



Before the U.S. Department of Labor, Wage and Hour Division

**Request for Comments on Proposed Rule
Governing Employee or Independent
Contractor Classification Under the Fair
Labor Standards Act**

**Regulation Identifier Number (RIN) 1235–
AA43**

Comments of the Authors Guild

The Authors Guild thanks the Department of Labor for the opportunity to submit the following comments in response to the Notice of Proposed Rulemaking (the “NPRM”) published in the Federal Register on October 13, 2022, for determining employee or independent contractor classification under the Fair Labor Standards Act (the “FLSA”).

The Authors Guild is a national non-profit association of approximately 13,000 professional, published writers of all genres. Among our members are historians, biographers, poets, novelists, and freelance journalists of every political persuasion. The Authors Guild defends and promotes the rights of all authors to write without interference or threat, and to receive fair compensation for their work. For over a century, the Authors Guild has vigorously represented writers’ concerns in Washington D.C. and advised Congress and federal agencies on laws and policies that would help—or harm—writers.

Worker misclassification is a significant problem in today’s economy and deprives scores of workers the legal benefits and protections they need. While “gig” and platform-based forms of work have created new opportunities for workers and companies, they have also enabled large companies to misapply the independent contractor status to economically dependent workers,

thus preventing the workers from accessing important employment benefits like minimum wage, healthcare, paid leave, and unemployment. The analysis of economic dependency lies at the core of whether a worker should be classified as an employee under the FLSA, and we believe that the proposed rule provides a reasonable framework for making determinations of employee or independent contractor status under the FLSA.

The proposed six-factor economic realities test should aid in more robust enforcement of misclassifications and give employers and workers much-needed clarity. We agree with the Department that, instead of clarifying the prior economic realities test, the 2021 IC rule rewrote it in a way that was a significant departure from case law and the Department's previous guidance. By combining the separate "investment by the worker" and "opportunity for profit and loss" factors, and by designating two of the five factors—"control" and "opportunity for profit and loss" as the most probative—the 2021 IC Rule narrowed the scope of misclassification analysis under the FLSA. The proposed rule brings the Department's regulatory framework in better alignment with judicial interpretations of the FLSA.

The proposed rule adds further clarity to the individual factors and would confer greatly deserved protections on economically dependent workers, particularly app-based workers, with whom, we—as proponents of economic justice—stand in solidarity. Most authors and most freelance journalists today are correctly classified as independent contractors, and that will not change under the proposed rule for purposes of the FLSA. But instances of misclassification abuse do still occur in parts of the journalism sector where companies hire some staff writers and newsroom employees as independent contractors, despite the fact that these individuals work full-time for them, often on-site, in jobs that mirror those of employees. In such cases, the worker is economically dependent on that employer, and the six-factor test will favor treating them as

employees, giving them the much-needed right to overtime and minimum wage. On the other hand, many freelance writers work for multiple entities and retain economic independence; and would retain their independent contractor status under the proposed rule. Indeed, many prefer to retain their “independent contractor” category because it allows them to retain copyright ownership. It gives them flexibility over their hours and workplace, which is so important for many people, including those with children at home, as well as those with disabilities and long-term illnesses.

To that point, we strongly suggest that the Department clarify that flexibility as to hours and workplace is a matter of company policy and does not on its own determine legal status. Factor 4 of the proposed rule does include, among a number of factors, “whether the employer sets the worker's schedule.” We request that the final rule emphasize that this is just one of many factors that should be weighed. Many jobs do not require a regular schedule, but employers are able to exploit those who need flexibility and insist they become independent contractors which allows the employer to save itself a lot of money by denying benefits, including health insurance, to those workers and requiring the worker to pay the employer’s share of employment taxes. At the same time, these workers also lose legal protections such as those the FLSA covers and unemployment insurance. That should not be the case – especially in this post-Covid era where so many work from home quite successfully.

We also take this opportunity to thank the Department for inviting us to the Worker Forum on June 29, 2022 and to revisit the concerns we expressed in that forum about the “ABC test,” which the Department discussed in its 2021 IC Rule, but rejected.¹ The primary issue with using an ABC test to distinguish independent contractors from employees is that the “B” prong

¹ 87 CFR 62230 (citing 86 CFR 1238)

of the test automatically makes any freelance writer who writes for a publisher or publication an employee without further analysis, and therefore sweeps in many writers who, under an economic realities analysis, would remain classified as independent contractors.

This broad sweep of the ABC test can cause more problems than it solves, especially for writers and other professional freelance creators because employees are not considered to be the author and copyright owner of any works they create in the course of their employment.²

Because most professional freelance writers earn a living by selling different rights to their work to different distributors and, generally speaking, no single licensee pays them enough to support the creation of the entire work, loss of copyright would be disastrous for many and would force them out of the business of writing.

An example of how writers might separately license rights to their works includes an author who writes an article for a magazine, then perhaps creates a serialized story based on it for one of the fiction serialization platforms, licenses the print and ebook rights to the complete serialized book to a traditional publisher and the audiobook rights to an audio publisher such as Audible; then the author might also turn the story into a podcast or license rights for film or TV. Licensing the same work for several different uses is the norm, and it is by making multiple uses of works, that writers can afford to write for the low fees that many publications pay today. If the author was considered an employee of the publication that initially hired them to write the article or serialization, the writer would have only one opportunity to earn income from the work. The likely outcome would be that publications would not be able to afford to pay writers sufficiently for the full value of all rights, and writers will have to look to other professions.

² Section 101 of the Copyright Act defines works made for as “(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use [in or as enumerated categories] if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire....”

In sum, we generally support the Department’s proposed rule, with the comments made above, because it fairly characterizes who is an employee and who is an independent contractor under the FLSA. But we raise a much bigger issue – and that is the lack of protection afforded to freelancers. Freelance writers and other freelance creators need greater protections under the law. They have as little negotiating leverage as employees – but the answer is not to classify them as employees under the FLSA. **The far better solution is to allow freelance workers to partake in the legal protections afforded employees.** There is no reason that freelance workers should not be protected from unfairly low wages; indeed, many work for less than minimum wage on an hourly basis. We would like to see writers and other professional freelance creators protected from pay that is below minimum wage—without stretching the definition of employee, which would almost certainly spill over to other areas of the law.

Although the Supreme Court acknowledged that the classification of employees and independent contractors is not and does not need to be consistent with respect to different laws, classifying writers as employees for some but not other labor and employment protections carries the risk that standards in one area of the law could influence others. Moreover, conflicting standards for employment classification could lead to confusion and misapplication as a consequence of which writers could lose their copyrights. And, as the Department acknowledges in the NPRM,³ “employers are likely to keep the status of most workers the same across all benefits and requirements.” Accordingly, we support the proposed six-factor test but ask the Department to consider extending the FLSA protections to certain classes of freelancers without altering their independent contractor status.

³ 87 CFR 62268

The working conditions today for many freelance creative workers, including writers, do require legal and policy interventions. The inability of writers to access unemployment and other benefits due to their status as independent contractors came into sharp relief during the pandemic. The experience has motivated us to find legislative and policy solutions to the benefits gap affecting writers other than the classification-based approach, which simply does not work for writers and other creators, as described in these comments. We invite the Department to investigate these issues with an eye to the particular structure of this labor market and would welcome an opportunity to share our proposed solutions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mary S J".

Mary Rasenberger

CEO, The Authors Guild