



April 12, 2021

The Honorable Martin J. Walsh
Secretary of Labor
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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; Withdrawal” 86 *Fed. Reg.* 14,027 (March 12, 2021), 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. Many of these startups—particularly those in their earliest stages—are unable to hire full-time employees and instead rely on independent contractors to meet their talent needs. As such, we were pleased with the Department of Labor’s (DOL) January 2021 rule clarifying independent contractor status under the Fair Labor and Standards Act, and we discourage DOL from withdrawing this rule.

As we noted in the past in comments to DOL, “[s]tartups thrive on clarity, as they often initially lack the resources to navigate regulatory ambiguity, including through hiring costly legal representation.”¹ The January 2021 rule issued by DOL helped to create certainty for the U.S. startup ecosystem regarding independent contractor status. American startups often launch with incredibly limited budgets—the average startup launches with only \$78,000²—and talent needs are often at top of mind. Some startup platforms operate in the “gig worker” space, whereas others rely on contractors to meet talent needs before hiring full-time employees. And many do so because the total cost associated with full-time talent can be cost prohibitive—as much as 20-30 percent more

¹ See Engine’s Comments to the Department of Labor, available at: https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5ff89e9e9a51207ad9bfec45/1610129054934/engine_comments_-_independent_contractor_status_under_the_fair_labor_standards_act_-_rin_1235-aa34.pdf.

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

expensive than independent contractors.³ While the notice of proposed rulemaking argues that “withdrawal would not be disruptive because the rule has yet to take effect,” DOL fails to take into account the need for regulatory certainty on the part of startups. And the clarity the rule would have provided could have eased uncertainty in making talent decisions that startups may have difficulty shouldering—lessening a burden during the current economic climate.

The notice also questions whether the January 2021 rule would have actually provided the intended clarity in distinguishing between employees and independent contractors. As we noted in our previous comments, multiple courts have applied the previously relied upon economic reality test used to determine independent contractor status inconsistently, including when considering economic dependence.⁴ The January 2021 rule, in elaborating upon five factors to consider, gives weight to two core factors that are considered the most probative: the level of an individual’s control over their work and the worker’s opportunity for profit or loss. These two factors speak to the level of independence enjoyed by a worker and—when taken into account as part of DOL’s January 2021 rule—provide more certainty than using the status quo or relying upon conflicting court determinations. And while we noted in our previous comments that DOL could have provided more clarity—for example, specifically elaborating upon the weight given to the other factors—abandoning the rule in its entirety is not a step in the right direction and would not spur on a return to a more functioning system.

Failure to provide certainty for startups in making hiring decisions may ultimately have a big impact on their bottom lines. Even minute shifts in expenses can be enough to cause a startup to shut its doors. As Engine stated previously, “[u]sing independent contractors to meet startups’ talent needs can . . . 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.” This is especially critical today amidst an economy colored by the effects of the COVID-19 pandemic and the changing nature of work. The Biden administration has iterated several times, both before officially taking office and after, that small businesses and entrepreneurs play critical roles in the U.S. economy. In order to fully provide the entrepreneurial community with the support it needs, the White House should work to promote policies that bolster long-term confidence when it comes to accessing talent. The January 2021 rule is a small but important step in giving these businesses certainty in their talent decisions, which in turn helps small businesses thrive. As Engine has indicated in the past, “[a]lready 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.” DOL should rethink efforts to withdraw the January 2021 rule, and at minimum should consider exploring a viable alternative if the rule is in fact rescinded. Simply returning to the status quo forces startups to again contend with inconsistency that can be too time consuming and costly to navigate.

Engine appreciates the opportunity to provide feedback on the need for clarity with respect to independent contractor status. Regulatory clarity is crucial for startup operations, and being able

³ Engine, *supra* note 1.

⁴ *Id.*

to differentiate between an employee and an independent contractor with a level of certainty 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.