June 26, 2024

The Honorable Bill Cassidy
Ranking Member, Committee on Health, Education, Labor and Pensions
United States Senate
428 Dirksen Senate Office Building
Washington, DC 20510

Submitted electronically via email

RE: Updating Labor and Employment Laws to Include Independent Workers

To Whom It May Concern,

As the voice of all things work, workers, and the workplace, SHRM is the foremost expert, convener, and thought leader on issues impacting today's evolving workplaces. With over 340,000 members in 180 countries, SHRM impacts the lives of more than 362 million workers and families globally. SHRM's membership of HR professionals and business executives sits at the intersection of continuing worker support and rapid economic change, helping to establish positive and collaborative workplace cultures where workers and employers thrive together. As such, SHRM welcomes the opportunity to respond to the request for information concerning whether current labor and employment laws fit the modern economy (the "RFI") and respectfully offers the following recommendations.

I. Introduction

Given SHRM's unique workplace knowledge and its economic posture, SHRM has a significant and immediate interest in this RFI. SHRM represents professionals attuned to the "on-the-ground" implications of current policy regarding worker classification. Our members understand that to recruit and retain top talent, organizations must offer myriad options that provide modern workers with the autonomy they desire. To compete in the modern global work environment, organizations must provide independent work opportunities.

SHRM's members must, therefore, engage with the contours—or lack thereof—of the consistently shifting regulatory interpretations of worker classification under key employment laws to render impactful and complicated classification decisions. Sometimes, these decisions can lead to confusion in the workplace, fewer and/or less robust opportunities for independent workers, and potential legal disputes. Therefore, SHRM's members—and, indeed, all economic stakeholders—understand the necessity of clear standards governing worker classification.

SHRM believes that the current shortcomings of the worker classification system cascade throughout the U.S. workforce. Without clear and consistent guidance on how to evaluate worker relationships, legal uncertainty undermines workers' autonomy and discourages companies from offering benefits to independent workers. The importance of clarity and certainty of the rules

governing worker classification—as well as the importance of the impacts that flow from these classification determinations—is critical.

The RFI rightly states that "workers have shown preferences for work models outside of traditional employment." SHRM has years of research that supports these findings. To aid in the drafting of our 2022 Regulatory Comment, SHRM's survey found that 75% of respondents' organizations utilize independent workers.[1] Additionally, SHRM's 2023 Global Worker Research found that independent workers prefer their freedom and flexibility and that these workers report the highest levels of satisfaction when it comes to key job features such as workplace manageability and flexibility to manage personal and professional obligations, which are important to workers of all types. For example, nearly 3 in 4 independent workers (72%) noted they are very or extremely satisfied with the manageability of their workload, compared to only 56% to 61% of other types of workers surveyed, including traditional full-time and part-time employees. Indeed, independent workers are most satisfied with the flexibility that independent work offers, such as 1) the location(s) they can work, 2) their working schedules, 3) control in setting their schedules, and 4) choosing the type of work they perform.[2]

Additionally, SHRM's 2019 White Paper, in collaboration with SAP Success Factors,[3] found that independent workers voluntarily choose independent work for various reasons, such as "being able to set my own schedule" (49%), "choosing how many hours I work" (40%), and "choosing my work location" (33%). In other words, workers choose independence because of its flexibility.

The popularity of independent contracting results from its unique benefits to both workers and businesses. These benefits go far beyond worker preference. In addition to workers' desire to "be their own boss," there is a strong relationship between independent contracting, entrepreneurship, and small business formation. These entrepreneurial small businesses are critical to our economy. Independent workers save business organizations time and money. Organizations do not need to incur significant costs onboarding and training independent contractors because they already possess the prerequisite knowledge in their work field. At the same time, independent workers offer businesses a pipeline of on-demand talent, often in highly specialized areas at peak or sporadic times that do not allow businesses to as successfully onboard short-term employees. Managers can supplement staff with independent contractors who have the talent and knowledge not only to advance a project, but to teach the companies' employees new skills.

II. Identifying the Shortcomings of the Current Worker Classification Model

[1] From October 18, 2022, to November 1, 2022, SHRM conducted an electronic survey of 956 randomly sampled HR professionals who were active SHRM members and 1,018 independent workers from a third-party online panel (2022 Survey).

[2] *See also* S. Milligan, *Gig Workers Challenge Old Order*, SHRM (Jan. 26, 2019), *available at* https://www.shrm.org/topics-tools/news/all-things-work/gig-workers-challenge-old-order (last visited June 19, 2024) (noting research that gig workers voluntarily chose to work as such).

[3] Surveyed 940 independent contractors, 350 employees, 424 managers who work with independent contractors, and 1,175 HR professionals in myriad sectors about the benefits of independent work for businesses and work (2019 White Paper).

A. The U.S. Workforce at Large Needs Independent Worker Definitions That Are Clear, Consistent, and Certain

Independent work is an essential part of the economy that necessitates clarity and consistency regarding the legal status of the relationship between independent workers and employers. The primary concern voiced by HR professionals is the need for clarity and specificity around independent contractor classification. In 2019, nearly three-quarters of HR professionals reported that they were somewhat concerned, concerned, or very concerned about the legal landscape of independent work.[4] When asked to identify the biggest issue or challenge they would like to see resolved related to external workers, many HR professionals cited legal ambiguity regarding the use and management of external workers as their greatest concern. Amplifying the need for consistency and clarity in the definitions of "employee" and "independent contractor" is the 180-degree shifts in regulatory action with each new presidential administration, as epitomized by regulatory oscillations concerning the Fair Labor Standards Act ("FLSA") and the National Labor Relations Act ("NLRA").

With respect to the FLSA, without statutory language defining the contours of an employee versus an independent contractor, courts historically have employed an economic-realities test, considering various factors and the totality of the circumstances, derived from the Supreme Court's decisions in *United States v. Silk*, 331 U.S. 704 (1947) and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). Application of this test has resulted in inconsistent rulings. In *Cromwell v. Driftwood Elec. Contractor, Inc.*, 348 F. App'x 57 (5th Cir. 2009), for example, cable splicers hired to perform repairs after Hurricane Katrina were deemed employees. In *Thibault v. Bellsouth Telecomm'n*, 612 F.3d 843 (5th Cir. 2010), however, cable splicers hired by the same company under remarkably similar arrangements as in *Cromwell* were deemed independent contractors. Thus, the economic-realities test, as utilized by the courts, provides little guidance to companies and workers about worker classification.

On January 7, 2021, in an attempt to modernize and provide guidance to the independent contractor analysis, the U.S. Department of Labor ("DOL") enacted a regulation titled "Employee or Independent Contractor Classification Under the Fair Labor Standards Act" ("the 2021 Rule").[5] SHRM supported the 2021 Rule because it established clear guideposts to evaluate worker classification. By instructing courts to focus on certain predominant factors (the nature and degree of control over the work and the worker's opportunity for profit or loss), the 2021 Rule promised clarity, certainty, and consistency.

The 2021 Rule also dovetailed with the realities of the modern workforce. Some circuit courts of appeals, for instance, consider the "relative" investment between the worker and purported employer. But this comparison makes little sense when independent contractors can now create their own businesses with minimal capital expenditure, such as by merely purchasing a laptop or tablet. In such scenarios, this factor will almost always tilt in favor of employment status, even if the relevant workers are in business for themselves. The 2021 Rule rightly recognized that investment should not be a blind comparison with the purported employer's investment, but rather should be considered within the profit/loss analysis—that is, whether the employer made an investment with an eye toward turning a profit (and potentially risking a loss).

[4] *See* Ex. B, 2019 White Paper at 39.
[5] *See* 86 Fed. Reg. 1168.

Before the impact of the 2021 Rule was fully realized, the DOL under the Biden administration promulgated a new regulation, which was finalized on January 10, 2024 (the "2024 Rule"), to replace the 2021 Rule.[6] The 2024 Rule reverts to a totality-of-the-circumstances test that lacks clarity and tilts the balance in favor of finding employee status, effectively nullifying the choice of millions of workers who prefer independent contractor status.

The issues with a lack of definitions or clarity do not begin and end with the FLSA; a similar dynamic has occurred with the NLRA. Within the last 16 years, the National Labor Relations Board ("the Board") initially expanded the definition of "employee," then reverted to a traditional common-law test, and later re-adopted the broader standard. With each swing of the pendulum, businesses and HR professionals had to re-analyze their relationships with contract workers to ensure compliance.

Compounding the problem is that other federal employment laws, such as Title VII of the Civil Rights Act and the Employee Retirement Income Security Act of 1974 ("ERISA"), each have their own definitions of "employee." The Government Accountability Office ("GAO") recently noted this issue when it observed that data on nonstandard and contract work arrangements were fragmented because it comes from at least seven federal agencies and each agency uses different definitions and measurements to assess whether a contractor arrangement exists.[7]

SHRM urges Congress to consider whether a single definition of "employee" across all federal employment laws would provide consistency to workers and businesses as well as enhance compliance with federal employment laws. SHRM notes that Congress might consider a definition rooted in the common law. As courts have observed, the one commonality running through all the various formulations of "employee" is that the common law control test is incorporated in all of them.[8] It is also at least a part of the tests commonly used by state courts to determine employee status (although there are notable exceptions, such as California, and in some jurisdictions and with some specific issues, there are additional requirements, as well). Therefore, adopting a single federal test pegged at the common law definition would not only harmonize federal definitions, but also at least provide some alignment and relevance to many state definitions. The common law standard, with its focus on control, is also easier to apply and has a rich body of case law, having been around for more than 100 years.

B. Legal Uncertainty Undermines Workers' Autonomy

The legal uncertainty surrounding the ever-changing and various definitions of "employee" does not exist in a vacuum; it significantly impacts workers, often to their detriment. Without clearly defined factors that determine the scope of employment and non-employment relationships, businesses are often dissuaded from providing training, safety guidelines, and other standard

[6] *See* 29 C.F.R. Part 795 (2024).
[7] *See* GAO, Work Arrangement: Improved Collaboration Could Enhance Labor Force Data (Dec. 2023), *available at* https://www.gao.gov/assets/d24105651.pdf (last visited June 17, 2024).
[8] *See* Murray v. Principal Fin. Grp., Inc., 613 F.3d 943, 945 (9th Cir. 2010) (finding that "there is no functional difference between the three formulations" of employee status expressed by the common-law agency test, the economic realities test, and a hybrid test); Restatement of Emp't Law § 1.01 rep. notes (Am. Law Inst. 2015) (noting the "lack of any sharp distinction between the common-law test ... and a multifactor economic-realities [test]").

business practices for the benefit of workers and the workplace, because doing so would risk a finding that a worker is misclassified. Some businesses have forgone providing independent workers with anti-harassment training due to the risk of being deemed to have exerted too much control over those workers. This harms not only the contractors but also the employees, especially those who regularly interact with contractors.

These concerns are not overstated. As discussed above, the DOL opined in the 2024 Rule that training or workplace standards that "go beyond compliance" with applicable law "may" be indicative of employee status. Therefore, businesses risk facing misclassification claims if they provide such beneficial training or subject contractors to policies designed to improve the workplace for all if doing so is not strictly necessary for compliance with applicable law. From an HR standpoint, businesses want to improve the work environment; however, they must also mitigate legal risk to their businesses and being subject to costly litigation.

In short, U.S. labor laws must be updated to reflect modern workplace demands, including consistently defining nonstandard and independent contractor work arrangements with clarity. This will provide businesses with the ability to know what types of training, benefits, and other protections they can afford independent contractors without risking potentially business-killing litigation.

C. Companies Are Disincentivized from Offering Independent Workers Benefits

Similarly, businesses that utilize independent workers have expressed concerns about offering benefits packages to independent workers for fear of creating an employer/employee relationship. More specifically, a court or agency will find that because employees are traditionally the only types of workers who receive fringe benefits, a business providing its independent contractors with fringe benefits is evidence of misclassification. This, in turn, may compel an independent worker to look for an employment relationship against their wishes. For example, when packaged as a fringe benefit, health insurance for independent workers is highly sought after and an attractive offering. However, due to fears of misclassification, organizations are disincentivized from offering this attractive benefit to these workers and, as a result of the need for insurance against the expense of self-funding, these workers are compelled to seek an employment relationship.

The understandable hesitancy of businesses to offer such workplace protections for, and benefits to, independent workers ultimately hurts businesses, too.[9] To attract and retain top talent, businesses need to offer attractive and competitive benefits packages. However, so long as doing so risks expensive litigation, businesses may be dissuaded from sharing certain benefits with their workforces. This is especially detrimental to smaller businesses, which rely on independent contractors to offer skills and know-how that the businesses themselves cannot otherwise afford to cultivate internally.

In addition to the above risks of misclassification of independent workers that arise from providing these workers with access to benefits, several structural legal challenges currently inhibit

[9] *See* L. Grensing-Pophal, *Best Benefits Practices for the Gig Economy*, SHRM (Oct. 27, 2021), *available at* https://www.shrm.org/topics-tools/news/benefits-compensation/best-benefits-practices-gig-economy (last visited Oct. 27, 2021).

independent workers from obtaining access to retiree benefits. For example, today, independent workers cannot be offered benefits governed by ERISA for which employees are eligible. As a result, businesses cannot include independent workers within ERISA plans offered to company employees or even facilitate transfers into retirement plans for independent workers.

Under the existing law and regulatory framework described above, businesses cannot even offer non-ERISA information or facilitate administratively or financially the retention by independent workers of employee retirement benefits without jeopardizing the legal status of their operational models.[10] ERISA pre-empts state laws that relate to employee benefits plans, but no such exemption would apply in the context of a company-sponsored benefit extended to independent workers. As such, states are permitted to regulate any such offering, and many states would restrict a business's ability to offer any form of health benefits to such workers. The Affordable Care Act's Marketplaces take a commendable step toward creating a "pooled" risk option that is portable across jobs, but it is still lacking in many respects. Notably, Marketplace options vary widely by state and can be prohibitively expensive.

Moreover, the Internal Revenue Code creates an uneven playing field when comparing the tax advantages available to common-law employees of a business to those available to independent contractors. Specifically, Code Sections 104, 105, 106, and 125 provide a total exclusion from income for employer and employee contributions toward health or accident insurance, starting with the first dollar of benefits. Employer contributions to an independent contractor are afforded no similar tax benefit (and workers generally cannot exclude health contributions in their entirety, or at all in many instances). Any employer contribution toward health benefits for an independent contractor would be treated as taxable income, reported on Form 1099. And the Code limits an independent contractor's deduction for medical care expenses to those exceeding 7.5% of adjusted gross income.

Independent contractors face similar disadvantages when it comes to retirement savings. Specifically, in 2024, employees can contribute up to $23,000 to a 401(k) on a tax-preferred basis,[11] while IRA contributions are limited to $7,000.[12] Similarly, employers can make additional contributions toward employee accounts in as long as the overall contributions do not exceed

[10] The common-law principles of agency solely determine, or guide, or are relevant to the determination of employment/independent contractor status under the majority of federal, state, and local laws. In *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) the U.S. Supreme Court adopted the common-law test for determining who qualifies as an employee under ERISA. The court concluded that agency law principles and common understanding require the conclusion that "the provision of employee benefits" by a service recipient is a relevant indicia of employment. Id. at 324. The Supreme Court's guidance that providing employee benefits to a worker is an indicia of employment has been incorporated into virtually all analyses of the legal status of workers. For example, "Employer's Supplemental Tax Guide," Department of the Treasury, Internal Revenue Service Publication 15-A (2017), https://www.irs.gov/pub/irs-pdf/p15a.pdf at 7 (explaining determination of worker classification considers "whether or not the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay"); and "Especially for Texas Employers," Texas Workforce Commission, https://efte.twc.texas.gov/texas-guidebook-for-employers-2024.pdf at 35 ("An employer who provides benefits such as vacation and sick leave, health insurance, bonuses, or severance pay will almost inevitably be considered the employer of the workers.").

[11] Internal Revenue Code Section 402(g).

[12] Internal Revenue Code Section 408(a).

$69,000.[13] This disparity severely disadvantages independent contractors in a manner that only accelerates over time, given the power of compounding interest.

In short, the current legal and regulatory scheme effectively discourages and disincentivizes companies who utilize independent workers from offering retirement benefits. Without the availability of this assistance, it is not surprising that many independent workers have not otherwise obtained access to a vehicle to save for retirement.

The foundation to solving the impediments to a portable retirement benefit system for independent workers includes consideration of the following: 1) increasing the availability and access to retirement and financial education and information regarding existing retirement vehicles (including Keoghs and IRAs) available to independent workers; 2) allowing companies to provide benefits information to independent workers; 3) allowing companies to assist with the administration and facilitation of direct deposit of funds into retirement vehicles; 4) allowing companies to contribute to portable retiree benefits for the benefit of independent workers; 5) promoting the development of flexible, portable retirement products and services with open platforms that allow for contributions from multiple organizations and participants; 6) providing independent workers monetary incentives to save for retirement; and 7) ensuring that businesses' facilitation of retiree benefits education, administration, and funding for independent workers does not negatively impact the independent workers' legal relationships with the businesses with whom they interact.[14] These steps will serve to establish protected retirement sources for independent workers.

By considering flexible approaches to the availability, facilitation, administration, and financial support of retiree benefits for independent workers engaged in the independent worker labor market and economy, we can support the financial future of these Americans, maximize our collective resources, and further economic growth.

III. Exploring Portable Benefits Options for Independent Workers

A. Independent Workers Lack Access to Important Benefits

SHRM's Global Worker Project analyzed trends in the United States, Canada, Mexico, and the United Kingdom (see chart below summarizing survey results). In these countries, independent workers are less likely to say that they have access to benefits such as health care, retirement, or paid leave through their workplace beyond what is required by law.

[13] Internal Revenue Code Section 415.

[14] For example, California's Labor Code allows certain companies to provide workers' compensation benefits to independent workers without regard to their worker classification status as an employee or independent contractor, expressly noting that providing such benefits cannot be used as indicia of employment for any purpose. Cal. Lab. Code § 4157.

	Retirement Benefits			Health Care Benefits		
	Very/ extremely important	**Workplace offers retirement benefits beyond what is required by law**	**Gap between importance and access**	**Very/ extremely important**	**Workplace offers health care benefits beyond what is required by law**	**Gap between importance and access**
Full-time salaried employees	87%	73%	15%	74%	74%	-1%
Full-time hourly employees	78%	70%	8%	76%	74%	2%
Part-time employees	67%	50%	18%	51%	40%	11%
Temporary employees	75%	38%	36%	69%	53%	16%
Independent Workers	58%	14%	44%	55%	21%	34%

B. Types Of Portable Benefits That Ensure Continued Access

SHRM supports efforts by Congress to implement flexibility in companies' ability to offer more robust benefits offerings while ensuring that, in doing so, it does not risk misclassification of the work. We offer the following guideposts to highlight areas where congressional action could assist in this regard:

- **General versus specific benefits:** Independent workers inherently face unique circumstances in their workplace needs, and, as such, we encourage Congress to focus on removing existing barriers rather than creating a narrow option. The most valuable changes would be those that provide flexibility in permissible benefits designs that allow independent workers and worker platforms to choose the benefits most relevant to their needs.

- **Eligibility and work hours:** Eligibility for portable benefits could be based on objective criteria such as the amount of work performed, revenue generated, or hours worked across multiple platforms. Technological solutions to track and aggregate this information could address these issues.

- **Treatment of workers using two-sided platform or technological marketplaces:** SHRM encourages Congress to think broadly regarding the multitude of different workers, including workers who use two-sided platforms to access potential customers. These workers are sometimes referred to as "gig workers." SHRM encourages Congress to consider the uniqueness of the way in which these workers obtain leads and customers, but not limit solutions to only this group of workers or these technological platforms. However, legislative solutions should allow for market and platform innovation.

- **Funding portable benefits:** Funding could be facilitated by the establishment of new product designs that allow shared responsibility between companies and workers. Funding models could include the contracting party's contributions and worker contributions, as well as tax incentives for certain benefits for certain eligible workers such as widening and accelerating the availability of the Saver's Credit for independent workers. Congress could also permit companies to contribute toward the cost of Marketplace benefits without otherwise impacting a worker's access to the Advanced Premium Tax Credits under Internal Revenue Code Section 36.

- **Fiduciary duties:** Administrators of portable benefits should have fiduciary duties to act in the best interest of the workers, ensuring transparency, accountability, and the proper management of benefits funds. However, companies should have the ability to enter pooling arrangements wherein an independent third party assumes administrative and fiduciary responsibilities relating to the plan (thereby limiting the company's obligation to an agreed-upon funding amount).

- **Insurance and risk pooling:** At present, federal law imposes barriers to independent workers banding together for risk pooling purposes. We encourage Congress to consider an approach that would allow for such risk pooling and pre-empt any efforts to prevent such arrangements at the state level.

- **Health insurance:** Independent workers typically have lower health insurance coverage rates. Congress could expand coverage through legislation that authorizes and empowers robust association health plan designs, supports health savings accounts (HSAs), and provides pathways for employer contributions to existing plans. From a tax perspective, Congress should exclude company contributions toward an independent worker's accident or health benefits from 1099 income and should permit independent contractors to exclude from income all payments toward medical premiums or expenses. Further, Congress should consider modifying the Internal Revenue Code to permit independent contractors to qualify for Advanced Premium Tax Credits, notwithstanding a contribution toward health insurance from company.

- **Retirement benefits:** Independent workers often face challenges in building consistent retirement savings due to variable income. Leveraging existing retirement infrastructures, such as IRAs and 401(k) plans adapted for independent work, could provide viable solutions. Congress should also raise the IRA contribution limits to bring them into parity with the deferral limits for 401(k) plans in situations where an independent contractor does not have access to a workplace retirement plan. Similarly, Congress should permit companies to contribute to (or match contributions to) an independent contractor's IRA on a tax-preferred basis.

- **Information and education:** Providing independent workers with clear information and guidance on retirement and other benefits is essential. Tools such as online platforms, financial literacy programs, and access to employer-provided investment advice benefits can support informed decision-making.

IV. Encouraging Innovation on Portable Benefits

SHRM encourages Congress to think boldly on issues relating to independent worker benefits. To begin, Congress should consider innovative models such as portable benefits accounts, flexible benefits marketplaces, and platforms that facilitate benefits portability across jobs and industries. Additionally, taking notes from lessons learned from various state and corporate experiments as they may provide valuable insights. For example, Washington state's portable benefits for gig workers and corporate benefits models such as Uber's driver benefits fund offer useful case studies. Innovation should be allowed to flower without forced retrenchment into older rigid structures.

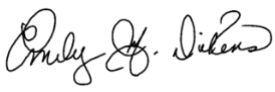
As Congress continues to consider policies around this important workplace issue, SHRM advocates that leveraging existing retirement infrastructure and removing legal barriers that restrict independent workers' access to traditional retirement benefits are key steps. Allowing platforms to automatically enroll workers in portable retirement savings plans could also nudge independent workers toward better retirement security. Such automatic enrollment structures would permit workers to opt out and ensure coordination with an existing account. Congress also must act to bring the Internal Revenue Code into parity to allow independent contractors to save at the same rates as traditional employees.

Finally, the law should recognize that the future of work is here. Workers, customers, and market realities demand new, innovative, and flexible work arrangements. Increased federal support and recognition of the value of independent work across the board is paramount. **We recommend a revision of existing federal employment laws to incorporate one consistent clear definition of status along with a safe harbor that specifically prohibits considering the provision of benefits to a worker as relevant to the determination of the status of the worker.**

V. Conclusion

Independent work is an essential part of the economy that necessitates clarity and consistency regarding the legal status of the relationship been independent workers and employers. SHRM supports policies to improve the world of work and would advocate for Congress to turn its attention to sponsoring legislation that provides such clarity and consistency. The government must provide safeguards for businesses to offer independent workers benefits without fear of having to defend against costly litigation. Such safeguards will improve working conditions, allow independent workers to stay independent, benefit all workers, and provide businesses with a robust independent workforce they can harness to facilitate innovation.

Sincerely,



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