

RIN 1235-AA43: Employee or Independent Contractor Classification Under the Fair Labor Standards Act

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Washington Center for Equitable Growth comments on DOL's proposed rule to revise the guidance on how to determine who is an employee or an independent contractor under the Fair Labor Standards Act

Dear Ms. DeBisschop:

The Washington Center for Equitable Growth supports the U.S. Department of Labor's proposed rulemaking to revise the department's guidance on how to determine who is an employee or an independent contractor under the Fair Labor Standards Act. This guidance is vital to [reducing employees' likelihood of being incorrectly classified as independent contractors](#), thereby preventing their exclusion from some of the country's key labor rights and protections.

### **The misclassification of employees as independent contractors**

Whether workers are classified as employees or as independent contractors has important implications for their economic security, access to benefits, and career mobility. For instance, independent contractors are not eligible for Unemployment Insurance benefits or Workers' Compensation. Unlike most employees, independent contractors are not eligible for the minimum wage or overtime requirements, cannot join a union or bargain collectively, and are not covered by anti-discrimination protections.

Independent contractors also are fully responsible for paying the full payroll tax contribution to Medicare and Social Security. And research finds that self-employed workers, such as independent contractors, are substantially [less likely](#) to participate in retirement savings plans or have health insurance coverage.

Fewer labor protections and greater uncertainty are a trade-off some U.S. workers are willing to make in exchange for [greater control](#) over when, how, and how much to work. However, it is also possible for employees to have a great degree of control and flexibility over their own work lives. Further, incorrect classification and inadequate guidance to determine who is an independent contractor and who is an employee create a system in which [businesses can shift economic and legal responsibilities](#) embedded in traditional employment relationships onto workers.

Misclassified workers, then, are stuck with the worst of both worlds: They have neither the

protections and security afforded by standard employment nor the control and flexibility that is supposed to be a feature of independent contracting.

Lack of protections under the Fair Labor Standards Act can result in [workers earning less than the minimum wage](#), can lead to [greater exposure](#) to labor violations, such as wage theft, and enable [lack of access to overtime](#). The U.S. Department of Labor’s proposed rule would replace and correct prior guidance, reducing the risk of misclassification and adopting an “[economic reality test](#)” that better captures whether a worker is truly leading an independent activity or working for someone else.

For instance, the test considers whether a worker can truly negotiate the pay they get for providing a service, the extent to which they can accept or reject offers, the degree to which they are supervised or surveilled by an employer, and whether an employer has a say over their schedule. These clarifications would improve the economic outcomes of the many misclassified workers currently not covered by the Fair Labor Standards Act, making the U.S. labor market more vibrant, fair, and dynamic.

### **Worker misclassification is widespread, bad for workers, and harmful to U.S. economic growth**

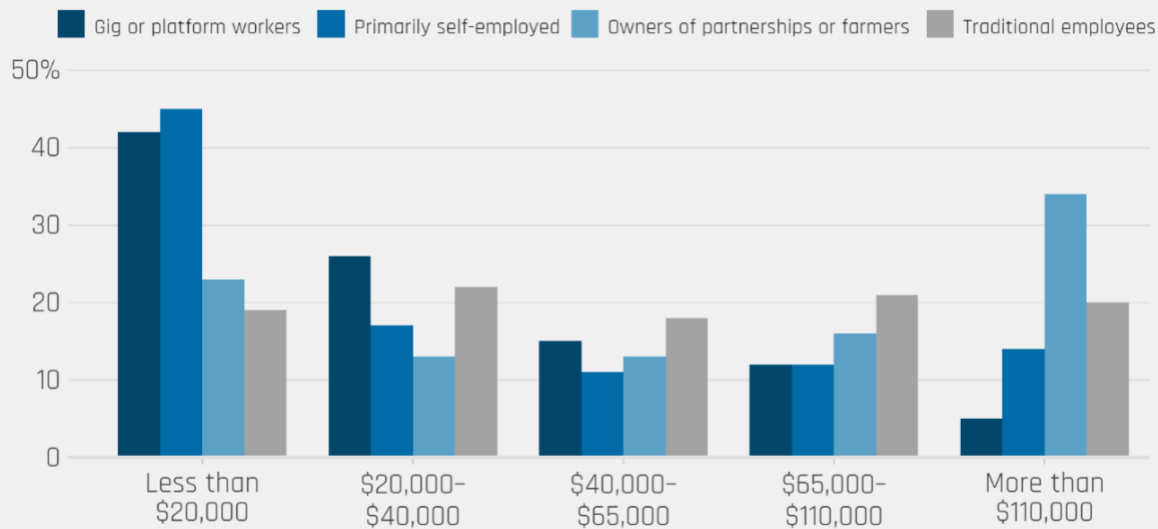
Measuring misclassification is difficult, but several audit and industry-specific studies find evidence that it affects a substantial number of U.S. workers. For instance, a 2000 analysis commissioned by the U.S. Department of Labor finds that between [10 percent and 30 percent](#) of audited U.S. employers misclassified workers as independent contractors. Later studies find that [about 20 percent](#) of Illinois employers and [30 percent](#) of Michigan employers engaged in misclassification. And a just-released report finds that [more than a quarter of a million](#) workers were incorrectly classified as independent contractors in Pennsylvania in 2020 and 2021.

Researchers also find that misclassification is widespread in industries such as [home healthcare, trucking, cleaning and janitorial services, and construction](#)—sectors of the U.S. economy that tend to pay low wages and suffer from other poor employment practices. As such, empirical evidence shows that independent contractors in the lower end of the income distribution are under especially precarious economic conditions. A 2017 study by U.S. Treasury Department economists, for example, finds that taxpayers who earn a substantial chunk of their earnings from self-employment and so-called gig platform work are [much more likely](#) to report annual incomes of \$20,000 or less than workers who earn wages. (See Figure 1 on the next page.)

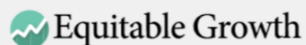
**Figure 1**

### Gig and self-employed workers are primarily low-income

Mean-adjusted gross income distribution of U.S. gig or platform workers, those primarily self-employed, owners of partnerships or farmers, and traditional employees, 2014



Source: Emilie Jackson, Adam Looney, and Shanthy Ramnath, "The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage." Working Paper No. 114 [U.S. Department of the Treasury Office of Tax Analysis, 2017].



That the misclassification of employees as independent contractors is especially pervasive in these low-wage industries, in turn, means that the practice [disproportionately affects](#) many parts of the U.S. economy in which workers of color, women workers, workers who are not U.S. citizens, and workers with lower levels of formal educational attainment are overrepresented as a share of the workforce. Further, an incorrect status can put historically marginalized groups of workers at [increased risk of experiencing discrimination, retaliation, and harassment](#) since [only employees](#) are covered by anti-discrimination laws enforced by the U.S. Equal Employment Opportunity Commission.

In addition to hurting workers' labor market outcomes and exacerbating longstanding economic disparities, misclassification affects [tax collection](#) and creates an economic disadvantage for employers who correctly classify their employees. By pushing back against misclassification, then, the U.S. Department of Labor's proposed rule would help workers currently classified incorrectly as independent contractors access to the rights and protections to which they are entitled, make it more difficult for employers to engage in labor violations, such as wage theft, and level the playing field among competing businesses.

**For workers who do not have true and substantial control over their work and how to do it, protections under the Fair Labor Standards Act are essential**

Workers who are recognized as employees under the Fair Labor Standards Act are covered by two key labor protections: the minimum wage and overtime requirements. In the case of the minimum wage, the department's proposed rule is likely to boost pay for many workers since there is evidence that some currently classified as independent contractors, such as ride-hail drivers, receive pay so low that they fall [below both the federal and their jurisdiction's minimum wage floor](#).

As such, the new rule also would provide currently misclassified workers with greater recourse to fight against overtime abuses and wage theft—a labor law violation that [disproportionately affects already-vulnerable workers](#) and that becomes more pervasive as economic conditions deteriorate, further hurting the economic outcomes of workers with insufficient bargaining power.

Thank you for the opportunity to submit comments on the Notice of Proposed Rulemaking.

Please do not hesitate to contact us if you have questions about how to apply the economic record to this rulemaking.

Sincerely,

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