COMMONWEALTH OF PENNSYLVANIA
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STATE OF NEW YORK
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April 12, 2021

Via Federal eRulemaking Portal (http://www.regulations.gov)

The Honorable Martin J. Walsh
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
United States Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Re: Notice of Proposed Rulemaking, *Independent Contractor Status Under the Fair Labor Standards Act; Withdrawal*, 86 Fed. Reg. 14,027 (Mar. 12, 2021), RIN: 1235-AA34

Dear Secretary Walsh and Director DeBisschop:

We write on behalf of the states of Pennsylvania, New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and the District of Columbia, in addition to the Minnesota Department of Labor and Industry, the Pennsylvania Department of Labor and Industry, and the Washington State Department of Labor and Industries, ("States") to support the proposed rulemaking by the U.S. Department of Labor ("DOL" or "Department"), 86 Fed. Reg. 14,027 (Mar. 12, 2021) ("Withdrawal NPRM"), to withdraw the Independent Contractor Rule, *Independent Contractor Status Under the Fair Labor Standards Act* ("Final Rule"). *See* 86 Fed. Reg. 1168 (Jan. 7, 2021). The States incorporate by

reference their previous comments on this rulemaking, including on the proposed rule and the proposed delay of the rule.[1]

I. The States Support the Department's Proposal to Withdraw the Final Rule.

The States welcome the Department's proposal to withdraw the Final Rule. First, withdrawing the rule would allow workers and businesses to continue recovering from the devastating effects of the COVID-19 pandemic. Second, the Final Rule is contrary to nearly 80 years of precedent interpreting the Fair Labor Standards Act ("FLSA"). Third, the Final Rule violates the Administrative Procedure Act's ("APA") rulemaking requirements because it fails to articulate a reasonable basis for its provisions, fails to consider the costs to workers, and lacks support for its proposition that it would be beneficial to workers. The Rule's withdrawal will not be disruptive because it has yet to go into effect, has not required substantial investment from the regulated community to prepare for its implementation, and has been legally vulnerable since its proposal.

A. Issuing the Final Rule in the Midst of the COVID-19 Pandemic is Indefensible.

The ongoing global pandemic has devastated the national economy. The month before DOL issued the Final Rule in January 2021, and almost a year into the pandemic, more than 4.4 million people filed initial claims for unemployment benefits.[2] The unemployment rate was 6.7 percent in December 2020 compared to 3.6 percent in December 2019.[3] Long-term unemployment and permanent job loss continue to grow. The high rate of unemployment puts workers at greater risk for wage and hour violations. While raising the rate of violations, high unemployment also decreases the likelihood of vulnerable workers filing complaints due to fear of losing their position. Since the beginning of the pandemic, the States' resources have been stretched thin under this increased enforcement burden.

Independent contractors have acutely experienced the harm of this economic downturn. Congress extended Pandemic Unemployment Assistance ("PUA") benefits to independent contractors who could not otherwise qualify for unemployment assistance ("UC"). The complications of administering this new program, combined with the vast number of claims for other benefits, have strained the States' resources for the last year. Independent contractors often cannot access other basic benefits, such as paid sick leave required by law, which many municipalities provide for in general or in COVID-19 related circumstances.

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[1] Coalition of State AGs, Request for Extension of Comment Deadline, *Independent Contractor Status Under the Fair Labor Standards Act* (Sept. 29, 2020), https://downloads.regulations.gov/WHD-2020-0007-0015/attachment_1.pdf; Coalition of State AGs, Comment Letter on Proposed Rule, *Independent Contractor Status Under the Fair Labor Standards Act* (Oct. 26, 2020), https://downloads.regulations.gov/WHD-2020-0007-1711/attachment_1.pdf; Coalition of State AGs, Comment Letter on Proposed Rule, *Independent Contractor Status Under the Fair Labor Standards Act: Delay of Effective Date* (Feb. 24, 2021), https://downloads.regulations.gov/WHD-2020-0007-3093/attachment_1.pdf.

[2] U.S. Dep't of Labor, Unemployment Insurance Weekly Claims Data (Dec. 2020-Jan. 2021), https://oui.doleta.gov/unemploy/claims.asp.

[3] U.S. Bureau of Labor Statistics, The Economic Daily, *South Dakota only state with lower unemployment rate for year ending December 2020* (Jan. 29, 2021), https://www.bls.gov/opub/ted/2021/south-dakota-only-state-with-lower-unemployment-rate-for-year-ending-december-2020.htm.

As highlighted in our prior comments, DOL issued the Final Rule in the midst of the COVID-19 pandemic. When it did so, DOL failed to address how the ongoing pandemic and record high rates of unemployment would increase the vulnerability for misclassified workers, who have even less bargaining power than usual to demand fair conditions given the scarcity of work. Furthermore, DOL's analysis relied on data collected prior to 2020, which reflects the state of the economy prior to the COVID-19 pandemic.

Despite the strain the pandemic puts on workers and the States, DOL moved forward with restructuring the long-established test for determining whether a worker is an employee or an independent contractor. The Final Rule would have led employers to reclassify many employees as independent contractors overnight in an attempt to apply the new test and save on employment costs. That kind of mass reclassification and the disruption to benefits, tax administration, and the economy it would cause is exactly the reason DOL gave for declining to institute the ABC test.[4] *See* 85 Fed. Reg. at 60,636.

The Final Rule would harm workers, the States, and responsible businesses. The consequences of reclassification and misclassification at this time are concerning to workers who rely on workplace protections and benefits available only to employees. Those protections include employer-provided health insurance and paid leave programs. The risk of reclassification is also a significant concern to the States, whose agencies have been processing record numbers of unemployment claims and implementing new programs in conjunction with federal agencies. Such disruption would undermine the States' efforts to administer their unemployment insurance and Pandemic Unemployment Assistance programs. Classification and unemployment insurance payments are particularly crucial to workers during a time where there are sustained, record levels of unemployment. And responsible businesses that properly classify their employees and pay into unemployment funds, devastated by the effects of the pandemic and forced to reduce costs, will bear the brunt of replenishing the depleted funds as a result of the Rule.

The following data demonstrate the scale of the economic impact of the pandemic and complications of administering separate programs from unemployment compensation and expanded assistance:

- Pennsylvania has received 2,831,265 unemployment compensation claims in the last year, a record number, and an additional 2,278,854 claims for Pandemic Unemployment Assistance.[5] The "accommodation and food services" industry accounted for the highest number of both PUA and UC initial claims, and UC continuing claims.[6]

[4] The ABC test provides that a worker is an employee unless all three elements of the test are met, with the burden of proof on the employer. The three elements are: (1) the worker is "free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact"; (2) the worker must provide a service "outside the usual course of business of the employer"; and (3) the worker must be "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed." Massachusetts Office of Attorney General, *An Advisory from the Attorney General's Fair Labor Division on M.G.L. c. 149, s. 148B 2008/1*, https://www.mass.gov/doc/attorney-generals-advisory-on-the-independent-contractor-law/download.

[5] Data on file with author.

[6] Data on file with author.

- Delaware received a record number of 194,753 initial UC claims from March 2020 to March 2021, compared to approximately 26,000 in the year prior to the pandemic. Delaware has paid more than $1.1 billion in benefits.[7]
- Illinois has received 2,916,151 initial claims for UC.[8] The "leisure and hospitality" industry has accounted for the highest number of UC claims. And if the Final Rule's effect of increasing misclassification of employees as independent contractors were realized, Illinois workers, employers, health providers, taxpayers, and the public would incur substantial costs.[9]
- Maryland has received over 1.77 million UC claims since March 2020, with the largest number of claims from the "accommodation and food services" sector.[10]
- Michigan received more than 4.3 million initial UC claims in 2020, an increase of 1200 percent from the prior six years, with call centers and restaurants/bars representing some of the largest portion.[11]
- Minnesota received at least 1,246,092 UC claims in 2020, with the largest number from the "accommodation and food services" industry.[12]
- New Jersey reported a record 2,000,000 initial UC claims in 2020 compared to 2.1 million total claims from 2016-19, with the "accommodation and food services" industry creating the most claims.[13]
- Virginia received 1,371,777 initial UC claims in 2020, a record number, with "accommodation and food services" generating the most claims.[14]
- Vermont reported 110,371 new UC claims in 2020 and 23,883 PUA claims.[15]
- The State of Washington has paid more than $15.8 billion in benefits to more than 1,000,000 claimants, a larger number than even during the Great Recession, with the most jobs lost in the "leisure and hospitality" industry.[16]
- Washington, D.C., received 190,225 UC claims between March 13, 2020 and April 8, 2021, as compared to only 37,720 for all of 2019.[17] There, too, service industry occupations filed high numbers of claims.

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[7] Data on file with author.
[8] U.S. Bureau of Labor Statistics, Illinois Monthly Program and Financial Data Report (Jan. 2020-Dec. 2020), https://oui.doleta.gov/unemploy/claimssum.asp.
[9] *See* Michael P. Kelsay, et al., The Economic Costs of Employee Misclassification in the State of Illinois, 11–14 (2006), http://www.faircontracting.org/wp-content/uploads/2012/09/Illinois_Misclassification_Study.pdf.
[10] Data on file with author.
[11] Data on file with author.
[12] Data on file with author.
[13] Data on file with author.
[14] Data on file with author.
[15] Data on file with author.
[16] Data on file with author. Washington State Employment Security Department, April 2020 Monthly Employment Report, https://esdorchardstorage.blob.core.windows.net/esdwa/Default/ESDWAGOV/labor-market-info/Libraries/Economic-reports/MER/MER_2020/MER-2020-04.pdf.
[17] DC Dep't of Employment Services, Unemployment Compensation Claims Data, https://does.dc.gov/publication/unemployment-compensation-claims-data (last visited Apr. 12, 2021); Eliza Berkon and Rachel Sadon, *More Than 50,000 People Have Filed For Unemployment In D.C.*, DCIST (Apr. 5, 2020), https://dcist.com/story/20/04/05/more-than-50000-people-have-filed-for-unemployment-in-d-c/.

Independent contractors or those workers that do not know their classification face significant challenges in obtaining benefits. In many jurisdictions, to qualify for PUA, a worker must first receive a determination that they are not eligible for UC benefits. This extra step has been confusing for applicants and difficult to administer, resulting in denials, delays, and sometimes overpayments. And while UC applicants typically have W-2 wage history on file with the agency, PUA applicants do not. If an individual seeks more than the minimum PUA weekly benefit amount, they must provide documentation to establish their entitlement to the higher amount. The Continued Assistance Act also established a new documentation requirement that PUA applicant provide documentation of employment, self-employment, or planned commencement of employment or self-employment. This left un- and underemployed workers with a higher documentation burden than typical UC applicants. And many independent contractors routinely itemize their expenses and report a loss or minimal income, reducing their PUA eligibility amount.

The pandemic has also exacerbated ongoing misclassification issues in the online platform sector. In Pennsylvania and Washington, D.C., Attorneys General Josh Shapiro and Karl A. Racine negotiated separate landmark public-private collaborations with Instacart to expand support to gig economy workers during the COVID-19 pandemic, including financial assistance to take time off for COVID-19 illness or quarantine, subsidized telehealth access, and childcare-related support.[18] Pennsylvania also negotiated a similar deal with DoorDash.[19] In Massachusetts, Attorney General Maura Healey pursued several enforcement actions against companies that use online platforms to hire and control their workers, including Uber, Lyft, Stynt, Inc., and Delta T Group, that have misclassified their workers, depriving them of legal rights and benefits.[20]

The pandemic has emphasized the importance of employee classification as a means to access vital safety net programs and other protections. For example, many protections for employees contain anti-retaliation provisions that do not extend to independent contractors. *See, e.g.*, 740 Ill. Comp. Stat. 174/5 (2011). At the same time, many of the States report increased

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[18] Office of Attorney General for the District of Columbia, AG Racine Secures Instacart Agreement to Expand COVID-19 Paid Sick Leave for Grocery Delivery Workers (June 2, 2020), https://oag.dc.gov/release/ag-racine-secures-instacart-agreement-expand-covid; Pennsylvania Office of Attorney General, AG Shapiro and Instacart Announce Expanded Gig Worker Protections for Pennsylvanians During Covid-19 Emergency (June 2, 2020), https://www.attorneygeneral.gov/taking-action/covid-19/ag-shapiro-and-instacart-announce-expanded-gig-worker-protections-for-pennsylvanians-during-covid-19-emergency/.

[19] Pennsylvania Office of Attorney General, AG Shapiro and Doordash Announce Expanded Gig Worker Protection During Covid-19 Emergency (May 4, 2020), https://www.attorneygeneral.gov/taking-action/covid-19/ag-shapiro-and-doordash-announce-expanded-gig-worker-protection-during-covid-19-emergency/.

[20] The Commonwealth of Massachusetts Office of the Attorney General, AG Healey: Uber and Lyft Drivers are Employees Under Massachusetts Wage and Hour Laws (July 14, 2020), https://www.mass.gov/news/ag-healey-uber-and-lyft-drivers-are-employees-under-massachusetts-wage-and-hour-laws; The Commonwealth of Massachusetts Office of the Attorney General, AG Healey Issues Statement in Response to Court Decision Denying Uber and Lyft's Motion to Dismiss (March 25, 2021), https://www.mass.gov/news/ag-healey-issues-statement-in-response-to-court-decision-denying-uber-and-lyfts-motion-to-dismiss; The Commonwealth of Massachusetts Office of the Attorney General, Staffing Agency Agrees to Treat Workers as Employees in Agreement with AG's Office (February 24, 2020), https://www.mass.gov/news/staffing-agency-agrees-to-treat-workers-as-employees-in-agreement-with-ags-office (Following wage and hour investigations out of the Massachusetts Attorney General's Office, Delta T Group and Stynt, Inc.—two internet based staffing agencies—agreed to change their business models and properly classify workers as employees.).

difficulty in conducting site visits during the pandemic, a crucial enforcement tool. The pandemic recession has been the worst since the Great Depression in terms of the number of unemployed workers, and has demonstrated the vulnerability of workers typically not eligible for benefits, misclassified workers, and bona fide independent contractors.

B. The Final Rule Violates the Administrative Procedure Act Because It Is Contrary to the Fair Labor Standards Act and Controlling Interpretations of the Act.

As discussed in the States' earlier comments on this issue, the Final Rule defies how the FLSA defines employment. And like those comments, the Withdrawal NPRM correctly identifies ways in which the Final Rule conflicts with the FLSA. For the same reasons presented in both the States' earlier comments and in the Withdrawal NPRM, the States agree that the Final Rule must be withdrawn for DOL to faithfully enforce the FLSA.

The FLSA was enacted "in the midst of the Great Depression [] to combat the pervasive 'evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.'" *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 132 (4th Cir. 2017) (quoting S. Rep. No. 75-884, at 4 (1937)). Its protections apply to employment relationships, and it defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d), "employee" as "any individual employed by an employer," *id.* at 203(e)(1), and "employ" "includes to suffer or permit to work," *id.* at 203(g). These definitions extend the FLSA's protections to a wide range of employment arrangements. In fact, the term "employee" was "given 'the broadest definition that has ever been included in any one act.'" *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (1937) (statement of Sen. Hugo Black)). While the FLSA broadly defines employment to capture diverse professional relationships, its protections are limited to employees. Independent contractors are not covered.

To give effect to the FLSA's intentionally broad definition of employment, courts determine if an employment relationship exists through a holistic evaluation of the economic realities of that relationship. The Supreme Court first announced the economic reality test in the context of the National Labor Relations Act ("NLRA") and Social Security Act ("SSA"). *See NLRB v. Hearst Publications*, 322 U.S. 111, 129 (1944) (analyzing "employee" under the NLRA based on "the facts involved in the economic relationship"); *United States v. Silk*, 331 U.S. 704, 713, 716 (1947) (analyzing "employee" under the SSA and describing analysis set forth in *Hearst* as considering whether workers were "employees" "as a matter of economic reality"). The Court applied the economic reality test to the FLSA the day it decided *Silk*. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947).

In *Silk*, the Court explained that "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete." 331 U.S. at 716. Then, in *Rutherford*, the Court found that the "[the NLRA and SSA] are persuasive in the consideration of a similar coverage under the [FLSA]," and applied the *Silk* factors, adding a sixth—whether the workers formed "part of [an] integrated unit of production." 331 U.S. at 723-24, 729. The Court held that the "determination of the relationship does not depend on . . .

isolated factors but rather upon the circumstances of the whole activity." *Id.* at 730. These seminal cases exhibit that whether someone is an employee depends on each listed factor, none of which is more important than any other.

Since *Rutherford*, the Supreme Court has reaffirmed that "'economic reality' rather than 'technical concepts' is to be the test of employment." *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (internal citation omitted); *see also Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) ("[t]he test of employment under the Act is one of 'economic reality'"). In determining that the homeworkers in question in *Goldberg* were employees, the Court noted that the workers were not "self-employed" or "independent, selling their products on the market for whatever price they can command." 366 U.S. at 32. Even though the workers were formally organized as a cooperative, the Court found controlling that the workers were "regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates," and that the "management . . . can hire or fire the homeworkers." *Id.* at 32-33. In *Alamo Foundation*, the Court likewise put little stock in the formalities of the employment arrangement; it focused on the fact that the workers were "entirely dependent upon the Foundation for long periods, in some cases several years." *Alamo Found.*, 471 U.S. at 301 (citation omitted).

In each of the cases, the Court has examined facts relevant to the economic reality of the relationship before it, but it has never endorsed any specific factors as priorities or elevated above all others. *See, e.g.*, *Rutherford*, 31 U.S. at 730; *Goldberg*, 366 U.S. at 33; *Alamo Found.*, 471 U.S. at 301. For over seventy years, the Supreme Court has rejected a focus on "isolated factors," insisting instead that whether a worker is a covered employee requires considering "the circumstances of the whole activity." *Rutherford*, 331 U.S. at 730. Because it is well settled that "[a]ll [the Court's] interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme," *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015), and the Supreme Court has continued to apply a holistic, economic reality test, that is the interpretation of the FLSA to which the Department must adhere.

Circuit courts, too, have uniformly applied this flexible test, typically considering: (1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers; (4) whether the service rendered requires a special skill; (5) the degree of permanency and duration of the working relationship; and (6) the extent to which the service rendered is an integral part of the alleged employer's business. *See Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1312 (11th Cir. 2013) (citations omitted); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–59 (2d Cir. 1988) (citations omitted). "No one of these factors is dispositive; rather, the test is based on the totality of the circumstances." *Superior Care*, 840 at 1059 (citations omitted).

The Final Rule broke from this well-established understanding of how employment is judged for purposes of the FLSA. The Withdrawal NPRM correctly identifies three ways in which that is so.

First, the Final Rule elevated two factors—control and opportunity for profit or loss—as being most probative of the economic reality of a professional relationship. 86 Fed. Reg. at 1246–47. At the same time, the Final Rule relegated multiple factors that courts have judged to be as relevant to a worker's economic reality as any other factor, including a worker's investment in facilities, the amount of skill required for the work, the degree of permanence of the relationship, and whether the work is part of an integrated unit of production. With these changes, the Final Rule codified a standard that unreasonably excludes relevant criteria from the determination of whether a worker is covered by the FLSA and jettisoned the definition of employment that flexibly accounts for the full details of a working relationship, as decades of precedent require. These changes implement a narrowed test that prioritizes particular factors that favor independent contractor status, and ignore that the primary aim of the FLSA is to "protect all covered workers from substandard wages and oppressive working hours . . . ." *New York v. Scalia*, 464 F. Supp. 3d 528, 533 (S.D.N.Y. 2020) ("*Scalia I*") (quoting *Mei Xing Yu v. Hasaki Rest., Inc.*, 944 F.3d 395, 402 (2d Cir. 2019)). The States agree with the Withdrawal NPRM, 86 Fed. Reg. at 14,031–32, that DOL cannot enforce the Final Rule and remain true to the FLSA.

Second, the Final Rule was wrong not only to elevate any one relevant factor over another in an assessment of a worker's economic reality, but also to elevate control in particular. As discussed, the FLSA uses an intentionally broad definition of employment, which expands the statute's protections to a class of workers greater than just those who would satisfy a common law understanding of employment based largely on the degree of control. *See, e.g.*, *New York v. Scalia*, 490 F. Supp. 3d 748, 787 (S.D.N.Y. Sept. 8, 2020). The Final Rule's emphasis on control reverts back to the common law standard. The Department is correct that this, too, requires withdrawal of the Final Rule. *See* Withdrawal NPRM, 86 Fed. Reg. at 14,032–33.

Third, the Final Rule recast the de-prioritized factors relevant to a worker's economic realities in a way that is contrary to law, and that unduly narrows the class of workers protected under the FLSA. In the Final Rule, DOL announced that "whether the work is part of an integrated unit of production" is a factor relevant to a worker's economic reality. 86 Fed. Reg. at 1247. Yet under well-established circuit court precedent, the relevant inquiry is whether the worker's work is "an integral part of the business," which could be satisfied by being part of an integrated unit, or by being integral to the business. *See, e.g.*, *Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989) (explaining "many courts have examined whether or not the type of work performed by the alleged employees is an integral part of the business" and concluding that the work performed by cake decorators is "obviously integral to the business of . . . selling cakes which are custom decorated"); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1537-38 (7th Cir. 1987) ("It does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business . . . .").

The Final Rule also unduly narrowed the existing factors when it emphasized that evaluating whether an employment relationship exists should rely heavily on actual practice. 86 Fed. Reg. at 1247; 86 Fed. Reg. 14,033-34. That instruction is contrary to law, and contributes to the Final Rule having narrowed employment even further than it was understood at common law. *See, e.g.*, *New York v. Scalia*, 490 F. Supp. 3d 748, 787–88 (S.D.N.Y. Sept. 8, 2020) (vacating DOL's final rule regarding the definition of "joint employment" under the FLSA, discussing the rule's requirement that a putative joint employer must "actually exercise" control as, read

generously, equivalent to the common law standard, while the FLSA definitions broadened the common law conception). In *Scalia*, the court held that DOL had improperly narrowed the "control" factor of the inquiry to the common law standard, displacing the FLSA's broad definitions of "employer," "employee," and "employ." Here, DOL's focus on the "primacy of actual practice" suffers from the same flaw. While the "economic reality" test must consider actual practice, reserved authority will often influence how two parties interact, and cannot be disregarded. *See Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 142 (2d Cir. 2017) ("[I]t is not what [Plaintiffs] *could* have done that counts, but as a matter of economic reality what they actually *do* that is dispositive.") (citation omitted).

All together, these changes do not offer a clearer restatement of the economic reality test; instead, they rewrite the law to tip the scales in favor of finding a worker is an independent contractor. Withdrawing the Final Rule is necessary to ensure workers who are employees receive the FLSA's protections.

C. The Final Rule Violates the APA Because It Fails to Offer a Reasoned Explanation for Its Provisions and Fails to Consider Its Costs to Workers.

The APA requires arbitrary and capricious agency rulemaking to be held unlawful and set aside. 5 U.S.C. § 706(2)(A). An agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation omitted). And when confronted with contrary evidence, the agency must treat it in more than a conclusory fashion. *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008). Because the Final Rule does neither, it should be withdrawn.

The Final Rule fails even the relatively low bar of APA review because it does not accomplish its stated purposes, does not adequately consider its potential effects, and dismisses contrary evidence. The Final Rule would not "significantly clarify to stakeholders how to distinguish between employees and independent contractors under the Act." 86 Fed. Reg. 1168; 86 Fed. Reg. 14,034. As discussed above, the Final Rule would implement a distorted version of the economic reality test that neither DOL nor any court has applied. As a result, it would require clarification of its contours through administrative procedure and litigation. As the Withdrawal NPRM accurately notes, it remains unclear how the two "core factors" will influence the analysis, as well as the narrowing of the other factors. 86 Fed. Reg. at 14,034. As an example, changing the inquiry from whether the work "is an integral part" of the employer's business to whether it is "part of an integrated unit of production" could significantly narrow the scope of the economic reality inquiry and result in more workers being considered independent contractors despite the fact that they are not in business for themselves. *See id.*

The Final Rule failed to consider the costs and benefits of the rule, summarily concluding that it would benefit workers as a whole. The Final Rule attempted to quantify only regulatory familiarization costs and savings from increased clarity and reduced litigation. 86 Fed. Reg. 1211. It utterly failed to quantify all other costs and benefits of the rule, including "possible transfers among workers and between workers and businesses." *Id.* at 1214-16. The Final Rule goes so far as to opine, theoretically, that "independent contractors would earn more per hour than traditional employees in base compensation as an offset to employer-provided benefits and

increases in tax liabilities." *Id.* at 1219. But that assertion is without evidentiary support and fails to note whether any increase to base pay is sufficient to "offset" the loss of benefits and increased tax liability. Faced with the Economic Policy Institute's ("EPI") analysis that the proposed rule would result in a transfer of $3.3 billion per year from workers to employers, the Final Rule merely criticizes the analysis and dismisses it as flawed.[21] But the Final Rule does not substitute its own reasoned estimate, summarily concluding that its asserted benefits to workers are "difficult to quantify" and that "workers as a whole will benefit from [the Final Rule]." 86 Fed. Reg. at 1222-23.

The States thus agree with the Withdrawal NPRM that the Final Rule did not "fully consider[] the likely costs, transfers, and benefits that could result from the [Final] Rule." 86 Fed. Reg. at 14,035. In addition to the harms to workers, withdrawing the protection of the FLSA from more workers will increase the administrative and enforcement burden on states to protect their residents from workplace violations.[22]

II. DOL Should Withdraw the Rule.

The States agree that withdrawal of the Final Rule would not be disruptive because it has yet to take effect, 86 Fed. Reg. at 14,035, and has not required the substantial expenditure of compliance resources from the regulated community. Moreover, its legality has been called into question since its inception, so it has not engendered substantial reliance interests. While the Final Rule's provisions would result in billions in transfers and costs, it does so only by changing the standard against which worker classifications are measured; that is, it is an interpretive rule that requires no immediate action by the regulated community. In addition, from its initial proposal to the present, the States and other commenters have consistently questioned its legality due to its departure from the FLSA and violation of APA-required procedures. No reasonable entity could have relied on it to go into effect without significant change, if at all.

The States appreciate this opportunity to comment on the proposed withdrawal and strongly support the Department's proposal.

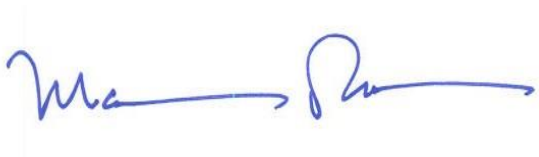
Sincerely,

Josh Shapiro
Pennsylvania Attorney General

Letitia James
New York Attorney General

[21] Economic Policy Institute, EPI comments on independent contractor status under the Fair Labor Standards Act (Oct. 26, 2020), https://www.epi.org/publication/epi-comments-on-independent-contractor-status-under-the-fair-labor-standards-act/.

[22] *See* Coalition of State AGs, Comment Letter on Proposed Rule, *Independent Contractor Status Under the Fair Labor Standards Act*, 8-11 (Oct. 26, 2020), https://downloads.regulations.gov/WHD-2020-0007-1711/attachment_1.pdf.



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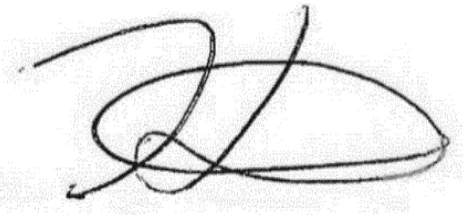
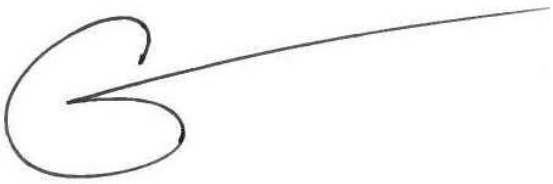
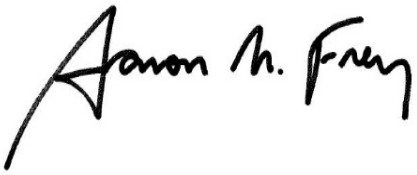


Karl A. Racine
Attorney General for the District of Columbia

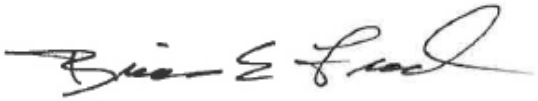


Clare E. Connors
Hawaii Attorney General

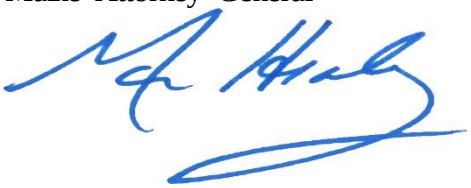
Kwame Raoul
Illinois Attorney General



Aaron M. Frey
Maine Attorney General



Brian E. Frosh
Maryland Attorney General



Maura Healey
Massachusetts Attorney General

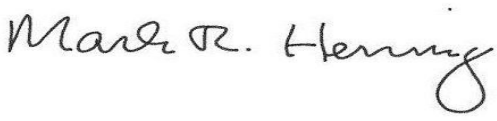
Dana Nessel
Michigan Attorney General

Keith Ellison
Minnesota Attorney General

Gurbir S. Grewal
New Jersey Attorney General

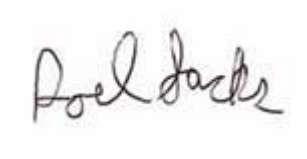
Joshua H. Stein
North Carolina Attorney General

Peter F. Neronha
Rhode Island Attorney General



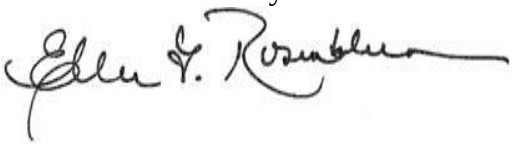
Mark R. Herring
Virginia Attorney General

Roslyn C. Robertson, Commissioner
Minnesota Department of Labor and Industry



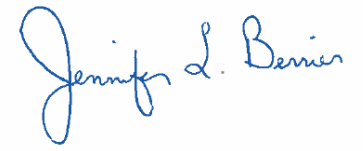
Joel Sacks, Director
Washington State
Department of Labor & Industries

Hector Balderas
New Mexico Attorney General



Ellen F. Rosenblum
Oregon Attorney General

Thomas J. Donovan, Jr.
Vermont Attorney General



Jennifer Berrier, Acting Secretary
Pennsylvania Department of Labor and Industry