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119TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
119–494

DIRECT SELLER AND REAL ESTATE AGENT HARMONIZATION ACT

FEBRUARY 11, 2026.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. WALBERG, from the Committee on Education and Workforce, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3495]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Workforce, to whom was referred the bill (H.R. 3495) to amend the Fair Labor Standards Act of 1938 to clarify the definition of employee as it relates to direct sellers and real estate agents, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Direct Seller and Real Estate Agent Harmonization Act".

SEC. 2. DEFINITION OF EMPLOYEE.

Section 3(e) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(e)) is amended by inserting after paragraph (5) the following:

"(6) The term 'employee' does not include any direct seller or qualified real estate agent (as such terms are defined in section 3508(b) of the Internal Revenue Code of 1986).".

PURPOSE

To amend the *Fair Labor Standards Act of 1938* (FLSA) to clarify the definition of employee as it relates to direct sellers and qualified real estate agents.

COMMITTEE ACTION

118TH CONGRESS

First Session—Hearing

On April 19, 2023, the Subcommittee on Workforce Protections held a hearing titled "Examining Biden's War on Independent Contractors," which discussed independent contractors and worker classification under the FLSA, including classification of real estate agents and direct sellers. The witnesses were Ms. Karen Anderson, Founder, Freelancers Against AB 5, Dana Point, CA; Ms. Tammy McCutchen, Senior Affiliate, Resolution Economics, New Market, TN; Mr. David Long, Chief Executive Officer, National Electrical Contractors Association, Washington, DC; Dr. Liya Palagashvili, Senior Research Fellow, Mercatus Center at George Mason University, Arlington, VA; Ms. Laura Padin, Director of Work Structures, National Employment Law Project, Washington, DC; and Ms. Kim Kavin, Freelance Writer and Editor, Morris County, NJ.

Second Session—Hearing

On February 14, 2024, the Subcommittee on Workforce Protections held a hearing titled "Examining the Policies and Priorities of the Wage and Hour Division," which discussed the U.S. Department of Labor's (DOL) wage-and-hour priorities, including the lack of clarity in worker classification for direct sellers, real estate agents, and other independent contractors. The sole witness was the Honorable Jessica Looman, Administrator, Wage and Hour Division, DOL.

119TH CONGRESS

First Session—Hearing

On February 26, 2025, the Committee on Education and Workforce held a hearing titled "Unleashing America's Workforce and Strengthening our Economy," which addressed, among other topics, the shortcomings of the Biden administration's independent contractor rule on worker classification under the FLSA and on potential regulatory solutions. Witnesses were Ms. Rosanna Maietta, President and CEO, American Hotel and Lodging Association, Washington, DC; Dr. William Beach, Senior Fellow in Economics, Economic Policy Innovation Center, Arlington, VA; Dr. Heidi Shierholz, President, Economic Policy Institute, Washington, DC; and Ms. Elizabeth Milito, Vice President and Executive Director, NFIB Small Business Legal Center, Washington, DC.

On March 25, 2025, the Subcommittee on Workforce Protections held a hearing titled "The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities," which discussed, among other topics, independent contractors and worker classification under the FLSA. Witnesses were Ms. Tammy McCutchen, Senior Affiliate, Resolution Economics, New Market,

TN; Ms. Pagie Boughan, Senior Vice President and Director of Human Resources, Farmers and Merchants Bank, Hampstead, MD, on behalf of the Society for Human Resource Management (SHRM); Mr. Andrew Stettner, Director of Economy and Jobs, The Century Foundation, New York, NY; and Mr. Jonathan Wolfson, Chief Legal Officer and Policy Director, Cicero Institute, Austin, TX.

On May 20, 2025, the Subcommittee on Workforce Protections held a hearing titled "Empowering the Modern Worker," which discussed worker classification under the FLSA and challenges faced by independent contractors. The National Association of Realtors submitted a statement for the record making clear that real estate professional should be treated as independent contractors under federal labor laws. Witnesses were Mr. Nathan Mehrens, Vice President of Workforce Policy, American Trucking Associations, Washington, DC; Ms. Kim Kavin, Freelance Writer and Editor, Morris County, NJ; Ms. Laura Padin, Director of Work Structures, National Employment Law Project, New York, NY; and Dr. Liya Palagashvili, Senior Research Fellow, Mercatus Center at George Mason University, Arlington, VA.

On June 5, 2025, the Committee on Education and Workforce held a hearing titled "Examining the Policies and Priorities of the Department of Labor," which included discussion of worker classification and independent contractors. The sole witness at the hearing was the Honorable Lori Chavez-Deremer, Secretary, DOL.

Legislative Action

On May 19, 2025, Representative Kevin Kiley (R–CA) introduced H.R. 3495, the *Direct Seller and Real Estate Agent Harmonization Act*, with Representative Henry Cuellar (D–TX) as an original cosponsor. The bill was referred solely to the Committee on Education and Workforce. On September 17, 2025, the Committee considered H.R. 3495 in legislative session and reported it favorably, as amended, to the House of Representatives by a recorded vote of 19–16. Chairman Tim Walberg (R–MI) offered an amendment in the nature of a substitute making a technical change to the bill. The amendment was adopted by voice vote.

COMMITTEE VIEWS

Introduction

An independent contractor[1] is a self-employed individual contracted to perform work or provide services to a person or business. In 2024, an estimated 72.7 million Americans worked as independent contractors, a diverse and rapidly expanding segment of the labor force.[2] According to the Internal Revenue Service and the Department of the Treasury, the share of workers in independent contracting grew by 22 percent between 2001 and 2016.[3] McKinsey's American Opportunity Survey shows further accelera-

[1] Examples include over 120 professions such as translators, youth sports coaches, golf caddies, certain health care workers, financial advisors, cartoonists, musicians, tutors, writers, direct sellers, delivery drivers, electricians, software developers, fitness instructors, nannies, graphic designers, photographers, and nutritionists.

[2] https://www.mbopartners.com/state-of-independence/.

[3] https://www.mercatus.org/research/policy-briefs/unleashing-portable-benefits-solutions.

tion, with the independent workforce jumping from 27 percent of the employed population in 2016 to 36 percent by 2022.[4]

Worker Classification

As the number of independent contractors continues to increase, professions such as direct selling have become more attractive. The direct selling industry markets or sells products and services outside of a fixed retail establishment. Direct selling is a retail channel used by top global brands and smaller entrepreneurial companies alike to market products and services to consumers. Through direct selling, companies market a variety of goods and services, including jewelry, cookware, energy, insurance, and more.[5]

Real estate agents whose pay is tied to output rather than hours worked are considered independent contractors. Out of 1.5 million real estate agents registered with the National Association of REALTORS, 87 percent are classified as independent contractors.[6]

It is clear that direct sellers and real estate agents are properly understood as independent contractors in part because there is no salary cap for either profession. If the direct seller sells more products, he or she earns more. If the real estate agent sells more properties, he or she earns more. On the other hand, an employee might be subject to a fixed income or a fixed bonus. Direct sellers and real estate agents often decide that independent contracting is best for them because it gives them the flexibility to work on multiple projects or with multiple clients at once based on their income needs and available work hours.

Both direct sellers and qualified real estate agents have been defined as independent contractors, and distinguished from employees, by the Internal Revenue Code (IRC) for federal tax purposes since 1982. However, this distinction is limited to the tax code: the FLSA only defines "employee" and does not address or extend itself to independent contractors. Because both direct sellers and most real estate agents are clearly independent contractors with respect to the way they work, the FLSA should be clarified to ensure these individuals are considered independent contractors under the statute, reflecting the clarity that exists for these workers under the IRC.

Conclusion

The FLSA is woefully outdated and no longer reflects the American workforce in 2025. Enacting H.R. 3495 offers a practical way to modernize this 1938 law and to address gaps that leave today's workers unserved. Both the National Association of REALTORS and Direct Selling Association—the organizations that represent the only two industries which are affected by the bill—are supportive of the effort. This bipartisan legislation is a common-sense reform that benefits workers and businesses.

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[4] https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/future-of-america/freelance-side-hustles-and-gigs-many-more-americans-have-become-independent-workers.

[5] https://www.dsa.org/about/direct-selling.

[6] https://www.nar.realtor/washington-report/nar-supports-new-legislation-protecting-independent-contractor-status.

H.R. 3495 SECTION-BY-SECTION SUMMARY

Section 1 identifies the bill's short title as the *Direct Seller and Real Estate Agent Harmonization Act*.

Section 2 clarifies that the definition of employee in section 3(e) of the FLSA does not include any direct seller or qualified real estate agent, to mirror the language in section 3508(b) of the IRC.

EXPLANATION OF AMENDMENTS

The amendment in the nature of a substitute is explained in the body of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch because the bill pertains to conditions of employment. H.R. 3495 amends the *Fair Labor Standards Act of 1938* (FLSA) to clarify the definition of employee, only as it relates to direct sellers and qualified real estate agents and not legislative branch employees, and therefore does not apply to the legislative branch.

UNFUNDED MANDATE STATEMENT

Pursuant to Section 423 of the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93–344 (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104–4), the Committee traditionally adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office (CBO) pursuant to section 402 of the Congressional Budget and Impoundment Control Act of 1974.

EARMARK STATEMENT

H.R. 3495 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House rule XXI.

ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: 09/17/2025

COMMITTEE ON EDUCATION AND WORKFORCE RECORD OF COMMITTEE VOTE

Roll Call: 5 Bill: H.R. 3495 Amendment Number: N/A

Disposition: Motion to Report Bill, As amended (19y-16n)

Sponsor/Amendment: Rep. Kiley (CA)

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. WALBERG (MI) (Chairman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mr. COURNTEY (CT))		X	
Mrs. FOXX (NC)	X			Ms. WILSON (FL)		X	
Mr. THOMPSON (PA)	X			Ms. BONAMICI (OR)		X	
Mr. GROTHMAN (WI)	X			Mr. TAKANO (CA))		X	
Ms. STEFANIK (NY)	X			Ms. ADAMS (NC)		X	
Mr. ALLEN (GA)	X			Mr. DESAULNIER (CA)		X	
Mr. COMER (KY)			X	Mr. NORCROSS (NJ)		X	
Mr. OWENS (UT)	X			Ms. MCBATH (GA)		X	
Ms. MCCLAIN (MI)	X			Ms. HAYES (CT)		X	
Mrs. MILLER (IL)	X			Ms. OMAR (MN)		X	
Ms. LETLOW (LA)			X	Ms. STEVENS (MI)		X	
Mr. KILEY (CA)	X			Mr. CASAR (TX)		X	
Mr. RULLI (OH)	X			Ms. LEE (PA)		X	
Mr. MOYLAN (GU)	X			Mr. MANNION (NY)		X	
Mr. ONDER (MO)	X			Ms. ANSARI (AZ)		X	
Mr. MACKENZIE (PA)	X						
Mr. BAUMGARTNER (WA)	X						
Mr. HARRIS (NC)	X						
Mr. MESSMER (IN)	X						
Mr. FINE (FL)							

TOTALS: Ayes: 19 Nos: 16 Not Voting: 2

Total: 37 / Quorum: 35 / Report: Passed

(21 R - 16 D)

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House of Representatives rule XIII, the goal of H.R. 3495, the *Direct Seller and Real Estate Harmonization Act*, is to clarify the worker classification of direct sellers and qualified real estate agents.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 3495 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

REQUIRED COMMITTEE HEARING

In compliance with clause 3(c)(6) of rule XIII of the Rules of the House of Representatives the following hearing held during the 119th Congress was used to develop or consider H.R. 3495: on March 25, 2025, the Subcommittee on Workforce Protections held a hearing on "The Future of Wage Laws: Assessing the FLSA's Effectiveness, Challenges, and Opportunities."

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 3495. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when, as with the present report, the Committee adopts as its own the cost estimate for the bill prepared by the Director of the Congressional Budget Office.

H.R. 3495, Direct Seller and Real Estate Agent Harmonization Act
As ordered reported by the House Committee on Education and Workforce on September 17, 2025

By Fiscal Year, Millions of Dollars	2026	2026-2030	2026-2035
Direct Spending (Outlays)	*	*	*
Revenues	*	*	*
Increase or Decrease (-) in the Deficit	*	*	*
Spending Subject to Appropriation (Outlays)	0	0	not estimated

Increases *net direct spending* in any of the four consecutive 10-year periods beginning in 2036?	No	Statutory pay-as-you-go procedures apply?	Yes
		Mandate Effects	
Increases *on-budget deficits* in any of the four consecutive 10-year periods beginning in 2036?	*	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	Yes, Under Threshold

* = between -$500,000 and $500,000.

H.R. 3495 would amend the Fair Labor Standards Act (FLSA) to exclude any direct sellers and real estate agents from the definition of "employee". That change would align the definition of employee for those individuals in both the FLSA and the Internal Revenue Code.

The FLSA authorizes the Department of Labor (DOL) to impose and collect civil monetary penalties from employers that repeatedly and willfully violate the law's minimum wage and overtime provisions. The penalties are recorded in the federal budget as revenues, and a portion can be spent without further appropriation. DOL typically collects less than $20 million per year in such penalties for all FLSA violations, according to agency enforcement statistics.

Enacting the bill would result in fewer entities being subject to those penalties. Under H.R. 3495, CBO estimates that the reduction in amounts collected would be small and that the decrease in revenues and direct spending, and the resulting net increase in the deficit would be less than $500,000 over the 2026–2035 period.

MANDATES

H.R. 3495 would impose a private-sector mandate, as defined in the Unfunded Mandates Reform Act (UMRA), on workers who would no longer be covered by the FLSA and therefore would not have legal grounds to seek financial compensation for violations of that act.

The cost of the mandate on workers would be the value of financial settlements that they would have received for violations of the FLSA in the absence of the bill. Using data from DOL on back wages and financial compensation for FLSA violations, CBO estimates that the cost of this mandate is below the threshold for private-sector mandates established in UMRA ($206 million in 2025, adjusted annually for inflation).

H.R. 3495 contains no intergovernmental mandates.

The CBO staff contact for this estimate is Susan Beyer (for federal spending) and Erich Dvorak (for mandates). The estimate was

reviewed by Christina Hawley Anthony, Deputy Director of Budget Analysis.

PHILLIP L. SWAGEL,
Director, Congressional Budget Office.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 3495. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when, as with the present report, the Committee adopts as its own the cost estimate for the bill prepared by the Director of the Congressional Budget Office.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

FAIR LABOR STANDARDS ACT OF 1938

* * * * * * *

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the Government Printing Office;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private nonprofit food banks and who receive from the food banks groceries.

(6) The term "employee" does not include any direct seller or qualified real estate agent (as such terms are defined in section 3508(b) of the Internal Revenue Code of 1986).

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees,

fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Producer" means produced, manufactured, mined, handled, or in any manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virture of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m)(1) "Wage" paid to any employee includes the reasonable cost, as determined by the Secretary of Labor, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided,* That the cost of board,

lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further,* That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee.

(2)(A) In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—

(i) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on the date of the enactment of this paragraph; and

(ii) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in clause (i) and the wage in effect under section 6(a)(1).

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(B) An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit.

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided,* That the sale is recognized as a bona fide retail sale in the industry.

(o) HOURS WORKED.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r)(1) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enter-

prise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive rights to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), the activities performed by any person or persons—

(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physicially handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency.

shall be deemed to be activities performed for a business purpose.

(s)(1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that—

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an es-

tablishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

(y) "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

* * * * * * *

MINORITY VIEWS

INTRODUCTION

H.R. 3495, the *Direct Seller and Real Estate Agent Harmonization Act*, would amend federal wage-and-hour law so that people who work in commissioned sales (including real estate agents and salespersons in multi-level marketing businesses) and newspaper delivery workers are excluded from the definition of an employee entitled to wage-and-hour protections. The law that would be changed by this bill—the *Fair Labor Standards Act of 1938*[1] (FLSA)—already accommodates the industries' customary commission-based pay practices. By categorically excluding these occupations from FLSA, this bill would threaten the independence of legitimate independent contractors and imperil the protections of low-wage workers in call centers. The Committee has not conducted any hearings on whether there is a problem to be fixed in these industries or any potential downstream consequences of the changes this bill could create.

This bill is opposed by the Communication Workers of America and the National Employment Lawyers Association.

BACKGROUND ON DIRECT SELLERS AND REAL ESTATE AGENTS

The short title of H.R. 3495 draws attention to two categories of workers: direct sellers and real estate agents.

Direct Sellers

The direct selling business model is predicated on direct sales of products and services outside of a traditional retail setting.[2] Today, a prominent form of direct selling is multi-level marketing (MLM). In an MLM business model, a company

> distributes products or services through a network of participants. Typically, the company does not directly recruit new participants, but relies on its existing participants to recruit additional participants, who, in turn, also recruit new participants. This creates multiple levels of participants organized in "downlines." A participant's "downline" is the network of their recruits, and recruits of those recruits, and so on. A participant's "upline" is the person who recruited them, and the person who recruited their recruiter, and so on.[3]

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[1] Pub. L. No. 75–718, 52 Stat. 1060 (1938).

[2] Johanna Leggatt, *Understanding Multi-Level Marketing*, FORBES (Apr. 11, 2025), https://www.forbes.com/advisor/investing/multi-level-marketing-mlm/.

[3] *Business Guidance Concerning Multi-Level Marketing*, FED. TRADE COMM., https://www.ftc.gov/business-guidance/resources/business-guidance-concerning-multi-level-marketing (last visited Sept. 26, 2025).

Some notable MLM companies include Amway, Herbalife, and Mary Kay.[4] Although not necessarily illegal by definition, "many MLMs have become infamous for their controversial business practices."[5] MLM businesses "tend to appeal to new recruits with promises of wealth and independence,"[6] but "it's the [MLM] company that hoards most of the advantages of the arrangement: an individual direct seller receives no salary, benefits, or paid time off; does not set her own prices or sales goals; has no say on suppliers or marketing strategy; and generally does not even choose what products she is selling."[7]

Real Estate Agents

Real estate agents are licensed professionals who help clients buy, sell, and manage real estate.[8] They are overwhelmingly—87% nationwide, according to the National Association of Realtors (NAR)[9]—set up as independent contractors and are customarily paid on a commission basis rather than a regular wage.[10]

Real estate agents are required under state laws to affiliate with a licensed real estate broker, who is also a licensed professional able to do the same work as an agent as well as move money to and from escrow accounts, mediate conflicts over transactions, and ensure legal compliance for real estate transactions that they and their affiliated agents close.[11] Real estate brokers typically earn commissions for transactions they close themselves and receive a portion of the commission earned by real estate agents affiliated with them.[12]

Real estate agents are generally limited to affiliating with only one broker in a state, although they may be able to affiliate with brokers in other states for purposes of arranging real estate transactions across state lines.[13]

Upstream Power Players

Whether or not a direct seller or real estate agent works as an employee or an independent contractor, each is subject to some sort of supervision or set of rules determined by a powerful actor. That actor can be a branded MLM firm, the "upline" lineage of sellers who collect a percentage of a seller's commissions,[14] or a real estate

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[4] Peter Gratton, *What Is MLM? How Multilevel Marketing or Network Marketing Works*, INVESTOPEDIA (May 14, 2025), https://www.investopedia.com/terms/m/multi-level-marketing.asp.
[5] *See* Leggatt, *supra* note 2.
[6] *Id.*
[7] Jessica Winter, *The Unkillable Appeal of Multilevel Marketing*, THE NEW YORKER (Mar. 20, 2024), https://www.newyorker.com/books/under-review/the-unkillable-appeal-of-multilevel-marketing.
[8] *Occupational Outlook Handbook: Real Estate Brokers and Sales Agents*, BUREAU OF LAB. STATS. (Aug. 28, 2025), https://www.bls.gov/ooh/sales/real-estate-brokers-and-sales-agents.htm.
[9] *NAR Issue Brief: Real Estate Professionals Classification as Independent Contractors*, NAT'L ASS'N OF REALTORS (Jan. 10, 2024), https://www.nar.realtor/advocacy/nar-issue-brief-real-estate-professionals-classification-as-independent-contractors [hereinafter NAR Brief].
[10] Victoria Araj, *Real Estate Broker vs. Agent: Differences Explained*, ROCKET MORTGAGE (Jan. 13, 2025), https://www.rocketmortgage.com/learn/real-estate-broker-vs-agent.
[11] Lauren Bowling, *What Is a Real Estate Broker and What Do They Do?*, ROCKET MORTGAGE (Feb. 2, 2024), https://www.rocketmortgage.com/learn/real-estate-broker.
[12] *Id.*
[13] Carlton, *FAQ: Can a Real Estate Agent Work for Multiple Brokers?*, REALTY HUB (June 26, 2025), https://joinrealtyhub.com/can-a-real-estate-agent-work-for-multiple-brokers/.
[14] *See supra* text accompanying note 3.

broker, as the case may be. For convenience, we will refer to these entities collectively as upstream power players.

EMPLOYMENT LAW THIS BILL WOULD AMEND

H.R. 3495 would change the definition of *employee* in the *Fair Labor Standards Act of 1938* (FLSA). FLSA is the federal employment law governing the minimum wage,[15] overtime,[16] oppressive child labor,[17] discrimination in pay on the basis of sex,[18] and the right of nursing mothers to take paid breaks at work for the purpose of expressing breast milk.[19] It is enforced by the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL), as well as by workers themselves who bring cases in court.

Economic Realities Test

In FLSA, the term "employ" includes "to suffer or permit to work."[20] Courts test the applicability of the FLSA definition using the "economic realities" test, which looks underneath whatever terms the parties to a relationship use to describe it and focuses instead on the reality of the relationship. The economic realities test examines the facts of the working relationship in light of the totality of the circumstances to determine whether the putative employee is economically dependent on the potential employer.[21] Ultimately, the application of the economic realities factors is guided by the overarching principle that the FLSA should be "construed liberally to apply to the furthest reaches consistent with congressional direction."[22]

The FLSA definitions of "employ" and "employee" also apply to family and medical leave rights under the *Family and Medical Leave Act of 1993* (FMLA).[23]

Relevant Exemptions

Even with its broad reach, FLSA still accommodates the particular needs and longstanding practices of specific industries and occupations, including a special rule for outside salespersons and another for news delivery persons.

The FLSA outside sales exemption excludes "any employee employed . . . in the capacity of outside salesman" from the minimum wage and overtime provisions of the law.[24] WHD defines this exemption as applying to an employee (1) whose primary duty is making sales or obtaining orders or contracts for services or the use of facilities for which a client or customer will pay some consideration, and (2) who conducts this work customarily and regularly outside of a fixed place of business (including the employee's own

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[15] FLSA § 6.
[16] *Id.* § 7.
[17] *Id.* § 12.
[18] *Id.* § 6(d).
[19] *Id.* § 18D.
[20] *Id.* § 3(g).
[21] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 301 (1985) (reiterating that the test of employment under the FLSA is economic reality); Goldberg v. Whitaker House Co-op, Inc., 366 U.S. 28, 33 (1961).
[22] Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207 (1959).
[23] Pub. L. No. 103–3, § 101(2)(C) (1993).
[24] FLSA § 13(a)(1).

home).[25] This exemption covers a wide range of sales activity, including real estate, radio and TV time, print ads, and intellectual property.[26]

The FLSA news delivery exemption excludes "any employee engaged in the delivery of newspapers to the consumer" from minimum wage, overtime, equal pay, and child labor provisions.[27]

How FLSA Would Be Amended

H.R. 3495 would amend the definition of employee in FLSA by excluding any worker treated for purposes of federal tax law as a statutory non-employee in section 3508 of the *Internal Revenue Code*.

Section 3508 allows, for purposes of tax treatment, that workers will be deemed independent contractors if they satisfy the following:

> (1) They are either licensed real estate agents or engaged in multi-level marketing/direct sales (e.g., Amway, Avon, Tupperware), trade or sales of consumer products in the home or anywhere other than a retail establishment, or engaged in newspaper or shopping news delivery or distribution;
>
> (2) Substantially all remuneration is directly related to sales or other output rather than the number of hours worked; and
>
> (3) Services are performed pursuant to a contract establishing the non-employee nature of the relationship.

There is substantial overlap with the FLSA outside sales and news delivery exemptions, except that the tax code definition does not include FLSA's specification of sales work conducted primarily outside of fixed workplaces.

Weaknesses of H.R. 3495

No Established Problem

If there is a problem to be addressed by this bill, it has never been established in this Committee. No Committee hearing has been scheduled this Congress, or in any Congress in recent memory, to identify any cases at all in which the real estate, direct sales, or news delivery industries have been disrupted, upset, or even slightly bothered by application of FLSA employment rules.

In fact, even if a real estate agent or direct seller could make a case that an employment relationship had been established in a given set of circumstances, the outside sales and news delivery exemptions already bar the application of minimum wage and overtime rules, allowing for the longstanding commission-oriented pay practices of those industries to prevail (even where, as is often the case in MLM businesses, sellers wind up earning less than the minimum wage or just drown in red ink).[28]

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[25] 29 C.F.R. §§ 541.500–504.

[26] Wage & Hr. Div., U.S. Dep't of Lab., *Fact Sheet #17: Exemption for Outside Sales Employees Under the Fair Labor Standards Act (FLSA)* (Aug. 2024).

[27] FLSA § 13(d).

[28] Michelle, Singletary, *Why Multilevel Marketing Won't Make You Rich*, Wash. Post (Sept. 26, 2018), https://www.washingtonpost.com/business/2018/09/27/why-that-multilevel-marketing-business-is-probably-not-going-pay-off/.

The Same Wrong Song and Dance

In the absence of committee hearings on the matter, the only resource for the case in favor of this legislation comes from the groups lobbying for it. They appear, however, to fundamentally misunderstand the relevant law and recent rulemakings implementing it.

The leading voice in support of this legislation appears to be the NAR and its state affiliates. NAR's materials describe its efforts as "protect[ing] independent contractors" from federal employment and labor laws adopting a streamlined employment test (the "ABC test") in place of the FLSA economic realities test and the common law control test used in the *National Labor Relations Act*.[29]

To the extent that the NAR has a rationale at all for this bill, it appears to be a rehash of an argument that the Majority has brought to this Committee in other contexts multiple times since the 118th Congress about supposedly radical changes to the FLSA employment test:

- *Before the Trump Rule:* The economic realities test, discussed above, was the test for FLSA going back to the 1940s.
- *The Trump Rule:* A Trump Administration rule, published in January 2021 (Trump Rule), completely rewrote this test.[30] It emphasized two factors above all—a worker's opportunity to make a profit under the arrangement, and the worker's control over schedule or other aspects of the job.[31] If a worker could arguably make a profit and had control over something basic such as his or her own schedule, those facts could alone be enough to overwhelm other factors of the Trump Rule's new test. According to the Economic Policy Institute (EPI), the Trump Rule would have cost workers more than $3 billion yearly in lost wages.[32] Courts either questioned the validity of the Trump Rule [33] or waved it away as an interpretation of law that does not trump authoritative court precedent.[34]
- *The Biden Rule:* The Biden Administration attempted to simply withdraw the Trump Rule but, after that move was rejected by a federal district court in Texas, opted to replace it in with a January 2024 rule that restores the decades-old economic realities test (Biden Rule).[35] The Biden Rule clarifies that the ultimate question of the economic realities test is whether workers are running their own businesses (making them truly independent contractors) or are dependent on finding work in the business of another.[36] It also adds helpful ex-

[29] NAR Brief, *supra* note 9.
[30] Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1168 (Jan. 7, 2021).
[31] *Id.*
[32] Heidi Shierholz, *EPI Comments on Independent Contractor Status Under the Fair Labor Standards Act*, ECON. POL'Y INST. (Oct. 26, 2020), https://www.epi.org/publication/epi-comments-on-independent-contractor-status-under-the-fair-labor-standards-act/.
[33] Wallen v. TendoNova Corp., No. 20–cv–790–SE, 2022 U.S. Dist. LEXIS 21126, *9, 2022 WL 17128983 (D.N.H. Nov. 22, 2022).
[34] Harris v. Diamond Dolls of Nev., No. 3:19–cv–00598–RCJ CBC, 2022 U.S. Dist. LEXIS 166300, *4–*5, 2022 WL 4125474 (D. Nev. July 26, 2022).
[35] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638 (Jan. 10, 2024) [hereinafter Biden Rule].
[36] *Id.* at 1742 (revising 29 C.F.R. § 795.105(a)).

planations for how and why each non-exhaustive factor in the economic realities test helps answer this ultimate question.[37]

• *Attacks on the Biden Rule:* The Republicans have repeatedly criticized the Biden Rule as though it radically rewrites the law.[38] Instead, it merely *restores the law as it was applied from 1938 to 2021*. The Republicans have also argued that the purpose of the Biden Rule is not to fix the damage of the Trump Rule but, instead, to attack independent contracting in its entirety by adopting the AB 5 version of the ABC Test. DOL reiterated more than once in the Biden Rule that it lacks the power to adopt the ABC test and merely restored the long-standing economic realities test laid out by the courts decades ago.[39] (On-demand gig companies such as Uber and Instacart, which mounted a $224 million campaign in California for a ballot initiative carving themselves out of AB 5,[40] agreed with the Biden Administration on this point.[41]) Five court challenges against the Biden Rule are still pending. Three were dismissed on standing grounds; of those, two are being appealed, and the third is likely to be appealed soon. Two others are on appeal for other reasons, with each delayed at the request of the Trump Administration.[42]

• *The Trump II Rollback:* On May 1, 2025, the Trump Administration issued a Field Assistance Bulletin (FAB)—which provides guidance to DOL field staff on how to enforce and interpret the law—declaring that DOL "will no longer apply the 2024 Rule's analysis when determining employee versus independent contractor status in FLSA investigations."[43] Instead, DOL is relying on previous guidance issued under the Trump and George W. Bush administrations, while it is considering "whether to rescind the regulation."[44] Although the 2024 rule can still be relied upon in private litigation while it remains in effect, this FAB signals the Trump administration's likely plan to rescind the 2024 rule and enact another employee classification test more in line with its own 2021 rule.

Despite their positions, the NAR and the Majority have yet to bring up any case in which FLSA has applied to real estate agents or direct sellers in the first instance. Moreover, even if FLSA applied in a specific arrangement, the outside sales exemption would

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[37] *Id*. at 1742–1743.

[38] *See, e.g., Empowering the Modern Worker: Hearing before the Subcomm. on Wrkf. Prots. of the H. Comm. on Educ. & Wrkf.*, 119th Cong. (2025); *Examining Biden's War on Independent Contractors: Hearing before the Subcomm. on Wrkf. Prots. of the H. Comm. on Educ. & the Wrkf.*, 118th Cong. (2023).

[39] DOL could not have stated it more plainly: "[DOL] is *not adopting an ABC test*. [DOL] continues to believe that an ABC test would be inconsistent with Supreme Court and federal appellate precedent interpreting and applying the FLSA, and therefore, *this final rule declines to adopt an ABC test*." Biden Rule, *supra* note 35, at 1662 (emphases added).

[40] Brian Chen & Laura Padin, *Prop 22 Was a Failure for California's App-Based Workers. Now, It's Also Unconstitutional.*, NAT'L EMP. L. PROJ. (Sept. 16, 2021), https://www.nelp.org/blog/prop-22-unconstitutional/.

[41] "The Department of Labor rule released today does not reclassify any workers," said Instacart in a statement on the Biden Rule. "It merely provides interpretation guidance on the factors the agency plans to consider when determining workers status under federal minimum wage law." *Id.*

[42] Rebecca Rainey & Chris Marr, *Punching In: The Court Battles Awaiting DOL's New Leaders*, BLOOMBERG (Mar. 17, 2025), https://www.bgov.com/next/news/ST9FP5DWLU68.

[43] Wage & Hr. Div., U.S. Dep't of Lab., Field Assistance Bulletin 2025–1, FLSA Independent Contractor Misclassification Enforcement Guidance (May 1, 2025), https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2025-1.pdf?lec6tn7bd.

[44] *Id.*

still allow for traditional pay practices to apply. There is, simply, no evidence of any problem at all in these industries that requires an amendment of the nation's fundamental wage protection and child labor law.

Threatening Independence

If real estate agents and direct sellers are categorically exempted from the FLSA employment definition, nothing would stop their respective upstream power players from denying the workers the independence that currently characterizes their work. A real estate broker could, for example, require set office hours and limit agents' flexibility in highly prescriptive ways, exercising the degree of control characteristic of employers under both the economic realities and common law control tests.

Leaving FLSA as it is, by contrast, protects the independence and flexibility that these workers currently enjoy, while accommodating the pay practices that define the industries.

Putting Low-Wage Call Center Workers at Risk

A DOL investigation in the first Trump Administration led to a FLSA wage theft enforcement action against a call center business in Las Vegas. The Defendants argued that they were allowed to characterize their workers as independent contractors paid solely for their sales because of the tax code treatment of direct sellers. A federal court disagreed. The court held, first, that the tax law has no bearing on FLSA. The court also noted that the workers were not engaged in independent sales work but, instead, simply read predefined scripts and did not exercise skills or sales acumen in the course of their work. Moreover, the workers were not hired for their salesmanship but, instead, for their ability to read and sound acceptable in a telephone call. Accordingly, FLSA applied and protected these low-wage call center workers' rights to a minimum wage and premium payment for overtime hours.[45]

In the world created by this bill, these workers would have been out of luck. These low-wage call center workers would have been categorically excluded from FLSA's coverage. As a result, they would have lost not only their case but also any right to a minimum wage, overtime pay, equal pay on the basis of sex, privacy for expressing breast milk, and protected family and medical leave.

[45] Acosta v. Wellfleet Commc'ns, LLC, No. 2:16–cv–02353–GMN–GWF, 2018 U.S. Dist. LEXIS 168671 (D. Nev. Sept. 29, 2018).

CONCLUSION

For the reasons stated above, Committee Democrats unanimously opposed H.R. 3495 when the Committee on Education and Workforce considered it on September 17, 2025. We urge the House of Representatives to do the same.

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