

ANALYZING THE IMPACT OF THE DEPARTMENT OF LABOR'S RULE ON RESTRICTING INDEPENDENT CONTRACTING

LIYA PALAGASHVILI

Senior Research Fellow, Mercatus Center at George Mason University

Employee or Independent Contractor Classification under the Fair Labor Standards Act
Agency: US Department of Labor, Wage and Hour Division
Comment Period Opens: October 13, 2022
Comment Period Closes: December 13, 2022
Comment Submitted: December 13, 2022
Docket No. WHD-2022-0003
RIN: 1235-AA43

The US Department of Labor (DOL) has proposed a rule change to the “economic realities test” for determining whether a worker is an employee or independent contractor for the purposes of the Fair Labor Standards Act (FLSA).¹ I am grateful for the opportunity to submit a comment to the DOL in response to its proposed rule. The Mercatus Center at George Mason University is dedicated to advancing knowledge about the effects of regulation and policy on society. Accordingly, my comment is designed to aid the DOL as it considers the impact of the rule.

This comment assesses whether the DOL meets the requirements of Executive Order 13563 by providing an appropriate and “reasoned determination that [the rule’s] benefits justify its costs.”² The DOL’s proposed rule narrows the definition of “independent contractor.”³ The proposed rule does this first by retracting the 2021 rule that was more favorable to the independent contractor status and second by providing additional considerations to the six-factor economic realities test that significantly limit the circumstances under which a worker can legally be classified as an independent contractor.

My assessment is based on the latter component—the additional considerations included by the DOL for the economic realities test. In particular, the changes to the factors on “nature and degree of control” and “investment by the worker and employer” severely limit the ability for workers to be classified as independent contractors and create more complexity in determining whether a worker is indeed an independent contractor. Therefore, even if a worker is, in theory, properly classified as an

1. Liya Palagashvili is a senior research fellow at the Mercatus Center at George Mason University and formerly an assistant professor of economics at Purchase College, State University of New York.

2. Exec. Order No. 13563, 76 Fed. Reg. No. 3821 (January 21, 2011).

3. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218 (October 13, 2022).

independent contractor, the additional considerations add sufficient complexity to deter organizations, especially small businesses, from working with independent contractors altogether.

The DOL's additional considerations to the economic realities test do not adhere to Executive Order 13563 for two main reasons:

- A. The DOL does not provide a "reasoned determination" that the benefits of the additional considerations to the economic realities test justify its cost.⁴

To assist the DOL in providing a reasoned determination, I outline the potential impact and cost considerations discussed later in this comment. Although costs and benefits are difficult to quantify, the DOL still must attempt to provide a fair and accurate cost-benefit assessment. This means the DOL should at least include ranges of estimates where specific numbers are unknown. Given how the proposed rule currently reads, the DOL seems to deliberately leave out the most significant negative consequences, in violation of Executive Order 13563. Notably, the DOL implicitly assumes that 100 percent of potential contracting jobs will be turned into employment jobs; this assumption is extremely optimistic and downplays very significant consequences in connection with the rule in question. In addition, the only cost that DOL does include is "rule familiarization costs," and it does not attempt to provide a proper impact analysis of the proposed rule.

- B. The DOL does not "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives."⁵ As described earlier, there are two parts to the DOL rule: (1) the rescinding of the 2021 rule and (2) the new modifications to the six-factor economic realities test. The DOL does confirm that the primary benefits of the proposed rule come from rescinding the 2021 rule. However, as detailed later in this comment, the most significant negative costs of the proposed rule come from the new considerations added to the factors of the economic realities test. Therefore, it seems that the DOL would be obligated to tailor the regulation to only rescind the 2021 rule, because that part of the rule imposes the least burden on society while still meeting the overall regulatory objectives.

For the DOL to impose both parts of the rule whilst following the executive order, it would first be required to disentangle and carefully quantify each of the two parts of the rule. As the proposed rule reads now, it seems to indicate that rescinding the 2021 rule is sufficient to meet the regulatory objectives without imposing the additional burdens on society that are unleashed by adding the new considerations to the economic realities test.

There are five considerations that the DOL has not included in providing a reasoned determination of the costs and benefits, of which the first is the most significant because it presents a clear risk that the rule would not confer its intended benefits on most independent contractors, who would neither become employees nor be able to maintain their jobs as independent contractors. The loss of independent contracting jobs could further harm workers who may already be suffering from hiring freezes and layoffs as the United States enters a recession.

1. *Impact on job losses.* The DOL makes an implicit assumption that 100 percent of workers who are impacted by this rule will be extended employment opportunities. This also allows the DOL to treat

4. Exec. Order No. 13563, 76 Fed. Reg. 3821 (January 21, 2011).

5. Exec. Order No. 13563, 76 Fed. Reg. 3821 (January 21, 2011).

all changes as mere transfers between employers and workers.⁶ This is not a reasonable assumption because contracting opportunities will not automatically be turned into employment opportunities, as demonstrated by recent research. If a large number of contractors lose their jobs, the aggregate benefit of a reclassification of workers may not offset its aggregate cost. Based on recent research, the DOL should provide a cost-benefit analysis of its rule that accounts for at least 58 percent of workers losing their contracting jobs.

2. *Impact on workers who recently faced unemployment or income loss.* Decades of economics research shows that independent contracting is an important source of income for those who have recently faced income loss and unemployment. Therefore, the loss of independent contracting opportunities would cause particular harm to these vulnerable individuals. As a recession looms and with employment opportunities becoming scarce, the DOL should assess how limiting contracting opportunities would further impact unemployment during a recession.
3. *Impact on majority of workers who value their labor relationship under contract.* The DOL must contend with the fact that a majority of independent contractors (79 percent) prefer their nontraditional job arrangements over a traditional employment arrangement because independent work provides far more flexibility in terms of work schedule. It is worth noting that this fact was established by DOL's own Bureau of Labor Statistics. Work schedule flexibility in nontraditional arrangements gives workers more freedom to choose what time to work and how often to work. By contrast, traditional employment often means a specified schedule (e.g., nine-to-five) and a specified quantity of work (e.g., 48 weeks a year).
4. *Impact on women's labor force participation rate.* Restricting independent contracting opportunities and reclassifying independent work as traditional employment would disadvantage many women who turn to independent work for the flexibility they need in their work schedules.
5. *Impact on workers who had a criminal record.* Restricting independent work would disproportionately harm workers who had a criminal record because, as recent evidence shows, the gig economy is providing an important avenue of work for those who previously had a criminal record.

SUBSTANTIAL JOB LOSSES FOR INDEPENDENT CONTRACTORS

The DOL does not examine the most significant potential consequence of the rule. If the costs are properly assessed, it may be the case that the DOL rule does not pass the cost-benefit analysis.

There are no research studies that support the DOL's implicit assumption that there will be zero contracting job losses and that 100 percent of impacted independent contractors will be extended employment positions. This unrealistic assumption also allows the DOL to treat all changes as mere transfers between employers and workers.⁷ Although the existing research is limited, it does indicate that there would be job losses because not all independent contractors would be hired as employees. A recent report estimates the impact of reclassifying ridesharing and delivery drivers as employees in Massachusetts. Using private data from Uber, Lyft, Instacart, and Doordash, the report finds that reclassifying drivers "would result in a loss of at least 49,270 app-based TNC and DNC jobs in

6. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62218, 62267-68 (October 13, 2022).

7. The DOL treats employer-provided fringe benefits, tax liabilities, minimum wage, and overtime all as potential transfers from employers to workers.

Massachusetts, which is equivalent to losing 58% of these earning opportunities in the state.⁸ The upper-bound estimate in the report finds that these job losses could be as great as 73,657, which is equivalent to losing 87 percent of these earning opportunities. The DOL should include at least one cost-benefit estimation that assumes that 58 percent of jobs will be lost.

Further illustrating the point that assuming 100 percent of contracting jobs will become employment jobs is unreasonable is a report by the California Legislative Analyst's Office in response to California's AB 5, which is more restrictive than the DOL rule for independent contractors, but is nonetheless illustrative that zero contracting losses is an improper assumption. The DOL should examine this report. The report concludes that "we cannot predict the exact number of contractors who will become employees due to AB 5. Although we cannot predict the exact figure, it is probably much smaller than the roughly 1 million contractors that AB 5 applies to."⁹ One of the primary reasons the office expected this outcome is that "businesses will comply with the law in different ways. Some businesses may hire their contractors as employees, while others may hire some, but not all, of their contractors. Other businesses may decide to stop working with their California-based contractors."¹⁰

There is some anecdotal evidence of these job losses in response to AB 5. For example, the *Los Angeles Times* reports job losses in the creative community of independent workers such as professional choral artists, classical performers and singers, dancers, actors, musicians, and other types of artists.¹¹ Several other news articles report harm and job losses for translators and interpreters, court transcript editors, musical performers, writers, and truck drivers.¹² In December 2019, the American Society of Journalists and Authors (the nation's largest professional organization of independent nonfiction writers) and the National Press Photographers Association (a leading professional organization for visual journalists) filed a lawsuit on behalf of their members because of harm from AB 5—in particular, harm resulting from a significant loss of freelancing opportunities for their members.¹³ Indeed, the *New York Times* reports that Vox Media had to terminate 200 freelance writers in response to the law.¹⁴ Because of these challenges, after the passage of AB 5, California added 53 occupations to its list of occupations exempt from the law, bringing the total to 110.

8. Taner Osman, *How Many App-Based Jobs Would Be Lost by Converting Rideshare and Food Delivery Drivers from Independent Contractors to Employees in the Commonwealth of Massachusetts?* (Los Angeles, CA: Beacon Economics, 2022).

9. "Staffing to Address New Independent Contractor Test," California Legislative Analyst's Office, February 11, 2020, <https://lao.ca.gov/Publications/Report/4151>.

10. "Staffing to Address New Independent Contractor Test."

11. Makeda Easter, "The AB5 Backlash: Singers, Actors, Dancers, Theaters Sound Off on Freelance Law," *Los Angeles Times*, February 12, 2020.

12. Sophia Bollag and Dale Kasler, "California Workers Blame New Labor Law for Lost Jobs. Lawmakers Are Scrambling to Fix It," *Sacramento Bee*, February 10, 2020; Carolyn Said, "Musicians Say AB5 Strikes Sour Note with Gig-Driven Profession," *San Francisco Chronicle*, February 24, 2020; Clarissa Hawes, "Some California Truckers Exit State before AB5 Labor Law Takes Effect," *FreightWaves*, December 31, 2019; Allana Akhtar, "It Feels Cold and Heartless: Hundreds of California Freelancers Have Been Fired before the Holidays over a State Law Meant to Help Uber and Lyft Drivers," *Business Insider*, December 18, 2019; Robert Frank, "Translators and Interpreters Unite to Demand AB5 Exemption," *EIN Presswire*, April 22, 2020.

13. The lawsuit was filed on December 17, 2019, and the legal filings show that the threat of enforcement had already resulted in lost freelancing opportunities even before the law went into effect on January 1, 2020 (in addition to other cited damages from AB 5). American Society of Journalists and Authors, Inc. v. Xavier Becerra, Case No. 2:19-cv-10645 (2019).

14. Marc Tracy and Kevin Draper, "Vox Media to Cut 200 Freelancers, Citing California Gig-Worker Law," *New York Times*, December 16, 2019.

The estimates and anecdotal evidence of job losses seem consistent with estimates of the cost of reclassifying independent workers as employees. One study finds that having an employee costs a business between 29 and 39 cents extra for every dollar of the employee’s pay.¹⁵

Owing to these substantial additional costs, organizations—especially small organizations—may not be able to hire all their independent contractors as employees. In fact, according to tax data, between 2000 and 2016, small firms (those with fewer than 20 employees) saw the greatest growth in the hiring of independent contractors, compared with medium-sized or large firms.¹⁶

This situation has several implications for discussions about the benefits of the new DOL rule. Some independent contractors would be better off as employees because of the value of the benefits they would receive as employees, such as paid leave, a minimum wage, overtime regulations, insurance benefits, workers’ compensation, and so on.¹⁷ One point of reference is provided by Heidi Shierholz, a senior economist at the Economic Policy Institute, who estimates that employees at the bottom of the pay scale would experience a drop of 25.7 percent in compensation if they were reclassified as independent contractors.¹⁸

Shierholz’s estimate suggests that making the opposite change, reclassifying contractors as employees (the way the DOL does), would increase their compensation by up to 34.6 percent. It seems reasonable to expect that stricter rules on the classification of workers as independent contractors would consequently translate into significant gains for the workers who become reclassified as employees. However, many independent contractors would not receive these benefits because they would end up without jobs—either as employees or as independent contractors. This is why the DOL cannot treat 100 percent of impacted workers’ benefits as mere transfers between employers and workers.

If a large number of contractors lose their jobs, the aggregate benefit of a reclassification of workers is not likely to offset its aggregate cost.

There is a clear danger that the proposed classification reforms may not confer their intended benefits on many independent contractors, who would neither become employees nor be able to maintain their jobs as contracts. The loss of contractor jobs could further harm workers who may already be suffering from hiring freezes and layoffs as the United States enters potential recession territory.

FEWER OPTIONS FOR INDIVIDUALS FACING LOSS OF INCOME

Several studies suggest that individuals turn to independent work temporarily after the loss of a job. In a 2017 paper published in the *American Economic Review*, economists Lawrence Katz and Alan Krueger report that workers who “suffered a spell of unemployment are 7 to 17 percentage points more likely than

15 Robert Habans, *Exploring the Costs of Classifying Workers as Independent Contractors: Four Illustrative Sectors* (Los Angeles, CA: UCLA Institute for Research on Labor and Employment, 2015).

16. Katherine Lim et al., “Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data” (working paper, Internal Revenue Service, Washington, DC, July 2019).

17. These benefits are analyzed in Heidi Shierholz, *EPI Comments on Independent Contractor Status under the Fair Labor Standards Act* (Washington, DC: Economic Policy Institute, 2020); Michael Reich, “Pay, Passengers and Profits: Effects of Employee Status for California TNC Drivers” (IRLE Working Paper No. 107-20, Institute for Research on Labor and Employment, University of California, Berkeley, October 2020); Linda Moe, James A. Parrott, and Jason Rochford, *The Magnitude of Low-Paid Gig and Independent Contract Work in New York State* (New York: Center for New York City Affairs, 2020).

18. Shierholz analyzes a DOL proposed rule change that would have made it easier for employers to classify workers as independent contractors. Shierholz, *EPI Comments*. The proposed rule change that Shierholz analyzes was more liberal than the finalized rule that came into effect in January 2021. For the proposed rule change, see Independent Contractor Status under the Fair Labor Standards Act, 85 Fed. Reg. 60600 (September 25, 2020). For the finalized rule change, see Independent Contractor Status under the Fair Labor Standards Act, 86 Fed. Reg. 1168, 1172–75 (January 7, 2021).

observationally similar workers to be employed in an alternative work arrangement when surveyed 1 to 2.5 years later.¹⁹

A study that uses IRS data to understand the income trends of both conventional freelancers and workers in the online platform economy finds that individuals turn to both types of independent work to smooth temporary income shocks after they have faced income declines or unemployment.²⁰

Economist Dmitri Koustas analyzes the financial data of individuals working on digital platforms and finds a significant pattern among individuals who participate in online gig platforms for work: they faced a decline in income or a significant decline in assets a quarter before they began participating in gig economy work.²¹ Their income and liquid assets partially recovered in the quarter after they began working gig economy jobs.

Lastly, a *Journal of Economic Perspectives* study reports a similar finding: “Individuals are significantly more likely to enter solo self-employment from unemployment than from traditional employment.”²² The study reports the survey responses of 45,000 individuals from across the United States, the United Kingdom, and Italy.²³ The study also concludes that “policies which seek to regulate alternative work arrangements by limiting their flexibility may not be desirable, in that they may well harm individuals” who need the extra income.²⁴

This research draws attention to the potentially harmful impact of restrictions on independent work for vulnerable individuals—those who have recently faced unemployment, income losses, or deterioration of assets. The DOL rule could eliminate work opportunities for these individuals and thereby worsen their economic standing, especially as a potential recession—which may increase unemployment—is looming.

FEWER OPTIONS FOR THE MAJORITY OF WORKERS WHO PREFER INDEPENDENT CONTRACTS

One way to evaluate whether independent workers would be better off with the DOL rule is to investigate their preferences. Would most independent contractors *prefer* to be reclassified as employees?

At least 14 surveys provide evidence of an overwhelming consensus: most independent contractors would like to keep their nontraditional work arrangements.²⁵ This is because most independent workers choose those types of work arrangements because such arrangements afford them more flexibility.

19. Lawrence F. Katz and Alan B. Krueger, “The Role of Unemployment in the Rise in Alternative Work Arrangements,” *American Economic Review* 107, no. 5 (2017): 388.

20. Andrew Garin et al., “Is New Platform Work Different Than Other Freelancing?,” *AEA Papers and Proceedings* 110 (2020): 157–61.

21. Dmitri K. Koustas, “What Do Big Data Tell Us about Why People Take Gig Economy Jobs?,” *AEA Papers and Proceedings* 109 (2019): 367–71.

22. Tito Boeri et al., “Solo Self-Employment and Alternative Work Arrangements: A Cross-Country Perspective on the Changing Composition of Jobs,” *Journal of Economic Perspectives* 34, no. 1 (2020): 183. In the study, “solo self-employed” refers to individuals such as gig workers and other types of independent contractors who are legally classified as self-employed but do not have employees.

23. Boeri et al., “Solo Self-Employment.” For the US labor market, the researchers used the Princeton Self-Employment Survey conducted in April 2017, which included 10,000 individuals.

24. Boeri et al., “Solo Self-Employment,” 182.

25. Some of these surveys were conducted during multiple years by the same organizations (e.g., the US Bureau of Labor Statistics, Upwork, and MBO Partners). US Bureau of Labor Statistics, “Contingent and Alternative Employment Arrangements—May 2017,” news release no. USDL-18-0942, June 7, 2018, <https://www.bls.gov/news.release/pdf/conemp.pdf>; US Bureau of Labor Statistics, “Contingent and Alternative Employment Arrangements—February 2005,” news release no. USDL 05-1433, July 27, 2005, <https://www.bls.gov/news.release/history/conemp.txt>; Adam Ozimek, “Freelance Forward Economist Report,” Upwork, accessed November 14, 2022, <https://www.upwork.com/research/freelance-forward-2021>; Boeri et al., “Solo Self-Employment”;

In the 2017 version of the Contingent and Alternative Employment Arrangements survey, the US Bureau of Labor Statistics reports that 79 percent of independent contractors preferred their arrangement over a traditional job and fewer than 1 in 10 independent contractors would prefer a traditional work arrangement instead.²⁶ The individuals surveyed were workers who indicated that independent contracting was their primary source of income.

Upwork's 2021 "Freelance Forward" survey finds that 72 percent of individuals engaged in independent work do so because of the increased flexibility of their work.²⁷ In particular, 74 percent indicate that independent work gives them the flexibility to be more available as a caregiver for their family, and 67 percent say it gives them flexibility to address personal mental or physical health needs. In the 2019 version of the survey, approximately 46 percent of independent workers state that independent work gives them the flexibility they need because they are unable to work for a traditional company owing to personal circumstances (health issues or family obligations). According to the survey, the proportion of workers who are parents and caregivers is higher for independent workers (46 percent) than for US workers overall (38 percent).²⁸

The results of these surveys are similar to those of an economic study that estimates the value of flexibility to UberX drivers.²⁹ The study finds that drivers would require almost twice as much pay to accept the inflexibility that comes from adopting a taxi-style schedule. The study concludes that drivers would reduce their hours driving on the Uber platform by more than two-thirds if they were required to work more inflexible hours, such as those of a taxi-style schedule.³⁰

Another high-profile study, published in the *Journal of Economic Perspectives* in 2020, finds that among self-employed workers, "the degree of flexibility that self-employed work offers seems likely to be the main driver of relatively high levels of satisfaction."³¹

Overall, the preponderance of research suggests that a majority of independent contractors would prefer to keep their nontraditional job arrangements rather than enter an employment arrangement, because the former provides extensive work-schedule flexibility. This means that, given what independent contractors say about their own preferences, most of them would likely be worse off if they were forced to be classified as employees. Many do not prefer to be employees of any particular company or organization.

Even in cases where employees can negotiate more flexible job arrangements with their employers, this is not the same type of job flexibility that is *inherent* for many independent contractors. Independent contractors have flexibility over how much to work (flexibility in quantity of work), when to work

David Storey, Tony Steadman, and Charles Davis, "How the Gig Economy Is Changing the Workforce," EY Global, November 20, 2018, https://ey.com/en_us/tax/how-the-gig-economy-is-changing-the-workforce; "State of Independence Reports," MBO Partners, accessed November 15, 2022, <https://www.mbopartners.com/state-of-independence/previous-reports/> (see the reports for 2016–2019); James Manyika et al., *Independent Work: Choice, Necessity, and the Gig Economy* (New York: McKinsey Global Institute, 2016); Hyperwallet, *The Future of Gig Work Is Female: A Study on the Behaviors and Career Aspirations of Women in the Gig Economy*, 2017.

26. US Bureau of Labor Statistics, "Contingent and Alternative Employment Arrangements—May 2017."

27. The report uses the term *freelancing*. For consistency's sake, I use the term *independent work* instead. Ozimek, "Freelance Forward Economist Report."

28. Edelman Intelligence, *Freelancing in America: 2019*, October 2019.

29. M. Keith Chen et al., "The Value of Flexible Work: Evidence from Uber Drivers," *Journal of Political Economy* 127, no. 6 (2019): 2735–94. The study was conducted in the United States between 2015 and 2016 using UberX data.

30. Chen et al., "Value of Flexible Work."

31. Boeri et al., "Solo Self-Employment."

(flexibility in scheduling), and sometimes where to work (geographic flexibility). It's worth noting that employees with lower bargaining positions will be unable to so freely "negotiate" for one or all aspects of these job flexibilities.

HARM TO WOMEN AS INDEPENDENT WORKERS

A substantial amount of research shows that women participate in independent contracting because it allows them greater flexibility to structure their days, a benefit that is crucial for women who are the primary caregivers in their households. The new DOL rule restricts independent work opportunities and reclassifies or restructures independent work as traditional employment and could be harmful for women who are unable to accept the nonflexible work requirements of traditional employment opportunities.

Research from the JPMorgan Chase Institute indicates that, if transportation sector platforms (such as ridesharing and delivery) are omitted from the analysis, women compose a greater share of income earners on digital platforms than men do.³² This is corroborated by a 2017 Hyperwallet study, which reports the results of a survey of 2,000 women who use platform-economy companies: most women indicated that they participated in professional freelancing, direct selling, or service platforms (e.g., Upwork, TaskRabbit, Care.com), but only 22 percent of women indicated that they participated in ridesharing (e.g., Uber, Lyft), and only 8 percent indicated that they participated in food delivery (e.g., Postmates, Grubhub).³³ Research suggests that there is significant variation in female participation on platforms; for example, between 2014 and 2015, 86 percent of independent workers on the platform Etsy were female, whereas only 19 percent of workers on Uber were female.³⁴

Additionally, an IRS study that uses tax data finds that the number of female contractors grew faster than the numbers of female employees or male contractors between 2001 and 2016.³⁵ Another study that also uses IRS tax data finds that, while independent work is more common among men, the participation in independent contracting since 2000 has grown significantly more among women.³⁶

Survey research reveals why women may prefer to participate in independent work. The 2017 study by Hyperwallet finds that 96 percent of these women indicated that the primary benefit of engaging in platform-economy work is the flexible working hours.³⁷ Moreover, the study finds that 70 percent of these platform-working women were the primary caregivers in their homes. A quarter of these women recently left their full-time employment for platform-based work, and 60 percent of them indicated that they did so because they wanted flexibility, needed more time to care for a child, parent, or other relative, or both.

Furthermore, a 2016 McKinsey Global Institute study reports the results of a survey of 8,000 independent workers and finds that 42 percent of US women and 48 percent of European women who participated in independent work were also caregivers.³⁸ In fact, referring to the 17 percent of the total

32. Diana Farrell, Fiona Greig, and Amar Hamoudi, *The Online Platform Economy in 2018: Drivers, Workers, Sellers, and Lessors* (New York: JPMorgan Chase Institute, 2018).

33. Hyperwallet, *Future of Gig Work Is Female*.

34. Etsy, *Building an Etsy Economy: The New Face of Creative Entrepreneurship*, 2015; Uber, "New Survey: Drivers Choose Uber for Its Flexibility and Convenience," news release, December 7, 2015, <https://www.uber.com/newsroom/driver-partner-survey/>.

35. Lim et al., "Independent Contractors in the U.S."

36. Brett Collins et al., "Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns" (working paper, IRS SOI Joint Statistical Research Program, Washington, DC, March 25, 2019).

37. Hyperwallet, *Future of Gig Work Is Female*.

38. Manyika et al., *Independent Work*.

sample in their survey who reported providing care to an elderly dependent, the authors state that “these caregivers participated in independent work at a significantly higher rate . . . than non-caregivers.”³⁹ Moreover, the study indicates that caregivers engage in independent work for supplemental income (67 percent, compared with 54 percent for noncaregivers). The authors conclude that independent work “provides a way for caregivers [who are disproportionately women] to generate income while fitting their hours around the needs of their families. This type of flexibility can ease the burden on financially stressed households facing logistical challenges.”⁴⁰

In a survey by the Kaiser Family Foundation (in partnership with CBS and the *New York Times*), researchers find that about 75 percent of self-identified homemakers, or stay-at-home mothers, in the United States indicated that they would likely return to work if they had flexible options.⁴¹

Altogether, this research indicates that independent work may be important for women who require more flexible work arrangements. Thus, to the extent that specific nontraditional work arrangements provide flexibility to those who need it and extend work opportunities to women who are unable to participate in traditional employment, restricting the legal classification of independent workers could disproportionately hinder women’s participation in the labor force.

HARM TO WORKERS WHO HAD CONTACT WITH THE CRIMINAL JUSTICE SYSTEM

A September 2022 IRS study finds that individuals who had their criminal records cleared after seven years go on to work in the gig economy rather than in traditional employment.⁴² The study finds no evidence that removal of records from criminal background checks (including for convictions or nonconvictions and for felonies or misdemeanors) increases the likelihood of these individuals having formal employment earnings.

Instead, the study finds consistent evidence that clearing records leads to increases in gig-work. When examining the impact of the Federal Credit Reporting Act (FCRA), the authors conclude: “While gig work is a new form of work activity, we find evidence that removal of a criminal record via FCRA has a large (in percent terms) impact on gig work for this particularly disadvantaged group, many of whom are likely entering self-employment for the first time.”⁴³ They find similar results on gig work when examining the impact of California’s Proposition 47, which reclassified eligible felonies as misdemeanors, and of Pennsylvania’s Clean Slate law, which sealed all nonconvictions for individuals that did not owe fines and fees.

These findings seem to suggest that independent work through the gig economy is providing an important avenue of work for those who previously had a criminal record. Thus, restricting the legal classification of independent workers would disproportionately hinder work opportunities for the criminal justice population.

CONCLUSION

Regardless of whether the DOL rescinds the 2021 rule, the additional guidance provided by the DOL severely limits the opportunities under which individuals can legally engage in independent contracting

39. Manyika et al., 76.

40. Manyika et al., 76.

41. Kaiser Family Foundation, CBS, and New York Times, *Non-Employed Poll*, December 2014, 25.

42. Amanda Agan et al., “The Impact of Criminal Records on Employment, Earnings, and Tax Filing” (working paper, IRS SOI Joint Statistical Research Program, Washington, DC, September 19, 2022).

43. Agan et al., “The Impact of Criminal Records,” 16.

work. This limitation has consequences and costs associated in the five areas highlighted earlier, of which the first consideration is the most important because, if a sufficient number of independent contractors are expected to lose their jobs without being extended an employment position, then the costs of the rule may outweigh the benefits. The DOL has an obligation under Executive Order 13563 to make reasonable determination of these costs. Furthermore, it needs to justify, by quantifying the marginal cost and benefits, why rescinding the 2021 rule would not accomplish the ends of this regulation at the lowest social cost of all possible alternatives.