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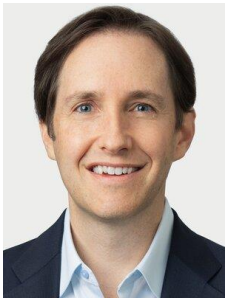
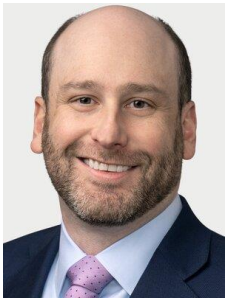
How DOL Rule Would Preserve App-Based Contractor Work

By **Michael Holecek, Andrew Kilberg and Tim Kolesk** (March 6, 2026, 3:59 PM EST)


Michael Holecek


Andrew Kilberg


Tim Kolesk

The U.S. Department of Labor's proposed 2026 independent contractor regulation, announced on Feb. 26, would help preserve flexible, independent work arrangements in the gig economy, particularly for app-based models.

As many as 70 million Americans engage in freelance or gig work, representing more than one-third of the U.S. workforce, according to estimates from industry and workforce research organizations MBO Partners and the Upwork Research Institute.[1] This includes ride-share drivers, delivery couriers, home repair providers, independent consultants and countless other workers who choose flexible work arrangements outside traditional employment structures.

Before the 2026 proposal, the DOL's 2024 independent contractor rule, which took effect in March 2024, applied an economic realities test that was framed as a totality-of-the-circumstances inquiry, without assigning weight to any factor. The new rule would largely reinstate the 2021 core factors framework, discussed below, for analyzing worker status under the Fair Labor Standards Act.

While many gig workers are already properly classified as independent contractors under existing law, the 2026 proposal would help preserve and stabilize independent contractor opportunities by reaffirming analytical principles that reflect how app-based work functions in practice.

Interested parties have until April 28 to submit comments, after which the DOL will review the comments and may modify the proposal before issuing a final rule.

Restoring Core Factors With Implications for Gig Work

At the center of the proposal is a return to a framework that emphasizes two core factors: (1) "the nature and degree of control over the work" by the individual or their potential employer, and (2) "the worker's opportunity for profit or loss."

Under the proposed rule, these factors would be analyzed first. If both point in the same direction, toward either contractor or employee, there is a "substantial likelihood" that the classification is correct. Other factors — such as skill and whether the work is "part of an integrated unit of production" — would serve as additional guideposts.

For gig economy platforms, this structure reinforces the centrality of worker autonomy and entrepreneurial opportunity that already characterize many app-based arrangements. Rather than introducing a new test, the proposed rule returns to a framework that recognizes the greater weight that the control and profit or loss factors typically receive, and that may offer increased predictability for platforms and workers alike.

Centering Control Around Flexibility

The proposed rule articulates the control factor in a manner that closely tracks the operational realities of many gig economy platforms. It identifies indicia of independent contractor status as including the worker's ability to set their own schedule; select among available opportunities; and work for multiple platforms, including competitors.

These features mirror the experience of many app-based workers, who decide when to log on, which assignments to accept and whether to provide services across multiple apps.

Crucially, the proposed rule clarifies that compliance with safety requirements, service standards and legal obligations — typical in some apps' operations — does not by itself constitute employer-like control.

This is a shift from the 2024 rule's approach, which treated measures that were taken for the sole purpose of complying with a specific legal obligation as not indicative of control, but suggested that practices that go beyond compliance — including a company's own safety, quality control or customer service standards — could be indicative of control.

The 2026 release explains that an overly expansive conception of control could disincentivize compliance with safety and regulatory standards, and that returning to the 2021 formulation provides a clearer line between legitimate operational guardrails and supervisory control indicative of employment.

For ride-sharing and delivery platforms operating in regulated environments, that clarification would help preserve necessary safety and compliance structures without undermining independent contractor status.

Clarifying Opportunity for Profit or Loss in App-Based Models

The second core factor — opportunity for profit or loss — is also particularly significant in the gig work context. Unlike the 2024 rule's more open-ended treatment of this factor, the proposed rule clarifies that a worker need not demonstrate both capital investment and managerial initiative for this factor to favor independent contractor status. An opportunity based on either initiative or investment may suffice.

This clarification aligns with many app-based models, where workers may use personal vehicles or equipment, but meaningfully influence their earnings through strategic decisions about when and where to work, and which opportunities to accept or reject.

The 2026 proposal supports this approach by citing the U.S. Supreme Court's 1947 decision in U.S. v. Silk, which recognized that workers' "initiative, judgment, and energy" are relevant to entrepreneurial

opportunity. By emphasizing initiative, the proposal reinforces the relevance of worker discretion and self-direction in digital labor markets.

Prioritizing Actual Practice Over Contractual Labels

The proposed rule also reinstates the principle that actual practice carries more weight than theoretical or contractual possibilities. A worker's contractual ability to negotiate rates or work for competitors is less meaningful if, in practice, those freedoms are constrained. Conversely, contractual provisions reserving certain rights to a platform may be less probative if they are not exercised in day-to-day operations.

For app-based businesses, where agreements must anticipate a range of contingencies, focusing on real-world operation may better capture how flexibility functions in practice. By emphasizing functional realities rather than isolated contractual language, the proposal seeks to align classification analysis with how work actually occurs.

Focusing Economic Dependence on Work, Not Income

The proposed rule reaffirms that economic dependence remains the ultimate inquiry under the FLSA's economic realities test, which evaluates the real-world relationship using multiple factors to determine worker classification.

In weighing those factors, the economic dependence inquiry asks whether the worker is economically dependent on the company, or whether they are in business for themselves and not dependent on the company. Importantly, however, the proposed rule clarifies that the analysis concerns dependence for work — not dependence for income.

The regulatory text explains that economic dependence "does not focus on the amount the worker earns or whether the worker has other sources of income." In the gig context, this distinction is significant. A worker may derive a substantial portion of their earnings from a single platform, yet still exercise meaningful autonomy over scheduling, task selection and participation. The proposal thus avoids reducing the inquiry to a worker's income profile alone.

Restoring App-Relevant Illustrative Examples

The proposed rule restores illustrative examples to the regulatory text itself, including one involving an app-based service connecting customers with home repair providers. In that example, the worker can meaningfully increase earnings through initiative and business acumen, even though the platform has invested heavily in building and operating the digital infrastructure.

The analysis concludes that the factor concerning the opportunity for profit or loss favors independent contractor status, because the relevant inquiry centers on the worker's meaningful opportunity — not the relative size of the platform's investment.

The proposal also includes an owner-operator transportation example clarifying that delivery deadlines, compliance requirements and safety testing tied to legal obligations do not automatically constitute employer-like control. This example speaks to control issues that commonly arise in app-based platforms — namely, whether safety and compliance measures and service-level expectation should be treated as control.

By treating these requirements as contractual guardrails that are tied to legal obligations and operational standards, the example reinforces that such contractual guardrails do not, standing alone, undermine independent contractor status.

Addressing California's A.B. 5 and the ABC Test

In the broader economic discussion, the 2026 release addresses California's experience under A.B. 5, which went into effect in January 2020 and codified the use of the ABC classification test.

The ABC test generally presumes employee status unless the hiring entity can satisfy three conditions: that the worker is free from control, performs work outside the usual course of the hiring entity's business, and is customarily engaged in an independent trade.

The department cites research from the Mercatus Center at George Mason University indicating reductions in self-employment and overall employment in certain affected occupations following A.B. 5's implementation.[2]

The release suggests that more restrictive classification frameworks can reduce independent work opportunities and may negatively affect workers who prefer flexible arrangements. By contrast, the proposed 2026 approach is described as less restrictive of independent contracting than the 2024 framework.

While the FLSA's economic realities test remains controlling under Supreme Court precedent — including Tony and Susan Alamo Foundation v. Secretary of Labor in 1985, and Goldberg v. Whitaker House Cooperative Inc. in 1961 — the department's discussion signals concern that overly rigid standards may limit worker choice and labor market flexibility.

Conclusion: Supporting Independent and Flexible Work

For millions of Americans who participate in gig and app-based work, the proposed 2026 rule represents an effort to reaffirm a classification framework that recognizes autonomy, initiative and flexibility as central features of independent contractor relationships.

By emphasizing control that is consistent with worker discretion, recognizing entrepreneurial opportunity without rigid capital thresholds, and focusing on actual practice rather than formal labels, the proposal would help preserve independent and flexible work opportunities in a sector that now represents a substantial share of the modern workforce.

Michael Holecek is a partner at Gibson Dunn & Crutcher LLP.

Andrew G.I. Kilberg is a partner at the firm. He also served as counselor to the secretary of labor when the 2021 rule was issued.

Tim Kolesk is an associate at the firm.

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[1] MBO Partners, State of Independence in America: 2024 Report (estimating 72.7 million independent workers in 2024), https://www.mbopartners.com/state-of-independence/2024-report/; Upwork Research Institute, Freelance Forward 2023 (estimating 64 million Americans, 38% of the U.S. workforce, performed freelance work in 2023), https://www.upwork.com/research/freelance-forward-2023-research-report.

[2] Mercatus Center at George Mason University, Assessing the Impact of Worker Reclassification: Employment Outcomes Post–California AB5 (Working Paper, 2024), https://www.mercatus.org/research/working-papers/assessing-impact-worker-reclassification-employment-outcomes-post.