IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

MARGARET LITTMAN and JENNIFER CHESAK	)	
PLAINTIFFS,	)	
V.	)	
	)	**Case No. ______________**
UNITED STATES DEPARTMENT OF LABOR; JULIE SU, as the acting U.S. Secretary of Labor; ADMINISTRATOR JESSICA LOOMAN, as head of U.S. Department of Labor's Wage and Hour Division; and U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION	)	
DEFENDANTS.	)	

<u>VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF</u>

INTRODUCTION

1. This case is about the right of workers to choose how they earn a living. Workers throughout the United States choose to work (1) by entering traditional employment relationships with companies, (2) by engaging in freelance work as independent contractors, or (3) a combination of both.

2. Plaintiffs Margaret Littman and Jennifer Chesak are highly regarded freelance writers based in Nashville, Tennessee. With roughly four decades of experience as freelance writers, Plaintiffs have written articles for countless publications regarding travel, food, and medicine. Plaintiffs wish to continue their freelance work as it provides them with the

opportunity to write about topics that they find interesting, flexibility to work hours that best suit their needs, and control over their careers.

3. Plaintiffs seek a court order setting aside the Department of Labor's 2024 Rule entitled "Employee or Independent Contractor Classification Under the Fair Labor Standards Act." The 2024 Independent Contractor Rule replaces a straightforward two-factor test with a vague and confusing six-factor test to determine whether a worker is an employee or independent contractor. The 2024 Rule violates the Administrative Procedure Act because the Department of Labor failed to provide a reasoned explanation for the change to the six-factor test and because the Department lacked the statutory authority to promulgate the 2024 Rule.
4. In practice, the 2024 Rule will force freelancers to enter undesirable employment relationships or to refrain from working at all. Plaintiffs thus bring this lawsuit to preserve their right to earn a living through freelance work.

JURISDICTION AND VENUE

5. This action arises under the Administrative Procedure Act, 5 U.S.C. § 702, *et seq*. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 702, 706.
6. Declaratory relief and injunctive relief are authorized by the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Administrative Procedure Act, 5 U.S.C. §§ 705, 706(2). This Court's authority to vacate unlawful agency action rests on 5 U.S.C. § 706.

7. Venue is proper in this Court under 28 U.S.C. § 1391(b)(2), and 28 U.S.C. § 1391 (e)(1)(B) because the plaintiffs reside in this judicial district and a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

PARTIES

8. Plaintiff Margaret Littman is a freelance writer based in Nashville, Tennessee. Ms. Littman first engaged in freelance work roughly 30 years ago, and now works as an independent contractor for over 20 companies. Ms. Littman wants to remain an independent contractor because freelance work provides her with opportunity, flexibility, and control over her career.

9. Plaintiff Jennifer Chesak is a freelance writer based in Nashville, Tennessee. Ms. Chesak first engaged in freelance work in 2010 and now writes and fact-checks articles, largely those that pertain to science and medicine. Ms. Chesak wants to remain an independent contractor because freelance work provides her with opportunity, flexibility, and control over her career.

10. Defendant the United States Department of Labor (Department or DOL) is an executive department of the United States federal government. The Department administers and enforces more than 180 federal laws. The Department promulgated the Final Rule at issue in this lawsuit.

11. Defendant United States Department of Labor's Wage and Hour Division is a federal agency. The Wage and Hour Division administers the Fair Labor Standards Act and promulgated the Final Rule at issue in this lawsuit.

12. Defendant Julie Su is the Acting United States Secretary of Labor. Acting Secretary Su is sued only in her official capacity.

13. Defendant Administrator Jessica Looman is the head of the United States Department of Labor's Wage and Hour Division. Administrator Looman is sued only in her official capacity.

FACTUAL ALLEGATIONS

The Fair Labor Standards Act

14. The Fair Labor Standards Act (FLSA) imposes several requirements regarding wage, hours, and recordkeeping on covered employers.

15. The FLSA imposes criminal penalties and civil liability on covered employers that fail to abide by the requirements of the FLSA. 29 U.S.C. § 216.

16. The FLSA defines "employers" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

17. An "employee" under FLSA "means any individual employed by an employer." 29 U.S.C. § 203(e)(1). "Employ" is further defined as "to suffer or permit to work" 29 U.S.C. § 203(g).

18. The FLSA does not apply to "independent contractors," a term that the FLSA does not define.

19. As the Supreme Court observed, the FLSA provides "no definition that solves problems as to the limits of the employer-employee relationship under the Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728–29 (1947).

20. To determine whether a worker is an employee or independent contractor, courts typically look to whether, "as a matter of economic reality," the worker is "dependent upon the business to which [he or she] render[s] service." *See, e.g.*, *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984).

The Department's 2021 Final Rule

21. Between 1938 and 2021, the Department of Labor did not engage in any rulemaking to distinguish between employees and independent contractors under the FLSA. Instead, the Department provided opinion letters and facts sheets that applied open-ended six-factor or seven-factor tests for determining whether an employment relationship exists under the FLSA. 86 Fed. Reg. 1168, 1171.

22. Federal appellate courts interpreting the FLSA attempted to apply an "economic realities" test in determining whether an employment relationship exists under the FLSA. But the courts were inconsistent on the factors they used and how they applied that test. 86 Fed. Reg. 1168, 1169-70.

23. On January 7, 2021, the Department of Labor issued a Final Rule entitled "Independent Contractor Status Under the Fair Labor Standards Act" to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy.

24. With the 2021 Rule, the Department sought to adopt an "economic realities" test that focuses on whether a worker was in business for himself or herself (independent contractor), or if instead, the worker was dependent on an employer for work (employee). 86 Fed. Reg. 1168, 1171.

25. The 2021 Rule emphasized two "core factors" when determining whether to classify an individual as an employee or independent contractor: (1) the nature and degree of the individual's control over the work; and (2) the individual's opportunity for profit or loss. The 2021 Rule also proposed more factors that could be used but stated that they were less probative than the two core factors when determining whether a worker was an employee or an independent contractor. 86 Fed. Reg. 1168, 1171.
26. The 2021 Rule's focus on the control and opportunity for profit and loss underscored the critical factors in determining whether someone is in business for themselves and thus not an employee. This clarification provided clarity and helped alleviate the problem of misclassification under FLSA, benefiting both businesses and workers.
27. The Department's decision to adopt the 2021 Rule included a robust cost-benefit analysis and relied on an exhaustive study of facts, statutory, and other legal considerations in reaching its conclusion that the two core factors were needed to sharpen and clarify the test. *See generally* 86 Fed. Reg. 1168.
28. After a change in presidential administration in 2021, the DOL sought to delay and later withdraw the 2021 Rule. *See* 86 Fed. Reg. 12,535 (Mar. 4, 2021) (Delay Rule); 86 Fed. Reg. 24,303 (May 6, 2021) (Withdrawal Rule).
29. In March 2022, the United States District Court for the Eastern District of Texas held that the Delay and Withdrawal Rules violated the Administrative Procedure Act. *See Coal. for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 U.S. Dist. LEXIS 68401, at *49 (E.D. Tex. Mar. 14, 2022). The court therefore vacated both the Delay and Withdrawal Rules and reinstated Department of Labor's 2021 Independent Contractor Rule.

The Department's 2024 Final Rule

30. On October 13, 2022, DOL announced rulemaking to replace the 2021 Rule. 87 Fed. Reg. 62,218. This rule was finalized on January 10, 2024, and goes into effect on March 11, 2024. *See* 89 Fed. Reg. 1638 (2024 Rule).

31. The 2024 Rule eliminates the core factors of control and opportunity for loss and profit. In its place, the 2024 Rule adopts a new balancing test includes several factors including "opportunity for profit or loss depending on managerial skill"; "investments by the worker and the employer"; "degree of permanence of the work relationship"; "nature and degree of control"; "extent to which the work performed is an integral part of the employer's business"; and "skill and initiative." 89 Fed. Reg. at 1742 (new 29 C.F.R. § 795.110). The Department does not provide guidance on how to apply or weigh the new factors in the 2024 Rule. 89 Fed. Reg. at 1670.

32. The 2024 Rule also notes that "[a]dditional factors may be relevant … if the factors in some way indicate whether the worker is in business for themsel[ves]." 89 Fed. Reg. at 1742 (new 29 C.F.R. § 795.110). The 2024 Rule does not enumerate those other factors. As a result, any conceivable fact could be relevant in determining whether a worker is an independent contractor or an employee.

33. The Department contends that the factors incorporated in its 2024 Rule is a "return" to a test that is aligned with "federal appellate case law." 89 Fed. Reg. at 1640. Yet as the Department explained in the 2021 Rule, there was no consistent and coherent "federal appellate case law" to determine whether a worker was an employee or an independent contractor.

34. In issuing the 2024 Rule, the Department cited contradictory case law and acknowledges that it is adopting the view held by some courts over the view held by other courts in formulating the 2024 Rule. *See* 89 Fed. Reg. at 1679, 1688–89, 1704.

35. The 2024 Rule gives stakeholders no guidance or useful information about how to classify and structure economic relationships. The 2024 Rule will lead to increased confusion, litigation, and costs. It will be harder for businesses and workers to distinguish between independent contractors and employees under the 2024 Rule than it was for businesses and workers to do so under the 2021 Rule.

36. A goal of the 2024 Rule is to prompt companies to classify more workers as employees. The 2024 Rule was animated by the Department of Labor's belief that the Rule will "protect workers" who are misclassified as independent contractors.

37. The 2024 Rule rescinds the 2021 Rule. Therefore, businesses can no longer avail themselves of a "safe harbor" defense by complying with the 2021 Rule's two-factor test. *See* 29 U.S.C. § 259.

Injury to Plaintiffs

38. Margaret Littman has been an independent contractor and freelance writer since 1994.

39. Ms. Littman does not wish to be classified as an employee. She wants to continue to freelance because it allows her to have greater control over her business, clients, time, and work structure.

40. Ms. Littman works with over 20 companies nationwide as a freelance writer.

41. The 2024 Rule increases the risk that companies with which Ms. Littman works will face liability if they continue to classify Ms. Littman as an independent contractor. Therefore,

the 2024 Rule increases the risk that companies will misclassify Ms. Littman as an employee. The 2024 Rule also increases the risk that companies with which Ms. Littman works will cease to work with Ms. Littman.

42. Under the 2021 Rule, Ms. Littman was able to confidently predict how her commercial relationships would be evaluated and could engage with publishers and clients with a degree of certainty. The 2024 Rule creates confusion and uncertainty, which will chill Ms. Littman's future business practices.

43. Jennifer Chesak has been an independent contractor and freelance writer since 2010.

44. Ms. Chesak does not want companies with which she currently works with as a freelancer to classify her as an employee. Ms. Chesak enjoys freelance work because it has provided her with better pay, more flexibility, and more control over her career.

45. Ms. Chesak works with companies that, to comply with the 2024 Rule, have taken measures that harm Ms. Chesak. One company has begun requiring Ms. Chesak to spend many unpaid hours documenting precise tasks she performs as a freelancer. Another company has limited the number of hours Ms. Chesak can work for it as a freelancer. Yet another company required Ms. Chesak to sign an agreement to indemnify the company if it were found liable for misclassifying Ms. Chesak.

46. The 2024 Rule increases the risk that companies with which Ms. Chesak works will face liability if they continue to classify Ms. Chesak as an independent contractor. Therefore, the 2024 Rule increases the risk that companies will misclassify Ms. Chesak as an employee. The 2024 Rule also increases the risk that companies with which Ms. Chesak works will cease to work with Ms. Chesak.

47. Under the 2021 Rule, Ms. Chesak was able to confidently predict how her commercial relationships would be evaluated and could engage with publishers and clients with a degree of certainty. The 2024 Rule creates confusion and uncertainty, which will chill Ms. Chesak's future business practices.

LEGAL CLAIMS

FIRST CLAIM FOR RELIEF

Violation Of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)—Arbitrary And Capricious

48. A court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

49. Agency action is arbitrary and capricious if the agency fails to provide a reasoned explanation for a change in existing policies.

50. The Department of Labor failed to provide a reasoned explanation for its shift from the 2021 Rule's two-factor test to the 2024 Rule's six-factor test.

51. The Department of Labor's contention that the 2021 Rule's two-core-factors test conflicts with the FLSA is wrong.

52. The Department of Labor's contention that the 2021 Rule introduced confusion and uncertainty is wrong. The Department of Labor's 2024 Rule will exacerbate—rather than alleviate—confusion and uncertainty regarding the status of employees and independent contractors.

53. The 2024 Rule is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law and is, therefore, invalid under 5 U.S.C. § 706(2)(A).

SECOND CLAIM FOR RELIEF

Violation Of the Administrative Procedure Act, 5 U.S.C. § 706(2)(C)—Rule in Excess of Statutory Authority

54. The Administrative Procedure Act (APA) directs courts to hold unlawful and set aside agency rules that are "in excess of statutory jurisdiction [or] authority." 5 U.S.C. § 706(2)(C).

55. The Department's 2024 Rule deviates from the text of the FLSA. The 2024 Rule therefore exceeds the Department's statutory authority and must be set aside.

56. The Department's 2024 Rule also exceeds the Department's statutory authority because the FLSA does not provide the Department with the authority to promulgate legislative rules that determine whether an employment relationship exists under the FLSA.

57. The Department's 2024 Rule is a legislative rule. The 2024 Rule affects existing individual rights and obligations. For example, the 2024 Rule rescinds the 2021 Rule, and makes it more difficult for businesses that retain freelancers to avail themselves of a safe harbor defense. *See* 29 U.S.C. § 259.

THIRD CLAIM FOR RELIEF

Violation Of U.S. Constitution, Non-Delegation Doctrine, And Separation of Powers

58. Article I, § 1, of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States."

59. Congress may not "abdicate or [] transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

60. The President, acting through his agencies, may not exercise Congress' legislative power to declare entirely "what circumstances . . . should be forbidden" by law. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418–19 (1935).

61. Congress did not grant the Department of Labor the authority to promulgate legislative rules to determine whether an employment relationship exists under the FLSA.

62. Congress must make fundamental policy decisions and provide an intelligible principle for agencies to apply the law to a given set of facts. Congress did not provide the Department of Labor with an intelligible principle to create a test in determining whether an employment relationship exists under the FLSA.

63. The Department of Labor's 2024 Rule violates the nondelegation doctrine and must be set aside.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court issue:

1. Preliminary and permanent injunctions prohibiting Defendants from enforcing the Final Rule pursuant to 5 U.S.C. § 705 and 28 U.S.C. § 2201;
2. A declaratory judgment, pursuant to 5 U.S.C. § 706(2) and 28 U.S.C. § 2202, holding that the Final Rule is unlawful and setting aside the Final Rule;
3. An award of attorneys' fees and costs to Plaintiffs pursuant to 28 U.S.C. § 2412, or any other applicable authority; and
4. Any other relief as the Court deems just and proper.

DATED: February 21, 2024

Respectfully submitted,

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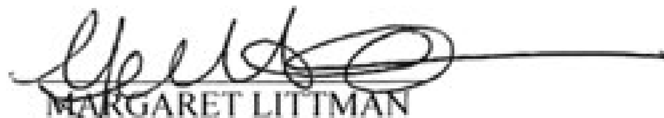
VERIFICATION

I, MARGARET LITTMAN, hereby declare as follows:

I am one of the plaintiffs in this action.

I have read the Verified Complaint for Injunctive and Declaratory Relief and know its contents. The facts alleged in this matter are within my own personal knowledge, and I know these facts to be true, except for matters stated on information and belief and, as to such matters, I reasonably believe them to be true.

I verify under penalty of perjury under the laws of the United States of America that the factual statements are true and correct. If called upon, I would competently testify to them. This Verification was executed this __16_ day of February 2024, in Nashville, Tennessee.



MARGARET LITTMAN

VERIFICATION

I, JENNIFER CHESAK, hereby declare as follows:

I am one of the plaintiffs in this action.

I have read the Verified Complaint for Injunctive and Declaratory Relief and know its contents. The facts alleged in this matter are within my own personal knowledge, and I know these facts to be true, except for matters stated on information and belief and, as to such matters, I reasonably believe them to be true.

I verify under penalty of perjury under the laws of the United States of America that the factual statements are true and correct. If called upon, I would competently testify to them. This Verification was executed this 17 day of February 2024, in Nashville, Tennessee.

JENNIFER CHESAK