A bold voice for transportation workers

October 26, 2020

The Honorable Eugene Scalia
Secretary
United States Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Amy DeBisschop
Director, Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: Independent Contractor Status Under the Fair Labor Standards Act
Docket No. WHD-2020-0007

Secretary Scalia and Director DeBisschop,

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I am pleased to respond to the Department of Labor's notice of proposed rulemaking entitled "Independent Contractor Status Under the Fair Labor Standards Act."

DOL's proposal would revise the agency's interpretation on whether workers are considered employees or independent contractors under the Fair Labor Standards Act (FLSA). The proposal seeks to amend the existing multi-factor test used to determine a worker's status, placing elevated emphasis on two core factors, including nature and degree of the worker's control over the work (e.g. schedule, assignments, and ability to work for other companies) and the worker's opportunity for profit or loss. DOL claims that the proposal will "benefit workers and businesses and encourage innovation and flexibility in the economy."

Despite the agency's claims, it is abundantly clear that DOL's proposal is nothing more than an unabashed attack on working people and a green light for corporations to cheat employees out of minimum and overtime wages. Further, the proposal would act to deny workers critical labor

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rights, including the obligation of an employer to come to the bargaining table with a union. Transportation workers long fought against illegal misclassification of employees for these reasons. However, DOL's proposal marks a radical departure from both previous legal and regulatory precedent and seeks to give unparalleled discretion to employers on how to classify their workers.

This is of particular concern to a number of TTD affiliated unions and we strongly endorse the comments filed by the AFL-CIO and the Transport Workers Union (TWU). Many transportation workers in today's economy are app-based, have mobile reporting locations, have variable schedules, provide their own tools and equipment, and/or may exert some modicum of control of their workflow; and DOL's proposal will usher in the immediate misclassification of many of these employees. This also includes Transportation Network Company (TNC) drivers who are currently fighting for proper classification in the courts and will not receive it under this NPRM. These companies misclassify and underpay their employees as a core principle of their business and this rule would permit this behavior indefinitely. Further, the rule would unfairly tilt the scales towards TNC companies, as they increasingly seek to compete with traditional modes of transportation like public transit.

To this point, DOL's proposal creates perverse incentives for employers and industries in which the use of independent contractors is not currently commonplace. Given the opportunity to contract away responsibilities, including fair pay and workplace conditions, many employers will take advantage of DOL's new regime to do so, and employers who do not will face artificial financial and competitive disadvantages. Over time, this framework will result in a wide-scale degradation of employment and reduced compensation, harming millions of Americans. Importantly, while FLSA primarily governs wages, transitioning employees to contractors is likely to lead to reductions in benefits like health care and leave as employers cut costs, and the loss of crucial labor rights.

From a transportation perspective, broad "contractor-ization" of the economy presents unique challenges. For decades, federal policy has ensured that federal funding of public transportation comes with strong labor protections and DOL's efforts to permit broad misclassification threatens to undermine these objectives, eliminate good unions jobs, and reduce wages and benefits across the country. Additionally, much of the Department of Transportation's safety regime assumes an employee/employer relationship. The inevitable move to independent contractor status for many DOT-regulated employees would immediately result in regulatory uncertainty. As an example, the Federal Transit Administration's drug and alcohol regulations address contractors and require most to submit to drug and alcohol testing. However, the regulations do not fully address the inherent issues of self-management of a testing program for a singular independent contractor. Even in the event that regulations are updated, the propagation of independent contractors in safety-sensitive jobs creates substantial compliance and monitoring challenges that are more easily resolved in the presence of an employee/employer relationship. On this and other issues, drastic increases in independent contractors in some sectors of the transportation industry are likely to cause significant regulatory and safety issues.

DOL's proposal to misclassify employees will have disastrous consequences for American workers, as it allows employers to slash wages, eliminate benefits, and mistreat their workforces. DOL should immediately withdraw their proposed NPRM and focus the agency's efforts on prohibiting the behavior of unscrupulous employers instead of codifying it.

Sincerely,

Larry I. Willis
President