: 4510-27-P

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Parts 780, 788, and 795

RIN 1235-AA34

Independent Contractor Status under the Fair Labor Standards Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: The U.S. Department of Labor (the Department) is revising its interpretation of independent contractor status under the Fair Labor Standards Act (FLSA or the Act) to promote certainty for stakeholders, reduce litigation, and encourage innovation in the economy.

DATES: This final rule is effective on [INSERT 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

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 http://www.dol.gov/whd/america2.htm.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The FLSA requires covered employers to pay their nonexempt employees at least the Federal minimum wage for every hour worked and overtime pay for every hour worked over 40 in a workweek, and it mandates that employers keep certain records regarding their employees. A worker who performs services for an individual or entity ("person" as defined in the Act) as an independent contractor, however, is not that person's employee under the Act. Thus, the FLSA does not require such person to pay an independent contractor either the minimum wage or overtime pay, nor does it require that person to keep records regarding that independent contractor. The Act does not define the term "independent contractor," but it defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. 203(d), "employee" as "any individual employed by an employer," *id.* at 203(e) (subject to certain exceptions), and "employ" as "includ[ing] to suffer or permit to work," *id.* at 203(g). Courts and the Department have long interpreted the "suffer or permit" standard to require an evaluation of the extent of the worker's economic dependence on the potential employer—*i.e.*, the putative employer or alleged employer—and have developed a multifactor test to analyze 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 dependent on a particular individual, business, or organization for work (and is thus an employee) or is in business for him- or herself (and is thus an independent contractor).

This economic realities test and its component factors have not always been sufficiently explained or consistently articulated by courts or the Department, resulting in uncertainty among the regulated community. The Department believes that a clear articulation will lead to increased precision and predictability in the economic reality test's application, which will in turn benefit workers and businesses and encourage innovation and flexibility in the economy. Accordingly, earlier this year the Department proposed to introduce a new part to Title 29 of the Code of

Federal Regulations setting forth its interpretation of whether workers are "employees" or independent contractors under the Act.

Having received and reviewed the comments to its proposal, the Department now adopts as a final rule the interpretive guidance set forth in the Notice of Proposed Rulemaking (NPRM) (85 FR 60600) largely as proposed. This regulatory guidance adopts general interpretations to which courts and the Department have long adhered. For example, the final rule explains that independent contractors are workers who, as a matter of economic reality, are in business for themselves as opposed to being economically dependent on the potential employer for work. The final rule also explains that the inquiry into economic dependence is conducted by applying several factors, with no one factor being dispositive, and that actual practices are entitled to greater weight than what may be contractually or theoretically possible. The final rule sharpens this inquiry into five distinct factors, instead of the five or more overlapping factors used by most courts and previously the Department. Moreover, consistent with the FLSA's text, its purpose, and the Department's experience administering and enforcing the Act, the final rule explains that two of those factors—(1) the nature and degree of the worker's control over the work and (2) the worker's opportunity for profit or loss—are more probative of the question of economic dependence or lack thereof than other factors, and thus typically carry greater weight in the analysis than any others.

The regulatory guidance promulgated in this final rule regarding independent contractor status under the FLSA is generally applicable across all industries. As such, it replaces the Department's previous interpretations of independent contractor status under the FLSA which applied only in certain contexts, found at 29 CFR 780.330(b) (interpreting independent contractor status under the FLSA for tenants and sharecroppers) and 29 CFR 788.16(a) (interpreting independent contractor status under the FLSA for certain forestry and logging workers). The Department believes this final rule will significantly clarify to stakeholders how to distinguish between employees and independent contractors under the Act.

This final rule is considered to be an Executive Order 13771 deregulatory action. Details on the estimated increased efficiency and cost savings of this rule can be found in the regulatory impact analysis (RIA) in section VI.

II. Background

A. Relevant FLSA Definitions

Enacted in 1938, the FLSA requires that, among other things, covered employers pay their nonexempt employees at least the Federal minimum wage for every hour worked and overtime pay for every hour worked over 40 in a workweek, and it mandates that employers keep certain records regarding their employees. *See* 29 U.S.C. 206(a), 207(a) (minimum wage and overtime pay requirements); 29 U.S.C. 211(c) (recordkeeping requirements). The FLSA does not define the term "independent contractor." The Act defines "employer" in section 3(d) to "include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee," "employee" in section 3(e)(1) to mean, subject to certain exceptions, "any individual employed by an employer," and "employ" in section 3(g) to include "to suffer or permit to work."[1] The Supreme Court has recognized that "there is in the [FLSA] no definition that solves problems as to the limits of the employer-employee relationship under the Act." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947).

The Supreme Court has interpreted the "suffer or permit" language to define FLSA employment to be broad and more inclusive than the common law standard. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). However, the Court also recognized that the Act's "statutory definition[s] … have [their] limits." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 295 (1985) (internal citation omitted); *see also Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) ("The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees."). The Supreme Court specifically recognized that "[t]here

[1] 29 U.S.C. 203(d), (e), (g). The Act defines a "person" as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." 29 U.S.C. 203(a).

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." *Rutherford Food*, 331 U.S. at 729. Accordingly, Federal courts of appeals have uniformly held, and the Department has consistently maintained, that independent contractors are not "employees" for purposes of the FLSA. *See, e.g.*, *Saleem v. Corporate Transp. Group, Ltd.*, 854 F.3d 131, 139–40 (2d Cir. 2017); *Karlson v. Action Process Serv. & Private Investigation, LLC*, 860 F.3d 1089, 1092 (8th Cir. 2017).

B. Economic Dependence and the Economic Reality Test

1. Supreme Court Development of the Economic Reality Test

As the NPRM explained, the U.S. Supreme Court explored the limits of the employer-employee relationship in a series of cases from 1944 to 1947 under three different Federal statutes: the FLSA, the National Labor Relations Act (NLRA), and the Social Security Act (SSA). 85 FR 60601 (summarizing *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *United States v. Silk*, 331 U.S. 704 (1947); *Bartels v. Birmingham*, 332 U.S. 126 (1947); and *Rutherford Food*, 331 U.S. 722)).

In *Hearst*, the Supreme Court held that the NLRA's definition of employment was broader than that of the common law. 322 U.S. 123–25. Congress responded by amending the definition of employment under the NLRA on June 23, 1947, "with the obvious purpose of hav[ing] the [National Labor Relations] Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the [NLRA]." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

On June 16, 1947, one week before Congress amended the NLRA in response to *Hearst*, the Supreme Court decided *Silk*, which addressed the distinction between employees and independent contractors under the SSA. In that case, the Court relied on *Hearst* to hold that "economic reality," as opposed to "technical concepts" of the common law standard alone, determines workers' classification. 331 U.S. at 712–14. 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," it 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." *Id.* at 716. The Court added that "[n]o one [factor] is controlling nor is the list complete." *Id.* One week after *Silk* and on the same day Congress amended the NLRA, the Court reiterated these five factors in *Bartels*, another case involving employee or independent contractor status under the SSA. In *Bartels*, the Court explained 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." *Id.* Although "control is characteristically associated with the employer-employee relationship," 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." *Id.*

The same day as it decided *Silk*, the Court ruled in *Rutherford Food* that certain workers at a slaughterhouse were employees under the FLSA, and not independent contractors, by examining facts pertaining to the five factors identified in *Silk*.[2] The Court also considered whether the work was "a part of the integrated unit of production" (meaning whether the putative independent contractors were integrated into the assembly line alongside the company's employees) to assess whether they were employees or independent contractors under the FLSA. *Id.* at 729–730.

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[2] For example, the Court noted that the slaughterhouse workers performed unskilled work "on the production line." 331 U.S. at 730. "The premises and equipment of [the employer] were used for the work," indicating little investment by the workers. *Id*. "The group had no business organization that could or did shift as a unit from one slaughter-house to another," indicating a permanent work arrangement. *Id*. "The managing official of the plant kept close touch on the operation," indicating control by the alleged employer. *Id*. And "[w]hile profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor." *Id*.

In November 1947, five months after *Silk* and *Rutherford Food*, the Department of the Treasury (Treasury) proposed regulations r defining when an individual was an independent contractor or employee under the SSA, which used a test that balanced the following factors:

1. Degree of control of the individual;
2. Permanency of relation;
3. Integration of the individual's work in the business to which he renders service;
4. Skill required by the individual;
5. Investment by the individual in facilities for work; and
6. Opportunity of the individual for profit or loss.

12 FR 7966. Factors one, two, and four through six corresponded directly with the five factors identified as being "important for decision" in *Silk*, 331 U.S. at 716, and the third factor corresponded with *Rutherford Food*'s consideration of the fact that the workers were "part of an integrated unit of production." 331 U.S. at 729. The Treasury proposal further relied on *Bartels*, 332 U.S. at 130, to apply these factors to determine whether a worker was "dependent as a matter of economic reality upon the business to which he renders services." 12 FR 7966.[3]

Congress replaced the interpretations of the definitions of "employee" adopted in *Hearst* for the NLRA and in *Silk* and *Bartels* for the SSA "to demonstrate that the usual common-law principles were the keys to meaning." *Darden*, 503 U.S. at 324–25. However, Congress did not similarly amend the FLSA. Thus, the Supreme Court stated in *Darden* that the scope of employment under the FLSA remains broader than that under common law and is determined not by the common law but instead by the economic reality of the relationship at issue. *See id*. Since implicitly doing so in *Rutherford Food*, the Court has not again applied (or rejected the application of) the *Silk* factors to an FLSA classification question.

[3] The Treasury proposal was never finalized because Congress amended the SSA to foreclose the proposal.

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

As the NPRM explained, in the 1970s and 1980s Federal courts of appeals began to adopt versions of a multifactor "economic reality" test based on *Silk*, *Rutherford Food*, and *Bartels* and similar to Treasury's 1947 proposed SSA regulation to analyze whether a worker was an employee or an independent contractor under the FLSA. *See* 85 FR 60603.[4] Drawing on the Supreme Court precedent discussed above, courts have recognized that the heart of the inquiry is whether "as a matter of economic reality" the workers are "dependent upon the business to which they render service." *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (quoting *Bartels*, 332 U.S. at 130). Some courts have clarified that this question of economic dependence may be boiled down to asking "whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves." *Saleem*, 854 F.3d at 139 (internal quotation marks and citations omitted). Courts have also explained that a non-exhaustive set of factors—derived from *Silk* and *Rutherford Food*—shape and guide this inquiry. *See, e.g.*, *Usery*, 527 F.2d at 1311 (identifying "[f]ive considerations [which] have been set out as aids to making the determination of dependence, vel non"); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) (articulating a six-factor test).

In *Driscoll*, the Ninth Circuit Court of Appeals described its six-factor test as follows:

1. the degree of the alleged employer's right to control the manner in which the work is to be performed;
2. the alleged employee's opportunity for profit or loss depending on his managerial skill;
3. the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;

[4] As explained below, versions of this multifactor economic realty test have also been enforced and articulated by the Department in subregulatory guidance since the 1950s.

4. whether the service rendered requires a special skill;
5. the degree of permanency of the working relationship; and
6. whether the service rendered is an integral part of the alleged employer's business. *Id.* at 754.

Most courts of appeals articulate a similar test, but application between courts may vary significantly. *Compare, e.g.*, *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1534–35 (7th Cir. 1987) (applying six-factor economic reality test to hold that pickle pickers were employees under the FLSA), *with Donovan v. Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984) (applying the same six-factor economic reality test to hold that pickle pickers were not employees under the FLSA). For example, the Second Circuit has analyzed opportunity for profit or loss and investment (the second and third factors listed above) together as one factor. *See, e.g.*, *Brock v. Superior Care, Inc*., 840 F.2d 1054, 1058 (2d Cir. 1988). The Fifth Circuit has not adopted the sixth factor listed above, which analyzes the integrality of the work, as part of its standard, *see, e.g.*, *Usery*, 527 F.2d at 1311, but has at times assessed integrality as an additional factor, *see, e.g. Hobbs v. Petroplex Pipe & Constr., Inc.*, 946 F.3d 824, 836 (5th Cir. 2020).

The NPRM highlighted noteworthy modifications some courts of appeals have made to the economic reality factors as originally articulated in 1947 by the Supreme Court. *See* 85 FR 60603-04. First, the "skill required" factor identified in *Silk*, 331 U.S. at 716, is now articulated more expansively by some courts to include "initiative." *See*, *e.g.*, *Parrish*, 917 F.3d at 379 ("the skill and initiative required in performing the job"); *Karlson*, 860 F.3d at 1093 (same); *Superior Care*, 840 F.2d at 1058–59 ("the degree of skill and independent initiative required to perform the work").

Second, *Silk* analyzed workers' investments, 331 U.S. at 717–19. However, the Fifth Circuit has revised the "investment" factor to instead consider "the extent of the relative investments of the worker and the alleged employer." *Hopkins*, 545 F.3d at 343. Some other circuits have adopted this "relative investment" approach but continue to use the phrase

"worker's investment" to describe the factor. *See, e.g.*, *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 810 (6th Cir. 2015); *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989).

Third, although the permanence factor under *Silk* was understood to mean the continuity and duration of working relationships, *see* 12 FR 7967, some courts of appeals have expanded this factor to also consider the exclusivity of such relationships. *See, e.g.*, *Scantland*, 721 F.3d at 1319; *Keller*, 781 F.3d at 807.

Finally, *Rutherford Food*'s consideration of whether work is "part of an integrated unit of production," 331 U.S. at 729, has now been replaced by many courts of appeals by consideration of whether the service rendered is "integral," which those courts have applied as meaning important or central to the potential employer's business. *See, e.g.*, *Verma v. 3001 Castor, Inc.*, 937 F.3d 221, 229 (3rd Cir. 2019) (concluding that workers' services were integral because they were the providers of the business's "primary offering"); *Acosta v. Off Duty Police Servs., Inc*., 915 F.3d 1050, 1055 (6th Cir. 2019) (concluding that services provided by workers were "integral" because the putative employer "built its business around" those services); *McFeeley v. Jackson Street Entertainment, LLC*, 825 F.3d 235, 244 (4th Cir. 2016) (considering "the importance of the services rendered to the company's business").

Courts of appeals have cautioned against the "mechanical application" of the economic reality factors. *See*, *e.g.*, *Saleem*, 854 F.3d at 139. "Rather, each factor is a tool used to gauge the economic dependence of the alleged employee, and each must be applied with this ultimate concept in mind." *Hopkins*, 545 F.3d at 343. Further, courts of appeals make clear that the analysis should draw from the totality of circumstances, with no single factor being determinative by itself. *See, e.g*., *Keller*, 781 F.3d at 807 ("No one factor is determinative."); *Baker*, 137 F.3d at 1440 ("None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach.").

3. Application of the Economic Reality Test by WHD

Since at least 1954, WHD has applied variations of this multifactor analysis when considering whether a worker is an employee under the FLSA or an independent contractor. *See* WHD Opinion Letter (Aug. 13, 1954) (applying six factors very similar to the six economic reality factors currently used by courts of appeals). In 1964, WHD stated, "The Supreme Court has made it clear that an employee, as distinguished from a person who is engaged in a business of his 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 serves." WHD Opinion Letter FLSA-795 (Sept. 30, 1964).

Over the years since, WHD has issued numerous opinion letters applying a multifactor analysis very similar to the multifactor economic reality test courts use (with some variation) to determine whether workers are employees or independent contractors.[5] WHD has also promulgated regulations applying a multifactor analysis for independent contractor status under the FLSA in certain specific industries. *See, e.g.*, 29 CFR 780.330(b) (applying a six factor economic reality test to determine whether a sharecropper or tenant is an independent contractor or employee under the Act); 29 CFR 788.16(a) (applying a six factor economic reality test in forestry and logging operations with no more than eight employees). Further, WHD has promulgated a regulation applying a multifactor economic reality analysis for determining independent contractor status under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). 29 CFR 500.20(h)(4).

The Department's sub-regulatory guidance, WHD Fact Sheet #13, "Employment Relationship under the Fair Labor Standards Act (FLSA)" (Jul. 2008), similarly stated that, when

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[5] *See, e.g.*, WHD Opinion Letter FLSA2019-6 at 4 (Apr. 29, 2019); WHD Opinion Letter, 2002 WL 32406602, at *2 (Sept. 5, 2002); WHD Opinion Letter, 2000 WL 34444342, at *3 (Dec. 7, 2000); WHD Opinion Letter, 2000 WL 34444352, at *1 (Jul. 5, 2000); WHD Opinion Letter, 1999 WL 1788137, at *1 (Jul. 12, 1999); WHD Opinion Letter, 1995 WL 1032489, at *1 (June 5, 1995); WHD Opinion Letter, 1995 WL 1032469, at *1 (Mar. 2, 1995); WHD Opinion Letter, 1986 WL 740454, at *1 (June 23, 1986); WHD Opinion Letter, 1986 WL 1171083, at *1 (Jan. 14, 1986); WHD Opinion Letter WH-476, 1978 WL 51437, at *2 (Oct. 19, 1978); WHD Opinion Letter WH-361, 1975 WL 40984, at *1 (Oct. 1, 1975); WHD Opinion Letter (Sept. 12, 1969); WHD Opinion Letter (Oct. 12, 1965).

determining whether an employment relationship exists under the FLSA, common law control is not the exclusive consideration. Instead, "it is the total activity or situation which controls"; and "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."[6] The fact sheet identified seven economic reality factors; in addition to factors that are similar to the six factors identified above, it also considered the worker's "degree of independent business organization and operation." On July 15, 2015, WHD issued 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). AI 2015-1 provided guidance regarding the employment relationship under the FLSA and the application of the six economic realities factors. AI 2015-1 was withdrawn on June 7, 2017 and is no longer in effect.

WHD's most recent opinion letter addressing this issue, from 2019, generally applied the principles and factors similar to those described in the prior opinion letters and Fact Sheet #13, but not the "independent business organization" factor because it did not add to the analysis as a separate factor and was "[e]ncompassed within" the other factors. It also stated that the investment factor should focus on the "amount of the worker's investment in facilities, equipment, or helpers." The opinion letter addressed the FLSA classification of service providers who used a virtual marketplace company to be referred to end-market consumers to whom the services were actually provided. WHD concluded that the service providers appeared to be independent contractors and not employees of the virtual marketplace company. *See* WHD Opinion Letter FLSA2019-6 at 7. WHD found that it was "inherently difficult to conceptualize the service providers' 'working relationship' with [the virtual marketplace company], because as a matter of economic reality, they are working for the consumer, not [the company]." *Id*.

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[6] Fact Sheet #13 is available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs13.pdf.

Because "[t]he facts … demonstrate economic independence, rather than economic dependence, in the working relationship between [the virtual marketplace company] and its service providers," WHD opined that they were not employees of the company under the FLSA but rather were independent contractors. *Id.* at 9.

As explained below, the Department's prior interpretations of independent contractor status, which themselves have evolved over time, are subject to similar limitations as that of court opinions, and the Department believes that stakeholders would benefit from clarification. For these reasons, the Department proposed promulgating a clearer and more consistent standard for evaluating whether a worker is an employee or independent contractor under the FLSA and is now finalizing that proposal, with some modifications based on comments received.

C. The Department's Proposal

On September 25, 2020, the Department published the NPRM in the Federal Register. The Department proposed to adopt an "economic reality" test to determine a worker's status as an FLSA employee or an independent contractor. The test considers whether a worker is in business for himself or herself (independent contractor) or is instead economically dependent on an employer for work (employee). The Department further identified two "core factors": the nature and degree of the worker's control over the work; and the worker's opportunity for profit or loss based on initiative, investment, or both. The Department explained it was proposing to emphasize these factors because they are the most probative of whether workers are economically dependent on someone else's business or are in business for themselves. The proposal identified three other factors to also be considered, though they are less probative than the core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the individual and the potential employer, and whether the work is part of an integrated unit of production. The Department further proposed to advise that the actual practice is more probative than what may be contractually or theoretically possible in determining whether a worker is an employee or an independent contractor.

D. Comments

The Department solicited comments on all aspects of the proposed rule. More than 1800 individuals and organizations timely commented on the Department's NPRM during the thirty-day comment period that ended on October 26, 2020. The Department received comments from employers, workers, industry associations, worker advocacy groups, and unions, among others. All timely comments may be viewed at the website www.regulations.gov, docket ID WHD-2020-0007.

Of the comments received, the Department received approximately 230 comments from workers who identified themselves as independent contractors (not including the over 900 comments received from Uber drivers discussed below). Of those, the overwhelming majority expressed support for the NPRM. These individuals identified themselves as freelancers or independent contractors in jobs including translator, journalist, consultant, musician, and many others. Among this group of commenters, over 200 expressed support for the proposed rule, while only 8 opposed it. The remaining individuals in this group did not express a specific position. Uber drivers submitted over 900 comments. While many expressed views on Uber corporate policies and not on the NPRM itself, the majority of these drivers who addressed the NRPM supported the Department's proposal. The Department also received a number of other comments that are beyond the scope of this rulemaking. For example, several commenters expressed opinions related to the issues addressed in the Department's proposal but that were specific to state legislation or employer policies.. Significant issues raised in the timely comments received are discussed below, along with the Department's response to those comments.

III. Need for Rulemaking

The NPRM explained that the Department has never promulgated a generally-applicable regulation addressing who is an independent contractor and thus not an employee under the FLSA. Instead, as described above, the Department has issued and revised guidance since at least

1954, using different variations of a multifactor economic reality test that analyzes economic dependence to distinguish independent contractors from employees. Such guidance reflects, in large part, application of the general principles of the economic reality test by Federal courts of appeals. Such guidance, however, did not reflect any public input. Indeed, the NPRM kicked off the Department's first ever notice-and-comment rulemaking to provide a generally applicable interpretation of independent contractor status under the FLSA. As recounted just above, the Department received many comments from stakeholders who are actually impacted by FLSA classification decisions, which are valuable information and insight that the Department has not previously gathered and many of which reinforced the Department's view that more clarity is needed in this area.

The Department explained in the NPRM preamble that prior articulations of the test have proven to be unclear and unwieldy for the four following reasons. First, the test's overarching concept of "economic dependence" is under-developed and sometimes inconsistently applied, rendering it a source of confusion. Second, the test is indefinite in that it makes all facts potentially relevant without guidance on how to prioritize or balance different and sometimes competing considerations. Third, inefficiency and lack of structure in the test further stem from blurred boundaries between the factors. Fourth, these shortcomings have become more apparent over time as technology, economic conditions, and work relationships have evolved.

The Department thus proposed to promulgate a regulation that would clarify and sharpen the contours of the economic reality test used to determine independent contractor classification under the FLSA. The NPRM explained that such a regulation would provide much needed clarity and encourage (or at least stop deterring) flexible work arrangements that benefit both businesses and workers.

Commenters in the business community and freelance workers generally agreed with the Department that the multifactor balancing test is confusing and needs clarification. The National Retail Federation (NRF) complained that "existing tests for independent contractor status tend to

have a large number of factors which can be nebulous, overlapping, and even irrelevant to the ultimate inquiry." The Workplace Policy Institute of Littler Mendelson, P.C. (WPI) stated that "[b]oth the Department and the courts have struggled to define 'dependence'" in the modern economy—resulting in confusion, unpredictability and inconsistent results." The Society for Human Resource Management (SHRM) echoed this sentiment, writing "the business community and workers are left applying numerous factors in a variety of ways that is mired in uncertainty and, therefore, unnecessary risk." The U.S. Chamber of Commerce stated that "[t]he confusion regarding whether a worker is properly classified as an employee or an independent contractor has long been a vexing problem for the business community, across many different industries and work settings." *See also, e.g.*, World Floor Covering Association (WFCA) ("The current test has resulted in inconsistent decisions, much confusion, and unnecessary costs."). Numerous individual freelancers and organizations that represent freelance workers also stated they would welcome "greater clarity and predictability in the application of the 'economic realities' test." Coalition to Promote Independent Entrepreneurs (CPIE); *see also* Coalition of Practicing Translators & Interpreters of California (CoPTIC) (requesting "greater clarity in Federal law"). Individual freelancers generally welcomed greater legal clarity. For example, one individual commenter wrote "to express [her] support for this proposed rule. As someone who has enjoyed freedom and flexibility as a freelancer for 20 years, this would be a welcome clarification." Another individual freelancer stated that "[t]he clarity and updating of [the FLSA] through this NPRM is long overdue and the DOL should issue ruling on independent contracting …."

These supportive commenters generally agreed with the Department that additional clarity would encourage flexible work arrangements that benefit businesses and workers alike. For example, the Coalition for Workforce Innovation (CWI) asserted that additional clarity of the economic reality test would "allow workers and businesses to pursue [] mutually beneficial opportunities as the United States economy evolves with technology." Fight for Freelancers

explained that its members value flexibility that comes with working as independent contractors and supported the Department's "efforts to protect [its members'] classification."

Some commenters who opposed this rulemaking questioned the need for a regulation on this topic. The Southwest Regional Council of Carpenters (SWRCC) stated that the "[t]he first of the Rule's shortcomings is its assumption that a new rule is necessary in the first place," and the American Federation of Labor & Congress of Industrial Organization (AFL-CIO) asserted that the Department's "quest for certainty … is quixotic." Mr. Edward Tuddenham, an attorney, contended that the current test is "generally consistent and predictable" and thus does not need further clarification. He and others repeatedly questioned the Department's reasons for rulemaking by asserting that the Department did not identify cases where courts reached incorrect outcomes. Rather than focus on the outcomes in particular cases, the NPRM highlighted inconsistent or confusing reasoning in many decisions to explain why the regulated community would benefit from regulatory clarity. *See* 85 FR 60605. Mr. Tuddenham and others also provided thoughtful and detailed comments criticizing specific aspects of the reasons presented in the NPRM's need for rulemaking discussion. The following discussion retraces those reasons and responds to these criticisms.

A. Confusion Regarding the Meaning of Economic Dependence

The NPRM explained that undeveloped analysis and inconsistency cloud the application of "economic dependence," the touchstone of the economic reality test. 85 FR 60605. The Department and some courts have attempted to furnish a measure of clarity by explaining, for example, that the proper inquiry is "'whether the workers are dependent on a particular business or organization *for their continued employment*' in that line of business," *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1054 (5th Cir. 1987) (quoting *DialAmerica*, 757 F.2d at 1385), or instead "are in business for themselves," *Saleem*, 854 F.3d at 139. But the Department and many courts have often applied the test without helpful clarification of the meaning of the economic dependency that they are seeking.

The NPRM explained that the lack of explanation of economic dependence has sometimes led to inconsistent approaches and results and highlighted as an example the apparently inconsistent results in *Cromwell v. Driftwood Elec. Contractor, Inc.*, 348 F. App'x 57 (5th Cir. 2009) (holding that cable splicers hired by Bellsouth to perform post-Katrina repairs were employees), and *Thibault* v. *BellSouth Telecommunication*, 612 F.3d 843 (5th Cir. 2010) (holding that cable splicer hired by same company under a very similar arrangement was an independent contractor). *See* 85 FR 60605. The *Thibault* court distinguished its result from *Cromwell* in part by highlighting Mr. Thibault's significant income from (1) his own sales company that had profits of approximately $500,000, (2) "eight drag-race cars [that] generated $1,478 in income from racing professionally[,]" and (3) "commercial rental property that generated some income." *Thibault*, 612 F.3d at 849. While these facts indicate that Mr. Thibault may have been in business for himself as a manager of a sales business, drag-race cars, and commercial properties, they are irrelevant as to whether he was in business for himself as a cable splicer.[7] The *Thibault* court nonetheless assigned these facts substantial weight because it understood economic dependence to mean dependence for income or wealth, which is incompatible with the dependence-for-work approach that other courts and the Department apply.[8] *See, e.g.*, *Off Duty Police*, 915 F.3d at 1058 ("[W]hether a worker has more than one source of income says little about that worker's employment status."); *Halferty,* 821 F.2d at 268 ("[I]t 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 ("The economic-dependence aspect of the [economic reality] test does not concern whether the workers at issue depend on the money they earn for obtaining the necessities of life."). As the

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[7] The *Thibault* court also highlighted the fact that Mr. Thibault worked for only 3 months—although he intended to work for 7 or 8 months—before being fired. *See* 612 F.3d at 846, 849. In contrast, the splicers in *Cromwell* worked approximately 11 months. *See* 348 F. App'x at 58.

[8] The *Thibault* case recognized that "[a]n individual's wealth is not a solely dispositive factor in the economic dependence question." 612 F.3d at 849 n.4. This confirms that wealth was in fact a meaningful consideration, which runs against other cases explaining that dependence on wealth is an inappropriate lens.

DialAmerica court explained, the dependence-for-income approach "would lead to a senseless result" because a wealthy individual who had an independent source of income would be an independent contractor even though a poorer individual who worked for the same company under the same work arrangement is an employee. 757 F.2d at 1385 n.11. Mr. Tuddenham initially defended the reasoning in *Thibault*, but later listed that case as an example of "the occasional erroneous application of the [economic reality] test."

The NPRM also highlighted the decision in *Parrish v. Premier Directional Drilling*, 917 F.3d 369, as an example of inconsistent articulation of economic dependence. In that case, the court first applied a dependence-for-work concept to analyze the control factor and then explicitly departed from that framework in favor of a dependence-for-income analysis of the opportunity factor. *See* 85 FR 60606. The *Parrish* court impliedly took a third concept of dependence to analyze the investment factor through a "side-by-side comparison" of each worker's individual investment to that of the alleged employer." 917 F.3d at 383. AI 2015-1 took the same approach and explained that "it is the relative investments that matter" because "[i]f the worker's investment is relatively minor, that suggests that the worker and the employer are not on similar footing and that the worker may be economically dependent on the employer." The comparative analysis of investments thus appears to rely on a concept of economic dependence that means "not on a similar footing," which is different from the "dependence for work" concept that the Department believes to be correct.

In summary, courts and the Department typically economic dependence as "dependence for work," but have sometimes applied other concepts of dependence to analyze certain factors, such as "dependence for income" and "not on similar footing." Because economic dependence is the ultimate inquiry of FLSA employment, these different conceptions result in essentially different tests that confuse the regulated community. Accordingly, the economic reality test needs a more developed and dependable touchstone at its heart.

B. Lack of Focus in the Multifactor Balancing Test

The NPRM explained that the versions of the multifactor economic reality test used by courts since at least the 1980s and the Department since the 1950s lack clear, generally applicable guidance about how to balance the multiple factors and the countless facts encompassed therein. *See* 85 FR 60606.The test's lack of guidance leads to uncertainty regarding "which aspects of 'economic reality' matter, and why." *Lauritzen*, 835 F.2d at 1539 (Easterbrook J., concurring).

As examples of such uncertainty, the NPRM highlighted court decisions analyzing economic reality factors to reach an overall decision about a worker's classification without meaningful explanation of how they balanced the factors to reach the final decision. 85 FR 60606 (citing, *e.g., Parrish*, 917 F.3d at 380; *Chao v. Mid-Atl. Installation Servs., Inc.*, 16 F. App'x 104, 108 (4th Cir. 2001); and *Snell*, 875 F.2d at 912). Even where many facts and factors support both sides of the classification inquiry, courts have not explained how they balanced the competing considerations. *See, e.g.*, *Acosta v. Paragon Contractors Corp*., 884 F.3d 1225, 1238 (10th Cir. 2018); *Iontchev v. AAA Cab. Services*, 685 F. App'x 548, 550 (9th Cir. 2017). The NPRM thus identified a need for guidance on which factors are most probative.

Even some commenters critical of the Department's approach in the NPRM conceded that the test as currently applied can create considerable ambiguity. Mr. Tuddenham asserted that the lack of general guidance regarding how to balance factors is "an unavoidable function of determining something as nebulous as 'economic dependence.'" *See also* Farmworker Justice ("[T]he test, as currently applied, creates necessary ambiguity."). The Department disagrees that the concept of "economic dependence" is necessarily "nebulous." FLSA employment itself depends on economic dependence, and nothing in the statute requires that this standard be nebulous and thus unmanageable. *See Usery*, 527 F.2d at 1311 ("It is dependence that indicates employee status."). Instead, the Department believes the correct concept of economic dependence tangibly defines FLSA employment to include individuals who are dependent on others for work, and to exclude individuals who are, as a matter of economic reality, in business

for themselves. *See Saleem*, 854 F.3d at 139. The Department thus believes it is possible to provide generally applicable guidance regarding how to consider and balance the economic reality factors to assess this concept of economic dependence.

C. Confusion and Inefficiency Due to Overlapping Factors

The NPRM next explained that courts and the Department have articulated the economic reality factors such that they have overlapping coverage, which undermines the structural benefits of a multifactor test. *See* 85 FR 60607. The NPRM noted that most of these overlaps did not exist in the Supreme Court's original articulation of the economic reality factors in *Silk* and were instead introduced by subsequent court of appeals decisions. The NPRM then explained several ways in which extensive overlaps may lead to inefficiency and confusion for the regulated community.

First, the "skill required" factor articulated in *Silk*, 331 U.S. at 716, has been expanded by the Department and some courts to analyze "skill and initiative." *See, e.g., Superior Care*, 840 F.2d at 1060; WHD Fact Sheet WHD #13. Because the capacity for on-the-job initiative is already part of the control factor, the NPRM explained that this approach essentially imports control analysis into the skill factor. Indeed, the presence of control appears to overrides the existence of skill,[9] effectively transforming the skill factor into an extension of the control factor in some circuits, but not others.[10] The "skill and initiative" factor also overlaps with the opportunity factor, which considers the impact of initiative on worker's earnings, resulting in initiative being analyzed under three different factors. As an illustration of confusion resulting

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[9] *See, e.g., Selker Bros*., 949 F.2d at 1295 (concluding that the skill factor weighed towards employee classification due to ''the degree of control exercised by [the potential employer] over the day-to-day operation"); *Baker*, 137 F.3d at 1443 (finding that the skill factor weighed towards employee classification where skilled welders "are told what to do and when to do it"); *Superior Care*, 840 F.2d at 1060 (finding that the skill factor weighed towards employee classification for skilled nurses because ''Superior Care in turn controlled the terms and conditions of the employment relationship'').

[10] Some courts of appeal continue to analyze skill rather than control as part of the skill factor. *See, e.g., Paragon,* 884 F3d at 1235 (considering "the degree of skill required to perform the work"); *see also Iontchev,* 685 F. App'x at 550 (asking ''whether services rendered … require[d] a special skill''); *Keller,* 791 F.3d at 807 (analyzing "the degree of skill required").

from this overlap, the NPRM highlighted a case in which a court found that workers exercised enough on-the-job initiative for the control and opportunity factors to point towards independent contractor status, but nonetheless found the 'skill and initiative factor points towards employee status' due to 'the key missing ingredient … of initiative.'" 85 FR 60607 (quoting *Express Sixty-Minutes Delivery*, 161 F.3d at 303).

Next, the permanence factor originally concerned the continuity and duration of a working relationship but has since been expanded by some courts and the Department to also consider the exclusivity of that relationship. *See* 85 FR 60608 (citing *Parrish* 917 F.3d at 386-87; *Keller*, 781 F.3d at 807-09; *Scantland*, 721 F.3d at 1319; WHD Opinion Letter FLSA 2019-6 at 8). But exclusivity—the ability or inability for a worker to offer services to different companies—is already a part of the control factor. This overlap results in exclusivity being analyzed twice and causes the actual consideration of permanence being potentially subsumed by control.

Third, the "integral part" factor is used by some courts to be merely a proxy of control. As one such court explained: "it is presumed that, with respect to vital or integral parts of the business, the employer will prefer to engage an employee rather than an independent contractor. This is so because the employer retains control over the employee and can compel attendan[ce] at work on a consistent basis." *Baker* v. *Dataphase, Inc.,* 781 F. Supp. 724, 735 (D. Utah 1992). But the control factor already directly analyzes whether a business can compel attendance on a consistent basis. It is unclear what additional value can be gained by indirectly analyzing that same consideration a second time under the "integral part" factor.[11]

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[11] As the NPRM explained, this presumption that firms would control all important services on which they rely may rest on a mistaken premise because, for example, manufacturers routinely have critical parts and components produced and delivered by wholly separate companies. 85 FR 60608. And companies whose business is to connect independent service providers with customers would find those service providers to be important even though they are independent from the company's business. *See State Dep't of Employment, Training & Rehab., Employment Sec. Div.* v. *Reliable Health Care Servs. of S. Nevada, Inc.,* 983 P.2d 414, 419 (Nev. 1999) ("[W]e cannot ignore the simple fact that providing patient care and brokering workers are two distinct businesses.'")

Finally, while *Silk* articulated the opportunity for profit and loss and investment as separate factors, it analyzed the two together in concluding that truck drivers in that case were independent contractors in part because they "invested in their own trucks and had "an opportunity for profit from sound management" of that investment. 331 U.S. at 719. The Second Circuit recognized such clear overlap, noting that "[e]conomic investment, by definition, creates the opportunity for loss, [and] investors take such a risk with an eye to profit." *Saleem,* 854 F.3d at 145 n.29. Nonetheless, most courts and Department have analyzed opportunity for profit and loss and investment as separate factors. When done right, separate analysis leads to redundancy. *See, e.g., Mid-Atlantic Installation Servs*., 16 F. App'x at 106–07. When done wrong, it leads to analysis of investment without regard for the worker's profit or loss, such as by comparing the dollar value of a worker's personal investments against the total investment of a large company that, for example, "maintain[s] corporate offices." *Hopkins* 545 F.3d at 344. The NPRM explained that such a comparison says nothing about whether the worker is in business for himself, as opposed to being economically dependent on that company for work, and is therefore not probative and potentially misleading. 85 FR 60608. The NRPM concluded that reducing the above-mentioned overlaps would make the economic reality test easier to understand and apply.

The SWRCC contended that "overlapping factors [have] never been the source of—and the DOL cannot point to—any credible criticism," but did not question or even acknowledge the above criticism discussed at length in the NRPM. In contrast, commenters that are significantly impacted by the FLSA's obligations generally agreed with the Department that overlapping factors have created confusion. For example, the Association of General Contractors stated that "[n]avigating and complying with the various overlapping and inconsistent standards are confusing and costly," and WPI "agree[d] with the Department that such overlap and blurring of factors is confusing and inefficient." *See also, e.g.*, Center for Workplace Compliance (CWC); NRF; U.S. Chamber of Commerce.

A multifactor test is a useful framework for determining FLSA employment in part because it organizes the many facts that are part of economic reality into distinct categories, thus providing some structure to an otherwise roving inquiry. However, this benefit is lost if the lines between those factors blur. Under prior articulations of the test, considerations within the control factor—capacity for on-the-job initiative, exclusivity, and ability to compel attendance—have been imported into analysis of three other factors: skill, permanence, and integral part. Indeed, those control-based considerations appear to be the most important aspect of the other factors, which obscures those factors' distinctive probative values. Moreover, considerations under the opportunity factor—the ability to affect profits through initiative—have been imported into the skill factor. And the ability to earn profits through investment overlaps completely with the investment factor. The Department continues to believe these overlapping coverages contribute to confusion and should be reduced where practicable.

D. The Shortcomings and Misconceptions that this Rulemaking Seeks to Remedy are More Apparent in the Modern Economy

The NPRM explained that certain technological and social changes have made shortcomings of the economic reality test more apparent in the modern economy. It highlighted the effects of three types of change. First, falling transaction costs in many industries makes it more cost effective for firms to hire independent contractors rather than employees to perform core functions.[12] This in turn means analyzing the importance of the work through the "integral part" factor, which the Supreme Court never endorsed, is more likely to result in misleading signals regarding an individual's employment status. Second, the transition from a more

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[12] Ronald Coase, *Nature of the Firm*, 4 Economica 386 (1937), https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-0335.1937.tb00002.x. *See also* Nobel Prizes and Laureates, Oct., 15, 1991, https://www.nobelprize.org/prizes/economic-sciences/1991/press-release/ (explaining *The Nature of the Firm's* contribution to economics literature as a central reason for Coase's receipt of the 1991 Nobel Prize in Economics); Katz and A. Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015," p. 25 (2018) ("Coase's (1937) classic explanation for the boundary of firms rested on the minimization of transaction costs within firm-employee relationships. Technological changes may be reducing the transaction costs associated with contracting out job tasks, however, and thus supporting the disintermediation of work.").

industrial-based to a more knowledge-based economy reduces the probative value of the investment factor in certain industries because individuals can be in business for themselves in those industries with minimal physical capital. Third, shorter job tenures among employees dull the ability of the permanence factor to distinguish between employees and independence contractor. *See* 85 FR 60608-09.

Several commenters agreed with the Department's assessments of modern trends. *See, e.g.*, TechNet ("Given falling transaction costs, companies are more willing to allocate certain pieces of their production, even integrated parts, to independent contractors."); Food Industry Association ("societal changes have resulted in innovative work arrangements and changes in job tenure expectation"). Former Deputy Under Secretary of Labor and retired law professor Henry H. Perritt, Jr. found the discussion of modern trends to be "particularly insightful and should be retained and expanded in the preamble to any final rule." Other commenters disagreed. The AFL-CIO, for instance, theorized that lower transaction costs "might just as easily result in employers not taking steps to retain employees who perform work central to their business, but instead tolerate frequent turnover in such positions" and that the "job tenure of independent contractors may have fallen more" than for employees—though it did not provide evidence in support of its hypotheses.[13] The Department continues to believe that each of the above shortcomings of the previously applied economic reality test provides sufficient reason for this rulemaking and that technological and societal changes have made these shortcomings even more apparent.

E. Effects of Additional Regulatory Clarity on Innovation

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[13] The Department notes that it is unlikely that job tenures of independent contractors have fallen by more than employees because average job tenure for employees have dropped by many years, which is greater than the total duration of a typical independent contractor relationship. *See* Julie Hotchkiss and Christopher Macpherson, *Falling Job Tenure: It's Not Just about Millennials*, Federal Reserve Bank of Atlanta, June 8, 2015, https://www.frbatlanta.org/blogs/macroblog/2015/06/08/falling-job-tenure-its-not-just-about-millennials.aspx. (showing that median job tenure for individuals born in 1933 was ten years or longer while median job tenure for individuals born after 1983 was three years or less).

The NPRM expressed concern that the legal uncertainty arising from the above-described shortcomings of the multifactor economic reality test may deter innovative, flexible work arrangements that benefit businesses and workers alike. Some commenters questioned this assumption. The Coalition of State Attorneys General, Cities, and Municipal Agencies (State AGs), for instance, contended that the Department "provides no empirical evidence or data demonstrating that employers now hesitate to engage in innovative arrangements" and further argued that because "digital platforms have become part of the modern economy … they have not been stifled by the current test." But the mere existence of certain types of businesses is insufficient evidence that other such businesses are not being stifled, and it is unclear what empirical data could measure innovation that is not occurring due to legal uncertainty. Commenters who represent technology companies stated that legal uncertainty regarding worker classification in fact deters them from developing innovative and flexible work arrangements. *See, e.g.*, CWI; TechNet. In addition, economists who study the impact of labor regulation on entrepreneurship also commented that clear independent contractor regulations would assist startup companies. Dr. Liya Palagashvilli ("71 percent of startups relied on independent contractors and thought it was necessary to use contract labor during their early stages"); Dr. Michael Farren and Trace Mitchell ("[G]reater legal clarity to employers and workers will allow for more efficient production processes and will reduce the resources wasted on determining a worker's employment classification through the legal process.").

For the reasons mentioned above, the Department continues to believe that, unless revised, the multifactor economic reality test suffers because the analytical lens through which all the factors are filtered remains inconsistent; there is no clear principle regarding how to balance the multiple factors; the lines between many of the factors are blurred; and these shortcomings have become more apparent in the modern economy. The resulting legal uncertainty obscures workers' and businesses' respective rights and obligations under the FLSA and deters innovative work arrangements, thus inhibiting the development of new job

opportunities or eliminating existing jobs. The Department is therefore issuing this final rule to increase legal certainty.

IV. Final Regulatory Provisions

Having reviewed commenter feedback submitted in response to the proposed rule, the Department is finalizing the addition of a new part 795 to Title 29 of the Code of Federal Regulations, which will address whether particular workers are "employees" or independent contractors under the FLSA. In relevant part, and as discussed in greater detail below, the part includes:

- an introductory provision at § 795.100 explaining the purpose and legal authority for the new part;
- a provision at § 795.105(a) explaining that independent contractors are not employees under the FLSA;
- a provision at § 795.105(b) discussing the "economic reality" test for distinguishing FLSA employees from independent contractors and clarifying that the concept of economic dependence turns on whether a worker is in business for him- or herself (independent contractor) or is economically dependent on a potential employer for work (employee);
- provisions at § 795.105(c) and (d) describing factors examined as part of the economic reality test, including two "core" factors—the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss—which typically carry greater weight in the analysis, as well as three other factors that may serve as additional guideposts in the analysis;
- a provision at § 795.110 advising that the parties' actual practice is more probative than what may be contractually or theoretically possible;
- fact-specific examples at § 795.115; and
- a severability provision at § 795.120.

The Department responds to commenter feedback on the proposed rule below.

A. The Purpose of Part 795

Proposed § 795.100 explained that the interpretations in part 795 will guide WHD's enforcement of the FLSA and are intended to be used by employers, businesses, the public sector, employees, workers, and courts to assess employment status classifications under the Act. *See* 85 FR 60638. Proposed § 795.100 further clarified that, if proposed part 795 is adopted, employers may safely rely upon the interpretations in part 795 under section 10 of the Portal-to-Portal Act, unless and until any such interpretation "is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id.* (quoting 29 U.S.C. 259).

Few commenters specifically addressed proposed § 795.100, but several discussed issues relevant to its content. For example, a few commenters questioned the Department's legal authority to promulgate any regulation addressing independent contractor status under the FLSA. *See* Northern California Carpenters Regional Council ("At no time since the FLSA was passed has Congress made substantive amendments to the definitions of employee, employer, or the 'suffer or permit to work' standard … nor has it directed any changes in the controlling regulations."); Rep. Bobby Scott et al. ("Congress has not delegated rulemaking authority to the DOL with respect to the scope of the employment relationship under the FLSA."). A few commenters requested that the Department explain its source of rulemaking authority and the level of deference it expects to receive from courts interpreting its proposed regulation. A diverse collection of commenters, including the American Trucking Association (ATA), the National Home Delivery Association (NHDA), the Northwest Workers Justice Project (NWJP), and Winebrake & Santillo, LLC, opined that the Department's proposed regulation would be entitled to *Skidmore* deference from courts, though these commenters diverged on the proposed rule's "power to persuade." *Skidmore v. Swift & Co.*, 323 US 134, 140 (1944). Finally, the AFL-CIO asserted that "[t]he proposed rule is based on considerations that did not motivate Congress when it adopted the FLSA, that the Department of Labor is not authorized to consider in construing the

terms of the FLSA, and that the Department has no expertise regarding," thus placing the proposed rule "outside the 'limits of the delegation' from Congress to the Department contained in the Act." (quoting *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865 (1984)).

The Department appreciates commenter interest in these issues. 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[14] and its decades of experience doing so. 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 (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). The Department believes 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. It has a long history of offering interpretations in this area and believes this rulemaking has great value regardless of what deference courts ultimately give to it.

While proposed § 795.100 emphasized that part 795 would state the Department's interpretation of independent contractor status under the FLSA, some commenters expressed concern that it would affect the scope of employment under other Federal laws. The United Food and Commercial Workers International Union (UFCW) believed that the proposal may narrow the coverage of the "Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act (ADEA), and the Equal Pay Act." *See also* National

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[14] *See* 29 U.S.C. 204, 211(a), 212(b), 216(c), 217; *see also Fernandez v. Zoni Language Centers, Inc.,* 858 F.3d 45, 48–49 (2d Cir. 2017) (noting that "[t]he DOL … administers the FLSA").

Women's Law Center (NWLC); CLASP. The Department reaffirms that the rule concerns the distinction between employees and independent contractors solely for the purposes of the FLSA, and as such, would not affect the scope of employment under other Federal laws.[15]

Many commenters requested that the Department promulgate a standard more broadly applicable across other state and Federal employment laws. *See*, *e.g.*, American Society of Travel Advisors, Inc. ("[The NPRM … represents something of a missed opportunity insofar as it fails to address the longstanding difficulty associated with the continued use of multiple tests at the Federal level to determine worker status."); Cambridge Investment Research, Inc. ("[W]ithout a more encompassing Department position or guidance addressing different state standards, some of the current uncertainty and unpredictability remain."); Chun Fung Kevin Chiu ("[I]nconsistent Federal and state standards with regards to classification may render the DOL rules ineffective in practice for those independent contractors and businesses affected."). While several commenters acknowledged the Department's lack of authority to interpret the scope of laws outside of its jurisdiction, the National Association of Manufacturers and the Mechanical Contractors Association of America (MCAA) urged the Department to collaborate with other Federal agencies to harmonize the varying employment definitions under Federal law. Finally, the Zobrist Law Group "urge[d] the Department to prohibit states from using classification tests that conflict with the proposed rule," asserting that "state law not preempted by the FLSA is narrow" and that state laws "shifting an independent contractor under the FLSA to an employee under state law … [impose] greater obligations upon those workers." *But see* Truckload Carriers Association ("TCA understands that, due to our nation's federalist system, individual states such as California can pursue misguided statues that are more stringent than the Federal standard the Department is seeking to clarify[.]").

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[15] Additionally and as explained in greater detail below, this rule does not narrow the longstanding standard for distinguishing between FLSA employees and independent contractors; employees are economically dependent on another for work, and independent contractors are in business for themselves as matter of economic reality.

While the Department appreciates the desire to achieve uniformity across the various state and Federal laws which may govern work arrangements, requests to modify definitions and tests under different laws are outside the scope of this rulemaking.

Some commenters supportive of the proposed rule requested that the Department make conforming edits to its MSPA regulation at 29 CFR 500.20(h)(4), addressing whether or not a farm labor contractor engaged by an agricultural employer/association is an independent contractor or an employee under MSPA. *See* Americans for Prosperity Foundation (AFPF) ("To further the Department's goal of clarification, simplification, and consistency … the same criteria used in the NPRM to define independent contractors for purposes of the FLSA also should apply to the MSPA, and to any other provision that references the FLSA."); Administrative Law Clinic at the Antonin Scalia Law School ("[T]he Department should simply use its proposed regulations in 29 C.F.R. §795.100, et seq., to determine employee status under MSPA, and repeal [29 CFR 500.20(h)] as duplicative."). Relatedly, Texas RioGrande Legal Aid (TRLA), which expressed opposition to the proposed rule, asserted that "the proposed rule will lead to considerable confusion among both employers and workers … because the proposed rule at odds with the Department's [MSPA] regulations," but opined that any effort to revise 29 CFR 500.20(h) "would be in direct contravention of Congressional directives regarding the interpretation of the MSPA."

As noted in the NPRM preamble, the Department acknowledges that MSPA adopts by reference the FLSA's definition of "employ," *see* 18 U.S.C. 1802(5), 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 independent contractor status under MSPA. At this time, however, the Department does not see a compelling need to revise 29 CFR 500.20(h)(4), as we are unsure whether application of the six factor economic reality test described in that regulation has resulted in confusion and uncertainty in the more limited MSPA context similar to that described in the FLSA context. Importantly, the regulatory standard for

determining an individual's classification status under MSPA is generally consistent with the FLSA guidance finalized in this rule: "In 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." 29 CFR 500.20(h)(4). Therefore, as explained in the NPRM, the Department prefers to proceed incrementally at this time by leaving the MSPA regulation at 29 CFR 500.20(h)(4) unchanged.[16][17]

The American Network of Community Options and Resources (ANCOR) expressed concern about the Department's statement in proposed § 795.100 that, if finalized, the proposed rule "would contain the Department's sole and authoritative interpretation of independent contractor status under the FLSA," fearing that the statement could be interpreted to "render obsolete the Department's specific guidance on the application of the FLSA to shared living in Fact Sheet # 79G and Administrator's Interpretation No. 2014-1." The Department disagrees with this interpretation, noting that § 795.100 only rescinds earlier WHD guidance addressing independent contractor status under the FLSA "[t]o the extent … [that such guidance is] inconsistent or in conflict with the interpretations stated in this part." As explained in the NPRM, the Department engaged in this rulemaking to "clarify the existing standard, not radically

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[16] *See, e.g.*, *Pharm. Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 203 (D.C. Cir. 2015) (affirming that agency had discretion to "proceeding incrementally" in promulgating rules that were directed to one industry but not others); *Inv. Co. Inst. v. Commodity Futures Trading Comm'n*, 720 F.3d 370, 378 (D.C. Cir. 2013) (observing that "[n]othing prohibits Federal agencies from moving in an incremental manner" (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 522 (2009)); *City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989) (noting that "agencies have great discretion to treat a problem partially").

[17] Similar to the MSPA regulation at 29 CFR 500.20(h)(4), a regulation promulgated by the Department's Veterans' Employment & Training Service (VETS) at 20 CFR 1002.44 articulates a six-factor balancing test based on the tests used by courts under the FLSA for determining whether an individual is an employee or an independent contractor under the Uniformed Services Employment and Reemployment Rights Act (USERRA). *See* 70 FR 75254 ("The independent contractor provision in this rule is based on Congress's intent that USERRA's definition of 'employee' be interpreted in the same expansive manner as the term is defined under the [FLSA]." (citing H.R. Rep. No. 103-65, Pt. I, at 29 (1993); S. Rep. No. 103-58, at 40 (1993))). Consistent with this rulemaking's incremental focus on the FLSA context, the Department declines to amend 20 CFR 1002.44 at this time.

transform it," 85 FR 60636, and none of the industry-specific guidance in Administrator's Interpretation No. 2014-1 is meaningfully affected by this final rule. For similar reasons, we believe that the assertion by the Nebraska Appleseed Center for Law in the Public Interest (Appleseed Center) that this rulemaking will "rescind years of [Departmental] guidance" is an overstatement. This rule is premised on familiar FLSA concepts that courts, employers, workers, and the Department have applied for years while providing updated and clearer explanations of what the concepts mean and how they are considered. Although this rule will change the Department's analysis for classifying workers as employees or independent contractors in some respect, those changes do not favor independent contractor classification (i.e., the ultimate legal outcome) relative to the status quo, but rather offer greater clarity as to workers' proper classifications.

B. Clarification That Independent Contractors Are Not Employees under the Act

Proposed § 795.105(a) explained that an independent contractor who renders services to a person is not an employee of that person under the FLSA, and that the Act's wage and hour requirements do not apply with respect to a person's independent contractors. *See* 85 FR 60638-39. Proposed 795.105(a) similarly explained that the recordkeeping obligations for employers under section 11 of the Act do not apply to a person with respect to services received from an independent contractor. *Id*.

The vast majority of substantive comments agreed with proposed § 795.105(a). One anonymous commenter suggested that the Department interpret the FLSA's minimum wage and overtime pay requirements to apply to independent contractors because the Act's "declaration of policy" at 29 U.S.C. 202 "suggests the purpose of the FLSA is to protect workers." The Department does not adopt this interpretation because Federal courts of appeals have uniformly held, and the Department has consistently maintained, that "FLSA wage and hour requirements do not apply to true independent contractors." *Karlson*, 860 F.3d at 1092; *see also, e.g.*, *Parrish*, 917 F.3d at 384; *Saleem*, 854 F.3d at 139–40; *Express Sixty-Minutes Delivery*, 161 F.3d at 305;

see also Portland Terminal, 330 U.S. at 152 (holding that the FLSA "was obviously not intended to stamp all persons as employees").

C. *Adopting the Economic Reality Test to Determine a Worker's Employee or Independent Contractor Status under the Act*

Proposed § 795.105(b) would adopt the economic reality test to determine a worker's status as an employee or an independent contractor under the Act. As the proposal explained, the inquiry of whether an individual is an employee or independent contractor under the Act is whether, as a matter of economic reality, the individual is economically dependent on the potential employer for work. *See* 85 FR 60611; *see also Pilgrim Equip.*, 527 F.2d at 1311 ("It is dependence that indicates employee status."). The proposal and this final rule provide further clarity as to the economic reality test's touchstone—economic dependence. .

The NPRM preamble explained that clarifying the test requires putting the question of economic dependence in the proper context. "Economic dependence is *not* conditioned reliance on an alleged employer for one's primary source of income, for the necessities of life." *Mr. W Fireworks*, 814 F.2d at 1054. Rather, courts have framed the question as "'whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves.'" *Saleem*, 854 F.3d at 139 (quoting *Superior Care*, 840 F.2d at 1059). This conception of economic dependence comports with the FLSA's definition of employ as "includ[ing] to suffer or permit to work." *See* 29 U.S.C. 203(g). An individual who depends on a potential employer for work is able to work only by the sufferance or permission of the potential employer. Such an individual is therefore an employee under the Act. In contrast, an independent contractor does not work at the sufferance or permission of others because, as a matter of economic reality, he or she is in business for him- or herself. In other words, an independent contractor is an entrepreneur who works for him- or herself, as

opposed to for an employer.[18] The Department did not receive any substantive comments disputing this distinction between employee and independent contractor classification under the Act.

The Department observed in the NPRM preamble that some courts have relied on a worker's entrepreneurship with respect to one type of work to conclude that the worker was also in business for him- or herself in a second, unrelated type of work. *See, e.g.*, *Parrish*, 917 F.3d at 384 (considering "plaintiff's enterprise, such as the goat farm, as part of the overall analysis of how dependent plaintiffs were on [defendant]" for working as consultants); *Thibault*, 612 F.3d at 849 (concluding that plaintiff was an independent contractor as a cable splicer in part because he managed unrelated commercial operations and properties in a different state). This approach is inconsistent with the Supreme Court's instruction that the economic reality analysis be limited to "the claimed independent operation." *Silk*, 331 U.S. at 716. Thus, the relevant question in this context is whether the worker providing certain service to a potential employer is an entrepreneur "in that line of business." *Mr. W Fireworks*, 814 F.2d at 1054. Otherwise, businesses must make worker classification decisions based on facts outside the working relationship.[19]

At bottom, the phrase "economic dependence" may mean many different things. But in the context of the economic reality test, "economic dependence" is best understood in terms of what it is not. The phrase excludes individuals who, as a matter of economic reality, are in business for themselves. Such individuals work for themselves rather than at the sufferance or permission of a potential employer, *see* 29 U.S.C. 203(g), and thus are not dependent on that potential employer for work. Section 795.105(b) therefore recognizes the principle that, as a

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[18] The Department's prior guidance has stated 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." Fact Sheet #13; *see also* WHD Opinion Letter FLSA-795 (Sept. 30, 1964). Upon consideration, however, the Department believes that describing an employee as someone who "follows the usual path of an employee" is circular and unhelpful.

[19] It is possible for a worker to be an employee in one line of business and an independent contractor in another.

matter of economic reality, workers who are in business for themselves with respect to work being performed are independent contractors for that work.

Many commenters supported the Department's decision to implement the economic reality test applying the above-described approach to economic dependence. WPI applauded the "decision to retain the long-standing economic reality test while sharpening the factors used to apply that test." The NRF stated that the economic reality test "is the proper basis for distinguishing independent contractors from employees under the FLSA as articulated by the U.S. Supreme Court." ATA) found that the economic dependence framework "comports with a thoughtful reading of decades of court precedent." *See also* Americans for Prosperity Foundation; Cetera Financial Group; Center for Workplace Compliance ("DOL is correct to propose using the economic dependence standard for determining whether an individual is an employee or independent contractor").

The majority of commenters agreed with the Department's proposal to adopt the economic reality test using the above-mentioned definition of economic dependence, including commenters that were generally critical of the proposed rule. For example, the State AGs approvingly stated that "[f]or nearly three-quarters of a century, the Supreme Court has held that whether a worker is a covered "employee" under the FLSA is governed by the economic reality test." *See also* National Employment Law Project (NELP); Signatory Wall and Ceiling Contractors Alliance (SWACCA) (recommending adopting an economic reality test with a different number of factors). While objecting commenters challenged various aspects of the proposed rule, they did not dispute the sharpened explanation of the economic dependence inquiry. Commenters, both supportive and objecting, made a number of thoughtful suggestions, which are addressed below.

The Administrative Law Clinic at the Antonin Scalia Law School suggested further clarifying the test by adding "[a]n individual is not an 'employee' merely because he or she is economically dependent in some way on the potential employer." Such additional language may

be redundant in § 795.105(b) because that section already articulates economic dependence as dependence on a potential employer for work, as opposed to being in business for oneself. As explained above, other forms of dependence, such as dependence on income or subsistence, do not count. However, given how important it is to apply the correct concept of economic dependence, the Department believes this point bears emphasis through a concrete, fact-specific example in the regulatory text. The Department is thus adding an example in § 795.115 to demonstrate that a different form of dependence, *i.e.,* dependence of income or subsistence, is not a relevant consideration in the economic reality test.

A number of individual commenters who generally support this rule requested that the Department allow workers who voluntarily agree to be independent contractors to be classified as such, regardless of other facts. For example, Farren and Mitchell urged the Department to "allow the parties themselves to explicitly define the nature of their labor relationship," asserting that such an approach would respect worker autonomy, maximize legal certainty, and promote greater flexibility in work arrangements. This requested approach would allow voluntary agreements to supersede the economic reality test in determining classification as an employee or independent contractor. The Supreme Court, however, held in *Tony & Susan Alamo,* 471 U.S. at 302, that the FLSA must be "applied even to those who would decline its protections." In other words, an individual may not waive application of the Act through voluntary agreement. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) ("FLSA rights cannot be abridged by contract or otherwise waived, because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.") (quoting *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 707 (1945)); *Lauritzen*, 835 F.2d at 1544-45 ("The FLSA is designed to defeat rather than implement contractual arrangements. If employees voluntarily contract to accept $2.00 per hour, the agreement is ineffectual.") (Easterbrook J., concurring). Because this request would contradict this precedent by allowing the possibility of workers who

are employees under the facts and law to waive the FLSA's protections by classifying themselves as independent contractors, the Department declines to implement it in the final rule.

Some commenters, including the Minnesota State Building & Construction Trades Council, PJC, and SWRCC, suggested that the rule include a presumption of employee status. The Supreme Court has said and the Department agrees that this is a totality of the circumstances analysis, based on the facts. The Department thus declines to create a presumption in favor of employee status.

NELA, Farmworker Justice (FJ), and several other commenters requested that the Department abandon the economic reality test in favor of the ABC test adopted by the California Supreme Court in *Dynamex Operations West v. Superior Court*, 416 P.3d 1 (2018). By contrast, other commenters, such as the American Society of Travel Advisors (ASTA) and National Federation of Independent Business (NFIB), urged the Department to adopt the common law standard used to distinguish between employees and independent contractors under the Internal Revenue Code and other Federal laws. These requests are addressed in the discussion of regulatory alternatives in Section VI, which explains why the Department is not adopting either the common law control test or the ABC test for employment under the FLSA.

For the reasons discussed above, the Department adopts § 795.105(b) as proposed to adopt the economic realty test to determine whether an individual is an employee or independent contractor under the FLSA. Under that test, an individual is an employee if he or she is dependent on an employer for work, and is an independent contractor if that he or she is, as a matter of economic reality, in business for him- or herself.

D. Applying the Economic Reality Factors to Determine a Worker's Independent Contractor or Employee Status

Proposed § 795.105(c) explained that certain nonexclusive economic reality factors guide the determination of whether an individual is, on one hand, economically dependent on a potential employer for work and therefore an employee or, on the other hand, in business for him- or herself and therefore an independent contractor. *See* 85 FR 60639. These factors were

listed in proposed § 795.105(d), based on the factors currently used by the Department and most Federal courts of appeals, with certain proposed reformulations. *Id*.

First, the Department proposed to follow the Second Circuit's approach of analyzing the worker's investment as part of the opportunity factor. The combined factor asked whether the worker has an opportunity to earn profits or incur losses based on his or her exercise of initiative or management of investments. *See* 85 FR 60613-15, 60639. Second, the Department proposed to clarify that the "skill required" factor originally articulated by the Supreme Court should be used, as opposed to the "skill and initiative" factor currently used in some circuits, because considering initiative as part of the skill factor creates unnecessary and confusing overlaps with the control and opportunity factors. *See* 85 FR 60615, 60639. Third, the Department proposed to further reduce overlap by analyzing the exclusivity of the relationship as a part of the control factor only, as opposed to both the control and permanence factors. *See* 85 FR 60615-16, 60639. Lastly, the Department proposed to reframe the "whether the service rendered is an integral part of the alleged employer's business" factor in accordance with the Supreme Court's original inquiry in *Rutherford Food*, 331 U.S. at 729, of whether the work is "part of an integrated unit of production." *See* 85 FR 60616-18, 60639.[20]

Proposed § 795.105(c) further aimed to improve the certainty and predictability of the test by focusing it on two core factors: (1) the nature and degree of the worker's control over the work; and (2) the worker's opportunity for profit or loss. The proposed rule explained that if both proposed core factors point towards the same classification—whether employee or independent contractor—there is a substantial likelihood that that classification is appropriate. *See* 85 FR 60618-20, 60639.

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[20] Consistent with WHD Opinion Letter FLSA2019-6, the Department's proposal did not include the "independent business organization" factor mentioned in Fact Sheet #13. The opinion letter explained that the "independent business organization" factor was "[e]ncompassed within" the other factors. Because the ultimate inquiry of the economic dependence test is whether workers are "in business for themselves," *Saleem*, 854 F.3d at 139, analyzing the worker's degree of "independent business organization" restates the inquiry and adds little, if anything, to the analysis that is not already covered by the other factors.

The following discussion addresses commenter feedback on the five proposed economic reality factors.

1. The "Nature and Degree of the Individual's Control over the Work" Factor

The first core factor identified in the proposed regulatory text was the "nature and degree of the individual's control over the work." 85 FR 60639. Proposed § 795.105(d)(1)(i) explained that this factor "weighs towards the individual being an independent contractor to the extent the individual, as opposed to the potential employer, exercises substantial control over key aspects of the performance of the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential employer's competitors." Proposed § 795.105(d)(1)(i) further explained that, in contrast, this factor "weighs in favor of the individual being an employee under the Act to the extent the potential employer, as opposed to the individual, exercises substantial control over key aspects of the performance of the work, such as by controlling the individual's schedule or workload and/or by directly or indirectly requiring the individual to work exclusively for the potential employer." In addition, the proposal stated that the following actions by the potential employer "do[] not constitute control that makes the individual more or less likely to be an employee under the Act": "[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 (as opposed to employment relationships)." Numerous commenters requested changes to the proposed control section regarding (1) the perspective from which control is framed; (2) the examples of control that are relevant to the economic dependence inquiry; and (3) examples of control that are not.

a. Responses to requests regarding the framing of control

Some commenters asserted that the control factor should focus on the potential employer's substantial control over the worker instead of the worker's substantial control over

the work. For example, the State AGs said that the "proposed control factor incorrectly focuses on the worker's control over the work" and that "[w]ell-established precedent makes clear that the proper focus is the employer's control over the worker." According to NELA, "the control analysis has historically been, and should continue to be, on the control that the employer has over the employee, not that the employee has over their work." NELA added that the Department "cannot deny that its proposal casts the control inquiry differently than the Supreme Court, courts of appeals, and the Department have in the past." And the United Brotherhood of Carpenters and Joiners of America stated that the proposal's "focus on the individual's control over the work turns the 'suffer or permit' standard on its head" because that standard "references the purported employer's behavior—not the worker's." *See also* Northern California Carpenters Regional Council (noting that "[b]ecause the 'nature and degree of the individual's control over the work' … focuses on the individual's control, as opposed to the employer's control, the factor skews towards most skilled tradespeople being classified as independent cont[r]actors"). Relatedly, attorney Richard Reibstein suggested that the title of the control subsection "be re-drafted in a manner that does not suggest it favors independent contractor status because the remaining text regarding [the control factor] is neutral." Mr. Reibstein suggested that the title be changed from the "nature and degree of the individual's control over the work" to the "nature and degree of each party's control over the work." Finally, WPI expected that some commenters would object to the Department's proposed articulation of the control factor, and it supported the Department's approach by saying that "the economic reality test focuses on the individual—whether the individual is economically dependent on another business or in business for him or herself," and that, "[t]hus, the focus of each factor should also be on the economic realities of the individual, not the businesses with which [he or she] contracts." *See also* CPIE (supporting "the NPRM's articulation of this factor").

Notwithstanding differing commenter preferences over the primary articulation of the control factor, the proposed (and final) regulatory text at § 795.105(d)(1)(i) discusses both the

individual worker's control and the potential employer's control.[21] This approach is consistent with that of courts, which also generally consider both the individual's control and the potential employer's control. *See, e.g.*, *Razak*, 951 F.3d at 142; *Hobbs*, 946 F.3d at 829; *Saleem*, 854 F.3d at 144-45; *Karlson*, 860 F.3d at 1096. The Department explained in the NPRM preamble that whether the control factor is articulated with reference to the individual worker's control or the potential employer's control is a "distinction … of no consequence," and that both "the nature and degree of control over the work by the worker and by the potential employer are considered to determine whether control indicates employee or independent contractor status." 85 FR 60612 n.34. The Department reaffirms that statement now and reiterates that both the worker's control and the potential employer's control should be considered. To remove any ambiguity on this point, the Department has modified the title of subsection 795.105(d)(1)(i) to "[t]he nature and degree of control over the work," removing the proposed rule's reference to "*the individual's* control over the work." This revised articulation is closer to the Supreme Court's description of the economic reality test's control factor in *Silk*, 331 U.S. at 716 ("degrees of control"), which does not indicate a focus on either the individual worker or the potential employer.

Mr. Reibstein also suggested that the control factor "should be drafted in a manner that focuses attention on the key to control, which is control over the manner and means by which the work in question is performed." He asserted that, as proposed, the control section "is ambiguous at best and may be misleading at worst," and suggested that "control over the work" should be changed to "control over the performance of the work, particularly how the work is to be performed." The Department, however, prefers to retain the "control over the work" articulation. It is purposefully broad to encompass various different types of control that the individual worker and the potential employer may exercise over the working relationship. Moreover, the Department agrees that who controls the manner and means by which the work is performed is a

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[21] As Mr. Reibstein acknowledged, the proposed regulatory text beyond the title of the control section was written in a "neutral" manner. The final regulatory text is written in a similarly neutral manner.

key component of the control analysis, and the Department believes that both the proposed and final regulatory text reflect the importance of the manner and means by which the work is performed.

b. Responses to comments regarding examples of relevant control

A number of comments addressed the proposed regulatory text's three non-exhaustive examples of control that may indicate employee or independent contractor status, which were setting schedules, selecting projects, and working exclusively for the employer or working for others.

Several commenters sought clarification that these examples may not always be probative of an employment or independent contracting relationship. For instance, NRF stated "there may be limits on schedules that are consistent with business relationships that should not be treated as impacting the analysis," such as delivery workers who can deliver only during the restaurant's operating hours and a retailer that arranges for after-hours cleaning services. The Department agrees that there are examples of impacts on a workers schedule that are not probative of the type of control that indicates economic dependence and that NRF has identified two such examples by pointing to the fact that a delivery worker can deliver for a restaurant only when the restaurant is open and a cleaning worker can clean a retailer only when it is closed. But the Department does not think any change to the regulatory text is warranted to clarify this point, as the regulatory text merely provides a few examples of facets of control that may—or may not—be probative in any given case depending on the facts. NHDA sought clarification of the working for others example because, in its view, "it is not enough for the individual to claim he/she never turned down projects or never worked for others. Rather, the individual must demonstrate some action, implementation, or execution (in other words, act or conduct) by the potential employer that prevented the individual from turning down projects or working for others." In response, the Department notes its statement in the NPRM preamble that "a potential employer may exercise substantial control, for example, where it explicitly requires an exclusive working relationship or

where it imposes restrictions that effectively prevent an individual from working with others." 85 FR 60613 (citing cases where the employer's schedule made it "impossible" or "practically impossible" for the worker to work for others). Where a worker could work for others, meaning the potential employer is not explicitly or effectively preventing the worker from doing so, the worker retains control over this aspect of his or her work. That he or she exercises this control by choosing to work only for one potential employer does not necessarily shift the control to the potential employer. Further, the parties' actions, including whether the potential employer enforced an explicit bar on working for others or has imposed working conditions that make doing so impracticable, are stronger evidence of control than contractual or theoretical ability or inability to control this aspect of the working relationship.[22]

Some commenters interpreted the few examples of control in the proposal as an effort to limit the types of control that may be considered. For example, Farmworker Justice stated that the proposal "improperly and erroneously tries to narrow the relevant considerations for the [control] factor." According to Edward Tuddenham, the proposal "lists some 'key' elements of control that … may have little or no significance whatsoever" and "[s]uch a rigid approach to the question of control can only wreak havoc with the established common law of FLSA employer/employee relationships." However, the examples of types of control identified in the proposal were not an attempt to narrow or limit the control factor analysis. The Department cannot provide an exhaustive list of types of control and so instead focused on several key examples of types of control. Any type of control over the work by the individual worker or the potential employer may be considered. Such considerations should not be "mechanical," *Saleem*, 854 F.3d at 140, and instead must focus on whether the control exercised by either the individual

[22] The Department received related feedback from commenters asking for proposed § 795.110 to discount the relevance of voluntary worker practices (e.g., choosing to work exclusively for one business, declining to negotiate prices, etc.); as explained in greater detail in Section IV(F), coercive behavior by a potential employer (e.g., vigilant enforcement of a non-compete clause, punishing workers for turning down available work, etc.) constitutes stronger evidence of employment status than such voluntary worker practices, but is not a prerequisite for such worker practices to have import under the FLSA's economic reality test.

or the potential employer answers the ultimate inquiry of "whether the individual is, as a matter of economic reality, in business for himself," as opposed to being economically dependent on the potential employer for work. In any event, as explained below, the Department is clarifying types of control that may be relevant to the analysis.

Numerous other commenters suggested the addition of dozens of examples of types of control that indicate employee or independent contractor status. For example, WPI suggested that the following types of control by the individual worker are indicative of independent contractor status: controlling whether to work at all; controlling the location of where to perform the work; controlling how the work is performed; setting prices or choosing between work opportunities based on prices; and hiring employees or engaging subcontractors. It suggested, conversely, that the following types of control by the potential employer are indicative of employee status: requiring the individual worker to comply with company specific procedures regarding how the work is performed; requiring a set schedule or minimum hours; controlling when the individual can take meal and rest breaks; and controlling when the individual can take time off. CWI recommended addition of the following as examples of the individual worker's control over the work that are indicative of independent contractor status: the worker's ability to make decisions with respect to the details of how the work is performed, including the staging and sequencing of aspects of the work; the worker's selection of supplies, tools, or equipment to be used (or not used) by the worker; the worker's control over when the work is conducted (e.g., worker flexibility in start and end times) where flexibility exists in the result to be accomplished or the time periods available to a worker to offer their services; the worker's control over where certain aspects of the services can be performed where the subparts do not change the results provided by the worker; and the worker's discretion to use the services of others to perform the work in whole or in part, or to support the worker's performance of services (including performing some of the contracted work and/or performing supporting services such as accounting, legal, administrative, or financial services to support the worker or services to support equipment or

tools used by the worker to perform services). UPS stated that the proposal "fails to provide examples beyond controlling the worker's schedule or workload and restricting the worker's ability to work with other entities," and that "courts have properly widened the lens when assessing control, looking at factors such as background checks, authority to hire and fire, training, advertising, licensing, uniforms, monitoring, supervision, evaluation, and discipline." Farmworker Justice commented that the proposal did "not acknowledge other examples of employer control that unquestionably shape a worker's experience and performance of daily tasks" and provided as examples "[r]equirements about how a worker must dress, what language or tone she may use in a professional setting, or what prices she must charge customers." Likewise, Sen. Sherrod Brown and 22 other senators commented that the proposal "ignore[s] other critical matters of control that an employer typically exercises or retains the right to, including setting the rate of pay and the manner in which the work must be performed and disciplining workers who do not meet their standards." And Human Rights Watch commented that the proposed control factor "potentially omits other ways that gig companies control their workers, such as the ways in which they unilaterally change the formula for calculating base earnings, the setting of default tip options, and restrictions on the range of assignments that are offered to workers at a specific time or in a specific locale." Other commenters provided various industry-specific examples that they viewed as indicative of control by the individual worker or the potential employer.

The Department has considered the various comments regarding additional examples of types of control that can be indicative of employee or independent contractor status and declines to make changes to the proposed regulatory text in response. While this preamble and the regulatory test cannot (and should not) address each and every potential scenario and example, they clarify and articulate principles related to the control factor that can be applied to an array of fact patterns as they arise.

As an initial matter, a number of commenters' examples fall within the general categories of control already identified in the regulatory text. For example, the worker's controlling whether to work at all, controlling when the work is conducted, and choosing between work opportunities based on prices are all examples of the worker's setting his or her schedule or selecting his or her projects, which the regulatory text identifies as examples of the worker's control over the work. Similarly, the potential employer's requiring a set schedule or minimum hours, controlling when the individual can take meal and rest breaks, controlling when the individual can take time off, and restricting the range of assignments that are offered to the worker are all examples of the potential employer's control over the worker's schedule, workload, or both, which the regulatory text identifies as examples of the potential employer's control over the work.

Moreover, as explained in the NPRM preamble, the Department is concerned that application of the economic reality factors has resulted in certain overlaps between the factors. *See* 85 FR 60607-08 (identifying ways in which the former skill/initiative, permanence, and "integral" factors considered control). Consistent with that discussion and in the interest of further clarification, the Department reiterates that the worker's ability to exercise significant initiative, whether the potential employer directly or indirectly requires the worker to work exclusively for it, and the potential employer's ability to compel the worker's attendance to work on a consistent basis or otherwise closely supervise and manage performance of the work are examples of relevant types of control and are part of the control analysis. And as stated above, the Department agrees that who controls the manner and means by which the work is performed is a key component of the control analysis. In addition, the Department approvingly cited in the NPRM preamble cases in which the workers' ability to accept or reject projects or deliveries without negative repercussions or retaliation,[23] the potential employer's lack of close supervision or specifications how the workers should do the work,[24] and the potential employer's allowing

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[23] *See* 85 FR 60612 n.35 (citing *Parrish*, 917 F.3d at 382; *Express Sixty-Minutes Delivery*, 161 F.3d at 303).
[24] *See id.* (citing *Thibault*, 612 F.3d at 847).

the workers broad discretion in the manner in which to complete their work[25] indicated substantial control over the work by the workers. Finally, the Department agrees that the various examples of types of control identified by the commenters above may, at least in some factual circumstances, be relevant to the control analysis.

Ultimately, however, it is not possible—and would be counterproductive—to identify in the regulatory text every type of control (especially industry-specific types of control) that can be relevant when determining under the FLSA whether a worker is an employee or independent contractor. As explained above, the Department purposefully articulated the control analysis in a general manner to encompass various different types of control that the individual worker and the potential employer may exercise over the working relationship, and to avoid any unintended inferences regarding omitted types of control. Accordingly, any type of control over the work by the individual worker or the potential employer may be considered, although some types of control are not probative of economic dependence as set forth in the final regulatory text (and discussed below).

The Owner-Operator Independent Drivers Association (OOIDA) objected that the proposal "offers no guidance on how" the examples of types of control "should be weighed against each other" and asked whether the Department intends "that a worker must satisfy all of the criteria that it mentions in order to be an independent contractor," or if there is "some other balance when evaluating this factor." OOIDA noted that although the proposal stated that no single factor of the economic reality test is dispositive, "it does not offer the same clarification when considering the details within a single factor." As explained above, any type of control over the work by the individual worker or the potential employer may be considered to the extent it is probative as to whether the individual is, as a matter of economic reality, in business for himself, as opposed to being economically dependent on the potential employer for work. No

[25] *See* 85 FR 60612-13 (citing *Mid-Atl. Installation*, 16 F. App'x at 106).

single example of control, if present or not present, is necessarily dispositive as to whether the control factor indicates economic dependence. The examples are simply that: examples.

c. Responses to comments regarding examples of requirements that are not probative

Despite the final rule's broad articulation of the control factor, not every requirement or limitation on the means of doing business constitutes control for the purpose of analyzing whether a worker is an employee under the FLSA. The proposed regulatory text contained examples of requirements by a potential employer that do not constitute control and thus are not probative to the ultimate inquiry of whether the individual is, as a matter of economic reality, in business for himself. These are 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 that are typical of contractual relationships between businesses (as opposed to employment relationships)." In other words, insisting on adherence to certain rules to which the worker is already legally bound would not make the worker more or less likely to be an employee.

NELA challenged the Department's "claims that case law supports this approach" and asserted that "[t]he majority view among courts … is that evidence of a business compelling its workers to comply with certain legal obligations or customer requirements is probative of control over the work relationship" (citing *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1316 (11th Cir. 2013), among other cases). NELA added that "[c]ourts have routinely held that employer guidelines put in place to ensure that workers conform with the law or follow safety regulations constitute control over employees" (citing *Narayan v. EGL, Inc.*, 616 F.3d 895, 902 (9th Cir. 2010), among other cases). The National Women's Law Center similarly stated that "courts have regularly rejected arguments that external requirements imposed by the defendant company's customers are irrelevant to the right to control factor" (citing cases). NELP asserted that the Department's "attempts to take away consideration of certain employer controls based on the source of the control" is "nonsense" because "if legislators or regulators have placed an

obligation on employers to comply with certain laws, that makes the worker less independent and more dependent on that employer, and this should be accorded weight." AFL-CIO commented that the "categorical exclusion of evidence of control based solely on the reasons why the employer exercises the control is both irrational and contrary to Supreme Court precedent and Congress' intent." And the United Brotherhood of Carpenters and Joiners of America asserted that the Department's proposal would "create[] a gaping hole that is fertile ground for exploitation by irresponsible employers like the ones we find in the construction industry."

On the other hand, the Coalition to Promote Independent Entrepreneurs "strongly agree[d]" with this proposal and "agree[d] that these types of requirements frequently apply to work performed by employees and independent contractors alike and thus are not probative of whether an individual is economically dependent on a company." In addition, NRF asserted that "this clarification is important, as there is a difference between 'control' and 'quality control' and/or other performance standards." And the Independent Bakers Association "strongly support[ed] the proposed clarification that requiring an individual to comply with specific legal obligations typical of business relationships would not constitute evidence of control or make an individual more or less likely to be an employee." *See also* SHRM ("support[ing] the [p]roposed … recognition that contracting parties should be able to build compliance with, for example, specific legal obligations, satisfy health and safety standards, and the carrying of insurance into the contractual relationship").

The Department understands that some courts have found requirements that workers comply with specific legal obligations or meet quality control standards to be indicative of employee status. In particular, the Eleventh Circuit in *Scantland* stated that it examines "the nature and degree of the alleged employer's control, not why the alleged employer exercised such control" and that "a company must hire employees, not independent contractors" if "the nature of [its] business requires [the] company to exert control over workers to the extent that

[the defendant] has allegedly done." 721 F.3d at 1316. The *Scantland* court correctly recognized that the ultimate inquiry in the economic reality test is "whether an individual is in business for himself or is dependent upon finding employment in the business of others." 721 F.3d at 1312 (quotation marks omitted). But to answer that question it is necessary to consider "why" the potential employer imposed a requirement. If the reason for a requirement applies equally to individuals who are in business for themselves and those who are employees, imposing the requirement is not probative. *See Parrish*, 917 F.3d at 379 ("although requiring safety training and drug testing is an exercise of control in the most basic sense of the word, … [r]equiring … safety training and drug testing, when working at an *oil-drilling site*, is not the type of control that counsels in favor of employee status.").

The *Scantland* court's discussion of the control factor included the fact that "[t]echnicians could also be … fired, for consistently misbilling, fraudulently billing, stealing, … [and] having consistently low quality control ratings" as evidence that the control factor weighed in favored employee classification. 721 F.3d at 1314 (11th Cir. 2013).[26] However, employees and independent contractors alike are routinely terminated for fraud, theft, and substandard work. Such dismissal are therefore not probative as to whether and the dismissed workers were in business for themselves, as opposed to being economically dependent on the potential employer. In contrast, dismissals for failing to work mandatory hours or for disregarding close supervision would be probative because mandatory hours and close supervision are typically not imposed on individuals who are in business for themselves. At bottom, the question of "why" workers were dismissed matters a great deal.

[26] The court also relied on the employers' close supervision, control over schedules, and ability to prevent technicians from hiring helpers or working for others to conclude that the control factors weighed in favor of employee classification. *Scantland*, 721 F.3d at 1314-15.

In any event, *Scantland*'s reasoning appears to be in the minority among courts of appeals.[27] As explained in the NPRM preamble, other courts have concluded that requiring such types of compliance is not probative of an employment relationship. *See*, *e.g.*, *Parrish* 917 F.3d at 379; *Iontchev v. AAA Cab Serv., Inc.*, 685 F. App'x 548, 550 (9th Cir. 2017) (noting that the potential employer's "disciplinary policy primarily enforced the Airport's rules and [the city's] regulations governing the [drivers'] operations and conduct" in finding that the potential employer "had relatively little control over the manner in which the [d]rivers performed their work"); *Mid-Atl. Installation*, 16 F. App'x at 106 (rejecting an argument that backcharging the workers "for failing to comply with various local regulations or with technical specifications demonstrates the type of control characteristic of an employment relationship," and noting that withholding money in such circumstances is common in contractual relationships); *cf. Mr. W Fireworks*, 814 F.2d at 1048 (finding that, because a scheduling requirement was imposed by the potential employer and not by state law, it suggested control over the workers). And courts have reached analogous conclusions in joint employer cases. *See*, *e.g.*, *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 75 (2d Cir. 2003) (finding that control with respect to "contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry" because such control is "perfectly consistent with a typical, legitimate subcontracting relationship"); *Moreau v. Air France*, 356 F.3d 942, 950-51 (9th Cir. 2003) (noting that control exercised by potential joint employer over contractor's employees to "ensure compliance with various safety and security regulations" is "qualitatively different'' from control that indicates employer status).

In addition to the supportive case law, the extent to which courts take differing approaches to the probative value of such requirements is yet another example of the need identified by the Department for a clear and uniform standard under the FLSA to distinguish

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[27] In *Narayan*, the Ninth Circuit applied California law – not the FLSA – and merely recited requirements imposed by the potential employer to comply with certain legal obligations among a litany of examples of control that precluded summary judgment on the employee versus independent contractor issue in that case. *See* 616 F.3d at 900-02.

between employees and independent contractors. Moreover, the Department believes that these types of requirements are generally imposed by employers on both employees and independent contractors (as some commenters indicated). Employers expect and often require all of their workers to, for example, comply with the law, satisfy health and safety standards, and meet deadlines and quality standards. Thus, the existence of the requirements themselves are not probative of whether the worker is an employee or independent contractor. Other indicia of control over the work, including the indicia of control identified in the final regulatory text, are more probative of the worker's economic dependence or independence. Accordingly, the Department retains in the final regulatory text's statement that requirements by the potential employer that the worker "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)" are not "control that makes the individual more or less likely to be an employee under the Act."

Although the ATA "strongly agrees" with the Department's proposal that requirements by the potential employer that the worker "comply with specific legal obligations" would not be "control that makes the individual more or less likely to be an employee under the Act," it suggested that "specific" be changed to "any" in the final regulatory text. ATA explained that referring to "specific" legal obligations "may unfortunately result in a great deal of litigation over whether any particular aspect of a contract is 'specifically' mandated by law." It cited, as examples, laws that impose general safety standards with which employers determine the specifics of how to comply. *See also* NHDA ("The proposal carves out compliance with *specific* legal obligations. However, not all legal obligations are specific, making other language in the proposal unnecessarily problematic.").

After careful consideration, the Department declines to adopt the suggested change. As an initial matter, the Department used the "specific legal obligations" language in its recent Joint

Employer Status under the Fair Labor Standards Act final rule. *See* 85 FR 2859 (finalizing 29 CFR 791.2(d)(3)).[28] The Department noted there that the obligations include compliance with the FLSA or other similar laws, sexual harassment policies, background checks, or workplace safety practices and protocols. *See id*. The Department did not intend a high degree of specificity there and intends the same meaning here. Moreover, a potential employer's requirement that a worker comply with legal obligations without any further specificity as to the law or the actual obligations is unlikely to be probative of control in the first place. Accordingly, retaining the word "specific" is consistent with the Department's position that, although requiring workers to comply with legal obligations could be some manner of control, such requirements reflect the applicable legal regime more than the potential employer's control, and encouraging such requirements in contractual work relationships has obvious benefits for employers, workers, and society generally.

Other commenters expressed support for the Department's proposal to carve out from the control analysis the identified employer actions toward individual workers, but also requested that the Department expand its proposal by identifying many additional employer requirements as not types of control that make the individual more or less likely to be an employee under the Act. For example, SHRM asserted that "the Final Rule must emphasize that all workers, regardless of their formal employment status, should be able to benefit from the training, resources, and positive workplace practices as those who are directly employed in the same workplace," and it gave examples of workplace trainings and audit measures. The U.S. Chamber of Commerce stated that the Department "should expand this concept" and "explicitly state that workers and businesses should not be discouraged from incorporating terms (and audit and other certification processes) into their relationship that support sound, lawful, safe work practices." It

[28] The Department's Joint Employer final rule was mostly vacated by the U.S. District Court for the Southern District of New York for reasons unrelated to the "specific legal obligations" language. *See New York v. Scalia*, No. 1:20-cv-1689-GHW, 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020). The Department appealed the decision to the U.S. Court of Appeals for the Second Circuit on November 6, 2020.

suggested the following examples of such terms: "incorporation of an obligation that the work be performed pursuant to acceptable professional, industry and customer service standards, as well as commonly accepted safety, ethics, licensure and other standards and recommendations (such as compliance with limitations or control imposed or necessitated by law, regulation, order or ordinance)." *See also* Seyfarth Shaw (requesting that the following employer actions toward workers be excluded from the control analysis: "(1) compliance with professional obligations and ethics standards; (2) compliance with regulatory obligations, including over health and safety; (3) compliance with other published industry standards; (4) compliance with applicable local, state, and national licensure standards and rules; and (5) additional contractual term examples of agreed upon results and deadlines");[29] WPI (asserting that the potential employer's practice or ability to do the following are not probative: requiring the individual to comply with or pass down contractual and legal obligations to subcontractors and employees; requiring the individual to comply with customer requirements; tracking and monitoring data related to the individual; providing the individual with market data on pricing; establishing default pricing that the individual may change; providing the individual with information related to the establishment or running of a business; providing the individual with emergency assistance (e.g., protective equipment during a public-health crisis); and complying with Federal, state or locals laws related to a contracting relationship). Likewise, the Financial Services Institute requested that the Department carve out from the control analysis requirements that "Independent Broker-Dealers" (IBDs) place on their "financial advisors" to "comply with requirements imposed by FINRA, the

[29] In a separate section of its comment, Seyfarth Shaw recommended that the Department state that the following are not evidence of a potential employer's control over the work of the worker: the business provides information regarding the final result to be accomplished by the worker; the business provides customer specifications/details and feedback relating to the work (including requesting confirmation that the customer feedback has been addressed); the business provides time frames within which services can be provided in light of the services contracted for, and/or the time sensitivity or perishable nature of the services/products; the business' right to enforce contractual obligations; the business provides the worker suggestions, recommendations, guidance, and/or tips that are not mandated but informational relating to the services; and the business pays the worker by the hour where it is customary in the particular business/trade to do so (e.g., attorneys, physical trainers).

SEC, and state securities regulators" and exclusivity requirements that IBDs place on their financial advisors to comply with "the extensive supervisory obligations imposed by the SEC and FINRA." OOIDA also expressed concerns about exclusivity requirements and sought clarification that a potential employer's compliance with "Federal regulations requir[ing] that an owner-operator lease[] his or her equipment exclusively to a carrier for the duration of the lease" not affect the control analysis. Finally, CPIE asked the Department to "make clear that duties or requirements imposed by any third party, whether it be a government agency or a third-party customer, … be disregarded" when applying the control factor. *See also* NHDA ("[C]ontrol weighing in favor of employee status should be control exercised by the potential employer that originates with the potential employer and does not originate from outside, independent forces or circumstances, such as customer requirements or governmental regulations.").

The Department does not agree with CPIE that any requirement stemming from "duties or requirements imposed by any third party" be "disregarded" or with NHDA that only control "that originates with the potential employer" can indicate employee status. This is because a third party may explicitly or impliedly encourage businesses to impose requirements on workers that signify employee classification. For example, clients of a home cleaning company may prefer that the company's workers wear uniforms, use the same equipment, and be closely supervised. Imposing such requirements, even to satisfy client preferences, makes the workers more likely to be classified as employees because those requirements are inconsistent with the workers being in business for themselves. A company may also require that workers it hires perform timely and high-quality work, as clients surely prefer. But contractually agreed-upon deadlines and quality standards do not signify employee classification because independent businesses routinely agree to meet deadlines and quality standards as part of their businesses.

In response to comments requesting that the Department identify many additional employer requirements as not types of control that make the individual more or less likely to be an employee under the Act, the Department declines to change its proposed regulatory text. As

an initial matter, many of the requested additions are already covered by the proposed text. For example, the following requested additions are requirements to "comply with specific legal obligations" and thus already covered: requirements to comply with limitations or control imposed or necessitated by law, regulation, order, or ordinance; regulatory obligations; Federal, state, or local laws related to a contracting relationship; requirements imposed by FINRA, the SEC, and state securities regulators; and Federal regulations requiring that an owner-operator lease his or her equipment exclusively to a carrier for the duration of the lease.[30] Other requested additions may fall into the "satisfy health and safety standards" category (for example: requiring that the work be performed pursuant to commonly accepted safety standards; and providing the individual emergency assistance such as protective equipment during a public-health crisis) or the "meet contractually agreed-upon deadlines or quality control standards" category (for example: agreements that the work be performed pursuant to acceptable professional, industry, or published industry standards; agreements to comply with applicable local, state, and national licensure standards and rules; and agreed upon results and deadlines). Other requested additions are narrow or industry-specific in nature, and the Department prefers general guidance that may be used by as many employers and workers as possible.

In any event, it is not possible to identify in the regulation every employer requirement that is not the type of control that makes the individual more or less likely to be an employee under the Act. The regulatory text accounts for this with a broader final category: requiring the worker to "satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships)." This category recognizes that contractual work relationships currently vary and will evolve going forward, and provides that additional

[30] Uber requested that the Department clarify that background checks are not an indicia of control: "Where a business is required by law to engage in certain activities (such as screening potential workers for violent crime history), the Department should make clear that this required screening is not an indicia of control." However, requiring a worker to undergo and pass a background check when the law requires it falls in the "comply with specific legal obligations" category. No further clarification is necessary.

employer requirements that are not expressly identified in the regulatory text but which are similar to those identified and are typical of such relationships do "not constitute control that makes the individual more or less likely to be an employee under the Act."

SHRM requested that the Department exclude from the control analysis the offering of benefits such as "health insurance, bonuses, or retirement savings." According to SHRM, "the modern workplace would suffer if businesses were effectively barred from providing workplace enhancements that all workers should enjoy like healthcare or retirement savings." Other commenters made overlapping requests, although not necessarily in the context of applying the control factor. For example, TechNet requested that the Department add a "safe harbor" stating that "a worker does not lose his or her independent status solely because a network platform provides the worker with emergency aid or benefits allowed or required under state law." Similarly, WPI requested a general "safe harbor" with respect to the provision of "protections or benefits as allowed or required by Federal, state or local laws, including but not limited to minimum guaranteed earnings, health insurance, retirement benefits, health or retirement subsidies, life insurance, workers compensation or similar insurance, unemployment insurance, sick or other paid leave, training and expense reimbursement."

The Department declines to change the regulatory text in response to these comments. The offering of health, retirement, and other benefits is not necessarily indicative of employment status. For example, payment of proceeds owed into a worker's own health plan or retirement account would not indicate an employment relationship. This is because it is reasonable for an independent contractor to have a personal health or retirement plan, and the precise method of compensation—whether cash, contributions to an account, or some other method—is not relevant to the question of economic dependence. However, providing a worker with the same employer-provided health or retirement plans on the terms that a business also gives its own employees may indicate the worker is not an independent contractor but rather an employee. Certain other benefits could also suggest employee status. For example, sick or other paid leave,

especially the potential employer's administration and authorization of the leave, could be indicative of the potential employer's control over the worker's schedule. Finally, offering a bonus to a worker may or may not be indicative of employee status. For example, a worker's participation in a bonus or profit sharing plan in which he or she receives a bonus depending on the employer's, a division of the employer's, or his or her own performance over a period of time could limit the worker's ability to affect his or her profit or loss through initiative or investment—suggesting economic dependence and thus employee status. But a contractual agreement to provide a worker with a fixed bonus if the worker completes a job by a certain deadline or completes a certain number of tasks over a fixed period is typical of contractual relationships between businesses and itself does not make the worker more or less likely to be an employee under the Act. Even if, based on the circumstances of a particular case, the provision of certain health, retirement, or other benefits suggests classification as an employee, that fact is not determinative by itself because other facts and factors must also be considered.

2. The "Opportunity for Profit or Loss" Factor

The second core factor identified in the proposed regulatory text was the "individual's opportunity for profit or loss." 85 FR 60639. This factor, included at proposed § 795.105(d)(1)(ii), "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." Proposed § 795.105(d)(1)(ii) further explained 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." In addition, under the proposal, this 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 more efficiently." Numerous comments were submitted regarding the proposals to analyze investment through the lens of opportunity for profit or loss and to focus that analysis on the worker's investment rather than comparing the worker's investment to the potential employer's investment. One commenter requested eliminating this factor altogether, and several commenters requested changes to the other aspects of the proposed opportunity factor section.

a. Whether to analyze investment through the lens of opportunity for profit or loss

Some commenters opposed the proposal to consider the individual 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" as part of the opportunity factor. For example, NELA stated that a worker's investment has "been a critically important factor in the economic realities test analysis" and that "[d]iscounting this important piece of the economic reality test, as the Department has done here, plainly makes it easier for businesses to require workers to make significant financial investments without risking a finding of employee status." The State AGs similarly commented that the proposed approach of considering investment only in the context of opportunity for profit or loss "inappropriately subordinates the investment factor to the opportunity for profit or loss" factor. According to the State AGs, "[c]ourts consider both factors, often together, but investment 'is, itself, indicative of independent contractor status' especially in smaller businesses" (quoting *Saleem v. Corp. Transp. Group, Ltd.*, 854 F.3d 131, 144 n.29 (2d Cir. 2017)). UPS said that "workers [who] make little or no monetary investment toward completion of the work … are more likely to be dependent on the company," but that the Department's proposal "ignores that reality" by suggesting that initiative and investment "are on equal footing." NELP stated that, although opportunity for profit or loss and investment "are linked, they are hardly duplicative and separately serve as useful indicia of an entity's status under the FLSA, as the Supreme Court's tests note."

On the other hand, some commenters supported the proposal to consider investment in the opportunity factor. For example, according to WPI, "[t]he Department's proposal to combine

[opportunity for profit or loss] with an individual's investment in facilities and equipment, following Second Circuit precedent, is a welcome change that will bring clarity and reduce overlap." It added that "[w]ise decisions about investments are perhaps the clearest path to increasing profits or suffering losses." CPIE supported the proposed "adoption of the Second Circuit's approach of combining the factors 'opportunity for profit or loss' and 'investment,' and not treating them as separate factors." According to CPIE, the proposal "better captures both the manufacturing-based independent contractor (who likely has a tangible capital business investment) and the new-economy independent contractor (who likely does not)."

Having carefully considered the comments on this issue, the Department adopts its proposal, consistent with Second Circuit case law, to consider investment as part of the opportunity factor. Some courts have acknowledged that the two concepts are related while still keeping the factors separate. *See McFeeley*, 825 F.3d at 243; *Lauritzen*, 835 F.2d at 1537. Other courts do not expressly acknowledge that they are related but consider investment when evaluating opportunity for profit or loss—resulting in unnecessary and duplicative analysis of the same facts under two factors. *See*, *e.g.*, *Mid-Atl. Installation*, 16 F. App'x at 106-07 (finding that the worker's capital investments in tools, equipment, and a truck indicated independent contractor status under both the opportunity and the investment factors). And consideration of investment separately has caused other courts to discuss the worker's involvement in outside businesses in the context of opportunity for profit or loss. *See*, *e.g.*, *Parrish*, 917 F.3d at 384 (considering consultant's management of a goat farm). After considering these varying approaches, the Department believes that adopting the Second Circuit's approach best furthers the Department's goal: a clear and non-duplicative analysis for determining employee versus independent contractor status. In sum, the individual worker's meaningful capital investments may evince opportunity for profit or loss: "[e]conomic investment, by definition, creates the opportunity for loss, [and] investors take such a risk with an eye to profit." *Saleem*, 854 F.3d at

145 n.29; *see also Superior Care*, 840 F.2d at 1060 (identifying "the workers' opportunity for profit or loss and their investment in the business" as a single factor).

Moreover, considering investment as part of opportunity for profit or loss is consistent with the Supreme Court's opinion in *Silk* which articulated the two factors separately but analyzed them together. In particular, the Court found that coal unloaders were employees because they had "no opportunity to gain or lose except from the work of their hands and [ ] simple tools," while truck drivers who invested in their own vehicles had "opportunity for profit from sound management" of that investment by, for instance, hauling for different customers. *Id.* at 719. Thus, it framed the analysis as whether workers are more like unloaders whose profits were based solely on "the work of their hands and [ ] simple tools" or the drivers whose profits depended on their initiative and investments. *See id.* As the Court explained decades ago and as the Second Circuit noted much more recently in *Saleem*, investment is a pathway to opportunity for profit or loss.

In response to NELA and likeminded commenters' concern that employers may require significant investments by their workers to avoid employee status, the Department reiterates that the investment must be capital in nature and consistent with the worker being in business for him/herself for the investment to indicate an opportunity for profit or loss. Senator Sherrod Brown and 22 other senators stated that "[r]equiring [workers] to purchase a franchise or their own equipment, including a vehicle" or otherwise "take on financial risk as a condition of employment does not convert an employee into an independent contractor under the FLSA." While no single fact or factor may "convert an employee into an independent contractor," the prospect of financial risk and reward plays an important role in distinguishing "wage earners toiling for a living" from "independent entrepreneurs seeking a return on their risky capital investments." *Mr. W. Fireworks,* 814 F.2d at 1051. Moreover, it matters why certain investments are required. If certain capital investments are necessary to perform the job for which the contractor is hired, then requiring a contractor to make such investments would be consistent

with the contractor being in business for him- or herself. For example, a company that hires independent contractors to haul freight may obviously require that drivers bring their own vehicles. *Silk* 331 U.S at 719. In contrast, a requirement to "invest" in specific, company-provided equipment would not be consistent with the worker being in business for him- or herself, and may constitute a consideration under the control factor that points towards employee status. *See Scantland*, 721 F.3d at 1318 (concluding that technicians' "expenditures [in equipment and materials] detract little from the[ir] economic dependence on Knight" in part because "many technicians purchased specialty tools from Knight directly via payroll withholdings"). As such, OOIDA's concern "that any requirement that a worker must purchase services or equipment from the business for which they work [w]ould weigh in favor of employee status" is misplaced. *See also* SWRCC ("[T]his standard would provide a perverse incentive for companies to require putative employees to maintain their own equipment in an effort to steer those employees to independent contractor status."). Consistent with the economic dependence inquiry, an investment must indicate an independent business by the worker, as opposed to merely being required by the potential employer, for it to indicate an opportunity for profit or loss.

In response to the State AGs, the Department's approach does not subordinate investment; it can still separately indicate independent contractor status as they suggest. Finally, the Department's approach is not contrary to UPS' assertion that workers who make little or no investment "are more likely to be dependent" on the potential employer.[31] Workers who make little or no investment are more likely to be employees than workers who make significant investments, but of course, such a worker's ultimate status as an employee or independent contractor will also depend on other factors. As the Department explained in the NPRM

[31] The American Society of Travel Advisors disagreed at least in part, commenting that "workers in many service industries may make only a minimal investment in equipment or materials and in such situations this consideration, by itself, should not be taken to weigh in favor of employee status."

preamble, workers who do not make significant investments may still be independent contractors: "while the presence of significant capital investment is still probative, its absence may be less so in more knowledge-based occupations and industries. Indeed, technological advances enable, for example, freelance journalists, graphic designers, or consultants to be entrepreneurs with little more than a personal computer and smartphone." 85 FR 60609 (citing *Faludi v. U.S. Shale Sols., L.L.C.*, 950 F.3d 269, 276 (5th Cir. 2020)); *see also Meyer v. United States Tennis Ass'n*, 607 F. App'x 121, 123 (2d Cir. 2015) (concluding that workers who invested little were independent contractors primarily because of their control over the work and their initiative); *Lauritzen*, 835 F.2d at 1540-41 (Easterbrook, J. concurring) ("[P]ossess[ing] little or no physical capital … is true of many workers we would call independent contractors. Think of lawyers, many of whom do not even own books. The bar sells human capital rather than physical capital, but this does not imply that lawyers are 'employees' of their clients under the FLSA.").[32]

b. Whether to analyze the worker's investment or compare the worker's investment with that of the potential employer

The Department noted in the NPRM preamble that, when considering investment, some courts use "a side-by-side comparison method" that directly compares the worker's individual investment to the investment by the potential employer. *See* 85 FR 60614 (citing cases). The Department explained that "such a 'side-by-side comparison method' does not illuminate the

[32] LocumTenens, an online company that specializes in the temporary placement of physicians and other health clinicians, requested that the Department eliminate from the economic reality test consideration of whether an individual has an opportunity for profit or loss. According to LocumTenens, its physicians and clinicians who provide temporary healthcare services "do not have an obvious investment or opportunity for profit when they step in" for another physician or clinician. However, as explained later, the Department believes that opportunity for profit or loss is very predictive of a worker's status as an employee or independent contractor. In addition, the rule requires a worker to exercise personal initiative or manage capital investments, but not necessarily both, for the opportunity factor to indicate independent contractor status. In other words, an absence of capital investment does not prevent an individual from having an opportunity for profit or loss, because such opportunity can be based on the individual's initiative. Nor does such absence necessarily prevent an individual from being properly classified an independent contractor, particularly in knowledge-based industries such as medicine where human capital matters more than physical capital.

ultimate question of economic dependence," but instead "merely highlights the obvious and unhelpful fact that individual workers—whether employees or independent contractors—likely have fewer resources than businesses" that, for example, maintain corporate offices. *Id.* (citing cases). The Department received a number of comments addressing its proposed rejection of the relative investment approach.

For example, UPS stated that the Department's proposal "undervalues comparative analysis of investment" and noted that courts "have evaluated investment comparatively—correctly measuring the worker's investment against the company's" (citing cases). NELA added that "comparing workers' investments to the employer's investments" has been "a critically important factor in the economic realities test analysis" and "must be done in the context of the working relationship." TRLA objected that "the proposed test does not include the Fifth Circuit's 'extent of the relative investments of the worker and alleged employer' factor" and asserted that, while its usefulness may vary "depending on the facts of individual cases," "its wholesale exclusion from the test factors is not warranted, especially given the Supreme Court's caution against an exhaustive list" (citing *Silk*, 331 U.S. at 716). The Southwest Regional Council of Carpenters described the relative investment approach as simple and efficient by "lining up the expenses between worker and company" and thus "advanc[ing] the key interest of all parties concerned with the predictability of this part of the independent contractor test." According to the Pacific Northwest Regional Council of Carpenters, the Department acted "arbitrarily" in proposing to eliminate consideration of relative investments and asserted that, because "virtually every craftsperson who works in the various carpentry trades owns his or her own tools," the proposal would make "all of those individuals more susceptible to being classified as" independent contractors regardless whether the investment is small or extensive.

Other commenters supported the Department's proposed position. For example, the ATA, the Arkansas Trucking Association, NHDA, and Scopelitis, Garvin, Light, Hanson & Feary (on behalf of various transportation companies) each agreed with the Department's proposal "that the

relative investment test fashioned by the Fifth Circuit 'does not illuminate the ultimate question of economic dependence'" (quoting 85 FR 60614). TechNet explained that "the relative sizes of the parties' investments" are not relevant to the analysis, asserting that "[l]arge businesses may contract with small businesses," make investments that "typically exceed their smaller partners' investments by orders of magnitude … because of their size," and "not endanger [their] partners' independence merely because [they are] bigger than [their partners] are." CPIE stated that "the determinative inquiry relative to investment should be whether the individual has a sufficient investment in his or her trade or business as to enable the individual to operate independently," asserting that "[t]he investment of a potential client has no discernible relevance to this inquiry." *See also* WFCA ("The issue is whether a worker invested in his or her business, not how that investment compares to the employing company's investment.").

Having carefully considered the comments, the 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. Comparing their respective investments does little more than compare their respective sizes and resources. In *Hopkins v. Cornerstone America*, 545 F.3d 338, 344 (5th Cir. 2008), it was of course "clear that [the insurance company's] investment—including maintaining corporate offices, printing brochures and contracts, providing accounting services, and developing and underwriting insurance products—outweighs the personal investment of any one Sales Leader." The court, however, never explained how this fact indicated the Sales Leaders' economic dependence. *See id.* Tellingly, when summing up the entirety of the facts and analyzing whether the workers were economically dependent on the insurance company as a matter of economic reality, the court did not even mention the insurance company's larger investment. *See id.* at 346. And in *Karlson*, 860 F.3d at 1096, the court found that comparing the worker's investment with the potential employer's total operating expenses had little relevance because "[l]arge corporations can hire independent contractors, and small businesses can hire employees." *Cf. Parrish*, 917 F.3d at 383 (comparing relative investments,

but noting that "[o]bviously, [the oil drilling company] invested more money at a drill site compared to each plaintiff's investments" and according the factor little weight in light of the other evidence). In sum, comparing the relative investments does not illuminate the worker's economic dependence or independence. By contrast, as explained herein, analyzing the extent to which the individual worker has an opportunity for profit or loss because of his or her investment in, or capital expenditure on, helpers or equipment or material to further his or her work is probative of the worker's economic dependence or independence.

c. Other comments concerning the opportunity factor

WFCA agreed that "an evaluation of a worker's investment and capital expenditures are relevant factors in determining whether he or she is an independent contractor" and suggested including of "a definition of what constitutes an investment or capital expense." WFCA suggested the following: "Investments and capital expenditure shall include: the purchase or rental of tools, equipment, material, and office or work facilities; the payment for marketing and administrative expenses; the payment of costs incurred hiring or using other workers; and similar expenditures." However, the regulatory text already identifies investment in "helpers or equipment or material" as relevant, and the "for example" preceding them in the regulatory text makes clear that the list is non-exhaustive. The Department believes that general and non-exhaustive examples are more helpful than trying to precisely identify as many examples of relevant investments as possible.

NRF commented that "it is important to emphasize that it is the 'opportunity' or 'ability' to earn profits or incur losses based on investment and/or initiative, as opposed to the actual level of investment or initiative shown by the individual." Relatedly, NRF expressed concern whether this factor squares with the discussion in proposed § 795.110 that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible, asserting that "the fact that someone might not engage in certain practices or take on certain risks that would further impact the level of profit or loss should not result in a finding that the

individual is not an independent contractor, unless that person is prevented from doing so by the entity with whom the individual contracts." Here, the Department believes that NRF is conflating the ultimate outcome of independent entrepreneurship (profit or loss) with the actions indicative of entrepreneurship (initiative and/or investment) that largely determine that outcome. While profits are hardly guaranteed for anyone in business for him/herself, the text at § 795.105(d)(1)(ii) makes clear that independent contractors typically "*exercise* … initiative" and/or "*manag[e]* … investment," (emphasis added). Thus, a lack of profit viewed in hindsight says little about a worker's economic independence; instead, the focus is the degree to which the worker actually exercised initiative or actually managed investments. A worker's theoretical ability to, for example, exercise initiative is weaker evidence than the worker's actual practices. *See e.g.*, *Sureway Cleaners*, 656 F.2d at 1371 ("[T]he fact that Sureway's 'agents' possess, in theory, the power to set prices … and advertise to a limited extent on their own is overshadowed by the fact that in reality the 'agents' … charge the same prices, and rely in the main on Sureway for advertising."). However, a worker's conscious decision to not make a particular investment (especially when choosing among a range of investments) or to not take a particular action (especially when choosing among a range of options) may constitute an affirmative exercise of initiative to consider among others when evaluating opportunity for profit or loss. In sum, in the context of the opportunity factor, the focus is the individual worker's opportunity for profit or loss, as shown by meaningful investments or the exercise of personal initiative; actual profits or losses are less relevant.

OOIDA expressed "concern[] that the timeline for determining profit or loss is not clarified in the NPRM" and explained that certain "[m]otor carriers that take advantage of drivers through a lease-purchase agreement are likely to argue that a driver's opportunity for profit is merely a few years in the future, and that this full timeline must be considered." The Department agrees with OOIDA that "[t]his is a fallacy"; the opportunity for profit or loss must be reasonably current to indicate independent contractor status.

Regarding the Department's proposal to include initiative as a consideration in the opportunity factor, NRF agreed that "[t]he ability to impact profits or losses also may be dependent on business acumen and managerial skills, regardless of the 'skill level' of the work or the level of investment." NRF added that "identifying 'business acumen' or 'management skill' as part of the profit or loss factor is appropriate and consistent with the FLSA." Senator Sherrod Brown and 22 other senators disagreed, commenting: "Just because employees can increase their wages by exercising skill or initiative does not mean they are running a separate, independent business, particularly if they cannot pass along costs to customers." They added that "[t]he rule does not include additional, critical considerations of skill and initiative that are necessary to define an employment relationship." And Seyfarth Shaw requested that the Department state that "a worker's business acumen is to be interpreted to cover acumen relevant to the wide range of business endeavors in the U.S. economy, including, for example: sales, managerial, customer service, marketing, distribution, communications, and other professional, trade, technical, and other learned skills, as well as other unique business abilities and acumen, including acumen that impacts a worker's ability to profitably run their own independent business."

Having carefully considered the comments, the Department continues to believe that a worker's initiative, such as managerial skill or business acumen or judgment, is an appropriate measure of a worker's opportunity to earn profits or incur losses. *See*, *e.g.*, *Karlson*, 860 F.3d at 1094-95 (discussing how the worker's decisions and choices regarding assignments and customers affected his profits); *Saleem*, 854 F.3d at 145 (noting in support of independent contractor status that the degree to which the worker's relationship with the potential employer "yielded returns was a function … of the business acumen of each [worker]"); *McFeeley*, 825 F.3d at 243 ("The more the worker's earnings depend on his own managerial capacity rather than the company's … the less the worker is economically dependent on the business and the more he is in business for himself and hence an independent contractor.") (internal quotation marks omitted); *Express Sixty-Minutes Delivery*, 161 F.3d at 304 (agreeing with district court that

"driver's profit or loss is determined largely on his or her skill, initiative, ability to cut costs, and understanding of the courier business"); WHD Opinion Letter FLSA2019–6 at 6 ("These opportunities typically exist where the worker receives additional compensation based, not [merely] on greater efficiency, but on the exercise of initiative, judgment, or foresight."). Commenters did not seriously dispute the relevance of initiative to a worker's opportunity for profit or loss. In response to the comment by Senator Sherrod Brown and 22 other senators, the Department agrees that a worker is not necessarily an independent contractor because he or she can use initiative to affect his or her opportunity for profit or loss but maintains that yet initiative is indicative of—or weighs towards—independent contractor status in the multifactor analysis. And the Department agrees that a worker's ability to cut costs, including by passing them along to customers, is relevant to determining initiative. *See Express Sixty-Minutes Delivery*, 161 F.3d at 304. Finally, the Department agrees with Seyfarth Shaw that a worker's business acumen can "cover acumen relevant to the wide range of business endeavors in the U.S. economy" — initiative is not limited to or automatically present in any particular type of job.

Regarding the last sentence of the proposed opportunity factor regulatory text ("This 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 more efficiently."), WFCA expressed the concern that the sentence means that a worker who starts his or her own business and seeks to develop efficiencies in so doing will be an employee under the analysis. WFCA suggested that the sentence be deleted. WPI also asked that the last sentence be deleted because "[a]n individual who uses initiative, skill or judgment to perform a job more efficiently can generate greater profits, even if compensated by the hour or piece rate." It asserted: "The ability to use managerial skill, expertise, market experience, or business acumen to perform work more efficiently is indicative of independent contractor status." The Department agrees that such use of initiative can indicate independent contractor status when it affects opportunity for profit or loss. The word "efficiently" was used in proposed § 795.105(d)(2)(ii) to mean working faster

to perform rote tasks more quickly. *See* 85 FR 60614 n.38 (identifying piece-rate workers as "an example of workers who are able to affect their earnings only through working more hours or more efficiently."). Higher earnings that result solely from this "working faster" concept of efficiency do not by themselves indicate independent contractor status. However, as WFCA and WPI note, efficiency may also mean effective management based on business acumen, which is indicative of being in business for oneself if it results in increased earnings. For instance, the Fifth Circuit found that the opportunity factor "points towards independent contractor status" where "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," observing that "drivers who made the most money appeared to be the most experienced and most concerned with efficiency, while the less successful drivers tended to be inexperienced and less concerned with efficiency." *Express Sixty-Minutes Delivery Serv.* 161 F.3d at 304. To avoid confusion between multiple potential meanings of "more efficiently," the Department is revising § 795.105(d)(2)(ii) to replace that term with "faster." Relatedly, ATA and other transportation commenters objected to the Department's statements in the NPRM preamble that "[w]orkers who are paid on a piece-rate basis are an example of workers who … lack meaningful opportunity for profit or loss." They asserted that the statements may result in some judges refraining from engaging in the actual analysis set forth in the rule as to opportunity for profit or loss. They further asserted that truck drivers paid on a piece-rate basis may be independent contractors based on their management decisions or ability to cut costs. The Department's statements in the NPRM preamble regarding workers paid on a piece-rate basis were general observations supported by case law[33] and not a categorical rule or

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[33] *See Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961) (plaintiffs who manufactured knitted goods at home were employees under the FLSA, in part, because "[t]he management fixes the piece rates at which they work"); *Rutherford Food*, 331 U.S. at 730 (because workers' earnings "depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor"); *Hodgson v. Cactus Craft of Arizona*, 481 F.2d 464, 467 (9th Cir. 1973) (persons who manufacture novelty and souvenir gift items at homes and were compensated at a piece rate were employees under the FLSA). And in *Donovan v.*

the complete analysis. The fact that a worker is paid on a piece-rate basis set by the potential employer does not indicate an opportunity for profit or loss, but whether that worker has an opportunity for profit or loss indicative of independent contractor status is determined by a fuller analysis of the worker's circumstances.

Some commenters requested additional examples that are indicative of an opportunity for profit or loss (many of the suggested examples overlapped with each other). TechNet asked for "concrete examples" and suggested the following: "[d]rivers who can set their own hours, choose which jobs to accept or reject, and use their judgment in how to best complete jobs," as well as "[a]pp-based opportunities–including opportunities to provide personal transportation, parcel deliveries, shopping services, or food delivery, among other types of service." The U.S. Chamber of Commerce offered eleven "additional examples of a worker's initiative or investment that may impact a worker's profit or loss."[34] The U.S. Chamber of Commerce also suggested

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DialAmerica Marketing, Inc., the court held that homeworkers who were paid on a piece-rate basis to perform the simple service of researching telephone numbers were employees who lacked meaningful opportunity for profit or loss. *See* 757 F.2d 1376, 1385 (3rd Cir. 1985). In contrast, distributors who recruited and managed researchers and were paid based on the productivity of those they managed were independent contractors, in part, because distributors' earnings depended on "business-like initiative." *Id.* at 1387.

[34] The U.S. Chamber of Commerce's suggested examples were: "1) The worker's own decision-making with respect to the details and means by which they make use of, secure, and pay helpers, substitutes, and related labor or specialties … ; 2) The worker's own decision-making with respect to the details and means by which they purchase, rent, or otherwise obtain and use tools … ; 3) The worker's own decision-making with respect to the details and means by which they purchase or otherwise obtain and use supplies … ; 4) The worker's own decision-making with respect to the details and means by which they purchase, rent, or otherwise obtain and use equipment … ; 5) The worker's initiative and decisions they implement in connection with their own performance of services through higher service fees, incentives, charges, and other ways; 6) The worker's initiative to invest in the development of skills, competencies, and trades … ; 7) The worker's expertise in delivery of services/products that result in enhanced profits, for example through tips and other incentives as a result of providing quality customer service; 8) The worker's losses incurred as a result of customer complaints or other charges where the worker's results were below customer or contractual expectations and obligations; 9) The worker's flexibility to choose amongst work opportunities offered that impact profits and losses; 10) The worker's contractual or other losses if they do not provide the accepted services or the worker provides substandard services, and are engaged to provide time-sensitive, often perishable services and products; and 11) The worker's avoidance of liquidated damages charges or indemnification obligations in the parties' agreement relating to various provisions, including material breaches of the parties' agreement."

"examples of fact situations which are neutral in the analysis of whether the worker controls their profits and losses."[35] SHRM requested numerous "additional examples of worker investment and initiative that impact profit and loss."[36] SHRM also requested that the final rule make "the following explicit statements regarding facts that do not support a finding of dependency: [w]orkers may experience financial losses as a result of cancellations of their service or the provision of service that does not meet customer expectations when the worker has flexibility to choose between work opportunities; and [e]ven if the business sets the price of goods provided by the worker, that does not negate the worker's initiative when the worker controls the amount of time, when, and where they provide the services as well as the amount of the same service they chose to provide." Seyfarth Shaw asked the Department to "expand upon the examples of ways that workers impact their own profitability as well as their losses (by impacting their profits and their costs)" and to include numerous examples.[37] And Mr. Reibstein commented that

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[35] These suggested examples were: "1) The business pays the worker by the hour where it is customary in the particular business/trade to do so (e.g., attorneys, physical trainers); 2) The business sets the price of goods and services offered by a worker to customers where the worker controls the amount of time, date and place they provide the services as well as the amount of services they choose to provide and the price is set to facilitate the time sensitive transaction as a result of the time sensitive or perishable nature of the service the customer desires[;] and 3) The business's facilitation of payments from the customer to the worker."

[36] SHRM's suggested examples were: "[t]he worker's decisions in choosing amongst opportunities offered that impact profit and loss; [t]he worker's losses suffered from receipt of customer complaints where the worker's results were below customer or contractual expectations; [t]he worker's decisions in avoiding liquidated damages charges or indemnification obligations in the parties' agreement; [t]he worker's own decision-making on whether to use other workers or services as helpers or substitutes as well as the use of related labor or specialties to assist in either the services provided, the tools and equipment used, or the maintenance of the worker's business structure; [t]he worker's acumen regarding the delivery of services/products that result in enhanced profits through tips and other incentives; [t]he worker's decision-making regarding the details and means by which they obtain supplies, tools, and equipment for use in their business, including choices regarding from whom to purchase these goods, how much of the goods are obtained at any one time, the quality of the goods, and the negotiated prices regarding said goods; and [t]he worker's decision-making regarding investment in skills they deem necessary to achieve the desired results from their work, including education, certificates, or classes."

[37] Seyfarth Shaw's suggested examples were "[t]he worker's own decision-making regarding the use of helpers, substitutes, and related labor or specialties to assist in the services provided, the tools and equipment used, or the maintenance of the worker's business structure … to the extent those decisions impact the worker's costs and overall profitability; [t]he worker's initiative and

"[e]xamples of loss should be identified … so it is clear [that this factor] does not focus only on profit." He offered the following examples: "he or she has to re-do work that is not consistent with industry standards or does not meet a customer's expectations; is potentially liable to the potential employer in the event his or her actions or inactions cause harm or legal expense to the potential employer; or fails to render services in a cost-efficient manner by not managing expenses or investing far too much time on activities that are unproductive."

The Department has considered the various requests for additional examples of initiative and investment that can indicate a worker's opportunity for profit or loss, but declines to change to the proposed regulatory text. The regulatory text already broadly describes initiative as including managerial skill and business acumen or judgment, and explains that investment is 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. Many of the suggested examples seem to fall into one of these categories, and some of them effectively repeat concepts already identified in the regulatory text—especially the ones involving helpers, tools, supplies, and equipment. The Department does not believe that (even after culling out all of the overlap) additional examples of initiative and investment would benefit employers or workers. It is not possible or productive to seek to identify in the regulatory text every example of initiative and investment that may be relevant to the opportunity for profit or loss analysis. The Department purposefully described both initiative and investment in a broad and general manner to provide helpful guidance to as many employers and workers as possible. The Department believes that this approach, along

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the decisions they implement in connection with the performance of services and/or capital expenditures on equipment, supplies, and tools … ; [t]he worker's initiative to invest in the development of skills, competencies, and trades (including education, training, licenses, certifications, and classes) … ; [t]he worker's expertise in delivery of services/products that result in enhanced profits through tips and other incentives as a result of great customer service and exceptional skills, for example[; t]he worker's losses incurred as a result of customer complaint or other charges where the worker's results were below customer or contractual expectations and obligations; and [t]he worker's avoidance of liquidated damages charges or indemnification obligations in the parties' agreement relating to various provisions, including material breaches of the parties' agreement."

with the further clarification provided throughout this preamble section as well as the examples added in § 795.115, will be more helpful and functional for employers and workers as they apply the analysis.

3. The "Skill Required" Factor

In the NPRM, the Department identified three other factors that may serve as "additional guideposts" in the analysis to determine whether a worker is an employee or independent contractor. The first of these other factors, included at proposed § 795.105(d)(2)(i), is the amount of skill required for the work. 85 FR 60639. The Department's proposed regulatory text stated that this factor would weigh 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; conversely, the factor would weigh 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. As explained in the NPRM, the Department proposed to clarify that this factor should focus on the amount of skill required because importing aspects of the control factor into the skill factor has diluted the consideration of actual skill to the point of near irrelevance, and such dilution generates confusion regarding the relevance and weight of the worker's skill in evaluating economic dependence.

Employer representatives were generally supportive of the Department's clarification and relegation of this factor as an "additional guidepost" but provided additional commentary and requests for modification. Several commenters suggested that this factor be eliminated entirely. The National Restaurant Association commented that this factor "does not add much clarity to the analysis" and "unnecessarily discriminates against individuals who operate businesses that do not require advanced degrees." WPI stated that "[s]o narrowed, this factor has little probative value in determining economic dependence and should be eliminated as a separate factor."

Other commenters suggested that the factor be included within the core, "profit and loss" factor or otherwise minimized. CWI suggested that the factor be incorporated into the profit and loss factor because "[w]here specialized skills are required to perform work, workers unquestionably have taken the initiative to invest time and money into developing those skills." SHRM and U.S. Chamber of Commerce agreed that this factor should not be a stand-alone factor, but rather should be incorporated into the opportunity factor, to ensure that workers who desire the flexibility and freedom of independent contractor status—but who provide services that may not require specialized training—are not negatively impacted. *See also* WFCA (requesting that lack of skill should not weigh in favor of the worker being an employee). Commenters also stated that this additional factor should be minimized further in the analysis, commenting that the factor places too much emphasis on the importance of skill, and requested that "the final rule should at least indicate that this may be a relevant factor in some but not all instances." Reibstein.

After considering these comments, the Department declines both the request to eliminate this factor from consideration entirely and the request to include it as part of the opportunity factor. The Department agrees with commenters that the concepts of initiative and judgment are sufficiently analyzed in multiple ways under the control and opportunity core factors, but believes that longstanding case law militates in favor of considering this additional factor—skill required—when relevant under the particular circumstances of each situation. As explained in the NPRM, the Supreme Court articulated the factor as "skill required" in *Silk,* 331 U.S. at 716, and multiple courts of appeals continue to consider as "the degree of skill required to perform the work." *Paragon Contractors*, 884 F.3d at 1235; *see also Iontchev*, 685 F. App'x at 550; *Keller*, 781 F.3d at 807. The Department believes that sharpening this factor to focus solely on skill clarifies the analysis. Moreover, analyzing the worker's ability to exercise initiative under the control factor, a core factor that is given more weight than the skill factor, appropriately reflects that that the presence or absence of initiative is usually more important than the presence or

absence of skill. Similarly, the effect of the worker's initiative is analyzed under the opportunity factor, another core factor that, for the reasons explained above, is usually more probative than the skill factor.

Commenters such as the National Restaurant Association and NRF suggested that the regulation should focus not on whether the skill required is specialized, but rather the extent to which a worker relies on the potential employer for training needed to perform the work. The Wood Flooring Covering Association, however, stated that the regulation as proposed may create unintended limits on training and employers should not be discouraged from funding needed training for workers, particularly in view of its industry's labor shortage. With respect to these requests, the Department declines to eliminate the modifier "specialized" from the regulation. This type of consideration is supported by discussions of this factor in case law. *See, e.g.*, *Simpkins v. DuPage Hous. Auth*., 893 F.3d 962, 966 (7th Cir. 2018) ("whether Simpkins had specialized skills, as well as the extent to which he employed them in performing his work, are [material] issues"); *Carrell v. Sunland Const., Inc*., 998 F.2d 330, 333 (5th Cir. 1993) (finding it relevant that "[p]ipe welding, unlike other types of welding, requires specialized skills"). The Department also declines to adjust the regulatory text to directly address who provides the training because such facts are not necessarily probative in every circumstance; the Department notes, however, that it can be suggests employee status if a worker receives all specialized skills from the employer. *See, e.g.*, *Keller*, 781 F.3d at 809 (explaining that if "the company provides all workers with the skills necessary to perform the job," that suggests employee status); *Scantland*, 721 F.3d at 1318; *Hughes v. Family Life Care Inc*., 117 F. Supp. 3d 1365, 1372 (N.D. Fla. 2015) ("The relevant inquiry [for the skill factor] is whether [the worker] is dependent upon [the company] to equip her with the skills necessary to perform her job."). This is because an individual who is in business for him- or herself typically brings his or her own skills to the job, rather than relying on the client to provide training.

While the WFCA generally supports this factor, it also requested that the Department include examples of specialized training or skill that focused on indicators such as certifications and licensing. Scopelitis, Garvin, Light, Hanson & Feary, a law firm commenting on behalf of several unnamed transportation providers, agreed that credentials such as testing to earn a Commercial Driver's License can demonstrate specialized skill, but also noted that skills needed to successfully operate a business should also be considered specialized skills to help distinguish independent contractors from employees. The Department notes that the opportunity factor already considers whether workers have an opportunity for profit or loss based on their business acumen or managerial expertise. It would be redundant to analyze "skills needed to successfully operate a business" as part of the skill factor. As to requests for examples or additional clarification as to what constitutes "specialized" skills, the Department agrees that credentials such as certifications and licenses can be helpful indicators of specialized skill, though they are by no means the only indicators of such skill. The Department does not believe any change to the regulatory text to clarify this point is warranted, however.

Employee representatives such as the AFL-CIO expressed concern that de-emphasizing the skill factor would "place considerable competitive pressure on law-abiding employers employing employees at the bottom of the wage scale, thus undermining the national minimum wage standard." The AFL-CIO further asserted that the proposed regulation would make it more likely that unskilled workers such as home care workers, delivery drivers, and janitors will be classified as independent contractors, and thus such workers will be unprotected by the FLSA's minimum wage and overtime pay standards. *See* AFL-CIO. The National Employment Lawyers Association (NELA) commented that the Department's proposed regulation "seeks to constrict and demote" the skill factor, and, relying on case law, noted that "courts typically assess whether workers are required to use specialized skills, beyond those typically acquired through occupational or technical training, in an independent way to perform their job" but that this factor, "which often favors employee status, does not suit the Department's purposes."

Regarding farmworkers specifically, TRLA stated that whether the services rendered by an employee require special skills has often been probative in the farm labor context, and that by largely eliminating consideration of this factor, the proposed rule makes the proper classification of farmworkers harder to determine. *See* Texas Rio Grande Legal Aid. This "will lead to more farmworkers being classified as independent contractors, thereby denying the protections of the FLSA to one of the most vulnerable classes of workers"; moreover, "[t]o the extent that the proposed rule purports to be descriptive of the current state of the law, it is flatly inaccurate."

The Department has considered these comments but continues to believe that its proposal with respect to this factor is logical and helpful. Although many courts consider the skill factor, courts appear to find the core factors to be more dispositive than the skill factor when such factors conflict. *See* 85 FR 60621-22 (listing cases). Continuing to take it into account, but not as one of the core factors, adds clarity to the economic realities test. The Department's formulation of the test does not preclude the possibility that in some circumstances, such as with respect to farmworkers, that this factor could be particularly probative.

The Department adopts § 795.105(d)(2)(i) as proposed.

4. The "Permanence of the Working Relationship" Factor

The second additional guidepost factor, described in the regulatory text at § 795.105(d)(2)(ii), is the degree of permanence of the working relationship between the individual and the potential employer. The Department proposed that this factor would weigh in favor of the individual being an independent contractor to the extent the work relationship is by design definite in duration or sporadic, which may include regularly occurring fixed periods of work, although the seasonal nature of work by itself would not necessarily indicate independent contractor classification. In particular, the Department explained that the seasonal nature of work would not indicate independent contractor status where the worker's position is permanent for the duration of the relevant season and where the worker has done the same work for multiple seasons. *See Paragon Contractors*, 884 F.3d at 1236–37. The proposal also provided that this

factor would weigh in favor of the individual being an employee to the extent the work relationship is instead by design indefinite in duration or continuous. As noted in the NPRM, courts and the Department routinely consider this factor when applying the economic reality analysis under the FLSA to determine employee or independent contractor status. *See, e.g.*, WHD Opinion Letter FLSA2019-6 at 4; *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.

Multiple commenters urged the Department to focus this factor further on the indefiniteness of a working relationship. For example, the U.S. Chamber of Commerce commented that independent contractors often enter into multiple, long-term contracts with the same business. It suggested that the Department clarify that such contracts do not indicate employee status merely because of their length, but that only contracts of an indefinite length would be indicative of employee status. CWI similarly requested that this factor focus only on the length of the relationship as reflected in contractual agreements, regardless of how long the relationship is in reality.

The Department considered adding clarifying language to the regulation indicating that a relationship whose length is indefinite is more indicative of employee status than a relationship that is merely long. However, because the focus of the economic realities test is not on technical formalities, it may be that a long relationship could be evidence of permanence despite a contract with a definite end. For example, an employer may have a permanent relationship with an employee despite requiring the employee to enter into annual employment contracts. Or a potential employer may have a long-term relationship reflected in several short-term contracts. The Department has therefore retained the proposed regulatory text because, although indefiniteness is a stronger indicator of permanence, the length of a working relationship is still relevant to this factor.

One commenter urged the Department to consider the exclusivity of a relationship as part of the permanence factor, an approach taken by some courts. Specifically, CPIE commented that permanence does not indicate an employment relationship unless it is due to the potential employer's requirement of exclusivity rather than the worker's choice. The Department agrees that exclusivity most strongly indicates an employment relationship when the exclusivity is required by the potential employer. However, as the Department discussed in the NPRM, an exclusivity requirement more strongly relates to the control exercised over the worker than the permanence of the relationship. As explained in the discussion of the control factor, that factor already considers whether a worker has freedom to pursue external opportunities by working for others, including a potential employer's rivals. *See, e.g.*, *Freund*, 185 F. App'x at 783 (affirming district court's finding that "Hi–Tech exerted very little control over Mr. Freund," in part, because "Freund was free to perform installations for other companies").[38] The same concept of exclusivity is then re-analyzed as part of the permanence factor. *Compare id.* ("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."), *with Scantland*, 721 F.3d at 1319 (finding installation technicians' relationships with the potential employer were permanent because they "could not work for other companies"). Such duplicative analysis of exclusivity under the permanence factor, however, is not supported by the Supreme Court's original articulation of that factor in *Silk*. *See* 331 U.S. at 716 (analyzing the "regularity" of unloaders' work); *id.* at 719 (analyzing truck drivers' ability to work "for any customer" as an aspect of "the control exercised" but not permanence); *see also* 12 FR 7967 (describing the permanence factor as pertaining to "continuity of the relation" but with no reference to exclusivity). Nor is the

[38] In addition, as also noted in the NPRM, the opportunity factor considers whether a worker's decisions to work for others affects profits or losses. *See, e.g.*, *Freund*, 185 F. App'x at 783 (affirming the district court's finding that the "looseness of the relationship between Hi–Tech and Freund permitted him great ability to profit," in part, because "Freund could have accepted installation jobs from other companies."). The Department does not believe this consideration overlaps with the control factor. While the control factor concerns the *ability* to work for others, the opportunity factor concerns the *effects* of doing so.

concept of exclusivity part of the common understanding of the word "permanent."[39] In a similar vein to the Department's analysis of the concept of initiative, the Department believes analysis of exclusivity as part of the permanence factor dilutes the significance of actual permanence within that factor, blurs the lines between the economic reality factors, and creates confusion by incorporating a concept that is distinct from permanence.

Because the worker's ability to work for others is already analyzed as part of the control factor, proposed § 795.105(d)(2)(ii) articulated the permanence factor without referencing the exclusivity of the relationship between the worker and potential employer, and the Department retains the same language in the final rule.

Commenters also requested that the Department clarify that long-term relationships that are based on the workers' choice to continue working for the same business rather than the potential employer's requirements should not indicate employee status under this factor. NRF commented that an independent contractor may choose to focus on a particular client for reasons of the contractor's own rather than the client's requirements, suggesting that the worker's choice does not indicate employee status. The Department does not believe that further explanation in the regulatory text is necessary, though it agrees that a long-term relationship may not always indicate an employee relationship. This factor is not always probative to the analysis, and the scenarios described by the commenters may be situations where the length of the relationship is not a useful indicator. However, explicitly stating that a relationship is not permanent whenever the worker chooses for it to be long-term is not accurate. After all, every employee to some extent chooses whether to continue working for their employer, and the FLSA's definition of "employ" includes to passively "suffer or permit to work." 29 U.S.C. 203(g). A long-term

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[39] *See* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/permanent (defining permanent as "continuing or enduring without fundamental or marked change"); *see also* Oxford American Dictionary 1980 (defining permanent as "lasting or meant to last indefinitely"); Merriam-Webster Pocket Dictionary 1947 (defining permanent as "Lasting; enduring").

relationship is always the result of choices by both the potential employer and the worker, but it is sometimes a helpful indicator of employee status.

Edward Tuddenham urged the Department to give examples relationships that may or may not be viewed as permanent, such as a contract that is repeatedly renewed or an industry that is generally itinerant. Although the Department has added one example regarding this factor to new § 795.115 to help illustrate how the factor is to be considered, the Department does not believe it is possible to address all of the possible working relationships and contractual arrangements in a useful fashion. Certain general principles should inform any analysis of work relationships. The Department reiterates that it is not contractual formalities that are relevant to the inquiry, but economic reality. A potential employer's attempts to use contractual technicalities to label a relationship as temporary even though it is indefinite in reality should not affect whether this factor indicates employee or independent contractor status. Again, this factor will not always be probative, and, for example, in certain industries where employees are often employed for short periods, a short term of employment would not indicate independent contractor status.

SWCCA pointed out that a recent WHD opinion letter included language stating that "the existence of a long-term working relationship may indirectly indicate permanence." WHD Opinion Letter FLSA 2019-06 (April 29, 2019). The Alliance requested that this language be added to § 795.105(d)(2)(ii). Though the quoted language and the case law from which it is drawn remain useful guidance for employers, the Department does not believe it is necessary to add this language to the regulation, which already indicates that a long-term relationship points toward an employment relationship.

Accordingly, the Department finalizes § 795.105(d)(2)(ii) as proposed.

5. The "Integrated Unit" Factor

The final additional guidepost factor, described in § 795.105(d)(2)(iii), is whether the work is part of an integrated unit of production. The Department proposed that this factor would

weigh in favor of the individual being an employee to the extent his or her work is a component of the potential employer's integrated production process for a good or service. The proposed regulatory text further explained that this factor would weigh in favor of an individual being an independent contractor to the extent his or her work is segregable from the potential employer's production process. The Department proposed to clarify that this factor is different from the concept of the importance or centrality of the individual's work to the potential employer's business.

As noted in the NPRM, the Department and courts outside of the Fifth Circuit have typically articulated the sixth factor of the economic reality test as "the extent to which services rendered are an integral part of the [potential employer's] business." WHD Fact Sheet #13. Under this articulation, the "integral part" factor considers "the importance of the services rendered to the company's business." *McFeeley*, 825 F.3d at 244. In line with this thinking, courts generally state that this factor favors employee status if the work performed is so important that it is central to or at "[t]he heart of [the potential employer's] business." *Werner v. Bell Family Med. Ctr., Inc.*, 529 F. App'x 541, 545 (6th Cir. 2013); *see also Baker*, 137 F.3d at 1443 ("[R]ig welders' work is an important, and indeed integral, component of oil and gas pipeline construction work."); *Lauritzen*, 835 F.2d at 1537-38 ("[P]icking the pickles is a necessary and integral part of the pickle business[.]"); *DialAmerica*, 757 F.2d at 1385 ("[W]orkers are more likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer.").

The Department explained in the NPRM that it is concerned that this focus on importance or centrality departs from the Supreme Court's original articulation of the economic reality test, has limited probative value regarding the ultimate question of economic dependence, and may be misleading in some instances. As such, the Department proposed that § 795.105(d)(2)(iii) would clarify that the "integral part" factor should instead consider "whether the work is part of an

integrated unit of production," which aligns with the Supreme Court's analysis in *Rutherford Food*, 331 U.S. at 729.

Many commenters representing workers urged the Department to retain the "integral part" factor used by courts as part of the economic realities test, rather than replacing it with the "integrated unit" factor articulated in the proposed rule. This "integral part" factor would consider the importance or centrality of the work performed to the purported employer's business. In particular, several commenters, including United Food and Commercial Workers, Senator Patty Murray, and the State AGs contended that removing the "integral" factor would be contrary to established circuit court precedent. The UFCW asserted that "[w]hether a worker's service is an integral part of the company's business may not be a relevant factor in all situations, but it may be in some and some courts have found value in analyzing this fact." It commented that if the Department stated that integrality is not relevant to the economic realities test, the Department's proposed rule would unduly limit the inquiry. One commenter, the Greenlining Institute, commented that eliminating an "integral part" factor disfavors workers "performing physical tasks instead of stereotypically 'intellectual' pursuits," who are disproportionately racial or ethnic minorities.

Many commenters agreed with the Department's proposal to eliminate the "integral part" factor or any similar factor focused on the importance of the work. The U.S. Chamber of Commerce, for example, commented, "In today's economy, independent workers provide services in all aspects of the economy and all aspects of individual businesses, including core and non-core functions, as well as in the same or different lines of business." The Society for Human Resource Management similarly commented that the "analysis concerning the 'integrated unit' factor should not focus on the 'importance of services' provided."

Though circuit courts have applied an "integral part" factor, it was not one of the factors analyzed by the Supreme Court in *Rutherford Food*. Rather, the Court considered whether the worker was part of an "integrated unit of production," 331 U.S. at 729, as this final rule does.

The Department believes that circuit courts—and even the Department itself—have deviated from the Supreme Court's guidance and, in doing so, have introduced an "integral part" factor that can be misleading. As explained in the NPRM, the "integral part" factor was not one of the distinct factors identified in *Silk* as being "important for decision." 331 U.S. at 716. The "integrated unit" factor instead derives from *Rutherford Food*, where the Supreme Court observed that the work at issue was "part of an integrated unit of production" in the potential employer's business and concluded that workers were employees in part because they "work[ed] alongside admitted employees of the plant operator at their tasks." 331 U.S. at 729. As the NPRM explained, the Department began using the "integral part" factor in subregulatory guidance in the 1950s. *See* WHD Opinion Letter (Aug. 13, 1954); WHD Opinion Letter (Feb. 8, 1956).[40] And circuit courts in the 1980s began referring to it as the "integral part" factor and analyzing it in terms of the "importance" of the work to the potential employer. *See, e.g.*, *Lauritzen*, 835 F.2d 1529, 1534-35; *DialAmerica Mktg.*, 757 F.2d at 1386.

The NPRM explained the reasons that the Department now believes the Supreme Court's original "integrated unit" formulation is more probative than the "integral part" (meaning "important") approach. As Judge Easterbrook pointed out in his concurrence in *Lauritzen*, "[e]verything the employer does is 'integral' to its business—why else do it?" *Lauritzen*, 835 F.2d at 1541 (Easterbrook J., concurring); *see also Zheng*, 355 F.3d at 73 (cautioning in the joint employer context that interpreting the factor to focus on importance "could be said to be implicated in *every* subcontracting relationship, because all subcontractors perform a function that a general contractor deems 'integral' to a product or a service").

[40] A 2002 opinion letter interpreted the factor to focus on the importance of the work, explaining that "[w]hen workers play a crucial role in a company's operation, they are more likely to be employees than independent contractors." WHD Opinion Letter, 2002 WL 32406602, at *3 (Sept. 5, 2002). However, the Department's most recent opinion letter on this subject characterized the factor as "the extent of the *integration* of the worker's services into the potential employer's business." WHD Opinion Letter FLSA2019–6 at 6 (emphasis added).

The Department's review of appellate cases since 1975 involving independent contractor disputes under the FLSA supports this criticism. The Department generally found that, in cases where the "integral part" factor was addressed, the factor aligned with the ultimate classification when the ultimate classification was employee.[41] However, courts' analyses of the "integral part" factor—again, if it was analyzed at all[42]—were misaligned more frequently than they were aligned with the ultimate classification when the ultimate classification was independent contractor status. *Compare Iontchev*, 685 F. App'x at 551; *Meyer*, 607 F. App'x at 123; *Freund*, 185 F. App'x at 784-85; *Mid-Atl. Installation*, 16 F. App'x at 107-08; *Brandel*, 736 F.2d at 1120, *with Werner*, 529 F. App'x at 545-46; *DialAmerica Mktg*., 757 F.2d at 1387. This higher rate of misalignment is precisely what Judge Easterbrook's criticism would have predicted: if "[e]verything the employer does is 'integral,'" that factor would point towards employee status for workers who are employees, but also for workers who are independent contractors.

The NPRM further explained that "the relative importance of the worker's task to the business of the potential employer says nothing about whether the worker economically depends on that business for work." 85 FR 60617. While some courts assumed that business may desire to exert more control over workers who provide important services, there is no need to use importance as an indirect proxy for control because control is already a separate factor. *Id.* (citing *Dataphase*, 781 F. Supp. at 735, and *Barnard Const.*, 860 F. Supp. at 777, *aff'd sub nom*. *Baker v. Flint Eng'g & Const. Co*., 137 F.3d 1436 (10th Cir. 1998)). And this assumption may not always be valid. Modern manufacturers, for example, commonly assemble critical parts and components that are produced and delivered by wholly separate companies through contract rather than employment arrangements. And low transaction costs in many of today's industries make it cost-effective for firms to hire contractors to perform routine tasks.

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[41] The only appellate case the Department found of misalignment in this scenario is *Paragon Contractors*, 884 F.3d at 1237-38.

[42] As explained elsewhere, the Fifth Circuit does not usually consider the "integral part" factor in its analysis.

The Department considered salvaging the "integral part" factor by deemphasizing "integral" and emphasizing "part." Instead of focusing on whether the work is important "to" a potential employer's business, the factor would focus on whether the work is an important "part" of that business. This approach would more closely align with how "integral part" was used by the Supreme Court in *Silk*, which asked whether workers were "an integral part of [defendants'] businesses," as opposed to operating their own businesses. 331 U.S. 716. But as the NPRM noted, the *Silk* Court framed that question as the ultimate inquiry, and not as a factor that is useful to guide the inquiry. *See* 85 FR 60616 n.41. Asking whether a worker is part of—integral or otherwise—a potential employer's business is not useful because it simply restates the ultimate inquiry: if a worker were part of the potential employer's business, then he or she could not be in business for him- or herself and therefore would be economically dependent. As an added complication, new technologies have led to the emergence of platform companies that connect consumers directly with service providers, and it is often difficult to determine whether those platform companies are in business of supporting service providers' own businesses or are in the business of hiring service providers to serve customers. *Compare Razak*, 951 F.3d at 147 n.12 ("We also believe [there] could be a disputed material fact" whether Uber is "a technology company that supports drivers' transportation businesses, and not a transportation company that employs drivers."), *with O'Connor v. Uber Techs., Inc*., 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) ("it is clear that Uber is most certainly a transportation company"). For the reasons explained, the final rule retains the "integrated unit" approach.

The Department does not share the Greenlining Institute's concern that the final rule's "integrated unit" factor would result in workers who perform "physical tasks" being classified as independent contractors more than workers who perform white collar, "intellectual" work. Meat deboning is a physical task, but deboners were found to be part of an integrated unit of production in *Rutherford Food*. 331 U.S. at 729. On the other hand, freelance writers perform a white collar task, but they generally are not integrated into a publication's production process

because they are not involved in, for instance, assigning, editing, or determining the layout of articles. Both white collar and physical labor jobs may be part of an integrated unit of production. The Department has added one example in new § 795.115 showing that a newspaper editor—who performs primarily white collar tasks—may be part of an integrated unit of production.

Another commenter, the Arkansas Trucking Association, agreed that the "integrated unit" factor was superior to "integral part," but suggested an alternative formulation based on whether the business's activities would cease or be severely impacted by the absence of the worker. However, this approach has the same limitations as the approaches that emphasize "importance." Almost every worker performs work that is in some sense important to the business that has hired the worker; otherwise, the business would not hire the worker. Moreover, as explained in the NPRM, easily-replaced workers are often more dependent on a particular business for work precisely because they are so easily replaced. Focusing on the impact of a worker's absence turns the economic dependence analysis on its head by essentially looking at the business's dependence on the worker. As a result, it sends misleading signals about employee status.

Another group of commenters suggested that the factor should include an explicit consideration of the location of the work performed. The U.S. Chamber of Commerce, for example, suggested that the factor should consider whether the worker is performing work "the majority of which is performed off the physical premises of the business."

Whether the work is performed on the business's physical premises may be a consideration under the "integrated unit" factor, as it may indicate the extent to which the worker is part of an integrated unit of production. However, the Department does not believe it is necessary to include this consideration as an explicit part of the "integrated unit" factor. Many businesses have no physical location but nevertheless employ employees. In other instances, an employee may be part of an integrated unit despite performing work at a different location than other employees. *See, e.g.*, *Goldberg v. Whitaker House Cooperative, Inc.*, 366 US 28, 32 (1961)

(holding that workers who produced copies of a sample product at home were employees). Some workers perform work on a business's physical premises but perform discrete, segregable services unrelated to any integrated process or unified purpose. Thus, although the location of the work may be a fact that is relevant to the "integrated unit" factor, it is not so probative that it would be useful to elevate it above other facts that may be more relevant in a particular case.

Several commenters asked that the Department clarify that the relevant inquiry is whether the worker is part of an integrated unit of production that is part of the potential employer's own processes rather than part of a broader supply chain. NRF suggested clarifying language that would "expressly state that merely serving as a link in the chain of a company's provision of goods or services" does not indicate employee status. It suggested that such language would make it clear that this factor does not indicate employee status where a worker is merely one, segregable step in the process of delivering a product to a consumer.

The Department does not believe such a clarification is needed, because the text of the final rule states that this factor points toward employee status only when the worker performs "a component of the potential employer's integrated production process." The relevant process is the potential employer's process, not the broader supply chain. A worker who performs a segregable step in the process of delivering a product but who is not integrated into the employer's own production process is not part of an integrated unit of production. Multiple businesses, including independent contractors, may perform steps in the same supply chain.

Some commenters suggested that the description of this factor in the preamble should define the scope of the "unified purpose" toward which the potential employer's processes work. WPI requested that the Department clarify that the "unified purpose" cannot be broader than the potential employer's "core or primary business purpose." On the other hand, Farmworker Justice urged a broad definition of "unified purpose" to prevent gamesmanship by which an employer may attempt to artificially separate its production process into separate units in order to claim that they are segregable rather than parts of a unified whole. It cited a hypothetical tomato farmer

who could label its tomato harvesters as a separate unit rather than as part of the process of growing tomatoes.

The Department rejects these suggestions, because the final rule's rejection of the "integral part" factor and the question of "importance" or "centrality" makes clear that the relevant facts are the integration of the worker into the potential employer's production processes, rather than the nature of the work performed. As explained above, identifying the "core or primary business purpose" is not a useful inquiry in the modern economy. Falling transaction costs and other factors described above allow businesses to hire independent contractors to carry out tasks that are part of the businesses' core functions, while keeping those functions separate from its own production processes. At the same time, seemingly peripheral functions may be integrated into an employer's own processes, indicating employee status. What matters is the extent of such integration rather than the importance or centrality of the functions performed, which the Department does not find to be a useful indicator of employee or independent contractor status.

As noted in the NPRM, the Department recognizes that it may be difficult to determine the extent to which a worker is part of an integrated unit of production. For this reason, this factor is not always useful to the economic realities inquiry, and it is less likely than the core factors to be determinative. For example, this factor would not indicate independent contractor status for Farmworker Justice's hypothetical tomato harvesters merely because the farmer artificially labeled them a separate unit. As has been the case since the concepts underlying the economic realities test was articulated, the test does not depend on labels assigned to workers. *Rutherford Food*, 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 factor may indicate either employee or independent contractor status based on the extent to which the harvesters are integrated into the farmer's production

process as a matter of fact, but most likely the ultimate determination would depend more on other factors, such as control and opportunity for profit or loss.

WPI also suggested that the Department clarify language in the preamble to the proposed rule stating that employee status would be indicated for a worker who performs work closely alongside conceded employees. WPI expressed concern that this language could wrongly imply that a worker performing different tasks than the conceded employees but in close proximity to them would indicate employee status. The Department does not believe such clarification is necessary, because the preamble stated that employee status is indicated where the worker "performs identical or closely interrelated tasks as those employees." In other words, WPI is correct that if a worker works physically close to conceded employees but performs unrelated tasks, that fact alone would not indicate employee status.

Finally, many commenters requested that the Department add examples explaining how this factor would apply to specific industries, including trucking, construction, financial advising, and personal shopping. Others wanted examples to address certain types of contractual arrangements, such as multi-sided platforms, franchisees, and buy/sell agreements. In response to these requests, the Department notes that the facts that inform the "integrated unit" factor are too circumstance-specific to apply blanket statements to entire industries or broad types of employment arrangements. Any particular task that is common in a particular industry may be performed in one instance by a worker who is part of an integrated unit of production or by a segregable unit. In other words, this factor may point in a different direction for workers who perform similar duties in the same industry but who are more or less integrated into their potential employer's processes based on the potential employer's business model. Moreover, contractual formalities such as a buy/sell agreement or contracts formed using multi-sided platforms could memorialize either employment or independent contractor arrangements; the determination would not depend on the labels assigned but on the various economic realities factors, including the worker's integration into the potential employer's production process.

That said, as explained elsewhere in this preamble, although the Department cannot address all industries or all possible factual scenarios, it does appreciate that examples are helpful to understanding how each factor operates. The new regulatory provision added in this final rule to further illustrate several factors, § 795.115, includes two examples specifically meant to demonstrate how facts about whether a worker is part of an integrated unit of production should be considered as part of the employment relationship analysis.

For the reasons explained, the Department finalizes § 795.105(d)(2)(iii) as proposed.

6. Additional Unlisted Factors

The National Restaurant Association stated that facts and factors not listed in § 795.105(d) may be relevant to the question of economic dependence even though they would not be as probative as the two core factors. This commenter expressed concern that future courts may ignore these unlisted but potentially relevant considerations in response to this rulemaking and requested that the Department revise the regulatory text to explicitly recognize that unlisted factors may be relevant.

While proposed § 795.105(c) already states that the five factors listed in § 795.105(d) are "not exhaustive,"[43] the Department agrees that it may be helpful to make this point more explicit. The Department is thus adding § 795.105(d)(2)(iv), which states that additional factors not listed in § 795.105(d) may be relevant to determine whether an individual is an employee or an independent contractor under the FLSA. As with any fact or factor, such additional factors are relevant only to the extent that they help answer whether the individual is in business for him- or herself, as opposed to being economically dependent on an employer for work. Factors 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. These unlisted factors are less probative than the core factors listed in § 795.105(d)(1), while their precise weight depends on the circumstances of each case and is unlikely to outweigh either of the core factors .

[43] *See Silk*, 331 U.S. at 716 ("No one [factor] is controlling nor is the list complete.").

E. Focusing the Economic Reality Test on Two Core Factors

Proposed § 795.105(c) was intended to improve the certainty and predictability of the economic reality test by focusing the test on two core factors: (1) the nature and degree of the worker's control over the work; and (2) the worker's opportunity for profit or loss. This focus is an important corollary of the sharpened definition of economic dependence to include individuals who are dependent on a potential employer for work and to exclude individuals who are in business for themselves. The NPRM explained that these core factors, listed in proposed § 795.105(d)(1), drive at the heart of what is meant by being in business for oneself: such a person typically controls the work performed in his or her business and enjoys a meaningful opportunity for profit or risk of loss through personal initiative or investment. The other economic reality factors—skill, permanence, and integration—are also relevant as to whether an individual is in business for him- or herself. But they are less probative to that determination. For instance, it is not uncommon for comparatively high skilled individuals—such as software engineers—to work as employees, and for comparatively low skill individuals—such as drivers—to be in business for themselves. *See, e.g., Saleem*, 854 F 3d at 140; *Express Sixty-Minutes Delivery*, 161 F.3d at 306. In contrast, "[i]n ordinary circumstances, an individual 'who is in business for him- or herself' will have meaningful control over the work performed and a meaningful opportunity to profit (or risk loss)." 85 FR 60618. As such, "it is not possible to properly assess whether workers are in business for themselves or are instead dependent on another's business without analyzing their control over the work and profit or loss opportunities." *Id.*

The NPRM further explained that focusing on the two core factors is also supported by the Department's review of case law. The NPRM presented a remarkably consistent trend based on the Department's review of the results of appellate decisions since 1975 applying the economic reality test. Among those cases, the classification favored by the control factor aligned with the worker's ultimate classification in all except a handful where the opportunity factor

pointed in the opposite direction. And the classification favored by the opportunity factor aligned with the ultimate classification in every case.[44] These two findings imply that whenever the control and opportunity factors both pointed to the same classification—whether employee or independent contractor—that was the court's conclusion regarding the worker's ultimate classification.[45] *See* 85 FR 60619. In other words, the Department did not uncover a single court decision where the combined weight of the control and opportunity factors was outweighed by the other economic reality factors. In contrast, the classification supported by other economic reality factors was occasionally misaligned with the worker's ultimate classification, particularly when the control factor, the opportunity factor, or both, favored a different classification. *See id.* at 60621.

The NPRM thus provided that, given their greater probative value, if both proposed core factors point towards the same classification—whether employee or independent contractor—there is a substantial likelihood that is the individual's correct classification. This is because it is quite unlikely for the other, less probative factors to outweigh the combined weight of the core factors. In other words, where the two core factors align, the bulk of the analysis is complete, and anyone who is assessing the classification may approach the remaining factors and circumstances with skepticism, as only in unusual cases would such considerations outweigh the combination of the two core factors.

Numerous commenters welcomed proposed § 795.105(c)'s sharpening of the economic reality test by recognizing the two core factors' greater probative value on whether an individual is in business for him- or herself. For instance, the U.S. Chamber of Commerce stated that "[t]he Department's straightforward focus on two core factors presents a concise interpretation of

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[44] This is not to imply that the opportunity factor necessarily aligns with the ultimate classification, but rather that the Department is not aware of an appellate case in which misalignment occurred.

[45] The only cases in which an appellate court's ruling on a worker's classification was contrary to the court's conclusions as to the control factor were cases in which the opportunity factor pointed in the opposite direction. *See* 85 FR 60619 (citing *Paragon Contractors*, 884 F.3d at 1235–36, and *Cromwell,* 348 F. App'x at 61).

'economic dependency' grounded in the Act's statutory definition of 'employ' and 'employer,' consistent with Supreme Court precedent, and well-reasoned courts of appeals' decisions." The American Bakers Association (ABA) likewise "supports the Department's position that the two most probative 'core' factors for determining independent contractor status under the FLSA are the degree and nature of an individual's control over their work, and the opportunity for profit (or loss)." *See also*, *e.g.,* ATA; CPIE; National Restaurant Association; SHRM. Even one commenter who did not generally support this rulemaking "agreed with the Department that the two main factors, control and opportunity for profit or loss, should be given greater weight." Owner-Operator Independent Driver Association (OOIDA).

Many commenters objected to focusing on the two core factors. Broadly speaking, they raised three interrelated concerns. First, commenters contended that elevating the two core factors is inconsistent with the economic reality test, which they asserted requires that factors be either unweighted or weighted equally. *See, e.g.,* NELP (objecting to "elevating two narrow 'core' factors"); SWACCA; Commissioner Slaughter of the Federal Trade Commission (FTC). Second, commenters contended that focusing on two core factors would narrow the scope of who is an employee (as opposed to an independent contractor) under the FLSA. *See, e.g.*, NELP ("The NPRM narrows the FLSA test for employee coverage[.]"); State AGs ("The Proposed Rule's interpretation of [employment under] the FLSA is unlawfully narrow."); Appleseed Center ("The Department of Labor is trying to impermissibly narrow this definition"); NCFW (objecting to "agency's proposed attempt to narrow the definition of employee"). Third, commenters asserted that focusing on two core factors would impermissibly restrict the set of circumstances that may be considered when assessing whether a worker is an employee or independent contractor under the FLSA. TRLA ("proposed reformulation would eliminate … any consideration of [the skill and permanence] factors"); NELA (objecting to "a narrow, control-dominated inquiry"); State AGs (objecting to proposed rule because it "narrows several

areas of inquiry.").[46] The Department responds to each of the above concerns below, and then addresses other requests relating to the focus on the two factors.

1. Focusing on two core factors is consistent with the economic reality test

Many commenters contended that emphasizing core factors over others would violate a requirement that economic reality factors be unweighted or weighted equally. According to SWACCA, "[t]he proposed weighted rule is a novel concept and a departure from existing caselaw." *See also, e.g.*, NELA (objecting to "emphasizing certain factors over what should be the 'ultimate inquiry'"). FTC Commissioner Slaughter likewise objected that "[t]he Proposal takes the Supreme Court's five factor test, where all five factors are given equal weight, and narrows it down to focus on only two [core] factors." *See also* Appleseed Center ("[A]ll are given equal weight."); Senator Patty Murray (suggesting that "DOL afford [factors] equal weight"). NELP appeared to agree with the Department that the economic reality test may focus on certain factors over others, but asserted that "the factor of integration into the business of another should be weighed heavily," rather than the proposed rule's two core factors. Several commenters further relied on an age discrimination case to contend that the economic reality test "cannot be rigidly applied" and that "[i]t is impossible to assign to each of these factors a specific and invariably applied weight." NELP (quoting *Hickley v. Arkla Indus., Inc*., 699 F.2d 748, 752 (5th Cir. 1983)); *see also* Michigan Regional Council of Carpenters (MRCC) (same).

The Department disagrees that the economic reality test requires factors to be unweighted or equally weighted. Each time the Department or a court applies the test, it must balance

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[46] There are two distinct concepts within the economic reality test—and any test for employment status—that can be broad or narrow. The first concept is the test's standard for employment, which is economic dependence. *See Bartels*, 332 U.S. at 130. The second concept is the set of circumstances that may be considered as part of the test, which is the "circumstances of the whole activity." *See Rutherford Food*, 331 U.S at 730. The breadth of these two concepts are not always logically related. For instance, the ABC test states that a worker is an employee unless the hiring party can establish that three criteria are met, *see*, *e.g.*, *Dynamex,* 416 P.3d at 35; thus, the ABC test considers a relatively narrow set of circumstances while imposing a broad standard for employment. While most commenters that objected to the narrowing of the economic reality test did not present the standard of employment and circumstance that may be considered as separate concepts, the Department addresses them separately.

potentially competing factors based on their respective probative value to the ultimate inquiry of economic dependence. In the very case that announced the economic reality factors, the Supreme Court listed five factors that are "important for decision" but did not treat them equally. *Silk*, 331 U.S. at 716. It instead emphasized the most probative factors, while de-emphasizing less probative ones in that case. The Court focused on the fact that coal unloaders "had no opportunity to gain or lose" to conclude they were employees under the SSA, while explaining the fact "[t]hat the unloaders did not work regularly was not significant." *Id.* at 717-18. The Court further focused on "the control exercised [and] the opportunity for profit from sound management" to conclude that truck drivers were independent contractors, without discussing any of the other economic reality factors. *Id.* at 719. Similarly, the Court in *Whitaker House* concluded that workers at issue in that case were employees based primary on considerations relating to control (*e.g.*, the workers were "regimented under one organization, manufacturing what the organization desires") and opportunity for profit (*e.g.*, the workers were "receiving the [piece rate] compensation the organization dictates" rather than "selling their products on the market for whatever price they can command"). 366 U.S. at 32-33.

As discussed in the NPRM, courts of appeals also emphasized facts and factors that are more probative of the economic dependence inquiry. *See* 85 FR 60620. In *Saleem*, the Second Circuit focused on facts relating to drivers' control over their work and their opportunity for profit or loss based on initiative or investment to conclude that they were independent contractors.[47] 854 F.3d at 138–39; *see also Agerbrink v. Model Service LLC*, 787 F. App'x 22, 25–27 (2d Cir. 2019) (denying summary judgement based solely on disputed facts regarding plaintiff's "control over her work schedule, whether she had the ability to negotiate her pay rate, and, relatedly, her ability to accept or decline work"). The Third Circuit in *Razak v. Uber*

[47] In particular, the *Saleem* court focused on: drivers' "considerable discretion in choosing the nature and parameters of their relationship with the defendant," "significant control over essential determinants of profits in [the] business," how they "invested heavily in their driving businesses," and the "ability to choose how much work to perform." 854 F.3d at 137–49.

Technologies took a similar approach by emphasizing disputed facts regarding "whether Uber exercises control over drivers"' and had "the opportunity for profit or loss depending on managerial skill" to deny summary judgment. 951 F.3d at 145–47.[48] And the Eight Circuit recently emphasized a process server's ability to determine his own profits by controlling hours, which assignments to take, and for which company to work, to affirm a jury verdict that he was an independent contractor. *See Karlson*, 860 F.3d at 1095.

Courts have repeatedly warned against the "mechanical application" of the economic reality factors when determining whether an individual is an employee or independent contractor. *See*, *e.g.*, *Saleem*, 854 F.3d at 139; *Superior Care*, 840 F.2d at 1059. Rather, the factors should be analyzed with the aim of answering the ultimate inquiry under the FLSA: "whether an individual is 'in business for himself' or is 'dependent upon finding employment in the business of others.'" *Scantland*, 721 F.3d at 1312 (quoting *Mednick*, 508 F.2d at 301-02). Commenters who object to focusing on the two core factors do not dispute this principle, and some affirmatively support it. For instance, NELA and the State AGs both stated that 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'" (quoting *Pilgrim Equip.*, 527 F.2d at 1311). NELA nonetheless believed that it would be inappropriate to "emphasiz[e] certain factors over what should be the 'ultimate inquiry': the worker's economic dependence on the putative employer." Emphasizing certain factors, however, would dilute the ultimate inquiry of economic dependence only if those factors were less probative of economic dependence than others. In contrast, emphasizing factors that are more probative would not dilute but rather focus the analysis on the ultimate inquiry under the FLSA. If NELA and the State AGs are correct that the economic reality factors must be "used to gauge the degree of dependence," then focusing on

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[48] The *Razak* decision also briefly addressed other factors, including a footnote on the "integral" factor and a discussion that was nominally about the permanence factor but actually concerned control: "On one hand, Uber can take drivers offline, and on the other hand, Plaintiffs can drive whenever they choose to turn on the Driver App, with no minimum amount of driving time required." 951 F.3d at 147 n.12.

factors that are more probative measures of economic dependence is not only permitted but preferred.

The 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.[49] *See* 85 FR 60619. Among the appellate decisions since 1975 that the Department reviewed, whenever the control factor and the opportunity factor both pointed towards the same classification—whether employee or independent contractor—that was the worker's ultimate classification. Put another way: in those cases where the control factor and opportunity factor aligned, had the courts hypothetically limited their analysis to just those two factors, it appears to the Department that the overall results would have been the same. One commenter attempted to dispute this finding. TRLA asserted that, in the following four cases, farmworkers who were found to be employees "might be reclassified as independent contractors based on the NPRM's two core factors:" *Driscoll*, 603 F.2d 748; *Lauritzen*, 835 F.2d 1529; *Perez v. Howes*, 7 F. Supp. 3d 715 (W.D. Mich. 2014); and *Cavazos v. Foster*, 822 F. Supp. 438 (W.D. Mich. 1993). However, the court in each of these cases actually concluded that the control and opportunity factors both favored employee classification,[50] and thus the farmworkers would

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[49] Some courts have explicitly acknowledged that facts related to the control factor were more probative than facts related to other factors. For instance, the court in *Saleem* stated that "whatever 'the permanence or duration' of Plaintiffs' affiliation with Defendants, both its length and the 'regularity' of work was entirely of Plaintiffs' choosing." 854 F. 3d at 147 (citation omitted). When discussing "the use of special skills," the court in *Selker Brothers* similarly explained that, "[g]iven the degree of control exercised by Selker over the day-to-day operations of the stations, this criterion cannot be said to support a conclusion of independent contractor status." 949 F.2d at 1295.

[50] *Driscoll*, 603 F.2d at 755 ("The appellants' affidavits, which must be taken as true for summary judgment purposes, plainly disclose that [defendant] possesses substantial control over important aspects of the appellants' work"); *id.* ("The appellants' opportunity for profit or loss appears to depend more upon the managerial skills of [defendant]"); *Lauritzen*, 835 F.2d at 1536 ("The defendants exercise pervasive control over the operation as a whole."); *id.* ("The Sixth Circuit [in a prior case] found that the migrant workers had the opportunity to increase their profits through the management of their pickle fields....We do not agree."); *Howes* 7 F. Supp. 3d at 726, *aff'd sub nom*. *Perez v. D. Howes LLC*, 790 F.3d 681 (6th Cir. 2015); ("Accordingly, [the control] factor weighs in favor of a finding that the workers were employees."); *id.* ("[W]orkers could simply increase their wages by working longer, harder, and smarter—this does not

have been found to be employees even if those courts had hypothetically based is decision solely on the core factors. These cases therefore reinforce the Department's conclusion that the control and opportunity factors have been consistently afforded significant weight in the economic dependence inquiry.

The consistent empirical trend indicating that the control and opportunity factors have been afforded greater weight should be unsurprising given their greater probative value. As the NPRM explained, those two factors "strike at the core" of what it means to be in business for oneself, 85 FR 60612, and therefore they are more probative of the ultimate inquiry under the FLSA: "whether an individual is 'in business for himself' or is 'dependent upon finding employment in the business of others.'" *Scantland*, 721 F.3d at 1312 (quoting *Mednick*, 508 F.2d at 301-02). No commenters offered a persuasive counterargument to the commonsense logic that, when determining whether an individual is in business for him- or herself, the extent of the individual's control over his or her work is more useful information than, for example, the skill required for that work. Nor did any commenters effectively rebut that the extent of an individual's ability to earn profits (or suffers losses) through initiative or investment is more useful information than, for example, how long that individual has worked for a particular company.

NELP appeared to agree with the Department that emphasis should be given to factors that are most probative to the ultimate inquiry of whether an individual is in business for him- or herself, but disagrees as to what those factors should be. In particular, NELP asserted that "the factor of integration into the business of another should be weighed heavily and in fact is ultimately the test. If the work is integrated this leads to the conclusion that the worker is not independently running a business."[51]

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constitute an opportunity for profit."); *Cavazos*, 822 F. Supp. at 442 ("Their lack of control supports plaintiffs' claim that they are employees."); *id.* at 443 (noting that the work relationship "does not afford plaintiffs an opportunity for profits").

[51] According to NELP, this language is a quotation from AI 2015-1 that was withdrawn in 2017. But that withdrawn guidance does not contain the quoted language.

NELP correctly defines the economic dependence inquiry as "whether a person is in business for themselves and therefore independent, or works instead in the business of another and dependent on that business for work." If a worker is economically dependent on an employer for work, the worker is not in business for him- or herself. NELP then defines the "integration factor" to mean the exact same thing: "If the work is integrated this leads to the conclusion that the worker is not independently running a business." NELP is correct that, when defined as such, "the factor of integration … in fact is the ultimate test," but that factor would not be helpful in ascertaining a worker's employment status because it simply restates the question. The Department, courts, and the regulated community would still have to determine which factors to analyze to determine whether an individual is in business for him- or herself. The Department therefore declines to create and give greater weight to NELP's concept of the "integration factor" and continues to believe that the control and opportunity factors are the most probative as to whether an individual is in business for him- or herself as a matter of economic reality.

NELP and MRCC quoted dicta from an age-discrimination case that "[i]t is impossible to assign to each of [the economic reality] factors a specific and invariably applied weight." *Hickley*, 699 F.2d at 752.[52] This proposed rule, however, does not run afoul of *Hickley*'s dicta. As an initial matter, neither core factor individually has "a specific and invariably applied weight" because the proposed rule does not state that one necessarily outweighs the other. The Department nonetheless recognizes that proposed § 795.105(c)' statement that "each [core factor] is afforded greater weight in the analysis than is any other factor" may be overly rigid. For reasons explained above, certain types of facts—*i.e.*, those falling within the control and

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[52] The court in *Hickley* applied the economic reality test in the context of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34, without opining whether that was the correct test under the ADEA. 699 F.2d at 752 ("Finding … there was no evidence … that Hickey was an employee under the more liberal 'economic realities' test used in FLSA cases, [but] express[ing] no opinion on whether it or one of the tests used in Title VII cases should ultimately be used to determine employee status in ADEA cases."). *Hickley*'s "specific and invariably applied weight" dicta appears in one FLSA case, *Parrish*, 719 F.3d at 380, as a *see also* parenthetical to support the proposition that economic reality factors should not be applied mechanically.

opportunity factors—are more probative than others regarding whether an individual is in business for him- or herself. But that does not necessarily mean the control or opportunity factors are entitle to greater weight in all cases. For example, it may be the case that, after all the circumstances have been considered, a core factor does not weigh very strongly towards a particular classification because considerations within that factor point in different directions. *See Cromwell*, 348 F. App'x at 61 (finding that "defendants here did not control the details of how the plaintiffs performed their assign jobs" but did have "complete control over [their] schedule and pay"). A core factor could even be at equipoise, in which case it would not weigh at all in favor of a classification. *See Johnson*, 371 F. 3d at 730 (concluding that competing facts regarding plaintiffs' opportunity for profit or loss meant that the "jury could have viewed this factor as not favoring either side"). In short, there is a subtle but important distinction that was not fully reflected in the NPRM's language between a factor's probative value as a general matter and its specific weight in a particular case. Probative value refers to the extent to which a factor encapsulates types of facts that illuminate the ultimate inquiry of whether workers are in business for themselves, as opposed to being dependent on an employer for work. The weight assigned to a factor in a particular case refers to how strongly specific facts within the factor, on balance, favors a particular classification. Considerations within a core factor may have significant probative value even though that factor, on balance, does not weigh heavily towards a classification in a specific case. The Department therefore revises § 795.105(c) to more clearly distinguish between a core factor's probative value as a general matter and its' weight in a specific case and to clarify that the core factors' greater probative value means that they typically (but not necessarily) carry greater weight . Thus it should be clear that the rule does not assign any factor a specific or invariable weight. In contrast, the approach favored by some commenters, including the Appleseed Center and Commission Slaughter, to give each factor "equal weight" would "assign to each of the factors a specific and invariably applied weight." *Hickley*, 699 F.2d at 752.

At bottom, the final rule's focus on two core factors thus does not depart from the economic reality test—it merely elucidates the factors' respective probative values that have always existed but never been explained. *Cf. Lauritzen*, 835 F.2d at 1539 ("Why keep [employers] in the dark about the legal consequences of their deeds." (Easterbrook, J., concurring)). As explained in more detail below, providing such clarification for the regulated community would not narrow the scope of who is an FLSA employee as opposed to an independent contractor. Nor would it narrow the circumstances that may be considered under the economic reality test.

2. The Proposed Rule Would Not Narrow the Standard for FLSA Employment

A number of commenters argued that focusing the economic reality test on the control and opportunity factors would narrow the standard for employment under the FLSA. The FLSA defines "employ" as including "to suffer or permit to work," 29 U.S.C. 203(g), and these commenters argued this definition should be interpreted to provide broad coverage in light of the Act's remedial purpose. *See, e.g.,* AFL-CIO; NELA; NELP; Senator Patty Murray; State AGs. Most of these commenters argued that the proposed rule is incompatible with the Act's broad definition of employment because focusing on the control factor would effectively adopt the narrower scope of employment under the common law control test. One commenter, however, had a different view: UPS argued that the proposed rule would adopt a narrower standard for employment by giving the control factor *too little* weight.

Discussing the proposed rule's consistency with the FLSA's standard for employment first requires an understanding of the Act's definitions. Commenters point out that the Act defines "employ" as including "to suffer or permit to work," 29 U.S.C. 203(g), but the Supreme Court has observed that, although broad, the Act's definitions are not clear regarding the scope of relationships that are included. *Rutherford Food*, 331 U.S. at 728 ("[T]here is in the [FLSA's text] no definition that solves problems as to the limits of the employer-employee relationship under the Act."). Courts of appeals have likewise found the definitions not to clearly indicate the

precise contours of FLSA employment. *See, e.g., Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522 (6th Cir. 2011); *Steelman v. Hirsch*, 473 F.3d 124, 128 (4th Cir. 2007).

As commenters also noted, the Supreme Court relied on the FLSA's purpose and legislative history to interpret the "suffer and permit" language to encompass a more inclusive definition of employment than that of the common law. *Rutherford Food*, 331 U.S. at 727 (affirming that FLSA employment is not limited to the "common law test of control, as the act concerns itself with the correction of economic evils through remedies which were unknown at common law"); *see also Darden*, 503 U.S. at 326. The Supreme Court has "consistently construed the Act liberally in recognition that broad coverage is essential to accomplish [its] goal," *Tony & Susan Alamo*, 471 U.S. at 296, but at the same time, the Court also recognized that the "suffer or permit" definition "does have its limits." *Id*. at 295; *see also Portland Terminal*, 330 U.S. at 152 ("The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees."). No court has suggested that applying such limits (including the limit that bona fide independent contractors are not employees under the Act) cannot be reconciled with the Act's remedial purpose. *Cf. Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (*Encino* II) (warning against relying on "flawed premise that the FLSA 'pursues' its remedial purpose 'at all costs'" when interpreting the Act). Ultimately, "[t]he test of employment under the Act is one of 'economic reality.'" *Tony & Susan Alamo*, 471 U.S. at 301 (quoting *Whitaker House*, 366 U.S. at 33)). This rule applies such a test and does so with sufficient breadth consistent with the Act's remedial purpose.

While the phrase "economic reality" is on its face no clearer than the "suffer or permit" language, *see Lauritzen*, 835 F.2d at 1539 (Easterbrook J., concurring), decades of case law has refined its meaning. The Court determined that employees include "those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels,* 332 U.S. at 130. Courts of appeals have subsequently used *Bartels*'s concept of economic dependence to determine employment under the FLSA. *See, e.g.*, *Saleem*, 854 F.3d at 139; *Mr.*

W Fireworks, 814 F.2d at 1054; *DialAmerica*, 757 F.2d at 1385. Thus, the courts have interpreted the scope of employment under the Act's definition to include any individual who is "dependent upon finding employment in the business of others," and to exclude any individual who is "in business for himself." *Scantland*, 721 F.3d at 1312.[53] However, as noted in the need for rulemaking discussion, this principle has not always been applied consistently.

The Department agrees with this interpretation and further believes that the economic dependence standard developed by courts comports with the "suffer or permit" statutory text. As the NPRM explained: "An individual who depends on a potential employer for work is an employee whom the employer suffers or permits to work. In contrast, an independent contractor does not work at the sufferance or permission of an employer because, as a matter of economic reality, he or she is in business for him- or herself." 85 FR 60606 (citing *Saleem*, 854 F.3d at 139). Commenters generally agreed that employee versus independent contractor status under the FLSA is determined by the worker's economic dependence, and several of the above-mentioned commenters affirmatively supported this standard. For example, NELA stated that "[i]t is dependence that indicates employee status" (quoting *Usery*, 527 F.2d at 1311). And the State AGs explain that "[t]he ultimate concern is whether, as a matter of economic reality, the workers depend on someone else's business … or are in business for themselves" (quoting *Superior Care*, 840 F.2d at 1059).

Most commenters who objected to focusing the economic reality test on the two core factors were concerned that such an approach would narrow FLSA employment to the common law standard. For instance, NELA stated that "[b]y affording the control factor greater weight in the economic reality analysis, the Department slides back toward the common law agency test." *See, e.g.,* AFL-CIO ("[T]he proposed rule effectively collapses the FLSA's definition into the common law definition by giving primacy and controlling weight to the two factors of control

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[53] Courts apply this economic dependence standard for employment in the employee-versus-independent contractor context, but use different approaches in other contexts. *See, e.g.*, *Glatt v. Fox Searchlight Pictures*, 811 F.3d 528 (2d Cir. 2016).

and opportunity for profit and loss."). The implied logic behind this concern is that if one test gives greater weight to a factor that is also given greater weight by a second test, the two tests necessarily have an equal scope of employment. But that does not follow.

A comparison with the ABC test is illustrative. That test creates a presumption of employee status, which can be overridden only if all three factors are established. One of the ABC test's factors is "whether the worker is free from the control and direction of the hiring entity." This factor is given dispositive weight under certain circumstances: if the worker is controlled by the hiring party, then he or she is automatically an employee, regardless of other considerations. The common law control test also gives control dispositive weight. While both tests afford control greater weight than the economic reality test, one test (ABC) has a broader scope of employment than the economic reality test and the other (common law) has a narrower scope. The relative weight attached to a particular factor does not, by itself, determine whether the ultimate scope of employment is broad or narrow. Accordingly, it is not possible to compare the breadth of the standards for employment used by two tests simply by comparing the weight attached to a shared factor. Rather, it is necessary to consider how each test's factors are actually applied.

Under the common law control test, control is the ultimate inquiry: if an individual controls the work, then he or she would be an independent contractor rather than an employee. However, such control by itself would be insufficient to establish the worker as an independent contractor under the Department's rule. Other considerations, including the second core factor of opportunity for profit or loss, can outweigh the control factor and result in a classification of employee status. That is precisely what happened in *Paragon Contractors*, wherein the control and integral part factors weighed in favor of independent contractor classification but the court nonetheless held that the worker was an employee because the remaining factors, including opportunity for profit or loss, favored classification as an employee. *See* 884 F.3d at 1238. And even if the individual both controls the work and has a meaningful opportunity for profit or loss,

he or she still would not necessarily be classified as an independent contractor under the Department's rule because other factors may outweigh those two core factors in rare cases. In short, because the ultimate inquiry under the common law control test is the worker's right to control the manner and means by which the work is performed, such control by the worker disqualifies the worker from being an employee under that test, but more is needed under the rule's articulation of the economic reality test because economic dependence is the ultimate inquiry. Thus, the rule's standard for employment remains broader than the common law standard. Nor does the rule "slide[] back toward the common law agency test," as NELA contends, or otherwise narrow the standard of employment under the FLSA. As explained above, the standard for determining whether an individual is an employee under the FLSA or an independent contractor has always been economic dependence. The two core factors are more probative than other factors regarding whether an individual is in business for him- or herself, as opposed to being dependent on an employer for work. Neither NELA nor likeminded commenters dispute this specific claim. NELA further recognized that economic reality factors must be "used to gauge the degree of dependence." If so, the test should focus on core factors that are more probative measures of dependence. Doing otherwise would serve no purpose other than to make regulations more confusing, thereby reducing compliance and driving up the transaction cost of a lawful business practice.

UPS expressed the opposite concern as NELA and likeminded commenters, asserting that the proposed rule did not give enough weight to the control factor. According to UPS, treating control as a factor to be balanced rather than giving it dispositive weight "leaves open the possibility that a worker could be classified as an 'independent contractor' even when the common-law control factor indicated employee status." The potential for such an outcome implies that FLSA employment may be narrower than the common law standard in certain circumstances.

As an initial matter, UPS's concern that the control factor may be outweighed by other considerations even when it indicates employee status also applies to every prior articulation of the economic reality test—indeed more so—because none of them gave the control factor greater weight, much less dispositive weight. The rule addresses UPS's concern because it explicitly identifies control as a core factor that is less likely to be outweighed by other factors. More importantly, UPS's concern could materialize only if the control factor were balanced against other factors without regard for the ultimate inquiry for FLSA employment. Courts have cautioned against such "mechanical application" of the economic reality factors and have instead instructed that all factors should guide the analysis of whether the individual is in business for him or herself or is dependent on others for work. *See, e.g.*, *Saleem*, 854 F.3d at 140. For these reasons, the Department does not share UPS's concern that not giving dispositive weight to the control factor results in a standard for employment that is narrower than the common law.[54]

3. The Rulemaking Will Not Restrict the Range of Considerations within Economic Reality Test

A number of commenters contend that the proposed rule's focus on the two core factors is inconsistent with case law requiring the "circumstances of the whole activity" to be considered as part of the inquiry into economic dependence. State AGs (quoting *Rutherford Food*, 331 U.S. at 730); *see also, e.g.*, NELA ("The economic reality inquiry therefore cannot be answered without 'employ[ing] a totality-of-the-circumstances approach.'" (quoting *Baker*, 137 F.3d at 1441)); *see also* Senator Patty Murray ("No one test factor is controlling, nor is the list exhaustive."); TRLA (same).

The Department agrees with commenters that the circumstances of the whole activity should be considered as part of the economic reality inquiry. *See* 85 FR 60621 ("Other factors may also be probative as part of the circumstances of the whole activity"). While all

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[54] In any event, courts have foreclosed UPS's requested remedy of giving the control factor dispositive weight to determine employee status. *See, e.g.*, *Silk*, 331 U.S. at 716 ("No one factor is controlling); *Keller,* 781 F.3d at 807 ("No one factor is determinative."); *Baker*, 37 F.3d at 1440 ("None of the factors alone is dispositive.").

circumstances must be considered, it does not follow that all circumstances or categories of circumstance, *i.e.*, factors, must also be "given equal weight." *See e.g.*, FTC Commissioner Slaughter; Appleseed Center. Assigning one factor less weight than another does not restrict the circumstances being considered because the very act of determining relative weight requires considering both factors.

As explained above, each factor should be analyzed in accordance with its probative value to the ultimate inquiry of whether an individual is in business for him or her-self. To be sure, the specific weight of the factors depends on specific circumstances. The control and opportunity factors are nonetheless more probative than other factors in determining whether an individual is in business for him- or herself. As such, it is appropriate to recognize, as the proposed rule does, that these two more probative factors should typically carry greater weight than other factors. Doing so would not, as TRLA contends, "eliminate … any consideration of [other] factors that have often been regarded as probative in the farm labor context." The proposed rule explicitly permits other factors to outweigh the two core factors if the specific circumstances of the case—whether in the farm labor context or another contexts—warrants such a result. In order to determine whether the combined weight of the two core factors are outweighed or not by other factors, it is necessary to consider both sets of factors. Nor would it make any "single factor determinative by itself." *Hopkins*, 545 F.3d at 343. Neither of the core factors can be "determinative by itself" because there is a second core factor against which each is balanced. Even when both core factors align, they are not "controlling" because their combined weight can still be outweighed by other considerations.

4. Other comments regarding the focus on the two core factors

PAM and Global Tranz requested that the Department create a "bright-line test" that "would be limited to the two 'core factors' already identified in the Proposed Rule: (1) the nature and degree of the individual's control over the work, and (2) the individual's opportunity for profit or loss." *See also* Cetera Financial Group (CFG) ("we believe it would be appropriate for

the Department to limit the criteria employed in the economic dependence analysis to the two Core factors and eliminate the others"). According to these commenters, a two-factor test would be even clearer and simpler than the proposal to focus the test on the two core factors, while still considering other factors. Other commenters requested that the Department eliminate one or more of the non-core factors listed in § 795.105(d)(2) from the economic reality test because such factors have little to no probative value in some circumstance, and may sometimes send misleading signals regarding an individual's classification. CWI and the National Restaurant Association asked the Department to eliminate the skill required factor; SHRM and the U.S. Chamber of Commerce were among several commenters who suggested that the Department eliminate the permanence factor; and ATA, NDHA, and others requested eliminating the integrated unit factor.

The Department believes that the two core factors of control and opportunity are always probative as to whether an individual is in business for him- or herself. The Department further agrees with the above commenters that the other factors are less probative and may have little to no probative value in some circumstances. *See, e.g.*, *Silk*, 331 U.S. at 718 ("That the unloaders did not work regularly is not significant."). However, "circumstances of the whole activity should be examined" as part of the economic reality test, meaning that the other factors should be considered in all cases even if they are not always probative once considered. *DialAmerica Mktg., Inc.*, 757 F.2d at 1382. If a factor is probative in some situations but not in others, there is still a need to consider that factor to determine whether it is probative in a particular case. Eliminating the non-core factors from consideration would therefore be warranted only if those factors lacked probative value in all circumstances—that is, if there was never a need to even consider whether they had probative value.

Because non-core factors are probative in many circumstances, the Department believes it would be inappropriate to eliminate them. In response to commenters' concern that non-core factors may not always be probative, the Department is making non-substantive revisions to

clarify that the two core factors are always probative as to whether an individual is in business for him- or herself, but there may be circumstances where one or more of the non-core factors, upon consideration, has little or no probative value.

Several commenters requested that the Department revise § 795.105(c) to state that if the two core factors point towards the same classification, there is no need to consider any other factors. *See e.g.*, NRF ("if both of the core factors point in the same direction, then a court may consider only those two factors and end the analysis without examining the three additional possible factors identified by DOL"); SHRM (requesting revision "to ensure that if the Core Factors indicate the same status of the worker, no further analysis is necessary"). According to the SHRM, such an approach would "create clear expectations and stable grounds to build working relationships."

The Department believes that the economic reality test cannot be rigidly applied and concludes that its approach of giving certain factors greater weight and other factors lesser weight while retaining flexibility as to the degree of weight depending on the facts of the case best accounts for all of the circumstances that work relationships present. Commenters' requests would require the Department to state that the combined probative value of the two core factors—whatever that might be—always outweighs the combined probative value of other factors. The Department believes that will usually be the case, but does not rule out the possibility that, in some circumstances, the core factors could be outweighed by particularly probative facts related to other factors.

Several commenters effectively requested that the Department assign a specific relative weight to one core factor as compared to the other. CWI requested that the Department always weigh the two core factors equally, while the HR Policy Institute requested that the control factor always be given greater weight than the opportunity factor. The Department declines to implement both requests. The Department's review of U.S. Courts of Appeals cases since 1975 did not indicate that the control and opportunity factors should be weighed equally. Nor did that

review indicate that the control factor should always outweigh the opportunity factor. Indeed, in the few cases reviewed by the Department where the control and opportunity factors pointed towards different classifications, the ultimate classification aligned with the opportunity for factor. *See* 85 FR 60619 (citing *Paragon Contractors*, 884 F.3d at 1235-36, and *Cromwell*, 348 F. App'x at 61). Ultimately, the Department is confident in its conclusion that the two core factors are more probative than all other factors and that framework is logical, as described above. But the Department declines to assign an invariable relative weight between the two core factors.

Several commenters requested that the Department revise § 795.105(c) to establish a rebuttable presumption of employee or independent contractor status if both core factors indicate the same classification. Such a presumption would be rebuttable only by "substantial evidence to the contrary under all three [other factors]." ATA. According to ATA, a rebuttable presumption "[w]ould further reduce the possibility of courts unnecessarily and potentially selectively applying and weighing the three additional factors for preferred policy outcomes, which has been a concern with regard to the current test in some instances." As the NPRM explained, the Department considered but did not propose a rebuttable presumption based on alignment of the two core factors because it was concerned a formal presumption may be needlessly complex or burdensome. *See* 85 FR 60621. The Department further believes that emphasizing the importance of the two core factors provides sufficient clarity. As such, the Department declines to adopt a presumption-based framework.

CWI requested that the "the Final Rule spell out specifically that each of the Core Factors should be analyzed independently of the other, without overlap." The Department agrees with CWI that overlaps between economic reality factors, core or otherwise, should be minimized. As discussed in the NPRM and in this preamble, reducing such overlap is one of the reasons for this rulemaking. That said, the Department believes specific regulatory instructions against overlapping analysis of the two core factors is not necessary and may be confusing. The

Department believes proposed § 795.105(d)(1) articulates the two core factors without apparent overlap, and CWI does not identity any specific considerations that risk being analyzed under both factors. Language in the regulatory text warning against overlapping analysis may therefore confuse members of the regulated community by priming them to look for potential overlapping considerations when there are none. The Department therefore declines to add CWI's requested language.

In summary, the economic reality test examines the circumstances of the whole activity to determine whether an individual is in business for him- or herself, as opposed to being economically deponent on others for work. Not all facts or factors are equally probative (if they are probative at all) as to whether, as a matter of economic reality, an individual is in business for him- or herself. Treating them all as equal would not focus the inquiry on economic dependence, but rather would distort that analysis. In contrast, highlighting factors that are more probative would sharpen the test's focus on economic dependence.

The NPRM presented reasoning and evidence based on the Department's review of case law indicating that control and opportunity factors are more probative to whether an individual is in business for him- or herself, as opposed to being economically dependent. While not all commenters agree with this approach, commenters who object to it have not convinced the Department to change its original assessment. The Department therefore believes that it is appropriate to focus the economic reality test on the two core factors that are more probative to the test's ultimate inquiry. Such focus appropriately guides how factors should be balanced, while retaining flexibility in the test.

F. Proposed Guidance Regarding the Primacy of Actual Practice

Proposed § 795.110 stated that the actual practice of the parties involved—both of the worker (or workers) at issue and of the potential employer—is more relevant than what may be contractually or theoretically possible. The proposed rule explained that this principle is derived from the Supreme Court's holding that "'economic reality' rather than 'technical concepts' is to

be the test of employment" under the FLSA. *Whitaker House*, 366 U.S. at 33; *see also Tony & Susan Alamo*, 471 U.S. at 301 ("The test of employment under the [FLSA] is one of 'economic reality'" (citing *Whitaker House*, 366 U.S. at 33)).

Several commenters expressed support for proposed § 795.110. For example, ATA wrote that "[t]he general principle also is almost black letter law—substance is always more important than form—under virtually every regulation WHD enforces." The Center for Workplace Compliance described the language as "consistent with historical interpretation of the economic reality test by Federal courts and DOL." Other commenters complimented the proposal with little or no further explanation, *see* NHDA; New Jersey Civil Justice Institute; WPI, while HR Policy Association urged the final rule to go further by entirely disregarding the relevance of unexercised contractual or theoretical possibilities. WFCA supported proposed § 795.110, but asked the Department to elaborate in the final rule that "best indicator of the actual practices is whether a significant segment of the industry has traditionally treated similar workers as independent contractors or employees."

No worker advocacy organizations specifically commented in support of the provision, but several groups, including NELA, the Pacific Northwest Regional Council of Carpenters, and the Public Justice Center, quoted Judge Frank Easterbrook's observation from *Lauritzen*, 835 F.2d at 1545, that "[t]he FLSA is designed to defeat rather than implement contractual arrangements." The International Brotherhood of Teamsters similarly asserted that Congress "chose to define 'employment' in a manner that would allow the Act to be applied flexibly so that employers could not simply recalibrate their contractual arrangements with workers to evade coverage." Finally, NELP and 32 other organizations quoted Judge Learned Hand's observation from *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547 (2d Cir. 1914), *cert. denied*, 235 U.S. 705 (1915), that employment statutes from the early 20th century were intended to "upset the freedom of contract" between workers and businesses. *Id.* at 553.

Some business commenters expressed general support for proposed § 795.110, but requested edits to discount the relevance of voluntary choices on the part of an individual worker that implicate one or more of the economic reality factors described in proposed § 795.105(d), such as choosing to work exclusively for one business, accepting all available work assignments from the business, or declining to negotiate prices. *See, e.g.*, American Bakers Association; ATA; New Jersey Warehousemen & Movers Association (NJWMA); NRF; Private Care Association; Scopelitis, Garvin, Light, Hanson & Feary; U.S. Chamber of Commerce ("[T]he Chamber urges the Department clarify that so long as a business does not take actions to foreclose an individual from exercising certain rights, that the individual's choice to not exercise those rights does not diminish their indicia of independence in the relationship."). Some of these commenters asserted that allowing voluntary worker practices to influence classification outcomes would lead to costly and inefficient business decisions. *See* Dart Transit Company ("[T]he practical effect of [proposed § 795.110] is to require independent contractors to arbitrarily switch routes and carriers … simply in order to preserve their independent status"); Minnesota Trucking Association ("In effect, the motor carrier would have to restrict offering to the independent owner operator a route both find beneficial in order to ensure that the independent owner operator performs services for other motor carriers."). Others asserted that considering voluntary worker practices would lead to classification discrepancies between workers with similar contractual freedoms. *See* NRF; SHRM.

Some business commenters were flatly opposed to proposed § 795.110. SHRM wrote that "[a] focus on 'practice' as opposed to the contractual 'rights,' of the parties … unnecessarily de-emphasizes voluntariness of the contract itself and places ambiguity over parties' negotiations." The Customized Logistics and Delivery Association objected that worker classifications could turn on voluntary worker practices that a business may not know about (*e.g.*, whether particular workers perform labor for other companies), asserting that proposed § 795.110 "essentially

shift[s] the burden of proof to the alleged employer to establish a worker's status as an IC" and "could force mass reclassifications of ICs for motor carriers, and many other industries."

Finally, several commenters representing workers, as well as Senator Patty Murray and the State AGs, voiced opposition to proposed § 795.110 on the basis that emphasizing the primacy of an alleged employer's practices would establish an employee classification standard impermissibly narrower than the common law, which evaluates an alleged employer's "right to control."[55] In this regard, the State AGs compared proposed § 795.110 to the Department's interpretation in its recent Joint Employer final rule that "[a] potential joint employer must actually exercise—directly or indirectly—one or more … indicia of control to be jointly liable" (85 FR 2859). Winebrake & Santillo, LLC asserted that proposed § 795.110 conflicts with a statement from a recent Third Circuit opinion that "actual control of the manner of work is not essential; rather, it is the right to control which is determinative," *Razak*, 951 F.3d at 145, while Edward. Tuddenham commented that "[a]ll of the cases [the Department cited in its NPRM] to support the primacy of 'actual practice' are referring to the actual practices of workers and are not discussing analysis of employer controls." In rejecting the proposed rule's distinction between a potential employer's contractual authority to control workers and control that they actually exercise, Senator Murray asserted that contractual authority "provides a potential employer an incredible amount of de facto control over a worker … induc[ing] a worker to perform the work in the manner the employer prefers, suggests, recommends, or hints at, even if the employer does not ever command it." *See also* State AGs ("[R]eserved authority in an agreement, like the looming sword of Damocles, will often influence what the parties do[.]").

The Department has carefully considered the views and arguments expressed by commenters and decided to implement § 795.110 as proposed. As emphasized in the NPRM, and as the plain language of § 795.110 makes clear, unexercised powers, rights, and freedoms are not

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[55] Restatement (Second) of Agency § 2(3); *see also Commun. for Non-Violence v. Reid*, 490 U.S. 730, 751 (1989) (describing "the hiring party's right to control the manner and means by which the product is accomplished" as the overarching focus of the common law standard).

irrelevant in determining the employment status of workers under the economic reality test;[56] such possibilities are merely *less* relevant than powers, rights, and freedoms which are actually exercised under the economic reality test.[57] Affording equal relevance to reserved control and control that is actually exercised—by either party—would ignore the Supreme Court's command to focus on the "reality" of the work arrangement, *Silk*, 331 U.S. at 713, which places a greater importance on what actually happens than what a contract suggests *may* happen. Several Federal courts of appeals decisions have explicitly made this observation. *See, e.g.*, *Saleem*, 854 F.3d at 142 ("[P]ursuant to the economic reality test, it is not what [Plaintiffs] could have done that counts, but as a matter of economic reality what they actually do that is dispositive.") (citations omitted); *Parrish*, 917 F.3d at 387 ("The analysis is focused on economic reality, not economic hypotheticals."); *Scantland*, 721 F.3d at 1311 ("It is not significant how one 'could have' acted under the contract terms. The controlling economic realities are reflected by the way one actually acts." (citations omitted)). Moreover, as some commenters pointed out, prioritizing substance over form is consistent with the Department's general interpretation and enforcement of the FLSA. *See, e.g.*, 29 CFR 541.2 ("A job title alone is insufficient to establish the exempt status of an employee."); 29 CFR 541.603(a) (providing that employers violate the salary basis requirement for certain employees exempt under Sec. 13(a)(1) of the Act only when they demonstrate "an actual practice of making improper deductions");[58] 29 CFR 778.414

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[56] Entirely disregarding unexercised contractual rights and authorities would not be consistent with the Supreme Court's instruction in *Rutherford Food* to evaluate "the circumstances of the whole activity." 331 U.S. at 730; *see also Mid-Atl. Installation*, 16 F. App'x at 107 (determining that cable installers were independent contractors in part because they had a "right to employ [their own] workers"); *Keller*, 781 F.3d at 813 (citing as relevant "the fact that Miri never explicitly prohibited Keller from performing installation services for other companies" and finding "a material dispute as to whether Keller could have increased his profitability had he improved his efficiency or requested more assignments").

[57] In this respect, § 795.110's emphasis on actual practice differs from the treatment of control in the Department's partially invalidated Joint Employer rule, which provided that "[a] potential joint employer *must* actually exercise—directly or indirectly—one or more … indicia of control to be jointly liable." 85 FR 2859 (emphasis added).

[58] In a 2004 final rule amending this language, the Department rejected commenter arguments that the mere existence of a policy permitting improper deductions should disqualify an

("[W]hether a contract which purports to qualify an employee for exemption under section 7(f) meets the requirements … will in all cases depend not merely on the wording of the contract but upon the actual practice of the parties thereunder.").

The Department disagrees with commenters who assert that prioritizing the actual practice of the parties involved makes the economic reality test impermissibly narrower than the common law control test. In many instances, the actual practices of the parties will establish the existence of an employment relationship despite what a "skillfully devised" contract might suggest on paper. *Silk*, 331 U.S. at 715; *see*, *e.g.*, *Scantland*, 721 F.3d at 1313-14 ("Though plaintiffs' 'Independent Contractor Service Agreements' provided that they could 'decline any work assignments,' plaintiffs testified that they could not reject a route or a work order within their route without threat of termination or being refused work in the following days."); *Hobbs*, 946 F.3d at 833 (dismissing the fact that welders determined to be employees "could hypothetically negotiate their rate of pay"). In any event, because the ultimate inquiry of the economic reality test is "economic dependence," the test ensures coverage over more workers in the aggregate than the common law control test, notwithstanding its more nuanced interpretation of the control factor itself. *See Silk*, 331 U.S. at 716 (listing "*degrees* of control" as one of several non-dispositive factors in the economic reality test) (emphasis added).

It is true that, under the economic reality test, some workers subject to a potential employer's "right to control" may nevertheless qualify as bona fide independent contractors for other reasons. To the extent that this excludes some workers who might qualify as "employees" under a traditional common law test,[59] this is the logical outcome of a multifactor test where "no

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employer from claiming the Section 13(a)(1) exemption for salaried employees whose earnings and job duties otherwise qualify for exemption. "[Such an] approach … would provide a windfall to employees who have not even arguably been harmed by a 'policy' that a manager has never applied and may never intend to apply[.]" 69 FR 22122, 22180.

[59] *See Commun. for Non-Violence v. Reid*, 490 U.S. 730, 751 (1989) ("In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's *right* to control the manner and means by which the product is accomplished.") (emphasis added).

one [factor] is controlling." *Silk,* 331 U.S. at 716; *see also*, *e.g.*, *Selker Bros.*, 949 F.2d at 1293 ("It is a well-established principle that … neither the presence nor the absence of any particular factor is dispositive."). Moreover, the Supreme Court arrived at precisely this outcome in two of its seminal cases applying the economic reality test.

First, in *Silk*, the Court evaluated the employment status of owner-operator truck drivers who contracted to perform services exclusively for a motor carrier company, subject to a "manual of instructions … purport[ing] to regulate in detail the conduct of the truckmen in the performance of their duties." 331 U.S. at 709-710. Before reaching its own conclusion, the Court excerpted an analysis from the appellate court below noting that, "[w]hile many provisions of the manual, if strictly enforced, would go far to establish an employer-employee relationship between the Company and its truckmen … there was evidence to justify the [district] court's disregarding of it," including testimony that the manual was "impractical and was not adhered to." *Id.* at 716 n.11 (quoting *Greyvan Lines v. Harrison*, 156 F.2d 412, 415 (7th Cir. 1946)). Although the Court acknowledged "cases … where driver-owners of trucks or wagons have been held employees in accident suits at tort" (under the common law), the Court said it "agree[d] with the decisions below" that the owner-operator truck drivers were independent contractors, as "the total situation, including … the control *exercised* … marks these driver-owners as independent contractors." *Id.* at 718-19 (emphasis added).

The Court in *Bartels*, even more clearly illustrated of how the economic reality test's emphasis on actual practice may indicate independent contractor. There, the Court found that band members were not employees of a public dance hall that hired them for short-term gigs, despite a contract provision stipulating that the dance hall "shall at all times have complete control of the services which the [band members] will render under the specifications of this contract." 332 U.S. at 128. Again applying the economic reality test, the Court noted that a worker's employment 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 or workers." *Id.* at 130 (emphasis added). While the Court made clear that other economic reality factors (e.g., skill, permanence, profit) indicated that the band members were independent contractors, *id*. at 132, the Court implicitly found that the control factor did as well, noting that it was the band leader (and not the dance hall) which "organizes and trains the band … [and] selects [its] members." *Id.* at 132. In other words, notwithstanding the dance hall's contractual authority to "complete[ly] control" the band members, the actual practice of the parties made clear that the band members themselves controlled the work, as a matter of economic reality.

Contrary to the argument put forth by several worker advocacy commenters, the outcome and reasoning of the Supreme Court's decisions in *Silk* and *Bartels* show 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. In other words, while the economic reality test is broad in the sense that it covers more workers as a general matter, it does not necessarily include every worker considered an employee under the common law.

At the same time, the Department disagrees with the interpretation suggested by various business commenters that only worker practices which are affirmatively coerced by a potential employer may indicate employee status. Such 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.[60] Accordingly, courts applying the economic reality test have not hesitated to consider voluntary worker practices where such practices indicate economic dependence. *See Keller*, 781 F.3d at 814 ("[A] reasonable jury could find that the way that [the defendant] scheduled [the worker's] installation appointments made it impossible for [the worker] to provide installation services for other companies."). To be sure, the Department agrees that coercive behavior by a potential employer (e.g., vigilant enforcement

[60] 29 U.S.C. 203(g). *See also* 83 C.J.S. Suffer (1953) ("[T]o suffer work requires no affirmative act by a putative employer.").

of a non-compete clause, punishing workers for turning down available work, etc.) constitutes stronger evidence of employment status than voluntary worker practices (e.g., the mere existence of an exclusive work arrangement, the fact that a worker rarely turn down available work, etc.), but coercive action on the part of the potential employer is not a prerequisite for such worker practices to have import.

The Department believes that commenters' concerns that proposed § 795.110 will cause workers with similar contractual freedoms to be classified differently are overstated. Consistent with evaluating the "the circumstances of the whole activity" in a work arrangement, *Rutherford Food*, 331 U.S. at 730, courts have often considered the rights and practices of similarly situated workers affiliated with a particular business, arriving at a single classification outcome for the group of workers at issue. *See, e.g.*, *Freund*, 185 F. App'x. at 784 (finding independent contractor status in part because "although Freund did not hire any workers, other of Hi-Tech's installers did"); *Express Sixty-Minutes Delivery*, 161 F.3d at 305 (finding independent contractor status in part because "[t]he majority of drivers work for Express for a short period of time"); *cf. Mr. W Fireworks*, 814 F.2d at 1048-51 (finding employee status in part because "the overwhelming majority of operators did not engage in independent advertising" and "the vast majority of operators made only minor investments in the business"). Even where meaningful factual differences exist between workers, courts may separate them into multiple groups for separate collective analyses instead of making individualized determinations. *See, e.g.*, *Off Duty Police*, 915 F.3d at 1055-1062 (separate collective analyses of "sworn officers" and "nonsworn officers" who provide security and traffic control services); *DialAmerica*, 757 F.2d at 1383-88 (separate collective analyses of home researchers and distributors). Judicial application of the economic reality test to groups of workers has shown that classification outcomes cannot turn on one factor alone. *See*, *e.g.*, *Silk*, 331 U.S. at 719 ("In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation … that marks these driver-owners as independent contractors.").

In summary, finalized § 795.110's emphasis on the actual practices of the parties involved is not a one-way ratchet, applying selectively either for or against a finding of independent contractor status. Instead, as the examples in § 795.110 illustrate, the principle applies to every potentially relevant factor, and can weigh in favor of either an employee or independent contractor relationship. In some cases, the actual practice of the parties involved may suggest that the worker or workers are employees. *See, e.g.*, *Sureway Cleaners*, 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."); *DialAmerica*, 757 F.2d at 1387 (concluding that evidence showing workers were not doing similar work for any other businesses "although they were free to do so" indicates employee status). In other cases, it may suggest that the worker or workers at issue are independent contractors. *See Saleem*, 854 F.3d at 143 (concluding that black-car drivers were independent contractors in part because "many Plaintiffs … picked up passengers via street hail, despite TLC's (apparently under-enforced) prohibition of this practice"); *see also Silk*, 331 U.S. at 718-19; *Bartels*, 332 U.S. at 129. Section 795.110's focus on actual practice is a neutral interpretive principle, consistent with the way courts and the Department have long applied the FLSA's economic reality test. Accordingly, and contrary to the concerns expressed by some commenters, it should not disrupt specific industries or result in substantial worker reclassifications in either direction (*i.e.*, from employee to independent contractor status, or vice versa).

G. Other Comments

Many substantive comments were not directed towards a specific provision of the proposed rule but rather the rule as a whole. These comments addressed the following topics: (1) whether the proposed rule would create confusion or clarity for the regulated community; (2) whether the proposed rule would exacerbate or ameliorate misclassification of employees;

(3) whether the rule is consistent with the FLSA's purpose; (4) whether Congressional inaction prohibits this rulemaking; and (5) whether the Department may depart from its prior practice.

1. Whether the Rulemaking Will Create Confusion or Clarity

Commenters from the business and freelance community generally expressed the view that the proposed rule would improve clarity regarding which workers are independent contractors versus employees under the FLSA. For example, the U.S. Chamber of Commerce stated that "[t]he Proposed Rule would provide long-awaited and much needed structure and clarity to the evaluation of worker relationships under the Act." SHRM agreed that "[t]he Proposed Rule is necessary to provide certainty and consistency to businesses and workers." *See also* CWI; WPI; ATA; NRF; National Restaurant Association. Freelancers and groups that represent them echoed this message, with the CPIE, for instance, stating that "[w]e believe the proposed guidance would provide greater clarity and predictability in the application of the 'economic realities' test to independent entrepreneurs and their clients." *See also* Fight for Freelancers. Individual commenters who identified themselves as freelancers or small business owners overwhelmingly agreed that the rule would improve legal clarity. For example, one individual commenter who believed that "independent contracting … kept [her] family afloat when [she] unexpectedly became a single mom" stated that "[t]his proposed rule is simple to understand and provides necessary clarity for both employers and individuals like myself that want to engage in freelancing." Another individual who identified himself as a small business owner believed that "[t]he regulations proposed seem to provide clarity for determining an individual's status as an employee or independent contractor under the Fair Labor Standards Act."

Some government and union commenters took the opposite view. The State AGs, for instance, asserted that "this rule will create confusion, not clarity" in part because they believe it "departs from the statutory text and Supreme Court precedent and is contrary to established application of the economic reality test." FTC Commissioner Slaughter expressed concern that

the proposed rule would "create legal confusion around the labor exemption to the antitrust laws." The AFL-CIO argued that "the proposal is likely to increase rather than decrease confusion because it does not clearly define 'an integrated unit of production.'"

The Department continues to believe that the rule will improve clarity because it clarifies the meaning of economic dependence, which determines FLSA employment, and aligns the economic reality test to more accurately analyze that concept by, among other things, highlighting the two core factors that are most probative to the inquiry. The rule does not depart from the statutory text, which courts have interpreted to define FLSA employment based on the concept of economic dependence on which this rule focuses. Nor does the rule depart from any Supreme Court precedent because it continues to consider the circumstances of the activity as a whole to analyze whether workers, as a matter of economic reality, depend on another business for work, or are in business for themselves. The Department further disagrees with the State AGs that the rule departs from the "established application of the economic reality test." The final rule takes into account facts and factors that have historically been part of the economic reality test, and decades of appellate decisions indicating that the two core factors frequently align with the ultimate determination of economic dependence or lack thereof. *See* 85 FR 60619-21. As one comment stated, the rulemaking "synthesizes previous understandings of the independent contractor rule," as opposed to departing from them. *See* Farren and Mitchell.

The Department does not believe this final rule will cause confusion regarding the labor exemption to antitrust laws because, as explained by FTC Commissioner Slaughter, that exemption is governed "[u]nder the Clayton Act and the Norris-La Guardia Act." In contrast, this rule's application is limited to the FLSA, and therefore, would not affect the labor exemption to antitrust laws established by other statutes. Finally, for reasons explained in the NPRM and this preamble, the Department believes this rule's articulation of the "integrated unit" is clearer than the prior "integral part" articulation. For added clarity, the Department added a pair of examples in § 795.115 to further illustrate application of the "integrated unit" factor.

For these reasons, the Department believes the final rule will result in greater clarity.

2. Whether the Rulemaking Exacerbates or Ameliorates Misclassification

Many commenters expressed concern that the proposed rule would exacerbate the misclassification of employees as independent contractors. *See, e.g.*, Equal Justice Center; Employee Rights Center; NELP; State AGs; TRLA. According to these commenters, the proposed rule would make it easier for an unscrupulous employer to classify its employees as independent contractors, and they cite statistics that purport to show high rates of misclassification in support of that contention. Several other commenters took the opposite position and asserted, for example, that "[c]larifying the application of the test for independent contractor status will promote compliance with labor standards under the FLSA and, in turn, reduce worker misclassification." Opportunity Solutions Project (OSP); *see also, e.g.*, TCA ("[t]he increased clarity provided by the [proposed rule] would likely lead to reduced misclassification."); IAW ("This rule will clear up misclassifications"); Financial Services Institute ("we agree that it will reduce worker misclassification and litigation"). These commenters also presented reports that dispute the widespread occurrence of misclassification. *See, e.g*. CWI; U.S. Chamber of Commerce; WPI.

FLSA employee versus independent contractor status is determined in terms of economic dependence. Misclassification occurs when an individual who is economically dependent on a business is classified by that business as an independent contractor and treated as such. This can occur inadvertently because the business misunderstands the concept of economic dependence or incorrectly analyzes factors to assess the concept. It can also occur intentionally. This final rule clearly defines economic dependence and explains how to assess facts and factors to evaluate whether that dependence exists. It discards misleading and confusing interpretations of that concept developed over the years and emphasizes the essential aspects. A clearer test means more businesses will better understand their obligations under the FLSA and thereby inadvertently misclassify fewer workers. As one commenter who identified himself as a small

business owner explained: "we want to comply [with the FLSA] but we need guidance that allows us to know how to comply." A clearer test also means more workers will understand their rights under the FLSA and thereby will be better positioned to combat intentional misclassification through, for example, private litigation or complaints to the Department. Unscrupulous employers may also be deterred from intentional misclassification in the first place if workers better understand their legal rights. For these reasons, the Department believes the final rule is likely to reduce both inadvertent and intentional FLSA misclassification.

While several commenters asserted that the proposed rule will facilitate misclassification, the Department does not agree. The Department's final rule makes clear that a business may classify a worker as an independent contractor with greater confidence if the worker has control over key aspects of the work and a meaningful opportunity for profit or loss based on initiative or investment. Except in unusual cases, a worker who enjoys substantial control over the work and has opportunity for profit in abundant measures is, as a matter of economic reality, in business for him- or herself, and thus properly classified as an independent contractor. The rule thus makes it easier for a business and its workers to structure their work arrangements to create bona fide independent contractor relationships. But that effect of the final rule will help avoid misclassification, not encourage it.

As discussed in greater detail in the RIA at Section VI(D)(6), the Department has concerns regarding the reliability of statistics cited by commenters regarding the prevalence of misclassification. Even assuming commenters' statistics are accurate, however, they would merely estimate the current rate of misclassification rather than how that rate would change as a result of this rule. Insofar as the final rule will reduce misclassification, these statistics make this rulemaking even more urgent.

For the above reasons, the Department believes this rule will ameliorate rather than exacerbate misclassification of employees under the FLSA.

3. Whether the Rulemaking is Consistent with the FLSA's Remedial Purpose

A number of commenters asserted that this rule "conflicts with the FLSA's remedial purposes of protecting workers." State AGs; *see also, e.g.,* Pacific Northwest Council of Carpenters ("the Proposed Rule … is contrary to the statutory definitions and remedial purpose of the FLSA"). NELP, for instance, stated that "DOL's proposed test would leave behind workers in high growth sectors with high rates of wage theft, contrary to the purposes of the FLSA." And NELA indicated that, because "the FLSA is a remedial statute" its coverage should be construed liberally to adopt a standard for employment that is even broader than economic dependence.[61] Commenters that supported the proposed rule pointed that the FLSA is not intended to cover all workers and that "Congress intended to cut off [the FLSA's] coverage at a certain point to preserve the freedom of workers to operate as independent contractors." Scalia School; *see also* WPI ("Nothing in the text or legislative history of any Federal employment law indicates that Congress intended to supplant or displace independent work and require instead for all workers to be employees.").

The Supreme Court has cautioned against the "flawed premise that the FLSA 'pursues' its remedial purpose 'at all costs'" when interpreting the Act. *Encino*, 138 S. Ct. at 1142. The *Encino* II Court rejected the principle that FLSA's remedial purpose required exemptions to be narrowly construed, *id*, and courts of appeal have followed that logic to reject the corollary principle, articulated above by NELA, that the Act's remedial purpose requires its coverage to be construed broadly. *See Sec'y United States Dep't of Labor v. Bristol Excavating, Inc*., 935 F.3d 122, 135 (3d Cir. 2019) (rejecting broad reading of the FLSA based its remedial purpose); *Diaz v. Longcore*, 751 F. App'x 755, 758 (6th Cir. 2018) (same). Rather, "'a fair reading' of the FLSA, neither narrow nor broad, is what is called for." *Bristol*, 935 F.3d at 135 (quoting *Encino*,

[61] NELA specifically urged the Department to adopt the "ABC" test to determine whether a worker is an independent contractor or an employee under the FLSA. The Regulatory Alternative discussion at Section VI(G) provide further explanation why the Department is not adopting that test.

138 S. Ct. at 1142); *Diaz*, 751 F. App'x at 758 ("We must instead give the FLSA a 'fair' interpretation.").

"The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all *covered* workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best Freight Sys., Inc*., 450 U.S. 728, 739 (1981) (emphasis added). The Supreme Court, however, has long recognized held that the FLSA "was obviously not intended to stamp all persons as employees." *Portland Terminal Co.*, 330 U.S. at 152. As the State AGs stated, the "the FLSA must be interpreted with its 'remedial and humanitarian purpose … purpose' in mind to protect 'those who sacrifices a full measure of their freedom and talents to the use and profit of others.'" State AGs (quoting *Tenn. Coal, Iron. R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)). Workers who are economically dependent on an employer for work have sacrificed "freedom and talents to the use of profits of others," and therefore are covered by the Act as employees. But independent contractors use their "freedom and talents" to operate their own businesses, and thus fall outside of the FLSA's coverage. *See Saleem*, 854 F.3d 131, 139–40 (2d Cir. 2017) (noting that independent contractors are separate from employees in the context of the FLSA); *Karlson*, 860 F.3d 1089, 1092 (8th Cir. 2017) ("FLSA wage and hour requirements do not apply to true independent contractors."); *Scantland,* 721 F.3d at 1311 ("[The Act's] 'broad' definitions do not, however, bring 'independent contractors' within the FLSA's ambit.''); *Hopkins*, 545 F.3d at 342 (observing that the "FLSA applies to employees but not to independent contractors").

The Department believes the line between economically dependent workers who are covered by the FLSA and independent contractors who are not comports with the Act's purpose to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine*, 450 U.S. at 739. Independent contractors who are in business for themselves do not need protection against "oppressive working hours" because they are not economically dependent on any employer who could oppress them. Nor do they need protection from

"substandard wages" because they are not economically dependent on an employer that sets wages. Forcing workers who are in business of themselves into the FLSA's coverage would not protect them, and would instead unduly restrict their ability to operate their own businesses. Indeed, numerous individuals who identified as freelancers or independent contractors commented that being classified as an employee would undermine their ability to operate their own business. For example, one freelance translator lamented that "many of my clients became unwilling to work with me" when a state law required her to be classified as clients' employee. Another commenter identified himself "[a]s a self employed professional [who] do[es] NOT want to be forced into employment." As a final illustrative example, another commenter stated that "I have no desire to be an employee …. If I was required to be an employee, I would no longer be able to make money for my family from my home on my own schedule."

The Supreme Court has explained that the FLSA's "exemptions are as much a part of the FLSA's purpose as the [Act's] requirement[s]." *Encino*, 138 S. Ct at 1134. By the same logic, respecting the independence of workers whom the FLSA does not cover is as much a part of the Act's purpose as extending the Act's coverage to workers who need its protection. Denying FLSA coverage to workers who are economically dependent on an employer for work would result in workers loosing needed protection "from substandard wages and oppressive working hours." *Barrentine*, 450 U.S. at 739. But extending the Act's coverage to workers who, as a matter of economic reality, are in business for themselves would unduly restrict independent workers who neither need nor benefit from the Act's provisions. This rule sharpens the distinction between these two categories of worker and thereby furthers the Act's purpose to protect employee who need protection without burdening independent contractors who do not.

4. Whether Congressional Inaction Prohibits This Rulemaking

The American Federation of State, County, and Municipal Employees, AFL-CIO (AFSCME) asserted that, "[b]ecause Congress has legislatively ratified the existing six-factor Economic Reality test, the Secretary and Administrator are powerless to alter the standard. This

also means the Proposed Rule would fail the first step of the *Chevron* deference analysis and would be entitled to no deference by the courts." According to AFSCME, "when Congress re-enacts a statute without change, it is presumed to be aware of administrative and judicial interpretation of that statute and to have adopted those interpretations." Based on this principle, AFSCME reasoned that, because Congress did not revise the definition of "employ" when it amended the FLSA in 1966, it must have adopted the "integrated unit of production" factor articulated in *Rutherford Food*, 331. U.S. 730. Additionally, AFSCME asserted that Congress's 1983 decision to adopt the FLSA's definition of "employ" without revision in MSPA indicates that Congress implicitly adopted the "six-factor test [that] was well embedded as the interpretation of the FLSA's 'employ.'"

AFSCME's ratification argument is based entirely on the fact that Congress has not amended the FLSA's definition of "employ." The Supreme Court, however, has "criticized … reliance on congressional inaction" as a tool of statutory interpretation, cautioning that, "[a]s a general matter ... these arguments deserve little weight in the interpretive process." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A.,* 511 U.S. 164, 187 (1994). "And when … Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, [the Court has] spoken more bluntly: 'It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation.'" *Alexander v. Sandoval*, 532 U.S. 275, 292, (2001) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)). Congress has not "comprehensively revised" the Act's statutory scheme in a manner that would indicate Congressional approval of a judicially created six-factor test as the standard for FLSA employment.

Even if some insight could be gleaned from Congressional inaction, that insight would not support ratifying a specific and definitive six-factor test because there has never been a uniform test for Congress to ratify. The Supreme Court has never articulated a six-factor test, and

courts of appeals articulate the test differently. As discussed earlier, the Second Circuit combines two of the factors. The Fifth Circuit omits one factor, while the remaining circuits use a sixth, "integral part" factor that departs from the Supreme Court's consideration of "integrated unit of production." Some circuits analyze a "skill and initiative" factor, while others consider just "skill required." Some circuits analyze the investment factor by comparing the dollar value of the worker's investment against that of the hiring entity, while others analyze whether the worker's investment creates opportunities for profit or loss. Simply put, there is no single test that Congress could have impliedly ratified, nor did AFSCME suggest one.

For these reasons, Congress's inaction does not demonstrate that it ratified a specific six-factor economic reality test.

5. Whether the Rulemaking Improperly Departs from Prior Practice

Several commenters, including NELA, contended that the proposed rule would be an improper departure from the Department's prior practice. The rule is consistent with the Department's prior position that the ultimate inquiry for determining employee versus independent contractor status under the FLSA is whether an individual is, as a matter of economic reality, economically dependent on another for work or is instead in business for him- or herself. The rule is further consistent with the Department's longstanding position that all economic reality factors should be analyzed when answering that ultimate inquiry.

The Department acknowledges that the rule's focus on two core factors that are most probative to that ultimate inquiry is different from how the Department articulated the economic reality test in the past. "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). The Department has explained its reasoning for focusing the economic reality test on two core factors throughout the NPRM and this preamble. The Department further acknowledges that the rule lists economic reality factors in § 795.105(d) that correspond with how the Department has articulated those factors in the past, with a few modifications. The

Department explained its reasons for these modifications in the NPRM and in this preamble. This rule does not improperly depart from the Department's prior positions.

H. Examples

As discussed above, many commenters requested that the regulatory text contain examples of how the economic reality test would apply in the context of their specific industries or practices. The Department, however, prefers to adopt generally applicable principles as opposed to attempting to provide guidance for every potential scenario. The later approach would require the regulation be drafted as an exhaustive treatise that is neither accessible nor helpful for most members of the regulated community. It would also invariably omit many important types of circumstances and be more difficult to adapt to future industries and practices that neither the Department nor commenters could have conceived.

While the Department cannot provide examples for every conceivable scenario, it is adding § 795.115 to provide six illustrative examples that involve a variety of industries and specific facts. Due to the complexities of balancing multiple factors that encompass countless facts that are part of the totality of the circumstances, the Department does not believe it would be helpful to provide examples that make conclusions regarding workers' ultimate classifications. Rather, each illustrative example focuses on the classification favored by a specific economic reality factor within the context of the fact-specific scenario. The first example concerns the control factor in the context of the long-haul transportation industry. The second example concerns the opportunity factor in the context of the gig economy. The third example concerns the opportunity factor in the context of the construction industry and clarifies the concept of economic dependence. The fourth example concerns the permanence factor within the context of a seasonal hospitality industry. The fifth example concerns the reframed "integrated unit" factor within the context of the journalism industry. The sixth example also concerns the new "integrated unit" factor within the context of the journalism industry and is designed to

work with the fifth example to elucidate the distinction between when this factor favors classification as an employee versus independent contractor.

I. Severability

The Department proposed to include a severability provision in part 795 so that, if one or more of the provisions of part 795 is held invalid or stayed pending further agency action, the remaining provisions would remain effective and operative. The Department did not receive any comments on this provision, and finalizes it as proposed.

J. Amendments to Existing Regulatory Provisions at §§ 780.330(b) and 788.16(a)

Finally, in addition to the proposed addition of part 795, the Department proposed to amend existing regulatory provisions addressing independent contractor status under the FLSA in narrower contexts at 29 CFR 780.330(b) (tenants and sharecroppers) and 29 CFR 788.16(a) (certain forestry and logging workers). Specifically, the Department proposed to replace descriptions of the six economic reality factors WHD has historically used to evaluate independent contractor status under the FLSA with a cross-reference to the guidance provided in new part 795. While some commenters invoked the existing provisions at §§ 780.330(b) and 788.16(a) to justify opposition to proposed part 795, the Department did not receive any commenter feedback regarding the proposed amendment of these provisions. Accordingly, the Department finalizes amendments to these provisions as proposed.

BILLING CODE: 4510-27-P

V. 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, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. In the NPRM, the Department invited public comment on its determination that the proposal did not contain a collection of information subject to OMB approval under the PRA. A few commenters, while not

referencing the PRA directly, discussed records in their public comments. However, this was merely to note agreement that section 11 of the FLSA does not require the keeping of records regarding workers who are independent contractors. This final rule does not contain a collection of information subject to OMB approval under the PRA.

VI. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

A. Introduction

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.[62] 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. Because the annual effect of this rule is estimated to be greater than $100 million, this rule will be economically significant under section 3(f) of Executive Order 12866.[63]

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

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[62] *See* 58 FR 51735 (Sept. 30, 1993).

[63] The entirety of the estimated costs from this deregulatory action, which exceed the $100 million threshold and relate strictly to familiarization, fall in the first year alone. The Department's Regulatory Impact Analysis further explains that these one-year costs are more than offset by continuing annual cost-savings of $495.8 million per year, accruing to the same parties that face the familiarization costs.

that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. 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.

B. Overview of Analysis

The Department believes this rule is likely to improve the welfare of both workers and businesses on the whole. With respect to businesses, the Department believes that the improved clarity offered by the rule will increase the efficiency of the labor market, allowing businesses to be more productive and decreasing their litigation burden. With respect to workers, broadly speaking, this rule is likely to have four categories of potential effects.

First, this rulemaking makes it easier for the millions of individuals who currently work as independent contractors and those who hire them to comply with the law. *See* Farren and Mitchell ("The proposed rule will likely reduce the cost of complying with the relevant Federal regulations."). Compliance cost savings will be shared between the independent contractors and businesses for which they work. *Id.* ("labor regulations are generally paid for by reductions in workers' total compensation").

Second, as explained above, the legal clarity from this rule is likely to reduce occurrences of misclassification by enabling firms and workers to better understand their respective obligations and rights under the FLSA. The Department agrees with commenters that misclassification harms workers and believes this rule will reduce those harms by facilitating compliance.

Third, legal clarity may encourage firms to create independent contractor arrangements for roles that did not previously exist, which may attract workers who otherwise would not work in that field. Such job creation unambiguously benefits workers and firms alike. *See* Dr. Liya Palagashvili ("[W]e got the impression from our interviews that the primary concern for startups

in terms of labor regulation or policy is mostly with regulation of independent contractors."), and Fuller et al. ("[M]ore than two-thirds of [women with advanced degrees or high-honors BAs] who drop out of the workforce would not have done so if they'd had access to more-flexible job arrangements.").[64]

Fourth, as a result of the improved clarity of the rule, businesses might convert existing positions from employee to independent contractor. This rule provides the most legal certainty to employers classifying a worker as an independent contractor if the worker substantially controls the work and has a meaningful opportunity for profit or loss based on initiative or investment. As such, a job conversion attributable to the legal clarity provided by this rule is likely to satisfy the control and opportunity criteria.[65] Businesses could reclassify existing employees as independent contractors by modifying their working relationship under the criteria of this rule, and would only be expected to do so upon determination that the clarity provided by this rule materially shifts the balance of tradeoffs. Business could also reclassify positions because the increased clarity of the rule confirms that their workers are actually already effectively independent contractors because their workers have substantial control over the work and have an opportunity for profit.[66] Any benefit to businesses of modified classifications would need to outweigh the costs, including any autonomy they cede to workers in such arrangements and any costs associated with implementation or modifying the classification itself, and such a relationship would need to be compatible with their business models. Further, generally speaking, workers have a choice of whether to agree to the new independent contractor arrangement. The overall

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[64] Joseph B. Fuller, et al, Rethinking the On-Demand Workforce, Harvard Business Review (Oct. 20, 2020).

[65] Section 795.105(c) indicates that a worker who lacks both control and opportunity is most likely an employee. As such, the Department believes this rule would discourage employers from converting such workers from employee to independent contractor status. Section 795.105(c) would not give an employer sufficient confidence that it could change the classification of a worker who has only control but not opportunity, or vice versa.

[66] The Department notes that the final rule does not, by its operation, change the classification of any employee. Notwithstanding the assertions of several commentators, as explained throughout the analysis, the rule does not narrow the definition of who is an employee under the FLSA.

effect of job conversion on workers is ambiguous and could vary from worker to worker, as discussed in more detail in section VI(D)(7) below. Impacts resulting from litigation avoidance due to increased clarity are discussed in section VI(F)(2).

The Department did not attempt to quantify all aspects of these four categories of potential impacts. In particular, the Department believes that significant uncertainty surrounds any attempt to quantify the number or nature of new independent contractor relationships that could arise as a result of this rule. Although the Department assumes that there will be an increase in the number of independent contracting relationships, the Department did not attempt to put a specific number on this figure and did not attempt to estimate how new independent contractors might differ from existing independent contractors. The Department is uncertain with respect to several key questions, including how many new workers will be added and what their characteristics will be, how many existing employee relationships may be converted to independent contractor status, and which industries, type or sizes of employers would be most impacted. Absent these data, the Department is not well positioned to generate a constructive estimate or model of impact on the change in independent contracting relationships due to the rule. Notwithstanding, the Department quantified certain other impacts associated with the final rule, including those to current independent contractors and businesses where sufficient data and theory afforded greater confidence in the resulting estimates.

Regarding the employees who may be negatively impacted by this rule, the Department has ascertained certain characteristics that it expects will be representative across this group. This rule provides a sharpening of the economic realities test, which is a marginal change that may impact firms' assessment of legal risk, leading to an increased chance that some employers will choose to reclassify certain positions from employee to independent contractor relationships. Because this analysis attempts to quantify the marginal impacts of this rule, if the only change is increased legal clarity, any resulting change in classification will most likely be limited to workers who already possess characteristics associated with independent contractor status,

including control and opportunity for profit or loss.[67] Due to the customary negotiation between firms and workers, most workers whose positions are converted will be in a position to influence the tradeoffs between employee and independent contractor status. The one group of workers for whom these assumptions may not apply is those workers paid the minimum wage, and whose positions already resemble characteristics of independent contractors. Workers earning the minimum wage may lack the bargaining power to fully offset the adverse effects triggered by the job conversion; however, independent contractor status often carries flexibilities that may further offset some of these effects, albeit non-monetarily. Further, on one hand, these workers likely do not have extensive benefits coverage, but on the other hand, they may qualify for access to benefits from other means. There are approximately 370,000 workers over the age of 19 who earn the minimum wage, which represents 0.24 percent of the workforce. It is unclear how many of these jobs could be converted to independent contractor status without material modifications to the position or substantive negotiation on overall compensation, but it is not likely to be many. Further, many of these workers may have access to health insurance coverage via a spouse or partner, a parent, or a government program (Medicaid, Medicare, Tricare, etc.). For these reasons, the Department does not expect there to be many current employees whose positions are converted to independent contractor relationships without meaningful ability to influence the terms of the new position in a way that mitigates deleterious impacts of the resulting tradeoffs.

The Department estimates there were 10.6 million workers who worked at any given time as independent contractors as their primary jobs in the United States in 2017 (6.9 percent of all workers), the most recent year of data available. Including independent contracting on secondary jobs results in an estimate of 18.9 million independent contractors (12.3 percent of all workers). The Department discusses other studies estimating the total number of independent contractors, ranging from 6.1 percent to 14.1 percent of workers (see Table 2 in VI.C.2). Due to uncertainties

[67] For greater discussion on this and other points in this summary, please see Section XXXX on Job Conversion.

regarding magnitude and other factors, the Department has not quantified the potential change to the aggregate number of independent contractors that may occur as a result of this rule. Furthermore, the Department's analysis relies on data collected prior to 2020, which reflects the state of the economy prior to the COVID-19 pandemic. The Department acknowledges that data on independent contractors could look different during the pandemic and following its economic effects, but does not yet have information to determine how the number of independent contractors could change nor whether these changes would be lasting or a near term market distortion.[68]

The Department estimates regulatory familiarization costs to be $370.9 million in the first year. The Department estimates cost savings due to increased clarity to be $447.1 million per year, and cost savings due to reduced litigation to be $48.7 million per year. This results in a 10-year annualized net cost savings of $452.4 million using a 3 percent discount rate and $443.0 million using a 7 percent discount rate.[69] For purposes of Executive Order 13771, the Department calculated the difference between the total cost savings and the total costs in $2016, discounted over a perpetual time horizon using a 7 percent discount rate beginning in 2021 when the rule will take effect. This results in an annualized net cost savings over a perpetual time horizon of $315.5 million.[70] Other anticipated costs, benefits, and cost savings are discussed qualitatively.

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[68] Recent studies and news reports suggest that more individuals are working under freelance or independent contractor arrangements during the pandemic. *See, e.g.,* Press Release, New Upword Study Finds 36% of the U.S. Workforce Freelance Amid the COVID-19 Pandemic, Sep. 15, 2020, available at https://www.upwork.com/press/releases/new-upwork-study-finds-36-of-the-us-workforce-freelance-amid-the-covid-19-pandemic; Kim Mackrael, In the Covid Economy, Laid-Off Employees become New Entrepreneurs, Wall Street Journal, Nov. 18, 2020; Uri Berliner, Jobs in the Pandemic: More Are Freelance and may stay that way forever, NPR, Sep. 16, 2020; Jon Younger, A New Payoneer Report Shows Covid 19 is Accelerating Freelance Growth, Forbes, Sep. 1., 2020.

[69] Discount rates are directed by OMB. *See* Circular A-4, OMB (Sept. 17, 2003).

[70] $332.9 million - $17.4 million = $315.5 million. Per OMB guidelines, Executive Order 13771 data is represented in 2016 dollars, inflation-adjusted for when the rule will take effect.

Table 1: Summary of Rule Impacts ($2019 Millions)

Impact	Year 1	Years 2 - 10	Annualized Values [a]	
			7% Discount	3% Discount
Regulatory Familiarization Costs				
Establishments	$152.3	$0.0	$21.7	$17.9
Independent Contractors	$218.6	$0.0	$31.1	$25.6
Total	$370.9	$0.0	$52.8	$43.5
Cost Savings from Increased Clarity				
Employers	$369.0	$369.0	$369.0	$369.0
Independent Contractors	$78.1	$78.1	$78.1	$78.1
Total	$447.1	$447.1	$447.1	$447.1
Cost Savings from Reduced Litigation				
	$48.7	$48.7	$48.7	$48.7
Total Cost Savings				
	$495.8	$495.8	$495.8	$495.8
Net Cost Savings (Cost Savings – Costs)				
	$125.0	$495.8	$443.0	$452.4

[a] Annualized over 10-years.

C. Independent Contractors: Size and Demographics

The Department extrapolated from U.S. Census Bureau data to estimate that there are 15.6 to 22.1 million individuals who work as independent contractors as either a primary or secondary job. This estimated figure could be higher or lower depending on different data sources and methodologies discussed below. The Department used the median of the above range, 18.9 million, for its estimates to avoid overestimation by accounting for a number of criteria, which are presented in this section.

1. Current Number of Independent Contractors

The Department 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. 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. 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 has 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.[71] 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. However, while the Department refers to the CWS measure of independent contractors throughout this analysis, due to the survey's design it should be uniformly recognized as representing a constrained subsection of the entire independent contractor pool. Due to its clear methodological constraints, the CWS measure should be differentiated from other, more comprehensive measures.

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:[72]

- 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.

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[71] 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.
[72] The variables used are PES8IC=1 for self-employed and PES7=1 for other workers.

- 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).[73] Therefore, the estimate of independent contractors does not include those who may be defined as an employee for their primary job, but may work as an independent contractor for a secondary or tertiary job.[74] For example, Lim et al. (2019) estimate that independent contracting work is the primary source of income for 48 percent of independent contractors.[75] Applying this estimate to 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

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[73] 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.

[74] 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).

[75] K. Lim, A. Miller, M. Risch, and E. Wilking, "Independent Contractors in the U.S.: New Trends from 15 years of Administrative Tax Data," Department of Treasury, p. 61 (Jul. 2019), https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf.

their primary source of income.[76] Applying that estimate to the 10.6 million independent contractors from the CWS results in an estimated 15.6 million independent contractors (10.6 million ÷ 0.68).

The Coalition for Workforce Innovation (CWI) submitted a survey they conducted of 600 self-identified independent contractors. The survey found that independent contracting is the primary source of income for 71 percent of respondents.[77] This is consistent with the prior estimate from Washington State. Applying this estimate to the 10.6 million primary independent contractors estimated from the CWS, results in 14.9 million independent contractors (10.6 million ÷ 0.71).

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.[78] For example, Farrell and Greig (2016) used a randomized sample of 1 million Chase customers to estimate prevalence of the Online Platform Economy.[79] They found that "[a]lthough 1 percent of adults earned income from the Online 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

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[76] Washington Department of Commerce, "Independent Contractor Study," p. 21 (Jul. 2019), https://deptofcommerce.app.box.com/v/independent-contractor-study.
[77] Coalition for Workforce Innovation. "National Survey of 600 Self-Identified Independent Contractors" (January 2020), https://rilastagemedia.blob.core.windows.net/rila-web/rila.web/media/media/pdfs/letters%20to%20hill/hr/cwi-report-final.pdf.
[78] 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.
[79] 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.

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.[80]

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).[81] This survey found that independent contractors comprise 7.2 percent of workers.[82] 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.[83] 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).[84, 85]

Another potential source of bias in the CWS is that some respondents may not self-identify as independent contractors, and others who self-identify may themselves be improperly classified. There are reasons to believe that some workers, who are legally considered

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[80] 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.
[81] *See* Katz and Krueger (2018), *supra* note 12.
[82] *Id.* at 49. The estimate is 9.6 percent without correcting for overrepresentation of self-employed workers or multiple job holders. *Id.* at 31.
[83] *Id.* at Addendum ("Reconciling the 2017 BLS Contingent Worker Survey").
[84] 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.
[85] 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.

independent contractors, would not self-identify as such. For example, if the worker has only one employer/client, or did not actively pursue the employer/client, then they may not agree that they "[obtain] customers on their own to provide a product or service." Additionally, individuals who do only informal work may not view themselves as independent contractors.[86] 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.[87] Conversely, some workers who are improperly classified by their employers as independent contractors may answer in the affirmative, despite not truly being independent contractors. The prevalence of misclassification is unknown, but it likely occurs across numerous sectors in the economy.[88] Because reliable data on the potential magnitude of these biases 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

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[86] The Department believes that including data on 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, but it nonetheless provides useful data for this purpose.

[87] 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.

[88] *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.").

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 estimates of 15.6 million and 22.1 million. The Department uses the average of these two estimates, 18.9 million, as the estimated 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.

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 2. Other studies were also considered but are excluded from this table because the study populations were broader than just independent contractors or limited to one state.[89] The RAND ALP[90] and the General Social Survey's (GSS's) Quality of Worklife (QWL)[91] supplement are widely cited alternative estimates. However, the Department chose to use sources with significantly larger sample sizes and more recent data for the primary estimate.

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[89] 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; 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* note 76; Farrell and Greig, *supra* note 79; 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* note 80; 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/#ixzz5IpbJp79a; Dourado and Koopman, "Evaluating the Growth of the 1099 Workforce," Mercatus Center (2015), https://www.mercatus.org/publication/evaluating-growth-1099-workforce.

[90] *See* Katz and Krueger (2018), *supra* note 12.

[91] *See* Abraham et al. (2018), *supra* note 89, Table 4.

Jackson et al. (2017)[92] and Lim et al. (2019)[93] 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.[94] 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 2: Summary of Estimates of Independent Contracting

Source	Method	Definition [a]	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
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% [b]	~5.9 million [c]	2014

[92] 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.

[93] Lim et al., *supra* note 75.

[94] 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.

Lim et al.	Tax data	Independent contractor	8.1%	1% of 1099-MISC and 5% of 1099-K	2016

[a] 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.
[b] 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.
[c] 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 employ 44 percent of primary independent contractors. Independent contractors tend to be older and predominately male (65 percent). Millennials have a significantly lower prevalence of primary independent contracting than older generations: 3.6 percent for Millennials compared to 6.0 percent for Generation X and 8.8 percent for Baby Boomers and Matures.[95] However, surveys suggest that this trend is reversed when secondary independent contractors, or those who did informal work as independent contractors, are included. These divergent data suggest that younger workers are more likely to use contractor work sporadically and/or for supplemental income.[96] White workers are somewhat overrepresented among primary

[95] The Department used the generational breakdown used in the MBO Partner's 2017 report, "The State of Independence in America." "Millennials" were defined as individuals born 1980–1996, "Generation X" were defined as individuals born 1965–1980, and "Baby Boomers and Matures" were defined as individuals born before 1965.
[96] Abraham and Houseman (2019), *supra* note 87, find that informal work decreases as a worker's age increases. Among 18 to 24 years 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. *See also* Upwork (2019), *supra* note 89.

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 9 percent and 13 percent, respectively).[97] The opposite trends emerge when evaluating informal work, where racial minorities participate at a higher rate than white workers.[98] 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.[99]

D. Potential Transfers

Given the current universe of independent contractors and the possibility that more individuals may become independent contractors after the rule is finalized, the Department here identifies the possible transfers among workers and between workers and businesses, which may occur. These transfer effects are discussed qualitatively and include effects relating to employer provided benefits, tax liability, earnings, minimum wage and overtime pay, accurate classification of workers, and conversions of employee jobs to independent contractor jobs.

In evaluating potential transfers that could be occasioned by the rule, the Department notes at the outset that the substantive effect of the rule is not intended to favor independent contractor or employee classification relative to the status quo of the Department's existing guidance and precedent from courts. However, the Department assumes in this RIA that the increased legal certainty associated with this final rule could lead to an increase in the number of independent contractor arrangements by reducing the transaction and compliance costs inherent in structuring such an arrangement. The Department has not attempted to estimate the magnitude of this change, primarily because there are not objective tools for quantifying the clarity, simplification, and enhanced probative value of the Department's proposals for sharpening and

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[97] These numbers are based on the respondents who state that their race is "white only" or "black only" as opposed to identifying as multi-racial.
[98] Abraham and Houseman (2019), *supra* note 87.
[99] *Id*.

focusing the economic reality test.[100] Several commenters assumed the increase in independent contractors would be 5 percent, although none provided substantive support to bolster the assumption. *See* EPI, Washington Center. Due to the lack of certainty and data to support a reliable estimate, the Department does not attempt to estimate the increase in independent contractor relationships that would result due to this rule. Therefore, potential transfers are discussed qualitatively with some numbers presented on a per worker basis. Potential transfers may result from differences in benefits, tax liabilities, and earnings between employees and independent contractors. Although employment benefits could decrease, and tax liabilities could increase, the Department believes the net impact on total compensation should be small in either direction. Furthermore, to attract qualified workers, companies must offer competitive compensation. Therefore, for workers in a competitive labor market, any reduction in benefits and increase in taxes are expected to be offset by higher base earnings. This concept is discussed further below in the Earnings section.

Assuming that independent contractor arrangements increase following this final rule, it is unclear the extent to which this would occur as a result of current employees being subsequently classified as independent contractors or as a result of the hiring of new workers as independent contractors. This will have implications for transfers. If current employees change classifications, then there may be transfers. Employers could change the classification of current employees only if those workers could already have been classified as independent contractors or if the working conditions are modified such that the relationship becomes a true independent

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[100] Another uncertainty limiting the Department's ability to quantify the possible increase in independent contracting is the nature and effect of state wage and hour laws. Some states, such as California, have laws that place more stringent limitations on who may qualify as independent contractors than the FLSA. *See* Cal. Labor Code 2775 (establishing a demanding "ABC" test applicable to most workers when determining independent contractor status under California law). Because the FLSA does not preclude states and localities from establishing broader wage and hour protections than those that exist under the FLSA, *see* 29 U.S.C. 218(a), workers in some states may be unaffected by this final rule. However, because the Department is not well positioned to interpret the precise scope of each state's wage and hour laws, the Department is unable to definitively determine the degree to which workers in particular states would or would not be affected by this final rule.

contractor relationship, assuming doing so is consistent with any applicable employment contracts, collective bargaining agreement, or other applicable laws.[101] Lim et al. (2019) found in the status quo that there was "little evidence that firms are increasingly reclassifying existing employee relationships as [independent contractor] relationships," however, they found that "firms are hiring more new workers as [independent contractors] rather than as employees."[102] The Department does not anticipate this phenomenon will cease occurring in the presence of the final rule. As discussed below, the limited number of businesses with employees whose roles would meet the requirements to be independent contractors likely face incentives to maintain the status quo for those workers, but there will likely be some degree of innovation in the labor market in response to the rule that compounds the current trend towards greater numbers of independent contractors. For more discussion on how employees may be affected by transfers, see the Job Conversion discussion in Section VI(D)(7).

By decreasing uncertainty and thus potentially opening new opportunities for firms, companies may hire independent contractors who they otherwise would not have hired. In this case, there may be a decrease in unemployment, an increase in the size of the labor force, or both. In a study of respondents from both Europe and the U.S., McKinsey Global Institute found that 15 percent of those not working are interested in becoming an independent contractor as their primary job.[103] Attracting these individuals to join the labor force would be classified as a societal benefit, rather than a transfer. These impacts are evaluated more fully below as part of the discussion on Cost Savings and Benefits.

The Department requested comments on its assumption that use of independent contractors will increase if the proposed rule is finalized. Most commenters took the view that, consistent with the Department's assumption, the final rule will lead to an increase in the number

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[101] Under the final rule, a worker may be classified only if the job meets the requirements of section 795.105.
[102] Lim et al., *supra* note 75 at 3.
[103] McKinsey Global Institute, *supra* note 89 at 71.

and proportion of workers who are independent contractors. Some commenters, such as the Signatory Wall and Ceiling Contractors Alliance (SWACCA) and other construction workers' unions commented that the rule could lead to increases in the percentage of independent contractors in the workforce by narrowing the standard for FLSA employment. But as explained above in Section IV(E)(2) and later in the discussion of regulatory alternatives in Section VI(G)(2), the final rule does not narrow or expand the standard for FLSA employment. Rather, the Department agrees with many commenters representing businesses and freelance workers that the final rule serves only to make that standard clearer, enabling businesses and individuals to structure their work relationships to comply with the law. *See* Section III (discussing commenter feedback). While this could lead to a greater incidence of independent contracting—as businesses and workers will be able to more freely adopt independent worker arrangements without fear of FLSA liability—the final rule does not narrow the standard for FLSA employment.[104]

Some commenters disagreed with the Department's decision not to specifically quantify a change in the number of independent contractors. Furthermore, most of the commenters who included assumptions of growing numbers of independent contractors also assumed that those workers were drawn from the existing pool of employees, not from the otherwise unemployed or those outside the labor market.[105] The Washington Center for Equitable Growth (Washington Center), for instance, simply assumed a 5 percent increase in the number of independent

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[104] The fact that the final rule is not an expansion or narrowing of the FLSA's scope of employment is not to say that courts have never in the past misapplied the economic reality test in particular cases. For example, some courts have expressly disagreed on the meaning of the "integral/integrated" factor in the test. The existence of seemingly contradictory and inconsistent case law is one of the reasons why the Department sees a need to issue this final rule. However, as discussed extensively above, the Department believes that the statement of the economic reality test in the final rule is consistent with precedent and the FLSA as a whole, even if it is in tension with particular cases.

[105] Some commenters and reports (*See* e.g., Palagashvili; Fuller et al,) cited data that indicate increased regulatory clarity would likely result in workers entering the workforce due to the greater flexibility and control provided by independent contracting relationships. This would expand the workforce rather than transfer workers between classifications.

contractors (corresponding to an equivalent decline in employees)[106]; however, it neither provided explanation why that percentage was reasonable nor justified its assumption that the percentage would entirely represent a shift of existing employment relationships to independent contractor relationships. Many commenters asserting and estimating a sizable shift from employment to independent contracting relationships seem to have based their estimates on the false impression that the final rule would narrow the FLSA scope of employment. As explained above, this is not the case—the final rule does not shift the definition of who is an employee under the FLSA. Any shift, the Department believes, would have to result from increased certainty, reduced overhead, and reduced misclassification. Conversely, the Americans for Prosperity Foundation (AFPF) agreed with the Department's decision to not quantify potential changes in the aggregate number of independent contractors and supported the Department's analysis.

The Department continues to believe that the necessary data and information are not available to quantify either any shift in independent contracting away from employee relationships or the number of new independent contractors who may enter the workforce in response to the rule and the impact of such a shift on workers and businesses. As explained in the NPRM, any attempt to produce a useful estimate for the impact of an increase in independent contractors requires ascertaining a number of additional variables, including how this reduction in administrative overhead and misclassification would impact independent contracting. *See* 85 FR 60626. The approach taken by some commenters of simply choosing a number without support and applying it across the entire economy, given the extremely large number of employment relationships in the United States, the differences in how a worker may value

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[106] EPI, Washington Center, and other commenters who use this 5 percent estimate assume the entire increase to independent contractors consists of workers whose overall compensation will decline and whose jobs otherwise remain the same. *See* EPI (characterizing converted workers as having "the same job for substantially less compensation"). The Department finds this highly unlikely. For more discussion on this topic, see the Job Conversion topic in Section II.D.6.

certain "benefits,"[107] and the unique relationships between different types of independent contractors and different businesses, could create a misleading and uncertain estimate of the impact of the rule without lending any additional clarity because of the lack of the basis for such a figure and likely differences between the current independent contractor population and the population likely to arise as a result of this rule. Since commenters, including those in support and those in opposition, did not proffer sufficient data upon which to build more accurate assumptions, the Department has not attempted to quantify this impact.

1. Impact of COVID-19 on the Rule

The Department also requested data and comment on the possible impacts resulting from the COVID-19 pandemic as it relates to the composition of the labor market, the share and scope of independent contractors in the workforce, and any associated wage effects. Several commenters noted the importance of independent contracting in weathering the pandemic. For example, the Center for Growth and Opportunity at Utah State University (CGO) wrote that the benefits of independent contracting "are likely to grow if the United States labor market adapts to the recession spurred by the COVID-19 pandemic similarly as it did to the financial crisis of 2008." They note that during an economic downturn, workers can turn to alternative work arrangements such as independent contracting to supplement their income. The view is supported by a recent Harvard Business Review article that describes how firms have increasingly relied on freelancing and platforms that allow access to the growing supply of on-demand workers to identify innovative solutions more flexibly and quickly than relying solely on their fulltime workforce, noting that "Early signs suggest that Covid-19 will also speed up this shift."[108] It is

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[107] If, for example, a state mandates that employees receive paid parental leave, but the worker does not have and intends not to have children, this "benefit" is of no value to that worker. Estimating how an individual worker values a particular "benefit" or even a tax liability would require a worker-by-worker analysis for which the Department lacks necessary data.

[108] Fuller, et al, *supra* note 64("Many freelance platforms offer access to workers from around the world with a wide variety of skills, and payment is often per completed task. Covid-19 is accelerating the move toward these platforms…."); *see also* Press Release, New Upwork Study Finds 36% of the U.S. Workforce Freelance Amid the COVID-19 Pandemic, Sep. 15, 2020,

also supported by a range of recent news reports indicating that freelance opportunities provide an important path for individuals to return to the workforce who lost their jobs due to the pandemic.[109] Women Employed claimed that this rule will degrade jobs, and that doing so in the midst of a pandemic would be harmful, basing this claim on assumptions that this rule would "undermine the FLSA" and increase misclassification of workers. But as explained above, this rule does not undermine the FLSA; it sharpens the focus of the economic reality test and clarifies the meaning of economic dependence that courts, the Department, and most commenters agree is the standard for employment under the Act. This clearer standard is likely to reduce rather than increase occurrences of misclassification.

2. Employer Provided Benefits

In the context of transfers, the Department attempted to evaluate how an increase in independent contracting relationships could affect employer provided benefits. Although this rule only addresses workers' independent contractor status 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.[110] To the extent that employers currently provide employees benefits such as health insurance, retirement contributions, and paid time off, these would likely decrease with an increase in the use of independent contractors because independent contractors generally do not receive these benefits directly (although independent contractors are able to purchase at least some of these benefits for themselves and, as explained in the preamble, the

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available at https://www.upwork.com/press/releases/new-upwork-study-finds-36-of-the-us-workforce-freelance-amid-the-covid-19-pandemic.

[109] *See, e.g.,* Kim Mackrael, In the Covid Economy, Laid-Off Employees become New Entrepreneurs, Wall Street Journal, Nov. 18, 2020; Uri Berliner, Jobs in the Pandemic: More Are Freelance and may stay that way forever, NPR, Sep. 16, 2020; Jon Younger, A New Payoneer Report Shows Covid 19 is Accelerating Freelance Growth, Forbes, Sep. 1. 2020.

[110] 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 FLSA's distinction between employees and independent contractors may affect the businesses' classification decisions for purposes of benefits and legal requirements under other Federal and state laws.

offering of health, retirement, and other benefits to workers is not necessarily indicative of employee status). Employer-provided benefits are often a significant share of workers' compensation. According to the BLS's Employer Costs for Employee Compensation (ECEC), the value of employer benefits that directly benefit employees average 21 percent of total compensation.[111] The Department notes that this 21 percent figure is an average for all employees and may not be representative of the subset of employees whose classification may be impacted by this rule. Since the 21 percent figure includes paid leave (7.2 percentage points) and retirement benefits (5.3 percentage points), and workers may value these benefits at very different levels, applying these elements does not seem reasonable in the context of this analysis.[112]

The Department used the CWS to compare prevalence of health insurance and retirement benefits across employees and independent contractors to produce a highly generalized picture. However, it should be noted that these two populations may differ in other ways than just their employment classification and the particular elements of their compensation packages discussed in the preceding paragraph which may impact benefit amounts. For instance, an employee shifting to independent contractor status who already receives health benefits through a partner's benefit plan would not be impacted by losing heath benefit eligibility. Additionally, lower benefits may be offset by increased base pay to attract workers because workers consider the full package of pay and benefits when accepting a job.

According to the CWS's relatively narrow definition of independent contractor:

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[111] BLS, "Employer Costs for Employee Compensation News Release" (Sept. 2019), https://www.bls.gov/news.release/archives/ecec_12182019.htm. For Civilian Workers, this includes paid leave ($2.68), insurance ($3.22), and retirement and savings benefits ($1.96). It does not include overtime and premium pay, shift differential pay, nonproduction bonuses, or legally required benefits. Calculated as ($2.68 + $3.22 + $1.96)/$37.03.

[112] The average economy-wide provision of insurance benefits, which represent 8.7 percentage points of the 21 percent figure, is also likely to be an overestimate for the average percentage of compensation offered to the workers most likely to be impacted by this rule.

- 79.4 percent of self-employed independent contractors have health insurance. Most of these workers either purchased insurance on their own (31.5 percent) or have access through their spouse (28.6 percent).
- 80.7 percent of other independent contractors have health insurance. There are three main ways these workers receive health insurance: through their spouse (25.1 percent), through an employer (24.2), or on their own (20.1 percent).
- 88.3 percent of employees have health insurance. Most of these workers receive health insurance through their work (64.1 percent). Furthermore, according to the ECEC, employers pay on average 12 percent of an employee's base compensation in health insurance premiums.

Several commenters estimated the prevalence of health insurance among independent contractors. In early 2020, CWI commissioned a national survey of 600 self-identified independent contractors. Their survey found that 84 percent of independent contractors have healthcare coverage.[113] The Workplace Policy Institute of Littler Mendelson, P.C. (WPI) pointed to a study that found about 90 percent of gig workers have health insurance.[114] The study also found that less than one-third of 1099-MISC workers purchase their own health insurance, "and most indicate that health insurance does not affect their decision to work as an independent contractor." It also notes that the businesses interviewed believe that workers may have "made an economic decision with their spouse – where one spouse works without benefits for higher pay and the other receives lower pay with benefits – resulting in a higher total income and health benefits for the household."

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[113] Coalition for Workforce Innovation (2020), *supra* note 77.
[114] A. Yildirmaz, M. Goldar, S. Klein, "Illuminating the Shadow Workforce: Insights Into the Gig Workforce in Businesses," ADP Research Institute (February 2020), https://www.adpri.org/research/illuminating-the-shadow-workforce/?release=illuminating-the-shadow-workforce-2020.

From these data, it is unclear exactly how health insurance coverage would change if the number of independent contractors increased, but the data suggest that independent contractors, on average, may be less likely to have health insurance coverage. That said, employment is not a guarantee of health insurance, nor do independent contractors generally lack health insurance. Additionally, simply comparing rates between independent contractors and employees may be misleading. As the U.S. Chamber of Commerce pointed out, many independent contractors would not be eligible for benefits even if they were employees due to the short-term and/or part-time nature of such an employment relationship.

Women Employed noted that the although the Department showed high rates of health insurance among independent contractors in general, the Department did not show that low-wage independent contractors have access to health insurance. In response, the Department compared health insurance rates for workers earning less than $15 per hour and found that 71.0 percent of such independent contractors have health insurance compared with 78.5 percent of such employees. Health insurance rates are lower for both independent contractors and employees when limited to low-wage workers. However, the gap in coverage between low-wage employees and independent contractors remains comparable to that for all workers: 7.5 percentage points for low-wage workers compared to 8.1 percentage points for all workers.

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 ECEC found that employers pay 5.3 percent of employees' total compensation in retirement benefits on average ($1.96/$37.03). If a worker shifts from employee to independent contractor status, that worker may no longer receive employer-provided retirement benefits, but may choose alternate personal investment options. As with health insurance, it is not clear whether retirement savings for such a worker would increase or

decrease, but such a worker would likely need to take a more active role in saving for retirement vis-à-vis an employee with an employer-sponsored retirement plan.[115]

Commenters pointed out that independent contractors generally have retirement accounts. CWIs survey of independent contractors found that 73 percent have a retirement savings plan. The WPI pointed to a study by T. Rowe Price that found that more than half of independent contractors are saving for retirement.[116] Conversely, commenters such as the Washington Center cited a study showing that independent contractors are "less likely… to make contributions to a retirement account."[117] However, that study narrowly defines retirement accounts to include "employer-sponsored plans" while excluding other common long-term saving methods, which biases the comparison between independent contractors and employees. This hampers the ability to substantively compare this commenter's position with those of other commenters, such as CWI and WPI, listed above.

Some commenters asserted the Department should quantify the impact of the rule on benefits such as health insurance and retirement savings. This includes a letter from 107 U.S. Representatives and separate letters from Rep. Donald Norcross and Rep. Pramila Jayapal. The Texas RioGrande Legal Aid (TRLA) claimed that because the Department did not estimate the "financial impact on the health and retirement accounts of workers" it violated the Administrative Procedure Act. However, the Department does not believe that these impacts could be usefully quantified. First, quantifying these impacts necessarily requires estimating any increase in the prevalence of independent contracting relationships. As explained previously, the Department does not believe that this figure can be meaningfully estimated. Second, classification under the FLSA does not directly determine whether workers qualify for these

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[115] Access to such benefits might be similar for both employees and independent contractors, but it is unlikely that the business will contribute similar sums to benefits for an independent contractor and employee.

[116] T. Rowe Price, "Press Release: The Majority of Independent Workers are Actively Saving for Retirement" (March 25, 2019), https://www.troweprice.com/corporate/en/press/t--rowe-price--the-majority-of-independent-workersare-actively-.html

[117] Jackson, Looney, and Ramnath (2017), *supra* note 92.

benefit programs, and as such, it is difficult to assess how the specific workers who are converted from employee to independent contractor status under the FLSA could have their individual benefits affected. If an employer provides health and retirement benefits to employees, but does not provide them to the same workers upon conversion of the positions into independent contractor relationships, overall compensation will be negatively impacted unless offset by sufficiently higher earnings. However, this could happen only in non-competitive labor markets in which employers have the ability to set compensation without regard for worker preferences. While some employers may desire to save the costs of providing certain benefits to employees by engaging independent contractors, if the relevant labor markets are even somewhat competitive, they likely will need to increase monetary compensation, give up, for example, certain elements of control (i.e., non-pecuniary compensation), or both to recruit workers for providing the same work. The impacts of the rule would not be uniform across workers, especially with respect to those workers that may become independent contractors. Furthermore and as explained further in Section VI(D)(7), the Department believes the ability for firms to deny benefits by converting their workers into independent contractors is constrained.

3. Tax Liability

Another potentially important source of transfers affected by the prevalence of independent contracting is tax liability. Payroll tax liability is generally divided between the employer and the employee in the United States. Most economists believe that the "incidence" of the payroll tax, regardless of liability, falls on the employee.[118] 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

[118] The share of payroll taxes borne by employees versus firms is unknown but economists generally believe that employer payroll taxes are partially-to-completely shifted to employees in the long run. For a detailed review of the literature see J. Deslauriers, B. Dostie, R. Gagné, and J. Paré, "Estimating the Impacts of Payroll Taxes: Evidence from Canadian Employer-Employee Tax Data," IZA Institute of Labor Economics Discussion Paper Series IZA DP No. 11598 (June 2018), http://ftp.iza.org/dp11598.pdf. Further information is available by the Tax Foundation, https://taxfoundation.org/what-are-payroll-taxes-and-who-pays-them/.

from employees to independent contractors, there may be a transfer in Federal tax liabilities from employers to workers (regardless of whether this affects the actual cost of these taxes to the worker). These payroll taxes include:[119]

- Social Security tax: the 6.2 percent employer component (half of the 12.4 percent total).[120]
- Medicare tax: the 1.45 percent employer component (half of the 2.9 percent total).[121]

In sum, vis-à-vis an employee, 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). However, any tax-related transfers from employers to workers would likely be offset by higher wages employers pay independent contractors. Employers will not pay payroll taxes for work transferred to workers classified as independent contractors and market forces could compel them to pass the full wage (wage + payroll tax) to the independent contractors. That is not the only reason we expect independent contractors will earn higher hourly earnings, but is the focus here. For discussion on other expected wage effects, see Section VI(D)(4) below.

Companies also cover unemployment insurance and workers' compensation taxes for their employees. Independent contractors may choose to pay for comparable insurance protection offered in the private market, but are not obligated to. The resulting regulatory effect (experienced as savings, either by companies or employees, depending on who ultimately bears the cost of the tax) combines societal cost savings (the lessened administrative cost of incrementally lower participation in unemployment insurance and workers' compensation programs) and transfers (from individuals whose unemployment insurance or workers' compensation payments decline, to entities paying less in taxes). Independent contractors may recoup some or all of the employer portion of these taxes and insurance premiums in the form of

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[119] Internal Revenue Service, "Publication 15, (Circular E), Employer's Tax Guide" (Dec. 23, 2019), https://www.irs.gov/pub/irs-pdf/p15.pdf.
[120] The social security tax has a wage base limit of $137,700 in 2020.
[121] An additional Medicare Tax of 0.9 percent applies to wages paid in excess of $200,000 in a calendar year for individual filers.

increased wages. This rule could decrease employers' tax liabilities and increase independent contractors' take-home compensation. However, there are costs to independent contractors if they are out of work or injured or ill on the job because they no longer are protected, unless they purchase their own private insurance.[122] Many of these impacts will depend on the individual risk tolerances of the workers. It is likely that workers who are more comfortable taking risks will be attracted to the potentially higher take-home compensation of independent contractor status, while workers who are risk averse will likely prefer the predictability of traditional employee relationships. It is uncertain how the universe of workers is dispersed, beyond theoretical generalizations. It is further unclear how workers' risk preferences will be distributed across the market for insurance products. The Department was not able to identify economy-wide distributional data on worker preferences and projected purchasing dynamics. That is likely because worker preferences are difficult to accurately measure and capture in datasets due to their high variability worker to worker and ambiguity of sorting across economic sectors. Without access to such data, the Department did not attempt to quantify the cost of changes in coverage or whether the net effect is a benefit or cost.

4. Earnings

Potential transfers could also occur through changes to earnings as a result of an increase in independent contracting. These transfers could occur if workers who were employees experience a change in earnings by becoming independent contractors, or if workers who are out of the labor market enter in order to become independent contractors. Although the minimum wage and overtime pay requirements of the FLSA would no longer apply to workers who shift from employee status to independent contractor status, as discussed below, this does not sufficiently explain the potential transfers that could occur as a result of such a shift. Furthermore, the Department anticipates an increase in labor force activity, but for the reasons

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[122] The Department did not undertake to comprehensively review state law on unemployment insurance in this area, but notes that some states do not use the economic reality test to determine which individuals are covered by state unemployment insurance.

stated above, the Department does not attempt to quantify the magnitude of any increase or decrease in earnings as a result of increased labor force activity.

If currently unemployed workers or individuals who are out of the labor market become independent contractors due to this rule, their earnings will increase as they currently have no work-related earnings other than possibly unemployment benefits. The impact on earnings is more ambiguous if employees' classifications change to independent contractors. In theory, because independent contractors likely prefer to have at least similar levels of total compensation as they would earn if they were employees, companies would likely have to pay more per hour to independent contractors than to employees because independent contractors generally do not receive company-provided benefits and have higher tax liabilities. Data show an hourly wage premium for independent contractors when comparing unadjusted mean averages. But as the analysis below illustrates, when controlling for certain differences in worker characteristics, this expected wage premium may not always be observable at a statistically significant level. It should be noted, however, that these estimates do not attempt to incorporate the value of flexibility and satisfaction that many independent contractors cite as key factors in their preference of independent contracting arrangements over traditional employment.

Comparing the average earnings, hourly wages, and hours of current employees and independent contractors may provide some indication of the impact on wages of a worker who transitions from an employee to independent contractor classification. A regression analysis that controls for observable differences between independent contractors and employees may help isolate the impact on earning, hourly wages, and usual hours of being an independent contractor. Katz and Krueger (2018)[123] regressed the natural log of hourly wages on independent contractor status,[124] occupation, sex, potential experience, potential experience squared, education, race, and ethnicity. They use the 2005 CWS and the 2015 RAND ALP (the 2017 CWS was not

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[123] *See* Katz and Krueger (2018), *supra* note 12.

[124] On-call workers, temporary help agency workers, and workers provided by contract firms are excluded from the base group of "traditional" employees.

available at the time of their analysis). The Department conducted a similar regression using the 2017 CWS. 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.[125]

The Department combined the CWS data on usual earnings per week and hours worked per week to estimate hourly wage rates to normalize the comparison between independent contractors and employees.[126] The Department found that independent contractors tend to earn more per hour: employees earned an average of $24.07 per hour, self-employed independent contractors earned an average of $27.43 per hour, and other independent contractors earned an average of $26.71 per hour (the average hourly wage is $27.29 when combining the two types of independent contractors).[127] Katz and Krueger conducted similar hourly earnings estimates based on 2005 CWS and 2015 ALP data. Their analysis of the 2005 CWS data indicated that "[b]efore conditioning on covariates, the 2005 and 2015 results are similar: freelancers and contract workers are paid more per hour than traditional employees."[128] When controlling for education, potential experience, potential experience squared, race, ethnicity, sex and occupation, independent contractors' higher hourly wages in the 2005 CWS data remained higher but were

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[125] Choice of exclusionary criteria from Katz and Krueger (2018), *supra* note 12.
[126] The CWS data, based on its relatively narrow definition of independent contractors, indicated that employees worked more hours per week in comparison to primary independent contractors. The Department found that 81 percent of employees worked full-time, compared to 72 percent for self-employed independent contractors and 69 percent for other independent contractors. Katz and Krueger similarly found that independent contractors work fewer hours per week than employees (statistically significant at the 1 percent level of significance in all specifications with both datasets). Despite working fewer hours per week than employees, self-employed independent contractors earned more per week on average ($980 per week compared to $943 per week). Other independent contractors, on average, worked fewer hours per week and earned less per week than employees ($869 per week compared to $943 per week). Given the difference between hours worked by primary independent contractors and employees, and the appeal of flexibility cited by many independent contractors, average weekly earnings may be an inadequate measure. Accordingly, the Department's analysis focuses on hourly wages.
[127] The Department followed Katz and Krueger's methodology in excluding observations with weekly earnings less than $50, hourly wages less than $1, or with hourly wages above $1,000. Additionally, workers with weekly earnings above $2,885 are topcoded at $2,885. Weekly earnings are used to calculate imputed hourly wages.
[128] *Id.* at 19.

not statistically significant. But Katz and Krueger's analysis of the 2015 ALP data under the same specifications found that primary independent contractors earned more per hour than traditional employees, and the estimates were statistically significant.[129]

Conceptually, the Department expects that independent contractors would earn more per hour than traditional employees in base compensation as an offset to employer-provided benefits and increases in tax liabilities. Katz and Krueger's analysis of the 2015 RAND ALP data appears to support this prediction.[130] However, they recommend caution in interpreting the estimates from the ALP due to the relatively small sample size. Their analysis of the 2005 CWS data and the Department's similar analysis of 2017 CWS data did not show a statistically significant difference. But as previously noted, comparing current employees to current primary independent contractors may not be indicative of how earnings would change for current employees who became independent contractors. Nor do such wage-based comparisons reflect the non-pecuniary attributes of employees and independent contractors.[131]

One potential reason for the variance among the estimates for independent contractor wages could be error in the measurement of independent contractor status and earnings, a factor that is present throughout every analysis in this area. As a recent analysis concluded, "different data sources provide quite different answers to the simple question of what is the level and trend of self-employment in the U.S. economy," which suggest substantial measurement error in at

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[129] *Id.* at 34.

[130] *See* Katz and Kreuger (2018), *supra* note 12 at 20 ("A positive hourly wage premium for independent contractors could reflect a compensating differential for lower benefits and the need to pay self-employment taxes.").

[131] In particular, at least some research reveals significant non-pecuniary advantages to independent contracting, including through increased job satisfaction. *See* "The State of Independence in America," MBO Partners (2019), https://www.mbopartners.com/state-of-independence/; Chen et al., "The Value of Flexible Work: Evidence from Uber Drivers," Journal of Political Economy 127:6, 2735–794 (2019); He, H. et al., "Do Workers Value Flexible Jobs? A Field Experiment," NBER Working Paper No. w25423, (2019), https://ssrn.com/abstract=3311395; McKinsey Global Institute, *supra* note 89; Upwork (2019), *supra* note 89.

least some data sources.[132] As noted above, reporting errors by survey respondents may contribute to measurement error in CWS data.[133] Additionally, CWS questions "were asked only about people who had already been identified as employed in response to the survey's standard employment questions and only about their main jobs," and therefore may miss important segments of the population. BLS has recently acknowledged limitations in the 2017 CWS survey in response to a GAO audit and is reevaluating how it would measure independent contractors in the future.[134]

Another potential bias in the Department's results could be due to the exclusion of relevant explanatory variables from the model specification, including the omission of observable variables that correlate with hourly earnings. For example, the Department's analysis of 2017 CWS data used 22 occupation dummy variables but did not control for a worker's job position within any of the occupations (although it did control for "potential experience"). However, as the Department's guidance indicates, a statistical comparison of earnings between workers generally must control for "job level or grade" in addition to experience to ensure the comparison is for workers in similar jobs.[135] If, hypothetically, independent contractors on average have lower job levels (or equivalents) than traditional employees within each

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[132] Abraham et al. (2018), *supra* note 89 at 15. Generally, "[h]ousehold surveys consistently show lower levels of self-employment than tax data and a relatively flat or declining long-term trend in self-employment as contrasted with the upward trend that is evident in tax data." *Id.; see also id.* at 45.

[133] "For example, a household survey respondent might fail to mention informal work that they do not think of as a job, something that further probing might uncover. To take another example, a household member who is doing work for a business may be reported as an employee of that business, even in cases where further probing might reveal that the person is in fact an independent contractor or freelancer." *Id.* at 15.

[134] Specifically, BLS recognized that: (1) the "CWS measures only respondents' main jobs …, thus potentially missing workers with nontraditional second or supplementary income jobs"; (2) "CWS only asks respondents about their work in the past week and may fail to capture seasonal workers or workers that supplement their income with occasional work"; and (3) "added questions regarding electronically-mediated employment resulted in a large number of false positive answers." Government Accountability Office, Contingent Workforce: BLS is Reassessing Measurement of Nontraditional Workers, Jan. 29, 2019, https://www.gao.gov/assets/700/696643.pdf.

[135] Department of Labor, Office of Federal Contracting Compliance Programs, Directive 2018-5, (Aug. 24, 2018), https://www.dol.gov/agencies/ofccp/directives/2018-05#ftn.id10.

occupation,[136] the Department's analysis would not be comparing the hourly earnings of primary independent contractors and employees who have the same jobs. Instead, the Department would be comparing a population of relatively low-level independent contractors with a population that includes both low- and high-level employees.

The existence of unobservable differences between independent contractors and employees that are correlated with earnings, such as productivity, skill, and preference for flexibility also bias comparison of hourly earnings. For example, independent contractors may be on average more willing than employees to trade monetary compensation for increased workplace flexibility that may accompany independent contractor status, which would obscure the observability of an earnings premium for independent contractors.[137] Non-pecuniary benefits of independent contracting, often including workplace flexibility, may impact the occurrence of an earnings premium, measured strictly in monetary terms, but may contribute to workers' evaluation of the merits of in engaging as independent contractors.

Independent contractors' hourly earnings premium may be best observed at the margin, such as comparing a worker's behavior when deciding between two similar positions, one as an employee and one as an independent contractor. However, the Department could not find data on such situations to allow for an economy-wide estimate, nor did commenters provide such data.

Some commenters expressed concern that the Department did not sufficiently justify its claim that independent contractors earn an earnings premium. Other commenters cited evidence purporting to show that workers misclassified as independent contractors earn less than employees. Much of this evidence, however, relates only to total take-home pay, which may reflect mere variation in hours-worked, rather than indicate any relation to the existence of an earnings premium. Some other evidence on lower earnings relates to misclassified workers—but

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[136] For example, because individuals working in that occupation as independent contractors are less likely to be in positions with managerial responsibilities over other workers than are employees.

[137] He, H. et al. (2019), *supra* note 131.

the final rule is expected to *reduce* misclassifications by increasing certainty, and as explained further below, the Department does not believe that evidence relating to misclassified workers is applicable to the independent contracting population as a whole. For example, the Coalition of State Attorneys General, Cities, and Municipal Agencies (State AGs) cited recent state data on awards to workers who were misclassified and evidence that the misclassified workers face higher rates of wage theft and wage suppression.[138,139] They additionally cited evidence produced by another critical commenter of this rule, the National Employment Law Project (NELP), that the State AGs claimed shows that once controls are implemented to account for taxes, business expenses, and legal risks, workers who have been misclassified as independent contractors often earn significantly less than similar workers paid as employees.[140] The Department expects the rule to reduce misclassification, which based on these above commenters' analyses will result in significant cost savings.

A number of other commenters made similar claims that the Department did not adequately address the misclassification of workers, and posited this would impose costs. In each case, the commenter did not demonstrate how the rule would increase the frequency of misclassification. North America's Building Trades Unions made similar claims. Its comment cited a number of studies, including a GAO study finding contingent workers (workers who lack

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[138] California Labor Commissioner's Office, 2017-2018 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement (2018), https://www.dir.ca.gov/dlse/BOFE_LegReport2018.pdf. Massachusetts Council on the Underground Economy, 2017 Annual Report, (2017), https://www.mass.gov/doc/cue-annual-report-2017-0/download. Written Testimony of Jennifer L. Berrier, Deputy Secretary, Department of Labor & Industry Before the House Labor & Industry Committee (April 29, 2019).

[139] C. Ruckelshaus and C. Gao, "Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work," National Employment Law Project, 9–27, (2014), https://www.nelp.org/wp-content/uploads/2015/02/Whos-the-Boss-Restoring-Accountability-Labor-Standards-Outsourced-Work-Report.pdf.

[140] S. Leberstein and C. Ruckelshaus, "Independent Contractor vs. Employee: Why Independent Contractor Misclassification Matters and What We Can Do to Stop It," National Employment Law Project, (2016), https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Independent-Contractor-vs-Employee.pdf. Bureau of Labor Statistics, "Contingent and Alternative Employment Arrangements - May 2017," (2018), https://www.bls.gov/news.release/archives/conemp_06072018.htm.

an explicit or implicit contract for long-term employment, but who can be employees or independent contractors under the FLSA) have lower earnings than those who are not contingent workers; a D.C. Office of Attorney General study that estimated misclassified construction workers in D.C. may earn 11.5 percent less in take-home pay than employees, based on implied findings that result from a series of selected assumptions; and a sampling of studies on construction workers that claimed significant losses in net pay for construction workers misclassified as independent contractors compared to employees.[141] The United Brotherhood of Carpenters and Joiners of America asserted that many construction companies misclassify workers as independent contractors in order to pay them less than employees and cited estimates of the magnitude of the difference, and claims that the Department's rule "does nothing to stem the abuse."[142] Commenter Matt Brown cited a Washington Center report that claims low- and middle-wage gig workers make less than comparable employees.[143] The same commenter noted that, applied appropriately, "Independent contracting is a critical part of the economy." NELP and the National Women's Law Center (NWLC) cited a study, notably from a report for New York's taxi and limousine industry, claiming that while independent contractors in New York in a subset of industries (construction, retail, personal care, and others) experienced positive wage growth, they had lower increases in their real annual earnings from 2013 to 2018 than the counterpart employees. [144] PA L&I claimed that the Department provided "no evidence" to

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[141] U.S. Government Accountability Office, "Contingent Workforce," GAO-15-168R. D.C., (2018). Office of Attorney General, "Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry," (2019). Ormiston, R., Belman, D., Brockman, J., and M. Hinkel, "Rebuilding Residential Construction," in *Creating Good Jobs: An Industry-Based Strategy* 75, 80 (Paul Osterman ed., MIT Press 2020).

[142] R. Ormiston et al. (2020), *supra* note 141. Liu, Y.Y., Flaming, D. and P. Burns, "Sinking Underground: The Growing Informal Economy in California Construction," Economic Roundtable, 2 (2014), https://economicrt.org/publication/sinking-underground.

[143] C. Husak, "How U.S. Companies Harm Workers by Making them Independent Contractors," Washington Center for Equitable Growth, (2019), https://equitablegrowth.org/how-u-s-companies-harm-workers-by-making-them-independent-contractors/

[144] J.A. Parrott and M. Reich, "An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment," Report for the New York City Taxi and Limousine Commission, (2018),

support other claims about compensation premiums. However, the Department offered a significant data-backed rationale for those sections, and in fact notes that PA L&I's own comment refers to some of these sources in its critique, though it offers no data of its own. Some commenters asserted that companies make workers independent contractors specifically because they can pay them less due to a lack of bargaining power, but they do not offer substantive data to demonstrate that this is the case throughout the economy. Since the failure to pay misclassified workers the wages that are due them is already prohibited by law, the Department determined comments on the topic fall outside the scope of this rule and analysis. As stated elsewhere, the Department expects that misclassification will be reduced because of this rule. Further, because meeting the proper standards for legitimate independent contracting will generally entail a substantively different relationship between a worker and a business beyond a simple change in classification, and no commenters nor the Department's own review of past court cases yielded any examples of this phenomenon in practice, the Department has not attempted to quantify it. For most discussion, see the Job Conversion discussion at Section (VI)(D)(7).

The data employed in the comments and the reports commenters cite to support their claims on impacts to earnings are not strictly based on independent contractors. In fact, several of them focus explicitly on contingent workers, who are defined as "persons who do not expect their jobs to last or who report that their jobs are temporary."[145] These persons can be employees or independent contractors, and may not include all independent contractors, depending on the nature of the contractor's work. Estimates based on these definitions are not useful for the purpose of evaluating the universe of independent contractors. The non-representative data sources preclude widespread applicability. Further, these commenters and their cited sources largely focused on misclassified workers, who are defined as workers unlawfully classified as independent contractors in order to limit employers' monetary and legal liabilities. Selection bias

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https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5b3a3aaa0e2e72ca74079142/1530542764109/Parrott-Reich+NYC+App+Drivers+TLC+Jul+2018jul1.pdf.

[145] BLS, https://www.bls.gov/news.release/conemp.nr0.htm

causes the estimates of the impacts on this group to be unreliable; the sample likely includes illicit actors. The Department recognizes that some illicit actors intentionally evade the law, but its analysis of this rule's impact naturally focuses on employers, employees, and independent contractors that would follow the rule to the best of their ability. While these comments and the sources upon which they rely highlight important worker issues, the non-representative data presented cannot be extrapolated to the universe of individuals classified as independent contractors, for whom the literature offers strong evidence of an earnings premium.

Some commenters provided specific concerns with the Department's numbers. SWACCA disputes the Department's justification of the assertion that independent contractors earn more than employees because the unconditional mean hourly rate of independent contractors is higher than the unconditional mean hourly rate of employees. They note that the 11 to 14 percent higher hourly wage ($26.71 and $27.43 per hour for independent contractors versus $24.07 per hour for employees) is insufficient to cover the average of 21 percent of total compensation that employees receive in employer-provided benefits. While SWACCA correctly identified that the hourly wage premium independent contractors enjoy economy-wide may be less than employer's total cost of providing benefits, such a comparison may not accurately reflect the *value* the employee places on the employer-provided benefits. If, for example, a worker already has access to health insurance as a military veteran, that worker will not value the employer's provision of health insurance. Further, even assuming the worker values these benefits at the same level as the employer's cost for the benefits, the analysis cited earnings premiums and benefits which are based on all employees and independent contractors in the economy and may not reflect the narrower universe of employees whose classification is most likely be affected by this rule. [146] Employing economy-wide averages to compare niche subsets of the economy is not a sound approach. As such, it is inappropriate to assume, as SWACCA

[146] The 11 to 14 percent earnings premium for independent contractors is also an economy-wide finding.

did, that the average employee who is converted to independent contractor status as a result of the rule would gain the same earnings premium enjoyed by the average economy-wide independent contractor, or lose benefits equal to the benefits enjoyed by the average economy-wide employee. The Department believes that many workers who are most likely to be converted due to this rule likely do not presently receive benefits or, if they do receive fringe benefits, their value (both as measured by the worker and as an absolute cost to the employer) falls below the economy-wide average.[147] Due to the highly individualized impacts that vary across numerous undefined variables (risk tolerances; specifics regarding level of position, industry, location; access to other means of benefits provision; etc.), the Department did not attempt to quantify such an impact. Considered qualitatively, the Department notes that employees who make more than the minimum wage implicitly display a measure of bargaining power because their employer could lawfully reduce their wages but has not. If employees have bargaining power—meaning labor market conditions require employers to account for workers' preferences— they would be positioned to negotiate an earnings premium that could offset a reduction in benefits that may result from being converted to independent contractors, which may be higher or lower than the economy-wide average. Similarly, a worker without bargaining power would be unlikely to receive the 11 to 14 percent earnings premium if converted from employee to independent contractor status—but such no-bargaining-power employees are also much less likely to have any company-provided benefits to lose as a result of the conversion. Ultimately, there is no reason to believe employees whose classification may be affected by the rule are likely to have the same benefits as an average employee or, if converted to independent contractors, would receive the same earnings premium that the average independent contractor has over the average employee. As explained below further in Section VI(D)(7), the Department expects that most workers whose classification may be affected by this rule will have a measure

[147] The Department expects that many new independent contractor jobs will be created due to this rule, but does not anticipate many existing employee positions to be converted to independent contractor relationships because of it.

of bargaining power that could allow them to offset reductions in benefits with higher earnings, better working conditions, or both.

The Washington Center asserted that the population of independent contractors is very diverse and that comparing mean wages is not appropriate, expounding that the independent contractor market includes both high-wage workers with adequate bargaining power and low-wage workers with little bargaining power. The commenter did not explain how this point meaningfully applies to the Department's analysis, which addressed the diversity of the labor market in its regression specifications, controlling for many more variables than simply income. Nonetheless, in response to this comment the Department conducted two additional regression analyses as a proxy for the labor market for low-wage workers. The results were largely consistent with the initial conclusions presented in the NPRM. The Department ran its regression model including only low-education workers (a high school diploma or less). In this case, independent contractors had an average wage about 9 percent higher, and the results were statistically significant. The Department also ran a regression including only workers in low-wage occupations (12 occupations with mean hourly rate less than the overall mean), for which the coefficient on independent contractor was positive, although small.[148]

The Economic Policy Institute (EPI) estimated annual transfers from workers to employers of $3.3 billion in supplemental pay, paid leave, insurance and retirement benefits, and the employer share of Social Security and Medicare taxes. Its estimate is based on the primary assumptions that (1) employees reclassified as independent contractors will be paid the same in nominal wages and (2) there will be an increase of 5 percent in the number of independent contractors. EPI states that the first assumption is based on sources demonstrating that perfect competition in labor markets is rare, a claim stated by several other commenters. However, Alan Manning, the author of the foundational source referenced to make this case (cited by EPI,

[148] The result is statistically significant at the 90 percent confidence level but not at the 95 percent level.

sources cited by EPI in the same section, and other commenters), explicitly caveats that the wage-setting assumption should not be applied to the self-employed (under which category independent contractors fall).[149] Manning states, "In this book it is assumed that firms set wages. This is a more appropriate assumption in some labour markets than others. For example, it would not seem to be appropriate […] for the self-employed."[150]The sources that EPI cites thus do not support its ultimate conclusion. Rather, EPI's methodological assumptions appear to run counter to a widely-cited source that EPI itself relies on. Finally, the EPI analysis also relied on firms' wage-setting power to be absolute, that labor supply is perfectly inelastic. EPI's analysis proceeds from the premise that "perfect competition is rare," but then jumps to the claim that "most labor markets do not function competitively," and that worker are particularly "likely to lack the power to bargain for higher wages to compensate for their loss of benefits and increase in taxes when they become independent contractors." However, each of the sources the EPI cites for this proposition, which are discussed above, clearly show that firms do not possess or exert such absolute wage-setting power. These flaws fundamentally undermine EPI's estimates and yet go unaddressed by EPI and other commenters that reference EPI's estimates. The Department,

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[149] EPI cites three sources alongside its claim, Manning (2003), Dube et al (2018), and a literature review by the Washington Center, which also submitted a comment opposing this rule. The Manning book is cited by both other commenters, with the Washington Center's analysis drawing on it in numerous sections of its review as fundamental support. The Dube et al study focused exclusively on users of a specific online task portal (Amazon Mechanical Turk), which is a niche market of independent contractors and is a marketplace accessible to 49 countries, which makes it difficult to apply the findings with confidence to the U.S. market and the whole independent contractor universe. The Washington Center citation was a literature review of work in the field of monopsony in labor markets; its findings did not offer direct applications to the independent contractor universe. Furthermore, its review concluded, "our results provide evidence on the elasticity of labor supply to the firm and the implied degree of firms' wage-setting power, but not necessarily whether the firms are able to exercise this power," explaining that it appears other forces rein in firms' wage-setting power to some degree.

[150] A. Manning, *Monopsony in Motion: Imperfect Competition in Labor Markets*, Princeton, N.J.: Princeton University Press, (2003). A. Sokolova and T. Sorensen, "Monopsony in Labor Markets: A Meta-Analysis," Washington Center for Equitable Growth, (February 2020). A. Dube, J. Jacobs, S. Naidu, and S. Suri, "Monopsony in Online Labor Markets," *American Economic Review*: Insights 2(1): 33-46 (March 2020), https://www.aeaweb.org/articles?id=10.1257/aeri.20180150.

therefore, declined to integrate these unreliable estimates into its analysis due to such methodological concerns.

EPI's analysis states that "it is difficult to imagine that there are a meaningful number of workers who would get more satisfaction from doing the same job for substantially less compensation as an independent contractor than for substantially more compensation as a payroll employee." But this statement exposes what appears to be a flawed assumption in EPI's analysis. Under the economic reality test, an employee typically cannot possess the "same job" as an independent contractor. Rather, for the worker to be classified as an independent contractor, the worker must, on the whole, possess the characteristics of an independent contractor, which often include meaningful control over the work or meaningful opportunity for profit. EPI's analysis assumes, however, that the employer can and will simply reclassify a worker as an independent contractor without regard for the features of the working relationship.

EPI's analysis considers only monetary compensation as part of the "value of a job to a worker." In the May 2017 Contingent Worker Supplement (CWS) to the Current Population Survey (CPS) workers classified as independent contractors were asked about their preferences toward employment arrangement. Their responses are indicative of non-monetary value derived from independent contractor status. When asked, "Would you prefer to work for someone else?" independent contractors resoundingly stated "No" over "Yes" by a ratio of nearly 8 to 1. Furthermore, the two most noted responses to the question, "What is the main reason you are self-employed/an independent contractor?" were "Flexibility of schedule" and "Enjoys being own boss/independent." It is evident that most independent contractors strongly value the non-pecuniary compensation they receive. EPI does not address how these non-pecuniary benefits factor into worker compensation.

Arguing against the Department's inclusion of flexibility and satisfaction as important non-pecuniary compensation factors in the NPRM, EPI states that "employers are able to provide

a huge amount of flexibility to payroll employees if they choose to; the 'inherent' tradeoff between flexibility and payroll employment is greatly exaggerated." [151]

EPI's argument is less than persuasive for a number of reasons. First, economists have long recognized that workers value leisure as well as the remuneration of labor. As such, any worker selecting between jobs is likely to consider the flexibility of work schedules, the compensation package, fringe benefits, and a host of non-pecuniary compensation factors when deciding both whether to work at a particular company and how many hours to spend working at that company. Second, the fact that some employees have flexibility does not imply that those employees do not value the flexibility or that greater flexibility is not something employees would trade for lower compensation. Third, in many jobs, employee flexibility is necessarily limited because the business requires a certain number of employees working together to accomplish a task, and so granting significant flexibility to employees would result in less productivity for the business which would likely result in lower compensation for the workers. Fourth, some employers do offer employees flexibility, but often that flexibility comes at a cost to the workers (of note, payroll employees generally have less control over their own schedules than similarly-situated independent contractors).

EPI, however, fails to explain why an employer would, all things equal, allow its employees to work for direct competitors, let them choose assignments, or set their own hours. The point of hiring employees is to have workers that an employer can call upon and direct to perform desired tasks, as opposed to contractors who operate their own businesses. While some employers may provide a measure of flexibility they generally would not offer the same degree of flexibility enjoyed by individuals who are in business for themselves. The Department

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[151] Some sources have argued that businesses, in fact, use scheduling in a way that negatively affect worker flexibility. *See* e.g., L. Golden, "Irregular Work Scheduling and Its Consequences," Economic Policy Institute, (April 2015), https://files.epi.org/pdf/82524.pdf ("Facilitated by new software technology, many employers are adopting a human resource strategy of hiring a cadre of part-time employees whose work schedules are modified, often on short notice, to match the employer's staffing with customer demand at the moment.").

believes, based on data in the CWS survey and beyond, that independent contractors experience significantly more flexibility than employees and that such a feature is a core motivator.[152]

The Department notes several other key weaknesses in EPI's estimate that undermine its assertions. EPI's estimate of transfers from workers to employers is an estimate of the gross transfer without taking into account that the independent contractors also have the ability to deduct some of their additional expenses on their income taxes and thus is not a comprehensive comparison of the net earnings of employees and independent contractors. EPI's estimate is based on applying a net loss in income for every new independent contractor, yet the data resoundingly show that workers pursue independent contract work voluntarily and in vast numbers, suggesting that other factors, unmentioned by the commenter, are significant to worker decisions in this field. EPI nonetheless assumes a blanket negative impact will be felt economy-wide for all new independent contractors—an assumption the Department believes is unsupportable in the face of the existing evidence.

Ultimately, based on the assumption that the final rule will increase independent contracting arrangements, the Department acknowledges that there may be transfers between employers and employees, and some of those transfers may come about as a result of changes in earnings. However, for the reasons stated above, the Department does not believe that these transfers can be quantified with a reasonable degree of certainty for purposes of this rule. The Department also does not believe that independent contracting roles are usefully compared by focusing solely on earnings to employee roles—under the economic reality test embraced by the final rule, control and an opportunity for profit are core considerations for determining who is an independent contractor. The Department believes that these factors are often valued by workers in ways that are difficult to quantify. Furthermore, the Department believes that workers as a

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[152] 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. MBO Partners, *The State of Independence in America*: 2018: The New Normal, 2018, 7. James Manyika et al., *Independent Work: Choice, Necessity, and the Gig Economy* (New York: McKinsey Global Institute, October 2016).

whole will benefit from this 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 below.

5. Minimum Wage and Overtime Pay

As noted above, an additional consideration in the discussion of transfers is that minimum wage and overtime pay requirements would no longer apply if workers shift from employee status to independent contractor status. The 2017 CWS data indicate that, before conditioning on covariates, primary 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).

Several commenters highlighted this possibility that independent contractors could earn below the minimum wage. The Washington Center cited a report by the Center of American Progress that estimated that almost 10 percent of independent contractors earn less than the Federal minimum wage.[153] Representative Mark Takano pointed to literature finding that in California and New York many gig drivers receive significantly less than the state minimum wage.[154] A letter from 107 U.S. Representatives referenced an instance where the Wage and Hour Division (WHD) recovered roughly $250,000 in unpaid overtime and minimum wages for 75 workers misclassified as independent contractors by a cleaning company.[155] EPI stated in its

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[153] K. Walter and K. Bahn, "Raising Pay and Providing Benefits for Workers in a Disruptive Economy." Washington: Center for American Progress (2017), https://www.americanprogress.org/issues/economy/reports/2017/10/13/440483/raising-pay-providing-benefits-workers-disruptive-economy/

[154] M. Reich. "Pay, Passengers and Profits: Effects of Employee Status for California TNC Drivers." University of California, Berkeley (October 5, 2020), https://irle.berkeley.edu/files/2020/10/Pay-Passengers-and-Profits.pdf; L. Moe, et al. "The Magnitude of Low-Paid Gig and Independent Contract Work in New York State," The New School Center for New York City Affairs (February 2020), https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e424affd767af4f34c0d9a9/1581402883035/Feb112020_GigReport.pdf.

[155] "Skokie Cleaning Business Must Pay $500K In Unpaid Wages, Damages to Workers," CHICAGO.CBSLOCAL.COM (May 5, 2012), https://chicago.cbslocal.com/2012/05/05/skokie-cleaning-business-must-pay-500k-in-unpaid-wages-damages-to-workers/. The Department

comment, "The workers most likely to be affected by this rule are workers in lower-wage occupations in labor-intensive industries, such as delivery workers, transportation workers like taxi drivers and some truckers, logistics workers including warehouse workers, home care workers, housecleaners, construction laborers and carpenters, agricultural workers, janitors, call center workers, and staffing agency workers in lower-paid placements." However, EPI did not provide a source for this important assumption, and the Department was unable to verify EPI's assertion in the Department's own research. The nature of the work done by workers across the diverse fields EPI identified is uncertain, although many roles in the above fields could lack features that would facilitate a position conversion to independent contractor status.

With respect to overtime, CWS has further indicated that, before conditioning on covariates, primary independent contractors are more likely to work overtime or extra hours beyond what they usually work at their main job (30 percent for self-employed independent contractors and 19 percent for other independent contractors versus 18 percent for employees). The Department was unable to determine whether these differences were the result of differences in worker classification, as opposed to other factors. The Department has cited many sources throughout this analysis that point to a wide range of income for independent contractors, and does not believe that this rule will be especially applicable to any particular income segment of independent contractors. Accordingly, the Department believes it prudent to rely on the numerous sources it has drawn on in the development of this rule, rather than to focus on any particular slice of the income distribution. And while independent contractors are not, by definition, subject to the minimum wage requirements of the FLSA, none of the evidence cited by commenters suggests that the final rule is likely to significantly impact this issue, and if so, to what extent. Accordingly, the Department did not attempt to quantify these potential transfers.

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believes that misclassification is an important concern that the rule addresses, and that the rule will reduce the ability of employers to misclassify its workers by rendering the test more clear and understandable.

6. Misclassification

Many commenters expressed concerns regarding misclassification of employees as independent contractors, which occurs when an individual who is economically dependent on an employer is classified by that employer as an independent contractor. FLSA misclassification may be inadvertent or intentional and its direct effects could include a transfer from the worker to the employer if the employer fails to pay minimum wage and overtime pay to which the worker is entitled. Conversely, reducing misclassification could result in a transfer from employers to workers.

Several commenters believe that "[c]larifying the application of the test for independent contractor status will promote compliance with labor standards under the FLSA and, in turn, reduce worker misclassification." Opportunity Solutions Project (OSP); *see also, e.g.,* Truckload Carriers Association ("[t]he increased clarity provided by the [proposed rule] would likely lead to reduced misclassification."); IAW ("This rule will clear up misclassifications"); Financial Services Institute ("we agree that it will reduce worker misclassification and litigation"). Other commenters believe this rule may make it easier for employers to misclassify employees as independent contractors. *See, e.g.*, Equal Justice Center; Employee Rights Center; NELP; State AGs; TRLA. These commenters cited reports purporting to show extremely high rates of misclassification. For example, a 2020 NELP report cited by many commenters 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."[156] The Washington Center also cited a study conducted by the Department of Labor in 2000 to claim that "between 10 percent and 30 percent of employers audited in 9 states misclassified workers as independent contractors."[157]

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[156] NELP, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, Oct. 2020, available at https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-Federal-state-treasuries-update-october-2020.

[157] Lalith de Silva, Adrian Millett, Dominic Rotondi, and William F. Sullivan, "Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs" Report of

These estimates, however, appear to be unreliable for at least two reasons. First, they make generalized conclusions regarding rates of misclassification using non-representative audit data. For example, the Department's 2000 study cited by the Washington Center states that audits were "selected on a targeted basis because of some prior evidence of possible non-compliance."[158] The 2020 NELP report likewise explained that "[m]ost studies [on misclassification] rely on audit data from unemployment insurance and workers' compensation audits, targeted or random."[159] As a 2015 EPI report explained, "[a]udit methods vary across states in the extent to which they target employers for audit: They can base the audits on specific criteria (e.g., a record of prior violation), or use a random sample of employers *within* industries prone to misclassification, or a mix of both methods."[160] Thus, even "random" audits are not necessarily representative because they target industries with high rates of misclassification. Because audits focus on groups of businesses or industries in which misclassification rates are the highest, their results would not support generalized conclusions regarding the wider population. As such, the reports' generalized conclusion lack reliable and representative evidence, and are almost certainly significant overestimates.

Second, the audit data cited by NELP and others do not necessarily focus on misclassification of employees as independent contractors; some states' data are evaluated based on prevalence of employer violations, which is not representative of percentages of workers misclassified as independent contractors. For example, the 2020 NELP report appears to state that audits conducted by Ohio found a misclassification rate of 45 percent, but the cited Ohio report stated otherwise. The report explained that the audits searched for unemployment

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Planmatics, Inc., for U.S. Department of Labor Employment and Training Administration (2000), available at https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

[158] *Id.* (emphasis added).

[159] NELP, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, Policy Brief Oct. 2020, available at https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-Federal-state-treasuries-update-october-2020/.

[160] Employment Policy Institute. Carre, Francoise, (In)dependent Contractor Misclassification. https://www.epi.org/publication/independent-contractor-misclassification

insurance violations, not just misclassifications, and that "45% of the audits produce findings, in many cases for workers misclassification."[161] In other words, the Ohio audits found 45% of audited employers failed to comply with some unemployment insurance requirement, with an unspecified subset committing misclassification. This and other misunderstandings of state audit findings may result in a misleading estimate of the frequency with which employers misclassify employees as independent contractors. Furthermore, the reporting is based on misclassification (or other issues, as documented above) on a per employer basis. The employer rate of misclassification may not necessarily correspond to the rate of employee misclassification. For example, if an employer employs 100 employees and misclassifies only one of them, the employer is recorded as a misclassifying employer in the aggregated results.[162] This binary approach to data collection on a per employer basis prevents a disambiguation to analyze the actual number of misclassified workers in the labor force. This phenomenon is present is another study conducted by the Wisconsin Department of Revenue cited by NELP, which claimed that "In 2018, 44% of audited employers were found to be misclassifying workers."[163] However, that data seems to be misleading for multiple reasons. First, the quotation does not appear to match the cited source. Appendix 2 of the Wisconsin Workforce Report states that in *2019* the "percentage of audited employers with misclassified workers" was 33.3 percent (divergent from the "44 percent" that NELP stated). Second, the number of businesses found to be misclassifying

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[161] Report of the Ohio Attorney General on the Economic Impact of Misclassified Workers for State and Local Governments in Ohio 16-17 (Feb. 18, 2009), available at https://iiiffc.org/images/pdf/employee_classification/OH%20AG%20Rpt%20on%20Misclass.Workers.2009.pdf.

[162] If 11 percent of businesses misclassify only one worker as an independent contractor, there are 100 businesses, and each employer has 20 workers, then the total percentage of these misclassified workers is actually 0.5 percent. To find that 11 percent of workers are misclassified as independent contractors, all of the businesses who misclassified workers as independent contractors would need to have misclassified 100 percent of their workforce as independent contractors.

[163] Wisconsin Department of Workforce Development, Payroll Fraud and Worker Misclassification Report 16 (2020), available at: https://dwd.wisconsin.gov/misclassification/pdf/2019-2020-misclassification-task-force-report.pdf.

workers does not address how many workers were misclassified. The percentage of workers misclassified was 10.6, across all of the audited employers, which is much smaller than either 33 or 44 percent. Finally, all of these estimates are compounded by the targeting bias described earlier, namely that the results only reflect businesses specifically targeted for audits, which presents only a partial picture of the incidence of such misclassification economy-wide.

Ultimately, and as explained above in Section VI(G)(2), commenters' estimates regarding current rates of misclassification—whether accurate or not—have little bearing on how misclassification rates are likely to change as a result of this rule. This rule establishes a clearer test for when a worker is an independent contractor rather than an employee under the FLSA. As such, it would reduce inadvertent misclassification by employers who are confused by the prior test, particularly small businesses that lack resources to hire expensive attorneys. For example, one small business owner commented to explain that "the ability to understand and properly determine worker status under the FSLA is paramount for small businesses who cannot afford the cost of litigation … I believe that with the proper transparency within the regulations, the better the outcome not only for small businesses, but the worker, and ultimately the care recipient. We want to comply, and I have confidence that the proposed [rule] … will be highly effective in achieving the desired clarity and certainty." A clearer test also means more workers will better understand their rights under the FLSA and can defend those rights through private litigation or complaints to the Department, which should deter unscrupulous employers from intentionally misclassifying them.

In summary, the Department believes that the simplicity and clarity this rule provides will reduce both inadvertent and intentional misclassification, which could produce transfers from employers to employees who are more likely to be correctly classified and given minimum wage and overtime pay. The Department is unable to calculate the exact transfer amount because it lacks reliable metrics on, for example, the existing misclassification rates in the general

economy, the precise extent to which this rule improves legal clarity, and how firms will respond to that clarity.

7. Job Conversion

Many commentators expressed concerns that the rule would cause businesses to reclassify their workers as independent contractors, causing those workers to lose the benefits of the FLSA with little gain in return. *See, e.g.*, Washington Center (asserting that "independent contractors tend to be worse-off than their wage-and-salary counterparts"); National Women's Law Center ("if finalized, this rule will cost workers … in the form of reduced compensation"); EPI (estimating that converted "workers would lose $6,963 per year"). Some of these issues are discussed above. For example, the Department discussed possible earnings effects of workers converting from employee to independent contractor extensively in this section VI(D) and concluded it could not definitively determine whether overall compensation—*i.e.*, earnings plus benefits—for a job that is converted from employee to independent contractor classification in response to this rule is likely to rise or fall on average. Regardless, the Department acknowledges that whether the overall effect of job conversion is likely to be, on balance, positive depends on the individual, reclassified worker, the unique circumstances of the business, and whether or not the working conditions were changed in order to reclassify the worker.

If the converted position is an entirely new position, it is more likely to be filled by one of the many individuals who desire to work as an independent contractor, for example because they value the "flexibility to choose when and where to work" that the position may provide more than "access to a steady income and benefits."[164] Such an individual may, for example, discount the value of certain types of compensation associated with employee classification, such as health insurance, that he or she might already enjoy from a different source. The individual may also simply prefer to trade overall compensation for the greater flexibility that often accompanies independent contractor roles. Thus, the lower paid converted new jobs do not

[164] *See* Coalition for Workforce Innovation (2020), *supra* note 77.

necessarily reduce such workers' welfare because they could offer tradeoffs that may be preferable to the workers who are most likely to sort themselves into those positions. On balance, the Department believes conversion of new jobs will have an overall positive impact on workers.

The second category of job conversion discussed above occurs when employers modify their working relationship with existing employees such that they are rendered independent contractors under this rule. As explained above, to act on the legal certainty provided by this rule, the converted position likely would have to provide the worker with substantial control over the work and a meaningful opportunity for profit or loss. The Department believes such conversions will be less common than conversion of future positions because the marginal cost of restructuring an existing work arrangement is greater than altering the arrangement of an unfilled position. And such restructuring would disrupt the preexisting working relationships, which risks negatively impacting worker morale, productivity, and retention. Nonetheless, some conversion of existing positions may occur, and some converted workers may prefer the additional flexibility and earn more by taking advantage of the opportunity for profit or loss that may accompany the conversion. The effect of the rule would be positive for these workers. Other converted workers may prefer the security, stability, and other features of an employment relationship or earn less due to, for example, reduction of employer-provided benefits, employment taxes, and loss of the FLSA's minimum wage and overtime pay. The effect of the rule would be negative for these converted workers, but, as explained above, the Department believes this type of conversion will be rare.

Finally, an employer may reclassify an existing employee position to an independent contractor position without meaningfully changing the nature of the job in response to the added legal clarity provided by this rule. Employers could be most confident of such reclassification under this rule if the preexisting job already provided the worker with substantial control over the work and a meaningful opportunity for profit or loss. The Department believes this phenomenon is likely to be rare because the current position would have to be held by an

individual who is in business for him- or herself as an economic reality but is nonetheless presently classified as an employee. While many commenters warned that economically dependent employees may be improperly classified as independent contractors, none expressed concern that there is widespread classification of individuals who are in business for themselves as employees.[165] Such employees may nonetheless exist and be converted into independent contractors as a result of this rule. Features of these converted workers' work, for example the level of flexibility and stability, would remain unchanged because the job remains the same. Firms could potentially reclassify existing workers who are already in business for themselves in a manner that reduces overall compensation, but their ability do to so would be constrained because such reduction could negatively impact worker morale, productivity, and retention.[166]

Nonetheless, the sharpening of the economic reality test may negatively impact some current employees who could be reclassified as independent contractors in a manner that results in reduced overall compensation but are not afforded non-pecuniary benefits, for example additional flexibility, in return.[167] EPI and likeminded commenters believe these workers would be "doing the same job for substantially less compensation as an independent contractor," and

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[165] Commenters in the business and freelancer community indicated that—rather than classify independent entrepreneurs as employee in response to legal uncertainty regarding classification—business simply decline to do business with those entrepreneurs in the first place. *See, e.g.,* ASTA ("The prospect of inconsistent determinations has had a chilling effect on the growth of businesses in industries reliant on contract workers which has resulted in fewer opportunities for individuals who choose to offer their services as independent entrepreneurs."); CPIE ("uncertainty associated with worker classification under the FLSA… discourages companies from doing business with independent entrepreneurs"). The effects described by these commenters are unsurprising. For example, it makes little sense for a business to classify a worker as an employee, thus obligating themselves to pay a premium rate for overtime work under the FLSA, if it is the worker and not the business who determines how many hours to work each week. Rather, the business likely would either not hire the worker at all or hire him or her as an employee but insist on controlling hours worked.

[166] Most firms can already reduce the overall compensation of their employees whose wages exceed the minimum wage through more direct means than reclassification as independent contractors but do not do so because of risks regarding morale, productivity, and retention.

[167] Employers and employees could make similar conversions to independent contractor status for reasons outside the sharpening of the economic reality test this rule provides. Such shifts would not be identified as impacts in this analysis because the impetus for such conversion is due to factors other than this rule.

that this class of worker comprises the majority or even all of the workers impacted by this rule. The Department agrees that some workers could be impacted in this manner, but believes such occasions are likely to be rare because two necessary conditions limit the number of such workers.

First, in order for conversion to have an unambiguously negative affect, a converted worker's overall compensation must be at the minimum wage. Generally, firms impacted by the rule can already directly reduce wages and benefits of their employees—they do not need to convert those employees to independent contractor to achieve these labor cost savings. However, most firms do not reduce their employees' compensation due to the risk of lowering morale, reducing productivity, and causing turnover. That is to say, the labor markets in which most firms operate prevents them from setting compensation without regard for worker preferences. The Department believes that a firms' ability and willingness to reduce its employees' compensation is shaped by the tradeoff between labor savings, on one hand, and the risk of lower productivity and higher turnover, on the other. Clarifying the legal requirement for firms to convert a position from employee to independent contractor status would not make firms any more willing or able to reduce compensation unless the worker was already earning the minimum wage and receiving no benefits. According to BLS, based on CPS data, in 2017 there were 370,000 adult[168] employees paid at the minimum wage, which comprise 0.24 percent of the U.S. labor force.[169] Second and as explained above, the converted worker whose job remains unchanged is likely to already have substantial control over the work and a meaningful

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[168] This figure excludes workers under the age of 19. If excluding workers under the age of 24, this figure drops over 40 percent to 221,000. This figure does not include workers who make less than the minimum wage, a vast majority of whom work in the restaurant industry and receive tips for their work. The average earnings of a restaurant worker who receives tips is significantly above the minimum wage. The figure includes part time workers, who would not likely receive overtime compensation due to the limited number of hours they work.

[169] In 2017, there were approximately 152,000,000 workers in the U.S., according to the U.S. Bureau of Labor Statistics.

opportunity for profit or loss such that he or she can be classified as independent contractor with the most legal certainty this rule can provide.

The Department was unable to determine how many of the 370,000 current minimum wage employees also meet these two criteria, although it expects the number to be low. The Department attempted to identify examples of minimum wage employees who enjoy substantial control over their work and a meaningful opportunity for profit or loss, but was unable to do so. Nor did commenters provide specific data or examples of minimum wage employees who would meet these criteria. Several commenters argued that the Department failed to adequately consider the effects of these possible conversions from employee to independent contractor, or the potential negative effects of misclassification on workers. NELA, for instance, asserted that the NPRM's cost-benefit analysis focused solely on companies rather than workers and further claimed that the Department "ignores the massive cost to misclassified workers." Other commenters stated that the final rule would harm workers by either increasing the rate of misclassification or by allowing employers to reduce wages and benefits of employees who are converted into independent contractors. *See, e.g.*, Washington Center for Equitable Growth (Washington Center) (asserting that "independent contractors tend to be worse-off than their wage-and-salary counterparts"); Appleseed Center (expressing concern that rule "will harm workers across a broad spectrum, [but] will have a disproportionate impact on Black and Hispanic workers who are overrepresented in the low-paying jobs where independent contractor misclassification is common"); National Women Law Center ("if finalized, this rule will cost workers … in the form of reduced compensation"); EPI (estimating that individual "workers would lose $6,963 per year").

As is explained in greater detail below, the Department disagrees with these comments that the rule will broadly harm workers. The Department agrees with the numerous commenters, including nearly all individual commenters who self-identified as freelancer workers, who asserted that the rule would encourage flexible work arrangements and thereby create

meaningful—though not easily measurable— value for workers. One commenter explained that "[b]eing an independent worker allows for me to do what I can as a single mother, have flexibility." Another stated that "[f]reelancing has afforded me independence and flexibility and the opportunity to be a productive member of society, and do my best work." As a final illustrative example, another commenter asserted that "[t]he primary value for myself as an independent contractor for my services is the freedom to negotiate, to choose, and the freedom to limit what services I provide, the days, and hours of work, and the price of my labor, unencumbered by the less flexible but more secure employer employee relationship." Although some workers in positions converted from employees to independent contractor relationships may receive fewer benefits traditionally associated with classification as employees, the Department believes that this would likely be infrequent and their net effect would not necessarily be negative.[170] Moreover, the Department believes any negative effects would be outweighed by the significant value the rule delivers to other workers and businesses by clarifying, simplifying, and reducing transaction costs around independent contractor arrangements.

No commenter provided evidence or specific cases in which individuals or types of workers would, as a result of this rule, be converted from employees to independent contractors. Because the rule does not change the classification of any employee, any jobs converted without meaningful change would have had to already have satisfied the requirements of bona fide independent contracting arrangements under this rule, with the only change likely being a lower assessed litigation risk for certain businesses. While the number of workers for whom reclassification occurs without bringing them meaningful benefits may not be zero, the Department believes such cases will be rare exceptions. Even if the classification of a worker

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[170] As explained in more detailed above, this is because most workers can be converted from employee into independent contractor classification only if they are provided with greater control over their work and opportunity for profit or loss based on their initiative or investment. Such flexibility and entrepreneurial opportunities may be more valuable to such workers than potential reduction in benefits associated with classification as employees.

were to change, the business could face market forces that would likely hold overall compensation steady. Furthermore, businesses would need to take caution that any new contract relationship would neither damage worker relations nor its underlying business model, both of which would likely negatively impact productivity.

In summary, the most common categories of job conversions—*e.g.*, new positions—are likely to positively impact workers. And the category of job conversions that is likely to produce negative impacts—*i.e.*, reclassification of workers without changes to the job—is most likely the rarest. For these reasons, the Department believes benefits to workers from job conversions will, on balance, exceed costs.

E. Costs

The Department considered several costs in evaluating the rule. The Department quantified regulatory familiarization costs and estimated that they will total $370.9 million in Year 1. Other potential costs, including those raised by commentators, were not quantified, for reasons explained in the sections that follow.

1. Regulatory 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, government entities, and current 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.

For a rule like this one, it is not clear whether regulatory familiarization costs are a function of the number of establishments or the number of firms.[171] Presumably, the headquarters of a firm will conduct the regulatory review for businesses with multiple locations, and also 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 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.

There may be differences in familiarization cost by the size of establishments; however, the analysis does not compute different costs for establishments of different sizes. Furthermore, the analysis does not revise down for states where the laws may more stringently limit who qualifies as an independent contractor (such as California) and thus the new rule will have little to no effect on classifications. 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.[172] In 2017, the most recent year available, there were 7.86 million establishments. These data were supplemented with the 2017 Census of Government that reports 90,075 local government entities, and 51 state and Federal

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[171] 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 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.

[172] U.S. Census Bureau, 2017 SUSB Annual Data Tables by Establishment Industry. https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html.

government entities.[173] The total number of establishments and governments in the universe used for this analysis is 7,950,800.

The applicable universe used by the Department for assessing familiarization costs of this final rule is all establishments that engage independent contractors, which is a subset of the universe of all establishments. In its analyses, the Department estimates the impact of regulatory familiarization based upon assessment of the regulated universe. In several recent rulemakings, the Department estimated that the regulated universe comprised all establishments because the rules were broadly applicable to every employer.[174] For those rules, the Department estimated familiarization costs by assuming each establishment would review each rule. Because this final rule affects only some establishments, *i.e.,* those that currently or may in short order face an independent contractor versus employee classification determination, the Department accordingly reduces the estimated pool to better estimate the establishments affected by the rule by assessing regulatory familiarity costs only for those establishments that engage independent contractors.

In 2019, Lim et al. used extensive IRS data to model the independent contractor market, finding that 34.7 percent of firms hire independent contractors.[175] These data are based on annual tax filings, so the dataset includes firms that may contract for only parts of a year. The 34.7 percent of establishments provides a figure of 2,758,928, which forms the foundation of the multiplier used in this analysis.

The Department did not estimate familiarization costs for companies that may decide to work with independent contractors only *after* the new rule is finalized, because they would need

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[173] U.S. Census Bureau, 2017 Census of Governments. https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.
[174] These include Joint Employer Status under the Fair Labor Standards Act; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; and Regular Rate Under the Fair Labor Standards Act.
[175] Table 10: Firm sample summary statistics by year (2001–2015), https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf.

to familiarize themselves with the current legal framework even in the absence of this rule.[176] Although firms that do not currently use independent contractors are not counted in this universe of employers, to allow for an error margin, the Department is using a rounded 35 percent of the total number of establishments defined above (7,950,800), resulting in 2,782,780 establishments estimated to incur familiarization costs.

The Pennsylvania Department of Labor & Industry (PA L&I) commented that the Department underestimated the cost of the rule by failing to include businesses that are newly incentivized to consider reclassifying workers to independent contractors. As stated above, even without the new rule any firm that does not currently engage any independent contractors but chooses to do so in the future would have already had to familiarize itself in the baseline case, so this rule does not impact those firms. Since the commenter's point is premised on the fact that the firm may be incentivized to investigate the regulation, it would be reasonable to assume that any firm without independent contractors that reviews the new rule and ultimately decides to hire independent contractors is doing so because the firm believes the new relationship will be beneficial to itself and the independent contractor also believes that the new relationship will be beneficial to him or herself. Such a situation would result in net benefits to the employer that more than fully compensate for any familiarization costs. Notably, and for comparability in estimates, the Department does not add these potential firms to the Benefits section either.

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.[177] According to the

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[176] An added dimension is that the final rule is expected to provide significant clarity, which would result in time and cost savings (net of regulatory familiarization costs) for those outside the pool of firms with existing independent contractor relationships. These (net) cost savings are not included in this analysis, consistent with this analysis' treatment of resulting growth in the independent contractor universe.

[177] 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; plans, 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.

Occupational Employment Statistics (OES), these workers had a mean wage of $33.58 per hour in 2019 (most recent data available). Given the proposed clarification to the Department's interpretation of who is an employee and who is an independent contractor under the FLSA, the Department assumes that it will take on average about 1 hour to review the rule as proposed. The Department believes that an hour, on average, is appropriate, because while some establishments will spend longer than one hour to review the rule, many establishments may rely on third-party summaries of the changes or spend little or no time reviewing the rule. Assuming benefits are paid at a rate of 46 percent of the base wage, and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is $54.74; thus, the average cost per establishment conducting regulatory familiarization is $54.74. Therefore, regulatory familiarization costs to businesses in Year 1 are estimated to be $152.3 million ($54.74 × 2,782,780) in 2019 dollars.

For regulatory familiarization costs for independent contractors, the Department used its estimate of 18.9 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. 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. Furthermore, the repercussions for independent contractors are smaller (*i.e.*, the litigation costs, damages, and penalties associated with misclassification tend to fall on establishments).[178] This time is valued at $46.36, which is the mean hourly wage rate for independent contractors in the CWS, $27.27, with an additional 46 percent benefits and 17 percent for overhead, then updated to 2019 dollars. Therefore, regulatory familiarization costs to independent contractors in Year 1 are estimated to be $218.6 million ($46.36 × 15 minutes × 18.9 million).

[178] An independent contractor that hires independent contractors would already be captured in the "establishment" calculation.

The estimate of 18.9 million independent contractors captures the universe of workers over a one-year period. Using this figure for the overall cost estimate results in an artificially high value because it includes workers who would have otherwise been included in the baseline case without the rule and thus spent time familiarizing themselves with the legal framework in the matter of course, without incurring a supplementary cost. Furthermore, the Department believes that it is probable that independent contractors would review the regulation only when they had reason to believe that the benefits would outweigh the costs incurred in familiarizing themselves with the rule, and since this analysis does not attempt to calculate those economic benefits it is possible that the costs presented in this section are overestimated.[179]

The total one-time regulatory familiarization costs for establishments and independent contractors are estimated to be $370.9 million. Regulatory familiarization costs in future years are assumed to be de minimis. Similar to the baseline case for employers, independent contractors would continue to familiarize themselves with the applicable legal framework in the absence of the rule, so this rulemaking—anticipated to provide more clarity—is not expected to impose costs after the first year.[180] This amounts to a 10-year annualized cost of $43.5 million at a discount rate of 3 percent or $52.8 million at a discount rate of 7 percent.

SWACCA commented that regulatory familiarization costs were underestimated because they "would not only be imposed upon adoption of a final rule but would be ongoing as stakeholders begin to understand whether and how it will be applied." Additionally, they asserted the costs for businesses to familiarize themselves with the new guidance would exceed the cost of familiarization for the existing guidance, a claim that the commenter did not substantiate with data. The Department disagrees with this assertion. The rule is expected to reduce the time spent

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[179] For example, independent contractors in states with classification frameworks that are known to be more stringent than the existing FLSA classification framework, such as in California, may not review the rule since it would be unlikely to affect their classification.

[180] As explained below, the Department considers that the regulation may produce benefits along this dimension in future years by simplifying the regulatory environment.

analyzing how the economic reality test's factors interact. Accordingly, the Department reiterates that incremental regulatory familiarization costs in future years are expected to be *de minimis*.

A number of commenters expressed support for the cost estimates. The CGO states that, "As currently written, the proposed rule carefully quantifies the cost savings of reduced litigation and increased clarity." AFPF posited that, if anything, the calculations would tend to reflect "an overstatement of regulatory familiarization costs."

2. Other Costs[181]

It is possible this rule will result in costs beyond the above described familiarization costs. In the NPRM, the Department invited comments and data on potential other costs of this rule. The Department received comments responsive to these requests which generally fell into seven categories: impacts to workers; impacts to tax revenues; impacts on competition; impacts on income inequality and to minorities and women; tax filing; implementation; and impacts on income stability. The Department evaluated all of the potential costs that were identified, and examined many of the citations provided. In general, the commenters did not provide ample data or other evidence to support their claims, and, upon review, the Department was unable to confirm or substantiate the proposed cost categories in its own research. Therefore, in this section of the analysis, the Department addresses the points raised and discusses the qualitative merits, but does not quantify estimates for inclusion in its top line figures.[182] Detailed explanations are presented in each category below, including discussion of the range of uncertainties and data limitations identified.

a. Additional Impacts to Workers

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[181] Various commenters to the NPRM raised points that they considered "costs," although those points may more accurately be defined as transfers under Executive Order 12866. To clearly address these points, the Department decided to address the following areas with the language used by commenters. For further discussion of related impacts, please see the Potential Transfers section.

[182] In some cases, commenters raised points that may very well impact certain individuals in specialized circumstances, but which are not, when aggregated across the economy as a whole, cumulatively significant or representative.

Several commenters asserted that the NPRM's discussion of costs did not include a discussion of effects on workers beyond minimum wage and overtime pay. Ironworkers Local Union 7 stressed the importance of benefits such as workers' compensation for the dangerous nature of the work of their members and other construction workers. The Center for Law and Social Policy (CLASP) noted that the rule could also impact other benefits based on the FLSA's definition of employment, such as access to paid sick leave in general and under the Families First Coronavirus Response Act (FFCRA). The Washington Center, among others, contended it may also impact workers' rights to join a union. The International Brotherhood of Teamsters commented that the liquidated damages remedy for willful or bad faith violations of the FLSA is not available to workers who are classified as independent contractors. Other commenters asserted that independent contractors are also not protected by the Federal anti-discrimination and health and safety statutes, and that the Department failed to consider this effect.[183]

These potential impacts do not change the Department's overarching view that workers as a whole will be better off as a result of this rule, even if some workers may not be better off. Generally speaking, the above commenters raise points that fundamentally rest on the assumption that independent contractors cannot adequately assess their risks, needs, and goals. Furthermore, these commentators seem to assume that the listed features could be obtained by workers with no cost to the worker. The Department does not agree with such assessments. The Independent Women's Forum stated that the flexibility afforded by independent contracting is

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[183] The Department has not conducted a thorough review of discrimination law at the Federal or state level for the purposes of this rulemaking, but notes that independent contractors are protected by at least some Federal anti-discrimination laws. *See, e.g.*, 42 U.S.C. § 1981. Further, the scope of these laws is not dependent on employee status under the FLSA. *See, e.g., Gulino v. New York State Educ. Dep't*, 460 F.3d 361, 379 (2d Cir. 2006) ("[T]he Supreme Court has given us guidelines for discerning the existence of an employment relationship [in the race-discrimination context]: traditional indicators of employment under the common law of agency.");*Weary v. Cochran*, 377 F.3d 522, 524 (6th Cir. 2004) ("[T]he proper test to apply in determining whether a hired party is an employee or an independent contractor under the [Age Discrimination in Employment] Act is the 'common law agency test.'").

especially "crucial for women who are the primary caregivers in their households." Palagashvili; Independent Women's Forum ("Women find independent contracting appealing because of the flexibility, autonomy, and freedom it provides."). Nor did individual freelancer commenters, who repeatedly affirmed their ability to make rational decisions for themselves and their own businesses. One such commenter stated that "I prefer the option to make my own schedule and decide how I want to proceed in making my money at my own discretion." Another explained that, "[a]s an independent contractor I am free to choose when and where I work. This is important to me as a caregiver for elderly relatives." As a final illustrative example, a freelancer stated that "I have chosen this profession because of the freedom and flexibility it affords me. I also can earn more freelancing than I could working in a similar full-time job […]. I am a far better judge of what is good for me than a politician in Washington." Independent workers are a bedrock of the U.S. economy and are acutely aware of their own values and needs. Fundamental to being an independent contractor is the ability to control one's own work, which enables workers to be the deciding factor in accepting or declining work that may be risky or not as rewarding. The commenters above did not cite or offer data to support their assumption that employees covered by the FLSA are intrinsically better off compared to genuine independent contractors who are not covered by the FLSA. Several commenters, notably CLASP and NWLC, who submitted comments related to the pandemic do not address the abundant data demonstrating that access to independent contracting has been essential for many workers attempting to balance responsibilities, especially for women and caregivers. Accordingly, to the extent the final rule will increase the frequency of independent contracting, the Department believes that workers will, on net, benefit from that option.

b. Impacts to Tax Revenue and Public Assistance

Some commenters asserted that the rule will either reduce tax revenue or increase public assistance. For example, some commenters pointed out that low-income workers who are classified as independent contractors are often forced to rely on public assistance programs. The

UFCW cites a study finding 15 percent of platform workers in the San Francisco area receive some form of public support (e.g. food stamps, housing assistance) and 30 percent were on state public-access health insurance.[184] This report did not, however, compare this finding with the extent to which low-income employees rely on public assistance. The Department notes that public assistance is available to low-income individual whether they are employees or independent contractors. An increase in independent contracting will not necessarily lead to increased public assistance expenditures. To the contrary, if independent contracting, even at a low income, is the alternative to unemployment or nonparticipation in the labor force, then it would reduce means-tested public assistance expenditures. Several individual commenters suggested that they would not be working at all but for independent contractor opportunities. One commenter said, "I am an independent contractor, i.e. business owner; I am self-employed. I would not be able to work in any capacity, other than self-employed." Another explained, "I am 71 years old and cannot (and will not) take regular employment. Earning an income from my home is safer, more effective and more satisfying." As a final illustrative example, a woman explained that "[a]s a single mother trying to go back to school I have day and night classes. Having a regular job during this time be [sic] very challenging to meet my school hours." Thus, making it easier for individuals to work as independent contractors may reduce the burden on public assistance. Furthermore, since this RIA focuses on the changes at the margin based on increased clarity of the classification factors, the concerns raised by the studies cited by these commenters would not necessarily apply to those this rule impacts.

Several commenters noted that taxpayers funded unemployment payments for independent contractors through the Pandemic Unemployment Assistance (PUA) program. SWACCA noted that more than 11 million self-employed individuals have received assistance

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[184] C. Benner, E. Johansson, K. Feng, and H. Witt. "On-Demand and On the Edge: Ride-Hailing & Delivery Workers in San Francisco" (May 5, 2020), https://transform.ucsc.edu/on-demand-and-on-the-edge.

from PUA.[185] The nationwide response to the COVID-19 pandemic was intentionally robust. PUA assistance was funded by Congress in the CARES Act.

Several commenters noted that any shift from employees to independent contractors will result in lost tax revenue. Specifically, the Michigan Regional Council of Carpenters cites estimates of the loss in taxes in Michigan and other states due to misclassification.[186] Notably, misclassified workers are not the same as independent contractors. In fact, this rule clarifies the classification of workers and is expected to result in fewer total cases of misclassified workers. The Department does not agree with the assumptions about the U.S. labor market held by commenters to this rule that reference studies on the cost of misclassified workers. EPI estimated that the increase in workers classified as independent contractors will lead to a transfer of at least $750 million annually from social insurance funds. EPI's estimate is predicated on an assumption that eligibility for independent contractors to receive unemployment benefits "will occur in future recessions." The unprecedented CARES Act funded unemployment benefits through PUA for the first time in history. EPI's entire estimate rests on such unprecedented relief becoming commonplace, a view which the Department does not share. The Washington Center cites a study by Harvard Law School's Labor and Worklife program that "found that between 2013 and 2017, the state of Washington lost $152 million in unemployment taxes and the Federal government lost $299 million in payroll taxes due to worker misclassification in the state."[187]

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[185] Unemployment Insurance Weekly Claims Report (October 15, 2020), https://oui.doleta.gov/press/2020/101520.pdf.

[186] D. Belman and R. Block, "Informing the Debate: The Social and Economic Costs of Misclassification in the Michigan Construction Industry," Institute for Public Policy and Social Research, Michigan State University (2008), http://ippsr.msu.edu/publications/ARMisClass.pdf. F. Carre, "(In)dependent Contractor Misclassification," EPI Briefing Paper #403 (June 8, 2015), https://files.epi.org/pdf/87595.pdf. O. Cooke, D. Figart, J. Froonjian, and K. Sloane, "The Underground Construction Economy in New Jersey," Stockton University (2016), https://www.mcofnj.org/wp-content/uploads/2018/05/Underground-Construction-Economy-Summary-June-2016.pdf.

[187] L. Xu and M. Erlich, "Economic Consequences of Misclassification in the State of Washington." Harvard Law School Labor and Worklife Program (2019), https://lwp.law.harvard.edu/news/worker-misclassification-washington-state-leads-millions-revenue-losses-new-harvard-report

Again, worker misclassification is erroneously compared to independent contractors. Further, the majority of these estimates of lost revenue are due to an assumption that freelance workers do not report their full earnings, which is a criminal offense. A letter from seven Congressional Representatives cited a 1984 IRS estimate that misclassification cost the Federal government $3.72 billion (adjusted to 2019 dollars), nearly 60 percent of which was from misclassified workers failing to pay income taxes and the remainder was due to failure to pay taxes used to fund social insurance programs. Once again, this comment failed to meaningfully explain how the studies it cites can be extrapolated across independent contractors.

The Department notes that certain employer required taxes, such as unemployment insurance and workers' compensation, are not required for independent contractors, and thus the associated tax revenue will decrease if more individuals choose to work as independent contractors. However, the lack of transfer means that the worker keeps more money, which may be saved to provide for periods of unemployment. Additionally, these are transfer programs where the benefits are paid to the workers who pay into the program through their employers. Thus, if independent contractors are not eligible to participate in these program, government expenditures would also decrease. Therefore, providing unemployment benefit or workers' compensation to independent contractors is generally not a cost to state and local governments. To demonstrate, consider unemployment programs, which are a type of insurance. Reduced unemployment taxes are generally offset by reduced unemployment benefits. The only direct cost would be if workers who no longer pay into these programs continue to receive benefits. These direct costs are expected to be small.

Government revenue from other taxes, such as income and Medicare taxes, may go up or down as a result of this rulemaking depending on the total income of employers, employees, and independent contractors. However, a decrease in tax revenue due to a failure of some independent contractors to fully pay their required taxes is not a cost attributable to the

Department's rulemaking revising the standards for independent contractor status under a Federal law separate and apart from any tax law.

Finally, the Department notes that overall state and local tax revenue may increase as a result of the efficiency and flexibility this rule promotes. The Department believes that legal clarity provided by this rule will result in, among other things, lower regulatory compliance and litigation costs, more efficient and innovative work arrangements, and new jobs for individuals who otherwise would not work. All of this could increase firms' profits and workers' incomes, which results in a larger pool from which state and local taxes are drawn. The overall positive effect on state and local tax revenue may dwarf, for example, any reduction in unemployment insurance or workers compensation taxes. The Department, however, declines to quantify net effects on state and local tax revenue because it believe any such attempt to do so would require too many assumptions.

c. Fair Competition

Several commenters stated that expanding the scope of independent contractors will "fuel a race to the bottom," where companies will feel pressure to classify workers as independent contractor to reduce labor costs in order to compete in their market. UPS claimed that companies misclassifying workers as independent contractors externalize their costs and hurt other businesses through unfair competition.[188] The Department believes that this will be unlikely because the risks of losing workers likely prevents businesses from reducing overall compensation, which includes the fully burdened wage rate (i.e., with taxes and benefits included). Any decrease in compensation below this level would likely result in firms not being able to hire adequate labor (either quantity or quality). This rule does not, as some commenters claimed, expand the scope of permissible independent contracting arrangements but rather

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[188] UPS does not use independent contractors for some of the roles or occupations that its largest competitor, FedEx, does. FedEx relies heavily on independent contractors for its business model, and recently won a legal case against the National Labor Relations Board, in which the court found that certain FedEx drivers were legitimately classified as independent contractors under the NLRA. *See FedEx Home Delivery v. NLRB*, 893 F.3d 1123No. 14-1196 (D.C. Cir. 2017).

clarifies and sharpens the test for determining proper classification, which is expected to benefit both workers and firms.

d. Income Inequality and Impacts on Minorities and Women

Some commenters asserted that the rule could increase racial and gender income inequality. NWLC wrote that additional protections other than minimum wage and overtime pay afforded by the FLSA were particularly important for working women, such as "employer obligations to accommodate breastfeeding workers"[189] and "protections against pay discrimination." The Washington Center cited a study on outsourcing that it believed shows independent contracting "has contributed to increased wage inequality in the United States."[190] But the cited study actually found something different: "the increased concentration of typically low-wage occupations over time can be explained by changes in the characteristics of establishments *employing* these occupations."[191] In other words, the study linked wage inequality to employers outsourcing jobs to other employers that paid lower wages, and made no attempt to isolate the effects of independent contracting. The evidence discussed in this analysis shows that independent contractors often earn more than their employee counterparts further undermines the commenter's assertion.

UFCW wrote that "[t]he proposed regulation fails to address its potential impact on people of color who are overrepresented in low-wage independent contractor positions such as app-based platform work." This rule clarifies for app-based platforms how to properly classify workers, thereby reducing regulatory compliance, litigation, and transaction costs. Some of these cost savings could be shared by app-based workers in the form of increased earnings, bonuses, or

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[189] Independent contractor relationships provide flexibility to accommodate individual worker needs, such as child care and breastfeeding.

[190] Including E. Handwerker and others. "Increased Concentration of Occupations, Outsourcing, and Growing Wage Inequality in the United States," (2015), https://www.semanticscholar.org/paper/Increased- Concentration-of-Occupations%2C-and-Growing-Handwerker- Abraham/f7d0d2c9cfcbf53f961bb07a2542abefe4be84c0?p2df

[191] *Id.* at 13 (emphasis added).

more job opportunities.[192] To the extent that certain racial groups make up a disproportionate share of app-based workers, those groups will also enjoy a disproportionate share of benefits. Regarding gender-based inequality in the gig economy, a recent NBER study found that the gender wage gap among on-demand rideshare workers is lower than that of the rest of the economy and is "entirely attributed" to differences in experience and preferences.[193] The NBER study specifically found that "discrimination is *not* creating a gender gap in this setting," and "no other paper has ever estimated such a precise 'zero' gender gap in any setting."[194] Several commenters cited other studies that document measurable benefits of independent contractor opportunities for women. Dr. Liya Palagashvili provided a lengthy review of the literature on the beneficial impacts of independent contract work for women. She cited a study that finds that women are the main caregivers at home, and 96 percent of women "indicate that the primary benefit of engaging in platform-economy work is the flexible working hours." *See also* Independent Women's Forum ("Women find independent contracting appealing because of the flexibility, autonomy, and freedom it provides."). A McKinsey Global Institute study, discussed in an earlier section, found that independent work offers caregivers, who are predominantly women, access to economic opportunity they would otherwise not have, concluding that "[t]his type of flexibility can ease the burden on financially stressed households facing logistical challenges." Dr. Palagashvili cited numerous other studies that are consistent in their findings: women are very much attracted to work arrangements that offer flexibility, including one that finds "75 percent of self-identified homemakers, or stay-at-home mothers in the United States, indicated they would be likely to return to work if they were to have flexible options." These

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[192] If, for example, the platform were to transfer some of these increased earnings to consumers in the form of discounts, the demand quantity for the services (and thus the job opportunities for the ICs) could increase.

[193] Cody Cook, et al., The Gender Earnings Gap in the Gig Economy: Evidence From Over a Million Rideshare Drivers, NBER Working Paper No. No. 24732, June 2018, available at https://www.nber.org/system/files/working_papers/w24732/w24732.pdf.

[194] *Id.* at 14.

studies offer data based on primary research, and several sources are based on economy-wide survey data.

Dr. Palagashvili's comments are supported by many individual women who commented to affirm that independent contracting provides necessary flexibility to balance their work and life priorities. One woman explained that "[a]s a work-at-home mom, I ramped up my business to coincide with the time I had available while raising my kids. I worked during their nap times, and then added more hours as they went to school." Another stated, "I have been a military spouse for 17 years and the ability to work as an independent contractor has been invaluable to my family. Through every move, my job comes with me; all I need is a computer and access to the internet. Had I been forced to find a new job with each [change of station], our family would have had some very tough times." As a final illustrative example, a woman informed the Department that, "I have been an independent contractor for more than 3 decades; it helped me as a single mother and now it helps me help the kids with my granddaughter."

The Department agrees with the above commenters and data indicating that women would benefit from greater access to independent contracting opportunities. By clarifying how workers can be properly classified as an independent contractor, this rule promotes the formation of such opportunities.

e. Tax Filing Costs

The AFL-CIO and the Washington Center commented that independent contractors have more time-intensive accounting and tax filing processes, and the Department should address these costs. The Washington Center claims that it is inappropriate to quantify time savings from increased clarity but not to quantify the increased time necessary to file taxes, which they estimate to amount to $832.3 million annually. Even assuming independent contractors spent more on their tax filings than employees, the Washington Center's estimate is based on average costs for all business filers in the country, drawn from the IRS's "Estimated Average Taxpayer

Burden for Individuals by Activity" Table in its 2019 instructions on form 1040.[195] This group of business filers includes anyone with income from rental property, royalties, S corporation earnings, farming, and other business ventures, which dramatically expands the scope beyond independent contractors. The Washington Center neither attempts to adjust for this overestimate nor explain how one might disentangle the conflated grouping, so the Department was unable to assess whether a real impact can be expected. The Department noted in the NPRM that it did not attempt to quantify the numerous benefits that it expects from the increased clarity regarding classification. Instead, it assumed that market actors operate in their own best interest, noting that for those workers that choose to pursue work as an independent contractor, as opposed to an employee, and file taxes as such it can be assumed that they have correctly determined for themselves that the benefits outweigh the costs, including any costs associated with increased time spent on tax filings.[196]

f. Implementation Costs

The PA L&I asserted that the Department "provided zero estimates for the cost of actual implementation of the regulation." PA L&I also claimed that implementation costs include reclassifying current workers and identifying the employment status of new hires. Concerning the first, the Department maintains that workers will only be reclassified when the benefits to businesses outweigh the costs. Concerning the later, the Department believes there will be a cost savings when new employment relationships must be analyzed (see following section on cost savings). The Department believes the implementation costs will be *de minimis*.

g. Income Stability

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[195] Based on the difference in estimates of burdens for businesses and nonbusinesses from the table "Estimated Average Taxpayer Burden for Individuals by Activity" in U.S. Internal Revenue Services, "1040 and 1040-SR Instructions," p. 101, (2019), https://www.irs.gov/pub/irs-pdf/i1040gi.pdf.

[196] All workers are required to file with the IRS regardless of classification. The time and cost of tax filing is highly dependent on the individual circumstances of the workers. The Department believes workers are able to best assess the costs and benefits of tax filing.

Several commenters asserted that independent contracting is associated with more volatile earnings. The Washington Center asserted that income stability is important for these workers and their families. UFCW cited literature finding that inconsistent earnings are one of the most reported disadvantages to gig work.[197]

The Department agrees that income volatility may be problematic for some workers and may require better money management to smooth consumption over periods of higher and lower income. However, as stated above, the Department assumes that market actors operate in their own best interest, and if a worker chooses to pursue work as an independent contractor, as opposed to an employee, it can be assumed that the worker has determined for himself or herself that the benefits outweigh the costs. The Department also believes income security is best achieved by removing barriers that prevent laid-off Americans from finding paid work, including as independent contractors. This lesson may be more important in the wake of the COVID-19 emergency, a point that has been presented by hundreds of academics.[198] Additionally, some literature indicates that many independent contractors value flexibility over income stability. CWI submitted a survey they conducted that found 61 percent of independent contractors prefer the "flexibility to choose when and where to work" over "having access to a steady income and benefits."[199]

F. Cost Savings

This final rule is expected to result in cost savings to firms and workers. While the Department believes that there are multiple areas where firms and workers may experience cost savings, the Department has quantified only two: the cost savings from increased clarity and reduced litigation. The Department estimates that annual cost savings associated with this rule would be $495.9 million ($447.2 million in increased clarity + $48.7 million in avoided litigation

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[197] Prudential Research, "Gig Workers in America" (2017), https://www.prudential.com/media/managed/documents/rp/Gig_Economy_Whitepaper.pdf
[198] *See* 151 Ph.D. Economists and Political Scientists in California, "Open Letter to Suspend California AB-5" (April 14, 2020).
[199] Coalition for Workforce Innovation (2020), *supra* note 77.

costs). Other areas of anticipated cost savings were not estimated due to uncertainties or data limitations. The Department believe the rule will result in the following additional cost savings, which are discussed qualitatively: making labor market more efficient; improving worker autonomy satisfaction; providing an alternate source of income for some workers during the pandemic; and facilitating independent contractors' ability to work for multiple customers.

While public comments specific to parts of the calculations are addressed at the corresponding location throughout this section, some commenters submitted general comments about the cost savings estimates. Several commenters offered supportive comments. The CGO said that "the proposed rule carefully quantifies the cost savings of reduced litigation and increased clarity." The AFPF also expressed support but suggested that cost-savings may be underestimated. Conversely, other commenters objected to the estimated cost savings, including that it was inappropriate to quantify the potential cost savings from this rule but not quantify the costs to workers. Representative Pramila Jayapal asserted that the Department's analysis did not include "any serious, fact-based argument as to why this rules change would be of benefit to the workers who would be most impacted by this rule change." Other commenters offered equivocal comments, including one individual who noted that "point made about less litigation is a valid one," but countered that the "cost-savings pointed out seem to fall only on the side of the business/employer."

1. Increased Clarity

This final rule is expected to increase clarity concerning whether a worker is classified as an employee or as an independent contractor under the FLSA. This would reduce the burden faced by employers, potential employers, and workers in understanding the distinction and how the working relationship should be classified. It is unclear exactly how much time would be saved, but the Department provides some quantitative estimates to provide a sense of the magnitude.

The importance of increased clarity is noted by a study coauthored and cited by the Society for Human Resource Management (SHRM) that found human resources professionals' largest challenge concerning external workers that they would like to see resolved is the legal ambiguity regarding the use and management of external workers.[200] Commenters from the business community agreed with the Department that the rule would improve legal clarity. *See, e.g.,* U.S. Chamber of Commerce; CWI; WPI; ATA; NRF; National Restaurant Association. Groups that represent freelancers and individual freelancers who commented also believe this rule would improve legal clarity. *See, e.g.,* CPIE; Fight for Freelancers. However, several commenters dispute the Department's claim that the rule will increase clarity, with some focusing on specific industries. The TRLA stated that "the proposed rule unnecessarily muddies the waters with respect to the farm labor market" because they believe it contradicts "Federal courts' interpretation of a Federal statute." The State AGs also stated this rule will create confusion because "many jurisdictions have applied the economic reality test" to distinguish between employees and independent contractors for decades.[201]

The Department expects this rule to produce beneficial cost savings by clarifying the classification process. To quantify this benefit, the following variables need to be defined and estimated: (1) the number of new employer-worker relationships being assessed to determine the appropriate classification; (2) the amount of time saved per assessment; and (3) an average wage rate for the time spent. The Department estimates this will result in a $447.2 million in savings annually.

The Department began with its estimate of the number of current independent contractors as the basis for estimating the number of new relationships. As discussed in section VI(C),

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[200] SHRM and SAP SuccessFactors. "Want Your Business to Thrive? Cultivate Your External Talent" (2019), https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/external-workers.aspx.

[201] While state-imposed requirements may influence the use of flexibilities provided by this rule, and could impact the number of entities and workers affected, the Department does not possess the requisite data to estimate the number of states that would implement measures or the magnitude of their impact on the universe of independent contractors considered in this analysis.

according to the CWS, there are 10.6 million workers who are independent contractors on their primary job. Adjusting this figure to account for independent contractors on their secondary job results in 18.9 million independent contractors. According to Lim et al. (2019), in 2016 the average number of 1099-MISC forms issued per independent contractor was 1.43. Therefore, the Department assumes the average independent contractor has 1.43 jobs per year.[202] This number does not account for the workers who do not file taxes, a recognized limitation in the cited study. Because it is unclear whether those who do not file taxes would have a higher or lower number of jobs per year, the Department does not believe that this limitation biases the estimate in either direction. Multiplying these two numbers results in an estimated 27.0 million new independent contractor relationships each year.[203]

The independent contracting sector is characterized by churn. In their annual *State of Independence in America* 2019 report, MBO Partners, a leading American staffing firm, finds that 47.8 percent of U.S. adults reported working as an independent contractor at some point in their career; they estimate that figure will reach 53 percent in the next five years.[204] This fits with the range of estimates for the size of the independent contractor universe presented in section VI(C). Thus, it is assumed that over the ten-year time horizon of this analysis, millions of Americans will choose independent contractor work either for the first time or return to it. This churn is not explicitly estimated for use in this analysis, but it provides a qualitative rationale for not attempting to taper the expected size of the independent contractor universe over time.

A subset of new independent contractor relationships may have time savings associated with the final rule. Such a reduction is difficult to quantify because it is unclear how many

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[202] Lim et al., *supra* note 75, at 61.

[203] The Department did not incorporate estimates of potential growth in independent contracting due to uncertainty. For example, the trend in independent contracting varies significantly based on the source. Additionally, the impact of this rule on the prevalence of independent contracting is uncertain. Lastly, state laws, such as those in California discussed below, may have significant impacts on the prevalence of independent contracting, which would make historical growth rates potentially inappropriate.

[204] MBO Partners (2019), *supra* note 131.

establishments and independent contractors will realize benefits of increased clarity. It is also possible that the increased clarity of the classification process will lead to compound effects that generate far greater benefits over time. Nonetheless, because it is possible that only a subset of contracts would receive the cost savings associated with increased clarity, the Department has reduced the number of contracts in the estimate by 25 percent. This results in 20.2 million contracts with cost savings to both the employer and the independent contractor.[205]

In her comment, Representative Pramila Jayapal questioned the breadth of the time savings benefit. She claimed that the only beneficiaries of this rulemaking would be large, repeat players that frequently misclassify workers. It is unclear what data Representative Jayapal relied on to come to this conclusion. Furthermore, Representative Jayapal largely ignores the millions of properly classified independent contractors that will benefit from added regulatory clarity. The Department disagrees that the cost savings benefits will be limited to large, repeat players. Other comments concur with the Department's view, supported by data-backed arguments that the expect the rule to enable access to flexible work for caregivers responding to the pandemic, enable workers to readily supplement their income, and unlock the potential of the growing tech sector. Farren and Mitchell, of the Mercatus Center, assert that the rule, "builds on existing precedent and serves largely as a synthesis and clarification of previous economic reality tests, rather than implementing any sort of radical change," adding that independent contractors will likely "develop more productive economic relationships."

Per each new contract with time savings, the Department has assumed that employers would save 20 minutes of time and independent contractors would save 5 minutes.[206] These numbers are small because they represent the marginal time savings for each contract, not the entire time necessary to identify whether an independent contractor relationship holds.

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[205] 18.9 million independent contractors × 1.43 contracts per year × (1 - 0.25 possible reduction in clarity benefits) = 20.2 million.

[206] These time savings are based on a 33 percent assumed reduction in the estimated familiarization time per contract for both independent contractors (15 minutes) and employers (1 hour).

The Washington Center commented, "[t]here is no transparency into what surveys or studies were used to quantify the current amount of time individuals and businesses currently spend on independent contractor regulatory familiarization. Further, there was no attempt to explain with any degree of accuracy how this rule will change that time spent." The Washington Center seems to misunderstand the analysis presented. The time savings variables are estimates of how the clarity provided in the rule will facilitate the contracting process. Estimating administrative time spend due to comply with government laws and regulations is a typical component of economic analyses and is often informed by consultation with subject matter experts. The Department requested data to further refine its estimate, but did not receive any. Notwithstanding, numerous commenters expressed support of the analysis the Department presented.

The UFCW believes that there will be an increase in time to assess employment status because employers and independent contractors will now evaluate the classification under both current precedent and the definition laid out in this rule; "courts may decide to ignore the DOL's new interpretation, meaning that companies and workers would now analyze their FLSA independent contractor determinations under current precedent and also the agency's proposed non-binding new test." The Department disagrees that courts will ignore the final rule. The RIA already includes a familiarization cost for the new rule, and, in the baseline, establishments are assumed to be familiar with the status quo environment. Accordingly, additional costs as stated in this comment are likely to be insignificant.

To estimate the cost savings due to the increased clarity this rule provides, the Department applies the following estimates. For employers, this time is valued at a loaded hourly wage rate of $54.74. This is the mean hourly rate of Compensation, Benefits & Job Analysis Specialists (13-1141) from the OES multiplied by 1.63 to account for benefits and overhead. For independent contractors, this time is valued at $46.36 per hour (mean wage rate for independent

contractors in the CWS of $27.29 with the amount of benefits and overhead paid by employers for employees, then adjusted to 2019 dollars using the GDP deflator).

Using these numbers, the Department estimates that employers will save $369.0 million annually and independent contractors will save $78.1 million annually due to increased clarity (Table 3). In sum, this is estimated to be a $447.1 million savings. The Department assumes the parameters used in this cost savings estimate will remain constant over time. This assumes no growth in independent contracting, no real wage growth, and no subsequent innovation in the employer-worker relationship. These assumptions facilitate simplicity of calculation.[207] The annualized savings over both a 10-year horizon and in perpetuity, with both the 3 percent and 7 percent discount rates is $447.1 million.

Table 3: Cost Savings for Increased Clarity to Employers and Independent Contractors

Parameter	Value
Number of new relationships (per year)	
Independent contractors	18,858,000
Number of jobs per contractor	1.43
New independent contractor jobs	26,966,940
Adjustment factor	75%
Total	20,225,205
Time savings per job (minutes)	
Employers	20
Independent contractors	5
Value of time	
Employers	$54.74
Independent contractors	$46.36
Total savings	
Employers	$369,011,556
Independent contractors	$78,137,248
Total	$447,148,804

In addition to increased clarity when assessing whether each relationship qualifies as an independent contractor or employment relationship, there may also be upfront time savings for

[207] By applying these assumptions to the Department's estimates, instead of incorporating anticipated growth and innovation impacts, the results may be an underestimate of total cost savings.

new entrants who must familiarize themselves with the standard for being an employee as compared to an independent contractor, and who now have clearer guidance to aid in that understanding. This would apply to new independent contractors, new establishments, and current establishments that are considering hiring independent contractors for the first time. The Department did not quantify this benefit due to uncertainty and the difficulty of determining reliable variables for the number of new relationships that might occur due to the rule. However, such benefits are expected to be real and significant.

2. Reduced Litigation

The changes included in this rule are expected to result in decreased litigation due to increased clarity and reduced misclassification. The methodology of this section mirrors previous final rules promulgated in recent years.[208] The rule would clarify to stakeholders how to distinguish between employees and independent contractors under the Act. The increased clarity is expected to result in fewer independent contractor misclassification legal disputes, and lower litigation costs. The Department estimates that $48.7 million in litigation costs related to independent contractor disputes will be avoided per year as a result of this rule. This may be a lower-bound estimate, reasons for which are described in more detail below.

The Department estimates litigation cost savings as being equal to an estimate of the number of cases avoided as a result of the rule multiplied by the average litigation cost per case.

Number of Cases Avoided

According to the Public Access to Court Records (PACER) system, there were 7,238 Federal cases relating to the FLSA closed in 2019.[209] The Department estimates that 9.4 percent of these cases relate to independent contractor status.[210]

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[208] For example, the Department applied a similar approach to litigation costs in the 2019 final rule *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 81 FR 51230 (2019).
[209] Downloaded from Public Access to Court Electronic Records (PACER).
[210] PACER does not provide a granular classification of FLSA case types to identify the number of cases specific to independent contractor disputes, so the Department performed a keyword

For the NPRM, to determine this percentage of cases relating to independent contracting, the Department reviewed a previous random sample of FLSA cases closed in 2014.[211] For this final rule, the Department updated its dataset, using a sample that included 500 cases closed in 2019. Of those cases, the Department identified 47 cases within this sample that related to independent contractor status. This ratio was applied to the 7,238 FLSA cases closed in 2019 to estimate 680 cases related to independent contractor status. The Department assumes that the increased clarity of the rule would reduce the number of Federal FLSA cases involving independent contractor classification disputes by 10 percent as stakeholders would better understand and be better able to agree on classification determinations without having to litigate.[212] Multiplying these variables results in an estimated 68 cases related to independent contractor disputes avoided annually. This estimate of the reduction in the number of independent contractor disputes filed does not take into account any reduction in the number of FLSA cases related to independent contractor disputes heard in state courts (e.g., where the state has adopted the FLSA standards for classifying workers), nor does it take into account any reduction in filings resolved before litigation or by alternative dispute resolution, neither of which are captured in PACER data.

Average Litigation Cost per Case

The Department applied a previous estimate of litigation costs of $654,182 per case. To obtain this estimate, the Department conducted a search for FLSA cases concluded between 2012

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analysis with spot checking of a random sample of 500 cases closed in 2019, determining that 9.4 percent of cases were related to independent contractor status (47/500 = 9.4 percent).

[211] The Department used data from 2014 already obtained for use in the analyses performed for the 2019 overtime and regular rate final rules. *See* 84 FR 51230, 51280–81 (reduced litigation estimate for the final rule updating the FLSA's white collar exemptions at 29 CFR part 541); 84 FR 68736, 68767–68 (reduced litigation estimate for the final rule updating the FLSA's "regular rate" regulations at 29 CFR part 778).

[212] This aligns with the methodology the Department has applied in a number of rulemakings (*See* e.g., Regular Rate Under the Fair Labor Standards Act), and in the NPRM for this rule. In each rulemaking with this assumption, the Department requested comments and data on this point, which yielded no substantive data or critiques on its merit. Therefore, the Department believes this is an appropriate assumption in this analysis.

and 2015 in the Westlaw Case Evaluator tool and on PACER and identified 56 cases that contained sufficient litigation cost information to estimate the average costs of litigation.[213, 214] The Department looked at records of court filings in the Westlaw Case Evaluator tool and on PACER to ascertain how much plaintiffs in these cases were paid for attorney fees, administrative fees, and/or other costs, apart from any monetary damages attributable to the alleged FLSA violations. After determining the plaintiff's total litigation costs for each case, the Department then doubled the figures to account for litigation costs that the defendant employers incurred. According to this analysis, the average litigation cost for FLSA cases concluded between 2012 and 2015 was $654,182. Adjusting for inflation, using the GDP deflator, results in a value of $715,637 in 2019 dollars.[215]

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[213] Litigation costs are not tracked in a systematic way by any publicly available source. Individual case records are available through various sources (e.g. PACER and Westlaw), but litigation costs are often not reported because of undisclosed settlement agreements or because attorney fees are not included in verdict judgements. However, because the FLSA entitles prevailing plaintiffs to litigation cost awards, the Department was able to ascertain costs for 56 relevant cases.

[214] The 56 cases used for this analysis were retrieved from Westlaw's Case Evaluator database using a keyword search for case summaries between 2012 and 2015 mentioning the terms "FLSA" and "fees." This was not limited to cases associated with independent contracting. Although the initial search yielded 64 responsive cases, the Department excluded one duplicate case, one case resolving litigation costs through a confidential settlement agreement, and six cases where the defendant employer(s) ultimately prevailed. Because the FLSA only entitles prevailing plaintiffs to litigation cost awards, information about litigation costs was only available for the remaining 56 FLSA cases that ended in settlement agreements or court verdicts favoring the plaintiff employees.

[215] This average litigation cost per case may underestimate total average costs because some attorneys representing FLSA plaintiffs may take a contingency fee atop their statutorily awarded fees and costs.

Applying these figures to the estimated 68 cases that could be prevented each year due to this rulemaking, the Department estimates that avoided litigation costs resulting from the rule total $48.7 million per year (2019 dollars).[216][217]

3. Improved Labor Market Conditions

The Department anticipates the final rule will produce benefits by reducing uncertainty and improving labor market conditions. Removing uncertainty improves labor market efficiency by reducing deadweight loss. As discussed in the need for rulemaking, the Department believes emerging and innovative economic arrangements that benefit both workers and business require reasonable certainty regarding the worker's classification as an independent contractor. The current legal uncertainty may deter businesses from offering these arrangements or developing them in the first place.[218] If so, the result would be economic deadweight loss: legal uncertainty prevents mutually beneficial independent contractor arrangements. This final rule may produce cost savings by reducing deadweight loss. Nonetheless, due to the abundance of variables at play, the Department has not attempted to quantify the precise amount of that reduction.

The CGO concurred in its public comment, emphasizing that an important benefit of this rule will likely be increased labor market flexibility. They note that "most labor models suggest

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[216] Using the median litigation cost, rather than the mean, results in a value of $122,341 (2019 dollars) per case, which for the estimated 68 annual cases produces a total annual litigation cost savings of $8.3 million. However, the median values do not adequately capture the magnitude of the impact resulting from large-scale litigation cases that are expected to benefit from the clarity provided in this final rule. Therefore, the mean average is used for this analysis.

[217] The Department's approach to estimating litigation cost savings takes into account the impact of the rule on the number of relevant cases filed. The approach does not take into account the impact of the rule on promoting settlements in the future among cases that are filed. Clarifying a rule may increase the settlement rate among cases filed, reducing litigation costs further (see Gelbach, J., "The Reduced Form of Litigation Models and the Plaintiff's Win Rate," J. Law & Economics 61(1), (2018), https://www.journals.uchicago.edu/doi/10.1086/699151).

[218] *See* Griffin Toronjo Pivateau, *The Prism of Entrepreneurship: Creating A New Lens for Worker Classification*, 70 Baylor L. Rev. 595, 628 (2018) ("The continued demand for innovative work solutions requires a new classification test. Without clarification, parties will be unwilling to engage in new or innovative work arrangements."); *see also* R. Hollrah and P. Hollrah, "The Time Has Come for Congress to Finish Its Work on Harmonizing the Definition of 'Employee,'" *J. L. & Pol'y* 26(2), p. 439 (2018), https://brooklynworks.brooklaw.edu/jlp/vol26/iss2/1/.

flexibility is crucial in allowing labor markets to efficiently match workers with jobs, spur entrepreneurship, and act as an important source of countercyclical income during a recession." They cite a study showing that a 10 percent increase in the freelance workforce is correlated with a 1 percent increase in entrepreneurial activity.[219] Similarly, CWI submitted their report that finds independent workers "can be an important part of improving business performance, such as by increasing speed to market, increasing organizational agility, improving overall financial performance, and allowing firms to compete in a digital world where increasingly relevant, highly-skilled talent is in short-supply."[220] By decreasing uncertainty and thus potentially opening new opportunities for firms, this final rule may encourage companies to hire independent contractors whom they otherwise would not have hired. Eisenach (2010) outlines the potential costs of curtailing independent contracting.[221] If independent contracting is expanded due to this rule, this could generate benefits that may include:

- Increased job creation and small business formation.
- Increased competition and decreased prices.
- A more flexible and dynamic work force, where workers are able to more easily move to locations or to employers where their labor and skills are needed.

Eisenach explains several channels through which these efficiency gains may be achieved. First, by avoiding some fixed employment costs, it is easier for firms to adjust their labor needs based on fluctuations in demand. Second, by using pay-for-preference, independent contractors are incentivized to increase production and quality. Third, "contracting can be an important mechanism for overcoming legal and regulatory barriers to economically efficient employment

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[219] A. Burke, I. Zawwar, and S. Hussels. "Do Freelance Independent Contractors Promote Entrepreneurship?" *Small Business Economics* 55(2), 415–27 (2019), https://doi.org/10.1007/s11187-019-00242-w.
[220] J. Langenfeld and C. Ring. "Analysis of Literature on Technology and Alternative Workforce Arrangements." Ankura (October 2020).
[221] J. Eisenach, "The Role of Independent Contractors in The U.S. Economy," Navigant Economics (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1717932.

arrangements." The analysis of these benefits assumes that businesses, especially in other industries, would like to increase their use of independent contractors, but have refrained from doing so because of uncertainty regarding who can appropriately be engaged as an independent contractor under the FLSA. Conversely, significant use of independent contractors may not be suitable for all industries, thus limiting the growth in its utilization.

Some commenters agreed that expanding independent contracting can lead to employment gains. For example, Dr. Palagashvili discussed the literature showing how restricting independent contracting can lead to loss of jobs. This final rule, by expanding independent contracting, could conversely increase employment. She also noted the importance of independent contracting for unemployed workers, referencing a paper that found workers who "suffered a spell of unemployment are 7 to 17 percentage points more likely than observationally similar workers to be employed in an alternative work arrangement when surveyed 1 to 2.5 years later."[222] [223]

She also emphasized the importance of independent contracting to startup firms. She references her work conducting interviews and a survey of technology startup executives. During these interviews they found that "71 percent of startups relied on independent contractors and thought it was necessary to use contract labor during their early stages." Independent contractors

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[222] L. Katz and A. Krueger, "The Role of Unemployment in the Rise in Alternative Work Arrangements," *American Economic Review,* 107(5), p. 388 (2017), https://www.aeaweb.org/articles?id=10.1257/aer.p20171092.

[223] It should be noted that government-mandated coverage is not free. The total value that a worker provides a business must be at least as large as the wage, any provided benefits, and government (state or Federal) mandates combined. Congress and/or state governments may conclude that the value of mandating certain coverages outweighs the costs of such coverage, but that does not necessarily mean that all covered workers receive significant benefits from such coverage or value such coverage compared to other compensation. In fact, in some cases workers may be able to strike a better deal with a business than would be provided under the terms of an employee relationship that operates under the associated mandates. Such as in a situation where a worker has clusters of available time to work punctuated by extended periods of inability to work, such as a long-haul shipper who spends a month at sea and then a month at home or a divorced parent who has five kids to care for every other week but is fully available on the off weeks to work as many hours as needed. In these cases, independent contractor relationships may be pivotal in mutually benefiting workers and business owners.

are important to startups because "during unpredictable times, when startups are trying to find their market and build their product, they need flexible labor and need to be able to hire and fire easily."

Several commenters disagreed that the rule would improve outcomes in the labor market. FTC Commissioner Rebecca Kelly Slaughter commented that it is inappropriate to conclude "that 'competition will increase and prices will decrease' when more workers are classified as independent contractors" because, according to the commenter, the only support offered in the NPRM was a 2010 non-peer-reviewed article providing little evidence of this claim. The Department maintains that economic laws generally apply to labor markets, and that as supply increases then prices can be expected to decrease. UFCW contested the Department's claim that this rule will lead to increased productivity. They presented an example of how independent contracting hurts efficiency: "Instead of ecommerce fulfil[l]ment carried out by a team of output-optimizing role players, the 'independent contractor' item selection and packing is carried out by the same individual who does the delivery, adding unnecessary and time consuming steps to the process. The 'independent contractor' must first park his or her car, walk into the store, orient him or herself to the store layout, select and pack the items, transact the payment, then carry the packed items back to the car." The Department does not think UFCW's claims are valid across the incredibly dynamic range of independent contractor jobs, and further questions UFCW's unsupported assertion that the expansive emergence of mobile customer-service-focused delivery applications "reduces the opportunity for productivity-enhancing innovation." Further, even the example ignores that efficiencies will likely be gained over time as the independent contractor fulfils additional orders each day, week, and month. The Department does not believe that these commenters provided reliable data to revise its analysis, especially in light of the data provided to its support by other commenters.

4. Improved Worker Satisfaction and Flexibility

The Department believes this rulemaking may also result in greater autonomy and job satisfaction for workers. Several surveys have shown that independent contractors have high job satisfaction.[224] Using the CWS, which only considers primary, active contractors, the Department estimates that of independent contractors with valid responses, 83 percent prefer their current arrangement rather than being an employee, compared with only 9 percent who would prefer an employment arrangement (the remaining 8 percent responded that it depends).

Additionally, the main reasons individuals work as independent contractors demonstrate that being an independent contractor often has valuable benefits. The 2017 CWS asked, "What is the main reason you are self-employed/an independent contractor?" The two most popular reasons were (1) being their own boss, and (2) scheduling flexibility.[225] In fact, these two choices were each selected over three times more often than any of the other options.[226] Additionally, McKinsey Global Institute found that "[i]ndependent workers report higher levels of satisfaction on many aspects of their work life than traditional workers."[227] The McKinsey Global Institute examined workers who work independently by choice and those who do so by necessity (such as needing supplemental income) and found that both groups report being happy with the flexibility and autonomy of their work.[228] Similarly, Kelly Services found that "free agents"—*i.e.*, workers

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[224] *See, e.g.*, MBO Partners (2019), *supra* note 131.

[225] The Department used PES26IC to identify preferred work arrangement and PES26IR to identify the reason they work as an independent contractor.

[226] The third most commonly selected reason was "Money is better," supporting the Department's view that monetary and non-pecuniary benefits are central motivations of most independent contractors.

[227] McKinsey Global Institute, *supra* note 89 at 11. A 2009 Pew survey similarly found that self-employed workers are "significantly more satisfied with their jobs than other workers." Rich Morin, "Job Satisfaction among the Self-Employed," Pew Research Center, (September 2009), http://pewsocialtrends.org/pubs/743/job-satisfaction-highest-among-self-employed. In particular, 39 percent of self-employed workers reported being "completely satisfied" with their jobs, compared with 28 percent of employees. *Id.*

[228] McKinsey Global Institute, *supra* note 89 at 10. The McKinsey survey found that, while "those working independently out of necessity report being happier with the flexibility and content of the work," they also report being "less satisfied with their level of income level and their income security." *Id.* The Department believes this rulemaking is unlikely to negatively

who "derive their primary income from independent work and actively prefer it"—report higher satisfaction than traditional workers concerning overall employment situation; work-life balance; opportunities to expand skills; and opportunities to advance career.[229]

Many commenters agreed that the scheduling flexibility afforded to independent contractors is of importance to many of these workers. WPI pointed out that many independent contractors require flexibility to balance work and other obligations. They cite a recent report that found "48 percent of freelancers report being caregivers, while 33 percent report having a disability in their household."[230] Dr. Palagashvili discussed the significance of independent contracting work for women, who tend to be the primary caregiver, and thus value scheduling flexibility. She cited several papers demonstrating the importance of flexible work arrangements for women. For example, a survey by HyperWallet found that "96 percent of women indicate that the primary benefit of engaging in platform-economy work is the flexible working hours.[231] SHRM pointed to their survey that found that 49 percent of external workers chose that work arrangement for the ability to set their own hours. [232]

Conversely, other commenters asserted that valuing flexibility is not relevant as a benefit to a worker who is classified as an independent contractor. The Department believes that non-pecuniary benefits like flexibility are very important to workers and should receive adequate attention in this RIA. Research has shown that flexibility is a criterion workers consider when evaluating job offers.[233]

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impact the average income level of such workers by encouraging independent contractor opportunities. As discussed above, there are data indicating that independent contractors, on average, may earn higher hourly wages than employees. Nor is rulemaking likely to negatively impact workers' income security, on average (see Section VI(E)(2)(viii)).

[229] Kelly Services (2015), *supra* note 89.

[230] Upwork, Freelance Forward 2020: The U.S. Independent Workforce Report (September 2020).

[231] HyperWallet. "The Future of Gig Work Is Female: A Study on the Behaviors and Career Aspirations of Women in the Gig Economy," (2017), https://www.hyperwallet.com/app/uploads/HW_The_Future_of_Gig_Work_is_Female.pdf.

[232] SHRM and SAP SuccessFactors (2019), *supra* note 200.

[233] He, H. et al. (2019), *supra* note 131.

The PA L&I wrote that it is inappropriate to present flexibility for independent contractors as a "replacement for lower wages and no benefits." PA L&I also stated that the Department does not discuss independent contractors' counteracting loss of stability in income, location of work, and frequency and schedule of work and instead simply "presumes that workers prize flexibility over stability" without citing any evidence. The Department notes that it examined numerous studies that directly address, and provide evidence regarding, the tradeoffs many independent contractors voluntarily make to attain flexibility. To that point, a survey submitted by CWI found 61 percent of independent contractors prefer the "flexibility to choose when and where to work" over "having access to a steady income and benefits."[234] Additionally, the workers who value flexibility will be the ones drawn to those independent contracting arrangements that provide flexibility.

The Washington Center posited that in many industries, such as trucking and deliveries, the flexibility benefits for independent contractors are small because workers often do not have control over their routes or work hours. This was echoed by the UFCW, who pointed out that in retail the use of just-in-time scheduling limits the scheduling flexibility for workers classified as independent contractors. The Department acknowledges that the flexibility benefits may differ across industries, but that they tend to exist in all industries to some degree.

UFCW contended that although current independent contractors may be satisfied with their employment status, this will not necessarily hold for newly classified workers. The Department acknowledges that new independent contractors may differ from current independent contractors but lacks any data to show how their satisfaction levels would differ. Lacking such data, which commenters did not provide, the best predictor of job satisfaction for new independent contractors is job satisfaction among current independent contractors. Further, the Department notes, as explained above, that this rule will not directly reclassify any workers but rather provides clarity regarding the current process for determining worker classification.

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[234] Coalition for Workforce Innovation (2020), *supra* note 77**Error! Bookmark not defined.**.

UFCW used a 2017 report from Prudential Research, specifically regarding gig workers, to dispute the Department's claim that independent contractors are more satisfied than employees. UFCW excerpted from the report that, "on-demand independent contractors who work full-time hours are less satisfied with their current work situation than full-time employees (44 percent vs. 55 percent)."[235] However, the commenter did not include all of the findings in the source it cited; the same Prudential study notes that for gig workers who also have other jobs, their job satisfaction rate is 86 percent. Notably, UFCW focused on gig workers in its comment, but conflates such workers with the entire universe of independent contractors. The Department acknowledges that although there may be lower job satisfaction for some subsets of independent contractors, studies that consider all independent contractors generally find that independent contractors report similar or higher job satisfaction than employees. For example, CWI submitted a survey they conducted finding that 94 percent of independent workers are satisfied with their work arrangements.[236]

By clarifying that control and opportunity for profit or loss are the core economic reality factors, this final rule is likely to encourage the creation of independent contractor jobs that provide autonomy and entrepreneurial opportunities that many workers find satisfying. For the same reason, this final rule likely will diminish the incidence of independent contractor jobs that lack these widely desired characteristics. Thus, the Department expects this final rule to result in more independent contractor opportunities which bring with them autonomy and job satisfaction. The benefits of worker autonomy and satisfaction obviously "are difficult or impossible to quantify," but they nonetheless merit consideration.

5. Income Smoothing

Several commenters asserted that independent contracting plays a key role in smoothing income during recessions by providing an alternative source of income. Commenters cited to a

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[235] Prudential Research (2017), *supra* note **Error! Bookmark not defined.**.
[236] Coalition for Workforce Innovation (2020), *supra* note 77**Error! Bookmark not defined.**.

JPMorgan Chase Institute study that makes this case.[237] Other commenters held the opposite view and highlighted the economic downturn related to COVID-19. For example, the Center for Innovation in Worker Organization claimed that high unemployment increases the likelihood that employers fail to pay minimum wage. Because this rule is focused on independent contractors, even assuming the premise of the comment from the Center for Innovation in Worker Organization is correct, this concern does not directly apply. Further, this commenter did not provide clear evidence that independent contracting does not help workers supplement their income.

6. Opportunities to Work for Multiple Customers

In the NPRM, the Department noted that independent contractors may more easily work for multiple companies simultaneously. The Washington Center disputed this claim, asserting that "economists have found that about 75 percent of workers receiving non-employee compensation are tied to one employer" and the likelihood of being tied to a single employer is similar for wage earners and contractors.[238] But the economists whom the Washington Center cites in support of their assertion explicitly noted that the independent contractors in their study "include[] those who are primarily employed at a W2 job, and vice versa."[239] This overlap prevents meaningful comparisons between independent contractors and W2 employees for the purpose of this RIA. Rebecca Kelly Slaughter, a Commissioner at the FTC wrote: "independent contractor status is not what allows a worker to work for two rivals. Indeed, many hourly workers are employed at more than one job, including for two employers who are rivals in the same industry." Commissioner Slaughter gave an example of a worker who holds two jobs at competing fast food restaurants, but this does not undermine the Department's discussion of independent contractors being able to use mobile applications to pick which tasks they choose to

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[237] D. Farrell, F. Greig, and A. Hamoudi, "The Online Platform Economy in 27 Metro Areas: JPMorgan Chase Institute," JPMorgan Chase Institute (2019), https://www.jpmorganchase.com/institute/research/labor-markets/report-ope-cities.htm.
[238] Collins et al. (2019), *supra* note 80.
[239] *Id*. at 14 n.7.

perform in real time on a job-by-job basis. That fast food worker cannot always decide which job he wants to work for each shift of the day. Additionally, Slaughter commented that working for multiple employers may demonstrate a worker's need to hold multiple jobs to pay bills rather than being indicative of flexibility. This point, however, was not substantiated by data showing that such a critique can effectively be applied across the universe of millions of independent contractors who cite flexibility as a core motivator. And as explained in Sections III(A) and IV(C), courts have repeatedly explained that need for income is not the correct legal lens through which to analyze whether a worker is an independent contractor or employee under the FLSA.[240] Lastly, she noted that "Uber has been known to discourage multi-apping by monitoring whether drivers were logging into more than one platform simultaneously and penalizing those that did not exclusively take Uber customers."[241] Under this rule, Uber's monitoring and controlling certain drivers' ability to multi-app would be a consideration under the control factors of the economic reality test as applied to those drivers. *See Razak*, 951 F.3d at 145-46 (including drivers' contention "that while 'online' for Uber, they cannot also accept rides through other platforms" in list of "disputed facts regarding control"). But it appears that the majority of rideshare drivers are able to multi-app.[242] The Department believes that economy-wide data

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[240] *See, e.g.*, *Halferty,* 821 F.2d at 268 ("[I]t 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 ("The economic-dependence aspect of the [economic reality] test does not concern whether the workers at issue depend on the money they earn for obtaining the necessities of life.").

[241] Commissioner Slaughter cited a note submitted as background material for an OECD meeting and a law review article to support this contention. *See* M. Steinbaum, Monopsony and the Business Model of Gig Economy Platforms, OECD 7 (Sept. 17, 2020), https://one.oecd.org/document/DAF/COMP/WD(2019)66/en/pdf; M. Steinbaum, "Antitrust, the Gig Economy, and Labor Market Power," 82 Law and Contemp. Probs. 45, 55 (2019), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4918&context=lcp.

[242] *See* This App Lets Drivers Juggle Competing Uber and Lyft Rides, Wired (Feb. 15, 2018) (estimating that over 70 percent of rideshare drivers multi-app), https://www.wired.com/story/this-app-lets-drivers-juggle-competing-uber-and-lyft-rides/.

reveal that many independent contractors hold multiple jobs,[243] and they resoundingly prize the flexibility to work when, where, and how they choose.[244]

G. Regulatory Alternatives

Pursuant to its obligations under Executive Order 12866,[245] the Department assessed three regulatory alternatives to the standard promulgated in this final rule. These three alternatives are the same as those analyzed in the NPRM,[246] listed below in order from least to most restrictive of independent contracting:[247]

(1) Codification of the common law control test, which applies in distinguishing between employees and independent contractors under various other Federal laws;[248]

(2) Codification of the traditional six-factor "economic reality" balancing test, as recently articulated in WHD Opinion Letter FLSA2019-6; and

(3) Codification of the "ABC" test, as adopted by the California Supreme Court in *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018).[249]

Although the Department believes that legal limitations preclude adoption of the "common law" and "ABC" test alternatives listed above, the Department notes that Congress is presently

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[243] Lim et al., *supra* note 7575, at 61.
[244] See the May 2017 CWS supplement to the CPS.
[245] Exec. Order No. 12866 § 6(a)(3)(C)(iii), 58 FR 51741.
[246] *See* 85 FR 60634 (discussing regulatory alternative to the proposed rule).
[247] OMB guidance advises that, where possible, agencies should analyze at least one "more stringent option" and one "less stringent option" to the proposed approach. OMB Circular A-4 at 16.
[248] *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(j) (similarly defining "employee" under the Social Security Act); *see also, e.g.*, *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989) (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); *Darden*, 503 U.S. 318 (holding that "a common-law test" should resolve employee/independent contractor disputes under ERISA).
[249] *See also Hargrove v. Sleepy's, LLC*, 106 A.3d 449, 465 (N.J. 2015) (extending the ABC test to state wage claims in New Jersey).

considering separate bills that would amend the FLSA to adopt these alternatives,[250] and accordingly presents them for the benefit of the public as recommended by OMB guidance.[251] All three regulatory alternatives are analyzed in qualitative terms, due to data constraints and inherent uncertainty in measuring the exact stringency of multi-factor legal tests and likely responses from the regulated community. The Department appreciates the feedback it received on these regulatory alternatives from commenters, which is described and addressed below.

1. Codifying a Common Law Control Test

The least stringent alternative to the final rule's streamlined "economic reality" test would be to adopt a common law control test, as is generally used to determine independent contractor classification questions arising under the Internal Revenue Code and various other Federal laws.[252] The overarching focus of the common law control test is "the hiring party's right to control the manner and means by which [work] is accomplished," *Reid*, 490 U.S. at 751, 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

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[250] The Modern Worker Empowerment Act, H.R. 4069, 116th Cong. (2019) (introduced by Rep. Elise Stefanik), would amend Sec. 3(e) of the FLSA statute to clarify that the term "employee" is "determined under the usual common law rules (as applied for purposes of section 3121(d) of the Internal Revenue Code of 1986)." *See also* S. 2973, 116th Cong. (2019) (companion Senate bill introduced by Sen. Tim Scott). By contrast, the Worker Flexibility and Small Business Protection Act, H.R. 8375, 116th Cong. (2020) (introduced by Rep. Rosa DeLauro) would, among other provisions, amend the FLSA and other labor statutes to clarify that "[a]n individual performing any labor for remuneration shall be considered an employee and not an independent contractor" unless such individual passes the "ABC" test discussed in this analysis. *See also* S. 4738, 116th Cong. (2020) (companion bill introduced by Senators Patty Murray and Sherrod Brown).

[251] 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."

[252] *See supra* note 248248. The Supreme Court has explained that the common law standard of employment applies by default under Federal law "unless [Congress] clearly indicates otherwise." *Darden*, 503 U.S. at 325; *see also Community for Creative Non-Violence v. Reid*, 490 US 730, 739-40 (1989) ("[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.").

the parties' relationship; 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.* at 751–52.

Although the common law control test considers many of the same factors as those identified in the final 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 more broadly examines the economic dependence of the worker. *See, e.g.*, *Diggs v. Harris Hospital-Methodist, Inc.*, 847 F.2d 270, 272 n.1 (5th Cir. 1988) (observing that "[t]he 'economic realities' test is a more expansive standard for determining employee status" than the common law control test). Thus, if a common law control test determined independent contractor status under the FLSA, it is possible that some workers presently classified as FLSA employees could be reclassified as independent contractors, increasing the overall number of independent contractors and reducing the overall number of employees. The Department is unable to estimate the exact magnitude of such a reclassification effect, but believes that the vast majority of FLSA employees would remain FLSA employees even under a common law control test.

As discussed in the NPRM, codifying a common law control test that is used for purposes of at least some other Federal statutes would create a simpler legal regime for regulated entities interested in receiving services from an independent contractor, thereby reducing confusion, compliance costs, and legal risk for entities interested in doing business with independent contractors. Entities would not have to understand and apply a different employment classification standard for FLSA purposes. Thus, adopting the common law control test would likely increase perpetual cost savings for regulated entities attributable to improved clarity and

reduced litigation as compared to the final rule. It could, on the other hand, impose burdens on workers who might prefer to be employees subject to FLSA protections. Moreover, the Supreme Court has interpreted the "suffer or permit" language in section 3(g) of the FLSA as establishing a broader definition of employment than the common law. *See*, *e.g.*, *Darden*, 503 U.S. at 326; *Portland Terminal Co*., 330 at 150–51.

A handful of business commenters addressed the merits of the common law control test as a regulatory alternative. In a joint comment, Vanliner Insurance Company and the Great American Trucking Division implicitly requested adoption of the common law standard presently used under the National Labor Relations Act (NLRA) and the Social Security Act (SSA), as they urged the Department to "foster efficiency and consistency by creating uniformity for compliance with the FLSA, the [NLRA], and the [SSA]." The American Society of Travel Advisors, Inc. (ASTA) asserted that "the simplest means to accomplish [a uniform classification standard under Federal law] would be to revise the FLSA, either legislatively or through regulation, to replace the economic reality test with the right of control test." While appearing to support the common law control test on substance, the Workplace Policy Institute warned that "any attempt by the Department to depart from the economic reality test likely would result in a successful legal challenge to this rulemaking," expressing support for the Department's proposed economic reality test "in the spirit of 'don't let the perfect be the enemy of the good.'" *See also* Dr. Palagashvili ("[A]lthough the DOL is constrained in adopting a common law control test, I suggest that lawmakers amend the FLSA to allow for codification thereof."). By contrast, the National Federation of Independent Business (NFIB) criticized the Department's conclusion in the NPRM that it lacks the legal authority to implement a common law standard through rulemaking as "unfortunate" and "questionable."

The Department appreciates the policy appeal of establishing a uniform Federal classification standard, and understands that the standard most familiar to the regulated community is likely the common law control test used for tax and other purposes. However, such

an approach would be inconsistent with the Supreme Court's statement that FLSA employment is more inclusive than the common law control test. *See, e.g.*, *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947) ("[I]n determining who are 'employees under the [FLSA], common law employee categories . . . are not of controlling significance."). The overwhelming majority of commenters who mentioned the common law standard in their comment, including business commenters inclined to favor the relative permissiveness of a common law standard, expressed agreement with that conclusion.

2. Codifying the Six-Factor "Economic Reality" Balancing Test

As discussed earlier in section II(B), WHD has long applied a multifactor "economic reality" balancing test to distinguish between employees and independent contractors in enforcement actions and subregulatory guidance. The six factors in WHD's multifactor balancing test, as recently articulated in WHD Opinion Letter FLSA2019-6, are as follows:

(1) The nature and degree of the potential employer's control;

(2) The permanency of the worker's relationship with the potential employer;

(3) The amount of the worker's investment in facilities, equipment, or helpers;

(4) The amount of skill, initiative, judgment, or foresight required for the worker's services;

(5) The worker's opportunities for profit or loss; and

(6) The extent of integration of the worker's services into the potential employer's business.

WHD Opinion Letter FLSA2019-6 at 4 (citing *Rutherford Food*, 331 U.S. at 730, and *Silk*, 331 U.S. at 716).

As discussed in the NPRM, the Department believes that this six-factor balancing test is neither more nor less permissive of independent contractor relationships as compared to the streamlined test finalized in this rulemaking. Both tests describe the "economic dependence" of the worker at issue as the ultimate inquiry; both emphasize the primacy of actual practice over

contractual or theoretical possibilities (*i.e*., the "economic reality" of the work arrangement); and both evaluate the same set of underlying factors, notwithstanding an emphasis and consolidation of certain factors under this rule's streamlined test. Notably, like § 795.105(d)(1)(i) of the final rule, WHD Opinion Letter FLSA2019-6 advised that certain safety measures and quality control standards do not constitute "control" indicative of an FLSA employment relationship. *See id*. at 8 n.4. However, the Department explained in the NPRM that the six-factor balancing test used by WHD and most courts, with some significant variations, would benefit from clarification, sharpening, and streamlining.

A number of commenters urged the Department to codify a six-factor balancing test. Several commenters, including NELP, Eastern Atlantic States Regional Council of Carpenters (EASRCC), and the United Brotherhood of Carpenters, specifically requested that the Department reinstate AI 2015-1, which was withdrawn in 2017. SWACCA asserted that "codification of the six-factor balancing test may well achieve more consistency of application from the courts as it pushes them to develop their similar precedents to align with the Department's views," criticizing the proposed rule as "a novel weighted test that will result in more litigation and less certain outcomes[.]" SWACCA also disputed the Department's assumption in the NPRM that codifying the six-factor balancing test would not reduce initial regulatory familiarization costs or provide greater per-contract cost savings compared to the proposed rule, *see* 85 FR 60635, arguing that this assumption "overlooks the fact that codifying the six-factor balancing test would simply incorporate what is now subregulatory guidance at the regulatory level." Finally, NELP, NWLC, and the State AGs asserted that the Department has no legal authority to promulgate any regulatory standard except the traditional six-factor balancing test, citing to *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446 (2015), for the proposition that the six-factor balancing test derived from *Silk* and *Rutherford Food* has effectively become part of the FLSA's "statutory scheme." *See id*. at 456 ("All [of the Supreme Court's] interpretive

decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change.").

While the Department agrees with NELP, NWLC, and the State AGs that Supreme Court precedent requires application of an "economic reality" test to evaluate independent contractor claims under the FLSA, we disagree that the Court has definitively prescribed the specific components of such a test. As explained earlier, courts in different Federal circuits have articulated the number and nature of relevant factors in different ways, so any formulation endorsed by the Department would be at least marginally "novel" to courts and affected stakeholders across jurisdictions in some respect. Moreover, many commenters are overstating the degree to which the standard finalized in this rule meaningfully departs from existing precedent. If anything, by elevating the two factors that are most probative to what courts have established as the ultimate inquiry of the test—*i.e.,* whether workers "are in business for themselves," *Saleem*, 854 F.3d at 139—the Department's approach is more faithful to courts' instruction that the factors "must be applied with that ultimate notion in mind." *Usery*, 527 F.2d at 1311. Moreover, because the Department's analysis of appellate case law since 1975 has found workers' control and opportunity for profit or loss to be most predictive of a worker's classification status, the finalized standard provides more accurate guidance.

To the extent that some businesses and independent contractors familiar with the Department's earlier subregulatory guidance might spend less time reviewing new regulatory language on the topic under this alternative, any reduction in initial regulatory familiarization costs compared to the streamlined test adopted in this final rule would likely be minimal. By contrast, and as we explained in the NPRM, codification of the traditional six-factor balancing test would yield smaller recurring benefits and cost savings over the long term, as the Department continues to believe in the added clarity of an appropriately weighted test with less overlapping redundancy.

The Department further believes that reinstatement of AI 2015-1's specific articulation of the six-factor test would be inappropriate because that withdrawn guidance exacerbates the very shortcomings that this rule remedies. As discussed in Section III(A), the first such shortcoming is the need for consistent application of economic dependence. While the AI 2015-1 correctly stated that "[t]he ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer or truly in business for him or herself," it failed to apply that concept consistently. Notably, it explained that the investment factor should be analyzed by comparing the amount of the worker's investments with the amount the potential employer invests because "[i]f the worker's investment is relatively minor, that suggests that the worker and the [potential] employer are not on similar footings and that the worker may be economically dependent on the employer." But the correct concept of economic dependence is not an inquiry into whether two entities are on a "similar footing," but rather whether an individual is in business for him- or herself.[253] Such an approach to the investment factor is misleading by placing the focus on the worker's financial means instead of the worker's relationship with the purported employer. Several cases explicitly or implicitly reject the "similar footing" analysis, most plainly because independent contractors routinely work for companies with whom they are not on a "similar footing." *See Karlson*, 860 F.3d at 1096 ("Large corporations can hire independent contractors"). The "similar footing" concept of economic dependence is also inconsistent with the Supreme Court's analysis in *Silk*, 331 U.S. 718, which found that truck drivers who invested in their own vehicles were independent contractors who transported coal for a coal company. The Court did not compare the relative investment of the drivers with that of the coal company or ask whether they were on a "similar footing"—they obviously were not. Instead, the Court ruled that the drivers were independent contractors, in part because they had "the opportunity for profit from sound management" of their investment. *Id.* at 719. What matters is not the relative size of a

[253] The Department is also concerned that the phrase "similar footing" lacks a clear meaning and therefore may be confusing to the regulated community.

worker's investment, but whether the worker has a meaningful opportunity for profit or loss based on that investment.

The second shortcoming discussed at Section III(B) is the need for guidance regarding which economic reality factors are more probative. AI 2015-1 exacerbates this shortcoming by relegating the more probative control factor while elevating the less probative "integral part" factor. In particular, AI-2015 stated that "[t]he control factor should not overtake the other factors of the economic realities test." Such guidance is plainly inconsistent with cases in which control explicitly "overtakes" other factors. *See, e.g., Saleem*; 854 F. 3d at 147 ("whatever 'the permanence or duration' of Plaintiffs' affiliation with Defendants, both its length and the 'regularity' of work was entirely of Plaintiffs' choosing" (citation omitted)); *Selker Bros*. 84 F.3d at 147 ("Given the degree of control exercised by Selker over the day-to-day operations of the stations, this [use of special skills] cannot be said to support a conclusion of independent contractor status."). Deemphasizing the control factor is also at odds with commonsense logic; control over the work seems to be extremely probative as to whether an individual is in business for him- or herself. In addition to de-emphasizing a highly probative factor, AI-2015 also states that "[c]ourts have found the 'integral' factor to be compelling," citing *Snell*, 875 F.2d at 811 and *Lauritzen*, F.2d at 1537-38 for support. But both cited cases actually analyzed the "integral part" factor as an afterthought: each devoted only a few conclusory sentences to this factor after more in depth analysis of the other factors *Snell*, 875 F.2d at 811 and *Lauritzen*, 835 F.2d at 1537-38. The "integral part" factor falls short of even an afterthought in the Fifth Circuit, which typically does not analyze it at all. As explained in Section IV(D)(5), the "integral part" factor—as used in AI 2015-1 to mean a worker's importance to a business—is not supported by Supreme Court precedent and may send misleading signals in many cases.

The third shortcoming discussed at Section III(C) is overlaps between economic reality factors, which undermines the structural benefits of a multifactor test by blurring the lines between factors. One type of overlap highlighted by the NPRM is the importation of the analysis

of initiative and business judgment, which are already part of the control and opportunity factors, into the skill factor, thus "dilut[ing] the consideration of actual skill to the point of irrelevance." 85 FR 60607. *Id.* AI 2015-1 reinforces this problem by focusing the skill factor entirely on initiative and business judgment, thus eliminating consideration of skill: "A worker's business skills, judgment, and initiative, not his or her technical skills, will aid in determining whether the worker is economically independent." The withdrawn guidance makes clear that it is not simply that skill matters less than initiative, but that skill matters not at all, because it unequivocally states that "specialized skill do not indicate that workers are in business for themselves." This categorical statement, however, is supported by more circumspect case law explaining that "skill is *not itself* indicative of independent contractor status." AI 2015-1 (quoting *Superior Care*, 84 F.2d at 1060 (emphasis added)); *see also id.* ("the use of special skills is *not itself* indicative of independent contractor status" (quoting *Selker Bros*. 949 F.d at 1295) (emphasis added)). AI 2015-1's categorical position is also at odds with the Supreme Court's instruction in *Silk* that "skill required" may be "important for decision." 331 U.S. at 716; s*ee also Simpkins*, 893 F.3d at 966 ("whether Simpkins had specialized skills, as well as the extent to which he employed them in performing his work, are [material] issues").

Further, reinstating AI 2015-1 or otherwise adopting a six-factor test with overlapping factors and without guidance regarding the factors' relative probative value would negate the overall beneficial effects that would likely result from this rule, which are discussed above.

For these reasons, the Department declines commenters' requests to reinstate AI 2015-1.The Department further notes that, unlike this rule, AI 2015-1 was issued without notice and comment and thus did not benefit from helpful input from the regulated community.

3. Codifying California's "ABC" Test

The most stringent regulatory alternative to the Department's proposed rule would be to codify the "ABC" test recently adopted under California's state wage and hour law to distinguish

between employee/independent contractor statuses.[254] As described by the California 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." 416 P.3d at 34.[255] In justifying the adoption of such a stringent test, the *Dynamex* court noted the existence of an "exceptionally broad suffer or permit to work standard" in California's wage and hour statute, *id.* at 31,[256] 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." *Id.* at 32.

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[254] *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) (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).

[255] California's ABC test is slightly more stringent 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. § 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.

[256] *See* Cal. Code Regs., tit. 8, § 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.

On its face, California's ABC test is far more restrictive of independent contracting arrangements than any formulation of an "economic reality" balancing test, including the proposed rule. Whereas no single factor necessarily disqualifies a worker from independent contractor status under an economic reality test, *each* of the ABC test's three factors may alone disqualify the worker from independent contractor status. Thus, the NPRM stated that adoption of an ABC test to govern independent contractor status under the FLSA would directly result in a large-scale reclassification of many workers presently classified as independent contractors into FLSA-covered employees, particularly those in industries that depend on independent contracting arrangements within the "usual course of the hiring entity's business." *Dynamex*, 416 P.3d at 34. While some independent contractors might benefit from reclassification by newly receiving overtime pay or a guaranteed minimum wage, these workers might also experience a reduction in work hours or diminished scheduling flexibility as their new employers attempt to avoid incurring additional expenses for overtime work. Others workers, particularly off-site workers who operate free from the business' direct control and supervision, might see their work arrangements terminated by businesses unwilling or unable to assume the financial burden and legal risk of the FLSA's overtime pay requirement. After highlighting some of the reports of adverse consequences experienced by workers and businesses in California following the passage A.B. 5, the Department concluded that adopting the ABC test as the FLSA's generally applicable standard for distinguishing employees from independent contractors would be unduly restrictive and disruptive to the economy. Finally, as a matter of law, the Department asserted that adoption of California's ABC test would be inconsistent with the more flexible economic reality test adopted by the Supreme Court, as it would cover workers who have been held by the Supreme Court to be independent contractors under the economic reality test. *See Silk*, 331 U.S. at 719; *Bartels*, 332 U.S. at 130.

The Department received a large volume of commenter feedback on the merits of California's ABC test. While the majority of these comments were highly critical of the standard,

it did have several supporters. Commenters in favor of the ABC test asserted that, as the regulatory alternative most restrictive of independent contracting considered by the Department, it would best effectuate Congress' intent to extend FLSA coverage broadly and reduce unlawful misclassification of employees as independent contractors. *See*, *e.g.*, Matt Brown; National Domestic Workers Alliance; Public Justice Center; SEIU. Numerous commenters asserted that the ABC test, with its three individually determinative factors, was also the clearest and most predictable approach considered. *See*, *e.g.*, International Brotherhood of Teamsters; Writers Guild of America, East, AFL-CIO. New York University's People's Parity Project argued that "[g]iven the importance of the California market to the national economy and the fact that it follows the more stringent ABC standard, any business that wishes to operate in California, and any national business, will have economic motivation to follow the ABC standard." NELA similarly disputed concerns that adoption of the ABC test would be unduly disruptive, asserting that Massachusetts wage and hour law has used an ABC test since 2004 and that "[m]any other states, including New Jersey, Illinois, Connecticut, and Hawaii, use an ABC test for certain [other] purposes, and have similarly suffered no disruption to their economies." Finally, regarding the Department's legal authority to adopt the ABC test, NELA asserted that "none of the cases on which the Department relies suggest that the multi-factor test is the only way to test 'economic reality' or that the ABC test ignores 'economic reality.'"

A diverse array of commenters voiced strong opposition to adopting an ABC test under the FLSA, including law firms, trade associations, advocacy organizations, academics, and individual freelancers. Several commenters dedicated the entirety or vast majority of their comment towards criticizing California's ABC test. *See, e.g.*, American Consumer Institute Center for Citizen Research (ACI); Fight for Freelancers USA; Institute for the American Worker; Joint Comment of the Pacific Legal Foundation (PLF), the American Society of Journalists and Authors, Inc. (ASJA), and the National Press Photographers Association (NPPA); Dr. Palagashvili; The People v AB5. The primary objection voiced by commenters critical of the

ABC test regarded the disruptive economic effects of implementing such a stringent standard, with several asserting that an ABC test would devastate their industry. *See*, *e.g.*, American Council of Life Insurers ("Thousands of jobs would likely have been lost had the California legislature failed to create [an exemption for insurance professionals]."); Coalition of Practicing Translators & Interpreters of California (CoPTIC) ("[A.B. 5] posed an existential threat to the survival of our profession."); Intermodal Association of North America (IANA)) ("The ABC test essentially eliminates the independent contractor model for motor carriers involved in intermodal drayage."). Several commenters invoked the numerous exemptions to the ABC test that California lawmakers initially adopted in A.B. 5 and subsequently expanded in A.B. 2257 as evidence of the standard's overreach. *See*, *e.g.*, California Chamber of Commerce ("During the first few months of the 2020 Legislative Session, more than 30 bills were introduced to add a myriad of exemptions to the ABC test …. As a result of the adoption of AB 2257, which was signed into law in September, there are now 109 exemptions to the ABC test."); Rep. Virginia Foxx et al. ("Rather than setting a dependable and workable standard, the AB 5 framework results in arbitrary treatment of industries based on political considerations to the detriment of workers."); Joint Comment of PLF, ASJA, and NPPA ("If a law requires dozens of exceptions to avoid destroying the careers of successful independent professionals, it is a strong indication that the law's basic premise—the ABC test—is flawed."). Some individual freelancers, including writer Karen Kroll, filmmaker/actor Margarita Reyes, unspecified professional Chun Fung Kevin Chiu, and unspecified professional Carola Berger, asserted that the ABC test is falsely premised on the assumption that all independent contractors, or at least those who provide services in a client's usual course of business, feel exploited and would prefer to be employees. The Independent Women's Forum and Dr. Palagashvili asserted that the ABC test implemented in California disproportionately burdened female workers with caregiving responsibilities, who are less able to find adequately flexible work schedules through traditional employment. Finally, some commenters agreed with the Department's conclusion in the NPRM that Supreme Court

precedent precludes the Department from adopting an ABC test under the FLSA. *See* NRF; FMI – The Food Industry Association.

After reviewing commenter feedback, the Department continues to believe that the ABC test would be infeasible, difficult to administer, and disruptive to the economy if adopted as the FLSA standard. The weight of data, arguments, and anecdotes that commenters shared about the ABC test's effects in California support the NPRM's conclusion that adopting an ABC test would have unacceptably disruptive economic effects. For instance, a self-employed "professional handyman with technical skills in furniture assembly and home repair" stated that "[a]s a California resident, it has been concerning to watch the way AB-5 has affected our state. I don't believe legislators should make decisions that make it harder for people like me to find work and earn a living the way we want to." A medical translator stated that "ABC test simply doesn't work in my field and it is not a fair standard to measure my situation. The original AB5 law in California was destructive to the livelihood of many of my colleagues in that state." And as a final illustrative example, a freelance journalist in California characterized that state's adoption of the ABC test as an "attempt to legislate an entire class of entrepreneurs out of business." *See also, e.g.*, People vs. AB5; Fight for Freelancers; NPPA; WPI.

Moreover, as commenters pointed out, the numerous exemptions initially and subsequently passed by the California legislature indicate the ABC test's inadequacy as a generally applicable standard, as well as its unpopularity with affected stakeholders. An "owner of a small, one-woman business in California" explained in her comment that "[t]he absurdity and overreach of AB5 is evidenced by the numerous attempts at clean-up bills in California (SB 875, SB 1039, SB 900, AB 1850, AB 2257...) that clogged the CA legislative landscape for months, culminating in the now adopted AB 2257, which lists too many exemptions to count." The recent passage of the high-profile Proposition 22 ballot initiative in California,[257] which

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[257] *See* Kate Conger, "Uber and Lyft Drivers in California Will Remain Contractors," NY Times (Nov. 4, 2020), https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html.

occurred shortly after the end of the comment period for this rulemaking and exempted numerous gig workers from the ABC test, is further evidence in this regard.

While California retains the ABC test for some industries but not others, the Department is required to apply the FLSA consistently for all covered industries (absent explicit statutory authority to do otherwise). Thus, if the Department adopted the ABC test, that standard would apply to virtually all industries nationwide, including numerous industries that the Californian legislature and voters exempted because they would suffer undue disruption under that standard. NELA contended that adoption of the ABC test by Massachusetts has not led to the same type of disruption experienced in California, which is disputed by some commenters from Massachusetts. *See e.g.,* New Jobs for Massachusetts; IFA; Fight for Freelancers. But even if NELA were correct, a nationwide ABC test would still disrupt California, the state with the largest population and economy, and likely many others. In the Department's view, the fact that a legal standard may be disruptive in only some states (e.g., California) but not others (e.g., Massachusetts) is not a persuasive reason for nationwide adoption.

Additionally, the Department continues to believe that it lacks legal authority to adopt the ABC test under the FLSA because that test is far too rigid and restrictive of independent contracting arrangements. As a threshold matter, each of the ABC test's three independently determinative factors would contradict binding Supreme Court precedent applying the economic reality test, where "[n]o one [factor] is controlling." *Silk*, 331 U.S. at 716. In particular, the test's "B" prong—denying independent contractor status unless the contractor "performs work that is outside the usual course of the hiring entity's business"—would contradict the Court's recognition in *Silk* that "[f]ew businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors." 331 U.S. at 714; *see also Rutherford Food*, 331 U.S. at 729 (recognizing that "[t]here may be independent contractors who take part in [the] production or distribution" of a hiring party). Indeed, application of California's

ABC test would result in different classification outcomes than those the Supreme Court arrived at applying the economic reality test in *Silk*, 331 U.S. at 719 (ruling that truckers who were "an integral part of the businesses of retailing coal or transporting freight" were independent contractors), and *Bartels*, 332 U.S. at 130 (concluding that musicians were independent contractors rather than employees of the music hall where they played). Absent revised guidance from the Supreme Court or Congressional legislation amending the FLSA statute, the Department continues to believe that it lacks the legal authority to implement a California-style "ABC" test through administrative rulemaking.

NELA contended that "an ABC test is more faithful to the broad, remedial purpose of the FLSA." According to NELA, "[a]t its core, the FLSA is a remedial statute" and therefore, the Department should interpret the FLSA's standard of employment to be broader than economic dependence. However, the Supreme Court warned against relying on "flawed premise that the FLSA 'pursues' its remedial purpose 'at all costs'" when interpreting the Act. *Encino*, 138 S. Ct. at 1142; *see also Bristol*, 935 F.3d 122 ("'[A] fair reading' of the FLSA, neither narrow nor broad, is what is called for." (quoting *Encino*, 138 S. Ct. at 1142)); *Diaz*, 751 F. App'x at, 758 (rejecting request to interpret FLSA provisions to provide "broad" coverage because "[w]e must instead give the FLSA a 'fair' interpretation."). Furthermore, even if remedial statutes should be liberally construed, the ABC test still runs afoul of the Supreme Court's stated limits on the extent of the FLSA's definition of employment, as explained above. As such, the Department may not (and no court has ever suggested that it could) replace the economic reality test with the ABC test to be faithful to the FLSA's remedial purpose.

In sum, legal constraints and the disruptive economic effects of adopting the ABC test in the FLSA context. As we stated in the NPRM, the Department engaged in this rulemaking to clarify the existing standard, not to radically transform it.

H. *Summary of Impacts*

In summary, the Department believes that this rule will increase clarity regarding whether a worker is classified as an employee or an independent contractor under the FLSA. This clarity could result in an increased use of independent contractors. The costs and benefits to a worker being classified as an independent contractor are discussed throughout this analysis, and are summarized below.

The Department believes that there are real benefits to the use of independent contractor status, for both workers and employers. Independent contractors generally have greater autonomy and more flexibility in their hours, providing them more control over the management of their time. The use of independent contracting for employers allows for a more flexible and dynamic workforce, where workers provide labor and skills where and when they are needed. Independent contractors may more easily work for multiple companies simultaneously, have more control over their labor-leisure balance, and more explicitly define the nature of their work. Independent contractors also appear to have higher job satisfaction.

An increase in the number of job openings for independent contractors can also have benefits for the economy as a whole. Increased job creation and enhanced flexibility in work arrangements are critical benefits during periods of economic uncertainty, such as the current COVID-19 pandemic.

There are also certain challenges that face independent contractors compared to employees subject to the FLSA. Independent contractors are not subject to the protections of the FLSA, such as minimum wage and overtime pay. Independent contractors generally do not receive the same employer-provided benefits as employees, such as health insurance, retirement contributions, and paid time off.[258] Independent contractors may have a higher tax liability than employees, as they are legally obligated to pay both the employee and employer shares of the Federal Insurance Contributions Act (FICA) taxes. However, economists recognize that payroll

[258] In some situations, independent contractors may be provided with benefits similar to those provided to employees.

taxes generally are subtracted from the wage rate of employees. Employers also cover unemployment insurance and workers' compensation taxes for their employees. These costs are also components of businesses' worker costs, and employee wages are expected to reflect that accordingly. Independent contractors do not pay these taxes nor are they generally protected by these insurance programs, but there are private insurance companies that offer equivalent coverage.

Because the Department does not know how many workers may shift from employee status to independent contractor status, or how many people who were previously unemployed or out of the labor force will gain work as an independent contractor, these costs and benefits have not been quantified.

VII. Regulatory Flexibility Act

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, Pub. L. No. 104-121 (1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, 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. Accordingly, the Department examined the regulatory requirements of this final rule to determine whether they would have a significant economic impact on a substantial number of small entities. Because both costs and cost savings are minimal for small business entities, the Department certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

The Department used the Small Business Administration size standards, which determine whether a business qualifies for small-business status, to estimate the number of small

entities.[259,260] The Department then applied these thresholds to the U.S. Census Bureau's 2012 Economic Census to obtain the number of establishments with employment or sales/receipts below the small business threshold in the industry.[261] These ratios of small to large establishments were then applied to the more recent 2017 Economic Census data on number of establishments.[262] Next, the Department estimated the number of small governments, defined as having population less than 50,000, from the 2017 Census of Governments.[263] In total, the Department estimated there are 6.4 million small establishments or governments.

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.[264] According to the Occupational Employment Statistics (OES), these workers had a mean wage of $33.58 per hour in 2019 (most recent data available). Given the proposed clarification to the Department's interpretation of who is an employee and who is an independent contractor under the FLSA, the Department assumes that it will take on average about 1 hour to review the rule as proposed. The Department believes that an hour, on average, is appropriate, because while some establishments will spend longer than one hour to review the rule, many establishments may rely on third-party summaries of the changes or spend little or no time reviewing the rule. Assuming benefits are paid at a rate of 46 percent of the base wage, and overhead costs are 17 percent of the base wage,

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[259] SBA, Summary of Size Standards by Industry Sector, 2017, www.sba.gov/document/support--table-size-standards.
[260] The most recent size standards were issued in 2019. However, the Department used the 2017 standards for consistency with the older Economic Census data.
[261] The 2012 data are the most recently available with revenue data.
[262] 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.
[263] 2017 Census of Governments. https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.
[264] 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; plans, 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.

the reviewer's effective hourly rate is $54.74; thus, the average cost per establishment conducting regulatory familiarization is $54.74. The per-entity rule familiarization cost for independent contractors, some of whom would be small businesses, is $11.59, or the fully loaded mean hourly wage of independent contractors in the CWS ($46.36) multiplied by 0.25 hour. The Department believes that 15 minutes, on average, is appropriate, because while some independent contractors will spend longer than one hour to review the rule, many will spend little or no time reviewing the rule.

The cost savings due to increased clarity estimated per year for each small business employer is $18.25, or the fully loaded mean hourly wage of a Compensation, Benefits, and Job Analysis Specialist multiplied by 0.33 hours. The cost savings due to increased clarity for each independent contractor, some of whom would be a small business, is $4.14 per year, or the fully loaded mean hourly wage of independent contractors in the CWS multiplied by 0.89 hours.[265] Because regulatory familiarization is a one-time cost and the cost savings from clarity recur each year, the Department expects cost savings to outweigh regulatory familiarization costs in the long run. Because both costs and cost savings are minimal for small business entities, and well below one percent of their gross annual revenues, which is typically at least $100,000 per year for the smallest businesses, the Department certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

There is some evidence that small firms use independent contractors for a greater proportion of their workforce than large firms.[266] If so, then it may be reasonable to assume that the increased use of independent contractors may also favor smaller companies. In which case, costs and benefits and cost savings may be larger for these small firms. Because benefits and cost savings are expected to outweigh costs, the Department does not expect this rule will result in an undue hardship for small businesses.

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[265] Note that the NPRM reported $3.86 which is the cost per job, rather than the cost per independent contractor.

[266] Lim et al, *supra* note 75 at 51.

AFL-CIO disagreed with including cost savings from increased clarity for independent contractors. They argue that "the independent contractors at issue – those who falls [sic] close to the line separating independent contractors from employees are not themselves employers, they provide services solely as individuals and they have no need to determine if they are themselves independent contractors." They additionally stated that the analysis failed to include compliance costs for the new small businesses created—the workers newly classified as independent contractors. Specifically, these new independent contractors will have increased regulatory burden due to additional accounting and tax filing costs. The Department believes it did address this because workers who choose to pursue independent contractor roles will not take them unless they believe the gains will offset the costs.

The AFL-CIO asserts that the Department failed to conduct the outreach to small businesses as required by Section 609(a) of the RFA. The Department notes that these requirements only apply when the rule will have a significant economic impact on a substantial number of small entities, which is not the case for this rulemaking.

VIII. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995 (UMRA)[267] requires agencies to prepare a written statement for rules with a Federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of $156 million ($100 million in 1995 dollars adjusted for inflation) or more in at least one year.[268] This statement must: (1) identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

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[267] *See* 2 U.S.C. 1501.

[268] Calculated using growth in the Gross Domestic Product deflator from 1995 to 2019. Bureau of Economic Analysis. Table 1.1.9. Implicit Price Deflators for Gross Domestic Product.

A. *Authorizing Legislation*

This final rule is issued pursuant to the Fair Labor Standards Act, 29 U.S.C. 201, *et seq*.

B. Assessment of Costs and Benefits

For purposes of the UMRA, this rule includes a Federal mandate that is expected to result in increased expenditures by the private sector of more than $156 million in at least one year, but will not result in increased expenditures by state, local, and tribal governments, in the aggregate, of $156 million or more in any one year.

Based on the cost analysis from this final rule, the Department determined that it will result in Year 1 total costs for state and local governments totaling $1.7 million, all for regulatory familiarization. There will be no additional costs incurred in subsequent years.

The Department determined that the rule will result in Year 1 total costs for the private sector of $369.2 million, all of them incurred for regulatory familiarization. The Department included all independent contractors in the private sector total regulatory familiarization costs. There will be no additional costs incurred in subsequent years.

UMRA requires agencies to estimate the effect of a regulation on the national economy if such estimates are reasonably feasible and the effect is relevant and material.[269] However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of Gross Domestic Product (GDP), or in the range of $53.6 billion to $107.2 billion (using 2019 GDP).[270] A regulation with a smaller aggregate effect is not likely to have a measurable effect in macroeconomic terms, unless it is highly focused on a particular geographic region or economic sector, which is not the case with this rule.

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[269] *See* 2 U.S.C. 1532(a)(4).

[270] According to the Bureau of Economic Analysis, 2019 GDP was $21.43 trillion. https://www.bea.gov/system/files/2020-02/gdp4q19_2nd_0.pdf.

The Department's RIA estimates that the total costs of the final rule will be $369.2 million. Given OMB's guidance, the Department has determined that a full macroeconomic analysis is not likely to show that these costs would have any measurable effect on the economy.

Many commenters claim that the rule will result in costs to Federal and state governments in the form of increased public assistance and decreased tax revenue. The Department discussed these potential costs in the RIA and directs the reader to Section VI(E)(2)(ii).

The State AGs stated that the Department failed to include the increased administrative and enforcement costs to states due to the change in the standard for determining independent contractor status under the FLSA. They wrote that states "would need to invest time and resources into training agency employees and educating the public," particularly in states with laws that are more restrictive than the economic reality test. States do not enforce Federal laws and therefore have no need to train their personnel in the enforcement of the FLSA or the Department's regulations. There is also no need for states to be "educating" the public about FLSA regulations—aside from pointing out that Federal law may impose different requirements than state labor laws. Finally, under the nation's federalist system, states may and often do enact and enforce labor standards and are more restrictive than Federal standards. A state's decision to do so, however, rests with the state because no state is forced to enact labor standards that are stricter than the Federal standard. Any costs associated with implementing a stricter standard, including training and education, reflect the free choice of the individual state, and not the existence of a different Federal standard. As such, costs that a state choose to bear in enacting and enforcing their own laws are the result of the state's own decision, and are outside the scope of the unfunded mandate concept.

C. *Least Burdensome Option Explained*

The Department believes that it has chosen the least burdensome but still cost-effective methodology to clarify the FLSA's distinction between employees and independent contractors. Although the regulation will impose costs for regulatory familiarization, the Department believes

that its proposal would reduce the overall burden on organizations by simplifying and clarifying the analysis for determining whether a worker is classified as an employee or an independent contractor under the FLSA. The Department believes that, after familiarization, this rule will reduce the time spent by organizations to determine whether a worker is an independent contractor. Moreover, the additional clarification could promote innovation and certainty in business relationships. The AFPF agreed "that the Department has adequately analyzed potential alternatives as well as selected the least burdensome option under the Unfunded Mandates Reform Act of 1995."

IX. Effects on Families

The undersigned hereby certifies that the proposed rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

List of Subjects

29 CFR part 780

Agriculture, Child labor, Wages.

29 CFR part 788

Forests and forest products, Wages.

29 CFR part 795

Employment, Wages.

Signed at Washington, D.C. this 31st day of December, 2020.

Cheryl M. Stanton,

Administrator, Wage and Hour Division.

For the reasons set out in the preamble, the Department of Labor amends 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; 29 U.S.C. 201-219.

2. Amend § 780.330 by revising paragraph (b) to read as follows:

§ 780.330 Sharecroppers and tenant farmers.

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(b) In determining whether such individuals are employees or independent contractors, the criteria laid down in §§ 795.100 through 795.110 of this chapter are used.

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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 laid down in §§ 795.100 through 795.110 of this chapter are used.

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5. Add part 795 to subchapter B 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 and independent contractor classification under the FLSA.
795.110 Primacy of actual practice.
795.115 Examples of analyzing economic reality factors.
795.120 Severability.

Authority: 52 Stat. 1060, as amended; 29 U.S.C. 201-219.

§ 795.100 Introductory statement.

This part contains the Department of Labor's general interpretations of the text governing individuals' classification as employees or independent contractors under the Fair Labor Standards Act (FLSA or Act). *See* 29 U.S.C. 201–19. The Administrator of the Wage and Hour Division will use these interpretations to guide the performance of his or her duties under the Act, and intends the interpretations to be used by employers, employees, and courts to understand employers' obligations and employees' rights under the Act. To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to classification as 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 such act or omission in the course of such reliance, any such interpretation in this part "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 and independent contractor classification under the FLSA.

(a) *Independent contractors are not employees under the Act*. An individual who renders services to a potential employer—*i.e.,* a putative employer or alleged employer— as an independent contractor is not that potential employer's employee under the Act. As such, sections 6, 7, and 11 of the Act, which impose obligations on employers regarding their employees, are inapplicable. Accordingly, the Act does not require a potential employer to pay an independent contractor either the minimum wage or overtime pay under sections 6 or 7. Nor does section 11 of the Act require a potential employer to keep records regarding an independent contractor's activities.

(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). 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. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947); *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947). An individual is an independent contractor, as distinguished from an "employee" under the Act, if the individual is, as a matter of economic reality, in business for him- or herself.

(c) *Determining economic dependence*. The economic reality factors in paragraph (d) of this section guide the determination of whether the relationship between an individual and a potential employer is one of economic dependence and therefore whether an individual is properly classified as an employee or independent contractor. These factors are not exhaustive, and no single factor is dispositive. However, the two core factors listed in paragraph (d)(1) of this section are the most probative as to whether or not an individual is an economically dependent "employee," 29 U.S.C. 203(e)(1), and each therefore typically carries greater weight in the analysis than any other factor. Given these two core factors' greater probative value, if they both point towards the same classification, whether employee or independent contractor, there is a substantial likelihood that is the individual's accurate classification. This is because other 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.

(d) *Economic reality factors*—(1) *Core factors*—(i) *The nature and degree of control over the work*. This factor weighs towards the individual being an independent contractor to the extent the individual, as opposed to the potential employer, exercises substantial control over key aspects of the performance of the work, such as by setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others, which might include the potential

employer's competitors. In contrast, this factor weighs in favor of the individual being an employee under the Act to the extent the potential employer, as opposed to the individual, exercises substantial control over key aspects of the performance of the work, such as by controlling the individual's schedule or workload and/or by directly or indirectly requiring the individual to work exclusively for the potential employer. Requiring 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 (as opposed to employment relationships) does not constitute control that makes the individual more or less likely to be an employee under the Act.

(ii) *The individual's opportunity for profit or loss*. This 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. While 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. This 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.

(2*) Other factors*—(i) *The amount of skill required for the work*. 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. 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.

(ii) *The degree of permanence of the working relationship between the individual and the potential employer*. This factor weighs in favor of the individual being an independent contractor to the extent the work relationship is by design definite in duration or sporadic, which may include regularly occurring fixed periods of work, although the seasonal nature of work by itself would not necessarily indicate independent contractor classification. This factor weighs in favor of the individual being an employee to the extent the work relationship is instead by design indefinite in duration or continuous.

(iii) *Whether the work is part of an integrated unit of production*. This factor weighs in favor of the individual being an employee to the extent his or her work is a component of the potential employer's integrated production process for a good or service. This factor weighs in favor of an individual being an independent contractor to the extent his or her work is segregable from the potential employer's production process. This factor is different from the concept of the importance or centrality of the individual's work to the potential employer's business.

(iv) *Additional factors.* Additional factors may be relevant in determining whether an individual is an employee or independent contractor for purposes of the FLSA, but only 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.

§ 795.110 Primacy of actual practice.

In evaluating the individual's economic dependence on the potential employer, the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible. For example, an individual's theoretical abilities to negotiate prices or to work for competing businesses are less meaningful if, as a practical matter, the individual is prevented from exercising such rights. Likewise, a business' contractual authority to supervise or discipline an individual may be of little relevance if in practice the business never exercises such authority.

§ 795.115 Examples of analyzing economic reality factors.

(a) The following illustrative examples demonstrate how the factors listed in § 795.105(d) may be analyzed under the facts presented and are limited to substantially similar factual situations.

(b)(1)(i) *Example***.** An individual is the owner and operator of a tractor-trailer and performs transportation services for a logistics company. The owner-operator substantially controls the key aspects of the work. However, the logistics company has installed, at its own expense, a device that limits the maximum speed of the owner-operator's vehicle and monitors the speed through GPS. The company limits the owner-operator's speed in order to comply with federally mandated motor carrier safety regulations and to ensure that she complies with local traffic laws. The company also requires the owner-operator to meet certain contractually agreed-upon delivery deadlines, and her contract includes agreed-upon incentives for meeting, and penalties for missing, the deadlines.

(ii) *Application.* The owner-operator exercises substantial control over key aspects of her work, indicating independent contractor status. The fact that the company has installed a device that limits and monitors the speed of the owner-operator's vehicle does not change the above conclusion. This measure is implemented in order to comply with specific legal obligations and to ensure safety, and thus under § 795.105(d)(1)(i) would not constitute control that makes the owner-operator more or less likely to be an employee under the Act. The contractually agreed-upon delivery deadlines, incentives, and penalties are typical of contractual relationships between businesses and likewise would not constitute control that makes the owner-operator more or less likely to be an employee under the Act.

(2)(i) *Example.* An individual accepts assignments from a company that provides an app-based service linking those who need home-repair work with those who perform home-repair work. The individual is able to meaningful increase his earnings by exercising initiative and business acumen and by investing in his own equipment. The company, however, has invested millions of dollars in developing and maintaining the app, marketing itself, maintaining the security of

information submitted by actual and prospective customers and workers, and monitoring customer satisfaction with the work performed.

(ii) *Application.* The opportunity for profit or loss factor favors independent contractor status for the individual, despite the substantial difference in the monetary value of the investments made by each party. While the company may have invested substantially more in its business, the value of that investment is not relevant in determining whether the individual has a meaningful opportunity for profit or loss through his initiative, investment, or both.

(3)(i) *Example.* An individual worker works full time performing home renovation and repair services for a residential construction company. She is also the part owner of a food truck, which she operates on weekends. In performing the construction work, the worker is paid a fixed hourly rate, and the company determines how many and which tasks she performs. Her food truck recently became very popular and has generated substantial profits for her.

(ii) *Application.* With regard to the construction work, the worker does not have a meaningful opportunity for profit or loss based on her exercise of initiative or investment, indicating employee status. She is unable to profit, *i.e.*, increase her earnings, by exercising initiative or managing investments because she is paid a fixed hourly rate and the company determines the assignment of work. While she earns substantial profits through her food truck, that is a separate business from her work in the construction industry, and therefore is not relevant to the question of whether she is an employee of the construction company or in business for herself in the construction industry.

(4)(i) *Example.* A housekeeper works for a ski resort every winter. At the end of each winter, he stops working for the ski resort because the resort shuts down. At the beginning of each of the past several winters, the housekeeper returned to his prior position at the ski resort without formally applying or interviewing.

(ii) *Application.* The housekeeper has a long-term and indefinite work relationship with the ski resort under the permanence factor, which weighs in favor of classification as an employee. That

his periods of working for the ski resort end at the end of each winter is a result of the seasonal nature of the ski industry and is thus not indicative of a sporadic relationship. The fact that the housekeeper returns to his prior position each new season indicates that his relationship with ski resort does not end and is indefinite as a matter of economic reality.

(5)(i) *Example***.** An editor works part-time for a newspaper. The editor works from home and is responsible for assigning and reviewing many articles published by the newspaper. Sometimes she also writes or rewrites articles. The editor is responsible for determining the layout and order in which all articles appear in the newspaper's print and online editions. She makes assignment and lay-out decisions in coordination with several full-time editors who make similar decisions with respect to different articles in the same publication and who are employees of the newspaper.

(ii) *Application.* The editor is part of an integrated unit of production of the newspaper because she is involved in the entire production process of the newspaper, including assigning, reviewing, drafting, and laying out articles. This factor points in the direction of her being an employee of the newspaper. This conclusion is further supported by the fact that the editor performs the same work as employees of the newspaper in coordination with those employees. The fact that she does not physically work at the newspaper's office does not outweigh these more probative considerations of the integrated unit factor.

(6)(i) *Example.* A journalist writes articles for a newspaper on a freelance basis. The journalist does not have an office and generally works from home. He submits an article to the newspaper once every 2 to 3 weeks, which the newspaper may accept or reject. The journalist sometimes corresponds with the newspaper's editor regarding what to write about or regarding revisions to the articles that he submits, but he does not otherwise communicate or work with any of the newspaper's employees. The journalist never assigns articles to others nor does he review or revise articles that others submit. He is not responsible for determining where his article or any other articles appear in the newspaper's print and online editions.

(ii) *Application.* The journalist is not part of an integrated unit of production of the newspaper, indicating independent contractor status. His work is limited to the specific articles that he submits and is completely segregated from other parts of the newspaper's processes that serve its specific, unified purpose of producing newspapers. It is not relevant in analyzing this factor that the writing of articles is an important part of producing newspapers. Likewise, the fact that he works at home does not strongly indicate either status, because the nature of the journalist's work is such that the physical location where it is performed is largely irrelevant.

§ 795.120 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.

[FR Doc. 2020-29274 Filed: 1/6/2021 8:45 am; Publication Date: 1/7/2021]