SMALL BUSINESS MAJORITY

December 12, 2022

The Honorable Marty Walsh
Secretary
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Federal Register 2022-21454, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division

As a leading representative of America's 33 million small businesses, Small Business Majority has concerns about the U.S. Department of Labor's efforts to modify Wage and Hour Division regulations, which would return to the expanded "totality of the circumstances" analysis when determining how to classify employees and independent contractors under the Fair Labor Standards Act. While we laud the Department's goals to clarify the definition of economic dependence and ensure individuals receive legally required compensation and benefits for their work, the Department's approach could create confusion and uncertainty for legitimate independent contractors and for small business owners who hire these contractors.

Our comment will underscore two key issues raised in Part III, Reason for Rulemaking, to urge the Department to clarify Factors Three and Five.

Small Business Majority is a national small business organization that empowers America's diverse entrepreneurs to build a thriving and equitable economy. We engage our network of more than 85,000 small businesses and 1,500 business and community organizations to deliver resources to entrepreneurs and advocate for public policy solutions that promote inclusive small business growth. Our work is bolstered by extensive research and deep connections with the small business community that enable us to educate stakeholders about key issues impacting America's entrepreneurs, with a special focus on the smallest businesses and those facing systemic inequities.

Small business entrepreneurship is a proven pathway for Americans from all walks of life to build income, independence, and financial security for themselves, their families, and their employees. Businesses owned by people of color, women, immigrants, and those in rural communities are a growing and vibrant element of our economy and their impact on our economies cannot be understated. The pandemic underscored their relevance and led to the "Great Resignation," comprised of more than 48 million people who quit their jobs in 2021 alone. As a result, those who classify themselves as "self-employed" grew by 500,000 since the pandemic's start, with a significant percentage representing women who are looking for more flexibility to combat the burden of home care work and childcare pressures. For some BIPOC individuals who are often underpaid in their jobs, self-employment offers them a chance to increase their income as an entrepreneur. Self-employment is an opportunity for individuals to become their own boss, pursue their own dreams and earn more money running a business they are passionate about. Without further clarification for these businesses, the Department's proposed regulation could negatively impact that reality for both self-employed individuals and small businesses that hire them as independent contractors.

The Department's effort to guard against misclassification is an important goal, as the problem jeopardizes the economic security of legitimate employees, particularly those in low-wage industries. Evidence collected by federal regulators as well as a growing body of academic and legal scholars demonstrates that labor markets across the country are undergoing substantial disruptions, including but not limited to changes resulting from the increase of "gig work." Given these changes to the economic realities, reinstating the traditional economic realities test, without providing additional clarity to

determine when a business owner may hire an independent contractor, leaves both legitimate self-employed individuals and small businesses in limbo.

The potential for confusion may create an increased threat of private litigation and treble damages that may have a dampening effect on entrepreneurship. Most businesses in this country are self-employed or have under 10 employees, and often lack the legal expertise needed to navigate complex federal, state and local regulations. In the past decade, we have also seen a dramatic expansion in the number and types of workers who are increasingly categorized as independent contractors. This creates significant ambiguity about the appropriate treatment of such workers. The ambiguity regarding the applicability of the NPRM among courts and employers may only be compounded by the broader definitions of employment used in states, like in California. Such an outcome would leave small business owners in certain industries with fewer tools to compete with large employers who can afford to engage in legal actions. The more the Department can do to provide clear guidance for these microbusinesses, the better. While we agree the current rule is flawed, relying on the "totality of circumstances" keeps the method of classification unclear.

Specifically, two of the seven factors by themselves provide little clarity for a small business owner without legal expertise on how to properly classify workers. For instance, the third factor states, "to provide further specificity by noting that an indefinite or continuous relationship is consistent with an employment relationship." This factor may be an inaccurate representation of the dynamic between a small business owner and an independent contractor. Many businesses have renewed contracts that can span years, if not decades. Requiring a business to hire their contractor or requiring that a contractor become an employee could impact the status of both entities.

Factor five is equally unclear. The Department wishes to align with the courts, which state they "have repeatedly found a worker's performance of work that is integral to the employer's business to be an indicator of employee status…whereas a worker who performs work that is more peripheral to the employer's business is more likely to be independent from the employer." This is a generalization that encapsulates many different types of relationships between employers and independent contractors. Take, for example, a newspaper company that may hire a freelance writer to author a piece that is integral to the employer's business. This does not mean that the freelance writer should be or wants to be hired by the company. Many barbershops rent out their chairs to independent cosmetologists, while fitness studios hire independent instructors to run classes. In another example, an events business hires independent artists or performers for a special event. In all of these examples, these individuals' work is integral to the business. On its own, factor five provides little assurance to a small business owner who operates these types of companies as to whether these individuals are properly classified.

We recognize that factors three and five would not be considered in silos, but instead as part of the "totality of circumstances" in any investigation. However, as stated previously, this ambiguity will only confuse small business owners and true independent contractors.

The way Americans work and start a business is changing, which has been especially true since the pandemic. The health crisis has also underscored why today's entrepreneurs and small business employees need a modernized and robust benefits infrastructure that promotes wealth creation, financial security and quality jobs. We must protect small businesses, particularly the newest influx of individuals who left their jobs because they seek a higher income or independence as entrepreneurs. We ask you to examine how the rule can be made clearer to strengthen worker protections while also providing more certainty and reducing complexity for the nation's key job creators.

Sincerely,

John Arensmeyer
Founder & CEO, Small Business Majority