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Submitted via www.regulations.gov

Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Comment Regarding “Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act” Proposed Rule, Docket No. WHD-2026-0001, RIN 1235-AA46, 91 Fed. Reg. 9932 (Feb. 27, 2026)

Dear Administrator Rogers:

Governing for Impact (“GFI”) submits this comment on a proposed rule, “Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act” (“the Proposed Rule”), issued by the Wage and Hour Division (“WHD”) within the Department of Labor (“DOL”).¹ The Proposed Rule would modify DOL’s test for determining whether a worker is an employee or an independent contractor by improperly prioritizing two “core” factors, thereby putting wage, hour, and leave protections at risk for American workers. GFI is a regulatory policy organization dedicated to ensuring that the federal government operates more effectively for everyday working Americans.²

Our comment proceeds as follows. First, we explain why the Proposed Rule’s elevation of two “core” factors is incompatible with Supreme Court precedent. Second, we identify several ways in which the Proposed Rule, if finalized, would likely be arbitrary and capricious: it fails to consider how the changing economy requires a multifactor test, it omits discussion of demographic impacts, and it fails to satisfy the Supreme Court’s change-in-position doctrine. Third, we describe how the Proposed Rule distorts the “control” factor in particular, including by imposing a categorical preference for considering actual (rather than reserved) control and omitting any discussion about technology-enabled control. Fourth, we remind DOL of its obligation to disclose any use of artificial intelligence in its rulemaking process.

We therefore respectfully request that the agency withdraw the Proposed Rule.

¹ U.S. Dep’t of Labor, Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, 91 Fed. Reg. 9932 (Feb. 27, 2026) (hereinafter “Proposed Rule”).

² Governing for Impact, <https://governingforimpact.org/>.

I. The Proposed Rule’s elevation of two “core” factors is incompatible with DOL’s prior practice and Supreme Court precedent.

The Fair Labor Standards Act (“FLSA”) mandates minimum wage and overtime protections for workers deemed to be employees.³ The FLSA defines an “employee” as anyone who is “suffer[ed] or permit[ted] to work” by an employer.⁴ An “employer,” in turn, is defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”⁵ Although the statute itself does not define or refer to independent contractors, judicial precedent has confirmed that such workers are not covered by the FLSA.⁶

The Supreme Court has repeatedly affirmed that the FLSA’s definition of “employee” is broad. 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.”⁷ To ensure that the maximum number of bona fide employees would enjoy FLSA protections, Congress gave the term “employee...the broadest definition that has ever been included in any one act.”⁸

To that end, the Supreme Court has long applied a multifactor totality-of-the-circumstances test to classify workers as employees or independent contractors—one focused on the economic realities of the relationship between the employer and the worker. Nine years after the enactment of the FLSA, in *Rutherford Food Corp. v. McComb* the Court emphasized the need to consider “the circumstances of the whole activity” rather than “isolated factors.”⁹ The same day, the Court decided *United States v. Silke*, which identified five important factors and noted that “[n]o one [factor] is controlling nor is the list complete.”¹⁰ Circuit courts have since repeatedly affirmed a multifactor approach to the determination.¹¹ These 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.¹²

Since the Supreme Court’s decision in *Rutherford*, DOL has also consistently applied a multifactor economic realities test. In 1949, DOL issued an opinion letter that laid out a six-factor test for determining whether a worker is an employee or an independent contractor.¹³ It emphasized that no single factor is controlling and that the test focuses on evidence of the day-to-day relationship

³ 29 U.S.C. §§ 206, 207.

⁴ 29 U.S.C. § 203(e)(1), (g).

⁵ 29 U.S.C. § 203(d).

⁶ *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

⁷ *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (quotations omitted) (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947)).

⁸ *United States v. Rosenmasser*, 323 U.S. 360, 362, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (statement of Senator Hugo Black)).

⁹ 331 U.S. 722, 730 (1947).

¹⁰ 331 U.S. 704, 716 (1947).

¹¹ See, e.g., *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976).

¹² See, e.g., *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311-13 (11th Cir. 2013); *Baker v. Flint Eng’g & Const. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998).

¹³ Proposed Rule at 9934.

between the worker and the principal.¹⁴ Subsequent DOL discussions of the test in regulations and subregulatory guidance have similarly emphasized that no one factor is more important than the others.¹⁵ The lone exception to date is the agency’s 2021 Rule, but that rule was subsequently withdrawn and replaced with the 2024 Rule.¹⁶

The Proposed Rule would rescind the current multifactor regulations (set forth by the 2024 Rule) and attempt a rerun of the agency’s 2021 Rule. However, the Proposed Rule’s attempt to rewrite the multifactor test into one that prioritizes two so-called “core factors”—the nature and degree of control over the work and the individual’s opportunity for profit or loss—is inconsistent with longstanding judicial precedent.¹⁷ As one district court judge recently explained, “it is not clear that the FLSA even permits a test that emphasizes two factors.”¹⁸ The Proposed Rule improperly narrows the economic reality test by limiting the facts that may be given greater weight as part of the test—an outcome that the Supreme Court and other judicial precedents discussed above do not permit.

The Proposed Rule also fails to give appropriate weight to DOL’s own consistent and longstanding interpretation of the classification inquiry as a multifactor test. “[A]s a general matter, a long-standing, contemporaneous construction of a statute by the administering agencies,” as is available in the earliest DOL FLSA interpretations, “is entitled to great weight” and “deference” in determining the true meaning of a statute.¹⁹ Notably, Congress has amended FLSA more than twenty times since its enactment,²⁰ and has not once sought to redefine “employee” to respond to the courts’ and DOL’s implementation of a multifactor test, even while it did narrow other statutes’ “employee” definitions.²¹ “It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.”²²

The Proposed Rule claims that its favored test remains multifactor and totality-based, and is intended merely to streamline the inquiry.²³ Under DOL’s new view, emphasizing two “core factors” does not give those factors “invariable weight,” but only signals that they “are typically more probative than others.”²⁴ But that downplays the Proposed Rule’s potential effect, which would be to effectively demote several important factors by priming anyone applying the test to discount their

¹⁴ *Id.*

¹⁵ 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).

¹⁶ U.S. Dep’t of Labor, Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 Fed. Reg. 24303 (May 6, 2021).

¹⁷ Proposed Rule at 9947.

¹⁸ *Colt & Joe Trucking, LLC v. U.S. Dep’t of Lab.*, 2025 WL 56658, at *9 (D.N.M. Jan. 9, 2025).

¹⁹ *Leary v. United States*, 395 U.S. 6, 25 (1969) (quotations omitted).

²⁰ Congressional Research Service, The Fair Labor Standards Act (FLSA): An Overview Table A-1 (Mar. 8, 2023), <https://www.congress.gov/crs-product/R42713>.

²¹ 2024 Rule at 1641-42.

²² *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 846 (1986) (quotation omitted).

²³ Proposed Rule at 9948-49.

²⁴ *Id.*

importance. The proposed regulatory text explains that non-core factors “are less probative” and “are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors.”²⁵ This finger on the scale against the non-core factors does not reflect the totality-of-the-circumstances approach required under the FLSA. The longstanding multifactor test *does* permit weighing some factors more heavily than others, but only where warranted based on the specific circumstances of a given worker.²⁶ The Proposed Rule, in contrast, *pre*-weights the factors and gives primacy to its chosen two without regard to the specific circumstances of a worker. This pre-weighting conflicts with decades of judicial precedent and Congressional ratification of DOL’s prior, longstanding approach.

II. The Proposed Rule is arbitrary and capricious.

The Proposed Rule, if finalized, would also violate the Administrative Procedure Act’s prohibition on arbitrary and capricious action.²⁷

A. The Proposed Rule fails to consider how the changing economy requires a flexible, multifactor test.

The Proposed Rule ignores “an important aspect of the problem”²⁸ because it fails to reckon with how its changed test interacts with changes in the economy. Employers are increasingly designating their workers as independent contractors to avoid the responsibilities and costs associated with formal employment. The Proposed Rule would frustrate Congress’s objective of widespread FLSA coverage, which is better supported by a multifactor test.

When companies attempt to misclassify their workers as independent contractors to avoid FLSA coverage, which is occurring with increased frequency as workplaces “fissure,”²⁹ they subvert the objectives of the law. Due in part to the rise of the internet and app-based platforms, firms across the American economy have developed novel organizational models that rely on less traditional notions of what constitutes a workplace. Before the 1980s, the economy was characterized by firms that, for the most part, directly employed the workers who completed all tasks associated with the business.³⁰ A hotelier, for example, would employ everyone from the front desk staff to the housekeepers, from the entertainers to the room service workers.

²⁵ Proposed 29 C.F.R. § 795.105(c).

²⁶ *See, e.g., Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1384 (3d Cir. 1985) (warning that the “control” factor should not be “overemphasized” in determining the status of homeworkers because “[t]hat the home researchers could generally choose the times during which they would work and were subject to little direct supervision inheres in the very nature of home work”).

²⁷ 5 U.S.C. § 706(2)(A); *Motor Vehicle Manufacturers’ Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

²⁸ *Id.*

²⁹ A fissured workplace refers to a business model where lead companies outsource core functions to smaller subcontractors and independent contractors rather than hiring employees directly. *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.

³⁰ *See generally id.*

In response to investor pressure, firms in the 1980s increasingly sought to outsource components of their work to other entities and to individual workers themselves.³¹ Doing so 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 individual 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.”³² 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 often maintain significant control and de facto integration with the business(es) that produce goods or provide services.

Firms across the economy have continued to rely upon workers treated as independent contractors, and the share of American workers with independent contractor income has increased 22 percent since 2001.³³ The Census Bureau estimated in 2017 that at least 10.6 million workers, or 6.9 percent, are independent contractors.³⁴ For a variety of reasons, including because it represents only the number of workers who worked as independent contractors on their primary job during the survey reference week, this is widely considered to be an underestimation.³⁵ For example, one study using tax data estimated that close to 12 percent of workers are classified as independent contractors.³⁶

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. A 2020 survey 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.³⁷ As a result, gig workers face economic insecurity and rely heavily on public benefits. In the same survey, 30 percent of gig workers reported using SNAP within a month of the survey, which is twice the rate of employee-designated service sector workers.³⁸ Accordingly, one in five gig workers could not afford

³¹ *Id.*

³² *Id.*

³³ Katherine Li, 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>.

³⁴ U.S. Dep’t of Labor, *Employee or Independent Contractor Classification Under the Fair Labor Standards Act*, 89 Fed. Reg. 1638, 1728 (Jan. 10, 2024) (hereinafter “2024 Rule”).

³⁵ *Id.* at 1729.

³⁶ Annette Bernhardt et al., *Independent Contracting, Self-Employment, and Gig Work: Evidence from CA Tax Data*, California Policy Lab Working Paper No. 2021-6 14 (2021), available at <https://www.capolicylab.org/wp-content/uploads/2022/07/Independent-Contracting-Self-Employment-and-Gig-Work-Evidence-from-CA-Tax-Data.pdf>.

³⁷ Ben Zipperer et al., *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay*, Economic Policy Institute (Jun. 1, 2022), <https://www.epi.org/publication/gig-worker-survey/>.

³⁸ *Id.*

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.³⁹

However, 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 carpenter who hangs a shingle and operates a practice on their own.⁴⁰ 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.⁴¹ Others work in the gig economy and accept tasks from individual customers or from companies in search of a good or service via platforms. 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.⁴² This underlies why the DOL and courts have, for decades, applied a multifactor test in assessing whether or not an employment relationship exists under the FLSA, rather than focusing on core factors that may not capture all relevant features of the relationship.

Emphasizing two core factors makes DOL’s task of navigating varied work arrangements more difficult, not less, as some of the factors that tend to weigh in favor of employee status in certain work situations could be relegated to second-class status.⁴³ The resulting misclassification would frustrate the purpose of the FLSA by enabling working arrangements that result in “low wages and long hours.”⁴⁴ By not explicitly grappling with these dynamics, the Proposed Rule fails to consider “an important aspect of the problem.”⁴⁵

B. The Proposed Rule does not consider the inequitable effects of misclassification.

The Proposed Rule also fails to recognize “an important aspect of the problem”⁴⁶ by omitting any discussion of the demographics of the workers it would affect. The 2024 Rule contained an

³⁹ *Id.*

⁴⁰ NCCI, Nontraditional Work Arrangements and the Gig Economy (2019), https://www.ncci.com/SecureDocuments/QEB/II_Insights_QEB_2019_Q2_Drilling_Down.html.

⁴¹ *See, e.g.*, Economic Policy Institute, (In)dependent Contractor Misclassification (Jun. 8, 2015), <https://www.epi.org/publication/independent-contractor-misclassification/> (describing misclassification of concert stagehands by “a staffing provider”).

⁴² 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, 998 (9th Cir. 2014).

⁴³ *See, e.g.*, 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>.

⁴⁴ *Usery v. Pilgrim Equip. Co.*, 527 F.2d at 1311.

⁴⁵ *State Farm*, 463 U.S. at 43.

⁴⁶ *Id.*

extensive discussion of the disproportionate effect that misclassification has on women and people of color, due in part to their concentration in industries where misclassification is most likely.⁴⁷ The 2024 Rule further explained that “women and people of color experience multiple types of economic inequities in the labor force, including gender and racial wage gaps and occupational segregation” and “the misclassification of these workers as independent contractors deprives them of wage and hour protections that could help alleviate some of this inequality.”⁴⁸ The Proposed Rule includes no mention of the potential demographic effects of its proposal, nor does it explain why it chose to ignore a factor that the Department previously thought important to include.

C. The Proposed Rule, if finalized, would likely violate the change-in-position doctrine.

The Proposed Rule also fails to provide an adequate explanation for deviating from how DOL has historically analyzed classification under the FLSA. Under the “change-in-position” doctrine, “agencies are free to change their existing policies as long as they provide a reasoned explanation for the change, display awareness that they are changing position, and consider serious reliance interests.”⁴⁹ And while an agency generally need not “provide a more detailed justification than what would suffice for a new policy created on a blank slate,” it nonetheless “must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.”⁵⁰ A more detailed justification is also required when an agency’s “new policy rests upon factual findings that contradict those which underlay its prior policy.”⁵¹

The Proposed Rule, if finalized, would violate these requirements in at least two ways.

1. The Proposed Rule does not adequately justify its changed factual findings.

Throughout the Proposed Rule, DOL fails to adequately reckon with its changed views of relevant facts. This subsection identifies just a few examples.

The 2024 Rule’s primary rationale was set forth in an extensive discussion of the risk to workers posed by the 2021 Rule, concluding that the 2021 Rule “increased the risk of worker misclassification” by “improperly narrow[ing] the focus of the inquiry” and that “confusion and misapplication of [the 2021 Rule] could deprive many workers of protections they are entitled to under the FLSA.”⁵² In contrast, the Proposed Rule asserts that its proposed framework—which is nearly identical to the 2021 Rule’s— “is neither more nor less permissive of independent contractor relationships” than the 2024 Rule.⁵³ That assertion directly contradicts the 2024 Rule’s prior finding on essentially an “identical factual record” without any adequate explanation of why the prior risk assessment was wrong or what circumstances have changed to make that risk no longer operative.⁵⁴

⁴⁷ 2024 Rule at 1735.

⁴⁸ *Id.* at 1656.

⁴⁹ *Food and Drug Administration v. Wages & White Lion Investments*, 604 U.S. 542, 568 (2025) (quotations omitted).

⁵⁰ *Id.* at 570 (quotations omitted).

⁵¹ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁵² 2024 Rule at 1658.

⁵³ Proposed Rule at 9961.

⁵⁴ *Organized Village of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 959 (9th Cir. 2015).

The Proposed Rule’s primary substantive response to the 2024 Rule’s misclassification concern does nothing to cure this deficiency. The Proposed Rule points to “numerous press releases contemporaneous to the 2022-2024 rulemaking announcing successful enforcement action where DOL applied the 2021 Rule’s analysis,” suggesting that the 2021 Rule “was no impediment to the Department to appropriately identify, pursue, and remedy” misclassification.⁵⁵ But the 2024 Rule itself expressly disclaimed reliance on any such premise: “the Department’s ability to pursue some enforcement actions involving misclassification while applying the 2021 IC Rule’s guidance is not a persuasive reason to retain the 2021 IC Rule.”⁵⁶ The Proposed Rule thus offers, as its answer to the 2024 Rule’s misclassification finding, an argument the 2024 Rule anticipated and rejected. More fundamentally, citing enforcement actions cannot answer the 2024 Rule’s actual concern: DOL may still be able to bring cases vigorously under a legally flawed standard, and yet that standard may still produce pervasive misclassification among the far larger universe of workers whose situations are never litigated or reviewed.

2. The Proposed Rule fails to adequately consider reliance interests.

The Proposed Rule fails to adequately consider the serious reliance interests of workers who have depended on the current regulations for legal certainty. The 2024 Rule has been operative since March 2024—over two years—and the 2024 Rule reflected a status quo in the case law and DOL’s general approach that stretched back decades. During that period, workers classified as employees have counted on that classification as the basis for their entitlement to minimum wage, overtime, and anti-retaliation protections under the FLSA. Workers in industries with high misclassification rates (including home care, gig work, transportation, and agriculture) may have accepted or continued employment arrangements, declined independent contractor offers, or otherwise structured their working lives around their employment status. Some may have taken on financial obligations, family commitments, or ongoing work arrangements premised on the wages and protections that employee classification provides.

In changing a position upon which parties may have relied, the Supreme Court in *Department of Homeland Security v. Regents of the University of California* explained that an agency must “assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.”⁵⁷ Instead, the Proposed Rule simply dismisses any consequences for workers’ reliance interests on the ground that the Proposed Rule “is neither more nor less permissive of independent contractor relationships” than the current regulations and any reclassification effects would be “minimal.”⁵⁸ But that assertion directly contradicts one of the Department’s primary justifications for this rulemaking: that the current regulations impose a widespread “chilling effect on independent contractor arrangements.”⁵⁹ At the very least, the Proposed Rule seems to admit that there will be at least *some* workers who will lose what the

⁵⁵ Proposed Rule at 9943.

⁵⁶ 2024 Rule at 1657.

⁵⁷ 591 U.S. 1, 33 (2020).

⁵⁸ Proposed Rule at 9961.

⁵⁹ *Id.* at 9941.

Department calls “voluntary” employment classification,” and so it must consider whether and how *those* workers relied on their employee classification.⁶⁰

The Proposed Rule utterly fails to assess these interests. It never even addresses them, let alone attempts to identify workers most likely to be reclassified or what protections they could lose as a result. Nor does the agency examine, as it must under *Regents*, how the effects of the agency’s change “would radiate outward” to affected workers, their families, their communities and states, their ongoing personal and professional commitments, and their financial circumstances.⁶¹ And the reliance interests of workers who will lose employee classification status are serious by any relevant measure. The rights at issue (minimum wage, overtime, anti-retaliation protections) are created by statute, which courts have recognized as weighing in favor of seriousness.⁶² Likewise, the loss of such protections is substantial for an individual worker reclassified from employee to independent contractor; for low-wage workers, these are not marginal entitlements but the basis for economic security.⁶³ By one estimate, a construction worker misclassified as an independent contractor could lose as much as \$20,399 in annual income and benefits compared to what they would have earned as an employee.⁶⁴ And a truck driver could lose up to \$23,266.⁶⁵ Relatedly, state and local social insurance systems can lose up to 30% of per-worker revenue as a result of misclassification.⁶⁶ And as noted above, while the 2024 Rule has been in effect only since March 2024, the broader legal status quo it codified reflects decades of settled law that workers, their employers, and state and local governments have long relied upon.⁶⁷

Having failed to identify the reliance interests at stake, the Proposed Rule likewise fails to weigh them against its purported benefits. The Proposed Rule does acknowledge that some workers might face reclassification, with “ambiguous” effects, and notes that “workers would have a choice of whether to agree to the new independent contractor arrangement.”⁶⁸ But this does not satisfy the change-in-position doctrine, which requires agencies to explain why they think a new policy is worth the disruption to serious reliance interests.⁶⁹ The agency has failed to do so.

⁶⁰ *Id.* at 9961.

⁶¹ *Regents*, 591 U.S. at 31 (quotation omitted).

⁶² *Immigrant Defs. L. Ctr. v. Noem*, 145 F.4th 972, 992 (9th Cir. 2025); *Int’l Org. of Masters, Mates & Pilots, ILA, AFL-CIO v. Nat’l Lab. Rels. Bd.*, 61 F.4th 169, 179 (D.C. Cir. 2023) (noting that employees could lose coverage under labor laws as a result of the change in position).

⁶³ See *Am. Hosp. Ass’n v. Kennedy*, No. 25-2236, 2026 WL 49499, at *33 (1st Cir. Jan. 7, 2026) (size of impact on individual reliant party weighs in favor of seriousness).

⁶⁴ Ismael Cid-Martinez, et al., *Misclassifying workers as independent contractors is costly for workers and social insurance systems*, Economic Policy Institute (Apr. 15, 2026),

<https://www.epi.org/publication/misclassifying-workers-as-independent-contractors-is-costly-for-workers-and-social-insurance-systems/>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Wages & White Lion*, 604 U.S. at 585 (interests that have “built up” over time warrant serious treatment).

⁶⁸ Proposed Rule at 9961.

⁶⁹ *Am. Fuel & Petrochemical Manufacturers v. Env’t Prot. Agency*, 937 F.3d 559, 578 (D.C. Cir. 2019) (noting that the agency explicitly determined that the “marginal benefit” of the prior policy to parties relying on it was “outweighed” by its costs).

III. The Proposed Rule’s consideration of the control factor is particularly flawed.

The Proposed Rule’s categorical discounting of the role of reserved, rather than actual, control conflicts with judicial precedent, and eliminating the current regulations’ discussion of technological supervision as an indicum of control would be arbitrary and capricious.

A. *The Proposed Rule’s decision to discount reserved control conflicts with the “economic realities” test.*

For the “[n]ature and degree of control” factor, the current regulations enacted by the 2024 Rule “consider[] the potential employer’s control, *including reserved control*, over the performance of the work and the economic aspects of the working relationship.”⁷⁰ DOL included reserved control as a consideration to reflect the fact that potential employers’ holding of contractual or implied rights to control can change worker behavior, so “the absence of...more apparent forms of control does not invariably lead to the conclusion that the control factor weighs in favor of independent contractor status.”⁷¹

The Proposed Rule removes the “reserved control” language and instead focuses only on whether a potential employer “*exercises substantial control over key aspects of the performance of the work.*”⁷² Although the Proposed Rule concedes that “reserved contractual rights and authorities” may be relevant,⁷³ it nonetheless creates a categorical preference for considering “the actual practice of the parties involved” over determining “what may be contractually or theoretically possible.”⁷⁴ However, as a district court explained in upholding the 2024 Rule, “precedent does not support the adoption of a generally applicable rule that in all circumstances reserved or unexercised rights, such as the right to control, are in every instance less indicative of the economic reality than the actual practices of the parties.”⁷⁵ Examples abound of workers changing their behavior due to a perception that they *could* be subject to an employer’s discipline, even if that discipline does not come.⁷⁶

Several circuit courts considering whether workers were employees or independent contractors under the FLSA have also rejected the generally applicable rule that the Proposed Rule would establish. For example, in *Brock v. Superior Care, Inc.*, the Second Circuit determined that a group of nurses were employees because, although management only actually visited job sites once or twice a month, the management company “unequivocally expressed the right to supervise the nurses’ work, and the nurses were well aware that they were subject to such checks as well as to regular review of their nursing notes.”⁷⁷ As the court explained, “[a]n employer does not need to look over his

⁷⁰ 29 C.F.R. § 795.110(b)(4) (emphasis added).

⁷¹ 2024 Rule at 1693.

⁷² Proposed Rule at 9973 (emphasis added).

⁷³ *Id.* at 9958.

⁷⁴ *Id.* at 9974.

⁷⁵ *Colt & Joe Trucking, LLC*, 2025 WL 56658, at *13.

⁷⁶ *See, e.g.*, Alex Rosenblat & Luke Stark, Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers, 10 Int'l J. Communication 3758, 3772 (2016) (“To achieve good ratings, drivers must modify their behavior to produce a homogenous Uber experience for riders. Instead of imposing disciplinary measures on drivers, Uber controls how drivers behave through weekly performance metrics delivered after the fact of their work.”) (internal citation omitted).

⁷⁷ 840 F.2d 1054, 1060 (2d Cir. 1988).

workers’ shoulders every day in order to exercise control.”⁷⁸ And, in some cases, the nature of a particular industry makes a mechanical emphasis on actual control inappropriate. The Third Circuit in *Donovan v. DialAmerica Mktg., Inc.*, explained that, for home-based researchers, the control factor did not weigh in favor of independent contractor status simply because the workers did their work at home and were therefore less subject to actual control on a day-to-day basis.⁷⁹ The Proposed Rule fails to address these on-point precedents or the broader importance of reserved control.

B. The Proposed Rule’s decision to eliminate technological supervision in the control factor is arbitrary and capricious.

Another aspect of the Proposed Rule’s treatment of control raises legal issues. Companies are increasingly 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. The Proposed Rule would eliminate the current regulations’ mention of technological supervision as an important aspect of control, but does so with an insufficient and incoherent explanation.

1. Worker surveillance technology is common throughout the economy.

A 2024 survey found that workplace surveillance technology affects more than two-thirds of American workers, a number that has grown over decades.⁸⁰ This has encouraged some employers to exert employer-like control over workers while avoiding the responsibilities and costs inherent to an employment relationship.

As early as the 1990s, franchisors like 7-Eleven were using point-of-sale 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.⁸¹ By the 2010s, surveillance technology enabled Domino’s and McDonald’s to control their workforce in similar, but more sophisticated, ways.⁸² In addition to disciplining workers for slow order processing, the mandatory software allowed the companies to dictate worker schedules and screen applicants from headquarters.⁸³ 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.⁸⁴

⁷⁸ *Id.*

⁷⁹ 757 F.2d 1376, 1386 (3d Cir. 1985).

⁸⁰ Alexander Hertel-Fernandez, Estimating the prevalence of automated management and surveillance technologies at work and their impact on workers’ well-being, *Equitable Growth* (Oct. 1, 2024), <https://equitablegrowth.org/research-paper/estimating-the-prevalence-of-automated-management-and-surveillance-technologies-at-work-and-their-impact-on-workers-well-being/>.

⁸¹ 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>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Jeffrey M. Hirsch, *Joint Employment in the United States*, 13 *Italian Labour L. e-J.* 57 (2020), https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1574&context=faculty_publications.

Amazon, the second largest private employer in the United States, has been at the forefront of using surveillance to control its 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.⁸⁵ 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.⁸⁶ While delivery drivers are often classified by Amazon as independent contractors⁸⁷ or are employed by small, nameless contracting companies, Amazon has nonetheless accelerated efforts to surveil drivers in order to maintain uniform operations.⁸⁸ Amazon maintains a variety of requirements⁸⁹ 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.⁹⁰ Contract drivers even report being fired via system-generated email.⁹¹

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.⁹² FedEx uses in-truck cameras to surveil its non-employee drivers.⁹³ Rideshare companies like Uber tightly control their purportedly non-employee workers through ride and job assignment and speed-monitoring apps, customer reviews, and cameras.⁹⁴ A Data & Society report detailed how delivery companies, in addition to dictating routes and shifts through their driver phone applications,

⁸⁵ Lauren Gurley, *Internal Documents Show Amazon's Dystopian System for Tracking Workers Every Minute of Their Shifts*, Vice (Jun. 2, 2022), <https://www.vice.com/en/article/internal-documents-show-amazons-dystopian-system-for-tracking-workers-every-minute-of-their-shifts/>.

⁸⁶ Juliana Kim, *NLRB says Amazon is a joint employer of some 3rd-party delivery drivers in California*, NPR (Aug. 24, 2024), <https://www.npr.org/2024/08/24/nx-s1-5088580/amazon-delivery-drivers-nlr-employees-teamsters>.

⁸⁷ Amazon Flex (Accessed: Apr. 5, 2025), <https://hiring.amazon.com/job-opportunities/flex-driver-jobs#/>.

⁸⁸ Josh Eidelson & 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-the-m/4955413001/>.

⁸⁹ Including minutiae like dress codes, hair styles, and deodorant usage. *Id.*

⁹⁰ 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-netradyn-2021-2>.

⁹¹ 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>.

⁹² Walmart Inc., *Spark Driver™ App*, Apple App Store, <https://apps.apple.com/us/app/spark-driver/id1483998235> (Accessed: Apr. 9, 2026) ("After you've accepted a trip, the app helps you every step of the way — from navigating to the store . . . to delivering to a customer's location.").

⁹³ 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>.

⁹⁴ 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>.

use the growing network of digital doorbell cameras to enlist consumers in the surveillance of the workers who complete deliveries.⁹⁵ Delivery workers explained how the feeling of being watched changed their behavior, underscoring the effect that technological surveillance has on the economic reality of the relationship.⁹⁶ Indeed, this is a good illustration of why reserved control, discussed above, should be considered alongside actually-exerted control.

In sum, widespread adoption of new surveillance technologies has increased the control that companies have over workers, even as those companies often disclaim an employment relationship.

2. The Proposed Rule’s explanation for ignoring worker surveillance technology is unreasonable.

In response to this reality, DOL’s current regulations explain that “[a]dditional[] facts relevant to the potential employer’s control over the worker include whether the potential employer uses technological means to supervise the performance of the work (such as by means of a device or electronically).”⁹⁷ The Proposed Rule eliminates that language, explaining only that the 2021 Rule (to which the Proposed Rule seeks to return) “purposefully articulated the control analysis in a general manner to encompass various different types of control” and “[i]t is simply not possible for the Department to describe all of the potentially-relevant considerations for the control factor.”⁹⁸

The Proposed Rule’s explanation is unreasonable. To pass muster under the APA, an agency must “articulate a rational connection between the facts found and the choices made”⁹⁹ and its “reasoning cannot be internally inconsistent.”¹⁰⁰ But the Proposed Rule provides no explanation for why the agency believes that technological supervision is irrelevant or of limited import. Instead, the agency simply claims that its regulations cannot be exhaustive, without drawing a logical connection between that premise and the removal of a specific, accurate consideration. The Proposed Rule does not explain why an inability to be exhaustive requires eliminating an important consideration already identified, rather than retaining it (perhaps alongside a reminder that the list is illustrative). Specificity about a real and increasingly common form of control does not create incompleteness; it mitigates it.

More fundamentally, the Proposed Rule’s reasoning has no limiting principle. As the Proposed Rule explains, the multifactor FLSA classification test is itself a “non-exhaustive” list of considerations that cannot anticipate every employment relationship.¹⁰¹ If the risk of incompleteness is a reason to remove regulatory text, then no explanatory clause, and indeed no factor, is safe. The Department cannot invoke such logic to strip the rule of content without undermining the enterprise the rule is meant to accomplish.

⁹⁵ See generally Aiha Nguyen & Eve Zelickson, *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>.

⁹⁶ *Id.*

⁹⁷ 29 C.F.R. § 795.110(b)(4).

⁹⁸ Proposed Rule at 9951.

⁹⁹ *State Farm*, 463 U.S. at 43.

¹⁰⁰ *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018).

¹⁰¹ Proposed Rule at 9935.

IV. Any use of artificial intelligence in this rulemaking must be disclosed.

Finally, DOL must disclose information related to any use of artificial intelligence as part of this rulemaking and, to the extent such use is significant, provide an additional opportunity for public comment.¹⁰² Under the APA’s reasoned-decisionmaking requirement, “[w]hen an agency uses a computer model, it must explain the assumptions and methodology used in preparing the model.”¹⁰³ Moreover, the public must have notice of, and an opportunity to comment on, agencies’ uses of models and data, AI-enhanced and otherwise, to regulate.¹⁰⁴ Such disclosures are “[t]he safety valves in the use of . . . sophisticated methodology.”¹⁰⁵

Beyond being legally required, disclosure of AI usage is prudent policy. Administrative agencies should uphold the values of transparency and public participation.¹⁰⁶ In particular, the Administrative Conference of the United States has recognized that “[a]gencies’ efforts to ensure transparency in connection with their AI systems can serve many valuable goals,” and it therefore recommends that “agencies might prioritize transparency in the service of legitimizing its AI systems, facilitating internal or external review of its AI-based decision making, or coordinating its AI-based activities.”¹⁰⁷ Among other things, disclosure of AI usage allows the public to confirm that agencies are adhering to relevant laws, apply technical expertise to improve agencies’ use of technology, assess the risk that federal policies might be influenced by biased or otherwise faulty methods or products, and learn about an emerging and important field of technology. Indeed, the Office of Management and Budget has recognized that the government, in using AI, must “provide improved services to the public, while maintaining strong safeguards for civil rights, civil liberties, and privacy.”¹⁰⁸

Consistent with these requirements and principles, DOL must disclose, first, whether it has used or plans to use AI as part of this rulemaking, including to develop substantive policy, produce supporting analysis, or respond to public comments. If so, DOL must disclose the particular AI product it has used and why it was selected, how that product was procured, whether the product was fine-tuned, what prompts or inputs the agency used to elicit responses from the product, and the responses the product produced. DOL must also disclose how agency staff used AI-produced information, including any quality control, peer review, or other validation performed. And DOL

¹⁰² We adopt the definition of artificial intelligence at Pub. L. 115-232 § 238(g), 132 Stat. 1697–98.

¹⁰³ *Owner-Operator Ind. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 204 (D.C. Cir. 2007) (quotation omitted).

¹⁰⁴ *See Am. Radio Relay League v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008); *Air Transp. Ass’n v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999).

¹⁰⁵ *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981).

¹⁰⁶ *See* Attorney General’s Manual on the Administrative Procedure Act 9 (1947) (describing the APA’s purposes to include “requir[ing] agencies to keep the public currently informed of their organization, procedures, and rules” and “provid[ing] for public participation in the rule making process”).

¹⁰⁷ Admin. Conf. of the U.S., Statement #20, Agency Use of Artificial Intelligence, 86 Fed. Reg. 6612, 6616 (Jan. 22, 2021).

¹⁰⁸ Memorandum for the Heads of Executive Departments and Agencies from Russell T. Vought, Director, Office of Management & Budget 1, M-25-21 (Apr. 3, 2025), <https://www.whitehouse.gov/wp-content/uploads/2025/02/M-25-21-Accelerating-Federal-Use-of-AI-through-Innovation-Governance-and-Public-Trust.pdf>.

must disclose what measures it took to ensure that its use of AI complied with applicable data security and privacy requirements. To that end, it must disclose whether and to what extent any persons and entities not employed by the agency developed, modified, provided access to, or used AI in the course of the agency's decisionmaking process. To the extent the disclosed use of AI is significant, DOL must provide an additional opportunity for public comment.

V. Conclusion

The proposals addressed above would, if adopted, run afoul of Supreme Court precedent and be arbitrary and capricious. Taken together, they threaten to undermine the goals and structure of the FLSA, including its fundamental purpose of promoting baseline protections for workers. We therefore request that DOL withdraw the Proposed Rule.

Sincerely,

Reed Shaw
Policy Counsel, Governing for Impact
Email: rshaw [at] governingforimpact.org