U.S. Wage and Hour Division
(Revised May 2014)

Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the meaning of "employment relationship" and the significance of that determination in applying provisions of the Fair Labor Standards Act (FLSA).

Determining Whether an Employment Relationship Exists: Is a Worker an Employee or Independent Contractor?

In order for the FLSA's minimum wage and overtime provisions to apply to a worker, the worker must be an "employee" of the employer, meaning that an employment relationship must exist between the worker and the employer. The FLSA defines "employ" as including to "suffer or permit to work", representing the broadest definition of employment under the law because it covers work that the employer directs or allows to take place. Applying the FLSA's definition, workers who are economically dependent on the business of the employer, regardless of skill level, are considered to be employees, and most workers are employees. On the other hand, independent contractors are workers with economic independence who are in business for themselves.

A number of "economic realities" factors are helpful guides in resolving whether a worker is truly in business for himself or herself, or like most, is economically dependent on an employer who can require (or allow) employees to work *and* who can prevent employees from working. The Supreme Court has indicated that there is no single rule or test for determining whether an individual is an employee or independent contractor for purposes of the FLSA. The Court has held that the totality of the working relationship is determinative, meaning that all facts relevant to the relationship between the worker and the employer must be considered.

While the factors considered can vary, and while no one set of factors is exclusive, the following factors are generally considered when determining whether an employment relationship exists under the FLSA *(i.e.*, whether a worker is an employee, as opposed to an independent contractor):

1) The extent to which the work performed is an integral part of the employer's business. If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself or herself. For example, work is integral to the employer's business if it is a part of its production process or if it is a service that the employer is in business to provide.

2) Whether the worker's managerial skills affect his or her opportunity for profit and loss. Managerial skill may be indicated by the hiring and supervision of workers or by investment in equipment. Analysis of this factor should focus on whether the worker exercises managerial skills and, if so, whether those skills affect that worker's opportunity for both profit and loss.

3) The relative investments in facilities and equipment by the worker *and* the employer. The worker must make some investment compared to the employer's investment (and bear some risk for a loss) in order for there to be an indication that he/she is an independent contractor in business for himself or herself. A worker's investment in tools and equipment to perform the work does not necessarily indicate independent contractor status, because such tools and equipment may simply be required to perform the work for the employer. If a worker's business investment compares favorably enough to the employer's that they appear to be sharing risk of loss, this factor indicates that the worker may be an independent contractor.

4) The worker's skill and initiative. Both employees and independent contractors may be skilled workers. To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment. Further, the fact that a worker is in open market competition with others would suggest independent contractor status. For example, specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that suggests independent contractor status.

5) The permanency of the worker's relationship with the employer. Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee, as opposed to an independent contractor. However, a worker's lack of a permanent relationship with the employer does not necessarily suggest independent contractor status because the impermanent relationship may be due to industry-specific factors, or the fact that an employer routinely uses staffing agencies.

6) The nature and degree of control by the employer. Analysis of this factor includes who sets pay amounts and work hours and who determines how the work is performed, as well as whether the worker is free to work for others and hire helpers. An independent contractor generally works free from control by the employer (or anyone else, including the employer's clients). This is a complex factor that warrants careful review because both employees and independent contractors can have work situations that include minimal control by the employer. However, this factor does not hold any greater weight than the other factors. For example, a worker's control of his or her own work hours is not necessarily indicative of independent contractor status; instead, the worker must control meaningful aspects of the working relationship. Further, the mere fact that a worker works from home or offsite is not indicative of independent contractor status because the employer may exercise substantial control over the working relationship even if it exercises less day-to-day control over the employee's work at the remote worksite.

There are certain factors which are immaterial in determining the existence of an employment relationship. For example, the fact that the worker has signed an agreement stating that he or she is an independent contractor is not controlling because the reality of the working relationship – and not the label given to the relationship in an agreement – is determinative. Likewise, the fact that the worker has incorporated a business and/or is licensed by a State/local government agency has little bearing on determining the existence of an employment relationship. Additionally, the Supreme Court has held that employee status is not determined by the time or mode of pay.

Requirements Under the FLSA

When an employer-employee relationship exists, and the employee is engaged in work that is subject to the FLSA, the employee must be paid at least the Federal minimum wage of $7.25 per hour, effective July 24, 2009, and in most cases overtime at time and one-half his/her regular rate of pay for all hours worked in excess of 40 per week. The FLSA also has youth employment provisions which regulate the employment of minors under the age of eighteen, as well as recordkeeping requirements.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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United States Department of Labor
Office of the Secretary
V. Contingent Workers

1. General Observations

As employers seek new ways to make the employment relationship more flexible, they have increasingly relied on a variety of arrangements popularly known as "contingent work." The use of independent contractors and part-time, temporary, seasonal, and leased workers has expanded tremendously in recent years. The Commission views this change both as a healthy development and a cause for concern.

On the positive side, contingent employment relationships are in many respects a sensible response to today's competitive global marketplace. The benefits are clear that various forms of contingent work can offer to both some management and some workers. Contingent arrangements allow some firms to maximize workforce flexibility in the face of seasonal and cyclical forces and the demands of modern methods such as just-in-time production. This same flexibility helps some workers, more of whom must balance the demands of family and work as the numbers of d On the negative side, as the Fact Finding Report noted, contingent arrangements may be introduced simply to reduce the amount of compensation paid by the firm for the same amount and value of work, which raises some serious social questions. This is particularly true because contingent workers are drawn disproportionately from the most vulnera- ble sectors of the workforce. They often receive less pay and benefits than traditional full-time or "permanent" workers, and they are less likely to benefit from the protections of labor and employment laws. A large percent- age of workers who hold part-time or temporary positions do so involuntarily. The expansion of contingent work has contributed to the increasing gap between high and low wage workers and to the increasing sense of insecurity among workers noted in the Fact Finding Report, (pp. 93-94).ual-earner and single-parent households rise. Workers benefit when a diversity of employment relationships is available. For example, temporary work provides a mechanism for transitions between jobs, affording employers and workers an opportunity to size each other up before deciding to enter into a more stable employment relationship. Manpower Incorporated CEO Mitchell S. Fromstein told the Commission that his firm transitioned approximately 150,000 "temps" into permanent jobs with client companies in 1993 alone. <Footnote: Statement of July 25, 1994, at 3.>

Unfortunately, current tax, labor and employment law gives employers and employees incentives to create contingent relationships not for the sake of flexibility or efficiency but in order to evade their legal obligations. For example, an employer and a worker may see advantages wholly unrelated to efficiency or flexibility in treating the worker as an independent contractor rather than an employee. The employer will not have to make contributions to Social Security, unemployment insurance, workers' compensation, and health insurance, will save the administrative expense of withholding, and will be relieved of responsibility to the worker under labor and employment laws. The worker will lose the protection of those laws and benefits and the employer's contribution to Social Security, but may accept the arrangement nonetheless because it gives him or her an opportunity for immediate and even illegitimate financial gains through underpayment of taxes. Many low-wage workers have no practical choice in the matter. The federal govern- ment loses billions of dollars to underpayment of taxes by workers misclassified as independent contractors. A 1989 GAO study found that 38 percent of the employers examined misclassified employees as independent contractors. <Footnote: GAO/GGD-89-107 Misclassification of Workers, 2. See Committee on Government Operations, U.S. House of Representatives, "The Administration and Enforcement of Employment Taxes--A Status Report on Ideas for Change," 1994. Also see, Advisory Council on Unemployment Compensation, Misclassification of Workers as Independent Contractors, November 1994.> A June 1994 study conducted by the accounting firm Coopers &

Lybrand estimates that revenue loss due to misclassification will total $3.3 billion annually by 1996.<Footnote: "Projection of the Loss in Federal Tax Revenues due to Misclassification of Workers," submitted July 25, 1994 by the Coalition for Fair Worker Classification.>

The Commission does not believe these problems render contingent forms of work inherently illegitimate. On the contrary, we affirm the valuable role contingent arrange- ments can play in diversifying the forms of employment relationship available to meet the needs of American companies and workers. The goal of public policy should be to remove incentives to use them for illegitimate purposes. We believe the changes in labor and employment law discussed below will make a contribution toward achieving this goal.

2. Recommendations

In light of the considerations discussed above, we make recommendations regarding contingent workers in two areas:

1. The definition of employee in labor, employment, and tax law should be modernized, simplified, and standardized. Instead of the control test borrowed from the old common law of master and servant, the definition should be based on the economic realities underlying the relationship between the worker and the party benefiting from the worker's services.

2. The definition of employer should also be standardized and grounded in the economic realities of the employment relationship. Congress and the NLRB should remove the incentives that now exist for firms to use variations in corporate form to avoid responsibility for the people who do their work.

The Commission received a number of other proposals about contingent work, many of which merit serious attention. We devoted a hearing to the subject on July 25, 1994. A working group of the Commission held a round table discussion with ten groups representing low wage workers on October 7, 1994. On both occasions, we heard testimony about the plight of people on the lowest rungs of the employment ladder. More workers now find themselves in contingent employment relationships than ever before.

Among the ideas advanced in these forums and in written submissions to the Commission were expanding the coverage of various statutes to seasonal workers; affording farm workers the protections of the NLRA; mandating equal pay for equal work as well as equal benefits on a pro-rata basis for part- time employees; giving employees of contractors a right of first refusal when they are displaced because their employer loses a contract for ongoing services; and putting a time limit on temporary positions, so that they would convert to regular employee positions with the client firm after a specified time period.

The Commission takes no position on these proposals. Frankly, it is beyond our means to recommend a full policy program in this emerging area of concern. However, we wish to emphasize the importance of a comprehensive study <Footnote: The Bureau of Labor Statistics announced on December 9, l994 its first comprehensive survey of the contingent workforce as a supplement to the current population survey, the results to be available in June l995.> to develop a balanced public policy to mediate the concerns of flexibility and productivity on the one hand and economic security and fairness on the other.

1. The Definition of Employee

The single most important factor in determining which workers are covered by employment and labor statutes is the way the line is drawn between employees and independent contractors. Each labor and employment law statute covers only those it defines as employees. The statutes do not protect others, notably independent contractors. When one thinks of an independent contractor relationship, one normally thinks of one firm hiring a second firm--with its own staff, equipment, and resources-- to do certain work, instead of having its own employees do it. The problems arise when the first firm hires not another firm but a single or several individuals to do work, and then wishes to treat those individuals as independent contractors rather than as employees.

There are two major problems with the definition of employee in current labor and employment law: (1) each statute makes the distinction in its own way, presenting employers with an unnecessarily complicated regulatory maze; (2) in substance, the law is based on a nineteenth century concept whose purposes are wholly unrelated to contemporary employment policy.

The NLRA, the Civil Rights Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act ~ each major labor and employment statute -- has its own definition of employee and its own way of drawing the line between employees and independent contractors. Many of these definitions appear to be quite similar. But they were created over a period of a half century, and their language is often vague or circular, leaving them open to a broad range of interpretations. As a result, the line has been drawn differently in the different statutes, depending on the inclinations of the agency at the time or Supreme Court doing the drawing. These differences in interpretation mean that a worker might be deemed an employee for purposes of the FLSA but an independent contractor for purposes of the NLRA, without any apparent policy justification for the disparity of treatment. The Commission finds no principled justification for this regulatory morass.

As for the substance of the definition of employee, the legal debate has been framed from the beginning by the common law distinction between an employee and independent contractor. This nineteenth century concept was created by judges for purposes such as determining when a "master" should be held liable for torts committed by a "servant." The doctrine emphasizes the degree of control the master has over the servant, on the theory that a person with little control over the actions of another should not be liable for them. Over the years, the doctrine has grown highly formalistic, to the point that the IRS, which uses a version of it for determining tax liability, employs 20 factors in drawing the employee/independent contractor line.<Footnote: Internal Revenue Manual, 4600 Employment Tax Procedure, Exhibit 4640-1.> Given the proliferation of factors making up the test, its application often yields inconsistent results. What is more, its formalism provides employers and workers with a means and incentive to circumvent the employment policies of the nation. Whatever the actual nature of their relationship, an employer and worker can structure it on paper to give the latter indepen- dent contractor rather than employee status.

While some statutes, notably the FLSA,<Footnote: See U.S. v. Silk, 331 U.S. 704 (1947).> have diverged from the traditional independent contractor test, others, such as the NLRA,<Footnote: NLRB v. United Insurance Company of America, 390 U.S. 256 (1968).> follow it closely. Two years ago, the Supreme Court gave the test new life in the case of Nationwide Mutual Insurance Company v. Darden.<Footnote: 112 S.Ct. 1344 (1992).> The Darden Court concluded that ERISA's definition of employee was meaningless. To solve this problem, the Court held that when Congress fails to define a term that has a settled meaning at common law, courts should infer that Congress meant to adopt the common law definition. Thus, under ERISA an employee means a worker under the direct control of the employer ~ i.e., one who is not a common law independent contractor. Darden has already begun to reverberate in the employment law field well beyond ERISA.<Footnote: Some lower courts have decided they must apply the common law test to Title VII as well as ERISA. See, e.g., Lattanzio v. Security National Bank, 825 F.Supp. 86 (E.D.Pa. 1993) (expressly disregarding the Third Circuit's previous reliance on another test).>

1. Streamline and Modernize the Definition of Employee

The Commission concludes that the ancient doctrine of master and servant provides a poor vehicle for delivering federal employment policy into the twenty-first century. The law in this area should be modernized and streamlined: there is no need for every federal employment and labor statute to have its own definition of employee. We recommend that Congress adopt a single, coherent concept of employee and apply it across the board in employment and labor law.

2. Use an Economic Realities Test to Determine Who is an Employee

The determination of whether a worker is an employee protected by federal labor and employment law should not be based on the degree of immediate control the employer exercises over the worker, but rather on the underlying eco- nomic realities of the relationship. Workers should be treated as independent contractors if they are truly independent entrepreneurs performing services for clients ~ i.e., if they present themselves to the general public as an established business presence, have a number of clients, bear the economic risk of loss from their work, and the like.

Workers who are economically dependent on the entity for whom they perform services generally should be treated as employees. Factors such as low wages, low skill levels, and having one or few employers should all militate against treatment as an independent contractor. A revised test based on the economic realities of the work relationship will eliminate the incentives to use the independent contractor form to evade the obligations of national workplace policy while leaving it fully available where its use is truly appropriate.

In order to create a consistent and rational policy on the definition of employees, Congress should change the tax law as well. Even if the definition of employee is simplified and standardized across employment and labor law, tax law will continue to present a significant incentive for misclassification if it goes unchanged. Two reforms are necessary in this area. First, Congress should apply an economic realities test for determining who is an employee to the Internal Revenue Code as well as to employment and labor law. Second, Congress should strengthen the IRS's ability to make sure employers and workers draw the line properly, whatever the test.

Currently, employers decide whether their workers are employees or independent contractors with little scrutiny from the IRS. Section 530 of the Revenue Act of 1978 ties the IRS's hands in attempting to deter misclassification. Section 530 prevents the IRS from collecting back taxes from an employer who misclassified its employees as independent contractors ~ or even from requiring the employer to reclassify the workers as employees ~ if any of three conditions are met: the employer's classification follows judicial precedent or IRS rulings; the classification is based on long-standing industry practice; or the employer has been audited by the IRS in the past without being assessed for the misclassification.

The past audit rule is indefensible as a matter of policy, because there is no requirement that the past audit looked into employment taxation. Thus, even if the employer was audited for something totally unrelated to the classifica- tion question, and the other two justifications for providing a safe harbor do not apply, the employer is free to misclassify employees indefinitely and avoid paying taxes it properly owes without penalty.

3. Eliminate the "Past Audit" Safe Harbor for Misclassification of Employees as Independent Contractors

Congress should reform Section 530 to permit the IRS to require an employer to reclassify an employee for the future any time the agency discovers an improper classification, regardless of past audits, if the employer's classification cannot be justified on the basis of accepted industry practice or tax law precedent. In addition, the IRS should be able to reclassify the employee for a limited period, such as up to three years into the past, if the agency has not audited the employer on the classification issue during that period.

2. The Definition of Employer

The definition of employer plays a role similar to the definition of employee in labor and employment law. Each statute sets out a definition of the employer concept which limits the scope of the statute's coverage by determining which entities are liable as employers and which are not. As with the employee concept, the employer definition varies from statute to statute. We believe it should be standardized and modernized in order to allow free play for mutually rewarding contingent relationships while eliminating incentives to create contingent relationships merely to evade legal obligations.

As a general rule, the definitions of employer are premised on a model of employment relations in which one set of employees is engaged in a continuing relationship with one enterprise. Thus, many federal statutes limit employer status to those parties responsible for hiring or firing, setting schedules, or actually issuing the worker's paycheck. This model of the employment relationship is badly out of date, not least because it fails to account for the extent to which contingent work arrangements have become commonplace rather than marginal in our society. Many thousands of workers are now employed by one firm but actually provide services for another as temporary, leased, or contract employees, and these relationships are often of short duration. Federal law should welcome this change, while ensuring that contingent relationships are established for the purposes of efficiency and flexibility, not to evade workplace standards

As the law now stands, the narrow definition of employer found in most employment and labor statutes gives firms incentives to create contingent relationships not for the sake of flexibility and efficiency, but to reduce the number of workers with access to collective bargaining and protections as to the minimum wage, overtime, pensions, benefits and the like. For example, Corporation A can create a subsidiary, Corporation B, and transfer to it work formerly done by Corporation A employees merely to avoid a collective bargaining agreement, as long as Corp. B has separate management and control over labor relations.

The incentives to use contingent forms to cut corners lead to harmful outcomes for American employers, workers, and society at large. Law abiding employers are undercut by contractors who can offer cheap services by avoiding minimum wage, Social Security, un-employment insurance, and other obligations. The economic security of workers is eroded, because the number of temporary and contract jobs is artificially inflated by socially harmful "cost savings." Many workers at the bottom of the employment ladder suffer under conditions that violate national standards of decency. For example, the GAO recently reported that sweatshops continue to be a major problem in the garment industry.<Footnote: United States General Accounting Office, Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops, Nov. 1994 (GAO/HEHS-95-29).> The incentives to use contingent arrangements to avoid employment obligations create an unnecessary enforcement burden that state and federal governments are unable to bear and for which taxpayers should not have to pay.

The Commission believes the solution to this problem is not to reduce the ability of the buyers and sellers of labor to experiment with all manner of contingent relationships, but rather to remove the incentives to use those arrangements in ways that undercut national employment standards. In light of this policy, we make the following recommendations.

3. Modernize and Standardize the Definition of Employer Based on Economic Realities

The definition of employer in statutes across the employment and labor law spectrum should be changed and made uniform in a way that reflects the economic realities of the relation- ship between providers and recipients of services.

4. Expand "Single Employer" Doctrine

"Single employer" doctrine should be expanded so that firms do not have incentives to use variations in the corporate form to avoid workplace responsibilities. In general, a grouping of parent, subsidiary, sibling, and spin-off entities should be considered a single employer of their respective employees.<Footnote: One illustration of the single employer problem arising under labor law is the "double-breasted" contractor arrangement in the construction industry. A unionized contractor may establish a related or subsidiary contractor to do essentially the same kind of construction work but to do it nonunion, even though the firm was bound by a collective agreement through the original corporate entity. The Supreme Court has concluded that the current definition of employer under the NLRA is broad enough for the NLRB to hold the two corporate entities to be a single employer. South Prairie Construction Co. v. Operating Engineers Local 627, 425 U.S. 800 (1976). However, the Board generally has continued to treat the operations of related corporate entities in the construction field as

separate bargaining units, with the unit designated by the firm as nonunion not having to meet the employment standards called for in the collective bargaining agreement. The Commission received extensive submissions on this issue. We recommend that the Board revisit the question of whether its policy continues to be appropriate in light of the Commission's broader judgments about the single employer doctrine.> In this area, the Internal Revenue Code can serve as a model for labor and employment law.<Footnote: See 26 U.S.C. 414.>

5. Expand "Joint Employer" Doctrine as to Safety and Health and Client Cancellation of Contracts

"Joint employer" doctrine should also be expanded, but not in a way that makes clients responsible for the actions of contractors over whose operations and employees they have little control. In client-provider relationships, the client firm should be liable to the provider firm's employees in two particular areas. First, because of the crucial importance of occupational safety and health, the client should be responsible for ensuring that its contractors meet the relevant legal standards regarding unsafe conditions or practices to which the workers may be exposed. Second, the client should be liable if its own decisions or actions with respect to the contract serve to deny the workers their legal rights under labor-relations law. .<Footnote: Thus, it should be a violation of the labor law for a client whose contractor's employees vote to unionize to terminate the contract as a result, since the client has effectively eliminated the employees' ability to choose collective bargaining. Indeed, the prospect of such a contract termination by an anti-union client ~ the risk of which the contractor can draw to the attention of its employees during the representation campaign ~ may prove a significant deterrent to the contractor's employees exercising their legal right to bargain collectively.>

The Commission also encourages the NLRB to use its rule making and adjudication processes to establish a fair doctrine governing joint-employer situations.

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U.S. Department of Labor
Wage and Hour Division
Washington, D.C. 20210

Administrator's Interpretation No. 2015-1

July 15, 2015

Issued by ADMINISTRATOR DAVID WEIL

SUBJECT: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors.

Misclassification of employees as independent contractors is found in an increasing number of workplaces in the United States, in part reflecting larger restructuring of business organizations. When employers improperly classify employees as independent contractors, the employees may not receive important workplace protections such as the minimum wage, overtime compensation, unemployment insurance, and workers' compensation. Misclassification also results in lower tax revenues for government and an uneven playing field for employers who properly classify their workers. Although independent contracting relationships can be advantageous for workers and businesses, some employees may be intentionally misclassified as a means to cut costs and avoid compliance with labor laws.

The Department of Labor's Wage and Hour Division (WHD) continues to receive numerous complaints from workers alleging misclassification, and the Department continues to bring successful enforcement actions against employers who misclassify workers. In addition, many states have acknowledged this problematic trend and have responded with legislation and misclassification task forces. Understanding that combating misclassification requires a multi-pronged approach, WHD has entered into memoranda of understanding with many of these states, as well as the Internal Revenue Service.[1] In conjunction with these efforts, the Administrator believes that additional guidance regarding the application of the standards for determining who is an employee under the Fair Labor Standards Act (FLSA or "the Act") may be helpful to the regulated community in classifying workers and ultimately in curtailing misclassification.

The FLSA's definition of employ as "to suffer or permit to work" and the later-developed "economic realities" test provide a broader scope of employment than the common law control test. Indeed, although the common law control test was the prevalent test for determining whether an employment relationship existed at the time that the FLSA was enacted, Congress rejected the common law control test in drafting the FLSA. *See Walling v. Portland Terminal*

[1] Information about the Department's Misclassification Initiative and related memoranda of understanding is available at http://www.dol.gov/whd/workers/misclassification/.

Co., 330 U.S. 148, 150-51 (1947). Instead, the FLSA defines "employ" broadly as including "to suffer or permit to work," 29 U.S.C. 203(g), which clearly covers more workers as employees, *see U.S. v. Rosenwasser*, 323 U.S. 360, 362-63 (1945).

In order to make the determination whether a worker is an employee or an independent contractor under the FLSA, courts use the multi-factorial "economic realities" test, which focuses on whether the worker is economically dependent on the employer or in business for him or herself.[2] A worker who is economically dependent on an employer is suffered or permitted to work by the employer. Thus, applying the economic realities test in view of the expansive definition of "employ" under the Act, most workers are employees under the FLSA. The application of the economic realities factors must be consistent with the broad "suffer or permit to work" standard of the FLSA.

This Administrator's Interpretation first discusses the pertinent FLSA definitions and the breadth of employment relationships covered by the FLSA. When determining whether a worker is an employee or independent contractor, the application of the economic realities factors should be guided by the FLSA's statutory directive that the scope of the employment relationship is very broad. This Administrator's Interpretation then addresses each of the factors, providing citations to case law and examples. All of the factors must be considered in each case, and no one factor (particularly the control factor) is determinative of whether a worker is an employee. Moreover, the factors themselves should not be applied in a mechanical fashion, but with an understanding that the factors are indicators of the broader concept of economic dependence. Ultimately, the goal is not simply to tally which factors are met, but to determine whether the worker is economically dependent on the employer (and thus its employee) or is really in business for him or herself (and thus its independent contractor). The factors are a guide to make this ultimate determination of economic dependence or independence.[3]

I. The Economic Realities Factors Should Be Applied in View of the FLSA's Broad Scope of Employment and "Suffer or Permit" Standard

[2] While most misclassified employees are labeled "independent contractors," the Department has seen an increasing number of instances where employees are labeled something else, such as "owners," "partners," or "members of a limited liability company." In these instances, the determination of whether the workers are in fact FLSA covered employees is also made by applying an economic realities analysis.

[3] The analysis in this Administrator's Interpretation should also be applied in determining whether a worker is an employee or an independent contractor in cases arising under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and the Family and Medical Leave Act (FMLA). MSPA expressly adopts the FLSA's definition of "employ" as MSPA's definition of "employ" and thus incorporates the broad "suffer or permit" standard for determining the scope of employment relationships. *See* 29 U.S.C. 1802(5) ("The term 'employ' has the meaning given such term under [the FLSA, 29 U.S.C. 203(g)]."); *see also* 29 C.F.R. 500.20(h)(1)-(4). The FMLA also adopts the FLSA's definition of "employ" for employer coverage and employee eligibility purposes (subject to additional eligibility requirements). *See* 29 U.S.C. 2611(3); 29 C.F.R. 825.105.

The FLSA's definitions establish the scope of the employment relationship under the Act and provide the basis for distinguishing between employees and independent contractors. The FLSA defines "employee" as "any individual employed by an employer," 29 U.S.C. 203(e)(1), and "employer" as including "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. 203(d). The FLSA's definition of "'employ' includes to suffer or permit to work." 29 U.S.C. 203(g). This "suffer or permit" concept has broad applicability and is critical to determining whether a worker is an employee and thus entitled to the Act's protections.

The "suffer or permit" standard was specifically designed to ensure as broad of a scope of statutory coverage as possible. *See Rosenwasser*, 323 U.S. at 362-63 ("A broader or more comprehensive coverage of employees . . . would be difficult to frame."); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) ("employ" is defined with "striking breadth"). The Supreme Court "has consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction,' recognizing that broad coverage is essential to accomplish the [Act's] goal . . . ." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)) (internal citation omitted).

The history of the "suffer or permit" standard highlights its broad applicability. Prior to the FLSA's enactment, the phrase "suffer or permit" (or variations of the phrase) was commonly used in state laws regulating child labor and was "designed to reach businesses that used middlemen to illegally hire and supervise children." *Antenor v. D & S Farms*, 88 F.3d 925, 929 n.5 (11th Cir. 1996). A key rationale underlying the "suffer or permit" standard in child labor laws was that the employer's opportunity to detect work being performed illegally and the ability to prevent it from occurring was sufficient to impose liability on the employer. *See, e.g., People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25, 29-31 (N.Y. 1918). Thus, extending coverage of child labor laws to those who suffered or permitted the work was designed to expand child labor laws' coverage beyond those who controlled the child laborer, counter an employer's argument that it was unaware that children were working, and prevent employers from using agents to evade requirements.

Unlike the common law control test, which analyzes whether a worker is an employee based on the employer's control over the worker and not the broader economic realities of the working relationship, the "suffer or permit" standard broadens the scope of employment relationships covered by the FLSA. Indeed, the FLSA's statutory definitions (including "suffer or permit") rejected the common law control test that was prevalent at the time. As the Supreme Court explained:

> [I]n determining who are "employees" under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.

Walling, 330 U.S. at 150-51 (internal citation omitted); *see also Darden*, 503 U.S. at 326 (FLSA's "suffer or permit" standard for employment "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles."); *Antenor*, 88 F.3d at 933 ("Indeed, the 'suffer or permit to work' standard was developed to assign responsibility to businesses that did not directly supervise putative employees."). Thus, the scope of employment under the FLSA is the "'broadest definition that has ever been included in any one act.'" *Rosenwasser*, 323 U.S. at 363 n.3 (quoting from statement of Senator Black on Senate floor).

An "entity 'suffers or permits' an individual to work if, as a matter of economic reality, the individual is dependent on the entity." *Antenor*, 88 F.3d at 929. The Supreme Court and Circuit Courts of Appeals have developed a multi-factor "economic realities" test to determine whether a worker is an employee or an independent contractor under the FLSA. *See, e.g., Tony & Susan Alamo*, 471 U.S. at 301 (noting that the test of employment under the FLSA is economic reality); *Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 33 (1961) (the economic realities of the worker's relationship with the employer control, rather than any technical concepts used to characterize that relationship). The factors typically include: (A) the extent to which the work performed is an integral part of the employer's business; (B) the worker's opportunity for profit or loss depending on his or her managerial skill; (C) the extent of the relative investments of the employer and the worker; (D) whether the work performed requires special skills and initiative; (E) the permanency of the relationship; and (F) the degree of control exercised or retained by the employer.[4]

In undertaking this analysis, each factor is examined and analyzed in relation to one another, and no single factor is determinative. The "control" factor, for example, should not be given undue weight. The factors should be considered in totality to determine whether a worker is economically dependent on the employer, and thus an employee. The factors should not be applied as a checklist, but rather the outcome must be determined by a qualitative rather than a quantitative analysis. The application of the economic realities factors is guided by the overarching principle that the FLSA should be liberally construed to provide broad coverage for workers, as evidenced by the Act's defining "employ" as "to suffer or permit to work."

In applying the economic realities factors, courts have described independent contractors as those workers with economic independence who are operating a business of their own. On the other hand, workers who are economically dependent on the employer, regardless of skill level, are employees covered by the FLSA. *See, e.g., Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) ("To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself."); *Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998) (the economic realities of the relationship govern, and the focal point is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself); *Brock v. Superior Care, Inc.*, 840 F.2d 1054,

[4] The number of factors and the exact articulation of the factors may vary some depending on the court. Courts routinely note that they may consider additional factors depending on the circumstances and that no one factor is determinative.

1059 (2d Cir. 1988) ("The ultimate concern is whether, as a matter of economic reality, the workers depend on someone else's business . . . or are in business for themselves."). "Ultimately, in considering economic dependence, the court focuses on whether an individual is 'in business for himself' or is 'dependent upon finding employment in the business of others.'" *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1312 (11th Cir. 2013) (quoting *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 301-02 (5th Cir. 1975)).

Moreover, the economic realities of the relationship, and not the label an employer gives it, are determinative. Thus, an agreement between an employer and a worker designating or labeling the worker as an independent contractor is not indicative of the economic realities of the working relationship and is not relevant to the analysis of the worker's status. *See, e.g., Scantland*, 721 F.3d at 1311 ("This inquiry is not governed by the 'label' put on the relationship by the parties or the contract controlling that relationship, but rather focuses on whether 'the work done, in its essence, follows the usual path of an employee.'") (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947)); *Superior Care*, 840 F.2d at 1059 ("[E]mployer's self-serving label of workers as independent contractors is not controlling."); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 667 (5th Cir. 1983) (explaining that "[a]n employee is not permitted to waive employee status," and affirming that welders were employees despite having signed independent contractor agreements). Likewise, workers who are classified as independent contractors may receive a Form 1099-MISC from their employers. This form simply indicates that the employer engaged the worker as an independent contractor, not that the worker is actually an independent contractor under the FLSA. *See Olson v. Star Lift Inc.*, 709 F. Supp. 2d 1351, 1356 (S.D. Fla. 2010) (worker's receipt of Form 1099-MISC from employer does not weigh in favor of independent contractor status). "Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA." *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979).

The ultimate inquiry under the FLSA is whether the worker is economically dependent on the employer or truly in business for him or herself. If the worker is economically dependent on the employer, then the worker is an employee. If the worker is in business for him or herself (i.e., economically independent from the employer), then the worker is an independent contractor.

II. The Economic Realities Factors Guide the Determination Whether the Worker Is Truly an Independent Business or Is Economically Dependent on the Employer

To help illustrate how the economic realities factors should be properly used to determine whether a worker is truly in business for him or herself, each factor is discussed in detail below. The distinction between workers who are economically dependent on employers and the narrower subset of workers who are truly independent businesspersons must not be eclipsed by a mechanical application of the economic realities test. The analysis whether the factors are met must focus on whether the worker is economically dependent on the employer or truly in business for him or herself. As a district court held in an enforcement action by the Department:

> These factors are to be considered and weighed against one another in each situation, but there is no mechanical formula for using them to arrive at the correct result. Rather, the factors are simply a tool to assist in understanding individual cases, with the ultimate goal

of deciding whether it is economically realistic to view a relationship as one of employment or not.

Solis v. Cascom, Inc., 2011 WL 10501391, at *4 (S.D. Ohio Sept. 21, 2011); *see also Scantland*, 721 F.3d at 1312 (the economic realities factors "serve as guides, [and] the overarching focus of the inquiry is economic dependence"); *Usery v. Pilgrim Equip. Co., Inc.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (The economic realities factors "are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is dependence that indicates employee status. Each test must be applied with that ultimate notion in mind.").

Each factor of the economic realities test is discussed below in order to highlight, using case law and examples, relevant considerations for each factor and how each suggests whether or not there is an employment relationship.

A. Is the Work an Integral Part of the Employer's Business?

The policy behind the "suffer or permit" statutory language was to bring within the scope of employment workers integrated into an employer's business. If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer. *See Rutherford*, 331 U.S. at 729 (workers were employees in part because work was "part of the integrated unit of production"); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985) ("workers are more likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer"). A true independent contractor's work, on the other hand, is unlikely to be integral to the employer's business.[5]

Courts have found the "integral" factor to be compelling. *See, e.g., Dole v. Snell*, 875 F.2d 802, 811 (10th Cir. 1989) (holding that work performed by cake decorators "is obviously integral" to the business of selling cakes which are custom decorated); *Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1537-38 (7th Cir. 1987) ("It does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business . . . ."). Work can be integral to a business even if the work is just one component of the business and/or is performed by hundreds or thousands of other workers. For example, a worker answering calls at a call center along with hundreds of others is performing work that is integral to the call center's business even if that

[5] Given that the "integral" factor particularly encompasses the "suffer or permit" standard and that the Supreme Court in *Rutherford* found the workers in that case to be employees, in part because they were "part of the integrated unit of production," whether the worker's work is an integral part of the employer's business should always be analyzed in misclassification cases. Although a few courts, such as the Fifth Circuit, do not include the "integral" factor in their recitation of the factors that comprise the economic realities test, they nonetheless recognize that the factors comprising the test are not exclusive. *See, e.g., Cromwell v. Driftwood Elec. Contractors, Inc.*, 348 Fed. App'x 57, 59 (5th Cir. 2009) (describing the five factors it identifies as "non-exhaustive"); *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043 (5th Cir. 1987) (same).

worker's work is the same as and interchangeable with many others' work. Moreover (and especially considering developments such as telework and flexible work schedules, for example), work can be integral to an employer's business even if it is performed away from the employer's premises, at the worker's home, or on the premises of the employer's customers.

Example:[6] For a construction company that frames residential homes, carpenters are *integral* to the employer's business because the company is in business to frame homes, and carpentry is an integral part of providing that service.

In contrast, the same construction company may contract with a software developer to create software that, among other things, assists the company in tracking its bids, scheduling projects and crews, and tracking material orders. The software developer is performing work that is *not integral* to the construction company's business, which is indicative of an independent contractor.

B. Does the Worker's Managerial Skill Affect the Worker's Opportunity for Profit or Loss?

In considering whether a worker has an opportunity for profit or loss, the focus is whether the worker's managerial skill can affect his or her profit and loss.[7] A worker in business for him or herself faces the possibility to not only make a profit, but also to experience a loss. The worker's managerial skill will often affect opportunity for profit or loss beyond the current job, such as by leading to additional business from other parties or by reducing the opportunity for future work. For example, a worker's decisions to hire others, purchase materials and equipment, advertise, rent space, and manage time tables may reflect managerial skills that will affect his or her opportunity for profit or loss beyond a current job.

On the other hand, the worker's ability to work more hours and the amount of work available from the employer have nothing to do with the worker's managerial skill and do little to separate employees from independent contractors—both of whom are likely to earn more if they work more and if there is more work available. *See Scantland*, 721 F.3d at 1316-17 ("Plaintiffs' opportunity for profit was largely limited to their ability to complete more jobs than assigned, which is analogous to an employee's ability to take on overtime work or an efficient piece-rate worker's ability to produce more pieces."). The effect on one's earnings of doing one's job well or working more hours is no different for an independent contractor than it is for an employee.

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[6] The addition or alteration of any of the facts in any of the examples could change the resulting analysis. Additionally, while the examples help illustrate the discussion of several common factors of the economic realities test, no one factor is determinative of whether a worker is an employee or independent contractor.

[7] This factor is sometimes articulated as "the degree to which the worker's opportunity for profit and loss is determined by the alleged employer," *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998), or simply as "the worker's opportunity for profit or loss," *Baker*, 137 F.3d at 1440. This factor should not focus, however, just on whether there is opportunity for profit or loss, but rather on whether the worker has the ability to make decisions and use his or her managerial skill and initiative to affect opportunity for profit or loss.

Those considerations are not the product of exercising managerial skill and do not demonstrate that the worker is an independent contractor. As one court said:

> There was no opportunity for increased profit or loss depending upon an alleged employee's managerial skill. While the alleged employees were free to work additional hours to increase their income, they had no decisions to make regarding routes, or acquisition of materials, or any facet normally associated with the operation of an independent business.

Cascom, 2011 WL 10501391, at *6; *see also Scantland*, 721 F.3d at 1317 ("An individual's ability to earn more by being more technically proficient is unrelated to an individual's ability to earn or lose profit via his managerial skill, and it does not indicate that he operates his own business."); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1294 (3d Cir. 1991) (opportunity for profit or loss must depend on managerial skills to indicate independent contractor status); *Snell*, 875 F.2d at 810 (cake decorators' "earnings did not depend upon their judgment or initiative, but on the [employer's] need for their work").[8]

Consistent with determining whether the worker is in business for him or herself, it is important not to overlook whether there is an opportunity for loss, as a worker truly in business for him or herself faces the possibility of experiencing a loss. *See, e.g., Snell*, 875 F.2d at 810 (possibility of loss is a risk usually associated with independent contractor status, but there was no way for cake decorators to experience a loss, and possible reduction in earnings was not the same as a loss); *Lauritzen*, 835 F.2d at 1536 (migrant farm workers had no possibility for loss of investment, only loss of wages, indicating that they were employees). In sum, in order to inform the determination of whether the worker is in business for him or herself, this factor should not focus on the worker's ability to work more hours, but rather on whether the worker exercises managerial skills and whether those skills affect the worker's opportunity for both profit and loss.

Example: A worker provides cleaning services for corporate clients. The worker performs assignments only as determined by a cleaning company; he does not independently schedule assignments, solicit additional work from other clients, advertise his services, or endeavor to reduce costs. The worker regularly agrees to work additional hours at any time in order to earn more. In this scenario, the worker *does not exercise managerial skill* that affects his profit or loss. Rather,

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[8] In *Chao v. Mid-Atlantic Installation Servs., Inc.*, 16 Fed. App'x 104, 106-07 (4th Cir. 2001), the Fourth Circuit identified "the business acumen with which the Installer makes his required capital investments in tools, equipment, and a truck" and the "decision whether to hire his own employees or to work alone" as indicative of the managerial skill that suggests independent contractor status. The court also identified the workers' skill in meeting technical specifications and their ability to control earnings by working more or fewer hours as indicative of managerial skill. *Id.*; *see also Express Sixty-Minutes*, 161 F.3d at 304 (relying on workers' "ability to choose how much they wanted to work" as indicative of managerial skill). These latter considerations do not helpfully distinguish between workers who are in business for themselves and those who are economically dependent on the employer.

his earnings may fluctuate based on the work available and his willingness to work more. This lack of managerial skill is indicative of an employment relationship between the worker and the cleaning company.

In contrast, a worker provides cleaning services for corporate clients, produces advertising, negotiates contracts, decides which jobs to perform and when to perform them, decides to hire helpers to assist with the work, and recruits new clients. This worker *exercises managerial skill* that affects his opportunity for profit and loss, which is indicative of an independent contractor.

C. How Does the Worker's Relative Investment Compare to the Employer's Investment?

Courts also consider the nature and extent of the relative investments of the employer and the worker in determining whether the worker is an independent contractor in business for him or herself. The worker should make some investment (and therefore undertake at least some risk for a loss) in order for there to be an indication that he or she is an independent business. An independent contractor typically makes investments that support a business as a business beyond any particular job. The investment of a true independent contractor might, for example, further the business's capacity to expand, reduce its cost structure, or extend the reach of the independent contractor's market.

Even if the worker has made an investment, it should not be considered in isolation; it is the relative investments that matter. Looking not just to the nature of the investment, but also comparing the worker's investment to the employer's investment helps determine whether the worker is an independent business. If so, the worker's investment should not be relatively minor compared with that of the employer. If the worker's investment is relatively minor, that suggests that the worker and the employer are not on similar footings and that the worker may be economically dependent on the employer.

For example, investing in tools and equipment is not necessarily a business investment or a capital expenditure that indicates that the worker is an independent contractor. *See Snell*, 875 F.2d at 810 (citing cases); *Lauritzen*, 835 F.2d at 1537. Instead, the tools and equipment may simply be necessary to perform the specific work for the employer. Even if the investment is possibly a business investment, the worker's investment must be significant in nature and magnitude relative to the employer's investment in its overall business to indicate that the worker is an independent businessperson. The Tenth Circuit determined, for example, that rig welders' investments in equipped trucks costing between $35,000 and $40,000 did not indicate that the rig welders were independent contractors when compared to the employer's investment in its business. *See Baker*, 137 F.3d at 1442 (comparing rig welders' investment to employer's "hundreds of thousands of dollars of equipment at each work site"); *see also Snell*, 875 F.2d at 810-11 (comparing cake decorators' $400 investment in their tools to employers' business investments, including paying for rent, advertising, operating expenses, and labor, in addition to supplies and decorating equipment); *Lauritzen*, 835 F.2d at 1537 (reasoning that where workers provided their own gloves, and the employer provided the farm equipment, land, seed, fertilizers, and living quarters, their work was not independent of the employer); *Hopkins*, 545 F.3d at 344 (comparing each worker's individual investment to employer's overall investment in the

business); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979) (strawberry growers' investment in light equipment, including hoes, shovels, and picking carts was "minimal in comparison" with employer's total investment in land and heavy machinery).

An analysis of the workers' investment, even if that investment is substantial, without comparing it to the employer's investment is not faithful to the ultimate determination of whether the worker is truly an independent business.[9] Moreover, an analysis that compares the worker's investment to the employer's investment—but only to the employer's investment in the particular job performed by the worker—likewise disregards the ultimate determination by examining only a piece of the employer's business for the comparison.

Example: A worker providing cleaning services for a cleaning company is issued a Form 1099-MISC each year and signs a contract stating that she is an independent contractor. The company provides insurance, a vehicle to use, and all equipment and supplies for the worker. The company invests in advertising and finding clients. The worker occasionally brings her own preferred cleaning supplies to certain jobs. *In this scenario, the relative investment of the worker as compared to the employer's investment is indicative of an employment relationship between the worker and the cleaning company.* The worker's investment in cleaning supplies does little to further a business beyond that particular job.

A worker providing cleaning services receives referrals and sometimes works for a local cleaning company. The worker invests in a vehicle that is not suitable for personal use and uses it to travel to various worksites. The worker rents her own space to store the vehicle and materials. The worker also advertises and markets her services and hires a helper for larger jobs. She regularly (as opposed to on a job-by-job basis) purchases material and equipment to provide cleaning services and brings her own equipment (vacuum, mop, broom, etc.) and cleaning supplies to each worksite. Her level of investments is similar to the investments of the local cleaning company for whom she sometimes works. *These types of investments may be indicative of an independent contractor.*

D. Does the Work Performed Require Special Skill and Initiative?

A worker's business skills, judgment, and initiative, not his or her technical skills, will aid in determining whether the worker is economically independent. "[T]he fact that workers are skilled is not itself indicative of independent contractor status." *Superior Care*, 840 F.2d at 1060. Even specialized skills do not indicate that workers are in business for themselves, especially if those skills are technical and used to perform the work. *See id.* Accordingly, the conclusion that the skills of installing cable are indicative of independent contractor status because the skills are "akin to those of carpenters, construction workers, and electricians, who

[9] *Cf. Mid-Atlantic Installation*, 16 Fed. App'x at 107 (analyzing workers' investment without comparing it to employer's investment); *Freund v. Hi-Tech Satellite, Inc.*, 185 Fed. App'x 782, 783-84 (11th Cir. 2006) (same).

are usually considered independent contractors," *Mid-Atlantic Installation*, 16 Fed. App'x at 107, overlooks whether the worker is exercising business skills, judgment, or initiative. The technical skills of cable installers, carpenters, construction workers, and electricians, for example, even assuming that they are special,[10] are not themselves indicative of any independence or business initiative. *See Selker Bros.*, 949 F.2d at 1295 ("the use of special skills is not itself indicative of independent contractor status, especially if the workers do not use those skills in any independent way"); *Superior Care*, 840 F.2d at 1060 (for skills to be indicative of independent contractor status, they should be used in some independent way, such as demonstrating business-like initiative); *Express Sixty-Minutes*, 161 F.3d at 305 (efficiency in performing work is not initiative indicative of independent contractor status); *Lauritzen*, 835 F.2d at 1537 ("Skills are not the monopoly of independent contractors."). Only carpenters, construction workers, electricians, and other workers who operate as independent businesses, as opposed to being economically dependent on their employer, are independent contractors.

Example: A highly skilled carpenter provides carpentry services for a construction firm; however, such skills are not exercised in an independent manner. For example, the carpenter does not make any independent judgments at the job site beyond the work that he is doing for that job; he does not determine the sequence of work, order additional materials, or think about bidding the next job, but rather is told what work to perform where. In this scenario, the carpenter, although highly-skilled technically, is *not demonstrating the skill and initiative of an independent contractor* (such as managerial and business skills). He is simply providing his skilled labor.

In contrast, a highly skilled carpenter who provides a specialized service for a variety of area construction companies, for example, custom, handcrafted cabinets that are made-to-order, may be demonstrating the *skill and initiative of an independent contractor* if the carpenter markets his services, determines when to order materials and the quantity of materials to order, and determines which orders to fill.

E. Is the Relationship between the Worker and the Employer Permanent or Indefinite?

Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee. After all, a worker who is truly in business for him or herself will

[10] A district court determined that the cable installation at issue in that case "did not require a special skill" and could be learned by workers with no experience in the field after six weeks of training. *Cascom*, 2011 WL 10501391, at *6; *see also Scantland*, 721 F.3d at 1318 (cable installers admitted that they were skilled workers; however, "[t]he meaningfulness of this skill as indicating that [they] were in business for themselves or economically independent . . . is undermined by the fact that [the employer] provided most [of them] with their skills"); *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 809-810 (6th Cir. 2015) (denying summary judgment and contrasting carpenters, who have "unique skill, craftsmanship, and artistic flourish," with cable technicians who do not need "unique skills" but rather are selected on the basis of availability and location).

eschew a permanent or indefinite relationship with an employer and the dependence that comes with such permanence or indefiniteness. Most workers are engaged on a permanent or indefinite basis (for example, the typical at-will employee). Even if the working relationship lasts weeks or months instead of years, there is likely some permanence or indefiniteness to it as compared to an independent contractor, who typically works one project for an employer and does not necessarily work continuously or repeatedly for an employer. *See, e.g., DialAmerica Mktg.*, 757 F.2d at 1384-85 (correcting district court for ignoring fact that workers worked continuously for the employer and that such evidence indicates that workers were employees); *Cascom*, 2011 WL 10501391, at *6 (workers who "worked until they quit or were terminated" had relationship "similar to an at-will employment arrangement").

However, a lack of permanence or indefiniteness does not automatically suggest an independent contractor relationship, and the reason for the lack of permanence or indefiniteness should be carefully reviewed to determine if the reason is indicative of the worker's running an independent business. As the Second Circuit noted, neither working for other employers nor not relying on the employer as his or her primary source of income transform the worker into the employer's independent contractor. *See Superior Care*, 840 F.2d at 1060. The key is whether the lack of permanence or indefiniteness is due to "operational characteristics intrinsic to the industry" (for example, employers who hire part-time workers or use staffing agencies[11]) or the worker's "own business initiative." *Id.* at 1060-61 ("the fact that these nurses are a transient work force reflects the nature of their profession and not their success in marketing their skills independently"); *see also Mr. W Fireworks*, 814 F.2d at 1054 ("We thus hold that when an industry is seasonal, the proper test for determining permanency of the relationship is not whether the alleged employees returned from season to season, but whether the alleged employees worked for the entire operative period of a particular season."). A worker's lack of a permanent or indefinite relationship with an employer is indicative of independent contractor status if it results from the worker's own independent business initiative. *See Superior Care*, 840 F.2d at 1060-61.

Example:[12] An editor has worked for an established publishing house for several years. Her edits are completed in accordance with the publishing house's specifications, using its software. She only edits books provided by the publishing house. This

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[11] *See, e.g., Solis v. A+ Nursetemps, Inc.*, 2013 WL 1395863, at *7 (M.D. Fla. Apr. 5, 2013) (holding that nurses were employees of a temporary health care staffing agency; although nurses "enjoy[ed] a degree of flexibility . . . not shared by many in the work force," had "an enhanced ability to 'moonlight' by working for more than one [staffing] agency at a time," and had some flexibility in choosing "when and where to make themselves available for work," the court concluded that when the nurses were working on assignment for the staffing agency they were, during those work weeks, its employees).

[12] This factor helps illustrate how no one factor alone is determinative of the economic realities of the relationship between a worker and an employer and how it can be difficult to isolate one factor. Here, the example necessarily includes relevant facts beyond just the permanence or indefiniteness of the editors' relationships with the publishing houses to illustrate the existence, or not, of an employment relationship.

scenario *indicates a permanence to the relationship* between the editor and the publishing house that is indicative of an employment relationship.

Another editor has worked intermittently with fifteen different publishing houses over the past several years. She markets her services to numerous publishing houses. She negotiates rates for each editing job and turns down work for any reason, including because she is too busy with other editing jobs. This *lack of permanence* with one publishing house is indicative of an independent contractor relationship.

F. What is the Nature and Degree of the Employer's Control?

As with the other economic realities factors, the employer's control should be analyzed in light of the ultimate determination whether the worker is economically dependent on the employer or truly an independent businessperson. The worker must control meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her own business. *See Scantland*, 721 F.3d at 1313 ("'Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity.'") (quoting *Pilgrim Equip.*, 527 F.2d at 1312-13); *Baker*, 137 F.3d at 1441. And the worker's control over meaningful aspects of the work must be more than theoretical—the worker must actually exercise it. *See, e.g., Snell*, 875 F.2d at 808; *Mr. W Fireworks*, 814 F.2d at 1047 ("it is not what the operators *could* have done that counts, but as a matter of economic reality what they actually *do* that is dispositive") (emphases in original).

For example, an employer's lack of control over workers is not particularly telling if the workers work from home or offsite. As the Third Circuit explained in *DialAmerica Marketing*, the fact that the workers could control the hours during which they worked and that they were subject to little direct supervision was unsurprising given that such facts are typical of homeworkers and thus largely insignificant in determining their status. *See* 757 F.2d at 1384 ("The district court therefore misapplied and overemphasized the right-to-control factor in its analysis."); *see also Superior Care*, 840 F.2d at 1060 ("An employer does not need to look over his workers' shoulders every day in order to exercise control."); *Antenor*, 88 F.3d at 933 (The "courts have found economic dependence under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employees."). Moreover, workers' control over the hours when they work is not indicative of independent contractor status. *See, e.g., Snell*, 875 F.2d at 806 ("Of course, flexibility in work schedules is common to many businesses and is not significant in and of itself."); *Doty v. Elias*, 733 F.2d 720, 723 (10th Cir. 1984) ("A relatively flexible work schedule alone, however, does not make an individual an independent contractor rather than an employee.").

Technological advances and enhanced monitoring mechanisms may encourage companies to engage workers not as employees yet maintain stringent control over aspects of the workers' jobs, from their schedules, to the way that they dress, to the tasks that they carry out. Some employers assert that the control that they exercise over workers is due to the nature of their business, regulatory requirements, or the desire to ensure that their customers are satisfied.

However, control exercised over a worker, even for any or all of those reasons, still indicates that the worker is an employee. As the Eleventh Circuit explained:

> [The employer] also argues that its quality control measures and regulation of schedules stemmed from "the nature of the business" and are therefore not the type of control that is relevant to the economic dependence inquiry. We disagree. The economic reality inquiry requires us to examine the nature and degree of the alleged employer's control, not why the alleged employer exercised such control. Business needs cannot immunize employers from the FLSA's requirements. If the nature of a business requires a company to exert control over workers to the extent that [the employer] has allegedly done, then that company must hire employees, not independent contractors.

Scantland, 721 F.3d at 1316. Thus, the nature and degree of the employer's control must be examined as part of determining the ultimate question whether the worker is economically dependent on the employer.

Finally, the "control" factor should not play an oversized role in the analysis of whether a worker is an employee or an independent contractor. All possibly relevant factors should be considered, and cases must not be evaluated based on the control factor alone. *See, e.g., Superior Care, Inc.*, 840 F.2d at 1059 ("No one of these factors is dispositive; rather, the test is based on a totality of the circumstances."). As discussed above, the FLSA's statutory definitions (including "suffer or permit") rejected the common law control test for determining employment that was prevalent at the time. *See Walling*, 330 U.S. at 150-51; *Darden*, 503 U.S. at 326. Indeed, the FLSA covers workers of an employer even if the employer does not exercise the requisite control over the workers, assuming the workers are economically dependent on the employer. The control factor should not overtake the other factors of the economic realities test, and like the other factors, it should be analyzed in the context of ultimately determining whether the worker is economically dependent on the employer or an independent business.

Example: A registered nurse who provides skilled nursing care in nursing homes is listed with Beta Nurse Registry in order to be matched with clients. The registry interviewed the nurse prior to her joining the registry, and also required the nurse to undergo a multi-day training presented by Beta. Beta sends the nurse a listing each week with potential clients and requires the nurse to fill out a form with Beta prior to contacting any clients. Beta also requires that the nurse adhere to a certain wage range and the nurse cannot provide care during any weekend hours. The nurse must inform Beta if she is hired by a client and must contact Beta if she will miss scheduled work with any client. In this scenario, *the degree of control exercised by the registry is indicative of an employment relationship*.

Another registered nurse who provides skilled nursing care in nursing homes is listed with Jones Nurse Registry in order to be matched with clients. The registry sends the nurse a listing each week with potential clients. The nurse is free to call as many or as few potential clients as she wishes and to work for as many or as few as she wishes; the nurse also negotiates her own wage rate and schedule with

the client. In this scenario, *the degree of control exercised by the registry is not indicative of an employment relationship.*

III. Conclusion

In sum, most workers are employees under the FLSA's broad definitions. The very broad definition of employment under the FLSA as "to suffer or permit to work" and the Act's intended expansive coverage for workers must be considered when applying the economic realities factors to determine whether a worker is an employee or an independent contractor. The factors should not be analyzed mechanically or in a vacuum, and no single factor, including control, should be over-emphasized. Instead, each factor should be considered in light of the ultimate determination of whether the worker is really in business for him or herself (and thus is an independent contractor) or is economically dependent on the employer (and thus is its employee). The factors should be used as guides to answer that ultimate question of economic dependence. The correct classification of workers as employees or independent contractors has critical implications for the legal protections that workers receive, particularly when misclassification occurs in industries employing low wage workers.