

December 13, 2022

VIA ELECTRONIC SUBMISSION: WWW.REGULATIONS.GOV

The Honorable Martin J. Walsh
Secretary of Labor
200 Constitution Avenue NW
Washington, DC 20210

Ms. Amy DeBisschop
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Ave., N.W.
Washington, DC 20210

Re: Notice of Proposed Rulemaking: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (Document ID: WHD-2022-0003-0001, RIN: 1235-AA43)

Dear Ms. DeBisschop:

We represent 28 startups, entrepreneur support organizations, incubators, and accelerators, who work to drive America's startup ecosystem through technology entrepreneurship, serving as and supporting America's innovators to create jobs, boost the economy, and develop novel technologies and services. While we are each at different stages of our startup journeys and have varying talent needs, we recognize the challenges faced by startups in hiring talent and the flexibility needed so that startups are able to staff and grow in a manner that suits our needs and lifecycles, and in turn allows for American innovation to thrive. Independent contract labor plays a crucial role in many startups' hiring toolkits. Efforts to restrict the ability of startups to hire talent, including independent contractors as needed, would stagnate the development of the startup ecosystem, adding yet another barrier founders must face on the risky path to startup growth.

Though innovation and entrepreneurship help form the backbone of the U.S. economy, most startups do not face an easy path to success, and many startups fail. U.S. startups most often launch with bootstrap budgets and limited staff. Founders often forgo salaries in an effort to grow their businesses, and talent decisions—including when and how to hire—are critical calculations for many startups. Though many associate the gig economy most closely with independent contractors, the reality is many startups and small businesses rely on contract labor to meet their talent needs.

One study of startup founders found that 79% of startups hire at least one contractor¹ and roughly 57% of startup executives indicated that contract labor is essential to their business models.² And startups have a need for contract labor that goes beyond the financial burdens associated with employing full time workers. The same survey found that 69% of founders indicated they hired independent contractors because “startups needed individuals for one-off projects or they needed specialized talent they could not hire full time.”³ Other top factors included the need for flexibility given the risky nature of startups and the need for flexibility because of fluctuations in demand for products and services.⁴ Therefore, it is not simply a matter of not having the resources to pay a salary and benefits package for employees right away, rather the nature of building a startup often does not necessitate bringing on full time employees in its initial stages, instead relying on project-by-project assistance from skilled contract workers.

Additionally, startup founders and small business owners similarly often do not have the capacity—due to financial or time constraints, or background knowledge—to confidently parse lengthy, complex regulatory requirements. The 2021 independent contractor rule sought to provide clarity for business owners in determining a worker’s designation as an employee or independent contractor, implementing a five-factor test, in which two core factors carried the most weight. But, through the proposed rule, the administration is suggesting a shift to a six-factor economic realities test to determine a worker’s economic dependence using a “totality of the circumstances” analysis, which is significantly more complex, and could result in increased costs and confusion for startup founders in need of talent. Per the proposed rule, economic dependence “does not focus on the amount of income earned, or whether the worker has other income streams.”⁵ Applying a multifactor test where no factor carries greater weight, and lacks direction, will limit the ability of startups to hire the contract labor they need, and opens startups up to significant costs they may not be able to afford. It will also take away the flexibility many workers want and need when choosing to become independent contractors. And the Department of Labor indicates that no differing compliance requirements will be given to small businesses, even though the cost of compliance will disproportionately affect startup businesses.

The Biden administration has repeatedly stressed the critical role small businesses fill in the U.S. economy,⁶ but the proposed rule and the complexity it brings undermines this belief. Instead of making it easier for founders and small business owners to grow their businesses and make calculated hiring decisions based on their needs, entrepreneurs will face greater uncertainty when

¹ Liya Palagashvili, *Exploring How Regulations Shape Technology Startups*.

https://www.mercatus.org/system/files/palagashvili_-_mercatus_research_-_exploring_how_regulations_shape_technology_startups_-_v1.pdf

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Employee or Independent Contractor Classification under the Fair Labor Standards Act, 87 FR 62218 (proposed Oct. 13, 2022).

⁶ See e.g., Small Business Administration. (2022, July 26). Biden-Harris Administration Awards Record-Breaking \$154.2 Billion in Contracting to Small Businesses [Press release].

<https://www.sba.gov/article/2022/jul/26/biden-harris-administration-awards-record-breaking-1542-billion-contracting-small-businesses>

classifying employees and independent contractors and could face significant consequences for making the wrong calculation. Startups face increased costs and they may be forced to turn to outside help (that many cannot afford) in order to decipher complex regulations. Because of this proposed shift, founders may be forced to forgo hiring the talent they need, slowing their growth, fearful of making the wrong employment determination, or be forced to hire not yet needed full time talent that they aren't yet able to afford in order to scale their businesses.

We strongly encourage the administration to abandon efforts to implement the proposed rule for determining employee or independent contractor classification. U.S. startups need certainty and flexibility when making talent decisions and the proposed rule unfortunately does not provide clarity to startup founders. This effort could stifle startup growth and lead to increased barriers that startups are ill-suited to shoulder.

Sincerely,

Abstract.US
Bryght Labs Inc
Center for American Entrepreneurship
Carefully, Inc.
Ecobot, Inc.
Fairshare Model
Forman Consulting
Grapefruit Health, Inc.
hobbyDB
iFixit
Jumpstart Nova
M1PR, Inc.
MITO material Solutions
Neolth

NetBeez, Inc.
nference
Patent Hacks, LLC
PIE
PIONEERS 21
R2
Radious, Inc.
Right to Start
Sapta Inc
Scroobious Inc.
Tampa Bay Wave
TheraTec, Inc
Tostie Productions, LLC
Voatz