an integral part of the putative employer’s business.” Both factors, the comment explained, often weighed heavily in favor of employee status for farmworkers. De-emphasizing them in favor of the “core factors,” the comment warned, would make it more difficult to determine the status of farmworkers and incentivize farm operators to adopt more “[e]xploitative” working arrangements like sharecropping or share-farming.<sup>22</sup>

This type of misclassification, enabled by a test focus on only two “core factors,” would frustrate the purpose of the FLSA by enabling working arrangements that result in “low wages and long hours.”<sup>23</sup>

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<sup>18</sup> Bureau of Labor Statistics (BLS). 2018. *Contingent and Alternative Employment Arrangements - May 2017*. (News Release) June 7, 2018. Available at: CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS-MAY 2017 (bls.gov)

<sup>19</sup> There is, of course, ongoing litigation and disagreement about whether workers in this arrangement should be classified as independent contractors or employees under state and federal employment law.

<sup>20</sup> As courts have explained, a company’s labeling of workers as “independent contractors” “does not conclusively make them so.” *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981 (9th Cir. 2014).

<sup>21</sup> Comment by Texas Rio Grande Legal Aid on DOL’s Proposed Rule, Independent Contractor Status Under the Fair Labor Standards Act 2, 85 Fed. Reg. 60600, (Sept. 25, 2020), <https://www.regulations.gov/comment/WHd-2020-0007-1720>.

<sup>22</sup> As another example, the Seventh Circuit carefully applied the multi-factor test to determine that migrant farmworkers harvesting pickles were employees under FLSA. *See generally Sec’y. of Labor, U.S. Dept. v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987).

<sup>23</sup> *Usery v. Pilgrim Equip. Co.*, 527 F.2d at 1311.

## 2. The Proposed Rule correctly considers worker surveillance in its discussion of control reserved or exerted through supervision.

More and more companies are implementing new surveillance practices, often enabled by technology, and using them to monitor, control, and integrate the work of independent contractors while disclaiming employment relationships. It is crucial that WHD enforces the FLSA evenly and fairly, and that the determination of independent contractor versus employee status is made based on the “economic realities” of the working arrangement. One of the six factors that contributes to this analysis is a consideration of the level and nature of control that the employer has over the worker. That control can exist in many forms, but the Proposed Rule correctly makes it clear that the fact that control is enabled through technology rather than in-person supervision does not necessarily weigh in favor of independent contractor status. Indeed, control reserved or exerted in this way can be just as indicative of employee status as when control stems from more traditional forms of supervision.<sup>24</sup>

### a. Companies use a variety of technologies to surveil workers.

Worker surveillance is a term with wide and varied definitions. One definition that appears in various forms in the literature is: “the monitoring of employees and collection of employee data, identifiable or not, for the purpose of influencing and managing the behavior of those being monitored.”<sup>25</sup> The types of technologies that enable this surveillance include: handheld devices, point-of-sale systems, mobile phones, fingerprint scanners, fitness and wellness apps, cameras, microphones, body sensors, keycards, electronic communication monitoring, geolocation tracking, collaboration tools, and customer review solicitation.<sup>26</sup> While intrusive surveillance of worker activity has a long history in the United States, the advent of new technologies makes it easier for employers to keep close tabs on workers and simultaneously disengage from modes of management that, in a pre-digital world, would likely have been indicators of an employment relationship.<sup>27</sup>

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<sup>24</sup> See, e.g., Proposed Rule at n. 401 quoting *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1101-02 (9th Cir. 2014) (finding in a state wage-and-hour case that direct monitoring techniques used by an employer to monitor its furniture delivery drivers were a form of supervision that made it more likely that the worker was an employee; as the court noted, the employer supervised the drivers by “conducting ‘follow-alongs;’ requiring that drivers call their . . . supervisor after every two or three stops; monitoring the progress of each driver on the ‘route monitoring screen;’ and contacting drivers if . . . [they] were running late or off course”—all of which supported the conclusion that the workers were employees under state law).

<sup>25</sup> United Tech and Allied Workers, Webpage: Employee Surveillance, (Accessed: Sept. 23, 2022), <https://utaw.tech/surveillance/what-is-employee-surveillance>. This definition is a variation on a definition of “surveillance” which has permeated the literature. See, e.g., Kirstie Ball, European Commission, *Electronic Monitoring and Surveillance in the Workplace* 10, (2021), <https://publications.jrc.ec.europa.eu/repository/handle/JRC125716> quoting David Lyon, *Surveillance Society: Monitoring Everyday Life* (2001).

<sup>26</sup> Aiha Nguyen, Data & Society, *The Constant Boss: Work Under Digital Surveillance* 3 (May 2021), [https://datasociety.net/wp-content/uploads/2021/05/The\\_Constant\\_Boss.pdf](https://datasociety.net/wp-content/uploads/2021/05/The_Constant_Boss.pdf); Kathryn Zickuhr, Washington Center for Equitable Growth 4 (Aug. 2021), <https://equitablegrowth.org/wp-content/uploads/2021/08/081821-worker-surv-report.pdf>.

<sup>27</sup> For example, Amazon’s tight monitoring and discipline of non-employee delivery drivers through technology instead of on-site supervisors. See Spencer Soper, *Fired by Bot at Amazon: It’s You Against the Machine*, Bloomberg (Jun. 28, 2021), <https://www.bloomberg.com/news/features/2021-06-28/fired-by-bot-amazon-turns-to-machine-managers-and-workers-are-losing-out>.

While surveillance is increasingly prevalent in high-wage “knowledge” work<sup>28</sup>, this comment primarily discusses worker surveillance in the low-wage context because, as a recent Data & Society report explained:

[L]ow-wage and hourly work—including in restaurant, retail, logistics, warehousing, agriculture, hospitality, domestic work, and healthcare—is more susceptible to datafication because these jobs’ tasks are easily measured. These workers are also often immigrants, women, and people of color, populations historically facing higher scrutiny and levels of surveillance and monitoring.<sup>29</sup>

Worker surveillance in the low-wage context has a variety of negative impacts on workers, including: physical injuries as a result of increased pace of work; mental health effects from job strain; and decreased worker power through disrupted organizing networks and “fissured” employment.

b. Worker surveillance is common throughout the economy.

Large companies frequently use worker surveillance technology to control their workers and the practice is increasing throughout the economy.

Amazon, the second largest private employer in the United States, has been at the forefront of using surveillance to control their workers and ensure they meet demanding production quotas. In the company’s warehouses, for example, workers are monitored by artificial intelligence-enabled surveillance cameras, which track their movements, and by item scanners, which measure the amount of time that passes between scans and discipline workers for time off task. Outside of the warehouse, the company contracts out most of its delivery business to third-parties in order to avoid the costs and liabilities associated with employment relationships. While delivery drivers are either considered independent contractors<sup>30</sup> or are employed by small, nameless contractors, Amazon has accelerated efforts to surveil drivers in order to maintain uniform operations.<sup>31</sup> Amazon maintains a variety of requirements<sup>32</sup> for non-employee drivers, and enforces its dictates through handheld devices that track package drop offs and determine routes, as well as through artificial intelligence-enabled camera systems that monitor driving behavior.<sup>33</sup> Contract drivers even report being fired via system-generated email.<sup>34</sup>

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<sup>28</sup> See Jodi Kantor and Arya Sundaram, *The Rise of the Worker Productivity Score*, NY Times, (Aug. 14, 2022), <https://www.nytimes.com/interactive/2022/08/14/business/worker-productivity-tracking.html>.

<sup>29</sup> Nguyen at 4.

<sup>30</sup> Amazon Flex, (Accessed: Nov. 28, 2022), <https://hiring.amazon.com/job-opportunities/flex-driver-jobs#/>.

<sup>31</sup> Josh Eidelson and Matt Day, *Drivers don't work for Amazon but company has lots of rules for them*, (May 5, 2021), <https://www.detroitnews.com/story/business/2021/05/05/drivers-dont-work-amazon-but-company-has-lots-rules-them/4955413001/>.

<sup>32</sup> Including minutiae like dress codes, hair styles, and deodorant usage. *Id.*

<sup>33</sup> Caroline O’Donovan & Ken Bensinger, *Amazon’s Next-Day Delivery Has Brought Chaos And Carnage To America’s Streets — But The World’s Biggest Retailer Has A System To Escape The Blame*, BuzzFeed News (Sept. 6, 2019), <https://www.buzzfeednews.com/article/carolineodonovan/amazon-next-day-delivery-deaths>; Tyler Sonnemaker, *Amazon is deploying AI cameras to surveil delivery drivers ‘100% of the time’*, (Feb 3, 2021), <https://www.businessinsider.com/amazon-plans-ai-cameras-surveil-delivery-drivers-netradyne-2021-2>.

<sup>34</sup> Spencer Soper, *Fired by Bot at Amazon: ‘It’s You Against the Machine’*, Bloomberg (Jun. 28, 2021), <https://www.bloomberg.com/news/features/2021-06-28/fired-by-bot-amazon-turns-to-machine-managers-and-workers-are-losing-out>.

Of course, Amazon is not the only firm to engage in this kind of surveillance and automated management of workers who are supposedly independent contractors. Walmart’s Spark Driver program directs and monitors “independent contractors” through its mobile phone app, which plans a driver’s driving routes, the order in which they traverse a stores’ aisles, and even which parking spot a driver should take.<sup>35</sup> FedEx uses in-truck cameras to surveil its non-employee drivers as well.<sup>36</sup>

Rideshare companies like Via and Uber tightly control their non-employee workers through ride and job assignment and speed-monitoring apps, customer reviews, and cameras.<sup>37</sup> A recent Data & Society report detailed how delivery companies, in addition to dictating routes and shifts through their driver phone applications, use the growing network of digital doorbell cameras to enlist consumers in the surveillance of the independent contractors who complete deliveries.<sup>38</sup> Delivery workers explained how the feeling of being watched changed their behavior.<sup>39</sup>

Outside of the independent contractor context, as early as the 1990s, franchisors like 7-Eleven were using point-of-sale (POS) software to maintain tight control over the employees of their franchisees, with whom 7-Eleven disclaims an employment relationship, by monitoring the amount of time spent at the cash register and the speed of the ordering process in order to discipline franchisees’ workers.<sup>40</sup> By the 2010s, surveillance technology enabled Domino’s and McDonald’s to control their workforce in similar, but more sophisticated, ways.<sup>41</sup> In addition to disciplining workers for slow order processing, the mandatory software allowed the companies to dictate worker schedules and screen applicants from headquarters.<sup>42</sup> In a lawsuit against McDonald’s, the NLRB’s General Counsel detailed the company’s use of technology to compare franchisees’ labor costs to their sales.<sup>43</sup>

c. The Proposed Rule appropriately includes surveillance in its discussion of control through supervision.

One of the six factors that the Proposed Rule considers in the “economic realities” test is the “[n]ature and degree of control” that the employer reserves or exerts “over the performance of the

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<sup>35</sup> Video, drive4spark.com, (Accessed Nov. 21, 2022), <https://drive4spark.walmart.com/>. In some markets, Walmart partners with other companies like DoorDash to source independent contractor drivers. Those drivers routinely earn below Walmart’s minimum wage for its own employees. Nandita Bose, *Why Walmart farms out same-day grocery deliveries to low-cost freelance drivers*, Reuters, (Feb. 14, 2019), <https://www.reuters.com/article/us-walmart-labor-outsource-focus/why-walmart-farms-out-same-day-grocery-deliveries-to-low-cost-freelance-drivers-idUSKCN1Q30JS>.

<sup>36</sup> Max Garland, *FedEx Ground requires video recorders in delivery vehicles. Is driver privacy a concern?*, USA Today (Apr. 30, 2021), <https://www.usatoday.com/story/money/2021/04/30/fedex-ground-ups-amazon-vehicle-recording-systems/7400325002/?gnt-cfr=1>.

<sup>37</sup> Mary Wisniewski, *Uber says monitoring drivers improves safety, but drivers have mixed views*, (Dec. 19, 2016), <https://www.chicagotribune.com/news/breaking/ct-uber-telematics-getting-around-20161218-column.html>.

<sup>38</sup> See generally Ahia Nguyen & Eve Zelikson, *At the Digital Doorstep: How Customers Use Doorbell Cameras to Manage Delivery Workers*, (Oct. 2022), <https://datasociety.net/wp-content/uploads/2022/10/AttheDigitalDoorstepFINAL.pdf>.

<sup>39</sup> *Id.*

<sup>40</sup> Brian Callaci, Data & Society, *Puppet Entrepreneurship: Technology and Control in Franchised Industries 6-7*, 13 (Jan. 2021), <https://datasociety.net/wp-content/uploads/2021/01/DataSociety-PuppetEntrepreneurship-Final.pdf> (hereinafter “Puppet Entrepreneurship Report”)

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Jeffrey M. Hirsch, *Joint Employment in the United States*, Italian Labour Law e-Journal Vol. 13 at 57 (2020), [https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1574&context=faculty\\_publications](https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1574&context=faculty_publications).



work and the economic aspects of the working relationship.”<sup>44</sup> Included in the “facts relevant to the employer’s control over the worker,” is “whether the employer uses technological means of supervision (such as by means of a device or electronically).”<sup>45</sup>

The Proposed Rule’s inclusion of this language appropriately acknowledges the role that novel surveillance technologies can play in enabling the supervision of workers in a manner that, previously, would have required an onsite supervisor. As the Proposed Rule preamble aptly explains in its discussion of the consideration of an employer’s level of control:

supervision can also come in many different forms, which may not be immediately apparent. For example, supervision can be maintained remotely through technology instead of, or in addition to, being performed in person. For instance, employers may implement monitoring systems that can track a worker’s location and productivity, and even generate automated reminders to check in with supervisors. Additionally, an employer can remotely supervise its workforce, for instance, by using electronic systems to verify attendance, manage tasks, or assess performance.<sup>46</sup>

This consideration of surveillance practices is much needed, as evidenced by the wide variety of work arrangements present in the modern economy. As technology enables new and different methods by which employers can manage their workforces, the WHD needs to be able to respond and analyze the dynamics of control that the new technologies create. The Proposed Rule equips the WHD to do this.

d. Surveillance enables the same type of control as traditional supervision methods.

Companies use technology to create management systems. Like any other management system, these are used to establish control and ensure that workers are contributing to the objectives of the business. While direct, on-site surveillance is not required, when it *is* present, it is often key to a finding of employee status. Worker surveillance technology makes this type of supervision possible even without a supervisor physically present.

The Proposed Rule correctly notes that the absence of direct, onsite, in-person supervision is not required for a court to determine that the control factor weighs in favor of employee status.<sup>47</sup> It explains that supervision can come in many forms, including situations where a worker is free to work without such supervision, but the business or nature of the work may make direct supervision unnecessary.<sup>48</sup> The Proposed Rule cites this scenario as an example: an employer’s day-to-day supervision was unnecessary to find employee status when the employer “relied on pre-hire certification programs and installation instructions when hiring.”<sup>49</sup> As another example, the WHD found that Cascom Inc., a cable installation company working for Time Warner, misclassified its workforce as independent contractors despite the fact that there was no direct supervision of their work at consumers’ homes. The agency held that they were employees because Cascom determined which homes the installers visited, set pay for the jobs, fined them for work that Cascom judged to

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<sup>44</sup> Proposed Rule at 62275.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 62250.

<sup>47</sup> *Id.* at 62249.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 62250 citing *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 814 (6th Cir. 2015).

be substandard, precluded them from taking on additional clients on their own, and monitored their activities prior and subsequent to installation. A court upheld the WHD award of \$1.47 million and enjoined Cascom from treating its workers as independent contractors.<sup>50</sup>

An important component of this discussion is the way in which surveillance technology directly contributes to the same purposes as does in-person supervision. Worker surveillance is not simply one alternative to in-person supervision that works because of a difference in the nature of the work. Rather, surveillance has completely supplanted in-person supervision in cases where the nature of the work would otherwise require an onsite supervisor.

For example, in a 2017 case in which framing and drywall installers brought a FLSA suit against their employer, the Fourth Circuit highlighted the daily, on-site supervision of the workers as a key piece of evidence to find that they were employees.<sup>51</sup> The supervision went well beyond the “oversight necessary to ensure that a contractor’s services meet contractual standards of quality and timeliness.”<sup>52</sup> Instead, the supervisors provided frequent feedback and instruction about the pace and quality of their work. The supervisors repeatedly held meetings to direct the workers on which projects they needed to complete and the methods by which they should do so.<sup>53</sup> Now imagine that the employer had used worker surveillance technologies to accomplish these same objectives. Rather than requiring an in-person supervisor to monitor the quality and timeliness of the job, the employer could have implemented an Uber-like customer feedback system that would discipline the workers whose work was deficient.<sup>54</sup> By the same token, instead of having frequent meetings to review the projects the workers must complete, the employer could have implemented an Amazon-like handheld device and route planner, which would direct the workers to their next projects, optimize their route, and alert management to deviations.<sup>55</sup>

As another example, consider the seminal Supreme Court case that established the broad definition of employee under FLSA in the first place, *Rutherford Food Corp. v. McComb*.<sup>56</sup> Finding that the workers in a slaughterhouse were employees, the Court took note of the supervision exercised by the employer: “[i]t is undisputed that the president and manager of [the employer] goes through the boning vestibule many times a day and is after the boners frequently about their failure to cut all of the meat off the bones.”<sup>57</sup> A modern day slaughterhouse might instead require workers to use wearable devices that monitor their movements and electronic scales to ensure the highest yield possible from each butchered animal.<sup>58</sup> Both practices – in-person supervisor walk-throughs and the

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<sup>50</sup> See generally *Solis v. Cascom, Inc.*, No. 3:09-CV-257, 2013 WL 4537109, at \*4 (S.D. Ohio Aug. 27, 2013).

<sup>51</sup> *Salinas v. Com. Interiors, Inc.*, 848 F.3d 125, 150 (4th Cir. 2017).

<sup>52</sup> *Id.* at 148.

<sup>53</sup> *Id.*

<sup>54</sup> Josh Dzieza, *The rating game*, The Verge, (Oct. 28, 2015), <https://www.theverge.com/2015/10/28/9625968/rating-system-on-demand-economy-uber-olive-garden>.

<sup>55</sup> Hayley Peterson, *'Amazon has all the power': How Amazon controls legions of delivery drivers without paying their wages and benefits*, Business Insider, (Oct. 4, 2018), <https://www.businessinsider.com/amazon-controls-delivery-drivers-without-paying-wages-2018-9>.

<sup>56</sup> *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

<sup>57</sup> *Id.* at 726 (internal quotations omitted).

<sup>58</sup> Investigate Midwest, *Tyson among companies using SmartWatch app to monitor workers*, (Oct. 15, 2022), [https://www.joplinglobe.com/news/local\\_news/tyson-among-companies-using-smartwatch-app-to-monitor-workers/article\\_d3c846f2-4bea-11ed-be53-7f50aff272ee.html](https://www.joplinglobe.com/news/local_news/tyson-among-companies-using-smartwatch-app-to-monitor-workers/article_d3c846f2-4bea-11ed-be53-7f50aff272ee.html).

use of surveillance technology – accomplish the same goal of monitoring the workers so as to control the “performance of the work.”<sup>59</sup>

As the above examples illustrate, worker surveillance technology replicates the same types of control that in-person supervision does. The presence of such surveillance should weigh in favor of employee status in the same way that in-person surveillance would.

### 3. Conclusion

We commend the DOL on its solid Proposed Rule that will provide protection to a wide range of workers. Misclassification of workers as independent contractors is costly to workers, the government, and to responsible employers who correctly classify their workforce. We believe that the Proposed Rule would reaffirm the centrality of economic dependence based on multiple factors to determine employment status in a manner used by the DOL, WHD, and courts for decades. This would reduce the confusion for workers and employers arising from the 2021 rule and benefit the public as a result.

Sincerely,

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<sup>59</sup> Proposed Rule at 62250.