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***Submitted Electronically***

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Honorable Martin J. Walsh
Secretary, Department of Labor
200 Constitution Ave NW
Washington, D.C. 20210

***Re**: Worker Classification NPRM*

Secretary Walsh:

We oppose the revocation of the 2021 Rules in the notice of proposed rulemaking (NPRM). While the Biden administration made it clear from its earliest days that it was hostile to independent contractors, this proposed effort follows the same failed policies of California's infamous AB 5, a law that resulted in thousands of jobs lost and harm to women and communities of color. .[1]

NetChoice is a trade association made up of the world's most competitive and innovative technology companies. Many of our members are pioneers of the gig economy and would be directly impacted by the Department of Labor's misguided NPRM.

NetChoice is, above all, dedicated to the principles of free enterprise and free expression. Inherent in those principles is the belief that Americans should have the freedom to set their own course – to decide for themselves how to shape their working lives. The Department's NPRM violates these principles and would undermine the choices made by every independent contractor.

It must be remembered: the primary group that would be adversely impacted by this NPRM is American workers – especially those seeking additional earnings to keep up with inflation.

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[1] Reuters, Back to the future: Obama-era labor policies to return in 2022 (January 3, 2022), https://www.reuters.com/legal/transactional/back-future-obama-era-labor-policies-return-2022-2022-01-03/

Today, workers have personal and often contrasting preferences. What makes sense for one worker and their family won't make sense for another. Employee designations provide some helpful aspects, as do independent contractor designations. The government shouldn't needlessly put its hand on the scale to the detriment of the gig economy and the workers who make it up, but that is the result of enactment of this NPRM.

## Merits of the 2021 Rule This NPRM Would Revoke

Just a year ago, the Department of Labor promulgated a rule related to worker classification. It gave greater flexibility to workers to establish their preferred working relationships and conditions.[2] Unfortunately, at the beginning of the Biden administration, this rule was illegally held from implementation.[3] Now that they've been directed by a federal judge to implement the Trump era rule, the Department is instead attempting to chart its own path.

In the rush to overturn the legacy of his predecessor, the Biden administration is throwing out a rule that was carefully constructed to empower Americans to work as they choose.. It is important to speak to the merits of the 2021 rule that has been targeted for elimination.

The 2021 rule does a better job at acknowledging reality for workers, in contrast to the NPRM currently under consideration. Ultimately, the goal of any designation rule should be to accurately identify the nature of the working relationship in question, not to artificially steer a worker towards the government's preferred outcome. Indeed, the government shouldn't even have a preferred outcome that frustrates choices made by workers. As long as a worker has entered into employment or an independent contractor position with a company free of illegal pressure or coercion, the government has no business reversing that worker's choices.

The 2021 worker classification rule was a measured improvement on the previous "economic reality" test that was used under the Obama administration. As the Trump Department of Labor noted, rulemaking was necessary because the former 6-factor test had been developed by courts based on statutes enacted in 1954. That is to say, the Department had never meaningfully attempted to establish

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[2] BenefitsPro, Judge rules in favor of Trump administration worker classification rule -- for now (March 23, 2022), https://www.benefitspro.com/2022/03/23/judge-rules-in-favor-of-trump-administration-worker-classification-rule-for-now/?slreturn=20221106164954

[3] Ibid

what was or was not an independent contractor relationship, and there had been zero public input on the issue up to that point.[4]

What the Trump administration developed was a simplified test. Instead of a laundry list of qualifications that workers needed to meet in order to be their own boss, the economic reality test was streamlined to two core factors: (1) the nature and degree of the individual's control over the work and (2) the opportunity for profit or loss.[5] The first core factor relates whether the worker has control over aspects of their work like schedule and project decisions. The second core factor deals with how profitable the type of work in question can be given a greater degree of entrepreneurship.

The 2021 rule represents actual public input and a meaningful attempt to update the federal government's engagement with the gig economy. It should not be rescinded.

## This NPRM is One Step Forward, Two Steps Back

Even if the Department is insistent on rescinding the 2021 worker classification rule, there is no obvious justification for repeating the mistakes of the past and returning to the Obama-era rule.

There is every indication, however, that underlying the Department's supposed "return to normal" regarding the classification rule is an attempt to box out access to and diminish the legitimacy of independent contracting. This would be a terrible posture for the Department to adopt.

Since the beginning of the COVID-19 pandemic millions of Americans have lost their regular jobs.[6] The gig economy provided a significant lifeline for those out of work. Ride sharers, delivery drivers, doctors, artists, actors, educators, and others realized the only way to continue their vocations was to embrace the flexibility and control inherent in the independent contractor model. Instead of supporting Americans who would want to make that choice, the Department seeks a rule that will throw workers back before the mercy of the traditional job market.

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[4] Independent Contractor Status Under the Fair Labor Standards Act (January 7, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-07/pdf/2020-29274.pdf

[5] Ibid

[6] Center on Budget and Policy Priorities, Tracking the COVID-19 Economy's Effects on Food, Housing, and Employment Hardships, https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-economys-effects-on-food-housing-and#:~:text=The%20unemployment%20rate%20jumped%20in,2021%20than%20in%20February%202020.

The return of the multi-pronged test also means the return of disparaging assumptions and prejudices about independent contractors. The proposed rule attempts to make the argument that an employee should be any worker who is economically dependent upon the employer.[7] Conveniently, the realities that establish "dependence" are greatly expanded, dramatically increasing the likelihood that a worker will be classified as an employee. For example, under the proposed rule, any type of "skilled" labor would likely be considered employee labor.[8] That is to say, from the perspective of the Department, independent contracting should be reserved for low skilled know-nothings.

That is, of course, not how we should be framing working life in America. Workers learn important skills from many different sources and experiences. Millions of Americans bring a preexisting skill to a job, while millions more develop a skill through the experience they gain by working. Just because a worker is trained on the job does not mean they lacked skill to begin with, or that they should be trapped in an employee/employer designation by the federal government.

It has also been noted that the proposed rule represents a significant departure from a Biden administration promise to not raise taxes on Americans making less than $400,000 a year. Recategorizing independent contractors as employees would strap them with a significantly greater tax burden.[9] The Beacon Hill Institute study showed that 96% of those workers who will pay more in taxes after their reclassification will be under that $400,000 threshold–effectively a tax increase for low and middle income Americans.

## California's AB 5: A Record of Failure

Beyond the near constant back and forth on worker classification at the federal level since the Obama administration, states have also been active in this arena. The Department's NPRM closely aligns with California's enactment of Assembly Bill 5 (AB 5) , so experience with that law is therefore instructive.

Simply put: AB 5 has been and continues to be an utter catastrophe for California's business and workers.[10]

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[7] Law and Policy Workplace, DOL's New Independent Contractor Rule: A Return to 2020 (October 31, 2022), https://www.lawandtheworkplace.com/2022/10/dols-new-independent-contractor-rule-a-return-to-2020/#:~:text=In%20March%202021%2C%20the%20Biden,was%20unlawful%2C%20and%20restored%20it.

[8] Ibid

[9] ATR, The Tax Impact of Applying the "ABC" Test to Independent Contractors (April 2022), https://www.atr.org/wp-content/uploads/2022/04/BHI-Study-of-Reclassification-of-Independent-Contractors-revised-FINAL-04.06.22.pdf

[10] Freelancers Against AB5, https://rolls.bublup.com/Anderson/AB5-Personal-Stories

AB 5 was written with ride sharing in mind. Ever since companies like Lyft and Uber introduced innovation and competition to a stagnant market, taxi companies have mobilized their allies in organized labor and Sacramento to protect their legacy business model. By forcing ride sharing companies to adopt worker classifications that don't match their business model, cab companies are hoping they can return to the golden age of rising fares and disappointing customer service.

But independent contractor classification isn't just about ride sharing. It isn't even just about tech. Artists, actors, truckers, psychiatrists, and electrical engineers all benefit from independent contracting, and all of them can be hurt when independent contracting is politically targeted.

In July of this year, California truckers shut down the port of Oakland in protest of AB 5. Up to 70,000 truckers in the state could be forced to reclassify as employees – effectively ending their self-employment. This means no more setting their own schedule or being their own boss.[11] These negative effects are being felt across the state by co-ops, non profits, and small businesses.

Instead of embracing any degree of regulatory humility, California politicians are prepared to spend big to double down on their mistakes. Assemblywoman Lorena Gonzalez, the author of AB 5, has drafted new legislation trying to stem the financial bleeding caused by her previous work. She's calling for $20 million in new spending so that art nonprofits can survive the calamitous effects of AB 5.[12] How much additional spending will need to be authorized to shore up every other sector that has been negatively impacted by Assemblywoman Gonzalez's "public service?" Governor Newsom has already signed supplementary bills giving temporary carve outs for construction truckers, data aggregators, insurance adjusters, newspaper distributors, manicurists, and others.[13]

Regardless of one's opinion regarding worker classification, or the belief that an individual has a right to make decisions for themselves, it should be clear that the drafting and execution of AB 5 have been

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[11] Reason, Truckers Shut Down CA Port Fighting for the Right to be Their Own Bosses (July 21, 2022), https://reason.com/2022/07/21/truckers-shut-down-california-port-fighting-for-the-right-to-be-their-own-bosses/

[12] North Bay Business Journal, California Workers Blame New Labor Law for Lost Jobs. Lawmakers are Scrambling to Fix It (February 10, 2020), https://www.northbaybusinessjournal.com/article/article/california-workers-blame-new-labor-law-for-lost-jobs-lawmakers-are-scrambl/

[13] SHRM, New California Laws Extend AB 5 Exemptions for Certain Industries (October 8, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/new-california-laws-extend-ab-5-exemptions-for-certain-industries.aspx

an abject failure. Given how chaotic the process has been and the economic hardship that resulted, the federal government should resist following in the footsteps of California.

## Conclusion

For the past decade, the federal and state governments have been hard at work attempting to regulate the emerging gig economy. Despite the regulatory back and forth, the industry–and the workers who compose it–have built one of the most dynamic sectors in the global economy.

Instead of launching into another round of industry upheaval, heaping greater uncertainty onto an already challenging startup landscape, the Department should practice regulatory humility and defer to the previously promulgated worker classification rule.

It is not in the nature of the government to trust the individual with their choices, but it is ultimately the path the Department should walk. Americans deserve the freedom to choose the type of work that works best for their preferred lifestyle. While the Department may believe its motivations are legitimate, it is safe to say that there will be precious few Americans thanking the Department of Labor for arrogantly presuming it needs to save workers from their own decisions. The only beneficiaries of this proposed rule will be organized labor and entrenched legacy industries.

NetChoice asks that the Department of Labor abandon this misguided attempt to undermine the rights of American workers and respectfully requests that the Department uphold the previously promulgated worker classification rule.

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