

Why Women Need the U.S. Department of Labor's Independent Contractor Rule

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The Fair Labor Standards Act (FLSA) protects the most basic rights of many workers in the U.S. These include the right to be paid at least the federal minimum wage and to be paid time and a half when they work more than 40 hours in a week. The FLSA also contains provisions ensuring that women are paid and treated equally at work, including protections against pay discrimination and rights to accommodations for breastfeeding workers. The FLSA provides these rights only for workers considered employees under the law.

The Department of Labor's (DOL) final rule on how to determine who is an employee or an independent contractor under the FLSA went into effect on March 11, 2024.¹ The rule simply reinstates a long-standing test for determining who is an employee, thereby restoring protections the Trump administration had reduced. By ensuring that workers who are employees are correctly identified as such, the rule will help combat abusive employer misclassification practices, such as when an employer incorrectly categorizes an employee as an independent contractor.² Misclassifying workers obstructs their access to basic workplace rights and protections provided under the FLSA and can leave workers without recourse for minimum wage or overtime violations. Moreover, misclassification of workers as independent contractors deprives many women of critically important protections for equal pay and accommodations for breastfeeding.

DOL's rule will reduce misclassification, which particularly harms women and people of color.

Combatting misclassification by clarifying the scope of the FLSA's protections is a racial and gender justice issue. Misclassification is rampant in low-paid, labor-intensive industries, such as delivery services, janitorial services, agriculture, trucking and home care, as well as in app-dispatched work.³ Women and people of color, including Black, Latinx, Asian American and Pacific Islander (AAPI) and Native workers, are overrepresented in these occupations,⁴ as they are in low-paid jobs more broadly.⁵ This is due to many factors, including that for much of our nation's history, women's work has been devalued, with women being paid lower wages and receiving fewer

opportunities. Entrenched racism and sexism have also resulted in this occupational segregation along racial and ethnic lines, leading to women and people of color not only being overrepresented in jobs with poorer wages and working conditions, but also having little or no access to benefits that support working families.

Women and people of color are overrepresented in low-paid industries where misclassification is common.

- In home care, for example, Black women, Latinas and other women of color make up the majority of the workforce.⁶
- Black women are also concentrated in other low-paying health care jobs, such as nursing assistants.⁷
- Native women are also overrepresented in home care, as well as in cleaning and child care.⁸
- Asian American, Native Hawaiian and Pacific Islander women are nearly 60 percent of manicurists and pedicurists and more than a quarter of skin care specialists.⁹
- Latinas are overrepresented in numerous occupations, including in agriculture, garment and cleaning related work.¹⁰

These are common occupations in industries that have been recognized by DOL as low-paid and where non-compliance with the FLSA – typically in the form of wage theft – is prevalent.¹¹ Wage theft further exacerbates the impacts of other workplace inequities women face, including discrimination, occupational segregation and the gender wage gap. Workers who are misclassified are not covered by the FLSA’s protections for minimum wage and overtime, leaving these workers without basic protections to ensure adequate compensation. Misclassification can also deny women rights to equal pay and accommodations for breastfeeding under the PUMP Act.¹²

Independent contractor misclassification by companies is also strikingly racialized, occurring disproportionately in occupations in which people of color, including Black, Latinx and Asian workers, are overrepresented.¹³ Because independent contractor misclassification often leaves workers without a remedy for wage theft or underpayment, it perpetuates racial income and wealth inequality, as well as health disparities in the U.S.

The DOL’s rule won’t affect true independent contractors.

DOL’s longstanding analysis for whether someone is an independent contractor is whether the individual is in fact in business for themselves. This final rule reinstates this common sense test and does not prevent true independent contractors and entrepreneurs—including women—from running their own businesses. Rather, it restores the well-established analysis DOL and the courts have used for decades. People who were running their own businesses prior to the short-lived Trump-era rule remain independent contractors under the Rule.

Women and workers of color have been shortchanged for too long. DOL’s final rule clarifies workers’ access to their FLSA rights and protections. It primarily affects low-paid workers in industries where misclassification is prevalent. Policy makers should take the necessary steps to ensure women, workers of color and other misclassified employees receive their wages and rights as supported by this final rule.

¹ U.S. Department of Labor. (n.d.). *Notice of Proposed Rule: Employee or Independent Contractor Classification Under the Fair Labor Standards Act, RIN 1235-AA43*. Retrieved 25 March 2024 from <https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking>

² U.S. Department of Labor. (n.d.). *Misclassification of Employees as Independent Contractors | U.S. Department of Labor*. Retrieved 25 March 2024 from <https://www.dol.gov/agencies/whd/flsa/misclassification>

³ National Employment Law Project (2020, October) *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*. Retrieved 25 March 2024 from <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>

⁴ Alexander, C. (2017) *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 925 (finding that “seven of the eight high misclassification occupations were held disproportionately by women and/or workers of color”).

⁵ National Women’s Law Center (2023, July). *Hard Work Is Not Enough: Women in Low-Paid Jobs*. Retrieved 24 March 2024 from <https://nwlc.org/resources/when-hard-work-is-not-enough-women-in-low-paid-jobs/>.

⁶ PHI. (2022, September 6). *Direct Care Workers in the United States*. Retrieved 25 March 2024 from <https://www.phinational.org/resource/direct-care-workers-in-the-united-states-key-facts-3/>.

⁷ Mason, J., & Robbins, K. (2023, March). *Women’s Work Is Undervalued, and It’s Costing Us Billions*. Retrieved 25 March 2024 from <https://nationalpartnership.org/wp-content/uploads/2023/04/womens-work-is-undervalued.pdf>

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Wage and Hour Division, U.S. Department of Labor. (2024). *Low Wage, High Violation Industries*. Retrieved 25 March 2024 from <https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries>.

¹² U.S. Department of Labor. (n.d.) *FLSA Protections to Pump at Work*. Retrieved 25 March 2024 from <https://www.dol.gov/agencies/whd/pump-at-work>

¹³ As a group, workers of color—Black, Latinx, Asian/Pacific Islander and Native American workers—are overrepresented in construction, trucking, delivery, home care, agricultural, personal care, ride-hail and janitorial and building service occupations by over 40 percent; they comprise just over a third of workers overall, but between 47 and 91 percent of workers in these occupations. NELP analysis of March 2022 Current Population Survey Annual Social and Economic Supplement microdata. For underlying data, see U.S. Census Bureau. (2023) *Annual Social and Economic Supplement*. Retrieved from <https://data.census.gov/mdat/#/search?ds=CPSASEC2022>; In digital labor platform work, Black and Latinx workers are overrepresented by 45 percent—more even than in more traditional misclassification-prone sectors. See U.S. Bureau of Lab. Statistics. (2018, September). *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*. Retrieved 25 March 2024 from <https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm>

The National Partnership for Women & Families is a nonprofit, nonpartisan advocacy group dedicated to promoting fairness in the workplace, reproductive health and rights, access to quality, affordable health care and policies that help all people meet the dual demands of work and family. More information is available at NationalPartnership.org.

The National Women’s Law Center fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. We use the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us—especially women of color, LGBTQ people, and low-income women and families. For 50 years, we have been on the leading edge of every major legal and policy victory for women. More information is available at NWLC.org.

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