

Attorneys General of New York, Pennsylvania, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington

September 29, 2020

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

Amy DeBisschop, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
United States Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Request for extension of comment deadline regarding Notice of Proposed Rulemaking, *Independent Contractor Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 60,600 (Sept. 25, 2020), RIN: 1235-AA34.

Dear Secretary Scalia and Ms. DeBisschop:

On September 22, 2020, the Wage and Hour Division (“WHD”) of the U.S. Department of Labor (the “Department”) announced a notice of proposed rulemaking (“NPRM”) that would create new regulations interpreting whether workers are “employees” or independent contractors under the Fair Labor Standards Act. *See Independent Contractor Status Under the Fair Labor Standards Act*, 85 Fed. Reg. 60,600 (Sept. 25, 2020) (“Proposed Rule”). The undersigned Attorneys General of New York, Pennsylvania, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington, write to urge you, consistent with longstanding White House guidance and the Department’s own historical practice, to extend the comment period beyond the truncated 30 days you provided for public comment in the Proposed Rule.

The Proposed Rule raises extremely important legal and policy matters that will affect workers in our states, and which also have the possibility of directly impacting the states’ own administrative costs and tax revenues. WHD has determined that the proposal is a “significant regulatory action” as it has an annual effect on the economy of greater than \$100 million. 85 Fed. Reg. at 60,622. The Proposed Rule also states that certain “costs and benefits have not been

quantified,” including those relating to impacts on workers, payroll taxes, unemployment insurance and workers’ compensation taxes (*id.* at 60,637) but acknowledges that total costs to private sector businesses of the proposed rule will be \$369.2 million (*id.* at 60,638). The undersigned require additional time to consider the potential costs to workers in their states, and to the interests of the states themselves, but certainly a rule of this magnitude warrants additional time for stakeholder consideration.

Additionally, the Proposed Rule raises complex legal questions of significant and longstanding public interest that require additional time to consider. As the Department highlights, it “has never promulgated a generally applicable regulation addressing the question of who is an independent contractor and, thus, not an employee under the Act.” *Id.* at 60,604. Accordingly, the Department should have the benefit of thoughtful input by affected stakeholders, including the undersigned states. Particularly in an area that has been the subject of active policy and legal debate since the 1940s, *see id.* at 60,601-604, allowing the public only 30 days to offer input on the Department’s sweeping proposal is insufficient on its face.

Indeed, the Administrative Procedure Act (“APA”) and the Executive Branch’s longstanding application of the APA’s requirements make clear that an abbreviated 30-day comment period would fail the APA’s notice-and-comment requirements for reasoned agency decisionmaking. The APA requires that “the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments” 5 U.S.C. § 553(c). For more than two and a half decades, executive agencies have followed a presumption that a minimum of 60 days is necessary to provide the affected public with a meaningful opportunity to comment on proposed agency regulations: Executive Order 12,866 provides that “[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.” Regulatory Planning & Review, Exec. Order No. 12,866, § 6(a)(1) (Sept. 30, 1993); *see also* Improving Regulation & Regulatory Review, Exec. Order No. 13,563, § 2(b) (Jan. 18, 2011) (“To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.”).

WHD’s own longstanding practice appears to be consistent with this presumption. Our understanding is that with respect to every other significant proposed regulation WHD has published in 2019 and 2020, the agency has allowed at least 60 days for public comment. WHD provided a 60-day comment period for other significant proposed rules, including: Tip Regulations Under the Fair Labor Standards Act (FLSA) (84 Fed. Reg. 53,956; 84 Fed. Reg. 67,681) (60-day comment period extended two days); Temporary Agricultural Employment of H-2A Nonimmigrants in the United States (84 Fed. Reg. 36,168) (60-day comment period); and Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (84 Fed. Reg. 10,900) (same). And in some instances, WHD has extended 60-day comment periods to 75 days in response to extension requests: Joint Employer Status Under the Fair Labor Standards Act (84 Fed. Reg. 14,043; 84 Fed. Reg. 21,301) (60-day period extended to 75 days) and Regular Rate Under the Fair Labor Standards Act (84 Fed. Reg. 11,888; 84 Fed. Reg. 21,300) (60-day period extended to 75 days). The Department has not identified any reason in the proposed rule that would justify deviating from the longstanding norm of allowing at least 60 days for public comment.

For these reasons, we respectfully request that the Department provide at least 60 days to respond to this NPRM, extending the comment period an additional 30 days.

Sincerely,



Letitia James
New York Attorney General



Josh Shapiro
Pennsylvania Attorney General



Xavier Becerra
California Attorney General



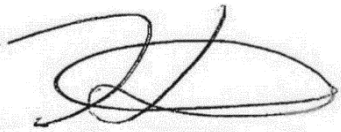
Philip J. Weiser
Colorado Attorney General



William Tong
Connecticut Attorney General



Kathleen Jennings
Delaware Attorney General



Karl A. Racine
Attorney General for the District of Columbia



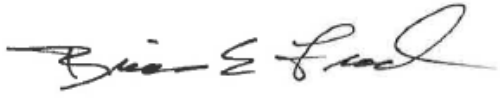
Clare E. Connors
Hawaii Attorney General



Kwame Raoul
Illinois Attorney General



Aaron M. Frey
Maine Attorney General



Brian E. Frosh
Maryland Attorney General



Maura Healy
Massachusetts Attorney General



Dana Nessel
Michigan Attorney General



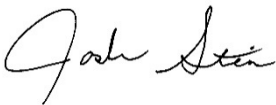
Keith Ellison
Minnesota Attorney General



Gurbir S. Grewal
New Jersey Attorney General



Hector Balderas
New Mexico Attorney General



Joshua H. Stein
North Carolina Attorney General



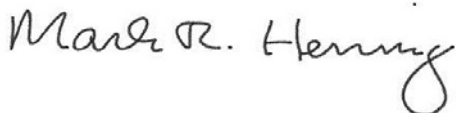
Ellen F. Rosenblum
Oregon Attorney General



Peter F. Neronha
Rhode Island Attorney General



Thomas J. Donovan, Jr.
Vermont Attorney General



Mark R. Herring
Virginia Attorney General



Bob Ferguson
Washington State Attorney General