

April 28, 2026

Daniel Navarrete
Director, Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20270

Re: Department of Labor, Wage and Hour Division, Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, WHD-2026-0001, RIN 1235-AA46

Dear Director Navarrete:

The Manhattan Institute for Policy Research is a 501(c)(3) nonprofit think tank committed to developing and disseminating new ideas that foster greater economic choice and individual responsibility. Legal Policy Fellow C. Jarrett Dieterle of the Manhattan Institute submits these comments in response to the Wage and Hour Division's notice of proposed rulemaking on Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act.¹

My name is Jarrett Dieterle, and I am a legal policy fellow with the Manhattan Institute.² In this role, I develop and communicate novel, sound ideas on how to improve America's constitutional, legal, and regulatory systems of governance. I have testified before Congress and submitted regulatory comments to federal agencies, as well as provided testimony and input to numerous state legislatures. I have authored many policy briefs, articles in journals including *National Affairs* and the *Georgetown Law Journal*, and short-form commentaries in popular publications such as the *New York Times*, *Wall Street Journal*, *USA Today*, and *Washington Post*.

I write in support of the proposed rulemaking and to specifically highlight the "unseen industries" in the debate over independent contractor classification.

¹ Department of Labor, Wage and Hour Division, Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, Feb. 27, 2026, Docket No. WHD-2026-0001, Doc. No. 2026-03962 (91 FR 9932), available at <https://www.federalregister.gov/documents/2026/02/27/2026-03962/employee-or-independent-contractor-status-under-the-fair-labor-standards-act-family-and-medical>.

² I am submitting this comment letter in my individual capacity. Details regarding my professional affiliation are provided here for convenience and ease of reference only.

I. Background

The Department is well familiar with the regulatory back-and-forth among presidential administrations over the past decade-plus when it comes to the legal test for independent contractors. Given that this history is thoroughly recounted in the Department’s notice of proposed rulemaking, this letter will not seek to replay it.

It is worth noting, however, that the Department’s 2024 Final Rule³—with its use of factors analyzing whether “the work performed” by a worker “is an integral part of the potential employer’s business”—weighted toward workers in all of the industries discussed below being classified as full-scale employees rather than contractors.

In contrast, the Department’s current proposed rulemaking, with its two core factors—the nature and degree of control over the work and the worker’s opportunity for profit or loss—weigh in favor of workers in these various industries being able to maintain their independent contractor status. This reality undergirds the undersigned’s support for the Department’s currently proposed rule.

II. The Unseen Industries in the Worker Classification Debates

As the Department discusses in its proposed rulemaking, the debate over contractor classification dates back many decades. But it unquestionably reached a fever pitch in the wake of California’s *Dynamex* state supreme court decision and subsequent A.B. 5 legislation.⁴ Since those landmark developments, the modern debate over worker classification has largely centered around the gig economy, whether it be rideshare drivers, food delivery workers, or other gig workers.

Given that A.B. 5 was a thinly veiled attempt to target gig platforms, the centering of gig work in this debate has largely been understandable. But it also has been underinclusive. In reality, policies that seek to reclassify independent contractors as full-scale employees have implications for a vast swath of industries and sectors that are integral to the American economy. While the undersigned has written copiously about worker classification in the context of gig work, this letter will focus on the unseen, unsung industries that often get overlooked in this debate.

There are hundreds, if not thousands, of industries that predominately operate under an independent contracting structure. Industries like barbering, manicuring, construction,

³ Department of Labor, Wage and Hour Division, Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act, Jan. 10, 2024, Docket No. WHD- WHD–2022–0003, Doc. No. 2024-00067 (89 FR 1638), *available at* <https://www.federalregister.gov/documents/2024/01/10/2024-00067/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act>.

⁴ *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, 4 Cal.5th 903 (Cal. 2018); Assembly Bill 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

transportation, and healthcare all heavily feature independent contractors and all help comprise much of the lifeblood of the American middle class.

While focusing on all of these industries would be neither possible nor desirable in this context, I will highlight three here: financial advising, real estate, and nursing. Each of these industries stands to be profoundly impacted if independent contractors face reclassification as full-scale employees. This counsels against legal tests such as the Department's 2024 Final Rule and weighs in favor of adopting the currently proposed rule.

Financial Advisers

The financial advisory sector features both W-2 and 1099 models for advisers. Today, there are over 300,000 financial advisers in America.⁵ Estimates range as to how many of these advisers operate as independent contractors, but it could be anywhere from 11 percent of the industry to over 50 percent.⁶

Just in the years from 2015 to 2019, independent contractors in the financial services industry reportedly created over 50,000 new businesses and over 170,000 new jobs, and independent contractor financial advisers and insurance agents were responsible for 27 percent of the output (comprising some \$47 billion) in their industries.⁷

Those financial advisers that operate as 1099 contractors enjoy numerous advantages over their W-2 peers. When operating as independent contractors, advisers have an easier time switching between financial advisory firms and taking their client base along with them.⁸ As is common for independent contractors, they also have control over their hours and can hire their own staff and select their own office space, rather than being beholden to the strictures and preferences of an employer.

Advertising and social media use by financial advisers is obviously heavily regulated, but W-2 employees face even further restrictions from their firms about what they can say publicly, which further separates them from their prospective client base.⁹

⁵ Bureau of Labor Statistics, Occupational Outlook Handbook, Personal Financial Advisors, <https://www.bls.gov/ooh/business-and-financial/personal-financial-advisors.htm>.

⁶ Jeffrey A. Eisenach et al., "The Role of Independent Contractors in the Finance and Insurance Sectors," NERA Economic Consulting, Nov. 2022, at 11, https://www.youraccountonline.com/content/dam/nera/publications/2022/NERA_Independent_Contracting_In_Financial_Services_November_2022_Final_For_Release.pdf; Written Testimony by Financial Services Institute, The U.S. House Committee on Education & the Workforce, Subcommittee on Workforce Protections, Hearing on "Examining Biden's War on Independent Contractors," April 19, 2023, <https://www.congress.gov/118/meeting/house/115679/documents/HHRG-118-ED10-20230419-SD003.pdf>.

⁷ Jeffrey A. Eisenach et al., "The Role of Independent Contractors in the Finance and Insurance Sectors," at 2.

⁸ Written Testimony by Financial Services Institute, Hearing on "Examining Biden's War on Independent Contractors," April 19, 2023.

⁹ C. Jarrett Dieterle, "The Unseen Industries in the Independent Contractor Debate," *Discourse*, Jul. 24, 2025, <https://www.discoursemagazine.com/p/the-unseen-industries-in-the-independent>.

Perhaps most critically, there's evidence to suggest that 1099 financial advisors can be more willing to work with clients further down the economic income ladder. A report from Oxford Economics and the Financial Services Institute found that 78 percent of independent advisers believe that converting to W-2 status would result in their account minimums increasing, which in turn would limit their ability to work with lower-net-worth clients.¹⁰

Overall, 77 percent believe that W-2 status would mean higher commissions and management fees—costs that get passed down to clients, once again icing out lower-net-worth investors. According to the advisers surveyed, if they were converted to W-2 status, they would expect to lose more than 30 percent of their existing client base due to these increased minimums and fees.¹¹ Nearly 20 percent of independent advisers said they would choose retirement in the event they were forcibly reclassified as employees.¹²

In other words, the financial advisory industry provides a classic case study of potential unintended consequences in response to overreaching government regulation. Not only would many advisers themselves be worse off if they were forcibly reclassified to full-scale employee status, but doing so would suddenly lock millions of mid- and lower-income clients out of the financial advisory market altogether. The impact this could have on the retirement savings of Americans across the country would be nearly incalculable; yet, to date, it has received barely any publicity in the ongoing worker classification debates.

Real Estate Agents

The United States has anywhere from 1.5 million to 3 million real estate agents.¹³ According to the National Association of Realtors, close to 90 percent of its 1.5 million members operate as independent contractors.¹⁴

The tradition of real estate agents operating as contractors is longstanding. From the 1980s onward, agents have been treated as non-employees under federal tax law.¹⁵ The vast bulwark of state laws likewise do not treat agents as employees.¹⁶

¹⁰ “The DOL’s Independent Contractor Classification Rule Would Decrease Access to Advice and Increase Costs for Investors,” Oxford Economics, Report for the Financial Services Institute, Jan. 2023, at 18-20, https://financialservices.org/wp-content/uploads/2023/01/Oxford-Economics-Report-on-Proposed-IC-Rule-for-FSI.2023.1.17.pdf?_gl=1*mzvzwt*_gcl_au*NzE3MjQ5MjMuMTcxMDM2MzcwMw.

¹¹ *Id.*

¹² *Id.* at 12.

¹³ “Strength in Numbers,” National Association of Realtors, Real Estate News, Nov. 11, 2024, <https://www.nar.realtor/magazine/real-estate-news/strength-in-numbers>; Association of Real Estate License Law Officials, Membership Options, <https://www.arello.org/membership/membership-options/>.

¹⁴ “NAR Issue Brief: Real Estate Professionals Classification as Independent Contractors,” National Association of Realtors, Jan. 10, 2024, <https://www.nar.realtor/advocacy/nar-issue-brief-real-estate-professionals-classification-as-independent-contractors>.

¹⁵ 26 U.S.C. § 3508.

¹⁶ National Association of Realtors, Independent Contractor Survey Table, updated June 15, 2020, *available at* <https://www.nar.realtor/sites/default/files/documents/Independent-Contractor-Survey-Table-June-2020->

Like in the financial advisory realm, reclassifying agents as employees would have drastic implications. Real estate brokerage firms already have notoriously thin profit margins, with the median EBITDA margin between 1-2 percent.¹⁷ Suddenly requiring these firms to cover everything from unemployment insurance to workers' comp for W-2 employees—not to mention other potential fees, such as Multiple Listing Service Fees (MIS)—could send many firms into the red.

Reclassification would also likely lead to real estate firms shedding less productive agents.¹⁸ Given that over 20 percent of agents work part-time hours—and therefore could be considered “less productive”—this could cause substantial job disruption and loss around the country.¹⁹

This would hit the middle class particularly hard. All told, 31 percent of agents have a college degree, another 31 percent have some college education but not a full degree, and another 12 percent have an associate's degree.²⁰ The majority of the remaining agents likely have a high school diploma, meaning that the lion's share of agents have an educational attainment below a bachelor's degree.

Any significant job loss in the industry would push a significant number of Americans out of work with no clear path back to employment.

Nurses

Few Americans likely recognize the role independent contracting plays in our country's health care system. The industry has a tradition of using so-called PRN or agency nurses²¹—many of whom are classified as contractors—to help fill staff shortages.

The health care sector continues to face dire supply shortages when it comes to providers. The number of nurses dwindled by 100,000 during the COVID-19 pandemic, and the Health Resources and Services Administration forecasts significant nursing shortages in the years

[Updated-10-19-20.pdf](#); “Independent Contractors: Real Estate Exemptions,” National Association of Realtors, <https://narfocus.com/billdatabase/clientfiles/172/21/4298.pdf>.

¹⁷ “New Research Finds Brokerages Regain Some Profitability in 2025, Largely by Cutting Costs,” PR Newswire, Feb. 4, 2025, <https://www.prnewswire.com/news-releases/new-research-finds-brokerages-regain-some-profitability-in-2025-largely-by-cutting-costs-302679046.html>.

¹⁸ “N.J. Case Creates Model for Independent Contractor Status,” National Association of Realtors, Real Estate News, May 16, 2024, <https://www.nar.realtor/magazine/real-estate-news/nj-case-creates-model-for-independent-contractor-status>.

¹⁹ Sarah Ryerson, “By the Numbers: A Breakdown of the Real Estate Profession,” The Warren Group, <https://www.thewarrengroup.com/blog/by-the-numbers-a-breakdown-of-the-real-estate-profession/>.

²⁰ “2017 Member Profile: Demographics of Real Estate Agents Examined Up Close,” South Carolina Realtors, <https://screaltors.org/2017-member-profile-demographics-of-real-estate-agents-examined-up-close/>.

²¹ Diane Campion, “What Is an Agency Nurse? Explanation and FAQ,” <https://www.intelycare.com/facilities/resources/what-is-an-agency-nurse-explanation-and-faq/>; “What is a PRN and Why Should I Consider It?,” St. Paul's School of Nursing, Mar. 3, 2021, <https://www.stpaulsschoolofnursing.edu/blog/nursing/what-is-a-prn-and-why-should-i-consider-it.html>.

ahead.²² App-based nurse staffing options have started to fill the void, allowing hospitals and other medical facilities to readily contract with on-demand nurses on an as-needed basis. This can help shore up staffing during nights, weekends, or other periods of high demand and low supply.²³

If these nurses are suddenly forced to reclassify as full-scale employees, this business model could be upended overnight, further exacerbating America’s medical provider shortage. There are already examples of healthcare workers being targeted for misclassification lawsuits, which underscores that this is no idle fear.²⁴

III. Exemptions and Political Clout

The above examples are merely three small case studies among hundreds, if not thousands, of industries that use at least some form of independent contracting. When widescale reclassification is pursued by policymakers, it acts as a broad net that ensnares an unknown—and indeed unknowable—number of sectors and workers.

Because of this reality, jurisdictions that have pursued aggressive reclassification have been forced to carve out significant numbers of exemptions to these rules. For instance, in California, the state legislature ultimately created over 100 different exemptions to A.B. 5.²⁵

This type of government-by-exemption is hardly an ideal way to govern given that it inevitably leads to government-by-favoritism.²⁶ Each discrete industry that seeks an exemption to reclassification rules needs to spend time and energy lobbying lawmakers, all while hoping that it has the political clout to be listened to.

Again, the example of California is illustrative. Financial advisers and real estate agents were exempted from A.B. 5, but nurses were not. At the federal level, the Department’s 2024 Final Rule failed to exempt all three of these occupations, thereby leaving them with little clarity and significant uncertainty.



²² “Fact Sheet: Nursing Shortage,” American Association of Colleges of Nursing, <https://www.aacnursing.org/Portals/0/PDFs/Fact-Sheets/Nursing-Shortage-Factsheet.pdf>.

²³ Melanie Evans, “Nurse Shortage Pushes Hospitals Into the Gig Economy,” *Wall Street Journal*, Apr. 18, 2023, <https://www.wsj.com/economy/nurse-shortage-hospitals-hiring-gig-economy-dc94bdb2>.

²⁴ Michael Vallante, “Emerging Healthcare Staffing Apps Face Legal Challenges in California and Across the Nation,” *California Globe*, Mar. 30, 2023, <https://californiaglobe.com/articles/emerging-healthcare-staffing-apps-face-legal-challenges-in-california-and-across-the-nation/>.

²⁵ Aaron H. Cole, “AB 2257 Enacts Significant Changes to AB 5 on Classification of Workers as Independent Contractors,” *Ogletree Deakins*, Oct. 13, 2020, <https://ogletree.com/insights-resources/blog-posts/ab-2257-enacts-significant-changes-to-ab-5-on-classification-of-workers-as-independent-contractors>.

²⁶ C. Jarrett Dieterle and Steven Greenhut, “Crony carve-outs in California independent-contractor fight,” *The Mercury News*, Mar. 21, 2019, <https://www.mercurynews.com/2019/03/21/opinion-carve-outs-for-cronies-in-california-independent-contractor-fight/>.

As I have written previously in another context:

When one thinks of the American middle class, it's not a stretch to think of moments like selling a home to upsize with a baby on the way, working with a local financial adviser to save for retirement, or having your child's broken arm mended at the neighborhood hospital. All these moments and industries could find themselves in the crosshairs of forced worker reclassification efforts in the years ahead.

Both the seen and unseen industries in this debate deserve to be protected. For the reasons laid out above, I urge the Department to finalize its proposed rulemaking.

Respectfully submitted,

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