

Congress of the United States

Washington, DC 20515

January 5, 2023

Jessica Looman
Principal Deputy Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Principal Deputy Administrator Looman:

We write today in support of the Department of Labor’s (DOL, the Department) strong and worker-centered proposed rule on employee classification,¹ and to provide the Department with an example that illustrates the tangible positive impact that properly classifying workers as employees under the rule will have on women’s access to essential reproductive care, including abortion services. We hope this example will underscore the importance of finalizing the strongest possible rule and pursuing robust, proactive enforcement against employers who engage in misclassification.

Worker misclassification, the practice of mislabeling workers who should be employees as independent contractors, has deprived millions of people across the country of their rights as workers.² Independent contractors traditionally are “self-employed” people who exercise entrepreneurial control over important business decisions, such as how often they work, what work they do, and how much to charge customers for their services.³ In recent years, however, large tech corporations in particular have abused the “independent contractor” label, applying it to workers who cannot truly make business decisions in their own economic interest.⁴ This illegal practice denies these workers access to paid time off, health insurance, workers’ compensation, and other critical benefits and rights guaranteed to employees.⁵

¹ U.S. Department of Labor Wage and Hour Division, Federal Register Notice, “Employee or Independent Contractor Classification Under the Fair Labor Standards Act,” October 13, 2022, <https://www.federalregister.gov/documents/2022/10/13/2022-21454/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act>.

² National Employment Law Project, “Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries,” October 2020, <https://s27147.pcdn.co/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf>.

³ Equitable Growth, “How U.S. companies harm workers by making them independent contractors,” Corey Husak, July 31, 2019, <https://equitablegrowth.org/how-u-s-companies-harm-workers-by-making-them-independentcontractors/>.

⁴ *Id.*

⁵ National Employment Law Project, “INDEPENDENT CONTRACTOR VS. EMPLOYEE: WHY MISCLASSIFICATION MATTERS AND WHAT WE CAN DO TO STOP IT,” Catherine Ruckelshaus, May 9, 2016, <https://www.nelp.org/publication/independent-contractor-vs-employee/>.

The Department of Labor’s proposed rule is a critical step towards rectifying this widespread abuse. It will bring both workers and employers much-needed clarity, and restore a commonsense standard based on legislative, judicial, and regulatory precedent.⁶ With appropriate enforcement, this rule could have far-reaching beneficial effects, particularly for the most vulnerable populations.

That population includes individuals in need of abortion services. In the wake of the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization (Dobbs)*, many employers began to offer new benefits aimed at protecting employees’ right to receive abortions and related care in states where they may have been restricted.⁷ Often, this benefit is structured as a travel reimbursement for employees who, due to new bans or restrictions on access to abortions in their state, need to travel out of state to receive the care they want or need.⁸ These new benefits were a welcome response from private sector companies in the wake of the *Dobbs* decision, and the Republican state legislatures that have enacted or are enacting laws to criminalize patients and providers who seek or offer abortion care.⁹

However, when we wrote to many of the companies that classify workers as independent contractors, we learned that their employees seeking to access the benefits had to be enrolled in the company’s employer-sponsored health insurance plan, meaning that the workers classified as independent contractors would likely be cut out of the benefit. Specifically, we wrote to five tech companies with significant or predominant independent contractor workforces and asked a series of questions to clarify how the benefit would work and who would be eligible to use it.¹⁰ The companies’ responses were generally inadequate and incompletely answered our questions. But all five confirmed, explicitly or implicitly, that independent contractors would be left out of the travel reimbursement for abortion care benefit¹¹:

⁶ National Employment Law Project, “NELP APPLAUDS DOL’S PROPOSED INDEPENDENT CONTRACTOR RULE,” press release, October 11, 2022, <https://www.nelp.org/news-releases/nelp-applauds-dols-proposed-independent-contractor-rule/>.

⁷ Wall Street Journal, “Uber, Lyft, Others to Support Employees Traveling Out-Of-State for Abortion,” Preetika Rana, June 24, 2022, <https://www.wsj.com/livecoverage/supreme-court-decision-roe-v-wade-6-24-2022/card/uberlyft-others-to-support-employees-traveling-out-of-state-for-abortion-vtYQJSQ5KFZppFnOXQGF>.

⁸ *Id.*

⁹ The New York Times, “Tracking the States Where Abortion is Now Banned,” October 7, 2022, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>.

¹⁰ Letters from Senator Warren, Rep. Bush, and colleagues to Uber, Lyft, Grubhub, DoorDash, and Amazon, September 22, 2022, <https://www.warren.senate.gov/imo/media/doc/Letters%20to%20Companies%20Worker%20Misclassification.pdf>.

¹¹ Letter from Amazon to Senator Warren and Rep. Bush, October 21, 2022, <https://www.warren.senate.gov/imo/media/doc/Amazon%20Warren.response.10.21.pdf>; Letter from Uber to Senator Warren and Rep. Bush, October 22, 2022, <https://www.warren.senate.gov/imo/media/doc/Uber%20Sen.%20Warren%209-22%20response%20-%20Oct%2020225.pdf>; Letter from Lyft to Senator Warren and Rep. Bush, October 22, 2022, <https://www.warren.senate.gov/imo/media/doc/Lyft%20Response%20Warren%20Bush%20Colleagues%2010.22.2022.pdf>; Letter from DoorDash to Senator Warren and Rep. Bush, October 22, 2022, <https://www.warren.senate.gov/imo/media/doc/DoorDash%20Response>

- Amazon: Amazon’s independent contractors and part-time employees are ineligible for the benefit. According to the company, “All independent contractors are ineligible [for the benefit]”; “Amazon employees working less than 20 hours per week are not eligible for medical plans,” and membership in one of Amazon’s employer-sponsored health care plans is a prerequisite for eligibility for the benefit. Another significant piece of Amazon’s workforce is made up of employees of third-party companies who contract with Amazon,¹² and Amazon declined to provide information as to whether these workers qualify for the benefit.
- Uber: The company informed us that “this benefit is available to employees of Uber, not independent contractors.”
- Lyft: While Lyft did not explicitly state that its independent contractor rideshare drivers are ineligible for the benefit, it noted that, “All U.S. employees and their dependents enrolled in Lyft’s self-funded medical plans administered are eligible for this benefit. Full-time team members working more than 30 hours per week are eligible to enroll in these plans.” Based on this explanation, it is clear that Lyft drivers, who are not full-time “team members” (employees) even if some do work more than 30 hours per week,¹³ are ineligible for the benefit.
- Grubhub: While Grubhub did not explicitly state that its independent contractor delivery drivers are ineligible for the benefit, it noted that, “As part of our employee benefits program, we now offer a reimbursement of up to \$4,000 per year for any health care-related travel expenses for services not available in an employee’s home state. This benefit, and the associated process and privacy protections, will be managed by our insurance carrier.” Based on this explanation, it is clear that Grubhub drivers, who are not able to participate in Grubhub’s employee benefits program due to their independent contractor status, are ineligible for the benefit.
- DoorDash: While DoorDash did not explicitly state that its independent contractor delivery drivers are ineligible for the benefit, it noted that, “This benefit is available to DoorDash’s full-time U.S. employees who are eligible for and participate in one of DoorDash’s healthcare plans, as well as any of their dependents who are enrolled under those plans.” Based on this explanation, it is clear that DoorDash drivers, who are not employees and are ineligible for DoorDash’s employer-sponsored health care plans, are ineligible for the benefit.

These responses confirm that while the companies’ higher-paid corporate executives will rightfully enjoy access to this benefit, their independent contractors, who lack both pay

[%20Sen%20Warren%20Rep%20Bush.pdf](#); Letter from Grubhub to Senator Warren and Rep. Bush, October 21, 2022, <https://www.warren.senate.gov/imo/media/doc/10.21.22%20Grubhub%20Response%20to%20Senator%20Warren3.pdf>.

¹² Detroit News, “Drivers don’t work for Amazon but company has lots of rules for them,” Josh Eidelson and Matt Day, May 5, 2021, <https://www.detroitnews.com/story/business/2021/05/05/drivers-dont-work-amazon-but-company-has-lots-rules-them/4955413001/>.

¹³ Business Insider, “Uber and Lyft say the battle over AB-5 is about preserving flexibility for part-time gig workers. The reality is their businesses have become dependent on full-time drivers and they can’t afford to pay them like employees,” Tyler Sonnemaker, August 21, 2020, <https://www.businessinsider.com/uber-lyft-ab5-fight-reveals-dependence-full-time-drivers-2020-8>.

stability and minimum wage protections, will not.¹⁴ This disparity will have particular implications for already marginalized communities: more and more women have joined the gig workforce in recent years,¹⁵ and women of color face even greater obstacles in accessing abortions and related care.¹⁶

However, should DOL finalize and enforce the proposed rule, many of these independent contractors would likely be reclassified as employees, potentially opening the door for them to receive previously inaccessible abortion care. For previously misclassified workers in states that have restricted or banned abortion access since the *Dobbs* decision, the benefit would cushion the cost of traveling out of state to access the care they need. And for gig workers across the board, many of whom experience economic insecurity as a result of low pay and other barriers,¹⁷ the rights to a minimum wage, overtime pay, and employer-sponsored health care linked to employee status would help alleviate the burden of accessing abortions and other necessary medical care. Furthermore, the benefits of employee status extend beyond abortion access: unlike independent contractors, employees are guaranteed the right to organize a union and bargain collectively¹⁸; in most states,¹⁹ the right to workers' compensation when they are injured or killed on the job (a tragically frequent occurrence for app-based workers²⁰); for eligible employees, access to unemployment insurance²¹ and social security payments²²; and more.

These companies' responses to our letters demonstrate the need for the federal government, and particularly the Department of Labor, to step up and protect their workers, and the specific impact on access to abortion care if they do not. We applaud the Department for releasing a strong proposed rule that will go far in rectifying the abuses perpetrated by these companies and their peers. We urge the Department to pursue the strongest rule possible and,

¹⁴ National Employment Law Project, "INDEPENDENT CONTRACTOR VS. EMPLOYEE: WHY MISCLASSIFICATION MATTERS AND WHAT WE CAN DO TO STOP IT," Catherine Ruckelshaus, May 9, 2016, <https://www.nelp.org/publication/independent-contractor-vs-employee/>.

¹⁵ Axios, "The rise of women in the gig economy," Erica Pandey, August 26, 2021, <https://www.axios.com/2021/08/26/women-gig-economy-doordash-uber-delivery-driver>.

¹⁶ Washington Post, "Women of color will be most impacted by the end of Roe, experts say," Anne Branigin and Samantha Chery, June 24, 2022, <https://www.washingtonpost.com/nation/2022/06/24/women-of-color-end-of-roe/>.

¹⁷ Economic Policy Institute, "National survey of gig workers paints a picture of poor working conditions, low pay," Ben Zipperer, Celine McNicholas, Margaret Poydock, Daniel Schneider, and Kristen Harknett, June 1, 2022, <https://www.epi.org/publication/gig-worker-survey/>.

¹⁸ National Labor Relations Board, "Your Rights," <https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights>.

¹⁹ Congressional Research Service, "Workers' Compensation: Overview and Issues," Scott Szymendera, updated February 18, 2020, <https://sgp.fas.org/crs/misc/R44580.pdf>.

²⁰ Gig Workers Rising, "DEATH AND CORPORATE IRRESPONSIBILITY IN THE GIG ECONOMY: AN URGENT SAFETY CRISIS," April 2022, https://www.gigsafetynow.com/_files/ugd/af5398_87e49dc58be84bff9cd94076baf5004.pdf.

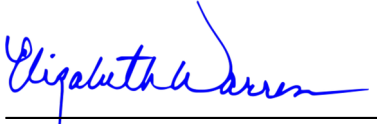
²¹ Department of Labor, "How Do I File for Unemployment Insurance?" <https://www.dol.gov/general/topic/unemployment-insurance>.

²² Social Security Administration, "Social Security Credits," <https://www.ssa.gov/benefits/retirement/planner/credits.html>; Social Security Administration, "SOCIAL SECURITY ENTITLEMENT REQUIREMENTS," <https://www.ssa.gov/ssi/text-entitle-ussi.htm>.

once finalized, engage in robust and targeted enforcement in sectors with high concentrations of vulnerable misclassified workers.

Thank you for your attention to this matter.

Sincerely,



Elizabeth Warren
United States Senator



CORI BUSH
Member of Congress



Mazie K. Hirono
United States Senator