



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

B-335873

January 24, 2024

The Honorable Bernard Sanders
Chairman
The Honorable Bill Cassidy
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable Virginia Foxx
Chairwoman
The Honorable Bobby Scott
Ranking Member
Committee on Education and the Workforce
House of Representatives

Subject: *Department of Labor, Wage and Hour Division: Employee or Independent Contractor Classification Under the Fair Labor Standards Act*

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 (DOL) entitled "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" (RIN: 1235-AA43). We received the rule on January 10, 2024. It was published in the *Federal Register* as a final rule on January 10, 2024. 89 Fed. Reg. 1638. The effective date is March 11, 2024.

The final rule, according to DOL, modifies regulations to replace the analysis for determining employee or independent contractor classification under the Fair Labor Standards Act, Pub. L. No. 75-718, 52 Stat. 1060 (June 25, 1938). DOL stated that the analysis in the modified regulations is more consistent with judicial precedent and the Act's text and purpose.

Enclosed is our assessment of DOL'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 that reads "Shirley A. Jones".

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Robert Waterman
Senior Policy Advisor
Wage and Hour Division
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
“EMPLOYEE OR INDEPENDENT CONTRACTOR CLASSIFICATION
UNDER THE FAIR LABOR STANDARDS ACT”
(RIN: 1235-AA43)

(i) Cost-benefit analysis

The Department of Labor, Wage and Hour Division (DOL) estimated the costs and benefits of this final rule. According to DOL, costs include rule familiarization costs, which represent direct costs to businesses and current independent contractors associated with reviewing the new regulation. DOL stated that the total one-time regulatory familiarization costs for establishments, governments, and independent contractors are estimated to be \$408 million. This amounts, according to DOL, to a 10-year annualized cost of \$56.4 million at a discount rate of 3 percent or \$54.3 million at a discount rate of 7 percent.

DOL stated that benefits and transfers from the rule include increased consistency and reduced misclassification. According to DOL, to the extent that the rule would reduce misclassification, it could result in transfers to workers in the form of employer-provided benefits like health care and retirement benefits. Additionally, DOL explained that there could be a transfer in federal tax liabilities from workers to employers. Further, any reduction in misclassification that occurs because of this rule would, according to DOL, lead to an increase in the applicability of Fair Labor Standards Act protections for workers and subsequently may result in transfers relating to minimum wage and overtime pay. Further, DOL stated that in addition to increased compliance with minimum wage and overtime pay requirements, potential transfers may also result from this rulemaking as a consequence of differences in earnings between employees and independent contractors.

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

DOL prepared a Final Regulatory Flexibility Analysis. In the Analysis, DOL discussed: (1) the need for, and objectives of, the final rule; (2) significant issues raised in public comments, including by the Small Business Administration Office of Advocacy; (3) the estimated number of small businesses affected by the final rule; (4) compliance requirements of the rule, including reporting and recordkeeping requirements; and (5) steps DOL has taken to minimize the significant economic impact on small entities.

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

DOL stated that this final rule is expected to create unfunded mandates that exceed \$165 million.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO's major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: "the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act's exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act's requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act" in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

In its submission to us, DOL did not discuss the Act.

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

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

On October 13, 2022, DOL published a notice of proposed rulemaking. 87 Fed. Reg. 62218. DOL stated it received approximately 55,400 comments on the proposed rule. DOL responded to comments in this final rule.

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

DOL stated that this final rule does not contain a collection of information subject to OMB approval under PRA.

Statutory authorization for the rule

DOL promulgated the final rule pursuant to sections 201–219 of title 29, United States Code, and Public Law 105-78.

Executive Order No. 12866 (Regulatory Planning and Review)

DOL stated that the Office of Information and Regulatory Affairs determined that this final rule is a significant regulatory action under the Order.

Executive Order No. 13132 (Federalism)

DOL stated the final rule does not have federalism implications. DOL determined the final rule 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.