

**DEPARTMENT OF LABOR****Wage and Hour Division****29 CFR Parts 780, 788, and 795**

RIN 1235-AA43

**Employee or Independent Contractor Classification Under the Fair Labor Standards Act****AGENCY:** Wage and Hour Division, Department of Labor.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The U.S. Department of Labor (the Department) is proposing to modify Wage and Hour Division regulations to revise its analysis for determining employee or independent contractor classification under the Fair Labor Standards Act (FLSA or Act) to be more consistent with judicial precedent and the Act's text and purpose.

**DATES:** Submit written comments on or before November 28, 2022.

**ADDRESSES:** You may submit comments, identified by Regulation Identifier Number (RIN) 1235-AA43, by either of the following methods:

- *Electronic Comments:* Submit comments through the Federal eRulemaking Portal at <https://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Address written submissions to Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210.

*Instructions:* Please submit only one copy of your comments by only one method. Of the two methods, the Department strongly recommends that commenters submit their comments electronically via <https://www.regulations.gov> to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. All comments must be received by 11:59 p.m. ET on November 28, 2022, for consideration in this rulemaking; comments received after the comment period closes will not be considered.

Commenters submitting file attachments on <https://www.regulations.gov> are advised that uploading text-recognized documents—*i.e.*, documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration. This recommendation applies particularly to mass comment

submissions, when a single sponsoring individual or organization submits multiple comments on behalf of members or other affiliated third parties. The Wage and Hour Division (WHD) posts such comments as a group under a single document ID number on <https://www.regulations.gov>.

Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to <https://www.regulations.gov>, including any personal information provided. Accordingly, the Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this notice of proposed rulemaking (NPRM).

*Docket:* For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division (WHD), U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Alternative formats are available upon request by calling 1-866-487-9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or logging onto WHD's website for a nationwide listing of WHD district and area offices at <https://www.dol.gov/whd/america2.htm>.

**SUPPLEMENTARY INFORMATION:****I. Executive Summary**

Congress enacted the FLSA in 1938 to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."<sup>1</sup> To this end, the FLSA generally requires covered employers to pay nonexempt employees at least the Federal minimum wage for all hours worked and at least one and one-half times the employee's regular rate of pay for every hour worked over 40 in a

workweek. The Act also requires covered employers to maintain certain records regarding employees and prohibits retaliation against employees who are discharged or discriminated against after, for example, inquiring about their pay or filing a complaint with the U.S. Department of Labor. However, the FLSA's minimum wage and overtime pay protections do not apply to independent contractors. As explained below, as used in this proposal, the term "independent contractor" refers to workers who, as a matter of economic reality, are not economically dependent on their employer for work and are in business for themselves. Such workers play an important role in the economy and are commonly referred to by different names, including independent contractor, self-employed, and freelancer. Regardless of the name or title used, the test for whether the worker is an employee or independent contractor under the FLSA remains the same. This proposed rulemaking is not intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves.

Determining whether an employment relationship exists under the FLSA begins with the Act's definitions. Although the FLSA does not define the term "independent contractor," it contains expansive definitions of "employer," "employee," and "employ." "Employer" is defined to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee," "employee" is defined as "any individual employed by an employer," and "employ" is defined to "include[] to suffer or permit to work."<sup>2</sup>

For more than 7 decades, the Department and courts have applied an economic reality test to determine whether a worker is an employee or an independent contractor under the FLSA. The ultimate inquiry is whether, as a matter of economic reality, the worker is either economically dependent on the employer for work (and is thus an employee) or is in business for himself (and is thus an independent contractor). To answer this ultimate inquiry of economic dependence, the courts and the Department have historically conducted a totality-of-the-circumstances analysis, considering multiple factors to determine whether a worker is an employee or an independent contractor under the FLSA. There is significant and widespread uniformity among the circuit courts in

<sup>1</sup> 29 U.S.C. 202(a).

<sup>2</sup> 29 U.S.C. 203(d), (e)(1), (g).

the application of the economic reality test, although there is slight variation as to the number of factors considered or how the factors are framed. These factors generally include the opportunity for profit or loss, investment, permanency, the degree of control by the employer over the worker, whether the work is an integral part of the employer's business, and skill and initiative.

In January 2021, the Department published a rule titled "Independent Contractor Status Under the Fair Labor Standards Act" (2021 IC Rule), providing guidance on the classification of independent contractors under the FLSA applicable to workers and businesses in any industry.<sup>3</sup> The 2021 IC Rule identified five economic reality factors to guide the inquiry into a worker's status as an employee or independent contractor.<sup>4</sup> Two of the five identified factors—the nature and degree of control over the work and the worker's opportunity for profit or loss—were designated as "core factors" that are the most probative and carry greater weight in the analysis. The 2021 IC Rule stated that if these two core factors point towards the same classification, there is a substantial likelihood that it is the worker's accurate classification.<sup>5</sup> The 2021 IC Rule also identified three less probative non-core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the employer, and whether the work is part of an integrated unit of production.<sup>6</sup> The 2021 IC Rule stated that it is "highly unlikely" that these three non-core factors can outweigh the combined probative value of the two core factors.<sup>7</sup> The 2021 IC Rule also limited consideration of investment and initiative to the opportunity for profit or loss factor in a way that narrows in at least some circumstances the extent to which investment and initiative are considered. The facts to be considered under other factors (such as control) were also narrowed, and the factor that considers whether the work is integral to the employer's business was limited

to whether the work is part of an integrated unit of production.<sup>8</sup> Finally, the 2021 IC Rule provided that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible and provided illustrative examples demonstrating how the analysis would apply in particular factual circumstances.<sup>9</sup>

The effective date of the 2021 IC Rule was March 8, 2021. On March 4, 2021, the Department published a rule delaying the effective date of the 2021 IC Rule (Delay Rule) and on May 6, 2021, it published a rule withdrawing the 2021 IC Rule (Withdrawal Rule). On March 14, 2022, in a lawsuit challenging the Department's delay and withdrawal of the 2021 IC Rule, a Federal district court in the Eastern District of Texas issued a decision vacating the Delay and Withdrawal Rules.<sup>10</sup> The district court concluded that the 2021 IC Rule became effective on the original effective date of March 8, 2021.

After further consideration, the Department believes that the 2021 IC Rule does not fully comport with the FLSA's text and purpose as interpreted by courts and departs from decades of case law applying the economic reality test. The 2021 IC Rule included provisions that are in tension with this case law—such as designating two factors as most probative and predetermining that they carry greater weight in the analysis, considering investment and initiative only in the opportunity for profit or loss factor, and excluding consideration of whether the work performed is central or important to the employer's business. These provisions narrow the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for himself.

While the Department considered waiting for a longer period of time in order to monitor the effects of the 2021 IC Rule, after careful consideration, it has decided it is appropriate to move forward with this proposed regulation. The Department believes that retaining the 2021 IC Rule would have a confusing and disruptive effect on workers and businesses alike due to its departure from case law describing and applying the multifactor economic

reality test as a totality-of-the-circumstances test. Because the 2021 IC Rule departed from legal precedent, it is not clear whether courts will adopt its analysis—a question that could take years of appellate litigation in different Federal circuits to sort out and will result in more uncertainty as to the applicable test. The Department also believes that departing from the longstanding test applied by the courts may result in greater confusion among employers in applying the new analysis, which could in some situations place workers at greater risk of misclassification as independent contractors due to the new analysis being applied improperly, and thus may negatively affect both the workers and competing businesses that correctly classify their employees.

Therefore, the Department believes it is appropriate to rescind the 2021 IC Rule and set forth an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule. While prior to the 2021 IC Rule the Department primarily issued subregulatory guidance in this area under the FLSA, it believes that its proposal to both rescind the 2021 IC Rule and replace it with detailed regulations addressing the multifactor economic reality test—in a way that more fully reflects the case law and provides the flexibility needed for application to the entire economy—would be helpful for both workers and employers. And as the 2021 IC Rule explained, workers and employers should benefit from affirmative regulatory guidance from the Department further developing the concept of economic dependence.

Accordingly, the Department is now proposing, in addition to rescinding the 2021 IC Rule, to again add part 795. Specifically, the Department proposes to modify the text of part 795 as published on January 7, 2021, at 86 FR 1246 through 1248, addressing whether workers are employees or independent contractors under the FLSA. As discussed below, the Department is not proposing the use of "core factors" but instead proposes to return to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. The Department is further proposing to return the consideration of investment to a standalone factor, provide additional analysis of the control factor (including detailed

<sup>3</sup> 86 FR 1168. The Office of the Federal Register did not amend the Code of Federal Regulations (CFR) to include the regulations from the 2021 IC Rule because, as explained elsewhere in this section, the Department first delayed and then withdrew the 2021 IC Rule before it became effective. A district court decision later vacated the Department's rules to delay and withdraw the 2021 IC Rule, and the Department has (since that decision) conducted enforcement in accordance with that decision.

<sup>4</sup> *Id.* at 1246–47 (§ 795.105(d)).

<sup>5</sup> *Id.* at 1246 (§ 795.105(c)).

<sup>6</sup> *Id.* at 1247 (§ 795.105(d)(2)).

<sup>7</sup> *Id.* at 1246 (§ 795.105(c)).

<sup>8</sup> *Id.* at 1246–47 (§ 795.105(d)(1) and (d)(2)(iii)).

<sup>9</sup> *Id.* at 1247–48 (§§ 795.110, 795.115).

<sup>10</sup> See *Coalition for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022).

discussions of how scheduling, supervision, price-setting, and the ability to work for others should be considered), and return to the longstanding interpretation of the integral factor, which considers whether the work is integral to the employer's business.

The Department recognizes that this return to a totality-of-the-circumstances analysis in which the economic reality factors are not assigned a predetermined weight and each factor is given full consideration represents a change from the 2021 IC Rule. As discussed below, however, it believes that this approach is the option that would be most beneficial for stakeholders because this proposal provides guidance that is aligned with the Department's decades-long approach (prior to the 2021 IC Rule) as well as circuit case law. The Department believes that this proposal, if finalized, will provide more consistent guidance to employers as they determine whether workers are economically dependent on the employer for work or are in business for themselves, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors. Accordingly, the Department believes this proposal will help protect workers from misclassification while at the same time recognizing that independent contractors serve an important role in our economy and providing a consistent approach for those businesses that engage (or wish to engage) independent contractors.

## II. Background

### A. Relevant FLSA Definitions

Enacted in 1938, the FLSA generally requires that covered employers pay nonexempt employees at least the Federal minimum wage (presently \$7.25 per hour) for every hour worked,<sup>11</sup> and at least one and one-half times the employee's regular rate of pay for all hours worked beyond 40 in a workweek.<sup>12</sup> The FLSA also requires covered employers to "make, keep, and preserve" certain records regarding employees.<sup>13</sup>

The FLSA's wage and hour protections apply to employees. In relevant part, section 3(e) of the Act defines the term "employee" as "any individual employed by an employer."<sup>14</sup> Section 3(d) defines the term "employer" to "includ[e] any person acting directly or indirectly in

the interest of an employer in relation to an employee."<sup>15</sup> Finally, section 3(g) provides that the term "[e]mploy' includes to suffer or permit to work."<sup>16</sup>

Interpreting these provisions, the U.S. Supreme Court has stated that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame," and that "the term 'employee' had been given 'the broadest definition that has ever been included in any one act.'" <sup>17</sup> In particular, the Court has noted the "striking breadth" of section 3(g)'s "suffer or permit" language, observing that it "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles."<sup>18</sup> Thus, the Court has repeatedly observed that the FLSA's scope of employment is broader than the common law standard often applied to determine employment status under other Federal laws.<sup>19</sup>

At the same time, the Supreme Court has recognized that the Act was "not intended to stamp all persons as employees."<sup>20</sup> Among other categories of workers excluded from FLSA coverage, the Court has recognized that "independent contractors" fall outside the Act's broad understanding of employment.<sup>21</sup> Accordingly, the FLSA does not require covered employers to pay an independent contractor the minimum wage or overtime pay under sections 6(a) and 7(a) of the Act, or to keep records regarding an independent contractor's work under section 11(c). However, merely "putting on an 'independent contractor' label does not take [a] worker from the protection of the [FLSA]."<sup>22</sup> Courts have thus recognized a need to delineate between employees, who fall under the

protections of the FLSA, and independent contractors, who do not.

The FLSA does not define the term "independent contractor." While it is clear that section 3(g)'s "suffer or permit" language contemplates a broader coverage of workers compared to what exists under the common law, "there is in the [FLSA] no definition that solves problems as to the limits of the employer-employee relationship under the Act."<sup>23</sup> Therefore, in articulating the distinction between FLSA-covered employees and independent contractors, courts rely on a broad, multifactor "economic reality" analysis derived from judicial precedent.<sup>24</sup> Unlike the control-focused analysis for independent contractors applied under the common law,<sup>25</sup> the economic reality test focuses more broadly on a worker's economic dependence on an employer, considering the totality of the circumstances.

### B. Judicial Development of the Economic Reality Test

#### 1. Supreme Court Development of the Economic Reality Test

In a series of cases from 1944 to 1947, the U.S. Supreme Court considered employee or independent contractor status under three different Federal statutes that were enacted during the 1930s New Deal Era—the FLSA, the National Labor Relations Act (NLRA), and the Social Security Act (SSA)—and applied an economic reality test under all three laws.

In the first of these cases, *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court considered the meaning of "employee" under the NLRA, which defined the term to

<sup>23</sup> *Id.* at 728.

<sup>24</sup> Courts invoke the concept of "economic reality" in FLSA employment contexts beyond independent contractor status. However, as in prior rulemakings, this NPRM refers to the "economic reality" analysis or test for independent contractors as a shorthand reference to the independent contractor analysis used by courts for FLSA purposes.

<sup>25</sup> In distinguishing between employees and independent contractors under the common law, courts evaluate "the hiring party's right to control the manner and means by which the product is accomplished." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989). "Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." *Id.* (footnotes omitted).

<sup>15</sup> 29 U.S.C. 203(d).

<sup>16</sup> 29 U.S.C. 203(g).

<sup>17</sup> *United States v. Rosenwasser*, 323 U.S. 360, 362, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (statement of Senator Hugo Black)).

<sup>18</sup> *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326 (1992).

<sup>19</sup> *Id.* at 326; see also, e.g., *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–51 (1947) ("[I]n determining who are 'employees' under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.") (citation omitted).

<sup>20</sup> *Portland Terminal*, 330 U.S. at 152.

<sup>21</sup> See, e.g., *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (noting that "[t]here may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees").

<sup>22</sup> *Id.*

<sup>11</sup> 29 U.S.C. 206(a).

<sup>12</sup> 29 U.S.C. 207(a).

<sup>13</sup> 29 U.S.C. 211(c).

<sup>14</sup> 29 U.S.C. 203(e)(1).

“include any employee.”<sup>26</sup> In relevant part, the *Hearst* Court rejected application of the common law standard,<sup>27</sup> noting that “the broad language of the [NLRA’s] definitions . . . leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.”<sup>28</sup>

On June 16, 1947, the Supreme Court decided *United States v. Silk*, 331 U.S. 704 (1947), addressing the distinction between employees and independent contractors under the SSA. In that case, the Court favorably summarized *Hearst* as setting forth “economic reality,” as opposed to “technical concepts” of the common law standard alone, as the framework for determining workers’ classification.<sup>29</sup> But it also acknowledged that not “all who render service to an industry are employees.”<sup>30</sup> Although the Court found it to be “quite impossible to extract from the [SSA] a rule of thumb to define the limits of the employer-employe[e] relationship,” the Court identified five factors as “important for decision”: “degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation[,] and skill required in the claimed independent operation.”<sup>31</sup> The Court added that “[n]o one [factor] is controlling nor is the list complete.”<sup>32</sup> The Court went on to note that the workers in that case were “from one standpoint an integral part of the businesses” of the employer, supporting a conclusion that some of the workers in that case were employees.<sup>33</sup>

The same day that the Supreme Court issued its decision in *Silk*, it also issued *Rutherford Food Corp. v. McComb*, 331 U.S. 722, in which it affirmed a circuit court decision that analyzed an FLSA employment relationship based on its economic realities.<sup>34</sup> Describing the FLSA as “a part of the social legislation of the 1930s of the same general character as the [NLRA] and the [SSA],” the Court opined that “[d]ecisions that define the coverage of the employer-Employee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the [FLSA].”<sup>35</sup>

Accordingly, the Court rejected an approach based on “isolated factors” and again considered “the circumstances of the whole activity.”<sup>36</sup> The Court considered several of the factors that it listed in *Silk* as they related to meat boners on a slaughterhouse’s production line, ultimately determining that the boners were employees.<sup>37</sup> The Court noted, among other things, that the boners did a specialty job on the production line, had no business organization that could shift to a different slaughter-house, and were best characterized as “part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment.”<sup>38</sup>

On June 23, 1947, one week after the *Silk* and *Rutherford* decisions, the Court decided *Bartels v. Birmingham*, 332 U.S. 126 (1947), another case involving employee or independent contractor status under the SSA. Here again, the Court rejected application of the common law control test, explaining that, under the SSA, employee status “was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker.”<sup>39</sup> Rather, employees under “social legislation” such as the SSA are “those who as a matter of economic reality are dependent upon the business to which they render service.”<sup>40</sup> Thus, in addition to control, “permanency of the relation, the skill required, the investment [in] the facilities for work and opportunities for profit or loss from the activities were also factors” to consider.<sup>41</sup> Although the Court identified these specific factors as relevant to the analysis, it explained that “[i]t is the total situation that controls” the worker’s classification under the SSA.<sup>42</sup>

Following these Supreme Court decisions, Congress responded with separate legislation to amend the NLRA and SSA’s employment definitions. First, in 1947, Congress amended the NLRA’s definition of “employee” to clarify that the term “shall not include any individual having the status of an independent contractor.”<sup>43</sup> The

following year, Congress similarly amended the SSA to exclude from employment “any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor.”<sup>44</sup> The Supreme Court interpreted the amendments to the NLRA as having the same effect as the explicit definition included in the SSA, which was to ensure that employment status would be determined by common law agency principles, rather than an economic reality test.<sup>45</sup>

Despite its amendments to the NLRA and SSA in response to *Hearst* and *Silk*, Congress did not similarly amend the FLSA following the *Rutherford* decision. Thus, when the Supreme Court revisited independent contractor status under the FLSA several years later in *Goldberg v. Whitaker House Cop., Inc.*, 366 U.S. 28 (1961), the Court affirmed that “‘economic reality’ rather than ‘technical concepts’” remained “the test of employment” under the FLSA,<sup>46</sup> quoting from its earlier decisions in *Silk* and *Rutherford*. The Court in *Whitaker House* found that certain homeworkers were “not self-employed . . . [or] independent, selling their products on the market for whatever price they can command,” but instead were “regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates.”<sup>47</sup> Such facts, among others, established that the homeworkers at issue were FLSA-covered employees.<sup>48</sup>

Most recently, in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), the Court again endorsed application of the economic reality test to evaluate independent contractor status under the FLSA, citing to *Rutherford* and emphasizing the broad “suffer or permit” language codified in section 3(g) of the Act.<sup>49</sup>

## 2. Application of the Economic Reality Test by Federal Courts of Appeals

Since *Rutherford*, Federal courts of appeals have applied the economic

<sup>44</sup> Social Security Act of 1948, Public Law 80–642, sec. 2(a), 62 Stat. 438 (1948) (codified as amended at 26 U.S.C. 3121(d)).

<sup>45</sup> See *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) (noting that “[t]he obvious purpose of” the amendment to the definition of employee under the NLRA “was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act”).

<sup>46</sup> 366 U.S. at 33 (quoting from *Silk*, 331 U.S. at 713, and *Rutherford*, 331 U.S. at 729).

<sup>47</sup> *Id.* at 32.

<sup>48</sup> *Id.* at 33.

<sup>49</sup> *Darden*, 503 U.S. at 325–26.

<sup>26</sup> 322 U.S. at 118–20; 29 U.S.C. 152(3).

<sup>27</sup> 322 U.S. at 123–25.

<sup>28</sup> *Id.* at 129.

<sup>29</sup> 331 U.S. at 712–14.

<sup>30</sup> *Id.* at 712.

<sup>31</sup> *Id.* at 716.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> 331 U.S. at 727.

<sup>35</sup> *Id.* at 723–24.

<sup>36</sup> *Id.* at 730.

<sup>37</sup> See *id.*

<sup>38</sup> *Id.* at 729–30.

<sup>39</sup> 332 U.S. at 130.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Labor Management Relations (Taft-Hartley) Act, 1947, Public Law 80–101, sec. 101, 61 Stat. 136, 137–38 (1947) (codified as amended at 29 U.S.C. 152(3)).

reality test to distinguish independent contractors from employees who are entitled to the FLSA's protections. Recognizing that the common law concept of "employee" had been rejected for FLSA purposes, courts of appeals followed the Supreme Court's instruction that "employees are those who as a matter of economic realities are dependent upon the business to which they render service."<sup>50</sup>

When determining whether a worker is an employee under the FLSA or an independent contractor, Federal circuit courts of appeals apply an economic reality test using the factors identified in *Silk*.<sup>51</sup> No court of appeals considers any one factor or combination of factors to predominate over the others in every case.<sup>52</sup> For example, the Eleventh Circuit has explained that some of the factors "which many courts have used as guides in applying the economic reality test" are: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the worker's opportunity for profit or loss depending upon their managerial skill; (3) the worker's investment in equipment or materials required for their task, or their employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) the extent to which the service rendered is an integral part of the alleged employer's business.<sup>53</sup> Like other circuits, the

Eleventh Circuit repeats the Supreme Court's explanation from *Silk* that no one factor is controlling, nor is the list exhaustive.<sup>54</sup>

Some courts of appeals have applied the factors with some variations. For example, the Fifth Circuit typically does not list the "integral part" factor as one of the considerations that guides the analysis.<sup>55</sup> Nevertheless, the Fifth Circuit, recognizing that the listed factors are not exhaustive, has considered the extent to which a worker's function is integral to a business as part of its economic realities analysis.<sup>56</sup> The Second and D.C. Circuits vary in that they treat the employee's opportunity for profit or loss and the employee's investment as a single factor, but they still use the same considerations as the other circuits to inform their economic realities analysis.<sup>57</sup>

In sum, since the 1940s, Federal courts have analyzed the question of employee or independent contractor status under the FLSA by examining the economic realities of the employment relationship to determine whether the worker is economically dependent on the employer for work or is in business for himself, even if they have varied slightly in their articulations of the factors. Nevertheless, all courts have looked to the factors first articulated in *Silk* as useful guideposts while acknowledging that those factors are not exhaustive and should not be applied mechanically.<sup>58</sup>

### C. The Department's Application of the Economic Reality Test

The Department has applied a multifactor economic reality test since the Supreme Court's opinions in *Rutherford* and *Silk*. For example, on June 23, 1949, the Wage and Hour Division (WHD) issued an opinion letter distilling six "primary factors which the Court considered significant" in *Rutherford* and *Silk*: "(1) the extent to which the services in question are an integral part of the 'employer[']s' business; (2) the amount of the so-called 'contractor's' investment in facilities and equipment; (3) the nature and degree of control by the principal; (4) opportunities for profit and loss; . . . (5)

the amount of initiative judgment or foresight required for the success of the claimed independent enterprise[;] and [(6)] permanency of the relation."<sup>59</sup> The guidance cautioned that no single factor is controlling, and "[o]rdinarily a definite decision as to whether one is an employee or an independent contractor under the [FLSA] cannot be made in the absence of evidence as to his actual day-to-day working relationship with his principal. Clearly a written contract does not always reflect the true situation."<sup>60</sup>

Subsequent WHD opinion letters addressing employee or independent contractor status under the FLSA have provided similar recitations of the *Silk* factors, sometimes omitting one or more of the six factors described in the 1949 opinion letter,<sup>61</sup> and sometimes adding (or substituting) a seventh factor: the worker's "degree of independent business organization and operation."<sup>62</sup> Numerous opinion letters have emphasized that employment status is "not determined by the common law standards relating to master and servant,"<sup>63</sup> and that "[t]he degree of control retained by the principal has been rejected as the sole criterion to be applied."<sup>64</sup>

In 1962, the Department revised the regulations in 29 CFR part 788,<sup>65</sup> which generally provides interpretive guidance on the FLSA's exemption for employees in small forestry or lumbering operations, and added a provision addressing the distinction between employees and independent contractors.<sup>66</sup> Citing to *Silk*, *Rutherford*, and *Bartels*, the regulation advised that "an employee, as distinguished from a person who is engaged in a business of his own, is one who 'follows the usual path of an employee' and is dependent on the business which he serves."<sup>67</sup> To "aid in assessing the total situation," the regulation then identified a partial list of "characteristics of the two classifications which should be considered," including "the extent to

<sup>50</sup> *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (quoting *Bartels*, 332 U.S. at 130).

<sup>51</sup> See *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–59 (2d Cir. 1988); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382–83 (3d Cir. 1985); *McFeeley v. Jackson Street Ent., LLC*, 825 F.3d 235, 241 (4th Cir. 2016); *Pilgrim Equip.*, 527 F.2d at 1311; *Acosta v. Off Duty Police Servs., Inc.*, 915 F.3d 1050, 1055 (6th Cir. 2019); *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1534–35 (7th Cir. 1987); *Walsh v. Alpha & Omega USA, Inc.*, 39 F.4th 1078, 1082 (8th Cir. 2022); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979); *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1235 (10th Cir. 2018); *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311–12 (11th Cir. 2013); *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (DC Cir. 2001).

<sup>52</sup> See, e.g., *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 380 (5th Cir. 2019) (stating that it "is impossible to assign to each of these factors a specific and invariably applied weight") (quoting *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983) (applying economic realities test in Age Discrimination in Employment Act case)); *Martin v. Selker Bros.*, 949 F.2d 1286, 1293 (3d Cir. 1991) ("It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive."); *Scantland*, 721 F.3d at 1312 n.2 (the relative weight of each factor "depends on the facts of the case") (quoting *Santelices v. Cable Wiring*, 147 F. Supp. 2d 1313, 1319 (S.D. Fla. 2001)).

<sup>53</sup> *Scantland*, 721 F.3d at 1311–12.

<sup>54</sup> *Id.* at 1312 n.2.

<sup>55</sup> See *Pilgrim Equip.*, 527 F.2d at 1311.

<sup>56</sup> See *Hobbs v. Petroplex Pipe & Constr., Inc.*, 946 F.3d 824, 836 (5th Cir. 2020).

<sup>57</sup> See, e.g., *Franze v. Bimbo Bakeries USA, Inc.*, 826 F. App'x 74, 76 (2d Cir. 2020); *Superior Care*, 840 F.2d at 1058–59. The D.C. Circuit has adopted the Second Circuit's articulation of the factors, including treating opportunity for profit or loss and investment as one factor. See *Morrison*, 253 F.3d at 11 (citing *Superior Care*, 840 F.2d at 1058–59).

<sup>58</sup> See, e.g., *Superior Care*, 840 F.2d at 1059.

<sup>59</sup> WHD Op. Ltr. (June 23, 1949).

<sup>60</sup> *Id.*

<sup>61</sup> See, e.g., WHD Op. Ltr. FLSA–314 (Dec. 21, 1982) (discussing three of the *Silk* factors); WHD Op. Ltr. FLSA–164 (Jan. 18, 1990) (discussing four of the *Silk* factors).

<sup>62</sup> See WHD Op. Ltr. (Oct. 12, 1965); WHD Op. Ltr. (Feb. 18, 1969).

<sup>63</sup> See, e.g., WHD Op. Ltr. (Feb. 18, 1969); WHD Op. Ltr. (Sept. 1, 1967); WHD Op. Ltr. FLSA–31 (Aug. 10, 1981); WHD Op. Ltr. (June 5, 1995).

<sup>64</sup> See, e.g., WHD Op. Ltr. FLSA–106 (Feb. 8, 1956); WHD Op. Ltr. (July 20, 1965); WHD Op. Ltr. FLSA–31 (Aug. 10, 1981).

<sup>65</sup> See 27 FR 8032.

<sup>66</sup> See 29 U.S.C. 213(b)(28) (previously codified at 29 U.S.C. 213(a)(15)).

<sup>67</sup> 27 FR 8033 (29 CFR 788.16(a)).

which the services rendered are an integral part of the principal's business; the permanency of the relationship; the opportunities for profit or loss; the initiative, judgment or foresight exercised by the one who performs the services; the amount of investment; and the degree of control which the principal has in the situation."<sup>68</sup> Implicitly referring to the *Bartels* decision, the regulation advised that "[t]he Court specifically rejected the degree of control retained by the principal as the sole criterion to be applied."<sup>69</sup>

In 1972, the Department added similar guidance on independent contractor status at 29 CFR 780.330(b), in a provision addressing the employment status of sharecroppers and tenant farmers.<sup>70</sup> This regulation was nearly identical to the independent contractor guidance for the logging and forestry industry previously codified at 29 CFR 788.16(a), including an identical description of the same six economic reality factors.<sup>71</sup> Both provisions—29 CFR 780.330(b) and 788.16(a)—remained unchanged until 2021.

In 1997, the Department promulgated a regulation applying a multifactor economic reality analysis for distinguishing between employees and independent contractors under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA),<sup>72</sup> which notably incorporates the FLSA's "suffer or permit" definition of employment by reference.<sup>73</sup> The regulation (which has not since been amended) advises that "[i]n determining if the farm labor contractor or worker is an employee or an independent contractor, the ultimate question is the economic reality of the relationship—whether there is economic dependence upon the agricultural employer/association or farm labor contractor, as appropriate."<sup>74</sup> The regulation elaborates that "[t]his determination is based upon an evaluation of all of the circumstances, including the following: (i) The nature and degree of the putative employer's control as to the manner in which the work is performed; (ii) The putative employee's opportunity for profit or loss

depending upon his/her managerial skill; (iii) The putative employee's investment in equipment or materials required for the task, or the putative employee's employment of other workers; (iv) Whether the services rendered by the putative employee require special skill; (v) The degree of permanency and duration of the working relationship; (vi) The extent to which the services rendered by the putative employee are an integral part of the putative employer's business."<sup>75</sup>

This description of six economic reality factors was very similar to the earlier description of six economic reality factors provided in 29 CFR 780.330(b) and 788.16(a).

Also in 1997, WHD issued Fact Sheet #13, "Employment Relationship Under the Fair Labor Standards Act (FLSA)."<sup>76</sup> Like WHD opinion letters, Fact Sheet #13 advises that "an employee, as distinguished from a person who is engaged in a business of his or her own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves."<sup>77</sup> The fact sheet identifies the six familiar economic realities factors, as well as consideration of the worker's "degree of independent business organization and operation."<sup>78</sup>

On July 15, 2015, WHD issued additional subregulatory guidance, Administrator's Interpretation No. 2015-1, "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors" (AI 2015-1).<sup>79</sup> AI 2015-1 reiterated that the economic realities of the relationship are determinative and that the ultimate inquiry is whether the worker is economically dependent on the employer or truly in business for him or herself. It identified six economic realities factors that followed the six factors used by most Federal courts of appeals: (1) the extent to which the work performed is an integral part of the employer's business; (2) the worker's opportunity for profit or loss depending on his or her managerial skill; (3) the

extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer. AI 2015-1 further emphasized that the factors should not be applied in a mechanical fashion and that no one factor was determinative. AI 2015-1 was withdrawn on June 7, 2017.<sup>80</sup>

In 2019, WHD issued an opinion letter, FLSA2019-6, regarding whether workers who worked for companies operating self-described "virtual marketplaces" were employees covered under the FLSA or independent contractors.<sup>81</sup> Like the Department's prior guidance, the letter stated that the determination depended on the economic realities of the relationship and that the ultimate inquiry was whether the workers depend on someone else's business or are in business for themselves.<sup>82</sup> The letter identified six economic realities factors that differed slightly from the factors typically articulated by the Department previously: (1) the nature and degree of the employer's control; (2) the permanency of the worker's relationship with the employer; (3) the amount of the worker's investment in facilities, equipment, or helpers; (4) the amount of skill, initiative, judgment, and foresight required for the worker's services; (5) the worker's opportunities for profit or loss; and (6) the extent of the integration of the worker's services into the employer's business.<sup>83</sup> Opinion Letter FLSA2019-6 was withdrawn on February 19, 2021.<sup>84</sup>

#### D. The Department's 2021 Independent Contractor Rule

On January 7, 2021, the Department published a final rule titled "Independent Contractor Status Under the Fair Labor Standards Act," with an effective date of March 8, 2021 (2021 IC

<sup>80</sup> See News Release 17-0807-NAT, "US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance" (June 7, 2017), <https://www.dol.gov/newsroom/releases/opa/opa20170607> (last visited June 30, 2022).

<sup>81</sup> See WHD Op. Ltr. FLSA2019-6, 2019 WL 1977301 (Apr. 29, 2019) (withdrawn Feb. 19, 2021).

<sup>82</sup> See *id.* at \*3.

<sup>83</sup> See *id.* at \*4. Opinion Letter FLSA2019-6's "extent of the integration" factor was a notable recharacterization of the factor traditionally considered by courts and the Department regarding the extent to which work is "an integral part" of an employer's business.

<sup>84</sup> See note at <https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA> (last visited June 30, 2022).

<sup>68</sup> *Id.*

<sup>69</sup> 27 FR 8033-34 (29 CFR 788.16(a)).

<sup>70</sup> See 37 FR 12084, 12102 (introducing 29 CFR 780.330(b)).

<sup>71</sup> *Id.*

<sup>72</sup> See 62 FR 11734 (amending 29 CFR 500.20(h)(4)); see also 29 U.S.C. 1861 (explicitly providing that "[t]he Secretary may issue such rules and regulations as are necessary to carry out this chapter").

<sup>73</sup> See 29 U.S.C. 1802(5) ("The term 'employ' has the meaning given such term under section 3(g) of the [FLSA]").

<sup>74</sup> 29 CFR 500.20(h)(4).

<sup>75</sup> *Id.*

<sup>76</sup> See WHD Fact Sheet #13 (1997) <https://web.archive.org/web/19970112162517/http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs13.htm>. WHD made minor revisions to Fact Sheet #13 in 2002 and 2008, before a more substantial revision in 2014. In 2018, WHD reverted back to the 2008 version of Fact Sheet #13, which remains the current version (available at <https://www.dol.gov/sites/dolgov/files/WHDLegacy/files/whdfs13.pdf>).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> AI 2015-1 is available at 2015 WL 4449086.

Rule).<sup>85</sup> The 2021 IC Rule set forth regulations to be added to a new part (part 795) in title 29 of the Code of Federal Regulations titled “Employee or Independent Contractor Classification under the Fair Labor Standards Act,” providing guidance on the classification of independent contractors under the FLSA applicable to workers and businesses in any industry.<sup>86</sup> The 2021 IC Rule also addressed the Department’s prior interpretations of independent contractor status in 29 CFR 780.330(b) and 788.16(a)—both of which applied to specific industries—by cross-referencing part 795.<sup>87</sup>

The Department explained that the purpose of the 2021 IC Rule was to establish a “streamlined” economic reality test that improved on prior articulations described as “unclear and unwieldy.”<sup>88</sup> It stated that the existing economic reality test applied by the Department and courts suffered from confusion regarding the meaning of “economic dependence” because the concept is “underdeveloped,” a lack of focus in the multifactor balancing test, and confusion and inefficiency caused by overlap between the factors.<sup>89</sup> The 2021 IC Rule asserted that shortcomings and misconceptions associated with the economic reality test were more apparent in the modern economy and that additional clarity would promote innovation in work arrangements.<sup>90</sup>

The 2021 IC Rule explained that independent contractors are not employees under the FLSA and are therefore not subject to the Act’s minimum wage, overtime pay, or recordkeeping requirements.<sup>91</sup> It adopted an economic reality test under which a worker is an employee of an employer if that worker is economically dependent on the employer for work.<sup>92</sup> By contrast, the worker is an independent contractor if the worker is in business for themself.

The 2021 IC Rule identified five economic realities factors to guide the inquiry into a worker’s status as an employee or independent contractor,<sup>93</sup> while acknowledging that the factors are not exhaustive, no one factor is dispositive, and additional factors may

be considered if they “in some way indicate whether the [worker] is in business for him- or herself, as opposed to being economically dependent on the potential employer for work.”<sup>94</sup> But in contrast to prior guidance and contrary to case law, the 2021 IC Rule designated two of the five factors—the nature and degree of control over the work and the worker’s opportunity for profit or loss—as “core factors” that should carry greater weight in the analysis. Citing the need for greater certainty and predictability in the economic reality test, and in an effort to sharpen the concept of economic dependence, the 2021 IC Rule determined that these two factors were more probative of economic dependence than the other economic realities factors. If both of those core factors indicate the same classification, as either an employee or an independent contractor, the 2021 IC Rule stated that there is a “substantial likelihood” that the indicated classification is the worker’s correct classification.<sup>95</sup>

The 2021 IC Rule’s first core factor is the nature and degree of control over the work, which indicates independent contractor status to the extent that the worker exercised substantial control over key aspects of the performance of the work, such as by setting their own schedule, by selecting their projects, and/or through the ability to work for others, which might include the potential employer’s competitors.<sup>96</sup> The 2021 IC Rule provides that requiring the worker to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) does not constitute control.<sup>97</sup>

The 2021 IC Rule’s second core factor is the worker’s opportunity for profit or loss.<sup>98</sup> The Rule states that this factor indicates independent contractor status to the extent the worker has an opportunity to earn profits or incur losses based on either (1) their exercise of initiative (such as managerial skill or business acumen or judgment) or (2) their management of investment in or capital expenditure on, for example, helpers or equipment or material to further the work.<sup>99</sup> While the effects of

the worker’s exercise of initiative and management of investment are both considered under this factor, the worker does not need to have an opportunity for profit or loss based on both initiative and management of investment for this factor to weigh towards the worker being an independent contractor.<sup>100</sup> This factor indicates employment status to the extent that the worker is unable to affect his or her earnings or is only able to do so by working more hours or faster.<sup>101</sup>

The 2021 IC Rule also identified three other non-core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the employer, and whether the work is part of an integrated unit of production (which it cautioned is “different from the concept of the importance or centrality of the individual’s work to the potential employer’s business”).<sup>102</sup> The 2021 IC Rule provided that these other factors are “less probative and, in some cases, may not be probative at all” of economic dependence and are “highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors.”<sup>103</sup>

The 2021 IC Rule also stated that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible,<sup>104</sup> and provided five “illustrative examples” demonstrating how the analysis would apply in particular factual circumstances.<sup>105</sup> Finally, the 2021 IC Rule rescinded any “prior administrative rulings, interpretations, practices, or enforcement policies relating to classification as an employee or independent contractor under the FLSA” to the extent that such items “are inconsistent or in conflict with the interpretations stated in this part,”<sup>106</sup> and explained that the 2021 IC Rule would guide WHD’s enforcement of the FLSA.<sup>107</sup>

On January 19, 2021, WHD issued Opinion Letters FLSA2021–8 and FLSA2021–9 applying the Rule’s analysis to specific factual scenarios. WHD subsequently withdrew those opinion letters on January 26, 2021, explaining that the letters were issued

<sup>85</sup> See 86 FR 1168. The Department initially published a notice of proposed rulemaking (NPRM) soliciting public comment on September 25, 2020. See 85 FR 60600. The final rule adopted “the interpretive guidance set forth in the [NPRM] largely as proposed.” 86 FR 1168.

<sup>86</sup> 86 FR 1246–48.

<sup>87</sup> *Id.* at 1246.

<sup>88</sup> *Id.* at 1172, 1240.

<sup>89</sup> *Id.* at 1172–75.

<sup>90</sup> *Id.* at 1175.

<sup>91</sup> *Id.* at 1246 (§ 795.105(a)).

<sup>92</sup> *Id.* at 1168, 1246 (§ 795.105(b)).

<sup>93</sup> *Id.* at 1246 (§ 795.105(c)).

<sup>94</sup> *Id.* at 1246–47 (§ 795.105(c) and (d)(2)(iv)).

<sup>95</sup> *Id.* at 1246 (§ 795.105(c)).

<sup>96</sup> *Id.* at 1246–47 (§ 795.105(d)(1)(i)).

<sup>97</sup> *Id.* at 1247 (§ 795.105(d)(i)).

<sup>98</sup> *Id.* (§ 795.105(d)(1)(ii)).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (§ 795.105(d)(2)).

<sup>103</sup> *Id.* at 1246 (§ 795.105(c)).

<sup>104</sup> *Id.* at 1247 (§ 795.110).

<sup>105</sup> *Id.* at 1247–48 (§ 795.115).

<sup>106</sup> *Id.* at 1246 (§ 795.100).

<sup>107</sup> *Id.*

prematurely because they were based on a rule that had yet to take effect.<sup>108</sup>

#### *E. Delay and Withdrawal of the 2021 Independent Contractor Rule*

On February 5, 2021, the Department published a proposal to delay the 2021 IC Rule's effective date until May 7, 2021—60 days after the Rule's original March 8, 2001, effective date.<sup>109</sup> On March 4, 2021, after considering the approximately 1,500 comments received in response to that proposal, the Department published a final rule delaying the effective date of the 2021 IC Rule as proposed (“Delay Rule”).<sup>110</sup>

On March 12, 2021, the Department published a notice of proposed rulemaking (NPRM) proposing to withdraw the 2021 IC Rule.<sup>111</sup> On May 5, 2021, after reviewing approximately 1,000 comments submitted in response to the NPRM, the Department announced a final rule withdrawing the 2021 IC Rule (“Withdrawal Rule”).<sup>112</sup> In explaining its decision to withdraw the 2021 IC Rule, the Department stated that the Rule was inconsistent with the FLSA's text and purpose and would have had a confusing and disruptive effect on workers and businesses alike due to its departure from longstanding judicial precedent.<sup>113</sup> The Withdrawal Rule stated that it took effect immediately upon its publication in the **Federal Register** on May 6, 2021.<sup>114</sup>

#### *F. Litigation Over the 2021 Independent Contractor Rule*

On March 14, 2022, in a lawsuit challenging the Department's Delay and Withdrawal Rules under the Administrative Procedure Act (APA), a district court in the Eastern District of Texas issued a decision vacating the Department's Delay and Withdrawal Rules.<sup>115</sup> While acknowledging that the Department engaged in separate notice-and-comment rulemakings in promulgating both of these rules, the district court concluded that the Department “failed to provide a meaningful opportunity for comment in promulgating the Delay Rule,”<sup>116</sup> failed

to show “good cause for making the [Delay Rule] effective immediately upon publication,”<sup>117</sup> and acted in an arbitrary and capricious manner in its Withdrawal Rule by “fail[ing] to consider potential alternatives to rescinding the Independent Contractor Rule.”<sup>118</sup> Accordingly, the district court vacated the Delay and Withdrawal Rules and concluded that the 2021 IC Rule “became effective as of March 8, 2021, the rule's original effective date, and remains in effect.”<sup>119</sup> The district court's ruling did not address the validity of the 2021 IC Rule; rather, the case was focused solely on the validity of the Delay and Withdrawal Rules.

The Department filed a notice of appeal of the district court's decision.<sup>120</sup> In response to a request by the Department informing the court of this rulemaking, the Fifth Circuit Court of Appeals entered an order staying the appeal until December 7, 2022 (subject to considering a further stay at that time).

### III. Need for Rulemaking

The Department recognizes that independent contractors and small businesses play an important role in our economy. It is fundamental to the Department's obligation to administer and enforce the FLSA, however, that workers who should be covered under the Act are able to receive its protections, as the misclassification of employees as independent contractors remains one of the most serious problems facing workers, businesses, and the broader economy. In the FLSA context, misclassified workers are denied basic workplace protections including rights to minimum wage and overtime pay.<sup>121</sup> Meanwhile, employers that comply with the law are placed at a competitive disadvantage compared to other businesses that misclassify employees, contravening the FLSA's goal of eliminating “unfair method[s] of competition in commerce.”<sup>122</sup>

failing to consider comments beyond its proposal to delay the 2021 IC Rule's effective date. *Id.* at \*7–10.

<sup>117</sup> *Id.* at \*11.

<sup>118</sup> *Id.* at \*13.

<sup>119</sup> *Id.* at \*20.

<sup>120</sup> See Fifth Circuit No. 22–40316 (appeal filed, May 13, 2022).

<sup>121</sup> Workers who are employees under the FLSA but are misclassified as independent contractors remain legally entitled to the Act's wage and hour protections and are protected from retaliation for attempting to assert their rights under the Act. See 29 U.S.C. 215(a)(3). However, many misclassified employees may not be aware that such rights and protections apply to them or face obstacles when asserting those rights.

<sup>122</sup> 29 U.S.C. 202(a)(3); see also *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) (noting that the misclassification of

After further consideration, the Department believes that the 2021 IC Rule does not fully comport with the FLSA's text and purpose as interpreted by the courts. The Department believes that retaining the 2021 IC Rule would have a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. While the 2021 IC Rule recognized the need to further develop the concept of economic dependence, the rule includes provisions that are in tension with this longstanding case law—such as designating two factors as most probative and predetermining that they carry greater weight in the analysis, considering investment and initiative only in the opportunity for profit or loss factor, and excluding consideration of whether the work performed is central or important to the employer's business. These provisions narrow the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themselves.

The 2021 IC Rule's elevation of certain factors and its preclusion of consideration of relevant facts under several factors may result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it used to be to classify certain workers as independent contractors rather than FLSA-covered employees. Elevating certain factors and precluding consideration of relevant facts may increase the risk of misclassification of employees as independent contractors. The 2021 IC Rule did not address the potential risks to workers of such misclassification.

Therefore, in light of the vacatur of the Withdrawal Rule, the Department believes it is appropriate to rescind the 2021 IC Rule and set forth an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule. While prior to the 2021 IC Rule the Department primarily issued subregulatory guidance in this area, as explained in greater detail below, it believes that rescinding the 2021 IC

employees “affect[s] many more people than those workers directly at issue . . . [because it] exert[s] a general downward pressure on wages in competing businesses”).

<sup>108</sup> See <https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA> (last visited June 30, 2022), noting the withdrawal of Opinion Letters FLSA2021–8 and FLSA2021–9.

<sup>109</sup> 86 FR 8326.

<sup>110</sup> *Id.* at 12535.

<sup>111</sup> *Id.* at 14027.

<sup>112</sup> *Id.* at 24303.

<sup>113</sup> *Id.* at 24307.

<sup>114</sup> *Id.* at 24320.

<sup>115</sup> *Coalition for Workforce Innovation*, 2022 WL 1073346.

<sup>116</sup> *Id.* at \*9. The court specifically faulted the Department's use of a shortened 19-day comment period in its proposal to delay of the 2021 IC Rule's original effective date (instead of 30 days), and for



Rule and replacing it with detailed regulations addressing the multifactor economic reality test—in a way that both more fully reflects the case law and continues to be relevant to the evolving economy—would be helpful for both workers and employers. The Department further believes that this proposal will protect workers from misclassification while at the same time providing a consistent approach for those businesses that engage (or wish to engage) with properly classified independent contractors, who the Department recognizes play an important role in the economy.

As noted in the 2021 IC Rule, the Department “without question has relevant expertise in the area of what constitutes an employment relationship under the FLSA, given its responsibility for administering and enforcing the Act and its decades of experience doing so.”<sup>123</sup> The Department continues to believe, as it stated in the 2021 IC Rule, that “a clear explanation of the test for whether a worker is an employee under the FLSA or an independent contractor not entitled to the protections of the Act in easily accessible regulatory text is valuable to potential employers, to workers, and to other stakeholders.”<sup>124</sup> Upon further consideration, however, the Department believes that the most valuable approach for stakeholders would be an accessible regulation that is more consistent with case law. As the 2021 IC Rule noted, rulemaking regarding employee or independent contractor status can have “great value regardless of what deference courts ultimately give to it.”<sup>125</sup> The Department also believes, however, that this proposal is more likely to have such value because it is better aligned with judicial precedent and longstanding principles used by circuit courts and the Department.

The Department acknowledges that it is changing the approach taken in the 2021 IC Rule, and that this warrants further discussion of the rationale used in that rule and why the Department has carefully reconsidered that reasoning and determined that modifications are necessary.<sup>126</sup> As noted above, the Department identified in the 2021 IC Rule four reasons underlying the need to promulgate the rule: (1) confusion regarding the meaning of “economic dependence” because the concept is “underdeveloped”; (2) lack of focus in the multifactor balancing test; (3)

confusion and inefficiency due to overlapping factors; and (4) the shortcomings of the economic reality test that are more apparent in the modern economy.<sup>127</sup> Moreover, the Department suggested as a fifth reason for the 2021 IC Rule that legal uncertainty based on the concerns identified with the economic reality test hindered innovation in work arrangements.<sup>128</sup> The Department believes that this proposed rule’s approach offers a better framework for understanding and applying the concept of economic dependence by explaining how the touchstone of whether an individual is in business for themselves is analyzed within each of the six economic realities factors. The proposal’s discussion of how courts and the Department’s previous guidance apply the factors brings the multifactor test into focus, reduces confusion as to the overlapping factors, and provides a better basis for understanding how the test has the flexibility to be applied to changes in the modern economy, such that the Department no longer views the concerns articulated in the 2021 IC Rule as impediments to using the economic reality test formulated by the courts and the Department’s longstanding guidance.

The Department continues to believe that the concept of economic dependence is underdeveloped in the case law. As noted in the 2021 IC Rule, a minority of courts have applied a “dependence-for-income” approach that considers whether the worker has other sources of income or wealth or is financially dependent on the employer instead of a “dependence-for-work” approach used by the majority of courts and the Department that appropriately considers whether the worker is dependent on the employer for work or depends on the worker’s own business for work.<sup>129</sup> The Department is therefore proposing to continue to include its interpretation, as it did in the 2021 IC Rule, that economic dependence is the ultimate inquiry, and that an employee is someone who, as a matter of economic reality, is economically dependent on an employer for work—not for income.<sup>130</sup>

<sup>127</sup> 86 FR 1172–75.

<sup>128</sup> *Id.* at 1175.

<sup>129</sup> *See id.* at 1172–73.

<sup>130</sup> *See id.* at 1246 (§ 795.105(b) (“An employer suffers or permits an individual to work as an employee if, as a matter of economic reality, the individual is economically dependent on that employer for work.”)); *see also infra* section V.B.; proposed § 795.105(b) (“An ‘employee’ under the Act is an individual whom an employer suffers, permits, or otherwise employs to work. . . . [This is] meant to encompass as employees all workers who, as a matter of economic reality, are

Rather than give primacy to only two factors as indicators of economic dependence, upon further consideration, the Department believes that developing the concept of economic dependence is better accomplished by, in addition to elaborating on the general meaning of economic dependence, sharpening the focus of each of the six factors’ probative value as to the distinction between economic dependence on the employer for work and being in business for oneself. By focusing on that distinction in its discussion of each factor, this proposal would provide the further development of the concept of economic dependence that the 2021 IC Rule indicated would be welcomed by workers and employers, but would do so in a way that is generally consistent with case law and the Department’s prior guidance.

To address what the Department viewed as a “lack of focus in the multifactor balancing test” that led to uncertainty as to how a court would balance the factors and which would be deemed more probative, the 2021 IC Rule identified two factors as more probative than the others.<sup>131</sup> The Department now finds that giving extra weight to two factors cannot be harmonized with decades of case law and guidance from the Department explaining that the economic reality test is a multifactor test in which no one factor or set of factors automatically carries more weight and that all relevant factors must be considered. Regardless of the rationale for elevating two factors, there is no legal support for doing so.<sup>132</sup> Moreover, elevating certain factors in such a predetermined fashion overlooks that each factor can be probative of the distinction between a worker who is economically dependent on the employer for work and a worker who is in business for themselves. Thus, the Department believes that refining the factors with this distinction in mind and consistent with case law is a better approach to giving the multifactor test more focus than the novel approach of elevating two factors.

The Department believes upon further consideration that any purported “confusion and inefficiency due to overlapping factors” was overstated in the 2021 IC Rule and that, in any event, when each factor is viewed under the framework of whether the worker is economically dependent or in business

economically dependent on an employer for work. . . . Economic dependence does not focus on the amount of income earned, or whether the worker has other income streams.”)

<sup>131</sup> 86 FR 1173.

<sup>132</sup> *See infra* section III.A.

<sup>123</sup> 86 FR 1176 (internal citations omitted).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

for themselves, the rationale for considering facts under more than one factor is clearer. The Department explains in more detail below why considering certain facts under more than one factor is consistent with the totality-of-the-circumstances approach of the economic realities analysis used by courts. And the Department provides guidance below regarding how to consider certain facts, such as the ability to work for others and whether the working relationship is exclusive, under more than one factor. The Department believes that this flexible approach is supported by the case law and preferable to rigidly and artificially limiting facts to only one factor, as the 2021 IC Rule did. Finally, in the 2021 IC Rule, the Department stated that “technological and social changes have made shortcomings of the economic realities test more apparent in the modern economy,” thus justifying the 2021 IC Rule’s characterization of the integral, investment, and permanence factors as less important in determining a worker’s classification.<sup>133</sup> However, upon further consideration, the Department believes that the multifactor economic reality test relied on by courts where no one factor or set of factors is presumed to carry more weight remains a helpful tool when evaluating modern work arrangements. The test’s vitality is confirmed by its application over seven decades that have seen monumental shifts in the economy. Modern work arrangements utilizing applications or other technology must be addressed, but the underlying economic reality test, which considers the totality of the circumstances in each working arrangement, offers the most flexible, comprehensive, and appropriately nuanced approach which can be adapted to disparate industries and occupations. It can also encompass continued social changes because it does not presume which aspects of the work relationship are most probative or relevant and leaves open the possibility that changed circumstances may make certain factors more important in certain cases or future scenarios.

*A. The 2021 IC Rule’s Test Is Not Supported by Judicial Precedent or the Department’s Historical Position and Is Not Fully Aligned With the Act’s Text as Interpreted by the Courts*

Among other reasons the Department is proposing to rescind and replace the 2021 IC Rule, the Department does not believe that the Rule is fully aligned with the FLSA’s text as interpreted by the courts or the Department’s

longstanding analysis, as well as decades of case law describing and applying the multifactor economic reality test.

1. The 2021 IC Rule’s Elevation of Control and Opportunity for Profit or Loss as the “Most Probative” Factors in Determining Employee Status Under the FLSA

The 2021 IC Rule set forth a new articulation of the economic reality test, elevating two factors (control and opportunity for profit or loss) as “core” factors above other factors, asserting that the two core factors have “greater probative value” in determining a worker’s economic dependence.<sup>134</sup> Notably, the 2021 IC Rule further provides that if both core factors point towards the same classification—either employee or independent contractor—then there is a “substantial likelihood” that this is the worker’s correct classification.<sup>135</sup> Although it identifies three other factors as additional guideposts and acknowledges that additional factors may be considered, it makes clear that non-core factors “are less probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors.”<sup>136</sup> In justifying this stratified analysis, the 2021 IC Rule disagreed that, as a general matter, the economic reality test “requires factors to be unweighted or weighted equally,”<sup>137</sup> asserting that “[t]he Department’s review of case law indicates that courts of appeals have effectively been affording the control and opportunity factors greater weight, even if they did not always explicitly acknowledge doing so.”<sup>138</sup>

Upon further review of judicial precedent, the Department is not aware of any court that has, as a general and fixed rule, elevated any one economic reality factor or subset of factors above others, and there is no statutory basis for such a predetermined weighting of the factors. To the contrary, the Supreme Court has emphasized that employment status under the economic reality test turns upon “the circumstances of the whole activity,” rather than “isolated factors.”<sup>139</sup> Federal appellate courts

have repeatedly cautioned against a mechanical or formulaic application of the economic reality test,<sup>140</sup> and specifically warn that it “‘is impossible to assign to each of these factors a specific and invariably applied weight.’”<sup>141</sup> The 2021 IC Rule’s elevation of two “core factors” is also in tension with the position, expressed by the Supreme Court and Federal courts of appeals, that no single factor in the analysis is dispositive.<sup>142</sup> Thus, the Department recognizes that the 2021 IC Rule’s predetermined and mechanical weighting of factors is not consistent with how courts have, for decades, applied the economic reality analysis.<sup>143</sup>

As explained in the Withdrawal Rule, the Department believes that the review of appellate cases<sup>144</sup> relied on to support the 2021 IC Rule’s creation of “core factors” is not complete and makes assumptions about the reasoning behind the courts’ decisions that are not clear from the decisions themselves.<sup>145</sup> For example, the 2021 IC Rule’s discussion of the case law review did not provide full documentation or citations, did not make clear what the scope of the review entailed (e.g.,

employee relationship” and determining employment status based on “the total situation”).

<sup>140</sup> See, e.g., *Superior Care*, 840 F.2d at 1059 (“Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.”).

<sup>141</sup> *Parrish*, 917 F.3d at 380 (quoting *Hickey*, 699 F.2d at 752); see also *Scantland*, 721 F.3d at 1312 n.2 (the relative weight of each factor “depends on the facts of the case” (quoting *Santelices*, 147 F. Supp. 2d at 1319)).

<sup>142</sup> See, e.g., *Silk*, 331 U.S. at 716 (explaining that “[n]o one [factor] is controlling” in the economic realities test); *Selker Bros.*, 949 F.2d at 1293 (“It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive.”); *Morrison*, 253 F.3d at 11 (“No one factor standing alone is dispositive and courts are directed to look at the totality of the circumstances and consider any relevant evidence.”); *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989) (“It is well established that no one of these factors in isolation is dispositive; rather, the test is based upon a totality of the circumstances.”); *Lauritzen*, 835 F.2d at 1534 (“Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.”).

<sup>143</sup> See *McFeeley*, 825 F.3d at 241 (“While a six-factor test may lack the virtue of providing definitive guidance to those affected, it allows for flexible application to the myriad different working relationships that exist in the national economy. In other words, the court must adapt its analysis to the particular working relationship, the particular workplace, and the particular industry in each FLSA case.”).

<sup>144</sup> The 2021 IC Rule references on several occasions a review of appellate case law since 1975 to justify its elevation of two “core” factors. 86 FR 1196, 1198, 1202, 1240.

<sup>145</sup> See 86 FR 24309–10.

<sup>134</sup> 86 FR 1246 (§ 795.105(c) and (d)).

<sup>135</sup> *Id.* (§ 795.105(c)); see also *id.* at 1201 (advising that other factors would only outweigh the two core factors “in rare cases”).

<sup>136</sup> *Id.* at 1246 (§ 795.105(c)).

<sup>137</sup> *Id.* at 1197.

<sup>138</sup> *Id.* at 1198.

<sup>139</sup> *Rutherford*, 331 U.S. at 730; see also *Silk*, 331 U.S. at 716, 719 (denying the existence of “a rule of thumb to define the limits of the employer-

<sup>133</sup> 86 FR 1175.

whether it included only published circuit court decisions or all cases, whether it included cases that were simply remanded to the district court for any reason, etc.), and oversimplified the analysis provided by the courts because court decisions regarding classification under the FLSA generally emphasize the fact-specific nature of the totality-of-circumstances analysis. Mechanically deconstructing court decisions and considering what courts have said about only two factors—even when courts did present their analyses in this manner—ignores the broader approach that most courts have taken in determining worker classification.

In fact, many decisions explicitly deny assigning any predetermined weight to these factors, but instead state that they considered the factors as part of an analysis of the whole activity.<sup>146</sup> While there are many cases in which the classification decision made by the court aligns with the classification indicated by the control and opportunity for profit or loss factors, the 2021 IC Rule did not identify any cases stating that those two factors are “more probative” of a worker’s classification than other factors. Moreover, the 2021 IC Rule concedes that there are cases in which the classification suggested by the control factor did not align with the worker’s classification as determined by the courts.<sup>147</sup> It is necessarily the case that if any two factors of a multifactor balancing test point toward the same outcome, then that outcome becomes increasingly likely to be the ultimate outcome. However, the 2021 IC Rule did not address whether a different combination of factors would yield similar results. Particularly when viewed in the context of repeated statements from the courts that no one factor in the economic reality test is dispositive, the selective reading of an undefined set of cases to support the opposite conclusion is not persuasive.

In any event, the 2021 IC Rule significantly altered both these factors, changing what may be considered for each. For example, contrary to the approach taken by most courts, the 2021 IC Rule downplays the employer’s right to control the work and recasts the opportunity for profit or loss factor as indicating independent contractor status based on the worker’s initiative or investment. Thus, irrespective of whether control and opportunity for profit or loss were more frequently aligned with the ultimate result in prior appellate cases, the new framing of these factors, as redefined in the 2021 IC

Rule, sets forth a new standard for analysis without precedent.

Finally, the Department has concerns that prioritizing two “core factors” over other factors may not fully account for the Act’s broad definition of “employ,” as interpreted by the courts. For example, if facts relevant to the control and opportunity for profit or loss factors both point to independent contractor status for a particular worker but weakly so, those factors should not be presumed to carry more weight than stronger factual findings under other factors (e.g., the existence of a lengthy working relationship under the “permanence” factor and the performance of work that does not require specialized skills). Courts and the Department may focus on some relevant factors more than others when analyzing a particular set of facts and circumstances, but that does not mean that it is possible or permissible to derive from these fact-driven decisions universal rules regarding which factors deserve more weight than the others when the courts themselves have not set forth any such universal rules despite decades of opportunity. Numerous commenters responding to the Department’s proposed withdrawal of the 2021 IC Rule voiced similar concerns.<sup>148</sup>

In sum, the Department believes that the 2021 IC Rule’s elevation of the control and opportunity for profit or loss factors is in tension with the language of the Act as well as the position, expressed by the Supreme Court and in appellate cases from across the circuits, that no single factor is determinative in the analysis of whether a worker is an employee or an independent contractor and does not better determine who is in fact economically dependent on their employer for work as opposed to being in business for themselves.

## 2. The Role of Control in the 2021 IC Rule’s Analysis

As explained above, the 2021 IC Rule identifies “the nature and degree of control over the work” as one of two core factors given “greater weight” in the independent contractor analysis.<sup>149</sup> The 2021 IC Rule addressed and rejected comments which opined that focusing the analysis on two core factors—one of which would be control—would narrow the analysis to a common law control test.<sup>150</sup>

Although the 2021 IC Rule’s standard for determining who is an employee and

who is an independent contractor is not the same as the common law control analysis, the Department continues to believe, as expressed in the Withdrawal Rule, that elevating the importance of control in every FLSA employee or independent contractor analysis brings the Rule closer to the common law control test that courts have rejected when interpreting the Act. As previously noted, section 3(g) of the FLSA expansively defines the term “employ” to include “to suffer or permit to work.”<sup>151</sup> The Supreme Court has repeatedly stated that this provision establishes a broader scope of employment for FLSA purposes than under a common law (*i.e.*, agency) analysis focused on control.<sup>152</sup> In light of this directive, the Department remains concerned that the outsized role of control under the 2021 IC Rule’s analysis is contrary to the Act’s text and case law interpreting the Act’s definitions of employment.

## 3. The 2021 IC Rule Improperly Altered Several Factors by Precluding the Consideration of Relevant Facts

As previously discussed in the Withdrawal Rule, the Department remains concerned that the 2021 IC Rule’s preclusion of certain factors from being considered under the factors improperly narrows the economic reality test and does not allow for a full consideration of all facts which might be relevant to determining whether a worker is economically dependent upon an employer for work or in business for themselves. Examples include: (1) advising that “control” indicative of an employment relationship must involve an employer’s “substantial control over key aspects of the performance of the work,” excluding requirements “to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms;”<sup>153</sup> (2) making the “opportunity for profit or loss” factor indicate independent contractor status based on the worker’s initiative or investment (not both);<sup>154</sup> (3) disregarding the employer’s investments;<sup>155</sup> (4) disregarding the importance or

<sup>151</sup> 29 U.S.C. 203(g).

<sup>152</sup> See *Darden*, 503 U.S. at 324–26; *Portland Terminal*, 330 U.S. at 150–51; and *Rutherford*, 331 U.S. at 728.

<sup>153</sup> 86 FR 1246–47 (§ 795.105(d)(1)(i)).

<sup>154</sup> *Id.*; see also *id.* at 1188 (§ 795.105(d)(1)(ii)).

<sup>155</sup> *Id.*; see also *id.* at 1188 (“[T]he Department reaffirms its position that comparing the individual worker’s investment to the potential employer’s investment should not be part of the analysis of investment.”).

<sup>146</sup> See *supra* nn. 139–142.

<sup>147</sup> See 86 FR 1197 n.45.

<sup>148</sup> *Id.* at 24307–11.

<sup>149</sup> *Id.* at 1246–47 (§ 795.105(c), (d)).

<sup>150</sup> *Id.* at 1200–01.

centrality of a worker's work to the employer's business;<sup>156</sup> and (5) downplaying the employer's reserved right or authority to control the worker.<sup>157</sup> In each of these ways—as explained in greater detail below—the 2021 IC Rule limits the scope of facts and considerations comprising the analysis of whether the worker is an employee or independent contractor.

As further explained below, the 2021 IC Rule's narrowing of certain economic realities factors by precluding consideration of certain facts provides another justification for the Rule's rescission and replacement.

### B. Confusion and Uncertainty Introduced by the 2021 IC Rule

One of the 2021 IC Rule's primary goals was to “significantly clarify to stakeholders how to distinguish between employees and independent contractors under the Act.”<sup>158</sup> Although the stated intent was to provide clarity, it has introduced several concepts to the analysis that neither courts nor the Department have previously applied, as discussed above.<sup>159</sup> This rulemaking arises in part from a concern that these changes will not provide clarity because of the inconsistency with circuit court case law, and that the conflict between the 2021 IC Rule's analysis and circuit precedent will inevitably lead to greater uncertainty as well as lead to inconsistent outcomes, rather than increase clarity or certainty.

As a threshold matter, because the 2021 IC Rule departed from courts' longstanding precedent, if left in place, it is not clear whether courts would adopt its analysis—a question that could take years of appellate litigation in different Federal circuits to sort out. If some courts try to reconcile the 2021 IC Rule's analysis with their precedent and the statute and some courts do not, it will create conflicts among courts and between courts and the Department, resulting in more uncertainty as to the

applicable economic reality test. Businesses operating nationwide will have had to familiarize themselves with multiple standards for determining who is an employee under the FLSA across different jurisdictions.<sup>160</sup>

In addition to uncertainty resulting from the 2021 IC Rule's reception by courts, the Rule introduces several ambiguous terms and concepts into the analysis for determining whether a worker is an employee under the FLSA or an independent contractor. For example, courts and regulated parties now must grapple with what it means in practice for two factors to be “core” factors and entitled to greater weight. In addition, they must determine, in cases where the two “core” factors point to the same classification, how “substantial” the likelihood is that they point toward the correct classification if the additional factors point toward the other classification. Additionally, the 2021 IC Rule cautions that its list of factors is “not exhaustive,”<sup>161</sup> but does not specify whether the “additional factors” referenced in § 795.105(d)(2)(iv) have less probative value (or weight) than the three “other factors” listed in § 795.105(d)(2)(i) through (iii).<sup>162</sup> Assuming that they do, the 2021 IC Rule has essentially transformed the analysis that courts and the Department have previously applied into a three-tiered multifactor balancing test, with “core” factors given more weight than enumerated “other” factors, and enumerated “other” factors given more weight than unspecified “additional” factors. Rather than weighing all factors against each other depending on the facts of a particular work arrangement, courts and the regulated community must evaluate factors within and across groups in a new hierarchical structure, which will likely cause confusion and inconsistency. Adding to the confusion, the Rule improperly collapses some factors into each other, so that investment and initiative are only considered as a part of the opportunity for profit or loss factor, requiring courts and the regulated community to reconsider how they have long applied those factors.<sup>163</sup>

The Department believes that the 2021 IC Rule has complicated rather than simplified the analysis for determining whether a worker is an

employee or independent contractor under the FLSA and does not provide clarity behind the meaning of economic dependence or reduce confusion.<sup>164</sup> For the reasons explained above, the Department believes that the 2021 IC Rule has introduced substantial confusion and uncertainty on the topic of independent contractor status, to the detriment of workers and businesses alike.

### C. Risks to Workers From the 2021 IC Rule

As part of its regulatory impact analysis, the 2021 IC Rule quantified some possible costs (regulatory familiarization) and some possible cost savings (increased clarity and reduced litigation).<sup>165</sup> It identified and discussed—but did not quantify—numerous other costs, transfers, and benefits possibly resulting from the 2021 IC Rule, including “possible transfers among workers and between workers and businesses.”<sup>166</sup> The 2021 IC Rule “acknowledge[d] that there may be transfers between employers and employees, and some of those transfers may come about as a result of changes in earnings,” but determined that these transfers cannot “be quantified with a reasonable degree of certainty for purposes of [the Rule].”<sup>167</sup> The 2021 IC Rule concluded that “workers as a whole will benefit from [the Rule], both from increased labor force participation as a result of the enhanced certainty provided by [the Rule], and from the substantial other benefits detailed [in the Rule].”<sup>168</sup>

The preliminary regulatory impact analysis for this proposed rule is provided below in section VII. As a general matter, the Department notes here that it does not believe that the 2021 IC Rule fully considered the likely costs, transfers, and benefits that could result from the Rule. This concern is premised in part on WHD's role as the agency responsible for enforcing the FLSA and its experience with cases involving the misclassification of employees as independent contractors.

<sup>164</sup> The 2021 IC Rule includes several important principles from the case law, such as that economic dependence is the ultimate inquiry, that the list of economic reality factors is not exhaustive and that no single factor is determinative—principles that the Department continues to agree with and has included in this NPRM. The 2021 IC Rule, however, also incorporates provisions that are in tension with these well-established judicial principles, such as the predetermined elevating of two factors. The Department is also concerned with this internal inconsistency in the 2021 IC Rule.

<sup>165</sup> 86 FR 1211.

<sup>166</sup> *Id.* at 1214–16.

<sup>167</sup> *Id.* at 1223.

<sup>168</sup> *Id.*

<sup>156</sup> *Id.* at 1247 (§ 795.105(d)(2)(iii)); *see also id.* at 1248 (noting through an example in § 795.115(b)(6)(ii) that “[i]t is not relevant . . . that the writing of articles is an important part of producing newspapers”); *accord id.* at 1195 (responding to commenters regarding the Department's decision to shift to an “integrated unit of production” analysis).

<sup>157</sup> *See id.* at 1246–47 (advising, in § 795.105(d)(1)(i), that the control factor indicates employment status if a potential employer “exercises substantial control over key aspects of the performance of the work”) (emphasis added); *id.* at 1247 (advising, in § 795.110, that “a business' contractual authority to supervise or discipline an individual may be of little relevance if in practice the business never exercises such authority”); *see also id.* at 1203–04 (same in response to commenters).

<sup>158</sup> *Id.* at 1168.

<sup>159</sup> *See supra* section III.A.

<sup>160</sup> *See, e.g.*, 86 FR 1241 n.255 (noting, while rejecting the “ABC” test for worker classification, that companies operating “nationwide businesses[ ] are likely to comply with the most demanding standard if they wish to make consistent classification determinations”).

<sup>161</sup> *Id.* at 1246 (§ 795.105(c)).

<sup>162</sup> *Id.* at 1247.

<sup>163</sup> *Id.* (§ 795.105(d)(1)(ii)).

The consequence for a worker of being misclassified as an independent contractor is that the worker is excluded from the protections of the FLSA to which they are entitled. These protections include being paid at least the Federal minimum wage for all hours worked, overtime compensation for hours worked over 40 in a workweek, and protection against retaliation for complaining about, for example, a violation of the FLSA. The Department concludes that, to the extent the 2021 IC Rule results in the reclassification or misclassification of employees as independent contractors, the resulting denial of FLSA protections would harm the affected workers. To the extent that women and people of color are overrepresented in low-wage positions where misclassification as independent contractors is more likely, this result could have a disproportionate impact on these workers. In comments on the Withdrawal Rule, several commenters cited a study finding that seven of the eight occupations with the highest rate of misclassification were held disproportionately by women and/or workers of color, asserting that “misclassification is rampant in low-wage, labor-intensive industries where women and people of color, including Black, Latinx, and AAPI workers, are overrepresented.”<sup>169</sup> These workers already experience multiple types of economic inequities in the labor force, including gender and racial wage gaps and occupational segregation. When comparing the median wages of women who worked full-time, year-round to the wages of men who worked full-time, year-round, women were paid 83 cents to every dollar paid to men.<sup>170</sup> For women of color, this wage gap is even greater—Black women were paid 64%, and Hispanic women (of any race) were paid 57% of what white non-Hispanic men were paid. The misclassification of these workers as independent contractors deprives them of the minimum wage and overtime protections that could help alleviate some of this inequality.

In sum, the Department’s proposal to rescind and replace the 2021 IC Rule is motivated, in part, by an assessment that doing so will benefit workers as a whole, including those workers at risk of being misclassified as independent contractors as well as those who are

appropriately classified as independent contractors.

#### *D. The Benefits of Replacing the Part 795 Regulations on Employee or Independent Contractor Status*

In its rulemaking last year to withdraw the 2021 IC Rule, the Department declined to propose alternative regulations.<sup>171</sup> The Department had not previously promulgated generally applicable regulations on independent contractor classification in the FLSA’s 83 years of existence.<sup>172</sup> Particularly in light of the consistency of the economic reality test as adopted by the circuits, the Department had for decades relied on subregulatory documents to provide generally applicable guidance for the Department and the regulated community on determining employee or independent contractor status under the FLSA.<sup>173</sup>

In its decision invalidating the Withdrawal Rule, the Eastern District of Texas faulted the Department for failing to consider “less disruptive alternatives” to withdrawal, such as “promulgat[ing] a regulation that enumerated six factors instead of five” or “adopting the seven factors that the Department previously set forth in Fact Sheet #13 as the applicable economic realities test.”<sup>174</sup> While the Department believes that its subregulatory guidance provided appropriate guidance to the regulated community, upon further consideration, it recognizes that publishing regulatory guidance on the distinction between FLSA-covered employees and independent contractors is beneficial for stakeholders, particularly because the Department published a regulation in 2021. In addition, detailed Federal regulations would be easier to locate and read for interested stakeholders than applicable circuit caselaw, potentially helping workers and businesses better understand the Department’s interpretation of their rights and responsibilities under the law. In contrast to WHD’s earlier opinion letters on independent contractor status and its prior regulations on the topic located in parts 780 and 788, new part 795 would also provide guidance to workers and businesses in any industry.

Adopting detailed regulations aligned with existing precedent that help workers and businesses to better understand their rights and responsibilities under the law could also better protect workers, who have been placed at a greater risk of misclassification as a consequence of the 2021 IC Rule. As described in sections III.A. and B., the 2021 IC Rule’s elevation of certain factors and its preclusion of consideration of relevant facts under several factors may result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it used to be to classify certain workers as independent contractors rather than FLSA-covered employees. Elevating certain factors and precluding consideration of relevant facts may increase the risk of misclassification of employees as independent contractors. Because the Department has serious concerns about the 2021 IC Rule, it is proposing to rescind and replace it with regulations that are fully aligned with the text of the FLSA as interpreted by the courts, the Department’s longstanding subregulatory guidance, and decades of court cases interpreting the Act while still providing additional clarity to workers and employers on the concept of economic dependence.

#### **IV. Alternatives Considered**

The Department assessed four regulatory alternatives to this proposed rule below in section VII.F. of the regulatory impact analysis. The Department previously considered and rejected, on legal viability grounds, the first two alternatives—codifying either a common law or ABC test for determining employee or independent contractor status—in the 2021 IC Rule.<sup>175</sup> The Department continues to believe that legal limitations prevent the Department from adopting either of those alternatives.

For the first alternative, the Department considered codifying the common law control test, which is used to distinguish between employees and independent contractors under other Federal laws, such as the Internal Revenue Code.<sup>176</sup> The focus of the

<sup>175</sup> See 86 FR 1238.

<sup>176</sup> See 26 U.S.C. 3121(d)(2) (generally defining the term “employee” under the Internal Revenue Code as “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee”). The Supreme Court has advised that the common law control test applies by default under Federal law unless a statute specifies an alternative standard. See *Darden*, 503 U.S. at 322–23 (“[W]hen Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional

<sup>169</sup> *Id.* at 24312.

<sup>170</sup> U.S. Department of Labor, Women’s Bureau, *Connecting the Dots: “Women’s Work” and the Wage Gap* (2022) [https://blog.dol.gov/2022/03/15/connecting-the-dots-womens-work-and-the-wage-gap?\\_ga=2.244962629.155756293.1655992165-662785877.1655992165](https://blog.dol.gov/2022/03/15/connecting-the-dots-womens-work-and-the-wage-gap?_ga=2.244962629.155756293.1655992165-662785877.1655992165).

<sup>171</sup> See 86 FR 24307.

<sup>172</sup> The FLSA was enacted in 1938. 29 U.S.C. 201. Until 2021, the Department had not promulgated generally applicable regulations regarding the classification of workers as employees or independent contractors.

<sup>173</sup> See, e.g., 86 FR 24318–20.

<sup>174</sup> *Coalition for Workforce Innovation*, 2022 WL 1073346, at \*18.

common law control test is “the hiring party’s right to control the manner and means by which [work] is accomplished,”<sup>177</sup> but the Supreme Court has explained that “other factors relevant to the inquiry [include] the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”<sup>178</sup>

Although the common law control test considers some of the same factors as those identified in the proposed rule’s “economic reality” test (e.g., skill, length of the working relationship, the source of equipment and materials, etc.), courts generally recognize that, because of its focus on control, the common law test is more permissive of independent contracting arrangements than the economic reality test, which examines the economic dependence of the worker.<sup>179</sup>

Codifying a common law control test for the FLSA could create a more uniform legal framework among Federal statutes, in the sense that entities would not, for example, have to understand and apply one employment classification standard for tax purposes and a different employment classification standard for FLSA purposes. However, the Department does not believe that adopting a common law control test for determining employee or independent contractor status under the FLSA would, in fact, simplify the analysis for the regulated community because courts and enforcement agencies applying a common law test for independent contractors have considered a greater number and different variation of factors than the six or so factors commonly considered under the economic reality test.<sup>180</sup>

master-servant relationship as understood by common-law agency doctrine.”) (quoting *Reid*, 490 U.S. at 739–40).

<sup>177</sup> *Reid*, 490 U.S. at 751.

<sup>178</sup> *Id.* at 751–52.

<sup>179</sup> See, e.g., *Baker v. Flint Eng’g & Const. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998) (recognizing that the “economic realities” test is a more expansive standard for determining employee status than the common law test).

<sup>180</sup> See RESTATEMENT (THIRD) OF AGENCY sec. 7.07, Comment (f) (2006) (identifying 10 factors); IRS Tax Topic No. 762 Independent

Regardless, applying the common law test would be contrary to the “suffer or permit” language in section 3(g) of the FLSA, which the Supreme Court has interpreted as demanding a broader definition of employment than that which exists under the common law.<sup>181</sup> Accordingly, the Department believes it is legally constrained from adopting the common law control test and that the common law test is not sufficiently protective in assessing worker classification under the FLSA.

For the second alternative, the Department considered codifying an ABC test to determine independent contractor status under the FLSA, similar to the ABC test recently adopted under California’s state wage and hour law.<sup>182</sup> As described by the California Supreme Court in *Dynamex Operations W., Inc. v. Superior Court*, “[t]he ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity’s business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.”<sup>183</sup>

Contractor vs. Employee (May 19, 2022), <https://www.irs.gov/taxtopics/tc762> (explaining the common law analysis through three main categories: behavioral control, financial control, and the relationship of the parties); *Reid*, 490 U.S. at 751–52 (identifying 13 factors).

<sup>181</sup> See, e.g., *Darden*, 503 U.S. at 326; *Portland Terminal*, 330 at 150–51.

<sup>182</sup> See *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018); Assembly Bill (“A.B.”) 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019) (codifying the ABC test articulated in *Dynamex*); A.B. 2257, Ch. 38, 2019–2020 Reg. Sess. (Cal. 2020) (retroactively exempting certain professions, occupations, and industries from the ABC test that A.B. 5 had codified). The ABC test originated in state unemployment insurance statutes, but some state courts and legislatures have recently extended the test to govern employee/independent contractor disputes under state wage and hour laws. See Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. Ill. U. L. Rev. 379, 408–11 (2019) (discussing the origins and recent expansion of the ABC test).

<sup>183</sup> 416 P.3d at 34 (emphasis in original). California’s ABC test is slightly different than versions of the ABC test adopted (or presently under consideration) in other states. For example, New Jersey provides that a hiring entity may satisfy the ABC test’s “B” prong by establishing either: (1) that the work provided is outside the usual course of the business for which the work is performed, or (2) that the work performed is outside all the places

Codifying an ABC test could establish a simpler and clearer standard for determining whether workers are employees or independent contractors. The ABC test only has three criteria, and no balancing of the criteria is required; all three prongs must be satisfied for a worker to qualify as an independent contractor. However, the Department believes it is legally constrained from adopting an ABC test because the Supreme Court has held that the economic reality test is the applicable standard for determining workers’ classification under the FLSA as an employee or independent contractor.<sup>184</sup> Moreover, the Supreme Court has stated that the existence of employment relationships under the FLSA “does not depend on such isolated factors” as the three independently determinative factors in the ABC test, “but rather upon the circumstances of the whole activity.”<sup>185</sup> Because the ABC test is inconsistent with Supreme Court precedent interpreting the FLSA, the Department believes that it could only implement an ABC test if the Supreme Court revisits its precedent or if Congress passes legislation that alters the applicable analysis under the FLSA.

For the third alternative, the Department considered a proposed rule that would not fully rescind the 2021 IC Rule and instead retain some aspects of that rule. As the Department has noted throughout this proposal, there are multiple instances in which this NPRM is consistent or in agreement with the 2021 IC Rule. Specifically, the Department has noted its agreement with the following aspects of the 2021 IC Rule: a totality of the circumstances test should be applied to appropriately determine classification as an employee or independent contractor; the concept of economic dependence needs further

of business of the hiring entity, N.J. Stat. Ann. sec. 43:21–19(i)(6)(A–C). The Department has chosen to analyze California’s ABC test as a regulatory alternative because businesses subject to multiple standards, including nationwide businesses, are likely to comply with the most demanding standard if they wish to make consistent classification determinations.

<sup>184</sup> See *Tony & Susan Alamo*, 471 U.S. at 301 (“The test of employment under the Act is one of ‘economic reality.’”); *Whitaker House*, 366 U.S. at 33 (“‘economic reality’ rather than ‘technical concepts’ is . . . the test of employment” under the FLSA) (citing *Silk*, 331 U.S. at 713; *Rutherford*, 331 U.S. at 729). ABC tests are not the same as the FLSA economic realities test. For example, the ABC test does not consider the totality of the circumstances of the working relationship between the employer and the worker; instead, it considers three specific circumstances. In addition, the ABC test does not weigh or balance the various considerations; instead, the test results in a finding of employee status if any one factor is not met regardless how close the facts are on that factor and regardless what the other two factors indicate.

<sup>185</sup> *Rutherford*, 331 U.S. at 730.

development; and a clear explanation of the test for whether a worker is an employee or independent contractor in easily accessible regulatory text is valuable. This proposal also includes several other important principles from the case law that were included in the 2021 IC Rule: economic dependence is the ultimate inquiry; the list of economic reality factors is not exhaustive; and no single factor is determinative. Further, with respect to specific factors, this proposal reinforces certain aspects addressed in the 2021 IC Rule such as that an exclusivity requirement imposed by the employer is a strong indicator of control, and that issues related to scheduling and supervision over the performance of the work (including the ability to assign work) are relevant considerations under the control factor.

Despite these areas of agreement, the governing principle of the 2021 IC Rule is that two of the economic reality factors are predetermined to be more probative and therefore carry more weight, which may obviate the need to meaningfully consider the remaining factors. Upon further consideration, as discussed in this proposal, the Department believes that this departure from decades of case law and the Department's own longstanding position that no one factor or subset of factors should carry more or less weight would have a confusing and disruptive effect on employers and workers alike. The Department considered simply removing the problematic "core factors" analysis from the 2021 IC Rule and retaining the five factors as described in the rule. However, the Department rejected this approach because other aspects of the rule such as considering investment and initiative only in the opportunity for profit or loss factor and excluding consideration of whether the work performed is central or important to the employer's business are also in tension with judicial precedent and longstanding Department guidance. These provisions narrow the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themselves. Therefore, after considering all of the common aspects of the 2021 IC Rule and whether to retain some portions of that rule, the Department has concluded that in order to provide clear, affirmative regulatory guidance that aligns with case law and is consistent with the text and purpose of the Act as interpreted by courts, a complete

rescission and replacement of the 2021 IC Rule is needed. For these reasons, the Department is not proposing a partial rescission of the 2021 IC Rule.

For the fourth alternative, the Department considered rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through subregulatory guidance instead of through new regulations. To begin with, for the reasons set forth in this NPRM, the Department believes that rescission of the 2021 IC Rule is appropriate, regardless of the new content proposed for its replacement. Specifically, the Department believes that the 2021 IC Rule does not fully comport with the FLSA's text as interpreted by the courts, and that retaining the 2021 IC Rule would have a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. The 2021 IC Rule's provisions—such as designating two factors as most probative and predetermining that they carry greater weight in the analysis, considering investment and initiative only in the opportunity for profit or loss factor, and excluding consideration of whether the work performed is central or important to the employer's business—are in tension with this longstanding case law.

The Department recognizes that the 2021 IC Rule sought to "clarify and sharpen the contours of the economic reality test used to determine independent contractor classification under the FLSA."<sup>186</sup> However, as noted above, although the stated intent was to provide clarity, the 2021 IC Rule introduced several concepts to the analysis that neither courts nor the Department have previously applied.<sup>187</sup> The Department believes that these changes will not provide clarity because of the inconsistency with circuit court case law, and that the conflict between the 2021 IC Rule's analysis and circuit precedent will inevitably lead to greater uncertainty as well as lead to inconsistent outcomes, rather than increase clarity or certainty.

Given the substantial uniformity among the circuit courts in the application of the economic reality test prior to the 2021 IC Rule, the Department believes that rescinding the 2021 IC Rule would provide greater clarity than retaining the 2021 IC Rule. For more than 80 years prior to the 2021 IC Rule, the Department primarily

issued subregulatory guidance in this area and did not have generally applicable regulations on the classification of workers as employees or independent contractors. This subregulatory guidance was informed by the case law and set forth a multifactor economic reality test to answer the ultimate question of economic dependence. However, as explained in section III above, the Department believes that replacing the 2021 IC Rule with regulations addressing the multifactor economic reality test that more fully reflect the case law and continue to be relevant to the modern economy will be helpful for both workers and employers in understanding how to apply the law in this area. Specifically, issuing regulations allows the Department to provide in-depth guidance that is more closely aligned with circuit case law, rather than the regulations set forth in the 2021 IC Rule which have created a dissonance between the Department's regulations and judicial precedent. Additionally, issuing regulations allows the Department to formally collect and consider a wide range of views from stakeholders by electing to use the notice-and-comment process. Finally, because courts are accustomed to considering relevant agency regulations, providing guidance in this format may further improve consistency among courts regarding this issue. Therefore, the Department has decided not to rescind the 2021 IC Rule and provide only subregulatory guidance, but to instead propose these regulations.

## V. Discussion of Proposed Rule

In view of the foregoing concerns and considerations, the Department is proposing modifications to title 29 of the Code of Federal Regulations addressing whether workers are employees or independent contractors under the FLSA. In relevant part, and as discussed in greater detail below, the Department proposes:

- Not using "core factors" and instead returning to a totality-of-the-circumstances analysis of the economic reality test that has a refined focus on whether each factor shows the worker is economically dependent upon the employer for work versus being in business for themselves, does not use predetermined weighting of factors, and that considers the factors comprehensively instead of as discrete and unrelated.

- Returning the consideration of investment to a standalone factor, focusing on whether the worker's investment is capital or entrepreneurial in nature, and considering the worker's

<sup>186</sup> 86 FR 1172.

<sup>187</sup> See *supra* sections III.A, B.

investments on a relative basis with the employer's investment.

- Providing additional analysis of the control factor, including detailed discussions of how scheduling, supervision, price-setting, and the ability to work for others should be considered when analyzing the degree of control over a worker, and not limiting control to control that is actually exerted.

- Returning to the longstanding Departmental interpretation of the integral factor, which considers whether the work is integral to the employer's business rather than whether it is exclusively part of an "integrated unit of production."

As in the 2021 IC Rule, the Department is proposing to include cross-references to the interpretations set forth in this proposed rule in 29 CFR 780.330(b) and 788.16(a); these provisions contain industry-specific guidance. Additionally, in the 2021 IC Rule, the Department declined to revise its regulation addressing employee or independent contractor status under MSPA in 29 CFR 500.20(h)(4), stating, in part, that the MSPA regulation and the 2021 IC Rule both applied an economic reality test in which the ultimate inquiry was economic dependence.<sup>188</sup> Although the Department has again considered revising the MSPA regulation, it proposes the same approach that it took in 2021—which is to not make any revisions at this time. The Department continues to recognize that MSPA adopts by reference the FLSA's definition of "employ,"<sup>189</sup> and that 29 CFR 500.20(h)(4) considers "whether or not an independent contractor or employment relationship exists under the Fair Labor Standards Act" to interpret employee or independent contractor status under MSPA.<sup>190</sup> The test contained in the MSPA regulation is substantially similar to the proposed test here, so the Department believes that there is not a need to revise the MSPA regulation at this time. The Department, however, welcomes comments regarding whether 29 CFR 500.20(h)(4) should be revised to more fully reflect the interpretation of employee or independent contractor status set forth in this proposed rule.

Finally, the Department is also proposing to formally rescind the 2021 IC Rule and to add a new part 795. In the Department's view, the operative

effects of proposing to rescind the 2021 IC Rule follow. If finalized, the proposed rule would formally rescind the 2021 IC Rule. That rescission would operate independently of the new content in any new final rule, as the Department intends it to be severable from the substantive proposal for adding a new part 795. For the reasons set forth in this NPRM, the Department believes that rescission of the 2021 IC Rule is appropriate, regardless of the new content proposed in this rulemaking. Thus, even if the substantive provisions of a new final rule were invalidated, enjoined, or otherwise not put into effect, the Department would not intend that the 2021 IC Rule become operative.

Since the passage of the FLSA until the 2021 IC Rule, the Department primarily issued subregulatory guidance in this area and did not have generally applicable regulations addressing the classification of workers as employees or independent contractors. The Department's subregulatory guidance was informed by the case law and set forth a multifactor economic reality test to answer the ultimate question of economic dependence that is consistent with the analysis set forth in this proposal. Should the 2021 IC Rule be rescinded without any replacement regulations, the Department would rely on circuit case law and provide subregulatory guidance for stakeholders through existing documents (such as Fact Sheet #13) and new documents (for example, a Field Assistance Bulletin). As explained below, there is widespread uniformity among the circuit courts in the application of the economic reality test, with slight variation as to the number of factors considered or how the factors are framed.<sup>191</sup> The well-known multifactor, totality-of-the-circumstances analysis that had been in place prior to the 2021 IC Rule has been reflected in the Department's subregulatory guidance for many years and accurately represents this case law. Thus, the Department believes reliance on this case law and subregulatory guidance, rather than the 2021 IC Rule, would be preferable due to the 2021 IC Rule's divergence from well-established precedent and potential effects on workers, as previously discussed. In sum, should a new final rule adding a new part 795 not go into effect for any reason, reverting to reliance on circuit case law and subregulatory guidance consistent with that case law for determining whether a worker is an employee or independent contractor would accurately reflect the Act's text and purpose as interpreted by the courts

and offer a standard familiar to most stakeholders.

The Department welcomes comments on all aspects of its proposal.

#### A. Introductory Statement (Proposed § 795.100)

Section 795.100 of the 2021 IC Rule generally explains that the interpretations in part 795 will guide WHD's enforcement of the FLSA and are intended to be used by employers, employees, workers, and courts to assess employment status under the Act.<sup>192</sup> The Department is proposing only clarifying edits to this section.

#### B. Economic Reality Test (Proposed § 795.105)

Section 795.105(a) of the 2021 IC Rule states that independent contractors are not employees under the FLSA. Section 795.105(b) explains that economic dependence is the ultimate inquiry in determining whether a worker is an independent contractor or employee under the Act, and § 795.105(c) addresses how to determine economic dependence, including the elevation of two "core" economic reality factors.<sup>193</sup> Section 795.105(d) discusses the economic reality factors.<sup>194</sup>

The Department is proposing to simplify paragraph (a) and make additional clarifying edits to paragraph (b). Proposed § 795.105(a) would continue to make clear that independent contractors are not "employees" under the Act. Proposed § 795.105(b) would affirm that economic dependence is the ultimate inquiry for determining whether a worker is an independent contractor or an employee and makes clear that the plain language of the statute is relevant to the analysis. This section focuses the analysis on whether the worker is in business for themselves and clarifies that economic dependence does not focus on the amount the worker earns or whether the worker has other sources of income. The Department is proposing to delete § 795.105(c) because it believes, as previously discussed in section III.A.1. of this preamble, that the factors of the economic reality test should not be given a predetermined weight. The Department is also proposing to delete § 795.105(d) and move discussion of the economic reality test and the individual factors to § 795.110.

<sup>192</sup> 86 FR 1246.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 1246–47.

<sup>188</sup> See 86 FR 1177.

<sup>189</sup> 29 U.S.C. 1802(5).

<sup>190</sup> The MSPA regulations consider, for example, whether a worker is economically dependent upon an agricultural association or farm labor contractor. See 29 CFR 500.20(h)(4).

<sup>191</sup> See generally *infra* section V.C.



*C. Economic Reality Test and Economic Reality Test Factors (Proposed § 795.110)*

The Department is proposing to replace § 795.110 of the 2021 IC Rule (Primacy of actual practice) with a provision discussing the economic reality test and the economic reality factors. Proposed § 795.110(a) introduces the economic reality test, emphasizing that the economic reality factors are guides to be used to conduct a totality-of-the-circumstances analysis. It also explains that the factors are not exhaustive, and no single factor is dispositive. The Department is proposing to address the economic reality factors in § 795.110(b). Before addressing the specific changes proposed, the Department believes that it is helpful to discuss the overarching framework of the economic reality test and how it should be considered.

Determining whether an employment relationship exists under the FLSA begins with the Act's definitions. The Act's text is expansive, defining "employer" to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee," "employee" as "any individual employed by an employer," and "employ" to "include[] to suffer or permit to work."<sup>195</sup> In its 1947 brief before the Supreme Court in *Rutherford*, the Department explained that the Act "contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category."<sup>196</sup> The Department continued, stating that "[t]he purposes of this Act require a practical, realistic construction of the employment relationship . . . and the broad language of the statutory definitions is more than adequate to support such a construction."<sup>197</sup> The Supreme Court agreed, reiterating the breadth and reach of the Act's definitions to work relationships that were not previously considered to constitute employment relationships, and emphasizing that the determination of an employment relationship under the FLSA depends not on "isolated factors but rather upon the circumstances of the whole activity."<sup>198</sup> The same need for a practical, realistic construction of the employment

relationship under the FLSA exists today. As explained below, the long-standing economic reality test, applied in view of the statutory language of the Act, is nimble enough to continue to provide a useful analysis for the broad range of potential employment relationships that exist today.

Prior to the FLSA's enactment, the phrasing "suffer or permit" was commonly used in state laws regulating child labor. As the Eleventh Circuit explained in *Antenor v. D & S Farms*, "[t]he 'suffer or permit to work' standard derives from state child-labor laws designed to reach businesses that used middlemen to illegally hire and supervise children."<sup>199</sup> In other words, the standard was designed to ensure that an employer could be covered under the labor law even if they did not directly control a worker or used an agent to provide supervision. The Supreme Court has explicitly and repeatedly recognized that this "suffer or permit" language demonstrates Congress's intent for the FLSA to apply broadly and more inclusively than the common law standard.<sup>200</sup> This textual breadth reflects Congress's stated intent. Section 2 of the Act, Congress's "declaration of policy," states that the Act is intended to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."<sup>201</sup> Particularly relevant to misclassification, section 2 identifies "unfair method[s] of competition in commerce" as an additional condition "to correct and as rapidly as practicable . . . eliminate."<sup>202</sup>

For decades, the Department and courts have applied an economic reality test to determine whether a worker is an employee or an independent contractor under the Act. The test was developed by the Supreme Court in interpreting and applying the social legislation of the 1930s, including the Fair Labor Standards Act, which defines the employment relationship in broad and

comprehensive terms.<sup>203</sup> In 1947, the Supreme Court issued two decisions, *Silk* and *Rutherford*, that used an economic reality test to determine employment status.<sup>204</sup> As explained in *Rutherford*, the "economic reality" test is designed to bring within such legislation "persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category."<sup>205</sup> In applying this economic reality test, it is essential to consider the Act's statutory language. The determination of whether a worker is covered under the FLSA must be made in the context of the Act's own definitions and the courts' expansive reading of its scope.<sup>206</sup> The

<sup>195</sup> 29 U.S.C. 203(d), (e)(1), (g).

<sup>196</sup> Brief for the Administrator at 10, *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (No. 562), 1947 WL 43939, at \*10 (quoting *Portland Terminal*, 330 U.S. at 152).

<sup>197</sup> *Id.*

<sup>198</sup> *Rutherford*, 331 U.S. at 728–30.

<sup>199</sup> 88 F.3d 925, 929 n.5 (11th Cir. 1996).

<sup>200</sup> See, e.g., *Darden*, 503 U.S. at 326 (noting that "employ" is defined with "striking breadth" (citing *Rutherford*, 331 U.S. at 728)); *Rosenwasser*, 323 U.S. at 362 ("A broader or more comprehensive coverage of employees . . . would be difficult to frame."); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 665 (5th Cir. 1983) ("The term 'employee' is thus used 'in the broadest sense 'ever . . . included in any act.'" (quoting *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 271 (5th Cir. 1982))).

<sup>201</sup> 29 U.S.C. 202(a).

<sup>202</sup> See *id.* at sec. 202(a), (b); see also *Rosenwasser*, 323 U.S. at 361–62; *Pilgrim Equip.*, 527 F.2d at 1311 ("Given the remedial purposes of the legislation, an expansive definition of 'employee' has been adopted by the courts.").

<sup>203</sup> *Rosenwasser*, 323 U.S. at 362.

<sup>204</sup> See *Silk*, 331 U.S. at 716–18 (applying the test under the Social Security Act); *Rutherford*, 331 U.S. at 730 (same under the FLSA).

<sup>205</sup> *Rutherford*, 331 U.S. at 729; see also *Whitaker House*, 366 U.S. at 31–32 (describing the same as it relates to homeworkers).

<sup>206</sup> The line of cases in which the Supreme Court has repeatedly recognized that the definitions of "employ," "employee," and "employer" that establish who is entitled to the FLSA's protections were written broadly and have appropriately been interpreted broadly are premised on the statutory text itself, not on any principle of how to interpret remedial legislation. Because these cases addressing the Act's definitions do not address exemptions from the Act's pay requirements, they have not been called into question by *Encino Motorcars v. Navarro*, 138 S. Ct. 1134 (2018), which overturned a rule of interpretation based on the FLSA's remedial purpose that applied to the Act's exemptions. In *Encino*, the Supreme Court addressed an exemption from the FLSA's overtime pay requirements and ruled that the "narrow construction" principle—that FLSA exemptions should be narrowly construed in favor of employee status—should no longer be used. The Court explained that instead, such exemptions should be given a fair reading, stating "[b]ecause the FLSA gives no textual indication that its exemptions should be construed narrowly, there is no reason to give [them] anything other than a fair (rather than a narrow) interpretation." *Encino*, 138 S. Ct. at 1142 (internal quotations and citation omitted). This decision did not apply to the Act's definitions, and, crucially, there is no need to rely on such an interpretive principle here because there is a clear textual indication in the Act's definitions, by the inclusion of the "suffer or permit" language, that broad coverage under the Act was intended. See 29 U.S.C. 203(g). Thus, the broad scope of who is an employee under the FLSA comes from the statutory text itself and not any "narrow-construction" principle. Moreover, *Encino* did not hold that the FLSA's remedial purpose may never be considered, it simply noted that it is a "flawed premise that the FLSA 'pursues' its remedial purpose 'at all costs.'" *Id.* at 1142 (quoting *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 234 (2013)) (emphasis added). To the extent that the language in the 2021 IC Rule preamble implied that the Act's remedial purpose can never be considered, including when determining whether an individual is an employee or an independent contractor under the FLSA, the Department clarifies that it believes that this would be an unwarranted extension of the Supreme Court's decision. See, e.g., 86 FR 1207–08 (discussing *Encino*'s application in response to commenters' concerns that the 2021 IC Rule conflicted with the FLSA's remedial purpose). Finally, courts have not changed their application

FLSA's "particularly broad" definition of "employee" encompasses all workers who are, "as a matter of economic reality, . . . economically dependent upon the alleged employer."<sup>207</sup> Only a worker who "is instead in business for himself" is an independent contractor not covered by the Act.<sup>208</sup> The "focus" and "ultimate concept" of the determination of whether a worker is an employee or an independent contractor, then, is "the economic dependence of the alleged employee."<sup>209</sup> The statutory language thus frames the central question that the economic reality test asks—whether the worker is economically dependent on an employer who suffers or permits the work or whether the worker is in business for themselves.

To aid in answering this ultimate inquiry of economic dependence, several factors have been considered by courts and the Department as particularly probative when conducting a totality-of-the-circumstances analysis of whether a worker is an employee or an independent contractor under the FLSA.<sup>210</sup> In *Silk*, the Supreme Court suggested that "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision."<sup>211</sup> The Court cautioned that no single factor is controlling and that the list is not exhaustive.<sup>212</sup> In *Rutherford*, the Court used a similar analysis considering "the circumstances of the whole activity," and relied on the fact that the workers' work was "a part of the integrated unit of production."<sup>213</sup> Since *Silk* and *Rutherford*, Federal courts of appeals have applied the economic reality test to distinguish independent contractors from employees who are entitled to the FLSA's protections. Federal appellate

courts considering employee or independent contractor status under the FLSA generally analyze the economic realities of the work relationship using the factors identified in *Silk* and *Rutherford*.<sup>214</sup> There is significant and widespread uniformity among the circuit courts in the application of the economic reality test, although there is slight variation as to the number of factors considered or how the factors are framed (for example, whether relative investment is considered within the investment factor, or whether skill must be used with business-like initiative).<sup>215</sup> As the 2021 IC Rule explained, "[m]ost courts of appeals articulate a similar test," and these courts consistently caution against the "mechanical application" of the economic reality factors, view the factors as tools to "gauge . . . economic dependence," and "make clear that the analysis should draw from the totality of circumstances, with no single factor being determinative by itself."<sup>216</sup> All of the circuit courts that have addressed employee or independent contractor status consider five of the same factors.<sup>217</sup> Briefly, these factors include the degree of control exercised by the employer over the worker, skill, permanency, opportunity for profit or loss, and investment, although the Second Circuit and the D.C. Circuit treat the worker's opportunity for profit or loss and the worker's investment as a single factor.<sup>218</sup> Nearly all circuit courts expressly consider a sixth factor, whether the work is an integral part of the employer's business. The Fifth Circuit has not adopted the integral factor but has at times assessed integrality as an additional relevant factor.<sup>219</sup>

Because the 2021 IC Rule focused on these slight variations among some of the factors or how to apply certain factors, it overlooked both the broader fact that the ultimate inquiry has

remained unchanged as well as the extent of the consistency in use of the economic reality test among the courts of appeals. The economic reality test, the case law, and the Department's position have remained remarkably consistent since the 1940's—the test's focus has remained on whether the worker is in business for themselves, with the inquiry directed toward the question of economic dependence. It is not surprising that some courts and the Department may have used slightly different iterations of the factors over the last several decades, as the factors "are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected."<sup>220</sup> These factors are only guideposts, and "[i]t is dependence that indicates employee status. Each [factor] must be applied with that ultimate notion in mind."<sup>221</sup> This is why most courts, and the Department, have long made clear that additional factors may be relevant when applying the test to a particular case. It is also expected that outcomes may vary somewhat among workers in the same profession, for example, because the test demands a fact-specific analysis and facts like job titles may not be probative of the economic realities of the relationship. In undertaking this analysis, each factor is examined and analyzed in relation to one another and to the Act's definitions. The test should not be approached in a formulaic manner, neglecting to consider the statutory framework upon which the test is based. Importantly, "[n]one of these factors is determinative on its own, and each must be considered with an eye toward the ultimate question—the worker's economic dependence on or independence from the alleged employer."<sup>222</sup>

With this proposed rulemaking, the Department describes the economic reality factors that reflect the totality-of-the-circumstances approach that courts have taken for decades, and provides an analysis as to how the Department considers each factor in today's workplaces, based on case law and the Department's enforcement expertise in this area. For example, the proposed investment factor is returned to being a standalone factor, considers facts such as whether the investment is capital or entrepreneurial in nature, and considers the worker's investments relative to the employer's investments. Significant additional guidance is provided for the

of the economic reality test to determine employee status based on *Encino*.

<sup>207</sup> *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) (citing *Darden*, 503 U.S. at 326; *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998)).

<sup>208</sup> *Id.* (citing *Express Sixty-Minutes*, 161 F.3d at 303).

<sup>209</sup> *Id.* (emphasis in the original); see also *Pilgrim Equip.*, 527 F.2d at 1311–12 ("[T]he final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of [the] FLSA or are sufficiently independent to lie outside its ambit.").

<sup>210</sup> See, e.g., *Flint Eng'g*, 137 F.3d at 1441 (explaining that "[n]one of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach").

<sup>211</sup> 331 U.S. at 716.

<sup>212</sup> See *id.*

<sup>213</sup> *Rutherford*, 331 U.S. at 729–30.

<sup>214</sup> See generally *supra* nn. 51–52.

<sup>215</sup> See, e.g., *Cornerstone Am.*, 545 F.3d at 344 (discussing relative investments); *Superior Care*, 840 F.2d at 1060 (discussing the use of skill as it relates to business-like initiative).

<sup>216</sup> 86 FR 1170; see also *Saleem v. Corporate Transp. Grp., Ltd.*, 854 F.3d 131, 139–40 (2d Cir. 2020); *Cornerstone Am.*, 545 F.3d at 343; *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015); *Flint Eng'g*, 137 F.3d at 1440–41.

<sup>217</sup> *Superior Care, Inc.*, 840 F.2d at 1058–59; *DialAmerica*, 757 F.2d at 1382–83; *McFeeley*, 825 F.3d at 241; *Off Duty Police*, 915 F.3d at 1055; *Lauritzen*, 835 F.2d at 1534–35; *Alpha & Omega*, 39 F.4th at 1082; *Driscoll*, 603 F.2d at 754–55; *Paragon*, 884 F.3d at 1235; *Scantland*, 721 F.3d at 1311–12; *Morrison*, 253 F.3d at 11.

<sup>218</sup> See, e.g., *Superior Care*, 840 F.2d at 1058–59; *Morrison*, 253 F.3d at 11 (citing *Superior Care*, 840 F.2d at 1058–59).

<sup>219</sup> See, e.g., *Hobbs*, 946 F.3d at 836.

<sup>220</sup> *Pilgrim Equip.*, 527 F.2d at 1311.

<sup>221</sup> *Id.*

<sup>222</sup> *Off Duty Police*, 915 F.3d at 1055 (alterations and internal quotations omitted).

proposed control factor, including detailed discussions of how scheduling, supervision, price-setting, and the ability to work for others should be considered when analyzing the degree of control exerted over a worker. And the proposed integral factor is returned to its longstanding Departmental and judicial interpretation, rather than the “integrated unit of production” approach that was included in the 2021 IC Rule.

This totality-of-the-circumstances analysis considers all factors that may be relevant and, in accordance with the case law, does not assign any of the factors a predetermined weight. While the 2021 IC Rule aspired to provide a clearer test, the Department believes, upon further consideration, that the weighted analysis in the 2021 IC Rule, which could have the effect of winnowing the test to two “core” factors—control and opportunity for profit or loss—sits in tension with decades of instruction from the Supreme Court and the circuit courts of appeals, as well as the Department’s own longstanding position that no factor or subset of factors should carry more or less weight in all cases. The 2021 IC Rule also errs in bringing the test closer to the common law test, which is inconsistent with the plain text of the Act and the case law interpreting it.<sup>223</sup> Limiting and weighting the factors in such a predetermined manner undermines the very purpose of the test, which is to consider—based on the economic realities—whether a worker is economically dependent on the employer for work or is in business for themselves.<sup>224</sup> Importantly, each factor, considered in isolation, does not determine whether a worker is economically dependent on an employer for work or in business for themselves. Rather, the factors are merely tools or indicators and must be analyzed together in order to answer this ultimate inquiry.<sup>225</sup>

This is not to say that in a particular case one factor may not be more or less probative than others—this is to be expected in each fact-specific analysis.

<sup>223</sup> See *supra* section III.A.2.

<sup>224</sup> See, e.g., *Scantland*, 721 F.3d at 1312 (quoting *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 301–02 (5th Cir. 1975)); see also *Saleem*, 854 F.3d at 139–140; *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1054–55 (5th Cir. 1987).

<sup>225</sup> See, e.g., *Scantland*, 721 F.3d at 1312 (the economic reality factors “serve as guides, [and] the overarching focus of the inquiry is economic dependence”); *Pilgrim Equip.*, 527 F.2d at 1311 (The economic reality factors “are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is dependence that indicates employee status. Each test must be applied with that ultimate notion in mind.”).

One or more factors may be more probative than the other factors depending on the facts and circumstances of a case; the analysis, however, cannot be conducted like a scorecard or a checklist. For example, two factors that strongly indicate employment status in a particular case could possibly outweigh other factors that indicate independent contractor status. But to assign a predetermined and immutable weight to certain factors ignores the totality-of-the-circumstances, fact-specific nature of the inquiry that is intended to reach a multitude of employment relationships across occupations and industries and over time. Similarly, it is possible that not every factor will be particularly relevant in each case and that is also to be expected.<sup>226</sup>

Thus, the economic reality factors help determine whether a worker is in business for themselves or is instead economically dependent on the employer for work.<sup>227</sup> “Ultimately, in considering economic dependence, the court focuses on whether an individual is ‘in business for himself’ or is ‘dependent upon finding employment in the business of others.’”<sup>228</sup> Economic dependence, however, “does not concern whether the workers at issue depend on the money they earn for obtaining the necessities of life . . . . Rather, it examines whether the workers are dependent on a particular business or organization for their continued employment.”<sup>229</sup> Additionally, consistent with the 2021 IC Rule, economic dependence does not mean that a worker who works for other employers, earns a very limited income from a particular employer, or is independently wealthy, cannot nevertheless be economically dependent on that employer for purposes of the

<sup>226</sup> See, e.g., *Lauritzen*, 835 F.2d at 1534 (referring to the economic reality factors and stating that “[c]ertain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.”).

<sup>227</sup> See, e.g., *Cornerstone Am.*, 545 F.3d at 343 (“To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.”); *Flint Eng’g*, 137 F.3d at 1440 (noting that the economic realities of the relationship govern, and the focal point is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself); *Superior Care*, 840 F.2d at 1059 (“The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else’s business . . . or are in business for themselves.”).

<sup>228</sup> *Scantland*, 721 F.3d at 1312 (quoting *Mednick*, 508 F.2d at 301–02).

<sup>229</sup> *DialAmerica*, 757 F.2d at 1385.

FLSA.<sup>230</sup> As the Fifth Circuit has explained, “it is not dependence in the sense that one could not survive without the income from the job that we examine, but dependence for continued employment.”<sup>231</sup>

The 2021 IC Rule stated that one of the reasons for that rulemaking was to reduce “overlap” between factors.<sup>232</sup> In the effort to eliminate redundancy, the 2021 IC Rule limits full consideration of how the factors may interrelate or be more relevant in certain factual scenarios than others. Upon further consideration, the Department believes that emphasizing the discrete nature of each particular factor and evaluating each factor in a vacuum fails to analyze potential employment relationships in the manner demanded by the Act’s text and accompanying case law. The Act’s definitions envision a broad range of potential employment relationships—defining “employer” as including “any person acting directly or indirectly in the interest of an employer in relation to an employee” and using the “suffer or permit” standard—and the test needs to be applicable to all of those potential relationships.<sup>233</sup> The Department recognizes that there are a variety of bona fide independent contractor relationships that need to be adequately addressed by the test as well.<sup>234</sup>

Applying a formulaic or rote analysis that isolates each factor is contrary to decades of case law, decreases the utility of the economic reality test, and makes it harder to analyze the ultimate inquiry of economic dependence. Rather, the analysis needs to be flexible enough to work for all kinds of jobs, all kinds of workers, from traditional economy jobs to jobs in emerging business models. A multifactor, totality-of-the-circumstances test provides that flexibility, which is why it has been used for more than 75 years to determine which workers receive the Act’s basic labor protections. Making the test facially simpler by, for example, limiting consideration of the employment relationship to only two “core” factors (as the 2021 IC Rule in

<sup>230</sup> See 86 FR 1173; see also *McLaughlin v. Seafood, Inc.*, 861 F.2d 450, 452–53 (5th Cir. 1988) (reasoning that “[l]aborers who work for two different employers on alternate days are no less economically dependent than laborers who work for a single employer”); *Halferty v. Pulse Drug Co.*, 821 F.2d 261, 267–68 (5th Cir. 1987) (rejecting the employer’s argument that the worker’s wages were too little to constitute dependence).

<sup>231</sup> See *Halferty*, 821 F.2d at 268.

<sup>232</sup> 86 FR 1202.

<sup>233</sup> See 29 U.S.C. 203(d), (g).

<sup>234</sup> Independent contractors are not “employees” for purposes of the FLSA. See generally *Portland Terminal*, 330 U.S. at 152 (stating that the “definition ‘suffer or permit to work’ was obviously not intended to stamp all persons as employees”).

effect does in some cases), ranking all of the factors, or creating a checklist, is unfaithful to the text of the Act and decades of case law. It also ignores what the test is required to do, which is to provide a totality-of-the-circumstances analysis to determine, in a wide variety of settings, which workers are economically dependent on their employers for work and should receive the basic labor protections of the Act. The FLSA applies to an extremely broad scope of employment relationships, and only workers who are in business for themselves are excluded from its coverage as independent contractors. The economic reality test, applied in view of the Act's definitions and with a focus on economic dependence, is able to assess that scope of potential employment relationships.

The Department is providing a detailed analysis about the application of each factor in this NPRM based on case law and the Department's enforcement experience as a guide for employers and workers in determining whether a worker is an employee or an independent contractor. Each factor is reviewed with the ultimate inquiry in mind: whether the worker is economically dependent on the employer for work or in business for themselves. The following discussion addresses each of the economic reality factors, including proposed revisions made to each to better reflect the weight of legal authority throughout the country.

#### 1. Opportunity for Profit or Loss Depending on Managerial Skill (Proposed § 795.110(b)(1))

Section 795.105(d)(1)(ii) of the 2021 IC Rule states that the opportunity for profit or loss factor “weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work.”<sup>235</sup> The provision also states that, “[w]hile the effects of the individual's exercise of initiative and management of investment are both considered under this factor, the individual does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor.”<sup>236</sup> Finally, the provision provides that “[t]his factor

weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster.”<sup>237</sup>

Proposed § 795.110(b)(1) focuses the opportunity for profit or loss factor on whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work. The 2021 IC Rule similarly considered managerial skill, as noted above. As discussed below, however, the Department is proposing to consider investment as a separate factor in the analysis, unlike the approach in the 2021 IC Rule. The proposed provision provides guidance on the application of this factor, including a non-exhaustive list of relevant facts to consider. And the proposed provision states that if a worker has no opportunity for a profit or loss, then that fact suggests that the worker is an employee. Similar to the 2021 IC Rule, the proposal states that some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor. Compared to the 2021 IC Rule, proposed § 795.110(b)(1) more accurately reflects the consideration of the profit or loss factor in the case law and reflects the ultimate inquiry into the worker's economic dependence or independence.

Many circuit courts of appeals apply this factor with an eye to whether the worker is using managerial skill to affect the worker's opportunity for profit or loss. For example, the Third Circuit describes the factor as the opportunity for profit or loss depending on managerial skill.<sup>238</sup> In *Razak v. Uber Technologies, Inc.*, the Third Circuit reversed the district court's ruling that this factor indicated independent contractor status, holding that, because the employer “decides (1) the fare[,] (2) which driver receives a trip request[,] (3) whether to refund or cancel a passenger's fare[,] and (4) a driver's territory,” “a reasonable fact-finder” could “rule in favor of” employee status on this factor.<sup>239</sup> In *Verma v. 3001 Castor, Inc.*, the Third Circuit acknowledged that each exotic dancer “had some degree of control over her profits and losses” by attracting

followers to the club, but explained that managerial skill is “the relevant factor here.”<sup>240</sup> After cataloguing the numerous ways in which the employer determined and managed the dancers' opportunity for profit or loss (such as determining the hours of operation, deciding whether to charge an admission fee, setting the length and price of dances on stage and in private rooms, and managing the club's atmosphere, operations, and advertising), the court ultimately found that any managerial skills exercised by the dancers had “minimal influence,” and ruled that this factor weighed in favor of employee status.<sup>241</sup>

Other courts likewise consider whether the workers' opportunities for profit or loss depend on their managerial skill.<sup>242</sup> In *McFeeley v. Jackson Street Entertainment, LLC*, the Fourth Circuit found that the dancers' “opportunities for profit or loss depended far more on [the employer's] management and decision-making than on their own” because the employer controlled the client base, handled all advertising, managed the club's atmosphere, and determined pricing.<sup>243</sup> And in *Schultz v. Capital International Security, Inc.*, the court concluded that “[t]here is no evidence the agents could exercise or hone their managerial skill to increase their pay.”<sup>244</sup> The Sixth Circuit likewise assesses whether the workers' opportunities for profit or loss depend on their managerial skill.<sup>245</sup> For example, in *Acosta v. Off Duty Police Services, Inc.*, the Sixth Circuit ruled that this factor favored employee status because the workers “earned a set hourly wage regardless of” the managerial skill they exercised, and the employer required them to work fixed hourly shifts “regardless of what skills they exercised, so workers could not complete jobs more or less efficiently than their counterparts.”<sup>246</sup> The Seventh, Ninth, and Eleventh Circuits also describe this factor as the worker's

<sup>240</sup> 937 F.3d at 230–31.

<sup>241</sup> *Id.* at 231.

<sup>242</sup> See, e.g., *McFeeley*, 825 F.3d at 241 (citing *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304–05 (4th Cir. 2006)).

<sup>243</sup> 825 F.3d at 243.

<sup>244</sup> 466 F.3d at 308.

<sup>245</sup> See, e.g., *Off Duty Police*, 915 F.3d at 1059; *Keller*, 781 F.3d at 812 (describing this factor as whether the worker “had an opportunity for greater profits based on his management and technical skills”).

<sup>246</sup> 915 F.3d at 1059. In response to the employer's argument that the workers could accept or reject shifts, the court explained that “[w]hile the decision to accept or reject work is a type of managerial action, the relevant question is whether workers could increase profits through managerial skill.” *Id.* (emphases in original).

<sup>237</sup> *Id.*

<sup>238</sup> See, e.g., *Razak v. Uber Techs., Inc.*, 951 F.3d 137, 146 (3d Cir.), *amended*, 979 F.3d 192 (3d Cir. 2020), *and cert. denied*, 141 S. Ct. 2629 (2021); *Verma v. 3001 Castor, Inc.*, 937 F.3d 221, 229 (3d Cir. 2019) (citing *Selker Bros.*, 949 F.2d at 1293).

<sup>239</sup> 951 F.3d at 146–47.

<sup>235</sup> 86 FR 1247.

<sup>236</sup> *Id.*

opportunity for profit or loss depending on the worker's managerial skill.<sup>247</sup>

Other circuits do not articulate this factor by expressly using the words "managerial skill," but they nonetheless apply the factor in a very similar way by focusing on whether the worker has an opportunity to use "initiative" or "judgment" to affect profits or losses. For example, the Tenth Circuit has found that this factor favored employee status because the workers' "earnings did not depend upon their judgment or initiative, but on the [employer's] need for their work."<sup>248</sup> And when affirming a ruling that this factor indicated employee status in another case, the Tenth Circuit explained that the workers "exercise independent initiative only in locating new work assignments," and "[w]hile working on a particular assignment, there is little or no room for initiative (certainly none related to profit or loss)."<sup>249</sup> The Second Circuit, although it considers the workers' opportunities for profit or loss along with their investment as one factor,<sup>250</sup> similarly evaluates the extent to which the workers' business judgment or acumen affects their opportunity for profit or loss. In *Franze v. Bimbo Bakeries USA, Inc.*, the Second Circuit found this factor to favor independent contractor status because the workers purchased delivery territories that could ultimately be sold again and the overall value of their territories "primarily depended on their own business judgment and foresight in modifying their territories and managing day-to-day costs, suggesting that they bore the risks of their decisions."<sup>251</sup> And in *Saleem v. Corporate Transportation Group, Ltd.*, the Second Circuit found that the workers "possessed considerable independence in maximizing their income through a variety of means" and their profits increased through their initiative, judgment, and foresight—indicating independent contractor status.<sup>252</sup>

By concentrating on the degree to which the worker's opportunity for

profit or loss is determined by the employer,<sup>253</sup> the Fifth Circuit focuses on whether the worker exercises judgment or initiative vis-a-vis the employer to affect profit or loss and thus takes a related approach to this factor. In *Hobbs v. Petroplex Pipe & Construction, Inc.*, for example, the Fifth Circuit relied on the facts that the workers never negotiated their rates of pay (the employer set a fixed hourly rate) and "the work schedule imposed by [the employer] severely limited the [workers'] opportunity for profit or loss" (meaning that "it would have been unrealistic for them to have worked for other companies") to affirm a finding that this factor indicated employee status.<sup>254</sup> In *Hopkins v. Cornerstone America*, the Fifth Circuit found that this factor weighed in favor of employee status because "[t]he major determinants of the Sales Leaders' profit or loss were controlled almost exclusively by [the employer]," including "the hiring, firing, and assignment of subordinate agents," the "overwrite commissions," the "distribution of sales leads," which products they could sell, and their territories.<sup>255</sup> In *Parrish v. Premier Directional Drilling, L.P.*, the Fifth Circuit found that the workers had "enough control over their profits and losses to have this factor support [independent contractor] status," including by making "decisions affecting their expenses."<sup>256</sup> And in *Herman v. Express Sixty-Minutes Delivery Service, Inc.*, the Fifth Circuit affirmed the district court's finding that this factor favored independent contractor status because "a driver's profit or loss is determined largely on his or her skill, initiative, ability to cut costs, and understanding of the courier business."<sup>257</sup>

In AI 2015–1, the Department described this factor as whether the worker's managerial skill affects the worker's opportunity for profit or loss and explained that this factor focuses "on whether the worker has the ability to make decisions and use his or her managerial skill and initiative to affect opportunity for profit or loss."<sup>258</sup> Section 795.105(d)(1)(ii) of the 2021 IC Rule similarly considers the impact of the worker's initiative and managerial

skill on the opportunity for profits or losses, discussing the worker's "exercise of initiative (such as managerial skill or business acumen or judgment)."<sup>259</sup> It also considers the impact of the worker's "management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work" on the worker's opportunity for profit or loss.<sup>260</sup> For the reasons explained below, however, the Department is proposing that investment be a separate, standalone factor in the analysis.<sup>261</sup>

Focusing on managerial skill, proposed § 795.110(b)(1) sets forth the following facts, which among others, can be relevant to assessing the degree to which the worker's managerial skill affects the worker's economic success or failure in performing the work: whether the worker determines the charge or pay for the work provided (or at least can meaningfully negotiate it); whether the worker accepts or declines jobs or chooses or can meaningfully negotiate the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space (as opposed to the amount and nature of the worker's investment).

In addition to those facts, whether the worker actually has an opportunity for a loss should be considered. Consistent with the overall inquiry of determining whether a worker is economically dependent on the employer or in business for themselves, the fact that a worker has no opportunity for a loss indicates employee status. On the other hand, workers who are in business for themselves face the possibility of experiencing a loss, and the risk of a loss as a possible result of the worker's managerial decisions indicates independent contractor status. Workers who incur little or no costs or expenses, simply provide their labor, and/or are paid an hourly or flat rate are unlikely to possibly experience a loss, and this factor may suggest employee status in those circumstances. The fact that workers may earn more or less at times (and their earnings may decline)

<sup>259</sup> 86 FR 1247.

<sup>260</sup> *Id.*

<sup>261</sup> See *infra*, section V.C.2. In addition to the explanation set forth *infra*, the Department is concerned by situations where workers are required to make a significant upfront payment in order to be allowed to perform work as non-employees but they exercise little, if any, managerial skill. In those situations, application of the opportunity for profit or loss factor should indicate employee status because of the lack of managerial skills affecting the opportunity for profit or loss.

<sup>247</sup> See, e.g., *Lauritzen*, 835 F.2d at 1535; *Iontchev v. AAA Cab Serv., Inc.*, 685 F. App'x 548, 550 (9th Cir. 2017) (finding that the workers' "opportunity for profit or loss depended upon their managerial skill"); *Driscoll*, 603 F.2d at 754–55; *Scantland*, 721 F.3d at 1312. And the Eighth Circuit recently described this factor as "whether workers had control over profits and losses depending on their 'managerial skill.'" *Alpha & Omega*, 39 F.4th at 1084.

<sup>248</sup> *Snell*, 875 F.2d at 810.

<sup>249</sup> *Flint Eng'g*, 137 F.3d at 1441.

<sup>250</sup> See, e.g., *Franze*, 826 F. App'x at 76; *Superior Care*, 840 F.2d at 1058–59.

<sup>251</sup> 826 F. App'x at 77–78 (internal quotations omitted).

<sup>252</sup> 854 F.3d at 143–44.

<sup>253</sup> See, e.g., *Hobbs*, 946 F.3d at 832–34; *Parrish*, 917 F.3d at 384–85.

<sup>254</sup> 946 F.3d at 833–34.

<sup>255</sup> 545 F.3d 338, 344–45 (5th Cir. 2008).

<sup>256</sup> 917 F.3d at 384–85. The workers could also turn down work and negotiate their pay. See *id.* at 376.

<sup>257</sup> 161 F.3d at 304.

<sup>258</sup> AI 2015–1, 2015 WL 4449086, at \*6 & n.7 (withdrawn June 7, 2017).

depending on how much they work is not the equivalent of experiencing a financial loss.

For example, the Third Circuit has explained that certain workers whose earnings “derived primarily from their fixed commission” from the employer and “were not tied to price levels and resale profit margins” had “no meaningful opportunities for profit *nor any significant risk of financial loss*,” indicating employee status.<sup>262</sup> Yet, a finding that workers “risked financial loss” indicates independent contractor status.<sup>263</sup> The Tenth Circuit has explained, in a case finding that this factor favored employee status, that the workers “did not undertake the risks usually associated with an independent business,” “there was no way that [they] could experience a business loss,” and “[a] reduction in money earned by the [workers] is not a ‘loss’ sufficient to satisfy the criteria for independent contractor status.”<sup>264</sup> The Seventh Circuit has explained, in a case involving migrant farm workers, that they had no possibility of a loss and that “[a]ny reduction in earnings due to a poor pickle crop is a loss of wages, and not of an investment.”<sup>265</sup> And the Sixth Circuit has explained in a case involving workers paid by the hour that they did not “appear to have been at risk of a loss based on their decision to work or not” and that “[d]ecreased pay from working fewer hours does not qualify as a loss.”<sup>266</sup> Relatedly, the fact that an employer may impose fines, penalties, or chargebacks on a worker for faulty performance does not mean that the worker may experience a loss. The Eleventh Circuit has explained that the “argument that plaintiffs could control losses by avoiding chargebacks is unpersuasive,” elaborating that “[c]hargebacks relate to the quality of a technician’s skill, not his managerial or entrepreneurial prowess.”<sup>267</sup>

Some decisions by a worker that may affect the worker’s earnings do not necessarily reflect managerial skill. Accordingly, proposed § 795.110(b)(1) explains that a worker’s decision to work more hours (when paid hourly) or work more jobs (when paid a flat fee per job) where the employer controls

assignment of hours or jobs is similar to decisions that employees routinely make and does not reflect managerial skill.

The Eleventh Circuit explained in a case involving cable installers that their “opportunity for profit was largely limited to their ability to complete more jobs than assigned, which is analogous to an employee’s ability to take on overtime work or an efficient piece-rate worker’s ability to produce more pieces.”<sup>268</sup> The court further explained that a worker’s “ability to earn more by being more technically proficient is unrelated to [the worker’s] ability to earn or lose profit via his managerial skill, and it does not indicate that he operates his own business.”<sup>269</sup> The Fourth Circuit similarly explained in a case involving security guards that the guards could not “exercise or hone their managerial skill to increase their pay” because the employer “paid [them] a set rate for each shift worked” and the customer’s “schedule and security needs dictated the number of shifts available and the hours worked.”<sup>270</sup> And the Sixth Circuit explained in a case involving workers paid by the hour that they “earned a set hourly wage regardless of the skill they exercised.”<sup>271</sup> By comparison, the Eighth Circuit found in a case involving a process server that, because the worker decided where and how often to work and “decided which assignments he was willing to accept” based on the worker’s own decisions regarding which jobs were more or less profitable and without any negative consequences imposed by the employer, this factor indicated independent contractor status.<sup>272</sup> Thus, where a worker is paid

<sup>268</sup> *Id.* at 1316–17.

<sup>269</sup> *Id.* at 1317.

<sup>270</sup> *Capital Int’l*, 466 F.3d at 308.

<sup>271</sup> *Off Duty Police*, 915 F.3d at 1059. *See also Snell*, 875 F.2d at 810 (cake decorators’ “earnings did not depend upon their judgment or initiative, but on the [employer’s] need for their work”); *Collinge v. IntelliQuick Delivery, Inc.*, No. 2:12-cv-00824 JWS, 2015 WL 1299369, at \*4–5 (D. Ariz. Mar. 23, 2015) (workers could not increase profit by taking on more work, noting that “a worker’s ability to simply work more is irrelevant” because “[m]ore work may lead to more revenue, but not necessarily more profit”); *Solis v. Kansas City Transp. Grp.*, No. 10–0887–CV–W–REL, 2012 WL 3753736, at \*9 (W.D. Mo. Aug. 28, 2012) (“The driver’s ability to make more money by driving additional routes is akin to a waiter making more money by taking another shift.”); *Solis v. Cascom*, No. 3:09-cv-257, 2011 WL 10501391, at \*6 (S.D. Ohio Sept. 21, 2011) (explaining that there was no opportunity for increased profit based on the workers’ managerial skills; although they could work additional hours to increase their income, they made no decisions regarding routes, acquisition of materials, “or any facet normally associated with operating an independent business”).

<sup>272</sup> *See Karlson v. Action Process Serv. & Priv. Investigation, LLC*, 860 F.3d 1089, 1095 (8th Cir.

by the job, the worker’s decision to work more jobs and the worker’s technical proficiency in completing each job are not the type of managerial skill that would indicate independent contractor status under this factor.

Proposed § 795.110(b)(1) is consistent on this point with 2021 IC Rule § 795.105(d)(1)(ii), which states that the opportunity for profit or loss factor “weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster.”<sup>273</sup> The Department likewise stated in AI 2015–1 that a “worker’s ability to work more hours and the amount of work available from the employer have nothing to do with the worker’s managerial skill and do little to separate employees from independent contractors—both of whom are likely to earn more if they work more and if there is more work available.”<sup>274</sup> Thus, the Department’s proposed regulation on this point is consistent with its prior guidance in addition to being supported by case law.<sup>275</sup>

The Department welcomes comments on all aspects of this factor.

#### Example: Opportunity for Profit or Loss Depending on Managerial Skill<sup>276</sup>

A worker for a landscaping company performs assignments only as determined by the company for its corporate clients. The worker does not independently choose assignments, solicit additional work from other clients, advertise their services, or endeavor to reduce costs. The worker regularly agrees to work additional hours in order to earn more. In this scenario, the worker does not exercise managerial skill that affects their profit or loss. Rather, their earnings may fluctuate based on the work available and their willingness to work more.

2017). *See also Express Sixty-Minutes*, 161 F.3d at 304 (opportunity for profit or loss factor indicated independent contractor status because the drivers could choose among “which jobs were most profitable”).

<sup>273</sup> 86 FR 1247.

<sup>274</sup> 2015 WL 4449086, at \*6 (withdrawn June 7, 2017).

<sup>275</sup> The Department notes, as it explains elsewhere in this proposal, that the fact that a worker has a business in an industry separate from the business in which the worker is working for the employer has little relevance when applying this factor.

<sup>276</sup> The Department is providing examples at the end of the discussion of each factor for the benefit of the public, and the addition or alteration of any of the facts in any of the examples may change the resulting analysis. Additionally, while the examples help illustrate the application of particular factors of the economic reality test, no one factor is determinative of whether a worker is an employee or independent contractor.

<sup>262</sup> *Selker Bros.*, 949 F.2d at 1294 (emphasis added).

<sup>263</sup> *DialAmerica*, 757 F.2d at 1386.

<sup>264</sup> *Snell*, 875 F.2d at 810. *See also Flint Eng’g*, 137 F.3d at 1441 (“[P]laintiffs are hired on a per-hour basis rather than on a flat-rate-per-job basis. There is no incentive for plaintiffs to work faster or more efficiently in order to increase their opportunity for profit. Moreover, there is absolutely no risk of loss on plaintiffs’ part.”).

<sup>265</sup> *Lauritzen*, 835 F.2d at 1536.

<sup>266</sup> *Off Duty Police*, 915 F.3d at 1059.

<sup>267</sup> *Scantland*, 721 F.3d at 1317.

Because of this lack of managerial skill affecting opportunity for profit or loss, this factor indicates employee status.

In contrast, a worker provides landscaping services directly to corporate clients, including Company A. The worker produces their own advertising, negotiates contracts, decides which jobs to perform and when to perform them, and decides when and whether to hire helpers to assist with the work. This worker exercises managerial skill that affects their opportunity for profit or loss, indicating independent contractor status.

## 2. Investments by the Worker and the Employer (Proposed § 795.110(b)(2))

The Department is proposing to treat investment as a standalone factor in the economic reality analysis (consistent with the Department's approach prior to the 2021 IC Rule and with the approach of most courts) instead of considering investment within the opportunity for profit or loss factor (as § 795.105(d)(1)(ii) in the 2021 IC Rule does). Proposed § 795.110(b)(2) states that an investment borne by the worker must be capital or entrepreneurial in nature to indicate independent contractor status. Such investments, for example, generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach, thus suggesting that the worker is in business for themselves. Proposed § 795.110(b)(2) further notes that costs borne by the worker simply to perform their job (e.g., tools and equipment to perform a specific job and the worker's labor) are not evidence of capital or entrepreneurial investment. Finally, proposed § 795.110(b)(2) provides that the worker's investments should be evaluated on a relative basis with the employer's investments, a position taken by many circuit courts of appeals.

From its earliest applications of the economic reality analysis until the 2021 IC Rule, the Department consistently identified the worker's investment as a separate factor in the analysis.<sup>277</sup>

<sup>277</sup> See, e.g., WHD Op. Ltr. (Aug. 13, 1954); WHD Op. Ltr. FLSA-795 (Sept. 30, 1964); WHD Op. Ltr. (Oct. 12, 1965); WHD Op. Ltr. (Sept. 12, 1969); WHD Op. Ltr. WH-476, 1978 WL 51437, at \*1 (Oct. 19, 1978); WHD Op. Ltr., 1986 WL 1171083, at \*1 (Jan. 14, 1986); WHD Op. Ltr., 1986 WL 740454, at \*1 (June 23, 1986); WHD Op. Ltr., 1995 WL 1032469, at \*1 (Mar. 2, 1995); WHD Op. Ltr., 1995 WL 1032489, at \*1 (June 5, 1995); WHD Op. Ltr., 1999 WL 1788137, at \*1 (July 12, 1999); WHD Op. Ltr., 2000 WL 34444352, at \*1 (July 5, 2000); WHD Op. Ltr., 2000 WL 34444342, at \*3 (Dec. 7, 2000); WHD Op. Ltr., 2002 WL 32406602, at \*2 (Sept. 5,

Beginning with the Supreme Court's decision in *Silk*,<sup>278</sup> courts with the exception of the Second and D.C. Circuits have almost universally identified the worker's investment as a separate factor.<sup>279</sup> Breaking from this longstanding approach, the 2021 IC Rule stated that investment is considered as part of the opportunity for profit or loss factor: "[T]he Department adopts its proposal, consistent with Second Circuit caselaw, to consider investment as part of the opportunity factor."<sup>280</sup> The Department further stated in the 2021 IC Rule that courts consider opportunity for profit or loss and investment to be related and combining them into one factor eliminates duplicative analyses.<sup>281</sup>

The Department believes that the 2021 IC Rule's approach of considering investment "as part of" the opportunity for profit or loss factor is flawed. Section 795.105(d)(1)(ii) of the 2021 IC Rule states that the opportunity for profit or loss factor indicates independent contractor status if the worker exercises initiative or if the worker manages their investment in the business.<sup>282</sup> Under the provision, the worker "does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor."<sup>283</sup> Thus, if either initiative or investment suggests independent contractor status, the other cannot change that outcome even if it suggests employee status. For example, under the 2021 IC Rule, if the worker makes no investment in the work but exercises initiative, then the opportunity for profit or loss factor indicates independent contractor status. In effect, that the

2002); WHD Fact Sheet #13, "Employment Relationship Under the Fair Labor Standards Act (FLSA)" (July 2008); AI 2015-1 (available at 2015 WL 4449086) (withdrawn June 7, 2017).

<sup>278</sup> 331 U.S. 704 (1947).  
<sup>279</sup> See, e.g., *DialAmerica*, 757 F.2d at 1382; *McFeeley*, 825 F.3d at 241; *Hobbs*, 946 F.3d at 829; *Off Duty Police*, 915 F.3d at 1055; *Lauritzen*, 835 F.2d at 1534-35; *Alpha & Omega*, 39 F.4th at 1082; *Driscoll*, 603 F.2d at 754; *Paragon*, 884 F.3d at 1235; *Scantland*, 721 F.3d at 1311. The Second Circuit and the D.C. Circuit are alone among the circuit courts of appeals in treating the worker's opportunity for profit or loss and the worker's investment as a single factor. See, e.g., *Franze*, 826 F. App'x at 76; *Superior Care*, 840 F.2d at 1058-59; *Morrison*, 253 F.3d at 11 (citing *Superior Care*, 840 F.2d at 1058-59).

<sup>280</sup> 86 FR 1186.

<sup>281</sup> *Id.* The 2021 IC Rule also cited *Silk*. *Id.* (citing *Silk*, 331 U.S. at 719). However, the Court in *Silk* merely decided that case based on its facts, 331 U.S. at 716-19, and in no way indicated that "opportunities for profit or loss" and "investment in facilities" must be combined into one factor when reciting each of the relevant factors separately, *id.* at 716.

<sup>282</sup> 86 FR 1247.

<sup>283</sup> *Id.*

worker makes no capital or entrepreneurial investment (a fact that indicates employee status) is eliminated from the analysis under that rule. Put another way, if a worker has an opportunity for profit or loss based on initiative, the opportunity for profit or loss factor under the 2021 IC Rule indicates independent contractor status, and the investment factor cannot reverse or weigh against that finding even if it indicates employee status as a matter of economic reality because, for example, the worker makes no investment. The Department believes that the way in which 2021 IC Rule § 795.105(d)(1)(ii) considers investment as part of the opportunity for profit or loss factor may incorrectly tilt the analysis in favor of independent contractor outcomes. Moreover, although the 2021 IC Rule purported to adopt the Second Circuit's approach of considering investment as part of opportunity for profit or loss, Second Circuit case law does not support the Rule's position that this factor indicates independent contractor status if either investment or initiative indicates an opportunity for profit or loss even if the other indicates employee status.<sup>284</sup>

There is little basis for an approach that always considers the worker's investment within the worker's opportunity for profit or loss factor, which can have the effect in some cases of preventing investment from affecting the analysis. The worker's investment may be relevant to whether the worker is economically dependent on the employer separate and apart from the worker's opportunity for profit or loss. This is consistent with various circuit court decisions which have found both opportunity for profit or loss and investment to be independently probative. For example, the Fifth Circuit found in *Parrish* that the investment factor favored employee status (although it merited "little weight" given the nature of the work) and that the opportunity for profit or loss factor favored independent contractor status.<sup>285</sup> In *Cromwell v. Driftwood Electrical Contractors, Inc.*, the Fifth Circuit conversely found that the investment factor indicated independent contractor status because the workers "invested a relatively substantial amount in their trucks, equipment, and tools" but that their opportunity for profit or loss was "severely limit[ed]." <sup>286</sup> In *Nieman v. National Claims Adjusters, Inc.*, the Eleventh Circuit found that the

<sup>284</sup> See generally *Saleem*, 854 F.3d at 141-46.

<sup>285</sup> 917 F.3d at 382-85.

<sup>286</sup> 348 F. App'x 57, 60-61 (5th Cir. 2009).

investment factor weighed in favor of independent contractor status while the opportunity for profit or loss factor did “not weigh in favor of either” independent contractor or employee status.<sup>287</sup> And in *Scantland v. Jeffrey Knight, Inc.*, the Eleventh Circuit found that the opportunity for profit or loss factor “point[ed] strongly toward employee status” although the investment factor weighed slightly in favor of independent contractor status.<sup>288</sup> Thus, investment is relevant to the ultimate economic dependence inquiry separate and apart from opportunity for profit or loss.

For these reasons, the Department is proposing to return to treating the worker’s investment as a separate factor from the opportunity for profit or loss factor.

The Department is also proposing, in addition to considering the amount and value of the worker’s investment, that the nature of and reason for the investment should be considered. Specifically, proposed § 795.110(b)(2) states that for a worker’s investment to indicate independent contractor status, the investment must be capital or entrepreneurial in nature. The Department believes that the worker’s investment should generally support an independent business or serve a business-like function, such as increasing the worker’s ability to do different types of or more work, reducing costs, or extending market reach, to indicate independent contractor status.<sup>289</sup> On the other hand, as proposed § 795.110(b)(2) notes, costs borne by a worker to perform a particular job are not the type of capital/entrepreneurial investments that suggest independent contractor status. The Department believes that considering the investment factor in this manner is consistent with the overall inquiry of determining whether the worker is economically dependent on the employer for work or is in business for themselves. The nature of the worker’s investment illuminates that distinction: an investment that is capital in nature indicates that the worker is operating as

an independent business. Yet, an investment that is expedient to perform a particular job (such as tools or equipment purchased to perform the job and that have no broader use for the worker) does not indicate independence. The Department understands that independent contractors make both capital investments to generally support their business and investments to perform particular jobs; therefore, the existence of expenses to perform jobs will not prevent this factor from indicating independent contractor status so long as there are also investments that are capital in nature indicating an independent business.

Consistent with the proposed approach, many appellate court decisions have emphasized how the worker’s investment must be capital in nature for it to indicate independent contractor status. For example, in *Secretary of Labor v. Lauritzen*, the Seventh Circuit found that migrant farm workers were not independent contractors, but employees, due in part to the lack of capital investments made by the workers.<sup>290</sup> As the court noted, investments that establish a worker’s status as an independent contractor should “be large expenditures, such as risk capital, capital investments, and not negligible items or labor itself. . . . The workers here are responsible only for providing their own gloves [which] do not constitute a capital investment.”<sup>291</sup> In *Acosta v. Paragon Contractors Corp.*, the Tenth Circuit explained that “[t]he mere fact that workers supply their own tools or equipment does not establish status as independent contractors; rather, the relevant ‘investment’ is ‘the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself.’ ”<sup>292</sup>

<sup>290</sup> See 835 F.2d at 1537.

<sup>291</sup> *Id.*

<sup>292</sup> 884 F.3d at 1236 (quoting *Snell*, 875 F.2d at 810). See also, e.g., *Off Duty Police*, 915 F.3d at 1056 (“The capital investment factor is most significant if it reveals that the worker performs a specialized service that requires a tool or application which he has mastered.”) (quoting *Donovan v. Brandel*, 736 F.2d 1114, 1118–19 (6th Cir. 1984)); *Mr. W Fireworks*, 814 F.2d at 1052 (“The fact that a few [workers] engage in minimal investments has little legal relevance, when the overwhelming majority of the risk capital is supplied by [the employer].”); *Pilgrim Equip.*, 527 F.2d at 1314 (The employer’s provision of “[a]ll investment or risk capital” and “all costly necessities” that the workers need to operate confirms the workers’ “total dependency” on the employer.); cf. *Nieman*, 775 F. App’x at 625 (investment factor indicated independent contractor status because the worker “had his own home office, a laptop, and iPad for field work and was equipped with a vehicle, ladder, measuring tools,

Relatedly, the use of a personal vehicle that the worker already owns to perform work—or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature. For example, in *Scantland*, the Eleventh Circuit explained that the “fact that most technicians will already own a vehicle suitable for the work” suggests that there is “little need for significant independent capital.”<sup>293</sup> In *Off Duty Police*, the Sixth Circuit found that, because the workers’ vehicles “could be used for any purpose, not just on the job,” they did not indicate independent contractor status.<sup>294</sup> The Fifth Circuit likewise considers the purpose of the vehicle and how the worker uses it. For example, in *Express Sixty-Minutes*, it explained that, “[a]lthough the driver’s investment of a vehicle is no small matter, that investment is somewhat diluted when one considers that the vehicle is also used by most drivers for personal purposes.”<sup>295</sup> And in *Brock v. Mr. W Fireworks*, it noted that most of the workers in that case purchased vehicles for personal and family reasons, not business reasons.<sup>296</sup> This approach to considering a worker’s use of a personal vehicle that the worker already owns to perform work is consistent with the overarching inquiry of examining the economic realities of the worker’s relationship with the employer.

Proposed § 795.110(b)(2) additionally provides that the worker’s investment be evaluated in relation to the employer’s investment in its business. This approach is not only consistent with the totality-of-the-circumstances analysis that is at the heart of the economic reality test, but it would also provide factfinders with an additional tool to differentiate between a worker’s economic dependence and independence based on the particular

digital voice and photographic equipment, and ‘other similar tools of the trade.’ ”).

<sup>293</sup> 781 F.2d at 1318.

<sup>294</sup> 915 F.3d at 1056. See also *Keller*, 781 F.3d at 810–11 (fact that equipment could be used “for both personal and professional tasks” weakens the indication of independent contractor status).

<sup>295</sup> 161 F.3d at 304.

<sup>296</sup> 814 F.2d at 1052; see also *Sigui v. M + M Commc’ns, Inc.*, 484 F. Supp. 3d 29, 39 (D.R.I. 2020) (discounting relevance of workers’ investment in vehicles because they could be used for other purposes), *jury verdict for plaintiffs*, 1:14–CV–00442, Dckt. No. 172 (June 13, 2022); *Roeder v. DirecTV, Inc.*, No. C14–4091–LTS, 2017 WL 151401, at \*17 (N.D. Iowa Jan. 13, 2017) (rejecting argument that “plaintiffs’ purchase and/or use of personal vehicles [weighs] in favor of finding plaintiffs were independent contractors” because the “vehicles had been purchased prior to taking DIRECTV work orders” and the record does not indicate that the vehicles were purchased for any business purpose).

<sup>287</sup> 775 F. App’x 622, 624–25 (11th Cir. 2019).

<sup>288</sup> 721 F.3d at 1316–18.

<sup>289</sup> The 2021 IC Rule suggested that a shift to a “knowledge-based economy” reduced the probative value of the investment factor because these types of workers can be in business for themselves “with minimal physical capital” investment. 86 FR 1175. That rule’s suggestion would be addressed by this proposal’s approach to the investment factor. By focusing on the capital or entrepreneurial nature of the worker’s investment, the proposed investment factor would not be limited to considering investments in physical capital but would also consider entrepreneurial investments by a worker to develop marketable knowledge.



facts of the case. Comparing the worker's investment to the employer's investment can be a gauge of the worker's independence or dependence. If the worker's investment compares favorably to the employer's investment, then that fact suggests independence on the worker's part and the existence of a business-to-business relationship between the worker and the employer. If the worker's investment does not compare favorably to the employer's investment, then that fact suggests that the worker is economically dependent and an employee of the employer. The Department understands that a worker's investment need not be (and rarely ever is) of the same magnitude and scope as the employer's investment to indicate that the worker is an independent contractor. Thus, although a worker's investment need not be on par with the employer's investment, it should support an independent business for this factor to indicate independent contractor status.

The Department has previously, but not consistently, explained that a worker's investment should be considered in relation to the employer's investment in its business. For example, in the Withdrawal Rule, the Department questioned the 2021 IC Rule's preclusion of consideration of the employer's investment.<sup>297</sup> In AI 2015–1, the Department explained that a worker's investment “should not be considered in isolation” because “it is the relative investments that matter.”<sup>298</sup> AI 2015–1 further explained that, in addition to “the nature of the investment,” “comparing the worker's investment to the employer's investment helps determine whether the worker is an independent business.”<sup>299</sup> The Department also compared the worker's and the employer's relative investments in opinion letters issued by the Wage and Hour Division.<sup>300</sup> However, in the 2021 IC Rule, the Department rejected any comparison of the worker's investment to the employer's investment in its

<sup>297</sup> See 86 FR 24313–24314 (as explained in section II.E. *supra*, the Withdrawal Rule was vacated by a district court decision that is currently on appeal before the Fifth Circuit).

<sup>298</sup> 2015 WL 4449086, at \*8 (withdrawn June 7, 2017).

<sup>299</sup> *Id.*

<sup>300</sup> See WHD Op. Ltr., 2002 WL 32406602, at \*1–2 (Sept. 5, 2002) (workers' “hand tools, which can cost between \$5,000 and \$10,000,” were “small in comparison to [the employer's] investment,” but the “amount is none the less substantial” and “thus indicative of an independent contractor relationship”); WHD Op. Ltr., 2000 WL 34444342, at \*4 (Dec. 7, 2000) (comparing “the relative investments” of the worker and the employer is the correct approach).

business.<sup>301</sup> Because of the Department's inconsistency on this point, it is important for the Department to address this point in this rulemaking.

Numerous circuit courts of appeals consider the worker's investment in the work in comparison to the employer's investment in its business. For example, the Fifth Circuit has explained that it “consider[s] the relative investments” and that, “[i]n considering this factor, ‘we compare each worker's *individual* investment to that of the alleged employer.’”<sup>302</sup> The Tenth Circuit has similarly explained that, “[t]o analyze this factor, we compare the investments of the worker and the alleged employer.”<sup>303</sup> The Sixth Circuit has explained that “[t]his factor requires comparison of the worker's total investment to the ‘company's total investment, including office rental space, advertising, software, phone systems, or insurance.’”<sup>304</sup> And the Fourth Circuit has compared the employers' payment of rent, bills, insurance, and advertising expenses to the workers' “limited” investment in their work.<sup>305</sup>

A few circuits do not compare the worker's investment in the work to the employer's investment in its business. For example, the Second Circuit has recently focused on whether the worker

<sup>301</sup> See 86 FR 1188 (“comparing the individual worker's investment to the potential employer's investment should not be part of the analysis of investment”). See also WHD Fact Sheet #13 (July 2008) (describing the factor as “[t]he amount of the [worker's] investment in facilities and equipment” without any further discussion).

<sup>302</sup> *Hobbs*, 946 F.3d at 831–32 (quoting *Cornerstone Am.*, 545 F.3d at 344) (emphasis in quoted language).

<sup>303</sup> *Paragon*, 884 F.3d at 1236; see also *Flint Eng'g*, 137 F.3d at 1442 (“In making a finding on this factor, it is appropriate to compare the worker's individual investment to the employer's investment in the overall operation.”).

<sup>304</sup> *Off Duty Police*, 915 F.3d at 1056 (quoting *Keller*, 781 F.3d at 810).

<sup>305</sup> *McFeeley*, 825 F.3d at 243. See also *Verma*, 937 F.3d at 231 (summarizing how courts have viewed this factor in cases examining the employment status of exotic dancers: “all concluded that ‘a dancer's investment is minor when compared to the club's investment’”) (quoting the district court's decision); *Lauritzen*, 835 F.2d at 1537 (disagreeing that “the overall size of the investment by the employer relative to that by the worker is irrelevant” and finding that “that the migrant workers' disproportionately small stake in the pickle-farming operation is an indication that their work is not independent of the defendants”); *Driscoll*, 603 F.2d at 755 (strawberry growers' investment in light equipment, including hoes, shovels, and picking carts was “minimal in comparison” with employer's total investment in land and heavy machinery); see also *Iontchev*, 685 F. App'x at 550 (noting that the drivers “invested in equipment or materials and employed helpers to perform their work” but concluding that the investment factor was “neutral” because the cab company “leased taxicabs and credit card machines to most of the [drivers]”).

has made a significant investment, irrespective of the employer's investment. In *Saleem*, the Second Circuit stated (like many other courts) that under “the economic reality test, ‘large capital expenditures’—as opposed to ‘negligible items, or labor itself’—are highly relevant to determining whether an individual is an employee or an independent contractor.”<sup>306</sup> The Second Circuit elaborated that the key is whether the worker's financial investment was made in order to generate a return on the investment.<sup>307</sup> The Eleventh Circuit has likewise focused on the nature of the worker's investment without comparing it to the employer's investment.<sup>308</sup> Neither the Second Circuit nor the Eleventh Circuit have expressly rejected comparing the investments, and as explained herein, the Department believes that comparing investments is consistent with the totality-of-the-circumstances analysis and is helpful in distinguishing between a worker's economic dependence and independence.

The usefulness of comparing the worker's investment to the employer's investment is not undermined because certain decisions from the Fifth and Eighth Circuits gave little weight to the comparison based on the facts and circumstances of the particular cases before them.<sup>309</sup> The Fifth Circuit decisions (*Parrish* and *Cornerstone America*) compared the relative investments as part of their analyses.<sup>310</sup> Although the *Parrish* decision accorded the relative investment factor “little weight in the light of the other summary-judgment evidence supporting IC-status,”<sup>311</sup> this does not support the conclusion that this factor is not useful. Instead, it simply reflects the Fifth Circuit's faithful application in that case of a totality-of-the-

<sup>306</sup> 854 F.3d at 144 (quoting *Snell*, 875 F.2d at 810).

<sup>307</sup> *Id.* at 144–46; see also *Franze*, 826 F. App'x at 77–78 (purchasing delivery routes “without any financial assistance from Bimbo” constitutes a substantial financial outlay that weighs in favor of independent contractor status).

<sup>308</sup> *Scantland*, 721 F.3d at 1317–18; see also *Nieman*, 775 F. App'x at 625.

<sup>309</sup> The 2021 IC Rule cited these decisions from the Fifth and Eighth Circuits in rejecting the relative investments approach. See 86 FR 1188.

<sup>310</sup> See *Parrish*, 917 F.3d at 382–83 (explaining that “[o]ur court uses a side-by-side comparison method in evaluating this factor” and determining that the relative investments factor favors employee status); *Cornerstone Am.*, 545 F.3d at 344 (explaining that “we compare each worker's *individual* investment to that of the alleged employer” and determining that the employer's “greater overall investment in the business scheme convinces us that the relative-investment factor weighs in favor of employee status”) (emphasis in original).

<sup>311</sup> 917 F.3d at 383.

circumstances approach considering many factors—no one of which was dispositive. Moreover, that the *Cornerstone America* decision “did not even mention the [employer’s] larger investment” when “summing up the entirety of the facts and analyzing whether the workers were economically dependent on the [employer] as a matter of economic reality” as stated in the 2021 IC Rule,<sup>312</sup> likewise does not support the conclusion that the relative investment factor is not useful, but instead simply reflects the overwhelming evidence of employee status in that case. Indeed, the Fifth Circuit’s recent decisions reflect a continued commitment to considering the worker’s investment in relation to the employer’s investment.<sup>313</sup>

In *Karlson v. Action Process Service & Private Investigations, LLC*, the Eighth Circuit affirmed the district court’s decision to allow evidence of the worker’s and the employer’s relative investments but not allow the worker to ask the employer about the dollar amount of its investment because “allowing [the worker] to ‘billboard large numbers’ . . . would create the danger of unfair prejudice.”<sup>314</sup> Thus, the Eighth Circuit simply affirmed a nuanced district court decision regarding how much evidence of the employer’s investment to allow but did not preclude consideration of the worker’s and the employer’s relative investments. Moreover, the Eighth Circuit recently issued a decision articulating, as the jury instruction in *Karlson* had, the investment factor as “the relative investments of the alleged employer and the employee.”<sup>315</sup>

For all of these reasons, the Department believes that the proposal to consider the worker’s investment in relation to the employer’s investment in its business is supported by prior WHD guidance and many appellate court decisions, is consistent with the overall totality-of-the-circumstances inquiry whether the worker is economically dependent on the employer or operating as an independent business and would

<sup>312</sup> 86 FR 1188 (citing *Cornerstone Am.*, 545 F.3d at 346).

<sup>313</sup> See, e.g., *Sanchez Oil & Gas Corp. v. Crescent Drilling & Prod., Inc.*, 7 F.4th 301, 313 n.17 (5th Cir. 2021); *Hobbs*, 946 F.3d at 829 (describing the investment factor as “the extent of the relative investments of the worker and the alleged employer”) (quoting *Cornerstone Am.*, 545 F.3d at 343). Thus, the Fifth Circuit routinely considers the relative investments of the worker and the employer even if the factor may ultimately be accorded less weight in some cases depending on the facts and circumstances of the case.

<sup>314</sup> 860 F.3d at 1096.

<sup>315</sup> *Alpha & Omega*, 39 F.4th at 1082 (citing *Karlson*, 860 F.3d at 1093).

aid factfinders’ analyses when applying that inquiry.

The Department welcomes comments on all aspects of this factor.

#### Example: Investments by the Worker and the Employer

A graphic designer provides design services for a commercial design firm. The firm provides software, a computer, office space, and all the equipment and supplies for the worker. The company invests in marketing and finding clients and maintains a central office from which to manage services. The worker occasionally uses their own preferred drafting tools for certain jobs. In this scenario, the worker’s relatively minor investment in supplies is not capital in nature and does little to further a business beyond completing certain jobs. Thus, this factor indicates employee status.

A graphic designer occasionally completes design projects for a local design firm. The graphic designer purchases their own design software, computer, drafting tools, and rents an office in a shared workspace. The worker also spends money to market their services. These types of investments support an independent business and are capital in nature (e.g., they allow the worker to do more work and extend their market reach). Thus, these facts indicate that the worker is in business for themselves and may be a freelance graphic designer (i.e., an independent contractor), not an employee of the local design firm.

#### 3. Degree of Permanence of the Work Relationship (§ 795.110(b)(3))

The Department is proposing to modify § 795.105(d)(2)(ii) of the 2021 IC Rule, which describes the “degree of permanence of the working relationship between the individual and the potential employer,” and address the permanency factor in proposed § 795.110(b)(3). This provision in the 2021 IC Rule states that this factor weighs in favor of the worker being an independent contractor where the work relationship is “by design definite in duration or sporadic” and that it weighs in favor of the worker being an employee where the work relationship is “by design indefinite in duration or continuous.”<sup>316</sup> The 2021 IC Rule provision also recognizes that “the provisional nature of work by itself would not necessarily indicate independent contractor classification.”<sup>317</sup>

As the Department noted in the 2021 IC Rule, “courts and the Department

routinely consider this factor when applying the economic reality analysis under the FLSA to determine employee or independent contractor status.”<sup>318</sup> Consistent with case law analyzing this factor, the Department is proposing to provide further specificity by noting that an indefinite or continuous relationship is consistent with an employment relationship, but that a worker’s lack of a permanent or indefinite relationship with an employer is not necessarily indicative of independent contractor status if it does not result from the worker’s own independent business initiative.<sup>319</sup> The Department is also proposing to continue to recognize that a lack of permanence may be inherent in certain jobs—such as temporary and seasonal work—and that this is not necessarily an indicator of independent contractor status because a lack of permanence does not necessarily mean that the worker is in business for themselves instead of being economically dependent on the employer for work.

Courts typically describe this factor’s relevance as follows: “‘Independent contractors’ often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas ‘employees’ usually work for only one employer and such relationship is continuous and of indefinite duration.”<sup>320</sup> For example, a typical employee often has an at-will work relationship with the employer and works indefinitely until either party decides to end that work relationship. Conversely, an independent contractor does not seek such a permanent or indefinite engagement with one entity. Because of these general characteristics of work relationships, the length of time or duration of the work relationship has long been considered under the “permanence” factor as an indicator of employee or independent contractor status.<sup>321</sup>

<sup>318</sup> 86 FR 1192 (citing a variety of circuit case law: *Razak*, 951 F.3d at 142; *Hobbs*, 946 F.3d at 829; *Karlson*, 860 F.3d at 1092–93; *McFeeley*, 825 F.3d at 241; *Keller*, 781 F.3d at 807; *Scantland*, 721 F.3d at 1312).

<sup>319</sup> See, e.g., *Superior Care*, 840 F.2d at 1060–61.

<sup>320</sup> *Snell*, 875 F.2d at 811 (citing *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1372 (9th Cir. 1981)); see also *Keller*, 781 F.3d at 807 (same); WHD Op. Ltr., 2002 WL 32406602, at \*3 (Sept. 5, 2002) (same).

<sup>321</sup> See, e.g., *Parrish.*, 917 F.3d at 386–87 (noting that one of the relevant considerations under the permanency factor is the total length of the working relationship between the parties); *Capital Int’l*, 466 F.3d at 308–09 (in analyzing the degree of permanency of the working relationship, the “more permanent the relationship, the more likely the worker is to be an employee”); *DialAmerica*, 757 F.2d at 1385 (finding that “the permanence-of-

<sup>316</sup> 86 FR 1247.

<sup>317</sup> *Id.*

However, the analysis under the “permanence” factor is not limited solely to the length or definiteness of the work relationship. Courts have also recognized that the temporary or seasonal nature of some jobs may result in a “lack of permanence . . . due to operational characteristics intrinsic to the industry rather than to the workers’ own business initiative.”<sup>322</sup> In such instances, a lack of permanence alone is not an indicator of independent contractor status. One industry where courts have recognized that the lack of permanence or indefiniteness in the work relationship does not preclude employee status is seasonal agricultural work, where workers often work solely for the duration of a harvest season and may return the following year.<sup>323</sup> Another seasonal example is the Fifth Circuit’s analysis of the working relationship between a fireworks business that operated during specific periods of the year and the fireworks stand operators who sold the company’s goods, where the district court found the relationship to be impermanent due to the 80 percent turnover rate between seasons.<sup>324</sup> The Fifth Circuit noted that “in applying the *Silk* factors courts must make allowances for those operational characteristics that are unique or intrinsic to the particular business or industry, and to the workers they employ.”<sup>325</sup> The Fifth Circuit held that the “proper test for determining the

working-relationship factor indicates that the home researchers were ‘employees’ because they ‘worked continuously for the defendant, and many did so for long periods of time’; *Pilgrim Equip.*, 527 F.2d at 1314 (“the permanent nature of the relations between [the employer] and these operators indicates dependence”); see also *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007) (describing an independent contractor as an individual who “appears, does a discrete job, and leaves again”); *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 328 (5th Cir. 1993) (“[a]lthough not determinative, the impermanent relationship between the dancers and the [employer] indicates non-employee status”).

<sup>322</sup> *Superior Care*, 840 F.2d at 1061 (citing *Mr. W Fireworks*, 814 F.2d at 1053–54); see also *Flint Eng’g*, 137 F.3d at 1442 (finding short duration of work relationships in oil and gas pipeline construction work to be intrinsic to the industry rather than a “choice or decision” on the part of the workers).

<sup>323</sup> See *Paragon*, 884 F.3d at 1235 (permanence factor favored employee status because the worker was hired temporarily for the harvest season “[b]ut his employment was permanent for the duration of each harvest season”); *Lauritzen*, 835 F.2d at 1537 (agricultural harvesters’ relationship with employer was “permanent and exclusive for the duration of that harvest season” and permanency was also indicated by the fact that many of the same migrant workers returned for the harvest each year; the court noted that “[m]any seasonal businesses necessarily hire only seasonal employees, but that fact alone does not convert seasonal employees into seasonal independent contractors”).

<sup>324</sup> *Mr. W Fireworks*, 814 F.2d at 1053.

<sup>325</sup> *Id.* at 1054.

permanency of the relationship” in such a seasonal industry is “not whether the alleged employees returned from season to season, but whether the alleged employees worked for the entire operative period of a particular season.”<sup>326</sup>

Courts have also recognized that non-seasonal temporary work is common in some industries, and that a lack of permanence in these work relationships is also not indicative of independent contractor status. For example, in *Brock v. Superior Care, Inc.*, the Second Circuit found that nurses who were referred by a temporary health-care staffing agency to work for patients, hospitals, and nursing homes on a short-term basis were “transient” workers who did not have continuous or permanent work relationships with the staffing agency.<sup>327</sup> Citing the discussion in *Mr. W Fireworks* regarding operational characteristics that may be unique to certain industries and the workers they employ, the Second Circuit determined that the lack of permanence did not preclude the nurses from being employees because this reflected “the nature of their profession and not their success in marketing their skills independently.”<sup>328</sup> Similarly, in *Baker v. Flint Engineering & Construction Co.*, the Tenth Circuit determined that temporary rig welders who worked no more than two months at a time for a gas pipeline contractor exhibited sufficient permanency in their work relationship to indicate employee status because such temporary work was intrinsic in the industry rather than a “choice or decision” by the workers.<sup>329</sup> Therefore, consistent with the applicable case law, the Department is proposing to revise the 2021 IC Rule provision’s acknowledgement that the seasonal nature of work alone would not necessarily indicate independent contractor status to acknowledge more broadly that a lack of permanence may be due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ rather than the workers’ business initiative, in which case this factor would not weigh in favor of independent contractor classification.<sup>330</sup>

<sup>326</sup> *Id.*

<sup>327</sup> *Superior Care*, 840 F.2d at 1060.

<sup>328</sup> *Id.* at 1061.

<sup>329</sup> *Flint Eng’g*, 137 F.3d at 1442.

<sup>330</sup> The 2021 IC Rule suggested that a trend in the modern economy that reduces the probative value of the permanence factor is that workers have shorter job tenures. See 86 FR 1175. However, as explained above, courts have developed ways to consider permanency that take into account the fact that some jobs and industries have shorter job

Case law discussing the permanence factor also commonly addresses whether the work relationship is exclusive and the extent to which the workers work for others.<sup>331</sup> The Department believes this analytical approach is appropriate, because working exclusively for a particular employer speaks to the permanence of the work relationship.<sup>332</sup> However, although an exclusive relationship is often associated with an employment relationship and a sporadic or project-based non-exclusive relationship is more frequently associated with independent contractor classification,<sup>333</sup> courts have explained that simply having more than one job or working irregularly does not remove a worker from employee status and the protections of the FLSA. For example, in *Silk*, the “unloaders” came to the coal yard “when and as they please[d] . . . work[ing] when they wish and work[ing] for others at will.”<sup>334</sup> The Court determined that the unloaders were employees even though they had the ability to work for others: “That the unloaders did not work regularly is not significant. They did work in the course of the employer’s trade or business. This brings them under the coverage of the Act.”<sup>335</sup> Similarly, as the Second Circuit explained in *Superior Care*, the fact that the temporary nurses “typically work for several employers,” was “not dispositive of independent contractor status” as “employees may work for more than one employer without losing their benefits under the FLSA.”<sup>336</sup>

tenures, yet can evidence the regularity consistent with an employment relationship.

<sup>331</sup> See, e.g., *Parrish*, 917 F.3d at 386–87 (noting that one of the relevant considerations under the permanence factor is whether any plaintiff worked exclusively for the potential employer); *Keller*, 781 F.3d at 807 (noting that “even short, exclusive relationships between the worker and the company may be indicative of an employee-employer relationship”); *Scantland*, 721 F.3d at 1319 (noting that “[e]xclusivity is relevant” to the permanency of the work relationship).

<sup>332</sup> See, e.g., WHD Op. Ltr., 2002 WL 32406602, at \*3 (Sept. 5, 2002) (considering exclusivity under permanence factor); WHD Op. Ltr., 2000 WL 34444342, at \*5 (Dec. 7, 2000) (same).

<sup>333</sup> See, e.g., *Carrell v. Sunland Constr., Inc.*, 998 F.2d 330, 332 (5th Cir. 1993) (finding welders to be independent contractors where they worked for multiple employers on a project-by-project basis rather than exclusively for one employer).

<sup>334</sup> 331 U.S. at 706.

<sup>335</sup> *Id.* at 718.

<sup>336</sup> *Superior Care*, 814 F.2d at 1060; see also *Saleem*, 854 F.3d at 142 n.24 (“It is certainly not unheard of for an individual to maintain two jobs at the same time, and to be an ‘employee’ in each capacity.”); *Keller*, 781 F.3d at 808 (agreeing with the Second Circuit that “employees may work for more than one employer without losing their benefits under the FLSA”); *Circle C Invs.*, 998 F.2d at 328–29 (noting that “[t]he transient nature of the work force is not enough here to remove the dancers from the protections of the FLSA”); *Seafood Inc.*, 867 F.2d at 877 (“The only question,

Relatedly, courts have also determined that the fact that a worker does not rely on the employer as their exclusive or primary source of income is not indicative of whether an employment relationship exists.<sup>337</sup> For example, the Sixth Circuit explained: “[W]hether a worker has more than one source of income says little about that worker’s employment status. Many workers in the modern economy, including employees and independent contractors alike, must routinely seek out more than one source of income to make ends meet.”<sup>338</sup>

Thus, the Department is proposing in § 795.110(b)(3) to include exclusivity as an additional consideration under the permanency factor while noting that working for others and having multiple jobs in which workers are economically dependent on each employer for work—as compared to a worker who is in business for themselves and chooses to market their independent services or labor to multiple entities—does not weigh in favor of independent contractor status. While the 2021 IC Rule did not include exclusivity as part of the permanence analysis, this was not based on a view that exclusivity was inconsistent with circuit case law but, rather, was primarily based on the view that concepts should not apply to more than one factor. Including consideration of exclusivity under permanence is consistent with the case law, as the 2021 IC Rule acknowledged.<sup>339</sup> Because the

therefore, is whether the fact that the workers moved frequently from plant to plant and from employer to employer removed them from the protections of the FLSA. We hold that it did not.”); *Hart v. Rick’s Cabaret Int’l, Inc.*, 967 F. Supp. 2d 901, 921 (S.D.N.Y. 2013) (noting that “countless workers . . . who are undeniably employees under the FLSA—for example, waiters, ushers, and bartenders”—work for multiple employers).

<sup>337</sup> *Superior Care*, 814 F.2d at 1060; *see also Halferty*, 821 F.2d at 267–68 (“it is not dependence in the sense that one could not survive without the income from the job that we examine, but dependence for continued employment”); *DialAmerica*, 757 F.2d at 1385 (noting that “[t]here is no legal basis” to say that work that constitutes a second source of income indicates a worker’s lack of economic dependence on a job because the proper analysis is “whether the workers are dependent on a particular business or organization for their continued employment”).

<sup>338</sup> *Off Duty Police*, 915 F.3d at 1058. The 2021 IC Rule correctly noted that a handful of cases improperly conflate having multiple sources of income with a lack of economic dependence on the potential employer. *See* 86 FR 1173, 1178. The 2021 IC Rule characterized such a “dependence-for-income” analysis as incorrect and a “dependence-for-work” analysis as correct. *Id.* at 1173. This critique continues to be valid, as is the observation that “[i]t is possible for a worker to be an employee in one line of business and an independent contractor in another.” *Id.* at 1178 n.19.

<sup>339</sup> The 2021 IC Rule recognized that courts often analyze the exclusivity of the work relationship as part of the permanence factor, and the Department

2021 IC Rule sought to avoid duplicating consideration of certain facts or concepts under more than one factor, however, it confined exclusivity and the ability to work for others under the control factor and excluded it from the permanence factor.<sup>340</sup>

The Department continues to believe that an exclusivity requirement imposed by the employer is a strong indicator of control, as discussed under the control factor. However, in this proposed rulemaking, the Department is prioritizing consideration of all facts that may be relevant to a particular factor, consistent with a totality-of-the-circumstances approach and the way courts analyze the factors. While some courts have focused on exclusivity (or the lack thereof) under the control factor rather than the permanence factor,<sup>341</sup> others have considered whether workers were able to work for other employers under both the control and permanency factors.<sup>342</sup> However, the weight of circuit authority appears to consider exclusivity and ability to work for others primarily under permanence, though it is certainly not the only relevant consideration under this factor.<sup>343</sup> As such, the Department believes it is appropriate to include

considered in its NPRM for that rule to include exclusivity under the permanence factor “to be more accurate.” 85 FR 60616.

<sup>340</sup> 86 FR 1192–93.

<sup>341</sup> *See, e.g., Saleem*, 854 F.3d at 141.

<sup>342</sup> *See, e.g., 86 FR 1192* (noting the analysis in *Freund v. Hi-Tech Satellite, Inc.*, 185 F. App’x 782, 783–84 (11th Cir. 2006), where the court found that “Hi-Tech exerted very little control over Mr. Freund,” in part, because “Freund was free to perform installations for other companies” and that “Freund’s relationship with Hi-Tech was not one with a significant degree of permanence . . . [because] Freund was able to take jobs from other installation brokers.”).

<sup>343</sup> *See, e.g., Parrish*, 917 F.3d at 386–87 (noting that one of the relevant considerations under the permanency factor is whether any plaintiff worked exclusively for the potential employer); *Keller*, 781 F.3d at 808 (noting under permanency whether satellite-dish installer could work for other companies but that working for more than one employer does not necessarily result in independent contractor status); *Scantland*, 721 F.3d at 1319 (length of relationship and exclusivity was relevant insofar as workers’ schedules and inability to refuse work prohibited them from actually working for other companies); *Cornerstone Am.*, 545 F.3d at 346 (permanency factor weighed in favor of employee status because sales leaders worked exclusively for the potential employer, often for significant periods of time); *Superior Care*, 840 F.2d at 1060–61 (noting under permanency that nurses typically worked for several employers but that this did not weigh in favor of independent contractor status because it was inherent in the profession); *Lauritzen*, 835 F.2d at 1537 (“however temporary the relationship may be it is permanent and exclusive for the duration of that harvest season”); *DialAmerica*, 757 F.2d at 1384 (noting under permanency that home researchers generally did not perform services for other organizations and therefore did not “transfer their services from place to place, as do independent contractors”).

exclusivity under this factor as well as the control factor.<sup>344</sup>

Finally, the Department notes that where workers provide services under a contract that is routinely or automatically renewed, courts have determined that this indicates permanence and an indefinite working arrangement associated with employment.<sup>345</sup> The proposed regulation noting that work relationships that are indefinite in duration or continuous favor employee status is consistent with that case law.

The Department welcomes comments on all aspects of this factor.

#### Example: Degree of Permanence of the Work Relationship

A cook has prepared meals for an entertainment venue continuously for several years. The cook prepares meals as directed by the venue, depending on the size and specifics of the event. The cook only prepares food for the entertainment venue, which has regularly scheduled events each week. The relationship between the cook and the venue is characterized by a high degree of permanence and exclusivity. The permanence factor indicates employee status.

A cook has prepared specialty meals intermittently for an entertainment venue over the past 3 years for certain events. The cook markets their meal preparation services to multiple venues and private individuals and turns down

<sup>344</sup> The 2021 IC Rule also supported its decision to reject consideration of exclusivity under permanence by referring to a dictionary definition of “permanent” that does not include exclusivity. 86 FR 1193 n.39. However, a dictionary definition should not override the longstanding case law applying exclusivity to the permanence factor. Additionally, the 2021 IC Rule viewed such case law as inconsistent with the Supreme Court’s *Silk* decision. 86 FR 1192–93. However, upon further consideration, the decision does not clearly identify which factor the Court associated with the truck drivers’ ability to work for others (leading to a decision that they were independent contractors, among other reasons), nor does it clearly identify which factor the Court associated with the coal unloaders’ ability to work for others (leading to a decision that they were employees, among other reasons). *See Silk*, 331 U.S. at 717–19. Therefore, reliance on *Silk* for this proposition is not warranted.

<sup>345</sup> *See, e.g., Scantland*, 721 F.3d at 1318 (finding one-year contracts that were automatically renewed to “suggest substantial permanence of relationship”); *Pilgrim Equip.*, 527 F.2d at 1314 (finding laundry operators’ one-year contracts that were routinely renewed indicated employee status); *Acosta v. Senvoy, LLC*, No. 3:16–CV–2293–PK, 2018 WL 3722210, at \*9 (D. Or. July 31, 2018) (noting that one-year contracts that automatically renew are “evidence that a worker is an employee”); *Solis v. Velocity Exp., Inc.*, No. CV 09–864–MO, 2010 WL 3259917, at \*9 (D. Or. Aug. 12, 2010) (the fact that package delivery drivers understood their contracts to be of indefinite duration and that contracts were routinely renewed without renegotiation indicated employee status).

work for any reason, including because the cook is too busy with other meal preparation jobs. The cook has a sporadic or project-based non-exclusive relationship with the entertainment venue. These facts indicate independent contractor status.

#### 4. Nature and Degree of Control (Proposed § 795.110(b)(4))

The Department is proposing to modify 2021 IC Rule § 795.105(d)(1)(i), which considers control as a “core” factor in the economic reality test. This provision in the 2021 IC Rule assesses the employer’s and the worker’s “substantial control over key aspects of the performance of the work,” which include setting schedules, selecting projects, controlling workloads, and affecting the worker’s ability to work for others.<sup>346</sup> This 2021 IC Rule provision also states that “[r]equiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses . . . does not constitute control” for purposes of the economic reality test.<sup>347</sup>

As reflected in proposed § 795.110(b)(4), the Department continues to believe that issues related to scheduling, supervision over the performance of the work (including the ability to assign work), and the worker’s ability to work for others are relevant considerations. The Department’s proposal would also consider additional aspects of control in the workplace that have been identified in the case law or through the Department’s enforcement experience—such as control mediated by technology or control over the economic aspects of the work relationship. However, as noted above, the Department’s proposal would not elevate control as a “core” factor in the analysis.<sup>348</sup> For decades, courts and the Department have taken the view that the control factor represents one facet of the economic reality test.<sup>349</sup> As such, control should be analyzed in the same manner as every other factor, rather than take an outsized role when analyzing

whether a worker is an employee or independent contractor. As the Fifth Circuit noted in 2019, it “is impossible to assign to each of these factors a specific and invariably applied weight.”<sup>350</sup>

In addition, as described in more detail below, and after taking relevant case law into account, an employer’s compliance with legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations, for example, may in some cases indicate that the employer is exerting control, suggesting that the worker is economically dependent on the employer. What follows is an overview of the Department’s proposal regarding control as well as detailed descriptions of certain aspects of control such as scheduling, supervision, price setting, and the ability to work for others.

##### a. Overview of Control Factor

When analyzing this factor for purposes of applying the economic reality test, the control factor is one of several factors used to reach the ultimate determination of whether a worker is economically dependent on an employer or is in business for himself.<sup>351</sup> Control can be exerted directly in the workplace by an employer, such as when it sets a worker’s schedule, compels attendance, or directs or supervises the work.<sup>352</sup> However, the absence of these more

apparent forms of control does not invariably lead to the conclusion that the factor weighs in favor of independent contractor status.<sup>353</sup> Employers may also exercise control in other ways, such as by relying on technology to supervise a workforce, setting prices for services, or restricting a worker’s ability to work for others—actions that can exert control without the traditional use of direct supervision, assignment, or scheduling.

The analysis focuses on whether the employer still retains control over meaningful economic aspects of the work relationship such that the control indicates that the worker does not stand apart as their own business, not simply whether the employer lacks control over discrete working conditions (e.g., scheduling) or whether the employer failed to exercise physical control over the workplace.<sup>354</sup> For example, even though dancers had some scheduling flexibility, the Third Circuit concluded that the control factor weighed in favor of employee status because the employer, and not the workers, controlled the economic aspects of the dancers’ work, such as the price of services, the clientele to be served, and the operations of the club in which they worked.<sup>355</sup>

This analytical approach was applied by the Fifth Circuit in a case where an insurance sales firm not only “controlled the hiring, firing, assignment, and promotion of the [workers’ subordinates],” but also

<sup>350</sup> *Parrish*, 917 F.3d at 380 (internal citation omitted). The circuit courts have taken this position for decades. See also, e.g., *Scantland*, 721 F.3d at 1312 n.2 (the relative weight of each factor “depends on the facts of the case”) (citation omitted); *Selker Bros.*, 949 F.2d at 1293 (“It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . [, and] neither the presence nor the absence of any particular factor is dispositive.”).

<sup>351</sup> The control factor has its roots in the common law, where the inquiry was whether the “employer” had the “right to control the manner and means by which [work] is accomplished.” *Reid*, 490 U.S. at 751. Employers that exercise such control could be held responsible for (or be in the best position to prevent) negligent actions affecting their workers. See *Lauritzen*, 835 F.2d at 1544 (describing how common law notions of control relate to findings of vicarious liability). Yet, the scope of employment under the FLSA is broader than the common law and is not concerned with assigning responsibility for negligent acts imputed to the employer. Rather, employment under the FLSA is determined by applying an economic reality analysis, which “does not depend on the common-law understanding of employment, which was based on limiting concepts of control.” *Antenor v. D & S Farms*, 88 F.3d 925, 933 (11th Cir. 1996) (drawing this conclusion, in the context of evaluating possible joint employment, by relying on the FLSA’s broad definition of employ which uses the term “suffer or permit to work”).

<sup>352</sup> See, e.g., *Scantland*, 721 F.3d at 1314 (finding workers to be employees, in part, because they “were subject to meaningful supervision and monitoring by” their employer).

<sup>353</sup> See, e.g., *Mr. W Fireworks*, 814 F.2d at 1049 (“[T]he lack of supervision over minor regular tasks cannot be bootstrapped into an appearance of real independence.”) (citation omitted); *Antenor*, 88 F.3d at 934 (noting in FLSA joint employment case that the Act reaches even those employers who “[do] not directly supervise the activities of putative employees”) (emphasis in original). Indeed, this has been the perspective of the Department for almost six decades. See WHD Op. Ltr., FLSA–795, at 3 (Sept. 30, 1964) (determining that professional divers were employees of a diving corporation, despite the lack of control over their work, by noting “that persons may be employees within the meaning of the Act even though they are unsupervised in their work, are not required to devote any particular amount of time to their work, [and] are under no restriction not to work for competitors of the employer”).

<sup>354</sup> See, e.g., *Cornerstone Am.*, 545 F.3d at 343–44 (finding that control weighs in favor of employee status even where the employer disclaims control over “day-to-day affairs” of the workers because the employer controlled the meaningful economic aspects of the work). Other elements may also be included in this examination of control, such as those identified by the Supreme Court in *Whitaker House*. They include whether the worker could sell their products or services “on the market for whatever price they can command,” whether the worker’s compensation was dictated by the employer; and whether management could fire the worker for failure to obey its regulations. 366 U.S. at 32–33.

<sup>355</sup> *Verma*, 937 F.3d at 230.

<sup>346</sup> See 86 FR 1246–47.

<sup>347</sup> *Id.* at 1247.

<sup>348</sup> See *supra* section V.B.

<sup>349</sup> See, e.g., WHD Op. Ltr. (Aug. 13, 1954) (applying six factors, of which control was one, that are very similar to the six economic reality factors currently used by almost all courts of appeals); *Shultz v. Hinojosa*, 432 F.2d 259, 265 (5th Cir. 1970) (affirming judgment in favor of Secretary of Labor that slaughterhouse worker was an employee under the FLSA under a multifactor economic reality test of which control was one of the factors).

controlled how the workers priced the insurance products, received leads for sales, and defined the territory in which the agents could sell products.<sup>356</sup> These actions made it clear that the employer, and not the workers, retained meaningful control over the “economic aspects of the business,” suggesting that the workers were employees.<sup>357</sup>

Finally, 2021 IC Rule § 795.105(d)(1)(i) states that an employer requiring a worker to “comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms . . . does not constitute control that makes the [worker] more or less likely to be an employee.”<sup>358</sup> In the 2021 IC Rule, however, the Department acknowledged “that some courts have found requirements that workers comply with specific legal obligations or meet quality control standards to be indicative of employee status.”<sup>359</sup> Upon further consideration and a thorough review of relevant case law, the Department believes, as reflected in proposed § 795.110(b)(4), that certain instances of control should not be excluded as irrelevant to the economic reality analysis only because they are required by business needs, contractual requirements, quality control standards, or legal obligations. As the Eleventh Circuit explained in *Scantland*:

The economic reality inquiry requires us to examine the nature and degree of the alleged employer’s control, *not why* the alleged employer exercised such control. . . . If the nature of a business requires a company to exert control over workers . . . then that company must hire employees, not independent contractors.<sup>360</sup>

The Department believes that the nature and degree of the employer’s control should be fully assessed, and this assessment may, in some cases, include consideration of control that is due to an employer’s compliance with legal, safety, or quality control obligations. As with all the economic reality factors, this control should be examined in view of the ultimate inquiry: is it probative of whether the worker is in business for themselves or

economically dependent on the employer for work. For example, when an employer, rather than a worker, controls compliance with legal, safety, or other obligations, it may be evidence that the worker is not in fact in business for themselves because they are not doing the entrepreneurial tasks that suggest that they are responsible for understanding and adhering to the legal and other requirements that apply to the work or services they are performing such that they are assuming the risk of noncompliance.<sup>361</sup>

While the case law is not uniform on this issue, the Department finds cases such as *Scantland* and others—which recognize that compliance with legal obligations or quality control may be relevant evidence of control—more persuasive and consistent with the totality-of-the-circumstances, economic reality analysis than the 2021 IC Rule’s approach. For example, in *Badon v. Berry’s Reliable Resources, LLC*, a district court, in granting the worker’s summary judgment motion, rejected a home healthcare employer’s argument that a state’s plan of care for each consumer dictated the work performed by the workers.<sup>362</sup> In finding that the control factor weighed in favor of employee status, the court credited testimony that the employer had, in fact, hired, trained, supervised, and directed the work of the caregivers to ensure compliance with the state’s requirements.<sup>363</sup> After taking these facts into consideration, the court found that the control factor weighed in favor of employee status.<sup>364</sup> Similarly, in *Molina v. South Florida Express Bankserv, Inc.*, a district court rejected the employer’s argument that its monitoring of workers was at customers’ behest and therefore

was not relevant to control, explaining that “[t]he Defendant’s reasoning is circular” since “[a]ny employer’s business is, in essence, directed by the needs of its customers.”<sup>365</sup>

Among the FLSA cases cited by the 2021 IC Rule to support the provision excluding facts about compliance with specific legal, contractual, or quality control obligations from consideration—such as *Parrish, Iontchev v. AAA Cab Service, Inc.*, *Mr. W Fireworks*, and *Chao v. Mid-Atlantic Installation Services, Inc.*<sup>366</sup>—none support the conclusion drawn by the 2021 IC Rule that the requirement to comply with, for example, legal obligations is never probative of employee status. In *Parrish*, for example, the Fifth Circuit concluded that “[a]lthough requiring safety training and drug testing is an exercise of control in the most basic sense of the word,” the safety training and drug testing in this particular case was not dispositive of control “because of the nature of the employment” at an oil-drilling site.<sup>367</sup> There, the employer was responsible for providing a place of employment free from certain recognized hazards and ensuring that all people working at an oil-drilling site comply with relatively minimal safety training and drug testing as “required for safe operations,” generally.<sup>368</sup> Thus, workers were not made more economically dependent on the employer because of these safety

<sup>365</sup> 420 F. Supp. 2d 1276, 1284 n.24 (M.D. Fla. 2006); see also *Amponsah v. DirecTV, LLC*, 278 F. Supp. 3d 1352, 1360 (N.D. Ga. 2017) (applying *Scantland* and finding genuine issues of material fact regarding control despite defendant’s argument that “strict installation standards and quality metrics” were not indicative of control because such requirements “were aimed at customer satisfaction, not control of Plaintiffs”); *Crouch v. Guardian Angel Nursing, Inc.*, Civil Action No. 3:07-cv-00541, 2009 WL 3737887, at \*18–20 (M.D. Tenn. Nov. 4, 2009) (finding a state law that required licensed practical nurses to work under the supervision and direction of doctors or registered nurses was strong evidence of control by the employer under the FLSA and rejecting defendants’ argument “that because a certain amount of supervision is mandated by the state or by the home health agencies with which they contract, it . . . does not count toward the quantification of the degree of control exercised”); *Flores v. Velocity Express, LLC*, 250 F. Supp. 3d 468, 484 (N.D. Cal. 2017) (“undisputed indicia of control” included completing a Department of Transportation–required road rest; obtaining certain insurance or enrolling in employer’s insurance program and undergoing a criminal history background check); see also *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1101–02 (9th Cir. 2014) (evaluating control for the purpose of applying state wage and hour laws and rejecting the employer’s assertion that control that is “driven by a need to comply with federal regulations or [customer] requirements”).

<sup>366</sup> See 86 FR 1183.

<sup>367</sup> 917 F.3d at 382.

<sup>368</sup> *Id.*

<sup>361</sup> Case law further demonstrates that legal obligations imposed by the government can provide evidence of control. For example, in *Chao v. First National Lending Corp.*, loan officers were prohibited by state licensing requirements from working for more than one mortgage company at a time. 516 F. Supp. 2d 895, 900 (N.D. Ohio 2006), *aff’d*, 249 F. App’x 441 (6th Cir. 2007). This inability to work for others—albeit in compliance with state requirements—was determined to be further evidence that the loan officers “were economically dependent on [the employer] and, therefore, were employees and not independent contractors for purposes of the FLSA.” *Id.* The Fifth Circuit reached a similar conclusion when it rejected an insurance sales company’s argument that it “exerted little control beyond what insurance-industry regulations required.” *Hopkins*, 545 F.3d at 343. Instead, the court found that the employer exerted significant control over the economics of the insurance sales work performed by the workers, which was dispositive on this factor. *Id.*

<sup>362</sup> Civil Action Nos. 19–12317 c/w 20–584 & 21–596, 2022 WL 2111341, at \*3–4 (E.D. La. June 10, 2022).

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at \*4.

<sup>356</sup> *Cornerstone Am.*, 545 F.3d at 343–44.

<sup>357</sup> *Id.* at 343.

<sup>358</sup> 86 FR 1247.

<sup>359</sup> 86 FR 1183.

<sup>360</sup> 721 F.3d at 1316 (emphasis added); see also *Schultz v. Mistletoe Express Serv., Inc.*, 434 F.2d 1267, 1271 (10th Cir. 1970) (noting that “arguments that an independent contractor relationship is shown by . . . the need to comply with the regulations of federal and state agencies do not persuade us” before affirming the conclusion that workers were employees under the FLSA).

requirements.<sup>369</sup> Moreover, in *Iontchev*, the Ninth Circuit determined that the employer had “relatively little control over the manner in which” the work was performed in part because “its disciplinary policy primarily enforced the Airport’s rules and regulations” governing drivers; it did not say that the fact that government regulations applied to the work was not relevant at all to control.<sup>370</sup>

These cases are thus not inconsistent with the Department’s proposed regulation that compliance with safety standards, for example, may be relevant in assessing the control factor, depending on the facts of the individual case, and that a complete bar to considering such facts is inappropriate under the economic reality test. The facts and circumstances of each case must be assessed, and the manner in which the employer chooses to implement such obligations will be highly relevant to the analysis. For example, if an employer requires all individuals to wear hard hats at a construction site for safety reasons, that is less probative of control; if an employer chooses a specific time and location for weekly safety briefings and requires all workers to attend, that is more probative of control. Similarly, if an employer requires workers to provide proof of insurance required by state law, that is less probative of control; if an employer mandates what insurance carrier workers must use, that is more probative of control.

Control exerted by the employer to achieve these ends therefore may be relevant to the underlying analysis of whether the worker is economically dependent on the employer, particularly where the employer dictates and enforces the manner and circumstances of compliance. Of course, such control may not be determinative of the worker’s employee or independent contractor status (given the other factors included in the economic reality test) or probative of whether the control factor itself weighs in favor of employee status. This is merely one aspect of a multifactor test. Even if compliance with specific legal obligations or safety requirements is indicative of control in a specific case, this does not compel a particular conclusion as to that worker’s

status under the Act.<sup>371</sup> Thus, the Department’s proposal would not preclude a finding that a worker is an independent contractor where an employer obligates workers, for example, to comply with safety standards, after also considering other relevant factors in the economic reality analysis.

With these general principles in mind, the next sections address the Department’s proposals regarding several aspects of control to be considered in determining whether the nature and degree of control indicates that the worker is an employee or an independent contractor. This discussion is intended to be an aid in assessing common aspects of control—including scheduling, supervision, price setting, and ability to work for others—but should not be considered an exhaustive list, given the various ways in which an employer may control a worker or the economic aspects of the work relationship.

#### b. Scheduling

As noted above, an employer’s direct control over a worker’s schedule can be evidence of employee status. For example, the Fifth Circuit, in *Cromwell*, concluded that workers were employees even though the workers “controlled the details of how they performed their work [and] were not closely supervised” because, in part, the employer had “complete control over [workers’] schedule[s].”<sup>372</sup> Yet the absence of direct scheduling control is not necessarily strong evidence that the employer lacks control for purposes of the economic reality test, particularly where other evidence demonstrates control.<sup>373</sup>

Independent contractor arrangements can include the ability to work at any time the contractor decides it is appropriate to begin and end work. Some courts have found such scheduling control by the worker to be indicative of an independent contractor relationship.<sup>374</sup> For example, the Eighth

Circuit affirmed a jury verdict finding a process server to be an independent contractor, in part, because the worker “was not required to report for work[,] . . . did not punch a time clock,” and did not have a set schedule, report a daily schedule to the employer, or face discipline for not working.<sup>375</sup> Section 795.105(d)(1)(i) of the 2021 IC Rule suggests as much, noting that the ability to set their own schedule is evidence that weighs towards a worker being an independent contractor.<sup>376</sup>

However, after further consideration and review of the case law, the Department considers this framing to be too narrow because it does not take into account actions the employer may take that would limit the significance of the worker setting their own schedule. In fact, courts have concluded that the ability to set one’s own schedule provides only minimal evidence that the worker is an independent contractor when considered in relation to other forms of control by the employer in the workplace.<sup>377</sup> If the ability to pick one’s shift is offset by the limited hours provided by the employer,<sup>378</sup> or the employer purports to allow a worker an accommodating schedule, but arranges the work in a way that makes finding other clients impossible,<sup>379</sup> then meaningful scheduling flexibility may not exist. Moreover, employers may also exert so much control over the amount or pace of the work as to negate any meaningful scheduling flexibility.<sup>380</sup>

favor of independent contractor status”); *Express Sixty-Minutes*, 161 F.3d at 303 (determining that the employer “had minimal control” over the delivery drivers in part because the drivers “set their own hours and days of work” which was evidence that the worker was an independent contractor).

<sup>375</sup> *Karlson*, 860 F.3d at 1095–96.

<sup>376</sup> 86 FR 1246–47.

<sup>377</sup> See, e.g., *Verma*, 937 F.3d at 230 (finding the ability to set hours, select shifts, stay beyond a shift, and accept or reject work to be, in truth, “narrow choices” when evaluated against other types of control exerted by the employer); *DialAmerica*, 757 F.2d at 1384–86 (finding telephone survey workers who set their own hours and were free from supervision to be employees); *Sureway*, 656 F.2d at 1371 (“circumstances of the whole activity” show that laundry company “exercises control over the meaningful aspects of the cleaning [work]” despite the fact that workers could set their own hours).

<sup>378</sup> *Doty v. Elias*, 733 F.2d 720, 723 (10th Cir. 1984) (“Since plaintiffs could wait tables only during the restaurant’s business hours, [the employer] essentially established plaintiffs’ work schedules.”).

<sup>379</sup> See, e.g., *Keller*, 781 F.3d at 814 (“[A] reasonable jury could find that the way that [the employer] scheduled [the worker’s] installation appointments made it impossible for [the worker] to provide installation services for other companies.”).

<sup>380</sup> See, e.g., *Flint Eng’g*, 137 F.3d at 1441 (“The record indicates rig welders cannot perform their work on their own schedule; rather, pipeline work has assembly line qualities in that it requires orderly and sequential coordination of various crafts and workers to construct a pipeline.”).

<sup>371</sup> Additionally, even in cases in which a court did not consider control exerted over workers to comply with safety obligations as indicative of control, the court nevertheless concluded that such workers were employees under the FLSA. See, e.g., *Rick’s Cabaret*, 967 F. Supp. 2d at 916, 922.

<sup>372</sup> 348 F. App’x 57, 61 (5th Cir. 2009); see also *Mr. W Fireworks*, 814 F.2d at 1048 (noting that compelled work schedules were evidence of control and thus employee status).

<sup>373</sup> See, e.g., *Pilgrim Equip.*, 527 F.2d at 1312 (“In the total context of the relationship neither the [worker’s] right to hire employees nor the right to set hours indicates such lack of control by [the employer] as would show these operators are independent from it.”) (emphasis added).

<sup>374</sup> See, e.g., *Franze*, 826 F. App’x at 77 (emphasizing that schedule flexibility “weigh[s] in

<sup>369</sup> See *id.* at 376.

<sup>370</sup> See 685 F. App’x at 550. Additionally, in *Mr. W Fireworks*, the Fifth Circuit found that a defendant company’s requirement that plaintiffs work after ordinary business hours favored plaintiffs’ employee status notwithstanding the company’s attempt to link plaintiffs’ work schedules to state regulatory requirements (finding, however, that state regulations did not require such after-hours work). See 814 F.2d at 1048.

As the Tenth Circuit observed in *Dole v. Snell*, “flexibility in work schedules is common to many businesses and is not significant in and of itself.”<sup>381</sup> Thus, scheduling flexibility should not supplant a full evaluation of the control factor, with the ultimate question of economic dependence guiding the analysis. For example, the Third Circuit reversed summary judgment in favor of the employer and found disputed issues of material fact about drivers’ classification even where it was undisputed that drivers were free to choose their work schedules.<sup>382</sup> The Fifth Circuit has also found that the employer had “significant control” indicating employee status over dancers even though they had “input . . . as to the days that they wish to work.”<sup>383</sup>

In fact, circuit courts have often evaluated scheduling flexibility relative to other forms of control by the employer; where the employer has more control in other ways, scheduling flexibility becomes less relevant. In *Verma*, the Third Circuit found the ability to set hours, select shifts, stay beyond a shift, and accept or reject work to be “narrow choices” when evaluated against other types of control by the employer, such as setting the price for services.<sup>384</sup> And multiple district courts have concluded that scheduling flexibility—including picking when to work or having the freedom to decline work—was not necessarily indicative of the overall control by an employer nor dispositive of a worker’s independent contractor status.<sup>385</sup> Conversely, as the Second Circuit noted, where workers have greater scheduling flexibility and can use that flexibility to further their independent business, then that

flexibility may be probative of their independent contractor status.<sup>386</sup>

Flexibility may also be an inherent component of a business model, which allows some workers the freedom to use time between tasks or jobs in any fashion, providing some evidence of the employer’s lack of control. But flexible work arrangements that allow workers to, among other things, work for others, are not exclusive to independent contractors<sup>387</sup> and do not preclude a finding that an employer has sufficient control over a worker in other ways such that this factor weighs in favor of employee status.<sup>388</sup> Moreover, the power to decline work, and thus maintain a flexible schedule, is not alone persuasive evidence of independent contractor status when the employer can discipline a worker for doing so.<sup>389</sup>

In sum, case law on this issue demonstrates that scheduling control must be assessed in view of the total amount of control exerted by an

<sup>386</sup> See *Saleem*, 854 F.3d at 146 (finding drivers that were able to set schedules that “were entirely of their making” were properly found to be independent contractors where, among other factors, drivers could select routes, turn down jobs without penalty, and exercise business-like initiative); see also *Alpha & Omega*, 39 F.4th at 1083–84 (finding genuine disputes of fact under control regarding whether drivers could set their own hours and whether drivers were allowed to decline trips without penalization).

<sup>387</sup> Employers continue to offer even more flexibility in work arrangements while retaining workers as employees. See, e.g., *Andr e Dua et al., Americans are Embracing Flexible Work—and They Want More of It*, McKinsey & Company (June 23, 2022), <https://www.mckinsey.com/industries/real-estate/our-insights/americans-are-embracing-flexible-work-and-they-want-more-of-it> (finding, for example, that 58 percent of surveyed workers have the option to work remotely, either on a full-time or part-time basis; a flexibility that spans industries and occupations); Alicia Adamczyk, *Say Goodbye To 9-To-5: More and More, Corporate America is Letting People Work Whenever They Want*, *Fortune* (March 21, 2022, 10:36 a.m.), <https://fortune.com/2022/03/21/9-to-5-dead-flexible-schedules-more-popular/> (noting the shift in corporate culture that is allowing more workers to remain employees while also obtaining flexible working schedules).

<sup>388</sup> For example, in *Collinge*, the employer contended that the on-demand drivers were properly independent contractors because of the flexible nature of their work despite exercising significant control including training the drivers, disciplining them for violations of procedure, dispatching pick-ups, and setting schedules. 2015 WL 1299369, at \*2–4. Importantly, the fact that on-demand “[d]rivers are free to wait at home for their first delivery of the day, and . . . are free to ‘kill time’ on a computer or run personal errands” in between jobs was “unavailing because they merely show that [the employer] is unable to control its drivers when they are not working, an irrelevant point.” *Id.* at \*4 (footnotes omitted).

<sup>389</sup> *Off Duty Police*, 915 F.3d at 1060 (“Although workers could accept or reject assignments, multiple workers testified that [the employer] would discipline them if they declined a job,” which was evidence of the employer’s ultimate control).

employer. This is consistent with the economic realities, totality-of-the-circumstances approach. Thus, scheduling flexibility is not necessarily indicative of independent contractor status where other aspects of control are present, such as where an employer asserts that workers can work when and where they want but retains authority to discipline workers for declining work or imposes other methods of control that limit flexibility.

### c. Supervision

Like the presence of a pre-defined work schedule, an employer’s close supervision of a worker on the job may be evidence of employee status.<sup>390</sup> Conversely, the ability to work independently without close supervision may be evidence that a worker is an independent contractor.<sup>391</sup> However, traditional forms of in-person, continuous supervision are not required for a court to determine that this factor weighs in favor of employee status.<sup>392</sup> The form supervision takes can vary by type and method, and this should be part of any consideration of supervision under the control factor.

While it may be indicative of independent contractor status if a worker is free to work without close supervision, the lack of supervision is not alone indicative of independent contractor status.<sup>393</sup> For instance, the nature of an employer’s business or the nature of the work may make direct supervision unnecessary. A lack of supervision in those circumstances, without further inquiry, does not compel a finding that the control factor

<sup>390</sup> See, e.g., *Scantland*, 721 F.3d at 1314 (finding “meaningful supervision and monitoring” in part because the employer required cable installers to log in and out of a service on their cell phones to record when they arrived on a job and when they completed a job).

<sup>391</sup> See, e.g., *Chao v. Mid-Atlantic Installation Servs., Inc.*, 16 F. App’x 104, 106–08 (4th Cir. 2001) (agreeing with the district court’s analysis that the ability to complete jobs in any order, conduct personal affairs, and work independently is evidence that leans toward identifying a worker as an independent contractor).

<sup>392</sup> See, e.g., *Superior Care*, 840 F.2d at 1060 (“An employer does not need to look over his workers’ shoulders every day in order to exercise control.”); *Driscoll*, 603 F.2d at 756 (farmworkers could be employees of a strawberry farming company even where the employer exercised little direct supervision over them); *Twyeffort*, 158 F.2d at 947 (rejecting an employer’s contentions that its tailors are independent contractors because they are “free from supervision, are at liberty to work or not as they choose, and may work for other employers if they wish”).

<sup>393</sup> The legislative history of the FLSA also supports this point directly, since the definition of “employ” was explicitly intended to cover as employment relationships those relationships where the employer turned a blind eye to labor performed for its benefit. *Antenor*, 88 F.3d at 934; see *supra* section V.C.4.a.

<sup>381</sup> 875 F.2d at 806; see also *Doty*, 733 F.2d at 723 (“A relatively flexible work schedule alone, however, does not make an individual an independent contractor rather than an employee.”); *Lilley v. BTM Corp.*, 958 F.2d 746, 750 (6th Cir. 1992) (noting that even though a worker could “set [their] own hours and vacation schedule, such flexibility is not sufficient to negate control”); *Walling v. Twyeffort, Inc.*, 158 F.2d 944, 947 (2d Cir. 1946) (holding that workers who “are at liberty to work or not as they choose” were employees under FLSA).

<sup>382</sup> *Razak*, 951 F.3d at 146.

<sup>383</sup> *Circle C. Invs.*, 998 F.2d at 327.

<sup>384</sup> 937 F.3d at 230; see also *Paragon*, 884 F.3d at 1235–38 (finding that even though a worker could set his own schedule, he was an employee, in part, because his flat rate of pay did not allow him profit based on his performance).

<sup>385</sup> See, e.g., *Hill v. Cobb*, No. 3:13–CV–045–SA–SAA, 2014 WL 3810226, at \*4–8 (N.D. Miss. Aug. 1, 2014) (holding that workers were employees even though they had no specific hours or schedule and could “come and go as [they] pleased”); *Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07–0069, 2008 WL 2944661, at \*12–17 (M.D. Tenn. July 31, 2008) (holding that nurses were employees, even though they could accept or reject shifts).



weighs in favor of independent contractor status. For example, the Sixth Circuit found that security officers were employees although they were “rarely if ever supervised” on the job, noting that “the actual exercise of control requires only such supervision as the nature of the work requires.”<sup>394</sup> More directly, “the level of supervision necessary in a given case is in part a function of the skills required to complete the work at issue,” and the officers in that case “had far more experience and training than necessary to perform the work assigned.”<sup>395</sup> Moreover, an employer may develop training and hiring systems that make direct supervision unnecessary. This was the case in *Keller v. Miri Microsystems LLC*, where an employer relied on pre-hire certification programs and installation instructions when hiring their satellite dish installers.<sup>396</sup> The employer argued that it had little day-to-day control over the workers and did not supervise the performance of their work. Yet the court noted that a factfinder could “find that [the employer] controlled [the installer’s] job performance through its initial training and hiring practices” in a way that would suggest that the workers were employees.<sup>397</sup> Conversely, the Eleventh Circuit affirmed a district court’s conclusion that an insurance claims investigator was properly classified as an independent contractor, in part, because the investigator worked largely without supervision when setting up appointments, deciding where to work, and how and when to complete his assignments.<sup>398</sup>

In addition, the right of the employer to supervise at its discretion is evidence of control, even if the employer rarely

exerts supervision.<sup>399</sup> The Second Circuit, for example, affirmed a district court’s rejection of a nursing referral company’s argument that they did not supervise the nursing staff directly where the employer, in the court’s judgment, “unequivocally expressed *the right* to supervise the nurses’ work,” even though the supervision “occurred only once or twice a month.”<sup>400</sup>

Finally, the Department notes that supervision can also come in many different forms, which may not be immediately apparent. For example, supervision can be maintained remotely through technology instead of, or in addition to, being performed in person. For instance, employers may implement monitoring systems that can track a worker’s location and productivity, and even generate automated reminders to check in with supervisors.<sup>401</sup> Additionally, an employer can remotely supervise its workforce, for instance, by using electronic systems to verify attendance, manage tasks, or assess performance.<sup>402</sup>

<sup>399</sup> See *infra* section V.D. (discussing this proposed rule’s approach to the primacy of actual practice); see also *Herman v. RSR Security Servs.*, 172 F.3d 132, 139 (2d Cir. 1999) (noting, in a joint employment case, that supervisory control “may be restricted, or exercised only occasionally, without removing the employment relationship from the protections of the FLSA”).

<sup>400</sup> *Superior Care*, 840 F.2d at 1060 (emphasis added); see also *Off Duty Police*, 915 F.3d at 1060 (describing the control analysis as an inquiry into “whether the company retains the right to dictate the manner of the worker’s performance”) (emphasis added and internal quotations omitted).

<sup>401</sup> See, e.g., *Ruiz*, 754 F.3d at 1102–03 (finding in a state wage-and-hour case that direct monitoring techniques used by an employer to monitor its furniture delivery drivers were a form of supervision that made it more likely that the worker was an employee; as the court noted, the employer supervised the drivers by “conducting ‘follow-alongs,’ requiring that drivers call their . . . supervisor after every two or three stops; monitoring the progress of each driver on the ‘route monitoring screen’; and contacting drivers if . . . [they] were running late or off course”—all of which supported the conclusion that the workers were employees under state law). For a general discussion of trends regarding remote supervision accomplished via technological means, see Matthew Finnegan, *Rise in Employee Monitoring Prompts Calls for New Rules to Protect Workers*, Computerworld (Nov. 30, 2021, 3:01 a.m.), <https://www.computerworld.com/article/3642712/rise-in-employee-monitoring-prompts-calls-for-new-rules-to-protect-workers.html>; and Rakeen Mabud, *When the Real Threat Is Worker Surveillance—Not The Robot Apocalypse*, Forbes (Jan. 22, 2019, 9:28 a.m.), <https://www.forbes.com/sites/rakeenmabud/2019/01/22/when-the-real-threat-is-worker-surveillance-not-the-robot-apocalypse/?sh=11fdfe046a2f>.

<sup>402</sup> The Department’s enforcement experience in this area is informative. An employer’s use of electronic visitor verification (“EVV”) systems can be evidence of an employment relationship, especially in those instances where the employer uses the systems to set schedules, discipline staff, or run payroll systems, for example. See *Domestic Service Final Rule Frequently Asked Questions (FAQs)*, U.S. Department of Labor (May 24, 2022,

Simply put, consistent with a totality-of-the-circumstances analysis, the ways in which supervision can be accomplished without traditional in-person techniques requires thorough consideration. As the Fifth Circuit recently reiterated, the “‘lack of supervision [of the individual] over minor regular tasks cannot be bootstrapped into an appearance of real independence.’”<sup>403</sup> Control may be exercised through nontraditional means such as automated systems that monitor performance, but it can be found to be control nonetheless. Employers may also eliminate the need for close supervision because the structure of the job or the fact that little skill or discretion is envisioned or allowed. Thus, the lack of apparent in-person supervision (or even the lack of any in-person supervision) is not necessarily indicative of independent contractor status and additional consideration must be given to the ways in which an employer can implement supervision over a worker.

#### d. Setting a Price or Rate for Goods or Services

The ability to set a price or rate for the goods or services provided by the worker, or influence the price or rate, is relevant when examining the control factor under the economic realities analysis. This fact relates directly to whether the worker is economically dependent on the employer for work and helps answer the question whether the worker is in business for themselves.

There is substantial case law supporting the relevance of price setting to the economic realities analysis under the FLSA, and workers in business for themselves are generally able to set (or at least negotiate) their own prices for services rendered. As the Supreme Court explained in *Whitaker House*, in concluding that workers for a cooperative were employees under the Act, such workers “are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates.”<sup>404</sup> Circuit courts have similarly made clear that the employer’s setting a price for goods or services provided by the worker is a form of

10:30 a.m.), <https://www.dol.gov/agencies/whd/direct-care/faq#g11> (discussing EVV systems at question #10 in relation to an FLSA joint employment analysis).

<sup>403</sup> *Parrish*, 917 F.3d at 381 (quoting *Pilgrim Equip.*, 527 F.2d at 1312) (alteration in original).

<sup>404</sup> 366 U.S. at 32.

<sup>394</sup> *Off Duty Police*, 915 F.3d at 1061–62 (citation omitted). This dynamic is also present in cases where the work can be performed away from a single work site and without supervision. This was the precise situation faced by the Third Circuit in *DialAmerica*. There, the fact that the workers could control the hours during which they worked and that they were subject to little direct supervision was unsurprising given that such facts are typical of homeworkers and thus largely insignificant in determining their status. 757 F.2d at 1383–84; see also *McComb v. Homeworkers’ Handicraft Coop.*, 176 F.2d 633, 636 (4th Cir. 1949) (“It is true that there is no supervision of [homeworkers’] work; but it is so simple that it requires no supervision.”).

<sup>395</sup> *Off Duty Police*, 915 F.3d at 1061–62; see also *Antenor* 88 F.3d at 933 n.10 (explaining in an FLSA joint employment case that “courts have found economic dependence under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employees”); *Superior Care*, 840 F.2d at 1060 (“An employer does not need to look over his workers’ shoulders every day in order to exercise control.”).

<sup>396</sup> 781 F.3d at 814.

<sup>397</sup> *Id.*

<sup>398</sup> *Nieman*, 775 F. App’x at 624–25.

control indicative of an employment relationship. For example, in *Martin v. Selker Bros.*, the court noted that, among other things, the fact that the employer set the price of cash sales of gasoline reflected the employer's "pervasive control" over the workers.<sup>405</sup> In *Off Duty Police*, the Sixth Circuit concluded that certain security guards were employees, in part, because "[the employer] set the rate at which the workers were paid."<sup>406</sup> The Fourth Circuit in *McFeeley*, affirmed that a nightclub owner was exercising significant control because, among other things, they set the fees for private dances.<sup>407</sup> And in *Verma*, the court identified, among other things, the employer's setting the price and duration of private dances as indicative of "overwhelming control" over the performance of the work.<sup>408</sup> Consistently, when a worker negotiates or sets prices, those facts weigh in favor of independent contractor status. For example, in *Eberline v. Media Net, LLC*, the court found that a jury had sufficient evidence to conclude that a worker exerted independent control over meaningful aspects of his business in part due to "testimony that installers could negotiate prices for custom work directly with the customer and keep that money without consequence."<sup>409</sup> The price of goods and services may sometimes be included in contracts between a business and an independent

contractor.<sup>410</sup> Such a contract, however, does not automatically alleviate the need for a full analysis of this factor in order to consider whether and if the employer has control over the economic realities of the job; for example, whether the worker had the opportunity to negotiate and alter the terms of the contract. As with the other economic reality factors, the particular facts and circumstances of each case must be examined and considered in the context of the totality of the circumstances. Accordingly, setting a price or rate for goods provided or services rendered is a form of control that must be carefully considered when undertaking an economic realities analysis. It is evidence of employee status when an entity other than the worker sets a price or rate for the goods or services offered by the worker, or where the worker simply accepts a predetermined price or rate without meaningfully being able to negotiate it.<sup>411</sup>

#### e. Ability To Work for Others

Another aspect of the control factor is the ability to work for others, which is reflected in 2021 IC Rule § 795.105(d)(1)(i). This provision states that the control factor weighs in favor of independent contractor status when the worker, as opposed to the employer, exercises substantial control, such as "through the ability to work for others, which might include the potential employer's competitors." The provision also states that the control factor weighs in favor of employee status where the employer, as opposed to the worker, exercises substantial control, such as "by directly or indirectly requiring the individual to work exclusively for the potential employer."

The Department continues to believe that where a worker has an exclusive work relationship with one employer and does not have the ability to work for others, this indicates employee status. Where the employer exercises control over a worker's ability to work for others—either by directly prohibiting other work, for example, through a contractual provision,<sup>412</sup> or indirectly

by, for example, making demands on workers' time such that they are not able to work for other employers<sup>413</sup>—this is indicative of the type of control over economic aspects of the work associated with an employment relationship. For example, in *Scantland*, the Eleventh Circuit determined that even if the workers were not prohibited from working for others, the workers essentially had an exclusive work relationship with the employer because they were required to work five to seven days a week and could not decline work.<sup>414</sup> Thus, the employer controlled whether they could work for others, which suggested that they were economically dependent on the employer.<sup>415</sup>

The Department also recognizes that some courts find that less control is exercised by an employer where the worker can work for others, particularly competitors, and that this is indicative of an independent contractor relationship.<sup>416</sup> For example, in *Saleem*,

control that indicated employee status); *Off Duty Police*, 915 F.3d at 1060–61 (non-compete clause preventing workers from working for employer's customers for two years after leaving employment was among evidence supporting finding that control factor indicated employee status); *Express Sixty-Minutes*, 161 F.3d at 303 ("Independent Contractor Agreement" did not contain a "covenant-not-to-compete" and drivers could work for other courier delivery providers, which indicated independent contractor status); see also WHD Op. Ltr., 2000 WL 34444342, at \*1, 4 (Dec. 7, 2000) (workers were required to sign an agreement that prohibited them from working for other companies while driving for the employer, which suggested employee status).

<sup>413</sup> See, e.g., *Keller*, 781 F.3d at 813–14 (although worker was not prohibited from working for other companies, "a reasonable jury could find that the way that [the employer] scheduled [the worker's] installation appointments made it impossible for [the worker] to provide installation services for other companies"); *Scantland*, 721 F.3d at 1313–15 (finding even if workers were not prohibited from working for other installation contractors their long hours and inability to turn down work suggested that the employer controlled whether they could work for others, which was in part why the control factor favored employee status); *Cromwell v. Driftwood Elec. Contractors, Inc.*, 348 F. App'x 57, 61 (5th Cir. 2009) ("Although it does not appear that [the workers] were actually prohibited from taking other jobs while working for [the employers], as a practical matter the work schedule established by [the employers] precluded significant extra work."); *Flint Eng'g*, 137 F.3d at 1441–42 (finding the hours the company required of the workers, coupled with driving time between home and remote work sites every day, made it "practically impossible for them to offer services to other employers").

<sup>414</sup> 721 F.3d at 1314–15.

<sup>415</sup> *Id.* at 1315.

<sup>416</sup> See, e.g., *Razak*, 951 F.3d at 145–46 (discussing disputed facts regarding the control factor, including whether drivers could drive for other services); *Paragon*, 884 F.3d at 1235 (finding control factor favored independent contractor status in part because worker could and did work for other employers); *Saleem*, 854 F.3d at 141–43 (drivers' ability to work for business rivals and transport

Continued

<sup>405</sup> 949 F.2d at 1294.

<sup>406</sup> 915 F.3d at 1060.

<sup>407</sup> 825 F.3d at 241–42.

<sup>408</sup> 937 F.3d at 230. Similarly, the Second Circuit in *Agerbrink v. Model Service, LLC*, 787 F. App'x 22, 25 (2d Cir. 2019), determined that there were material facts in dispute regarding the worker's "ability to negotiate her pay rate," which related to the degree of control exerted by the employer. The court also rejected the employer's contention that the worker had control over her pay rate simply because she could either work for the amount offered or not work for that amount, stating that this "says nothing of the power to negotiate a rate of pay." *Id.* at 26. See also *Cornerstone Am.*, 545 F.3d at 343–44 (finding employment where employer controlled "meaningful" aspects of the work, including pricing); *Karnes v. Happy Trails RV Park, LLC*, 361 F. Supp. 3d 921, 929 (W.D. Mo. 2019) (finding park managers to be employees in part because the park owners "set all the prices"); *Hurst v. Youngelson*, 354 F. Supp. 3d 1362, 1370 (N.D. Ga. 2019) (finding relevant to the control analysis that the plaintiff was not free to set the prices she charged customers and had no ability to waive or alter cover charges for her customers).

<sup>409</sup> 636 F. App'x 225, 227 (5th Cir. 2016); see also *Nelson v. Texas Sugars, Inc.*, 838 F. App'x 39, 42 (5th Cir. 2020) (concluding that because the dancers set their own schedule, worked for other clubs, chose their costume and routine, decided where to perform (onstage or offstage), kept all the money that they earned, and even chose how much to charge customers for dances, a reasonable jury could conclude that the Club did not exercise significant control over them") (emphasis added).

<sup>410</sup> *McFeeley*, 825 F.3d at 242–43 (observing that a worker doesn't "automatically become[] an employee covered by the FLSA the moment a company exercises any control over him. After all, a company that engages an independent contractor seeks to exert some control, whether expressed orally or in writing, over the performance of the contractor's duties . . .").

<sup>411</sup> See, e.g., *Scantland*, 721 F.3d at 1315 (reversing summary judgment for the employer based in part on evidence that the workers "could not bid for jobs or negotiate the prices for jobs").

<sup>412</sup> See *Parrish*, 917 F.3d at 382 (noting that the non-disclosure agreement did not require exclusive employment, and was therefore not an element of

the Second Circuit determined that black car drivers' ability to work for business rivals and transport personal clients showed less control by and economic dependence on the employer.<sup>417</sup> The Second Circuit distinguished the black car drivers' ability to shift their business operations from one entity to another in order to maximize their profits through the exercise of "initiative, judgment, or foresight" from the nurses in *Superior Care* who were dependent on the employer for referrals to job assignments with multiple health care entities.<sup>418</sup> The Second Circuit also noted that the black car drivers were able to seek out multiple sources of income by building their own long-term business relationships, creating business cards, and advertising their services.<sup>419</sup>

Consistent with the case law, the Department is proposing to address the ability to work for others in the control factor. The proposed regulation explains that where an employer either explicitly limits a worker's ability to work for others or places demands on a worker's time that effectively preclude them from working for others, these facts are relevant to the employer's control over the worker. The proposed regulation also states that more indicia of employer control favors employee status and more indicia of worker control favors independent contractor status. However, the regulation does not state that the ability to work for others is a form of control exercised by the worker. The Department is concerned that this framing, as reflected in the 2021 IC Rule, fails to distinguish between work relationships where a worker has multiple jobs in which they are dependent on each employer and do not exercise the control associated with being in business for oneself, and relationships where the worker has sought out multiple clients in furtherance of their business. For example, if one worker holds multiple lower-paying jobs for which they are dependent on each employer for work in order to earn a living, and a different worker services multiple clients due to their business acumen and entrepreneurial skills, there are qualitative and legally significant

personal clients showed less control by and economic dependence on the employer); *Express Sixty-Minutes*, 161 F.3d at 303 (control factor "point[ed] toward independent contractor status" in part because of drivers' ability to work for other courier delivery providers).

<sup>417</sup> 854 F.3d at 141–43.

<sup>418</sup> *Id.* at 143–44 (citing *Superior Care*, 840 F.2d at 1060 and *Keller*, 781 F.3d at 809) (internal quotation marks omitted).

<sup>419</sup> *Id.* at 143.

differences in how these two scenarios should be evaluated under the economic reality test. Thus, the mere fact that an employer allows workers to work for others does not transform an employee into an independent contractor. As the Fifth Circuit stated, "[the] purposes [of the FLSA] are not defeated merely because essentially fungible piece workers work from time to time for neighboring competitors."<sup>420</sup>

Ultimately, "the question [a] court must resolve is whether a [worker's] freedom to work when she wants and for whom she wants reflects economic independence, or whether those freedoms merely mask the economic reality of dependence."<sup>421</sup> For example, in *McLaughlin v. Seafood, Inc.*, the Fifth Circuit examined whether piece-rate workers who peeled and picked crabmeat and crawfish for a seafood processor, and who were allowed "to come and go as they please . . . and even to work for competitors on a regular basis" were, as a matter of economic reality, dependent on their employers and therefore employees under the Act.<sup>422</sup> The court determined that the workers' ability to work for others was not dispositive, and that "[l]aborers who work for two different employers on alternate days are no less economically dependent on their employers than laborers who work for a single employer" because "that freedom is hardly the same as true economic independence."<sup>423</sup>

Finally, the Department notes that courts frequently consider the exclusivity of the work relationship and workers' ability to work for others under the permanence factor as well, as discussed above in section V.C.3. The 2021 IC Rule elected to consider exclusivity and ability to work for others only under the control factor.<sup>424</sup> Upon further consideration, however, the Department is proposing to retain consideration of these issues under the control factor as well as considering exclusivity under the permanency factor. The Department does not believe that this leads to confusion, however, because courts often analyze workers' ability to work for others under both the control and permanence factors, demonstrating that these facts are relevant to both factors and aid factfinders' analyses when determining

<sup>420</sup> *McLaughlin v. Seafood, Inc.*, 867 F.2d 875, 877 (5th Cir. 1989) (per curiam).

<sup>421</sup> *Reich v. Priba Corp.*, 890 F. Supp. 586, 592 (N.D. Tex. 1995) (citing *Mednick*, 508 F.2d at 300, 301–02).

<sup>422</sup> 861 F.2d 450, 451–53 (5th Cir. 1988), modified on reh'g, 867 F.2d 875 (5th Cir. 1989).

<sup>423</sup> *Seafood Inc.*, 867 F.2d at 877.

<sup>424</sup> 86 FR 1192–93.

whether the worker is economically dependent on the employer or operating as an independent business as part of the overall economic realities inquiry. Specifically, the case law reflects and the Department believes that exclusivity can be considered as it relates to the degree of control exercised by the employer—such as what an employer's actions allow a worker to do vis-à-vis other employers—and that it speaks to the permanency of the work relationship. While permanency is often associated with an exclusive work relationship, it may or may not be due to the employer's control.<sup>425</sup>

The Department welcomes comments on all aspects of this factor.

#### Example: Nature and Degree of Control

A registered nurse provides nursing care for Alpha House, a nursing home. The nursing home sets the work schedule with input from staff regarding their preferences and determines where in the nursing home each nurse will work. Alpha House's internal policies prohibit nurses from working for other nursing homes while employed with Alpha House in order to protect its residents. In addition, the nursing staff are supervised by regular check-ins with managers, but nurses generally perform their work without direct supervision. While nurses at Alpha House work without close supervision and can express preferences for their schedule, Alpha House maintains control over when and where a nurse can work and whether a nurse can work for another nursing home. These facts related to the control factor indicate employee status.

Another registered nurse provides specialty movement therapy to residents at Beta House. The nurse maintains a website and was contacted by Beta House to assist its residents. The nurse provides the movement therapy for residents on a schedule agreed upon between the nurse and the resident, without direction or supervision from Beta House, and sets the price for services on the website. In addition, the nurse simultaneously provides therapy sessions to residents at Beta House as well as other nursing homes in the community. The facts related to the control factor—that the nurse markets their specialized services to obtain work for multiple clients, is not supervised by

<sup>425</sup> The Department noted in the 2021 IC Rule that it "disagree[d] with the interpretation suggested by various business commenters that only worker practices which are affirmatively coerced by a potential employer may indicate employee status." *Id.* at 1205. As noted, "[s]uch a reading conflicts with the definition of 'employ' in section 3(g) of the Act, which makes clear that the FLSA was intended to cover employers who passively 'suffer or permit' work from individuals." *Id.*

Beta House, sets their own prices, and has the flexibility to select a work schedule—indicate independent contractor status.

##### 5. Extent to Which the Work Performed is an Integral Part of the Employer's Business (Proposed § 795.110(b)(5))

Section 795.105(d)(2)(iii) of the 2021 IC Rule addresses whether the worker's work "is part of an integrated unit of production" of the employer's business.<sup>426</sup> The 2021 IC Rule explained that "the relevant facts are the integration of the worker into the potential employer's production processes" because "[w]hat matters is the extent of such integration rather than the importance or centrality of the functions performed" by the worker.<sup>427</sup> Thus, § 795.105(d)(2)(iii) expressly rejects as irrelevant to this factor whether the work is important or central to the employer's business, and § 795.115(b)(6)(ii) similarly advises in an illustrative example involving a freelance journalist that "[i]t is not relevant . . . that the writing of articles is an important part of producing newspapers."<sup>428</sup>

In proposed § 795.110(b)(5), the Department returns to the framing of this factor as whether the worker's work is an "integral part" of the employer's business. The Department believes that this return to considering whether the work is critical, necessary, or central to the employer's business better reflects the economic reality case law and is more consistent with the totality-of-the-circumstances approach to determining whether a worker is an employee or an independent contractor.<sup>429</sup> For decades, courts have repeatedly found a worker's performance of work that is integral to the employer's business to be an indicator of employee status.<sup>430</sup> This judicial treatment reflects the understanding that a worker who performs work that is integral to an employer's business is more likely to be employed by the business, whereas a worker who performs work that is more peripheral to the employer's business is

more likely to be independent from the employer.<sup>431</sup>

The 2021 IC Rule suggested that, in the modern economy, this assumption "may not always be valid," because lower transaction costs make it easier for companies to contract for products and services.<sup>432</sup> Yet, a firm's economic decision to contract for more essential functions is not synonymous with their workers' proper classification as employees or independent contractors. Practices that lead to efficiency or cost savings for the employer do not diminish the role of a factor in the economic reality test. Of course, it is not always true that workers whose work is integral are employees.<sup>433</sup> The integral factor is just one part of the analysis. However, courts continue to find the factor useful for evaluating economic dependence or independence because of the insight it provides into whether a worker is in business for themselves or is a part of the employer's business.<sup>434</sup>

Most courts adopt a common-sense approach to whether the work or service performed by the worker is an integral part of the employer's business. For

<sup>431</sup> See, e.g., *Keller*, 781 F.3d 799 at 815 ("The more integral the worker's services are to the business, then the more likely it is that the parties have an employer-employee relationship."); *DialAmerica*, 757 F.2d at 1385 ("workers are more likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer").

<sup>432</sup> 86 FR 1194. The 2021 IC Rule's rejection of the "integral" factor relied in part on a criticism articulated by Judge Easterbrook in a concurring opinion. *Id.* (citing *Lauritzen*, 835 F.2d at 1541 (Easterbrook, J., concurring)). Judge Easterbrook argued that the factor was not useful, because "[e]verything the employer does is 'integral' to its business—why else do it?" *Id.* He argued that the cucumber-pickers in *Lauritzen* may be crucial to the employer's pickle business, but so would architects be to a building firm, or tires to Chrysler—but that does not imply the firms employ the architects or Chrysler employs tire makers. 835 F.2d at 1541. The Department believes, however, that although other factors may indicate that workers who provide important or central services are independent contractors, it is nevertheless the case that such workers are more likely to be employees. Like any other factor, the integral factor provides only part of the analysis.

<sup>433</sup> See, e.g., *Meyer v. U.S. Tennis Ass'n*, 607 F. App'x 121, 123 (2d Cir. 2015) ("Although tennis umpires are an integral part of the U.S. Open," other factors supported determination that umpires were independent contractors); *Perdomo v. Ask 4 Realty & Mgmt., Inc.*, No. 07–20089, 2007 WL 9706364, at \*4 (S.D. Fla. Dec. 19, 2007) (construction worker's work was integral to remodeling business, but economic reality factors as a whole indicated independent contractor status).

<sup>434</sup> See, e.g., *Sigui*, 484 F. Supp. 3d at 41 (finding that this factor indicated employee status for cable installers after acknowledging that not all courts consider this factor but rejecting employer's argument that the factor "is not particularly important in the analysis" because, in this case, it "gives a complete picture of the business relationship") (quoting *Pizzarelli v. Cadillac Lounge, LLC*, No. 15–254, 2018 WL 2971114, at \*6 (D.R.I. Apr. 13, 2018)).

example, if the employer could not function without the service performed by the workers, then the service they provide is integral.<sup>435</sup> Such workers are more likely to be economically dependent on the employer because their work depends on the existence of the employer's principal business, rather than their having an independent business that would exist with or without the employer.<sup>436</sup> Courts also look at whether the work is important, critical, primary, or necessary to the employer's business.<sup>437</sup> In most cases, if an employer's primary business is to make a product or provide a service, then the workers who are involved in making the product or providing the service are integral.<sup>438</sup>

The focus of the integral factor is on the work performed, not the individual worker.<sup>439</sup> This approach evaluates

<sup>435</sup> See, e.g., *Off Duty Police*, 915 F.3d at 1055 (rejecting employer's argument that it was merely an agent between its customers and the officers because the company "could not function without the services its workers provide"); *McFeeley*, 825 F.3d at 244 ("[E]ven the clubs had to concede the point that an 'exotic dance club could [not] function, much less be profitable, without exotic dancers.'") (quoting Secretary of Labor's Amicus Br. in Supp. of Appellees at 24); *Capital Int'l*, 466 F.3d at 309 (finding security guards were integral to a business where company "was formed specifically for the purpose of supplying" private security); cf. *Johnson v. Unified Gov't of Wyandotte Cnty./Kansas City*, 371 F.3d 723, 730 (10th Cir. 2004) (upholding jury verdict finding independent contractor status for security guards working for government housing authority and noting, with regard to integral factor, that the housing authority "had functioned for years before and after the program" under which security guards were hired).

<sup>436</sup> See, e.g., *Brock v. Lauritzen*, 624 F. Supp. 966, 969 (E.D. Wis. 1985), *aff'd*, 835 F.2d 1529 (7th Cir. 1987) (finding that cucumber harvesters were integral to cucumber farmer's business and were "economically dependent upon Lauritzen's business for their work during the cucumber harvest season").

<sup>437</sup> See, e.g., *Alpha & Omega*, 39 F.4th at 1085 (noting that this factor "turns 'on whether workers' services are a necessary component of the business'") (quoting *Paragon*, 884 F.3d at 1237); *Flint Eng'g*, 137 F.3d at 1443 (finding rig welders' work to be "an important, and indeed integral, component of oil and gas pipeline construction work" because their work is a critical step on every transmission system construction project); *Lauritzen*, 835 F.2d at 1537–38 ("It does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business[.]"); cf. *Paragon*, 884 F.3d at 1237 ("Because [the worker]'s management of the pecan grove was not integral to the bulk of Paragon's [construction] business, this factor supports consideration of [the worker] as an independent contractor").

<sup>438</sup> See, e.g., *Superior Care*, 840 F.2d at 1059 (for business that provided on-demand health care personnel, the nurses provided were themselves integral to the business).

<sup>439</sup> See, e.g., *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 589 F. Supp. 2d 569, 581 (D. Md. 2008) (explaining that "this factor does not turn on whether the individual worker was integral to the business; rather, it depends on whether the service

<sup>426</sup> 86 FR 1247.

<sup>427</sup> 86 FR 1195.

<sup>428</sup> 86 FR 1247–48.

<sup>429</sup> In addition, the common law test considers "whether the work is part of the regular business of the hiring party" in distinguishing between employees and independent contractors. *Reid*, 490 U.S. at 752.

<sup>430</sup> See *Silk*, 331 U.S. at 716 (unloaders were "an integral part of the business[] of retailing coal"); see also *Off Duty Police*, 915 F.3d at 1055; *McFeeley*, 825 F.3d at 244; *Scantland*, 721 F.3d at 1319; *Flint Eng'g*, 137 F.3d at 1443; *Superior Care*, 840 F.2d at 1060–61; *Lauritzen*, 835 F.2d at 1537–38; *DialAmerica*, 757 F.2d at 1385; *Driscoll*, 603 F.2d at 755.

whether the worker performs work that is central to the employer's business, not whether the worker possesses some unique qualities that render them indispensable as an individual. An individual worker who performs the work that an employer is in business to provide but is just one of hundreds or thousands who perform the work (such as one operator among many at a call center) is nonetheless an integral part of the employer's business even if that one worker makes a minimal contribution to the business when considered among the workers as a whole.

As with the other components of the economic reality test, the integral part factor is just one area of inquiry and must be considered in relation to the other factors and to the extent that it contributes to the determination of economic dependence or independence. As such, it is unsurprising that, as noted in the 2021 IC Rule, there will be instances in which this factor "misaligns" with the ultimate result.<sup>440</sup> It is to be expected that not every factor will "align" with the ultimate result in many cases. With a multifactor analysis, it is common that some factors will indicate one result while others will indicate another. This difference shows that courts correctly weigh the factors against each other. A factor pointing in a different direction from other factors in any one case is not evidence that a factor is not useful in the run of situations.

In support of its rejection of the integral factor in favor of an "integrated unit" factor, the 2021 IC Rule relied on a rigid reading of *Rutherford* (which noted that the work was "part of an integrated unit of production" of the employer).<sup>441</sup> Upon further consideration, the Department finds that this rigid approach to the specific phrasing of *Rutherford* does not reflect Supreme Court or circuit court precedent. As the 2021 IC Rule acknowledged, the Supreme Court's contemporaneous decision in *Silk* determined that coal "unloaders" were employees of a retail coal company as a matter of economic reality in part because they were "*an integral part of the business[] of retailing coal.*"<sup>442</sup> This language was interpreted in the 2021 IC

the worker performed was integral to the business").

<sup>440</sup> 86 FR 1194. Although it asserted a "higher rate of misalignment" when the ultimate classification was independent contractor status, the 2021 IC Rule did not identify any cases where the "integral part" factor led to a result that was contrary to the totality of the evidence. *See id.*

<sup>441</sup> 86 FR 1193–94 (citing *Rutherford*, 331 U.S. at 729).

<sup>442</sup> 331 U.S. at 716 (emphasis added).

Rule as being part of the overall inquiry rather than a factor that is useful to guide the inquiry.<sup>443</sup> The Supreme Court's list of factors in *Silk* was not intended to be exhaustive, but instead consisted of factors the Court believed would be useful to courts and agencies applying the economic reality test in the future.<sup>444</sup> The Court noted that the workers were an "integral part" of the business, and later courts have likewise found this to be useful to the economic reality analysis—so much so that most circuit courts routinely list it as an enumerated factor, but no court uses "integrated unit" for this factor.<sup>445</sup>

For these reasons, the Department is proposing to eliminate the "integrated unit" factor as an enumerated factor and instead to restore the integral factor, understood by courts as being focused on whether the work is critical, necessary, or central to the employer's business.<sup>446</sup> The Department used this approach for decades prior to the 2021 IC Rule and found it a useful factor in the economic reality analysis.<sup>447</sup> No court has applied the "integrated unit" approach adopted by the 2021 IC Rule. Restoring the integral factor would avoid confusion and provide greater consistency with existing case law—the overwhelming majority of which includes an analysis of the integral factor as set forth in this proposed rule.

The Department welcomes comments on all aspects of this factor.

#### Example: Extent To Which the Work Performed Is An Integral Part of the Employer's Business

A large farm grows tomatoes that it sells to distributors. The farm pays workers to pick the tomatoes during the harvest season. Because picking tomatoes is an integral part of farming tomatoes, and the company is in the business of farming tomatoes, the tomato pickers are integral to the company's business. The integral factor indicates employee status.

Alternatively, the same farm pays an accountant to provide non-payroll

<sup>443</sup> 86 FR 1194.

<sup>444</sup> 331 U.S. at 716.

<sup>445</sup> *Id.*; *see supra* n. 430.

<sup>446</sup> Of course, if it is somehow relevant to the question of economic dependence or independence, the extent to which a worker is integrated into a business's production processes may be considered under any relevant factor or as an additional factor. For example, indicators that a worker is integrated into an employer's main production processes, such as whether the worker is required to work at the employer's main workplace or wear the employer's uniform, may be indicators of an employer's control over the work.

<sup>447</sup> *See, e.g.,* WHD Fact Sheet #13 (July 2008) (listing "[t]he extent to which the services rendered are an integral part of the principal's business" as a factor).

accounting support, including filing its annual tax return. This accounting support is not critical, necessary, or central to the principal business of the farm, thus the accountant is not integral to the business. Therefore, the integral factor indicates independent contractor status.

#### 6. Skill and Initiative (Proposed § 795.110(b)(6))

The 2021 IC Rule includes an "amount of skill required for the work" factor and § 795.105(d)(2)(i) states that this factor "weighs in favor of the individual being an independent contractor to the extent the work at issue requires specialized training or skill that the potential employer does not provide."<sup>448</sup> That regulation further states that this factor "weighs in favor of the individual being an employee to the extent the work at issue requires no specialized training or skill and/or the individual is dependent upon the potential employer to equip him or her with any skills or training necessary to perform the job."<sup>449</sup>

The Department is proposing that this factor be described as the "skill and initiative" factor and consider whether a worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative that is consistent with the worker being in business for themselves instead of being economically dependent on the employer. The Department is proposing to reaffirm the longstanding principle that this factor indicates employee status where the worker lacks specialized skills. Proposed § 795.110(b)(6) states that where the worker brings specialized skills to the work relationship, it is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor instead of an employee. The Department believes that the application of initiative in connection with specialized skills is useful in answering the overarching inquiry of whether the worker is economically dependent on the employer for work or is in business for themselves, and is therefore proposing to reintegrate initiative into this factor and no longer exclude consideration of initiative when applying this factor, as provided in the 2021 IC Rule.

When applying this factor, many courts have recognized that a worker's lack of specialized skills to perform the work indicates that the worker is an employee. For example, courts have

<sup>448</sup> 86 FR 1247.

<sup>449</sup> *Id.*

found that where the work of security guards and traffic control officers requires little skill, this lack of specialized skills indicates that the workers are employees instead of independent contractors.<sup>450</sup> Numerous courts have found that driving is not a specialized skill, indicating employee status.<sup>451</sup> Other courts have found that the skill factor favors employee status where janitorial work does not require specialized skills.<sup>452</sup> Courts have reached similar conclusions in cases involving landscape workers and call center workers, among other workers.<sup>453</sup>

As these cases make clear, the worker's lack of specialized skills when

<sup>450</sup> See, e.g., *Off Duty Police*, 915 F.3d at 1055–56 (noting that “[t]he skills required to work for ODPS are far more limited than those of a typical independent contractor” in finding that the skill factor weighed in favor of employee status for security guards and traffic control workers); *Walsh v. EM Protective Servs. LLC*, No. 3:19–cv–00700, 2021 WL 3490040, at \*7 (M.D. Tenn. Aug. 9, 2021) (traffic control officers require “relatively little skill” and security guards require “minimal skill,” indicating employee status); *Solis v. Int'l Detective & Protective Serv., Ltd.*, 819 F. Supp. 2d 740, 752 (N.D. Ill. 2011) (finding that the “vast majority of the Guards’ work . . . did not require any special skills”).

<sup>451</sup> See, e.g., *Razak*, 951 F.3d at 147 (noting that it “is generally accepted that ‘driving’ is not itself a ‘special skill’” in determining that the skill factor weighs in favor of employee status); *Iontchev*, 685 F. App'x at 550 (“The service rendered by the [taxi drivers] did not require a special skill.”); *Campos v. Zopounidis*, No. 3:09–cv–1138 (VLB), 2011 WL 2971298, at \*7 (D. Conn. July 20, 2011) (“There is no evidence that Campos’s job as a delivery person required him to possess any particular degree of skill. Campos did not need education or experience to perform his job. Although he needed a driver’s license in order to legally drive his vehicle for deliveries, the possession of a driver’s license and the ability to drive an automobile is properly characterized as a ‘routine life skill’ that other courts have found to be indicative of employment status rather than independent contractor status.”).

<sup>452</sup> See, e.g., *Perez v. Super Maid, LLC*, 55 F. Supp. 3d 1065, 1077–78 (N.D. Ill. 2014) (noting, in finding that skill factor favored employee status, that “[m]aintenance work, such as cleaning, sweeping floors, mowing grass, unclogging toilets, changing light fixtures, and cleaning gutters, does not necessarily involve such specialized skills as would support independent contractor status,” and that “cleaning services, although difficult and demanding, were even less complex than those maintenance services”) (internal quotation marks omitted); *Harris v. Skokie Maid & Cleaning Serv., Ltd.*, No. 11 C 8688, 2013 WL 3506149, at \*8 (N.D. Ill. July 11, 2013) (“The maids’ work may be difficult and demanding, but it does not require special skill,” indicating employee status).

<sup>453</sup> See, e.g., *Acosta v. New Image Landscaping, LLC*, No. 1:18–cv–429, 2019 WL 6463512, at \*6 (W.D. Mich. Dec. 2, 2019) (facts that “little or no skill was required” and “prior landscaping experience” was not required meant that skill factor favored employee status for landscapers); *Acosta v. Wellfleet Commc'ns, LLC*, No. 2:16–cv–02353–GMN–GWF, 2018 WL 4682316, at \*7 (D. Nev. Sept. 29, 2018) (explaining that skill factor favored employee status for call center workers because “all that Defendants required was the ability to communicate well and read a script”), *aff'd sub nom. Walsh v. Wellfleet Commc'ns*, No. 20–16385, 2021 WL 4796537 (9th Cir. Oct. 14, 2021).

performing the work generally indicates employee status.<sup>454</sup> This is consistent with 2021 IC Rule § 795.105(d)(2)(i),<sup>455</sup> as noted above. It is also consistent with the position taken in an opinion letter issued by WHD in 2000, which stated that the fact that “the drivers appear to perform routine work that requires no prior experience” indicates employee status.<sup>456</sup>

That the work does not require prior experience, that the worker is dependent on training from the employer to perform the work, or that the work requires no training are indicators that the worker lacks specialized skills. Even if the worker possesses specialized skills, this factor may indicate employee status if the work does not require those skills. The Sixth Circuit explained that the skill factor favored employee status in a case because, although a subset of the workers possessed skill and prior experience, the work did not require skill and prior experience and the “workers [we]re required to attend only a four-hour training session before they begin work.”<sup>457</sup> The Tenth Circuit has similarly explained in a case that, even if some workers had prior experience and training, the workers were not required “to have any specialized skills or prior experience when they start to work,” indicating employee status.<sup>458</sup>

Consistent with the principle that no one factor is dispositive, however, workers who lack specialized skills may be independent contractors even if this factor is very unlikely to point in that direction in their circumstances. A landscaper, for example, may perform work that does not require specialized skills, but application of the other factors may demonstrate that the landscaper is an independent contractor (for example, the landscaper may have a meaningful role in determining the price charged for the work, make decisions affecting opportunity for profit or loss, determine the extent of capital investment, work for many clients, and/or perform work for clients for which landscaping is not integral).

Where a worker brings specialized skills to the work relationship, further

analysis will determine whether this factor indicates employee or independent contractor status. Consistent with the approach of evaluating each factor in the context of the ultimate inquiry of whether the worker is economically dependent on the employer or in business for themselves, proposed § 795.110(b)(6) states that the worker should use the specialized skills in connection with business-like initiative for this factor to suggest independent contractor status. Many circuit courts of appeals have expressly recognized that business-like initiative is at least part of the inquiry. For example, the Second Circuit has explained that “the fact that workers are skilled is not itself indicative of independent contractor status.”<sup>459</sup> Although the workers in that case “possess[ed] technical skills,” the court noted that “nothing in the record reveal[ed] that they used these skills in any independent way,” which indicated that the workers’ skill did not “weigh significantly in favor of independent contractor status.”<sup>460</sup> The Third Circuit agreed that “the use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in any independent way.”<sup>461</sup> The Third Circuit has further explained that if the workers use their skills in connection with “business-like initiative,” the factor indicates independent contractor status: “Some distributors benefitted from their skill in persuading others to become distributees, and they certainly exercised business-like initiative in this regard.”<sup>462</sup>

The Fifth Circuit describes this factor as evaluating the skill and initiative required in performing the work and considers initiative along with skill.<sup>463</sup> The Fifth Circuit has explained that, generally, “we look for some unique skill set, or some ability to exercise significant initiative within the business.”<sup>464</sup> It has noted that “[g]reater skill and more demonstrated initiative counsel in favor of [independent contractor] status.”<sup>465</sup> When the

<sup>459</sup> *Superior Care*, 840 F.2d at 1060.

<sup>460</sup> *Id.*

<sup>461</sup> *Selker Bros.*, 949 F.2d at 1295.

<sup>462</sup> *DialAmerica*, 757 F.2d at 1387.

<sup>463</sup> See, e.g., *Hobbs*, 946 F.3d at 834; *Parrish*, 917 F.3d at 385.

<sup>464</sup> *Cornerstone Am.*, 545 F.3d at 345 (citations omitted).

<sup>465</sup> *Parrish*, 917 F.3d at 385; see also, e.g., *Express Sixty-Minutes*, 161 F.3d at 305 (“The district court did not discuss initiative during its evaluation of this factor. We agree with the Secretary that the skill and initiative factor points toward employee status.”); *Circle C. Invs.*, 998 F.2d at 328 (“The

<sup>454</sup> As the Tenth Circuit, for example, has explained, “the lack of the requirement of specialized skills is indicative of employee status.” *Flint Eng'g*, 137 F.3d at 1443 (quoting *Snell*, 875 F.2d at 811) (alteration omitted).

<sup>455</sup> 86 FR 1247.

<sup>456</sup> WHD Op. Ltr., 2000 WL 34444342, at \*5 (Dec. 7, 2000).

<sup>457</sup> *Off Duty Police*, 915 F.3d at 1056 (citing *Keller*, 781 F.3d at 807, 809).

<sup>458</sup> *Snell*, 875 F.2d at 811; see also *McFeeley*, 825 F.3d at 244 (“As to the degree of skill required, the Clubs conceded that they did not require dancers to have prior dancing experience.”).

worker's specialized skills are coupled with initiative, the Fifth Circuit has found that this factor indicates independent contractor status.<sup>466</sup>

Similarly, in a case involving workers on a pickle farm, the Seventh Circuit explained that employees are skilled workers too, noting that although the workers in that case had "develop[ed] some specialized skill," "this development of occupational skills is no different from what any good employee in any line of work must do," and concluding that "[s]kills are not the monopoly of independent contractors."<sup>467</sup> The Tenth Circuit has explained that although the lack of specialized skills indicates employee status, "the use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in any independent way."<sup>468</sup> And the Eleventh Circuit has explained in a case where the workers were "clearly skilled workers" that "[t]he meaningfulness of this skill as indicating that plaintiffs were in business for themselves or economically independent, however, is undermined by the fact that [the employer] provided most technicians with their skills."<sup>469</sup>

The Department has previously stated in guidance that specialized skills should be coupled with business-like initiative for this factor to indicate independent contractor status. In AI 2015-1, the Department explained that "specialized skills do not indicate that workers are in business for themselves, especially if those skills are technical

dancers do not exhibit the skill or initiative indicative of persons in business for themselves.").

<sup>466</sup> See, e.g., *Thibault v. BellSouth Telecommc'ns, Inc.*, 612 F.3d 843, 847 (5th Cir. 2010) (noting when considering this factor that "the splicers' success depended on their ability to find consistent work by moving from job-to-job"); *Carrell*, 998 F.2d at 333 (welders' work "requires specialized skills" and, although they exercised "limited" initiative "once on a job," a welder's "success depended on his ability to find consistent work by moving from job to job and from company to company"); cf. *Hobbs*, 946 F.3d at 834 (agreeing with the district court's finding that this factor was neutral because, although the workers "were highly skilled workers" and their work "required specialized skills," their work "did not require them to demonstrate significant initiative"); but see *Parrish*, 917 F.3d at 386 (although the employer's evidence that the workers showed initiative was not very compelling, the workers' "specialized skill weighs heavily in our analysis and persuades us to hold this factor leans in favor of [independent contractor] status").

<sup>467</sup> *Lauritzen*, 835 F.2d at 1537; see also *Super Maid*, 55 F. Supp. 3d at 1077 (noting that "all jobs require some modicum of skill") (citing *Lauritzen*, 835 F.2d at 1537); *Keller*, 781 F.3d at 809 (noting that, "[t]o a certain extent, . . . every worker has and uses relevant skills to perform his or her job, but not everyone is an independent contractor").

<sup>468</sup> *Flint Eng'g*, 137 F.3d at 1443 (quoting *Selker Bros.*, 949 F.2d at 1295).

<sup>469</sup> *Scantland*, 721 F.3d at 1318.

and used to perform the work."<sup>470</sup> For that reason, application of this factor should not "overlook[] whether the worker is exercising business skills, judgment, or initiative."<sup>471</sup> The July 2008 version of WHD Fact Sheet #13 describes the factor as "[t]he amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor."<sup>472</sup> The Department's May 2014 version of Fact Sheet #13 explained:

Both employees and independent contractors may be skilled workers. To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment. Further, the fact that a worker is in open market competition with others would suggest independent contractor status. For example, specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that suggests independent contractor status.

For all these reasons, there is strong support in the case law and the Department's prior guidance for not limiting this factor to an evaluation of whether the worker has specialized skills and for also considering whether the worker is exercising business-like initiative in relation to any specialized skills. Moreover, considering initiative in this manner would be consistent with evaluating each factor in the context of the ultimate inquiry of whether the worker is economically dependent on the employer or is an independent business. Considering only whether the worker has technical or specialized skills is not necessarily probative of the ultimate inquiry of economic dependence or independence because, as explained above, employees and independent contractors often both have specialized skills, and thus evaluating those skills is not particularly distinguishing. Whether a worker uses those specialized skills to exercise business-like initiative or in some other way that suggests that the worker is operating as an independent business is

<sup>470</sup> 2015 WL 4449086, at \*9 (citing *Superior Care*, 840 F.2d at 1060) (withdrawn June 7, 2017).

<sup>471</sup> *Id.*

<sup>472</sup> WHD Fact Sheet #13 (July 2008). This language from the July 2008 version of Fact Sheet #13 comes from *Rutherford*, which noted that the workers in that case did not exercise "the initiative, judgment or foresight of the typical independent contractor." 331 U.S. at 730.

more probative, as a matter of economic reality, of that distinction between economic dependence and independence.<sup>473</sup>

The 2021 IC Rule does not consider initiative in the context of this factor.<sup>474</sup> The 2021 IC Rule limited this factor to "focus solely on skill" to "clarif[y] the analysis"; the 2021 IC Rule acknowledged that initiative is an important consideration, but it confined consideration of initiative to the control and opportunity for profit or loss factors because, for purposes of that rule, those factors are the more probative factors.<sup>475</sup>

Upon further consideration, the Department believes that it is appropriate to consider initiative under the skill factor to the extent that workers exercise business-like initiative in the use of their specialized skills. For the reasons explained above, the worker's use of initiative in connection with any specialized skills is more probative of the ultimate inquiry of whether the worker is economically dependent on the employer or is an independent business. Both employees and independent contractors can be highly skilled,<sup>476</sup> so consideration of the worker's specialized skills alone can be less probative of that inquiry. On the other hand, consideration of the worker's initiative in connection with any specialized skills better assesses the economic realities of the work relationship and is more helpful in distinguishing between employees and independent contractors.

As explained above in this NPRM, types of initiative by a worker may also

<sup>473</sup> Some circuit court decisions have not considered the worker's initiative when evaluating the skill factor. See, e.g., *Keller*, 781 F.3d at 809-10 (focusing on the workers' skill and how they acquired it and contrasting carpenters, who have "unique skill, craftsmanship, and artistic flourish," with cable technicians, who do not need "unique skills" but rather are selected on the basis of availability and location); *Mid-Atlantic Installation*, 16 F. App'x at 107 (affirming district court's conclusion that the skills of installing cable are indicative of independent contractor status because the skills are "akin to those of carpenters, construction workers, and electricians, who are usually considered independent contractors"). For the reasons explained above, however, whether workers use those specialized skills to exercise business-like initiative is what makes this factor probative of the ultimate inquiry of whether the workers are in business for themselves. Thus, the skills of cable installers, carpenters, construction workers, and electricians, for example, even assuming that they are specialized, are not themselves indicative of independent contractor status. Carpenters, construction workers, electricians, and other workers who operate as independent businesses, instead of being economically dependent on their employer, are independent contractors. See generally AI 2015-1, 2015 WL 4449086, at \*9-10.

<sup>474</sup> See 86 FR 1247 (§ 795.105(d)(2)(i)).

<sup>475</sup> 86 FR 1191.

<sup>476</sup> See, e.g., *supra* n. 467 and accompanying text.

be relevant when applying the control factor or the opportunity for profit or loss factor.<sup>477</sup> When evaluating the skill factor, the focus should be whether the worker uses any specialized skills to exercise business-like initiative. When applying the opportunity for profit or loss factor, for example, the focus is whether the worker uses managerial skill—a type of initiative—to affect the worker's opportunity for profit or loss. Thus, the focus of each factor is different, but some facts showing an exercise of initiative can nonetheless be relevant under the skill factor and another factor. Considering facts showing an exercise of initiative under more than one factor to the extent appropriate depending on the facts of a case is consistent with and furthers the totality-of-the-circumstances approach to assessing the economic realities of the work relationship.<sup>478</sup>

The Department welcomes comments on all aspects of this factor.

#### Example: Skill and Initiative

A highly skilled welder provides welding services for a construction firm. The welder does not make any independent judgments at the job site beyond the decisions necessary to do the work assigned. The welder does not determine the sequence of work, order additional materials, think about bidding the next job, or use those skills to obtain additional jobs, and is told what work to perform and where to do it. In this scenario, the welder, although highly skilled technically, is not using those skills in a manner that evidences business-like initiative. The skill and initiative factor indicates employee status.

A highly skilled welder provides a specialty welding service, such as custom aluminum welding, for a variety of area construction companies. The welder uses these skills for marketing purposes, to generate new business, and to obtain work from multiple companies. The welder is not only technically skilled, but also uses and markets those skills in a manner that evidences business-like initiative. The skill and initiative factor indicates independent contractor status.

#### 7. Additional Factors (Proposed § 795.110(b)(7))

Section 795.105(d)(2)(iv) of the 2021 IC Rule states that additional factors may be considered if they are relevant to the ultimate question of whether the

workers are economically dependent on the employer for work or in business for themselves.<sup>479</sup> This reflects the necessity of considering all facts that are relevant to the question of economic dependence or independence, regardless of whether those facts fit within one of the enumerated factors. This approach is consistent with the Supreme Court's guidance in *Silk*, where it cautioned that its suggested factors are not intended to be exhaustive.<sup>480</sup> It is also consistent with the approach that courts and the Department have used in the decades since to determine whether workers are employees or independent contractors under the FLSA. The Department is proposing to move this provision to proposed § 795.110(b)(7) with minor editorial changes.

The 2021 IC Rule states that its list of factors is “not exhaustive.”<sup>481</sup> In order to emphasize that point, the Department included an explicit provision recognizing that other potentially relevant factors may exist in some circumstances.<sup>482</sup> The 2021 IC Rule thus states that “[a]dditional factors may be relevant in determining whether an individual is an employee or independent contractor for purposes of the FLSA[.]”<sup>483</sup> The regulation further cautions that such additional factors are only relevant “if the factors in some way indicate whether the individual is in business for him- or herself, as opposed to being economically dependent on the potential employer for work.”<sup>484</sup> The preamble to the Rule explained that “[f]actors that do not bear on this question, such as whether an individual has alternate sources of wealth or income and the size of the hiring company, are not relevant.”<sup>485</sup>

The Department is proposing to retain § 795.105(d)(2)(iv) with only minor editorial changes. Retaining this provision reiterates that the enumerated factors are not to be applied mechanically but should be viewed along with any other relevant facts in light of whether they indicate economic dependence or independence. Retaining the provision also preserves the caution that only factors that are relevant to the overall question of economic dependence or independence should be considered. This language stresses that the economic reality is what matters, and not labels or formalities.

<sup>479</sup> 86 FR 1247.

<sup>480</sup> *Silk*, 331 U.S. at 716 (“No one [factor] is controlling nor is the list complete.”).

<sup>481</sup> 86 FR 1246 (§ 795.105(c)).

<sup>482</sup> 86 FR 1196.

<sup>483</sup> 86 FR 1247 (§ 795.105(d)(2)(iv)).

<sup>484</sup> *Id.*

<sup>485</sup> 86 FR 1196.

The Department is not proposing to identify any particular additional factors that may be relevant. The Department previously identified the “degree of independent business organization and operation” as a seventh factor that it considered in its analysis.<sup>486</sup> However, given the Department's focus in this proposed rulemaking on reflecting the economic reality factors commonly used by the circuit courts of appeals, the Department is not proposing to include the worker's “degree of independent business organization and operation” as a seventh factor. The Department is not aware of any court that has used this as a standalone factor. Moreover, the Department is concerned that facts that may relate to whether a worker has an independent business organization—such as whether the worker has incorporated or receives an Internal Revenue Service (IRS) Form 1099 from an employer—reflect mere labels rather than the economic realities and are thus not relevant. To the extent facts such as the worker having a business license or being incorporated may suggest that the worker is in business for themselves, they may be considered either as an additional factor or under any enumerated factor to which they are relevant. However, consistent with an economic reality analysis, it is important to inquire into whether the worker's license or incorporation are reflective of the worker being in business for themselves as a matter of economic reality. For example, if an employer requires a worker to obtain a certain license or adopt a certain form of business in order to perform work for it, this may be evidence of the employer's control, rather than a worker who is independently operating a business. Indeed, even where “the parties structure[] the relationship as an independent contractor, . . . the caselaw counsels that, for purposes of the worker's rights under the FLSA, we must look beyond the structure to the economic realities.”<sup>487</sup>

The Department welcomes comments on this provision.

#### D. Primacy of Actual Practice (2021 IC Rule § 795.110)

The Department is proposing to delete 2021 IC Rule § 795.110 and use this section for the discussion of the economic reality factors.

Section 795.110 of the 2021 IC Rule provides that in determining economic dependence “the actual practice of the parties involved is more relevant than

<sup>486</sup> WHD Fact Sheet #13 (July 2008).

<sup>487</sup> *Safarian v. American DG Energy Inc.*, 622 F. App'x 149, 151 (3d Cir. 2015).

<sup>477</sup> See *supra* sections V.C.1. and 4., discussions of opportunity for profit or loss and control.

<sup>478</sup> See *supra* section V.C., discussion of economic reality test.



what may be contractually or theoretically possible.”<sup>488</sup> This absolute rule, elevating actual practice over contractual authority that the employer may have reserved for exercise in the future, is overly mechanical and does not allow for appropriate weight to be given to contractual provisions in situations in which they are crucial to understanding the economic realities of a relationship. Instead, the Department believes that a less prescriptive approach is more faithful to the totality-of-circumstances economic reality analysis, such that contractual or other reserved rights should be considered like any other fact under each factor to the extent they indicate economic dependence.

The 2021 IC Rule stressed that “unexercised powers, rights, and freedoms” are “less relevant” than those that are actually exercised.<sup>489</sup> Section 795.110 of the 2021 IC Rule states that a worker’s theoretical ability to control aspects of the work are less meaningful if the worker is prevented from exercising those rights, and that a business’ contractual authority to exercise control may be of little relevance if it is never exercised.<sup>490</sup> Though it is true that contractual authority may in some instances be less relevant, the 2021 IC Rule’s blanket statement that actual practice is always more relevant is incompatible with an approach that does not apply the factors mechanically but looks to the totality of the circumstances in evaluating the economic realities.<sup>491</sup> The focus is always on the economic realities rather than mere labels,<sup>492</sup> but contractual provisions are not always mere labels. They sometimes reflect and influence the economic realities of the relationship.

Every fact that is relevant to economic dependence should be considered in the analysis. Because the entirety of the economic reality must be considered, both the actual practices of the parties and the contractual possibilities must be considered. Within each factor of the test, there may be actual practices that

are relevant, and there may also be contractual provisions that are relevant. The significance of each in the overall analysis should be informed by their relevance to the economic realities. This examination will be specific to the facts of each economic relationship and cannot be predetermined.

It is often the case that the actual practice of the parties is more relevant to the economic dependence inquiry than contractual or theoretical possibilities. For example, where an employer theoretically permits its workers to decline work assignments, but in practice disciplines workers who decline assignments, the actual practice of the parties outweighs the theoretical rights of the workers.<sup>493</sup> However, in other cases the contractual possibilities may reveal more about the economic reality than the parties’ practices. For example, a company may reserve the right to supervise workers despite rarely making supervisory visits.<sup>494</sup> Such reserved rights to control the worker may strongly influence the behavior of the worker in their performance of the work even without the company exercising its contractual rights. As a result, this contractual possibility may be more indicative of the reality of the economic relationship between the worker and the company than the company’s apparent hands-off practice. That courts often refer to the control factor as the “right to control” the work suggests that even rarely exercised or unexercised rights can be informative in evaluating economic dependence.<sup>495</sup>

In response to comments asserting that prioritizing actual practice would make the economic reality test impermissibly narrower than the common law control test, the 2021 IC Rule asserted that “the common law control test does not establish an irreducible baseline of worker coverage for the broader economic reality test applied under the FLSA.”<sup>496</sup> This understanding of the FLSA’s scope of employment is inconsistent with the Supreme Court’s observations that “[a]

broader or more comprehensive coverage of employees” than that contemplated under the FLSA “would be difficult to frame,”<sup>497</sup> and that the FLSA “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”<sup>498</sup> The 2021 IC Rule’s blanket diminishment of the relevance of the right to control is inconsistent with the Supreme Court’s observations that the FLSA’s scope of employee coverage is exceedingly broad and broader than what exists under the common law. That the employer’s right to control is part of the common law test shows that it is a useful indicator of employee status.<sup>499</sup> The 2021 IC Rule’s dismissal of contractual rights as always less relevant than actual practice is inconsistent with the need to consider all facts relevant to the economic realities.<sup>500</sup>

In sum, the declaration in 2021 IC Rule § 795.110 that the parties’ actual practices are invariably more relevant is inconsistent with how courts have evaluated employment relationships. It lacks the flexibility required by the economic reality test and is inconsistent with the FLSA’s broad definition of employment. For these reasons, the Department is proposing to strike § 795.110, so that all facts relevant to the economic realities of a potential employment relationship may be evaluated according to their relevance to the question of economic dependence.

<sup>497</sup> *Rosenwasser*, 323 U.S. at 362–63.

<sup>498</sup> *Darden*, 503 U.S. at 326.

<sup>499</sup> *Id.* at 323 (common-law employment test considers “the hiring party’s right to control the manner and means by which the product is accomplished”) (quoting *Reid*, 490 U.S. at 751–52); Restatement (Third) of Agency, sec. 7.07, Comment (f) (2006) (“For purposes of respondeat superior, an agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs work.”).

<sup>500</sup> Though the economic reality test requires consideration of all relevant facts, and upon further consideration, the Department does not believe it is appropriate to maintain a regulatory provision that dismisses consideration of reserved rights that are not exercised where relevant to economic dependence, the Department does not intend to minimize or disregard the longstanding case law that looks to the actual behavior of the parties. See, e.g., *Parrish*, 917 F.3d at 387 (“[T]he analysis is focused on economic reality, not economic hypotheticals.”); *Saleem*, 854 F.3d at 142 (“[P]ursuant to the economic reality test, it is not what [workers] could have done that counts, but as a matter of economic reality what they actually do that is dispositive.”) (internal quotation marks and citation omitted); *Sureway*, 656 F.2d at 1371 (“[T]he fact that Sureway’s ‘agents’ possess, in theory, the power to set prices, determine their own hours, and advertise to a limited extent on their own is overshadowed by the fact that in reality the ‘agents’ work the same hours, charge the same prices, and rely in the main on Sureway for advertising.”).

<sup>493</sup> See *Off Duty Police*, 915 F.3d at 1060–61 (finding that, among other things, officers’ testimony that they were disciplined for turning down assignments, despite having the right to do so, supported employee status).

<sup>494</sup> See *Superior Care*, 840 F.2d at 1060 (“Though visits to the job sites occurred only once or twice a month, Superior Care unequivocally expressed the right to supervise the nurses’ work, and the nurses were well aware that they were subject to such checks as well as to regular review of their nursing notes. An employer does not need to look over his workers’ shoulders every day in order to exercise control.”).

<sup>495</sup> See, e.g., *Off Duty Police*, 915 F.3d at 1060; *DialAmerica*, 757 F.2d at 1386; *Driscoll*, 603 F.2d at 754.

<sup>496</sup> 86 FR 1205.

<sup>488</sup> 86 FR 1247.

<sup>489</sup> *Id.* at 1204.

<sup>490</sup> *Id.* at 1247.

<sup>491</sup> See *Flint Eng’g*, 137 F.3d at 1441 (“None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach.”); *Superior Care*, 840 F.2d at 1059 (“Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.”).

<sup>492</sup> *Rutherford*, 331 U.S. at 729 (“Where the work done, in its essence, follows the usual path of an employee, putting on an ‘independent contractor’ label does not take the worker from the protection of the Act.”).

The Department welcomes comments on the removal of this provision.

#### *E. Examples of Analyzing Economic Reality Factors (2021 IC Rule § 795.115)*

Section 795.115 of the 2021 IC Rule provides examples of factors in the economic reality test. The Department is proposing to delete this section and instead include examples in the preamble. Real-world examples provide valuable information to the general public and regulated parties and help succinctly explain relevant issues in the analysis. The Department believes, however, that the examples best serve this explanatory function in preamble text, particularly considering how fact-dependent the analysis of each economic reality factor is. The preamble contains the most detailed description of each factor along with the case law and rationale for each interpretation proposed by the Department. Providing the examples after the discussion of each factor in the economic reality test thus provides an immediate application of the relevant interpretation.

The Department cautions that the examples are specific to the included facts and the addition or alteration of any of the facts in any of the examples may change the resulting analysis. Additionally, while the examples help illustrate the application of particular factors of the economic reality test, no one factor is determinative of whether a worker is an employee or an independent contractor.

#### *F. Severability (Proposed § 795.115)*

Section 795.120 of the 2021 IC Rule contains a severability provision. The Department is proposing to move this provision to § 795.115 and is not proposing any edits to this section.

### **VI. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. This NPRM does not contain a collection of information subject to OMB approval under the Paperwork Reduction Act. The Department welcomes comments on this determination.

### **VII. Executive Order 12866, Regulatory Planning and Review; Executive Order 13563, Improved Regulation and Regulatory Review**

Under Executive Order 12866, the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.<sup>501</sup> Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OIRA has determined that this proposed rule is a "significant regulatory action" under section 3(f) of Executive Order 12866 and is economically significant.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits.<sup>502</sup> Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this proposed rule and was prepared pursuant to the above-mentioned executive orders.

#### *A. Introduction*

In this NPRM, the Department is proposing to modify the regulations addressing the classification of workers as employees or independent contractors under the Fair Labor Standards Act (FLSA or Act) to be more consistent with judicial precedent and the Act's text and purpose as interpreted by the courts. For decades, the Department and courts have applied an economic reality test to determine whether a worker is an employee or an independent contractor under the FLSA. The ultimate inquiry is whether, as a matter of economic reality, the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themself (and is thus an independent contractor). To answer this ultimate inquiry of economic dependence, the courts and the Department have historically conducted a totality-of-the-circumstances analysis, considering multiple factors to determine whether a worker is an employee or an independent contractor under the FLSA.

In January 2021, the Department published a rule titled "Independent Contractor Status Under the Fair Labor Standards Act" (2021 IC Rule) that provided guidance on the classification of independent contractors under the FLSA.<sup>503</sup> As explained in sections III, IV, and V above, the Department believes that the 2021 IC Rule does not fully comport with the FLSA's text and purpose as interpreted by the courts and will have a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. The 2021 IC Rule included provisions that are in tension with this longstanding case law—such as designating two factors as most probative and predetermining that they carry greater weight in the analysis, considering investment and initiative only in the opportunity for profit or loss factor, and excluding consideration of whether the work performed is central or important to the employer's business. These and other provisions in the 2021 IC Rule narrow the application of the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themself. The Department believes that retaining the 2021 IC Rule would have

<sup>501</sup> *See* 58 FR 51735, 51741 (Oct. 4, 1993).

<sup>502</sup> *See* 76 FR 3821 (Jan. 21, 2011).

<sup>503</sup> *See* 86 FR 1168.

a confusing and disruptive effect on workers and businesses alike due to its departure from case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. Departing from the longstanding test applied by the courts also increases the risk of misapplication of the economic reality test, which the Department believes may result in increased misclassification of workers as independent contractors.

Therefore, the Department is proposing to rescind the 2021 IC Rule and replace it with an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule. Specifically, the Department is not proposing the use of "core factors" and instead proposes to return to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. The Department is further proposing to return the consideration of investment to a standalone factor, provide additional analysis of the control factor (including detailed discussions of how scheduling, remote supervision, price-setting, and the ability to work for others should be considered), and return to the longstanding interpretation of the integral factor, which considers whether the work is integral to the employer's business. The Department believes this proposed rule is more grounded in the ultimate inquiry of whether a worker is in business for themself or is economically dependent on the employer for work. Workers, employers, and independent businesses should benefit from affirmative regulatory guidance from the Department further developing the concept of economic dependence and how each economic reality factor is probative of whether the worker is economically dependent on the employer for work or is in business for themself.

When evaluating the economic impact of this proposed rule, the Department has considered the appropriate baseline with which to compare changes. As discussed in section II.E., on March 14, 2022, in a lawsuit challenging the Department's delay and withdrawal of the 2021 IC Rule, a Federal district court in the Eastern District of Texas issued a decision vacating the delay and withdrawal of the 2021 IC Rule and concluded that the 2021 IC Rule became

effective on March 8, 2021.<sup>504</sup> Because the 2021 IC Rule is currently in effect, is being enforced and would continue to be in effect in the absence of this proposed rule, the Department believes that the 2021 IC Rule is the official baseline to compare against when estimating the economic impact of this proposed rule.<sup>505</sup> Compared to the 2021 IC Rule, the Department anticipates that this proposed rule would reduce misclassification of employees as independent contractors, because this rule is more consistent with existing judicial precedent and the Department's longstanding guidance. The 2021 IC Rule could increase misclassification because its elevation of certain factors and its preclusion of consideration of relevant facts under several factors may result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it used to be to classify certain workers as independent contractors rather than FLSA-covered employees. The issuance of this proposed rule could reduce or prevent this misclassification from occurring.

Because the Department does not have data on the number of misclassified workers and because there are inherent challenges in determining the extent to which the rule would reduce this misclassification, much of the analysis is presented qualitatively, aside from rule familiarization costs, which are quantified.<sup>506</sup> The Department has therefore provided a qualitative analysis of the transfers and benefits that could occur because of this reduced misclassification.

As discussed above, the 2021 IC Rule is the appropriate baseline to represent what the world could look like going forward in the absence of this proposed rule. However, this baseline may not reflect what the world looked like prior to this NPRM. Until March of 2022, the Department had not been using the framework for analysis from that rule when assessing independent contractor status in its enforcement and

<sup>504</sup> See *Coalition for Workforce Innovation*, 2022 WL 1073346.

<sup>505</sup> OMB Circular A-4 notes that when agencies are developing a baseline, "[it] should be the best assessment of the way the world would look absent the proposed action."

<sup>506</sup> The Department uses the term "misclassification" throughout this analysis to refer to workers who have been classified as independent contractors but who, as a matter of economic reality, are economically dependent on their employer for work. These workers' legal status would not change under the 2021 IC Rule or this proposed rule—they would properly be classified as employees under both rules. The Department notes that sources cited in this analysis may use other misclassification standards which may not align fully with the Department's use of the term.

compliance assistance activities. The 2021 IC Rule baseline also may not reflect the current economic landscape, because the Department is not aware of any Federal district or appellate court that has relied on the substance of the 2021 IC Rule so far to resolve a dispute regarding the proper classification of a worker as an employee or independent contractor. Therefore, if the Department were to instead compare the proposed rule to the current economic and legal landscape, the economic impact would be much smaller, because this proposed rule is consistent with the longstanding judicial precedent and guidance that the Department was relying on prior to March of 2022. The Department still believes that the 2021 IC Rule is the appropriate baseline, but notes that the current economic landscape may not be the same as a future situation without this proposed rule.

The Department does not believe, as reflected in this analysis, that this proposed rule would result in widespread reclassification of workers. That is, for workers who are properly classified as independent contractors, the Department does not, for the most part, anticipate that this rule would result in these workers being reclassified as employees. Especially compared to the guidance that was in effect before the 2021 IC Rule, the test proposed in this NPRM would not make independent contractor status significantly less likely. Rather, impacts resulting from this rule would mainly be due to a reduction in misclassification. If the 2021 IC Rule is retained, the risk of misclassification could be increased. As noted previously, the 2021 IC Rule's elevation of certain factors and its preclusion of consideration of relevant facts under several factors, which is a departure from judicial precedent applying the economic reality test, may result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it used to be to classify certain workers as independent contractors rather than FLSA-covered employees. This NPRM could therefore help prevent this misclassification by providing employers with guidance that is more consistent with longstanding precedent. The Department welcomes comments and data on all of the analysis presented here.

#### *B. Estimated Number of Independent Contractors*

To provide some context on the prevalence of independent contracting, the Department first estimated the number of independent contractors. There are a variety of estimates of the

number of independent contractors spanning a wide range depending on methodologies and how the population is defined.<sup>507</sup> There is no data source on independent contractors that perfectly mirrors the definition of independent contractor in the Department's regulations. There is also no regularly published data source on the number of independent contractors and data from the current year does not exist, making it difficult to examine trends in independent contracting or to measure how regulatory changes impact the number of independent contractors.

The Department believes that the Current Population Survey (CPS) Contingent Worker Supplement (CWS) offers an appropriate lower bound for the number of independent contractors; however, there are potential biases in these data that will be noted. This is the estimation method used in the 2021 IC Rule, and the Department has not found any new data or analyses to indicate a need for any changes. Some recent data sources provide an indication of how COVID-19 may have impacted the number of independent contractors, but this is inconclusive. Additionally, estimates from other sources will be presented to demonstrate the potential range.

The U.S. Census Bureau conducts the CPS, and it is published monthly by the Bureau of Labor Statistics (BLS). The sample includes approximately 60,000 households and is nationally representative. Periodically since 1995, and most recently in 2017, the CPS included a supplement to the May survey to collect data on contingent and alternative employment arrangements. Based on the CWS, there were 10.6 million independent contractors in 2017, amounting to 6.9 percent of workers.<sup>508</sup> The CWS measures those who say that their independent contractor job is their primary job and that they worked at the independent contractor job in the survey's reference week.

The BLS's estimate of independent contractors includes "[w]orkers who are identified as independent contractors, independent consultants, or freelance workers, regardless of whether they are

self-employed or wage and salary workers." BLS asks two questions to identify independent contractors:<sup>509</sup>

- Workers reporting that they are self-employed are asked: "Are you self-employed as an independent contractor, independent consultant, freelance worker, or something else (such as a shop or restaurant owner)?" (9.0 million independent contractors.) We refer to these workers as "self-employed independent contractors" in the remainder of the analysis.

- Workers reporting that they are wage and salary workers are asked: "Last week, were you working as an independent contractor, an independent consultant, or a freelance worker? That is, someone who obtains customers on their own to provide a product or service." (1.6 million independent contractors.) We refer to these workers as "other independent contractors" in the remainder of the analysis.

It is important to note that independent contractors are identified in the CWS in the context of the respondent's "main" job (*i.e.*, the job with the most hours).<sup>510</sup> Therefore, the estimate of independent contractors does not include those who may be an employee for their primary job, but may also work as an independent contractor.<sup>511</sup> For example, Lim et al. (2019) estimate that independent contracting work is the primary source of income for 48 percent of independent contractors.<sup>512</sup> Applying this estimate to

<sup>509</sup> The variables used are PES8IC=1 for self-employed and PES7=1 for other workers.

<sup>510</sup> While self-employed independent contractors are identified by the worker's main job, other independent contractors answered yes to the CWS question about working as an independent contractor last week. Although the survey question does not ask explicitly about the respondent's main job, it follows questions asked in reference to the respondent's main job.

<sup>511</sup> Even among independent contractors, failure to report multiple jobs in response to survey questions is common. For example, Katz and Krueger (2019) asked Amazon Mechanical Turk participants the CPS-style question "Last week did you have more than one job or business, including part time, evening, or weekend work?" In total, 39 percent of respondents responded affirmatively. However, these participants were asked the follow-up question "Did you work on any gigs, HITs or other small paid jobs last week that you did not include in your response to the previous question?" After this question, which differs from the CPS, 61 percent of those who indicated that they did not hold multiple jobs on the CPS-style question acknowledged that they failed to report other work in the previous week. As Katz and Krueger write, "If these workers are added to the multiple job holders, the percent of workers who are multiple job holders would almost double from 39 percent to 77 percent." See L. Katz and A. Krueger, "Understanding Trends in Alternative Work Arrangements in the United States," RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5), p. 132–46 (2019).

<sup>512</sup> K. Lim, A. Miller, M. Risch, and E. Wilking, "Independent Contractors in the U.S.: New Trends

the 10.6 million independent contractors estimated from the CWS, results in 22.1 million independent contractors (10.6 million ÷ 0.48). Alternatively, a survey of independent contractors in Washington found that 68 percent of respondents reported that independent contract work was their primary source of income.<sup>513</sup> However, because this survey only includes independent contractors in one state, the Department has not used this data to adjust its estimate of independent contractors.

The CWS's large sample size results in small sampling error. However, the questionnaire's design may result in some non-sampling error. For example, one potential source of bias is that the CWS only considers independent contractors during a single point in time—the survey week (generally the week prior to the interview).

These numbers will thus underestimate the prevalence of independent contracting over a longer timeframe, which may better capture the size of the population.<sup>514</sup> For example, Farrell and Greig (2016) used a randomized sample of 1 million Chase customers to estimate prevalence of the Online Platform Economy.<sup>515</sup> They found that "[a]lthough 1 percent of adults earned income from the Online

from 15 years of Administrative Tax Data," Department of Treasury, p. 61 (Jul. 2019), <https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf>. From table 5, the total number of independent contractors across all categories is 13.81 million. The number of independent contractors in the categories where these workers earn the majority of their labor income from independent contractor earnings is 6.63 million. 6.63 million ÷ 13.81 million = 0.48.

<sup>513</sup> Washington Department of Commerce, "Independent Contractor Study," p. 21 (Jul. 2019), <https://deptofcommerce.app.box.com/v/independent-contractor-study>.

<sup>514</sup> In any given week, the total number of independent contractors would have been roughly the same, but the identity of the individuals who do it for less than the full year would likely vary. Thus, the number of unique individuals who work at some point in a year as independent contractors would exceed the number of independent contractors who work within any one-week period as independent contractors.

<sup>515</sup> D. Farrell and F. Greig, "Paychecks, Paydays, and the Online Platform," JPMorgan Chase Institute (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2911293](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911293). The authors define the Online Platform Economy as "economic activities involving online intermediaries." This includes "labor platforms" that "connect customers with freelance or contingent workers" and "capital platforms" that "connect customers with individuals who rent assets or sell goods peer-to-peer." As such, this study encompasses data on income sources that the Department acknowledges might not be a one-to-one match with independent contracting and could also include work that is part of an employment relationship. However, the Department believes that including data on income earned through online platforms is useful when discussing the potential magnitude of independent contracting.

<sup>507</sup> The Department uses the term "independent contractor" throughout this analysis to refer to workers who, as a matter of economic reality, are not economically dependent on their employer for work and are in business for themselves. The Department notes that sources cited in this analysis may use other definitions of independent contractors that may not align fully with the Department's use of the term.

<sup>508</sup> Bureau of Labor Statistics, "Contingent and Alternative Employment Arrangements—May 2017," USDL-18-0942 (June 7, 2018), <https://www.bls.gov/news.release/pdf/conemp.pdf>.

Platform Economy in a given month, more than 4 percent participated over the three-year period.” Additionally, Collins et al. (2019) examined tax data from 2000 through 2016 and found that the number of workers who filed a form 1099 grew substantially over that period, and that fewer than half of these workers earned more than \$2,500 from 1099 work in 2016. The prevalence of lower annual earnings implies that most workers who received a 1099 did not work as an independent contractor every week.<sup>516</sup>

The CWS also uses proxy responses, which may underestimate the number of independent contractors. The RAND American Life Panel (ALP) survey conducted a supplement in 2015 to mimic the CWS questionnaire but used self-responses only. The results of the survey were summarized by Katz and Krueger (2018).<sup>517</sup> This survey found that independent contractors comprise 7.2 percent of workers.<sup>518</sup> Katz and Krueger identified that the 0.5 percentage point difference in magnitude between the CWS and the ALP was due to both cyclical conditions, and the lack of proxy responses in the ALP.<sup>519</sup> Therefore, the Department believes a reasonable upper-bound on the potential bias due to the use of proxy responses in the CWS is 0.5 percentage points (7.2 versus 6.7).<sup>520 521</sup>

Another potential source of bias in the CWS is that some respondents may not self-identify as independent contractors. For example, Abraham et al. (2020) estimated that 6.6 percent of workers in

their study initially respond that they are employees but were then determined (by the researcher) to be independent contractors based on their answers to follow-up questions.<sup>522</sup> Additionally, individuals who do what some researchers refer to as “informal work” may in fact be independent contractors though they may not characterize themselves as such.<sup>523</sup> This population could be substantial. Abraham and Houseman (2019) confirmed this in their examination of the Survey of Household Economics and Decision-making. They found that 28 percent of respondents reported doing “informal work” for money over the past month.<sup>524</sup>

Conversely, another source of bias in the CWS is that some workers who self-identify as independent contractors may misunderstand their status or may be misclassified by their employer. These workers may answer the survey in the affirmative, despite not truly being independent contractors. While precise and representative estimates of nationwide misclassification are unavailable, multiple studies suggest its prevalence in numerous sectors in the economy.<sup>525</sup> See section VII.D.2. for a more thorough discussion of the prevalence of misclassification.

Because reliable data on the potential magnitude of the biases discussed above

are unavailable, and so the net direction of the biases is unknown, the Department has not attempted to calculate how these biases may impact the estimated number of independent contractors.

Because the CWS estimate represents only the number of workers who worked as independent contractors on their primary job during the survey reference week, the Department applied the research literature and adjusted this measure to include workers who are independent contractors in a secondary job or who were excluded from the CWS estimate due to other factors. As noted above, integrating the estimated proportions of workers who are independent contractors on secondary or otherwise excluded jobs produces an estimate of 22.1 million, representing the total number of workers working as independent contractors in any job at a given time. Given the prevalence of independent contractors who work sporadically and earn minimal income, adjusting the estimate according to these sources captures some of this population. It is likely that this figure is still an underestimate of the true independent contractor pool.

#### 1. COVID-19 Adjustment to the Estimated Number of Independent Contractors

The Department’s estimate of the number of independent contractors, 22.1 million, is based primarily on 2017 data. Because COVID-19 has had a substantial impact on the labor market, it is possible that this estimate is not currently appropriate. The Department conducted a search for more recent data to indicate any trends in the number of independent contractors since 2017. The findings are inconclusive but generally do not indicate an increase.

The Federal Reserve Board’s annual Survey of Household Economics and Decisionmaking (SHED) provides measures of the economic well-being of U.S. households. The Federal Reserve Board publishes a report “Economic Well-Being of U.S. Households” summarizing the findings of each survey.<sup>526</sup> One subsection of the Employment section describes the results of the questions related to “The Gig Economy.” While the survey questions about work in the “gig economy” include more types of work

<sup>516</sup> B. Collins, A. Garin, E. Jackson, D. Koustas, and M. Payne, “Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns,” IRS SOI Joint Statistical Research Program (2019) (unpublished paper), <https://www.irs.gov/pub/irs-soi/19rpgigworkreplacingtraditionalemployment.pdf>.

<sup>517</sup> See L. Katz and A. Krueger, “The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015,” (2018).

<sup>518</sup> *Id.* at 49. The estimate is 9.6 percent without correcting for overrepresentation of self-employed workers or multiple job holders. *Id.* at 31.

<sup>519</sup> *Id.* at Addendum (“Reconciling the 2017 BLS Contingent Worker Survey”).

<sup>520</sup> Note that they estimate 6.7 percent of employed workers are independent contractors using the CWS, as opposed to 6.9 percent as estimated by the BLS. This difference is attributable to changes to the sample to create consistency.

<sup>521</sup> In addition to the use of proxy responses, this difference is also due to cyclical conditions. The impacts of these two are not disaggregated for independent contractors, but if we applied the relative sizes reported for all alternative work arrangements, we would get 0.36 percentage point difference due to proxy responses. Additionally, it should be noted that this may not entirely be a bias. It stems from differences in independent contracting reported by proxy respondents and actual respondents. As Katz and Krueger explain, this difference may be due to a “mode” bias or proxy respondents may be less likely to be independent contractors. *Id.* at Addendum p. 4.

<sup>522</sup> K. Abraham, B. Hershbein, and S. Houseman, “Contract Work at Older Ages,” NBER Working Paper 26612 (2020), <http://www.nber.org/papers/w26612>.

<sup>523</sup> The Department believes that including data on what is referred to in some studies as “informal work” is useful when discussing the magnitude of independent contracting, although not all informal work is done by independent contractors. The Survey of Household Economics and Decision-making asked respondents whether they engaged in informal work sometime in the prior month. It categorized informal work into three broad categories: personal services, on-line activities, and off-line sales and other activities, which is broader than the scope of independent contractors. These categories include activities like house sitting, selling goods online through sites like eBay or craigslist, or selling goods at a garage sale. The Department acknowledges that the data discussed in this study might not be a one-to-one match with independent contracting and could also include work that is part of an employment relationship, but it nonetheless provides some useful data for this purpose.

<sup>524</sup> K. Abraham, and S. Houseman, “Making Ends Meet: The Role of Informal Work in Supplementing Americans’ Income,” RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5): 110–31 (2019), <https://www.aeaweb.org/conference/2019/preliminary/paper/QreAaS2h>.

<sup>525</sup> See, e.g., U.S. Gov’t Accountability Off., GAO–09–717, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* 10 (2008) (“Although the national extent of employee misclassification is unknown, earlier national studies and more recent, though not comprehensive, studies suggest that employee misclassification could be a significant problem with adverse consequences.”).

<sup>526</sup> Consumer and Community Research Section of the Federal Reserve Board’s Division of Consumer and Community Affairs, “Economic Well-Being of U.S. Households in 2021,” Board of Governors of the Federal Reserve System (2022). Reports from all years available at <https://www.federalreserve.gov/publications/report-economic-well-being-us-households.htm>.

scenarios than just independent contracting, a decrease from 30 percent to 20 percent of adults answering “yes” from 2017 to 2020 may indicate that the number of independent contractors in this industry also decreased during that time period.<sup>527</sup> The report summarizing the 2021 data is available, but unfortunately the gig economy questions were revised substantially, so a comparable value is not available for 2021. Moreover, trends of potential independent contractors in one industry are not necessarily indicative of trends across the economy.

MBO Partners, a company with the goal of connecting enterprise organizations and top independent professionals, also conducts an annual survey and prepares a research report of the findings.<sup>528</sup> In all groups of “independent workers,” MBO Partners similarly found a decrease in the number from 2017 to 2020. Conversely, in total, the 2021 report shows a large increase from 2020, enough that the number of independent workers in 2021 is larger than the 2017 number. However, this increase occurs only in the “occasional independent” workers category, described as those who work

part-time and regularly, but without set hours. Comparing the number of part-time and full-time independent workers yields similar values in 2017 and 2021, so the Department believes that no adjustments are needed to the 2017 estimate of 22.1 million independent contractors.

## 2. Range of Estimates in the Literature

To further consider the range of estimates available, the Department conducted a literature review, the findings of which are presented in Table 1. Other studies were also considered but are excluded from this table because the study populations were broader than just independent contractors, limited to one state, or include workers outside of the United States.<sup>529</sup> The RAND ALP,<sup>530</sup> the Gallup Survey,<sup>531</sup> and the General Social Survey’s (GSS’s) Quality of Worklife (QWL)<sup>532</sup> supplement are widely cited alternative estimates. However, the Department chose to use sources with significantly larger sample sizes and/or more recent data for the primary estimate.

Jackson et al. (2017)<sup>533</sup> and Lim et al. (2019)<sup>534</sup> use tax information to estimate the prevalence of independent contracting. In general, studies using tax

data tend to show an increase in prevalence of independent contracting over time. The use of tax data has some advantages and disadvantages over survey data. Advantages include large sample sizes, the ability to link information reported on different records, the reduction in certain biases such as reporting bias, records of all activity throughout the calendar year (the CWS only references one week), and inclusion of both primary and secondary independent contractors. Disadvantages are that independent contractor status needs to be inferred; there is likely an underreporting bias (*i.e.*, some workers do not file taxes); researchers are generally trying to match the IRS definition of independent contractor, which does not mirror the scope of independent contractors under the FLSA; and the estimates include misclassified independent contractors.<sup>535</sup> A major disadvantage of using tax data for this analysis is that the detailed source data are not publicly available and thus the analyses cannot be directly verified or adjusted as necessary (*e.g.*, to describe characteristics of independent contractors, etc.).

TABLE 1—SUMMARY OF ESTIMATES OF INDEPENDENT CONTRACTING

Source	Method [a]	Definition [b]	Percent of workers	Sample size	Year
CPS CWS .....	Survey .....	Independent contractor, consultant or freelance worker (main only).	6.9%	50,392 ....	2017
ALP .....	Survey .....	Independent contractor, consultant or freelance worker (main only).	7.2%	6,028 .....	2015
Gallup .....	Survey .....	Independent contractor .....	14.7%	5,025 .....	2017
GSS QWL .....	Survey .....	Independent contractor, consultant or freelancer (main only) ..	14.1%	2,538 .....	2014
Jackson et al.	Tax data .....	Independent contractor, household worker .....	6.1% [c]	~5.9 million [d].	2014

<sup>527</sup> The report defines gig work as including “three types of non-traditional activities: offline service activities, such as child care or house cleaning; offline sales, such as selling items at flea markets or thrift stores; and online services or sales, such as driving using a ride-sharing app or selling items online.” Consumer and Community Research Section of the Federal Reserve Board’s Division of Consumer and Community Affairs, “Economic Well-Being of U.S. Households in 2017,” Board of Governors of the Federal Reserve System (May 2018).

<sup>528</sup> MBO partners, “The Great Realization: 11th Annual State of Independence,” (2021). Annual reports are available at <https://www.mbopartners.com/state-of-independence/previous-reports/>.

<sup>529</sup> Including, but not limited to: McKinsey Global Institute, “Independent Work: Choice, Necessity, and the Gig Economy” (2016), <https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy>; Kelly Services, “Agents of Change” (2015), <https://www.kellyservices.com/>

[global/siteassets/3-kelly-global-services/uploadedfiles/3-kelly\\_global\\_services/content/sectionless\\_pages/kocg1047720freeagent20whitepaper20210x21020final2.pdf](https://global/siteassets/3-kelly-global-services/uploadedfiles/3-kelly_global_services/content/sectionless_pages/kocg1047720freeagent20whitepaper20210x21020final2.pdf); Robles and McGee, “Exploring Online and Offline Informal Work: Findings from the Enterprising and Informal Work Activities (EIWA) Survey” (2016); Upwork, “Freelancing in America” (2019); Washington Department of Commerce, *supra* n. 513; Farrell and Greig, *supra* n. 515; MBO Partners, “State of Independence in America” (2016); Abraham et al., “Measuring the Gig Economy: Current Knowledge and Open Issues” (2018), <https://www.nber.org/papers/w24950>; Collins et al. (2019), *supra* n. 516; Gitis et al., “The Gig Economy: Research and Policy Implications of Regional, Economic, and Demographic Trends,” American Action Forum (2017), <https://www.americanactionforum.org/research/gig-economy-research-policy-implications-regional-economic-demographic-trends/#ixzz51pbj79a>; Dourado and Koopman, “Evaluating the Growth of the 1099 Workforce,” Mercatus Center (2015), <https://www.mercatus.org/publication/evaluating-growth-1099-workforce>.

<sup>530</sup> See Katz and Krueger (2018), *supra* n. 517.

<sup>531</sup> “Gallup’s Perspective on The Gig Economy and Alternative Work Arrangements,” Gallup (2018), <https://www.gallup.com/workplace/240878/gig-economy-paper-2018.aspx>.

<sup>532</sup> See Abraham et al. (2018), *supra* n. 529, Table 4.

<sup>533</sup> E. Jackson, A. Looney, and S. Ramnath, “The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage,” OTA Working Paper 114 (2017), <https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-114.pdf>.

<sup>534</sup> Lim et al., *supra* n. 512.

<sup>535</sup> In comparison to household survey data, tax data may reduce certain types of biases (such as recall bias) while increasing other types (such as underreporting bias). Because the Department is unable to quantify this tradeoff, it could not determine whether, on balance, survey or tax data are more reliable.

TABLE 1—SUMMARY OF ESTIMATES OF INDEPENDENT CONTRACTING—Continued

Source	Method [a]	Definition [b]	Percent of workers	Sample size	Year
Lim et al.	Tax data .....	Independent contractor .....	8.1%	1% of 1099–MISC and 5% of 1099–K.	2016

[a] The CPS CWS and the GSS QWL are nationally representative, and the ALP CWS is approximately nationally representative. The Gallup poll is demographically representative but does not explicitly claim to be nationally representative. Lastly, the two tax data sets are very large random samples and consequently are likely to be nationally representative, although the authors do not explicitly claim so.

[b] The survey data only identify independent contractors on their main job. Jackson et al. include independent contractors as long as at least 15 percent of their earnings were from self-employment income; thus, this population is broader. If Jackson et al.’s estimate is adjusted to exclude those who are primary wage earners, the rate is 4.0 percent. Lim et al. include independent contractors on all jobs. If Lim et al.’s estimate is adjusted to only those who receive a majority of their labor income from independent contracting, the rate is 3.9 percent.

[c] Summation of (1) 2,132,800 filers with earnings from both wages and sole proprietorships and expenses less than \$5,000, (2) 4,125,200 primarily sole proprietorships and with less than \$5,000 in expenses, and (3) 3,416,300 primarily wage earners.

[d] Estimate based on a 10 percent sample of self-employed workers and a 1 percent sample of W–2 recipients.

### 3. Demographics of Independent Contractors

The Department reviewed demographic information on independent contractors using the CWS, which, as stated above, only measures those who say that their independent contractor job is their primary job and that they worked at the independent contractor job in the survey’s reference week. According to the CWS, these primary independent contractors are most prevalent in the construction and professional and business services industries. These two industries comprise 44 percent of primary independent contractors. Independent contractors tend to be older and predominately male (64 percent). Millennials (defined as those born 1981–1996) have a significantly lower prevalence of primary independent contracting than older generations: 4.2 percent for Millennials compared to 7.2 percent for Generation X (defined as those born 1965–1980) and 10.2 percent for Baby Boomers and Matures (defined as individuals born before 1965).<sup>536</sup> However, other surveys that capture secondary independent contractors, or those who did informal work as

<sup>536</sup> The Department used the generational breakdown used in the MBO Partners 2017 report, “The State of Independence in America.” “Millennials” were defined as individuals born 1981–1996, “Generation X” were defined as individuals born 1965–1980, and “Baby Boomers and Matures” were defined as individuals born before 1965.

independent contractors show that the prevalence of informal work is lower among older workers. Abraham and Houseman (2019), find that among 18- to 24-year-olds, 41.3 percent did informal work over the past month. The rate fell to 25.7 percent for 45- to 54-year-olds, and 13.4 percent for those 75 years and older.<sup>537</sup> According to MBO partners, the COVID–19 pandemic may have accelerated this trend; when accounting for both primary and secondary independent work, 2021 marked the first year that Millennials and members of Generation Z (34 percent and 17 percent of independent workers respectively) outnumbered members of Generation X and Baby Boomers (23 percent and 26 percent respectively) as part of the independent workforce.<sup>538</sup>

According to the CWS, 64 percent of primary independent contractors are men. Additionally, Garin and Koustas (2021) find that men comprise both a larger share of independent contractors

<sup>537</sup> Abraham and Houseman (2019), *supra* n. 524. Note that this informal work may be broader than what would be considered independent contracting and includes activities like babysitting/housesitting and selling goods online through sites like eBay and Craigslist. *See also* Upwork (2019), *supra* n. 529.

<sup>538</sup> This data comes from the 2021 edition of the MBO Partners report, “The State of Independence in America.” While maintaining the generational breakdown used in the 2017 edition, “Generation Z” was additionally defined as individuals born 1997–2012. [https://info.mbopartners.com/rs/mbo/images/MBO\\_2021\\_State\\_of\\_Independence\\_Research\\_Report.pdf](https://info.mbopartners.com/rs/mbo/images/MBO_2021_State_of_Independence_Research_Report.pdf).

who perform work through traditional contracting arrangements and those who secure work through online platforms.<sup>539</sup> This study also found that a greater share of men than women who earn income in this way are primarily self-employed; women who perform online platform work are more likely to use that work to supplement other income.<sup>540</sup>

According to the CWS, white workers are somewhat overrepresented among primary independent contractors; they comprise 85 percent of this population but only 79 percent of the population of workers. Conversely, Black workers are somewhat underrepresented (comprising 8 percent and 13 percent, respectively).<sup>541</sup> The opposite trends emerge when evaluating the broader category of “informal work”, where racial minorities participate at a higher rate than white workers.<sup>542</sup> Primary independent contractors are spread across the educational spectrum, with no group especially overrepresented. The same trend in education attainment holds for workers who participate in informal work.<sup>543</sup>

<sup>539</sup> Garin, A. and Koustas, D., “The Distribution of Independent Contractor Activity in the United States: Evidence from Tax Filings,” (2021).

<sup>540</sup> *Id.*

<sup>541</sup> These numbers are calculated by the Department and based on the CWS respondents who state that their race is “white only” or “black only” as opposed to identifying as multi-racial.

<sup>542</sup> Abraham and Houseman (2019), *supra* n. 524.

<sup>543</sup> *Id.*

TABLE 2—CHARACTERISTICS OF WORKERS, ALL WORKERS AND INDEPENDENT CONTRACTORS

Demographic	Number of workers (millions)	Percent of workers	Number of independent contractors (primary job) (millions)	Percent of independent contractors
Total .....	158.9	100	10.6	100
<b>By Age</b>				
16–20 (Generation Z) .....	8.2	5.1	0.1	0.7
21–37 (Millennials) .....	59.2	37.3	2.5	23.4
38–52 (Generation X) .....	49.8	31.3	3.6	33.8
53+ (Baby Boomers and Matures) .....	43.6	27.5	4.5	42.1
<b>By Sex</b>				
Female .....	75.4	47.4	3.8	35.7
Male .....	85.4	53.7	6.8	64.3
<b>By Race</b>				
White only .....	125.6	79.1	9.0	84.6
Black only .....	20.3	12.8	0.9	8.3
All other races .....	14.9	9.4	0.8	7.1
<b>By Ethnicity</b>				
Hispanic .....	27.0	17.0	1.6	14.8
Not Hispanic .....	133.8	84.2	9.0	85.2
<b>By Industry</b>				
Agr, forestry, fishing, and hunting .....	2.6	1.6	0.2	2.0
Mining .....	0.8	0.5	0.0	0.1
Construction .....	11.0	6.9	2.0	19.3
Manufacturing .....	16.5	10.4	0.2	2.2
Wholesale and retail trade .....	20.5	12.9	0.8	7.9
Transportation and utilities .....	8.0	5.1	0.6	5.7
Information .....	3.0	1.9	0.2	2.2
Financial activities .....	10.9	6.9	1.0	9.6
Professional and business services .....	19.3	12.2	2.7	25.1
Educational and health services .....	36.2	22.8	1.0	9.6
Leisure and hospitality .....	15.1	9.5	0.7	6.2
Other services .....	7.8	4.9	1.0	9.7
Public administration .....	7.2	4.6	0.0	0.4
<b>By Education</b>				
Less than high school diploma .....	14.3	9.0	1.0	9.3
High school diploma or equivalent .....	41.9	26.4	2.6	24.4
Less than Bachelor's degree .....	45.3	28.5	2.8	26.5
Bachelor's degree .....	37.3	23.5	2.7	25.5
Master's degree or higher .....	21.9	13.8	1.5	14.5

**Note:** Estimates based on the 2017 CPS Contingent Worker Survey.

### C. Costs

#### 1. Rule Familiarization Costs

Regulatory familiarization costs represent direct costs to businesses and current independent contractors associated with reviewing the new regulation. To estimate the total regulatory familiarization costs, the Department used (1) the number of establishments and government entities using independent contractors, and the current number of independent contractors; (2) the wage rates for the employees and for the independent

contractors reviewing the rule; and (3) the number of hours that it estimates employers and independent contractors will spend reviewing the rule. This section presents the calculation for establishments first and then the calculation for independent contractors.

Regulatory familiarization costs may be a function of the number of establishments or the number of firms.<sup>544</sup> Presumably, the headquarters

<sup>544</sup> An establishment is commonly understood as a single economic unit, such as a farm, a mine, a factory, or a store, that produces goods or services. Establishments are typically at one physical

of a firm will conduct the regulatory review for businesses with multiple locations and may require some locations to familiarize themselves with the regulation at the establishment level. Other firms may either review the rule to consolidate key takeaways for their affiliates or they may rely entirely on

location and engaged in one, or predominantly one, type of economic activity for which a single industrial classification may be applied. An establishment contrasts with a firm, or a company, which is a business and may consist of one or more establishments. See BLS, "Quarterly Census of Employment and Wages: Concepts," <https://www.bls.gov/opub/hom/cew/concepts.htm>.



outside experts to evaluate the rule and relay the relevant information to their organization (e.g., a chamber of commerce). The Department used the number of establishments to estimate the fundamental pool of regulated entities—which is larger than the number of firms. This assumes that regulatory familiarization occurs at both the headquarters and establishment levels.

To estimate the number of establishments incurring regulatory familiarization costs, the Department began by using the Statistics of U.S. Businesses (SUSB) to define the total pool of establishments in the United States.<sup>545</sup> In 2019, the most recent year available, there were 7.96 million establishments. These data were supplemented with the 2017 Census of Government that reports 90,075 local government entities, and 51 state and Federal government entities.<sup>546</sup> The total number of establishments and governments in the universe used for this analysis is 8,049,229.

This universe is then restricted to the subset of establishments that engage independent contractors. In 2019, Lim et al. used extensive IRS data to model the independent contractor market and found that 34.7 percent of firms hire independent contractors.<sup>547</sup> These data are based on annual tax filings, so the dataset includes firms that may contract for only parts of a year. Multiplying the universe of establishments and governments by 35 percent results in 2.8 million entities.

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) (or a staff member in a similar position) will review the rule.<sup>548</sup> According to the Occupational Employment and Wage Statistics (OEWS), these workers had a median wage of \$30.83 per hour in 2021 (most recent data available).<sup>549</sup>

<sup>545</sup> U.S. Census Bureau, 2019 SUSB Annual Datasets by Establishment Industry. <https://www.census.gov/data/datasets/2019/econ/susb/2019-susb.html>.

<sup>546</sup> U.S. Census Bureau, 2017 Census of Governments. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>.

<sup>547</sup> Lim et al., *supra* n. 512, Table 10: Firm sample summary statistics by year (2001–2015), <https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf>.

<sup>548</sup> A Compensation/Benefits Specialist ensures company compliance with Federal and state laws, including reporting requirements; evaluates job positions, determining classification, exempt or non-exempt status, and salary; develops, evaluates, improves, and communicates methods and techniques for selecting, promoting, compensating, evaluating, and training workers. See BLS, “13–1141 Compensation, Benefits, and Job Analysis Specialists,” <https://www.bls.gov/oes/current/oes131141.htm>.

<sup>549</sup> The 2021 IC Rule used the mean wage rate to calculate rule familiarization costs, but the

Assuming benefits are paid at a rate of 45 percent of the base wage,<sup>550</sup> and overhead costs are 17 percent of the base wage, the reviewer’s effective hourly rate is \$49.94. The Department assumes that it will take on average about 30 minutes to review the rule as proposed. The Department believes that 30 minutes, on average, is appropriate, because while some establishments will spend longer to review the rule, many establishments may rely on third-party summaries of the changes or spend little or no time reviewing the rule. Furthermore, the analysis outlined in this rule aligns with existing judicial precedent and previous guidance released by the Department, with which much of the regulated community is already familiar. Total regulatory familiarization costs to businesses in Year 1 are estimated to be \$70.3 million ( $\$49.94 \times 0.5 \text{ hour} \times 2,817,230$ ) in 2021 dollars.

For regulatory familiarization costs for independent contractors, the Department used its estimate of 22.1 million independent contractors and assumed each independent contractor will spend 15 minutes to review the regulation. The average time spent by independent contractors is estimated to be smaller than for establishments and governments. This difference is in part because the Department believes independent contractors are likely to rely on summaries of the key elements of the rule change published by the Department, worker advocacy groups, media outlets, and accountancy and consultancy firms, as has occurred with other rulemakings. This time is valued at \$21.35, which is the median hourly wage rate for independent contractors in the CWS of \$19.45 updated to 2021 dollars using the gross domestic product (GDP) deflator.<sup>551 552</sup> Therefore,

Department has used the median wage rate here, because it is more consistent with cost analyses in other Wage and Hour Division rulemakings. The Department used the median wage rate in the Withdrawal Rule. Generally, the Department uses median wage rates to calculate costs, because the mean wage rate has the potential to be biased upward by high-earning outlier wage observations.

<sup>550</sup> Employer Costs for Employee Compensation, 2021 Annual Averages. <https://www.bls.gov/ncs/data.htm>.

<sup>551</sup> Based on Department calculations using the individual level data. The Department also calculated the mean hourly wage for independent contractors using the CWS data and found that the mean wage in 2017 was \$27.29, which would be \$29.97 updated to 2021 dollars using the GDP deflator.

<sup>552</sup> In the 2021 IC Rule the Department included an additional 45 percent for benefits and 17 percent for overhead. These adjustments have been removed here, because independent contractors do not usually receive employer provided benefits and generally have overhead costs built into their hourly rate.

regulatory familiarization costs to independent contractors in Year 1 are estimated to be \$118 million ( $\$21.35 \times 0.25 \text{ hour} \times 22.1 \text{ million}$ ).

The total one-time regulatory familiarization costs for establishments, governments, and independent contractors are estimated to be \$188.3 million. Regulatory familiarization costs in future years are assumed to be de minimis. Employers and independent contractors would continue to familiarize themselves with the applicable legal framework in the absence of the rule, so this rulemaking is not expected to impose costs after the first year. This amounts to a 10-year annualized cost of \$26.0 million at a discount rate of 3 percent or \$25.1 million at a discount rate of 7 percent.

#### D. Benefits

##### 1. Increased Consistency

This proposed rule presents a detailed analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department’s longstanding guidance prior to the 2021 IC Rule. This analysis will provide more consistent guidance to employers in properly classifying workers as employees or independent contractors, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors. The analysis will provide a consistent approach for those businesses that engage (or wish to engage) independent contractors, who the Department recognizes play an important role in the economy. The proposed rule’s consistency with judicial precedent could also help to reduce legal disputes.

##### 2. Reduced Misclassification

This proposed rule would provide consistent guidance to employers in properly classifying workers as employees or independent contractors, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors. This clear guidance could help reduce the occurrence of misclassification.

The prevalence of misclassification of employees as independent contractors is unclear, but the literature indicates it is substantial. A 2020 National Employment Law Project (NELP) report, for example, reviewed state audits and concluded that “these state reports show that 10 to 30 percent of employers (or more) misclassify their employees as independent contractors.”<sup>553</sup> Similarly,

<sup>553</sup> NELP, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, (Oct. 2020),

a 2000 Department of Labor study also found that “between 10 percent and 30 percent of employers audited in 9 states misclassified workers as independent contractors.”<sup>554</sup> This same report found that depending on the state, between 1 percent and 9 percent of workers are misclassified as independent contractors.

Misclassification disproportionately affects Black, indigenous, and people of color (BIPOC) because of the disparity in occupations affected by misclassification.<sup>555</sup> High incidence of misclassification of employees as independent contractors has been documented in agriculture, construction, trucking, housecleaning, in-home care, stagecraft, and ‘sharing economy’ companies.<sup>556</sup>

Misclassification violates one of the purposes of the FLSA: eliminating “unfair method[s] of competition in commerce.”<sup>557</sup> When employers misclassify employees as independent contractors, they illegally cut labor costs, undermining law-abiding competitors.<sup>558</sup> While the services offered may be comparable at face value, the employer engaging in misclassification is able to offer lower estimates and employers following the rules are left at a disadvantage.

*E. Transfers*

1. Employer-Provided Fringe Benefits

Misclassification of independent contractors culminates in a reduced social safety net starting with the individual and cascading out through the local, state, and Federal programs.

Employees who are misclassified as independent contractors generally do not receive employer-sponsored health and retirement benefits, potentially resulting in or contributing to long-term financial insecurity.

Employees are more likely than independent contractors to have health insurance. According to the CWS, 75.4 percent of independent contractors have health insurance, compared to 84.0 percent of employees. This gap between independent contractors and employees is also true for low-income workers. Using CWS data, the Department compared health insurance rates for workers earning less than \$15 per hour and found that 71.0 percent of independent contractors have health insurance compared with 78.5 percent of employees. Lastly, the Department considered whether this gap could be larger for traditionally underserved groups or minorities. Considering the subsets of independent contractors who are female, Hispanic, or Black, only the Hispanic independent contractors have a statistically significant difference in the percentage of workers with health insurance (estimated to be about 18 percentage points lower).<sup>559</sup>

Additionally, a major source of retirement savings is employer-sponsored retirement accounts. According to the CWS, 55.5 percent of employees have a retirement account with their current employer; in addition, the BLS Employer Costs for Employee Compensation (ECEC) found that in 2021 employers pay 5.1 percent of employees’ total compensation in

retirement benefits on average (\$2.03/\$39.46). A 2017 Treasury study found that in 2014, while forty two percent of wage earners made contributions to an individual retirement account (IRA) or employer plan, only eight percent of self-employed individuals made any retirement contribution.<sup>560</sup> Smaller retirement savings could result in a long-term tax burden to all Americans due to increased reliance upon social assistance programs.

To the extent that this proposed rule would reduce misclassification, it could result in transfers to workers in the form of employer-provided benefits like health care and retirement benefits. As shown in Table 3 below, using from BLS Employer Costs for Employee Compensation, the Department has calculated the average cost to employers for various benefits as a percentage of the average cost to employers for wages and salaries. This share was then applied to the median weekly wage of both full-time and part-time independent contractors to estimate the value of these benefits to an average independent contractor if they were to begin receiving these benefits. The Department estimated that the value of these benefits could average more than \$15,000 annually for full-time independent contractors and almost \$6,000 annually for part-time independent contractors. This example transfer estimate could be reduced if there is a downward adjustment in the worker’s wage rate to offset a portion of the employer’s cost associated with these new benefits.

TABLE 3—POTENTIAL TRANSFERS ASSOCIATED WITH EMPLOYER-PROVIDED FRINGE BENEFITS

Employer-provided fringe benefit	Employer cost for benefit as a share of employer cost for wages and salaries (Q1 2022) [a]	Value of benefit for the median weekly wage of a full-time independent contractor (\$980) [d]	Value of benefit for the median weekly Wage of a part-time independent contractor (\$383) [d]
Health Insurance .....	11.5%	\$112.70	\$44.05
Retirement [b] .....	7.5%	73.50	28.73
Paid Leave [c] .....	10.8%	105.84	41.36

<https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020>.

<sup>554</sup> Lalith de Silva, Adrian Millett, Dominic Rotondi, and William F. Sullivan, “Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs” Report of Planmatics, Inc., for U.S. Department of Labor Employment and Training Administration (2000), <https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

<sup>555</sup> See NELP, *supra* n. 553.

<sup>556</sup> Carré, F. (2015). *(In)dependent contractor misclassification*. Economic Policy Institute. Briefing Paper #403, <https://www.epi.org/publication/independent-contractor-misclassification/>.

<sup>557</sup> 29 U.S.C. 202(a), (b).

<sup>558</sup> *Id.*

<sup>559</sup> To measure if the difference between these proportions is statistically significant, the Department used the replicate weights for the CWS. At a 0.05 significance level, the proportion of Hispanic independent contractors with any health

insurance is lower than the proportion for all independent contractors.

<sup>560</sup> Jackson, E., Looney, A., & Ramnath, S., Department of Treasury, *The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage*, Working Paper #114 (Jan. 2017), <https://home.treasury.gov/system/files/131/WP-114.pdf>. As discussed in the 2021 IC Rule, this study defines retirement accounts as “employer-sponsored plans,” which may not encompass all of the possible long-term saving methods.

TABLE 3—POTENTIAL TRANSFERS ASSOCIATED WITH EMPLOYER-PROVIDED FRINGE BENEFITS—Continued

Employer-provided fringe benefit	Employer cost for benefit as a share of employer cost for wages and salaries (Q1 2022) [a]	Value of benefit for the median weekly wage of a full-time independent contractor (\$980) [d]	Value of benefit for the median weekly Wage of a part-time independent contractor (\$383) [d]
Total Annual Value of Fringe Benefits .....	.....	15,186.08	5,934.97

[a] The share for each benefit is calculated as the cost per hour for civilian workers divided by the wages and salaries cost per hour for civilian workers. Series IDs CMU115000000000D, CMU118000000000D, and CMU104000000000D divided by Series ID 102000000000D

[b] Includes defined benefit and defined contribution retirement plans

[c] Includes vacation, holiday, sick and personal leave

[d] Earnings data from the 2017 CWS (<https://www.bls.gov/news.release/conemp.t13.htm>) were inflated to Q1 2022 using GDP Deflator

2. Tax Liabilities

As self-employed workers, independent contractors are legally obligated to pay both the employee and employer shares of the Federal Insurance Contributions Act (FICA) taxes. Thus, if workers' classifications change from independent contractors to employees, there could be a transfer in Federal tax liabilities from workers to employers.<sup>561</sup> Although this proposed rule only addresses whether a worker is an employee or an independent contractor under the FLSA, the Department assumes in this analysis that employers are likely to keep the status of most workers the same across all benefits and requirements, including for tax purposes.<sup>562</sup> These payroll taxes include the 6.2 percent employer component of the Social Security tax and the 1.45 percent employer component of the Medicare tax.<sup>563</sup> In sum, independent contractors are legally responsible for an additional 7.65 percent of their earnings in FICA taxes (less the applicable tax deduction for this additional payment). Some of this increased tax liability may be partially or wholly paid for by the individuals and companies that engage independent contractors, to the extent that the compensation paid to independent contractors accounts for

this added tax liability. However, changes in compensation are discussed separately below. Changes in benefits, tax liability, and earnings must be considered in tandem to identify how the standard of living may change.

In addition to affecting tax liabilities for workers, this proposed rule could have an impact on state tax revenue and budgets. Misclassification results in lost revenue and increased costs for states, because states receive less tax revenue than they otherwise would from payroll taxes, and they have reduced funds to unemployment insurance, workers' compensation, and paid leave programs.<sup>564</sup> Although it has not been updated more recently, the IRS conducted a comprehensive worker misclassification estimate in 1984. At the time, the IRS found misclassification resulted in an estimated total tax loss of \$1.6 billion in Social Security taxes, Medicare taxes, Federal unemployment taxes, and Federal income taxes (for Tax Year 1984).<sup>565</sup> To the extent workers were incorrectly classified due to misapplication of the 2021 IC Rule, that could lead to reduced tax revenues.

Generally, employers are only required to contribute to unemployment insurance, disability insurance, or worker's compensation on behalf of employees therefore independent contractors do not have access to those benefits. Reduced unemployment insurance, disability insurance, and worker's compensation contributions result in reduced disbursement

capabilities. Misclassification of employees as independent contractors thus impacts the funds paid into such state programs. Even if the misclassified worker is unaffected and needs no assistance, the state has diminished funds for those who require the benefits. In Tennessee, from September 2017 to October 2018, the Uninsured Employers Fund unit "assessed 234 penalties against employers for not maintaining workers' compensation insurance, for a total assessment amount of \$2,730,269.60."<sup>566</sup> This amount represents only what was discovered by the taskforce in thirteen months and in just one state. By rescinding the 2021 IC Rule, this proposed rule could prevent this increased burden on government entities.

3. FLSA-Protections

When workers are properly classified as independent contractors, the minimum wage, overtime pay, and other requirements of the FLSA no longer apply. The 2017 CWS data indicate that independent contractors are more likely than employees to report earning less than the FLSA minimum wage of \$7.25 per hour (8 percent for self-employed independent contractors, 5 percent for other independent contractors, and 2 percent for employees). Concerning overtime pay, not only do independent contractors not receive the overtime pay premium, but the number of overtime hours worked by independent contractors is also higher. Analysis of the CWS data indicated that, before conditioning on covariates, primary self-employed independent contractors are more likely to work overtime (more than 40 hours in a workweek) at their main job than employees, as 29 percent of self-employed independent contractors reported working overtime versus just 17 percent for employees.<sup>567</sup>

<sup>561</sup> See 86 FR 1218.

<sup>562</sup> Courts have noted that the FLSA has the broadest conception of employment under Federal law. See, e.g., *Darden*, 503 U.S. at 326. To the extent that businesses making employment status determinations base their decisions on the most demanding Federal standard, a rulemaking addressing the standard for determining classification of worker as an employee or an independent contractor under the FLSA may affect the businesses' classification decisions for purposes of benefits and legal requirements under other Federal laws.

<sup>563</sup> Internal Revenue Service, "Publication 15, (Circular E), Employer's Tax Guide" (Dec 16, 2021), <https://www.irs.gov/pub/irs-pdf/p15.pdf>. The social security tax has a wage base limit of \$137,700 in 2020. An additional Medicare Tax of 0.9 percent applies to wages paid in excess of \$200,000 in a calendar year for individual filers.

<sup>564</sup> See, e.g., Lisa Xu and Mark Erlich, Economic Consequence of Misclassification in the State of Washington, Harvard Labor and Worklife Program, 2 (2019), [https://lwp.law.harvard.edu/files/lwp/files/wa\\_study\\_dec\\_2019\\_final.pdf](https://lwp.law.harvard.edu/files/lwp/files/wa_study_dec_2019_final.pdf); Karl A. Racine, Issue Brief and Economic Report, *Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry*, 13 (September 2019), <https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf>.

<sup>565</sup> Treasury Inspector General for Tax Inspection 2013, *Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings*, <https://www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf>.

<sup>566</sup> NELP, *supra* n. 553.

<sup>567</sup> The Department based this calculation on the percentage of workers in the CWS data who

Additionally, independent contractors who work overtime tend to work more hours of overtime than employees. According to the Department's analysis of CWS data, among those who usually work overtime, the mean usual number of overtime hours for independent contractors is 15.4 and the mean for employees is 11.8 hours. Independent contractors are also not protected by other provisions in the FLSA that are centered on ensuring that women are treated fairly at work, including employer-provided accommodations for breastfeeding workers and protections against pay discrimination.

As discussed above, compared to the 2021 IC Rule, this proposed rule could result in reduced misclassification of employees as independent contractors. Any reduction in misclassification that occurs as a result of this proposed rule would lead to an increase in the applicability of these FLSA protections for workers and subsequently may result in transfers relating to minimum wage and overtime. Specifically, to the extent misclassified workers were not earning the minimum wage, reduced misclassification would increase hourly wages for these workers to the Federal minimum wage. Similarly, to the extent misclassified workers were not receiving the applicable overtime pay, reduced misclassification would increase overtime pay for any overtime hours they continued to work. However, compared to the economic landscape prior to the Department's enforcement of the 2021 IC Rule in March 2022, these transfers would be less likely to occur.

#### 4. Hourly Wages, Bonuses, and Related Compensation

In addition to increased compliance with minimum wage and overtime requirements, potential transfers may also result from this rulemaking as a consequence of differences in earnings between employees and independent contractors.<sup>568</sup> Independent contractors are generally expected to earn a wage premium relative to employees who perform similar work to compensate for

respond to the PEHRUSL1 variable ("How many hours per week do you usually work at your main job?") with hours greater than 40. Workers who answer that hours vary were excluded from the calculation. The Department also applied the exclusion criteria used by Katz and Krueger (exclude workers reporting weekly earnings less than \$50 and workers whose calculated hourly rate (weekly earnings divided by usual hours worked per week) is either less than \$1 or more than \$1,000).

<sup>568</sup> The discussion of data on the differences in earnings between employees and independent contractors in the 2021 IC Rule was potentially confusing and included some evidence that was not statistically significant, so the findings and methodology are discussed again here.

their reduced access to benefits and increased tax liability. However, this may not always be the case in practice. The Department compared the average hourly wages of current employees and independent contractors to provide some indication of the impact on wages of a worker who is reclassified from an independent contractor to an employee.

The Department used an approach similar to Katz and Krueger (2018).<sup>569</sup> Both regressed hourly wages on independent contractor status<sup>570</sup> and observable differences between independent contractors and employees (e.g., occupation, sex, potential experience, education, race, and ethnicity) to help isolate the impact of independent contractor status on hourly wages. Katz and Krueger used the 2005 CWS and the 2015 RAND American Life Panel (ALP) (the 2017 CWS was not available at the time of their analysis). The Department used the 2017 CWS.<sup>571</sup>

Both analyses found similar results. A simple comparison of mean hourly wages showed that independent contractors tend to earn more per hour than employees (e.g., \$27.29 per hour for all independent contractors versus \$24.07 per hour for employees using the 2017 CWS). However, when controlling for observable differences between workers, Katz and Krueger found no statistically significant difference between independent contractors' and employees' hourly wages in the 2005 CWS data. Although their analysis of the 2015 ALP data found that primary independent contractors earned more per hour than traditional employees, they recommended caution in interpreting these results due to the imprecision of the estimates.<sup>572</sup> The Department found no statistically significant difference between independent contractors' and employees' hourly wages in the 2017 CWS data.

Based on these inconclusive results, the Department believes it is

<sup>569</sup> Katz and Krueger (2018), *supra* n. 517.

<sup>570</sup> On-call workers, temporary help agency workers, and workers provided by contract firms are excluded from the base group of "traditional" employees.

<sup>571</sup> In both Katz and Krueger's regression results and the Department's calculations, the following outlying values were removed: workers reporting earning less than \$50 per week, less than \$1 per hour, or more than \$1,000 per hour. Choice of exclusionary criteria from Katz and Krueger (2018), *supra* n. 517.

<sup>572</sup> See top of page 20, "Given the imprecision of the estimates, we recommend caution in interpreting the estimates from the [ALP]." The standard error on the estimated coefficient on the independent contractor variable in Katz and Krueger's regression based on the 2015 ALP is more than 2.5 times larger than the standard error of the coefficient using the 2017 CWS.

inappropriate to conclude independent contractors generally earn a higher hourly wage than employees. The Department ran another hourly wage rate regression including additional variables to determine if independent contractors in underserved groups are impacted differently by including interaction terms for female independent contractors, Hispanic independent contractors, and Black independent contractors. The results indicate that in addition to the lower wages earned by Black workers in general, Black independent contractors also earn less per hour than independent contractors of other races; however, this is not statistically significant at the most commonly used significance level.<sup>573</sup>

In addition to the potential transfers discussed above, the Department welcomes comments on how the interaction of these transfer dynamics may be realized by workers and businesses.

#### F. Analysis of Regulatory Alternatives

Pursuant to its obligations under Executive Order 12866,<sup>574</sup> the Department assessed four regulatory alternatives to this proposed rule. The Department welcomes comments on these regulatory alternatives, as well as suggestions regarding any other potential alternatives.

The Department previously considered and rejected the first two alternatives described below—codifying either a common law or ABC test for determining employee or independent contractor status—in the 2021 IC Rule.<sup>575</sup> Although the Department continues to believe that legal limitations prevent the Department from adopting either of those alternatives, the Department nonetheless presents them as regulatory alternatives, which is permissible under OMB guidance.<sup>576</sup>

For the first alternative, the Department considered codifying the common law control test, which is used to distinguish between employees and independent contractors under other Federal laws, such as the Internal

<sup>573</sup> The coefficient for Black independent contractors was negative and statistically significant at a 0.10 level (with a p-value of 0.067). However, a significance level of 0.05 is more commonly used.

<sup>574</sup> E.O. 12866, section 6(a)(3)(C)(iii), 58 FR 51741.

<sup>575</sup> See 86 FR 1238.

<sup>576</sup> OMB Circular A-4 advises that agencies "should discuss the statutory requirements that affect the selection of regulatory Approach. If legal constraints prevent the selection of a regulatory action that best satisfies the philosophy and principles of Executive Order 12866, [agencies] should identify these constraints and estimate their opportunity cost. Such information may be useful to Congress under the Regulatory Right-to-Know Act."

Revenue Code.<sup>577</sup> The focus of the common law control test is “the hiring party’s right to control the manner and means by which [work] is accomplished,”<sup>578</sup> but the Supreme Court has explained that “other factors relevant to the inquiry [include] the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”<sup>579</sup>

Although the common law control test considers some of the same factors as those identified in the proposed rule’s “economic reality” test (e.g., skill, length of the working relationship, the source of equipment and materials, etc.), courts generally recognize that, because of its focus on control, the common law test is more permissive of independent contracting arrangements than the economic reality test, which examines the economic dependence of the worker.<sup>580</sup>

Codifying a common law control test for the FLSA may create a more uniform legal framework among Federal statutes, in the sense that entities would not, for example, have to understand and apply one employment classification standard for tax purposes and a different employment classification standard for

<sup>577</sup> See 26 U.S.C. 3121(d)(2) (generally defining the term “employee” under the Internal Revenue Code as “any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee”); 42 U.S.C. 410(f)(2) (similarly defining “employee” under the Social Security Act); see also, e.g., *Darden*, 503 U.S. 318 (holding that “a common-law test” should resolve employee/independent contractor disputes under ERISA); *Reid*, 490 U.S. at 751 (applying “principles of general common law of agency” to determine “whether . . . work was prepared by an employee or an independent contractor” under the Copyright Act of 1976). The Supreme Court has advised that the common law control test applies by default under Federal law unless a statute specifies an alternative standard. See *Darden*, 503 U.S. at 322–23 (“[W]hen Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”) (quoting *Reid*, 490 U.S. at 739–40).

<sup>578</sup> *Reid*, 490 U.S. at 751.

<sup>579</sup> *Id.* at 751–52.

<sup>580</sup> See, e.g., *Flint Eng’g*, 137 F.3d at 1440 (recognizing that the “economic realities” test is a more expansive standard for determining employee status than the common law test).

FLSA purposes. However, the Department does not believe that adopting a common law control test for determining employee or independent contractor status under the FLSA would otherwise simplify the analysis for the regulated community because courts and enforcement agencies applying a common law test for independent contractors have considered a greater number and different variation of factors than the six or so factors commonly considered under the economic reality test.<sup>581</sup> And as with the economic reality test, the Supreme Court has cautioned that “the common-law test contains ‘no shorthand formula or magic phrase that can be applied to find the answer, [as] all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.’”<sup>582</sup>

With respect to workers, replacing the FLSA’s economic reality test with a common law control test would jeopardize the employment status of some economically dependent workers who have traditionally qualified as FLSA-covered employees. The Department believes that depriving economically dependent workers of the FLSA’s wage and hour protections would be detrimental to such workers, for reasons explained earlier. Moreover, applying the common law test would be contrary to the “suffer or permit” language in section 3(g) of the FLSA, which the Supreme Court has interpreted as demanding a broader definition of employment than that which exists under the common law.<sup>583</sup> Accordingly, the Department believes it is legally constrained from adopting the common law control test absent Congressional legislation to amend the FLSA.

For the second alternative, the Department considered codifying an “ABC” test to determine independent contractor status under the FLSA, similar to the ABC test recently adopted under California’s state wage and hour law.<sup>584</sup> As described by the California

<sup>581</sup> See RESTATEMENT (THIRD) OF AGENCY sec. 7.07, Comment (f) (2006) (identifying 10 factors); IRS Tax Topic No. 762 Independent Contractor vs. Employee (May 19, 2022), <https://www.irs.gov/taxtopics/tc762> (explaining the common law analysis through three main categories: behavioral control, financial control, and the relationship of the parties); *Reid*, 490 U.S. at 751–52 (identifying 13 factors).

<sup>582</sup> *Darden*, 503 U.S. at 324 (quoting *United Ins. Co. of America*, 390 U.S. at 258).

<sup>583</sup> See, e.g., *Darden*, 503 U.S. at 326; *Portland Terminal*, 330 at 150–51.

<sup>584</sup> See *Dynamex*, 416 P.3d 1; Assembly Bill (“A.B.”) 5, Ch. 296, 2019–2020 Reg. Sess. (Cal. 2019) (codifying the ABC test articulated in *Dynamex*); A.B. 2257, Ch. 38, 2019–2020 Reg. Sess. (Cal. 2020) (retroactively exempting certain

Supreme Court in *Dynamex*, “[t]he ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity’s business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.”<sup>585</sup> In justifying the adoption of this test for independent contractors, the *Dynamex* court noted the existence of an “exceptionally broad suffer or permit to work standard” in California’s wage and hour statute,<sup>586</sup> as well as “the more general principle that wage orders are the type of remedial legislation that must be liberally construed in a manner that serves its remedial purposes.”<sup>587</sup>

Compared to either the common law or economic reality tests, codifying an ABC test would establish a far simpler and clearer standard for determining whether workers are employees or independent contractors. The ABC test only has three criteria, and no balancing of the criteria is required; all three prongs must be satisfied for a worker to

professions, occupations, and industries from the ABC test that A.B. 5 had codified). The ABC test originated in state unemployment insurance statutes, but some state courts and legislatures have recently extended the test to govern employee/independent contractor disputes under state wage and hour laws. See Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractors of Platform Work*, 39 N. Ill. U. L. Rev. 379, 408–11 (2019) (discussing the origins and recent expansion of the ABC test).

<sup>585</sup> 416 P.3d at 34 (emphasis in original). California’s ABC test is slightly different than versions of the ABC test adopted (or presently under consideration) in other states. For example, New Jersey provides that a hiring entity may satisfy the ABC test’s “B” prong by establishing either: (1) that the work provided is outside the usual course of the business for which the work is performed, or (2) that the work performed is outside all the places of business of the hiring entity. N.J. Stat. Ann. sec. 43:21–19(i)(6)(A–C). The Department has chosen to analyze California’s ABC test as a regulatory alternative because businesses subject to multiple standards, including nationwide businesses, are likely to comply with the most demanding standard if they wish to make consistent classification determinations.

<sup>586</sup> 416 P.3d at 31; see also Cal. Code Regs., tit. 8, sec. 11090, subd. 2(D) (“‘Employ’ means to engage, suffer, or permit to work.”). The *Dynamex* court noted that California’s adoption of the “suffer or permit to work” standard predated the enactment of the FLSA and was therefore “not intended to embrace the federal economic reality test” that subsequently developed. 416 P.3d at 35.

<sup>587</sup> *Id.* at 32.

qualify as an independent contractor. For this reason, adopting an ABC test may eliminate some of the uncertainty related to independent contracting under laws which apply different standards, and substantially reduce the risk of worker misclassification.<sup>588</sup> Though an ABC test would be clear and simple to use for regulated entities who use (or wish to use) independent contractors, it would also be more restrictive of independent contracting arrangements compared to the proposed rule.

In any event, the Department believes it is legally constrained from adopting an ABC test because the Supreme Court has held that the economic reality test is the applicable standard for determining workers' classification under the FLSA as an employee or independent contractor.<sup>589</sup> Moreover, the Supreme Court has stated that the existence of employment relationships under the FLSA "does not depend on such isolated factors" as the three independently determinative factors in the ABC test, "but rather upon the circumstances of the whole activity."<sup>590</sup> Because the ABC test is inconsistent with Supreme Court precedent interpreting the FLSA, the Department believes that it could only implement an ABC test if the Supreme Court revisits its precedent or if Congress passes legislation to amend the FLSA.

For the third alternative, the Department considered a proposed rule that would not fully rescind the 2021 IC Rule and instead retain some aspects of that rule. As the Department has noted throughout this proposal, there are multiple instances in which this NPRM is consistent or in agreement with the 2021 IC Rule. Specifically, the Department has noted its agreement with the following aspects of the 2021 IC Rule: a totality of the circumstances test should be applied to appropriately determine classification as an employee or independent contractor; the concept of economic dependence needs further development; and a clear explanation of the test for whether a worker is an employee or independent contractor in easily accessible regulatory text is

valuable. This proposal also includes several other important principles from the case law that were included in the 2021 IC Rule: economic dependence is the ultimate inquiry; the list of economic reality factors is not exhaustive; and no single factor is determinative. Further, with respect to specific factors, this proposal reinforces certain aspects addressed in the 2021 IC Rule such as that an exclusivity requirement imposed by the employer is a strong indicator of control, and that issues related to scheduling and supervision over the performance of the work (including the ability to assign work) are relevant considerations under the control factor.

Despite these areas of agreement, the governing principle of the 2021 IC Rule is that two of the economic reality factors are predetermined to be more probative and therefore carry more weight, which may obviate the need to meaningfully consider the remaining factors. Upon further consideration, as discussed in this proposal, the Department believes that this departure from decades of case law and the Department's own longstanding position that no one factor or subset of factors should carry more or less weight would have a confusing and disruptive effect on employers and workers alike. The Department considered simply removing the problematic "core factors" analysis from the 2021 IC Rule and retaining the five factors as described in the rule. However, the Department rejected this approach because other aspects of the rule such as considering investment and initiative only in the opportunity for profit or loss factor and excluding consideration of whether the work performed is central or important to the employer's business are also in tension with judicial precedent and longstanding Department guidance. These provisions narrow the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themselves. Therefore, after considering all of the common aspects of the 2021 IC Rule and whether to retain some portions of that rule, the Department has concluded that in order to provide clear, affirmative regulatory guidance that aligns with case law and is consistent with the text and purpose of the Act as interpreted by courts, a complete rescission and replacement of the 2021 IC Rule is needed. For these reasons, the Department is not proposing a partial rescission of the 2021 IC Rule.

For the fourth alternative, the Department considered rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through subregulatory guidance. For more than 80 years prior to the 2021 IC Rule, the Department primarily issued subregulatory guidance in this area and did not have generally applicable regulations on the classification of workers as employees or independent contractors. This subregulatory guidance was informed by the case law and set forth a multifactor economic reality test to answer the ultimate question of economic dependence. The Department considered rescinding the 2021 IC Rule and continuing to provide subregulatory guidance for stakeholders through existing documents (such as Fact Sheet #13) and new documents (for example a Field Assistance Bulletin). Rescinding the 2021 IC Rule without issuing a new regulation would lower the regulatory familiarity costs associated with the proposal. As explained in sections III, IV, and V above, however, the Department believes that replacing the 2021 IC Rule with regulations addressing the multifactor economic reality test that more fully reflects the case law and continues to be relevant to the modern economy will be helpful for both workers and employers. Specifically, issuing regulations allows the Department to provide in-depth guidance that is more closely aligned with circuit case law, rather than the regulations set forth in the 2021 IC Rule which have created a dissonance between the Department's regulations and judicial precedent. Additionally, issuing regulations allows the Department to formally collect and consider a wide range of views from stakeholders by electing to use the notice-and-comment process. Finally, because courts are accustomed to considering relevant agency regulations, providing guidance in this format may further improve consistency among courts regarding this issue. Therefore, the Department is not proposing to rescind the 2021 IC Rule and provide only subregulatory guidance but welcomes comments on the costs and benefits of this alternative.

#### VIII. Initial Regulatory Flexibility Act (IRFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121 (March 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities,

<sup>588</sup> See *id.* at 48 (observing that the ABC test "will provide greater clarity and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis").

<sup>589</sup> See *Tony & Susan Alamo*, 471 U.S. at 301 ("The test of employment under the Act is one of 'economic reality.'"); *Whitaker House*, 366 U.S. at 33 ("'economic reality' rather than 'technical concepts' is . . . the test of employment" under the FLSA) (citing *Silk*, 331 U.S. at 713; *Rutherford*, 331 U.S. at 729).

<sup>590</sup> *Rutherford*, 331 U.S. at 730.

consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities.

#### A. Why the Department Is Considering Action

As discussed in section II.E., on March 14, 2022, a district court in the Eastern District of Texas issued a decision vacating the Department's delay and withdrawal of the 2021 IC Rule and concluding that the 2021 IC Rule became effective on March 8, 2021.<sup>591</sup> The Department believes that the 2021 IC Rule does not fully comport with the FLSA's text and purpose as interpreted by the courts and will have a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test. Therefore, the Department believes it is appropriate to rescind the 2021 IC Rule and set forth an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule.

#### B. Objectives of and the Legal Basis for the Proposed Rule

The Department is proposing to modify the regulations addressing whether workers are employees or independent contractors under the FLSA. Specifically, the Department is proposing to discontinue the use of "core factors" and instead proposing to return to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. The Department is further proposing to return the consideration of investment to a standalone factor, provide additional analysis of the control factor (including detailed discussions of how scheduling, remote supervision, price-setting, and the ability to work for others should be considered), and return to the longstanding interpretation of the integral factor, which considers whether the work is integral to the employer's

business. The Department is also proposing to formally rescind the 2021 IC Rule.

The Department believes that rescinding the 2021 IC Rule and replacing it with regulations addressing the multifactor economic reality test—in a way that both more fully reflects the case law and continues to be relevant to the evolving economy—would be helpful for both workers and employers. The Department believes this proposal will help protect workers from misclassification while at the same time providing a consistent approach for those businesses that engage (or wish to engage) independent contractors.

The Department's authority to interpret the Act comes with its authority to administer and enforce the Act. *See Herman v. Fabri-Centers of Am., Inc.*, 308 F.3d 580, 592–93 & n.8 (6th Cir. 2002) (noting that "[t]he Wage and Hour Division of the Department of Labor was created to administer the Act" while agreeing with the Department's interpretation of one of the Act's provisions); *Dufrene v. Browning-Ferris, Inc.*, 207 F.3d 264, 267 (5th Cir. 2000) ("By granting the Secretary of Labor the power to administer the FLSA, Congress implicitly granted him the power to interpret."); *Condo v. Sysco Corp.*, 1 F.3d 599, 603 (7th Cir. 1993) (same).

#### C. Estimating the Number of Small Businesses Affected by the Rulemaking

The Department used the Small Business Administration (SBA) size standards, which determine whether a business qualifies for small-business status, to estimate the number of small entities.<sup>592</sup> The Department then applied these thresholds to the U.S. Census Bureau's 2017 Economic Census to obtain the number of establishments with employment or sales/receipts below the small business threshold in the industry.<sup>594</sup> These ratios of small to large establishments were then applied to the more recent 2019 Statistics of United States Businesses (SUSB) data on number of establishments.<sup>595</sup> Next, the Department estimated the number of small governments, defined as having

<sup>592</sup> SBA, Summary of Size Standards by Industry Sector, 2017, [https://www.sba.gov/sites/default/files/2018-05/Size\\_Standards\\_Table\\_2017.xlsx](https://www.sba.gov/sites/default/files/2018-05/Size_Standards_Table_2017.xlsx).

<sup>593</sup> The most recent size standards were issued in 2022. However, the Department used the 2017 standards for consistency with the older Economic Census data.

<sup>594</sup> The 2017 data are the most recently available with revenue data.

<sup>595</sup> For this analysis, the Department excluded independent contractors who are not registered as small businesses, and who are generally not captured in the Economic Census, from the calculation of small establishments.

population less than 50,000, from the 2017 Census of Governments.<sup>596</sup> In total, the Department estimated there are 6.5 million small establishments or governments who could potentially have independent contractors, and who could be affected by this rulemaking. However, not all of these establishments will have independent contractors, and so only a share of this number will actually be affected. The impact of this rule could also differ by industry. As shown in Table 2 of the regulatory impact analysis, the industries with the highest number of independent contractors are the professional and business services and construction industries.

Additionally, as discussed in section VII.B., the Department estimates that there are 22.1 million independent contractors. Some of these independent contractors may be considered small businesses and may also be impacted by this rule.

The Department welcomes comments and data on any costs to small businesses.

#### D. Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping

This proposed rule lays out the framework for assessing employee or independent contractor status under the FLSA. It does not create any new reporting or recordkeeping requirements for businesses.

In the Regulatory Impact Analysis, the Department estimated regulatory familiarization to be one hour per entity and one-quarter hour per independent contractor. The per-entity cost for small business employers is the regulatory familiarization cost of \$24.97, or the fully loaded median hourly wage of a Compensation, Benefits, and Job Analysis Specialist multiplied by 0.5 hour. The per-entity rule familiarization cost for independent contractors, some of whom would be small businesses, is \$5.34, or the median hourly wage of independent contractors in the CWS multiplied by 0.25 hour. The Department welcomes comments and data on any costs to small businesses.

#### E. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the Proposed Rule

The Department is not aware of any relevant Federal rules that conflict with this NPRM.

<sup>596</sup> 2017 Census of Governments. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>.

<sup>591</sup> See *Coalition for Workforce Innovation*, 2022 WL 1073346.

### F. Alternatives to the Proposed Rule

The RFA requires agencies to discuss “any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.”<sup>597</sup> As discussed earlier in section VII.F., the Department does not believe that it has the legal authority to adopt either a common law or “ABC” test to determine employee or independent contractor status under the FLSA, foreclosing the consideration of these alternatives for purposes of the RFA.

As explained in section VII.F., the Department considered two other regulatory alternatives: proposing a rule that would not fully rescind the 2021 IC Rule and instead retain some aspects of that rule in the new proposal; and completely rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through subregulatory guidance, as the Department had done for over 80 years prior to the 2021 IC Rule. The Department believes that the overall economic impact of retaining some portions of the 2021 IC Rule while issuing a proposed rule to revise other portions of the rule would not minimize the economic impact on small entities as they would incur costs to familiarize themselves with the new regulation. Similarly, the Department believes that the overall economic impact of fully rescinding the 2021 IC Rule and providing subregulatory guidance, would not necessarily minimize the economic impact on small entities as they would incur some costs to familiarize themselves with any subregulatory guidance. Moreover, as explained in sections III, IV, and V above, the Department believes that replacing the 2021 IC Rule with regulations addressing the multifactor economic reality test that more fully reflect the case law and continue to be relevant to the modern economy will be helpful for both workers and employers, particularly over the long term.

In addition to the alternatives discussed above, Section 603(c) of the RFA describes four categories of regulatory alternatives that might be appropriate for consideration in an IRFA analysis. The Department does not believe that the FLSA is best interpreted to encompass these categories of regulatory alternatives or that they are necessarily applicable to this proposal.

#### 1. Differing Compliance or Reporting Requirements That Take Into Account the Resources Available to Small Entities

Nothing in the FLSA or the decades of court decisions interpreting it suggest that a worker’s status as an employee or independent contractor should turn on the size of the entity that benefits from their labor. As described earlier, one of the primary goals of the FLSA is to curtail “unfair method[s] of competition in commerce” by establishing minimum labor standards that all covered employers must observe.<sup>598</sup> Providing differing compliance or reporting requirements for small businesses would undermine this important purpose of the FLSA. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance and, if this proposed rule is finalized, will prepare a small entity compliance guide, as required by the Small Business Regulatory Enforcement Fairness Act (SBREFA).<sup>599</sup> Therefore, the Department has not proposed differing compliance or reporting requirements for small businesses.

#### 2. The Clarification, Consolidation, or Simplification of Compliance and Reporting Requirements for Small Entities

This proposed rule does not impose any new reporting requirements, and the Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

#### 3. The Use of Performance Rather Than Design Standards

This proposed rule provides guidance regarding the factors that should be considered regarding a worker’s employment status under the FLSA where no one factor is, in a pre-determined manner, given more weight than the others and the weight given to the various factors may depend on the particular circumstances of the case.

#### 4. An Exemption From Coverage of the Rule, or Any Part Thereof, for Such Small Entities

Creating an exemption from coverage of this proposed rule for businesses with as many as 500 employees, those defined as small businesses under SBA’s size standards, would be inconsistent with the FLSA, which applies to all employers that satisfy the enterprise coverage threshold or employ

individually covered employees, regardless of the employer’s number of employees. Further, as described above, case law interpreting the distinction between employees and independent contractors under the FLSA does not support such an exemption.

The Department welcomes comments on this IRFA’s analysis of regulatory alternatives.

### IX. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any unfunded Federal mandate that may result in excess of \$100 million (adjusted annually for inflation) in expenditures in any one year by State, local, and tribal governments in the aggregate, or by the private sector. Adjusting the threshold for inflation using the GDP deflator, using the most recent annual result (2021), yields a threshold of \$165 million. Therefore, this rulemaking is expected to create unfunded mandates that exceed that threshold. See section VII for an assessment of anticipated costs and benefits.

### X. Executive Order 13132, Federalism

The Department has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and determined that it does not have federalism implications. The proposed rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

### XI. Executive Order 13175, Indian Tribal Governments

This proposed rule would not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The proposed rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### List of Subjects

29 CFR Part 780

Agriculture, Child labor, Wages.

29 CFR Part 788

Forests and forest products, Wages.

<sup>597</sup> 5 U.S.C. 603(c).

<sup>598</sup> 29 U.S.C. 202(a)(3).

<sup>599</sup> Small Business Regulatory Enforcement Fairness Act, Public Law 104–121, sec. 212.



## 29 CFR Part 795

## Employment, Wages.

For the reasons set out in the preamble, the Department of Labor proposes to amend 29 CFR chapter V as follows:

**PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT**

■ 1. The authority citation for part 780 continues to read as follows:

**Authority:** Secs. 1–19, 52 Stat. 1060, as amended; 75 Stat. 65; 29 U.S.C. 201–219. Pub. L. 105–78, 111 Stat. 1467.

■ 2. Amend § 780.330 by revising paragraph (b) to read as follows:

**§ 780.330 Sharecroppers and tenant farmers.**

\* \* \* \* \*

(b) In determining whether such individuals are employees or independent contractors, the criteria set forth in §§ 795.100 through 795.110 of this chapter are used.

\* \* \* \* \*

**PART 788—FORESTRY OR LOGGING OPERATIONS IN WHICH NOT MORE THAN EIGHT EMPLOYEES ARE EMPLOYED**

■ 3. The authority citation for part 788 continues to read as follows:

**Authority:** Secs. 1–19, 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

■ 4. Amend § 788.16 by revising paragraph (a) to read as follows:

**§ 788.16 Employment relationship.**

(a) In determining whether individuals are employees or independent contractors, the criteria set forth in §§ 795.100 through 795.110 of this chapter are used.

\* \* \* \* \*

■ 5. Add part 795 to read as follows:

**PART 795—EMPLOYEE OR INDEPENDENT CONTRACTOR CLASSIFICATION UNDER THE FAIR LABOR STANDARDS ACT.**

Sec.

795.100 Introductory statement.

795.105 Determining employee or independent contractor classification under the FLSA.

795.110 Economic reality test to determine economic dependence.

795.115 Severability.

**Authority:** 29 U.S.C. 201–219.

**§ 795.100 Introductory statement.**

This part contains the Department of Labor’s (the Department) general interpretations for determining whether workers are employees or independent contractors under the Fair Labor Standards Act (FLSA or Act). *See* 29 U.S.C. 201–19. These interpretations are intended to serve as a “practical guide to employers and employees” as to how the Department will seek to apply the Act. *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944). The Administrator of the Department’s Wage and Hour Division will use these interpretations to guide the performance of their duties under the Act, unless and until the Administrator is otherwise directed by authoritative decisions of the courts or the Administrator concludes upon reexamination of an interpretation that it is incorrect. To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to determining who is an employee or independent contractor under the Act are inconsistent or in conflict with the interpretations stated in this part, they are hereby rescinded. The interpretations stated in this part may be relied upon in accordance with section 10 of the Portal-to-Portal Act, 29 U.S.C. 251–262, notwithstanding that after any act or omission in the course of such reliance, the interpretation is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. 29 U.S.C. 259.

**§ 795.105 Determining employee or independent contractor classification under the FLSA.**

(a) *Relevance of independent contractor or employee status under the Act.* The Act’s minimum wage, overtime pay, and recordkeeping obligations apply only to workers who are covered employees. Workers who are independent contractors are not covered by these protections. Labeling employees as “independent contractors” does not make these protections inapplicable. A determination of whether workers are employees or independent contractors under the Act focuses on the economic realities of the workers’ relationship with the employer and whether the workers are either economically dependent on the employer for work or in business for themselves.

(b) *Economic dependence as the ultimate inquiry.* An “employee” under the Act is an individual whom an employer suffers, permits, or otherwise employs to work. 29 U.S.C. 203(e)(1), (g). The Act’s definitions are meant to encompass as employees all workers who, as a matter of economic reality, are

economically dependent on an employer for work. A worker is an independent contractor, as distinguished from an “employee” under the Act, if the worker is, as a matter of economic reality, in business for himself. Economic dependence does not focus on the amount of income earned, or whether the worker has other income streams.

**§ 795.110 Economic reality test to determine economic dependence.**

(a) *Economic reality test.* (1) In order to determine economic dependence, multiple factors assessing the economic realities of the working relationship are used. These factors are tools or guides to conduct a totality-of-the-circumstances analysis. This means that the outcome of the analysis does not depend on isolated factors but rather upon the circumstances of the whole activity to answer the question of whether the worker is economically dependent on the employer for work or is in business for himself.

(2) The six factors described in paragraphs (b)(1) through (6) of this section should guide an assessment of the economic realities of the working relationship and the question of economic dependence. Consistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive, and the weight to give each factor may depend on the facts and circumstances of the particular case. Moreover, these six factors are not exhaustive. As explained in paragraph (b)(7) of this section, additional factors may be considered.

(b) *Economic reality factors*—(1) *Opportunity for profit or loss depending on managerial skill.* This factor considers whether the worker exercises managerial skill that affects the worker’s economic success or failure in performing the work. The following facts, among others, can be relevant: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space. If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee. Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the

exercise of managerial skill indicating independent contractor status under this factor.

(2) *Investments by the worker and the employer.* This factor considers whether any investments by a worker are capital or entrepreneurial in nature. Costs borne by a worker to perform their job (e.g., tools and equipment to perform specific jobs and the workers' labor) are not evidence of capital or entrepreneurial investment and indicate employee status. Investments that are capital or entrepreneurial in nature and thus indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach. Additionally, the worker's investments should be considered on a relative basis with the employer's investments in its overall business. The worker's investments need not be equal to the employer's investments, but the worker's investments should support an independent business or serve a business-like function for this factor to indicate independent contractor status.

(3) *Degree of permanence of the work relationship.* This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships. This factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities. This may include regularly occurring fixed periods of work, although the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification. Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular

businesses or industries and the workers they employ, rather than the workers' own independent business initiative, this factor is not indicative of independent contractor status.

(4) *Nature and degree of control.* This factor considers the employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship. Facts relevant to the employer's control over the worker include whether the employer sets the worker's schedule, supervises the performance of the work, or explicitly limits the worker's ability to work for others. Additionally, facts relevant to the employer's control over the worker include whether the employer uses technological means of supervision (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands on workers' time that do not allow them to work for others or work when they choose. Whether the employer controls economic aspects of the working relationship should also be considered, including control over prices or rates for services and the marketing of the services or products provided by the worker. Control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control. More indicia of control by the employer favors employee status; more indicia of control by the worker favors independent contractor status.

(5) *Extent to which the work performed is an integral part of the employer's business.* This factor considers whether the work performed is an integral part of the employer's business. This factor does not depend on whether any individual worker in particular is an integral part of the business, but rather whether the function they perform is an integral part. This factor weighs in favor of the worker being an employee when the

work they perform is critical, necessary, or central to the employer's principal business. This factor weighs in favor of the worker being an independent contractor when the work they perform is not critical, necessary, or central to the employer's principal business.

(6) *Skill and initiative.* This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative. This factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the employer to perform the work. Where the worker brings specialized skills to the work relationship, it is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.

(7) *Additional factors.* Additional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the employer for work.

#### **§ 795.115 Severability.**

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof.

**Martin J. Walsh,**  
*Secretary of Labor.*

[FR Doc. 2022-21454 Filed 10-11-22; 8:45 am]

**BILLING CODE 4510-27-P**