

Coalition to Promote Independent Entrepreneurs

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BY EMAIL

Ms. Mary Ziegler
Director, Division of Regulations
Legislation and Interpretation,
Wage and Hour
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Proposed Information Collection Request (ICR) for the
Worker Classification Survey; Comment Request
FR Doc: 2013-00389, Filed Jan. 10, 2013

Dear Ms. Ziegler:

The Coalition to Promote Independent Entrepreneurs (the "Coalition"), www.iccoalition.org, submits these comments in response to the above-referenced Proposed Information Collection Request (ICR) for the Worker Classification Survey (the "Survey"). The stated purpose of the Survey is to:

provide critical information to Department policymakers on whether workers have knowledge of their employment classification and whether they understand the implications of their classification status. The primary tasks of the survey include: (1) design and cognitively test survey questions to be used for worker classification survey, (2) develop sampling methodology that will generate nationally representative samples of workers (or as close to nationally representative as possible), (3) conduct in-depth interviews of employers and employer groups to explore employer knowledge, attitudes, and practices around classifying workers, and (4) execute the survey, analyze the data and report the results

The Survey description indicates that the data analysis component will include worker-status determinations based on Survey data.

The Coalition submits that the proposed Survey is predicated on a flawed methodology, and that the worker-status determinations it produces will be unreliable and have limited if any practical utility. These concerns are based on the Survey design, in which (i) worker-status

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determinations will be made by “researchers” of unknown experience in applying legal, regulatory and judicial guidance to make such determinations under applicable laws, including the Fair Labor Standards Act (“FLSA”); (ii) the factual record on which these determinations will be made will be incomplete and will consist of factual representations made by only one party to a work relationship, namely, the individual; and (iii) the proposed Survey questions are framed in a manner that reflects a bias suggestive of employment.

The Coalition respectfully urges that the U.S. Department of Labor (“DOL”) eliminate entirely from this project any substantive worker-status determinations predicated on Survey results, due to their inherent unreliability. In addition, the Coalition urges that the wording of Survey questions be changed to eliminate their bias suggesting employee status.

Finally, the Coalition suggests that DOL consider other options for obtaining data on worker classification. The Survey results will be largely duplicative of, but inherently less reliable than, the data that the Internal Revenue Service (“IRS”) is currently developing in its three-year National Research Program (“NRP”), involving audits of 6,000 U.S. employers. The NRP data will be less than ideal, but for reasons discussed below will be eminently more reliable than worker-status determinations predicated on Survey responses.

The Coalition believes the Survey could have very significant policy implications, in light of what appears to be an intended use of its results. The accompanying Supporting Statement for Paperwork Reduction Act Submissions of Survey (the “Supporting Statement”), in Section A.6, states:

If the proposed data collection is not accomplished in a timely manner, the Congress, the Department of Labor, and other policy makers will have no substantive, relevant data upon which to base policy decisions regarding worker classification.

The contemplated policy decisions regarding worker classification, to be informed by the Survey, could have an enormous impact on the economic future of the millions of individuals who work as legitimate independent contractors and on the nation’s economy generally.¹

¹ A recent study of this issue found that:

curtailing independent contracting would:

- ! Reduce job creation and small business formation. Independent contractors start businesses and create jobs. Of the 10.3 million independent contractors in the most recent Bureau of Labor Statistics survey, nearly 2.4 million had one or more paid employees, with the vast majority employing five or fewer workers.

- ! Reduce competition and increase prices. By reducing the importance of economies of scale, independent contracting allows small businesses to compete with larger ones, increasing competition and lowering prices for consumers.

- ! Create sector specific disruptions. Independent contracting is a primary business model in a number of important industries, including construction, emergency medicine, financial advice, timber harvesting and transportation. Limitations on independent contracting could create serious economic disruptions in these and other industries.

DOL in Supporting Statement Sections A.1 and 6 identifies one specific intended use of the Survey, wherein it identifies as a problem the fact that current law does not require employers to disclose information regarding employment status or the basis on which status determinations are made; and in Section A.1 contends that “In the absence of required disclosure, employers may intentionally or unintentionally classify a worker as a contractor rather than as an employee without full knowledge of the worker.” The foregoing suggests that DOL intends to use Survey results to evaluate this contemplated new disclosure requirement.²

The implications of requiring companies to comply with new disclosure requirements along the lines being contemplated would be enormous. Legitimate independent contractors would be materially disadvantaged relative to other businesses, as a client would need to provide an independent contractor with a legal analysis explaining why the client is treating the independent contractor as a nonemployee, but would have no similar obligation when doing business instead with a larger incorporated vendor. Furthermore, firms that contract with legitimate independent contractors to perform large numbers of relatively low-fee projects would be overwhelmed by such a requirement, almost certainly leading to further job losses.

It is submitted that any data that will inform DOL and guide its policy decisions on this important issue need to be highly reliable. For reasons set forth below, the findings and conclusions that the contemplated Survey would produce would be patently unreliable.

I. Determinations whether individuals are properly classified would be made by “researchers” of unknown experience

In Section A.1 of the Supporting Statement, DOL, in justifying its need for the Survey, notes that “currently data that would facilitate a better understanding of the scope and magnitude of misclassification are lacking.” In Section A.4, the Survey argues that the Contingent and Alternative Employment Arrangement (CAEA) supplement to the Current Population Survey is inadequate because:

- 1) it has not been conducted since 2005 and 2) it does not contain the important, detailed questions about the job duties performed in

Produce a less flexible and dynamic work force. Independent contracting allows both firms and workers to respond to changes in the economy, reducing “structural” unemployment. Empirical studies show independent contracting facilitates workers’ re-entry into the workforce after being laid off.

Jeffrey A. Eisenach, *THE ROLE OF INDEPENDENT CONTRACTORS IN THE U.S. ECONOMY*, (December 2010) 174-202.

² In this regard, DOL during 2011 began work on developing a proposal to impose such a disclosure requirement, in a project known as *Right to Know Under the Fair Labor Standards Act* (DOL/WHd RIN: 1235-AA04). The project was expected to require companies to:

- provide each independent contractor with whom it does business with a written analysis explaining the legal basis for classifying the individual as an independent contractor for purposes of the FLSA; and
- provide each company employee treated as exempt from the FLSA’s overtime and/or minimum wage requirements with a written analysis explaining the legal basis for classifying the individual as exempt.

Furthermore, the document announcing this proposed Survey references testimony on June 17, 2010, before the Senate Committee on Health, Education, Labor and Pensions by then Deputy Secretary of Labor, Seth Harris, concerning this contemplated disclosure requirement.

contingent or alternative work arrangements that would enable researchers to identify whether or not the employment classification is appropriate.

The foregoing indicates that the Survey will include substantive determinations as to whether individuals interviewed are properly classified; and that these determinations will be made by “researchers.” The DOL offers no information about the qualifications of these researchers, e.g., whether they have any experience in applying legal, regulatory and judicial guidance to make worker-classification determinations under the FLSA, or about the time they will be permitted to devote to conducting legal research in connection with these determinations.

Moreover, even if the researchers have years of experience making worker-status determinations under the FLSA, the Survey description is unclear as to whether the determinations will be subject to any level of review. Worker-status determinations under the FLSA are very fact intensive and involve highly subjective determinations. Even experienced DOL Wage and Hour investigators can make determinations that are later reversed, as evidenced by the recent decision in *Gate Guard Services L.P. v. Solis*, 2013 U.S. Dist. LEXIS 20156 (Feb. 13, 2013), in which a DOL Wage and Hour investigator determined that certain individuals had been misclassified as independent contractors, resulting in DOL asserting that the company owed over \$6 million in back wages to the allegedly misclassified workers. The determination was reversed by a federal district court, holding that the workers were properly classified.

If highly trained DOL Wage and Hour investigators, who are able to diligently investigate the facts and question all parties to a work relationship, can make an erroneous determination, the reliability of worker-status determinations made by researchers with unknown expertise in making these determinations is a serious concern. While the *Gate Guard Services L.P.* decision reversed a determination by DOL Wage and Hour investigators, the decision cites *Solis v. Intern. Detective & Protective Serv., Ltd.*, 819 F. Supp. 2d 740 (N.D. Ill. 2011), in which a federal district court held in favor of the DOL in a worker-classification dispute.

What both court decisions demonstrate is the complexity and subjective judgment involved in making worker-status determinations. In each of these reported court decisions, the DOL and the company at issue presumably analyzed the work relationships at issue, by developing the facts and applying relevant legal precedents, but nonetheless reached conflicting worker-status determinations, which conflict a court resolved – in one case reversing DOL’s determination, and in the other case affirming DOL’s determination.

The Coalition submits that the worker-status determinations contemplated under the Survey are inherently unreliable. The Coalition also submits that the reliability of these determinations is further compromised by an incomplete and deficient factual record.

II. The factual record on which worker-status determinations are to be made will be unreliable

a. The factual record will be incomplete

The factual record on which the researchers will make the contemplated worker-status determinations will be incomplete. The Survey questions do not include questions concerning several of the factors which the court in *Gate Guard Services L.P.* found to be determinative of the independent-contractor status of individuals at issue in the case. Examples of omitted questions include (i) whether an individual is free to accept or decline offered opportunities, (ii) whether an individual can arrange for substitutes to perform in his or her place, and (iii) whether an individual is offered opportunities on a project by project basis.

The Survey questions also omit additional factors which are highly relevant to worker-status determinations generally. Examples include (i) the terms and conditions of any written agreement between the individual and the other contacting party, (ii) whether the individual maintains any insurance related to his or her business endeavors, (iii) whether the individual reports his or her earned income on a Schedule C and claims related business tax deductions, and (iv) whether the individual operates with an employer identification number ("EIN"), as opposed to a social security number ("SSN").

Furthermore, many of the questions that pertain to the economic realities factors are conclusory in nature, and do not delve deeper into the underlying facts that would be necessary to meaningfully evaluate whether the facts actually support the response an individual provides. While such deeper factual inquiries might not be realistic in a telephone survey, we believe this does not justify the omission of such deeper factual inquiries, but rather demonstrates the inherent unsuitability of a telephone survey for developing a factual record on which to make worker-status determinations to inform significant policy decisions.

b. The factual record will only present facts from one side

Another critical deficiency in the factual record on which worker-status determinations will be made is that the factual record will be developed entirely by factual representations made by only one party to a work relationship, namely, the individual.³ All of the questions contained in *Attachment F: Crosswalk between Worker Classification Survey Questions and Other Survey Questions*, will be asked only of individuals.

One need not have been involved in many worker-status controversies to appreciate how the description of a work relationship presented by an individual can differ materially from the description of that same relationship presented by the company that contracted with the individual; and how an initial description by either party can change once the party offering the description is subject to cross-examination.

³ The employer interview questions, set forth in Attachment E, do not include any questions concerning the proper classification of an individual.

In the Survey, researchers will make worker-status determinations based entirely on Survey responses provided by individuals only, and with no cross-examination of the individuals to test the validity of their responses. It follows that these determinations would be patently unreliable.

III. The proposed Survey questions reflect a bias suggestive of employment

Further compounding the unreliability of the worker-status determinations, the proposed Survey questions, set forth in *Attachment F: Crosswalk between Worker Classification Survey Questions and Other Survey Questions*, reflect a bias weighing in favor of employee determinations.

Many of the Survey questions use terminology associated with employment, rather than terms that are more neutral or that are consistent with an independent-contractor relationship. For example, beginning on page 4, but continuing throughout the Survey questions, the term “main job” is used in lieu of a more neutral term, such as “main source of income,” and in lieu of a term more appropriate for an independent contractor, such as “main client” or “main business.” In apparent recognition of this bias, on page 3, a question inquires about a “job [or business]” but this is an isolated incident.

The questions premised on an individual’s “job” or “main job,” when considered in the context of an independent contractor, inconsistently refer to an individual’s “job” as a reference sometimes to the individual’s entire business, while at other times to a particular client. For example on page 4, “Do you USUALLY work 35 hours or more per week at your main job” and “In what state is your main job?” and on page 5, “How many clients did you have in the last 30 days in your Main job?” – all suggest that the term “job” is a reference to the individual’s entire business. By contrast, on page 6, the question “Since the beginning of this Main job, have you always been self-employed?”; on page 8, the question “Did you use any of the following kinds of agencies to help you obtain your Main job?”; and on page 8, “To work at your Main job, were you REQUIRED to do any of the following?” – suggest that the term “job” is a reference to a specific client. This inconsistent use of the same term can create confusion to a legitimate independent contractor trying to respond to these questions during an interview and lead to responses that inaccurately describe the facts on which a worker-status determination will be predicated.

The questions about payment arrangements implicitly assume employment. On page 13, an interviewer will ask “Are you salaried on your Main job, paid by the hour, or paid some other way?” and “(including overtime pay, tips and commissions) what are your usual earnings on your Main job, before taxes and other deductions?” Both of these questions lead with unambiguously employee-based jargon, and neither inquires about whether an independent contractor needs to “bill” clients to collect “fees.”

Several of the questions limit possible response options in a manner that can lead to false responses. For example, on page 8, an interviewer will ask “Did you use any of the following kinds of agencies to help you obtain your Main job?” But the list of permitted response categories includes only third-party firms that are premised on an employment relationship. The

list does not include any third-party firms that are premised on independent-contractor relationships, such as services referral agencies, registries, or internet-based client matching sites. Consequently, an independent contractor who is presented with the listed options could tend to select the option that most resembles the option actually used, without recognizing that the selection is suggestive of an employment relationship and could be used as a factor supporting a determination that the individual should have been classified as an employee.

Some questions can yield a response that will lead to incorrect or inscrutable inferences. For example, on page 8, an interviewer will ask “To work at your Main job, were you REQUIRED to do any of the following?” and the listed options include “Sign a contract, form or other legal documents” and “Agree to create your own business or LLC.” The second option arguably could raise suspicion, but the first option is a standard procedure for any business-to-business relationship. If an individual responds “yes” to the question, it is impossible to infer anything meaningful from that response.

On page 12, an interviewer will ask “Provided the economy does not change and your job performance is adequate, can you continue to work in your current job as long as you wish?” As a threshold ambiguity, it is not clear whether the term “job” refers to an independent-contractor’s entire business, or to a specific client. A response of “yes,” predicated on interpreting “job” to mean an independent contractor’s entire business, would be a false indicator of employment if the question is actually intended to mean a continuing relationship with a specific client. Also, if an individual were to interpret “job” to refer to a specific client, the individual could respond “yes,” even though the individual is currently working under an agreement for a specific project, but believes a subsequent project will be offered. Moreover, the stated predicates for the question are too narrow – individual company, individual sector, fortunes could change and lead to layoffs even if the economy does not change and the person’s job performance is adequate.

On page 18, an interviewer will ask “How often does someone tell you how to perform your usual work activities or duties?” Without limiting the “someone” to an individual who is acting on behalf of a client or employer, a response could be misleading. For example, a self-employed musician who receives comments and advice on his or her performance from listeners, but no feedback at all from the client, could nonetheless select the option “multiple times per day.”

On page 18, an interviewer will ask “On your Main job, Is there a job or procedures manual for the duties you perform?” An individual could respond “yes” to this question, based solely on having been told that such a manual exists, even though the individual has never been given one or actually seen one.

On page 19, an interviewer will ask “On your Main job, have you ever invested your own money in the company where you work to support the day-to-day operations?” This is another example of how the ambiguous reference to “job” can product unreliable responses. The phrase “company where you work” suggests that the term “job” refers to a client. If an individual interprets “job” to mean client, a “no” response is likely, inasmuch as vendors do not normally invest in their clients. A possible false inference from a “no” response, however, is that the individual does not invest in his or her *own* business.

On page 19, an interviewer will ask “In the event that the company where you work loses money, would you continue to earn your wage from the work you perform?” The reference to “company” appears to refer to a client, as an independent contractor does normally refer to his or her own business as a company. In some cases, the response will be “yes,” because clients, especially larger clients, can temporarily lose money, but still pay their vendors. Inasmuch as this question is identified as part of the “ABC” test, a “yes” response arguably would be interpreted to mean the absence of a risk of loss, which weighs in favor of employment. Such an inference would be a false inference in many cases.

On page 20, an interviewer will ask “Do you use your own funds to advertise your services, with a website, flyers, newspapers, business cards or any other way?” An individual could interpret this question as permitting a “yes” response only by incurring out-of-pocket expenses. An individual might advertise by using free websites or by using his or her own social media page at no expense, and yet respond “no” to this question, due to the absence of an out-of-pocket expenditure. It follows that the wording of this question can lead to a false response.

As the foregoing demonstrates, the wording of many Survey questions will produce responses that do not accurately describe the actual working relationship, and in many instances are susceptible to creating responses suggestive of employment, when the true response would be suggestive of an independent-contractor relationship. It follows that worker-status determinations predicated on these Survey responses would be inherently unreliable.

Finally, the questions directed at ascertaining whether an individual understands the implications of being self-employed focus exclusively on statutory protections intended for employees, which do not apply to independent contractors. The Survey includes no questions concerning the benefits an individual hoped to attain by choosing to work as an independent contractor, in lieu of working as an employee. In this regard, in *THE ROLE OF INDEPENDENT CONTRACTORS IN THE U.S. ECONOMY*, referenced above, Dr. Eisenach reported:

More recently, a Pew Research Center survey found that self-employed workers are “significantly more satisfied with their jobs than other workers. They’re also more likely to work because they want to and not because they need a paycheck.” Specifically, the Pew study found that 39 percent of self-employed workers are “completely satisfied” with their jobs, compared with 28 percent of workers in wage or salary jobs, and that self-employed workers are also more likely to work because they “want to work” than other workers (32 percent versus 19 percent).

In addition to the survey data, there is a fairly extensive academic literature on the relationship between self-employment and job satisfaction. Daiji Kawaguchi, for example, analyzed U.S. data from the National Longitudinal Survey of Youth to conclude that “Analyses of job satisfaction scores show that self-employed workers are more satisfied with their jobs than salary/wage workers. Moreover, one dollar of earnings while a self-employed

worker is equivalent to 2.5 dollars of earnings while a salary/wage worker in terms of job satisfaction.” Benz and Frey have documented similar results using international data.

Research also provides insight into workers’ rationales for preferring IC and other alternative relationships. The vast majority of respondents to the CAWA survey cite personal reasons (e.g., flexibility of schedule) over economic reasons to explain why they are independent contractors. In addition, as discussed further below, there is evidence that self-employment serves as a stepping stone to entrepreneurship and small-business creation.

To summarize, independent contractor arrangements serve several important economic functions. They provide a means of low-cost contracting as an alternative to the fixed costs of traditional employment relationships; facilitate efficient incentive arrangements and effective quality control, especially in the face of obstacles sometimes created by regulatory and legal aspects of traditional employment contracts; and, perhaps most importantly, respond to workers’ desires to “be their own boss” and, in many cases, take the first steps down the road of small business creation.

(Footnotes omitted.)

The Coalition submits that to obtain a balanced assessment of an individual’s understanding of the implications of his or her classification status, it is necessary to include some questions concerning the benefits of being self-employed, in addition to the questions the Survey currently includes concerning the trade-offs of being self-employed – especially when the published literature discussed above suggests that on balance individuals working as independent contractors appear to be more content than their counterparts working as employees.

IV. The Survey results will be duplicative of, but inherently less reliable than, IRS’s NRP

In February 2010, the IRS launched a major employment-tax audit program, called the National Research Program (“NRP”). As noted, this audit program will consist of 6,000 IRS employment-tax audits conducted over three years. These NPR audits consider, among other things, worker classification. DOL states in Section 1 of the Supporting Statement that:

Furthermore, the Secretary of Labor recently announced a signing of a Memorandum of Understanding (MOU) between DOL and the Internal Revenue Service (IRS) which will allow the agencies to more easily will work together and share information to reduce the incidence of misclassification of employees, to help reduce the tax gap, and to improve compliance with federal labor laws.

Pursuant to this robust information-sharing arrangement, the Coalition submits that DOL should request IRS to share its data from the NRP.

The NRP is scheduled to end during 2013. The program is likely to create substantial data concerning, among other things, worker classification. While the data to be produced by this program is not perfect,⁴ it would be far superior to the worker-classification data to be developed based solely on one-party Survey responses. The NRP audits are conducted by experienced IRS employment-tax revenue agents, who have the opportunity to develop an extensive factual record on which to base their worker-classification determinations. Furthermore, the IRS will have the opportunity to obtain information from both sides of a work relationship, namely, both the individual and the company that does business with the individual.

The Coalition submits that the data to be produced from the NRP audits will be far more reliable for informing policy decisions than the worker-classification data to be produced from the contemplated Survey, and that DOL should eliminate any substantive worker-status determinations from its Survey program and instead obtain relevant data through other sources, such as the NRP.

V. Conclusion

The Coalition appreciates the opportunity to submit these comments concerning the contemplated Survey. The Coalition respectfully submits that the proposed Survey is predicated on a flawed methodology, and that any worker-status determinations it produces will be inherently unreliable and have limited if any practical utility.

Consequently, the Coalition urges that substantive worker-status determinations be eliminated from the contemplated Survey; that Survey questions be modified to eliminate their current bias in favor of employment; and that DOL obtain worker-classification data from other sources.

Thank you very much for your consideration.

Very truly yours,



Russell A. Hollrah
Executive Director

⁴ The deficiencies of the NRP's data on worker classification include, among other things, the fact that those taxpayers that are protected by Section 530 of the Revenue Act of 1978 would arguably have no financial incentive to aggressively defend the common-law status of Section-530-protected workers, which could lead to false findings in the NRP that Section 530 protects companies that misclassify workers.