

441 G St. N.W.  
Washington, DC 20548

B-333266

May 18, 2021

The Honorable Patty Murray  
Chair  
The Honorable Richard Burr  
Ranking Member  
Committee on Health, Education, Labor, and Pensions  
United States Senate

The Honorable Robert C. "Bobby" Scott  
Chairman  
The Honorable Virginia Foxx  
Ranking Member  
Committee on Education and Labor  
House of Representatives

Subject: *Department of Labor, Wage and Hour Division: Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Labor, Wage and Hour Division (Department) titled, "Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal" (RIN: 1235-AA34). We received the rule on May 6, 2021. It was published in the *Federal Register* as a final rule; withdrawal on May 6, 2021. 86 Fed. Reg. 24303. The effective date is May 6, 2021.

The Department stated that this action finalizes its proposal to withdraw a rule titled, "Independent Contractor Status under the Fair Labor Standards Act," (Independent Contractor Rule) which was published in the *Federal Register* on January 7, 2021. See generally 86 Fed. Reg. 1168. The Department also stated that upon further review and consideration it does not believe that the Independent Contractor Rule fully aligns with the Fair Labor Relations Act text or purpose, or with decades of case law describing and applying the multifactor economic realities test. See generally 29 U.S.C. 201–219.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date for a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The 60-day delay in effective date can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. § 808(2). Here, although the Department did not specifically mention the 60-day delay in effective date requirement for major rules, the Department asserts that it found good cause to make this rule effective immediately upon publication. The Department stated that allowing for a delay between publication and the

effective date of this rulemaking would result in the Independent Contractor Rule taking effect for a short period before its withdrawal, which would cause confusion for regulated entities.

Enclosed is our assessment of the Department's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink, reading "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones  
Managing Associate General Counsel

Enclosure

cc: Robert Waterman  
Compliance Specialist  
Department of Labor

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE  
ISSUED BY THE  
DEPARTMENT OF LABOR,  
WAGE AND HOUR DIVISION  
ENTITLED  
“INDEPENDENT CONTRACTOR STATUS UNDER THE  
FAIR LABOR STANDARDS ACT (FLSA): WITHDRAWAL”  
(RIN: 1235-AA34)

(i) Cost-benefit analysis

The Department of Labor, Wage and Hour Division (Department) stated that this final rule is withdrawing a rule titled, “Independent Contractor Status under the Fair Labor Standards Act,” (Independent Contractor Rule), which has not taken effect. See *generally* 86 Fed. Reg. 1168 (Jan. 7, 2021). The Department conducted an economic analysis for this final rule that included a discussion about the cost of withdrawing the Independent Contractor Rule. These costs included the time it took businesses to become familiar with this final rule. The Department also addressed other costs and benefits associated with the potential effects of the Independent Contractor Rule if it were not withdrawn. The Department’s analysis also included a discussion about transfers from one group to another, namely, workers to employers, which would be avoided by withdrawing the Independent Contractor Rule.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

The Department certified that this final rule will not have a significant economic impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

The Department stated that this final rule is not expected to result in increased expenditures by the private sector or by state, local, and tribal governments of \$165 million (\$100 million, adjusted for inflation) or more in any one year.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On March 12, 2021, the Department published a notice of proposed rulemaking (NPRM) proposing to withdraw the Independent Contractor Rule. 86 Fed. Reg. 14027. The Department stated that it received 1,010 comments in response to the NPRM. The Department stated that numerous state officials, Members of Congress, labor unions, social justice organizations, worker advocacy groups, and individual commenters wrote in support of its proposal to withdraw the Independent Contractor Rule. According to the Department, these commenters expressed opposition to the Independent Contractor Rule predominantly on the basis that, in their view, it would have facilitated the exploitation of workers reclassified or misclassified as independent contractors as a consequence of the Independent Contractor Rule. The Department also stated

that numerous companies, trade associations, business advocacy organizations, law firms, and individual commenters submitted comments opposing its proposal to withdraw the Independent Contractor Rule. The Department noted that these commenters generally supported the Independent Contractor Rule for, in their view, providing a clearer and preferable analysis for determining employee or independent contractor status, and they raised numerous other legal and policy arguments in defense of the Independent Contractor Rule (or in objection to the proposed withdrawal). The Department stated that it addressed relevant comments in the preamble of this final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

The Department stated that this final rule does not contain a collection of information subject to Office of Management and Budget approval under PRA.

Statutory authorization for the rule

The Department promulgated this final rule pursuant to sections 201–219 of title 29, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

The Department determined that this final rule is economically significant because it is withdrawing an economically significant rule, 86 Fed. Reg. 1168 (Jan. 7, 2021).

Executive Order No. 13132 (Federalism)

The Department determined that this final rule does not have federalism implications because the Independent Contractor Rule's withdrawal will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.