

United States Senate

WASHINGTON, DC 20510

December 13, 2022

The Principal Deputy Administrator Jessica Looman
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Comments on the Notice of Proposed Rulemaking, RIN 1235-AA43, Employee or Independent Contractor Classification Under the Fair Labor Standards Act

Dear Principal Deputy Administrator Jessica Looman:

We write to offer comment on the Department of Labor’s (“DOL”) October 13, 2022 Notice of Proposed Rulemaking on the Employee or Independent Contractor Classification Under the Fair Labor Standards Act (“the proposal”).¹ We support DOL’s proposal to reinstate the economic realities test to more closely align with congressional intent and Supreme Court jurisprudence. The return to this test, which was in place for more than seven decades, will help ensure that all workers who are covered by the Fair Labor Standards Act’s (FLSA) legal protections, including minimum wage and overtime, are not deprived of its protections by misclassification. The proposed rule will help limit employee misclassification by providing more clarity to workers and employers about their rights and responsibilities under the law.

Rescinding the 2021 Independent Contractor Rule (2021 IC Rule) and formally reinstating the economic realities test through rulemaking is fundamental to Congress’ goals in passing the FLSA because *only employees* under the Act are covered by its protections. Congress enacted the FLSA to end “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”² To that end, the FLSA contains an expansive definition of “employee,” “employer,” and “employ” demonstrating Congress’ intent that the FLSA broadly cover workers who depend on their employer for work.³ Congress defined “employee” in the FLSA to be “given ‘the broadest definition that has ever been included in any one act.’”⁴ The Supreme Court has further recognized that “the definition of ‘employ’ is broad”⁵ and commented on its “striking breadth.”⁶

The question of who is an employee is at the core of the FLSA because it is central to determining whether the statute applies. Drawing the line between employees and independent

¹ 87 Fed. Reg. 62218 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, and 795).

² 29 U.S.C. 202(a).

³ 29 U.S.C. 203(e)(1) (“the term “employee” means any individual employed by an employer”); 29 USC 203(d) (“any person acting directly or indirectly in the interest of an employer in relation to an employee”); 29 USC 203(g) (“‘Employ’ includes to suffer or permit to work.”).

⁴ *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n. 3 (citing Sen. Rep. No. 884 (75th Cong., 1st Sess.) p. 6. (quoting Senator Black on the Senate floor)).

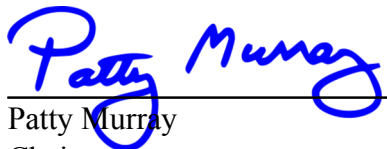
⁵ *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947) (noting that the definition is derived from child labor laws and applies to the child labor provisions of the FLSA).

⁶ *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

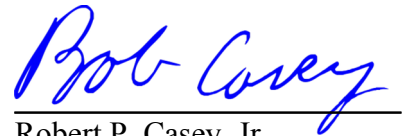
contractors is necessary to and clearly contemplated by the FLSA. The proposal clarifies who is an employee under the Act and who is an independent contractor—a worker who is in business for themselves. By restoring and codifying the longstanding economic realities test, this rule will protect workers against misclassification and even the playing field for businesses that properly classify their workers. DOL has long made this determination both in its own enforcement actions⁷ and in its subregulatory guidance.⁸ Returning to the historical formulation of the economic realities test, which is supported by Supreme Court and the appellate courts' interpretations of the FLSA, and replacing the 2021 IC Rule would clarify the standard for workers and employers and ensure that workers are not misclassified.

Accordingly, we strongly support the DOL's proposed rule and urge the Department to finalize it.

Sincerely,



Patty Murray
Chair
Committee on Health,
Education, Labor, and
Pensions



Robert P. Casey, Jr.
United States Senator



Charles E. Schumer
United States Senator



Benjamin L. Cardin
United States Senator



Cory A. Booker
United States Senator



Christopher S. Murphy
United States Senator

⁷ 29 U.S.C. 201-219.

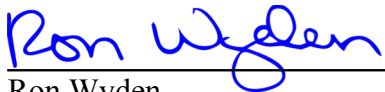
⁸ 87 Fed. Reg. at 62219 (noting that before issuing the 2021 IC Rule the DOL primarily issued subregulatory guidance on this topic).



Tina Smith
United States Senator



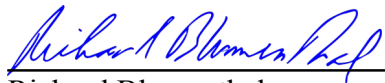
Sheldon Whitehouse
United States Senator



Ron Wyden
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