



October 26, 2020

The Honorable Eugene Scalia  
Secretary United States Department of Labor  
200 Constitution Avenue NW  
Washington, D.C. 20210

Amy DeBisschop  
Director, Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor Room S-3502  
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Re: Comments on Department of Labor, Wage and Hour Division, Notice of Proposed Rulemaking, “Independent Contractor Status under the Fair Labor Standards Act,” 85 *Fed. Reg.* 60,600 (Sept. 25, 2020), RIN 1235-AA34

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship. To that end, Engine welcomes the opportunity to submit comments regarding the Department of Labor’s proposed revision of its interpretation of independent contractor status under the Fair Labor Standards Act (FLSA).

While innovation and entrepreneurship remain strong forces in the U.S. economy, most American startups launch with bootstrap budgets, founders who often forgo salaries, and very few resources to hire many employees right away. Some of these startups operate in the “gig worker” space, while others require assistance on a project-by-project basis when they can’t yet afford to hire full-time employees. The ability to hire independent contractors to meet a startup’s skills and talent needs is critically important, particularly in their beginning stages, as hiring full time employees can be up to 20-30 percent more expensive.<sup>1</sup>

In executing a final rule, any effort to distinguish between an employee and an independent contractor needs to take into account the lifecycle of an America’s startup. The average startup launches with only \$78,000—any shift in expenses, even minimally, could be

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<sup>1</sup> Eric Boehm, *Labor Department: Gig Workers are Contractors, not Employees* (April 30, 2019), [https://reason.com/2019/04/30/labor-department-gig-workers-are-contractors-not-employees/?itm\\_source=parsely-api](https://reason.com/2019/04/30/labor-department-gig-workers-are-contractors-not-employees/?itm_source=parsely-api).

enough to push a nascent company towards shutting their doors.<sup>2</sup> Using independent contractors to meet startups' talent needs can therefore be an important strategic move, allowing new startups to adjust operations costs to their budgets and to the amount of work available, so that they can scale their ventures efficiently and at a faster pace.<sup>3</sup> Further still, many workers prefer the nature of freelance work—it allows workers to similarly be entrepreneurial and have flexibility in their schedule.

Startups thrive on clarity, as they often initially lack the resources to navigate regulatory ambiguity, including through hiring costly legal representation. In the Notice of Proposed Rulemaking (NPRM), the Department of Labor explains, “[t]he ultimate inquiry is whether, as a matter of economic reality, the worker is dependent on a particular individual, business, or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor).”<sup>4</sup> As multiple courts have applied the economic reality test inconsistently in analyzing whether a worker is in fact in business for himself (including in analysing economic dependence),<sup>5</sup> Engine appreciates efforts to clarify what constitutes an independent contractor under the FLSA. This effort is also important, particularly in light of the modern economy and the changing nature of work, with more Americans working in less-traditional jobs—including gig work—that afford greater flexibility. And providing certainty and clarity is even more crucial as startups continue to struggle with the lingering effects of the pandemic. Already tight budgets are stressed even further as businesses try their best to stay afloat amidst economic uncertainty. Certainty in the rules differentiating employees from independent contractors works to eliminate the need for startups to hire help (help that they often cannot afford) in deciphering complex regulations.

In its proposed rule, the department seeks to assess, ultimately, whether a worker is economically dependent through his work on a person or business, or instead, is in business for himself/herself.<sup>6</sup> In parsing that question out, the department proposes five factors for consideration, though two are deemed core factors—the level of an individual's control over their work, and the worker's opportunity for profit or loss.<sup>7</sup> The ability to rely on a limited number of factors gives companies more clarity in determining how to classify their workers. The Department of Labor, however, should consider clarifying certain aspects of the proposed rule. For example, delineating what weight the other factors will have in assessing a workers' status would be helpful. In doing so, startups would not have to expend additional resources trying to determine how much weight each factor carries. The department could also provide sample scenarios, as suggested in the comments submitted by the National Federation of Independent Business in response to this NPRM, pertaining to the five-factor test, so that startups

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<sup>2</sup> Fundable, *Startup Funding Infographic*, <https://www.fundable.com/learn/resources/infographics/startup-funding-infographic>.

<sup>3</sup> Christopher Manes, *Will California's New Gig Rules Increase Startup Relocation* (Aug. 1, 2019), <http://calresidencytaxattorney.com/residency-tax-news/will-california-s-new-gig-rules-increase-startup-relocations>.

<sup>4</sup> See 85 Fed. Reg. at 60600.

<sup>5</sup> See 85 Fed. Reg. at 60605-60607.

<sup>6</sup> See 85 Fed. Reg. at 60610.

<sup>7</sup> See 85 Fed. Reg. at 60612.

can use the provided examples to best determine if a worker should be classified as an independent contractor.

Engine appreciates the opportunity to provide feedback on the proposed rule regarding independent contractor status under the FLSA. Regulatory clarity is crucial for startup operations, and being able to certainly differentiate between an employee and independent contractor is an important factor in determining a startup's talent needs. We look forward to engaging on issues pertaining to talent and startups with the department in the future.

Respectfully Submitted,

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