

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Parts 780, 788, and 795

RIN 1235-AA43

Employee or Independent Contractor Classification Under the Fair Labor Standards Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

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

DATES: This final rule is effective on March 11, 2024.

FOR FURTHER INFORMATION CONTACT:

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

SUPPLEMENTARY INFORMATION:

I. Executive Summary

This final rule addresses how to determine whether a worker is properly classified as an employee or independent contractor under the Fair Labor Standards Act (FLSA or Act). Congress enacted the FLSA in 1938 to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."¹ To this end, the FLSA generally requires covered employers to

pay nonexempt employees at least the Federal minimum wage for all hours worked and at least one and one-half times the employee's regular rate of pay for every hour worked over 40 in a workweek. The Act also requires covered employers to maintain certain records regarding employees and prohibits retaliation against employees who are discharged or discriminated against after, for example, filing a complaint regarding their pay. However, the FLSA's protections do not apply to independent contractors.

As used in this rule, the term "independent contractor" refers to workers who, as a matter of economic reality, are not economically dependent on an employer for work and are in business for themselves. Such workers play an important role in the economy and are commonly referred to by different names, including independent contractor, self-employed, and freelancer. This rule is not intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves.

Determining whether an employment relationship exists under the FLSA begins with the Act's definitions. Although the FLSA does not define the term "independent contractor," it contains expansive definitions of "employer," "employee," and "employ." "Employer" is defined to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee," "employee" is defined as "any individual employed by an employer," and "employ" is defined to "include[] to suffer or permit to work."² As detailed below, courts have developed an analysis that recognizes that independent contractors are not encompassed within these definitions.

Since the 1940s, the Department and courts have applied an economic reality test to determine whether a worker is an employee or an independent contractor under the FLSA, grounded in the Act's broad understanding of employment. The ultimate inquiry is whether, as a matter of economic reality, the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themself (and is thus an independent contractor). In assessing economic dependence, courts and the Department have historically conducted a totality-of-the-circumstances analysis, considering multiple factors to determine whether a worker is an employee or an independent contractor, with no factor

or factors having predetermined weight. There is significant and widespread uniformity among federal courts of appeals in the adoption and application of the economic reality test, although there is slight variation as to the number of factors considered or how the factors are framed. These factors generally include the opportunity for profit or loss, investment, permanency, control, whether the work is an integral part of the employer's business, and skill and initiative.

In January 2021, the Department published a rule titled "Independent Contractor Status Under the Fair Labor Standards Act" (2021 IC Rule), providing guidance on the classification of independent contractors under the FLSA applicable to workers and businesses in any industry.³ The 2021 IC Rule marked a departure from the consistent, longstanding adoption and application of the economic reality test by courts and the Department of how to determine whether a worker is an employee or an independent contractor under the FLSA. It identified five economic reality factors to guide the inquiry into a worker's status as an employee or independent contractor.⁴ Two of the five identified factors—the nature and degree of control over the work and the worker's opportunity for profit or loss—were designated as "core factors" that were the most probative and carried greater weight in the analysis. The 2021 IC Rule stated that if these two core factors pointed towards the same classification, there was a substantial likelihood that it was the worker's accurate classification.⁵ The 2021 IC Rule also identified three less probative non-core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the potential employer, and whether the work is part of an integrated unit of production.⁶ The 2021 IC Rule stated that it was "highly unlikely" that these three non-core factors could outweigh the combined probative value of the two core factors.⁷ The 2021 IC Rule also

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

⁴ *Id.* at 1246–47 (§ 795.105(d)).

⁵ *Id.* at 1246 (§ 795.105(c)).

⁶ *Id.* at 1247 (§ 795.105(d)(2)).

⁷ *Id.* at 1246 (§ 795.105(c)).

¹ 29 U.S.C. 202.

² 29 U.S.C. 203(d), (e)(1), (g).

limited consideration of investment and initiative to the opportunity for profit or loss factor in a way that narrowed, in at least some circumstances, the extent to which investment and initiative are considered. The facts to be considered under other factors (such as control) were also narrowed, and the factor that considers whether the work is integral to the employer's business was limited to whether the work was part of an integrated unit of production.⁸ Finally, the 2021 IC Rule provided that the actual practice of the parties involved was more relevant than what may be contractually or theoretically possible.⁹

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

On October 13, 2022, the Department published a Notice of Proposed Rulemaking (NPRM) regarding employee or independent contractor classification under the FLSA, proposing to rescind and replace the 2021 IC Rule.¹¹ The Department explained in its proposal that upon further consideration, the Department believed that the 2021 IC Rule did not fully comport with the FLSA's text and purpose as interpreted by courts and departed from decades of case law applying the economic reality test. The NPRM identified provisions of the 2021 IC Rule that were in tension with this case law—such as designating two “core factors” as most probative and predetermining that they carry greater weight in the analysis, considering investment and initiative only in the opportunity for profit or loss factor, and excluding consideration of whether the work performed is central or important to the employer's business. The NPRM stated that these provisions narrowed the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining

whether a worker is economically dependent on the employer for work or in business for themselves.

After careful consideration, the Department decided it was appropriate to move forward with a proposed rescission of the 2021 IC Rule and a replacement regulation. As explained in the NPRM, the Department believed that retaining the 2021 IC Rule would have a confusing and disruptive effect on workers and businesses alike due to its departure from case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. Further, because the 2021 IC Rule departed from legal precedent, it was not clear whether courts would adopt its analysis—a question that could take years of appellate litigation in different federal courts of appeals to sort out, resulting in more uncertainty as to the applicable test. The Department also explained in the NPRM that it believed the 2021 IC Rule's departure from the longstanding test applied by the courts could result in greater confusion among employers in applying the new analysis, which could place workers at greater risk of misclassification as independent contractors due to the new analysis being applied improperly, and thus could negatively affect both the workers and competing businesses that correctly classify their employees.

The initial deadline for interested parties to submit comments on the NPRM was November 28, 2022. In response to requests for an extension of the time period for filing written comments, the Department lengthened the comment period an additional 15 days to December 13, 2022, resulting in a total comment period of 61 days.¹² The Department received approximately 55,400 comments on the proposed rule.

As described below, after considering the views expressed by commenters, the Department is finalizing its proposal with some modifications. For the reasons explained in the NPRM and detailed in section III, the Department concludes that it is appropriate to rescind the 2021 IC Rule and set forth an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule.

Summary of the Major Provisions of the Final Rule

In addition to rescinding the 2021 IC Rule, the Department is adding part 795. Specifically, this final rule modifies the

regulatory text published on January 7, 2021, at 86 FR 1246 through 1248, addressing whether workers are employees or independent contractors under the FLSA. Instead of using the “core factors” set forth in the 2021 IC Rule, this final rule returns to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. In addition to this critical reversion to the longstanding analysis that preceded the 2021 IC Rule, this final rule returns to the longstanding framing of investment as its own separate factor, and the integral factor as one that looks to whether the work performed is an integral part of a potential employer's business rather than part of an integrated unit of production. The final rule also provides broader discussion of how scheduling, remote supervision, price setting, and the ability to work for others should be considered under the control factor, and it allows for consideration of reserved rights while removing the provision in the 2021 IC Rule that minimized the relevance of retained rights. Further, the final rule discusses exclusivity in the context of the permanency factor, and initiative in the context of the skill factor.

While the above modifications from the 2021 IC Rule were all proposed in the NPRM, the Department also made several adjustments to the proposed regulations after consideration of the comments received. Notably, as discussed further below, the portion of the Department's proposal for the control factor stating that control implemented for purposes of complying with legal obligations may be indicative of control generated many comments. The Department is modifying the proposed language to address confusion and concern regarding potential unintended consequences.

Additionally, the Department received many comments regarding the investment factor. In response to a number of comments concerning the Department's proposal to consider the relative investments of the worker and the potential employer, the Department is clarifying in the final rule that consideration of the relative investments of the worker and the potential employer should be compared not only in terms of dollar value or size of the investments, but should focus on whether the worker is making similar types of investments as the employer (albeit on a smaller scale) that would suggest that the worker is operating independently. Further, in response to

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

⁹ *Id.* at 1247–48 (§ 795.110).

¹⁰ See *Coal. for Workforce Innovation v. Walsh*, No. 1:21–CV–130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022), *appeal filed*, No. 22–40316 (5th Cir. May 13, 2022) (“*CWI v. Walsh*”).

¹¹ 87 FR 62218.

¹² 87 FR 64749.

comments regarding the unilateral nature of some costs imposed by potential employers on workers, which could appear to be capital or entrepreneurial in nature, the Department is including language recognizing that costs that are unilaterally imposed are not indicative of a worker's capital or entrepreneurial investment.

Further clarifications and adjustments to the regulatory text that reflect a range of comments made by employers; workers; those who view themselves as independent contractors, self-employed, or freelancers; labor unions; legal services providers; policy and research organizations; and counsel for both businesses and employees have been made as well and are discussed under the section-by-section analysis that follows.

The final rule reiterates that part 795 contains the Department's general interpretations for determining whether workers are employees or independent contractors under the FLSA. Further, it reiterates that economic dependence is the ultimate inquiry, meaning that a worker is an independent contractor as opposed to an employee under the Act if the worker is, as a matter of economic reality, in business for himself. The final rule explains that the economic reality test is comprised of multiple factors that are tools or guides to conduct the totality-of-the-circumstances analysis to determine economic dependence. The six factors described in the regulatory text should guide an assessment of the economic realities of the working relationship, but no one factor or subset of factors is necessarily dispositive. The final rule provides guidance on how six economic reality factors should be considered—opportunity for profit or loss depending on managerial skill, investments by the worker and the potential employer, the degree of permanence of the work relationship, the nature and degree of control, the extent to which the work performed is an integral part of the potential employer's business, and skill and initiative. Just as under the 2021 IC Rule, and in accordance with longstanding precedent and guidance, additional factors may also be considered if they are relevant to the overall question of economic dependence.

The Department recognizes that this return to a totality-of-the-circumstances analysis in which the economic reality factors are not assigned a predetermined weight and each factor is given full consideration represents a change from the 2021 IC Rule. However, the Department believes that this approach

is the most beneficial because it is aligned with the Department's decades-long approach (prior to the 2021 IC Rule) as well as with federal appellate case law, and is more consistent with the Act's text and purpose as interpreted by the courts. The Department believes that this final rule will provide more consistent guidance to employers as they determine whether workers are economically dependent on the employer for work or are in business for themselves, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors. Accordingly, the Department believes that the guidance provided in this final rule will help protect employees from misclassification. Moreover, this final rule recognizes that independent contractors serve an important role in our economy and provides a consistent approach for those businesses that engage (or wish to engage) independent contractors as well as for those who wish to work as independent contractors.

II. Background

A. Relevant FLSA Definitions

Enacted in 1938, the FLSA generally requires that covered employers pay nonexempt employees at least the Federal minimum wage (presently \$7.25 per hour) for every hour worked, and at least one and one-half times the employee's regular rate of pay for all hours worked beyond 40 in a workweek.¹³ Among other protections, the FLSA also regulates the employment of children,¹⁴ prohibits employers from keeping employee tips,¹⁵ and requires employers to provide reasonable break time and a place for covered nursing employees to express breast milk at work.¹⁶ Finally, the FLSA requires covered employers to “make, keep, and preserve” certain records regarding employees, and prohibits retaliation against employees who engaged in protected activity, such as filing a complaint regarding their pay.¹⁷

The FLSA's wage-and-hour protections apply to employees. In relevant part, section 3(e) of the Act defines the term “employee” as “any individual employed by an employer.”¹⁸ Section 3(d) defines the term “employer” to “includ[e] any

person acting directly or indirectly in the interest of an employer in relation to an employee.”¹⁹ Finally, section 3(g) provides that the term “[e]mploy” includes to suffer or permit to work.”²⁰

Interpreting these provisions, the U.S. Supreme Court has stated that “[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame,” and that “the term ‘employee’ under the FLSA had been given ‘the broadest definition that has ever been included in any one act.’”²¹ In particular, the Court has noted the “striking breadth” of section 3(g)'s “suffer or permit” language, observing that it “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”²² Thus, the Court has repeatedly observed that the FLSA's scope of employment is broader than the common law standard often applied to determine employment status under other Federal laws.²³

At the same time, the Supreme Court has recognized that the Act was “not intended to stamp all persons as employees.”²⁴ Among other categories of workers excluded from FLSA coverage, the Court has recognized that “independent contractors” fall outside the Act's broad understanding of employment.²⁵ Accordingly, the FLSA does not require covered employers to pay an independent contractor the minimum wage or overtime pay under sections 6(a) and 7(a) of the Act, or to keep records regarding an independent contractor's work under section 11(c). However, merely “putting on an ‘independent contractor’ label does not take [a] worker from the protection of the [FLSA].”²⁶ Courts have thus recognized a need to delineate between

¹⁹ 29 U.S.C. 203(d).

²⁰ 29 U.S.C. 203(g).

²¹ *United States v. Rosenwasser*, 323 U.S. 360, 362, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (statement of Senator Hugo Black)).

²² *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326 (1992).

²³ *Id.*; see also, e.g., *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–51 (1947) (“[I]n determining who are ‘employees’ under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.”) (citation omitted).

²⁴ *Portland Terminal*, 330 U.S. at 152.

²⁵ See, e.g., *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (noting that “[t]here may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees”).

²⁶ *Id.*

¹³ 29 U.S.C. 206(a), 207(a).

¹⁴ 29 U.S.C. 212.

¹⁵ 29 U.S.C. 203(m)(2)(B).

¹⁶ See 29 U.S.C. 218d (added by the PUMP for Nursing Mothers Act, Public Law 117–328, 136 Stat. 4459 (Dec. 29, 2022)).

¹⁷ 29 U.S.C. 211(c), 215(a)(3).

¹⁸ 29 U.S.C. 203(e)(1).

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

The FLSA does not define the term “independent contractor.” While it is clear that section 3(g)’s “suffer or permit” language contemplates a broader coverage of workers compared to what exists under the common law, “there is in the [FLSA] no definition that solves problems as to the limits of the employer-employee relationship under the Act.”²⁷ Therefore, in articulating the distinction between FLSA-covered employees and independent contractors, courts rely on a broad, multifactor “economic reality” analysis derived from judicial precedent.²⁸ Unlike the control-focused analysis for independent contractors applied under the common law,²⁹ the economic reality test focuses more broadly on a worker’s economic dependence on an employer, considering the totality of the circumstances.

B. Development of the Economic Reality Test

1. Supreme Court Development of the Economic Reality Test

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

In the first of these cases, *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court considered the meaning of “employee” under the

NLRA, which defined the term to “include any employee.”³⁰ In relevant part, the *Hearst* Court rejected application of the common law standard, noting that “the broad language of the [NLRA’s] definitions . . . leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.”³¹

On June 16, 1947, the Supreme Court decided *United States v. Silk*, 331 U.S. 704 (1947), addressing the distinction between employees and independent contractors under the SSA. The Court favorably summarized *Hearst* as setting forth “economic reality,” as opposed to “technical concepts” of the common law standard alone, as the framework for determining workers’ classification, but acknowledged that not “all who render service to an industry are employees.”³² 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-employee[] relationship,” the Court identified five factors as “important for decision”: “degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation[,] and skill required in the claimed independent operation.”³³ The Court added that “[n]o one [factor] is controlling nor is the list complete.”³⁴ The Court went on to note that the workers in that case were “from one standpoint an integral part of the businesses” of the employer, supporting a conclusion that some of the workers in that case were employees.³⁵

The same day that the Supreme Court issued its decision in *Silk*, it also issued *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), in which it affirmed a federal court of appeals decision that analyzed an FLSA employment relationship based on its economic realities.³⁶ Describing the FLSA as “a part of the social legislation of the 1930s of the same general character as the [NLRA] and the [SSA],” the Court opined that “[d]ecisions that define the coverage of the employer-employee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage

under the [FLSA].”³⁷ Accordingly, the Court rejected an approach based on “isolated factors” and again considered “the circumstances of the whole activity.”³⁸ The Court considered several of the factors that it listed in *Silk* as they related to meat boners on a slaughterhouse’s production line, ultimately determining that the boners were employees.³⁹ The Court noted, among other things, that the boners did a specialty job on the production line, had no business organization that could shift to a different slaughter-house, and were best characterized as “part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment.”⁴⁰

On June 23, 1947, one week after the *Silk* and *Rutherford* decisions, the Court decided *Bartels v. Birmingham*, 332 U.S. 126 (1947), another case involving employee or independent contractor status under the SSA. Here again, the Court rejected application of the common law control test, explaining that, under the SSA, employee status “was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker.”⁴¹ Rather, employees under “social legislation” such as the SSA are “those who as a matter of economic reality are dependent upon the business to which they render service.”⁴² Thus, in addition to control, “permanency of the relation, the skill required, the investment [in] the facilities for work and opportunities for profit or loss from the activities were also factors” to consider.⁴³ Although the Court identified these specific factors as relevant to the analysis, it explained that “[i]t is the total situation that controls” the worker’s classification under the SSA.⁴⁴

Following these Supreme Court decisions, Congress responded with separate legislation to amend the NLRA and SSA’s employment definitions. First, in 1947, Congress amended the NLRA’s definition of “employee” to clarify that the term “shall not include any individual having the status of an independent contractor.”⁴⁵ The

²⁷ *Id.* at 728.

²⁸ Courts invoke the concept of “economic reality” in FLSA employment contexts beyond independent contractor status. However, as in prior rulemakings, this final rule refers to the “economic reality” analysis or test for independent contractors as a shorthand reference to the independent contractor analysis used by courts for FLSA purposes.

²⁹ In distinguishing between employees and independent contractors under the common law, courts evaluate “the hiring party’s right to control the manner and means by which the product is accomplished.” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989). “Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.” *Id.* (footnotes omitted).

³⁰ 322 U.S. at 118–20; 29 U.S.C. 152(3).

³¹ *Id.* at 123–25, 129.

³² 331 U.S. at 712–14.

³³ *Id.* at 716.

³⁴ *Id.*

³⁵ *Id.*

³⁶ 331 U.S. at 727.

³⁷ *Id.* at 723–24.

³⁸ *Id.* at 730.

³⁹ *See id.*

⁴⁰ *Id.* at 729–30.

⁴¹ 332 U.S. at 130.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Labor Management Relations (Taft-Hartley) Act, 1947, Public Law 80–101, sec. 101, 61 Stat.

following year, Congress similarly amended the SSA to exclude from employment “any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor.”⁴⁶ The Supreme Court interpreted the amendments to the NLRA as having the same effect as the explicit definition included in the SSA, which was to ensure that employment status would be determined by common law agency principles, rather than an economic reality test.⁴⁷

Despite its amendments to the NLRA and SSA in response to *Hearst* and *Silk*, Congress did not similarly amend the FLSA following the *Rutherford* decision. Thus, when the Supreme Court revisited independent contractor status under the FLSA several years later in *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28 (1961), the Court affirmed that “‘economic reality’ rather than ‘technical concepts’” remained “the test of employment” under the FLSA,⁴⁸ quoting from its earlier decisions in *Silk* and *Rutherford*. The Court in *Whitaker House* found that certain homeworkers were “not self-employed. . . [or] independent, selling their products on the market for whatever price they can command,” but instead were “regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates.”⁴⁹ Such facts, among others, established that the homeworkers at issue were FLSA-covered employees.

Subsequently, in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), the Court again endorsed application of the economic reality test to evaluate independent contractor status under the FLSA, citing to *Rutherford* and emphasizing the broad “suffer or permit” language codified in section 3(g) of the Act.⁵⁰

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

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

reality test to distinguish independent contractors from employees who are entitled to the FLSA’s protections. Recognizing that the “suffer or permit” language in section 3(g) of the FLSA provides a more expansive scope of employment than that which exists at common law, courts of appeals have followed the Supreme Court’s instruction that “‘employees are those who as a matter of economic realities are dependent upon the business to which they render service.’”⁵¹

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

business.⁵⁴ Like other federal courts of appeals, the Eleventh Circuit repeats the Supreme Court’s explanation from *Silk* that no one factor is controlling, nor is the list exhaustive.⁵⁵

Some courts of appeals have applied the factors with some variations. For example, the Fifth Circuit typically does not list the “integral part” factor as one of the considerations that guides its analysis.⁵⁶ However, recognizing that its list of enumerated factors is not exhaustive, the Fifth Circuit has considered the extent to which a worker’s function is integral to a business as part of its economic realities analysis.⁵⁷ Similarly, the Second and D.C. Circuits vary in that they describe the employee’s opportunity for profit or loss and the employee’s investment as a single factor, but they still use the same considerations as the other circuits to inform their economic realities analysis.⁵⁸

In sum, since the 1940s, federal courts have analyzed the question of employee or independent contractor status under the FLSA using a multifactor, totality-of-the-circumstances economic reality test, with no factor or factors being dispositive. The courts have examined the economic realities of the employment relationship to determine whether the worker is economically dependent on the employer for work or is in business for themselves, even if they have varied slightly in their articulations of the factors. Despite such variation, all courts have looked to the factors first articulated in *Silk* as useful guideposts while acknowledging that those factors are not exhaustive and should not be applied mechanically.

3. The Department’s Application of the Economic Reality Test

The Department has applied a multifactor economic reality test since the Supreme Court’s opinions in *Rutherford* and *Silk*. For example, on June 23, 1949, the Wage and Hour Division (WHD) issued an opinion letter

136, 137–38 (1947) (codified as amended at 29 U.S.C. 152(3)).

⁴⁶ SSA of 1948, Public Law 80–642, sec. 2(a), 62 Stat. 438 (1948) (codified as amended at 26 U.S.C. 3121(d)).

⁴⁷ See *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) (noting that “[t]he obvious purpose of” the amendment to the definition of employee under the NLRA “was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act”).

⁴⁸ 366 U.S. at 33 (quoting from *Silk*, 331 U.S. at 713, and *Rutherford*, 331 U.S. at 729).

⁴⁹ *Id.* at 32.

⁵⁰ *Darden*, 503 U.S. at 325–26.

⁵¹ *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (quoting *Bartels*, 332 U.S. at 130).

⁵² See *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–59 (2d Cir. 1988); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382–83 (3d Cir. 1985); *McFeeley v. Jackson Street Ent., LLC*, 825 F.3d 235, 241 (4th Cir. 2016); *Pilgrim Equip.*, 527 F.2d at 1311; *Acosta v. Off Duty Police Servs., Inc.*, 915 F.3d 1050, 1055 (6th Cir. 2019); *Sec’y of Labor, U.S. Dep’t of Labor v. Lauritzen*, 835 F.2d 1529, 1534–35 (7th Cir. 1987); *Walsh v. Alpha & Omega USA, Inc.*, 39 F.4th 1078, 1082 (8th Cir. 2022); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979); *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1235 (10th Cir. 2018); *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311–12 (11th Cir. 2013); *Morrison v. Int’l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001).

⁵³ See, e.g., *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369, 380 (5th Cir. 2019) (stating that it “is impossible to assign to each of these factors a specific and invariably applied weight”) (quoting *Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 752 (5th Cir. 1983)); *Scantland*, 721 F.3d at 1312 n.2 (the relative weight of each factor “depends on the facts of the case”) (quoting *Santelices v. Cable Wiring*, 147 F. Supp. 2d 1313, 1319 (S.D. Fla. 2001)); *Martin v. Selker Bros.*, 949 F.2d 1286, 1293 (3d Cir. 1991) (“It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive.”).

⁵⁴ *Scantland*, 721 F.3d at 1311–12.

⁵⁵ *Id.* at 1312 n.2.

⁵⁶ See *Pilgrim Equip.*, 527 F.2d at 1311.

⁵⁷ See *Hobbs v. Petroplex Pipe & Constr., Inc.*, 946 F.3d 824, 836 (5th Cir. 2020) (considering “the extent to which the pipe welders’ work was ‘an integral part’ of Petroplex’s business”). Every other federal court of appeals that has decided an FLSA case involving alleged independent contractors includes the “integral part” factor among the list of enumerated economic reality factors. See the cases cited *supra* at n.52 other than *Pilgrim Equipment*.

⁵⁸ See, e.g., *Franze v. Bimbo Bakeries USA, Inc.*, 826 F. App’x 74, 76 (2d Cir. 2020); *Superior Care*, 840 F.2d at 1058–59. The D.C. Circuit has adopted the Second Circuit’s articulation of the factors, including treating opportunity for profit or loss and investment as one factor. See *Morrison*, 253 F.3d at 11 (citing *Superior Care*, 840 F.2d at 1058–59).

distilling six “primary factors which the Court considered significant” in *Rutherford and Silk*: “(1) the extent to which the services in question are an integral part of the ‘employer[']s’ business; (2) the amount of the so-called ‘contractor’s’ investment in facilities and equipment; (3) the nature and degree of control by the principal; (4) opportunities for profit and loss; . . . (5) the amount of initiative judgment or foresight required for the success of the claimed independent enterprise[;] and [(6)] permanency of the relation.”⁵⁹ The guidance cautioned that no single factor is controlling, and “[o]rdinarily a definite decision as to whether one is an employee or an independent contractor under the [FLSA] cannot be made in the absence of evidence as to [the worker’s] actual day-to-day working relationship with [their] principal. Clearly a written contract does not always reflect the true situation.”⁶⁰

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

In 1962, the Department revised the regulations in 29 CFR part 788, which generally provides interpretive guidance on the FLSA’s exemption for employees in small forestry or lumbering operations, and added a provision addressing the distinction between employees and independent contractors.⁶³ Citing to *Silk*, *Rutherford*, and *Bartels*, the regulation advised that “an employee, as distinguished from a person who is engaged in a business of his own, is one who ‘follows the usual

path of an employee’ and is dependent on the business which he serves.”⁶⁴ To “aid in assessing the total situation,” the regulation then identified a partial list of “characteristics of the two classifications which should be considered,” including “the extent to which the services rendered are an integral part of the principal’s business; the permanency of the relationship; the opportunities for profit or loss; the initiative, judgment or foresight exercised by the one who performs the services; the amount of investment; and the degree of control which the principal has in the situation.”⁶⁵ Implicitly referring to the *Bartels* decision, the regulation advised that “[t]he Court specifically rejected the degree of control retained by the principal as the sole criterion to be applied.”⁶⁶

In 1972, the Department added similar guidance on independent contractor status at 29 CFR 780.330(b), in a provision addressing the employment status of sharecroppers and tenant farmers.⁶⁷ This regulation was nearly identical to the independent contractor guidance for the logging and forestry industry previously codified at 29 CFR 788.16(a), including an identical description of the same six economic reality factors.⁶⁸ Both provisions—29 CFR 780.330(b) and 788.16(a)—remained unchanged until 2021.

In 1997, the Department promulgated a regulation applying a multifactor economic reality analysis for distinguishing between employees and independent contractors under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which notably incorporates the FLSA’s “suffer or permit” definition of employment by reference.⁶⁹ The regulation (which has not since been amended) advises that 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. The regulation elaborates that “[t]his determination is based upon an evaluation of all of the circumstances, including the following: (i) The nature

and degree of the putative employer’s control as to the manner in which the work is performed; (ii) The putative employee’s opportunity for profit or loss depending upon his/her managerial skill; (iii) The putative employee’s investment in equipment or materials required for the task, or the putative employee’s employment of other workers; (iv) Whether the services rendered by the putative employee require special skill; (v) The degree of permanency and duration of the working relationship; (vi) The extent to which the services rendered by the putative employee are an integral part of the putative employer’s business.”⁷⁰ This description of six economic reality factors was very similar to the earlier description of six economic reality factors provided in 29 CFR 780.330(b) and 788.16(a).

Also in 1997, WHD issued Fact Sheet #13, “Employment Relationship Under the Fair Labor Standards Act (FLSA).”⁷¹ Like WHD opinion letters, Fact Sheet #13 advises that an employee, as distinguished from a person who is engaged in a business of their own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which they serve. The fact sheet identifies the six familiar economic realities factors, as well as consideration of the worker’s degree of independent business organization and operation.

On July 15, 2015, WHD issued additional subregulatory guidance, Administrator’s Interpretation No. 2015–1, “The Application of the Fair Labor Standards Act’s ‘Suffer or Permit’ Standard in the Identification of Employees Who Are Misclassified as Independent Contractors” (AI 2015–1).⁷² AI 2015–1 reiterated that the economic realities of the relationship are determinative and that the ultimate inquiry is whether the worker is economically dependent on the employer or truly in business for themselves. It identified six economic realities factors that followed the six factors used by most federal courts of

⁵⁹ WHD Op. Ltr. (June 23, 1949).

⁶⁰ *Id.*

⁶¹ See, e.g., WHD Op. Ltr. (Oct. 12, 1965) (discussing degree of independent business organization); WHD Op. Ltr. (Feb. 18, 1969) (same); WHD Op. Ltr. FLSA–314 (Dec. 21, 1982) (discussing three of the *Silk* factors); WHD Op. Ltr. FLSA–164 (Jan. 18, 1990) (discussing four of the *Silk* factors).

⁶² See, e.g., WHD Op. Ltr. FLSA–106 (Feb. 8, 1956); WHD Op. Ltr. (July 20, 1965); WHD Op. Ltr. (Sept. 1, 1967); WHD Op. Ltr. (Feb. 18, 1969); WHD Op. Ltr. FLSA–31 (Aug. 10, 1981); WHD Op. Ltr. (June 5, 1995).

⁶³ See 27 FR 8032; 29 U.S.C. 213(b)(28) (previously codified at 29 U.S.C. 213(a)(15)).

⁶⁴ 27 FR 8033 (29 CFR 788.16(a)).

⁶⁵ *Id.*

⁶⁶ 27 FR 8033–34 (29 CFR 788.16(a)).

⁶⁷ See 37 FR 12084, 12102 (introducing 29 CFR 780.330(b)).

⁶⁸ *Id.*

⁶⁹ See 62 FR 11734 (amending 29 CFR 500.20(h)(4)); see also 29 U.S.C. 1802(5) (“The term ‘employ’ has the meaning given such term under section 3(g) of the [FLSA]”).

⁷⁰ 29 CFR 500.20(h)(4).

⁷¹ See WHD Fact Sheet #13 (1997) <https://web.archive.org/web/19970112162517/http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs13.htm>. WHD made minor revisions to Fact Sheet #13 in 2002 and 2008, before a more substantial revision in 2014. In 2018, WHD reverted back to the 2008 version of Fact Sheet #13, which—apart from the addition of an advisory note referring to the 2021 IC Rule—is identical to the current March 2022 version (available at <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>).

⁷² AI 2015–1 is available at 2015 WL 4449086 (withdrawn June 7, 2017).

appeals: (1) the extent to which the work performed is an integral part of the employer's business; (2) the worker's opportunity for profit or loss depending on their managerial skill; (3) the extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer. AI 2015–1 further emphasized that the factors should not be applied in a mechanical fashion and that no one factor was determinative. AI 2015–1 was withdrawn on June 7, 2017.⁷³

In 2019, WHD issued an opinion letter, FLSA2019–6, regarding whether workers who worked for companies operating self-described “virtual marketplaces” were employees covered under the FLSA or independent contractors.⁷⁴ Like the Department's prior guidance, the letter stated that the determination depended on the economic realities of the relationship and that the ultimate inquiry was whether the workers depend on someone else's business or are in business for themselves. The letter identified six economic realities factors that differed slightly from the factors typically articulated by the Department previously: (1) the nature and degree of the employer's control; (2) the permanency of the worker's relationship with the employer; (3) the amount of the worker's investment in facilities, equipment, or helpers; (4) the amount of skill, initiative, judgment, and foresight required for the worker's services; (5) the worker's opportunities for profit or loss; and (6) the extent of the integration of the worker's services into the employer's business.⁷⁵ The Department later withdrew Opinion Letter FLSA2019–6 on February 19, 2021.⁷⁶

C. The Department's 2021 Independent Contractor Rule

1. Overview

On January 7, 2021, the Department published the 2021 IC Rule, with an

effective date of March 8, 2021.⁷⁷ The 2021 IC Rule set forth regulations to be added to a new part (part 795) in title 29 of the Code of Federal Regulations titled “Employee or Independent Contractor Classification under the Fair Labor Standards Act,” providing guidance on the classification of independent contractors under the FLSA applicable to workers and businesses in any industry.⁷⁸ The 2021 IC Rule also addressed the Department's prior interpretations of independent contractor status in 29 CFR 780.330(b) and 788.16(a)—both of which applied to specific industries—by cross-referencing part 795.⁷⁹

The Department explained that the purpose of the 2021 IC Rule was to establish a “streamlined” economic reality test that improved on prior articulations described as “unclear and unwieldy.”⁸⁰ It stated that the existing economic reality test applied by the Department and courts suffered from confusion regarding the meaning of “economic dependence,” a lack of focus in the multifactor balancing test, and confusion and inefficiency caused by overlap between the factors.⁸¹ The 2021 IC Rule asserted that shortcomings and misconceptions associated with the economic reality test were more apparent in the modern economy and that additional clarity would promote innovation in work arrangements.

The 2021 IC Rule explained that independent contractors are not employees under the FLSA and are therefore not subject to the Act's minimum wage, overtime pay, or recordkeeping requirements. It adopted an economic reality test under which a worker is an employee of an employer if that worker is economically dependent on the employer for work and is an independent contractor if the worker is in business for themselves.⁸²

The 2021 IC Rule identified five economic realities factors to guide the inquiry into a worker's status as an employee or independent contractor, while acknowledging that the factors were not exhaustive, no one factor was dispositive, and additional factors could be considered if they “in some way indicate whether the [worker] is in business for him- or herself, as opposed to being economically dependent on the

potential employer for work.”⁸³ In contrast to prior guidance and contrary to case law, the 2021 IC Rule designated two of the five factors—the nature and degree of control over the work and the worker's opportunity for profit or loss—as “core factors” that should carry greater weight in the analysis. Citing the goal of providing greater certainty and predictability in the economic reality test, the 2021 IC Rule determined that these two factors were more probative of economic dependence than other economic realities factors. If both of those core factors indicate the same classification, as either an employee or an independent contractor, the 2021 IC Rule stated that there was a “substantial likelihood” that the indicated classification was the worker's correct classification.⁸⁴

The 2021 IC Rule's first core factor was the nature and degree of control over the work, which indicated independent contractor status to the extent that the worker exercised substantial control over key aspects of the performance of the work, such as by setting their own schedule, by selecting their projects, and/or through the ability to work for others, which might include the potential employer's competitors.⁸⁵ The 2021 IC Rule provided that requiring the worker to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses (as opposed to employment relationships) did not constitute control for purposes of determining employee or independent contractor classification.⁸⁶

The 2021 IC Rule's second core factor was the worker's opportunity for profit or loss.⁸⁷ The Rule stated that this factor indicates independent contractor status to the extent the worker has an opportunity to earn profits or incur losses based on either (1) their exercise of initiative (such as managerial skill or business acumen or judgment) or (2) their management of investment in or capital expenditure on, for example, helpers or equipment or material to further the work. While the effects of the worker's exercise of initiative and management of investment were both considered under this factor, the worker did not need to have an opportunity for profit or loss based on both initiative

⁷³ See News Release 17–0807–NAT, “US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance” (June 7, 2017), <https://www.dol.gov/newsroom/releases/opa/opa20170607> (last visited November 20, 2023).

⁷⁴ See WHD Op. Ltr. FLSA2019–6, 2019 WL 1977301 (Apr. 29, 2019) (withdrawn Feb. 19, 2021).

⁷⁵ See *id.* at *4. Opinion Letter FLSA2019–6's “extent of the integration” factor was a notable recharacterization of the factor traditionally considered by courts and the Department regarding the extent to which work is “an integral part” of an employer's business.

⁷⁶ See note at <https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA> (last visited November 20, 2023).

⁷⁷ See 86 FR 1168. The Department initially published a NPRM soliciting public comment on September 25, 2020. See 85 FR 60600. The final rule adopted “the interpretive guidance set forth in the [NPRM] largely as proposed.” 86 FR 1168.

⁷⁸ 86 FR 1246–48.

⁷⁹ *Id.* at 1246.

⁸⁰ *Id.* at 1172, 1240.

⁸¹ *Id.* at 1172–75.

⁸² *Id.* at 1246 (§ 795.105(a)–(b)).

⁸³ *Id.* at 1246–47 (§ 795.105(c) and (d)(2)(iv)).

⁸⁴ *Id.* at 1246 (§ 795.105(c)).

⁸⁵ *Id.* at 1246–47 (§ 795.105(d)(1)(i)).

⁸⁶ *Id.*

⁸⁷ *Id.* (§ 795.105(d)(1)(ii)).

and management of investment for this factor to weigh towards the worker being an independent contractor. This factor indicated employee status to the extent that the worker was unable to affect their earnings or was only able to do so by working more hours or faster.

The 2021 IC Rule also identified three other non-core factors: the amount of skill required for the work, the degree of permanence of the working relationship between the worker and the employer, and whether the work is part of an integrated unit of production (which it cautioned is “different from the concept of the importance or centrality of the individual’s work to the potential employer’s business”).⁸⁸ The 2021 IC Rule provided that these other factors were “less probative and, in some cases, may not be probative at all” of economic dependence and were “highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors.”⁸⁹

The 2021 IC Rule also stated that the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible, and provided five “illustrative examples” demonstrating how the analysis would apply in particular factual circumstances.⁹⁰ Finally, the 2021 IC Rule rescinded any “prior administrative rulings, interpretations, practices, or enforcement policies relating to classification as an employee or independent contractor under the FLSA” to the extent that such items “are inconsistent or in conflict with the interpretations stated in this part,” and explained that the 2021 IC Rule would guide WHD’s enforcement of the FLSA.⁹¹

On January 19, 2021, WHD issued Opinion Letters FLSA2021–8 and FLSA2021–9 applying the Rule’s analysis to specific factual scenarios. WHD subsequently withdrew those opinion letters on January 26, 2021, explaining that the letters were issued prematurely because they were based on a rule that had yet to take effect.⁹²

2. Delay and Withdrawal

On February 5, 2021, the Department published a proposal to delay the 2021 IC Rule’s effective date until May 7, 2021—60 days after the Rule’s original March 8, 2001, effective date.⁹³ On

March 4, 2021, after considering the approximately 1,500 comments received in response to that proposal, the Department published a final rule delaying the effective date of the 2021 IC Rule as proposed.⁹⁴

On March 12, 2021, the Department published a NPRM proposing to withdraw the 2021 IC Rule.⁹⁵ On May 5, 2021, after reviewing approximately 1,000 comments submitted in response to the NPRM, the Department announced a final rule withdrawing the 2021 IC Rule.⁹⁶ In explaining its decision to withdraw the 2021 IC Rule, the Department stated that the Rule was inconsistent with the FLSA’s text and purpose and would have had a confusing and disruptive effect on workers and businesses alike due to its departure from longstanding judicial precedent. The Withdrawal Rule stated that it took effect immediately upon its publication in the *Federal Register* on May 6, 2021.⁹⁷

3. Litigation

On March 14, 2022, in a lawsuit challenging the Department’s Delay and Withdrawal Rules under the Administrative Procedure Act (APA), a district court in the Eastern District of Texas issued a decision vacating the Department’s Delay and Withdrawal Rules.⁹⁸ While acknowledging that the Department engaged in separate notice-and-comment rulemakings in promulgating both of these rules, the district court concluded that the Department “failed to provide a meaningful opportunity for comment in promulgating the Delay Rule,”⁹⁹ failed to show “good cause for making the [Delay Rule] effective immediately upon publication,”¹⁰⁰ and acted in an arbitrary and capricious manner in its Withdrawal Rule by “fail[ing] to consider potential alternatives to rescinding the Independent Contractor Rule.”¹⁰¹ Accordingly, the district court vacated the Delay and Withdrawal Rules and concluded that the 2021 IC Rule “became effective as of March 8, 2021, the rule’s original effective date, and remains in effect.”¹⁰² The district

court’s ruling did not address the validity of the 2021 IC Rule; rather, the case was focused solely on the validity of the Delay and Withdrawal Rules.

The Department filed a notice of appeal of the district court’s decision.¹⁰³ In response to requests by the Department informing the court of this rulemaking, the Fifth Circuit Court of Appeals has entered successive orders staying the appeal. The Fifth Circuit’s most recent order was dated October 9, 2023 and stayed the appeal for an additional 120 days.

D. The Department’s Proposal

Following a series of stakeholder forums on the classification of workers as employees or independent contractors under the FLSA, the Department published an NPRM on October 13, 2022 proposing to rescind the 2021 IC Rule and replace it with new part 795 regulations.¹⁰⁴ In the NPRM, the Department proposed to add a new part 795 to Title 29 of the Code of Federal Regulations providing guidance regarding whether workers are employees or independent contractors, which would be different in notable respects from the regulatory text in the 2021 IC Rule, published at 86 FR 1246 through 1248. In contrast to the 2021 IC Rule’s creation of elevated “core factors,” the Department proposed returning to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. Additional proposed differences from the 2021 IC Rule included restoring consideration of investment as a separate factor, providing additional analysis of the control factor (including detailed discussions of how scheduling, supervision, price-setting, and the ability to work for others should be considered), and returning to the longstanding interpretation of the integral factor, which considers whether the work performed is integral to the employer’s business.

E. Comments

The initial deadline for interested parties to submit comments on the NPRM was November 28, 2022. In response to requests for an extension of the time period for filing written comments, the Department lengthened the comment period an additional 15

⁸⁸ *Id.* (§ 795.105(d)(2)).

⁸⁹ *Id.* at 1246 (§ 795.105(c)).

⁹⁰ *Id.* at 1247–48 (§§ 795.110–.115).

⁹¹ *Id.* at 1246 (§ 795.100).

⁹² See <https://www.dol.gov/agencies/whd/opinion-letters/search?FLSA> (last visited November 20, 2023), noting the withdrawal of Opinion Letters FLSA2021–8 and FLSA2021–9.

⁹³ 86 FR 8326.

⁹⁴ 86 FR 12535.

⁹⁵ 86 FR 14027.

⁹⁶ 86 FR 24303.

⁹⁷ *Id.* at 24320.

⁹⁸ *CWI v. Walsh*, 2022 WL 1073346.

⁹⁹ *Id.* at *9. The court specifically faulted the Department’s use of a shortened 19-day comment period in its proposal to delay of the 2021 IC Rule’s original effective date (instead of 30 days), and for failing to consider comments beyond its proposal to delay the 2021 IC Rule’s effective date. *Id.* at *7–10.

¹⁰⁰ *Id.* at *11.

¹⁰¹ *Id.* at *13.

¹⁰² *Id.* at *20.

¹⁰³ See Fifth Circuit No. 22–40316 (appeal filed, May 13, 2022).

¹⁰⁴ See 87 FR 62218.

days to December 13, 2022, resulting in a total comment period of 61 days.¹⁰⁵

The Department received approximately 55,400 comments on the NPRM. Comments were submitted by a diverse array of stakeholders, including employees, self-identified independent contractors, businesses, trade associations, labor unions, advocacy groups, law firms, members of Congress, state and local government officials, and other interested members of the public. This section provides a high-level summary of commenter views. Significant issues raised in the comments received are discussed in subsequent sections of this preamble, along with the Department's response to those comments and a discussion of resulting changes that have been made in the final rule's regulatory text. All comments received may be viewed on the <http://www.regulations.gov> website, docket ID WHD-2022-0003.

Many of the comments the Department received can be characterized in the following ways: (1) very general statements of support or opposition; (2) personal anecdotes that did not address a specific aspect of the proposal; or (3) identical or nearly identical "campaign" comments sent in response to comment initiatives sponsored by various groups.¹⁰⁶ Other comments provided specific data, views, and arguments, which are described throughout this preamble. Commenters expressed a wide variety of views on the merits of the Department's proposal. Acknowledging that there are strong views on the issues presented in this rulemaking, the Department has carefully considered the comments submitted.

As a general matter, most employees, labor unions, worker advocacy groups, and other affiliated stakeholders generally expressed support for the NPRM, asserting that its proposed guidance was more consistent with judicial precedent and would better protect employees from

misclassification than the 2021 IC Rule. By contrast, most commenters who identified as independent contractors, business entities, and commenters affiliated with those constituencies generally expressed opposition to the NPRM, criticizing the Department's proposed economic reality test as ambiguous and biased against independent contracting.

The Department received several comments addressing topics that are beyond the scope of this rulemaking. For example, numerous individuals submitted comments expressing support or opposition to the "Protecting the Right to Organize Act", H.R. 842, 117th Cong. (2021), proposed legislation that would amend the NLRA. Other commenters expressed views on possible legislative reforms to extend wage-and-hour protections and other employment benefits to workers classified as independent contractors. *See, e.g.,* Center for Cultural Innovation ("CCI") (discussing collective bargaining rights and sector wage standards as "two promising approaches to guaranteeing [wage-and-hour] protections to independent workers"); DoorDash ("[L]aws should be updated to preserve the independence workers like Dashers value, while clearing the way for new protections and benefits that independent contractors have historically lacked."); Uber ("We look forward to working with the Department to address the shortcomings of existing laws, including unlocking access to benefits for independent contractors such as app-based workers."). Such legislative efforts are beyond the scope of this rulemaking as they would require congressional action; the scope of this regulation is limited to providing guidance regarding employee or independent contractor classification under the FLSA as currently enacted.

Some commenters addressed the rulemaking's potential effect on workers other than those classified as independent contractors. For example, the Labor Relations and Employment Law Society at St. John's University School of Law requested the Department to apply the NPRM's proposed economic reality test to evaluate the employment status of unpaid student interns. Similarly, Boulette Golden & Marin L.L.P. asserted that the NPRM's proposed guidance creates a "false dichotomy" where "every worker in the United States is either an employee or an 'independent business.'" To clarify, this rulemaking specifically addresses the legal distinction between FLSA-covered employees and independent contractors; it does not replace or supplant the analyses that courts and

the Department apply when evaluating FLSA coverage of other kinds of workers, such as unpaid interns, students, trainees, or volunteers.¹⁰⁷ Coverage for these types of workers is not addressed in this rule.

Finally, some commenters opined on potential compliance or enforcement measures. For example, the Sheet Metal and Air Conditioning Contractors' National Association ("SMACNA") requested that the Department introduce a mandatory "Notice of Independent Contractor Status" form for businesses and independent contractors in the construction industry, to notify "true independent contractors" of their tax obligations and help enforcement against misclassification. This suggestion, however, is outside the scope of this rulemaking, which has not proposed any mandatory notice and focuses specifically on the legal distinction between FLSA-covered employees and independent contractors. Further, some commenters raised compliance with employment verification requirements under the Immigration Reform and Control Act (IRCA), both to note that some employers are incentivized to misclassify immigrant workers as independent contractors in part because they do not have to verify the work authorization of independent contractors, *see, e.g.,* Equal Justice Center; SMACNA, and to note that being able to operate as an independent contractor or in business for oneself provides economic opportunity for people who lack work authorization, *see* TheDream.US. Because this rulemaking pertains only to the question of employee classification under the FLSA, it does not address employers' compliance obligations with respect to employees as determined under other laws, such as IRCA. The FLSA's various worker protections apply to FLSA-covered employees regardless of their citizenship or immigration or work authorization status.

III. Need for Rulemaking

The Department recognizes that independent contractors and small businesses play an important role in our economy. It is also fundamental to the Department's obligation to administer and enforce the FLSA that workers who should be covered under the Act are able to receive its protections. In the FLSA context, employees misclassified as independent contractors are denied

¹⁰⁵ 87 FR 64749. Although several commenters requested a longer extension or otherwise objected that the comment period was inadequately short, the resulting 61-day comment period was more than twice as long as the 30-day comment period for the NPRM for the 2021 IC Rule, when the Department initially proposed regulatory guidance on employee and independent contractor status under the FLSA. *See* 85 FR 60600. The Department declined several requests to extend the comment period for the 2020 NPRM. *See* <https://www.regulations.gov/document/WHD-2020-0007-0193>.

¹⁰⁶ Campaign comments, both in favor and opposed to the proposal, were received from a variety of groups, including, for example, court reporters, construction industry employers, DoorDash workers, professional translators, truckers, financial advisors, and healthcare professionals.

¹⁰⁷ *See, e.g.,* WHD Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act (describing the analysis applied by courts and the Department to evaluate the FLSA employment status of students and interns).

basic workplace protections, including the rights to minimum wage and overtime pay.¹⁰⁸ Meanwhile, employers that comply with the law are placed at a competitive disadvantage compared to other businesses that misclassify employees, contravening the FLSA's goal of eliminating "unfair method[s] of competition in commerce."¹⁰⁹

As explained in the NPRM, the Department believes that the 2021 IC Rule did not fully comport with the FLSA's text and purpose as interpreted by the courts. The Department further believes that leaving the 2021 IC Rule in place would have a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. While the Department agrees that the 2021 IC Rule identified a need to further develop and center the concept of economic dependence, the 2021 IC Rule included provisions that are in tension with longstanding case law, such as designating two "core factors" as most probative and predetermining that they carry greater weight in the analysis; considering investment and initiative only as part of the opportunity for profit or loss factor; and excluding consideration of whether the work performed is central or important to the potential employer's business. These and other provisions in the 2021 IC Rule narrowed the economic reality test by limiting the facts that may be considered as part of the test—facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or is in business for themselves. As the NPRM explained, this novel narrowing of the test under which certain factors are always elevated and other facts are essentially precluded from consideration may result in misapplication of the economic reality test and an increased risk of FLSA-covered employees being misclassified as independent

contractors. Moreover, the 2021 IC Rule did not address the potential risks to workers of such misclassification.¹¹⁰

The Department previously explained these concerns about the 2021 IC Rule at length in the Withdrawal Rule,¹¹¹ which was vacated by a district court (the Department's appeal of the district court's order is pending). The Department now believes it is appropriate to rescind the 2021 IC Rule and replace it with an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule. While prior to the 2021 IC Rule the Department primarily issued subregulatory guidance in this area, the NPRM explained that rescinding the 2021 IC Rule and replacing it with detailed regulations addressing the multifactor economic reality test—in a way that both more fully reflects the case law and continues to be relevant to the evolving economy—would be helpful for workers and businesses alike. Specifically, the Department explained that its proposed guidance would protect workers from misclassification while at the same time provide a consistent approach for those businesses that engage (or wish to engage) with properly classified independent contractors.

In the NPRM, the Department acknowledged that its proposal departed from the approach taken in the 2021 IC Rule, and further discussed the rationale used in the 2021 IC Rule and why the Department had carefully reconsidered that reasoning and determined that modifications were necessary.¹¹² As the NPRM noted, the Department had identified four reasons underlying the need to promulgate the 2021 IC Rule: (1) confusion regarding the meaning of "economic dependence" because the concept is "underdeveloped"; (2) lack of focus in the multifactor balancing test; (3) confusion and inefficiency due to overlapping factors; and (4) the shortcomings of the economic reality test that are more apparent in the modern economy.¹¹³ The 2021 IC Rule had also suggested as a fifth reason that the economic reality test hindered innovation in work arrangements.¹¹⁴ As discussed further below, the Department explained in the NPRM that it believed that the proposed rule's approach offers

a better framework for understanding and applying the concept of economic dependence by explaining how the touchstone of whether an individual is in business for themselves is analyzed within each of the six economic realities factors. Further, the Department believed that the proposal's discussion of how courts and the Department's previous guidance apply the factors brings the multifactor test into focus, reduces confusion as to the overlapping factors, and provides a better basis for understanding how the test has the flexibility to be applied to changes in the modern economy, such that the Department no longer viewed the concerns articulated in the 2021 IC Rule as impediments to using the economic reality test formulated by the courts and the Department's longstanding guidance.

Thousands of commenters opined on this rulemaking. Most commenters that expressed support for the NPRM—including labor unions, worker advocacy organizations, and workers—were highly critical of the 2021 IC Rule, often referencing or attaching earlier comments filed in opposition to that rule when it was proposed. *See, e.g.*, American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"); National Women's Law Center ("NWLC"); Northwest Worker Justice Project; United Brotherhood of Carpenters and Joiners of America ("UBC"). Using common template language, several dozen advocacy organizations and local unions affiliated with the United Food and Commercial Workers ("UFCW") characterized the 2021 IC Rule as an "anti-worker rule" which "narrowed the scope of who is considered an employee under the FLSA." Many of these commenters also asserted that the 2021 IC Rule "contravenes the [FLSA's] statutory definitions and Supreme Court precedent." Additionally, numerous commenters supportive of the Department's rulemaking asserted that replacing the 2021 IC Rule with the NPRM's proposed economic reality test would reduce the misclassification of employees as independent contractors, given the proposed test's fuller consideration of facts that were minimized or excluded under the 2021 IC Rule. *See, e.g.*, AARP; Joint Comment of the National Electrical Contractors Association and the International Brotherhood of Electrical Workers ("NECA & IBEW"); REAL Women in Trucking.

A number of commenters supportive of the NPRM also stated that the economic reality test applied by courts is not only compatible with the modern

¹⁰⁸ Workers who are employees under the FLSA but are misclassified as independent contractors remain legally entitled to the Act's wage-and-hour protections and are protected from retaliation for attempting to assert their rights under the Act. *See* 29 U.S.C. 215(a)(3). However, many misclassified employees may not be aware that such rights and protections apply to them or face obstacles when asserting those rights.

¹⁰⁹ 29 U.S.C. 202; *see also* *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985) (noting that allowing workers who are employees under the Act to work as non-employees "would affect many more people than those workers directly at issue . . . and would be likely to exert a general downward pressure on wages in competing businesses").

¹¹⁰ 86 FR 1225; *see also id.* at 1206–07.

¹¹¹ *See* 86 FR 24307–18.

¹¹² *See* 87 FR 62226 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

¹¹³ *Id.* (citing 86 FR 1172–75).

¹¹⁴ *Id.* (citing 86 FR 1175).

economy, but preferable to the 2021 IC Rule's elevation of certain factors as controlling. *See, e.g.,* AARP ("It is precisely because work arrangements are more varied and complex in today's economy that no one factor should be controlling or exclusive to others."); Coalition of State Attorneys General and State Labor Departments ("State AGs") ("As State AGs who enforce and defend state wage and hour laws, we know that a flexible standard that considers the totality of the circumstances is required to address changing work arrangements."). Some business stakeholders expressed support for the NPRM, but for different reasons. For example, some employers—including Alto Experience, Inc., Gale Healthcare Solutions, IntelyCare, Inc., and various union-affiliated contractor associations—expressed support for the NPRM on the grounds that its guidance would better prevent rival businesses from obtaining an unfair competitive advantage through the misclassification of employees as independent contractors, consistent with the FLSA's goal of eliminating unfair methods of competition in commerce. Additionally, some business stakeholders stated that they preferred the economic reality test applied by courts to the 2021 IC Rule. *See, e.g.,* Ho-Chunk Inc. (supporting the proposed analysis because the 2021 IC Rule "deviat[ed] from established case law"); Small Business Legislative Council ("SBLC") ("While the SBLC has not taken a position on whether the economic realities test strikes the right balance, applying a test like the economic realities test that has been fleshed out over years through case law and administrative guidance certainly makes this complex issue easier to navigate."); *see also* Opera America ("The 'totality-of-the-circumstances' approach allows for the nuance necessary to truly evaluate the nature of an employment or contractor relationship"); Texas Association for Home Care and Hospice ("We support the reiteration in the [NPRM] that the enumerated factors should each be equally relevant, including any additional relevant factors that indicate economic dependence or independence.").

Other commenters, including most business-affiliated stakeholders and many self-identified independent contractors, disagreed with the Department's proposal to rescind and replace the 2021 IC Rule. Many of these commenters argued that the 2021 IC Rule was based on judicial precedent. *See e.g.,* Coalition for Workforce Innovation ("CWI"); Independent

Bakers Association ("IBA"); Pacific Legal Foundation. Commenters opposed to this rulemaking further stated that the 2021 IC Rule's analysis is clearer than the NPRM's proposed economic reality test, asserting that returning to a totality-of-the-circumstances analysis would increase litigation and deter businesses from engaging with independent contractors. *See, e.g.,* American Society of Travel Advisors ("ASTA"); Financial Services Institute ("FSI"); U.S. Chamber of Commerce ("U.S. Chamber"). While many commenters opposed to the NPRM acknowledged that the misclassification of employees as independent contractors might be a problem in some industries, several commenters disputed the need for generally applicable guidance that (in their view) could be disruptive to businesses and legitimate independent contractors in their particular industries. *See, e.g.,* American Translators Association; IMC Companies, LLC; *see also* HR Policy Association. Finally, many self-identified independent contractors and advocacy groups asserted that the Department's proposal would "misclassify" independent contractors as employees. *See, e.g.,* American Society of Journalists and Authors; Cambridge Investment Research, Inc.; Fight for Freelancers; Transportation Intermediaries Association ("TIA").

Commenters opposed to this rulemaking agreed with the 2021 IC Rule's assessment that the economic reality test traditionally applied by courts is incompatible with the modern economy. *See, e.g.,* Institute for the American Worker ("IAAW"); Society for Human Resources Management ("SHRM"); TIA. Several commenters pointed to differences in the economy today compared to the 1930s and 1940s, when the FLSA was enacted and the Supreme Court first endorsed the economic reality test. *See, e.g.,* Flex Association ("Flex") ("It is no longer 1938, when Congress enacted the FLSA. Today, independent contractors can leverage app-based technology to build their own businesses in ways we could not have conceived even 20, let alone 84, years ago."); National Association of Professional Insurance Agents ("[I]n many ways, the 1938 Congress could not have conceived of the present-day global economy or the variations among worker statuses that have emerged and continue to evolve therefrom.").

Several commenters stated that the Department's proposal would deter businesses from engaging with independent contractors, which in turn would have disruptive economic consequences. In a joint comment, 33

business advocacy organizations and over 100 local Chambers of Commerce ("Coalition of Business Stakeholders") asserted that, under the NPRM, "the only scenario in which a hiring entity can be sure it is safe from an enforcement action by the DOL is when it classifies, or misclassifies, its workers as employees" and concluded that the NPRM would "upend millions of legitimate, productive independent contractor relationships." *See also, e.g.,* California Association of Realtors (C.A.R.) ("This proposal as is would seriously disrupt the current and historical choices of the real estate industry that have been in place for at least fifty years."); FSI ("Changes in laws or regulations that substantially limited or prohibited the use of independent contracting in financial services would harm those who currently work as independent contractors, harm consumers by reducing their financial literacy and thus their ability to accumulate wealth and save for retirement, and harm the economy overall.").

Upon consideration of the comments and as described throughout this preamble, the Department continues to believe that this final rule's approach offers a better framework for understanding and applying the concept of economic dependence by explaining how the touchstone of whether an individual is in business for themselves is analyzed within each of the six economic reality factors. This rule's discussion of how courts and the Department's previous guidance apply the factors brings the multifactor test into focus, reduces confusion as to the overlapping factors, and provides a more consistent basis for understanding how the test has the flexibility to be applied to changes in the modern economy. Accordingly, the Department no longer views the concerns articulated in the 2021 IC Rule as impediments to using the economic reality test formulated by the courts and the Department's longstanding guidance.

The Department is, however, retaining its longstanding interpretation, as it did in the 2021 IC Rule, that economic dependence is the ultimate inquiry, and that an employee is someone who, as a matter of economic reality, is economically dependent on an employer for work—not for income.¹¹⁵

¹¹⁵ *See* 86 FR 1246 (§ 795.105(b)) ("An employer suffers or permits an individual to work as an employee if, as a matter of economic reality, the individual is economically dependent on that employer for work."); *see also infra* section V.B.; 29 CFR 795.105(b) ("An 'employee' under the Act is an individual whom an employer suffers, permits, or otherwise employs to work. . . . [This is] meant

Consistent with the 2021 IC Rule and as explained in the NPRM, the Department continues to believe that, as compared to the economic realities analysis generally, the particular concept of economic dependence is underdeveloped in the case law. As noted in the 2021 IC Rule, the Department and most courts have historically applied a “dependence-for-work” approach which considers whether the worker is dependent on the employer for work or depends on the worker’s own business for work. However, a minority of courts have applied a “dependence-for-income” approach that considers whether the worker has other sources of income or wealth or is financially dependent on the employer.¹¹⁶ Further, rather than giving primacy to only two factors as indicators of economic dependence, the Department believes that developing the concept of economic dependence is better accomplished by, in addition to elaborating on the general meaning of economic dependence, explaining how each of the six factors can illuminate the distinction between economic dependence on the employer for work and being in business for oneself. By focusing on that distinction in its discussion of each factor, the Department expects that this rule will provide clarity on the concept of economic dependence that the 2021 IC Rule indicated would be welcomed by workers and businesses, but will do so in a way that is consistent with case law and the Department’s prior guidance.

Regarding commenters that stated that the 2021 IC Rule provided more clarity in distinguishing between factors, the Department believes, upon further consideration, that any purported confusion and inefficiency due to overlapping factors was overstated in the 2021 IC Rule. Moreover, when each factor is viewed under the framework of whether the worker is economically dependent or in business for themselves, the rationale for considering facts under more than one factor is clearer. The Department explains in more detail in section V why considering certain facts under more than one factor is consistent with the totality-of-the-circumstances approach of the economic realities analysis used by courts. And the Department provides guidance regarding how to consider certain facts, such as the ability to work for others

and whether the working relationship is exclusive, under more than one factor. The Department believes that this flexible approach is supported by the case law and preferable to rigidly and artificially limiting facts to only one factor, as the 2021 IC Rule did.

Concerning comments that the 2021 IC Rule was better suited to the modern economy, the Department believes that this final rule is well-equipped to address a wide array of traditional and emerging work relationships, as discussed throughout section V of this preamble. In the 2021 IC Rule, the Department stated that “technological and social changes have made shortcomings of the economic realities test more apparent in the modern economy,” thus justifying the 2021 IC Rule’s characterization of the integral, investment, and permanence factors as less important in determining a worker’s classification.¹¹⁷ Upon further consideration, however, the Department believes that the multifactor economic reality test relied on by courts where no one factor or set of factors is presumed to carry more weight is the most helpful tool for evaluating modern work arrangements. The test’s vitality is confirmed by its application over seven decades that have seen monumental shifts in the economy. Modern work arrangements utilizing applications or other technology are best addressed using the underlying economic reality test, which considers the totality of the circumstances in each working arrangement and offers a flexible, comprehensive, and appropriately nuanced approach which can be adapted to disparate industries and occupations. It can also encompass continued social changes because it does not presume which aspects of the work relationship are most probative or relevant and leaves open the possibility that changed circumstances may make certain factors more important in certain cases or future scenarios.

The Department’s response to commenter feedback on the potential economic consequences of this rulemaking is discussed in the regulatory impact analysis provided in section VII. However, the Department continues to believe that proper application of the FLSA in the modern economy requires the flexibility of an economic reality test that does not predetermine the probative value of particular factors and which is adaptable to different industries and workers. As further explained in sections III.C and VII, commenter assertions of economic disruption

related to this rulemaking are belied by the fact that this rulemaking merely aligns the Department’s interpretive guidance with the same legal standard courts have been applying for decades—and are continuing to apply today.

The discussion that follows sets forth the Department’s explanation of the need for this rulemaking and responds to relevant commenter feedback.

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

In the NPRM, the Department explained that it was proposing to rescind and replace the 2021 IC Rule in part because that rule was not fully aligned with the FLSA’s text as interpreted by the courts or the Department’s longstanding analysis, as well as decades of case law describing and applying the multifactor economic reality test. In relevant part, the NPRM explained that the Department had three primary and overlapping legal concerns with the 2021 IC Rule: (1) its creation of two “core factors” as the “most probative” in the economic reality analysis; (2) the oversized role of the control factor in its analysis; and (3) its altering of several economic reality factors to minimize or exclude key facts commonly analyzed by courts.¹¹⁸

After considering the comments, the Department continues to believe that the 2021 IC Rule marked a departure from the way in which courts and the Department adopted and applied the multifactor, totality-of-the-circumstances economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. The Department also continues to believe that the 2021 IC Rule’s departure from longstanding precedent unduly narrowed the economic reality test by limiting facts that may be considered as part of the test that are relevant in determining whether a worker is economically dependent on the employer for work or is in business for themselves. By doing so, the 2021 IC Rule artificially restricted the Act’s expansive definitions of “employer,” “employee,” and “employ,” undermining the Act’s text and purposes, as interpreted by courts and the Department’s longstanding interpretation of the economic reality test.

¹¹⁸ See 87 FR 62227–29. The Department had previously identified and discussed these three concerns in its 2021 Withdrawal Rule. See 86 FR 24307–15.

to encompass as employees all workers who, as a matter of economic reality, are economically dependent on an employer for work. . . . Economic dependence does not focus on the amount of income earned, or whether the worker has other sources of income.”).

¹¹⁶ See 86 FR 1172–73.

¹¹⁷ 86 FR 1175.

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

As the NPRM explained, the 2021 IC Rule set forth a new articulation of the economic reality test, elevating two factors (control and opportunity for profit or loss) as "core" factors above other factors, asserting that the two core factors have "greater probative value" in determining a worker's economic dependence.¹¹⁹ Notably, the 2021 IC Rule further provided that if both core factors point toward the same classification—either employee or independent contractor—then there is a "substantial likelihood" that this is the worker's correct classification.¹²⁰ Although it identified three other factors as additional guideposts and acknowledged that additional factors may be considered, it made clear that non-core factors "are less probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors."¹²¹ The NPRM explained that the Department believes that the 2021 IC Rule's elevation of the control and opportunity for profit or loss factors was in tension with the language of the Act as well as the longstanding judicial precedent, expressed by the Supreme Court and in appellate cases from across the circuits, that no single factor is determinative in the analysis of whether a worker is an employee or an independent contractor, nor is any factor or set of factors necessarily more probative of whether the worker is in fact economically dependent on the employer for work as opposed to being in business for themselves.

Many commenters expressed concerns about the 2021 IC Rule's elevation of two "core factors" and supported the Department's proposal to restore a totality-of-the-circumstances analysis where no factor (or set of factors) is given a predetermined weight. Several commenters asserted that the use of core factors was contrary to Supreme Court precedent. *See, e.g.*, International Association of Machinists and Aerospace Workers, AFL–CIO; Laborers' International Union of North America ("LIUNA"); National Employment Law Project ("NELP"). The AFL–CIO and the North America's

Building Trades Unions ("NABTU") further commented that the 2021 IC Rule's elevation of control and opportunity for profit or loss effectively (and impermissibly) adopted a common law test for independent contractor status. The Signatory Wall and Ceiling Contractors Alliance ("SWACCA") stated that "[b]y giving greater emphasis to these two factors . . . the [2021 IC Rule] improperly narrows the analysis of the facts and circumstances surrounding the business-worker relationship, thereby reducing the scope of the FLSA's protections." *See also* State AGs (commenting that the 2021 IC Rule's "emphasis on two 'core' factors . . . negated the need to fully consider the remaining factors"). Farmworker Justice commented that the 2021 IC Rule's use of core factors could facilitate the misclassification of farmworkers, whose employment status is particularly dependent on the economic reality factors examining the skill and integrality of the work being performed. *See also* Joint Comment from the Center for Law and Social Policy & Governing for Impact ("CLASP & GFI") (same).

Other commenters supported the 2021 IC Rule's use of core factors and did not agree with the Department's proposal to change the 2021 IC Rule's analysis. Pointing to the Department's review of appellate case law described in the 2021 IC Rule preamble,¹²² several commenters stated that the elevation of the control and opportunity for profit or loss factors was fully consistent with the outcome of FLSA court decisions, if not their explicit reasoning. *See, e.g.*, Associated Builders and Contractors ("ABC"); Coalition to Promote Independent Entrepreneurs ("CPIE"); Flex; FSI. Several commenters, like the Club for Growth, Flex, and Modern Economy Project ("MEP") agreed with the 2021 IC Rule's determination that the control and the opportunity for profit or loss factors "drive at the heart" of economic dependence.¹²³ CWI asserted that "it is simply inaccurate that no court has determined, as a general rule, that any core factor should be afforded greater weight in determining whether an individual is an [employee]." *See also* CPIE.

Having considered the comments, the Department continues to believe that the 2021 IC Rule was in tension with the Act, judicial precedent, and congressional intent. As the Department explained in the NPRM, there is no statutory basis for such a predetermined weighting of the factors and the Department is concerned that

prioritizing two core factors over other factors may not fully account for the Act's broad definition of "employ," as interpreted by the courts. The Department agrees with those commenters that noted that the elevation of two core factors improperly narrowed the analysis of the relevant facts, thereby reducing the scope of the FLSA's protections. For example, if facts relevant to the control and opportunity for profit or loss factors both point to independent contractor status for a particular worker but weakly so, those factors should not be presumed to carry more weight than stronger factual findings under other factors (*e.g.*, the existence of a lengthy working relationship under the "permanence" factor and the performance of work that does not require specialized skills and is an integral part of the business), which would indicate that the worker is an employee.

Moreover, the Department is not aware of any court that has, as a general rule, elevated any one economic reality factor or subset of factors above others, despite receiving several comments suggesting that there was such case law. The 2021 IC Rule did not cite or rely on any particular decision where a court announced such a general rule predetermining the weight of some of the economic reality factors. Further, the Department has examined cases raised by commenters in support of the core factor analysis and none stand for the proposition that a predetermined elevation of any factor or set of factors is appropriate under the economic reality analysis for worker classification under the FLSA. Rather, the cases cited by commenters are either relevant to a different statute such as the Americans with Disabilities Act ("ADA") or Title VII, reference a joint employment analysis rather than an employee classification analysis, or have had excerpts taken out of context.¹²⁴ While

¹²⁴ For example, although some commenters cited *Walsh v. Medical Staffing of America*, that case explicitly stated that "[n]o single factor in the six-factor test is dispositive as 'the test is designed to capture the economic realities of the relationship between the worker and the putative employer.'" 580 F. Supp. 3d 216, 229 (E.D. Va. 2022) (quoting *McFeeley*, 825 F.3d at 241). The *Medical Staffing* court's reference to *Smith v. CSRA*, 12 F.4th 396, 413 (4th Cir. 2021), is unpersuasive since that case addressed employment status under the Americans with Disabilities Act, not the FLSA. *See CSRA*, 12 F.4th at 412–13. Other cases cited by commenters in support of core factors are inapposite. *See Brown v. BCG Attorney Search*, No. 12 C 9596, 2013 WL 6096932, at *1 (N.D. Ill. Nov. 20, 2013) (citing *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378 (7th Cir. 1991), which concerned Title VII not the FLSA); *Meyer v. U.S. Tennis Ass'n*, No. 1:11-cv-06268 (ALC)(MHD), 2014 WL 4495185, at *6 (S.D.N.Y. Sept. 11, 2014) (citing *Wadler v. Eastern Coll. Athletic Conference*, No. 00–civ–5671,

¹¹⁹ 87 FR 62227 (citing 86 FR 1246 (§ 795.105(c) and (d))).

¹²⁰ 86 FR 1246 (§ 795.105(c)); *see also id.* at 1201 (advising that other factors would only outweigh the two core factors "in rare cases").

¹²¹ *Id.* at 1246 (§ 795.105(c)).

¹²² *See* 86 FR 1196–98.

¹²³ *Id.* at 1196.

courts and the Department may focus on some relevant factors more than others when analyzing a particular set of facts and circumstances, this does not mean that it is possible or permissible to derive from these fact-driven decisions universal rules regarding which factors deserve more weight than the others when the courts themselves have not set forth any such universal rules despite decades of opportunity.

The Supreme Court has emphasized that employment status under the economic reality test turns upon “the circumstances of the whole activity,” rather than “isolated factors.”¹²⁵ Federal appellate courts have repeatedly cautioned against a mechanical or formulaic application of the economic reality test,¹²⁶ and specifically warn that it “‘is impossible to assign to each of these factors a specific and invariably applied weight.’”¹²⁷ The 2021 IC Rule’s elevation of two “core factors” was also in tension with judicial precedent, expressed by the Supreme Court and federal courts of appeals, that no single factor in the analysis is dispositive.¹²⁸

2003 WL 21961119, at *2 (S.D.N.Y. Aug. 14, 2003), a Title VII case not an FLSA case); *see also Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 135 (2d Cir. 1999) (joint employment not worker classification); *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61 (2d Cir. 2003) (joint employment not worker classification); *Razak v. Uber Technologies, Inc.*, 951 F.3d 137, 145 (3d Cir. 2020) (making the uncontroversial statement that the control factor “is highly relevant to the FLSA analysis” while also reaffirming the Third Circuit’s statement that “neither the presence nor absence of any particular factor is dispositive” and that “courts should examine the circumstances of the whole activity” (quoting *DialAmerica*, 757 F.2d at 1382)).

¹²⁵ *Rutherford*, 331 U.S. at 730; *see also Silk*, 331 U.S. at 716, 719 (denying the existence of “a rule of thumb to define the limits of the employer-employee relationship” and determining employment status based on “the total situation”).

¹²⁶ *See, e.g., Parrish*, 917 F.3d at 380 (“And, obviously, the factors should not ‘be applied mechanically.’”) (quoting *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043–44 (5th Cir. 1987)); *Superior Care*, 840 F.2d at 1059 (“Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.”).

¹²⁷ *Parrish*, 917 F.3d at 380 (quoting *Hickey*, 699 F.2d at 752); *see also Scantland*, 721 F.3d at 1312 n.2 (“The weight of each factor depends on the light it sheds on the putative employee’s dependence on the alleged employer, which in turn depends on the facts of the case.”) (quoting *Santelices*, 147 F. Supp. 2d at 1319)).

¹²⁸ *See, e.g., Silk*, 331 U.S. at 716 (explaining that “[n]o one [factor] is controlling” in the economic realities test); *Morrison*, 253 F.3d at 11 (“No one factor standing alone is dispositive and courts are directed to look at the totality of the circumstances and consider any relevant evidence.”); *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989) (“It is well established that no one of these factors in isolation is dispositive; rather, the test is based upon a totality of the circumstances.”); *Lauritzen*, 835 F.2d at 1534 (“Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its

Thus, the 2021 IC Rule’s predetermined and mechanical weighting of factors was not consistent with how courts have, for decades, applied the economic reality analysis.¹²⁹

Regarding comments relying on the 2021 IC Rule’s reference to an appellate case law analysis to support the elevation of core factors, the Department has carefully reconsidered the cases cited in the 2020 NPRM and 2021 IC Rule in support.¹³⁰ The appellate cases relied on in the 2020 NPRM¹³¹ and 2021 IC Rule to support the 2021 IC Rule’s creation of “core factors” do not, themselves, elevate these two factors—rather, the 2021 IC Rule made assumptions about the reasoning behind the courts’ decisions that are not clear from the decisions themselves and in some cases are contrary to the decisions’ instructions that the test should not be applied in a mechanical fashion.¹³² In fact, most of the decisions cited as supporting a “core factor” analysis based on the case law review explicitly deny assigning any predetermined weight to these factors, and instead state that they considered the factors as part of an analysis of the whole activity, with no determinative single factor.¹³³

absence, dispositive or controlling.”); *Selker Bros.*, 949 F.2d at 1293 (“It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive.”).

¹²⁹ *See McFeeley*, 825 F.3d at 241 (“While a six-factor test may lack the virtue of providing definitive guidance to those affected, it allows for flexible application to the myriad different working relationships that exist in the national economy. In other words, the court must adapt its analysis to the particular working relationship, the particular workplace, and the particular industry in each FLSA case.”).

¹³⁰ The 2021 IC Rule referenced on several occasions a review of appellate case law since 1975 to justify its elevation of two “core” factors. *See* 86 FR at 1194, 1196–97, 1198, 1202, 1240.

¹³¹ 85 FR 60619.

¹³² Federal courts of appeals have repeatedly cautioned against the “mechanical application” of the economic reality factors, including in the cases cited in support of the predetermined elevation of core factors. *See, e.g., Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 139 (2d Cir. 2017) (“Relevant FLSA precedent, despite endorsing the *Silk* factors, cautions against their ‘mechanical application.’”) (quoting *Superior Care*, 840 F.2d at 1059). And as explained herein, courts of appeals make clear that the analysis should draw from the totality of circumstances, with no single factor being determinative by itself.

¹³³ *See, e.g., Hobbs*, 946 F.3d at 829 (“No single factor is determinative. 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.”) (quotation marks omitted) (citing *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008)); *Parrish*, 917 F.3d at 380 (noting that no one factor is determinative and “obviously, the factors should not ‘be applied mechanically’”) (quoting *Mr. W Fireworks*, 814 F.2d at 1043); *Saleem*, 854 F.3d at 139–40 (explaining that employment relationships are determined by

Particularly when viewed in the context of repeated statements from the courts that no one factor in the economic reality test is dispositive, divining from the cases a conclusion that is the exact opposite from what the courts say that they are doing is not persuasive. The Department now believes that the 2020 NPRM and 2021 IC Rule’s discussion of the case law in support of the core factors improperly simplified the courts’ analysis in an attempt to quantify the probative value of certain factors in a manner that is facially inconsistent with the decisions themselves.

Additionally, while there are certainly many cases in which the classification decision made by the court aligns with the classification indicated by the control and opportunity for profit or loss factors, the 2021 IC Rule did not identify any cases stating that those two factors are “more probative” of a worker’s classification than other factors. Rather, the 2021 IC Rule acknowledged that there are cases in which the classification suggested by the control factor did not align with the worker’s classification as determined by the courts.¹³⁴ The Department has also identified appellate cases in which the classification suggested by the profit or loss factor, for example, did not align with the worker’s classification as determined by the courts or in which that factor was simply not addressed due to the fact-specific nature of the analysis. *See, e.g., Nieman v. Nat’l Claims Adjusters, Inc.*, 775 F. App’x 622, 625 (11th Cir. 2019) (concluding that worker was an independent contractor without considering profit or loss or integral factors because facts were not presented on those issues); *Simpkins v. DuPage Hous. Auth.*, 893 F.3d 962, 967 (7th Cir. 2018) (reversing the district court’s summary judgment decision and remanding case for determination of employee status without addressing opportunity for profit or loss); *Thomas v. TXX Servs., Inc.*, 663 F. App’x 86, 90 (2d Cir. 2016) (reversing summary judgment on the issue of plaintiffs’ status as employees

the circumstances of the whole activity); *McFeeley*, 825 F.3d at 241 (“No single factor is dispositive,—all six are part of the totality of circumstances presented.”) (citing *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998)) (internal citation and quotation marks omitted); *Barlow v. C.R. England, Inc.*, 703 F.3d 497, 506 (10th Cir. 2012) (“None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach.”) (citing *Baker v. Flint Eng’g & Const. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998)); *Schultz v. Capital Int’l Sec., Inc.*, 466 F.3d 298, 305 (4th Cir. 2006) (“No single factor is dispositive; again, the test is designed to capture the economic realities of the relationship between the worker and the putative employer.”).

¹³⁴ *See* 86 FR 1196–97.

under the FLSA but not discussing opportunity for profit or loss); *Meyer v. U.S. Tennis Ass'n*, 607 F. App'x 121, 123 (2d Cir. 2015) (affirming summary judgment decision and concluding that district court did not err in determining that plaintiffs were independent contractors where district court found that the profit or loss factor “cuts both ways”) (quoting *Meyer*, 2014 WL 4495185, at *7); *Johnson v. Unified Gov't of Wyandotte Cnty./Kansas City, Kansas*, 371 F.3d 723, 730 (10th Cir. 2004) (affirming jury verdict that workers were independent contractors despite concluding that “[t]he jury could have viewed [the profit or loss] factor as not favoring either side”); *Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. 1981) (noting that the worker “could elect to be paid by the hour or by the job and thus profit from foresight” but that this and other facts were not sufficient “to counterbalance the strong indicia of employee status”). As such, it is clear that mechanically deconstructing certain court decisions and considering what those courts have said about only two factors—even when the courts did not present their analyses in this manner—ignores the broader approach that most courts have taken in determining worker classification.

Moreover, it is necessarily the case when applying a multifactor balancing test that when any two factors of that test both point toward the same outcome, the probability of that indicated outcome aligning with the ultimate outcome increases. The 2021 IC Rule did not address whether a different combination of two factors would yield similar results. Yet, an in-depth review of the case law indicates that it would yield similar results, as most of the cases cited in the 2020 NPRM and 2021 IC Rule in support of its core factor analysis had multiple factors pointing in the same direction.¹³⁵ This further

underscores the unduly narrow focus on two “core factors” in the 2021 IC Rule.

In any event, the 2021 IC Rule significantly altered the “control” and “opportunity for profit or loss” factors, changing what facts may be considered for each, as discussed more fully in section V. For example, contrary to the approach taken by most courts, the 2021 IC Rule placed a significant focus on the worker's control rather than the potential employer's control and recast the opportunity for profit or loss factor as indicating independent contractor status based on the worker's initiative or investment. Thus, irrespective of whether control and opportunity for profit or loss were more frequently aligned with the ultimate result in prior appellate cases, the new framing of these factors, as redefined in the 2021 IC Rule, set forth a new standard for analysis that is unsupported by precedent.

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

The 2021 IC Rule identified “the nature and degree of control over the work” as one of two core factors given “greater weight” in the independent contractor analysis.¹³⁶ In the NPRM, the Department expressed concern that elevating the importance of control in every FLSA employee or independent contractor analysis brings the 2021 IC Rule closer to the common law control test that courts have rejected when interpreting the Act. Accordingly, the NPRM proposed restoring control to one of six factors to be considered, with no single factor being determinative.

Commenter views on the 2021 IC Rule's emphasis on control overlapped with those responding to its creation of “core factors.” For example, several commenters in support of the NPRM asserted that elevating the role of control makes the 2021 IC Rule's analysis too similar to a common law control test. *See, e.g., AFL-CIO; LIUNA; NABTU; State AGs. Lawyers' Committee for Civil Rights Under Law & the Washington Lawyers' Committee for Civil Rights and Urban Affairs* (“LCCRUL & WLC”) discussed court decisions where workers were found to be misclassified employees under the economic reality test despite a lack of “actual control” exercised by the employer, implying that the outcomes might have been different if courts had

applied the 2021 IC Rule. NELP requested that the Department further deemphasize the relevance of control, asserting that “the ‘control’ factor is furthest removed from the statutory ‘suffer or permit’ language, and that an absence of control is not particularly telling given that language.” Finally, several commenters asserted that the 2021 IC Rule's elevation of control is doubly problematic in view of alterations to the control factor which, in commenters' views, make the factor less likely to indicate employee status. *See NWLC* (“[T]he 2021 Rule not only gave the ‘control’ factor outsized importance, but impermissibly narrowed the concept of control itself by focusing on control over work exercised by the individual worker, as opposed to the right to control by an employer, and defining control primarily with reference to considerations that are often disregarded as irrelevant by courts.”); *see also AFL-CIO; International Brotherhood of Teamsters* (“IBT”).

As discussed earlier, commenters opposed to the NPRM stated that the control factor should be given added weight in the economic reality test (along with the opportunity for profit or loss factor), due to its purported strong correlation with the ultimate outcomes of prior FLSA court decisions. *See, e.g., ABC; CPIE; Flex; FSI.* CWI commented that the 2021 IC Rule's elevation of control served a “definitional purpose,” identifying control as a foundational aspect of the “dependence” in “economic dependence.” *See also Club for Growth* (“[Because control is] virtually synonymous with what it means to be an independent businessperson . . . it makes sense that [it] typically matter[s] more than, for instance, the duration of a business relationship or a worker's level of skill.”). The U.S. Chamber commented that the 2021 IC Rule “rightly elevated the importance of control” because “courts and scholars have found . . . no functional difference between” the economic reality and common law control tests. *See also Club for Growth* (“It would be odd to say that control, which underpins the concept of employment and agency law generally, should have no more weight than, say, whether the worker bought his own boots.”).

As noted in the NPRM, although the 2021 IC Rule's analysis regarding who is an employee and who is an independent contractor was not the same as the common law control analysis, elevating the importance of control in every FLSA employee or independent contractor analysis brought the 2021 Rule closer to

¹³⁵ Unsurprisingly, most of the cases cited in support of the core factor analysis had multiple factors pointing in the same direction, not only control and opportunity for profit or loss. *See, e.g., Hobbs*, 946 F.3d at 830–36 (all factors pointing in same direction); *Verma v. 3001 Castor, Inc.*, 937 F.3d 221, 230–32 (3d Cir. 2019) (control, profit or loss, integral, skill, and investment all pointing in same direction); *Gayle v. Harry's Nurses Registry, Inc.*, 594 F. App'x 714, 717–18 (2d Cir. 2014) (control, profit or loss, and integral all pointing in same direction); *Schultz*, 466 F.3d at 307–09 (control, profit or loss, investment, permanence, integral all pointing in same direction); *Parrish*, 917 F.3d at 379–388 (control, profit or loss, skill, permanence all pointing same direction); *Saleem*, 854 F.3d at 140–48 (control, profit or loss, investment, permanence all pointing same direction); *Mid-Atl. Installation Servs.*, 16 F. App'x at 106–08 (control, profit or loss, investment, skill all pointing same direction); *Off Duty Police*, 915 F.3d at 1059–1062 (profit or loss, investment, permanence, skill, and integral all pointing in same

direction); *McFeeley*, 825 F.3d at 243–44 (control, profit or loss, investment, skill, and integral all pointing in same direction); *Eberline v. Media Net, L.L.C.*, 636 F. App'x 225, 228–29 (5th Cir. 2016) (control, profit or loss, investment, and skill all pointing in same direction).

¹³⁶ *Id.* at 1246–47 (§ 795.105(c), (d)).

the common law control test that courts have rejected when interpreting the Act.¹³⁷ The Supreme Court has repeatedly stated that the Act establishes a broader scope of employment for FLSA purposes than under a common law analysis focused on control.¹³⁸ The Department remains concerned that the outsized role of control under the 2021 IC Rule's analysis was contrary to the Act's text and case law interpreting the Act's definitions of employment and as such disagrees with commenters who suggested that control is essentially synonymous with economic dependence and should be given more weight. The Department, however, also disagrees with NELP that the FLSA's "suffer or permit" standard suggests that control should be afforded less weight than other economic reality factors, as courts have similarly not adopted such an approach.

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

The NPRM stated that the Department remained concerned that the 2021 IC Rule's preclusion of certain facts from being considered under the factors improperly narrowed the economic reality test and did not allow for a full consideration of all facts which might be relevant to determining whether a worker is economically dependent upon an employer for work or in business for themselves. Examples of such narrowing from the 2021 IC Rule include: (1) stating that "control" indicative of an employment relationship must involve an employer's "substantial control over key aspects of the performance of the work," excluding requirements "to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms;"¹³⁹ (2) making the "opportunity for profit or loss" factor indicate independent contractor status based on either the worker's initiative or investment (even if either a lack of initiative or lack of investment suggests that the worker is an employee);¹⁴⁰ (3)

disregarding the employer's investments;¹⁴¹ (4) disregarding the importance or centrality of a worker's work to the employer's business;¹⁴² and (5) downplaying the employer's reserved right or authority to control the worker.¹⁴³ In each of these ways, the 2021 IC Rule limited the scope of facts and considerations comprising the analysis of whether the worker is an employee or independent contractor.

Numerous commenters opined on the 2021 IC Rule's general narrowing of the economic reality test and the extent to which it justifies this rulemaking. For example, IBT stated that "[t]he current rule conflicts with the intended broad definition and coverage of the [FLSA] and adopts an impermissibly narrow test for determining employee status." *See also, e.g.,* AFL-CIO ("Overall, the 2021 IC Rule contracted the coverage of the FLSA, strongly contrary to congressional intent and Supreme Court precedent."); Outten & Golden LLP ("The January 2021 rule restricts FLSA coverage to a smaller subset of workers than those whose work is 'suffer[ed] or permit[ted]' under the statute's expansive coverage."). While some commenters focused on the 2021 IC Rule's elevation of "control" as a core factor, other commenters additionally addressed the rule's alteration of individual economic factors. *See, e.g.,* LCCRUL & WLC (describing the 2021 IC Rule as "elevating facts tending to show independent contractor status, while reducing the probative weight of other factors and downplaying facts tending to show employee status"); NECA & IBEW ("The 2021 IC Rule also narrowed the facts to be considered under the 'non-core' factors."). The AFL-CIO and LCCRUL & WLC both identified two changes to the factors from the 2021 IC

for this factor to weigh towards the individual being an independent contractor.").

¹⁴¹ *Id.*; *see also id.* at 1188 ("[T]he Department reaffirms its position that comparing the individual worker's investment to the potential employer's investment should not be part of the analysis of investment.").

¹⁴² *Id.* at 1247 (§ 795.105(d)(2)(iii)); *see also id.* at 1248 (noting through an example in § 795.115(b)(6)(ii) that "[i]t is not relevant . . . that the writing of articles is an important part of producing newspapers"); *accord id.* at 1195 (responding to commenters regarding the Department's decision to shift to an "integrated unit of production" analysis).

¹⁴³ *See id.* at 1246–47 (advising, in § 795.105(d)(1)(i), that the control factor indicates employment status if a potential employer "exercises substantial control over key aspects of the performance of the work") (emphasis added); *id.* at 1247 (advising, in § 795.110, that "a business' contractual authority to supervise or discipline an individual may be of little relevance if in practice the business never exercises such authority"); *see also id.* at 1203–04 (same in response to commenters).

Rule as particularly problematic: the diminution of an employer's reserved right to control, and the alteration of the "integral part" factor (excluding any consideration of the importance or centrality of the work to the employer).

Other commenters defended the merit of the 2021 IC Rule's five economic reality factors, as discussed in greater detail in section V. As a general matter, these commenters praised the 2021 IC Rule's description of the economic reality factors for reducing overlap and redundancy compared to the approach taken by courts, stating that such changes brought greater clarity to the regulated community. *See, e.g.,* American Hotel & Lodging Association; Center for Workplace Compliance ("CWC"); FSI; MEP; National Retail Federation and the National Council of Chain Restaurants ("NRF & NCCR"). Discussing examples such as the "integrated unit" factor's exclusion of the importance or centrality of the individual's work to the potential employer's business,¹⁴⁴ CWI asserted that the 2021 IC Rule "ensures that each factor is properly tailored to address the ultimate determinant of employee or independent contractor status—economic dependence."

Having considered the comments on this issue, the Department believes that the 2021 IC Rule altered various economic reality factors in ways that improperly narrowed the economic reality test, because such alterations minimized or excluded facts which in many cases are relevant for determining whether a worker is economically dependent upon an employer for work or in business for themselves. The Department remains of the view that the 2021 IC Rule's alteration of several economic reality factors provides another important justification for this rulemaking. Commenter feedback on the proper articulation of each factor in the economic reality test is described in greater detail in section V.

B. Confusion and Uncertainty Introduced by the 2021 IC Rule

The 2021 IC Rule stated that it sought to "significantly clarify to stakeholders how to distinguish between employees and independent contractors under the Act."¹⁴⁵ However, as previously discussed,¹⁴⁶ the 2021 IC Rule introduced a new analysis regarding employee or independent contractor classification that was materially different from the longstanding analysis applied by courts and that included

¹³⁷ The Department previously identified this concern as one of the primary reasons for the Withdrawal Rule. *See* 86 FR 24311.

¹³⁸ *See Darden*, 503 U.S. at 324–26; *Portland Terminal*, 330 U.S. at 150–51; and *Rutherford*, 331 U.S. at 728.

¹³⁹ 86 FR 1246–47 (§ 795.105(d)(1)(i)).

¹⁴⁰ *Id.* at 1247 (§ 795.105(d)(1)(ii)) ("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

¹⁴⁴ *See* 86 FR 1247 (§ 795.105(d)(2)(iii)).

¹⁴⁵ *Id.* at 1168.

¹⁴⁶ *See supra* section III.A.

several new concepts that neither courts nor the Department had previously applied. This final rule (and particularly rescission of the 2021 IC Rule) is needed in part because of the concern that the 2021 IC Rule's new analysis and concepts did not provide the intended clarity.

First, as the Department explained in the NPRM, because the 2021 IC Rule departed from courts' longstanding precedent, it is not clear whether courts would have at some point adopted the Rule's analysis were it not being rescinded as part of this rulemaking. The Department further explained that this question could have taken years of appellate litigation in different federal courts of appeals to sort out, resulting in more uncertainty as to the applicable economic reality test. Businesses operating nationwide would have had to familiarize themselves with multiple standards for determining who is an employee under the FLSA. This litigation and these multiple standards would have likely caused confusion and uncertainty.¹⁴⁷

Second, as the Department noted in the NPRM, the 2021 IC Rule would have introduced several ambiguous terms and concepts into the analysis for determining whether a worker is an employee under the FLSA or an independent contractor. For example, those following the guidance provided in the 2021 IC Rule had to grapple with what it means in practice for two factors to be "core" factors and entitled to greater weight. In addition, they had to determine, in cases where the two core factors point to the same classification, how "substantial" the likelihood is that they point toward the correct classification if the additional factors point toward the other classification. Additionally, as explained in the NPRM, the 2021 IC Rule did not specify whether the "additional factors" that could be considered under that rule had less probative value (or weight) than the three non-"core" factors. Assuming that they did, the 2021 IC Rule would have essentially resulted in a three-tiered multifactor balancing test, with the "core" factors given more weight than enumerated non-"core" factors, and the enumerated non-"core" factors given more weight than the "additional" factors. The 2021 IC Rule would have also improperly collapsed some factors into each other, so that, for example, investment and initiative would have been considered only as a part of the opportunity for profit or loss factor, requiring courts and the regulated community to reconsider how they have

long applied those factors. These new concepts, this new weighing of the factors, and this new treatment of the factors would have likely caused confusion and uncertainty.¹⁴⁸

In sum, the NPRM explained that the 2021 IC Rule would have complicated rather than simplified the analysis for determining whether a worker is an employee or independent contractor under the FLSA, which is further justification for this final rule to rescind and replace the 2021 IC Rule.

As a threshold matter, commenters disagreed over whether courts would adopt and apply the 2021 IC Rule's analysis if it were left in place. Multiple commenters agreed with the Department's concern, as described in the NPRM, that courts might not adopt or apply the 2021 IC Rule, which they criticized as an unlawfully narrow interpretation of the FLSA. *See, e.g.,* LIUNA (discussing "the clear illegality of the 2021 Rule"); NELP (describing the 2021 IC Rule as "a legally incorrect standard" that "merits neither adherence, agency deference, nor smallest persuasive effect"); UBC ("The 2021 Rule is so abundantly flawed that it is ripe for challenge under the Administrative Procedure Act."). The State AGs commented that "it could take years of litigation to determine if and how courts will adopt" the 2021 IC Rule's analysis. *See also* SWACCA ("Judicial disregard of the January 2021 Rule's interpretation of the FLSA would create considerable confusion."). UBC elaborated that uncertainty over judicial adoption of the 2021 IC Rule poses a significant legal risk to businesses, as "any employer relying on the 2021 Rule faces the very real possibility that their presumed compliance with the FLSA would in fact be the opposite." *See also* NECA & IBEW (asserting that the 2021 IC Rule does not provide "certainty and clarity" for businesses because courts will continue applying a broader economic reality test). Notwithstanding their concerns with some aspects of the NPRM's proposed guidance, some independent contractors and business stakeholders shared the Department's concerns over whether courts would actually apply the 2021 IC Rule and the attendant risks that they would not. *See, e.g.,* Ho-Chunk, Inc. ("Ho-Chunk supports the Department's revision of the 2021 IC Rule as we agree that [it] would have a confusing and disruptive effect due to its deviation from established case law.").

Commenters opposed to the NPRM, however, expressed confidence that, if left in place, the 2021 IC Rule would be

adopted by courts over time and promote greater uniformity in the law. *See, e.g.,* IMC Companies ("After decades of uncertainty and imprecise applications of the law, the [2021 IC Rule] was on the cusp of ushering in a new era of streamlined analysis and consistent court decisions across all jurisdictions."); NRF & NCCR ("If left in place, [the 2021 IC Rule] would undoubtedly increase consistency."). Several of these commenters asserted that the Department's concerns about the 2021 IC Rule's reception by courts were speculative, unsupported by evidence, and premature. *See, e.g.,* American Bakers Association; CPIE; Freedom Foundation. A comment from two fellows at the Heritage Foundation asserted that courts would adopt the 2021 IC Rule given the deferential standard of review afforded to agency rules that fill statutory gaps under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984).¹⁴⁹ Other commenters disputed the relevance of the Department's concern over the 2021 IC Rule's adoption by courts, asserting that courts were already applying different versions of the economic reality test and arriving at different outcomes prior to the 2021 IC Rule. *See, e.g.,* ASTA; Independent Women's Forum ("IWF"); *see also* Club for Growth ("Without supporting experience, the critique is no more than the same argument that could be leveled against virtually any regulation."). Finally, many commenters questioned the likelihood that courts would adopt the NPRM's proposed guidance, which they viewed as less consistent with the FLSA and judicial precedent than the 2021 IC Rule. *See, e.g.,* CPIE; FSI; National Association of Manufacturers ("NAM"); Workplace Policy Institute of Littler Mendelson, P.C. ("WPI").

Having considered the comments, the Department continues to have serious concerns about the extent to which federal courts would have adopted the 2021 IC Rule, were it not being rescinded by this rulemaking. The Department is unaware of a single federal court that has applied the 2021 IC Rule's analysis. To the contrary, to the Department's knowledge, only a few court decisions have even considered the 2021 IC Rule and all expressly

¹⁴⁹ A far larger number of commenters—including those both supportive and critical of the NPRM—asserted that any regulatory guidance issued by the Department addressing employee or independent contractor status under the FLSA would be a non-binding "interpretive rule," given the Department's lack of explicit rulemaking authority on the topic. *See, e.g.,* Club for Growth; CWC; NELP; Winebrake & Santillo, LLC; WPI.

¹⁴⁷ *See generally* 87 FR 62229.

¹⁴⁸ *See generally id.*

declined to apply its analysis.¹⁵⁰ Other courts that have considered employee or independent contractor classification under the FLSA have continued applying a broader economic reality test consistent with their own longstanding precedent.¹⁵¹

The Department disagrees with commenter assertions that the 2021 IC Rule's analysis was more likely to be adopted by courts than the analysis proposed in the NPRM. The Department's analysis in this rulemaking is grounded in longstanding case law, while the new standard and new concepts introduced by the 2021 IC Rule were a very significant departure from that longstanding case law. For example, as previously discussed, the 2021 IC Rule created "core" factors that were automatically given greater weight in the analysis, contrary to how every appellate court has described the economic reality test.¹⁵² In line with the case law, this final rule has no "core"

factors. Similarly, while every federal court of appeals that has applied the integral factor in an FLSA independent contractor case has examined whether the worker's work is an "integral part" of the potential employer's business,¹⁵³ no circuit applies the 2021 IC Rule's narrower inquiry into "whether the work is part of an integrated unit of production" as the standard under this factor.¹⁵⁴ And unlike the 2021 IC Rule, all but two circuits share the approach of listing "investment" and "opportunity for profit and loss" as separate economic reality factors, consistent with the Supreme Court's original listing of these factors in *Silk*.¹⁵⁵

Some commenters alleged that certain aspects of the NPRM's proposed guidance were departures from judicial precedent, such as its proposal that "control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control,"¹⁵⁶ and its proposed consideration of investments made by the potential employer as well as the worker.¹⁵⁷ However, as the discussions of the control and investments factors in section V explain, this final rule's guidance on both issues is well-supported by the case law. Moreover, the Department has made meaningful changes in this final rule to aspects of its proposed guidance in response to comments, including the treatment of control exercised to comply with legal obligations and the consideration of investments made by the potential employer.¹⁵⁸ The Department believes that such changes further align this final rule's guidance with the analysis presently applied by courts, providing greater certainty for interested parties.

Apart from the 2021 IC Rule's reception by courts, commenters also disagreed over whether the 2021 IC Rule's guidance brought clarity or confusion as a standalone matter. Some commenters asserted that the novelty of the 2021 IC Rule's analysis, for example, would have created confusion as compared to the longstanding analysis applied by courts. *See, e.g.,* NELP ("By departing from decades of federal case law on the scope of the Act's

protections, and by downplaying relevant facts of an employment relationship in the analysis, the 2021 IC Rule . . . creates more confusion for employers and workers alike."); SWACCA (asserting that the ability to "draw[] on 70 years of existing interpretations from the courts and Department of Labor guidance" under the NPRM's guidance will "save time and resources for all stakeholders compared to the January 2021 Rule's novel, untested weighted framework.").

In contrast, other commenters asserted that rescission and replacement of the 2021 IC Rule would reduce certainty and clarity. *See, e.g.,* Americans for Prosperity Foundation ("AFPF"); Coalition of Business Stakeholders; NAM; Republican Members of Congress; SHRM; U.S. Chamber. Numerous commenters that preferred the 2021 IC Rule identified its establishment of core factors as that rule's most clarifying feature. *See, e.g.,* Competitive Enterprise Institute ("CEI"); CWC; IWF; Landmark Legal Foundation; National Association of Women Business Owners ("NAWBO"); Raymond James Financial, Inc. ("Raymond James"). Some commenters additionally supported the 2021 IC Rule's elimination of purported redundant or overlapping considerations in various economic reality factors. *See, e.g.,* FSI (criticizing the NPRM's proposed separation of the "investment" and "opportunity for profit or loss" factors as "yet another way in which the [NPRM] . . . undo[es] the 2021 Rule's clarifying efforts to articulate an appropriately weighted test with less overlapping redundancy"); MEP.

Having reviewed the comments, the Department continues to believe that the 2021 IC Rule introduced uncertainty regarding the applicable legal standard for determining whether a worker is an employee or an independent contractor under the FLSA, contrary to its stated intent. Prior to the 2021 IC Rule, there was certainty as to the applicable legal standard for determining whether a worker was an employee or independent contractor under the FLSA because federal courts of appeals applied a totality-of-the-circumstances, economic reality test that did not elevate any factors above the others. Despite slight variation in the exact number and phrasing of specific economic reality factors, courts and the Department generally examined the same economic reality factors. The 2021 IC Rule, however, injected uncertainty into this area of the law by putting forth new guidance that was at odds (for all of the reasons discussed herein) with

¹⁵⁰ *See Wallen v. TendoNova Corp.*, No. 20-cv-790-SE, 2022 WL 17128983, at *4 (D.N.H. Nov. 22, 2022) (noting that the 2021 IC Rule "is not controlling . . . and may not be valid"); *Harris v. Diamond Dolls of Nevada, LLC*, No. 3:19-cv-00598-RJC-CBC, 2022 WL 4125474, at *2 (D. Nev. July 26, 2022) (denying defendants' motion to reconsider the court's earlier ruling that plaintiffs were FLSA-covered employees in part because the 2021 IC Rule is "not binding"); *Badillo-Rubio v. RF Constr., LLC*, No. 18-CV-1092, 2022 WL 821421, at *13 (M.D. La. Mar. 17, 2022) (rejecting plaintiff's argument that the court should apply the 2021 IC Rule's "integrated production" factor as "unnecessary" in determining that plaintiff was an employee). The *Wallen* decision is notable because, as the court explained, the First Circuit has neither adopted nor rejected a particular test, and thus the court was not bound by any prior circuit-level precedent. Still, the *Wallen* court declined to apply the 2021 IC Rule and applied "the standard six-factor test." 2022 WL 17128983, at *3-4.

¹⁵¹ *See, e.g., Acevedo v. McCalla*, No. MJM-22-1157, 2023 WL 1070436, at *3-5 (D. Md. Jan. 27, 2023) (relying on the Fourth Circuit's economic reality test to find that the worker failed to state a claim for relief under the FLSA without reference to 2021 IC Rule); *Brunet v. GB Premium OCTG Servs. LLC*, No. 4:21-CV-1600, 2022 WL 17730576, at *5-10 (S.D. Tex. Dec. 1, 2022) (applying the Fifth Circuit's economic reality test without reference to 2021 IC Rule); *report and recommendation adopted*, 2023 WL 2186441 (Feb. 23, 2023); *Ajquiixtos v. Rice & Noodles, Inc.*, No. 4:21-CV-01546, 2022 WL 7055396, at *2-4 (S.D. Tex. Oct. 12, 2022) (relying on the Fifth Circuit's economic reality test and not referencing the 2021 IC Rule to conclude that a worker was an employee and not an independent contractor); *Black v. 7714 Ent., Corp.*, No. 21-CV-4829, 2022 WL 4229260, at *6-8 (E.D.N.Y. July 29, 2022); *report and recommendation adopted*, 2022 WL 3643969 (E.D.N.Y. Aug. 24, 2022) (relying on the Second Circuit's economic reality test to conclude that a worker is an employee and not an independent contractor without reference to the 2021 IC Rule); *Hill v. Pepperidge Farm, Inc.*, No. 3:22-CV-97-HEH, 2022 WL 3371321, at *2-5 (E.D. Va. Aug. 16, 2022) (relying on the Fourth Circuit's economic reality test to find that the worker has stated a claim for relief under the FLSA without reference to 2021 IC Rule).

¹⁵² *See supra* section III.A.1.

¹⁵³ *See supra* n.52.

¹⁵⁴ *See infra*, section V.C.5.

¹⁵⁵ 331 U.S. at 716. As discussed earlier, the Second and D.C. Circuit Courts of Appeals describe "investment" and "opportunity for profit or loss" as a single factor in the economic reality test. *See supra* n.58.

¹⁵⁶ 87 FR 62275 (proposed § 795.110(b)(4)).

¹⁵⁷ 87 FR 62275 (proposed § 795.110(b)(2)).

¹⁵⁸ *See infra*, section V.C.

the substantive standard applied by courts. As a result of the 2021 IC Rule, the regulated community was confronted with inconsistent standards for interested parties to apply to determine a worker's status—the test from the 2021 IC Rule and the totality-of-the-circumstances test in federal appellate case law.¹⁵⁹ Leaving the 2021 IC Rule in place would have risked greater confusion regarding its relation to well-settled circuit precedent. Thus, the 2021 IC Rule's new standard introduced uncertainty that did not exist before.¹⁶⁰

Additionally, the Department continues to believe that the aspects of the 2021 IC Rule's analysis introduced confusion, making that rule's guidance vulnerable to misapplication. Confusion about how to apply the 2021 IC Rule was evident in many of the comments submitted in opposition to the Department's proposal to rescind and replace that rule. For example, several commenters inaccurately described the 2021 IC Rule as establishing a “two-factor test,” *see, e.g.*, CEI; National Demolition Association (“NDA”), while others mistakenly assumed that non-core factors were only considered when the two core factors pointed to opposite classification outcomes. *See, e.g.*, Information Technology & Innovation Foundation; News/Media Alliance (“N/MA”); Professional Golfers' Association of America (“PGA”).¹⁶¹ Some commenters appeared to conflate the reduced importance of non-core factors under the 2021 IC Rule's analysis with a reduced need to consider such factors at all. *See, e.g.*, National Federation of Independent Businesses (“NFIB”); SHRM.¹⁶² Additionally, some

commenters viewed the 2021 IC Rule's economic reality test, in its totality, as essentially the same as a common law control test.¹⁶³ *See* The National Council of Agricultural Employers (asserting that common law definitions of independent contractor status “are consistent with the 2021 IC Rule”); U.S. Chamber (asserting that “despite the ostensible variances between the economic realities and common law control tests, ‘there is no functional difference between’ these tests”).

Commenter confusion about the 2021 IC Rule is unsurprising because that rule set forth a novel analysis which has not been applied by any court. The confusion evident in the comments received reinforces the Department's assessment, as explained in the NPRM, that the 2021 IC Rule could have resulted in misapplication of the economic reality test and may have conveyed to employers that more workers could be classified as independent contractors than prior to the 2021 IC Rule.

C. Risks to Workers From the 2021 IC Rule

In the NPRM, the Department explained that to the extent the 2021 IC Rule's guidance resulted in the misclassification of employees as independent contractors, the resulting denial of FLSA protections could harm the affected workers. These protections include being paid at least the federal minimum wage for all hours worked, overtime compensation for hours worked over 40 in a workweek, and protection against retaliation for complaining about, for example, a violation of the FLSA. The Department further explained in the NPRM that the 2021 IC Rule did not fully consider these potential consequences for workers. The NPRM noted that this result could have a disproportionate impact on women and people of color, to the extent such workers are overrepresented in low-wage positions where misclassification is more likely.¹⁶⁴ The NPRM further noted that women and people of color experience multiple types of economic inequities in the labor force, including gender and

racial wage gaps and occupational segregation, and that the misclassification of these workers as independent contractors deprives them of wage and hour protections that could help alleviate some of this inequality.¹⁶⁵

Many commenters, including worker advocacy groups, labor unions, and other stakeholders, shared views about the 2021 IC Rule's effect on employees vulnerable to misclassification. The Department also received significant feedback regarding the potential effects of this rulemaking on independent contractors, as well as from commenters who did not agree that the 2021 IC Rule would or could increase the prevalence of misclassification.

Many commenters agreed with the Department's assessment that the misclassification of employees as independent contractors remains a serious problem for workers, businesses, and the broader economy. Several commenters referenced studies or data estimating a high prevalence of misclassification in the economy, in addition to those mentioned in the NPRM's regulatory impact analysis.¹⁶⁶ *See, e.g.*, NABTU (citing multiple studies estimating the misclassification of construction workers in various states); State AGs (discussing a June 2022 report estimating that “at least 10 percent of New York State's workers are misclassified as independent contractors” and a December 2022 report estimating that “approximately 259,000 workers in Pennsylvania are wrongly classified as independent contractors”). CLASP & GFI asserted that the misclassification of employees as independent contractors is “occurring with increased frequency as workplaces ‘fissure,’” and “firms . . . outsource bigger and bigger portions of their workforces to other entities and to workers themselves.” Similarly, the UFCW asserted that misclassification is a “pervasive and growing problem,” citing one report showing that in Washington state, misclassification increased from 5 percent of employers misclassifying workers in 2008 to 14 percent of employers misclassifying workers in 2017, with construction workers, clerical workers, and hotel and restaurant workers the most likely to be misclassified.” Several commenters emphasized the prevalence of misclassification in specific industries. *See, e.g.*, American Federation of State,

¹⁵⁹ To the extent that there was any uncertainty around outcomes when applying federal appellate case law beyond what would be expected from any fact-specific test, the standard that courts and the Department would apply prior to the 2021 IC Rule was known. And with this rulemaking, the Department hopes to decrease any uncertainty around outcomes by providing detailed guidance about the application of each factor that is consistent with the case law, as opposed to the new concepts that the 2021 IC Rule introduced.

¹⁶⁰ The Department acknowledges that the 2021 IC Rule includes several important principles from the case law, such as: economic dependence is the ultimate inquiry, the list of economic reality factors is not exhaustive, and no single factor is determinative. However, as explained herein, the 2021 IC Rule was, on balance, a departure from the case law to an extent that it introduced uncertainty.

¹⁶¹ The 2021 IC Rule explained that it rejected commenter requests to “state that if the two core factors point towards the same classification, there is no need to consider any other factors” because “in some circumstances, the core factors could be outweighed by particularly probative facts related to other factors.” 86 FR 1202.

¹⁶² The 2021 IC Rule explained that “there may be circumstances where one or more of the non-core

factors, upon consideration, has little or no probative value.” 86 FR 1202 (emphasis added).

¹⁶³ *Cf.* 86 FR 1201 (“[T]he rule's standard for employment remains broader than the common law.”); *see also id.* at 1239 (rejecting the adoption of a common law control test in the analysis of regulatory alternatives).

¹⁶⁴ *See* 87 FR 62230 (describing commenter feedback from the Withdrawal Rule asserting that “misclassification is rampant in low-wage, labor-intensive industries where women and people of color, including Black, Latinx, and AAPI workers, are overrepresented”).

¹⁶⁵ *Id.*

¹⁶⁶ *See* 87 FR 62266 (citing a 2020 study from NELP estimating that “10 to 30 percent of employers (or more) misclassify their employees as independent contractors”).

County and Municipal Employees (custodial work); Farmworker Justice (agriculture); IntelyCare Inc. (nursing); National Domestic Workers Alliance (“NDWA”) (domestic and home care); REAL Women in Trucking (trucking); Service Employees International Union (janitorial and gig work); SMACNA (construction).

Many commenters discussed how the misclassification of employees as independent contractors deprives workers of wages. SWACCA, for example, commented that “the estimated 20 percent of construction workers who should be treated as employees (but are not) lose close to \$1 billion in wages annually.” Commenters pointed out that misclassification undercuts employers that comply with the law and causes a “race to the bottom” in labor standards. *See, e.g.*, AARP; Indiana, Illinois, Iowa Foundation for Fair Contracting; SWACCA (estimating that “construction companies that treat their workforce as independent contractors save at least 20 to 30 percent on labor costs”). Gale Healthcare Solutions stated that “[t]emporary staffing platform companies that hire nursing staff as W2 employees lose talent to companies that use a 1099 model, as 1099 agencies promote wages that appear higher because they do not provide traditional protections of employment or account for withholding taxes and additional expenses required by the W–2 model.” Alto Experience Inc., a ridesharing company that classifies its drivers as employees, asserted that the misclassification of employees as independent contractors constitutes an “unfair method of competition in commerce” that the FLSA was passed to prevent.

Beyond wage effects, commenters identified and discussed many other consequences of worker misclassification. For example, the NWLC asserted “by strengthening the employment test to reduce misclassification, the Department can ensure that more nursing mothers will be able to hold their employers accountable for providing appropriate facilities and adequate break time.” *See also* A Better Balance (“[W]e are pleased that this rule will help to ensure that workers are able to access their rights under the Family and Medical Leave Act and the Break Time for Nursing Mothers law.”). As discussed more fully in section VII, commenters also raised other negative consequences of misclassification for workers beyond those directly related to the FLSA, such as: decreased access to employment benefits such as health insurance or

retirement benefits, inability to access paid sick leave, unemployment insurance, and worker’s compensation, a lack of ability to take collective action to improve workplace conditions, and a lack of anti-discrimination protections under various civil rights laws. *See, e.g.*, Smith Summerset & Associates LLC; UFCW.

Several commenters emphasized the uniquely harmful risks and consequences of misclassification for workers in certain demographic groups. *See, e.g.*, AARP (senior workers); California Immigrant Policy Center (immigrant workers); Equal Justice Center (low-income workers); LCCRUL & WLC (workers of color); NWLC (women workers). In a joint comment, the Action Center on Race and the Economy, Color of Change, Liberation in a Generation, Unemployed Workers United, MediaJustice, the National Black Worker Center, Muslims for Just Futures, Raise Up South Florida, Human Impact Partners, ROC United, Interfaith Center on Corporate Responsibility, HEAL Food Alliance, and the Public Accountability Initiative/LittleSis.org (“ACRE et al.”) pointed to the overrepresentation of workers of color in low-wage, labor-intensive industries where misclassification is pervasive and asserted that they “view misclassification as a critical racial justice issue that the DOL must help address.”

Many commenters agreed with the Department’s assessment that the 2021 IC Rule has increased the risk of misclassification. For example, SWACCA asserted that challenges in enforcing misclassification in the construction industry “would be compounded if enforcement officials had to pursue bad actors under the January 2021 Rule’s novel interpretation of the law that could require protracted litigation to clarify and would permit more contractors to argue that their classification of workers as independent contractors is permissible, or at least defensible, under the FLSA.” The International Association of Machinists and Aerospace Workers asserted that the 2021 IC Rule “creates perverse incentives for companies to misclassify workers,” because “[t]he more easily a company can misclassify its workforce, the more incentive for other companies to do the same, creating a ‘race to the bottom’ in employment practices and social standards to the detriment of workers.” CLASP & GFI and Farmworker Justice both commented that the 2021 IC Rule’s elevation of the “control” and “opportunity for profit or loss” factors might exacerbate misclassification among farmworkers,

whose employment status is particularly dependent on the consideration of factors other than the 2021 IC Rule’s “core” factors.

Commenters opposed to this rulemaking generally did not dispute the occurrence or importance of employee misclassification, at least in certain industries. For example, a lawyer representing employers acknowledged that “independent contractor status can be abused.” *See also, e.g.*, HR Policy Association (“The Association does not question the fact that worker misclassification does occur and that individuals may be deprived of rights and benefits crucial for their livelihood.”); U.S. Black Chambers, Inc. (“[W]e agree that worker misclassification is a pressing issue to be solved at the Federal level[.]”). Some commenters, however, alleged that rescinding and replacing the 2021 IC Rule would be an overbroad solution for a problem that could be addressed with industry-specific measures. *See* H.R. Policy Association; IMC Companies, LLC (trucking company) (“What we do ask is that the WHD and legislators across our country recognize that targeted regulation of these [app-based technology] companies is the answer to this issue.”). Other commenters asserted that, in the NPRM, the Department failed to explain how the 2021 IC Rule has increased the risk of worker misclassification or otherwise hampered efforts to reduce misclassification. *See, e.g.*, IWF (“The Department has provided no evidence that these drastic changes are necessary to prevent misclassification, or even that widespread misclassification actually occurred under the 2021 Rule.”); NAWBO. Some commenters referenced Departmental press releases published after the March 2022 *CWI v. Walsh* decision (which ruled that the 2021 IC Rule had taken effect in March 2021) as evidence that the Department is successfully using the 2021 IC Rule to combat misclassification. *See, e.g.*, Coalition of Business Stakeholders (“DOL has repeatedly boasted about the cases it has brought showing improper classification of independent contractors and the amounts of back pay remedies it has secured.”); *see also* Flex; U.S. Chamber.

Having considered the comments, the Department remains of the view that the misclassification of employees as independent contractors is a serious problem affecting workers who do not receive proper wages and businesses that have to compete in the economy against businesses that unlawfully misclassify their workers. As explained more fully in section III.B., the 2021 IC

Rule increased the risk of worker misclassification by adding considerable confusion and uncertainty over the proper analysis for distinguishing between FLSA-covered employees and independent contractors. By elevating certain factors, devaluing other factors, and precluding the consideration of certain relevant facts, the novel—and unprecedented—analysis in the 2021 IC Rule has improperly narrowed the focus of the inquiry in a way that may have led employers to believe the test no longer includes as many considerations; the comments received evidenced such misunderstanding. If widespread misperceptions about the 2021 IC Rule articulated by some of its supporters in the comments are any indication, such confusion and misapplication of that rule could deprive many workers of protections they are entitled to under the FLSA.

The Department's 2022 press releases addressing misclassification enforcement referenced by some commenters primarily involved investigations by the Department that were initiated before the 2021 IC Rule was published and/or covered a period of investigation prior to March 8, 2021. In any event, the Department's ability to pursue some enforcement actions involving misclassification while applying the 2021 IC Rule's guidance is not a persuasive reason to retain the 2021 IC Rule. The Department is not promulgating this rule because the 2021 IC Rule renders the Department powerless to enforce misclassification. Rather, the 2021 IC Rule's guidance injected a new framework for analyzing whether workers are employees or independent contractors under the FLSA that is inconsistent with decades of case law interpreting the Act. As explained earlier, the Department is further concerned that widespread stakeholder confusion over the 2021 IC Rule and its guidance regarding how its factors should be applied (as discussed in section II.B.) may be causing some misclassification that would not occur in the absence of the rule. For these reasons, the Department believes that rescinding the 2021 IC Rule will likely both reduce misclassification and restore the Department's ability to consider all relevant facts under a totality-of-the-circumstances economic reality test that does not predetermine the weight of certain factors, consistent with the text of the FLSA and decades of judicial precedent.

Other commenters expressed concern that rescinding the 2021 IC Rule will result in the widespread reclassification of workers who should be considered independent contractors. *See* Cambridge

Investment Research, Inc. (“[T]he practical result of the [NPRM] . . . will be that many workers—including workers who want to be independent contractors—will be reclassified as employees under the FLSA.”); SBA Office of Advocacy (“Small businesses and independent contractors have told Advocacy that this rule may be disruptive and detrimental to the millions of businesses in industries that rely upon the independent contractor model.”). This concern was also expressed by numerous self-identified independent contractors, who feared reclassification or lost work opportunities as an unintended consequence of the rulemaking.

Some commenters contended that the NPRM's guidance was inappropriately broad and would encompass as employees individuals who they assert are appropriately classified as independent contractors. *See, e.g.,* IBA (asserting that the NPRM would improperly “broaden the test and thereby expand the meaning of ‘employee’ to encompass individuals who under current law would qualify independent contractors”); National Association of Insurance and Financial Advisors (“NAIFA”) (“NAIFA believes that [the NPRM] wrongly construes the scope of FLSA coverage and would thus misclassify many independent insurance agents and brokers as employees.”). Other commenters asserted that ambiguity inherent in reverting to a “totality-of-the-circumstances” analysis would deter businesses from engaging with independent contractors. *See, e.g.,* Beacon Center of Tennessee (asserting that the NPRM would “rob[] businesses of the regulatory certainty needed to effectively operate and make personnel decisions, which is likely to have a chilling effect on hiring new employees or contractors”); NFIB (“Companies . . . will be less likely to engage a contractor or consultant if there’s uncertainty over a worker’s status since a finding of misclassification can result in ruinous penalties”); Opportunity Solutions Project (“If implemented, the proposal would make it more difficult for entrepreneurs and independent workers to find companies willing to take on the risk of becoming their client.”).

Other commenters disagreed that the Department's proposal would result in the reclassification of appropriately classified independent contractors. For example, an individual commenter wrote that “[i]mproving classification rules and returning to a back-to-basics approach used for over fifty years does not mean independent contractors will automatically be classified as

employees.” Noting that “[t]he Proposed Rule is a restatement of decades of court precedents and WHD guidance,” UBC remarked that “[a]ny employer who has been correctly classifying its independent contractors has no worry that the Proposed Rule will result in liability under the FLSA.” Multiple business stakeholders and self-identified independent contractors commented that they did not expect such reclassification for workers in their industry. For example, LPL Financial stated that it believes that the Department's proposal “will not result in the reclassification of independent financial professionals as employees” and it “commend[ed] the DOL for undertaking the rulemaking process and proposing a rule that recognizes that entrepreneurs who establish and build small businesses utilizing their managerial skills and professional expertise can operate in an independent contractor model to create multigenerational financial advising practices.” Over 1,000 financial advisors affiliated with Ameriprise and LPL Financial submitted separate campaign comments in support of the NPRM, asserting that “[the] proposal will allow me to continue to choose to be an independent contractor.” *See also* International Dale Carnegie Franchise Association (“The IDCFA is confident that independent instructors would not be reclassified as employees under the Proposed IC Rule.”).

Having considered the comments, the Department continues to believe that this rulemaking will not jeopardize legitimate independent contracting arrangements. Fears to the contrary are not realistic given that the Department is adopting guidance derived from the same analysis that courts have applied for decades and have been continuing to apply since the 2021 IC Rule took effect. There is no evidence that the status quo prior to the 2021 IC Rule was hindering the use of independent contractors.¹⁶⁷

Because the FLSA's economic reality test is broad and fact-specific, the Department cannot categorically declare that individual workers in particular occupations or industries will always qualify as independent contractors applying the guidance provided in this rule. However, keeping in mind that the Department is adopting guidance in this

¹⁶⁷ The 2021 IC Rule asserted that “legal uncertainty arising from . . . shortcomings of the multifactor economic reality test may deter innovative, flexible work arrangements,” but declined to provide any evidence in response to comments questioning that claim, explaining it was “unclear what empirical data could measure innovation that is not occurring due to legal uncertainty.” 86 FR 1175.

rule that is essentially identical to the standard it applied for decades prior to the 2021 IC Rule, the Department agrees with those commenters who stated that workers properly classified as independent contractors prior to the 2021 IC Rule will likely continue to be properly classified as independent contractors under this rule and disagrees with other commenter assertions that this rule will “cause workers who have long been properly classified as independent contractors . . . to improperly lose their independent status.” ABC; *see also, e.g.*, Finseca (expressing concern that the NPRM “could materially disrupt longstanding, well-understood, and properly classified independent contractor relationships”); National Association of Chemical Distributors (asserting that the NPRM would “disrupt longstanding business models”). Rather, because this final rule is aligned with longstanding case law, the Department does not anticipate that independent contractors (who sometimes also self-identify as freelancers or small/micro business owners) who are correctly classified as independent contractors under current circuit case law would be reclassified applying the guidance provided in this rule.

In sum, the Department’s rulemaking to rescind and replace the 2021 IC Rule is motivated, in part, by an assessment that the guidance provided here will likely benefit workers as a whole, including those workers at risk of being misclassified as independent contractors as well as those who are appropriately classified as independent contractors.

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

Until the 2021 IC Rule, the Department had not previously promulgated generally applicable regulations on independent contractor classification in the FLSA’s 83 years of existence. In light of the consistency of the economic reality test as adopted by the circuits, the Department had instead relied on subregulatory documents to provide generally applicable guidance for the Department and the regulated community on determining employee or independent contractor status under the FLSA. In the NPRM, the Department explained that, although it believes that its earlier subregulatory guidance provided appropriate guidance to the regulated community, the Department upon further consideration recognized that publishing regulatory guidance would be beneficial for stakeholders, particularly because the Department had

published a regulation in 2021. The NPRM elaborated that detailed federal regulations would be easier to locate and read for interested stakeholders than applicable circuit case law, potentially helping workers and businesses better understand the Department’s interpretation of their rights and responsibilities under the law. Additionally, the NPRM explained that adopting detailed regulations that are aligned with existing precedent could better protect workers, who were placed at a greater risk of misclassification as a consequence of the 2021 IC Rule.¹⁶⁸

Several commenters agreed with the Department’s reasons for replacing the 2021 IC Rule with alternative regulatory guidance. These commenters generally asserted that detailed regulatory guidance brings added clarity to interested parties. *See, e.g.*, NELP (“[T]o address confusion that can stem from a multifactor balancing test, the commentary to the proposed rule clarifies how each of the factors (described in more detail below) informs the economic dependence analysis, *i.e.*, *how and why* each factor helps to answer the question of whether a worker is truly in business for themselves.”); State AGs (“Subregulatory guidance is not as robust as promulgating a new rule.”); Winebrake & Santillo, LLC (supporting the NPRM for “clarifying topics which had not been fully explored by all courts”). LIUNA asserted that the regulatory guidance’s “expert synthesis of complicated precedents will . . . clarify the FLSA and promote its uniform application.”

Other commenters commended the accessibility of generally applicable regulatory guidance. *See* UBC (“In one place, without searching through WHD guidance and court cases, employers and workers can go to the rule for information that will assist in correct classification. This need for rulemaking, albeit for slightly different reasons, is where the interest of the proponents of the 2021 Rule and drafters of the NPRM are aligned.”). Some business stakeholders also agreed with the potential benefits of regulatory guidance. *See, e.g.*, Consumer Brands Association (“The CPG industry believes strongly in the potential opportunities afforded through clear rulemaking”); CWC (“We . . . concur with DOL’s assessment that a clear explanation of the test in easily accessible regulatory text is valuable.”).

Some labor unions and worker advocacy organizations opined that the

Department needs to promulgate regulatory guidance to counteract confusion introduced by the 2021 IC Rule. *See* State AGs (asserting that “a new rule is necessary because the 2021 Rule was such a drastic departure from the status quo”); UBC (“The 2021 Rule’s confusion and encouragement of misclassification . . . creates the necessity for the Proposed Rule with its adherence to the intent of Congress and judicial precedents.”); *see also* NECA & IBEW.

Several commenters, however, disagreed that the Department should issue regulations addressing independent contractor status under the FLSA. Some of these commenters asserted that the Department has no legal authority or expertise to do so. *See, e.g.*, ArcBest (“Congress has not delegated authority to DOL to define ‘independent contractor’—a definition with far-reaching economic and political consequences.”); Boulette Golden & Marin L.L.P. (“[W]hile the DOL may have authority to issue guidance on its view of the term ‘employee,’ the DOL does not have any authority to offer guidance on the meaning of the term ‘independent contractor.’”); IBA (“The DOL has no special expertise in interpreting Supreme Court precedent.”). Insight Association and several individual commenters asserted that Congress should address the distinction between FLSA-covered employees and independent contractors rather than the Department. Finally, CPIE asserted that “this area of the law is one that is not appropriate for general regulatory guidance,” urging the Department to “continue its policy of issuing subregulatory guidance on the application of the economic reality test to specific facts” if it rescinded the 2021 IC Rule.

Having considered the comments, the Department continues to believe not only in the benefits of adopting alternative guidance on the distinction between FLSA-covered employees and independent contractors, but also in the value of providing such guidance in easily-accessible regulatory text. Although the Department previously issued regulatory guidance on this issue specific to the sharecropping and lumber industries in parts 780 and 788,¹⁶⁹ the Department believes that regulatory text that can be applied to workers in any industry is beneficial to the regulated community.

Further, as noted in the 2021 IC Rule, the Department “without question has relevant expertise in the area of what

¹⁶⁸ *See generally* 87 FR 62230.

¹⁶⁹ *See supra*, nn.63 and accompanying text.

constitutes an employment relationship under the FLSA, given its responsibility for administering and enforcing the Act and its decades of experience doing so.”¹⁷⁰ As also noted in the 2021 IC Rule, the Department’s “authority to interpret the Act comes with its authority to administer and enforce the Act.”¹⁷¹ The Department issues interpretations on a range of issues under the Act, and addressing which workers are employees protected by the Act or independent contractors not subject to the Act is one such issue. The Department’s attention to relevant judicial precedent interpreting the Act is key to providing such guidance.

The Department acknowledges that some commenters would prefer Congress to address this issue through legislation and to adopt one uniform standard that would apply across federal laws. *See, e.g.,* ASTA; CPIO. However, in the absence of congressional legislation to amend the FLSA, the Department believes that this final rule will provide detailed guidance on employee or independent contractor status that is not only consistent with the FLSA and the decades of case law interpreting it, but clearer and more robust than the Department’s earlier subregulatory guidance on the topic.

E. Timing of the Rulemaking

Many of the commenters opposed to this rulemaking asserted that the Department’s rulemaking to rescind and replace the 2021 IC Rule is premature or otherwise ill-timed. *See, e.g.,* CPIO (“[CPIO] urges DOL to defer action until courts have had an opportunity to apply the 2021 IC Rule.”); CWI (“The most obvious alternative action ‘within the ambit of the existing policy’ is simply to allow the 2021 IC Rule to go into effect and study its results, rather than assume unproven consequences.”); MEP (“MEP strongly believes WHD should allow the courts to weigh in on the current rule before determining the analysis does not work and replacing it with a standard that will clearly create substantial confusion and uncertainty for the regulated community.”).

Some commenters noted the added costs and uncertainty attributable to the Department promulgating the 2021 IC Rule and subsequently proposing to rescind and replace it. *See* American Association of Advertising Agencies (“4A’s”) (“The regulatory whiplash here is real, and costly, and should not be taken so lightly by DOL.”); *see also* App Association; N/MA; Vegas Chamber.

Other commenters cited to various economic conditions that caution (in their view) against any rulemaking that would deter independent contracting. *See, e.g.,* NRF & NCCR (“As the American economy and the modern workplace continue to evolve in the wake of the COVID–19 pandemic, it is imperative that policymakers account for the wide range of innovative and imaginative methods by which individuals engage in the marketplace and feed their families.”); Scopelitis, Garvin, Light, Hanson & Feary (“Scopelitis”) (“The Proposed Rule would add pressure to already stressed supply chains.”).

The Department disagrees with the various timing arguments advanced by commenters urging the Department to delay or withdraw this rulemaking, though it is mindful of the impact that changes in the Department’s guidance may end up having on the regulated community. As the Department has explained, there are compelling reasons to rescind and replace the 2021 IC Rule, including its significant departure from judicial precedent, the confusion it has introduced for affected stakeholders, and the consequences for workers and competing businesses attributable to an increased risk of misclassification. Allowing the 2021 IC Rule to stay in effect for a longer period would not ameliorate any of those concerns. To the contrary, as NELP pointed out, “over time . . . negative consequences . . . will be exacerbated.” The fact that no court has applied the 2021 IC Rule in the year since the district court’s decision in *CWI v. Walsh* is not a justification for its retention.

The Department further finds arguments about stakeholder reliance on the 2021 IC Rule to be unpersuasive. Before the 2021 IC Rule’s effective date, the Department issued rules intending to delay the effective date of and then withdraw the 2021 IC Rule, while also identifying concerns with the 2021 IC Rule. The Department then announced on June 3, 2022 that it was initiating a new rulemaking on employee and independent contractor classification under the FLSA.¹⁷² Thus, the regulated community has been on notice since very soon after the 2021 IC Rule’s publication as to the Department’s concerns regarding the 2021 IC Rule, including the way in which it upset decades of precedent the regulated

community and workers had previously been relying on to distinguish between employees and independent contractors.

Finally, the Department disagrees with commenters that it is obligated to wait for more time to gather data before rescinding the 2021 IC Rule and promulgating a new rule.¹⁷³ As discussed in the NPRM, the Department considered waiting for a longer period to monitor the effects of the 2021 IC Rule but believed that the potential confusion and disruption from the 2021 IC Rule outweighed any potential benefit from this monitoring.¹⁷⁴ In making the decision to proceed with this final rule, the Department drew upon its extensive experience in interpreting and enforcing the FLSA and its consideration of the comments received.¹⁷⁵ The Department believes that this rule, which provides guidance that is consistent with longstanding precedent, provides more consistency for stakeholders than the 2021 IC Rule.

IV. Alternatives Considered

In the NPRM, the Department noted that it had considered four alternatives to what it proposed.¹⁷⁶ The Department further noted that it had previously considered and rejected two of those alternatives—issuing guidance adopting either the common law test or the ABC test for determining FLSA employee or independent contractor status—in the 2021 IC Rule.¹⁷⁷

Regarding adoption of the common law test, as the Department explained in the NPRM, that test is contrary to the “suffer or permit” language in section 3(g) of the FLSA, which the Supreme Court has interpreted as requiring a broader definition of employment than under the common law. Accordingly, the Department stated that the common law test is inconsistent with the FLSA because that test “is not sufficiently protective in assessing worker classification under the FLSA.” Regarding adoption of an ABC test, as the Department explained, the Supreme Court has held that the economic reality test is the applicable standard for determining workers’ classification

¹⁷³ “[A]n agency need not—indeed cannot—base its every action upon empirical data; depending upon the nature of the problem, an agency may be entitled to conduct . . . a general analysis based on informed conjecture.” *Chamber of Com. of U.S. v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005) (internal quotation and citation omitted).

¹⁷⁴ *See* 87 FR 62219.

¹⁷⁵ An agency’s reliance on “its own and its staff’s experience, the many comments received, and other evidence, in addition to [] limited and conflicting empirical evidence” meets APA requirements. *Chamber of Com.*, 412 F.3d at 142.

¹⁷⁶ 87 FR 62230.

¹⁷⁷ *Id.* (citing 86 FR 1238).

¹⁷⁰ 86 FR 1176.

¹⁷¹ *Id.*

¹⁷² *See* Jessica Looman, “Misclassification of Employees as Independent Contractors Under the Fair Labor Standards Act,” U.S. Department of Labor Blog (June 3, 2022), <https://blog.dol.gov/2022/06/03/misclassification-of-employees-as-independent-contractors-under-the-fair-labor-standards-act>.

under the FLSA as an employee or independent contractor, and “the existence of employment relationships under the FLSA ‘does not depend on such isolated factors’ as the three independently determinative factors in the ABC test, ‘but rather upon the circumstances of the whole activity.’” Because an ABC test is, in the Department’s view, inconsistent with Supreme Court precedent interpreting the FLSA, the Department explained that “it could only implement an ABC test if the Supreme Court revisits its precedent or if Congress passes legislation that alters the applicable analysis under the FLSA.”¹⁷⁸

As a third alternative, the Department considered proposing to only partially rescind the 2021 IC Rule and instead retain some aspects of it. In discussing this alternative, the Department listed numerous instances in which its NPRM was consistent or in agreement with the 2021 IC Rule. The Department explained that it considered “simply removing the problematic ‘core factors’ analysis from the 2021 IC Rule and retaining the five factors as described in th[at] rule.” However, the Department rejected this approach because numerous ways in which that rule described the factors were in tension with judicial precedent and longstanding Department guidance and “narrow[ed] the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themself.” For those reasons, the Department “concluded that in order to provide clear, affirmative regulatory guidance that aligns with case law and is consistent with the text and purpose of the Act as interpreted by courts, a complete rescission and replacement of the 2021 IC Rule is needed” as opposed to a partial rescission.¹⁷⁹

As a fourth alternative, the Department considered rescinding the 2021 IC Rule and, instead of promulgating new regulations, providing guidance on employee or independent contractor classification through subregulatory guidance. In discussing this alternative, the Department reiterated the reasons why it believed that rescission of the 2021 IC Rule was necessary. The Department acknowledged that prior to the 2021 IC Rule, it did not have general guidance published in the Code of Federal Regulations on the classification of

workers as employees or independent contractors. The Department explained that issuing a new rule rather than subregulatory guidance would allow the Department to provide in-depth guidance that is more closely aligned with circuit case law, allows the Department to formally collect and consider a wide range of views by using the notice-and-comment process, and may further improve consistency among courts regarding the classification of workers because courts are accustomed to considering relevant agency regulations. For these reasons, the Department decided not to propose rescinding the 2021 IC Rule and providing only subregulatory guidance, and to instead propose the regulations set forth in the NPRM.¹⁸⁰

A few commenters expressly addressed the first alternative—adopting a common law control test.¹⁸¹ For example, State AGs agreed with the Department’s reasoning that the common law control test is inconsistent with the FLSA. State AGs stated that “[t]he common law test, which focuses on control rather than economic dependence, provides a narrower definition of employment than the broad ‘suffer or permit’ language of the FLSA” and that the common law test therefore “conflicts with the broad statutory definition of ‘employ’ in the FLSA.” UFCW added: “Correctly, the DOL’s proposed rule does not incorporate the narrower common law independent contractor standard because Congress sought for the FLSA to guard against labor exploitation by intentionally covering employment relationships that may not have constituted employer and employees under common law” (emphasis omitted). ASTA disagreed. Noting the various tests under federal law for determining employment, it advocated for “the adoption of a single standard to evaluate worker status for all federal purposes.” The commenter acknowledged the Department’s view that it lacks the authority to do so, but asserted that “the simplest means to that end would be amendment of the FLSA to replace the economic reality test with the right of control test.”

Having considered the comments, the Department reaffirms its position that the FLSA’s definitions, as interpreted by courts, reflect Congress’ rejection of the

common law test as determining employee status under the Act. The Department continues to believe that adopting the common law test would be contrary to FLSA section 3(g)’s “suffer or permit” language, which under Supreme Court and federal appellate precedent requires a broader definition of employment than the common law test.¹⁸²

A number of commenters addressed the second alternative—adopting an ABC test. Most commenters agreed with the Department’s proposed rejection of an ABC test as inconsistent with current precedent and/or expressed opposition to an ABC test. For example, CCI stated that, “[w]hile the ABC test may be appropriate in some circumstances (for example collective bargaining rights), we believe the Department is correct to return to a broader ‘totality-of-the-circumstances’ analysis for wage and overtime protections under the Fair Labor Standards Act.” UBC described the rejection of an ABC test as an “adherence to precedent.” State AGs stated that, although “the ABC test arguably protects against employee misclassification better than other tests in use” and “several of the undersigned State AGs apply the ABC test,” they “understand the Department believes it is constrained under current law from implementing the ABC test under the FLSA[.]”

SBLC “applaud[ed] the DOL for declining calls to adopt an ABC test, like what is currently used in California, or a similar test that would apply a stringent requisite factor test rather than a balancing test.” The International Franchise Association (“IFA”) “support[ed] the DOL’s explicit statement in its 2022 NPRM that the ABC test, which is used in states like California and Massachusetts, is ‘inconsistent’ with controlling Supreme Court authority under the FLSA.” The App Association expressed concerns with the ABC test and “discourage[d] alignment in federal regulation with California’s approach.” The Coalition of Trucking Stakeholders stated that the Department “properly acknowledge[d] that the adoption of any ABC-like test, which is not based upon an economic-realities assessment, would be contrary to precedent” (citation omitted). And noting that the ABC test “assumes all workers are employees unless they can demonstrate that they meet specific criteria,” The Owner-Operator Independent Drivers Association (“OOIDA”) stated that “the Department is correct in its assessment that the ABC

¹⁸⁰ See generally *id.* at 62232.

¹⁸¹ A number of commenters discussed the common law test in their comments, but not in the context of consideration of the common law test as an alternative. Instead, these commenters, for example, compared the analysis in the 2021 IC Rule to the common law test or compared the economic realities test generally to the common law test.

¹⁷⁸ See generally *id.* at 62231.

¹⁷⁹ See generally *id.* at 62231–32.

¹⁸² See, e.g., *Darden*, 503 U.S. at 326; *Portland Terminal*, 330 U.S. at 150–51.

Test is not consistent with the history of the FLSA because it establishes independently determinative factors.” See also C.A.R. (supporting the decision not to adopt the ABC test).

Some commenters advocated for adoption of an ABC test. For example, the Los Angeles County Federation of Labor, AFL-CIO & Locals 396 and 848 of the International Brotherhood of Teamsters (“LA Fed & Teamsters Locals”) acknowledged that “the Department is correct in its conclusion that the lower federal courts have developed a fairly consistent version of what is referred to as the economic realities test by identifying a list of six non-exclusive factors to frame their analysis,” but asserted that “there is nothing in the FLSA’s legislative history nor in the Supreme Court’s precedent that compels this exact six-factor framing.” Discussing *Rutherford* and *Silk*, the commenter argued that Supreme Court precedent does not require a six-factor economic realities test, prohibit adoption of an ABC test, or prevent adoption of a test that includes dispositive factors or presumes employee status unless the employer proves otherwise. See also Blitman & King LLP; National Employment Lawyers Association (“NELA”); Nichols Kaster.

Having considered the comments, the Department is not adopting an ABC test. The Department continues to believe that an ABC test would be inconsistent with Supreme Court and federal appellate precedent interpreting and applying the FLSA, and therefore, this final rule declines to adopt an ABC test. The Supreme Court has repeatedly explained that “economic reality” is the applicable standard for determining whether a worker is an employee or not under the FLSA.¹⁸³ The Supreme Court has further explained that the existence of employment relationships under the FLSA does not depend on “isolated factors but rather upon the circumstances of the whole activity,”¹⁸⁴ and that “[n]o one [factor] is controlling nor is the list complete.”¹⁸⁵ As explained in section II, federal courts of appeals have consistently interpreted this Supreme Court precedent to apply a nonexhaustive multifactor economic realities analysis in which there is no presumption of employee status that

must be rebutted, no one factor is determinative, and all of the factors must be considered and weighed.¹⁸⁶ The Department is grounding the economic realities analysis set forth in this final rule in the decades of federal appellate case law applying such analyses and is rescinding the 2021 IC Rule because of its deviations from that case law. An ABC test, on the other hand, has a presumption of employee status, considers only three factors—each of which can be determinative on its own—and does not result in all of the factors being weighed or even necessarily considered. Adopting the ABC test would be a similarly unsupported deviation from that case law, would have no moorings in the case law applying the FLSA or the Department’s prior guidance, and could undermine the Department’s well-founded reasons for rescinding and replacing the 2021 IC Rule.¹⁸⁷ For all of these reasons, this final rule does not adopt an ABC test.

NABTU stated that, although it “believes that the ‘ABC test’ is the better test for determining worker classification, NABTU understands that absent congressional action, DOL must operate within the parameters of the statute as defined by controlling Supreme Court precedent” (footnote omitted). NABTU nonetheless recommended that, “for purposes of applying the economic reality test to the construction industry, DOL adopt a rebuttable presumption that all construction workers are employees.”¹⁸⁸ The Department declines this recommendation for two reasons. First, the Department’s intent in promulgating this final rule is to provide as much as possible a general analysis for determining employee or independent contractor status. NABTU’s recommendation, on the other hand, is specific to one industry. Second, regardless of its scope, this recommendation implicates the same concerns as discussed in the above paragraph. Specifically, this approach would not be consistent with Supreme Court precedent and federal appellate case law interpreting and applying that

precedent in part because that precedent and case law have not adopted a rebuttable presumption of employee status when determining employee or independent contractor status under the FLSA. Thus, the Department believes that it is not an option to adopt a rebuttable presumption of employee status in this context for the same reasons that the Department also declines to adopt an ABC test.

A number of commenters objected that the Department’s proposed test (in particular the integral factor) might have the same effect—either unintentionally or not—as an ABC test. See, e.g., CWI; FMI—The Food Industry Association (“FMI”); Customized Logistics and Delivery Association (“CLDA”); Erik Sherman; Western States Trucking Association (“WSTA”). However, as discussed in section V.C.5, the suggestion that this final rule’s economic realities analysis essentially implements an ABC test is baseless. As explained above, the economic realities analysis considers multiple factors (no one of which is dispositive) and weighs them as part of a totality-of-the-circumstances analysis to determine if the worker is economically dependent on the employer for work or in business for themselves. An ABC test, on the other hand, presumes that a worker is an employee unless the employer can show that each of the three factors is satisfied. (In other words, each factor is dispositive on its own and the other factors need not be considered if one points to employee status.) In sum, this final rule’s economic realities test is not an ABC test, and any concern that its economic realities analysis is or will become an ABC test is thus unfounded.¹⁸⁹

A few commenters addressed generally the NPRM’s discussion of the alternatives considered by the Department. State AGs, in addition to commenting on the first and second alternatives, commented that “retaining portions of the 2021 Rule that are consistent with the Proposed Rule would not provide needed clarity because the governing principle of the 2021 Rule was a marked departure from

¹⁸⁶ See *supra* section II.B.

¹⁸⁷ The assertions of LA Fed & Teamsters Locals that Supreme Court precedent could have been interpreted differently and that the six traditional economic realities factors could be “fit within the three elements of the ABC Test” are unavailing considering how Supreme Court precedent has actually been interpreted and applied for decades.

¹⁸⁸ LIUNA endorsed NABTU’s recommendation. SMACNA similarly recommended that “[i]n the construction industry, the DOL should create a rebuttable presumption that ‘laborers and mechanics’ are ‘employees’ of the engaging business.”

¹⁸³ See *Tony & Susan Alamo*, 471 U.S. at 301 (“The test of employment under the Act is one of ‘economic reality.’”); *Whitaker House*, 366 U.S. at 33 (“‘economic reality’ rather than ‘technical concepts’ is . . . the test of employment” under the FLSA) (citing *Silk*, 331 U.S. at 713; *Rutherford*, 331 U.S. at 729).

¹⁸⁴ *Rutherford*, 331 U.S. at 730.

¹⁸⁵ *Silk*, 331 U.S. at 716.

¹⁸⁹ In any event, there are arguably some similarities between an ABC test and most alternative analyses under the FLSA. For example, the 2021 IC Rule provided that two factors were “core” factors and gave them near-dispositive weight if they both indicated the same status, which was a step away from a multifactor totality-of-the-circumstances analysis and a step closer to a test (like an ABC test) where each factor is dispositive. And the 2021 IC Rule considered control like an ABC test and considered control to be a “core” factor, giving it more weight and making it closer to the dispositive factor that it is under the ABC test.

the Department's longstanding position." In their view, the 2021 IC Rule's "emphasis on two 'core' factors . . . negated the need to fully consider the remaining factors," and therefore "a full rescission of the 2021 Rule is needed to provide clarity to workers, employers, and the public." Regarding the fourth alternative, State AGs stated that "merely rescinding the 2021 Rule and issuing subregulatory guidance will not provide the direction necessary to achieve consistent application of the economic reality test." In their view, "a new rule is necessary because the 2021 Rule was such a drastic departure from the status quo" and would "provide needed regulatory guidance for the consistent application of the economic reality test by courts and employers." State AGs agreed with the Department's assessment of the four alternatives and that "a full rescission of the 2021 Rule and replacement with the Proposed Rule is most appropriate for clarity and consistency with the FLSA."

WPI commented that it "is well settled that agencies are required to consider alternatives within the ambit of the regulation being considered," including "less restrictive rules than those proposed" (citations omitted). WPI further commented that the district court in *CWI v. Walsh* "held that DOL failed to consider any alternatives in the withdrawal of the 2021 IC Rule" and asserted that "[t]he Department repeats this error and only pays lip service to these requirements by 'considering' four alternatives, two of which are not even legally viable options." The commenter faulted the Department for "conclud[ing] in identical fashion to the 2021 rule that codifying a common law or ABC test would not be legally permissible, yet . . . nevertheless continu[ing] to 'analyze' these two alternatives despite the knowledge that neither can be adopted." The commenter concluded that the NPRM's "consideration of only two viable alternatives falls short of the requirements under the APA and is thus arbitrary and capricious" (citing the district court's decision in *CWI v. Walsh*).

As an initial matter, although the Department believes that the common law control test and an ABC test are not feasible options in this rulemaking, as discussed above, several commenters advocated for the adoption of one or the other of those tests.¹⁹⁰ In any event, the

¹⁹⁰ In addition, discussing alternatives that an agency may be legally constrained from adopting is permissible and encouraged under OMB guidance. OMB Circular A-4 advises that agencies "should discuss the statutory requirements that affect the selection of regulatory approaches. 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."

¹⁹¹ The 2021 IC Rule, which WPI urged be permitted by the Department "to remain in effect," considered only one viable alternative if the commenter's logic applied. See 86 FR 1238 (considering three alternatives: "[c]odification of the common law control test," codification of a "six-factor 'economic reality' balancing test," and "[c]odification of the 'ABC' test").

¹⁹² 2022 WL 1073346, at *18 (internal quotation marks and citation omitted).

¹⁹³ As a general matter, agency action must be upheld in the face of an arbitrary and capricious challenge if the agency "articulate[s] a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (citation omitted); see also *City of Abilene v. EPA*, 325 F.3d 657, 664 (5th Cir. 2003) ("If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld.") (citation omitted).

district court's decision in *CWI v. Walsh* (which is on appeal to the Fifth Circuit) does not support WPI's assertion that a rule's consideration of "only two viable alternatives" makes a rule arbitrary and capricious under the APA.¹⁹¹ The district court ruled that "agency action is arbitrary and capricious when the agency considers only the binary choice of whether to retain or rescind a policy, without also considering less disruptive alternatives."¹⁹² In this rulemaking, the Department considered less disruptive alternatives than fully rescinding and replacing the 2021 IC Rule, including a partial rescission of the 2021 IC Rule.¹⁹³ In the Department's judgment, however, only removing the 2021 IC Rule's designation of two factors as the "core" factors would not undo the numerous ways in which that rule's discussion of the factors were "in tension with judicial precedent and longstanding Department guidance" and unjustifiably narrowed the facts that may be considered when applying the factors.¹⁹⁴ Thus, the Department concluded that, "in order to provide clear, affirmative regulatory guidance that aligns with case law and is consistent with the text and purpose of the Act as interpreted by courts, a complete rescission and replacement of the 2021 IC Rule is needed" as opposed to a partial rescission.¹⁹⁵ As further detailed above, the Department also specifically considered rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through subregulatory guidance instead of through new

regulations. The Department reiterated the reasons why it believed that rescission of the 2021 IC Rule was necessary and identified numerous benefits in favor of issuing a new rule rather than relying on subregulatory guidance.¹⁹⁶ Having considered the comment, the Department continues to believe that, in addition to rescinding the 2021 IC Rule, promulgating new regulations is preferable to providing only subregulatory guidance. Although WPI disagrees with the judgments that the Department is making, the Department plainly considered less disruptive alternatives and made reasonable judgments in not adopting those alternatives.¹⁹⁷

Finally, WPI claimed that the NPRM did not consider "simply reverting to interpretive guidance already in place prior to the 2021 IC Rule" and "ignore[d] this option in a purported quest for clarity." In the commenter's view, there is already clarity in the economic reality test because of the case law explaining and interpreting it, and the commenter added that the NPRM went "beyond any position the Department has taken historically" and was not "faithful to settled caselaw and analysis by courts upon which it claims to base its proposed rule." As an initial matter, the Department considered (as the fourth alternative) "rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through subregulatory guidance instead of through new regulations."¹⁹⁸ As discussed in the NPRM and this final rule, the Department concludes that issuing new regulations is the preferable alternative to subregulatory guidance.¹⁹⁹ Moreover, as explained generally throughout the NPRM and this final rule and specifically in their discussions of each economic reality factor, the Department's regulatory text and accompanying guidance seek consistency with, and are grounded in, existing case law. The 2021 IC Rule departed from case law in numerous ways, and contrary to WPI's comment,

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."

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¹⁹² 2022 WL 1073346, at *18 (internal quotation marks and citation omitted).

¹⁹³ As a general matter, agency action must be upheld in the face of an arbitrary and capricious challenge if the agency "articulate[s] a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (citation omitted); see also *City of Abilene v. EPA*, 325 F.3d 657, 664 (5th Cir. 2003) ("If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld.") (citation omitted).

¹⁹⁴ 87 FR 62232.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See *City of Abilene*, 325 F.3d at 664; see also *California v. Azar*, 950 F.3d 1067, 1096 (9th Cir. 2020) (When reviewing agency action under the arbitrary and capricious standard, a court "cannot 'ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives'" and is "prohibited from 'second-guessing the [agency]'s weighing of risks and benefits and penalizing [it] for departing from the . . . inferences and assumptions' of others.") (citations omitted).

¹⁹⁸ 87 FR at 62232.

¹⁹⁹ The Department in its 2021 IC Rule also reached the same conclusion that the Department is reaching here: relying solely on subregulatory guidance is not the preferable alternative.

regulations. The Department reiterated the reasons why it believed that rescission of the 2021 IC Rule was necessary and identified numerous benefits in favor of issuing a new rule rather than relying on subregulatory guidance.¹⁹⁶ Having considered the comment, the Department continues to believe that, in addition to rescinding the 2021 IC Rule, promulgating new regulations is preferable to providing only subregulatory guidance. Although WPI disagrees with the judgments that the Department is making, the Department plainly considered less disruptive alternatives and made reasonable judgments in not adopting those alternatives.¹⁹⁷

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¹⁹⁶ *Id.*

¹⁹⁷ See *City of Abilene*, 325 F.3d at 664; see also *California v. Azar*, 950 F.3d 1067, 1096 (9th Cir. 2020) (When reviewing agency action under the arbitrary and capricious standard, a court "cannot 'ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives'" and is "prohibited from 'second-guessing the [agency]'s weighing of risks and benefits and penalizing [it] for departing from the . . . inferences and assumptions' of others.") (citations omitted).

¹⁹⁸ 87 FR at 62232.

¹⁹⁹ The Department in its 2021 IC Rule also reached the same conclusion that the Department is reaching here: relying solely on subregulatory guidance is not the preferable alternative.

the Department's stated goal in promulgating this final rule is to realign the Department's guidance with that case law. Moreover, to the extent that commenters argued that the NPRM's proposed analysis was not supported by applicable case law, the Department considered those comments and, where appropriate, made changes in this final rule in response.

As explained in section III, the Department believes that replacing the 2021 IC Rule with regulations addressing the multifactor economic reality test that more fully reflect the case law and continue to be relevant to the modern economy is helpful for workers and employers in understanding how to apply the law in this area. These regulations and the explanatory preamble provide in-depth guidance, and because courts are accustomed to considering relevant agency regulations, issuing these regulations may further improve consistency among courts regarding this issue. The Department is therefore rescinding the 2021 IC Rule and issuing this final rule to replace part 795; the provisions of the regulation are discussed below.

V. Final Regulatory Provisions

Having reviewed commenter feedback submitted in response to the proposed rule, the Department is finalizing the following regulations to provide guidance regarding whether workers are employees or independent contractors under the FLSA. The regulations include a new part 795 and cross-references in 29 CFR 780.330(b) and 788.16(a) to part 795. Of particular note, the regulations set forth in this final rule do not use "core factors" and instead return to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. Regarding the economic reality factors, this final rule returns to the longstanding framing of investment as a separate factor, and integral as an integral part of the potential employer's business rather than an integrated unit of production. The final rule also provides broader discussion of how scheduling, remote supervision, price setting, and the ability to work for others should be considered under the control factor, and it allows for consideration of reserved rights while removing the provision in the 2021 IC Rule that minimized the relevance of retained rights. Further, the final rule discusses exclusivity in the context of the permanency factor, and initiative in the context of the skill

factor. The Department also made several adjustments to the proposed regulations after consideration of the comments received, including revisions to the regulations regarding the investment factor and the control factor (specifically addressing compliance with legal obligations).

Additionally, in the 2021 IC Rule, the Department proposed not to revise its regulation addressing employee or independent contractor status under MSPA in 29 CFR 500.20(h)(4), stating, in part, that the MSPA regulation and the 2021 IC Rule both applied an economic reality test in which the ultimate inquiry was economic dependence. In the NPRM, the Department similarly did not propose to make any revisions to the MSPA regulation, which adopts by reference the FLSA's definition of "employ," and considers "whether or not an independent contractor or employment relationship exists under the Fair Labor Standards Act" to interpret employee or independent contractor status under MSPA.²⁰⁰ The test contained in the MSPA regulation is substantially similar to the proposed test here, and the comments received in this rulemaking did not address MSPA. Accordingly, the Department is not revising the MSPA regulation at this time.

Finally, the Department also proposed to formally rescind the 2021 IC Rule.²⁰¹ In the Department's view, the operative effects of rescinding the 2021 IC Rule are as follows. With this final rule, the 2021 IC Rule is formally rescinded. This rescission operates independently of the new content in this final rule, as the Department intends the rescission to be severable from the substantive regulatory text added as part 795. For the reasons set forth in this final rule, the Department believes that rescission of the 2021 IC Rule is appropriate, regardless of the new regulations in this final rule. Thus, even if the entirety of the part 795 regulations promulgated by this final rule or any part thereof were invalidated, enjoined, or otherwise not put into effect, the Department would not intend that the 2021 IC Rule remain in effect, and the Department would rely on federal appellate case law and provide subregulatory guidance for stakeholders as appropriate unless or until it decided to engage in additional rulemaking.

The Department responds to commenters' feedback on the proposed rule below.

A. Introductory Statement (§ 795.100)

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, employees, workers, and courts to assess employment status under the Act.²⁰² Commenters did not generally address this section, which is very similar to the 2021 IC Rule introductory statement, except to note that these regulations would be interpretive guidance. *See, e.g.,* NELP; WPI. The Department is adopting this section without change.

B. Economic Dependence (§ 795.105)

In the NPRM, the Department proposed to simplify § 795.105(a) of the 2021 IC Rule and make additional clarifying edits to § 795.105(b).²⁰³ Proposed § 795.105(a) would continue to make clear, as the 2021 IC Rule did, that independent contractors are not "employees" under the Act. The Department did not receive significant comments regarding this and is adopting it without change.

The Department proposed that paragraph § 795.105(b) would affirm that economic dependence is the ultimate inquiry for determining whether a worker is an independent contractor or an employee; this paragraph also makes clear that the plain language of the statute is relevant to the analysis.²⁰⁴ The Department explained that this proposed section would focus the analysis on whether the worker is in business for themselves and clarified that economic dependence does not focus on the amount the worker earns or whether the worker has other sources of income.

As a preliminary matter, Cetera Financial Group urged the Department to "recognize that economic dependence often does not exist and certainly should not be presumed" and that it "should be the subject of a threshold inquiry prior to applying the other factors in the economic realities test, or, at a minimum, added as an additional factor." As the Department explained in the NPRM, the question of economic dependence is the ultimate inquiry, and the factors are tools or guideposts for answering that inquiry, so it would not be appropriate to make "economic dependence" an additional factor or a threshold inquiry. The Department agrees, however, that economic dependence should never be presumed and that when it does not exist, that worker is not an employee.

²⁰⁰ 29 CFR 500.20(h)(1), (4).

²⁰¹ Comments regarding this aspect of the NPRM are discussed in section V.F. below.

²⁰² 87 FR 62233 (proposed § 795.100).

²⁰³ 87 FR 62233 (proposed § 795.105(a), (b)).

²⁰⁴ 87 FR 62233 (proposed § 795.105(b)).

Commenters generally agreed that economic dependence was the right lens for evaluating whether an employment relationship exists under the FLSA. *See, e.g.,* CPIO; IBA; NELP; Outten & Golden. The AFL-CIO and others, for example, noted that “[c]ourts have interpreted the FLSA’s broad suffer or permit to work language as seeking to answer one foundational question regarding the relationship between a worker and the entity to whom that worker provides their labor—whether as a matter of economic reality that worker is dependent upon the business to which they render service.” At least one commenter, however, stated that using the idea of economic dependence as a “litmus test” is “exceptionally challenging to prove or meet in today’s complex world of business operations for both large and small business.” *See* Vegas Chamber. Additionally, some self-identified freelancers questioned how the definition of “economic dependence” would apply to a freelance worker who may, for example, be a writer for multiple publications. One freelancer explained that “self-employed independent contractors do not see it as having that many employers [but rather] view those publications as customers.”

Some commenters stated that the Department’s proposed language broadened the definition of “economic dependence” and objected to this perceived broadening. *See, e.g.,* Goldwater Institute, Job Creators Network Foundation. The Antonin Scalia Law School’s Administrative Law Clinic (“Scalia Law Clinic”), for instance, commented that the Department’s proposed definition of economic dependence “wrongly states that a worker can be an employee merely because she is dependent in some way on a business, and it incorrectly says that a worker’s income is entirely irrelevant to whether a worker is dependent on a business.” Similarly, the Goldwater Institute stated that the proposal “creates a broad new definition of ‘economic dependence’ that does not focus on the amount of income earned or whether the independent contractor has other income streams.” Several commenters further stated that the Department had put forward a new definition of economic dependence “that a worker is an employee if they are merely ‘economically dependent’ on a business in a small or inconsequential way.” *See, e.g.,* NAIFA. Smith Summerset and Associates did not disagree with the content of § 795.105(b) but suggested that the provision be edited for clarity,

noting that the regulatory language referring to “other income streams” is “unnecessarily abstract and confusing” and suggested incorporating alternative language from the preamble that the Department will be adopting.

The Department notes that this concept of economic dependence—one which does not focus on the amount of income earned or whether the worker has other income streams—has been the Department’s consistent position. Although some commenters believed the Department was proposing a different approach, the concept of economic dependence in the NPRM and this final rule is identical to the 2021 IC Rule, which stated that, “other forms of dependence, such as dependence on income or subsistence, do not count” and that “dependence of income or subsistence, is not a relevant consideration in the economic reality test.”²⁰⁵ The Department continues to believe that this position is correct and most consistent with the concept of economic dependence for work. As noted in the 2021 IC Rule and raised again in comments received in response to the NPRM, a minority of courts have applied a “dependence-for-income” approach that considers whether the worker has other sources of income or wealth or is financially dependent on the employer. Most courts, however, as well as the Department, believe a “dependence-for-work” approach that considers whether the worker is dependent on the employer for work or depends on the worker’s own business for work is the better interpretation. This approach focuses the analysis on whether the worker is in business for themselves (and thus dependent upon themselves for work), or whether the worker is dependent upon the potential employer for work.²⁰⁶ This approach is also consistent with the majority of case law. As the Eleventh Circuit has explained, “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.’”²⁰⁷ Economic dependence, however, “does not concern whether the workers at issue depend on the money they earn for obtaining the necessities of life Rather, it examines whether the workers are dependent on a particular business or organization for their continued employment.”²⁰⁸ Additionally, consistent with the 2021 IC Rule, economic dependence does not mean that a worker who works for other employers, earns a very limited income from a particular employer, or is independently wealthy cannot nevertheless be economically dependent on any particular employer for purposes of the FLSA.²⁰⁹ As the Fifth Circuit has explained, “it is not dependence in the sense that one could not survive without the income from the job that we examine, but dependence for continued employment.”²¹⁰

Lastly, as a global matter, some commenters objected to the Department’s use of the word “employer” throughout the proposed regulatory provisions and recommended that the Department use an alternate term such as “potential employer” instead because it made it seem as if the result of the analysis was predetermined in favor of employee status. *See, e.g.,* National Association of Convenience Stores (“NACS”); National Home Delivery Association (“NHDA”); Scopelitis.

Having considered the comments, the Department is adopting § 795.105(a) and (b) largely as proposed, explaining that economic dependence is the ultimate inquiry, and that an employee is someone who, as a matter of economic reality, is economically dependent on an employer for work—not for income. The Department is also making three clarifying edits. First, in response to comments, the Department uses the phrase “worker’s potential employer” or “potential employer” instead of the word “employer” in § 795.105(a). The Department did not intend for its use of the word “employer” to predetermine any result and makes the change throughout the regulatory text. The Department is using the terms

²⁰⁵ 86 FR 1178.

²⁰⁶ *See id.* at 1172–73; *see also* *Cornerstone Am.*, 545 F.3d at 343 (“To determine if a worker qualifies as an employee, we focus on whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.”); *Flint Eng’g*, 137 F.3d at 1440 (noting that “the economic realities of the relationship govern, and the focal point is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself”); *Superior Care*, 840 F.2d at 1059 (“The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else’s business . . . or are in business for themselves.”).

²⁰⁷ *Scantland*, 721 F.3d at 1312 (quoting *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 301–02 (5th Cir. 1975)).

²⁰⁸ *DialAmerica*, 757 F.2d at 1385.

²⁰⁹ *See* 86 FR 1173; *see also* *McLaughlin v. Seafood, Inc.*, 861 F.2d 450, 452 (5th Cir. 1988), *modified on reh’g*, 867 F.2d 875 (5th Cir. 1989) (reasoning that “[l]aborers who work for two different employers on alternate days are no less economically dependent than laborers who work for a single employer”); *Halferty v. Pulse Drug Co., Inc.*, 821 F.2d 261, 267–68 (5th Cir. 1987) (rejecting the employer’s argument that the worker’s wages were too little to constitute dependence).

²¹⁰ *See Halferty*, 821 F.2d at 268.

“employer,” “potential employer,” and “the worker’s potential employer” throughout the preamble discussion, and the terms are not intended to predetermine any result. Second, the Department is adding the statutory definition of “employer” to § 795.105(a) for completeness. And third, consistent with the 2021 IC Rule and the proposed regulatory text, the Department is finalizing language that makes clear that other sources of income or amount of pay are not relevant to economic dependence, although, in response to comments, the Department is making some minor edits for additional clarity.

The Department also proposed to delete § 795.105(c) and (d) of the 2021 IC Rule because it believed that the factors of the economic reality test should not be given a predetermined weight and designated as “core” or “additional guideposts.” As discussed in section III (Need for Rulemaking) as well as in section V.C., the Department is proceeding with the removal of these paragraphs, and discussion of the economic reality test and the individual factors is being moved to § 795.110. The comments regarding the discontinuation of “core factors” and the Department’s return to the economic reality test’s longstanding totality-of-the-circumstances analysis are discussed in section V.C.

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

In the NPRM, the Department proposed to replace § 795.110 (Primacy of actual practice) from the 2021 IC Rule with a provision discussing the economic reality test and the economic reality factors. Proposed § 795.110(a) introduced the economic reality test, emphasizing that the economic reality factors are guides to be used to conduct a totality-of-the-circumstances analysis. It also explained that the factors are not exhaustive, and no single factor is dispositive.²¹¹ The Department then proposed to address the economic reality factors in § 795.110(b).²¹²

Many commenters supported the Department’s return to the longstanding totality-of-the-circumstances economic reality analysis, stating that it would provide clarity and align with the statutory text and relevant case law. *See, e.g.,* IBT; Leadership Conference on Civil and Human Rights (“Leadership Conference”); NELP; REAL Women in Trucking; State AGs; William E. Morris Institute for Justice. Outten & Golden, for instance, commented that the NPRM “properly establishes that the purpose

of the ‘economic reality’ factors is to inform and illuminate the ‘economic dependence’ inquiry, while no one factor independently drives the analysis.” NECA and IBEW commented that they “support returning to the longstanding six-factor balancing test, which will ensure certainty and clarity for construction employers and employees, provide protection to law-abiding responsible contractors and workers in the construction industry, and reduce burdensome and costly litigation.” Securities Industry Financial Markets Association (“SIFMA”) agreed that “[t]he Department of Labor is correct to note that it is the totality of the circumstances that one must look at to properly determine status” and observed that “courts have found that there is no ‘rule of thumb’, but that they must instead look at ‘the total situation.’” Similarly, the Shriver Center on Poverty Law commented that the “proposed rule’s six-factor ‘economy reality’ analysis is a sensible, totality-of-the-circumstances approach that takes into account all relevant aspects of the worker’s relationship with the hiring entity, is not easily manipulated by employers, and is well-supported by Supreme Court and circuit court precedent.” Regarding the Department’s explanations accompanying each factor, NELP commented that “[b]y sharpening the focus of each factor, the proposed rule provides greater clarity, which will encourage employer compliance and reduce misclassification while still enabling true independent contractors to run their businesses as they see fit.” The Transport Workers Union of America commented that the Department’s proposal “will ensure that the legal line between those realities matches the facts on the ground. The six-factor test envisioned in this rule accurately reflects the everyday relationship between workers and their employers. None of our members would risk becoming independent contractors under this rule (as they would have under the previous administration’s proposal).” Likewise, SWACCA stated that the Department’s proposal “will achieve more certainty than the January 2021 Rule because it reflects a standard that the courts have clarified and explained in numerous specific contexts through decades of judicial rulings. It is a well understood body of law that employers, workers, enforcement officials, private attorneys, and the federal courts all have considerable experience applying.”

Several commenters emphasized that the Act’s definitions should guide the analysis. The LA Fed & Teamsters

Locals, for example, observed that “[c]ourts have interpreted the FLSA’s broad suffer or permit to work language as seeking to answer one foundational question regarding the relationship between a worker and the entity to whom that worker provides their labor.” They added that the 2021 IC Rule “improperly elevates certain factors and prevents consideration of certain facts, would invite employers to find ways to cloak a worker’s dependence in a veneer of independence and would fail to account for changes in working structures that come with societal progress.”

In contrast, other commenters stated that the Department’s proposal to replace the “core factor” analysis and return to the totality-of-the-circumstances analysis undermined the clarity of the 2021 IC Rule, creating more uncertainty and confusion. *See, e.g.,* Consumer Brands Association; CWI; Forest Resources Association; I4AW; NYS Movers and Warehousemen’s Association; WSTA. For example, the 4A’s stated that the Department’s proposal to return to a “totality-of-the-circumstances analysis, in which the economic reality factors are no longer weighted more heavily based on importance, represents a change from the 2021 Independent Contractor Rule that will inevitably bring uncertainty and confusion for advertising agencies and the U.S. business community at large.” FSI commented that “[b]y expanding the range of relevant factors and expressly refusing to give guidance on how to weigh them against each other, DOL actively undermines the clarifying improvements of the 2021 Rule and works against its own stated objectives.” Several commenters objected to the Department’s framing of the proposal as a return to a longstanding analysis, instead opining that the NPRM set forth a novel test. *See, e.g.,* Mackinac Center for Public Policy; WPI. Many of these commenters expressed concern that the proposed rule would have detrimental effects on their industries, work opportunities, and earnings. *See, e.g.,* American Council of Life Insurers (“ACLI”) (identifying aspects of the proposal that “would be enormously economically disruptive to the local businesses and preferred livelihoods of these individuals”); Buckeye Institute (“[B]y making it more expensive and more difficult to undertake independent work, this rule will shrink the available labor pool for employers.”); PGA (commenting that the proposal could “[t]hreaten the source of income of thousands of workers across the country

²¹¹ 87 FR 62234–37 (proposed § 795.110).

²¹² *Id.*

in a time of economic uncertainty”); National Pork Producers Council (“As a result, pork producers and other business owners could be subject to increased legal and tax issues.”).

Other commenters stated that the 2021 IC Rule’s core factor analysis was better suited to the issues of the current economy than the Department’s proposal. For instance, the Job Creators Network Foundation commented that the Department’s proposal “conflicts with the way America’s economy works today” and that the new economy would be “significantly diminished” if the proposal were to move forward. In contrast, other commenters stated that the NPRM “accurately analyzes modern workplace trends and provides detailed guidance on how these changes to the nature of work itself must be integrated and considered within those six identified factors (and within the additional factors that may arise in particular factual scenarios).” LA Fed & Teamsters Locals; *see also* LCCRUL & WLC (commenting that the NPRM “closely aligns with long-standing judicial precedent and that has proven well-suited to adapt to the myriad forms of working arrangements that have existed in the over 80 years since the FLSA’s passage, as well as to unforeseeable work structures that will appear in the future”).

Some commenters stated that the Department’s proposed factors were too broad and not tethered to economic dependence. IBA and CPIE, for example, commented that the proposed regulations “are not faithful to answering the question of economic dependence” and instead “consistently resolve alternative interpretations of a specific factor in the direction of broadening the scope of the factor.” Similarly, some commenters stated that the Department’s proposal expanded the range of relevant factors and “hold[s] a thumb on the analytical scale towards employment.” *See* SHRM. The U.S. Chamber stated that the proposed rule “would not only lead to significant reclassification of independent contractors but would also lead to a considerable increase in litigation. The bias in favor of employee status, which appears throughout the Proposed Rule, makes the risk that independent contractors would be misclassified as employees especially acute, with potentially dramatic consequences for entire industries.” *See also* Boulette Golden & Marin LLP (commenting that the Department has attempted “to narrow the scope of the economic reality test and suggests an individual is *not* an employee *only if* the employee has a free-standing business”).

Relatedly, other commenters requested that “[i]f it is the Department’s intent that this rule should uphold practices that were in place for years before the 2021 Independent Contractor Rule, then we believe any final rule should confidently state that most workers would not see a change.” *See* OOIDA.

Several commenters requested that the Department provide additional guidance regarding how to weigh the factors in various scenarios. *See, e.g.*, Grantmakers in the Arts; National Small Business Association. NRF & NCCR, for example, commented that “[t]his approach provides little guidance as to how individuals and businesses should apply those factors when they do not all point in the same direction.” Commenters also stated that, in contrast to the 2021 IC Rule, potential overlap among factors made this test more challenging to understand. For example, the Club Management Association of America and the National Club Association (“CMAA & NCA”) commented that “[e]ach factor includes multiple subjective elements for consideration that are not distinct from other factors” and the Alabama Trucking Association stated that the proposal “also create[d] subtests that overlap at least conceptually or completely with aspects of other parts of the test.” *See also* MEP (“Overlap makes it more difficult for the regulated community to understand how to analyze the different elements of the contractual relationship.”).

Various commenters requested that the Department state that workers in their particular industry or occupation were bona fide independent contractors. *See, e.g.*, Insights Association (strongly urging “the addition of a clarification that market research participants receiving incentives are independent contractors”); American Securities Association (stating its belief “that, consistent with this precedent, there is wisdom in including in the Proposed Rule an exemption for the financial services and insurance industries”); C.A.R. (“C.A.R. asks the DOL to not apply any new rule to established industries whose businesses have already addressed this long-standing issue.”); National Alliance of Forest Owners (“NAFO”) (requesting “a safe harbor provision to provide forestry businesses a clear standard for classifying workers as independent contractors”).

After considering all comments and as discussed in detail below, the Department is adopting § 795.110(a) as proposed.

Regarding comments that the Department’s proposal is generally

biased in favor of employee status, or that its analysis of each factor places a “thumb on the scale” toward employment, the Department reiterates that its proposal is consistent with longstanding judicial precedent and, critically, the plain language of the Act. The Department agrees with those commenters who emphasized the Act’s relevant statutory definitions. As it has stated previously, the Department believes that determining whether an employment relationship exists under the FLSA begins with the Act’s definitions.²¹³ The Act’s text is expansive, defining “employer” to “include[] any person acting directly or indirectly in the interest of an employer in relation to an employee,” “employee” as “any individual employed by an employer,” and “employ” to “include[] to suffer or permit to work.”²¹⁴ Prior to the FLSA’s enactment, the phrasing “suffer or permit” was commonly used in state laws regulating child labor. As the Eleventh Circuit explained in *Antenor v. D & S Farms*, “[t]he ‘suffer or permit to work’ standard derives from state child-labor laws designed to reach businesses that used middlemen to illegally hire and supervise children.”²¹⁵ In other words, the standard was designed to ensure that an employer could be covered under the labor law even if they did not directly control a worker or used an agent to supervise the worker. The Supreme Court has explicitly and repeatedly recognized that this “suffer or permit” language demonstrates Congress’s intent for the FLSA to apply broadly and more inclusively than the common law standard.²¹⁶ This textual breadth reflects Congress’s stated intent. Section 2 of the Act, Congress’s “declaration of policy,” states that the Act is intended to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”²¹⁷ Particularly relevant to misclassification, section 2 identifies “unfair method[s] of competition in commerce” as an additional condition “to correct and as

²¹³ 87 FR 62234.

²¹⁴ 29 U.S.C. 203(d), (e)(1), (g).

²¹⁵ 88 F.3d 925, 929 n.5 (11th Cir. 1996).

²¹⁶ *See, e.g., Darden*, 503 U.S. at 326 (noting that “employ” is defined with “striking breadth” (citing *Rutherford*, 331 U.S. at 728)); *Rosenwasser*, 323 U.S. at 362 (“A broader or more comprehensive coverage of employees . . . would be difficult to frame.”); *Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 665 (5th Cir. 1983) (“The term ‘employee’ is thus used ‘in the broadest sense’ ever . . . included in any act.”) (quoting *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 271 (5th Cir. 1982))).

²¹⁷ 29 U.S.C. 202.

rapidly as practicable . . . eliminate.”²¹⁸

In its 1947 brief before the Supreme Court in *Rutherford*, the Department explained that the Act “contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.”²¹⁹ The Department continued, stating that “[t]he purposes of this Act require a practical, realistic construction of the employment relationship . . . and the broad language of the statutory definitions is more than adequate to support such a construction.”²²⁰ The determination of whether a worker is covered under the FLSA must be made in the context of the Act’s own definitions and the courts’ expansive reading of its scope.²²¹ The FLSA’s “particularly

broad” definition of “employee” encompasses all workers who are, “as a matter of economic reality, . . . economically dependent upon the alleged employer.”²²² The Supreme Court agreed, reiterating the breadth and reach of the Act’s definitions to work relationships that were not previously considered to constitute employment relationships and emphasizing that the determination of an employment relationship under the FLSA depends not on “isolated factors but rather upon the circumstances of the whole activity.”²²³

Thus, the Department’s analysis does not place a “thumb on the scale” for employment. Rather, it was Congress’s clear intent in fashioning the Act (which has been repeated by courts for decades) that the statutory language sweep broader than the common law and encompass all workers who are “suffered or permitted” to work, and the test for employment must reflect that plain language and clear intent. The Department emphasizes again, however, that there is a wide assortment of bona fide independent contractors across industries and occupations, and it believes that the regulations as finalized in this rule allow for this range of work relationships—from employees to independent contractors—to be appropriately classified.

The Department has also considered the comments opining that the Department’s totality-of-the-circumstances economic reality test will cause confusion or uncertainty and that the 2021 IC Rule’s core factors analysis was clearer. The Department believes,

(quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013)) (emphasis added). Indeed, other courts have appropriately continued to consider the purpose of the Act. See, e.g., *Uronis v. Cabot Oil & Gas Corp.*, 49 F.4th 263, 269 (3d Cir. 2022) (“As a remedial statute, the FLSA . . . is broadly construed, and ‘must not be interpreted or applied in a narrow, grudging manner.’”) (quoting *Brock v. Richardson*, 812 F.2d 121, 124 (3d Cir. 1987)). The Department does not agree with the commenters’ views that any pre-*Encino* case law discussing the remedial purpose of the Act has been abrogated, and it notes that courts have not changed their application of the economic reality test to determine employee status based on *Encino*. Finally, the Department reiterates that, to the extent that the language in the 2021 IC Rule preamble implied that the Act’s remedial purpose can never be considered, including when determining whether an individual is an employee or an independent contractor under the FLSA, the Department clarifies that it believes that this would be an unwarranted extension of the Supreme Court’s decision. See, e.g., 86 FR 1207–08 (discussing *Encino*’s application in response to commenters’ concerns that the 2021 IC Rule conflicted with the FLSA’s remedial purpose).

²²² *Cornerstone Am.*, 545 F.3d at 343 (citing *Darden*, 503 U.S. at 326; *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998)).

²²³ *Rutherford*, 331 U.S. at 728–30.

however, that an analysis that has been applied for decades and is aligned with the breadth of the relevant statutory definitions and binding judicial precedent is not only more faithful to the Act but also more familiar to the regulated community, workers, and those enforcing the Act.

The economic reality test was developed by the Supreme Court in interpreting and applying the social legislation of the 1930s, including the FLSA.²²⁴ In 1947, the Supreme Court issued two decisions, *Silk* and *Rutherford*, that used an economic reality test to determine employment status.²²⁵ As explained in *Rutherford*, the “economic reality” test is designed to bring within such legislation “persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.”²²⁶ Only a worker who “is instead in business for himself” is an independent contractor not covered by the Act.²²⁷ The “focus” and “ultimate concept” of the determination of whether a worker is an employee or an independent contractor, then, is “the economic dependence of the alleged employee.”²²⁸ The statutory language thus frames the central question that the economic reality test asks—whether the worker is economically dependent on an employer who suffers or permits the work or whether the worker is in business for themselves.

To aid in answering this ultimate inquiry of economic dependence, several factors have been considered by courts and the Department as particularly probative when conducting a totality-of-the-circumstances analysis of whether a worker is an employee or an independent contractor under the FLSA.²²⁹ In *Silk*, the Supreme Court suggested that “degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are

²²⁴ *Rosenwasser*, 323 U.S. at 362.

²²⁵ See *Silk*, 331 U.S. at 716–18 (applying the test under the SSA); *Rutherford*, 331 U.S. at 730 (same under the FLSA).

²²⁶ *Rutherford*, 331 U.S. at 729; see also *Whitaker House*, 366 U.S. at 31–32 (describing the same as it relates to homeworkers).

²²⁷ *Cornerstone Am.*, 545 F.3d at 343 (citing *Express Sixty-Minutes*, 161 F.3d at 303).

²²⁸ *Id.*; see also *Pilgrim Equip.*, 527 F.2d at 1311–12 (“[T]he final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of [the] FLSA or are sufficiently independent to lie outside its ambit.”).

²²⁹ See, e.g., *Flint Eng’g*, 137 F.3d at 1441 (explaining that “[n]one of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach”).

²¹⁸ *Id.*; see also *Rosenwasser*, 323 U.S. at 361–62; *Pilgrim Equip.*, 527 F.2d at 1311 (“Given the remedial purposes of the legislation, an expansive definition of ‘employee’ has been adopted by the courts.”).

²¹⁹ Brief for the Administrator at 10, *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (No. 562), 1947 WL 43939, at *10 (quoting *Portland Terminal*, 330 U.S. at 150–51).

²²⁰ *Id.* at *10–11.

²²¹ Some commenters contended that the Department’s discussion in this section of cases where the Supreme Court repeatedly recognized that the definitions of “employ,” “employee,” and “employer” that establish who is entitled to the FLSA’s protections were written broadly and have been appropriately interpreted broadly, failed to properly account for the Court’s more recent decision in *Encino Motorcars v. Navarro*, 138 S. Ct. 1134 (2018), which overturned a rule of interpretation that applied to exemptions. See U.S. Chamber; FSI. In *Encino*, the Supreme Court addressed an exemption from the FLSA’s overtime pay requirements and ruled that the “narrow construction” principle—that FLSA exemptions should be narrowly construed—should no longer be used. The Court explained that instead, such exemptions should be given a fair reading, stating “[b]ecause the FLSA gives no textual indication that its exemptions should be construed narrowly, there is no reason to give [them] anything other than a fair (rather than a narrow) interpretation.” *Encino*, 138 S. Ct. at 1142 (internal quotations and citation omitted). Though this decision did not apply to the Act’s definitions (which have not been interpreted under the “narrow construction” principle), the Department recognizes that some courts have gone beyond *Encino* and extended the “fair reading” principle to other parts of the Act or to the Act generally. See, e.g., *McKay v. Miami-Dade Cnty.*, 36 F.4th 1128, 1133 (11th Cir. 2022). There is no need to rely on the “fair reading” principle here because there is a clear textual indication in the Act’s definitions, by the inclusion of the “suffer or permit” language, that broad coverage under the Act was intended. See 29 U.S.C. 203(g). Thus, even if it were applied, such broad coverage would be a “fair” interpretation under *Encino* because the broad scope of who is an employee under the FLSA comes from the definitions themselves and not any “narrow-construction” principle. See *id.* Moreover, *Encino* did not hold that the FLSA’s remedial purpose may never be considered, it simply noted that it is a “flawed premise that the FLSA ‘pursues’ its remedial purpose ‘at all costs.’” *Id.* at 1142

important for decision.”²³⁰ The Court also drew a distinction between workers who are an integral part of the business but are not the directors of their business, and workers who “depend upon their own initiative, judgment, and energy for a large part of their success.”²³¹ The Court cautioned that no single factor is controlling and that the list is not exhaustive.²³² In *Rutherford*, the Court used a similar analysis when concluding that the workers in that case were employees, considering “the circumstances of the whole activity,” and relied on the fact that the workers’ work was “a part of the integrated unit of production.”²³³

These considerations identified by the Supreme Court are the same factors that the Department set forth in its NPRM. Courts, employers, workers, and enforcement personnel have been considering these factors for over 75 years. As such, the Department does not see a credible basis for comments that predict sharply increased litigation, dramatic curtailment of opportunities, or massive reclassification of workers. This is the analysis that the Department (except for the 2021 IC Rule) and courts have applied for more than 7 decades to classify workers under the Act, and the predictions raised in the comments as concerns have not been evident. Moreover, this final rule represents the Department’s most comprehensive guidance regarding the economic reality test used by courts to determine employee or independent contractor status. As such, to the extent there was litigation around this issue due to a lack of clarity, that should be further alleviated by this rulemaking. As explained further in the economic analysis in section VII, because of this alignment with a longstanding analysis, the Department does not expect widespread reclassification as a result of this rule.

Rather, the economic reality test, the case law, and the Department’s position have remained remarkably consistent since the 1940s, and throughout this time the test has demonstrated its ability to address evolving workplace trends. The test’s focus has remained on whether the worker is in business for themselves, with the inquiry directed toward the question of economic dependence. This consistency is, at least in part, due to the fact that the analysis works for a broad swath of work arrangements, both longstanding and emerging, and its overarching rationale

based on economic dependence makes common sense. It is not surprising that some courts and the Department may have used somewhat different iterations of the factors over the last several decades, as the factors “are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected.”²³⁴ These factors are only guideposts, and “[i]t is dependence that indicates employee status. Each [factor] must be applied with that ultimate notion in mind.”²³⁵ This is why most courts, and the Department, have long made clear that additional factors may be relevant when applying the test to a particular case. It is also expected that outcomes may vary somewhat among workers even in the same profession, for example, because the test demands a fact-specific analysis. Facts like job titles or whether a worker receives a 1099 form are not probative of the economic realities of the relationship. Rather, in undertaking this analysis, each factor is examined and analyzed in relation to one another and to the Act’s definitions. Importantly, “[n]one of these factors is determinative on its own, and each must be considered with an eye toward the ultimate question—the worker’s economic dependence on or independence from the alleged employer.”²³⁶

While the Department appreciates, as some commenters noted, that two factors (like any test with fewer factors) are simpler in some ways than six factors, the Department believes that it would be a disservice to stakeholders to present an analysis that is contrary to how courts view the totality-of-the-circumstances analysis. Courts have repeatedly admonished against a mechanical application of the factors and have required a full analysis of all relevant factors, which is why the Department believes that any clarity created by shrinking the test to two core factors and artificially weighting them is illusory. As addressed in the NPRM, since *Silk* and *Rutherford*, federal courts of appeals have applied the economic reality test to distinguish independent contractors from employees who are entitled to the FLSA’s protections. Federal appellate courts considering employee or independent contractor status under the FLSA generally analyze the economic realities of the work relationship using the factors identified in *Silk* and *Rutherford*.²³⁷ There is

significant and widespread uniformity among the federal courts of appeals in the application of the economic reality test, although there is slight variation as to the number of factors considered or how the factors are framed (for example, whether relative investment is considered within the investment factor, or whether skill must be used with business-like initiative).²³⁸ As the 2021 IC Rule explained, “[m]ost courts of appeals articulate a similar test,” and these courts consistently caution against the “mechanical application” of the economic reality factors, view the factors as tools to “gauge . . . economic dependence,” and “make clear that the analysis should draw from the totality of circumstances, with no single factor being determinative by itself.”²³⁹ All of the federal courts of appeals that have addressed employee or independent contractor status under the FLSA consider five of the same factors.²⁴⁰ Briefly, these factors include the degree of control exercised by the employer over the worker, skill, permanency, opportunity for profit or loss, and investment, although the Second Circuit and the D.C. Circuit treat the worker’s opportunity for profit or loss and the worker’s investment as a single factor.²⁴¹ Nearly all federal courts of appeals expressly consider a sixth factor, whether the work is an integral part of the employer’s business. The Fifth Circuit has not adopted the integral factor as an enumerated factor but has at times assessed integrality as an additional relevant factor.²⁴² As such, courts can and do accord weight to different factors depending upon the particular facts of a case. And because courts are the ultimate arbiter of disputes regarding worker classification, an analysis that is aligned with how courts view the issue is the most beneficial guidance that the Department can provide to stakeholders.

Regarding comments that the Department should provide additional guidance regarding how to weigh the

²³⁸ See, e.g., *Cornerstone Am.*, 545 F.3d at 344 (discussing relative investments); *Superior Care*, 840 F.2d at 1060 (discussing the use of skill as it relates to business-like initiative).

²³⁹ 86 FR 1170; see also *Saleem*, 854 F.3d at 139–40; *Cornerstone Am.*, 545 F.3d at 343; *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 807 (6th Cir. 2015); *Flint Eng’g*, 137 F.3d at 1440–41.

²⁴⁰ *Superior Care*, 840 F.2d at 1058–59; *DialAmerica*, 757 F.2d at 1382–83; *McFeeley*, 825 F.3d at 241; *Off Duty Police*, 915 F.3d at 1055; *Lauritzen*, 835 F.2d at 1534–35; *Alpha & Omega*, 39 F.4th at 1082; *Driscoll*, 603 F.2d at 754–55; *Paragon*, 884 F.3d at 1235; *Scantland*, 721 F.3d at 1311–12; *Morrison*, 253 F.3d at 11.

²⁴¹ See, e.g., *Superior Care*, 840 F.2d at 1058–59; *Morrison*, 253 F.3d at 11 (citing *Superior Care*, 840 F.2d at 1058–59).

²⁴² See, e.g., *Hobbs*, 946 F.3d at 836.

²³⁰ 331 U.S. at 716.

²³¹ *Id.*

²³² See *id.*

²³³ *Rutherford*, 331 U.S. at 729–30.

²³⁴ *Pilgrim Equip.*, 527 F.2d at 1311.

²³⁵ *Id.*

²³⁶ *Off Duty Police*, 915 F.3d at 1055 (alterations and internal quotations omitted).

²³⁷ See generally *supra* n.52.

factors, the Department believes that adding mechanistic rules for analyzing the factors would be contrary to judicial precedent and would limit the test's intended flexibility. As explained in the NPRM, this totality-of-the-circumstances analysis considers all factors that may be relevant and, in accordance with the case law, does not assign any of the factors a predetermined weight. Limiting and weighting the factors in a predetermined manner undermines the very purpose of the test, which is to consider—based on the economic realities—whether a worker is economically dependent on the employer for work or is in business for themselves.²⁴³ Importantly, each factor, considered in isolation, does not determine whether a worker is economically dependent on an employer for work or in business for themselves. Rather, the factors are tools or indicators and must be analyzed together in order to answer this ultimate inquiry. This is the guidance that the Department has tried to provide for each factor, as discussed in this section below.²⁴⁴ Depending on the facts and circumstances of a case, it is to be expected that one or more factors may be more probative than the other factors. The analysis, however, cannot be conducted like a scorecard or a checklist. For example, two factors that strongly indicate independent contractor status in a particular case could possibly outweigh other factors that indicate employee status, and vice versa. But to assign a predetermined and immutable weight to certain factors ignores the totality-of-the-circumstances, fact-specific nature of the inquiry that is intended to reach a multitude of employment relationships across occupations and industries and over time. Similarly, it is possible that not every factor will be particularly relevant in each case and that is also to be expected.²⁴⁵ Accordingly, the Department believes that the nuanced

analysis that accompanies each factor below is more appropriate guidance than rote instructions for weighing the factors.

Regarding comments that certain relevant facts may overlap among the factors, as explained in the NPRM, the Department believes that emphasizing the discrete nature of each particular factor and evaluating each factor in a vacuum fails to analyze the entire range of potential employment relationships in the manner demanded by the Act's text and accompanying case law. Additionally, the test must be able to identify the vast variety of legitimate independent contractor relationships.²⁴⁶ As such, the Department does not wish to be overly prescriptive regarding overlap among factors, because doing so encourages a more formulaic application of the factors as a checklist, when instead the factors are guides to determining, by looking at all relevant facts, the economic reality of the situation. Applying a formulaic or rote analysis that isolates each factor is contrary to decades of case law, decreases the utility of the economic reality test, and makes it harder to analyze the ultimate inquiry of economic dependence. Rather, the analysis needs to be flexible enough to apply to all kinds of work, and all kinds of workers, from traditional economy jobs to jobs in emerging business models. As the Supreme Court stated in *Silk*, “[p]robably it is quite impossible to extract from the [SSA] a rule of thumb to define the limits of the employer-employee relationship” but the Court identified factors as “important”: “degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation[,] and skill required in the claimed independent operation” and added that “[n]o one is controlling, nor is the list complete.”²⁴⁷ With this rule, the Department is providing its most detailed guidance to date regarding the application of each of the considerations identified by the Supreme Court as being important to the determination of whether a worker is an employee under the Act.

As to those comments stating that the proposed rule was not well-suited to the modern economy, the Department disagrees. The Department notes that the cases addressing employee vs. independent contractor status discussed in this rule and using the economic reality test apply to a wide range of

today's workers, from cable installers to exotic dancers to health care workers, and the Department's enforcement experience applying the economic reality test is similarly varied. With this rulemaking, the Department describes the economic reality factors that reflect the totality-of-the-circumstances approach that courts have taken for decades and are still applying to today's workplaces, and provides an analysis as to how the Department considers each factor in today's workplaces, based on case law and the Department's enforcement expertise in this area. For example, the investment factor is returned to being a separate factor, considers facts such as whether the investment is capital or entrepreneurial in nature, and considers the worker's investments relative to the employer's investments. Significant additional guidance is provided for the control factor, including detailed discussions of how scheduling, supervision, price-setting, and the ability to work for others should be considered when analyzing the degree of control exerted over a worker. And the integral factor is returned to its longstanding Departmental and judicial interpretation, rather than the “integrated unit of production” approach that was included in the 2021 IC Rule.

The Department declines commenter requests to provide any industry-specific or occupation-wide exemptions or carve-outs to this rule. As explained elsewhere, the Department intends these regulations to apply to a broad range of work relationships and will continue to assess the need for more specific subregulatory guidance.

Finally, multiple commenters seemed to refer to worker classification as a preference or suggested that the Department's proposal would infringe upon workers' or businesses' choices. See, e.g., Cambridge Investment Research (commenting that the result of the NPRM “will be that many workers—including workers who want to be independent contractors—will be reclassified as employees under the FLSA”); Transcend Software and Technology Solutions (commenting that the proposal would create an environment “where the freedom for entrepreneurs to operate as independent contractors is significantly diminished”). For instance, the NDA stated that it “believes employers and workers should have the freedom and flexibility to engage in labor arrangements that meet the specific needs and preferences of both parties involved,” and Cetera Financial Group commented that the “Department could

²⁴³ See, e.g., *Scantland*, 721 F.3d at 1312 (quoting *Mednick*, 508 F.2d at 301–02); see also *Saleem*, 854 F.3d at 139–140; *Mr. W Fireworks*, 814 F.2d at 1054–55.

²⁴⁴ See, e.g., *Scantland*, 721 F.3d at 1312 (the economic reality factors “serve as guides, [and] the overarching focus of the inquiry is economic dependence”); *Pilgrim Equip.*, 527 F.2d at 1311 (The economic reality factors “are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is dependence that indicates employee status. Each test must be applied with that ultimate notion in mind.”).

²⁴⁵ See, e.g., *Lauritzen*, 835 F.2d at 1534 (referring to the economic reality factors and stating that “[c]ertain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.”).

²⁴⁶ Independent contractors are not “employees” for purposes of the FLSA. See generally *Portland Terminal*, 330 U.S. at 152 (stating that the “definition ‘suffer or permit to work’ was obviously not intended to stamp all persons as employees”).

²⁴⁷ *Silk*, 331 U.S. at 716.

take a huge step toward . . . certainty [for stakeholders] by including the expressed intention of the parties as a threshold criteria for the existence of economic dependence.” While businesses are certainly and unequivocally able to organize their businesses as they prefer consistent with applicable laws, and workers are free to choose which work opportunities are most attractive to them, if a worker is an employee under the FLSA, then those FLSA-protected rights cannot be waived by either party.

The Supreme Court’s “decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee’s right[s] . . . under the Act” and “have held that FLSA rights cannot be abridged by contract or otherwise waived.”²⁴⁸ The Supreme Court has identified at least three reasons for this nonwaiver rule. First, the Court has determined, based on the legislative history of the FLSA, that the Act constituted “a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency.”²⁴⁹ According to the Court, the protective purposes of the Act thus “require that it be applied even to those who would decline its protections”; otherwise, “employers might be able to use superior bargaining power to coerce employees to . . . waive their protections under the Act.”²⁵⁰ Second, in enacting the FLSA, Congress sought to establish a “uniform national policy of guaranteeing compensation for all work” performed by covered employees.²⁵¹ Consequently, “[a]ny custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage . . . cannot be utilized to deprive employees of their statutory rights.”²⁵² Third, the Court has held that permitting employees to waive their FLSA rights is inconsistent with the explicit purpose of the Act to protect employers against unfair methods of competition.²⁵³ Accordingly, FLSA rights cannot be waived by either party under the law.

The Department is finalizing § 795.110(a) as proposed. In the sections that follow, the Department is providing a detailed analysis about the application of each factor based on case law and the Department’s enforcement experience as a guide for employers and workers in determining whether a worker is an employee or an independent contractor, with each factor discussed through the lens of economic dependence.

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

Regarding the opportunity for profit or loss depending on managerial skill factor, the Department proposed that this factor consider “whether the worker exercises managerial skill that affects the worker’s economic success or failure in performing the work.” The Department identified a nonexclusive list of facts that may be relevant when considering this factor: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space. The Department added that, if a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee. The Department said further that some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.²⁵⁴

The Department explained that the proposed regulatory text for this factor focused the opportunity for profit or loss factor on whether the worker exercises managerial skill that affects the worker’s economic success or failure in performing the work. The Department noted that the 2021 IC Rule similarly considered managerial skill, but explained that the proposed regulatory text more accurately reflects the consideration of the profit or loss factor in the case law and reflects the ultimate inquiry into the worker’s economic dependence or independence. The Department further explained that many federal courts of appeals “apply this factor with an eye to whether the worker

is using managerial skill to affect the worker’s opportunity for profit or loss” and discussed that case law. The Department also noted that its proposal would consider investment as a separate factor, unlike the 2021 IC Rule’s consideration of investment within its opportunity for profit or loss factor. Additionally, the Department explained that the proposed regulatory text stating that the fact that a worker has no opportunity for a loss indicates employee status is consistent with the overall inquiry into economic dependence and is supported by the case law. Finally, the Department discussed the case law and its prior guidance supporting its view that a worker’s decision to work more hours (when paid hourly) or work more jobs (when paid a flat fee per job) where the employer controls assignment of hours or jobs is similar to decisions that employees routinely make and does not reflect managerial skill.²⁵⁵

In addition to the numerous comments generally supporting the Department’s six-factor analysis, a number of commenters expressed support for the NPRM’s discussion of the opportunity for profit or loss depending on managerial skill factor. For example, Smith Summerset & Associates LLC “highly applaud[ed] inclusion of ‘managerial skill’ in the title line and in the first sentence of the proposed” regulatory text and stated that “the exercise of managerial skill is a sine qua non of independent contractor status.” LA Fed & Teamsters Locals agreed “that it is managerial skill that matters when analyzing whether a worker’s earning ability is relevant to the employee status analysis” (emphasis omitted). Several commenters (including Farmworker Justice, NWLC, and the Shriver Center) stated that “a worker who has the power to make key business decisions that affect their opportunity for profit or loss is more likely to be an independent contractor than a worker who does not have power over these decisions.” Similarly, NELP expressed agreement with the proposal “to explicitly tie the opportunity for profit or loss to a worker’s managerial skill, not their ability to work longer” (emphasis omitted). *See also* Gale HealthCare Solutions. OOIDA agreed with the Department’s rejection of how the 2021 IC Rule discussed this factor, commenting: “We believe that the 2021 Rule may have opened additional opportunities for truckers to fall prey to lease-purchase schemes by stipulating that an individual only needed to exhibit exercise of initiative or

²⁴⁸ *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (listing cases).

²⁴⁹ *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706 (1945).

²⁵⁰ *Tony & Susan Alamo*, 471 U.S. at 302 (citing *Barrentine*, 450 U.S. 728 and *Brooklyn Sav.*, 324 U.S. 697).

²⁵¹ *Jewell Ridge Coal Corp. v. UMWA Local 6167*, 325 U.S. 161, 167 (1945).

²⁵² *Id.* (internal quotation marks omitted).

²⁵³ 29 U.S.C. 202(a); *Brooklyn Sav.*, 324 U.S. at 710.

²⁵⁴ *See generally* 87 FR 62274–75 (proposed § 795.110(b)(1)).

²⁵⁵ *See generally id.* at 62237–39.

management of investment for the factor to weigh towards the individual being an independent contractor. The formulation of the factor may have dismissed predatory leasing arrangements because an owner-operator otherwise exercised some initiative in the management of their work.”

Regarding the Department’s proposal that decisions to work more hours or take more jobs “generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor,”²⁵⁶ NDWA agreed, stating that “a worker’s ability to impact their pay by working more hours or taking more jobs does not show the exercise of managerial skill indicating independent contractor status.” IBT also agreed with the NPRM’s “rejection of the proposition that a worker[’s] decision to take additional hours or tasks indicates ‘managerial skill.’” See also Leadership Conference, ROC United, UFCW.

Several commenters found the NPRM’s listing of potentially relevant facts when applying this factor to be helpful. Real Women in Trucking noted that this factor can appropriately indicate employee or independent contractor status for truck drivers and that the NPRM’s “addition of relevant facts to consider under this factor . . . provides helpful context to differentiate between these scenarios.” Smith Summerset & Associates LLC “applaud[ed] the specific examples of managerial skill listed in the [proposal].” And UFCW stated that, “[c]orrectly, the proposed rule highlights whether the worker can meaningfully negotiate, accept or decline jobs, and engage in efforts to expand their independent business.”

Some other commenters that generally supported the Department’s six-factor analysis requested changes to or clarifications of the opportunity for profit or loss depending on managerial skill factor. For example, UFCW cited agreements that it says are imposed by companies like Instacart, Uber, and Lyft that prohibit workers from connecting with or soliciting their customers and stated that “actively prohibit[ing] workers from developing an independent business is evidence of a lack of opportunity to profit or loss based managerial skill.” UFCW also stated that, “when black-box algorithms solely dictate their available work, pay, and other economic conditions,” “[w]orkers are powerless to negotiate or make any managerial decisions.” The Department agrees that such facts would

be probative of whether a worker has an opportunity for profit or loss depending on managerial skill but also reiterates that no one fact is dispositive under this factor.

Real Women in Trucking requested that the Department address “free market” load boards (load boards are matching systems where shippers post freights that they need carried and carriers post their availability), which, in the commenter’s view, “offer an opportunity to control profit or loss (unlike internal load boards).” Similarly, OOIDA explained its view that “the mere fact that an individual purchases equipment or services from a business they work with *does not* necessarily indicate an employee relationship.” OOIDA further explained that “[t]here are many owner-operators who choose to make purchases from the business they are leased to because it is a profitable deal” and provided an example involving a group discount on tires. OOIDA “believe[s] that the NPRM’s totality-of-the-circumstances approach should be able to distinguish between these types of situations.” The Department appreciates these concerns and agrees that the test put forth is flexible enough to account for a wide variety of situations, but its intent in promulgating this final rule is to provide as much as possible a general standard for determining employee or independent contractor status. The requested guidance is technical and industry-specific and is better addressed outside of rulemaking after this final rule takes effect.

Smith & Summerset recommended adding “depending on managerial skill” to the third sentence of the regulatory text so that it reads: “If a worker has no opportunity for profit or loss depending on managerial skill, then this factor suggests that the worker is an employee.” The commenter stated that, “[w]ithout the managerial skill qualifier, the reader is invited to quickly think of working more or fewer hours as an opportunity for profit or loss.” However, the subsequent sentence in the regulatory text addresses working more hours. Moreover, the intent of the third sentence is to explain that, where a worker who has no opportunity for profit or loss, this factor indicates employee status. Qualifying that explanation with a reference to managerial skill is unnecessary, because regardless of managerial skill, the worker’s lack of an opportunity for profit or loss points this factor toward employee status.

NELA recommended a number of changes to this factor. It stated that a “worker who can experience ‘profit’

with no attached risk of business loss is not truly in business for themselves,” and suggested that the following language from the NPRM preamble be added to the regulatory text: “The fact that a worker has no opportunity for a loss indicates employee status. Workers who incur little or no costs or expenses, simply provide their labor, and/or are paid hourly, piece rate, or flat rate are unlikely to experience a loss. This factor suggests employee status in those circumstances.” However, the third sentence of the regulatory text already explains that this factor indicates employee status where a worker has no opportunity for a loss. NELA further suggested that the Department should “incorporate the flip side” of its above suggestion and state that “the chance for a ‘loss’ with no corresponding opportunity for profit is a sign of dependence on the employer, which points toward employee status.” Again, the third sentence of the regulatory text already covers circumstances where the worker has “no opportunity for a profit or loss.” NELA also suggested that the following language be added to the regulatory text: “The fact that an employer may impose fines, penalties, or chargebacks on a worker for faulty performance does not mean that the worker may experience a loss. These kinds of costs are likely to make workers more dependent on their employers, and therefore more like employees.” (The first sentence is from the NPRM preamble, and the second sentence is new language suggested by NELA.) The Department declines to add this language to the regulatory text. The Department notes that although fines, penalties, and chargebacks can indicate a worker’s economic dependence on the employer, whether they indicate dependence may depend on the circumstances.

NELA additionally suggested changing the regulatory text identifying accepting or declining jobs as a relevant factor so that it would read: “whether the worker exercises managerial skill in accepting or declining jobs without employer input or chooses the order and/or time in which the jobs are performed independent from employer control.” In the Department’s view, however, adding a reference to “managerial skill” is unhelpful because accepting or declining jobs is an underlying fact that is relevant to determining whether the worker exercises managerial skill. And adding references to “employer input” and “employer control” are unnecessary because the focus of this factor is whether the worker has an opportunity

²⁵⁶ *Id.* at 62274–75 (proposed § 795.110(b)(1)).

for profit or loss through managerial skill, and there are many aspects of accepting/declining jobs and choosing the order/time to perform jobs—not only “employer input” and “employer control”—which may shed light on whether those decisions and choices exemplify managerial skills. Finally, NELA suggested adding two sentences to the regulatory text. The first sentence would read: “A worker’s technical proficiency in completing each job is not the type of managerial skill that would indicate independent contractor status.” This suggested sentence is, in the Department’s view, correct in the abstract. As the Department explained in the NPRM, “where a worker is paid by the job, the worker’s decision to work more jobs and the worker’s technical proficiency in completing each job are not the type of managerial skill that would indicate independent contractor status under this factor.”²⁵⁷ However, the Department also identifies in the regulatory text instances of managerial skill, such as efforts to expand a business or secure more work, hiring others, and purchasing materials and equipment, that can affect a worker’s opportunity for profit or loss by, at least in part, increasing the worker’s technical proficiency. The focus of this factor should be the degree of managerial skill, and the Department does not believe that adding a blanket statement regarding technical proficiency to the regulatory text would be helpful because doing so could distract from evaluating managerial skill. Technical proficiency in completing a job, even if it affects a worker’s earnings, is alone insufficient for this factor to indicate independent contractor status, but, ultimately, whether that technical proficiency is the product of managerial skill is probative of employee or independent contractor status. NELA’s second suggested sentence would read: “Managerial skill will typically affect opportunity for profit or loss beyond a given job, and will relate to the worker’s business as a whole.” The Department believes that the second suggested sentence is not necessarily probative of this factor and is not a point emphasized in the case law.

Numerous commenters opposed, disagreed with, and/or requested changes to or clarifications of the proposed opportunity for profit or loss depending on managerial skill factor. For example, several commenters raised concerns that certain of the facts in the nonexclusive list of facts identified by

the Department as relevant to this factor cannot be satisfied in their particular industries. Texas Association for Home Care & Hospice stated that, “[i]n home care, independent contractor clinicians cannot hire other workers for the purposes of completing the contracted jobs (*i.e.*, patient visits) they have accepted from the home care agency” because of “stringent human resources and patient care regulations from both state and federal regulatory agencies.” It added that workers “purchase and maintain their own equipment,” but if the worker “accepts a specialized patient job, for instance a wound care patient, then the home care agency must purchase and provide to the independent contractor clinician the appropriate wound care supplies . . . as ordered by the physician.” The ACLI stated that, “[w]ithout question, [insurance agents’] profit or loss depends upon their own managerial skill,” but “insurance regulations, including New York Insurance Law § 4228, set strict limits on the commissions that insurers can pay to agents, who are ‘unable to negotiate or change their commission structure.’” And although it “generally supports the Department’s proposed application” of this factor, the American Securities Association expressed concern that this factor “globally suggests, without any exceptions, that ‘whether the worker determines or can meaningfully negotiate the charge or pay for the work provided’ is a relevant factor.” Because “insurance and financial services regulations . . . set strict limits on the premiums that can be charged to customers and on the commissions that can be paid to agents and advisors,” it asserted that financial professionals would not be seen as independent under this factor. The American Securities Association suggested that the Department “eliminate from consideration whether the worker can meaningfully negotiate his or her pay from the list of potentially relevant facts under this factor,” include a carveout, or “clarify that a brokerage firm establishing prices to meet regulatory supervision obligations or considerations of its registered representatives does not create an employee relationship and is at most a neutral factor.” ABC suggested that the NPRM “improperly presumes that independent contractors must have a staff and a marketed ‘business’ to ‘manage.’” It stated that “many independent contractors deliberately offer their services to employers of their choosing for the express purpose of avoiding negotiating costs” and “do not

want to run a business that requires overhead for services, advertising and hiring support staff.” It added that “[i]t should be made clear that a worker who does solicit work from multiple clients remains an independent contractor.” Finally, although it “generally agree[d] with the description of this factor,” the California Chamber of Commerce (“CA Chamber”) expressed concern “that this factor would weigh against a gig worker being an independent contractor simply because the company for which they perform work sets pricing.”

Having considered these comments, the Department adopts its proposed list of facts that may be relevant when applying this factor. The list is plainly nonexclusive, and neither any fact listed nor this factor will be dispositive of a worker’s status. As the regulatory text provides, “no one factor or subset of factors is necessarily dispositive,” and the “outcome of the analysis does not depend on isolated factors but rather upon the circumstances of the whole activity.”²⁵⁸ The status of the workers identified by these comments will be determined by multiple facts bearing on their work relationships, and accordingly, these commenters’ concerns do not reflect how the Department’s analysis will be applied. Consistent with a totality-of-the-circumstances analysis, not hiring others and not advertising, for example, do not make the worker an employee or even conclusively determine that this factor indicates employee status. (And as discussed below, certain decisions to “not” take business actions such as those listed in the regulatory text may be as indicative of managerial skill as decisions to take those business actions.) In that same vein, soliciting work from multiple clients, for example and while of course relevant, does not guarantee that a worker is an independent contractor or even that this factor points to independent contractor status. In addition, the Department believes that the nonexclusive list of facts that are potentially relevant to this factor provides helpful guidance, as other commenters have stated. And even if a particular fact is not probative or always points in one direction for a particular worker in a particular industry, that does not mean that the fact is not probative on a general level. The Department is striving to provide a generally applicable regulation in this rulemaking and will provide additional

²⁵⁷ *Id.* at 62238; see also *Scantland*, 721 F.3d at 1316–17.

²⁵⁸ 29 CFR 795.110(a)(1)–(2).

guidance after this final rule takes effect.²⁵⁹

Although the U.S. Chamber agreed that the facts listed in the regulatory text are “relevant to whether workers are independent contractors or employees,” it stated that the NPRM was “wrong to require a worker to ‘exercise’ these decisions to exemplify independent contractor status.” Analogizing to the NPRM’s discussion of how reserved rights can be relevant in addition to actual practice, the U.S. Chamber asserted that “the more important question is whether the worker has the *opportunity* to impact their profits and losses by engaging in various activities such as working for other companies, regardless of whether the worker actually acts on that opportunity.” CWI criticized the NPRM for, in its view, “requir[ing] consideration of whether the worker *actually exercises* his skill to impact economic success.” CWI asserted that the NPRM “consistently references ‘opportunity,’ not actual exercise of that opportunity, as the relevant touchstone” and added that: “Whether a worker chooses to exercise the opportunities for profit and loss available to him is fundamentally his own business decision. It is the ability to follow that business judgment—even to his detriment—that is the hallmark of the independence he is afforded.” See also N/MA; NRF & NCCR.

Having considered the comments on this point, the Department is revising the final regulatory text to emphasize the worker’s “opportunities” for profit or loss based on managerial skill and to delete the reference to whether the worker “exercises” managerial skill. The Department concurs that the term “opportunities,” which encompasses opportunity more broadly than “whether the worker exercises managerial skill,” is more consistent conceptually with the case law analyzing this factor and with the remainder of the regulatory text. Although the Department did not intend for the “exercises managerial skill” language to be limiting, focusing on “opportunities” should capture the facts relevant to a worker’s profit or loss and

managerial skill, as explained further in the discussion of comments in the following paragraph.

The Coalition of Business Stakeholders stated that “[m]any independent contractors offer their services to select employers for the express purpose of avoiding negotiating costs for services, advertising, and hiring support staff,” and that the NPRM “utterly fails to account for workers’ preference for having an independent contractor relationship that avoids these costs.” The commenter asserted that this “framework would virtually always weigh in favor of employment status.” NRF & NCCR stated 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.” According to the commenter, for example, “[a] carpenter or plumber who chooses to market through word of mouth and to complete one job at a time, and not hire helpers and make the investments necessary to work on multiple job[s] simultaneously, is no less an independent contractor than a carpenter or plumber who has made different choices about how to operate his or her business.” The Department believes that the opportunity, for example, to hire others or purchase materials and equipment, and a decision to not take such action based on a consideration of possible costs and rewards, can indicate managerial skill. For this to be the case, the worker must have a real opportunity to take the action and make an independent business decision indicating managerial skill to not take the action. In other circumstances, not taking an action may not indicate managerial skill. For example, if the action requires approval from the employer (for example, the employer must approve any person hired by the worker as a helper) or the action is not feasible financially (for example, the worker is lower-paid and cannot hire others or make purchases), then there is likely no opportunity for the worker to make an independent business decision indicating managerial skill. Regardless, no one action or lack of action should determine whether this factor indicates employee or independent contractor status; the Department identifies in the regulatory text a number of possibly relevant facts, and other relevant facts may be considered too.

Several commenters expressed concern that the mention of “managerial skill” in the proposed regulatory text did not include references to “initiative,” “business acumen,” and “judgment.” For example, CWI stated that the proposed regulatory text “narrows the inquiry” as compared to the 2021 IC Rule, which referenced “business acumen or judgment” in its discussion of this factor. CWI further stated that the NPRM’s preamble “acknowledge[d] that ‘initiative,’ ‘business acumen,’ and ‘judgment’ are informative of the opportunity-for-profit-or-loss factor” (citing 87 FR 62238). CWI requested that the Department “retain the 2021 IC Rule’s formulation of the standard.” See also N/MA. The U.S. Chamber added that the proposed regulatory text “wrongly narrows the inquiry to ‘whether the worker exercises managerial skill,’ as opposed to ‘managerial skill or business acumen or judgment,’ as stated in the 2021 IC Rule.” The Department did not intend to exclude initiative, judgment, or business acumen from the inquiry under this factor. The NPRM’s preamble explained that considering initiative and judgment is very similar to considering managerial skill.²⁶⁰ Accordingly, in light of the comments and the discussion of managerial skill in the NPRM’s preamble and the cases cited therein, the Department is modifying the regulatory text to clarify that managerial skill includes “initiative or business acumen or judgment.” Thus, with this change and the change discussed above, the first sentence of the regulatory text for this factor reads: “This factor considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker’s economic success or failure in performing the work.”

CPIE commented that, although earlier court decisions “properly considered an individual’s opportunity for loss in evaluating the individual’s economic dependence,” the U.S. economy has changed, and “[t]here are countless numbers of individuals today who operate thriving businesses with their laptop computers and incur no risk of loss whatsoever.” The commenter asserted that “[t]he fact that these individuals operate a type of business that does not require a substantial financial investment should not deny them their right to offer their services as

²⁵⁹ Fight for Freelancers commented that the Department does “not define what constitutes marketing and advertising” (one of the listed facts) and asked: “What, specifically, must we do to satisfy your definition of marketing and advertising?” The Department believes that the terms “marketing” and “advertising” are well understood, and engaging in marketing or advertising are just examples of types of managerial skill that may be relevant when applying this factor. No worker needs to “satisfy” any of these facts; all facts relevant to the worker’s opportunity for profit or loss depending on managerial skill should be considered.

²⁶⁰ 87 FR 62238 (citing, *inter alia*, *Franze*, 826 F. App’x at 76–78; *Flint Eng’g*, 137 F.3d at 1441; *Superior Care*, 840 F.2d at 1058–59; *Snell*, 875 F.2d at 810).

independent contractors.” Having considered this comment, the Department stands by its position that “the fact that a worker has no opportunity for a loss indicates employee status.”²⁶¹ The Department believes that the risk of a loss as a possible result of the worker’s managerial decisions indicates that the worker is in business for themselves. Although a worker need not experience a loss or even likely experience a loss for this factor to indicate independent contractor status, the scenario presented by the commenter—“no risk of loss whatsoever”—does not suggest that the worker is an independent contractor because at least some risk of a loss is inherent in operating an independent business. Moreover, the Department’s position is grounded in the case law, which has recognized that the lack of possibility of a loss indicates employee status.²⁶² The Department notes, however, that whether the worker in the scenario presented by the commenter is an employee or independent contractor depends on application of all of the factors and a consideration of the totality of the circumstances because neither this factor nor any other factor is necessarily dispositive. Thus, workers “who operate thriving businesses with their laptop computers and incur no risk of loss whatsoever” (the scenario presented by the commenter) may be employees or independent contractors depending on all of the factors.

A number of commenters expressed concerns with and/or sought changes to the last sentence of the regulatory text: “Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.” For example, NHDA stated that each decision by a “driver to accept or reject an opportunity (in this case, a load) is a business decision that affects his/her economic success” and “involves the weighing of an opportunity cost” (*i.e.*, “the cost of accepting that load versus the revenue to be earned and also against the foregone opportunity to transport a different load”). NHDA further stated that, for these reasons, this sentence “is misleading and susceptible to short-circuiting a proper analysis.” *See also* Scopelitis (same). Flex described this sentence as

“misleading” and “likely lead[ing] to the discounting of evidence that is, in fact, highly relevant to a worker’s ‘opportunity for profit or loss depending on managerial skill.’” It stated that, “[i]f a cashier at a fast-food restaurant voluntarily chooses to work overtime or pick up an additional shift, that decision would not support independent contractor status[,]” but if a driver “who was planning to drive clients five days one week is solicited by a new client for a lucrative opportunity on Saturday, the decision to accept that new client and work an extra day is plainly an entrepreneurial decision that reflects managerial decision making.” Flex explained that “technological advances . . . have facilitated independent contractors’ ability to quickly determine what earnings opportunities and hours worked will yield *for them* the biggest return on the investment of *their* time.” SHRM added that “[t]he economic reality is that a worker who can profit by taking other jobs is more independent—and therefore less economically dependent on the employer—than an employee who cannot,” and that “[t]he ability to make that choice should point to an independent relationship.” CWI stated that “[t]he Department’s commentary even cites authority noting that choosing among ‘which jobs were most profitable’ is evidence of independent contractor status, but the Proposed Rule contains no similar nuance.” *See also* U.S. Chamber; MEP.

Having considered these comments, the Department believes that the last sentence of the proposed regulatory text for this factor can be more precise. In the NPRM, the Department explained this concept as follows: “a worker’s decision to work more hours (when paid hourly) or work more jobs (when paid a flat fee per job) where the employer controls assignment of hours or jobs is similar to decisions that employees routinely make and does not reflect managerial skill.”²⁶³ The proposed regulatory text, however, did not account for payment for the hours and jobs at a fixed rate or the employer’s control over the flow of work. The NPRM recognized that courts have held that a worker’s ability to freely choose among jobs based on the worker’s assessment of the comparable profitability of those jobs can indicate independent contractor status when applying the opportunity for profit or loss factor.²⁶⁴ Other cases relied on by

the Department in the NPRM involved workers who were paid at set or fixed rates and/or situations where more work was dictated by the employer’s needs as opposed to the worker’s initiative.²⁶⁵ Based on the comments, the discussion in the NPRM, and the case law, the Department is revising the last sentence of the opportunity for profit or loss factor. In the NPRM, that sentence read: “Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.” As revised, that sentence reads (with the new language in italics): “Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs *when paid a fixed rate per hour or per job*, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.” The Department also considered adding to the regulatory text a reference to the employer’s control of assignment of the hours or jobs. Although such control may be relevant in this context, the Department believes that the fact that the hours or jobs are paid at a fixed rate is more indicative that the worker is not exercising managerial skill by taking more such hours or jobs.

Fight for Freelancers asserted that there was a conflict between this provision regarding working more hours or jobs and the provision stating that accepting or declining jobs can be a relevant fact when applying this factor. The Coalition of Business Stakeholders commented that the NPRM is “unclear on whether, when assessing the opportunity for profit or loss factor, a worker’s ability to accept or decline work weighs in favor of independent contractor status.” The Department believes these comments overlook the totality-of-the-circumstances nature of the analysis; there is no particular factor to satisfy. In addition, the text addresses two concepts that are not in conflict. The last sentence of the regulatory text (as revised) addresses a worker who can earn more by working more hours or taking more jobs. That worker is working more to earn more but not exercising managerial skill (at least in that regard). On the other hand, a worker may be able to accept and

(8th Cir. 2017)); *Express Sixty-Minutes*, 161 F.3d at 304).

²⁶⁵ *Id.* (citing *Off Duty Police*, 915 F.3d at 1059; *Scantland*, 721 F.3d at 1316–17; *Capital Int’l*, 466 F.3d at 308; *Snell*, 875 F.2d at 810).

²⁶¹ *Id.*

²⁶² *Id.* at 62239 (citing *Off Duty Police*, 915 F.3d at 1059; *Flint Eng’g*, 137 F.3d at 1441; *Selker Bros.*, 949 F.2d at 1294; *Snell*, 875 F.2d at 810; *Lauritzen*, 835 F.2d at 1536; *DialAmerica*, 757 F.2d at 1386).

²⁶³ 87 FR 62239.

²⁶⁴ *Id.* (citing *Karlson v. Action Process Serv. & Private Investigations, LLC*, 860 F.3d 1089, 1095

decline jobs where the jobs have varying degrees of potential profitability and the worker must determine which jobs to pursue and how much of the worker's time and resources should be devoted to the various jobs. That worker is exercising managerial skill (at least in that regard), which weighs in favor of independent contractor status.

MEP commented that “managerial skill should be broadly defined” and that “managerial skill should include an individual's ability to complete the work more efficiently or effectively.” World Floor Covering Association (“WFC”) commented that, although it “recognizes that merely working longer hours or more efficiently does not distinguish an independent contractor from an employee,” “[a]n individual who uses initiation or judgment to perform a job more efficiently can generate greater profits, even if compensated by the hour or by piecework rates.” WFC suggested that “depending on managerial skill” be stricken from the title of this factor and that the first sentence of the regulatory text be revised to state: “This factor considers whether the worker exercises managerial skills, implements innovations, or uses other entrepreneurial concepts that affects the worker's economic success or failure in performing the work.” For the reasons explained in the NPRM and in this section, managerial skill is properly the focus of the opportunity for profit or loss factor because it helps to distinguish between decisions that affect a worker's earnings and the use of initiative, judgment, or business acumen that may create opportunities for profit or loss. As further explained in the NPRM, whether the worker's opportunity for profit or loss depends on managerial skill (or initiative or judgment as discussed above) is ingrained in the case law.²⁶⁶ Accordingly, striking “depending on managerial skill” would not be supported. And although being innovative and acting entrepreneurially are synonymous with managerial skill, implementing innovations and using entrepreneurial concepts are not necessarily synonymous with the worker's managerial skill if those innovations and concepts are developed

and perfected by others. WFC's suggested language would detract the focus from, and not necessarily be consistent with, managerial skill.

In addition, WFC provided examples of workers who can “install complex wood or tile patterns” and requested that implementing “new techniques or innovations” and developing “specialized or unique skills” be added to the nonexclusive list of facts that may be relevant when applying this factor. However, as discussed in this section, implementing techniques or innovations is not necessarily indicative of managerial skill and may instead relate more to how the worker performs the work. The same may be said about developing skills; especially considering the examples provided by WFC, these skills seem more about performing particular work. As discussed above in response to NEA's comment that technical proficiency in completing each job is not managerial skill indicative of independent contractor status, the focus of this factor is the worker's managerial skill and not the worker's performance of particular jobs. Accordingly, the Department declines to make the changes requested by WFC.²⁶⁷

The Department is finalizing the opportunity for profit or loss depending on managerial skill factor (§ 795.110(b)(1)) with the modifications discussed herein.

Example: Opportunity for Profit or Loss Depending on Managerial Skill

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

employee status under the opportunity for profit or loss factor.

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

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

Regarding the investments factor, the Department proposed that this factor consider “whether any investments by a worker are capital or entrepreneurial in nature.” The provision stated that “[c]osts borne by a worker to perform their job,” such as “tools and equipment to perform specific jobs and the worker's labor,” “are not evidence of capital or entrepreneurial investment and indicate employee status.” The provision further stated that investments that are capital or entrepreneurial in nature and thus indicative of independent contractor status are those that “generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach.” The Department also proposed that “the worker's investments should be considered on a relative basis with the employer's investments in its overall business.” The provision further said that “[t]he worker's investments need not be equal to the employer's investments, but the worker's investments should support an independent business or serve a business-like function for this factor to indicate independent contractor status.”²⁶⁸

The Department explained that its proposal to treat investments as its own separate factor in the economic reality analysis is consistent with its approach prior to the 2021 IC Rule and with the approach of most courts. The Department further explained that considering investments as part of the opportunity for profit or loss factor, as the 2021 IC Rule did, is flawed because, among other reasons, it “may incorrectly tilt the analysis in favor of independent contractor outcomes” and “have the effect in some cases of

²⁶⁶ 87 FR 62237–38 (citing, *inter alia*, *Franze*, 826 F. App'x at 76–78; *Razak*, 951 F.3d at 146; *Verma*, 937 F.3d at 229 (citing *Selker Bros.*, 949 F.2d at 1293); *Off Duty Police*, 915 F.3d at 1059; *Iontchev v. AAA Cab Serv., Inc.*, 685 F. App'x 548, 550 (9th Cir. 2017); *McFeeley*, 825 F.3d at 241 (citing *Capital Int'l*, 466 F.3d at 304–05); *Keller*, 781 F.3d at 812; *Scantland*, 721 F.3d at 1312; *Flint Eng'g*, 137 F.3d at 1441; *Snell*, 875 F.2d at 810; *Superior Care*, 840 F.2d at 1058–59; *Lauritzen*, 835 F.2d at 1535; *Driscoll*, 603 F.2d at 754–55).

²⁶⁷ CPIO discussed technical proficiency and commented: “An individual's ability to maximize the profitability attributable to the individual's technical proficiency will depend on the individual's managerial skill and ability to persuasively communicate to a potential client the value of such proficiency.” The Department generally agrees with this statement to the extent that it focuses the inquiry on the worker's managerial skill.

²⁶⁸ See generally 87 FR 62275 (proposed § 795.110(b)(2)).

preventing investment from affecting the analysis.” The Department set forth its reasons (and the supporting case law) for focusing on the nature and reason for the worker’s investment and why the worker’s investment must be capital in nature for it to indicate independent contractor status. Consistent with that focus, the Department further explained (with a discussion of supporting case law) that “the use of a personal vehicle that the worker already owns to perform work—or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature.”²⁶⁹

Finally, the Department explained that its proposal to evaluate the worker’s investment in relation to the employer’s investment in its business “is not only consistent with the totality-of-the-circumstances analysis that is at the heart of the economic reality test, but it would also provide factfinders with an additional tool to differentiate between a worker’s economic dependence and independence based on the particular facts of the case.” The Department discussed the federal appellate case law supporting its proposal and addressed any contrary federal appellate case law.²⁷⁰

In addition to the numerous comments generally supporting the Department’s six-factor analysis, a number of commenters expressed support for the NPRM’s treatment of investments as a separate factor in the economic realities analysis. NWLC explained that, “[c]onsistent with the Department’s guidance from its earliest applications of the economic reality test until the 2021 Rule, the proposed rule considers investments by the worker and the employer as a factor distinct from opportunity for profit or loss.” LA Fed & Teamsters Locals stated that the 2021 IC Rule had “improperly combine[d]” the investments factor with the opportunity for profit or loss factor and that the NPRM’s treatment of the investments factor as a separate factor “more faithfully adheres to the long history of jurisprudence defining how to determine the economic reality.” The State AGs agreed that treating investments as a separate factor is “consistent with the case law.” Gale Healthcare Solutions expressed “support [for] the proposal to treat worker investment as a standalone factor in the economic reality analysis rather than as part of [the] opportunity for profit or loss analysis.” Others, including NELP, Real Women in

Trucking, IBT, and AFL–CIO, expressed similar support.

A number of commenters also supported the substance of the NPRM’s discussion of the investments factor. For example, Leadership Conference appreciated the clarification that the NPRM’s investments factor would provide, stating that “[a] true independent contractor should make significant capital or entrepreneurial investments in their business, especially relative to the entity that hired them.” The Shriver Center agreed that the investments of “a true independent contractor . . . must be capital or entrepreneurial, as opposed to tools that a worker is required by a business to have in order to perform a job.” Others, including Farmworker Justice, Real Women in Trucking, and LIUNA, commented similarly. See also NELP, Winebrake & Santillo, LLC, Gale Healthcare Solutions.

ROC United described as crucial the NPRM’s clarification “that ‘the use of a personal vehicle that the worker already owns to perform work—or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature.’” AFL–CIO “strongly encourage[d] [the Department] to include in the Final Rule its observation” regarding a worker’s use of a personal vehicle. LA Fed & Teamsters Locals agreed that the NPRM’s approach to a worker’s use of a personal vehicle was right and added that evaluating the worker’s investment relative to the employer’s “is critical because even when employers push the cost of tools and supplies onto the workers doing the work at the core of the employer’s business, the employers often have even larger investments.”

Some commenters that generally supported the Department’s six-factor analysis requested changes to or clarifications of the investments factor. In particular, a number of commenters addressed costs and expenses that employers require workers to bear or that they otherwise impose on workers and argued that such costs and expenses are not of a capital or entrepreneurial nature indicating independent contractor status. For example, Intelycare asserted that when a nursing agency shifts fees for malpractice insurance onto workers, those fees are not an investment by the workers. Intelycare added: “We urge the Department to close such loopholes and instruct that companies cannot shift or attempt to disguise their own investments in an effort to avoid employee classification.” Gale Healthcare Solutions likewise requested

that the Department “clarify that when a company shifts its ‘investment’ cost or a typical cost of doing business to workers (e.g., . . . purchasing group malpractice insurance and deducting the cost from workers’ pay), this transferred cost does not constitute worker investment.” LA Fed & Teamsters Locals requested that the Department make “clear in its final rule that *any* investments that an employer *requires* fall into th[e] category of non-probative investments, and provide additional guidance to ensure that employers cannot find additional ways to manipulate these factors.” NELP similarly requested that the Department “clarify that investments made by a worker that reflect a *contractual demand by the hiring entity, rather than an independent business investment decision or meaningful negotiation between business parties*, should not weigh towards independent contractor status.” NELP added: “Without this clarification, hiring entities may misclassify workers as independent contractors and require or pressure them, as a condition of receiving work, to make expenditures that appear large in comparison to an undercapitalized hiring entity—such as a fly-by-night subcontractor or labor broker—to avoid accountability.”

Having considered these comments, the Department agrees that costs unilaterally imposed by an employer on a worker are not capital or entrepreneurial in nature. Where the worker has no meaningful say either in the fact that the cost will be imposed or the amount, the cost cannot be an investment indicating that the worker is in business for themselves. Using malpractice insurance for nurses as an example, if such insurance is required by law or regulation and a nursing staffing agency purchases and maintains the insurance for the nurses and passes that cost on to, or imposes a charge for insurance on, the nurses, that cost does not indicate independent contractor status. But, if insurance is required by law or regulation, and the nurse can choose among policies based on their prices and coverages and does independently procure a policy, then the cost of the insurance could be capital or entrepreneurial in nature and indicative of independent contractor status. For these reasons, the Department is modifying the relevant sentence from the regulatory text regarding the investments factor to add the following text: “and costs that the

²⁶⁹ See generally *id.* at 62240–41.

²⁷⁰ See generally *id.* at 62241–43.

potential employer imposes unilaterally on the worker.”²⁷¹

Relatedly, Real Women in Trucking stated that truck drivers who wholly own or independently finance a truck are true owner-operators because “[t]his type of investment gives [them] the ability to keep their truck if they decide to stop working for any particular company, and accordingly some measure of economic independence.” The commenter further stated that, in contrast, “employer-sponsored leases for work equipment, including for trucks, are not investments of the kind that weigh in favor of independent contractor classification.” The Department generally agrees with this distinction, although it is hesitant to state that the existence of an employer-sponsored lease can never indicate independent contractor status. Consistent with the discussion of malpractice insurance in the previous paragraph, if a driver is not required to lease a truck from the employer, is able to consider independent financing options, is able to meaningfully negotiate the terms of the lease with the employer, is not required by the employer to work for it for a minimum period of time nor prohibited by it from using the leased truck to work for others, and then decides to lease from the employer, the cost of the truck leased from the employer could be capital or entrepreneurial in nature, especially if the lease could ultimately result in the driver’s wholly owning the truck.²⁷²

Regarding the proposed regulatory text’s statement that the costs to workers of tools to perform specific jobs are not capital or entrepreneurial investments, LIUNA suggested the following addition: “The mere utility of a worker’s tools to perform similar work for other employers does not render the worker’s purchase of those tools an entrepreneurial investment, especially

where the pertinent employer invests far more in facilitating or purchasing the employees’ work.” In support, LIUNA stated that “[t]he weight of authority . . . overwhelmingly suggests that the potential utility of a workers’ tools for other projects does not render those workers[] independent contractors.” This statement, however, overlooks that the economic realities analysis considers the totality of the circumstances. A worker’s use of tools alone does not determine whether the worker is an employee or independent contractor. Moreover, the Department believes that a worker’s purchase of tools and equipment for use performing multiple jobs for multiple employers can be a capital or entrepreneurial investment. The regulatory text already explains that the nature of such purchases of tools and equipment needs to be determined and that such costs to a worker and the worker’s other investments should be considered on a relative basis with the employer’s investments in its overall business. Accordingly, the Department declines LIUNA’s suggestion.

NELA stated that the NPRM “correctly focuses on whether investments are capital or entrepreneurial in nature” but expressed concerns that the “Department’s decision to separate the ‘investment’ prong from the ‘opportunities for profit and loss’ prong . . . goes too far, and detracts from . . . needed clarity.” According to NELA, “[a]n expenditure is only an ‘investment’ when it may impact profit and loss,” and “[i]f an employee has spent money for work but has no opportunity for profit and loss as a result, then the conclusion should be that they are not ‘investing’ in anything.” NELA requested that the NPRM “be edited to clarify that ‘investment’ inherently implies the possibility of profit and is only ‘capital or entrepreneurial in nature’ . . . when it has a nexus with profit and loss.” The Department agrees that whether the worker’s expenditures may result in profits or losses to the worker is highly relevant to whether those expenditures are capital or entrepreneurial in nature. However, because, as explained further below, the investment factor is not synonymous with the opportunity for profit or loss factor and because adding a “nexus with profit or loss” requirement is not supported by the weight of the case law that has historically viewed the two factors as analytically distinct under the economic reality test, the Department declines to promulgate an absolute requirement that

expenditures have “a nexus with profit and loss” to be capital or entrepreneurial in nature. Moreover, such a requirement could be viewed as similar to the 2021 IC Rule’s approach of combining the consideration of investments with opportunity for profit or loss—an approach that the Department is rejecting as discussed below. For all the reasons stated herein, the Department is restoring investments as its own separate factor. Although some overlaps between factors are understandable, tying investments to profits and losses in the absolute manner suggested by NELA would be contrary to the Department’s goal of rectifying the 2021 IC Rule’s treatment of investments as part of the opportunity for profit or loss factor.

NELA further stated that the NPRM was “correct to incorporate a relative-investment analysis” in this factor, but that “the Department should explain that the relative-investment analysis is qualitative, not quantitative, to better align this prong with the overarching dependence/independence inquiry.” According to NELA, “[a] qualitative review of relative investments helps determine whether the investment is entrepreneurial in nature,” but “[a]n analysis that instead focuses on a quantitative comparison of investments is rarely conclusive, because not all industries are equally capital-intensive.” NELA added that “the threshold question of which expenditures are entrepreneurial ‘investments’ versus ‘tools’ makes quantitative comparison confusing and inconclusive.” See also NELP (The Department should “clarify[] that the comparison of investments must be qualitative.”); Real Women in Trucking (“While a single tractor trailer is a relatively small investment compared to the fleets of trucks owned by some firms, when wholly owned or independently financed, it is sufficient to support a personal trucking business, and thereby meets the standard discussed in the Proposed Rule.”).

Having considered these comments, the Department agrees that focusing the comparison of the worker’s and the employer’s investments on their qualitative natures is helpful. As NELA points out, different industries may be more or less “capital-intensive.” Thus, focusing only on the quantitative measures (e.g., dollar values or size) of the investments may not achieve the full probative value of comparing the investments. On the other hand, comparing the investments in a qualitative manner (*i.e.*, the types of investments) is a better indicator of whether the worker is economically

²⁷¹ NELP additionally commented that “[c]larifying the relationship between [the investments and opportunity for profit or loss] factors will help identify situations (like the personal vehicle example . . .) where a corporation may be transferring the cost of doing business to its workers, who are required to make expenditures that are not independent decisions impacting their businesses’ profits or losses.” The Department believes that its discussion in this paragraph and the following paragraph, as well as its discussion below regarding the investments factor as it relates to the opportunity for profit or loss factor, provide additional clarity.

²⁷² On the other hand, where a driver has “the means to engage in the freight-hauling business only because [the employer] advanced a truck, equipment, and many other resources up front on [the employer’s] own credit” and is charged for those costs, the investment factor indicates employee status. *Brant v. Schneider Nat’l*, 43 F.4th 656, 671 (7th Cir. 2022).

dependent on the employer for work or is in business for themselves. That is because regardless of the amount or size of their investments, if the worker is making similar types of investments as the employer or investments of the type that allow the worker to operate independently in the worker's industry or field, then that fact suggests that the worker is in business for themselves. The comment from Real Women in Trucking captures this point well. Although the driver who wholly owns or is independently financing a single truck is making a quantitatively smaller investment (in dollars and size) than the employer that has a fleet of trucks, the driver is making a similar type of investment as the employer and a sufficient investment so that the driver can operate independently in that industry—suggesting independent contractor status. Another example is an individual photographer who has cameras and related equipment, has software to edit photos, and works out of their home. Although the individual may not have the extent of equipment, software with every capability, or a leased office space like a larger firm, the type of investments that the individual has made are sufficient in this case for the individual to operate independently in the photography field—suggesting independent contractor status. Accordingly, the Department is revising the last sentence of the proposed regulatory text for the investments factor to be two sentences and to read: “The worker’s investments need not be equal to the potential employer’s investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.” ²⁷³

²⁷³ IBT commented that, “[a]s it is currently written, this proposed factor could be misinterpreted as it unintentionally excludes from consideration, many of the conditions workers who work for platform-based companies are subject to.” IBT added: “By overemphasizing workers’ ability to increase earnings through minimal investment or personal initiative, the proposed rule risks inviting employers to engage in further tactics to exclude more of their workers from the FLSA’s protections.” The Department disagrees with this characterization, especially considering the modifications that it has made to the investments factor. For all of the reasons explained herein, the Department believes that it has struck the right balance by focusing on the nature of the worker’s investment (it should be capital or entrepreneurial to indicate independent contractor status) and by

Numerous commenters opposed, disagreed with, and/or requested changes to or clarifications of the proposed investments factor. For example, several commenters opposed the NPRM’s proposed treatment of investments as its own separate factor. NRF & NCCR stated that “investments are so interrelated with profits and losses that analyzing them separately is duplicative and unnecessary,” and that the 2021 IC Rule, “following Second Circuit precedent,” “brings clarity and helps reduce overlap to this analysis.” N/MA stated that “[i]nvestment by a worker in their own business creates an expense, which by definition creates an equation whether the worker may experience loss or profit depending on the worker’s net profits.” CWI stated that, “because the investment factor is already sufficiently addressed in the opportunity-for-profit-or-loss factor, there is no need for it to be addressed again as a standalone factor.” CWI disagreed with the Department’s characterization of the 2021 IC Rule on this point, stating that the 2021 IC Rule “provides that both initiative and investment must be considered, though both are not required” and thus “provides that the satisfaction of either is a *necessary* condition for the opportunity-for-profit-or-loss factor, but not that either is *per se sufficient*” (emphases added). See also Coalition of Business Stakeholders. FSI stated that the NPRM “introduces redundancy and double-counting by assessing a worker’s ‘investment’ in the business as a ‘standalone factor.’” The commenter further stated that although the Supreme Court in *Silk* articulated investment as a separate factor than opportunity for profit or loss, the Court “analyzed them together,” which the commenter asserted that the Department “fail[ed] to address.” Other commenters, such as ABC, North American Meat Institute, and the U.S. Chamber, also disagreed with the NPRM’s treatment of investments as its own separate factor.

Having considered the comments, the Department agrees with the comments discussed above from commenters including AFL–CIO, IBT, LA Fed & Teamsters Locals, NELP, and NWLC, and is retaining investments as a separate factor in the economic realities analysis. The Department’s approach is consistent with the overwhelming majority of federal appellate case law and the Department’s practice prior to

qualitatively comparing the worker’s investments to the employer’s investments to determine if the worker is making similar types of investments as the employer to suggest that the worker is in business for themselves.

the 2021 IC Rule. Almost all of the federal courts of appeals consider investments as a separate factor.²⁷⁴ In addition, the Department consistently identified investments as a separate factor in the analysis prior to the 2021 IC Rule.²⁷⁵ The Department understands that the Second and D.C. Circuits consider investments and opportunity for profit or loss as one factor.²⁷⁶ However, treating investments as a separate factor is consistent with the approach taken by most federal appellate courts, the Department’s intent for this final rule to be as grounded as possible in the case law, and the Department’s prior guidance. And as explained below, treating investments as a separate factor rather than including it in the opportunity for profit or loss factor as the 2021 IC Rule ensures that investments are considered in each case and may result in a fuller consideration of relevant facts.

The Department recognizes that the consideration of investments may be related to the consideration of the opportunity for profit or loss. As explained above in response to a comment from NELA, whether the worker’s expenditures may result in profits or losses to the worker is highly relevant to whether those expenditures are capital or entrepreneurial in nature. The U.S. Chamber, for example, cited the Fourth Circuit’s decision in *McFeeley* to support its argument that “[i]nvesting in one’s business necessarily entails creating an opportunity for profit or risking a loss on that investment.” In *McFeeley*, the court noted that the two factors “relate logically to one other” ²⁷⁷ but nonetheless articulated them

²⁷⁴ See, e.g., *DialAmerica*, 757 F.2d at 1382; *McFeeley*, 825 F.3d at 241; *Hobbs*, 946 F.3d at 829; *Off Duty Police*, 915 F.3d at 1055; *Brant*, 43 F.4th at 665; *Alpha & Omega*, 39 F.4th at 1082; *Driscoll*, 603 F.2d at 754; *Paragon*, 884 F.3d at 1235; *Scantland*, 721 F.3d at 1311.

²⁷⁵ See, e.g., WHD Op. Ltr. (Aug. 13, 1954); WHD Op. Ltr. FLSA–795 (Sept. 30, 1964); WHD Op. Ltr. (Oct. 12, 1965); WHD Op. Ltr. (Sept. 12, 1969); WHD Op. Ltr. WH–476, 1978 WL 51437, at *1 (Oct. 19, 1978); WHD Op. Ltr., 1986 WL 1171083, at *1 (Jan. 14, 1986); WHD Op. Ltr., 1986 WL 740454, at *1 (June 23, 1986); WHD Op. Ltr., 1995 WL 1032469, at *1 (Mar. 2, 1995); WHD Op. Ltr., 1995 WL 1032489, at *1 (June 5, 1995); WHD Op. Ltr., 1999 WL 1788137, at *1 (July 12, 1999); WHD Op. Ltr., 2000 WL 34444352, at *1 (July 5, 2000); WHD Op. Ltr., 2000 WL 34444342, at *3 (Dec. 7, 2000); WHD Op. Ltr., 2002 WL 32406602, at *2 (Sept. 5, 2002); WHD Fact Sheet #13, “Employment Relationship Under the Fair Labor Standards Act (FLSA)” (July 2008); AI 2015–1, available at 2015 WL 4449086 (withdrawn June 7, 2017).

²⁷⁶ See, e.g., *Franze*, 826 F. App’x at 76; *Superior Care*, 840 F.2d at 1058–59; *Morrison*, 253 F.3d at 11 (citing *Superior Care*, 840 F.2d at 1058–59).

²⁷⁷ 825 F.3d at 243.

separately²⁷⁸ and ultimately made determinations on each factor as it related to the workers' status as employees or independent contractors.²⁷⁹ And even assuming that the Supreme Court in *Silk* "analyzed them together" as FSI argued, the Court did articulate the two factors separately.²⁸⁰

Moreover, as decisions from the Fifth Circuit and other Circuits demonstrate, investments may be relevant to whether the worker is economically dependent on the employer separate and apart from the worker's opportunity for profit or loss. For example, the Fifth Circuit found in *Parrish* that the investment factor favored employee status (although it merited "little weight" in that case given the nature of the work) and that the opportunity for profit or loss factor favored independent contractor status.²⁸¹ In *Cromwell*, the Fifth Circuit conversely found that the investment factor indicated independent contractor status because the workers "invested a relatively substantial amount in their trucks, equipment, and tools" but that their opportunity for profit or loss was "severely limit[ed]." ²⁸² In *Nieman*, the Eleventh Circuit found that the investment factor weighed in favor of independent contractor status while the opportunity for profit or loss factor did "not weigh in favor of either" independent contractor or employee status.²⁸³ And in *Scantland*, the Eleventh Circuit found that the opportunity for profit or loss factor "point[ed] strongly toward employee status" although the investment factor weighed slightly in favor of independent contractor status.²⁸⁴

The 2021 IC Rule's treatment of investments as part of its opportunity for profit or loss factor further reinforces the Department's decision to treat investments as a separate factor. The 2021 IC Rule stated that its opportunity for profit or loss factor indicates independent contractor status if the worker exercises initiative or if the

worker manages their investment in the business.²⁸⁵ Although "the effects of the [worker's] exercise of initiative and management of investment are both considered" under its opportunity for profit or loss factor, the 2021 IC Rule clearly stated that a worker "does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor." ²⁸⁶ Thus, contrary to, for example, the argument of CWI that there would be a "balancing test," the 2021 IC Rule provided that, if either initiative or investment suggested independent contractor status, the other could not change that outcome even if it suggested employee status. The 2021 IC Rule's approach to investments was accordingly flawed because it, in some cases, eliminated the role of investments in helping to determine a worker's status, particularly when the investments or the lack thereof indicated that the worker was an employee.

In sum, nothing in this final rule forecloses consideration, in an appropriate case, of investments as they relate to the worker's opportunity for profit or loss. However, for all of the reasons set forth above and consistent with this final rule's totality-of-the-circumstances approach, treating investments as a separate factor in the analysis ensures that investments are accorded, at least at the outset of the analysis, the same considerations as the other factors and that the probative value of the investments toward the worker's dependence or independence will affect the ultimate outcome of the analysis.

A few commenters objected to the proposed regulatory text's statement that the investments factor "considers whether any investments by a worker are capital or entrepreneurial in nature." ²⁸⁷ CWI commented that "[n]othing in *Silk* or *Rutherford* construed the factor so narrowly," and that "limiting investments to those that are 'capital or entrepreneurial' would disproportionately impact underserved communities" because "the standard imposes significant barriers for individuals without the financial resources needed for capital and entrepreneurial investments—i.e., it

penalizes, and removes freedom in choosing work arrangements, from those without pre-existing financial resources." Flex made a similar point, stating that "tools need not be 'capital or entrepreneurial in nature' to have the effect of helping the worker achieve economic independence."

Having considered these comments, the Department adopts the proposal that whether the worker's investments are capital or entrepreneurial in nature is probative of whether they indicate employee or independent contractor status. Considering the worker's investment in this manner is consistent with the overall inquiry of determining whether the worker is economically dependent on the employer for work or is in business for themselves because a capital or entrepreneurial investment indicates that the worker is operating as an independent business. More specifically, capital or entrepreneurial investments tend to help a worker work for multiple companies—a characteristic of an independent business.

Accordingly, the examples in the regulatory text ("increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach") generally involve efforts to work independently for multiple companies. Focusing on whether the worker's investments are capital or entrepreneurial in nature does not construe the factor "narrowly," as CWI asserted. As explained below in response to specific comments asserting that this factor is limiting, there are no minimum-dollar thresholds or other requirements for investments to be capital or entrepreneurial and thus indicate independent contractor status. Instead, focusing on the nature of the worker's investments ties this factor to the worker's economic dependence or independence.

Many federal appellate court decisions have emphasized how the worker's investment must be capital in nature for it to indicate independent contractor status. For example, the Seventh Circuit determined in *Lauritzen* that migrant farm workers were not independent contractors, but employees, due in part to the lack of capital investments made by the workers.²⁸⁸ The court explained that investments that establish a worker's status as an independent contractor should be "risk capital [or] capital investments, and not negligible items or labor itself. . . . The workers here are responsible only for providing their own gloves [which] do not constitute a

²⁷⁸ *Id.* at 241.

²⁷⁹ *Id.* at 243 ("These two factors thus fail to tip the scales in favor of classifying the dancers as independent contractors.").

²⁸⁰ 331 U.S. at 716. Whether the Court in *Silk* actually analyzed the two factors together is questionable, particularly with respect to the "driver-owners." The Court concluded that "[i]t is the total situation, including the risk undertaken [a reference to the facts that they "own their own trucks" and "hire their own helpers"], the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors." *Id.* at 718.

²⁸¹ 917 F.3d at 382–85.

²⁸² *Cromwell v. Driftwood Elec. Contractors, Inc.*, 348 F. App'x 57, 60–61 (5th Cir. 2009).

²⁸³ 775 F. App'x at 624–25.

²⁸⁴ 721 F.3d at 1316–18.

²⁸⁵ 86 FR 1247 ("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.").

²⁸⁶ *Id.*

²⁸⁷ 87 FR 62275 (proposed § 795.110(b)(2)).

²⁸⁸ See 835 F.2d at 1537.

capital investment.”²⁸⁹ In *Paragon*, the Tenth Circuit explained that “the relevant ‘investment’ is ‘the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself.’”²⁹⁰ The Fifth Circuit has focused on whether the worker has any “risk capital” in the work and has found this factor to indicate employee status when all or an overwhelming majority of the risk capital is provided by the employer.²⁹¹ And the Sixth Circuit has described this factor as the “capital investment factor.”²⁹²

Moreover, CWI’s efforts to use *Silk* and *Rutherford* to undercut the Department’s approach are unpersuasive. In *Silk*, the unloaders “provided only picks and shovels,” and there was nothing to suggest that their “simple tools” were capital or entrepreneurial in nature.²⁹³ On the other hand, the “driver-owners” at issue in *Silk* “own[ed] their own trucks” and “hire[d] their own helpers,” and at least some worked “for any customer.”²⁹⁴ The circumstances of the driver-owners, and particularly the indication that their owned trucks and hired helpers allowed them to manage their businesses, operate independently, and work for multiple customers, suggest that their investments were capital or entrepreneurial in nature. And *Rutherford* is not instructive because the workers merely owned some tools specific to their boning work—nothing that suggested any type of investment to the Court indicating that they were independent contractors.²⁹⁵ Focusing on whether the worker’s investments are capital or entrepreneurial nature is thus consistent with *Silk* and *Rutherford* and is not a narrowing of those decisions.

Appraisal Institute and Real Estate Evaluation Advocacy Association asked whether “an appraiser seeking out specialized education, training, and certification” is making a capital or entrepreneurial investment “even when those trainings or certifications are industry requirements for certain categories of work.” As a general matter and as opposed to costs that a potential employer unilaterally imposes on a worker, a worker’s efforts to obtain specialized education, training, and

certification that are required by an industry can be capital or entrepreneurial in nature if (for example and as explained in the regulatory text) they increase the worker’s ability to do different types of or more work or extend market reach.

CLDA asserted that the “rule commentary also states the investment must be large, must be a capital expenditure, and must be entrepreneurial in nature.” It added: “This ignores the practical realities of starting a business. Few entrepreneurs can start a business with multi-million-dollar investments in equipment, technology, and real estate.” Direct Selling Association (“DSA”) similarly commented that focusing on whether the investment is capital or entrepreneurial in nature “would disproportionately impact underserved communities that direct selling serves such as Hispanics.” Stating that “practically any individual can start [a direct selling business] for an average of \$82.50,” it added that the Department proposed “a rule that would penalize this low-cost business by requiring a large investment to point towards being an independent contractor.” TheDream.US commented that “Dreamers certainly have skills and initiative, but not the resources to make the level of capital investment that the DOL seems to be proposing.” Although the NPRM cited cases discussing “large” expenditures,²⁹⁶ the NPRM focused on the nature of the investments, did not propose any minimum-dollar threshold, and absolutely did not suggest that “multi-million-dollar” or even “large” investments are required for this factor to indicate independent contractor status. As explained above, focusing on the nature of the investments and whether they are capital or entrepreneurial in nature is most probative of whether the worker is economically dependent on the employer for work or in business for themselves. Consistent with that focus, there is no minimum-dollar threshold or requirement that the investment be “large” or of a certain level for a worker’s investment to be capital or entrepreneurial in nature.

MEP stated that the examples of capital or entrepreneurial investments in the proposed regulatory text “unnecessarily limit the personal investments that should be considered in the analysis and seem to suggest that independent contractors can only be those individuals who want to expand

their business, increase their workload, or extend the business’ market reach.” These examples, however, are preceded in the regulatory text by the words “such as” and are plainly a nonexhaustive set of examples—none of which have to be satisfied.²⁹⁷ A worker’s investments are most likely to be capital or entrepreneurial in nature if they create or further the worker’s ability to work for multiple employers (as these examples suggest), but the examples are not limiting as MEP asserted. Likewise, in response to comments discussed below about particular types of investments, such as computers, phones, and specialized software, the Department is not suggesting that certain types of investments are always or can never be capital or entrepreneurial. Instead, the focus should be on the nature of the investment in the circumstances.

Numerous commenters raised concerns with the statement in the proposed regulatory text that: “Costs borne by a worker to perform their job (e.g., tools and equipment to perform specific jobs and the workers’ labor) are not evidence of capital or entrepreneurial investment and indicate employee status.”²⁹⁸ For example, Coalition of Business Stakeholders stated that the proposed provision “is far too broad of a directive to be of any use in conducting an independent contractor analysis” and that it would require factfinders to “ignore any amount of investment a worker made in his or her tools and equipment, even if those tools and equipment were—as in the case of a software security auditor who provides his own specially designed laptop—highly specialized and expensive.” CWI stated that, contrary to the proposed regulatory text, “such investments are plainly a function of the business-like decisions that contractors must make in choosing between the projects available to them” because “[t]hey may purchase equipment that allows them to complete a particular job more quickly—and thus more profitably—or may bypass projects requiring discrete expenditures that would lower profitability.” ABC added “independent contractors in the construction industry who invest in their own tools and equipment are in fact acting as entrepreneurs, and such investment should continue to be recognized as indicative of independent contractor status.” The U.S. Chamber

²⁸⁹ *Id.*

²⁹⁰ 884 F.3d at 1236 (quoting *Snell*, 875 F.2d at 810).

²⁹¹ See *Mr. W Fireworks*, 814 F.2d at 1052; *Pilgrim Equip.*, 527 F.2d at 1314.

²⁹² See *Off Duty Police*, 915 F.3d at 1056 (quoting *Donovan v. Brandel*, 736 F.2d 1114, 1118–19 (6th Cir. 1984)).

²⁹³ 331 U.S. at 717–18.

²⁹⁴ *Id.* at 719.

²⁹⁵ 331 U.S. at 725.

²⁹⁶ 87 FR at 62241 (citing *Paragon*, 884 F.3d at 1236 (quoting *Snell*, 875 F.2d at 810); *Lauritzen*, 835 F.2d at 1537).

²⁹⁷ *Id.* at 62275 (proposed § 795.110(b)(2)).

²⁹⁸ *Id.* As explained above, the Department is modifying this provision in response to comments to add “and costs that are unilaterally imposed by the potential employer on the worker.”

stated this provision “contradicts the weight of case law, which has held that a worker’s investment in the equipment necessary to perform a discrete job is evidence of independent contractor status” and that “[e]ven the Fifth Circuit, which utilizes a ‘relative investment’ inquiry, has found this to be true”). The U.S. Chamber added that “workers can be in business for themselves without having to expend huge sums of money,” and that “[a] ‘knowledge-based’ worker, such as an IT worker, may be able to perform independent work with only a laptop or tablet, which are seemingly ubiquitous and relatively inexpensive.” Relatedly, Fight for Freelancers asked whether “the investment in a computer, a cell phone and some specialized software constitute a meaningful enough investment to indicate independent contractor status under [the investments factor]?” Moreover, although WFCFA agreed with evaluating the worker’s “capital expenditures,” it expressed concern that the NPRM “eliminates one of the major capital expenses of many independent contractors—tools and equipment.” WFCFA identified “specialty tools” such as a “floor scrapper” and “power stretchers,” and stated that “[t]hese tools and equipment are major investments and should be recognized in evaluating whether the installer is an independent contractor or an employee.” WFCFA suggested modifying this provision in the regulatory text so that it provides that “investment in tools and equipment to perform specific jobs (other than common household tools or equipment) are evidence of capital or entrepreneurial investment and indicate independent contractor status.” Flex commented: “When a worker’s investment in tools and equipment allows the worker to move from client to client, the worker’s investment in those tools and equipment makes the worker less economically reliant on any one client.” CPIO, noting that “the Tenth Circuit reasoned that ‘[t]he mere fact that workers supply their own tools or equipment does not establish status as independent contractors’” (citing *Paragon*, 884 F.3d at 1236), commented that “*not establishing status* as independent contractors is vastly different from *establishing status* as employees,” and that “[a]t most, a finding that an individual bears that costs of performing a service would be neutral.” OOIDA expressed concern that this provision “might be construed as saying that the purchase or financing of equipment like a truck or trailer does not weigh in favor of independent

contractor status since this equipment is used to complete a job.” It asked the Department to “better clarify between the ‘tools and equipment’ that are used by a worker to perform specific jobs and may not indicate independent contractor status with the ‘capital and entrepreneurial’ investments that do.” NHDA expressed concern that a “medium duty Class 6 box truck, which costs between \$50,000—\$90,000 on average . . . may not indicate independence under the Proposed Rule, because . . . a medium duty truck is arguably expedient to perform the business of home delivery transportation.”

Having considered these comments, the Department continues to believe that it is helpful to provide guidance regarding workers who provide tools and equipment to perform a specific job, but acknowledges that the “to perform their job” language in the proposed regulatory text can be made more precise. Applying the general principle from the regulatory text that the focus should be on whether the investment is capital or entrepreneurial in nature and that capital or entrepreneurial investments tend to increase the worker’s ability to do different types of or more work, reduce costs, or extend market reach, investment in tools or equipment to perform a specific job would not qualify as capital or entrepreneurial. As the Department explained in the NPRM, “an investment that is expedient to perform a particular job (such as tools or equipment purchased to perform the job and that have no broader use for the worker) does not indicate independence.”²⁹⁹ On the other hand, a worker may invest in tools and equipment for reasons beyond performing a particular job, such as to increase the worker’s ability to do different types of or more work, reduce costs, or extend market reach. Such investments can be capital or entrepreneurial in nature. To the extent that the “to perform their job” language in the proposed regulatory text suggested otherwise, the Department is removing that language. Accordingly, the Department is further modifying the regulatory text so that this provision reads: “Costs to a worker of tools and equipment to perform a specific job, costs of workers’ labor, and costs that the potential employer imposes unilaterally on the worker, for example, are not evidence of capital or entrepreneurial investment and indicate employee status.” A worker may have expenses to perform a specific job and also make investments that generally

support, expand, or extend the work performed which may be of a capital or entrepreneurial nature. Thus, the existence of expenses to perform a specific job will not prevent this factor from indicating independent contractor status so long as there are also investments that are capital or entrepreneurial in nature.

A number of commenters expressed concerns with the statement in the NPRM’s preamble that “the use of a personal vehicle that the worker already owns to perform work—or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature.”³⁰⁰ Several of those commenters, however, gave examples of vehicles that are plainly not the type of vehicles identified in this statement. *See, e.g.*, NHDA (purchasing or leasing “personal vehicles for the primary purpose of starting a transportation business, whether full-time or part-time”); U.S. Chamber (purchasing “a car to use as a driver for a ride-sharing application”); WFCFA (purchasing “a vehicle that is capable of carrying the weight of flooring materials and tools”). The NPRM’s statement does not cover vehicles of the types in these examples that a worker purchased for a business purpose—vehicles which can be investments of a capital or entrepreneurial nature.³⁰¹

CLDA commented that “most entrepreneurs start their businesses with what they already have,” stating that “[t]hey start with using . . . their car as their delivery vehicle.” CLDA added that “[t]hose items may have started as personal items, but they become critical business tools and critical business investments when the entrepreneur starts using them to build a business.” The U.S. Chamber commented that the NPRM’s “absolutist statement ignores the fact that contractors may utilize their personal vehicles in a way that shows entrepreneurial activity. For example, if workers forgo selling their personal vehicle and, instead, choose to use their vehicle to drive for a ridesharing platform, that is quintessentially entrepreneurial activity. The fact that they had already owned their vehicle is immaterial.” Uber commented that “[w]hile it is true that drivers on platforms like Uber’s

³⁰⁰ *Id.*

³⁰¹ N/MA, while commenting on this statement regarding personal vehicles, gave as an example a “photographer who purchases more sophisticated special camera equipment expecting that he or she will use it in their work.” Again, purchasing specialized equipment for use in work can be an investment that is capital or entrepreneurial in nature.

²⁹⁹ *Id.* at 62241.

may be using vehicles they owned before they started driving, drivers can, and some do, choose to invest in, for example, a luxury vehicle in order to earn more by way of higher-end engagements . . . [or] a hybrid or electric vehicle specifically to increase their fuel economy.” MEP stated that “[i]ndividuals may not make . . . investments [in things such as personal vehicles] for the purpose of performing work, but individuals can choose to monetize those investments through independent work arrangements, such as via the gig economy.” It added that “[u]sing these pre-owned investments to engage in independent work should reflect economic independence, which is the ultimate inquiry in the worker classification analysis.” CWI suggested that the NPRM’s “discussion of vehicle investments should be withdrawn, and that the weight that each investment is afforded should instead be evaluated under the totality of the circumstances in which each such investment occurred.”

Having considered the comments, the Department agrees with the comments discussed above from commenters that supported the NPRM’s statement regarding personal vehicles, including AFL–CIO, LA Fed & Teamsters Locals, and ROC United, and reaffirms this statement. Whether a vehicle owned or leased by a worker and used to perform work is a capital or entrepreneurial investment does depend on the totality of the circumstances. In the scenario where a worker already owns a vehicle and happens to then use it to perform work, the acquisition of that vehicle was not for a business purpose and generally cannot be a capital or entrepreneurial investment. As the Eleventh Circuit explained in *Scantland*, the “fact that most technicians will already own a vehicle suitable for the work” suggests that there is “little need for significant independent capital.”³⁰² If a worker already owns a vehicle for personal use and then modifies, upgrades, or customizes the vehicle to perform work, the worker’s investment in modifying, upgrading, or customizing the vehicle could be a capital or entrepreneurial investment. In other scenarios, whether the vehicle is a capital or entrepreneurial investment often depends on whether the vehicle was purchased for a personal or business purpose. Where any vehicle is suitable to perform the work, purchase of the vehicle is generally not a capital or entrepreneurial investment. When the worker owns a vehicle with certain specifications (such as a van or truck) to

perform the work and the worker also uses the vehicle for personal reasons, that personal use is relevant, but the vehicle may still be a capital or entrepreneurial investment. For example, the Sixth Circuit has found that, where the workers’ vehicles “could be used for any purpose, not just on the job,” they did not indicate independent contractor status.³⁰³ The Fifth Circuit has considered the purpose of the vehicle and how the worker uses it, and in *Mr. W Fireworks*, it noted that most of the workers in that case purchased vehicles for personal and family reasons, not business reasons, in concluding that the investment factor indicated employee status.³⁰⁴ The Fifth Circuit has also noted that, “[a]lthough the driver’s investment of a vehicle is no small matter, that investment is somewhat diluted when one considers that the vehicle is also used by most drivers for personal purposes.”³⁰⁵ In sum, focusing on the purpose of the vehicle and how it is used is consistent with the overarching inquiry of examining the economic realities of the worker’s relationship with the employer. And the reality for a worker who already owns a vehicle for personal use and then uses it (without any modifications) to perform work is that the vehicle was not purchased for a business purpose and generally is not a capital or entrepreneurial investment.³⁰⁶ Even where a personal vehicle is not a capital investment indicating independent contractor status, there may be other facts relevant to the investment factor, and the worker’s ultimate status will be determined by application of all of the factors,

³⁰³ *Off Duty Police*, 915 F.3d at 1056.

³⁰⁴ 814 F.2d at 1052.

³⁰⁵ *Express Sixty-Minutes*, 161 F.3d at 304; see also *Keller*, 781 F.3d at 810–11 (fact that equipment could be used “for both personal and professional tasks” weakens the indication of independent contractor status).

³⁰⁶ WPI stated that “the NPRM posits that a worker buying a car is an immaterial investment for purposes of independent contractor classification if they also use the car for personal reasons.” The commenter, however, mischaracterized the NPRM’s statement, which addressed a personal vehicle that the worker already owns (and thus invested in for reasons other than a business purpose) and then uses to perform work. In the different scenario posited by the commenter, a car purchased by a worker may be an investment of a capital or entrepreneurial nature if purchased for a business purpose even if the worker also uses the car for personal reasons. Coalition of Business Stakeholders similarly mischaracterized the NPRM’s statement, saying that the NPRM “presumptively declares that a vehicle, should be considered ‘generally not an investment that is capital or entrepreneurial in nature’” (quoting the NPRM). The NPRM’s statement, however, addressed only a vehicle already owned by a worker that the worker then uses to perform work.

consistent with the totality-of-the-circumstances analysis.

Finally, numerous commenters opposed the NPRM’s proposal to consider the worker’s investments “on a relative basis with the employer’s investments in its overall business.”³⁰⁷ That proposed regulatory text further provided that “[t]he worker’s investments need not be equal to the employer’s investments, but the worker’s investments should support an independent business or serve a business-like function for this factor to indicate independent contractor status.”³⁰⁸

For example, CWI expressed “grave concerns” with comparing investments, stating that this approach “is inconsistent with law, uninformative to the economic realities test, and ultimately injects nothing but further uncertainty into the analysis.” CWI added that the Supreme Court in *Silk* addressed only the workers’ investments and not the employer’s investments, and that an “employer investing in its *own* business provides absolutely no insight into whether the worker is economically dependent on that business.” CWI further stated that “[i]t is hardly surprising that virtually all workers—employees and independent contractors alike—have fewer resources than businesses,” but “[t]hat fact, however, does not influence the question of economic dependence for either group.” NRF & NCCR requested that any consideration of relative investments “be stricken entirely,” raising similar concerns to CWI. NRF & NCCR added that consideration of relative investments would create barriers to entry in businesses because workers “would effectively be excluded from contracting with any but the smallest of companies.” The IFA requested clarification in the franchise context, noting that franchise opportunities require varying upfront investments, but “[t]his does not mean that someone who invests in a lower-cost franchise opportunity is any less an independent business person than someone with the means to invest a million dollars in a franchise.” N/MA argued that considering relative investments is inconsistent with *Silk* because the Supreme Court in that case “addressed the investment of the worker as part of the economic realities test only by reference to the worker’s investment.” The commenter added: “A putative employer’s level of investment in its own business provides no insight into

³⁰⁷ 87 FR 62275 (proposed § 795.110(b)(2)).

³⁰⁸ *Id.*

³⁰² 781 F.2d at 1318.

whether the worker is economically dependent on that business, as the work and investment made by the worker may be in an entirely different area of services than that even performed by the putative employer.” FSI stated that the Department “offers no reasoned explanation *why* that relative inquiry is probative of independent contractor status, contrary to the 2021 Rule’s conclusion that it measures an irrelevant comparison of respective organizational size.”

Club for Growth Foundation commented that the 2021 IC Rule was correct to reject a relative investments analysis. It added: “The size of the hiring business has no relevance to whether the worker is a contractor or an employee. Consider a talented translator who translates a book, on the same terms and for the same fee, into French for a local college press and into Spanish for a major commercial publishing house. Why should she be considered more likely to be an employee when doing the Spanish work?” OOIDA similarly commented that “it doesn’t make sense that an owner-operator would be an independent contractor if they are working with a three-truck carrier but then be judged differently if they go to work for a carrier with hundreds or thousands of trucks.” The CA Chamber, CLDA, Flex, NACS, NHDA, and Scopelitis, made similar points. *See also* ABC; CPIE; WFCFA.

Having considered these comments, the Department continues to believe that comparing the worker’s investments to the employer’s investment is well-grounded in the case law and the Department’s prior guidance. The Department further believes that comparing types of investments is indicative of whether a worker is economically dependent on the employer for work or is in business for himself.

Although the Supreme Court in *Silk* did not make such a comparison, federal courts of appeals applying the factors from *Silk* routinely make that comparison. For example, the Fifth Circuit “consider[s] the relative investments” and has explained that, “[i]n considering this factor, ‘we compare each worker’s individual investment to that of the alleged employer.’”³⁰⁹ The Sixth Circuit has

explained that “[t]his factor requires comparison of the worker’s total investment to the ‘company’s total investment, including office rental space, advertising, software, phone systems, or insurance.’”³¹⁰ The Fourth Circuit has similarly compared the employers’ payment of rent, bills, insurance, and advertising expenses to the workers’ “limited” investment in their work.³¹¹ In addition, the Third,³¹² Ninth,³¹³ and Tenth³¹⁴ Circuits have compared the worker’s investments to the employer’s investments. Moreover, the Department has previously provided guidance that the worker’s investments and the employer’s investments should be compared. In AI 2015–1, the Department explained that a worker’s investment “should not be considered in isolation” because “it is the relative investments that matter.”³¹⁵ AI 2015–1 further explained that, in addition to “the nature of the investment,” “comparing the worker’s investment to the employer’s investment helps determine whether the worker is an independent business.”³¹⁶ The Department has also compared the worker’s and the employer’s relative investments in opinion letters issued by WHD.³¹⁷ In sum, the relative investments approach is firmly supported by the case law and the Department’s precedent.³¹⁸

not useful; instead, it simply reflects the Fifth Circuit’s faithful application in that case of a totality-of-the-circumstances approach considering many factors, no one of which was dispositive.

³¹⁰ *Off Duty Police*, 915 F.3d at 1056 (quoting *Keller*, 781 F.3d at 810).

³¹¹ *McFeeley*, 825 F.3d at 243.

³¹² *Verma*, 937 F.3d at 231 (summarizing how courts have viewed this factor in cases examining the employment status of exotic dancers: “all concluded that ‘a dancer’s investment is minor when compared to the club’s investment’”) (quoting the district court’s decision).

³¹³ *Driscoll*, 603 F.2d at 755 (strawberry growers’ investment in light equipment, including hoes, shovels, and picking carts was “minimal in comparison” with employer’s total investment in land and heavy machinery).

³¹⁴ *Paragon*, 884 F.3d at 1236 (“To analyze this factor, we compare the investments of the worker and the alleged employer.”); *Flint Eng’g*, 137 F.3d at 1442 (“In making a finding on this factor, it is appropriate to compare the worker’s individual investment to the employer’s investment in the overall operation.”).

³¹⁵ 2015 WL 4449086, at *8 (withdrawn June 7, 2017).

³¹⁶ *Id.*

³¹⁷ *See* WHD Op. Ltr., 2002 WL 32406602, at *1–2 (Sept. 5, 2002) (workers’ “hand tools, which can cost between \$5,000 and \$10,000,” were “small in comparison to [the employer’s] investment,” but the “amount is none the less substantial” and “thus indicative of an independent contractor relationship”); WHD Op. Ltr., 2000 WL 34444342, at *4 (Dec. 7, 2000) (comparing “the relative investments” of the worker and the employer is the correct approach).

³¹⁸ Flex stated that the Department’s proposal to compare the worker’s and the employer’s relative

That said, the Department understands the concerns raised by many commenters with merely comparing the size of and dollar expenditures by the worker to those of the employer, especially for workers who are sole proprietors. Accordingly, as explained above in response to comments from NELA and others that suggested that the comparison of the worker’s and the employer’s investments should focus on the “qualitative” nature of their respective investments, the Department is modifying the last sentence of the proposed regulatory text for the investments factor to be two sentences and to read: “The worker’s investments need not be equal to the potential employer’s investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.” This modification should address commenters’ concerns that the size of and/or dollar investments of the employer will determine the outcome when comparing the investments. As explained above, comparing the qualitative (rather than primarily the quantitative) value of the investments is a better indicator of whether the worker is economically dependent on the employer for work or is in business for himself. That is because, regardless of the amount or size of their investments, if the worker is making similar types of investments as the employer or investments of the type that allow the worker to operate independently in the worker’s industry or field, then that fact suggests that the worker is in business for himself.³¹⁹

investments “directly contradicts the Department’s subregulatory guidance in Fact Sheet #13, which for decades has advised that ‘the amount of the alleged contractor’s investment in facilities and equipment’ is not only relevant to a worker’s status but tends to support classification as an independent contractor.” Fact Sheet #13 has been revised several times over the past years and will be revised to reflect this final rule. Regardless, there is no basis for Flex’s characterization that the version of Fact Sheet #13 available at the time of the NPRM advised that this factor “tends to support classification as an independent contractor” as that language is not in the Fact Sheet.

³¹⁹ Comparing the investments qualitatively also addresses the Eighth Circuit’s ruling in *Karlson* that the district court was correct to allow evidence of the worker’s and the employer’s relative investments, but also correct to not allow the worker to ask the employer about the dollar amount

³⁰⁹ *Hobbs*, 946 F.3d at 831–32 (quoting *Cornerstone Am.*, 545 F.3d at 344). In *Parrish*, the Fifth Circuit compared the relative investments as part of its analysis but accorded the relative investment factor “little weight in the light of the other summary-judgment-record evidence supporting IC-status.” 917 F.3d at 382–83. This does not support the conclusion that this factor is

Applying this qualitative approach to, for example, the hypothetical truck driver described by OOIDA is instructive. The hypothetical suggests that a driver “would be an independent contractor if [the driver is] working with a three-truck carrier,” but the same driver would be an employee if the driver goes “to work for a carrier with hundreds or thousands of trucks.”³²⁰ Comparing the driver’s investment qualitatively with each carrier, however, should produce the same indicator of employee or independent contractor status. With respect to either carrier, the focus should be on whether the driver is making similar types of investments as the carrier (even if on a smaller scale) so that the driver (like the carrier) can operate independently in the industry. As the application of a qualitative comparison to this hypothetical shows, this focus better aligns the relative investment analysis with the ultimate inquiry of whether the worker is dependent on the employer for work or in business for themself.³²¹

of its investment in order to simply compare the dollar value of the employer’s investment to the worker’s investment. See 860 F.3d at 1096.

³²⁰ This hypothetical and the hypotheticals offered by Club for Growth Foundation, Flex, and other commenters overlook the totality-of-the-circumstances nature of the economic realities analysis. No one fact or factor (including comparing the worker’s investments to the employer’s investments) will necessarily determine a worker’s status as an employee or independent contractor.

³²¹ ACLI commented that “[n]othing in the Proposed Rule explains whether the [relative investments] analysis is focused on investments that the company made in the specific worker’s business (*i.e.*, paying for the worker’s staff, rent, tools or equipment) or whether the analysis focuses on the overall investment of the company in the entirety of its separate business operations (*i.e.*, advertisements, branding, overhead for headquarters, etc.).” See also American Securities Association (“It is unclear whether the analysis is focused on investments that the company made in the specific worker’s business (*i.e.*, purchasing tools or equipment for the individual worker) or whether the analysis focuses on the overall investment of the company in its business operations (*i.e.*, branding, marketing campaigns, etc.).”). The proposed and final regulatory text, however, clearly indicate that the worker’s investments should be considered on a relative basis with “the employer’s investments in its overall business.” 29 CFR 795.110(b)(2). The ACLI also requested that the Department “clarify how the relative investments of the worker and the employer would be measured.” See also CPIO (“The NPRM offers no guidance on how to distinguish between those arrangements for which its proposed comparison of an individual’s investment with a company’s investment in its *overall* businesses would be relevant and those arrangements for which its proposed comparison should be disregarded.”). The Department has provided additional guidance in the discussion above and by modifying the regulatory text to convey that “the focus should be on comparing the investments qualitatively” more than by “comparing dollar values of investments or the sizes of the worker and the employer.” 29 CFR 795.110(b)(2). CPIO and IBA suggested modifying the relative investments analysis to “measure an individual’s investment in

ACLI commented that the proposed “Relative Investment factor conflicts with . . . the Ability to Profit or Loss Based On Managerial Skill factor” because the Department is “saying that a worker’s effectiveness in managing their overhead and expenses to maximize profit suggests independent contractor status, but that a worker’s failure to invest sizeable sums to offset the company’s investment suggests employment status.” It added that the opportunity for profit or loss factor “should be given greater weight than the relative investment factor so that workers who are skilled in managing their own overhead expenses are not penalized and deemed employees simply because they are better businesspeople and need to invest less and less over time as their businesses mature.” American Securities Association made a similar point. As an initial matter, the Department is not giving any factor any greater predetermined weight than any of the other factors for all of the reasons explained in this final rule. And as reiterated in this final rule, workers will not be “deemed employees” when applying the economic realities analysis based on one fact or factor because the analysis considers the totality of the circumstances. The Department’s modifications to the investments factor, and particularly the emphasis on comparing the worker’s investments and the employer’s investments qualitatively more than quantitatively, should address any concern that “a worker’s failure to invest sizeable sums to offset the company’s investment suggests employment status.”

The Department is finalizing the investments factor (§ 795.110(b)(2)) with the revisions discussed herein.

Example Investments by the Worker and the Potential Employer

A graphic designer provides design services for a commercial design firm. The firm provides software, a computer, office space, and all the equipment and supplies for the worker. The company invests in marketing and finding clients and maintains a central office from which to manage services. The worker occasionally uses their own preferred

the specific items the individual requires to perform the individual’s services, or compare the relative investment in those specific items by an individual and the company.” These commenters state that such a modification would avoid the need to address the relative size and magnitude of the worker and the employer and would be consistent with the ultimate inquiry of economic dependence. For all of the reasons explained above, however, the Department believes that those goals are better accomplished by focusing relative investments on a qualitative comparison.

drafting tools for certain jobs. In this scenario, the worker’s relatively minor investment in supplies is not capital in nature and does little to further a business beyond completing specific jobs. Thus, these facts indicate employee status under the investment factor.

A graphic designer occasionally completes specialty design projects for the same commercial design firm. The graphic designer purchases their own design software, computer, drafting tools, and rents an office in a shared workspace. The graphic designer also spends money to market their services. These types of investments support an independent business and are capital in nature (*e.g.*, they allow the worker to do more work and extend their market reach). Thus, these facts indicate independent contractor status under the investment factor.

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

For this factor, the Department proposed that the degree of permanence of the work relationship would “weigh[] in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships,” and that this factor would “weigh[] in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple entities.” The Department noted that independent contractors may have “regularly occurring fixed periods of work,” but that “the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification.” To further clarify, the Department proposed that “[w]here a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers’ own independent business initiative,” this would not indicate that the workers are independent contractors.³²²

As the Department noted in the NPRM and in the 2021 IC Rule, courts and the Department routinely consider the permanence of the work relationship as part of the economic reality analysis under the FLSA to determine employee

³²² See generally 87 FR 62243–45, 62275 (proposed § 795.110(b)(3)).

or independent contractor status.³²³ Courts typically describe this factor's relevance as follows: "'Independent contractors' often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas 'employees' usually work for only one employer and such relationship is continuous and of indefinite duration.'" ³²⁴ For example, a typical employee often has an at-will work relationship with the employer and works indefinitely until either party decides to end that work relationship. Conversely, an independent contractor does not usually seek such a permanent or indefinite engagement with one entity. Because of these general characteristics of work relationships, the length of time or duration of the work relationship has long been considered under the "permanence" factor as an indicator of employee or independent contractor status.³²⁵

Consistent with case law analyzing this factor, the Department proposed to provide further specificity by noting that an indefinite or continuous relationship is often consistent with an employment relationship, but that a worker's lack of a permanent or indefinite relationship with an employer is not necessarily indicative of independent contractor status if it does not result from the worker's own independent business initiative.³²⁶ The

Department also proposed to continue to recognize that a lack of permanence may be inherent in certain jobs—such as temporary and seasonal work—and that this lack of permanence does not necessarily mean that the worker is in business for themselves instead of being economically dependent on the employer for work. For example, courts have also recognized that the temporary or seasonal nature of some jobs may result in a "lack of permanence . . . due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative." ³²⁷ In such instances, a lack of permanence alone is not an indicator of independent contractor status.

Many commenters agreed with the Department's overall proposal for this factor. *See, e.g.,* AFL-CIO; IBT, LA Fed & Teamsters Locals; NDWA; NELP; NWLC; REAL Women in Trucking; UFCW. The LA Fed & Teamsters Locals noted in particular that by relegating the permanence factor to "secondary status," the 2021 IC Rule had negated the significance of "effectively indefinite working relationships" and that the Department's proposal "corrects this issue" by returning the factor to "an equal basis with all other factors." NELP concurred that "[a] worker whose work relationship is indefinite or continuous or who is performing a job that is regularly required by the business is more likely to be an employee than a worker who performs work that is definite in duration, project-based, or sporadic."

Many commenters also agreed with the portion of the Department's proposal that addressed situations in which a lack of permanency is inherent in the work, such as temporary or seasonal positions, which the Department had proposed as not necessarily indicating independent contractor status if it is not the result of the worker's own business initiative. *See, e.g.,* Gale Healthcare Solutions; LA Fed & Teamsters Locals; LIUNA; NABTU; NELP. Gale Healthcare Solutions agreed that a lack of permanence may be due to operational characteristics intrinsic to the industry rather than the workers' own business initiative, and it provided the example of temporary or seasonal forces such as "flu season" that can drive temporary nursing demand in the healthcare industry. It analogized this to the Second Circuit's decision in *Superior*

Care, where temporary nurses' lack of permanence did not preclude them from being employees because "this reflected 'the nature of their profession and not their success in marketing their skills independently.'" And commenters such as Farmworker Justice and the New Mexico Center on Law and Poverty affirmed the importance of recognizing that farmwork can be seasonal and/or temporary, but that this does not weigh against employee status for farmworkers, as many courts have recognized.³²⁸

The primary concern commenters raised about the Department's proposal to consider the degree of permanence of the work relationship as an indicator of employee or independent contractor status is that a long-term pattern of interaction is valued in business relationships, and that it can indicate the vitality and stability of a business where, for example, satisfied long-term clients or customers continue to use their services or contract for particular work. *See, e.g.,* CPIE; Fight for Freelancers; N/MA; NRF & NCCR; OOIDA; SIFMA; SHRM; U.S. Chamber. Similarly, commenters such as CWI and the U.S. Chamber noted that independent contractors may have mutually beneficial business relationships for a long or indefinite time period, which brings into question whether an "indefinite" work relationship is probative of employee status.³²⁹ Commenters raising such

³²³ See 87 FR 62243; 86 FR 1192 (citing a variety of federal appellate case law: *Razak*, 951 F.3d at 142; *Hobbs*, 946 F.3d at 829; *Karlson*, 860 F.3d at 1092–93; *McFeeley*, 825 F.3d at 241; *Keller*, 781 F.3d at 807; *Scantland*, 721 F.3d at 1312); *see also* WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002); WHD Op. Ltr., 2000 WL 34444342, at *5 (Dec. 7, 2000); WHD Fact Sheet #13.

³²⁴ *Snell*, 875 F.2d at 811 (citing *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1372 (9th Cir. 1981)); *see also Keller*, 781 F.3d at 807 (same); WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002) (same).

³²⁵ *See, e.g., Parrish*, 917 F.3d at 386–87 (noting that one of the relevant considerations under the permanency factor is the total length of the working relationship between the parties); *Capital Int'l*, 466 F.3d at 308–09 (in analyzing the degree of permanency of the working relationship, the "more permanent the relationship, the more likely the worker is to be an employee"); *DialAmerica*, 757 F.2d at 1385 (finding that "the permanence-of-working-relationship factor indicates that the home researchers were 'employees'" because they "worked continuously for the defendant, and many did so for long periods of time"); *Pilgrim Equip.*, 527 F.2d at 1314 ("the permanent nature of the relations between [the employer] and these operators indicates dependence"); *see also Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 408 (7th Cir. 2007) (describing an independent contractor as an individual who "appears, does a discrete job, and leaves again"); *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 328 (5th Cir. 1993) ("[a]lthough not determinative, the impermanent relationship between the dancers and the [employer] indicates non-employee status").

³²⁶ *See, e.g., Superior Care*, 840 F.2d at 1060–61; *see also* AI 2015–1, 2015 WL 4449086, at *10 (withdrawn June 7, 2017).

³²⁷ *Superior Care*, 840 F.2d at 1060–61 (citing *Mr. W Fireworks*, 814 F.2d at 1053–54); *see also Flint Eng'g*, 137 F.3d at 1442 (finding short duration of work relationships in oil and gas pipeline construction work to be intrinsic to the industry rather than a "choice or decision" on the part of the workers).

³²⁸ As noted in the NPRM, agriculture is an industry where courts often view permanency as working continuously for the duration of a harvest season or returning in multiple years. *See, e.g., Paragon*, 884 F.3d at 1237 (permanence factor favored employee status because the worker was hired temporarily for the harvest season "[b]ut his employment was permanent for the duration of each harvest season"); *Lauritzen*, 835 F.2d at 1537 (agricultural harvesters' relationship with employer was "permanent and exclusive for the duration of that harvest season" and permanency was also indicated by the fact that many of the same migrant workers returned for the harvest each year; the court noted that "[i]n many seasonal businesses necessarily hire only seasonal employees, but that fact alone does not convert seasonal employees into seasonal independent contractors").

³²⁹ One of the cases relied on by these commenters is *Donovan v. Brandel*, 736 F.2d 1114, 1117 (6th Cir. 1984), where the court determined that migrant farmworker families who sometimes returned annually to harvest pickles during a 30–40 day harvest season and "considered their jobs as migrant farm laborers to be opportunities for supplementing their income if their family situation allowed" were engaged in a "mutually satisfactory arrangement" that was "no more indicative of the employment relationship than when a businessman repeatedly uses the same subcontractors due to satisfaction with past performance." The Department is careful to note that *Brandel* is not necessarily representative of the way courts have viewed the permanence factor or employment status of agricultural workers who perform seasonal work, nor were these commenters specifically criticizing the regulatory language proposed by the

concerns did not want the fact that an independent contractor had fostered successful, long-term business relationships to indicate that these economically-independent businesses were actually employees of the entities that continued to use their services. They contended that the analysis should be more nuanced, including CWI's comment that "as is the case with most aspects of the economic realities analysis, '[t]he inferences gained from the length of time of the relationship depend on the surrounding circumstances.'"

The Department agrees that the permanence factor, like other factors in the economic reality test, is best understood in the overall context of the relationship between the parties where all relevant aspects are considered. The Department also clearly recognizes and appreciates that people who are in business for themselves often rely on repeat business and long-term clients or customers in order for their business to remain economically viable or successful. Thus, the Department notes that the proposed regulatory text does not reduce the permanence analysis to a simple long-term/short-term question. Instead, it looks to the general characteristics historically identified by courts and the Department regarding the permanency factor, which indicate employee status where there is a longer-term, continuous, or indefinite work relationship, and independent contractor status where the work is definite in duration, nonexclusive, project-based, or sporadic due to the worker being in business for himself. It explicitly recognizes that an independent contractor may have "regularly-occurring fixed periods of work." As shown in the example, a 3-year relationship between a cook who provides specialty meals and an entertainment venue does not automatically result in the cook being an employee of the venue, particularly where the cook acts as a "freelancer" by providing meals intermittently to the venue while marketing their meal preparation services to multiple customers and the cook can determine whether to provide meals for specific events at the venue based on any reason,

including because the cook is too busy with other work.

Several commenters expressed a mistaken belief that having a degree of permanence in a work relationship would automatically make workers employees, *see, e.g.*, N/MA; SBA Office of Advocacy, or that the Department was creating a "per se" rule that work of continuous or indefinite duration equates to employee status, *see, e.g.*, CWI; NRF & NCCR. Commenters who raised this concern generally asked the Department to either modify the regulatory text or eliminate this factor from consideration. However, as the Department has repeatedly explained, the economic reality test is a totality-of-the-circumstances test where no one factor is dispositive. Even if the degree of permanence in a work relationship indicates employee status, this is just one factor that would be considered along with other factors such as control, opportunity for profit or loss, investment, integral, and skill and initiative. The Department does not believe there is a scenario in which, for example, a worker who controls conditions of employment, sets their own fees, hires helpers, and markets their business is converted from an independent contractor to an employee solely because they have long-lasting relationships with some clients.

Some commenters suggested clarifications to better capture the permanency factor, in their view. For example, IBT and NELP suggested that the Department focus on whether the worker's role or position in a business is long-term, regular, or indefinite, rather than focusing on the individual's tenure, because high turnover of individuals in a particular position does not mean that the position or role within a business is not long-term, but that the job may be economically unsustainable or too dangerous for the worker. The Department agrees that a short-term duration of work may not be indicative of independent contractor status for these and other reasons. However, the Department notes that while this factor is known as the "permanency" factor, which could be observed literally by the length of an individual worker's tenure, the regulatory text also provides guidance regarding whether the work was on an indefinite or continuous basis. The Department believes that this captures situations where a position began as an indefinite or continuous one but was cut short—without the need to focus on the nature of the position or role within a business. Further, the commenters' suggestion is not, to the Department's

knowledge, an analysis that has been adopted for this factor by the courts.

NELP also suggested that the Department note that an employer may manipulate the permanence of a work relationship by firing or terminating a worker, and that if a worker lacks the power to influence their own permanence, this should weigh in favor of employee status. The Department notes that consideration of whether this type of manipulation to evade the obligations of the FLSA has occurred would seem to be more appropriate in an enforcement situation than in the regulatory text.

One commenter, CWI, objected to the Department's inclusion of "[w]here a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers' own business initiative, this factor is not indicative of independent contractor status" because it felt this language fails to account for the fact that "many types of independent contractor work are often limited or sporadic in duration precisely because such work is only needed for a discrete period of time" and that "the critical question is whether the worker acted like a business." The U.S. Chamber also contended that it "makes no difference whether . . . project-to-project work occurs as a result of 'operational characteristics,'" urging the Department to more clearly identify that whether a worker is acting independently is better viewed through the lens of whether the worker chooses "how, when, and the volume of services to provide." The Department agrees with these commenters that the critical question is whether the worker is in business for himself, which is why the proposed regulatory language would require consideration of whether a lack of permanence is due to the workers' own business initiative. Commenters such as NABTU and the NDWA supported the Department's proposal in this respect, noting that in industries like construction and home care, employment can be temporary and sporadic, and that consideration of whether the worker exercised independent business initiative was important.

The Department continues to believe that it is consistent with the case law and relevant to the overall question of economic reality to consider whether short periods of work are due to workers acting independently to obtain business opportunities or to the operational characteristics of particular industries

Department that was almost identical to the language in the 2021 IC Rule recognizing that the short duration of seasonal work such as in agriculture would not necessarily indicate independent contractor classification. *See* 86 FR 1247 (§ 795.105(d)(2)(ii)); *see also, e.g., Lauritzen*, 835 F.2d at 1536–37 (noting that *Brandel* has been "narrowed and distinguished"); *Cavazos v. Foster*, 822 F. Supp. 438, 441–42 (W.D. Mich. 1993) (collecting decisions issued after *Brandel* holding that migrant farmworkers are employees).

and the workers they employ.³³⁰ However, after considering the comments received, the Department finds that a clearer articulation of the final sentence in the proposed regulatory text would be beneficial to employees, employers, independent contractors, and the Department's enforcement staff. Therefore, the last sentence of § 795.110(b)(3) has been rephrased to emphasize whether the worker is exercising their own business initiative: "Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, this factor is not necessarily indicative of independent contractor status *unless the worker is exercising their own independent business initiative.*" (Emphasis added.) The Department believes this formulation makes it clearer that the proper analysis is not categorically based on operational characteristics of particular industries, as some commenters seemed to have read into the proposal, and that it is important to consider whether the worker is exercising independent business initiative with respect to these periods of work.

Many commenters suggested industry-specific analyses for the permanence factor. *See, e.g.,* ACLI (insurance agents); AFL-CIO (platform-based companies); American Securities Association and LPL Financial (financial advisors); MEP (applications on smart phones); NABTU (construction); NAFO (forestry); National Association of Realtors ("NAR") (real estate brokers). Because the Department is promulgating a general rule, it believes that this type of industry-specific guidance would be better suited to potential subregulatory guidance. The Department agrees that these types of factual analyses would, however, be highly relevant when applying the factors to particular situations and should certainly be considered by parties and factfinders. As some commenters noted, however, *see, e.g.,* CWI and U.S. Chamber, the operational characteristics of a

particular business or industry would not take precedence over the overall inquiry as to whether, as a matter of economic reality, the worker is in business for himself.

A smaller number of commenters addressed the Department's proposal to recognize that the exclusivity of a work relationship is appropriately considered under the permanency factor and to reject the 2021 IC Rule's approach of considering exclusivity just under the control factor based on whether the worker has the ability to work for others.³³¹ IBT strongly supported the inclusion of this consideration "because working exclusively for a particular employer clearly speaks to the permanence of the work relationship." Farmworker Justice, LIUNA, and NABTU highlighted the case law discussed in the NPRM where courts found that working exclusively for a particular employer for the duration of a seasonal or temporary job was indicative of employee status, agreeing that this was the appropriate analysis.³³²

The Coalition of Business Stakeholders, NHDA, and NRF & NCCR commented that they preferred to have exclusivity considered only under the control factor, as in the 2021 IC Rule. Similarly, the American Trucking Association contended that the permanence factor was redundant with the control factor because the only relevant aspect of the tenure of the parties' relationship is whether the entity contracting with the worker exercised coercion to prevent them from pursuing other business. Another commenter, FSI, objected that the Department had proposed to include exclusivity under the permanence factor based in part on the weight of the

federal appellate case law rather than applying its own independent reasoning.

The Department continues to believe, as discussed in the NPRM, that when analyzing worker classification under the FLSA, all facts that may be relevant to a particular factor should be considered, consistent with the totality-of-the-circumstances approach taken by courts.³³³ The case law clearly indicates that facts regarding the exclusivity of a work relationship are salient under both the permanence and control factors. In many cases courts considered this under permanence,³³⁴ and in many cases courts consider this under both permanence and control,³³⁵ while a smaller number of cases considered this only as part of a control analysis.³³⁶ Because the weight of federal appellate authority does not confine consideration of exclusivity to the control factor, and because the Department has historically viewed exclusivity as relevant to permanence,³³⁷ the Department does not believe it is appropriate to silo these facts under the control factor.³³⁸ For

³³³ *See* 87 FR 62244–45.

³³⁴ *See, e.g.,* *Hobbs*, 946 F.3d at 835; *Henderson v. Inter-Chem Coal Co., Inc.*, 41 F.3d 567, 570 (10th Cir. 1994); *Carrell v. Sunland Constr., Inc.*, 998 F.2d 330, 332, 334 (5th Cir. 1993); *Superior Care*, 840 F.2d at 1060–61; *Lauritzen*, 835 F.2d at 1537; *DialAmerica*, 757 F.2d at 1384.

³³⁵ *See, e.g.,* *Parrish*, 917 F.3d at 382, 386–87; *Keller*, 781 F.3d at 807–09, 814; *Scantland*, 721 F.3d at 1314, 1319; *Cornerstone Am.*, 545 F.3d at 344, 346.

³³⁶ *See, e.g.,* *Razak*, 951 F.3d at 145–46; *Saleem*, 854 F.3d at 141.

³³⁷ *See, e.g.,* WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002); WHD Op. Ltr., 2000 WL 34444342, at *5 (Dec. 7, 2000).

³³⁸ The 2021 IC Rule also recognized that some courts analyze the exclusivity of the work relationship as part of the permanence factor, 86 FR 1192, and the Department considered in its NPRM for that rule whether to include exclusivity under the permanence factor and change the articulation to "permanence and exclusivity of the working relationship" in order "to be more accurate," 85 FR 60616, ultimately rejecting an approach that would "blur[] the lines" between the factors, 86 FR 1193. As explained, upon further consideration of the importance of a totality-of-the-circumstances test where all relevant facts inform the economic dependence determination, the Department believes it is more accurate to consider the exclusivity of the work relationship under both permanence and control factors, especially as it may contribute to a fuller understanding of the parties' work relationship. *See Keller*, 781 F.3d at 807–09, 814 (explaining that consideration of the control exercised by the business that precluded the worker's ability to work for others "informs our analysis of the permanency and exclusivity of the relationship"); *Scantland*, 721 F.3d at 1319 ("looking through the lens of economic dependence *vel non*, long tenure, along with control, and lack of opportunity for profit, point strongly toward economic dependence"). Courts may find exclusivity to be relevant under other factors as well, consistent with the totality-of-the-circumstances approach. *See, e.g.,* *Hobbs*, 946 F.3d at 833, 835 (finding that the work schedule imposed by the employer prevented workers from engaging

³³⁰ *See, e.g.,* *Flint Eng'g*, 137 F.3d at 1442 (temporary rig welders exhibited sufficient permanency because such temporary work was intrinsic in the industry rather than a "choice or decision" by the workers); *Superior Care*, 840 F.2d at 1061 (lack of permanence did not preclude temporary nurses from being employees because this reflected "the nature of their profession and not their success in marketing their skills independently"); *Mr. W Fireworks*, 814 F.2d at 1054 ("in applying the *Silk* factors courts must make allowances for those operational characteristics that are unique or intrinsic to the particular business or industry, and to the workers they employ").

³³¹ *See* 87 FR 62244–45; *see, e.g.,* *Parrish*, 917 F.3d at 386–87 (noting that one of the relevant considerations under the permanency factor is whether any plaintiff worked exclusively for the potential employer); *Keller*, 781 F.3d at 807 (noting that "even short, exclusive relationships between the worker and the company may be indicative of an employee-employer relationship"); *Scantland*, 721 F.3d at 1319 (noting that "[e]xclusivity is relevant" to the permanency of the work relationship); *see also* WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002) (considering exclusivity under permanence factor); WHD Op. Ltr., 2000 WL 34444342, at *5 (Dec. 7, 2000) (same).

³³² *See, e.g.,* *Lauritzen*, 835 F.2d at 1537 (agricultural harvesters' relationship with employer was "permanent and exclusive for the duration of that harvest season"); *Mr. W Fireworks*, 814 F.2d at 1054 (the "proper test for determining the permanency of the relationship" in a seasonal industry is "whether the alleged employees worked for the entire operative period of a particular season"); *see also* *Flint Eng'g*, 137 F.3d at 1442 (temporary rig welders' relationship with employer was "permanent and exclusive for the duration of the particular job for which they [were] hired") (quoting *Lauritzen*, 835 F.2d at 1537).

example, in *Keller* the court considered the exclusivity of the work relationship under the permanence factor because an exclusive work relationship is a hallmark of the regularity of many employment relationships, and under the control factor because an employer's action that directly or indirectly prevents workers from working for others (thereby imposing an exclusive relationship) is a relevant mechanism of control.³³⁹ The Department believes it is appropriate to consider the weight of the case law when providing guidance, as the Department is doing consistently in this rule. For these reasons, the Department concludes that exclusivity should remain in the permanence factor and that it may also be considered under the control factor to the extent it speaks to the employer's control.

LIUNA suggested certain edits to the proposed regulatory text to better capture, in its view, the case law discussed in the NPRM where courts found that working exclusively for a particular employer for the duration of a seasonal or temporary job was indicative of employee status. LIUNA commented that the first sentence of the proposed regulatory text did not properly reflect this case law because it could be read solely as a characterization of work relationships that are indefinite or continuous: "This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships." It suggested that the Department better align the regulatory text with the case law by substituting the language regarding exclusivity in that sentence with the phrase "or exclusive of work for other employers." The Department agrees that the concept of exclusivity should not be limited to work relationships that are indefinite or continuous, and that it is more precise and aligned with the case law to substitute the language suggested, which the Department is adopting in this final rule. The Department wishes to emphasize, however, that the disjunctive word "or" is used in the regulatory text, and that it is intended to mean that exclusivity is not required in order for this factor to weigh in favor of employee status.³⁴⁰

in outside work, which was relevant under the opportunity for profit or loss factor as well as the permanence factor).

³³⁹ *Keller*, 781 F.3d at 807–09, 814–15.

³⁴⁰ LIUNA recognized that the Department might be concerned that "more emphatically stating the relationship between permanency and exclusivity would risk suggesting that a non-exclusive working relationship never supports employee status."

LIUNA requested further clarifying edits that would remove "project-based" from the general description of work relationships that weigh in favor of independent contractor status in order to add a more specific sentence stating that exclusivity in definite-term, project-based working relationships in industries that require project-based work "such as certain segments of the agricultural or construction industries" is probative of employee status. Similarly, Outten & Golden noted that project-based work can be indicative of employment when it is "regular, repeated, or when it is project-based, but still long-term" and it recommended including in the regulatory text the examples of seasonal or temporary work that were discussed in the NPRM as being consistent with an employment relationship, such as seasonal construction, agriculture, and retail work and temporary staffing agencies. *See also* NELA; Nichols Kaster PLLP.³⁴¹ The Department declines to remove "project-based" from the general description of work relationships that weigh in favor of independent contractor status because courts and the Department have associated project-based work with independent contractor status,³⁴² but it notes that "project-based" work alone is not dispositive of whether this factor weighs in favor of independent contractor status because all considerations relating to the permanence of the work should be considered. The Department also declines to add a more specific sentence or examples as requested because the Department has determined that it is not appropriate to address particular industries in this regulation of general applicability.

which it noted would be inaccurate, as the Department discussed in the NPRM. The Department concurs that this would be inaccurate for the reasons discussed in the NPRM and herein, and that clarifying this aspect should not be understood to require an exclusive relationship in order to establish employee status.

³⁴¹ Nichols Kaster also requested that the Department include additional language from the preamble in the final regulatory text. The Department declines this suggestion in the interest of providing succinct statements regarding each factor of the economic reality test in this final rule. The Department notes, however, that the preamble will be accessible for additional information regarding the rule.

³⁴² *See, e.g., Henderson*, 41 F.3d at 570 (facts that supported an inference that a mechanic was economically dependent on the employer included that he "primarily, if not exclusively" worked for the employer for over three years rather than being hired for a specific repair project); *Carrell*, 998 F.2d at 332, 334 (finding welders to be independent contractors where they worked for multiple employers on a project-by-project basis rather than exclusively for one employer); AI 2015–1, 2015 WL 4449086, at *10 (withdrawn June 7, 2017).

NHDA posited that whether a work relationship is exclusive is less illustrative of whether a worker is in business for themselves than the reason for the exclusivity, and that where a worker freely chooses to have an exclusive relationship with one transportation provider because of a "satisfying selection of routes or loads that permits the worker to attain financial goals," that worker should "not be judged as less in business for themselves than a worker who contracts with multiple transportation providers." The Department agrees that an exclusive relationship alone would not be determinative of the economic reality of the working relationship, and that it is important to look at all relevant factors, including factors referenced by the comment such as the worker's opportunity for profit or loss, to aid in the analysis. The Department notes that by recognizing that exclusivity weighs in favor of the worker being an employee, the Department is not stating either that independent contractors can never have exclusive relationships with other businesses or that employees who have nonexclusive relationships with employers because they work multiple jobs become independent contractors.

To the contrary, as discussed in the NPRM, although an exclusive relationship is often associated with an employment relationship and a sporadic or project-based, nonexclusive relationship is more frequently associated with independent contractor classification, courts have explained that simply having more than one job or working irregularly for a particular employer does not remove a worker from employee status and the protections of the FLSA. For example, in *Silk*, the "unloaders" came to the coal yard "when and as they please[d] . . . work[ing] when they wish and work[ing] for others at will."³⁴³ The Court nevertheless determined that the unloaders were employees: "That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act."³⁴⁴ Similarly, as the Second Circuit explained in *Superior Care*, the fact that the temporary nurses "typically work[ed] for several employers," was "not dispositive of independent contractor status" as "employees may work for more than one employer

³⁴³ 331 U.S. at 706.

³⁴⁴ *Id.* at 718.

without losing their benefits under the FLSA.”³⁴⁵

Courts have also determined that the fact that a worker does not rely on the employer as their exclusive or primary source of income is not indicative of whether an employment relationship exists.³⁴⁶ For example, the Sixth Circuit explained: “[W]hether a worker has more than one source of income says little about that worker’s employment status. Many workers in the modern economy, including employees and independent contractors alike, must routinely seek out more than one source of income to make ends meet.”³⁴⁷ Commenters supported the Department’s clarification in the NPRM, which the Department reiterates here, that exclusivity is not required in order to find a degree of permanence and that working multiple jobs does not necessarily favor independent contractor status—particularly because, as the Sixth Circuit noted, many workers’ financial needs require them to have multiple sources of income. *See, e.g.,* IBT; LCCRUL & WLC; NELP. LCCRUL & WLC described a current client who “often has to work for a variety of gig economy jobs

simultaneously, such as Uber Eats, GoPuff, Instacart, and Caviar, to keep her finances afloat.” And NELP observed that in “low-wage industries, particularly in services such as transportation, delivery, or home care, many workers juggle multiple jobs with multiple entities not as an exercise of their own business judgment but as a necessity to cobble together a living wage in an underpaying economy.”

Finally, the Department noted in the NPRM that where workers provide services under a contract that is routinely or automatically renewed, courts have determined that this indicates permanence and an indefinite working arrangement associated with employment.³⁴⁸ The proposed regulation noting that work relationships that are indefinite in duration or continuous weigh in favor of employee status is consistent with this case law. Some commenters mistakenly believed that the regulatory text explicitly stated that contractual renewals equate to employee status and objected for largely the same reasons commenters objected to their reading of the proposed regulatory text to imply that businesses could not have long-term relationships with clients without being considered employees of their clients, to which the Department responded above. *See* Fight for Freelancers; NRF & NCCR.

The Department is finalizing the permanence factor (§ 795.105(b)(3)) with the modifications discussed herein.

Example: Degree of Permanence of the Work Relationship

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

These facts indicate employee status under the permanence factor.

A cook has prepared specialty meals intermittently for an entertainment venue over the past 3 years for certain events. The cook markets their meal preparation services to multiple venues and private individuals and turns down work for any reason, including because the cook is too busy with other meal preparation jobs. The cook has a sporadic or project-based nonexclusive relationship with the entertainment venue. These facts indicate independent contractor status under the permanence factor.

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

In the NPRM, the Department proposed to modify § 795.105(d)(1)(i), which considered control as a “core” factor in the economic reality test. The 2021 IC Rule assessed the employer’s and the worker’s “substantial control over key aspects of the performance of the work,” which included setting schedules, selecting projects, controlling workloads, and affecting the worker’s ability to work for others.³⁴⁹ The 2021 IC Rule also stated that “[r]equiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses . . . does not constitute control” for purposes of the economic reality test.³⁵⁰

In its proposal and consistent with the 2021 IC Rule, the Department explained that it continues to believe that issues related to scheduling, supervision over the performance of the work (including the ability to assign work), and the worker’s ability to work for others are relevant considerations in evaluating the nature and degree of control. The Department’s proposal also considered additional aspects of control in the workplace that have been identified in the case law or through the Department’s enforcement experience—such as control mediated by technology or control over the economic aspects of the work relationship. However, as noted above, the Department’s proposal did not elevate control as a “core” factor in the analysis.³⁵¹

In addition, and contrary to the 2021 IC Rule, the Department’s proposed regulation included a sentence stating that an employer’s compliance with

³⁴⁵ *Superior Care*, 814 F.2d at 1060; *see also Saleem*, 854 F.3d at 142 n.24 (“It is certainly not unheard of for an individual to maintain two jobs at the same time, and to be an ‘employee’ in each capacity.”); *Keller*, 781 F.3d at 808 (agreeing with the Second Circuit that “employees may work for more than one employer without losing their benefits under the FLSA”); *Circle C Invs.*, 998 F.2d at 328–29 (noting that “[t]he transient nature of the work force is not enough here to remove the dancers from the protections of the FLSA”); *McLaughlin v. Seafood, Inc.*, 867 F.2d 875, 877 (5th Cir. 1989) (per curiam) (“The only question, therefore, is whether the fact that the workers moved frequently from plant to plant and from employer to employer removed them from the protections of the FLSA. We hold that it did not.”); *Hart v. Rick’s Cabaret Int’l, Inc.*, 967 F. Supp. 2d 901, 921 (S.D.N.Y. 2013) (noting that “countless workers . . . who are undeniably employees under the FLSA—for example, waiters, ushers, and bartenders”—work for multiple employers).

³⁴⁶ *Superior Care*, 814 F.2d at 1060; *see also Halferty*, 821 F.2d at 267–68 (“it is not dependence in the sense that one could not survive without the income from the job that we examine, but dependence for continued employment”); *DialAmerica*, 757 F.2d at 1385 (noting that “[t]here is no legal basis” to say that work that constitutes a second source of income indicates a worker’s lack of economic dependence on a job because the proper analysis is “whether the workers are dependent on a particular business or organization for their continued employment”).

³⁴⁷ *Off Duty Police*, 915 F.3d at 1058. The 2021 IC Rule correctly noted that a handful of cases improperly conflate having multiple sources of income with a lack of economic dependence on the potential employer. *See* 86 FR 1173, 1178. The 2021 IC Rule characterized such a “dependence-for-income” analysis as incorrect and a “dependence-for-work” analysis as correct. *Id.* at 1173. This critique continues to be valid, as is the observation that “[i]t is possible for a worker to be an employee in one line of business and an independent contractor in another.” *Id.* at 1178 n.19.

³⁴⁸ *See, e.g., Brant*, 43 F.4th at 672 (stating that “[a]utomatic [contract] renewal would weigh more heavily in favor of employee status”); *Scantland*, 721 F.3d at 1318 (finding one-year contracts that were automatically renewed to “suggest substantial permanence of relationship”); *Pilgrim Equip.*, 527 F.2d at 1314 (finding laundry operators’ one-year contracts that were routinely renewed indicated employee status); *Acosta v. Senvoy, LLC*, No. 3:16–CV–2293–PK, 2018 WL 3722210, at *9 (D. Or. July 31, 2018) (noting that one-year contracts that automatically renew are “evidence that a worker is an employee”); *Solis v. Velocity Exp., Inc.*, No. CV 09–864–MO, 2010 WL 3259917, at *9 (D. Or. Aug. 12, 2010) (the fact that package delivery drivers understood their contracts to be of indefinite duration and that contracts were routinely renewed without renegotiation indicated employee status).

³⁴⁹ *See* 86 FR 1246–47 (§ 795.105(d)(1)(i)).

³⁵⁰ *Id.* at 1247 (§ 795.105(d)(1)(i)).

³⁵¹ *See supra* section III.A.

legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations, for example, may indicate that the employer is exerting control, suggesting that the worker is economically dependent on the employer.

a. Overview of Control Factor

Commenters from across the spectrum agreed that control was a highly relevant factor to the economic reality analysis. *See, e.g.,* Gig Workers Rising; U.S. Chamber. Some commenters objected to the Department's proposed text that shifted the focus of this factor back to the nature and degree of control exerted by the potential employer, rather than by the worker. The 2021 IC Rule described the factor as considering the worker's and the potential employer's nature and degree of control, while the NPRM described the factor as considering primarily the potential employer's nature and degree of control.³⁵² N/MA, for example, commented that "a worker's right to control the manner and means by which a worker provides services is, and should remain, a primary consideration in the Department's discussion of the right to control factor." CWI described this aspect of the proposal as "misguided" because "[f]ocusing on the individual's control ensures that the totality of the worker's business are evaluated, including control the worker may have over whether to subcontract, how to manage his workforce, whether and how to advertise his services, and whether to prioritize, stagger, or overlap projects." It added that such "considerations are largely lost when the analysis is unduly narrowed to an evaluation of an individual putative employer's alleged control." *See also* NAM ("Instead of focusing on the control a worker exercises over their work (which would evidence that they are in business for themselves), the Department would rather determine 'employee' status on the employer's generally considered control over the work."). In contrast, other commenters agreed with the Department's returned focus on the nature and degree of the potential employer's control. For instance, the State AGs stated that the "case law is clear that the appropriate focus for this factor must be on the employer's control over the worker, and *not* the worker's control over the work." Similarly, Farmworker Justice commented that the NPRM "helpfully clarifies that a hiring entity/employer

who has the ability to control key aspects of the work is likely an employer."

Regarding the proposed scope of the factor, one commenter criticized the Department's proposal for eliminating the 2021 IC Rule's "express requirement of 'substantial' control." *See* Scalia Law Clinic. Additionally, business commenters generally disagreed with the inclusion of reserved control, stating that that this broadened the control factor and introduced additional uncertainty by using this "undefined, vague terminology." U.S. Chamber; *see also* CWI. Other commenters, however, such as the State AGs, noted that inclusion of reserved control is "the appropriate interpretation of the control factor and properly accounts for the variety of today's work arrangements." *See also* AFL-CIO (commenting that "discounting contractual or reserved control is inconsistent with congressional intent to expand the coverage of the FLSA beyond the narrow confines of common law employment").

A very large proportion of the comments received regarding the control factor addressed the proposal that an employer's compliance with legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations may indicate control, suggesting that the worker is economically dependent on the employer. Many commenters objected to this proposal. For example, Flex commented: "Legally required control is generally disregarded since that is control imposed by the government, not by the client or hiring party. The client or hiring party is not choosing to exercise legally required control; it is required to do so." *See also* Richard Reibstein, publisher of legal blog. The WFLA and others commented that "[r]equiring an independent contractor to comply with legal obligations, safety standards, contractual obligations, or industry standards should not be indicative of control" because "[t]hese requirements are standard in contracts and subcontracts." *See also* Genesis Timber; National Association of Home Builders ("NAHB"); NRF & NCCR.

Other commenters stated that the Department's proposal would disincentivize employers to prioritize safety and other beneficial policies, because employers would not want to risk workers being classified as employees. *See, e.g.,* Kentucky Trucking Association; Southeastern Wood Producers Association, Inc. The U.S. Chamber commented that workers and businesses should not be discouraged

from incorporating contractual terms that "support sound, lawful, safe work practices," as those terms do not evidence control over the worker by the business under the Act's economic realities test. SHRM stated that this aspect of the NPRM "will deter some companies from upholding their obligations in this respect by holding the specter of a misclassification finding over their heads for simply trying to do right by the people who make their businesses viable." *See also* CWI (commenting that this aspect of the NPRM "would effectively encourage businesses to avoid measures encouraging legal compliance and the safety of both independent workers and the public generally, so that they do not increase their risk of misclassification claims"). WPI noted that all businesses operate against regulatory backdrops and posited the following example: "a regulation might require all people on a construction site to wear a hard hat. The builder might, therefore require site visitors, including the eventual tenant, to wear hardhats. Is the eventual tenant now the builder's employee based [on] the exercise of control over a worksite?"³⁵³ And multiple financial advisors submitted identical comments stating that "[t]he Department should recognize that [supervision in order to comply with regulatory requirements] . . . helps my firm and me stay compliant with securities law and should not be viewed as a negative factor when determining my status under the [FLSA]." Flex opposed this proposed language as well, and further commented that the proposed regulatory language "lacks all of the context provided in the preamble" and that, "[i]f the Department's intent is to make clear that there 'may' be 'some cases' in which compliance with legal, safety, or quality control obligations 'may' be relevant, then the rule should say that and should provide the full context contained in the narrative."

Some heavily regulated industries in particular expressed concern about this proposed provision, including the trucking, financial services, insurance, and real estate industries. Scopelitis stated that "the proposal to consider compliance with legal, safety, or quality control obligations as employer-like control indicative of an employee relationship is untenable in the highly regulated trucking and logistics industries and any rollback of

³⁵³ In its NPRM, the Department explicitly addressed this scenario, stating that "if an employer requires all individuals to wear hard hats at a construction site for safety reasons, that is less probative of control." 87 FR 62248.

³⁵² 86 FR 1180; 87 FR 62275 (proposed § 795.110(b)(4)).

requirements for owner-operators to comply with such obligations will almost certainly lead to less safe roads in our Nation.”³⁵⁴ SIFMA commented that “[i]t is important for the highly regulated securities industry that independent contractors do not morph into employees merely because they must remain in compliance with federal and state securities, banking, and insurance laws.” The ACLI stated that “[i]t also would place at risk the careful balance that the courts and legislatures have fashioned in confirming the importance and viability of independent contractor models while ensuring regulatory compliance to protect the public.” And NAR stated that “[w]hile there may be some degree of control over an individuals’ work within broker-agent relationship as required by state law, the manner in which that work is completed—at the individuals’ broad discretion, for example—is a critical distinction that should not weigh in favor of classification as an employee.” Fight for Freelancers similarly explained that there are basic legal obligations for anyone involved in publishing, such as contract provisions that prohibit libel or theft of copyrighted material, and that such terms are “not indicative of a business’s control over how, when and where an article is written.”

Other commenters supported this proposed provision. The AFL-CIO commented that the very fact that a government entity or court “imposes an obligation on an entity to ensure a workplace or a set of workers complies with law strongly suggests that responsible government officials believe that the entity stands in a relationship with the workers such that it is appropriate for it to do so.” See also NELA (“When the employer, rather than the worker, controls compliance with legal, safety, or other obligations, it is evidence that the worker is not in fact in business for themselves because they are not doing the risk-management work involved in understanding and adhering to the legal and other requirements that apply to the work they perform and are not assuming the risk of

noncompliance.”); NELP (“The Department should explain that if a government agency or other entity looks to the hiring entity for compliance, that fact alone suggests that the hiring entity has the requisite control to demand compliance.”). ROC United commented that it was “an appropriate correction of the 2021 Rule” because delivery companies tend to exert control with respect to customer service standards and that “monitoring of drivers’ compliance is indicative of the control [those companies] has over them.” See also A Better Balance; Outten & Golden (commenting that the regulation should state that controls implemented by the employer to comply with legal obligations, safety standards, or contractual or customer service standards provides a strong indication of employee status). Finally, Intelycare supported this provision of the proposed regulation and further commented that the Department should explain that certain industries “are so highly regulated such that it is inherent in the nature of the work that the company must comply, and exercise control to require their workers to comply, with legal and safety regulations” and that in such circumstances the use of independent contractors is “likely inappropriate.”

Upon consideration, the Department is adopting proposed § 795.110(b)(4) with several revisions in response to comments received. For decades, courts and the Department have taken the view that the control factor represents one facet of the economic reality test.³⁵⁵ As noted in the NPRM, the Department continues to believe that control should be analyzed in the same manner as every other factor, rather than take an outsized role when analyzing whether a worker is an employee or independent contractor. As the Fifth Circuit stated in 2019, it “is impossible to assign to each of these factors a specific and invariably applied weight.”³⁵⁶

³⁵⁵ See, e.g., WHD Op. Ltr. (Aug. 13, 1954) (applying six factors, of which control was one, that are very similar to the six economic reality factors currently used by almost all courts of appeals); *Shultz v. Hinojosa*, 432 F.2d 259, 264–65 (5th Cir. 1970) (affirming judgment in favor of Secretary of Labor that slaughterhouse worker was an employee under the FLSA under a multifactor economic reality test of which control was one of the factors).

³⁵⁶ *Parrish*, 917 F.3d at 380 (quotation marks and citation omitted). The federal courts of appeals have taken this position for decades. See also, e.g., *Scantland*, 721 F.3d at 1312 n.2 (the relative weight of each factor “depends on the facts of the case”) (citation omitted); *Selker Bros.*, 949 F.2d at 1293 (“It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . [, and] neither the presence nor the absence of any particular factor is dispositive.”).

Regarding comments critiquing the Department’s proposed regulatory text shifting the focus of this factor back to the nature and degree of control exerted by the potential employer rather than by the worker, the Department declines to make any alterations to this proposed text. The control factor has its roots in the common law, where the inquiry was whether the “employer” had the “right to control the manner and means by which [work] is accomplished.”³⁵⁷ Courts have consistently, and for decades, considered this factor with the focus on the potential employer, not the worker. See, e.g., *Saleem*, 854 F.3d at 141 (“[A] company relinquishes control over its workers when it permits them to work for its competitors.”); *Razak*, 951 F.3d at 142 (phrasing the factor as “the degree of the alleged employer’s right to control the manner in which the work is to be performed”); *McFeeley*, 825 F.3d at 241 (phrasing the factor as the “degree of control that the putative employer has over the manner in which the work is performed”); *Karlson*, 860 F.3d at 1093 (phrasing the factor as “the degree of control exercised by the alleged employer over the business operations”); *Flint Eng’g*, 137 F.3d at 1440 (stating that, when “applying the economic reality test, courts generally look at (1) the degree of control exerted by the alleged employer over the worker”); *Scantland*, 721 F.3d at 1316 (explaining that “[t]he economic reality inquiry requires us to examine the nature and degree of the alleged employer’s control”). Congress and the Department have also historically focused on the control exerted by the potential employer (until the 2021 IC Rule). In the House Report accompanying the 1966 FLSA Amendments, for example, Congress described the factor as “[t]he degree of control which the principal [potential employer] has in the situation”³⁵⁸ and then affirmed that the “committee fully subscribes to these criteria.” In a 1968 Wage and Hour opinion letter, the Department described the factor as “[t]he nature and degree of control retained or exercised by the principal,” in a 1973 Wage and Hour Publication, it described the factor as “the nature and degree of control by the principal;”

³⁵⁷ *Reid*, 490 U.S. at 751.

³⁵⁸ See House Report No. 871, 89TH CONG., 1ST SESS., at 43 (1965). It is clear that Congress was referring to a potential employer by the use of the term “principal” because its articulation of the integral factor in the same section stated: “The extent to which the services rendered are an integral part of the principal’s business.” In contrast, its articulation of the initiative factor stated: “The initiative, judgment, or foresight exercised by the one who performs the services.” *Id.* (emphases added).

³⁵⁴ Several commenters, such as the Pennsylvania Motor Truck Association for example, included a number of contractual provisions in their comment and stated that the Department “has a duty to address each one in the context of any final rule as to whether it amounts to control.” The Department cannot opine on a particular employer’s discrete contractual provisions in a final rule. As stated in the 2021 IC Rule, “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.” 86 FR 1182.

and in longstanding Fact Sheet #13, the factor is also described as “[t]he nature and degree of control by the principal.”³⁵⁹ Accordingly, the Department believes that the appropriate focus of this factor should be on the potential employer.

Moreover, as explained in the NPRM and consistent with the economic reality analysis, this factor should necessarily focus on whether the employer controls meaningful economic aspects of the work relationship because that focus is probative of whether the worker stands apart as their own business. Simply assessing whether the employer lacks control over discrete working conditions (e.g., scheduling) or whether the employer exercises physical control over the workplace does not fully address whether the employer controls meaningful economic aspects of the work relationship.³⁶⁰ Specifically, the Fifth Circuit applied this analytical approach in a case where an insurance sales firm not only “controlled the hiring, firing, assignment, and promotion of the [workers’ subordinates],” but also controlled how the workers priced the insurance products, received leads for sales, and defined the territory in which the agents could sell products.³⁶¹ These actions made it clear that the employer, and not the workers, retained meaningful control over the “economic aspects of the business,” suggesting that the workers were employees.³⁶² The Third Circuit has similarly held that even though dancers had some scheduling flexibility, the control factor weighed in favor of employee status because the employer, and not the workers, controlled the economic aspects of the dancers’ work, such as the price of services, the clientele to be served, and the operations of the club in which they worked.³⁶³

Regarding the comments received addressing the scope of the control

factor such as whether reserved control should be included or whether the regulation should require “substantial” control, the Department declines to make the changes requested. First, the Department believes that the reference to reserved control should remain in the regulation as proposed. Control can certainly be exerted directly in the workplace by an employer, such as when it sets a worker’s schedule, compels attendance, or directs or supervises the work.³⁶⁴ As explained in the NPRM and addressed fully in section V.D. of this final rule, however, the absence of these more apparent forms of control does not invariably lead to the conclusion that the control factor weighs in favor of independent contractor status.³⁶⁵ Employers may also exercise control in other ways, including reserved rights to control, because such reserved rights may, in some situations, be probative of the economic reality of the total situation. Second, the Department declines to modify the regulation to require “substantial control” as requested by the Scalia Law Clinic. The Department does not believe such a modifier is appropriate in the regulatory text because the totality of the circumstances must be considered, and this heightened requirement is not supported by case law. Of course, substantial control can be indicative of employee status as several cases have held, but “substantial control” is not a predetermined requisite under the economic reality test.³⁶⁶ Moreover, as the regulatory text provides, “[m]ore indicia of control by the potential employer favors employee status; more indicia of control by the worker favors independent contractor

status.”³⁶⁷ Thus, substantial control by the employer would clearly favor employee status, though it is not required.³⁶⁸

Finally, current § 795.105(d)(1)(i) states that an employer requiring a worker to “comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms . . . does not constitute control that makes the [worker] more or less likely to be an employee.”³⁶⁹ In the NPRM, the Department explained that a blanket prohibition on consideration of compliance with legal or other obligations would not be appropriate, and that certain instances of control should not be excluded as irrelevant to the economic reality analysis only because they are required by business needs, contractual requirements, quality control standards, or legal obligations. Moreover, the Department recognized that the “case law is not uniform on this issue” and undertook a detailed discussion explaining why a complete bar to ever considering such compliance with legal, safety, or health obligations, or quality control measures would be inappropriate under the economic reality test.

The Department took a more nuanced approach in the preamble discussion than some commenters recognized in their comments, and it continues to find cases such as *Scantland* and others—which recognize that compliance with legal or contractual obligations or quality control may be relevant evidence of control—persuasive and more consistent with a totality-of-the-circumstances, economic reality analysis.³⁷⁰ The NPRM explained

³⁶⁴ See, e.g., *Scantland*, 721 F.3d at 1314 (finding workers to be employees, in part, because they “were subject to meaningful supervision and monitoring by” their employer).

³⁶⁵ See, e.g., *Mr. W Fireworks*, 814 F.2d at 1049 (“[T]he lack of supervision over minor regular tasks cannot be bootstrapped into an appearance of real independence.”) (citation omitted); *Antenor*, 88 F.3d at 934 (noting in FLSA joint employment case that the Act reaches even those employers who “[do] not directly supervise the activities of putative employees”). This has been the Department’s perspective for almost 6 decades. See WHD Op. Ltr., FLSA–795, at 3 (Sept. 30, 1964) (determining that professional divers were employees of a diving corporation, despite the lack of control over their work, by noting “that persons may be employees within the meaning of the Act even though they are unsupervised in their work, are not required to devote any particular amount of time to their work, [and] are under no restriction not to work for competitors of the employer”).

³⁶⁶ For example, in *Driscoll*, the Ninth Circuit described the control factor as the “degree of the alleged employer’s right to control the manner in which the work is to be performed” but then concluded that the employer possessed “substantial control over important aspects” of the workers’ work. 603 F.2d at 755.

³⁶⁷ 29 CFR 795.110(b)(4).

³⁶⁸ The Department also received comments urging it to delete this sentence of the proposed regulatory text. See NELP; Outten & Golden. These commenters expressed concern that the concluding sentence suggested a relative weighing of facts relevant to control in lieu of a “totality of the circumstances” analysis, and that this “implies a simple arithmetic tallying of the various listed facts” that would “invite an unnecessary contest that threatens to overshadow the purpose of the factor.” The Department declines to delete this sentence because it believes that considering the various indicia of control and whether they weigh in favor of employee or independent contractor status can be a helpful analytical tool. However, the Department agrees that the correct analysis is an overall, qualitative analysis, and that the considerations described within the control factor should not be used as a checklist or in a “tallying” fashion, just as the economic reality factors should not be tallied but rather considered based on the totality of the circumstances.

³⁶⁹ 86 FR 1247 (§ 795.105(d)(1)(i)).

³⁷⁰ As the Eleventh Circuit explained in *Scantland*, the “economic reality inquiry requires

³⁵⁹ WHD Op. Ltr. June 25, 1968; “Employment Relationship Under the Fair Labor Standards Act”, WHD Publication 1297, February 1973; WHD Fact Sheet #13 (July 2008).

³⁶⁰ See, e.g., *Cornerstone Am.*, 545 F.3d at 343–44 (finding that control weighs in favor of employee status even where the employer disclaims control over “day-to-day affairs” of the workers because the employer controlled the meaningful economic aspects of the work). Other elements may also be included in this examination of control, such as those identified by the Supreme Court in *Whitaker House*. They include whether the worker could sell their products or services “on the market for whatever price they can command,” whether the worker’s compensation was dictated by the employer; and whether management could fire the worker for failure to obey its regulations. 366 U.S. at 32–33.

³⁶¹ *Cornerstone Am.*, 545 F.3d at 343–44.

³⁶² *Id.* at 343.

³⁶³ *Verma*, 937 F.3d at 230.

explicitly and with detail that compliance with legal requirements may not always be relevant to control, and that such compliance was only one facet of control. However, the Department takes seriously the many comments received from stakeholders about the proposed regulatory language, the legitimate points they raised, and the concerns commenters expressed, even though the Department does not necessarily agree with all issues raised.

In the NPRM, the Department was cognizant of the challenge of setting forth a regulation that would capture all of the facts relevant to the nature and degree of a potential employer's control while balancing the practical considerations of the way businesses, particularly in some industries, must simultaneously comply with a host of legal, regulatory, and business-related demands. While the Department sought to strike the suitable balance between these two concerns in the NPRM, the comments have persuaded the Department that the provision as proposed may lead to unintended consequences due to stakeholder confusion and uncertainty. The Department does not agree, however, with commenters who stated that the Department's proposed regulatory text would make compliance with the law a "negative factor." As noted by commenters, businesses already must comply with various legal and regulatory requirements—for example, from the IRS, state licensing boards, and city ordinances. Additionally, the Department never had a blanket prohibition prior to the 2021 IC Rule on the consideration of compliance with legal obligations, and none of the mass uncertainty or noncompliance with legal norms suggested by commenters were apparent.³⁷¹ Nevertheless, the

us to examine the nature and degree of the alleged employer's control, *not why* the alleged employer exercised such control." 721 F.3d at 1316 (emphasis added). The court continued to explain that 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." *Id.*; see also *Schultz v. Mistletoe Express Serv., Inc.*, 434 F.2d 1267, 1271 (10th Cir. 1970) (noting that "arguments that an independent contractor relationship is shown by . . . the need to comply with the regulations of federal and state agencies do not persuade us" before affirming the conclusion that workers were employees under the FLSA).

³⁷¹ For example, in a 2014 Administrator's Interpretation "Joint employment of home care workers in consumer-directed, Medicaid-funded programs by public entities under the Fair Labor Standards Act" (withdrawn in 2020), the Department stated that "under an economic realities analysis, all of the facts and circumstances of the relationship between a provider and the state must be evaluated, and no single factor is determinative. Relevant factors that must be

Department recognizes the confusion evident in the comments regarding this provision. The Department agrees with commenters, for example, that stated that a publication's required compliance with libel law for a writer is not probative of a worker's economic dependence on that publication but if the publication instructed how, when, and where the work is performed, that is relevant to the control analysis. To provide another example, a home care agency requiring a criminal background check for all individuals with patient contact in compliance with a specific Medicaid regulation requiring such checks would not be indicative of control. Accordingly, the Department is revising the regulation to state that "actions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control."

The Department is further revising the regulation to state that "actions taken by the potential employer that go beyond compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control." This part of the regulatory text means that a potential employer's control over compliance methods, safety, quality control, or contractual or customer service standards that goes beyond what is required by specific, applicable Federal, State, Tribal, or local law or regulation may in some—but not all—cases be relevant to the analysis of a potential employer's control if it is probative of a worker's economic dependence. For example, in contrast to the background check example in the prior paragraph, a home care agency's extensive provider qualifications, such as fulfilling comprehensive training requirements (beyond training required for relevant licenses), may be probative of control. The Department continues to believe that control exerted by the employer to achieve these ends may be

considered when evaluating whether a state administering a consumer-directed program is an employer include the various legal requirements with which consumer-directed programs must comply, and how programs choose to comply with those requirements." See Administrator's Interpretation 2014–2, available at 2014 WL 2816951, at *5; see also Administrator's Interpretation 2015–1, available at 2015 WL 4449086, at *12 ("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.").

relevant to the underlying analysis of whether the worker is economically dependent on the employer, particularly where the employer dictates and enforces the manner and circumstances of compliance.

These instances of potential control, however, are relevant only if probative of the worker's economic dependence, as with any other consideration under the economic reality factors. For example, when an employer, rather than a worker, imposes safety or customer service obligations beyond what is required by specific, applicable Federal, State, Tribal, or local law or regulations, it may be evidence that the worker is not in fact in business for themselves. In those instances, they are not doing the entrepreneurial tasks that suggest that they are responsible for understanding and adhering to requirements that apply to the work or services they are performing such that they are assuming the risk of noncompliance—a typical and expected risk that workers in business for themselves regularly assume. Moreover, the Department understands that parties representing a wide array of business relationships enter into contracts, and this regulation should not inhibit those practices. For example, if a potential employer requires all workers to sign a contract acknowledging that the business's general policy is that invoices for work projects must be submitted within a particular timeframe, this is not indicative of control because such a generally applicable contractual term does not itself suggest that a worker is economically dependent on the employer for work. In contrast, if a potential employer requires all workers to sign a contract outlining specifically how, when, and where the work must be performed, that specific direction would be indicative of control because it suggests that the workers are not operating independently. The Department believes that this revised text will be able to encompass control that is relevant to the overall analysis of economic dependence while providing businesses with a clear rule regarding compliance with specific legal obligations.

As the Department emphasized in the NPRM and again emphasizes here, the facts and circumstances of each case must be assessed, and the manner in which the employer chooses to implement such obligations will be highly relevant to the analysis. For example, under this final regulatory text, it is not indicative of control if a potential employer requires everyone who enters a construction site to wear a hard hat as required by city ordinance.

However, if a potential employer chooses a specific time and location for its own weekly safety briefings that are not specifically required by law and requires all workers to attend, that may be probative of control. Similarly, it is not probative of control if a potential employer requires workers to provide proof of insurance required by state law, but if a potential employer mandates what insurance carrier workers must use, that may be probative of control.

The Department reminds stakeholders that this is merely one aspect of one factor of a multifactor test. Even if compliance with specific safety, contractual, customer service, or quality control requirements is indicative of control in a specific case, this does not compel a particular conclusion that the control factor favors employee status or that the overall analysis requires a particular result.³⁷² Thus, the final rule does not preclude a finding that a worker is an independent contractor where an employer obligates workers, for example, to comply with its own safety standards or quality control measures, after also considering other relevant factors in the economic reality analysis.

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

b. Scheduling

As a consideration under the control factor, the Department proposed that “[f]acts relevant to the employer's control over the worker include whether the employer sets the worker's schedule[.]”³⁷³ While the 2021 IC Rule similarly recognized that a potential employer's control over “key aspects of

the performance of the work, such as by controlling the individual's schedule” is relevant to determining employee or independent contractor status, the 2021 IC Rule also suggested that the worker's “substantial control over key aspects of the performance of the work” may be demonstrated simply by “by setting his or her own schedule.”³⁷⁴ As explained in the NPRM, after further consideration and review of the case law, the Department considered that framing to be too narrow because it shifted focus away from the employer's control—potentially allowing a finding of independent contractor status under the control factor based solely on a worker setting their own schedule, irrespective of other relevant considerations under control—and did not encompass actions the employer may take that would limit the significance of the worker's ability to set their own schedule.

The Department recognizes that many independent contractor relationships include the worker's ability to start and end work as they see fit.³⁷⁵ And the Department noted that such scheduling freedom may be probative of a worker's independent contractor status.³⁷⁶ Yet, multiple courts of appeals have determined that workers were employees, rather than independent contractors, even when they had the flexibility to choose their work schedule.³⁷⁷ Further, the Department

noted that employers may still be able to limit the number of hours available for a worker to choose or arrange the sequence or pace of the work in such a way that it would not be possible for the worker to have a truly flexible schedule, thus exhibiting control that could indicate that a worker is an employee.³⁷⁸

As the Department noted, courts have often found that a worker's ability to set their own schedule, by itself, provides only minimal evidence that a worker is an independent contractor, particularly when the hiring entity exerts other types of control; therefore, the freedom to set one's schedule should be evaluated against other forms of control implemented by an employer.³⁷⁹ The Department also cited the Tenth Circuit's common-sense observation that “flexibility in work schedules is common to many businesses and is not significant *in and of itself*.”³⁸⁰ For example, in *Silk*, the “unloaders” who came to the coal yard “when and as they please[d]” were employees rather than

and were free from supervision to be employees); *Sureway*, 656 F.2d at 1370–71 (“circumstances of the whole activity” show that laundry company “exercises control over the meaningful aspects of the cleaning [work]” despite the fact that workers could set their own hours).

³⁷⁸ 87 FR 62248 (citing *Flint Eng'g*, 137 F.3d at 1441 (“The record indicates rig welders cannot perform their work on their own schedule; rather, pipeline work has assembly line qualities in that it requires orderly and sequential coordination of various crafts and workers to construct a pipeline.”); *Doty v. Elias*, 733 F.2d 720, 723 (10th Cir. 1984) (“Since plaintiffs could wait tables only during the restaurant's business hours, [the employer] essentially established plaintiffs' work schedules.”)).

³⁷⁹ See, e.g., *Verma*, 937 F.3d at 230 (the Third Circuit found the ability to set hours, select shifts, stay beyond a shift, and accept or reject work to be “narrow choices” when evaluated against other types of control by the employer, such as setting the price for services); *Hill v. Cobb*, No. 3:13–CV–045–SA–SAA, 2014 WL 3810226, at *4–5 (N.D. Miss. Aug. 1, 2014) (finding that even though workers had no specific hours or schedule and could “come and go as [they] pleased” the employer “maintained extensive control over the remaining aspects” of the business such that the control factor weighed in favor of employee status); *Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07–0069, 2008 WL 2944661, at *15–16 (M.D. Tenn. July 31, 2008) (finding that although nurses could accept or reject shifts the employer exercised substantial control in other respects, such as over the manner in which nurses conducted their duties).

³⁸⁰ 87 FR 62249 (citing *Snell*, 875 F.2d at 806) (emphasis added); see also *Circle C. Invs.*, 998 F.2d at 327 (finding that the employer had “significant control” over dancers indicating employee status even though they had “input . . . as to the days that they wish to work”); *Doty*, 733 F.2d at 723 (“A relatively flexible work schedule alone, however, does not make an individual an independent contractor rather than an employee.”); *Wallington v. Twyeffort, Inc.*, 158 F.2d 944, 947 (2d Cir. 1946) (holding that workers who “are at liberty to work or not as they choose” were employees under FLSA).

³⁷⁴ 86 FR 1246–47 (§ 795.105(d)(1)(i)).

³⁷⁵ See, e.g., *Franze*, 826 F. App'x at 77 (noting that schedule flexibility “weigh[s] in favor of independent contractor status”); *Karlson*, 860 F.3d at 1094–96 (affirming a jury verdict finding a process server to be an independent contractor, in part, because the worker “was not required to report for work[.] . . . did not punch a time clock,” and did not have a set schedule, report a daily schedule to the employer, or face discipline for not working); *Express Sixty-Minutes*, 161 F.3d at 303 (determining that the employer “had minimal control” over the delivery drivers in part because the drivers “set their own hours and days of work” and could reject deliveries “without retaliation,” which was evidence that the worker was an independent contractor).

³⁷⁶ 87 FR 62249 (citing *Saleem*, 854 F.3d at 146 (finding drivers who were able to set schedules that “were entirely of their making” were properly found to be independent contractors where, among other factors, drivers could select routes, there was no incentive structure for them to drive at certain times, and they could exercise business-like initiative)).

³⁷⁷ See, e.g., *Verma*, 937 F.3d at 230, 232 (finding the ability to set hours, select shifts, stay beyond a shift, and accept or reject work to be “narrow choices” when evaluated against other types of control exerted by the employer and that a “holistic assessment” of all factors showed that the workers were not, “as a matter of economic reality, operating independent businesses for themselves”); *Paragon*, 884 F.3d at 1235–38 (finding that even though a worker could set his own schedule, he was an employee, in part, because his flat rate of pay did not allow him profit based on his performance); *DialAmerica*, 757 F.2d at 1384–86 (finding telephone survey workers who set their own hours

³⁷² For example, a court can consider control exerted over workers to comply with safety obligations as not indicative of control and nevertheless conclude upon consideration of all of the factors that such workers were employees under the FLSA. See *Rick's Cabaret*, 967 F. Supp. 2d at 916, 922.

³⁷³ 87 FR 62275 (proposed § 795.110(b)(4)).

independent contractors.³⁸¹ Flexibility that allows workers to use time between tasks or jobs may also be an inherent component of some business models, but such flexibility does not preclude a finding that the employer has sufficient control over a worker in other ways to weigh in favor of employee status. For instance, the Department noted that “the power to decline work, and thus maintain a flexible schedule, is not alone persuasive evidence of independent contractor status when the employer can discipline a worker for doing so.”³⁸² Moreover, both employees and independent contractors may possess scheduling flexibility in their working relationships.

As the discussion in the NPRM concluded, control over a worker’s schedule exhibits just that: one form of control.³⁸³ Both employees and independent contractors can take advantage of flexible work arrangements, which is why such scheduling flexibility, on its own, may not clearly indicate that the employer lacks control over the worker.³⁸⁴ As the Department noted, this approach is consistent with the economic realities, totality-of-the-circumstances approach, where such scheduling flexibility should be weighed along with other aspects of control the employer may be implementing.

Several commenters expressed general support for the NPRM’s discussion of scheduling flexibility. For example, the AFL–CIO noted that “[t]he NPRM . . . correctly makes clear that . . . scheduling flexibility is not necessarily indicative of independent

contractor status where other aspects of control are present[.]” In their comments, ACRE et al. and the Washington Center for Equitable Growth agreed that flexible work schedules can be common to employees and independent contractors alike and ACRE et al. noted that “flexible schedules alone do not determine a worker’s employment status.” See also NPWF. PowerSwitch Action supported the NPRM’s discussion of scheduling flexibility, commenting that the economic reality inquiry “is not illuminated by whether a worker can choose to perform their work at nights instead of days (or vice versa), in short several-hour increments over a single day or several days, or in periods that vary seasonally.” It contended that workers classified as employees have historically included workers with great scheduling flexibility across various industries, indicating that such freedoms are not synonymous with being an independent contractor. The LA Fed & Teamsters Locals agreed, noting that scheduling flexibility, alone, is a “poor indicator[] of the economic realities of the contemporary working relationship” unless that fact can “actually demonstrate the worker’s economic independence.” NWLC noted that “[t]he Department’s guidance here is consistent with court decisions finding, for instance, that nurses, dancers, and delivery drivers . . . were employees even though they had substantial control over their work hours, because their employers retained control over prices for their services and/or other important elements of their jobs.”

Some commenters addressed industry specific practices. For example, ROC United noted that their members, who are restaurant workers, “frequently decide when and how long to work,” yet, “once working, they have very little control over how they actually do the work,” suggesting their economic dependence. UFCW similarly commented that, in their experience working with drivers, app-based companies “threaten to expel workers from the platform or reduce the availability of work shifts, unless the worker continuously accepts jobs;” a situation that limits the benefit of flexibility.³⁸⁵ REAL Women in Trucking applauded “the Department’s decision to broaden its framing of the scheduling element from the 2021 Rule and to focus

on whether apparent scheduling flexibility actually provides for economic independence or whether the worker is still functionally dependent.” It noted that truckers can be constrained by other forms of control—such as retaliation for declining too many offered loads—and stated the proposal’s “emphasis on whether apparent scheduling flexibility is constrained by economic reality is accordingly well considered.”

The law firm Nichols Kaster noted that, in their experience, “employers who misclassify their workers as independent contractors rely on the workers’ ability to decline work as evidence of lack of control. But there is oftentimes no meaningful choice because declining work can result in discipline or other consequences.” It suggested including language from the preamble in the final rule to emphasize this point. NEHA agreed with the Department’s discussion of scheduling flexibility and similarly suggested that the Department include more information about scheduling flexibility in the final rule. Moreover, Gale Healthcare Solutions noted that the term “scheduling flexibility” needs further refinement, since workers in the healthcare industry may have the flexibility to select their preferred shift from a job board but do not have the flexibility to decide when the shift starts and ends, and this “inherently less ‘flexibility’” would indicate employee status. The Department declines commenters’ suggestions to include additional content in the final regulatory text for this factor. The current proposal was intended to provide succinct statements regarding each factor of the economic reality test with the understanding that the preamble will be accessible for additional information regarding the rule, as will future subregulatory guidance.

Several commenters also expressed concern with the Department’s approach, asserting that scheduling flexibility is a strong indicator of independent contractor status. For instance, Uber stated that “a worker’s ability to autonomously determine their own work schedule (days, hours, time of day, and more) is a strong predictor of independent status—on Uber, drivers and couriers can start and stop work whenever and wherever they choose, accepting only those offers they want to take[.]” DoorDash asserted that “[n]ot only is scheduling flexibility a significant distinction between employment and independent work: it gets to the very heart of the economic

³⁸¹ 331 U.S. at 706, 718.

³⁸² 87 FR 62249; see, e.g., *Off Duty Police*, 915 F.3d at 1060–62 (noting that “[a]lthough workers could accept or reject assignments, multiple workers testified that [the employer] would discipline them if they declined a job,” which supported a finding that the control factor favored employee status for one set of workers; testimony that another set of workers may not have been punished for declining work did not clearly support either employee or independent contractor status under the control factor’); see also *Parrish*, 917 F.3d at 382 (ability to turn down projects without negative repercussion was among the reasons the control factor weighed in favor of independent contractor status).

³⁸³ See, e.g., *Mr. W Fireworks*, 814 F.2d at 1048 (noting that work schedules compelled by the employer were, among other considerations within control, evidence that, “[a]s a matter of economic reality” the employer “exercise[d] great control” over the workers and thus, ultimately employee status).

³⁸⁴ See 87 FR 62249 (citing *Collinge*, 2015 WL 1299369, at *4 (finding that the fact that on-demand “[d]rivers are free to wait at home for their first delivery of the day, and . . . are free to ‘kill time’ on a computer or run personal errands” in between jobs did not demonstrate lack of control “because [it] merely show[s] that [the employer] is unable to control its drivers when they are not working, an irrelevant point.”) (footnotes omitted)).

³⁸⁵ The comment noted specific practices that erode the benefit of scheduling flexibility, such as app-based platforms offering first access to premium deliveries or allowing workers first access to select shifts on the condition that they have accepted enough jobs in the prior month.

reality test.” See also National Propane Gas Association.

SHRM suggested that the Department’s treatment of scheduling flexibility is misguided because, for example, “contract work may provide [low-wage earners] with control over their schedules, providing the ability to maximize their earnings and better attend to their personal obligations.” Multiple individuals, like one “independent healthcare professional,” stressed that many people like them want “the freedom to engage in flexible work arrangements that best meet our needs.”

The Department recognizes that many workers need and desire flexibility in their work schedules and seek out job opportunities that provide that flexibility. And, in some cases, control over one’s schedule can be probative of an employer’s lack of control over a worker, indicating that they may be an independent contractor.³⁸⁶ However, case law has consistently held that scheduling flexibility may be a relatively minor freedom, especially in those cases where a worker is prevented from exercising true flexibility because of the pace or timing of work or because the employer maintains other forms of control, such as the ability to punish workers who may seek to exercise flexibility on the job.³⁸⁷ In this way, the 2021 IC Rule’s focus on scheduling flexibility as a fact that demonstrates “substantial control over key aspects of the performance of the work” misapplied relevant cases that suggest the opposite conclusion.³⁸⁸ The proper lens for the test is the totality-of-the-circumstances analysis, which considers scheduling flexibility along with other forms of control the employer might exert, as well as with other factors in the economic reality test.³⁸⁹

³⁸⁶ See, e.g., *Express Sixty-Minutes*, 161 F.3d at 303 (determining that the employer “had minimal control” over the delivery drivers in part because the drivers “set their own hours and days of work” and could reject deliveries “without retaliation,” which was evidence that the worker was an independent contractor).

³⁸⁷ See, e.g., *Verma*, 937 F.3d at 230 (ability to set hours, select shifts, stay beyond a shift, and accept or reject work were “narrow choices” when evaluated against other types of control by the employer, such as setting the price for services); *Off Duty Police*, 915 F.3d at 1060 (“Although workers could accept or reject assignments, multiple workers testified that [the employer] would discipline them if they declined a job,” which was evidence of the employer’s ultimate control); *Flint Eng’g*, 137 F.3d at 1441 (“The record indicates rig welders cannot perform their work on their own schedule; rather, pipeline work has assembly line qualities in that it requires orderly and sequential coordination of various crafts and workers to construct a pipeline.”).

³⁸⁸ 86 FR 1247–48.

³⁸⁹ See, e.g., *Pilgrim Equip.*, 527 F.2d at 1312 (“In the total context of the relationship neither the

Some commenters asserted that consideration of scheduling flexibility should take into account specific industry and/or contractual arrangements that limit its availability. For example, NRF & NCCR commented that the Department’s proposed approach “ignores key realities of business relationships common to retailers and restaurants.” Examples include individuals who rent retail space but are constrained by limited operating hours of the building in which they rent, food delivery workers who may only be able to deliver food when a restaurant is open, or cleaning crews who can only do their work at night. They asserted that these types of limitations do not necessarily indicate that the worker lacks control over their schedule. The CA Chamber echoed this sentiment, noting that “[a] business engaging a contractor to perform services is likely to have certain dates or times that they would prefer or possibly need that work to be performed,” suggesting the Department did not take this reality into account. See also AFPP (asserting that the control analysis is complicated “by adding to it such items of routine contractual terms” like scheduling which “cast no meaningful light on employer-employee status.”). The PGA noted, specific to its industry, that “[golf] teaching professionals set their own schedules,” yet “their ability to teach at a particular space may be limited by the space’s operating hours or conflicting events that require the use of the property.” They asserted that this limitation “should not be viewed as an example of a lack of control by the teaching professional.”

Dart contended that if the Department’s perspective is that limited scheduling control by the worker indicates employee status, then many drivers who independently “elect to transport similar loads along the same routes over a period of time, risk losing their status and independence under this factor.” They asserted that drivers who wish to remain independent would thus have to “arbitrarily switch routes and carriers, and . . . bear whatever costs or inefficiencies such switches may give rise to, simply to preserve their independent status under this factor” and requested that the Department adopt “language which specifically incorporates consideration of the reality of the industry in question.”

[workers’] right to hire employees nor the right to set hours indicates such lack of control by [the employer] as would show these operators are independent from it.”) (emphasis added).

In addition, DoorDash suggested that the type of flexibility its workers possess is fundamentally different from the flexibility an employee may obtain from an employer. For instance, “[h]aving some room to voice a preference about shifts or work remotely isn’t true scheduling flexibility, because the ultimate control still belongs to their employers, who dictate things like deadlines and meeting schedules that can’t be shirked.” In contrast, DoorDash noted that its platform allows workers to work on their own time and walk away, potentially for weeks or months at a time.

The Department disagrees that its formulation of the control factor must explicitly consider unique contractual or industry-specific scenarios that might affect scheduling flexibility. The language of the proposed rule noted that “[f]acts relevant to the employer’s control over the worker include whether the employer sets the worker’s schedule,” or where the employer “places demands on workers” that do not allow them to work . . . when they choose.”³⁹⁰ To the extent a potential employer is exerting control over when and for how long an individual can work, that fact is indicative of the employer’s control. And even in those scenarios where the worker’s schedule is constrained by contract or employer requirements, such scheduling control is only one fact among many that could be considered under the control factor.

Finally, some commenters asserted that the Department’s shift in focus to the employer’s control was misguided. CWI suggested that “where a result or service is perishable or deadline driven, based on the consumer’s desire or the nature of the product or service, it is inappropriate to describe the final deadline as evidence of the business setting the worker’s schedule.” In this way, CWI argued, a focus on scheduling flexibility solely from the perspective of the employer, “prevents a counterbalancing of those separate actions by the employee that, separate and apart from its direct interactions with the putative employer, establish he is in business for himself.” Similarly, N/MA noted that a shift in focus “from the worker’s right to control the manner and means by which the work is performed to the purported employer’s control . . . [is] misdirected,” and does not consider “the totality of the worker’s business . . . including . . . whether the worker . . . determines to prioritize, stagger, or overlap projects from multiple entities” as they see fit.

³⁹⁰ 87 FR 62275.

The Department's decision to present the control factor from the perspective of the employer's control over the economic aspects of the working relationship conforms to relevant case law describing the factor and also represents a common-sense understanding that an employer's ability to control a worker's time may be probative of the worker's status.³⁹¹ And as discussed earlier, where a worker has the ability to set their own work schedule, courts have often found this to be less significant relative to other ways in which the employer exerts control. As such, scheduling flexibility should not be considered potentially dispositive of the control factor as articulated in the 2021 IC Rule. Moreover, the rule does not eliminate the relevance of the worker's ability to control their schedule in the analysis, as the rule notes that "more indicia of control by the worker," such as control over one's schedule, may "favor[] independent contractor status."³⁹²

The Department is finalizing the scheduling portion of the control factor at § 795.105(b)(4) as proposed.

c. Supervision

With respect to the consideration of supervision within the control factor, the Department proposed that "[f]acts relevant to the employer's control over the worker include whether the employer . . . supervises the performance of the work" including "whether the employer uses technological means of supervision (such as by means of a device or electronically)" or "reserves the right to supervise or discipline workers."³⁹³ In describing its proposal, the Department noted the common-sense observation that an employer's close supervision of a worker on the job may be evidence of the employer's control over the worker, which is indicative of employee status. Conversely, as the Department noted, the lack of close supervision may be evidence that a worker is free from control and is in business for themselves.³⁹⁴ However, courts have found that traditional forms of in-person, continuous supervision are not required to determine that this factor weighs in favor of employee status.³⁹⁵

A lack of supervision is not alone indicative of independent contractor status,³⁹⁶ such as when the employer's business or the nature of the work make direct supervision unnecessary. For example, in *Off Duty Police*, the Sixth Circuit determined that security officers were employees although they were "rarely if ever supervised" on the job, noting that "the actual exercise of control 'requires only such supervision as the nature of the work requires.'"³⁹⁷ Moreover, "the level of supervision necessary in a given case is in part a function of the skills required to complete the work at issue."³⁹⁸ As the court noted, there was a limited need to supervise where officers in that case "had far more experience and training than necessary to perform the work assigned."³⁹⁹ And in *DialAmerica*, the Third Circuit concluded that homeworkers were employees even though they were subject to little direct supervision (a fact typical of homeworkers generally).⁴⁰⁰ As the Second Circuit stated, "[a]n employer does not need to look over his workers' shoulders every day in order to exercise control."⁴⁰¹

In the NPRM, the Department also explained that employers may rely on training and hiring systems that make direct supervision unnecessary. As the Department noted, in *Keller v. Miri Microsystems LLC*, an employer relied on pre-hire certification programs and installation instructions when hiring their satellite dish installers.⁴⁰² The court noted that the employer had little day-to-day control over the workers and did not supervise the performance of their work, but that a factfinder could "find that [the employer] controlled [the

independent contractors because they are "free from supervision, are at liberty to work or not as they choose, and may work for other employers if they wish").

³⁹⁶ 87 FR 62249 n.393 (noting that the legislative history of the FLSA supports this point directly, since the definition of "employ" was explicitly intended to cover as employment relationships those relationships where the employer turned a blind eye to labor performed for its benefit) (citing *Antenor*, 88 F.3d at 934)).

³⁹⁷ 915 F.3d at 1061–62 (quoting *Peno Trucking, Inc. v. Comm'r of Internal Revenue*, 296 F. App'x 449, 456 (6th Cir. 2008)).

³⁹⁸ *Id.* at 1061.

³⁹⁹ *Id.* at 1062.

⁴⁰⁰ 757 F.2d at 1383–84. See also *McComb v. Homeworkers' Handicraft Coop.*, 176 F.2d 633, 636 (4th Cir. 1949) ("It is true that there is no supervision of [homeworkers'] work; but it is so simple that it requires no supervision.").

⁴⁰¹ *Superior Care*, 840 F.2d at 1060; cf. *Antenor* 88 F.3d at 933 n.10 (explaining in an FLSA joint employment case that "courts have found economic dependence under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employees").

⁴⁰² 781 F.3d at 814.

installer's] job performance through its initial training and hiring practices."⁴⁰³ The Department also highlighted, from the Fifth Circuit's statement in *Parrish*, that the "lack of supervision [of the individual] over minor regular tasks cannot be bootstrapped into an appearance of real independence."⁴⁰⁴ Yet, the Department recognizes that a worker's ability to work without supervision may be probative of their independent contractor status, such as in *Nieman*, where the court affirmed a district court's conclusion that an insurance claims investigator was properly classified as an independent contractor, in part, because the investigator worked largely without supervision when setting up appointments, and deciding where to work and how and when to complete his assignments.⁴⁰⁵

Finally, the Department noted that supervision can come in many different forms beyond physical "over the shoulder" supervision, which may not be immediately apparent.⁴⁰⁶ For instance, supervision can be maintained remotely through technology instead of, or in addition to, being performed in person, such as when supervision is implemented via monitoring systems that can track a worker's location and productivity, and even generate automated reminders to check in with supervisors.⁴⁰⁷ Additionally, an employer can remotely supervise its workforce, for instance, by using electronic systems to verify attendance, manage tasks, or assess performance.⁴⁰⁸

⁴⁰³ *Id.*

⁴⁰⁴ 917 F.3d at 381 (quoting *Pilgrim Equip.*, 527 F.2d at 1312) (alteration in original)).

⁴⁰⁵ *Nieman*, 775 F. App'x at 624–25.

⁴⁰⁶ 87 FR 62250.

⁴⁰⁷ *Id.* (citing, for example, *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1102–03 (9th Cir. 2014) (finding in a state wage-and-hour case that techniques used by an employer to monitor its furniture delivery drivers were a form of supervision that made it more likely that the drivers were employees; as the court noted, the employer "closely monitored and supervised" the drivers by, among other things, "conducting 'follow-alongs'; requiring that drivers call their . . . supervisor after every two or three stops; monitoring the progress of each driver on the 'route monitoring screen'; and contacting drivers if . . . [they] were running late or off course"). See also *Scantland*, 721 F.3d at 1314 (finding "meaningful supervision and monitoring" in part because the employer required cable installers to log in and out of a service on their cell phones to record when they arrived on a job, when they completed a job, and what their estimated time of arrival was for their next job).

⁴⁰⁸ See *id.* (relying on the Department's enforcement experience in this area). For example, an employer's use of electronic visitor verification ("EVV") systems can be evidence of an employment relationship, especially in those instances where the employer uses the systems to set schedules, discipline staff, or run payroll systems, for example. See *Domestic Service Final Rule Frequently Asked Questions (FAQs)*, U.S. Department of Labor (March

³⁹¹ For discussion of this issue generally, see section V.C.4(a).

³⁹² *Id.*

³⁹³ 87 FR 62275 (proposed § 795.110(b)(4)).

³⁹⁴ *Id.* at 62249.

³⁹⁵ See, e.g., *Driscoll*, 603 F.2d at 756 (farmworkers could be employees of a strawberry farming company even where the potential employer exercised little direct supervision over them); *Twyeffort*, 158 F.2d at 947 (rejecting an employer's contentions that its tailors are

Thus, a totality-of-the-circumstances analysis properly includes not only exploring ways in which supervision is expressly exercised, but also those instances where supervision is not apparent but still used by the employer—either through the job’s structure, training, or the use of technological tools.

Several commenters supported the Department’s discussion of supervision generally. For instance, LCCRUL & WLC noted that case law confirms the fact that, “direct, on-site supervision” is not a prerequisite to find that a worker is an employee. As LCCRUL & WLC noted, the Department’s approach toward supervision allows a “more accurate and comprehensive determination of the economic reality of the parties’ relationship.” ACRE et al., PowerSwitch Action and other commenters noted that the Department’s description of supervision is helpful, since it highlights the many ways in which a worker might be controlled at work through direct management or technological surveillance.

Commenters such as NELP and ROC United commended the Department’s decision to address technologically-mediated supervision, since, as NELP noted, “[m]any businesses today manage their workforces with monitoring systems that track productivity, location, and attendance.” Providing this focus, NELP explained, “will ensure that supervision is analyzed regardless of the medium used to accomplish it.” As CLASP & GFI commented, “new technologies make[] it easier for employers to keep close tabs on workers and simultaneously disengage from modes of management that, in a pre-digital world, would likely have been indicators of an employment relationship.” The use of such technology, they noted, may particularly effect low-wage workers whose jobs can be easier to measure, such as warehouse workers whose efficiency in moving material can be readily quantified, or delivery drivers, whose speed, routes, and drop-off points can be managed digitally. As they describe, in some industries, digital “surveillance has completely supplanted in-person supervision in cases where the nature of the work would otherwise require an onsite supervisor.”

While some comments supported the overall approach to supervision in the NPRM, others suggested that the Department go further, either by adding

additional context to the regulatory text or discussing additional facets of supervision. For instance, Nichols Kaster commented that the Department’s approach is helpful since “supervision can take multiple forms” and employers have often argued that their workers are independent contractors by citing to the fact that they don’t engage in in-person supervision of their work. However, it, along with NELA, called on the Department to include more information from the preamble discussion in the final regulatory text, specifically language addressing supervision via automated systems and that the lack of apparent supervision would not necessarily be indicative of a worker’s independent contractor status.

Similarly, NELP requested that the Department include language in the final regulatory text specifically clarifying “that a lack of direct supervision may still support a finding of an employer’s right to control if an employer can simply exert control when it deems it in the employer’s interest to do so.” Outten & Golden noted that the text of the final rule should also encompass the concept of “monitoring,” since “many workers who work remotely . . . are primarily ‘supervised’ through digital monitoring.” In addition, Gale Healthcare Solutions and IntelyCare suggested that the Department include supervision provided by onsite or related entities such as scenarios where healthcare staff sent by an employer to a worksite receive “supervisory-like feedback” on their performance that can be communicated back to their employer. Moreover, Gale Healthcare was concerned that if the Department indicated in the final rule that initial training—which some employers have deployed in lieu of direct supervision—is indicative of control, and thus employee status, that employers who wish to continue engaging independent contractors may forego such training, which could harm individuals in the healthcare industry.

The Department declines to adopt the additional regulatory language suggested by commenters, as it believes additional discussion is more appropriate for future subregulatory guidance. In response to NELP, the Department understands its suggestion as requesting additional detail regarding reserved control, which is discussed elsewhere in this final rule. The Department also declines to add the phrase “monitoring” to the final regulatory text as requested by Outten & Golden. As described below, the Department agrees that supervision of a

worker includes all forms of supervision which go to the worker’s performance of the work. Thus, while the act of collecting data through monitoring systems could be used to supervise the performance of work, it might instead serve other operational needs of the employer not related to control. Therefore, adding “monitoring” to the regulatory text would not be helpful at highlighting this distinction. Moreover, to the extent Outten & Golden’s comments were intended to include monitoring to capture situations where the employer would monitor a worker and then exert supervisory control when needed or desired, the Department is confident that this scenario is very similar to its discussion of reserved control where an employer possesses supervisory control but elects to exert it when it chooses.⁴⁰⁹ Where an employer reserves the right to use electronic or digital means of supervision—rather than traditional in-person supervision—to monitor a worker and thus correct or direct the performance of the work when it deems necessary, then this too would be relevant to the economic reality analysis.⁴¹⁰ Accordingly, the Department concludes that the regulatory language describing the control factor contains sufficient information to inform stakeholders about the scope of this factor.

The Department also recognizes the situation that Gale Healthcare Solutions and IntelyCare raise regarding supervision that may be performed by other entities where the work is performed and relayed back to a potential employer. However, the Department declines to add specific language addressing this scenario, since this scenario would require a fact-specific inquiry. For example, if a potential employer is exercising control, but delegates it to a third party that is conducting onsite supervision and then reports that to the employer, then the same analysis regarding the employer’s supervision would apply. Finally, to Gale Healthcare’s concern regarding training, while it may be indicative of other factors in the economic reality test (e.g., skill and initiative), its relevance for the purposes of this portion of the control analysis is to simply highlight how training may be used by some employers to avoid any necessary supervision once the worker begins performing work. Such training that is not a replacement for close supervision,

⁴⁰⁹ See section V(D).

⁴¹⁰ See generally *Superior Care*, 840 F.2d at 1060 (finding that the employer’s reserved right to perform in-person supervision of nursing staff was relevant to the economic reality analysis).

20, 2023, 4:30 p.m.), <https://www.dol.gov/agencies/whd/direct-care/faq#g11> (discussing EVV systems at question #10 in relation to an FLSA joint employment analysis).

such as apprising workers of safety protocols, would not necessarily be indicative of supervisory-like control.

UFCW commended the Department's focus on providing additional context to the control factor analysis, specifically the ways in which an employer might use technology to supervise its workforce. However, as discussed in the section on examples used in the preamble, UFCW, several of its locals, and the AFL-CIO would also have the Department go further by providing additional examples of ways in which employers use technology, including surveillance, data collection, and algorithmic management tools, to supervise workers. According to UFCW, since "employers in all industries are rapidly exploiting electronic surveillance to supervise workers," the final rule "should additionally explain that a company's use of nontransparent computer algorithms (programming codes) to manage workers is evidence indicative of employer control."

The Department agrees with commenters like the AFL-CIO that control over the performance of work that is exercised by means of data, surveillance, or algorithmic supervision is relevant to the control inquiry under the economic reality test. Such tools could be used directly by the employer or on their behalf to supervise the performance of the work. Digital tools are many times developed, controlled, and deployed to assist in (or independently conduct) supervision in ways that would have otherwise required in-person oversight. However, the Department believes that such tools, including algorithmic control, if used by the employer to supervise the performance of the work, are already captured by the regulatory text addressing a potential employer's use of "technological means of supervision (such as by means of a device or electronically)." Relatedly, the Department declines to add additional language suggesting actions like mere data collection would constitute supervision for the purposes of control. Like monitoring, an employer may collect data on business operations for purposes unrelated to its relationship to workers. Yet, the Department recognizes that where the employer collects information that then is used for the purposes of supervision and thus goes beyond information collection, that may be probative of an employer's control under this factor.

Several commenters disagreed with the Department's approach regarding supervision. CWI noted that a lack of supervision may in fact reflect that a worker is an independent contractor as

independent contractors are often "retained precisely because they perform work that the putative employer does not," which results in less supervision. CWI further contended that a lack of supervision should edge toward a finding of independent contractor status in most cases. This concern was echoed by N/MA, which suggested that the Department's approach "turns the control factor upside down by effectively ignoring a lack of putative employer control." Many independent contractors, N/MA contended, function without supervision precisely because of the specialized or technical services they render. N/MA asserted that "work that does not require supervision by the hiring entity is exactly the type of work that should be recognized as more likely to result in a determination of a lack of control over the manner and means by which the work is performed, and indicative of independence."

The Department agrees with commenters that a lack of supervision may be probative of a worker's independent contractor status. That fact is reflected in case law as well as the Department's proposal.⁴¹¹ For example, regarding N/MA's comment, the Department agrees that workers who deliver technical or specialized services may use that technical expertise to operate without supervision (either because the employer need not supervise a technically-proficient worker or the employer does not have the expertise themselves to meaningfully supervise). In such circumstances, an employer's lack of supervision may support a finding that the control factor weighs in favor of independent contractor status. The Department notes however, also consistent with case law, that the lack of supervision on its face should not halt a full analysis.⁴¹² Lack of direct or in-person supervision may not indicate that the control factor weighs in favor of independent contractor status if there

⁴¹¹ See, e.g., *Chao v. Mid-Atlantic Installation Servs., Inc.*, 16 F. App'x 104, 106–08 (4th Cir. 2001) (agreeing with the district court's analysis that the ability to complete jobs in any order, conduct personal affairs, and work independently is evidence that leans toward identifying a worker as an independent contractor).

⁴¹² See, e.g., *Superior Care*, 840 F.2d at 1060 ("An employer does not need to look over his workers' shoulders every day in order to exercise control."); *Driscoll*, 603 F.2d at 756 (farmworkers could be employees of a strawberry farming company even where the employer exercised little direct supervision over them); *Twyeffort*, 158 F.2d at 947 (rejecting an employer's contention that its tailors are independent contractors because they are "free from supervision, are at liberty to work or not as they choose, and may work for other employers if they wish").

are other ways in which the employer is able to accomplish the same manner of control that would have otherwise been performed through close, in-person supervision over the performance of the work. As the Department indicated, for example, the employer may rely on detailed training or instructions, deploy electronic tools to direct the performance of the work remotely, or retain the right to conduct in-person supervision.

CWI further suggested that the Department's proposal missed a critical distinction. By focusing merely on the fact that supervision may be maintained by technological means, they asserted that the proposal did not distinguish between supervision through technology that is "targeted toward the direction of the manner in and means by which the worker performs his work" and monitoring that is "targeted toward the particular goods or services at issue."⁴¹³ The California and U.S. Chambers of Commerce and WPI agreed, with WPI similarly contending that electronic monitoring "has little to no impact on economic realities, and that it is an often-commonplace component of normal arm's-length contracts." See also Cambridge Investment Research, Raymond James, and WPCA. As Flex similarly noted, technology is used to manage basic business functions and compliance monitoring, as well as "enhance[] the user experience for consumers" such as noting a driver's location, arrival time, or facilitating the exchange of money for the consumer. See also DSA; NHDA. Moreover, Flex noted that federal regulations require electronic monitoring for safety purposes in some industries, like trucking.⁴¹⁴ See also; American Trucking Association; State Trucking Associations; U.S. Chamber. Therefore, to avoid confusion, Flex suggested that references to technology should be stricken from the rule. See also DSA; PGA; Raymond James.

CWI also stated, however, that technological supervision "coupled with some manner of corrective direction about the means and manner of performance may evidence employment," yet they commented that the Department's proposal "sweeps too broadly." The Coalition of Business

⁴¹³ The comment noted, for example, that distributors of perishable goods like food and medicine use technological monitoring "to ensure product integrity, compliance with customer and regulatory commitments, and even the safety of the public at large," not necessarily to exercise control over the worker as an employee.

⁴¹⁴ For discussion of comments related to actions taken to comply with regulatory requirements see section V(C)(4)(a).

Stakeholders noted that the language in the proposal could encompass the employer's or worker's use of everyday technologies that are used to run a contemporary workplace. Finally, the CA Chamber noted that independent contractors are also supervised, suggesting that it would be "nonsensical to assert that you would hire a contractor and never oversee their services or check in on progress."

The Department agrees with commenters such as CWI and WPI that employers may at times use technology to track information critical to their business or, as the CA Chamber notes, the mere status of work performed by a worker. Such actions can be performed consistent with an independent contractor relationship with a worker, even when the data being collected is generated from the actions of the worker. The Department thus agrees with CWI, for example, that the proposed regulatory text missed this nuanced distinction. However, as CWI noted, where such tracking is then paired with supervisory action on behalf of the employer such that the performance of the work is being monitored so it might then be directed or corrected, then this type of behavior may suggest that the worker is under the employer's control. Thus, the Department is adding additional language to the control factor to clarify that the relevant consideration is not simply the employer's use of technology to supervise, but the use of technology "to supervise the performance of the work." This is why the Department disagrees with Flex's call to eliminate any reference to technology and WPI's assertion that the use of technology never implicates the analysis under the economic reality test. Such a complete bar would suggest that a worker's performance of the work can never be controlled or directed by technology, which is not correct, especially when such tools are not only ubiquitous in many employment settings, but also are specifically deployed by some employers to supervise and direct the means through which a worker performs their job. Moreover, the Department does not believe that the inclusion of a reference to technology, as noted by the Coalition of Business Stakeholders, would act as an unbounded factor, pulling in all forms of technology used in modern workplaces. The only forms of technology referenced by the rule are those that are deployed by the employer as a means of supervising the performance of the work which are thus probative of economic dependence, not

all technologies that the employer might be using in their business.

The Department notes that comments received regarding the proposal's discussion of an employer's reserved control over the worker, including reserved rights to supervise, are addressed in the discussion of reserved rights in section V.D.

The Department is finalizing the supervision portion of the control factor at § 795.105(b)(4) with the revisions discussed herein.

d. Setting a Price or Rate for Goods or Services

Regarding the control factor's treatment of the ability to set a price or rate for goods or services, the Department proposed that this factor consider whether the "employer controls economic aspects of the working relationship . . . including control over prices or rates for services."⁴¹⁵ As the Department noted, facts related to the employer's ability to set prices or rates of service relate directly to whether the worker is economically dependent on the employer for work and help answer the question whether the worker is in business for themselves.⁴¹⁶

At the outset, the Department noted that workers in business for themselves are generally able to set (or at least negotiate) their own prices for services rendered.⁴¹⁷ The Department further noted that one of the early Supreme Court cases applying the economic reality test concluded that the workers were employees in part because they were not "selling their products on the market for whatever price they can command."⁴¹⁸ The Court explained that, instead, the workers were "regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates."⁴¹⁹ The Department also cited multiple court of appeals and district court decisions finding that an employer's command over the price or rate for services indicated their control over the worker and that the worker was thus less likely to be in business for themselves.⁴²⁰

⁴¹⁵ 87 FR 62275 (proposed § 795.110(b)(4)).

⁴¹⁶ 87 FR 62250.

⁴¹⁷ *Id.*

⁴¹⁸ *Whitaker House*, 366 U.S. at 32.

⁴¹⁹ *Id.*

⁴²⁰ 87 FR 62250–51 (citing *Verma*, 937 F.3d at 230 (identifying, among other things, the employer's setting the price and duration of private dances as indicative of "overwhelming control" over the performance of the work); *Off Duty Police*, 915 F.3d at 1060 (concluding that certain security guards were employees, in part, because "[the employer] set the rate at which the workers were paid"); *McFeeley*, 825 F.3d at 241–42 (affirming that a

Conversely, the Department noted that when a worker negotiates or sets prices, those facts weigh in favor of independent contractor status.⁴²¹ For instance, in *Eberline v. Media Net, LLC*, the court found that a jury had sufficient evidence to conclude that a worker exerted control over meaningful aspects of his business in part due to "testimony that installers could negotiate prices for custom work directly with the customer and keep that money without consequence."⁴²²

The Department also noted that the price of goods and services may sometimes be included in contracts between a business and an independent contractor.⁴²³ The Department quoted *McFeeley*, where the court observed that a worker doesn't "automatically become[] an employee covered by the FLSA the moment a company exercises any control over him. After all, a company that engages an independent contractor seeks to exert some control, whether expressed orally or in writing, over the performance of the contractor's duties[.]"⁴²⁴ Yet, the Department cautioned that the presence of a contract does not obviate the need for a complete analysis regarding the control exerted by the employer, such as the worker's ability to negotiate and alter the terms

nightclub owner was exercising significant control because, among other things, it set the fees for private dances); *Cornerstone Am.*, 545 F.3d at 343–44 (finding the control factor weighed in favor of employee status where employer controlled "meaningful" economic aspects of the work, including pricing of products sold); *Selker Bros.*, 949 F.2d at 1294 (finding that, among other things, the fact that the employer set the price of cash sales of gasoline reflected the employer's "pervasive control" over the workers); *Agerbrink v. Model Serv., LLC*, 787 F. App'x 22, 25–26 (2d Cir. 2019) (determining that there were material facts in dispute regarding the worker's "ability to negotiate her pay rate," which related to the degree of control exerted by the employer, and rejecting the employer's contention that the worker had control over her pay rate simply because she could either work for the amount offered or not work for that amount, stating that this "says nothing of the power to negotiate a rate of pay"); *Karnes v. Happy Trails RV Park, LLC*, 361 F. Supp. 3d 921, 929 (W.D. Mo. 2019) (finding park managers to be employees in part because the park owners "set all the prices"); *Hurst v. Youngelson*, 354 F. Supp. 3d 1362, 1370 (N.D. Ga. 2019) (finding relevant to the control analysis that the plaintiff was not free to set the prices she charged customers and had no ability to waive or alter cover charges for her customers).

⁴²¹ *Id.* at 62251.

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

⁴²³ 87 FR 62251.

⁴²⁴ *Id.* n. 410 (quoting *McFeeley*, 825 F.3d at 242–43).

of the contract. As the discussion in the NPRM concluded, it is evidence of employee status when an entity other than the worker sets a price or rate for the goods or services offered by the worker, or where the worker simply accepts a predetermined price or rate without meaningfully being able to negotiate it.⁴²⁵

Multiple commenters supported the Department's inclusion and description of price setting under the control factor. For example, the LA Fed & Teamsters Locals stated that this inclusion is a "recognition of the great significance of an employer's control over setting prices for services" which is "much more reliable indicia of entrepreneurial status than less significant aspects of control." Such an approach, it suggested, will prevent employers from "offering [workers] minor forms of control while effectively setting a ceiling on the workers' earnings by maintaining control over the rates offered to customers." The law firm Nichols Kaster noted that the proposal "expounds on this important point and provides focus and clarity on what 'economic aspects' means." NELP stated that the Department's discussion of price setting appropriately recognized that price-setting is a form of control, since an independent contractor "controls, and has the right to control, all important business decisions," including "what good or service to sell and at what price." As NELP further noted, "without the power to set prices for goods or services, a worker will likely be economically dependent on an employer for work, and if she wants to increase earnings, her only option is to work longer, harder, or more jobs." REAL Women in Trucking commended the Department for providing "helpful clarity" regarding price setting generally, providing an example of a worker's ability to negotiate rates where drivers select jobs from a "free-market load board" where they can negotiate the rates for their services and sign a rate contract directly with brokers.

Some commenters suggested revisions to the proposed regulatory language. For example, UFCW urged the Department to amend the discussion regarding control to include a discussion of information asymmetries, noting that where a company conceals pricing data, that would indicate that a worker is not an independent contractor, since the worker lacks key information regarding price that would affect entrepreneurial

decisions they might make. ACRE et al. similarly suggested that the Department "clarify in the rule that another factor in determining if workers are considered employees must include if a corporation exercises control over workers through pay structures," specifically bonus pay systems used by some transportation network companies that encourage workers to drive more. ACRE et al. also suggested that the Department clarify that price (or wage) setting is so critical to the analysis that "workers who can not independently set their own wage rates are, *per se*, not independent contractors." See also Jobs With Justice; NELA; Outten & Golden; PowerSwitch Action.

The Department agrees that the lack of information regarding prices may prevent a worker from negotiating prices to further their own business. The Department believes that this concept was captured in the proposed language that the Department is finalizing which states that "[w]hether the employer controls economic aspects of the working relationship" should be considered, including "control over prices or rates for services."⁴²⁶ Control over price is one specific example and is not meant to be exhaustive. Further, the Department believes that defining the relationship in terms of "information asymmetry" would be less helpful to businesses that are trying to understand their obligations, since that term is ambiguous. Moreover, the Department is confident that situations in which the employer is controlling specific payment terms or pay structures are captured by the proposed regulatory language because the relevant inquiry focuses on an employer's control of "economic aspects of the working relationship," which can embrace a nonexclusive set of considerations that may be relevant to a specific working relationship. Finally, the Department declines to adopt multiple commenters' suggestion to state that a worker's lack of control over prices would suggest conclusively that they are not independent contractors. As mentioned throughout this final rule, the Department declines suggestions to predetermine the weight of certain considerations, facts, or individual factors. The Department notes, however, that in a particular case, after considering all the facts of a particular relationship, control over pricing may be highly relevant to whether the control factor weighs in favor of employee or independent contractor status. This approach is consistent with case law, where a court "adapt[s] its

analysis to the particular working relationship, the particular workplace, and the particular industry in each FLSA case."⁴²⁷

Some commenters were opposed to the inclusion of price setting or the extent to which it may be used to illuminate the control factor of the economic reality test. For instance, the CA Chamber noted that while it "generally agree[s] with the description of this facet of the control factor," it was concerned that it may receive too much weight in the analysis because some employees, "such as salaried white-collar workers" can negotiate their pay, while others, like an "hourly employee on an assembly line" may not. Therefore, the CA Chamber stated that considerations regarding price control, "should have limited use in the analysis because it is not a defining feature of employment generally." See also AFPP; Richard Reibstein, publisher of legal blog.

The IFA noted its concern with the Department's treatment of price as it related to franchising relationships. IFA explained, "[f]ranchisors commonly suggest resale prices for offerings across the franchise system and, subject to applicable law, may set minimum or maximum prices for products or services, or have uniform advertising requirements for system-wide promotions." IFA requested that the Department, "expressly state that, in the franchise context, the fact that a franchisor sets prices for goods or services is not probative of an employment relationship." Similarly, ACLI shared that considerations regarding price are misplaced for the insurance industry, as "neither insurers nor insurance agents have unlimited discretion to adjust prices however they see fit." In fact, "[c]onsistent with the requirement of financial solvency, insurance agents and advisors have no say or influence over the price of the products that they sell on behalf of firms, and they are prohibited by law from 'rebating' any of the commissions earned from those sales," a fact that "effectively bars them from getting involved in, or setting, pricing." The Alternative and Direct Investment Securities Association noted a similar arrangement among some investment advisors, who cannot fully negotiate rates for commissions because such rates are, in part, determined by the application of SEC regulations. Similarly, C.A.R. noted that real estate industry commission payments in California are required to be paid through a broker (with a written

⁴²⁵ *Id.* (citing *Scantland*, 721 F.3d at 1315 (reversing summary judgment for the employer based in part on evidence that the workers "could not bid for jobs or negotiate the prices for jobs")).

⁴²⁶ 87 FR 62275 (proposed § 795.110(b)(4)).

⁴²⁷ *McFeeley*, 825 F.3d at 241.

agreement on how the commission will be shared between broker and salesperson). And the Coalition of Cattle Associations stated that cattle health processing crews, workers common in the cattle industry that care for herds, are similarly paid indirectly by a cattle farm that contracts for services of a company that engages crew members.

CWI commented that considerations around prices or rates are superfluous because “[a] worker’s ability to negotiate or otherwise impact the amounts that he earns for his work is already fully incorporated in the opportunity-for-profit-or-loss factor.” Thus, CWI suggested that since this consideration should be withdrawn as it is redundant. The N/MA similarly noted that such overlapping analysis results in “improper[] double counting.” See also CMAA. & NRA.

The Department declines to adopt commenters’ proposals to de-emphasize the relevance of control over prices or rates of service. Just as the Department declined the suggestion that it elevate the role of control over prices, the Department concludes that giving this consideration less weight would similarly undermine a totality-of-the-circumstances analysis. An employer’s control over pricing should be one fact among all other facts considered under the control factor as it may be probative of a worker’s economic dependence on a potential employer.

The Department recognizes that many industries, occupations, or even business sectors set prices and rates for goods or services in ways that are unique, as noted by commenters like ACLI and IFA. However, workers who are truly in business for themselves will generally control the fundamental economic components of their business, including the prices to charge customers or clients for the goods or services offered. As discussed in section V.C.4.a, the Department is revising the final regulatory text of this factor to state: “Actions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control.” However, beyond those obligations, where the potential employer exerts control to set rates or prices for services, the worker is more likely to be “receiving the compensation the organization dictates,” and thus less likely to be in business for themselves.⁴²⁸

In addition, the Department disagrees with commenters such as CWI and N/MA contending that the discussion of price in both the nature and degree of

control and opportunity for profit and loss factors is not warranted. In the former, the analysis is focused on the employer’s actions that would control the economic aspects of the working relationship, while the discussion of the latter focuses on ways in which the individual has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker’s economic success or failure in performing the work. Each discusses prices from different analytical points of view, an effort that is consistent with this final rule’s approach, which is to analyze the working relationship in all its facets.

Finally, the Department declines commenter suggestions to omit any discussion of price setting under the control factor. The Department continues to believe, consistent with case law, that a potential employer’s general control over the prices or rates for services—paid to the workers or set by the employer—is indicative of employee status. When an entity other than the worker sets a price or rate for the goods or services offered by the worker, or where the worker simply accepts a predetermined price or rate without meaningfully being able to negotiate it, this is relevant under the control factor. As such, the Department declines to create a carve-out for certain business models or industries, as requested by some commenters, although the Department emphasizes that this position is intended to be consistent with the case law on this issue and is not creating a novel interpretation. Importantly, however, as with all considerations discussed under all the factors, the Department does not intend for this fact to presuppose the outcome of employment classification decisions in any particular industry, occupation, or profession.

The Department is finalizing the price setting portion of the control factor at § 795.105(b)(4) as proposed.

e. Ability To Work for Others

Another consideration that the Department proposed under the control factor was whether the employer “explicitly limits the worker’s ability to work for others” or “places demands on workers’ time that do not allow them to work for others.”⁴²⁹ This consideration was consistent with the 2021 IC rule, which also recognized that directly or indirectly requiring an individual to work exclusively for an employer was

indicative of an employer-employee relationship.⁴³⁰

As explained in the NPRM, where an employer exercises control over a worker’s ability to work for others, this is indicative of the type of control over economic aspects of the work that is associated with an employment relationship rather than an independent contractor relationship.⁴³¹ Control over a worker’s ability to work for others may be exercised by directly prohibiting other work—for example, through a contractual provision.⁴³² It may also be exercised indirectly by, for example, making demands on workers’ time such that they are not able to work for other employers,⁴³³ or by imposing other restrictions that make it not feasible for a worker to work for others.⁴³⁴ For

⁴³⁰ See 86 FR 1247 (§ 795.105(d)(1)(i)).

⁴³¹ 87 FR 62251–52.

⁴³² See *Parrish*, 917 F.3d at 382 (noting that the non-disclosure agreement did not require exclusive employment, and was therefore not an element of control that indicated employee status); *Off Duty Police*, 915 F.3d at 1060–61 (non-compete clause preventing workers from working for employer’s customers for two years after leaving employment was among evidence supporting finding that control factor indicated employee status); *Express Sixty-Minutes*, 161 F.3d at 303 (“Independent Contractor Agreement” did not contain a “covenant-not-to-compete” and drivers could work for other courier delivery providers, which indicated independent contractor status); see also WHD Op. Ltr., 2000 WL 3444342, at *1, 4 (Dec. 7, 2000) (workers were required to sign an agreement that prohibited them from working for other companies while driving for the employer, which suggested employee status); but cf. *Faludi v. U.S. Shale Sols., LLC*, 950 F.3d 269, 276–77 (5th Cir. 2020) (a non-compete clause “does not automatically negate independent contractor status”); *Franze*, 826 F. App’x at 76–77 (although a non-compete provision prohibited drivers from driving routes and carrying products for competing companies, facts showed that the drivers “controlled the overall scope of their delivery operations” because of their control over distribution territories, ability to hire others, schedule flexibility, and lack of oversight).

⁴³³ See, e.g., *Keller*, 781 F.3d at 813–14 (although worker was not prohibited from working for other companies, “a reasonable jury could find that the way that [the employer] scheduled [the worker’s] installation appointments made it impossible for [the worker] to provide installation services for other companies”); *Scantland*, 721 F.3d at 1313–15 (finding even if workers were not prohibited from working for other installation contractors their long hours and inability to turn down work suggested that the employer controlled whether they could work for others, which was in part why the control factor favored employee status); *Cromwell*, 348 F. App’x at 61 (“Although it does not appear that [the workers] were actually prohibited from taking other jobs while working for [the employers], as a practical matter the work schedule established by [the employers] precluded significant extra work.”); *Flint Eng’g*, 137 F.3d at 1441 (finding the hours the company required of the workers, coupled with driving time between home and remote work sites every day, made it “practically impossible for them to offer services to other employers”).

⁴³⁴ See *Brant*, 43 F.4th at 669–70 (despite having the contractual ability to haul freight for other carriers, a driver alleged that the company maintained a “system for approving and monitoring

Continued

⁴²⁸ *Whitaker House*, 366 U.S. at 32.

⁴²⁹ 87 FR 62275 (proposed § 795.110(b)(4)).

example, in *Scantland*, the Eleventh Circuit determined that cable technicians could not work for other companies, either because they were told they could not do so or because the workers essentially had an exclusive work relationship with the employer because they were required to work 5 to 7 days a week and could not decline work without risking termination or being refused subsequent work.⁴³⁵ Thus, the employer controlled whether they could work for others, which suggested that they were economically dependent on the employer.⁴³⁶

The NPRM also recognized that some courts find that less control is exercised by a potential employer where the worker is not prohibited from working for others, particularly competitors, and that this may be indicative of an independent contractor relationship.⁴³⁷ However, the Department declined to include in the regulatory text for the control factor a blanket statement that the ability to work for others is a form of control exercised by the worker that indicates independent contractor status. The Department was concerned that this framing, which was in the 2021 IC Rule, fails to distinguish between work relationships where a worker has multiple jobs in which they are economically dependent on each potential employer and do not exercise the control associated with being in business for oneself, and relationships where the worker has sought out multiple clients in furtherance of their business.⁴³⁸ As the Department noted, if one worker holds multiple lower-paying jobs for which they are dependent on

each employer for work in order to earn a living, and a different worker provides services to multiple clients due to their business acumen and entrepreneurial skills, there are qualitative and legally significant differences in how these two scenarios should be evaluated under the economic reality test.

Ultimately, as stated in the NPRM, the question is “whether a [worker’s] freedom to work when she wants and for whom she wants reflects economic independence, or whether those freedoms merely mask the economic reality of dependence.”⁴³⁹ Dating back to *Silk*, the “unloaders” who came to the coal yard “when and as they please[d] . . . work[ing] when they wish and work[ing] for others at will” were deemed to be employees rather than independent contractors.⁴⁴⁰ And as the Fifth Circuit has explained, “[the] purposes [of the FLSA] are not defeated merely because essentially fungible piece workers work from time to time for neighboring competitors.”⁴⁴¹ For example, in *Seafood, Inc.*, the Fifth Circuit examined whether piece-rate workers who peeled and picked crabmeat and crawfish for a seafood processor, and who were allowed “to come and go as they please . . . and even to work for competitors on a regular basis” were, as a matter of economic reality, dependent on their employers and therefore employees under the Act.⁴⁴² The court determined that the workers’ ability to work for others was not dispositive, and that “[l]aborers who work for two different employers on alternate days are no less economically dependent on their employers than laborers who work for a single employer” because “that freedom is hardly the same as true economic independence.”⁴⁴³ The Sixth Circuit has further observed that “[m]any workers in the modern economy, including employees and independent contractors alike, must routinely seek out more than one source of income to make ends meet.”⁴⁴⁴

Several commenters supported the way the Department’s proposal framed consideration of the ability to work for others within the control factor, including both direct and indirect means of limiting individuals’ ability to work for others. See, e.g., LA Fed & Teamsters Locals; NWLC; Real Women in Trucking; UFCW. For example, the

LA Fed contended that the 2021 IC Rule “misapplies the law” by stating that workers could be found to exercise “substantial control” by having the ability to work for others, because “[f]or decades, employees have been able to have multiple jobs . . . without losing the protections the law bestows on employees.” The LA Fed supported the Department’s proposal, explaining that it “rightly recognizes that workers’ ability to . . . work for others does not support independent contractor status unless . . . facts actually demonstrate the worker’s economic independence.” Similarly, the NWLC stated that the 2021 IC Rule “impermissibly narrow[ed] the concept of control itself by focusing on control over work exercised by the individual worker, as opposed to the right to control by an employer” and by using as an example a worker’s “substantial control” through the ability to work for others despite many decisions finding workers to be employees even though they worked for others.

Some commenters requested that the Department provide a description of this aspect of the control factor that would address the workers’ ability to work for others, not just the employer’s actions, and state that where an individual has the ability to work for others, including competitors, this weighs in favor of independent contractor status. See, e.g., CPE; DoorDash; N/MA. For example, DoorDash commented that the proposed rule “adopts a one-sided approach: if a hiring entity limits a worker’s ability to work for others, that counts toward employee status, but if a worker has the freedom to work for others, that doesn’t count toward independent contractor status.” However, Outten & Golden observed that employer limitations on the ability to work for others cannot be viewed simply as the converse of a worker’s ability to work for others: “The fact that an employer entity does not prohibit outside work does not suggest independent contractor status because having multiple jobs is compatible with an employment relationship. However, being prohibited from working for others clearly indicates the control of an employer, rather than an independent contractor relationship.”

CWI also contended that the “employer-centric focus” of the proposed regulatory text addressing a worker’s ability to work for others was “misguided” because, as the Department noted in the NPRM, there is appellate authority acknowledging “a worker’s ability to work for others—and thus develop multiple sources of business—as evidence of independent contractor status.” CWI did not feel it

trips made for other carriers” that was “so complex and onerous that Drivers could not, as a practical matter, carry loads for anyone other than” the company, which the court determined weighed in favor of employee status).

⁴³⁵ 721 F.3d at 1313–15.

⁴³⁶ *Id.* at 1315.

⁴³⁷ See, e.g., *Razak*, 951 F.3d at 145–46 (discussing disputed facts regarding whether drivers could drive for other services—Uber contended drivers could drive for other services but drivers contended that they could not accept rides from other platforms while online for Uber; drivers also noted that Uber’s Driver Deactivation Policy stated that soliciting rides outside the Uber system leads to deactivation and that activities conducted outside the Uber system, like “anonymous pickups,” were prohibited); *Paragon*, 884 F.3d at 1235 (finding control factor favored independent contractor status in part because worker could and did work for other employers); *Saleem*, 854 F.3d at 141–43 (drivers’ ability to work for business rivals and transport personal clients showed less control by and economic dependence on the employer); *Express Sixty-Minutes*, 161 F.3d at 303 (control factor “point[ed] toward independent contractor status” in part because the “Independent Contractor Agreement” did not contain a covenant-not-to-compete and drivers could work for other courier delivery providers).

⁴³⁸ 87 FR 62252.

⁴³⁹ *Reich v. Priba Corp.*, 890 F. Supp. 586, 592 (N.D. Tex. 1995) (citing *Mednick*, 508 F.2d at 300, 301–02).

⁴⁴⁰ 331 U.S. at 706, 718.

⁴⁴¹ *Seafood, Inc.*, 867 F.2d at 877.

⁴⁴² 861 F.2d at 451–53.

⁴⁴³ *Seafood, Inc.*, 867 F.2d at 877.

⁴⁴⁴ *Off Duty Police*, 915 F.3d at 1058.

was sufficient to address this factor by stating that a business placing a limitation on the ability to work for others was evidence of employee status because this failed to take into account “the fact that a worker may be simultaneously (and in a multi-app situation, potentially at the exact same time) working for others.” Moreover, referencing *Saleem*, CWI contended that the fact that a worker could earn income through work for others meant that the worker was “less economically dependent on his putative employer.”

The Department notes that the mere fact that a worker earns income from more than one employer does not mean that the worker is not economically dependent on one or all of those employers, as a matter of economic reality. Economic dependence is based on an analysis of the multifactor economic reality test, not whether a worker is less financially dependent on the income they earn from any one employer.⁴⁴⁵ As discussed under this factor and the permanence factor (section V.C.3), it is well established that having multiple jobs is not inconsistent with employee status under the FLSA, and in fact, workers are often required to take on more than one job just to make ends meet. Moreover, in *Saleem*, the case referenced in CWI’s comment, the Second Circuit recognized that: “a company relinquishes control over its workers when it permits them to work for its competitors.”⁴⁴⁶ This case supports the importance of looking to whether a potential employer restricts a worker’s ability to work for others.

Similarly, N/MA argued that the focus should be on the worker’s right to control and not the employer’s control, because “a freelancer may perform multiple projects among multiple separate (and sometimes competing) entities,” and N/MA felt that the right to control factor should consider “the totality of the worker’s business . . . including control over whether the worker subcontracts any part of the work necessary to complete a project, whether and how the worker may advertise their services, and whether the worker determines to prioritize, stagger, or overlap projects from multiple entities.” The Department views N/MA’s comment to be advocating for a totality-of-the-circumstances test that is congruent with the economic reality test, including consideration not just of control, but also factors like opportunity for profit or loss, investment, and use of specialized skills in connection with business-like initiative. Whether a

potential employer restricts a worker’s ability to work for others would certainly not be the only consideration under control, nor would it preclude consideration of the other factors listed in N/MA’s comment. Further, the Department notes that even within the control factor, the regulatory text acknowledges that “more indicia of control by the worker favors independent contractor status.”⁴⁴⁷

Several commenters pointed out the increased fluidity in terms of working for others that can be associated with using applications or platforms to access work. DoorDash explained with respect to its business that workers “are free to work with anyone they want, including our competitors. Most importantly . . . they can do it in real time—even while they’re logged into our app. If [they] find a better work opportunity (or work that’s simply more appealing to them), they can switch back and forth.” CEI noted that “rideshare drivers often work for different app-based companies simultaneously. Anyone who calls for a ride using [Uber] has noticed the driver’s car also bearing a Lyft sticker. . . . This situation is common in gig work, where the companies are, in effect, bidding for the same workers.” CEI further noted the Department’s concern that the framing in the 2021 IC Rule, which indicated independent contractor status if a worker had the ability to work for others, fails to distinguish between work relationships where a worker has multiple jobs in which they are dependent on each employer and do not exercise the control associated with being in business for oneself, and relationships where the worker has sought out multiple clients in furtherance of their business. CEI stated: “The framing does not distinguish between the two scenarios because there is no significant distinction. A worker who has ‘sought out multiple clients in furtherance of their business’ is no less dependent on those clients than the hypothetical worker with multiple jobs.” CEI suggested that the only solution to this problem was beyond the scope of this rulemaking and would require Congress to amend the FLSA to “carve out specific professions.” UFCW, however, did not view “multi-apping” as a unique concept that could not be addressed within the economic reality test, arguing that a “worker who attempts to leverage earnings between two app-based platforms (‘multi-apping’) [is] now simply dependent on two platform companies for which the employee is waiting around for work to

perform. This is not indicative of the worker exercising initiative to develop a business for themselves independent of these platform companies.”

The Department does not believe that the ability to use applications or platforms to access work necessitates changing how the ability to work for others is weighed when determining employee or independent contractor status. The Department reiterates that as always, the overall test is economic dependence. Even if a worker has the ability to more fluidly move among potential employers while performing work by using multiple applications, this does not necessarily mean that the entire control factor weighs in favor of independent contractor status. Nor is it dispositive of whether the worker is in business for themselves rather than being subject to the control of the entity for whom they are performing work at any given time.⁴⁴⁸

While SHRM posited that the Department’s proposal “adopts an antiquated view of economic independence in its consideration of a worker’s ability to work for others under the control factor” because “low-wage earners may, in fact, *gain* independence by maintaining the flexibility to work with multiple hiring entities,” NELP observed that in “low-wage industries, particularly in services such as transportation, delivery, or home care, many workers juggle multiple jobs with multiple entities not as an exercise of their own business judgment but as a necessity to cobble together a living wage in an underpaying economy.” For example, the LCCRUL & WLC described a current client who “often has to work for a variety of gig economy jobs simultaneously, such as Uber Eats, GoPuff, Instacart, and Caviar, to keep her finances afloat.” Further supporting the notion that the ability to work for multiple employers simultaneously does not necessarily indicate independent contractor status, the NDWA explained that home care workers may work for more than one third-party agency at the same time, “given the scheduling irregularities and occasional disruptions in assignments that are an unavoidable part of the in-home personal care industry.” However, it noted that “[w]hile home care workers may choose to have multiple employers at the same time, it does not defeat the

⁴⁴⁵ See *supra*, section V.B.

⁴⁴⁶ *Saleem*, 854 F.3d at 141.

⁴⁴⁷ 29 CFR 795.110(b)(4).

⁴⁴⁸ See, e.g., *Razak*, 951 F.3d at 145–46 (discussing disputed facts regarding whether drivers could drive for other services simultaneously—Uber contended drivers could drive for other services, but drivers contended that they could not accept rides from other platforms while online for Uber).

conclusion that they are employees rather than independent contractors.”

After considering these comments, the Department declines to add a statement to the regulatory text stating that a worker’s ability to work for others indicates independent contractor status. The Department believes that having multiple jobs can too often be necessary for financial survival in the modern economy, as many commenters and courts have noted.⁴⁴⁹ For example, an employee may have two jobs, several part-time jobs, or a regularly-recurring seasonal job in addition to a full-time employment situation, and an independent contractor may also have multiple customers based on their exercise of business initiative. Thus, the mere ability to work for others is not necessarily an indicator of employee or independent contractor status.

Some commenters urged the Department to create an exception for industries like trucking where legal requirements make it more complicated for drivers to use the same equipment to work for another motor carrier. *See e.g.*, NHDA, Scopelitis, Garvin, Light, Hanson & Feary. However, Real Women in Trucking observed that “the ability to work for others is key to whether a driver is economically dependent or not,” noting that “the Department’s emphasis that both direct prohibitions on working for others and indirect barriers are relevant to this factor” was “[e]specially important” because their members experienced working arrangements where they were nominally permitted to carry loads for other carriers, but “this flexibility is not available in practice.”

This situation was addressed by the Seventh Circuit in a recent decision where the company retained sole discretion to deny the driver’s request to haul freight for another carrier, and it also reserved the right to arrange for third-party monitoring of compliance with federal safety regulations at the driver’s expense if he drove for other carriers.⁴⁵⁰ Further, even if the driver received approval to haul for another carrier and could have afforded to pay for third-party compliance monitoring, he would have been required to remove or cover the company’s identification on his truck and to display his own or the other company’s information.⁴⁵¹ The court determined that these facts, showing that the company’s “system for approving and monitoring trips made for other carriers was so complex and onerous that Drivers could not, as a

practical matter,” haul loads for other carriers, weighed in favor of employee status.⁴⁵²

Although the Department is recognizing in this final rule that actions taken by a potential employer for “the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation” are not indicative of control, the Department continues to believe that where a business goes beyond compliance with the law or regulation in a way that serves the business’s own compliance methods—for example, the system described in *Brant* that imposed several restrictions on the driver’s ability to haul freight for others, including requiring the driver to pay for a third-party monitor—this may be indicative of control. Therefore, the Department declines to adopt a more blanket, imprecise provision pertaining to industry-specific limitations on the ability to work for others.

Moreover, commenters and the *Brant* decision have prompted the Department to conclude that the regulatory proposal addressed indirect means of limiting workers’ ability to work for others too narrowly, as it only would have recognized situations in which the potential employer “places demands on workers’ time” that do not allow them to work for others.⁴⁵³ As NELP noted, “whether a worker is truly free to work for others requires an examination of the facts on the ground; businesses may place demands on time or monetary penalties that effectively preclude a worker from seeking other work.” Because businesses may impose financial demands or other restrictions on workers’ ability to work for others such as the “complex and onerous” system in *Brant*—in addition to demands on time that do not allow them to work for others—the Department is revising the regulatory language in the final rule to encompass such situations. The revised text removes the word “time” and adds the words “or restrictions” after “or places demands” to more accurately capture indirect means of limiting workers’ ability to work for others.

UFCW urged the Department to add additional considerations that are related to a potential employer limiting a worker’s ability to work for others. First, it contended that platform

companies essentially coerce workers to continuously accept work (which would preclude them from working for others) by threatening to terminate workers from the platform or reduce the availability of work shifts unless the worker continuously accepts jobs. Additionally, it noted that an employer may prohibit workers from developing their own business or customer base, for example, by prohibiting a platform worker from doing any independent work for customers they connect with through the app. The LCCRUL & WLC also described clients—a tow truck driver and a cannabis dispensary delivery driver—who similarly were not able to work for others because they were expected to be on call all day waiting for assignments. The Department agrees that these types of facts could be relevant to whether a potential employer has either explicitly limited the worker’s ability to work for others or has placed demands or other restrictions on workers that do not allow them to work for others. However, the Department views these as encompassed within the final regulatory text, such that there is no need to add additional language.

Finally, OOIDA encouraged the Department to view the ability to work for others within a working arrangement as “relevant, but not determinative of the relationship” and as “one of several considerations within the ‘control’ factor.” The Department reaffirms that the ability to work for others is just one consideration within the control factor and agrees with the commenter that it is relevant, but not determinative, of whether the worker is an employee or independent contractor. Moreover, the control factor itself is not determinative of a worker’s status—the economic reality test is a totality-of-the-circumstances test where no one factor is dispositive.⁴⁵⁴

The Department is finalizing the ability to work for others portion of control factor at § 795.105(b)(4) with the revisions discussed herein.

Example: Nature and Degree of Control

A registered nurse provides nursing care for Alpha House, a nursing home. The nursing home sets the work schedule with input from staff regarding their preferences and determines where in the nursing home each nurse will work. Alpha House’s internal policies prohibit nurses from working for other nursing homes while employed with

⁴⁴⁹ *See supra*, section V.C.3.

⁴⁵⁰ *Brant*, 43 F.4th at 669–70.

⁴⁵¹ *Id.*

⁴⁵² *Id.* (analyzing the driver’s ability to haul freight for other carriers under the opportunity for profit or loss factor because it was relevant to whether the driver could exercise his managerial skill to increase profits by selecting more favorable loads or by driving for other carriers) (internal quotation marks omitted).

⁴⁵³ 87 FR 62275 (proposed § 795.110(b)(4)).

⁴⁵⁴ *See, e.g., Flint Eng’g*, 137 F.3d at 1441 (“None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach.”).

Alpha House in order to protect its residents. In addition, the nursing staff are supervised by regular check-ins with managers, but nurses generally perform their work without direct supervision. While nurses at Alpha House work without close supervision and can express preferences for their schedule, Alpha House maintains control over when and where a nurse can work and whether a nurse can work for another nursing home. These facts indicate employee status under the control factor.

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

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

In § 795.110(b)(5), the Department proposed to return to framing this factor as “whether the work performed is an integral part of the employer's business.”⁴⁵⁵ The Department emphasized its belief that its proposed articulation of the integral factor—which considers whether the work is “critical, necessary, or central to the employer's principal business”—better reflects the economic reality case law and is more consistent with the totality-of-the-circumstances approach to determining whether a worker is an employee or an independent contractor than the 2021 IC Rule's “integrated unit of production” framing.⁴⁵⁶

The Department explained that the 2021 IC Rule's integral formulation relied on a rigid reading of *Rutherford* (which noted that the work was “part of an integrated unit of production” of the employer).⁴⁵⁷ Having further considered the case law, the Department concluded in the NPRM that the 2021 IC Rule's

approach did not reflect Supreme Court or federal appellate court precedent.⁴⁵⁸ As the 2021 IC Rule acknowledged, the Supreme Court's decision in *Silk* determined that coal “unloaders” were employees of a retail coal company as a matter of economic reality in part because they were “an integral part of the business[] of retailing coal.”⁴⁵⁹ The 2021 IC Rule interpreted this language as merely articulating a part of the overall inquiry rather than a specific factor useful for deciding the question of economic dependence or independence. But as the Department explained in the NPRM, the Court in *Silk* explicitly considered the fact that the workers were an “integral part” of the business to be relevant to the inquiry, and later courts likewise found this framing to be useful to the economic reality analysis—so much so that most federal courts of appeals routinely list “integral” as an enumerated factor, but no court of appeals uses “integrated unit” for this factor.⁴⁶⁰ Additionally, the NPRM explained that the Department has also used this proposed approach to the integral factor for decades and has consistently found it to be a useful factor in the economic reality analysis.⁴⁶¹ For these reasons, the Department proposed to eliminate the “integrated unit” factor as an enumerated factor and instead to restore the integral factor, understood by courts as being focused on whether the work is critical, necessary, or central to the potential employer's business.⁴⁶²

The Department explained that most courts adopt a common-sense approach to determining whether the work or service performed by a worker is an integral part of a potential employer's business.⁴⁶³ For example, if the potential employer could not function without the service performed by the workers, then the service they provide is integral.⁴⁶⁴ The Department noted

⁴⁵⁸ 87 FR 62254; see *Silk*, 331 U.S. at 716 (unloaders were “an integral part of the business[] of retailing coal”); see also *Off Duty Police*, 915 F.3d at 1055; *McFeeley*, 825 F.3d at 244; *Scantland*, 721 F.3d at 1319; *Flint Eng'g*, 137 F.3d at 1443; *Superior Care*, 840 F.2d at 1060–61; *Lauritzen*, 835 F.2d at 1537–38; *DialAmerica*, 757 F.2d at 1385; *Driscoll*, 603 F.2d at 755.

⁴⁵⁹ 331 U.S. at 716.

⁴⁶⁰ *Id.*; see *supra* section II.B.2.

⁴⁶¹ See, e.g., WHD Fact Sheet #13 (July 2008) (listing “[t]he extent to which the services rendered are an integral part of the principal's business” as a factor).

⁴⁶² 87 FR 62254.

⁴⁶³ *Id.* at 62253.

⁴⁶⁴ See, e.g., *Off Duty Police*, 915 F.3d at 1055 (rejecting employer's argument that it was merely an agent between its customers and the officers because the company “could not function without the services its workers provide”); *McFeeley*, 825 F.3d at 244 (“[E]ven the clubs had to concede the

that “[s]uch workers are more likely to be economically dependent on the potential employer because their work depends on the existence of the employer's principal business, rather than their having an independent business that would exist with or without the employer.”⁴⁶⁵ Additionally, courts also look at whether the work is important, critical, primary, or necessary to the potential employer's business.⁴⁶⁶ In most cases, if a potential employer's primary business is to make a product or provide a service, then the workers who are involved in making the product or providing the service are performing work that is integral to the potential employer's business.⁴⁶⁷

The Department emphasized that the judicial treatment of the integral factor reflects the understanding that a worker who performs work that is integral to an employer's business is more likely to be employed by the business, whereas a worker who performs work that is more peripheral to the employer's business is more likely to be independent from the employer.⁴⁶⁸ Finally, the Department

point that an ‘exotic dance club could [not] function, much less be profitable, without exotic dancers.’”) (quoting Secretary of Labor's Amicus Br. in Supp. of Appellees at 24); *Capital Int'l*, 466 F.3d at 309 (finding security guards were integral to a business where company “was formed specifically for the purpose of supplying” private security); cf. *Johnson*, 371 F.3d at 730 (upholding jury verdict finding independent contractor status for security guards working for government housing authority and noting, with regard to integral factor, that the housing authority “had functioned for years before and after the program” under which security guards were hired).

⁴⁶⁵ 87 FR 62253. See, e.g., *Brock v. Lauritzen*, 624 F. Supp. 966, 969 (E.D. Wis. 1985), *aff'd*, 835 F.2d 1529 (7th Cir. 1987) (finding that cucumber harvesters were integral to cucumber farmer's business and were “economically dependent upon Lauritzen's business for their work during the cucumber harvest season”).

⁴⁶⁶ See, e.g., *Alpha & Omega*, 39 F.4th at 1085 (noting that this factor “turns ‘on whether workers’ services are a necessary component of the business’”) (quoting *Paragon*, 884 F.3d at 1237); *Flint Eng'g*, 137 F.3d at 1443 (finding rig welders’ work to be “an important, and indeed integral, component of oil and gas pipeline construction work” because their work is a critical step on every transmission system construction project); *Lauritzen*, 835 F.2d at 1537–38 (“It does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business[.]”); cf. *Paragon*, 884 F.3d at 1237 (“Because [the worker]’s management of the pecan grove was not integral to the bulk of Paragon’s [construction] business, this factor supports consideration of [the worker] as an independent contractor.”).

⁴⁶⁷ See, e.g., *Superior Care*, 840 F.2d at 1059 (for business that provided on-demand health care personnel, the nurses provided were themselves integral to the business).

⁴⁶⁸ See, e.g., *Keller*, 781 F.3d 799 at 815 (“The more integral the worker's services are to the business, then the more likely it is that the parties have an employer-employee relationship.”); *DialAmerica*, 757 F.2d at 1385 (“workers are more

Continued

⁴⁵⁵ 87 FR 62275 (proposed § 795.110(b)(5)).

⁴⁵⁶ *Id.* at 62253.

⁴⁵⁷ *Id.* at 62254; *Rutherford*, 331 U.S. at 729.

noted that while it is only one part of the overall inquiry, courts continue to find the integral factor useful for evaluating economic dependence.

Many commenters expressed agreement with the Department's decision to return to the framing of this factor as the extent to which the work performed is an integral part of the potential employer's business. *See, e.g.*, AFL-CIO; Century Foundation; IBT; NDWA; NELP; NWLC; ROC United; State AGs; Transport Workers Union of America. For example, NELP commented that it agreed with the statement in the NPRM that "if the [employer] could not function without the service performed by the workers, then the service they provide is integral," explaining that this factor "recognizes a simple truth: workers are more likely employees under the FLSA if 'they perform the primary work of the alleged employer.'" AFL-CIO similarly commented that it "strongly supports the return of this factor to its 'longstanding Departmental and judicial interpretation, rather than the 'integrated unit of production' approach that was included in the 2021 IC Rule.'" The Century Foundation commented that "[t]his factor helpfully looks at whether the work performed is an essential or critical aspect of the business,—i.e., whether the work is critical to the main service or product that the business provides." NWLC agreed with the NPRM's rejection of the 2021 IC Rule's "integrated unit" framing of this factor, stating that the Department's proposal "appropriately considers whether the work performed is an essential or critical aspect of the business—i.e., whether the work is critical to the main service or product that the business provides." NWLC explained that the NPRM's "framing is consistent with the long line of court decisions finding a worker's performance of work that is integral to the employer's business to be an indicator of employee status, reflecting the commonsense understanding that employers are more likely to hire employees to perform the tasks involved in providing the core products and/or services that their business offers."

IBT expressed support for the Department's proposed articulation of the integral factor and recommended "that guidance for this factor make explicitly clear the focus of the factor is on the work performed, not the individual worker." Outten & Golden also stated that the final regulatory text

should incorporate the text from the NPRM stating that "the focus of the integral factor is on the work performed, not the individual worker." As the Department explained in the NPRM, this approach evaluates whether the worker performs work that is central to the employer's business, not whether the worker possesses some unique qualities that render them indispensable as an individual.⁴⁶⁹ An individual worker who performs the work that an employer is in business to provide but is just one of hundreds or thousands who perform the work is nonetheless an integral part of the employer's business even if that one worker makes a minimal contribution to the business when considered among the workers as a whole.⁴⁷⁰ The Department believes that the proposed regulatory text, which states that "[t]his factor considers whether the work performed is an integral part of the employer's business" rather than "whether any individual worker in particular is an integral part of the business" sufficiently captures this understanding of the integral factor.

Some commenters urged the Department to maintain the 2021 IC Rule's framing of this factor as "integrated unit of production," expressing the view that the 2021 IC Rule's approach is more consistent with *Silk* and *Rutherford*. *See e.g.*, Freedom Foundation; Scalia Law Clinic; U.S. Chamber; *see also* NELA; Outten & Golden. For example, Scalia Law Clinic commented that *Rutherford* and *Silk* "make clear that the 'integral' factor concerns whether a worker is part of an integrated unit of production, not whether she is economically important to a business operation." The U.S. Chamber commented that "focusing the integral prong on an integrated unit of production is fully supported by the extant decisional law" stating that "[t]he Supreme Court has described this prong as considering whether the worker is part of an 'integrated economic unit' in the putative employer's business." The Freedom Foundation similarly commented that the Supreme Court in *Rutherford* espoused the proper articulation of the factor as "integrated unit of production" explaining that "'[i]ntegral' and 'integrated' could be described as near homonyms . . . they are etymologically related words that

sound similar but have different meanings." The Freedom Foundation further explained that "'[i]ntegral,' in the sense described by the Department . . . means 'necessary to make a whole complete; essential, fundamental; whereas 'integrated' in the sense used by the Supreme Court in *Rutherford* means 'with various parts linked or coordinated.'" The Freedom Foundation commented that it believes the Department misrelies on *Silk* to support its proposed framing of the integral factor, noting that "*Silk* did not include integrality in its list of factors, nor did it apply it as a factor of decision." *See also* I4AW (factor was originally articulated as "integrated unit of production" but "[o]ver the years . . . morphed, without explanation, into whether a role was 'integral' to the business hiring the putative contractor. . . . [T]his scrivener's error has created greater confusion for businesses that want to be or work with ICs and has made it more difficult for courts to permit independent contract work").

NELP agreed with the Department's framing of the integral factor but stated that "[t]o provide further clarity on this factor, the DOL should recognize that the question of integration is not an either/or proposition" noting that "[w]hether the work is integral such that the business could not offer its goods or services without it . . . is important to consider" but "it does not define the outer limits of this factor." NELP explained that "[a]s the Supreme Court has recognized[,] whether the work is part of an 'integrated unit of production' also informs whether the worker is more likely to be an employee or independent contractor."

After considering these comments, the Department is retaining the approach proposed in the NPRM, which considers whether the work performed by the worker is an integral part of the employer's business. As discussed below, the Department believes that its proposed approach to the integral factor is more consistent with longstanding judicial precedent and decades of Department guidance than the 2021 IC Rule's articulation of this factor, which focused on whether the worker is part of a "integrated unit of production." The Department notes, however, that it does not intend to preclude consideration of the potential relevance of the Supreme Court's discussion of the "integrated unit of production" in *Rutherford*. Consistent with the totality-of-the-circumstances approach, under which all relevant facts should be considered, the Department recognizes that the extent to which a worker is

likely to be 'employees' under the FLSA if they perform the primary work of the alleged employer").

⁴⁶⁹ 87 FR 62254. *See, e.g., Montoya v. S.C.C.P. Painting Contractors, Inc.*, 589 F. Supp. 2d 569, 581 (D. Md. 2008) (explaining that "this factor does not turn on whether the individual worker was integral to the business; rather, it depends on whether the service the worker performed was integral to the business").

⁴⁷⁰ 87 FR 62254 (giving the example of one operator among many in a call center).

integrated into a business's production processes may be relevant to the question of economic dependence or independence and may be considered under any relevant enumerated factor, or as an additional factor. For example, as the Department expressed in the NPRM, indicators that a worker is integrated into an employer's main production processes, such as whether the worker is required to work at the employer's main workplace or wear the employer's uniform, may illustrate an employer's control over the work being performed.⁴⁷¹

Commenters' claims that the 2021 IC Rule's emphasis on the "integrated unit of production" is more consistent with applicable judicial precedent than the approach proposed in the NPRM stands in sharp contrast to decades of judicial precedent and Departmental guidance. The Supreme Court's decision in *Silk* determined that coal "unloaders" were employees of a retail coal company as a matter of economic reality in part because they were "an integral part of the business [] of retailing coal."⁴⁷² Some commenters took the position that the Court in *Silk* merely mentioned the integral nature of the work performed but did not intend for it to be a factor considered in the overall inquiry. However, the Supreme Court in *Silk* emphasized that its list of factors was not intended to be exhaustive, but instead consisted of factors the Court believed would be useful to courts and agencies applying the economic reality test in the future. Moreover, the Court explicitly considered it relevant to the determination of employment status that the coal unloaders in *Silk* were an "integral part" of the retail coal business, and the majority of federal courts of appeals have likewise adopted this consideration as a relevant factor for the inquiry into economic dependence or independence.⁴⁷³

Commenters attempted to cast aside decades of judicial precedent by employing an overly rigid understanding of *Rutherford*, an understanding that no federal court of appeals has adopted as the standard for this factor in the decades since *Silk* and *Rutherford*. As the Department has emphasized, the approach in this final rule is underpinned by a desire to bring consistency and clarity to the economic reality inquiry by aligning this rule with the approach taken by the majority of federal appellate case law. Nearly all the federal courts of appeals expressly consider whether the work performed is

an integral part of the potential employer's business as a sixth enumerated factor in the economic dependence or independence inquiry.⁴⁷⁴ The Fifth Circuit has not expressly enumerated the integral factor but has at times assessed integrality as an additional relevant factor.⁴⁷⁵ The Department has also long considered whether the work performed is an integral part of the employer's business as a factor in the economic realities' inquiry.⁴⁷⁶ For example, in one of the Department's earliest pronouncements of the economic reality factors—a 1949 WHD opinion letter distilling the six "primary factors which the Court considered significant" in *Rutherford* and *Silk*—the first factor enumerated was "the extent to which the services in question are an integral part of the 'employer's' business."⁴⁷⁷

The Department disagrees with the commenters' contention that the approach proposed by the Department and taken by nearly every federal court of appeals is a result of a misunderstanding of *Rutherford*, *Silk*, the FLSA, and the economic reality inquiry. The historical approach to this factor by the Department and the courts stands in stark contrast to the fact that not a single federal court of appeals identifies "integrated unit of production" as the standard for this enumerated factor of the economic reality test. Commenters identified one federal appellate decision that they contend applied *Rutherford's* "integrated unit of production" as the standard for this factor in an independent contractor inquiry under the FLSA, *Tobin v. Anthony-Williams Mfg. Co.*⁴⁷⁸ See e.g., CPIE; CWI; DSA; IBA; N/MA. The decision in *Tobin* does not, however, stand for the proposition that the relevant standard for this factor under the enumerated factors of the economic reality test is whether workers are part of an "integrated unit of production." Instead, *Tobin* was a factually analogous case to *Rutherford* where the Eighth Circuit found it relevant to the overall economic reality

inquiry that the timber haulers and wood workers were part of one integrated unit of production.⁴⁷⁹ Consistent with the Department's discussion above, *Tobin* illustrates how *Rutherford's* "integrated unit of production" framing may be considered when relevant to the question of economic dependence. Moreover, the Eighth Circuit has elsewhere recognized that the extent to which the work performed is integral to the employer's business is one of the enumerated factors under the economic reality test.⁴⁸⁰

A number of commenters expressed concerns that the Department's proposed articulation of the integral factor was an attempt to adopt one of the prongs of the ABC test. See, e.g., 4A's; Club for Growth; Fight for Freelancers; NRF & NCCR; U.S. Chamber; WSTA. For example, the U.S. Chamber commented that "it appears that the Proposed Rule's shift away from the Supreme Court's focus on an 'integrated unit' to whether the work is 'critical, necessary, or central' is a thinly veiled attempt to inject Prong B of the ABC test—whether the work takes place outside the usual course of the putative employer's business—into the analysis." The Club for Growth, NRF & NCCR, and the U.S. Chamber contended that the Department's proposal for the integral factor was at odds with the Department's explanation elsewhere in the NPRM that the Department believes the ABC test to be inconsistent with Supreme Court precedent interpreting the FLSA, and as such, cannot be adopted without Supreme Court or congressional alteration of the applicable analysis under the FLSA. Fight for Freelancers also commented that "[the integral factor] is the most likely to misclassify legitimate independent contractors as employees, because it is so similar to the B-prong of the ABC Test."

Although there may be conceptual overlap between the Department's proposed integral factor and Prong B of the ABC test, as discussed above, the Department is not adopting an ABC test. The assertion that the Department's proposal regarding the integral factor is an attempt to insert Prong B of an ABC test in this rule is baseless. First, the integral factor is but one factor in a

⁴⁷⁴ See e.g., *Superior Care*, 840 F.2d at 1058–59; *DialAmerica*, 757 F.2d at 1382–83; *McFeeley*, 825 F.3d at 241; *Off Duty Police*, 915 F.3d at 1055; *Lauritzen*, 835 F.2d at 1537–38; *Alpha & Omega*, 39 F.4th at 1082; *Driscoll*, 603 F.2d at 754; *Sureway*, 656 F.2d at 1368; *Paragon*, 884 F.3d at 1235; *Scantland*, 721 F.3d at 1311–12; *Morrison*, 253 F.3d at 11.

⁴⁷⁵ See, e.g., *Hobbs*, 946 F.3d at 836.

⁴⁷⁶ See WHD Op. Ltr. (June 23, 1949); 27 FR 8033; WHD Fact Sheet #13 (1997); WHD Fact Sheet #13 (July 2008); AI 2015–1, available at 2015 WL 4449086.

⁴⁷⁷ WHD Op. Ltr. (June 23, 1949).

⁴⁷⁸ 196 F.2d 547, 550 (8th Cir. 1952) (analyzing whether timber haulers and wood workers were "an integrated part of defendant's production set-up").

⁴⁷⁹ *Id.*

⁴⁸⁰ *Alpha & Omega*, 39 F.4th at 1082 (stating "[w]e assume without deciding that the economic realities test is appropriate in determining whether a worker is an employee or independent contractor under the FLSA" and articulating the sixth relevant factor as "the degree to which the alleged employee's tasks are integral to the employer's business.").

⁴⁷¹ 87 FR 62254.

⁴⁷² 331 U.S. at 716.

⁴⁷³ See *supra* section II.B.2.

multifactor inquiry, where no one factor is dispositive, and where the totality of the circumstances is considered to determine the ultimate question of whether a worker is economically dependent on the potential employer for work or is in business for themselves. The totality-of-the-circumstances test thus stands in stark contrast to an ABC test, in which each element of the test is dispositive. As the Department expressly recognized in the NPRM, and reaffirms here, not all workers who perform integral work are employees, and there may be times when this factor misaligns with the ultimate result. This is entirely consistent with the totality-of-the-circumstances approach.⁴⁸¹ Prong B of the ABC test, on the other hand, is dispositive of employment status. If the hiring entity cannot show that the work being performed by the worker is outside the usual course of the hiring entity's business, employment status is found regardless of the other factors of the ABC test.⁴⁸² Thus, while a worker can perform work that is integral to the potential employer's business and still be considered an independent contractor under this final rule, a worker performing work in the usual course of their potential employer's business will always be an employee under the ABC test. In this final rule, the Department is returning to the longstanding understanding of the integral factor consistent with decades of court precedent and Department guidance applying the economic reality test under the FLSA. Again, the Department is not adopting an ABC test.

Several commenters expressed concerns that the integral factor would lead to virtually every worker being classified as an employee since most, if not all, work performed for a business could theoretically be considered critical or necessary to an employer's business. *See, e.g.,* Alabama Forestry Association; FMI; Goldwater Institute; MEP; NAFO; Scalia Law Clinic; U.S. Chamber. For example, Scalia Law Clinic commented that "[a]ll work for a business is in some sense 'critical, necessary, or central to . . . [a] business,' because businesses only hire workers that add economic value." The U.S. Chamber similarly commented that "[t]he Department has mistakenly

equated 'integral' with 'critical, necessary, or central to the employer's business'. . . . Taken literally, this could include every independent contractor, because a business would not hire an independent contractor unless it was 'necessary' to do so." NAFO similarly commented "[t]his new interpretation makes it impossible to understand or apply the 'integral' factor" noting that the Department's rule "would effectively subsume virtually every contracting or subcontracting relationship because all subcontractors perform a function that the entity deems 'integral' to a product or a service—otherwise, it would not contract with them." MEP further explained that "[t]his is particularly the case with small businesses that need to rely on outside expertise." As an example, MEP noted that IT, security, services, marketing, or legal consulting services, may not be the main intent of the business, but they may be critical or necessary to the business.

As a threshold matter, the Department reiterates that, as with the other enumerated factors of the economic reality test, the integral factor is just one area of inquiry that is considered along with the other factors to reach the ultimate determination of economic dependence or independence. The Department again emphasizes that it is "not always true that workers whose work is integral are employees."⁴⁸³ Additionally, commenters' assertions that this factor would subsume every contracting relationship and would always weigh in favor of employee status are misguided. The commenters misapply the Department's articulation of this factor by suggesting that virtually every type of work commissioned by a business would be considered integral, since businesses do not contract for work that isn't necessary or critical to their functioning. The key limiting word that commenters appear to overlook is "principal." As illustrated by the example the Department provided for this factor in the NPRM, which is also part of this final rule, while it might in some sense be critical or necessary for a business to hire an accountant to manage their tax obligations, for example, this accounting work may nonetheless not be critical, necessary, or central to the potential employer's principal business. To further illustrate, a coffee shop's "principal" business is making, selling, and serving coffee. A coffee shop might need window washers to ensure clear views and a clean appearance for customers, but the window washers are not generally

integral to the principal business of the coffee shop. Commenters maintaining that any work contracted by a business is central, necessary, or critical to its functioning overlook this important limitation of the integral factor—only work that is critical, necessary, or central to the potential employer's principal business is integral.

Some commenters requested clarification for their specific industries, expressing concerns that in certain industries laws and regulations mandate relationships such that the work performed would be considered an integral part of the potential employer's business. For example, NAR commented "that the extent to which the work is performed as an integral part of the employer's business within the real estate industry context, is mandated by state laws and regulations." NAR suggested the Department's rule "should recognize such industry nuances, understanding that compliance with state statutory and regulatory provisions does not conflict with the ability to work as an independent contractor under the test." ACLI similarly commented that "if insurance and/or securities industry laws and regulations compelling agents and registered representatives to affiliate with licensed insurers and broker dealers were sufficient to negate independent contractor status, this factor would perpetually weigh against independent contractor status for insurance industry relationships." ACLI requested the Department "categorically affirm that where laws or regulations dictate that an insurance worker must be affiliated with a company in the same business . . . the integral part of the business factor be viewed as at most a neutral factor."

As the Department repeatedly states throughout this final rule, no one factor is dispositive, and the ultimate question is whether as matter of economic reality the worker is in business for themselves or is economically dependent on the potential employer for work. If the work being performed is necessarily integral to the business of the potential employer, the integral factor may weigh in favor of employee status, but it is only one part of the inquiry. It is not dispositive. Where the other factors weigh in favor of independent contractor status, and the economic reality as a whole indicates the worker is in business for themselves, the overall conclusion may likely be that the worker is an independent contractor; notably, compliance with specific, applicable legal obligations is addressed in the discussion of the control factor, section V.C.4.a of this preamble. This inquiry, however, is specific to the

⁴⁸¹ *See, e.g., Meyer*, 607 F. App'x at 123 ("Although tennis umpires are an integral part of the U.S. Open," other factors supported determination that umpires were independent contractors.); *Perdomo v. Ask 4 Realty & Mgmt., Inc.*, No. 07–20089, 2007 WL 9706364, at *4 (S.D. Fla. Dec. 19, 2007) (construction worker's work was integral to remodeling business, but economic reality factors as a whole indicated independent contractor status).

⁴⁸² 87 FR 62231.

⁴⁸³ 87 FR 62253.

factual circumstances of a particular relationship, and the Department cannot broadly make a determination about the status of an entire sector of workers whose economic relationships are varied. Therefore, the Department declines to provide exemptions from a particular factor for certain industries.

After consideration of the comments received, the Department reiterates its belief that the extent to which the work performed is an integral part of the potential employer's business sheds light on the ultimate inquiry of whether a worker is economically dependent on the potential employer for work or is in business for themselves. The Department is returning to this framing of the integral factor in this final rule because this approach is more consistent with Supreme Court precedent, decades of judicial precedent in the federal courts of appeals, and the totality-of-the-circumstances approach than the 2021 IC Rule's "integrated unit of production" framing of this factor. The Department is adopting the integral factor as proposed in the NPRM with minor wording changes to provide additional clarity (adding "of the business" to the end of the second sentence of the regulatory text to state "whether the function they perform is an integral part of the business").

The Department is finalizing the integral factor (§ 795.110(b)(5)) as discussed herein.

Example: Extent to Which the Work Performed Is an Integral Part of the Employer's Business

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

Alternatively, the same farm pays an accountant to provide non-payroll accounting support, including filing its annual tax return. This accounting support is not critical, necessary, or central to the principal business of the farm (farming tomatoes), thus the accountant's work is not integral to the business. Therefore, these facts indicate independent contractor status under the integral factor.

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

The Department proposed that the skill and initiative factor consider "whether the worker uses specialized skills to perform the work and whether

those skills contribute to business-like initiative." The Department stated that "[t]his factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the employer to perform the work." The Department further stated that, "[w]here the worker brings specialized skills to the work relationship, it is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor."⁴⁸⁴

The Department explained that the proposed regulatory text for this factor would reaffirm the longstanding principle that this factor indicates employee status where the worker lacks specialized skills. The Department further explained that it believed that the application of initiative in connection with specialized skills is useful in answering the overarching inquiry of whether the worker is economically dependent on the employer for work or is in business for themselves, and that, as a result, it was "proposing to reintegrate initiative into this factor and no longer exclude consideration of initiative when applying this factor, as provided in the 2021 IC Rule." The Department then discussed the case law supporting its position that a worker's lack of specialized skills when performing the work generally indicates employee status, but also reiterated that no one factor is dispositive, consistent with the overarching economic realities analysis. Because both employees and independent contractors can be highly skilled and/or bring specialized skills to the work relationship, the Department discussed how focusing on whether the worker uses "the specialized skills in connection with business-like initiative" is helpful in distinguishing between the two classifications and further discussed the case law and its prior guidance supporting such an approach. Finally, the Department acknowledged that some facts showing an exercise of initiative can be relevant under the skill factor and another factor, and explained that considering facts showing an exercise of initiative under more than one factor to the extent appropriate depending on the facts of a case is consistent with and furthers the totality-of-the-circumstances approach to assessing the economic realities of the work relationship.⁴⁸⁵

⁴⁸⁴ See generally 87 FR 62275 (proposed § 795.110(b)(6)).

⁴⁸⁵ See generally *id.* at 62254–57.

In addition to the numerous comments generally supporting the Department's six-factor analysis, a number of commenters expressed support for the NPRM's discussion of the skill and initiative factor. For example, NDWA stated that the NPRM's analysis "is helpful because requiring initiative as well as skill better answers the questions of whether a worker is in business for themselves." The Shriver Center agreed. The Leadership Conference similarly stated that the NPRM's analysis "is helpful because we believe that all work is skilled work in the colloquial sense of the term, and elevating the question of whether a worker can exercise initiative as well as skill better answers the question of whether a worker is in business for themselves." Gale Healthcare Solutions advised that for nurses, "adding business initiative to skill is an appropriate measure for distinguishing workers who should be classified as independent contractors . . . from those who, while they employ nursing skills in the performance of their work, do not do so in combination with the business-like initiative needed to grow a nursing practice." The LA Fed & Teamsters Locals commented that the NPRM "appropriately recognizes that while a lack of specialized skills indicates employee status, the exercise of such specialized skills does not indicate independent contractor status absent the worker's using business-like initiative in relation to those skills." And ROC United stated that the NPRM's "decision to include skill and initiative as a stand-alone factor is another improvement over the 2021 Rule," and that the NPRM "correctly recognizes that most work that does not require specialized skills is not performed by independent contractors (e.g., security guards, janitors, drivers, landscape workers, and call center workers)." See also NELP (expressing agreement with also including in this factor "an analysis of whether the worker uses those skills in connection with 'business-like initiative'"); NWLC (commenting that the NPRM would correctly restore consideration of initiative to this factor and affirm that "a true independent contractor is likely to have specialized skills" and use those skills to exercise "business-like initiative").

Some other commenters that generally supported the Department's proposal requested changes to or clarifications of the skill and initiative factor. For example, SMACNA stated that "[t]his is correct as far as skills" but added that, "for workers who are highly skilled, the 'skill and initiative' factor should not be

used to weigh against employee status.” The case law, however, does not support the position that, for highly skilled workers, this factor should not weigh against employee status.⁴⁸⁶ Real Women in Trucking stated that it would appreciate clarification that, “although truck driving typically is not classified as ‘skilled’ labor in other contexts, it requires sufficient skill that, when combined with business-like initiative, drivers are appropriately considered independent contractors.” The Department agrees that, consistent with the analysis for this factor and its discussion of commercial drivers’ licenses (CDLs) below, this factor would indicate independent contractor status for a worker who uses truck-driving skills in connection with business-like initiative.

Farmworker Justice stated that “courts have made clear that ‘most farm labor jobs require little specialized skill’ ” and “encourage[d] the DOL to include reference to such cases in the Final Rule, as it has for workers in numerous other industries, such as janitors, security guards, landscape workers, and call center workers.” The Department agrees with this characterization of the case law regarding “most farm labor jobs” and notes that it has taken that position in its own enforcement actions.⁴⁸⁷ IBT “supports the Department’s proposal for this factor,” “applauds the Department’s recognition that several courts have already determined that certain workers including, drivers, security guards, janitors, landscape workers, and call center workers do not require specialized skills,” and “recommends that guidance for this factor include specific instruction that asks courts to rely on the previous decisions finding certain occupations do not require prior experience; the workers are dependent on training from the employer to perform the work; or that the work requires no training, and thus are indicators that the relevant worker(s) lack(s) specialized skills.” The Department declines to include that type of instruction as it is unnecessary in light of these court decisions. Moreover, the Department is not intending to identify any particular occupation as lacking specialized skills in all cases.

NELA stated that, “[a]lthough the Proposed Rule correctly reestablishes the link between skill and business-like initiative as the *raison d’être* of the

factor, it does not make clear enough that the factor only points to independent contractor status when such a link is found.” NELA suggested accordingly that the final rule “would be strengthened by incorporating a few key principles from the commentary into the rule itself.” NELA requested that sentences from the NPRM stating that the “fact that workers are skilled is not itself indicative of independent contractor status” and that “[b]oth employees and independent contractors may be skilled workers” be added to the regulatory text.⁴⁸⁸ The Department agrees that including versions of these sentences in the regulatory text will help sharpen the point that use of skills in connection with business-like initiative is what distinguishes between independent contractors and employees under this factor. Accordingly, the Department is revising the last sentence of the proposed regulatory text for this factor to be two sentences and to read (the italicized language is new as compared to the NPRM): “Where the worker brings specialized skills to the work relationship, *this fact is not itself indicative of independent contractor status because both employees and independent contractors may be skilled workers*. It is the worker’s use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.”

The Department, however, believes that it is unnecessary to add the following sentence that NELA suggested incorporating into the regulatory text: “To indicate possible independent contractor status, the worker’s skills should demonstrate that they exercise independent business judgment.” This sentence would be duplicative of the existing regulatory text language that it “is the worker’s use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.” The Department further believes that adding “only” to this existing regulatory text language (as NELA requested) so that it would read that it “is only the worker’s use . . .” would not provide clarification, especially considering the changes that the Department is making to the regulatory text.

Numerous commenters opposed, disagreed with, and/or requested changes to, or clarifications of, the proposed skill and initiative factor. For example, CWI stated that, although it agrees that “both skill and initiative

may play a role in the independent contractor calculus,” it “fundamentally disagrees, however, that those considerations should be treated as a standalone factor in the economic realities calculus.” And N/MA stated that “[c]onsideration of skill and initiative as a stand-alone factor creates confusion and ambiguity, and results in the considerations under that factor being provided outsized weight in the totality of the circumstances analysis.” See also Scalia Law Clinic (“The NPRM creates a new definition of the ‘skill’ factor that gives it greater weight, despite precedent to the contrary.”). However, courts and the Department have invariably included some version of skill and initiative as a separate and distinct factor in their analyses for decades. Consistent with the Department’s repeated statements in this final rule, this factor should not be given, as a predetermined matter, any different weight than any of the other factors.⁴⁸⁹

SHRM commented that the NPRM “purports to convert a standard consideration utilized by myriad independent contractor classification tests—the degree of skill required by the work—into an assessment of a worker’s business acumen.” See also TheDream.US (describing a focus on business-like initiative as an “amorphous qualification to an otherwise straightforward consideration”). SHRM expressed concern that “[t]his is not only a drastic departure from a well-settled standard, but it also negates the Proposed Rule’s decree that a worker’s *opportunity* for profit or loss based on their managerial skill is relevant to their classification as an employee or an independent contractor.” Many federal courts of appeals consider initiative as part of this factor,⁴⁹⁰ and thus, it is by no means a

⁴⁸⁹ See 29 CFR 795.110(a)(2) (“Consistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive, and the weight to give each factor may depend on the facts and circumstances of the particular case.”). Scalia Law Clinic further commented that, “[w]hile the 2021 [IC] Rule did not prohibit considering a worker’s skill, [it] rightly excluded skill from its ‘core factors.’” As explained in this final rule and as the regulatory text provides, however, the Department is rejecting the concept of “core” factors in favor of not giving a predetermined weight to any factor. See *id.* The 2021 IC Rule stated (and Scalia Law Clinic reiterated in its comment) that skill should be given lesser weight because highly-skilled workers can be employees and comparatively lesser-skilled workers can be independent contractors. The Department believes, however, that this is better addressed by reintegrating initiative into the skill factor for the reasons explained in the NPRM and herein and by reinforcing that all factors determine a worker’s status.

⁴⁹⁰ See, e.g., *Hobbs*, 946 F.3d at 834; *Parrish*, 917 F.3d at 385; *Cornerstone Am.*, 545 F.3d at 345;

⁴⁸⁶ See *id.* (citing cases).

⁴⁸⁷ See, e.g., *Perez v. Howes*, 7 F. Supp.3d 715, 724–25 (W.D. Mich. 2014), *aff’d*, 790 F.3d 681 (6th Cir. 2015).

⁴⁸⁸ The first sentence was at 87 FR 62255 (quoting *Superior Care*, 840 F.2d at 1060); the second sentence was at 87 FR 62256.

“drastic departure.” Moreover, because both employees and independent contractors may be skilled workers, considering whether a worker uses specialized skills in connection with business-like initiative—rather than considering only whether the worker has specialized skills—helps to distinguish the worker’s status and is probative of the ultimate question of economic dependence.⁴⁹¹ And there is no basis for asserting that the skill and initiative factor “negates” the relevance of the opportunity for profit or loss factor; both factors are relevant to the analysis even if, as explained in the NPRM,⁴⁹² some facts showing an exercise of initiative can be considered under both factors.

FSI, Coalition of Business Stakeholders, and NRF & NCCR similarly objected to the inclusion of initiative in this factor. FSI stated that including initiative in the skill factor contravenes *Silk* and that “this alteration represents yet another way in which the Proposed Rule repeatedly and improperly emphasizes ‘entrepreneurial drive’ as an overarching consideration across many factors.” The Coalition of Business Stakeholders and NRF & NCCR disagreed with the inclusion of initiative in this factor and described it as “inconsistent” with *Silk*. This factor, however, is consistent with *Silk*. The unloaders in *Silk* performed “simple tasks”⁴⁹³ and were employees, in part, for that reason; the Department’s skill and initiative factor would likewise point to employee status for such unloaders. The “driver-owners” in *Silk*, on the other hand, seemed to use their truck-driving skills in a business-like way, drove for multiple clients, and were described by the Court as “small businessmen.”⁴⁹⁴ The Department’s skill and initiative factor would likewise point to independent contractor status for such driver-owners.

FSI further stated that emphasizing “entrepreneurial drive” may “lead to erroneous classification decisions because, among other considerations, some workers may strongly prefer to work as independent contractors, not for

the flexibility to grow their businesses, but for the flexibility to control their workloads and to work when they want to.” It added that, “while initiative is an appropriate consideration in favor of independent contractor status, its absence does not indicate that a worker is not pursuing independence.” 4A’s similarly stated that the “the proposed rule could create uncertainty for agencies that utilize legitimate independent contractor relationships to carry out important business functions, but their freelance talent does not have entrepreneurial drive or take personal initiative to expand their business to working with other agencies or in house marketing shops.” The Department continues to believe that whether workers with specialized skills use those skills in connection with business-like initiative is probative of their status as employees or independent contractors. Using such skills to “grow” or “expand” their work is a prime example of business-like initiative as the commenters recognize, but there may be other ways in which workers can use such skills in connection with business-like initiative. Of course, the determination of a worker’s status ultimately requires consideration of the totality of the circumstances—not just the skill and initiative factor.

DSA stated that “[a]n individual could not have a specialized skill, but still take the initiative of an independent business or vice versa. If the rule were to go forward as proposed, and each factor pointed in different directions, there could be confusion as to where a ruling may come down on this one factor.” The Department does not believe this to be the case when applying the skill and initiative factor. As explained in the NPRM, courts have often recognized that a worker’s lack of specialized skills to perform the work indicates that the worker is an employee. As the Tenth Circuit, for example, has explained, “the lack of the requirement of specialized skills is indicative of employee status.” *Flint Eng’g*, 137 F.3d at 1443 (quoting *Snell*, 875 F.2d at 811) (alteration omitted).⁴⁹⁵

When a worker lacks specialized skills, this factor will indicate employee status even if the worker exercises “the initiative of an independent business.” That initiative, of course, is very relevant to the overall analysis, and the worker who lacks the specialized skills but exercises “the initiative of an independent business” may very well be an independent contractor after considering all of the factors. For those reasons, there should be no confusion. The landscaper example in the NPRM’s discussion of the skill and initiative factor provides additional explanation; the landscaper’s landscaping work does not require specialized skills, but the landscaper’s use of initiative and other facts may demonstrate that the landscaper is an independent contractor.⁴⁹⁶

The U.S. Chamber similarly commented that the NPRM was “wrong to focus on ‘specialized skills’ as probative in determining independent contractor status.” The U.S. Chamber further commented that “a focus on ‘the amount of skill required’ separate from a worker’s initiative that impacts the worker’s profits is an unnecessarily restrictive view of independent work currently being performed in the U.S. economy.” In making these arguments, however, the U.S. Chamber did not rebut the substantial case law relied on by the Department explaining that the use of specialized skills in an independent or business-like way is what makes this factor probative of employee or independent contractor status. The Department grounds this factor in that case law. Citing drivers among other occupations, the U.S. Chamber added that “[e]ven low-skilled workers can work as independent contractors if they have a skill that they can market to customers.” See also *Scalia Law Clinic*. The Department agrees, as stated above, that workers lacking specialized skills can be independent contractors when all of the

Express Sixty-Minutes, 161 F.3d at 305 (“The district court did not discuss initiative during its evaluation of this factor. We agree with the Secretary that the skill and initiative factor points toward employee status.”); *Flint Eng’g*, 137 F.3d at 1443 (quoting *Selker Bros.*, 949 F.2d at 1295); *Circle C. Invs.*, 998 F.2d at 328; *Superior Care*, 840 F.2d at 1060; *DialAmerica*, 757 F.2d at 1387.

⁴⁹¹ See, e.g., *Scantland*, 721 F.3d at 1318; *Flint Eng’g*, 137 F.3d at 1443; *Selker Bros.*, 949 F.2d at 1295; *Superior Care*, 840 F.2d at 1060; *DialAmerica*, 757 F.2d at 1387.

⁴⁹² See 87 FR 62256–57.

⁴⁹³ 334 U.S. at 718.

⁴⁹⁴ *Id.* at 719.

⁴⁹⁵ See also, e.g., *Razak*, 951 F.3d at 147; *Off Duty Police*, 915 F.3d at 1055–56; *Iontchev*, 685 F. App’x at 550; *Walsh v. EM Protective Servs. LLC*, No. 3:19-cv-00700, 2021 WL 3490040, at *7 (M.D. Tenn. Aug. 9, 2021); *Acosta v. New Image Landscaping, LLC*, No. 1:18-cv-429, 2019 WL 6463512, at *6 (W.D. Mich. Dec. 2, 2019); *Acosta v. Wellfleet Commc’ns, LLC*, No. 2:16-cv-02353-GMN-GWF, 2018 WL 4682316, at *7 (D. Nev. Sept. 29, 2018), *aff’d sub nom. Walsh v. Wellfleet Commc’ns*, No. 20–16385, 2021 WL 4796537 (9th Cir. Oct. 14, 2021); *Perez v. Super Maid, LLC*, 55 F. Supp. 3d 1065, 1077–78 (N.D. Ill. 2014); *Harris v. Skokie Maid & Cleaning Serv., Ltd.*, No. 11 C 8688, 2013

WL 3506149, at *8 (N.D. Ill. July 11, 2013); *Campos v. Zopounidis*, No. 3:09-cv-1138 (VLB), 2011 WL 2971298, at *7 (D. Conn. July 20, 2011); *Solis v. Int’l Detective & Protective Serv., Ltd.*, 819 F. Supp. 2d 740, 752 (N.D. Ill. 2011).

⁴⁹⁶ 87 FR 62255 (“A landscaper, for example, may perform work that does not require specialized skills, but application of the other factors may demonstrate that the landscaper is an independent contractor (for example, the landscaper may have a meaningful role in determining the price charged for the work, make decisions affecting opportunity for profit or loss, determine the extent of capital investment, work for many clients, and/or perform work for clients for which landscaping is not integral).”). DSA’s statement that the examples of welders in the NPRM’s discussion of the skill and initiative factor do not include the scenario where “there is no specialized skill, but the ability to independently market a business” overlooked the landscaper example that addresses that scenario.

factors are considered. In addition, the Department continues to believe that the landscaper example in the NPRM's discussion of this factor, an example which the Department reaffirms, addresses that scenario.⁴⁹⁷ Moreover, no one fact or factor determines whether a worker of any skill level is an employee or independent contractor.

MEP described the Department's articulation of this factor as "unreasonably narrow" and stated that the Department "should recognize a wide variety of skills that demonstrate an individual's business-like initiative." It added that the Department "should not be in the business of judging which skills are considered specialized or nonspecialized or place high or low value on the skills independent contractors provide." As noted in the NPRM, courts have identified some occupations where workers were found to lack specialized skills (for example, security guards, traffic control officers, drivers, janitorial work, landscaping, and call center workers).⁴⁹⁸ The

⁴⁹⁷ See also *Iontchev*, 685 F. App'x at 550–51 (finding that the "service rendered by the Drivers did not require a special skill," but concluding that, "[u]nder the totality of the circumstances, the Drivers were not economically dependent upon [the employer]" and thus independent contractors).

⁴⁹⁸ See, e.g., *Razak*, 951 F.3d at 147 (noting that it "is generally accepted that 'driving' is not itself a 'special skill'" in determining that the skill factor weighs in favor of employee status); *Off Duty Police*, 915 F.3d at 1055–56 (noting that "[t]he skills required to work for ODPS are far more limited than those of a typical independent contractor" in finding that the skill factor weighed in favor of employee status for security guards and traffic control workers); *Iontchev*, 685 F. App'x at 550 ("The service rendered by the [taxi drivers] did not require a special skill."); *EM Protective Servs.*, 2021 WL 3490040, at *7 (traffic control officers require "relatively little skill" and security guards require "minimal skill," indicating employee status); *New Image Landscaping*, 2019 WL 6463512, at *6 (facts that "little or no skill was required" and "prior landscaping experience" was not required meant that skill factor favored employee status for landscapers); *Wellfleet Commc'ns*, 2018 WL 4682316, at *7 (explaining that skill factor favored employee status for call center workers because "all that Defendants required was the ability to communicate well and read a script"); *Super Maid*, 55 F. Supp. 3d at 1077–78 (noting, in finding that skill factor favored employee status, that "[m]aintenance work, such as cleaning, sweeping floors, mowing grass, unclogging toilets, changing light fixtures, and cleaning gutters, does not necessarily involve such specialized skills as would support independent contractor status," and that "cleaning services, although difficult and demanding, were even less complex than those maintenance services") (internal quotation marks omitted); *Skokie Maid*, 2013 WL 3506149, at *8 ("The maids' work may be difficult and demanding, but it does not require special skill," indicating employee status.); *Campos*, 2011 WL 2971298, at *7 ("There is no evidence that Campos's job as a delivery person required him to possess any particular degree of skill. Campos did not need education or experience to perform his job. Although he needed a driver's license in order to legally drive his vehicle for deliveries, the

Department is seeking to ground this factor in that case law. Certain occupations may often lack specialized skills, but the Department cannot say that a particular occupation always lacks specialized skills. For example, as explained below, drivers may often lack specialized skills, but drivers with CDLs may have a specialized skill. Moreover, determining whether a worker has specialized skills is just one part of the inquiry, and workers who lack specialized skills may still be independent contractors. The landscaper example referenced above is one example of a worker who can be an independent contractor even if the work is unskilled, and this outcome is possible in other industries because a worker's classification is ultimately determined by application of all of the factors.

NRF & NCCR recommended that "specialized skills" be changed to "skill, talent or creativity," referencing singers at restaurants among other examples. Again, the Department is not seeking to limit the types of work that involve skills or taking the position that any particular occupation lacks specialized skills. Instead, consistent with the bulk of case law, the Department is focusing this factor on whether the worker uses their specialized skills in connection with business-like initiative—rather than only considering whether the worker has specialized skills—because that focus is probative of the ultimate question of economic dependence.

Regarding the NPRM's statement that "[n]umerous courts have found that driving is not a specialized skill," NHDA commented that "a number of courts have found professional driving, including driving that requires a commercial driver's license (CDL), involves specialized skills" (footnote omitted). See also *Scopelitis*. These commenters added that "[a] driver with a CDL is a clear indicator of an individual pursuing a specialized skill to engage in a business." OOIDA commented similarly, stating that the cases relied on by the Department in the NPRM "were focused on automobile driving, not the driving of a commercial motor vehicle," and that it was "unclear whether the Department believes the driving skills required for a Class A Commercial Drivers License (CDL) are

possession of a driver's license and the ability to drive an automobile is properly characterized as a 'routine life skill' that other courts have found to be indicative of employment status rather than independent contractor status."); *Int'l Detective & Protective Serv.*, 819 F. Supp. 2d at 752 (finding that the "vast majority of the Guards' work . . . did not require any special skills").

not specialized." Considering these comments and the requests for clarification, the Department clarifies that it recognizes the distinctive nature of CDLs and further recognizes that drivers performing work requiring such licenses are likely using specialized skills as compared to drivers generally.⁴⁹⁹ As with any worker, consideration of whether a driver with a CDL uses that specialized skill in connection with business-like initiative determines whether this factor indicates employee or independent contractor status.

CPIE stated that "the NPRM's interpretation would ignore any initiative that is not attributable to an individual's specialized skill," expressed concern that this factor may not always align with the ultimate outcome, and "respectfully urges DOL to interpret this factor to consider any business initiative that demonstrates an individual's economic independence, regardless of whether the initiative is attributable to any skills." As an initial matter, the Department notes that it is not unusual when applying a multifactor economic realities analysis for one factor to not align with the ultimate outcome when the analysis is applied and the totality of the circumstances is considered. Regardless, any business initiative by a worker is plainly relevant to the analysis and may be considered under the opportunity for profit or loss depending on managerial skill factor and other factors, as the landscaper example in the NPRM's discussion of the skill and initiative factor demonstrates. Accordingly, this rulemaking accounts for IBA's comment that "[a] true measure of economic independence would not restrict the analysis of skill and initiative to considering only specialized skills and only initiative attributable to those skills but instead would consider 'all major components open to initiative,' such as 'business management skills.'" If not under the skill and initiative factor, the factors comprising the economic realities analysis certainly consider all types of initiative and business management skills by the worker.

Fight for Freelancers asserted that, in the case of a highly skilled worker who is asked by "one of her regular clients" to do "a task that requires far less skill"

⁴⁹⁹ NRF & NCCR commented that "[t]he fact that many people have regular driver's licenses should not be viewed as in any way negating or reducing the likelihood that a contractor who meets the other factors will be properly treated as an independent contractor." As the Department has clearly and repeatedly stated, no one fact will determine a worker's status as an employee or independent contractor.

than usual, the worker “would now have to tell her client—with whom she likes to work—that she cannot provide what the client needs for this particular project, because it does not make use of her more specialized skills.” The Department recognizes that using specialized skills in connection with business-like initiative does not preclude (and, in fact, may often also include) performance of lower-skilled tasks. Whether the worker uses specialized skills to perform the work is not determined by isolating any one task performed by the worker; instead, consistent with a totality-of-the-circumstances approach, the worker’s work on the whole should be considered to determine if the worker uses specialized skills in connection with business-like initiative.

Coalition of Business Stakeholders stated that the Department’s articulation of this factor “dispenses with all independent consideration of a worker’s specialized skills obtained or developed separate and apart from the hiring entity” and “all but ensures consideration of this factor will preclude an independent contractor finding.” This comment overlooks the totality-of-the-circumstances nature of the analysis; no one factor can preclude an independent contractor or employee finding. Contrary to this commenter’s assertion, the Department believes that the worker’s skills developed separate and apart from the hiring entity are relevant. The regulatory text providing that this factor indicates “employee status . . . where the work is dependent on training from the employer to perform the work” reflects that bringing skills to the work relationship (*i.e.*, skills developed separate and apart from the employer) may indicate independent contractor status if the skills contribute to business-like initiative.

Regarding training, America Outdoors Association stated that it “may benefit an outfitter to train an independent contractor, or pay for a first aid certification class, in order for the contractor to better serve out the terms of the contract.” Referencing a labor shortage in its industry, WFCa stated that “the mere fact that a contractor or dealer is willing to pay to train independent contractor should not make the worker an employee” and asked that the regulatory text be revised to reflect that. *See also* ABC. As an initial matter, some basic training in a workplace, such as paying for a first-aid certification class, does not prevent a finding that a worker uses specialized skills to perform the work. Instead, the analysis is more general and, as the

regulatory text states, should focus on whether the worker is dependent on training from the employer to perform the work. Finally, the revision requested by WFCa is unnecessary given that the regulatory text already provides generally that “the outcome of the analysis does not depend on isolated factors but rather upon the circumstances of the whole activity” and, “[c]onsistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive.”⁵⁰⁰

The Department is finalizing the skill and initiative factor (§ 795.110(b)(6)) as discussed herein.

Example: Skill and Initiative

A highly skilled welder provides welding services for a construction firm. The welder does not make any independent judgments at the job site beyond the decisions necessary to do the work assigned. The welder does not determine the sequence of work, order additional materials, think about bidding the next job, or use those skills to obtain additional jobs, and is told what work to perform and where to do it. In this scenario, the welder, although highly skilled technically, is not using those skills in a manner that evidences business-like initiative. These facts indicate employee status under the skill and initiative factor.

A highly skilled welder provides a specialty welding service, such as custom aluminum welding, for a variety of area construction companies. The welder uses these skills for marketing purposes, to generate new business, and to obtain work from multiple companies. The welder is not only technically skilled, but also uses and markets those skills in a manner that evidences business-like initiative. These facts indicate independent contractor status under the skill and initiative factor.

7. Additional Factors (§ 795.110(b)(7))

Section 795.105(d)(2)(iv) of the 2021 IC Rule stated that additional factors may be considered if they are relevant to the ultimate question of whether the workers are economically dependent on the employer for work or in business for themselves.⁵⁰¹ The Department proposed to retain this provision with only minor editorial changes, moving it to § 795.110(b)(7). Specifically, the Department’s proposed regulatory text provided that “[a]dditional factors may be relevant in determining whether the worker is an employee or independent

contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the employer for work.”⁵⁰²

The Department explained in the NPRM that retaining this provision would “reiterate[] that the enumerated factors are not to be applied mechanically but should be viewed along with any other relevant facts in light of whether they indicate economic dependence or independence.”⁵⁰³ Additionally, it reemphasized that “only factors that are relevant to the overall question of economic dependence or independence should be considered.”⁵⁰⁴ The Department explained that this approach reflects the necessity of considering all facts that are relevant to the question of economic dependence or independence, regardless of whether those facts fit within one of the enumerated factors. The Department reasoned that this approach is consistent with the Supreme Court’s guidance in *Silk*, where the Court cautioned that its suggested factors are not intended to be exhaustive.⁵⁰⁵ Additionally, this approach is also consistent with the approach that courts and the Department have used in the decades since *Silk* to determine whether workers are employees or independent contractors under the FLSA.⁵⁰⁶

Like in the 2021 IC Rule, the Department proposed not to identify any specific additional factors, and specifically declined to identify the “degree of independent business organization and operation,” a factor considered in prior departmental guidance, as a seventh factor in the analysis. The Department explained that given the “focus in this proposed rulemaking on reflecting the economic reality factors commonly used by the circuit courts of appeals, the Department chose not to include the worker’s ‘degree of independent business organization and operation’ as a seventh factor.”⁵⁰⁷ The Department noted that it was not aware of any court that has used this as a standalone factor and expressed concerns that “facts that may relate to whether a worker has an independent business organization—such as whether the worker has incorporated or receives an Internal

⁵⁰² 87 FR 62275 (proposed § 795.110(b)(7)).

⁵⁰³ *Id.* at 62257.

⁵⁰⁴ *Id.*

⁵⁰⁵ 331 U.S. at 716 (“No one [factor] is controlling nor is the list complete.”).

⁵⁰⁶ *See generally* 87 FR 62257; *infra* n.512.

⁵⁰⁷ 87 FR 62257.

⁵⁰⁰ 29 CFR 795.110(a)(1) and (a)(2), respectively.

⁵⁰¹ 86 FR 1247.

Revenue Service (IRS) Form 1099 from an potential employer—reflect mere labels rather than the economic realities and are thus not relevant.”⁵⁰⁸

A few commenters expressed support for the Department’s proposed section on additional factors. *See e.g.*, NWLC; AFL–CIO; DSA; and State AGs. DSA commented that it “agrees with the Department’s retention of the 2021 IC Rule that additional factors may be considered if they are relevant to the ultimate question of economic dependence.” The AFL–CIO expressed support for the Department’s additional factors provision, noting that the Department correctly recognized that additional factors should be considered when relevant to the economic reality.

Several commenters expressed concerns with a perceived vagueness and lack of clarity arising from inclusion of additional factors, and some requested that the Department delete the additional factors section from the final rule entirely. For example, IEC commented that “[t]he proposed rule does little to further define ‘additional factors’ which will only lead to employers, employees, and independent contractors” speculating about “how to apply this in their analysis.” SBA expressed concerns with what it described as an “open-ended factor” and recommended the Department delete it. Inline Translation Services similarly commented that “[t]he catch all phrase ‘additional factors’ should be removed entirely,” stating that “this open ended clause could introduce innumerable other factors during labor audits with very uncertain and unpredictable outcomes.” AFPP expressed concerns that “[s]takeholders will have no clarity as to what additional factors may be considered in any particular case.”

Goldwater Institute commented that “[t]o the extent an employer has concluded its economic dependence analysis and finds that the worker is indeed an independent contractor, this final consideration could ostensibly swallow the rule.” The National Restaurant Association also expressed concerns with the Department’s decision not to define specific additional factors, commenting that the undefined additional factors section could create confusion as it offers “little guidance to the regulated community.”⁵⁰⁹

NAFO commented that “this catch-all factor provides [the Department] a vague and highly discretionary means by which it can determine whether there is something that ‘indicates’ whether a worker is economically dependent on an employer for work without historical precedent or guidance.” The Coalition of Business Stakeholders similarly expressed that “the [Department] inserts into the Proposed Rule a mechanism whereby it can hinge its classification decision on anything it deems to ‘indicate’ that a worker is either in business for themselves or economically dependent on an employer, regardless of whether such consideration has historically, or ever, been considered as part of the classification analysis.” *See also, e.g.*, MEP, Promotional Products Association International.

Contrary to some of the commenters’ assertions, the Department reiterates that the proposed regulatory language on additional factors is consistent with and reflects decades of Supreme Court and federal appellate court precedent—as well as guidance from the Department including the 2021 IC Rule—emphasizing that the enumerated economic realities factors are not exhaustive. For example, the Supreme Court explained in *Silk* that “[n]o one [factor] is controlling nor is the list complete.”⁵¹⁰ Many federal courts of appeals have also emphasized that the enumerated factors are not exhaustive.⁵¹¹ Courts have reiterated

relevant. Specifically, as explained in the 2021 IC Rule, the Restaurant Association contended that “facts and factors” that were not listed in the Department’s 2020 proposal, which included two core factors and three additional factors, “may be relevant to the question of economic dependence even if they would not be as probative as the two core factors.” They 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.” 86 FR 1196.

⁵¹⁰ 331 U.S. at 716.

⁵¹¹ *See Sureway*, 656 F.2d at 1370 (stating that “the courts have identified a number of factors that should be considered” when determining if an individual is an employee under the FLSA but noting that “the list is not exhaustive”); *Razak*, 951 F.3d at 143 (noting that the Third Circuit agreed with *Sureway* “that ‘neither the presence nor absence of any particular factor is dispositive’” and explaining that “‘courts should examine the circumstances of the whole activity,’ determining whether, ‘as a matter of economic reality, the individuals are dependent upon the business to which they render service’”) (internal citation omitted); *Hobbs*, 946 F.3d at 836 (stating that “[b]ecause the *Silk* factors are non-exhaustive, we will also look to other factors to help gauge the economic dependence of the pipe welders”); *Parrish*, 917 F.3d at 387 (stating that the “*Silk* factors being ‘non-exhaustive’, other relevant factors may be in play in an employee vel non analysis”); *Karlson*, 860 F.3d at 1092 (“No one [factor] is controlling nor is the list complete.”) (quoting *Silk*, 331 U.S. at 716) (internal quotations omitted);

that “[t]he determination of whether an employer-employee relationship exists for purposes of the FLSA should be grounded in ‘economic reality’ rather than technical concepts,” . . . determined by reference not to ‘isolated factors but rather upon the circumstances of the whole activity.’”⁵¹² The Department’s guidance has emphasized a similar approach. For example, WHD Fact Sheet #13 has indicated that its factors are not exhaustive and stated that “the Supreme Court has held that it is the total activity or situation which controls” the inquiry and that “[t]he employer-employee relationship under the FLSA is tested by ‘economic reality’ rather than ‘technical concepts.’”⁵¹³ AI 2015–1 explained that courts “routinely note that they may consider additional factors depending on the circumstances.”⁵¹⁴

The Department continues to believe that the additional factors section is entirely consistent with how the courts and the Department have approached the economic realities inquiry for decades, including in the 2021 IC Rule. Commenters expressing concerns that the consideration of additional factors will lead to confusion and uncertainty overlook several important considerations. First, as mentioned, this has been the approach of the courts and the Department for decades—the enumerated economic realities factors are not exhaustive, all relevant facts should be considered, and the focus of the determination should be grounded in the economic realities as opposed to any isolated factors. There is no basis for the concern that the retention of a regulatory provision stating what courts, the Department, and the regulated community have understood to be part of the economic reality test under the FLSA for over 75 years will result in confusion and uncertainty as opposed to consistency and familiarity. Second, the additional factors section is not

Scantland, 721 F.3d at 1312 (“We note, however, that these six factors are not exclusive and no single factor is dominant.”); *Lauritzen*, 835 F.2d at 1534 (“Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.”); *Superior Care*, 814 F.2d at 1043 (explaining that “[t]hese factors are not exhaustive” and “must always be aimed at an assessment of the ‘economic dependence’ of the putative employees, the touchstone for this totality of the circumstances test”) (internal citation omitted).

⁵¹² *Saleem*, 854 F.3d at 140 (quoting *Barfield v. New York City Health & Hospitals Corp.*, 537 F.3d 132, 141 (2008) quoting *Goldberg*, 366 U.S. at 33, and *Rutherford*, 331 U.S. at 730)) (internal quotation marks omitted).

⁵¹³ *See* WHD Fact Sheet #13 (July 2008).

⁵¹⁴ 2015 WL 4449086, at *3 n.4 (withdrawn June 7, 2017).

⁵⁰⁸ *Id.*

⁵⁰⁹ The Department notes that it included the additional factors provision in the 2021 IC Rule in response to the National Restaurant Association’s comment in that rulemaking expressing concern about the lack of a specific regulatory provision acknowledging that additional factors could be

unbounded and includes clear constraining language in the regulatory text, emphasizing that only those additional factors which indicate that the worker is economically dependent on the potential employer for work or in business for themselves can be considered. This reflects the necessity of considering all facts that are relevant to the question of economic dependence or independence, regardless of whether those facts fit within one of the six enumerated factors. While the department declines to specify any particular additional factors, the language of the regulatory text appropriately limits the scope of potentially relevant additional facts or factors that might be considered.

Moreover, the Department recognizes that, in many instances, consideration of additional factors will not be necessary because the relevant factual considerations can and will be considered under one or more of the enumerated factors. The additional factors section is simply a recognition by the Department, consistent with decades of case law, that a rule applying to varying economic relationships across sectors of the economy must be applied in a non-mechanical fashion and must focus on the totality of the circumstances.

The U.S. Chamber expressed concern that the additional factors section “has the potential to swallow the six defined factors,” and that “[b]usinesses and workers alike are being asked to consider, weigh, and make significant business decisions under a test that has unlimited undefined possibilities.” The U.S. Chamber distinguished the NPRM’s additional factors section from the 2021 IC Rule’s section on additional factors, asserting that the 2021 IC Rule constrained or narrowed the additional factors application by, first, explicitly assigning more weight to core factors than any potentially relevant additional factors, and second, by identifying relevant additional factors.

Some commenters suggested that the Department assign the category of potentially relevant additional factors less weight than the enumerated factors. *See* SHRM; U.S. Chamber. But as the Department explained in the NPRM, “to assign a predetermined and immutable weight to certain factors ignores the totality-of-the-circumstances, fact-specific nature of the inquiry that is intended to reach a multitude of employment relationships across occupations and industries and over time.”⁵¹⁵ This is true both in respect to the elevation of core factors above non-

core and additional factors in 2021 IC Rule, and with respect to the suggested devaluation of potential additional factors that some commenters urged here.

Other commenters asked the Department to specifically recognize certain additional factors. For example, DSA suggested that the Department identify as an additional factor “the recognition of independent contractor status for businesses under other statutes, such as the Internal Revenue Code and numerous state statutes.” TechServe Alliance urged the Department to “consider the degree of independent business formalization (incorporation, licenses, taxes) in analyzing” independent contractor status. ACRE et al. requested that the Department consider the degree of transparency provided to a worker about the nature of the work, such as the location, scope, and pay for a particular task, as an additional factor. SIFMA commented that the Department should recognize employment or independent contractor agreements as an additional factor relevant to the economic reality inquiry. ABC suggested the Department recognize as an additional factor “whether it is a recognized, longstanding practice for a large segment of the industry to treat certain types of workers as independent contractors.” A legal blogger urged the Department to clarify some additional factors courts have used in determining whether there is an employment relationship, stating that, for example, “the courts have considered whether the potential employer has the right to terminate the worker for any reason at any time; whether the parties are subject to an agreement indicating an intent to establish an independent contractor relationship; and whether the worker operates in the form of a corporate entity, including as a limited liability company.”

After further consideration, and consistent with the NPRM, the Department declines to identify in this final rule any particular additional factors that may be relevant. The Department believes that the regulatory text addressing additional factors, which focuses on whether the additional factors are indicative of whether the worker is in business for themselves or is economically dependent on the potential employer for work, is sufficiently constrained to narrow the possible relevant considerations and sufficiently flexible to capture potentially relevant factual considerations that fall outside the enumerated factors. In light of this, the Department believes it is unnecessary to

specify any additional factors. The Department previously identified the “degree of independent business organization and operation” as a seventh factor that it considered in its analysis.⁵¹⁶ However, as noted in the NPRM, the Department is not aware of any court that has used this as a standalone factor, and the Department declines to identify this as a standalone factor in this final rule. Additionally, as explained in the NPRM, the Department is concerned that facts such as whether the worker has incorporated or receives an IRS Form 1099 from a potential employer reflect mere labels rather than the economic realities and are thus not relevant. The Department has similar concerns that contractual provisions indicating the intent of the parties to establish an independent contractor relationship also may reflect mere labels rather than the economic realities and are thus not relevant. To the extent facts such as the worker having a business license or being incorporated may suggest that the worker is in business for themselves, they may be considered either as an additional factor or under any enumerated factor to which they are relevant. However, consistent with an economic reality analysis, it is important to inquire into whether the worker’s license or incorporation are reflective of the worker being in business for themselves as a matter of economic reality. For example, if a potential employer requires a worker to obtain a certain license or adopt a certain form of business as a condition for performing work, this may be evidence of the potential employer’s control, rather than a worker who is independently operating a business.⁵¹⁷

Finally, Flex requested that the Department clarify whether it still agrees with guidance as to the lack of relevance of certain factors expressed in WHD Fact Sheet #13. Flex urged the Department to “add guidance to the proposed rule that mirrors the subregulatory guidance in Fact Sheet #13 and make clear that the same factors previously deemed not relevant are still deemed not relevant.” While the Department declines to identify specific factors as never relevant to the inquiry of whether a worker is economically dependent or in business for themselves, the Department agrees that certain factors are generally immaterial

⁵¹⁶ *See* WHD Fact Sheet #13 (July 2008).

⁵¹⁷ *See, e.g., Safarian v. American DG Energy Inc.*, 622 F. App’x 149, 151 (3d Cir. 2015) (even where “the parties structure[] the relationship as an independent contractor, . . . the caselaw counsels that, for purposes of the worker’s rights under the FLSA, we must look beyond the structure to the economic realities”).

in determining the existence of an employment relationship because they reflect mere labels rather than the economic realities, and do not indicate whether a worker is in business for themselves or is economically dependent on a potential employer for work. As it has stated previously, the Department continues to believe that “such facts as the place where work is performed, the absence of a formal employment agreement, . . . whether an alleged independent contractor is licensed by State/local government,” and “the time or mode of pay” do not generally indicate whether a worker is economically dependent or in business for himself.⁵¹⁸

The Department is finalizing the additional factors section (§ 795.110(b)(7)) as proposed with one minor editorial change as explained.

D. Primacy of Actual Practice (2021 IC Rule § 795.110)

The Department proposed to remove § 795.110 of the 2021 IC Rule and use that section for the discussion of the economic reality factors.⁵¹⁹ Section 795.110 of the 2021 IC Rule provided that in determining economic dependence “the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible.”⁵²⁰ In the NPRM, the Department explained that this absolute rule “is overly mechanical and does not allow for appropriate weight to be given to contractual provisions in situations in which they are crucial to understanding the economic realities of a relationship.”⁵²¹ The Department expressed its belief that a less prescriptive approach is more faithful to the totality-of-circumstances economic reality analysis, such that contractual or other reserved rights should be considered like any other fact under each factor to the extent they indicate economic dependence.⁵²²

In its proposal, the Department acknowledged that contractual authority may in some instances be less relevant, but noted that the 2021 IC Rule’s position that actual practice is always more relevant is incompatible with an approach that does not apply the factors mechanically but looks to the totality of the circumstances in evaluating the economic realities. The Department explained that the focus is always on the economic realities rather than mere labels, but contractual provisions are

not always mere labels. Instead, contractual provisions sometimes reflect and influence the economic realities of the relationship. The Department explained that within each factor of the test, there may be actual practices that are relevant, and there may also be contractual provisions that are relevant and that this examination will be specific to the facts of each economic relationship and cannot be predetermined.⁵²³

In the NPRM, the Department also discussed the 2021 IC Rule’s response to “comments asserting that prioritizing actual practice would make the economic reality test impermissibly narrower than the common law control test.”⁵²⁴ The 2021 IC Rule asserted that “the common law control test does not establish an irreducible baseline of worker coverage for the broader economic reality test applied under the FLSA.”⁵²⁵ As the Department noted in the NPRM, this view of the FLSA’s scope of employment is inconsistent with the Supreme Court’s observations that “[a] broader or more comprehensive coverage of employees” than under the FLSA “would be difficult to frame,”⁵²⁶ and that the FLSA “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”⁵²⁷ The Department further explained that the “2021 IC Rule’s blanket diminishment of the relevance of the right to control is inconsistent with the Supreme Court’s observations that the FLSA’s scope of employee coverage is exceedingly broad and broader than what exists under the common law.”⁵²⁸ Finally, the Department recognized that the fact that the employer’s right to control is part of the common law test shows that it is a useful indicator of employee status.⁵²⁹

Multiple commenters expressed support for the Department’s decision to remove the 2021 IC Rule’s provision on the primacy of actual practice. For example, the State AGs agreed with the NPRM’s reasoning, noting “that unexercised contractual powers among the parties may be equally as relevant to determining economic dependence as exercised powers” and stating that

“[t]he Department rightly recognizes that the parties’ actual practice is not more relevant than any other factor as to the question of economic dependence.” The LA Fed & Teamsters Locals stated “a worker cannot be said to be acting independently in running their own business if they are unable to make and effectuate certain decisions because another entity has reserved power over those decisions.” Similarly, NELP commented that the NPRM rightly recognized “that contractual provisions can be powerful silencers; a right that is never exercised may be more significant evidence of control than a right that is routinely ignored.” Justice at Work Pennsylvania commented that they support the Department’s position on the primacy of actual practice “which would restore the broad, holistic test for FLSA employment, as intended by Congress.” Gale Healthcare Solutions similarly commented that they “agree with DOL’s proposal to remove Section 795.110 of the 2021 IC Rule, as every fact that is relevant to economic dependence should be considered in the analysis of economic dependence, and contractual possibilities—not just actual practices—should be considered.”

A number of commenters, however, expressed disagreement with the Department’s proposal to remove this provision of the 2021 IC Rule. For example, FMI commented that “control has always been evaluated based upon the actual exercise of control, that is, what the actual practice of the business and worker is—not the theoretical reservation of control.” Cambridge Investment Research commented that “[m]erely because an independent contractor elects not to take advantage of his or her independence or freedom says nothing about whether in fact the worker is properly classified.” The U.S. Chamber expressed concern that the NPRM “contradicts the principle that ‘[i]t is not significant how one ‘could have’ acted under the contract terms. The controlling economic realities are reflected by the way one actually acts.’” N/MA urged the Department to maintain the 2021 IC Rule’s position “that unexercised contractual rights are not irrelevant, they are simply not as informative as the actual experience of the parties,” expressed concerns that the NPRM “turns the economic realities test into a focus on economic possibilities,” and noted that “[c]ontractual provisions that are truly important necessarily manifest in the actual experiences of the worker.” CWI similarly commented: “To be clear, the 2021 IC Rule does not provide that unexercised rights are irrelevant. It merely states the obvious:

⁵²³ See generally 87 FR 62258.

⁵²⁴ 87 FR 62258.

⁵²⁵ 86 FR 1205.

⁵²⁶ *Rosenwasser*, 323 U.S. at 362–63.

⁵²⁷ *Darden*, 503 U.S. at 326.

⁵²⁸ 87 FR 62258.

⁵²⁹ *Id.* In *Silk*, the Supreme Court described this standard as “power of control, whether exercised or not, over the manner of performing service to the industry.” 331 U.S. at 713 (citing Restatement of the Law, Agency, sec. 220).

⁵¹⁸ WHD Fact Sheet #13 (July 2008).

⁵¹⁹ 87 FR 62257.

⁵²⁰ 86 FR 1247 (§ 795.110).

⁵²¹ 87 FR 62258.

⁵²² *Id.*

that what the control a putative employer actually exercises is more informative than the control it could exercise.” See also CWC; MEP; NRF& NCCR.

Upon considering the comments, the Department is finalizing the removal of § 795.110 of the 2021 IC Rule (Primacy of actual practice). Consistent with case law and the Department’s historical position prior to the 2021 IC Rule, the Department declines to create a novel bright line rule that assigns a predetermined and immutable weight or level of importance to reserved rights. As explained in the NPRM, the Department believes a less prescriptive approach is more faithful to the totality-of-the-circumstances, economic-reality analysis, and contractual or other reserved rights should be considered like any other fact under each factor to the extent they indicate economic dependence.⁵³⁰ The significance of each fact in the analysis should be informed by its relevance to the economic realities and this analysis will be specific to the facts of each economic relationship and cannot be predetermined. Finally, the Department’s approach to the reserved right to control is more consistent with the historical bounds of the control factor than the 2021 IC Rule’s blanket diminishment of the relevance of the right to control, which was inconsistent with the Supreme Court’s observations that the FLSA’s scope of employee coverage is exceedingly broad, even more so than under the common law.⁵³¹ That the common law test includes the employer’s right to control shows that it is a useful indicator of employee status.⁵³² As such, the Department believes that removal of this provision is appropriate. Specific concerns raised in the comments relevant to this issue are discussed and addressed in this section below.

Several commenters expressed concerns that the proposed removal of the primacy of actual practice provision was inconsistent with longstanding case law and previous guidance issued by the Department. See, e.g., CWC; DSA; FSI; Scalia Law Clinic; U.S. Chamber. For example, FMI expressed concerns that the NPRM was inconsistent with

“the articulation of the control factor in Administrator’s Interpretation (AI) No. 2015–1 (July 15, 2015)” which FMI contends “debunked the idea that reserved control should be a consideration.” FMI also suggested that the NPRM was inconsistent with case law cited in AI 2015–1 which expressed that a “worker’s control over meaningful aspects of the work must be more than theoretical—the worker must actually exercise it.” See also CWC. DSA commented that the 2021 IC Rule’s elevation of actual practice as always more relevant than contractual or theoretical possibilities was consistent with a 1949 Opinion Letter that stated “ordinarily, a definite decision as to whether one is an employee or independent contractor under the [FLSA] cannot be made in the absence of evidence as to his actual day-to-day working relationship with his principal.” The U.S. Chamber commented that the NPRM was inconsistent with decades of court precedent holding that “the focus is on economic reality, not contractual language.” According to the U.S. Chamber, the NPRM “would effectively elevate reserved contractual rights above the actual practice of the parties” and the “economic realities test would be replaced by a contractual reservation test.” Similarly, MEP expressed its position that the 2021 IC Rule “ensures the true nature of the contractual relationship is considered above all but leaves room for theoretical possibilities to still be considered,” which it contended is consistent with court precedent.

Contrary to these comments, the Department’s approach to this issue is consistent with both prior Departmental guidance as well as judicial precedent. As the Department explained in the NPRM, AI 2015–1 recognized six economic realities factors that followed the six factors used by most federal courts, including a control factor described as “the degree of control exercised or retained by the employer.”⁵³³ The NPRM also noted “AI 2015–1 further emphasized that the factors should not be applied in a mechanical fashion and that no one factor was determinative.”⁵³⁴ Thus, contrary to FMI’s contention, the NPRM’s approach to the primacy of actual practice is consistent with AI 2015–1’s non-mechanical, totality-of-the-circumstances approach to the economic dependence inquiry and the potential relevance of the reserved right to control as an indicator of economic

reality.⁵³⁵ Additionally, the Department’s approach to this issue is certainly not in tension with the notion that the economic reality inquiry cannot be made without evidence of the day-to-day working relationship between a worker and their potential employer.⁵³⁶

As the Department emphasizes in this final rule, it in no way intends to depart from case law which similarly emphasizes consideration of the actual behavior of the parties in deciding the economic reality inquiry.⁵³⁷ Indeed, the Department’s position is more consistent with the case law, which does not deem actual practice and reserved rights to be mutually exclusive and instead requires a nuanced consideration of all relevant facts.⁵³⁸ Some commenters misconstrued the Department’s proposal to remove the primacy of actual practice provision from the regulatory text. To be clear, the Department does not seek to elevate the weight of theoretical or contractual rights above the weight of actual practice. Rather, the Department affirms that actual practice is always relevant to the economic reality test. Further, the Department agrees that in many—if not most—circumstances the actual practices of the parties will be more relevant to the economic reality than reserved rights or unexercised contractual terms (as, for example, where an employer theoretically or contractually permits workers to decline work assignments, but in practice disciplines workers who decline assignments).⁵³⁹ And, as the Department explained in the NPRM, it does not intend to in any way minimize or disregard the longstanding case law that considers the actual behavior of the parties in order to determine the

⁵³⁵ AI 2015–1, 2015 WL 4449086, at *11 (withdrawn June 7, 2017). Additionally, AI 2015–1 cited, among other cases, *Superior Care*, for the proposition that “[a]n employer does not need to look over his workers’ shoulders every day in order to exercise control.” In *Superior Care*, even though the parties stipulated that actual practice of the parties was to have infrequent supervisory visits, the Second Circuit found more probative of control the fact that the employer “unequivocally expressed the right to supervise the nurses’ work, and the nurses were well aware that they were subject to such checks as well as to regular review of their nursing notes.” *Superior Care*, 840 F.2d at 1060.

⁵³⁶ See WHD Op. Ltr. (June 23, 1949) (“Ordinarily a definite decision as to whether one is an employee or an independent contractor under the [FLSA] cannot be made in the absence of evidence as to his actual day-to-day working relationship with his principal.”).

⁵³⁷ See *infra* n.541.

⁵³⁸ See discussion regarding the Seventh Circuit’s decision in *Brant v. Schneider Nat’l*, *infra*.

⁵³⁹ See *Off Duty Police*, 915 F.3d at 1060–61 (finding that, among other things, officers’ testimony that they were disciplined for turning down assignments, despite having the right to do so, supported employee status).

⁵³⁰ 87 FR 62258.

⁵³¹ *Id.*

⁵³² *Darden*, 503 U.S. at 323 (common-law employment test considers “the hiring party’s right to control the manner and means by which the product is accomplished”) (quoting *Reid*, 490 U.S. at 751–52); Restatement (Third) of Agency, sec. 7.07, Comment (f) (2006) (“For purposes of respondeat superior, an agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs work.”).

⁵³³ 87 FR 62223.

⁵³⁴ *Id.*

economic reality.⁵⁴⁰ These cases reflect a bedrock principle about the economic reality test, which looks to the reality of a situation rather than assuming that a written label, contractual arrangement, or form of business, is dispositive.

This case law, however, does not require or even support the adoption of a generally applicable rule that in all circumstances reserved or unexercised rights, such as the right to control, are in every instance less indicative of the economic reality than the actual practices of the parties. Such a rule would be inconsistent with federal appellate court precedent recognizing that reserved rights may be more probative, such as the temporary nurse staffing agency in *Superior Care* that reserved the right to supervise the nurses even though in actuality it did so infrequently.⁵⁴¹ The 2021 IC Rule's mandate regarding the primacy of actual practice effectively established a bright line rule that has not been adopted by courts and is in tension with longstanding instructions from courts that a totality-of-the-circumstances analysis be applied in order to analyze a worker's economic dependence. As such, rejecting the 2021 IC Rule's prescriptive regulation is more consistent with a non-mechanical, fact-specific approach to the economic dependence or independence inquiry that has been adopted by the courts.⁵⁴²

Some commenters seemingly conflated the terms "economic reality" and "actual practice." See, e.g., FSI (defining "actual practice" as "the economic reality of the relationship at issue"). Again, the Department's position is not departing from or minimizing case law holding that the focus of the inquiry is on the "economic reality, not contractual language."⁵⁴³ Courts routinely consider both reserved rights and actual practice in order to

evaluate the overall question of economic reality. For example, the Seventh Circuit recently addressed both in *Brant*.⁵⁴⁴ In that case, the court examined the operating agreement signed by the driver, which purported to grant the driver broad authority over how to conduct their work, but also "retain[ed] the right to gather remotely and to monitor huge quantities of data about how drivers conducted their work." The court rejected the company's argument that the broad grant of authority in the agreement was dispositive of independent contractor status because it found that the company exercised complete control over meaningful aspects of the transportation business, including by retaining the right to gather data that could be used to terminate the driver for noncompliance, which weighed in favor of employee status.⁵⁴⁵

Moreover, none of the case law cited by commenters—and to the best of the Department's knowledge, no existing case law—stands for the proposition that reserved or unexercised rights cannot under any circumstances be indicative of the economic realities, nor does the 2021 IC Rule's provision state that reserved rights are never relevant. Rather, as discussed, the case law is more consistent with the approach the Department is adopting in this final rule, which recognizes that while mere contractual language is not generally driving the economic reality inquiry, reserved contractual rights, like reserved control, may in certain cases be equally as, or more, indicative of the economic reality than the actual practice of the parties.

N/MA expressed their view that the Department "failed to identify any scenarios in which a contractual, but unexercised right would be more relevant than the parties' actual practices in assessing a worker's day-to-day economic realities." The NPRM illustrated how reserved rights might be more indicative of the economic reality than actual practice where, for example, a potential employer reserves the right to supervise workers despite rarely making supervisory visits.⁵⁴⁶ The mere existence of such reserved rights to control the worker may strongly influence the behavior of the worker in

their performance of the work even absent the employer actually exercising its contractual rights. As a result, this reserved right to supervise may be more indicative of the reality of the economic relationship between the worker and the potential employer than the potential employer's apparent hands-off approach to supervision.

Several commenters also expressed concerns that the NPRM's approach will lead to an inconsistent application of the economic reality test and a lack of certainty and clarity for employers, workers, and factfinders. For example, SHRM urged the Department to retain the actual practice provision from the 2021 IC Rule, noting the NPRM "implies that unexecuted contractual rights may be more important than real-world practices" and "will require HR professionals to speculate on how WHD or a court may interpret each individual criterion" which will "surely result in inconsistencies in application and the resulting confusion will lead to continued uncertainty for employers and workers." NAHB expressed similar concerns about clarity, noting that "actual practice is more relevant than what may be contractually or theoretically possible . . . and it provides a clearer and simpler federal test for determining worker status for regulated employers and small businesses." Because the entirety of the economic reality must be considered in the analysis, the Department finds that it cannot reduce the inquiry to only actual practice and that the 2021 IC Rule's predetermined elevation of actual practice above unexercised or reserved rights is not fully consistent with the economic reality inquiry that the Department and courts have followed for decades.

The Coalition of Business Stakeholders expressed concerns that the Department failed to "specify just how important such 'reserved control' is" and stated that the NPRM exacerbates "the uncertainty with which the Proposed Rule may be implemented" and "apparently directs the factfinder to weigh the control factor in favor of employee classification if a hiring entity *merely possesses* the ability to exercise control of a worker, regardless of whether the hiring entity ever has exercised such control." The Coalition of Business Stakeholders also commented that by including "the vague concept of 'reserved control', which is to be considered in some unstated capacity, the Proposed Rule broadens the control factor far beyond its historical bounds and creates such uncertainty that the definition of 'control' under the Proposed Rule is

⁵⁴⁰ See, e.g., *Parrish*, 917 F.3d at 387 ("[T]he analysis is focused on economic reality, not economic hypotheticals."); *Saleem*, 854 F.3d at 142 ("[P]ursuant to the economic reality test, it is not what [workers] could have done that counts, but as a matter of economic reality what they actually do that is dispositive.") (internal quotation marks and citation omitted); *Sureway*, 656 F.2d at 1371 ("[T]he fact that Sureway's 'agents' possess, in theory, the power to set prices, determine their own hours, and advertise to a limited extent on their own is overshadowed by the fact that in reality the 'agents' work the same hours, charge the same prices, and rely in the main on Sureway for advertising.").

⁵⁴¹ See *Superior Care*, 840 F.2d at 1060.

⁵⁴² See, e.g., *Flint Eng'g*, 137 F.3d at 1441 ("None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach."); *Superior Care*, 840 F.2d at 1059 ("Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.").

⁵⁴³ See, e.g., *Parrish*, 917 F.3d at 388.

⁵⁴⁴ 43 F.4th 656 (7th Cir. 2022).

⁵⁴⁵ *Id.* at 666.

⁵⁴⁶ See *Superior Care*, 840 F.2d at 1060 ("Though visits to the job sites occurred only once or twice a month, Superior Care unequivocally expressed the right to supervise the nurses' work, and the nurses were well aware that they were subject to such checks as well as to regular review of their nursing notes. An employer does not need to look over his workers' shoulders every day in order to exercise control.").

unworkable and would all but preclude an independent contractor finding.” The Department notes again that reserved control was included in the 2021 IC Rule.⁵⁴⁷ In any event, the Coalition of Business Stakeholders misconstrues the Department’s discussion of reserved control. The Department does not take the position that reserved rights are always indicative of economic dependence, and certainly does not preclude the existence of factual circumstances where this fact could be found to weigh in favor of independent contractor status. Moreover, the Department reiterates, consistent with decades of case law and guidance from the Department, that “the economic reality test is a multifactor test in which no one factor or set of factors automatically carries more weight and that all relevant factors must be considered.”⁵⁴⁸ The notion that the Department’s position that the reserved right of control can be indicative of the economic reality in some circumstances somehow makes the economic reality test “unworkable” and “all but precludes an independent contractor finding” is simply inconsistent with a multifactor totality-of-the-circumstances approach in which this is but one potentially relevant fact under one factor. That a potential employer’s reserved right to control might indicate an employment relationship does not preclude a finding of independent contractor status based on other factual indicators of the economic reality of the relationship.

IWF expressed concerns that NPRM’s approach to the primacy of actual practice was inconsistent, noting that “even accepting the Department’s focus on theory, the proper application of this factor is far from clear. . . . The Proposed Rule states both that (1) ‘[i]t is often the case that the actual practice of the parties is more relevant to the economic dependence inquiry than contractual or theoretical possibilities,’ and (2) ‘in other cases the contractual possibilities may reveal more about the economic reality than the parties’ practices.’” The Department’s recognition that actual practice is often

more relevant to the economic dependence inquiry than contractual possibilities is not at all inconsistent with its position that, in some factual circumstances, reserved contractual rights can be more or equally as indicative of the economic reality as the actual practices of the parties. The Department is rejecting the overly broad and mechanical approach that in all factual circumstances, for every worker in every industry and occupation, actual practice is always more indicative of the economic reality than reserved rights or contractual possibilities. The Department’s position is more consistent with the case law, which does not deem these two concepts to be mutually exclusive and instead requires a nuanced consideration of all relevant facts.⁵⁴⁹

Some commenters felt that the Department was focusing solely on how reserved rights might be used to find employee status. For example, IWF stated that the Department was interested in reserved rights only to the extent they support finding employee status. *See also* Coalition of Business Stakeholders. Minnesota Trucking Association commented that it would support the NPRM’s logic on the relevance of reserved rights to the economic realities test “so long as the analysis also considers the rights the worker possesses but also chooses not to exercise.” *See also* CLDA. The Department does not agree with the contention that its approach to actual practice and reserved rights would always only be used to indicate employee status.⁵⁵⁰ The inquiry should take every aspect of the relationship into account if relevant to the economic reality and the worker’s dependence on their potential employer.⁵⁵¹

The Club for Growth Foundation expressed concerns with the Department’s statement that a reserved right to supervise workers, even unexercised, “may strongly influence the behavior of the worker in [his or her] performance of the work,” and this “may be more indicative of the reality of the economic relationship between

the worker and the company than the company’s apparent hands-off practice,” noting that “even under this example a company that does not intervene is surely exercising less control than one that does.” This comment misunderstands the relevant inquiry. The question is not whether a potential employer who reserves the right to control their workers can be said to exercise more control than a different potential employer who in actual practice exercises control over their workers. Rather, the inquiry is whether, as a matter of economic reality, a potential employer’s reserved right of control is probative of a worker’s economic dependence. The 2021 IC Rule mechanically provided that actual practice is always more relevant than reserved control. By removing that provision, this final rule takes the position that all relevant aspects of the working relationship, including reserved rights, should be considered, without placing a thumb on that scale.

The U.S. Chamber also raised concerns that having “contractual language eclipse actual practice would flip the economic realities on its head” and “would also prohibit certain facts from being introduced into evidence: namely, the actual practice of the parties, which according to the Supreme Court is the touchstone of the analysis.” The Department reiterates firmly that this final rule neither tips the scales in favor of contractual language over actual practice nor excludes the consideration of any relevant facts demonstrating economic dependence. Rather, the Department is merely declining to adopt a bright-line rule predetermining how relevant facts may be considered, recognizing that in some factual circumstances reserved rights may be as indicative of the economic reality as the actual practice of the parties. Additionally, the Department’s final rule does not prohibit any subset of facts from being introduced into evidence before a factfinder, and certainly does not prohibit facts about the actual practices of the parties from being introduced into evidence. To the contrary, the purpose of eliminating the actual practice provision from the 2021 IC Rule is to ensure that all facts relevant to inquiry of economic dependence or independence may be considered.⁵⁵² Within each factor of the test, there may be actual practices that are relevant, and there may also be

⁵⁴⁷ 86 FR 1204 (“As emphasized in the NPRM, and as the plain language of § 795.110 makes clear, unexercised powers, rights, and freedoms are not irrelevant in determining the employment status of workers under the economic reality test.”).

⁵⁴⁸ 87 FR 62222; *see, e.g., Scantland*, 721 F.3d at 1312 n.2 (the relative weight of each factor “depends on the facts of the case”) (quoting *Santelices*, 147 F. Supp. 2d at 1319); *Selker Bros.*, 949 F.2d at 1293 (“It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive.”).

⁵⁴⁹ See discussion regarding the Seventh Circuit’s decision in *Brant v. Schneider Nat’l*, *supra*.

⁵⁵⁰ *See, e.g., Faludi* 950 F.3d at 275–76 (determining that an attorney was an independent contractor even though facts “point[ed] in both directions,” such as the attorney’s fairly lengthy tenure, even though he had the right to leave whenever he wanted upon giving 15 days’ notice, and a non-compete clause under which the attorney worked exclusively for the company, but which the court found “does not automatically negate independent contractor status”).

⁵⁵¹ *See* section V.C.4.a (discussing why the control factor is discussed from the employer’s perspective).

⁵⁵² *See Superior Care*, 840 F.2d at 1059 (“Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.”).

contractual provisions that are relevant. The examination is specific to the facts of each economic relationship and cannot be predetermined.

For all of the foregoing reasons, the Department is finalizing the removal of § 795.110 of the 2021 IC Rule (Primacy of actual practice). As discussed in section V.C, § 795.110 of this rule contains a new provision discussing the economic reality test and the economic reality factors.

E. Examples of Analyzing Economic Reality Factors (2021 IC Rule § 795.115)

Several commenters addressed the examples that the Department provided in the proposed rule to illustrate the application of each factor of the economic reality test as applied to various factual scenarios. The Department provided these examples in the preamble of the proposal rather than in the final text of the regulations—as was the case with the 2021 IC Rule—to provide readers an application of the proposed factor immediately following the detailed description of each factor along with the discussion of the case law and rationale.⁵⁵³ Each example provided two scenarios: one where the facts indicated that a factor pointed toward employee status and one where the facts indicated that a factor pointed toward independent contractor status. As the Department cautioned in the NPRM, additional facts or alterations to the examples could change the resulting analysis.⁵⁵⁴ Moreover, no example attempted to determine the worker's ultimate status, only which way a particular factor would point based on the described facts.

Several commenters found the examples generally helpful or applied them to their industry practices. For instance, the Advisor Group applied the Department's skill and initiative example to financial advisors. A freelance writer and editor found the examples provided in the preamble to be reasonable, though they suggested that sections describing each factor were narrower than the examples suggested. The AFL-CIO commended the Department's "decision to provide examples of how each of the various factors have been applied in commonly-occurring fact patterns."

Other commenters had concerns regarding the examples or suggested alterations to various examples. For instance, the CA Chamber suggested that the investment factor example was confusing since the relative investments of a graphic designer would be dwarfed

by a design firm, leading to different outcomes depending on whether the graphic designer worked for a large firm or a sole proprietor. In addition, a comment from two fellows at the Heritage Foundation suggested that this example was ambiguous because it was unclear if all the facts in the example, including the worker's investment in equipment, office space, and marketing, were required for the analysis.

Regarding the investment factor example, the Department discussed relative investments in the first scenario, where a worker occasionally purchased and used their own drafting tools while working for a commercial design firm. These tools were minor investments that do not further the worker's independent business beyond completing specific jobs for the commercial design firm. Regarding the CA Chamber's concern that the size of the business would alter a relative investment analysis, the example was not intended to alter the size of the hypothetical employer. However, to avoid confusion, the Department is aligning the examples to ensure that both feature a "commercial design firm" as the hypothetical employer. Additionally, the regulatory text for the investments factor explains that, in addition to comparing the sizes of the worker's and the employer's investments, the focus should be on comparing the nature of their investments to determine whether the worker is making similar types of investments as the employer that suggest that the worker is operating independently.⁵⁵⁵

Further, commenters were concerned that the same facts that point toward independent contractor status under the investment prong example would point toward employee status under the integral prong. As the Department stated in the NPRM, however, the examples are intended to be aids to apply the discussion of each proposed factor; the examples are not designed to illustrate the application of the full totality-of-the-circumstances test. For instance, the Department's investment example intentionally does not address whether the designer is integral to the commercial design firm, which would necessitate a separate analysis.

Regarding the integral factor, IWF was concerned that the examples were

unhelpful because they covered two different industries and did not illuminate what kinds of activities would be considered central or important. The Department's intent regarding this factor was to illuminate those tasks that are core to the functioning of the business, *e.g.*, jobs which the "employer could not function without the service performed by the workers."⁵⁵⁶ Here, a farm selling tomatoes could not function without the work of those picking the tomatoes. However, while a business is generally required to file their tax returns, failure to do so would not immediately halt the operations of the farm, suggesting that non-payroll accounting support is "more peripheral to the employer's business."⁵⁵⁷ The Department's intent was to provide a comparison meant to highlight the "common-sense approach" many courts have taken when evaluating this factor.⁵⁵⁸

Similarly, ABC was concerned that the example for the opportunity for profit or loss factor did not differentiate the facts between the two workers in a way that would demonstrate which facts were determinative of the analysis. As they noted, even if a worker relies on word of mouth instead of traditional advertising or only works for one client at a time, they can still be found to be independent contractors. However, the example of the landscaper includes a scenario where the first landscaper does not actively market their services and a second where the landscaper does market their services. The inclusion of these facts in the example does not indicate that the Department believes that traditional marketing is required for a worker to be classified as an independent contractor, only that such affirmative marketing may be probative of the worker acting in a way consistent with being in business for themselves. Put another way, the Department intentionally drafted the examples to avoid giving the impression that certain facts are always less or always more probative to the analysis of any given factor.

SMACNA noted that the Department's second example for skill and initiative featuring a welder should omit the fact that the welder has specialty skills, since that should not change the general analysis under this factor. Instead, it suggested that the example should clarify how the welder "markets those skills in a manner that evidences business-like initiative." Similarly, the DSA's comment noted that the skill and

⁵⁵³ 87 FR 62259.

⁵⁵⁴ *Id.*

⁵⁵⁵ The Department notes that it has edited the investment example to omit the reference to a "freelance graphic designer." While the department recognizes that independent contractors may go by many names, its intent is to ensure that the examples reflect consistent terminology. Because the Department used the phrase "independent contractor" throughout the examples.

⁵⁵⁶ 87 FR 62253.

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.*

initiative example (featuring a welder) only drew a distinction between the two workers based on their ability to market their services where both workers have specialized skill. It proposed including an example where a worker has no specialized skill but can still market their services to demonstrate initiative. Finally, ABC objected to the same example, noting that the skills of the workers “should not have to be paired with independent business marketing skills” to find that a worker is an independent contractor.

The Department chose to display both workers as having high technical skills to illuminate the discussion regarding skill in the NPRM. Specialized skills are required for this factor to point to independent contractor status, but specialized skills alone are not sufficient; it is the use of those specialized skills to “contribute to business-like initiative that is consistent with the worker being in business for himself instead of being economically dependent on the employer.”⁵⁵⁹ As the Department noted in the NPRM, “workers who lack specialized skills may be independent contractors even if this factor is very unlikely to point in that direction in their circumstances.”⁵⁶⁰ Thus the existence of specialized skills or the marketing of services, while relevant to the analysis under this factor, would not necessarily resolve the ultimate inquiry of the worker’s classification.

Several comments suggested that the Department include new industry-specific examples for various factors. For instance, Gale Healthcare Solutions requested that the Department provide an example that would apply to on-demand nursing staffing scenarios. 4A’s requested that specific industries, such as “video production professionals, web designers, freelance writers, [and] fashion workers” be included as examples. And NAFO requested that a forestry example be included in the section of the rule discussing the integral factor.

The Department recognizes that examples specific to an industry can provide helpful guidance for that segment of the regulated community. As the Department explained, however, its intent is for the examples to provide general guidance to regulated parties in this rulemaking. Adding examples specific to commenter industries would reduce their general applicability to other parties and would require more facts and detail than can be included to create succinct, yet helpful, examples.

The Department mentions various industries or occupations in the examples to provide recognizable context for the reader; the examples do not provide the Department’s definitive view on the ultimate outcome of the totality-of-the-circumstances analysis.

Some commenters suggested that the Department add examples to capture newer facets of the economic reality factors. For instance, one commenter suggested that the Department should include an example to show how an employer’s collection of data related to how a worker performs and use of that data to enhance their operations could be part of the economic reality analysis. The AFL–CIO similarly suggested that the Department should include an example where an employer implements control using algorithms.

In addition, commenters suggested that the Department should provide more examples of how current facets of the economic reality test would be applied. For instance, LeadingAge requested more examples of how the Department views reserved control and more examples regarding situations in which a worker’s ability to work for others is constrained by the number of hours or days they need to work. Flex suggested that if the Department were to retain language under the control factor related to regulatory or contractual control, then the Department should provide “a comprehensive set of examples to illustrate that such cases would be rarities.” And CPIE requested additional examples of where the Department would find a worker to be properly classified as an independent contractor, particularly under the control, investment, and skill and initiative factors.

The Department agrees with commenters like the AFL–CIO that topics like control over data or algorithmic supervision are highly relevant to some workers and could have an impact on the economic reality test. However, as noted above, the purpose of the examples is to provide aids to applying the information just discussed in the preamble as to each factor. The Department intends for the examples to provide general guidance to regulated parties and not to be tied to the specifics of certain businesses or jobs. The examples reflect the Department’s enforcement experience in some of the most commonly occurring scenarios.

In addition, the Department understands that commenters such as LeadingAge would prefer more context regarding reserved control. However, the Department declines to add that additional context to the current

examples, which were drafted to address common themes regarding each factor to illuminate the preamble discussion, not present every fact or issue presented in the proposed rule. The Department is also concerned that additional results-oriented examples—such as those requested by NAHB specifically addressing when a worker would be classified as an independent contractor under certain factors—would not be helpful to the broader public. Such examples could leave the impression that the proper classification of workers rests on one or a handful of factors. To the contrary, the Department believes the current examples’ focus on illustrating the basic analysis under a single factor and noting that the results indicate potential classification under each factor, but not the ultimate result, provides more useful guidance for this rule. Moreover, industry- or profession-specific examples relaying how a worker’s ultimate classification would be resolved are best addressed in subregulatory guidance after the issuance of this final rule as necessary.

Commenters suggested that the Department provide examples that mix and compare the factors together. For instance, Grantmakers in the Arts suggested that the Department include examples that demonstrate the resolution of a worker’s status after applying multiple factors and ArcBest Corporation provided an example applying the full economic reality test to an owner operator in the trucking industry. The Department declines to offer such examples in this rulemaking. While a multifactor example might appear helpful, the Department is also concerned that such an example could potentially prejudge a specific case in a specific industry or occupation not yet before the Department or a court, without adequate factual predicates. Moreover, such an example would undermine the Department’s efforts to align the economic reality analysis with current precedent, which requires a consideration of all the factors. Finally, any multifactor analysis would require a larger number of facts to be useful, which may be less generally useful to workers and businesses who may not be able to analogize the given example to their current working relationships.

IBA commented that some examples were too similar to prior withdrawn subregulatory guidance. The Department notes that it assembled these examples, in part, by reviewing case law, opinion letters, the 2021 IC Rule, and other subregulatory guidance. Each source was consulted and helped the Department arrive at the examples provided.

⁵⁵⁹ 87 FR 62254.

⁵⁶⁰ *Id.* at 62255.

Other commenters requested that the Department keep examples that were provided in the 2021 IC Rule. For instance, the Arizona Trucking Association suggested that the Department keep the trucking example from the 2021 IC Rule. Similarly, NAWBO noted how helpful the trucker and home repair examples were in the 2021 IC Rule. As explained above, some facets of the 2021 IC Rule's examples no longer align with the approach in this final rule. For instance, the 2021 IC Rule's app-based home repair example discusses investment as a component of the opportunity for profit or loss factor. As proposed in the NPRM and finalized here, however, the two factors are separate and evaluated independently.

Finally, some commenters suggested that the Department include examples in the final rule's regulatory text, as was done with the 2021 IC Rule. For instance, the author of an independent contractor legal blog requested that more examples be provided in the regulatory text, including those related to the integral factor. 4A's similarly requests that examples be included in the regulatory text and that they better correlate with modern trends in employment.

The Department recognizes that examples are helpful to workers and businesses alike. The Department continues to believe, however, that the examples provided in the NPRM currently provide the greatest value by residing in the preamble to the final rule following the detailed discussion of the relevant factor. In this way, the examples can provide a capstone for each section's discussion of the relevant economic reality factor, rather than being disconnected from that discussion and appearing only in regulatory text. The Department is confident that the examples initially provided in the NPRM preamble, as modified in the preamble to this final rule in response to comments received, serve this explanatory purpose. Over time, the Department will continue providing guidance where necessary through subregulatory guidance.

As it did in the NPRM, the Department is including examples of each factor in the preamble to this final rule. As discussed above, the example of the investment factor has been clarified. In addition, non-substantive changes have been made to the final sentence of each paragraph in each example to clearly indicate which factor is under discussion and that the facts of each example indicate employee or independent contractor status under that factor.

F. Severability (§ 795.115)

The Department proposed that the regulatory text include a severability provision.⁵⁶¹ Specifically, the Department proposed that, if any provision of its regulation "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 [the regulation] and shall not affect the remainder thereof."⁵⁶² The Department noted that the 2021 IC Rule contained a severability provision and that it was not proposing any edits to that provision.⁵⁶³

In addition, the Department explained in the NPRM that rescission of the 2021 IC Rule would be separate from the new regulations regarding employee and independent contractor status promulgated to replace the 2021 IC Rule: "That rescission would operate independently of the new content in any new final rule, as the Department intends it to be severable from the substantive proposal for adding a new part 795." The Department further explained that, even if the "substantive provisions" (*i.e.*, the new regulations) of a final rule were invalidated, enjoined, or otherwise not put into effect, the Department would not intend that the 2021 IC Rule become operative. Instead, in such case, for all of the separate reasons for rescinding the 2021 IC Rule set forth by the Department, the rescission would still take effect, and "the Department would rely on circuit case law and provide subregulatory guidance for stakeholders through existing documents (such as Fact Sheet #13) and new documents (for example, a Field Assistance Bulletin)." As the Department noted, relying on federal appellate case law and subregulatory guidance consistent with that case law for determining whether a worker is an employee or independent contractor would accurately reflect the FLSA's text and purpose as interpreted by the courts and offer a standard familiar to most stakeholders.⁵⁶⁴

Few commenters addressed severability, and the focus of their comments was more on the severability of the rescission of the 2021 IC Rule from the proposed regulations to replace

it than the proposed severability provision at 29 CFR 795.115. Several commenters supported the Department's position that the rescission of the 2021 IC Rule is severable from the proposed regulations to replace it. For example, Farmworker Justice stated that "[b]oth the rescission of the 2021 IC Rule and the newly proposed portion of the [NPRM] are critical to reinstating stability and clarity in the Department's approach to defining an employee." It advocated that the "Department should expressly state that it intends for the rescission of the 2021 IC Rule to be severable from the new portion of the [NPRM]." The AFL-CIO agreed that "the severability clause and DOL's explanation of that clause in the preamble to the NPRM make clear that, in the unlikely event a court were to decide to enjoin some portion of the Final Rule addressing the economic reality test, DOL intends that the rescission of the 2021 IC Rule should still take effect." It described this approach as "cautious" and "prudent" and added that "the severance clause makes clear that DOL intended that the rescission of the 2021 IC Rule stands on its own." LIUNA also supported "the Department's decision to render rescission of the 2021 IC Rule severable from the substantive proposal for adding further regulatory guidance." It added that the Department was "correct to conclude that, in the unlikely event its substantive proposals are 'invalidated, enjoined, or otherwise not put into effect,' the 2021 IC Rule should still not become operative."

Several other commenters criticized the Department's position that the rescission of the 2021 IC Rule is severable from the proposed regulations to replace it. For example, Freedom Foundation stated that "[t]he rescission of the [2021 IC Rule] and the adoption of the proposed rule should not be severable" and added that the Department's "promise that in the absence of a regulation it would provide subregulatory guidance has a hollow ring." Raymond James described the Department's position as "present[ing] workers and business with a Hobson's Choice: either accept the new regulations, or there will be no regulations at all." It stated that, "[c]onsidering that the Department will not even consider making discrete changes, it does not seem appropriate to require businesses and workers to accept a wholesale re-write or face the risks of having no rule at all." And CWI asserted that the reference to "'substantive' provisions" in the NPRM's severability discussion were

⁵⁶¹ 87 FR 62275 (proposed § 795.115).

⁵⁶² *Id.*

⁵⁶³ *Id.* at 62259.

⁵⁶⁴ See generally *id.* at 62233.

inconsistent with how, “[e]lsewhere” in the NPRM, “the Department present[ed] the Proposed Rule as only ‘interpretive guidance.’”

Having considered the comments, the Department is finalizing the severability provision in 29 CFR 795.115 as proposed and finalizing its proposal that the rescission of the 2021 IC Rule set forth in this final rule is separate and severable from the new part 795 regulations for determining employee or independent contractor status under the FLSA set forth in this final rule. No commenter questioned the well-settled legal principle that one portion of a rule may remain operative if another portion is deemed impermissible as long as the agency would independently adopt the remaining portion and the remaining portion can operate sensibly without the impermissible portion.⁵⁶⁵ The Department continues to believe that rescission of the 2021 IC Rule is proper for all of the reasons stated in this final rule, and its intent accordingly is for the rescission to remain operative even if this final rule’s regulations replacing the 2021 IC Rule are invalidated for any reason. In addition, the Department continues to believe that if any particular provision or application of this final rule is invalidated, the rest should continue in effect and can operate sensibly. In such case, case law and the Department’s subregulatory guidance, as appropriate, would provide a familiar and longstanding standard for businesses and workers. Freedom Foundation’s assertion that this “has a hollow ring” neglects the multiple forms of subregulatory guidance, including fact sheets and field assistance bulletins, that the Department may issue. And there was no “Hobson’s Choice” between the proposed rule and “having no rule at all”; the Department has carefully considered the many comments to the proposed rule and, as reflected in this final rule, has made numerous changes as a result of those comments. Finally, CWI took the Department’s reference to “substantive provisions” out of context. The Department’s reference to the proposed regulatory provisions as “substantive” was not a characterization of this rulemaking, but an effort to distinguish promulgating the new part 795 regulations from rescinding the 2021 IC Rule.

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

Finally, in addition to the proposed regulations at part 795, the Department proposed to amend existing regulatory provisions addressing employee or independent contractor status under the FLSA in particular contexts at 29 CFR 780.330(b) (tenants and sharecroppers) and 29 CFR 788.16(a) (certain forestry and logging workers).⁵⁶⁶ Specifically, the Department proposed to replace these provisions with cross-references to the guidance provided in part 795. The Department did not receive commenter feedback regarding the proposed amendments of these provisions. Accordingly, the Department finalizes the amendments to these provisions as proposed.

VI. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency’s need for its information collections, their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. This final rule does not contain a collection of information subject to OMB approval under the PRA.

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

Under Executive Order 12866, as amended by Executive Order 14094, the Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.⁵⁶⁷ 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 \$200 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; (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 legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. OIRA has determined that this rule is a “significant regulatory action” under section 3(f)(1) of Executive Order 12866.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits.⁵⁶⁸ Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this rule and was prepared pursuant to the above-mentioned executive orders.

A. Introduction

In this rule, the Department is rescinding and replacing regulations addressing the classification of workers as employees or independent contractors under the Fair Labor Standards Act (FLSA or Act) to be more consistent with judicial precedent and the Act’s text and purpose as interpreted by the courts. For decades, the Department and courts have applied an economic reality test to determine whether a worker is an employee or an independent contractor under the FLSA. The ultimate inquiry is whether, as a matter of economic reality, the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themselves (and is thus an independent contractor). To answer this ultimate inquiry of economic dependence, the courts and the Department have historically conducted a multifactor totality-of-the-circumstances analysis, considering multiple factors with no factor or factors being dispositive to determine whether a worker is an employee or an independent contractor under the FLSA.

In January 2021, the Department published a rule titled “Independent Contractor Status Under the Fair Labor Standards Act” (2021 IC Rule) that

⁵⁶⁵ See, e.g., *Carlson v. Postal Regulatory Comm’n*, 938 F.3d 337, 351 (D.C. Cir. 2019).

⁵⁶⁶ 87 FR 62274.

⁵⁶⁷ See 88 FR 21879 (Apr. 11, 2023); 58 FR 51735, 51741 (Oct. 4, 1993).

⁵⁶⁸ See 76 FR 3821 (Jan. 21, 2011).

provided guidance on the classification of independent contractors under the FLSA.⁵⁶⁹ As explained in sections III, IV, and V above, the Department believes that the 2021 IC Rule did not fully comport with the FLSA's text and purpose as interpreted by the courts and, had it been left in place, would have had a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. The 2021 IC Rule included provisions that were in tension with this longstanding case law—such as designating two factors as most probative and predetermining that they carry greater weight in the analysis, considering investment and initiative only in the opportunity for profit or loss factor, and excluding consideration of whether the work performed is central or important to the employer's business. These and other provisions in the 2021 IC Rule narrowed the application of the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themselves. The Department believes that retaining the 2021 IC Rule would have had a confusing and disruptive effect on workers and businesses alike due to its departure from case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test. Departing from the longstanding test applied by the courts also increases the risk of misapplication of the economic reality test, which the Department believes could result in the increased misclassification of workers as independent contractors.

Therefore, the Department is rescinding the 2021 IC Rule and replacing it with an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule. Of particular note, the regulations set forth in this final rule do not use "core factors" and instead return to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. Regarding the economic reality factors, this final rule returns to the longstanding framing

of investment as its own separate factor, and integral as an integral part of the potential employer's business rather than an integrated unit of production. The final rule also provides broader discussion of how scheduling, remote supervision, price setting, and the ability to work for others should be considered under the control factor, and it allows for consideration of reserved rights to control while removing the provision in the 2021 IC Rule that minimized the relevance of retained rights. Further, the final rule discusses exclusivity in the context of the permanency factor, and initiative in the context of the skill factor. The Department also made several adjustments to the proposed regulations after consideration of the comments received, including revisions to the regulations regarding the investment factor and the control factor (specifically addressing compliance with legal obligations).

The Department believes this rule is more grounded in the ultimate inquiry of whether a worker is in business for themselves or is economically dependent on the employer for work. Workers, employers, and independent businesses should benefit from affirmative regulatory guidance from the Department further developing the concept of economic dependence and how each economic reality factor is probative of whether the worker is economically dependent on the employer for work or is in business for themselves.

When evaluating the economic impact of this rule, the Department has considered the appropriate baseline with which to compare changes. As discussed in section II.C.3., on March 14, 2022, in a lawsuit challenging the Department's delay and withdrawal of the 2021 IC Rule, a federal district court in the Eastern District of Texas issued a decision vacating the delay and withdrawal of the 2021 IC Rule and concluded that the 2021 IC Rule became effective on March 8, 2021.⁵⁷⁰ Because the 2021 IC Rule is in effect according to the district court until this final rule takes effect and would continue to be in effect in the absence of this rule, the Department believes that the 2021 IC Rule is the proper baseline to compare against when estimating the economic impact of this rule.⁵⁷¹ Compared to the 2021 IC Rule, the Department anticipates that this rule may reduce

misclassification of employees as independent contractors, because this rule is more consistent with existing judicial precedent and the Department's longstanding guidance. The 2021 IC Rule's elevation of certain factors, devaluation of other factors, and its preclusion of consideration of relevant facts under several factors could result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it was prior to the 2021 IC Rule to classify workers as independent contractors rather than FLSA-covered employees. As discussed in section III.B., the Department received comments indicating confusion about how to apply the analysis in the 2021 IC Rule, which could lead to misclassification of workers as independent contractors. The issuance of this rule could reduce or prevent this type of misclassification from occurring.

Because the Department does not have data on the number of misclassified workers and because there are inherent challenges in determining the extent to which the rule would reduce this misclassification, much of the analysis is presented qualitatively, aside from rule familiarization costs, which are quantified.⁵⁷² The Department has therefore provided a qualitative analysis of the effects (transfers and benefits) that could occur because of this reduced misclassification.

As discussed above, the 2021 IC Rule is the appropriate baseline to represent what the world could look like going forward in the absence of this rule. However, this baseline may not fully reflect what the world would look like absent this rule. Until March 2022, the Department had not been using the framework for analysis from the 2021 IC Rule when assessing independent contractor status in its enforcement and compliance assistance activities because the Department had published final rules delaying the effective date of, and subsequently withdrawing, the 2021 IC Rule. (As described in section II.C., a federal district court in March 2022 vacated the Department's Delay and Withdrawal Rules and ruled that the 2021 IC Rule had taken effect in March

⁵⁷² The Department uses the term "misclassification" throughout this analysis to refer to workers who have been classified as independent contractors but who, as a matter of economic reality, are economically dependent on their employer for work. These workers' legal status would not change under the 2021 IC Rule or this rule—they would properly be classified as employees under both rules. The Department notes that sources cited in this analysis may use other misclassification standards which may not align fully with the Department's use of the term.

⁵⁶⁹ See 86 FR 1168.

⁵⁷⁰ See *CWI v. Walsh*, 2022 WL 1073346.

⁵⁷¹ OMB Circular A-4 notes that when agencies are developing a baseline, "[it] should be the best assessment of the way the world would look absent the proposed action."

2021.) Further, as explained earlier in section III.B., the Department is not aware of any federal district or appellate court that has endorsed the 2021 IC Rule's analysis in the course of resolving a dispute regarding the proper classification of a worker as an employee or independent contractor. Therefore, if the Department were to instead compare this final rule to the current economic and legal landscape that continues to reflect the courts' longstanding multifactor economic reality test, the economic impact would be much smaller, because this rule is consistent with that landscape (*i.e.*, the longstanding judicial precedent and guidance that the Department was relying on prior to March of 2022).

The Coalition to Promote Independent Entrepreneurs agreed that the 2021 IC Rule is the correct baseline to analyze the rescission of the rule, but not the separate issue of issuing new regulations "containing a new interpretation of the multifactor economic reality test." This commenter appeared to disagree with the Department's explanation that "under the *current economic and legal landscape* baseline, the economic impact of DOL's proposed new iteration of the test might, or might not, be 'much smaller.'" It asserted that the direction of this economic impact would be negative, because the rule would lead to increased uncertainty and confusion and would create an adverse economic impact by "denying individuals their right to be recognized as independent contractors under the FLSA." The Department addresses claims from this commenter and others on the potential costs and benefits of this rule throughout this economic analysis.

The Department does not believe, as reflected in this analysis, that this rule will result in widespread reclassification of workers. That is, for workers who are properly classified as independent contractors, the Department does not, for the most part, anticipate that the guidance provided in this rule will result in these workers being reclassified as employees. Especially compared to the guidance that was in effect before the 2021 IC Rule, the test put forth in this rule would not make independent contractor status significantly less likely. Rather, impacts resulting from this rule will mainly be due to a reduction in misclassification. If the 2021 IC Rule had been retained, the risk of misclassification could have increased. As noted previously in section III, the 2021 IC Rule's elevation of certain factors and its preclusion of consideration of relevant facts under

several factors, which is a departure from judicial precedent applying the economic reality test, could result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it was prior to the 2021 IC Rule to classify certain workers as independent contractors rather than FLSA-covered employees. This rule could therefore help prevent this misclassification by providing employers with guidance that is more consistent with longstanding precedent.

Many commenters who wrote in opposition to the proposed rule were concerned that, because of this rule, many independent contractors would be reclassified as employees, and that there would be a large negative impact associated with this reclassification. For example, a senior research fellow at the Mercatus Center said "DOL implicitly assumes that 100 percent of potential contracting jobs will be turned into employment jobs; this assumption is extremely optimistic and downplays very significant consequences in connection with the rule in question." Cambridge Investment Research Inc. stated that the practical result of the Proposed Rule would be that many workers will be reclassified as employees, including those who want to be independent contractors. However, the proposed rule explicitly noted that the Department does not expect any widespread reclassification of independent contractors as employees, and at no point assumed that 100 percent of contracting jobs would be turned into employment jobs. The Department believes that concerns about widespread reclassification are not realistic because the Department is adopting guidance in this rule that is essentially identical to the standard it applied for decades prior to the 2021 IC Rule, derived from the same analysis that courts have applied for decades and have been continuing to apply since the 2021 IC Rule took effect.

The Department received multiple comments discussing the negative impacts of widespread reclassification and citing research about potential job losses and loss of earnings. For example, Littler's Workplace Policy Institute says, "[A] study published last April concluded that widespread reclassification would destroy as many as 769,000 work opportunities and wipe out \$9.1 billion in earnings."⁵⁷³ The proposed rule fails to take these effects

into account." The Chamber of Progress cites this same study, noting that, "A national rule reclassifying independent contractors as employees could result in approximately 4.4 million people being involuntarily reclassified[.]" However, the study that these data points come from is an analysis of the potential impacts of a nationwide ABC test. The Chamber of Progress release about the report states, "Specifically, the study examines the 'ABC Test,' which is used in a variety of state and federal proposals to determine whether a worker is an employee or an independent contractor." The Department believes that the reclassification effects raised by these commenters cannot be applied to this rule, because the Department's economic reality test is not the ABC test.

While the Department responds throughout this economic analysis to comments about the potential negative impacts of the rule from those who are in opposition, it is important to note that any reclassification or job loss estimates associated with a nationwide ABC test are not appropriate to apply to this rule because this rule does not adopt an ABC test and are therefore not included in the Department's estimated impacts.

B. Estimated Number of Independent Contractors

To provide some context on the prevalence of independent contracting, the Department first estimated the number of independent contractors. There are a variety of estimates of the number of independent contractors spanning a wide range depending on methodologies and how the population is defined.⁵⁷⁴ There is no data source on independent contractors that perfectly mirrors the definition of independent contractor in the Department's regulations. There is also no regularly published data source on the number of independent contractors and data from the current year does not exist, making it difficult to examine trends in independent contracting or to measure how regulatory changes impact the number of independent contractors.

The Department believes that the Current Population Survey (CPS) Contingent Worker Supplement (CWS) offers an appropriate lower bound for

⁵⁷³ "New Study Finds Millions Could Lose Work if U.S. Reclassifies Contractors," April 6, 2022. <https://progresschamber.org/new-study-finds-millions-could-lose-work-if-u-s-reclassifies-contractors/>.

⁵⁷⁴ The Department uses the term "independent contractor" throughout this analysis to refer to workers who, as a matter of economic reality, are not economically dependent on their employer for work and are in business for themselves. The Department notes that sources cited in this analysis may use other definitions of independent contractors that may not align fully with the Department's use of the term.

the number of independent contractors; however, there are potential biases in these data that will be noted. This was the estimation method used in the 2021 IC Rule and the proposed rule, and the Department has not found any new data or analyses to indicate a need for any changes. Some recent data sources provide an indication of how COVID-19 may have impacted the number of independent contractors, but this is inconclusive. Additionally, estimates from other sources will be presented to demonstrate the potential range.

The U.S. Census Bureau conducts the CPS, and it is published monthly by the Bureau of Labor Statistics (BLS). The sample includes approximately 60,000 households and is nationally representative. Periodically since 1995, and most recently in 2017, the CPS included a supplement to the May survey to collect data on contingent and alternative employment arrangements. Based on the CWS, there were 10.6 million independent contractors in 2017, amounting to 6.9 percent of workers.⁵⁷⁵ The CWS measures those who say that their independent contractor job is their primary job and that they worked at the independent contractor job in the survey's reference week.

The BLS's estimate of independent contractors includes "[w]orkers who are identified as independent contractors, independent consultants, or freelance workers, regardless of whether they are self-employed or wage and salary workers." BLS asks two questions to identify independent contractors:⁵⁷⁶

- Workers reporting that they are self-employed are asked: "Are you self-employed as an independent contractor, independent consultant, freelance worker, or something else (such as a shop or restaurant owner)?" (9.0 million independent contractors). We refer to these workers as "self-employed independent contractors" in the remainder of the analysis.

- Workers reporting that they are wage and salary workers are asked: "Last week, were you working as an independent contractor, an independent consultant, or a freelance worker? That is, someone who obtains customers on their own to provide a product or service." (1.6 million independent contractors). We refer to these workers as "other independent contractors" in the remainder of the analysis.

It is important to note that independent contractors are identified in the CWS in the context of the respondent's "main" job (*i.e.*, the job with the most hours).⁵⁷⁷ Therefore, the estimate of independent contractors does not include those who may be an employee for their primary job, but may also work as an independent contractor.⁵⁷⁸ For example, Lim et al. (2019) estimate that independent contracting work is the primary source of income for 48 percent of independent contractors.⁵⁷⁹ 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 their primary source of income.⁵⁸⁰ However, because this survey only includes independent contractors in one state, the Department has not used this data

⁵⁷⁷ 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 about the respondent's main job.

⁵⁷⁸ 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).

⁵⁷⁹ 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>. From table 5, the total number of independent contractors across all categories is 13.81 million. The number of independent contractors in the categories where these workers earn the majority of their labor income from independent contractor earnings is 6.63 million. 6.63 million ÷ 13.81 million = 0.48.

⁵⁸⁰ Washington Department of Commerce, "Independent Contractor Study," p. 21 (Jul. 2019), <https://deptofcommerce.app.box.com/v/independent-contractor-study>.

to adjust its estimate of independent contractors.

The CWS's large sample size results in small sampling error. However, the questionnaire's design may result in some non-sampling error. For example, one potential source of bias is that the CWS only considers independent contractors during a single point in time—the survey week (generally the week prior to the interview).

These numbers will thus underestimate the prevalence of independent contracting over a longer timeframe, which may better capture the size of the population.⁵⁸¹ For example, Farrell and Greig (2016) used a randomized sample of 1 million Chase customers to estimate prevalence of the Online Platform Economy.⁵⁸² 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 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.⁵⁸³

The CWS also uses proxy responses, which may underestimate the number of independent contractors. The RAND

⁵⁸¹ 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 1-week period as independent contractors.

⁵⁸² 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. The authors define the Online Platform Economy as "economic activities involving online intermediaries." This includes "labor platforms" that "connect customers with freelance or contingent workers" and "capital platforms" that "connect customers with individuals who rent assets or sell goods peer-to-peer." As such, this study encompasses data on income sources that the Department acknowledges might not be a one-to-one match with independent contracting and could also include work that is part of an employment relationship. However, the Department believes that including data on income earned through online platforms is useful when discussing the potential magnitude of independent contracting.

⁵⁸³ 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>.

⁵⁷⁵ 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>.

⁵⁷⁶ The variables used are PES8IC=1 for self-employed and PES7=1 for other workers.

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).⁵⁸⁴ This survey found that independent contractors comprise 7.2 percent of workers.⁵⁸⁵ 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.⁵⁸⁶ 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).^{587 588}

Another potential source of bias in the CWS is that some respondents may not self-identify as independent contractors. For example, Abraham et al. (2020) estimated that 6.6 percent of workers in their study initially responded that they are employees but were then determined (by the researcher) to be independent contractors based on their answers to follow-up questions.⁵⁸⁹ Additionally, individuals who do what some researchers refer to as “informal work” may in fact be independent contractors though they may not characterize themselves as such.⁵⁹⁰ 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.⁵⁹¹

Conversely, another source of bias in the CWS is that some workers who self-identify as independent contractors may misunderstand their status or may be misclassified by their employer. These workers may answer the survey in the affirmative, despite not truly being independent contractors. While precise and representative estimates of nationwide misclassification are unavailable, multiple studies suggest its prevalence in numerous sectors in the economy.⁵⁹² See section VII.D.2. for a more thorough discussion of the prevalence of misclassification.

Because reliable data on the potential magnitude of the biases discussed above are unavailable, and so the net direction of the biases is unknown, the Department has not attempted to calculate how these biases may impact the estimated number of independent contractors.

As noted above, integrating the estimated proportions of workers who are independent contractors on secondary or otherwise excluded jobs produces an estimate population of 22.1 million, representing the total number of workers working as independent contractors in any job at a given time. Given the prevalence of independent contractors who work sporadically and earn minimal income, adjusting the estimate according to these sources captures some of this population. It is likely that this figure is still an underestimate of the true independent contractor pool. This is because, in part,

than the scope of independent contractors. These categories include activities like house sitting, selling goods online through sites like eBay or Craigslist, or selling goods at a garage sale. The Department acknowledges that the data discussed in this study might not be a one-to-one match with independent contracting and could also include work that is part of an employment relationship, but it nonetheless provides some useful data for this purpose.

⁵⁹¹ 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.jstor.org/stable/10.7758/rsf.2019.5.5.06>.

⁵⁹² 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.”).

the CWS estimate represents only the number of workers who worked as independent contractors on their primary job during the survey reference week, which is why the Department applied the research literature and adjusted this measure to include workers who are independent contractors in a secondary job or who were excluded from the CWS estimate due to other factors.

1. Range of Estimates in the Literature

To further consider the range of estimates available, the Department conducted a literature review, the findings of which are presented in Table 1. Other studies were also considered but are excluded from this table because the study populations were broader than just independent contractors, limited to one state, or include workers outside of the United States.⁵⁹³ The RAND ALP,⁵⁹⁴ the Gallup Survey,⁵⁹⁵ and the General Social Survey’s (GSS’s) Quality of Worklife (QWL)⁵⁹⁶ supplement are

⁵⁹³ 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, “Independent Contractor Study,” (Jul. 2019), <https://deptofcommerce.app.box.com/v/independent-contractor-study>; 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; 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>; 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>; 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/#ixzz5Jpbjp79a>; Dourado and Koopman, “Evaluating the Growth of the 1099 Workforce,” Mercatus Center (2015), <https://www.mercatus.org/publication/evaluating-growth-1099-workforce>.

⁵⁹⁴ See L. Katz and A. Krueger, “The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015,” (2018).

⁵⁹⁵ “Gallup’s Perspective on The Gig Economy and Alternative Work Arrangements,” Gallup (2018), <https://www.gallup.com/workplace/240878/gig-economy-paper-2018.aspx>.

⁵⁹⁶ See Abraham et al., “Measuring the Gig Economy: Current Knowledge and Open Issues”

Continued

⁵⁸⁴ See L. Katz and A. Krueger, “The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015,” (2018).

⁵⁸⁵ *Id.* at 49. The estimate is 9.6 percent without correcting for overrepresentation of self-employed workers or multiple job holders. *Id.* at 31.

⁵⁸⁶ *Id.* at Addendum (“Reconciling the 2017 BLS Contingent Worker Survey”).

⁵⁸⁷ 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.

⁵⁸⁸ 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, 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.

⁵⁸⁹ K. Abraham, B. Hershbein, and S. Houseman, “Contract Work at Older Ages,” NBER Working Paper 26612 (2020), <http://www.nber.org/papers/w26612>.

⁵⁹⁰ The Department believes that including data on what is referred to in some studies as “informal work” is useful when discussing the magnitude of independent contracting, although not all informal work is done by independent contractors. The Survey of Household Economics and Decision-making asked respondents whether they engaged in informal work sometime in the prior month. It categorized informal work into three broad categories: personal services, on-line activities, and off-line sales and other activities, which is broader

widely cited alternative estimates. However, the Department chose to use sources with significantly larger sample sizes and/or more recent data for the primary estimate.

Jackson et al. (2017)⁵⁹⁷ and Lim et al. (2019)⁵⁹⁸ 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.⁵⁹⁹ A major disadvantage of using tax data for this analysis is that the detailed source data are not publicly available and thus the analyses cannot be directly verified or adjusted as necessary (*e.g.*, to describe characteristics of independent contractors, etc.).

TABLE 1—SUMMARY OF ESTIMATES OF INDEPENDENT CONTRACTING

Source	Method ^a	Definition ^b	Percent of workers	Sample size	Year
CPS CWS	Survey	Independent contractor, consultant or freelance worker (main only).	6.9	50,392	2017
ALP	Survey	Independent contractor, consultant or freelance worker (main only).	7.2	6,028	2015
Gallup	Survey	Independent contractor	14.7	5,025	2017
GSS QWL	Survey	Independent contractor, consultant or freelancer (main only) ...	14.1	2,538	2014
Jackson et al. ...	Tax data	Independent contractor, household worker	^c 6.1	~5.9 million ^d	2014
Lim et al.	Tax data	Independent contractor	8.1	1% of 1099–MISC and 5% of 1099–K.	2016

^a The CPS CWS and the GSS QWL are nationally representative, and the ALP CWS is approximately nationally representative. The Gallup poll is demographically representative but does not explicitly claim to be nationally representative. Lastly, the two tax data sets are very large random samples and consequently are likely to be nationally representative, although the authors do not explicitly claim so.

^b The survey data only identify independent contractors on their main job. Jackson et al. include independent contractors as long as at least 15 percent of their earnings were from self-employment income; thus, this population is broader. If Jackson et al.'s estimate is adjusted to exclude those who are primary wage earners, the rate is 4.0 percent. Lim et al. include independent contractors on all jobs. If Lim et al.'s estimate is adjusted to only those who receive a majority of their labor income from independent contracting, the rate is 3.9 percent.

^c Summation of (1) 2,132,800 filers with earnings from both wages and sole proprietorships and expenses less than \$5,000, (2) 4,125,200 primarily sole proprietorships and with less than \$5,000 in expenses, and (3) 3,416,300 primarily wage earners.

^d Estimate based on a 10 percent sample of self-employed workers and a 1 percent sample of W–2 recipients.

2. COVID–19 Adjustment to the Estimated Number of Independent Contractors

The Department's estimate of the number of independent contractors, 22.1 million, is based primarily on 2017 data. Because COVID–19 has had a substantial impact on the labor market, it is possible that this estimate is not currently appropriate. The Department conducted a search for more recent data to indicate any trends in the number of independent contractors since 2017. The findings are inconclusive but generally do not indicate an increase.

The Federal Reserve Board's annual Survey of Household Economics and

Decisionmaking (SHED) provides measures of the economic well-being of U.S. households. The Federal Reserve Board publishes a report "Economic Well-Being of U.S. Households" summarizing the findings of each survey.⁶⁰⁰ One subsection of the Employment section describes the results of the questions related to "The Gig Economy." While the survey questions about work in the "gig economy" include more types of work scenarios than just independent contracting, a decrease from 30 percent to 20 percent of adults answering "yes" from 2017 to 2020 may indicate that the number of independent contractors in

this industry also decreased during that time period.⁶⁰¹ The report summarizing the 2021 data is available, but unfortunately the gig economy questions were revised substantially, so a comparable value is not available for 2021. Moreover, trends of potential independent contractors in one industry are not necessarily indicative of trends across the economy.

MBO Partners, a company with the goal of connecting enterprise organizations and top independent professionals, also conducts an annual survey and prepares a research report of the findings.⁶⁰² In all groups of "independent workers," MBO Partners

(2018), <https://www.nber.org/papers/w24950>, Table 4.

⁵⁹⁷ 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>.

⁵⁹⁸ 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>.

⁵⁹⁹ 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.

⁶⁰⁰ Consumer and Community Research Section of the Federal Reserve Board's Division of Consumer and Community Affairs, "Economic Well-Being of U.S. Households in 2021," Board of Governors of the Federal Reserve System (2022). Reports from all years available at <https://www.federalreserve.gov/publications/report-economic-well-being-us-households.htm>.

⁶⁰¹ The report defines gig work as including "three types of non-traditional activities: offline

service activities, such as child care or house cleaning; offline sales, such as selling items at flea markets or thrift stores; and online services or sales, such as driving using a ride-sharing app or selling items online." Consumer and Community Research Section of the Federal Reserve Board's Division of Consumer and Community Affairs, "Economic Well-Being of U.S. Households in 2017," Board of Governors of the Federal Reserve System (May 2018).

⁶⁰² MBO partners, "The Great Realization: 11th Annual State of Independence," (2021). Annual reports are available at <https://www.mbopartners.com/state-of-independence/previous-reports/>.

similarly found a decrease in the number from 2017 to 2020. Conversely, in total, the 2021 report shows a large increase from 2020, enough that the number of independent workers in 2021 is larger than the 2017 number. However, this increase occurs only in the “occasional independent” workers category, described as those who work part-time and regularly, but without set hours. Comparing the number of part-time and full-time independent workers yields similar values in 2017 and 2021, so the Department believes that no adjustments are needed to the 2017 estimate of 22.1 million independent contractors.

A few commenters said that the Department underestimated the number of independent contractors in the U.S. because the estimate is based on outdated data. Commenters such as the Coalition for Workforce Innovation referenced a more recent study from Upwork, which found that “59 million workers performed freelance work in the past 12 months, representing 36%—or more than one-third—of the entire U.S. workforce.”⁶⁰³ As discussed above, the Department acknowledges that its estimate of independent contractors could be an underestimate. However, the estimates presented in the Upwork study could be an overestimate because their definition of “freelancer” likely also includes some workers who would be classified as employees under the FLSA in addition to those who would be classified as independent contractors.⁶⁰⁴ Furthermore, the Department was unable to verify whether their sample of 6,000 workers was representative of all workers in the U.S. While the Department appreciates this additional context on the potential scope of independent contracting in the U.S., the estimate of independent contractors in this analysis has not been revised.

⁶⁰³ “Upwork Study Finds 59 Million Americans Freelancing Amid Turbulent Labor Market,” Upwork, December 8, 2021. <https://www.upwork.com/press/releases/upwork-study-finds-59-million-americans-freelancing-amid-turbulent-labor-market>. Full study available at <https://www.upwork.com/research/freelance-forward-2021>.

⁶⁰⁴ Their report defines freelancers as “[i]ndividuals who have engaged in supplemental, temporary, project- or contract-based work, within the past 12 months.” While many of these workers could be independent contractors, some workers engaged in supplemental or temporary work could likely be considered employees.

3. Demographics of Independent Contractors

The Department reviewed demographic information on independent contractors using the CWS, which, as stated above, only measures those who say that their independent contractor job is their primary job and that they worked at the independent contractor job in the survey’s reference week. According to the CWS, these primary independent contractors are most prevalent in the construction and professional and business services industries. These two industries comprise 44 percent of primary independent contractors. Independent contractors tend to be older and predominately male (64 percent). Millennials (defined as those born 1981–1996) have a significantly lower prevalence of primary independent contracting than older generations: 4.2 percent for Millennials compared to 7.2 percent for Generation X (defined as those born 1965–1980) and 10.2 percent for Baby Boomers and Matures (defined as individuals born before 1965).⁶⁰⁵ However, other surveys that capture secondary independent contractors, or those who did informal work as independent contractors show that the prevalence of informal work is lower among older workers. Abraham and Houseman (2019), find that among 18- to 24-year-olds, 41.3 percent did informal work over the past month. The rate fell to 25.7 percent for 45- to 54-year-olds, and 13.4 percent for those 75 years and older.⁶⁰⁶ According to MBO partners, the COVID-19 pandemic may have accelerated this trend; when accounting for both primary and secondary independent work, 2021 marked the first year that Millennials and members of Generation Z (34

⁶⁰⁵ The Department used the generational breakdown used in the MBO Partners 2017 report, “The State of Independence in America.” “Millennials” were defined as individuals born 1981–1996, “Generation X” were defined as individuals born 1965–1980, and “Baby Boomers and Matures” were defined as individuals born before 1965.

⁶⁰⁶ 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/QreAa52h>. Note that this informal work may be broader than what would be considered independent contracting and includes activities like babysitting/housesitting and selling goods online through sites like eBay and Craigslist.

percent and 17 percent of independent workers respectively) outnumbered members of Generation X and Baby Boomers (23 percent and 26 percent respectively) as part of the independent workforce.⁶⁰⁷

According to the CWS, 64 percent of primary independent contractors are men. Additionally, Garin and Koustas (2021) find that men comprise both a larger share of independent contractors who perform work through traditional contracting arrangements and those who secure work through online platforms.⁶⁰⁸ This study also found that a greater share of men than women who earn income in this way are primarily self-employed; women who perform online platform work are more likely to use that work to supplement other income.⁶⁰⁹

According to the CWS, white workers are somewhat overrepresented among primary independent contractors; they comprise 85 percent of this population but only 79 percent of the population of workers. Conversely, Black workers are somewhat underrepresented (comprising 8 percent and 13 percent, respectively).⁶¹⁰ The opposite trends emerge when evaluating the broader category of “informal work”, where racial minorities participate at a higher rate than white workers.⁶¹¹ 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.⁶¹²

⁶⁰⁷ This data comes from the 2021 edition of the MBO Partners report, “The State of Independence in America.” While maintaining the generational breakdown used in the 2017 edition, “Generation Z” was additionally defined as individuals born 1997–2012. https://info.mbopartners.com/rs/mbo/images/MBO_2021_State_of_Independence_Research_Report.pdf.

⁶⁰⁸ Garin, A. and Koustas, D., “The Distribution of Independent Contractor Activity in the United States: Evidence from Tax Filings,” (2021). <https://www.irs.gov/pub/irs-soi/21-rp-independent-contractor-activity.pdf>.

⁶⁰⁹ *Id.*

⁶¹⁰ These numbers are calculated by the Department and based on the CWS respondents who state that their race is “white only” or “black only” as opposed to identifying as multi-racial.

⁶¹¹ 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/QreAa52h>.

⁶¹² *Id.*

TABLE 2—CHARACTERISTICS OF WORKERS, ALL WORKERS AND INDEPENDENT CONTRACTORS

Demographic	Number of workers (millions)	Percent of workers	Number of independent contractors (primary job) (millions)	Percent of independent contractors
Total	158.9	100	10.6	100
By Age				
16–20 (Generation Z)	8.2	5.1	0.1	0.7
21–37 (Millennials)	59.2	37.3	2.5	23.4
38–52 (Generation X)	49.8	31.3	3.6	33.8
53+ (Baby Boomers and Matures)	43.6	27.5	4.5	42.1
By Sex				
Female	75.4	47.4	3.8	35.7
Male	85.4	53.7	6.8	64.3
By Race				
White only	125.6	79.1	9.0	84.6
Black only	20.3	12.8	0.9	8.3
All other races	14.9	9.4	0.8	7.1
By Ethnicity				
Hispanic	27.0	17.0	1.6	14.8
Not Hispanic	133.8	84.2	9.0	85.2
By Industry				
Agr, forestry, fishing, and hunting	2.6	1.6	0.2	2.0
Mining	0.8	0.5	0.0	0.1
Construction	11.0	6.9	2.0	19.3
Manufacturing	16.5	10.4	0.2	2.2
Wholesale and retail trade	20.5	12.9	0.8	7.9
Transportation and utilities	8.0	5.1	0.6	5.7
Information	3.0	1.9	0.2	2.2
Financial activities	10.9	6.9	1.0	9.6
Professional and business services	19.3	12.2	2.7	25.1
Educational and health services	36.2	22.8	1.0	9.6
Leisure and hospitality	15.1	9.5	0.7	6.2
Other services	7.8	4.9	1.0	9.7
Public administration	7.2	4.6	0.0	0.4
By Education				
Less than high school diploma	14.3	9.0	1.0	9.3
High school diploma or equivalent	41.9	26.4	2.6	24.4
Less than Bachelor's degree	45.3	28.5	2.8	26.5
Bachelor's degree	37.3	23.5	2.7	25.5
Master's degree or higher	21.9	13.8	1.5	14.5

Note: Estimates based on the 2017 CPS Contingent Worker Survey.

An individual commenter wrote that because the COVID–19 pandemic created specific burdens for women and people of color and resulted in the increased participation of both groups in self-employment, the use of 2017 data reduces the inclusion of these workers. The commenter cited a study from the Center for Economic Policy and Research (CEPR), which found “[t]he share of employed women who report being self-employed rose from 7.5 percent in the pre-pandemic period to 8.2 percent: an increase of 0.7 percentage points. By contrast, the share

of employed men who report being self-employed rose by just 0.3 percentage points (from 12.1 percent to 12.4 percent).”⁶¹³ The study also found “[t]he share of employed Blacks who reported being self-employed rose from 5.8 percent to 6.8 percent: an increase of 1.0 percentage point. . . . For Hispanics, there was a 1.5 percentage

⁶¹³ Annabel Utz, Julie Yixia Cai, & Dean Baker, “The Pandemic Rise in Self-Employment: Who is Working for Themselves Now,” Center for Economic and Policy Research. (August 2022). <https://cepr.net/the-pandemic-rise-in-self-employment-who-is-working-for-themselves-now/>.

point rise in shares from 8.4 percent to 9.9 percent By contrast, the rise in self-employment among whites was just 0.2 percent, from 11.3 to 11.5 percent.” While the Department acknowledges that the demographic makeup of independent contractors could have shifted following the COVID–19 pandemic, the data cited in the CEPR study includes all self-employed persons, which is a broader population than independent contractors. It is possible that this data may also reflect the demographic trends of the more specific population of

independent contractors, but the Department has not made any adjustments to its overall estimate of the number of independent contractors.

C. Costs

1. Rule Familiarization Costs

Regulatory familiarization costs represent direct costs to businesses and current independent contractors associated with reviewing the new regulation. To estimate the total regulatory familiarization costs, the Department used (1) the number of establishments and government entities using independent contractors, and the current number of independent contractors; (2) the wage rates for the employees and for the independent contractors reviewing the rule; and (3) the number of hours that it estimates employers and independent contractors will spend reviewing the rule. This section presents the calculation for establishments first and then the calculation for independent contractors.

Regulatory familiarization costs may be a function of the number of establishments or the number of firms.⁶¹⁴ Presumably, the headquarters of a firm will conduct the regulatory review for businesses with multiple locations and may require some locations to familiarize themselves with the regulation at the establishment level. Other firms may either review the rule to consolidate key takeaways for their affiliates or they may rely entirely on outside experts to evaluate the rule and relay the relevant information to their organization (e.g., a chamber of commerce). The Department used the number of establishments to estimate the fundamental pool of regulated entities—which is larger than the number of firms. This assumes that regulatory familiarization occurs at both the headquarters and establishment levels.

To estimate the number of establishments incurring regulatory familiarization costs, the Department began by using the Statistics of U.S. Businesses (SUSB) to define the total pool of establishments in the United States.⁶¹⁵ In 2019, the most recent year

available, there were 7.96 million establishments. These data were supplemented with the 2017 Census of Government that reports 90,075 local government entities, and 51 state and federal government entities.⁶¹⁶ The total number of establishments and governments in the universe used for this analysis is 8,049,229.

This universe is then restricted to the subset of establishments that engage independent contractors. In 2019, Lim et al. used extensive IRS data to model the independent contractor market and found that 34.7 percent of firms hire independent contractors.⁶¹⁷ These data are based on annual tax filings, so the dataset includes firms that may contract for only parts of a year. Multiplying the universe of establishments and governments by 35 percent results in 2.8 million entities.

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) (or a staff member in a similar position) will review the rule.⁶¹⁸ According to the Occupational Employment and Wage Statistics (OEWS), these workers had a median wage of \$32.59 per hour in 2022 (most recent data available).⁶¹⁹ Assuming benefits are paid at a rate of 45 percent of the base wage,⁶²⁰ and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is \$52.80. The Department

www.census.gov/data/datasets/2019/econ/susb/2019-susb.html.

⁶¹⁶ U.S. Census Bureau, 2017 Census of Governments. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>.

⁶¹⁷ Lim et al., *supra* n.512, Table 10: Firm sample summary statistics by year (2001–2015). <https://www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf>.

⁶¹⁸ 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>.

⁶¹⁹ The 2021 IC Rule used the mean wage rate to calculate rule familiarization costs, but the Department has used the median wage rate here, because it is more consistent with cost analyses in other Wage and Hour Division rulemakings. The Department used the median wage rate in the Withdrawal Rule. 86 FR 24321. Generally, the Department uses median wage rates to calculate costs, because the mean wage rate has the potential to be biased upward by high-earning outlier wage observations.

⁶²⁰ Calculated using BLS Employer Costs for Employee Compensation data. The Department took the average of the most recent four quarters of Total Benefits per Hour Worked for Civilian Workers (Series ID CMU10300000000000D) divided it by the average of the most recent four quarters of Wages and Salaries Cost per Hour Worked for Civilian Workers (Series ID CMU10200000000000D). <https://www.bls.gov/ncs/data.htm>.

assumes that it will take on average about 1 hour to review the rule. In the proposed rule, the Department assumed a review time of 30 minutes, but has increased this estimate in response to concerns from commenters that the regulatory familiarization costs were understated. The Department has provided a discussion of these comments at the end of this section. The Department believes that 1 hour, on average, is appropriate, because while some establishments will spend longer to review the rule, many establishments may rely on third-party summaries of the changes or spend little or no time reviewing the rule. Furthermore, the analysis outlined in this rule aligns with existing judicial precedent and previous guidance released by the Department, with which much of the regulated community is already familiar. Total regulatory familiarization costs to businesses in Year 1 are estimated to be \$148,749,744 ($\$52.80 \times 1 \text{ hour} \times 2,817,230$) in 2022 dollars.

For regulatory familiarization costs for independent contractors, the Department used its estimate of 22.1 million independent contractors and assumed each independent contractor will spend 30 minutes to review the regulation. In the proposed rule, the Department assumed that it would take independent contractors an average of 15 minutes to review the regulation but has also increased this estimate in the final rule in response to commenters' concerns. The average time spent by independent contractors is estimated to be shorter than for establishments and governments. This difference is in part because the Department believes independent contractors are likely to rely on summaries of the key elements of the rule change published by the Department, worker advocacy groups, media outlets, and accountancy and consultancy firms, as has occurred with other rulemakings. This time is valued at \$23.46, which is the median hourly wage rate for independent contractors in the CWS of \$19.45 updated to 2022 dollars using the gross domestic product (GDP) deflator.^{621 622} Therefore, regulatory familiarization costs to

⁶²¹ Based on Department calculations using the individual level data. The Department also calculated the mean hourly wage for independent contractors using the CWS data and found that the mean wage in 2017 was \$27.29, which would be \$32.92 updated to 2022 dollars using the GDP deflator.

⁶²² In the 2021 IC rule the Department included an additional 45 percent for benefits and 17 percent for overhead. These adjustments have been removed here, because independent contractors do not usually receive employer-provided benefits and generally have overhead costs built into their hourly rate.

⁶¹⁴ 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>.

⁶¹⁵ U.S. Census Bureau, 2019 SUSB Annual Datasets by Establishment Industry. <https://www.census.gov/data/datasets/2019/econ/susb.html>.

independent contractors in Year 1 are estimated to be \$259,233,000 ($\$23.46 \times 0.5 \text{ hour} \times 22.1 \text{ million}$).

The total one-time regulatory familiarization costs for establishments, governments, and independent contractors are estimated to be \$408 million. Regulatory familiarization costs in future years are assumed to be de minimis. Employers and independent contractors would continue to familiarize themselves with the applicable legal framework in the absence of the rule, so this rulemaking is not expected to impose costs after the first year. This amounts to a 10-year annualized cost of \$56.4 million at a discount rate of 3 percent or \$54.3 million at a discount rate of 7 percent.

Multiple commenters said that they were concerned that the Department's rule familiarization cost estimate was too low. Commenters asserted that the Department's initial estimate of 30 minutes to review the rule was too short, and that it would take firms much longer to read and understand the final rule. For example, a comment from two fellows at the Heritage Foundation estimated that "[e]ven individuals with very high rates of reading and comprehension" would need more than two hours to read the full proposal. The Coalition for Workforce Innovation said that while a person could simply read the rule in 30 minutes, it wouldn't be enough time to understand the rule and translate the understanding into advice to be communicated within the organization. The U.S. Chamber of Commerce commented, "[a]n economically appropriate approach for gauging the scale of familiarization costs is to assume no less than one hour of familiarization time for both affected workers and hiring establishments." The Modern Economy Project commented that the complexity of the rulemaking and of the issue of worker classification necessitates more time for review. Other commenters echoed similar sentiments. In response to all the comments received on this topic, the Department reconsidered the time for rule familiarization and doubled its original estimates, increasing them to 1 hour for potentially affected firms and 30 minutes for independent contractors. The Department believes that a longer time estimate would not be appropriate because this estimate represents an average of the firms who may spend more time for review, and those who will not spend any time reviewing the rule.

Some commenters also expressed concerns with the Department's assumption that the rule would be read by a Compensation, Benefits, and Job

Analysis Specialist. For example, the Coalition for Workforce Innovation stated, "businesses task their high-level, well-trained human resources workers, in-house attorneys, and outside counsel with this responsibility at an hourly rate well exceeding \$50." The U.S. Chamber of Commerce wrote that the "Department's selection of 'Compensation, Benefits and Job Analysis Specialist' as the model reviewer for its calculation of familiarization costs misunderstands and misrepresents the seriousness and complexity of the regulation being proposed." The Department acknowledges that in some cases, higher-paid senior workers could be charged with reading this rule, but believes that the use of the Compensation, Benefits, and Job Analysis Specialist hourly wage is consistent with other rules released by the Wage and Hour Division and the Department, including the 2021 IC Rule.⁶²³ The Department notes that it did not receive any comments objecting to the use of this occupation in its rule familiarization calculation in the 2021 IC Rule.

2. Comments Received on the Department's Cost Analysis

Some commenters asserted that the Department did not properly consider all of the potential costs of the regulation. For example, commenters such as the Financial Services Institute said that the Department did not consider substantial costs of the rule, such as the cost that will arise from businesses being forced to provide health insurance and other benefits to their former independent contractors or the indirect costs of higher taxes. The Department notes that these costs would be considered transfers and are discussed in section VII.E of this economic analysis. Other commenters mentioned that the rule would lead to significant compliance costs for firms. For example, two fellows from the Heritage Foundation commented that in addition to familiarizing themselves with the rule, the firm would have to perform an individualized assessment of the economic relationship with each of their contractors, renegotiate or cancel existing contracts, spend time converting independent contractors into employees, engage with labor unions and elections, and deal with enforcement actions. The Cetera Financial Group said that the ongoing

cost of compliance for employers is considerable. They stated that applying this rule only to independent financial professionals would create an obligation for employers to track the earnings and hours worked for more than 140,000 independent financial professionals in the U.S. As discussed above, the Department does not believe that this rule will lead to widespread reclassification (and additional tracking of hours and earnings), and for the limited cases in which reclassification could occur, many of these costs should already be incurred by firms. For example, as a matter of good practice, firms should already be assessing the economic relationship of contractors when they engage in business with them.

Other commenters wrote that the rule would actually reduce compliance costs. For example, the Laborers' International Union of North America (LIUNA) urged the Department to consider reduced compliance costs as an important impact of the rule. They stated that the rule will improve public understanding of legal obligations because it codifies judicial precedent in a comprehensive, accessible, and reliable format.

D. Benefits and Transfers

1. Increased Consistency

This rule presents a detailed analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule. This analysis will provide more consistent guidance to employers in properly classifying workers as employees or independent contractors, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors. The analysis will provide a consistent approach for those businesses that engage (or wish to engage) independent contractors, who the Department recognizes play an important role in the economy. The rule's consistency with judicial precedent could also help to reduce legal disputes.

2. Reduced Misclassification

This rule will provide consistent guidance to employers in properly classifying workers as employees or independent contractors, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors. This clear guidance could help reduce the occurrence of misclassification.

⁶²³ 86 FR 1228 ("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.").

The prevalence of misclassification of employees as independent contractors is unclear, but the literature indicates it is substantial. A 2020 National Employment Law Project (NELP) report, for example, reviewed state audits and concluded that “these state reports show that 10 to 30 percent of employers (or more) misclassify their employees as independent contractors.”⁶²⁴ Similarly, a 2000 Department of Labor study also found that among audits from nine states, “employers with misclassified workers ranged from approximately 10% to 30%.”⁶²⁵ This same report found that depending on the state, between 1 percent and 9 percent of workers are misclassified as independent contractors.

Misclassification disproportionately affects Black, indigenous, and people of color (BIPOC) because of the disparity in occupations affected by misclassification.⁶²⁶ Commenters echoed these concerns and provided additional supporting information. For example, a joint comment from the Lawyers Committee for Civil Rights Under Law (LCCRUL) and The Washington Lawyer’s Committee for Civil Rights and Urban Affairs (WLC) stated, “[d]ue to occupational segregation, the sectors in which misclassification is most prevalent are comprised disproportionately [of] BIPOC workers, especially Black and immigrant workers.”⁶²⁷ Looking at 2021 BLS data, LCCRUL and WLC noted that 41% of workers in the construction industry identify as Black, Asian, or Hispanic. As discussed in the section below, research has shown that misclassification is prevalent in the construction industry. LCCRUL and WLC also point out, “[i]n gig-based jobs,

where the classification of workers as independent contractors is a defining characteristic of the industry, people of color and immigrants are also overrepresented: 30% of Latinx adults, 20% of Black adults, and 19% of Asian adults work in such jobs, compared to 12% of white adults.”⁶²⁸ NELP also agreed, stating, “[i]ndependent contractor misclassification by companies is also strikingly racialized, occurring disproportionately in occupations in which people of color, including Black, Latinx, and Asian workers, are overrepresented.” NELP analyzed the March 2022 Current Population Survey Annual Social and Economic Supplement (CPS ASEC) data and found that workers of color comprise just over a third of workers overall but comprise between 47 and 91 percent of workers in industries such as construction, trucking, delivery, home care, agricultural, personal care, ride-hail, and janitorial and building service.⁶²⁹

Misclassification contravenes one of the purposes of the FLSA: eliminating “unfair method[s] of competition in commerce.”⁶³⁰ When employers misclassify employees as independent contractors, they illegally cut labor costs, undermining law-abiding competitors.⁶³¹ While the services offered may be comparable at face value, the employer engaging in misclassification is able to offer lower estimates and employers following the rules are left at a disadvantage.

Multiple commenters also provided data on the prevalence and harms of misclassification, specifically in the construction industry. For example, the Illinois Economic Policy Institute (ILEPI), the National Electrical Contractors Association (NECA) and the International Brotherhood of Electrical Workers (IBEW), the United Brotherhood of Carpenters and Joiners (UBC), and North America’s Building Trades Unions (NABTU), among others, all cite to a study from Russell Ormiston et al., which found that between 12 and 21 percent of the construction industry workforce were either misclassified as independent contractors or working

“off-the-books.”⁶³² The paper notes that these results suggest that “between 1.30 and 2.16 million workers were misclassified or working in cash-only arrangements.” Although the impacts discussed in this study involve broader labor violations than independent contractor misclassification, its results are still useful for understanding the extent of the problem. Commenters asserted that not only is misclassification prevalent in the construction industry, but it is also harmful to workers and to employers who do not misclassify their workers. For example, SWACCA noted that when construction companies misclassify their workers, they avoid costs such as overtime, workers’ compensation, unemployment insurance, employment taxes, and compliance with health and safety requirements. They explained that when “high road” employers are unable to compete with contractors who are misclassifying their workers, it leads to a “race to the bottom,” which further degrades working conditions in construction. UBC discussed a report on the number of construction worker families in the U.S. enrolled in safety net programs, such as Medicaid, Temporary Assistance for Needy Families (TANF), and the Supplemental Nutrition Assistance Program (SNAP). UBC noted that the report found, “[s]hockingly, 3 million families, or 39 percent of construction worker families, are enrolled in at least one safety net program, costing state and federal taxpayers \$28 billion a year.”⁶³³ They further explained that “[t]he authors of the report attributed the high degree of reliance on public assistance to a number of factors. Chief among those were low pay, wage theft, misclassification as independent contractors, off-the-books payments, and ‘payroll fraud.’” While the costs discussed in that report reflect a variety of factors, if misclassification contributes to just a share of this overall cost, the costs of misclassification could still be significant, especially for just one industry. If this final rule is then able to reduce a fraction of overall misclassification in the U.S., the

⁶²⁴ NELP, “Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries,” (Oct. 2020), <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020>.

⁶²⁵ Lalith de Silva, Adrian Millett, Dominic Rotondi, and William F. Sullivan, “Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs” Report of Planmatics, Inc., for U.S. Department of Labor Employment and Training Administration (2000), <https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

⁶²⁶ NELP, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, (Oct. 2020) (describing how misclassification rates are higher in certain industries such as construction, trucking, janitorial, and home care work), <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020>.

⁶²⁷ Marina Zhavoronkova et al., Occupational Segregation in America, Center for American Progress (Mar. 29, 2022), <https://www.americanprogress.org/article/occupational-segregation-in-america/>.

⁶²⁸ Risa Gelles-Watnick & Monica Anderson, Racial and Ethnic Differences Stand Out in the U.S. Gig Workforce, PEW RSCH. CTR. (Dec. 15, 2021), <https://www.pewresearch.org/fact-tank/2021/12/15/racial-and-ethnic-differences-stand-out-in-the-u-s-gig-workforce/>.

⁶²⁹ NELP analysis of March 2022 Current Population Survey Annual Social and Economic Supplement microdata. For underlying data, see CPS Annual Social and Economic Supplement, U.S. Census Bureau, <https://data.census.gov/mdat/#/search?ds=CPSASEC2022>.

⁶³⁰ 29 U.S.C. 202(a), (b).

⁶³¹ *Id.*

⁶³² Russel Ormiston, Dale Belman, & Mark Erlich, “An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry,” (Jan. 2020), available at <https://stoptaxfraud.net/wp-content/uploads/2020/03/National-Carpenters-Study-Methodology-for-Wage-and-Tax-Fraud-Report-FINAL.pdf>.

⁶³³ Ken Jacobs, Kuichih Huang, Jenifer MacGillvary and Enrique Lopezlira, “The Public Cost of Low-Wage Jobs in the US Construction Industry,” UC Berkeley Labor Center (January 2022), <https://laborcenter.berkeley.edu/the-public-cost-of-low-wage-jobs-in-the-us-construction-industry/>.

Department would anticipate benefits for affected workers and businesses in competition.

E. Additional Discussion of Transfers

1. Employer-Provided Fringe Benefits

Misclassification of independent contractors culminates in a reduced social safety net starting with the individual and cascading out through the local, state, and federal programs. Employees who are misclassified as independent contractors generally do not receive employer-sponsored health and retirement benefits, potentially resulting in or contributing to long-term financial insecurity.

Employees are more likely than independent contractors to have health insurance. According to the CWS, 75.4 percent of independent contractors have health insurance, compared to 84.0 percent of employees. This gap between independent contractors and employees is also true for low-income workers. Using CWS data, the Department compared health insurance rates for workers earning less than \$15 per hour and found that 71.0 percent of independent contractors have health insurance compared with 78.5 percent of employees. Lastly, the Department considered whether this gap could be larger for traditionally underserved

groups or minorities. Considering the subsets of independent contractors who are female, Hispanic, or Black, only the Hispanic independent contractors have a statistically significant difference in the percentage of workers with health insurance (estimated to be about 18 percentage points lower).⁶³⁴

Additionally, a major source of retirement savings is employer-sponsored retirement accounts. According to the CWS, 55.5 percent of employees have a retirement account with their current employer; in addition, the BLS Employer Costs for Employee Compensation (ECEC) found that in 2022, employers paid 5.1 percent of employees' total compensation in retirement benefits on average (\$2.16/\$42.48).⁶³⁵ A 2017 Treasury study found that in 2014, while forty two percent of wage earners made contributions to an individual retirement account (IRA) or employer plan, only eight percent of self-employed individuals made any retirement contribution.⁶³⁶ Smaller retirement savings could result in a long-term tax burden to all Americans due to increased reliance upon social assistance programs.

To the extent that this rule would reduce misclassification, it could result in transfers to workers in the form of employer-provided benefits like health care and retirement benefits. The

National Retail Federation questioned this assumption, asserting that "it does not take into account the myriad of insurance arrangements that are available to individuals and their families." While some independent contractors do have health insurance, as evidenced in the data discussed above, they are insured at a lower rate than employees.

As shown in Table 3 below, using data from BLS Employer Costs for Employee Compensation, the Department has calculated the average cost to employers for various benefits as a percentage of the average cost to employers for wages and salaries. This share was then applied to the median weekly wage of both full-time and part-time independent contractors to estimate the value of these benefits to an average independent contractor if they were to begin receiving these benefits. The Department estimated that the value of these benefits could average more than \$15,000 annually for full-time independent contractors and more than \$6,000 annually for part-time independent contractors. This example transfer estimate could be reduced if there is a downward adjustment in the worker's wage rate to offset a portion of the employer's cost associated with these new benefits.

TABLE 3—POTENTIAL TRANSFERS ASSOCIATED WITH EMPLOYER-PROVIDED FRINGE BENEFITS

Employer-provided benefit	Employer cost for benefit as a share of employer cost for wages and salaries (%) (Q4 2022) ^a	Value of benefit for the median weekly wage of a full-time independent contractor (\$1017) ^d	Value of benefit for the median weekly wage of a part-time independent contractor (\$398) ^d
Health Insurance	11.2	\$113.90	\$44.58
Retirement ^b	7.4	75.26	29.45
Paid Leave ^c	10.8	109.84	42.98
Total Annual Value of Benefits		15,547.90	6,084.62

^a The share for each benefit is calculated as the cost per hour for civilian workers divided by the wages and salaries cost per hour for civilian workers. Series IDs CMU1150000000000D, CMU1180000000000D, and CMU1040000000000D divided by Series ID CMU1020000000000D.

^b Includes defined benefit and defined contribution retirement plans.

^c Includes vacation, holiday, sick and personal leave.

^d Earnings data from the 2017 CWS (<https://www.bls.gov/news.release/conemp.t13.htm>) were inflated to Q3 2022 using GDP Deflator.

2. Tax Liabilities

As self-employed workers, independent contractors are legally obligated to pay both the employee and employer shares of the Federal Insurance Contributions Act (FICA)

taxes. Thus, if workers' classifications change from independent contractors to employees, there could be a transfer in federal tax liabilities from workers to employers.⁶³⁷ Although this rule only addresses whether a worker is an

employee or an independent contractor under the FLSA, the Department assumes in this analysis that employers are likely to keep the status of most workers the same across all benefits and requirements, including for tax

⁶³⁴ To measure if the difference between these proportions is statistically significant, the Department used the replicate weights for the CWS. At a 0.05 significance level, the proportion of Hispanic independent contractors with any health insurance is lower than the proportion for all independent contractors.

⁶³⁵ BLS Employer Costs for Employee Compensation—December 2022. <https://www.bls.gov/news.release/pdf/ecec.pdf>.

⁶³⁶ Jackson, E., Looney, A., & Ramnath, S., Department of Treasury, *The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage*, Working Paper

#114 (Jan. 2017), <https://home.treasury.gov/system/files/131/WP-114.pdf>. As discussed in the 2021 IC Rule, this study defines retirement accounts as "employer-sponsored plans," which may not encompass all of the possible long-term saving methods. See 86 FR 1217.

⁶³⁷ See 86 FR 1218.

purposes.⁶³⁸ These payroll taxes include the 6.2 percent employer component of the Social Security tax and the 1.45 percent employer component of the Medicare tax.⁶³⁹ In sum, independent contractors are legally responsible for an additional 7.65 percent of their earnings in FICA taxes (less the applicable tax deduction for this additional payment). Some of this increased tax liability may be partially or wholly paid for by the individuals and companies that engage independent contractors, to the extent that the compensation paid to independent contractors accounts for this added tax liability. However, changes in compensation are discussed separately below. Changes in benefits, tax liability, and earnings must be considered in tandem to identify how the standard of living may change.

The Coalition to Promote Independent Entrepreneurs contended that the Department's analysis of transfers is problematic and that the claim that employers are likely to keep the status of most workers the same across all benefits and requirements is legally incorrect. In the Department's enforcement experience, employers generally classify workers as employees or independent contractors for all purposes. The Department is not making any statement regarding employers' compliance with other laws that use different standards for employee classification than the FLSA.

In addition to affecting tax liabilities for workers, this rule could have an impact on state tax revenue and budgets. Misclassification results in lost revenue and increased costs for states because states receive less tax revenue than they otherwise would from payroll taxes, and they have reduced funds to unemployment insurance, workers' compensation, and paid leave programs.⁶⁴⁰ Although it has not been

updated more recently, the IRS conducted a comprehensive worker misclassification estimate in 1984 using data collected by auditors. At the time, the IRS found misclassification resulted in an estimated total tax loss of \$1.6 billion in Social Security taxes, Medicare taxes, Federal unemployment taxes, and Federal income taxes (for Tax Year 1984).⁶⁴¹ ⁶⁴² To the extent workers were incorrectly classified due to misapplication of the 2021 IC Rule, that could have led to reduced tax revenues.

Generally, employer requirements pertaining to unemployment insurance, disability insurance, or worker's compensation are on behalf of employees, therefore independent contractors do not have access to those benefits. Reduced unemployment insurance, disability insurance, and worker's compensation contributions result in reduced disbursement capabilities. Misclassification of employees as independent contractors thus impacts the funds paid into such state programs. Even if the misclassified worker is unaffected because they need no assistance, the employer has not paid into the programs as required. As a result, the state has diminished funds for those who require the benefits. For example, in Tennessee, from September 2017 to October 2018, the Uninsured Employers Fund unit "assessed 234 penalties against employers for not maintaining workers' compensation insurance, for a total assessment amount of \$2,730,269.60."⁶⁴³ This amount represents only what was discovered by the taskforce in thirteen months and in just one state. By rescinding the 2021 IC Rule, this rule could prevent this increased burden on government entities.

3. FLSA Protections

When workers are properly classified as independent contractors, the minimum wage, overtime pay, and other requirements of the FLSA no longer apply. The 2017 CWS data indicate that independent contractors are more likely than employees to report earning less than the FLSA minimum wage of \$7.25 per hour (8 percent for self-employed independent contractors, 5 percent for other independent contractors, and 2 percent for employees). Concerning

overtime pay, not only do independent contractors not receive the overtime pay premium, but the number of overtime hours worked (more than 40 hours in a workweek) by independent contractors is also higher. Analysis of the CWS data indicated that, before conditioning on covariates, primary self-employed independent contractors are more likely to work overtime at their main job than employees, as 29 percent of self-employed independent contractors reported working overtime versus just 17 percent for employees.⁶⁴⁴

Additionally, independent contractors who work overtime tend to work more hours of overtime than employees. According to the Department's analysis of CWS data, among those who usually work overtime, the mean usual number of overtime hours for independent contractors is 15.4 and the mean for employees is 11.8 hours. Independent contractors are also not protected by other provisions in the FLSA that are centered on ensuring that women are treated fairly at work, including employer-provided accommodations for breastfeeding workers and protections against pay discrimination.

As discussed above, compared to the 2021 IC Rule, this rule could result in reduced misclassification of employees as independent contractors. Any reduction in misclassification that occurs because of this rule would lead to an increase in the applicability of these FLSA protections for workers and subsequently may result in transfers relating to minimum wage and overtime pay. Specifically, to the extent misclassified workers were not earning the minimum wage, reduced misclassification would increase hourly wages for these workers to the federal minimum wage. Similarly, to the extent misclassified workers were not receiving the applicable overtime pay, reduced misclassification would increase overtime pay for any overtime hours they continued to work. However, compared to the current economic and legal landscape where courts and parties outside the Department are not necessarily using the 2021 IC Rule's framework for analyzing employee or independent contractor classification

⁶³⁸ Courts have noted that the FLSA has the broadest conception of employment under federal law. *See, e.g., Darden*, 503 U.S. at 326. To the extent that businesses making employment status determinations base their decisions on the most demanding federal standard, a rulemaking addressing the standard for determining classification of worker as an employee or an independent contractor under the FLSA may affect the businesses' classification decisions for purposes of benefits and legal requirements under other federal laws.

⁶³⁹ Internal Revenue Service, "Publication 15, (Circular E), Employer's Tax Guide" (2023 <https://www.irs.gov/publications/p15>). The social security tax has a wage base limit of \$160,200 in 2023. There is no wage base limit for Medicare Tax.

⁶⁴⁰ *See, e.g.,* Lisa Xu and Mark Erlich, Economic Consequence of Misclassification in the State of Washington, Harvard Labor and Worklife Program, 2 (2019), https://lwp.law.harvard.edu/files/lwp/files/wa_study_dec_2019_final.pdf; Karl A. Racine, Issue Brief and Economic Report, *Illegal Worker Misclassification: Payroll Fraud in the District's*

Construction Industry, 13 (September 2019), <https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf>.

⁶⁴¹ Treasury Inspector General for Tax Inspection 2013, *Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings*, https://www.oversight.gov/sites/default/files/oig-reports/TIGTA/201330058fr_0.pdf.

⁶⁴² Adjusted for inflation using the CPI-U, the current value of this tax loss would be \$4.5 billion.

⁶⁴³ NELP, *supra* n.553.

⁶⁴⁴ The Department based this calculation on the percentage of workers in the CWS data who respond to the PEHRUSL1 variable ("How many hours per week do you usually work at your main job?") with hours greater than 40. Workers who answer that hours vary were excluded from the calculation. The Department also applied the exclusion criteria used by Katz and Krueger (exclude workers reporting weekly earnings less than \$50 and workers whose calculated hourly rate (weekly earnings divided by usual hours worked per week) is either less than \$1 or more than \$1,000).

and are instead continuing to use longstanding judicial precedent and guidance that the Department was relying on prior to March of 2022, these transfers (and the other transfers discussed above) would be less likely to occur.

4. Hourly Wages, Bonuses, and Related Compensation

In addition to increased compliance with minimum wage and overtime pay requirements, potential transfers may also result from this rulemaking as a consequence of differences in earnings between employees and independent contractors.⁶⁴⁵ Independent contractors are generally expected to earn a wage premium relative to employees who perform similar work to compensate for their reduced access to benefits and increased tax liability. However, this may not always be the case in practice. The Department compared the average hourly wages of current employees and independent contractors to provide some indication of the impact on wages of a worker who is reclassified from an independent contractor to an employee.

The Department used an approach similar to Katz and Krueger (2018).⁶⁴⁶ Both regressed hourly wages on independent contractor status⁶⁴⁷ and observable differences between independent contractors and employees (e.g., occupation, sex, potential experience, education, race, and ethnicity) to help isolate the impact of independent contractor status on hourly wages. Katz and Krueger used the 2005 CWS and the 2015 RAND American Life Panel (ALP) (the 2017 CWS was not available at the time of their analysis). The Department used the 2017 CWS.⁶⁴⁸

Both analyses found similar results. A simple comparison of mean hourly wages showed that independent contractors tend to earn more per hour than employees (e.g., \$27.29 per hour for all independent contractors versus \$24.07 per hour for employees using the 2017 CWS). However, when controlling

for observable differences between workers, Katz and Krueger found no statistically significant difference between independent contractors' and employees' hourly wages in the 2005 CWS data. Although their analysis of the 2015 ALP data found that primary independent contractors earned more per hour than traditional employees, they recommended caution in interpreting these results due to the imprecision of the estimates.⁶⁴⁹ The Department found no statistically significant difference between independent contractors' and employees' hourly wages in the 2017 CWS data.

Based on these results, the Department believes it is inappropriate to conclude independent contractors generally earn a higher hourly wage than employees. The Department ran another hourly wage rate regression including additional variables to determine if independent contractors in underserved groups are impacted differently by including interaction terms for female independent contractors, Hispanic independent contractors, and Black independent contractors. The results indicate that in addition to the lower wages earned by Black workers in general, Black independent contractors also earn less per hour than independent contractors of other races; however, this is not statistically significant at the most commonly used significance level.⁶⁵⁰

A group of DC economists provided a comment discussing an analysis they performed using aggregate data and analysis from individual-level IRS tax data from Washington, DC.⁶⁵¹ In their study, they found that taxpayers who switched from employment to self-employment saw a decrease in income and vice versa. They found, "[b]etween 2013–2018 switching from a typical wage-earning job to self-employment, was associated with a 20–50 percent drop in income, while switching away from self-employment was associated with an income increase of 65–85 percent." They also note that low-income tax filers who switched from self-employment to a wage-earning job

approximately doubled their income from 2013–2018. However, this analysis is specifically focused on workers in Washington, DC, and the definition of self-employment may differ from independent contractor classification under the FLSA.

The Coalition for Workforce Innovation asserted that the Department failed to consider additional studies reconfirming that independent contractors earn more than traditional employees. They cite the Upwork study, saying "[t]he number of freelancers who earn more by freelancing than in their traditional jobs continues to grow: 44% of freelancers say they earn more freelancing than with a traditional job in 2021, . . . up from 39% in 2020 and 32% in 2019."⁶⁵² The Department notes that even if 44% of freelancers say that they earn more than they would under traditional employment, that would still mean that a larger share of freelancers (56%) either report earning the same or less than with traditional employment. Also, as discussed in section VII.B.1, the nature of this study and its definition of freelancing may not be applicable to how independent contracting is discussed in this rule.

The Economic Policy Institute (EPI) also submitted a comment with a quantitative analysis of the difference in the value of a job to a worker who is classified as an independent contractor rather than as an employee. Their analysis reviewed data for workers in 11 occupations identified as particularly vulnerable to misclassification: construction workers, truck drivers, janitors and cleaners, home health and personal care aides, retail sales workers, housekeeping cleaners, landscaping workers, call center workers, security guards, light truck delivery drivers, and manicurists and pedicurists.

F. Analysis of Regulatory Alternatives

Pursuant to its obligations under Executive Order 12866,⁶⁵³ the Department assessed four regulatory alternatives to this rule.

The Department had previously considered and rejected two of these alternatives in the 2021 IC Rule—adopting either a common law or ABC test for determining employee or independent contractor status.⁶⁵⁴ The Department reaches the same

⁶⁴⁵ The discussion of data on the differences in earnings between employees and independent contractors in the 2021 IC Rule was potentially confusing and included some evidence that was not statistically significant, so the findings and methodology are discussed again here.

⁶⁴⁶ L. Katz and A. Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015," (2018).

⁶⁴⁷ On-call workers, temporary help agency workers, and workers provided by contract firms are excluded from the base group of "traditional" employees.

⁶⁴⁸ In both Katz and Krueger's regression results and the Department's calculations, the following outlying values were removed: workers reporting earning less than \$50 per week, less than \$1 per hour, or more than \$1,000 per hour. Choice of exclusionary criteria from Katz and Krueger (2018).

⁶⁴⁹ See top of page 20, "Given the imprecision of the estimates, we recommend caution in interpreting the estimates from the [ALP]." The standard error on the estimated coefficient on the independent contractor variable in Katz and Krueger's regression based on the 2015 ALP is more than 2.5 times larger than the standard error of the coefficient using the 2017 CWS.

⁶⁵⁰ The coefficient for Black independent contractors was negative and statistically significant at a 0.10 level (with a p-value of 0.067). However, a significance level of 0.05 is more commonly used.

⁶⁵¹ This analysis can also be found at: <https://ora-cfo.dc.gov/blog/self-employment-income-drop>.

⁶⁵² "Upwork Study Finds 59 Million Americans Freelancing Amid Turbulent Labor Market," Upwork, December 8, 2021, <https://www.upwork.com/press/releases/upwork-study-finds-59-million-americans-freelancing-amid-turbulent-labor-market>. Full study available at <https://www.upwork.com/research/freelance-forward-2021>.

⁶⁵³ E.O. 12866 section 6(a)(3)(C)(iii), 58 FR 51741.

⁶⁵⁴ See 86 FR 1238.

conclusion in this final rule. Section IV above discusses why legal constraints prevent the Department from adopting either of these alternatives and the comments received regarding these alternatives.

For a third alternative, the Department considered a rule that would not fully rescind the 2021 IC Rule and instead retain some aspects of that rule. As the Department has noted throughout this final rule, there are multiple instances in which it is consistent or in agreement with the 2021 IC Rule. However, the numerous ways in which the 2021 IC Rule described the factors were in tension with judicial precedent and longstanding Department guidance and narrowed the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for himself. For these reasons, and as discussed in sections III and IV above, the Department has ultimately concluded that a complete rescission and replacement of the 2021 IC Rule is needed.

For a fourth alternative, the Department considered rescinding the 2021 IC Rule and providing guidance on employee and independent contractor classification through subregulatory guidance. For more than 80 years prior to the 2021 IC Rule, the Department primarily issued subregulatory guidance in this area and did not have generally applicable regulations on the classification of workers as employees or independent contractors. The Department considered rescinding the 2021 IC Rule and continuing to provide subregulatory guidance for stakeholders through existing documents (such as Fact Sheet #13) and new documents (for example a Field Assistance Bulletin). Rescinding the 2021 IC Rule without issuing a new regulation would have lowered the regulatory familiarity costs associated with this rulemaking. As explained in sections III, IV, and V above, however, the Department continues to believe that replacing the 2021 IC Rule with regulations addressing the multifactor economic reality test that more fully reflect the case law and continue to be relevant to the modern economy will be helpful for both workers and employers. Specifically, issuing regulations with an explanatory preamble allows the Department to provide in-depth guidance. Additionally, issuing regulations allowed the Department to formally collect and consider a wide

range of views from stakeholders by electing to use the notice-and-comment process. Finally, because courts are accustomed to considering relevant agency regulations, providing guidance in this format may further improve consistency among courts regarding this issue. Therefore, the Department is not rescinding the 2021 IC Rule and providing only subregulatory guidance.

VIII. Final Regulatory Flexibility Act (FRFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their rules 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. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities.

A. Need for Rulemaking and Objectives of the Rule

As discussed in section II.C.3., on March 14, 2022, a district court in the Eastern District of Texas issued a decision vacating the Department's delay and withdrawal of the 2021 IC Rule and concluding that the 2021 IC Rule became effective on March 8, 2021. The Department believes that the 2021 IC Rule does not fully comport with the FLSA's text and purpose as interpreted by the courts and, had it been left in place, would have had a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test. Therefore, the Department believes it is appropriate to rescind the 2021 IC Rule and set forth an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule.

The Department is rescinding and replacing regulations addressing whether workers are employees or independent contractors under the FLSA. Of particular note, the regulations set forth in this final rule do not use "core factors" and instead return to a totality-of-the-circumstances

analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity. Regarding the economic reality factors, this final rule returns to the longstanding framing of investment as a separate factor, and integral as an integral part of the potential employer's business rather than an integrated unit of production. The final rule also provides broader discussion of how scheduling, remote supervision, price setting, and the ability to work for others should be considered under the control factor, and it allows for consideration of reserved rights while removing the provision in the 2021 IC Rule that minimized the relevance of retained rights. Further, the final rule discusses exclusivity in the context of the permanency factor, and initiative in the context of the skill factor. The Department also made several adjustments to the proposed regulations after consideration of the comments received, including revisions to the regulations regarding the investment factor and the control factor (specifically addressing compliance with legal obligations).

The Department believes that rescinding the 2021 IC Rule and replacing it with regulations addressing the multifactor economic reality test—in a way that both more fully reflects the case law and continues to be relevant to the evolving economy—will be helpful for both workers and employers. The Department believes this rule will help protect employees from misclassification while at the same time providing a consistent approach for those businesses that engage (or wish to engage) independent contractors as well as for those who wish to work as independent contractors.

B. Significant Issues Raised in Public Comments, Including by the Small Business Administration Office of Advocacy

Several commenters submitted feedback in response to the NPRM's Initial Regulatory Flexibility Analysis (IRFA) or otherwise addressing the potential impact of this rulemaking on small entities. Commenters, including the Small Business Administration Office of Advocacy (SBA) contended that the Department has severely underestimated the economic impacts of this rule on small businesses and independent contractors. For example, several commenters criticized the rule familiarization time estimates referenced in the IRFA, with the Independent Electrical Contractors, the Small Business & Entrepreneurship

Council (“SBE Council”), and SBA citing the length of the NPRM as evidence that the Department was providing an underestimate. By contrast, the SWACCA asserted that the “well understood framework” of the NPRM’s proposed guidance would reduce regulatory familiarization costs for stakeholders “compared to the January 2021 Rule’s novel, untested weighted framework.”

As explained in section VII.C., the Department considered all of the comments received on this topic and has increased the regulatory familiarization cost estimate for this rule to 1 hour for firms and 30 minutes for independent contractors, who may be small businesses themselves. The Department believes that this time estimate is appropriate because it represents an average, in which some small businesses will spend more time reviewing the rule and others will spend no time reviewing.

Some commenters asserted that the Department failed to identify other potential costs of this rulemaking. For example, SBA wrote that “DOL has failed to estimate any costs for small businesses and independent contractors to reclassify workers as independent contractors, for lost work, and for business disruptions.” Similarly, SBE Council wrote that the IRFA did “not include the cost to a small business or small entity if an independent contractor is determined to be ‘misclassified,’ or if a small business or small entity loses business revenue due to the loss of human capital, or the cost to comply with the new rule, or if an independent contractor loses business due to potential or actual misclassification.” As discussed in greater detail in section III(C) and VII(A), the Department does not believe that this rule will lead to widespread reclassification.

SBA claimed that the IRFA failed to address certain employment-related costs related to the reclassification of independent contractors as employees (e.g., payroll tax obligations, employment benefits costs, etc.) that were mentioned in the NPRM’s Regulatory Impact Analysis; *see also* American First Legal Foundation (“AFL”) (“The Department failed to consider that small businesses reclassifying independent contractors as employees under the Proposed Rule will substantially increase their respective tax burdens.”); Engine (asserting that “startups that err on the side of caution and hire or shift to full-time workers” may have to “offer more robust compensation packages” to compete with larger competitors). The

Department’s Regulatory Impact Analysis only provides a qualitative discussion of these potential transfers and explains that these transfers may result from reduced misclassification resulting from this rule. The Department does not believe that coming into compliance with the law would be a “cost” for the purposes of the economic analyses of this rulemaking.

SBA also commented that “many independent contractors or freelance workers, who may also be small businesses, believe they will lose work because of this rule.” The Department does not believe that this rule will lead to job losses because most workers who were properly classified as independent contractors before the 2021 IC Rule will continue to retain their status as independent contractors.

Finally, AFL was concerned about the Department “treating small businesses the same as all other entities” and asserted that Section 223 of the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”) requires the Department to create an exemption waiving the application of civil money penalties for small entities “that will inevitably misapply the confusing and inconsistent ‘economic reality’ test.” *See also* Engine (“It is unclear how the proposed rule, if implemented, will be enforced consistent with SBREFA, if the Department does not accommodate differing compliance requirements by waiving or reducing penalties when circumstances warrant.”). In response to these comments, the Department notes that courts apply the same economic reality test when evaluating the FLSA employment status of any worker alleged to be an independent contractor, regardless of the size of the potential employer.⁶⁵⁵ Similarly, the Department is striving to provide a generally-applicable regulation in this rulemaking. As with other enforcement-related requests from commenters described in section II.E., whether the Department should reduce or waive certain civil money penalties for small entities found to have violated the FLSA is an enforcement issue that is beyond the scope of this rulemaking.

⁶⁵⁵ *See, e.g., Rutherford*, 331 U.S. at 724 (noting that the slaughterhouse involved in the case “had one hourly paid employee” prior to hiring the alleged independent contractors at issue); *Silk*, 331 U.S. at 706 (describing the employer at issue as an individual named “Albert Silk, doing business as the Albert Silk Coal Co.,” who “owns no trucks himself, but contracts with workers who own their own trucks to deliver coal”).

C. Estimating the Number of Small Businesses Affected by the Rulemaking

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.⁶⁵⁶ The Department then applied these thresholds to the U.S. Census Bureau’s 2017 Economic Census to obtain the number of establishments with employment or sales/receipts below the small business threshold in the industry.⁶⁵⁷ These ratios of small to large establishments were then applied to the more recent 2019 Statistics of United States Businesses (SUSB) data on number of establishments.⁶⁵⁸ Next, the Department estimated the number of small governments, defined as having population less than 50,000, from the 2017 Census of Governments.⁶⁵⁹ In total, the Department estimated there are 6.5 million small establishments or governments who could potentially have independent contractors, and who could be affected by this rulemaking. However, not all of these establishments will have independent contractors, and so only a share of this number will actually be affected. The impact of this rule could also differ by industry. As shown in Table 2 of the regulatory impact analysis, the industries with the highest number of independent contractors are the professional and business services and construction industries.

Additionally, as discussed in section VII.B., the Department estimates that there are 22.1 million independent contractors. Some of these independent contractors may be considered small businesses and may also be impacted by this rule.

D. Compliance Requirements of the Final Rule, Including Reporting and Recordkeeping

This rule provides guidance for analyzing employee or independent contractor status under the FLSA. It does not create any new reporting or

⁶⁵⁶ SBA, Summary of Size Standards by Industry Sector, 2017, https://www.sba.gov/sites/default/files/2018-05/Size_Standards_Table_2017.xlsx. The most recent size standards were issued in 2022. However, the Department used the 2017 standards for consistency with the older Economic Census data.

⁶⁵⁷ The 2017 data are the most recently available with revenue data.

⁶⁵⁸ 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.

⁶⁵⁹ 2017 Census of Governments. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>.

recordkeeping requirements for businesses.

In the Regulatory Impact Analysis, the Department estimates that regulatory familiarization to be one hour per entity and one-half hour per independent contractor. The per-entity cost for small business employers is the regulatory familiarization cost of \$52.80, or the fully loaded median hourly wage of a Compensation, Benefits, and Job Analysis Specialist multiplied by 1 hour. The per-entity rule familiarization cost for independent contractors, some of whom would be small businesses, is \$11.73 or the median hourly wage of independent contractors in the CWS multiplied by 0.5 hour.

E. Steps the Department Has Taken To Minimize the Significant Economic Impact on Small Entities

The RFA requires agencies to discuss “any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.”⁶⁶⁰ As discussed earlier in section VII.F., the Department does not believe that it has the legal authority to adopt either a common law or “ABC” test to determine employee or independent contractor status under the FLSA, foreclosing the consideration of these alternatives for purposes of the RFA.

As explained in section VII.F., the Department considered two other regulatory alternatives: a rule that would not fully rescind the 2021 IC Rule and instead retain some aspects of that rule in the new rule; and completely rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through subregulatory guidance, as the Department had done for over 80 years prior to the 2021 IC Rule. The Department believes that the overall economic impact of retaining some portions of the 2021 IC Rule while issuing a rule to revise other portions of the rule would not minimize the economic impact on small entities as they would incur costs to familiarize themselves with the new regulation. Similarly, the Department believes that the overall economic impact of fully rescinding the 2021 IC Rule and providing subregulatory guidance, would not necessarily minimize the economic impact on small entities as they would incur some costs to familiarize themselves with any subregulatory guidance. Moreover, as explained in sections III, IV, and V

above, the Department believes that replacing the 2021 IC Rule with regulations addressing the multifactor economic reality test that more fully reflect the case law and continue to be relevant to the modern economy will be helpful for both workers and employers, particularly over the long term.

IX. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any unfunded Federal mandate that may result in excess of \$100 million (adjusted annually for inflation) in expenditures in any one year by State, local, and tribal governments in the aggregate, or by the private sector. Adjusting the threshold for inflation using the GDP deflator, using a recent annual result (2021), yields a threshold of \$165 million. Therefore, this rulemaking is expected to create unfunded mandates that exceed that threshold. *See* section VII for an assessment of anticipated costs and benefits.

X. Executive Order 13132, Federalism

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism and determined that it does not have federalism implications. The rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

XI. Executive Order 13175, Indian Tribal Governments

This rule will not have tribal implications under Executive Order 13175 that require a tribal summary impact statement. The rule will not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects

29 CFR Part 780

Agriculture, Child labor, Wages.

29 CFR Part 788

Forests and forest products, Wages.

29 CFR Part 795

Employment, Wages.

For the reasons set out in the preamble, the Wage and Hour Division,

Department of Labor amends Title 29 CFR chapter V, as follows:

PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT

■ 1. The authority citation for part 780 continues to read as follows:

Authority: Secs. 1–19, 52 Stat. 1060, as amended; 75 Stat. 65; 29 U.S.C. 201–219. Pub. L. 105–78, 111 Stat. 1467.

■ 2. Amend § 780.330 by revising paragraph (b) to read as follows:

§ 780.330 Sharecroppers and tenant farmers.

* * * * *

(b) In determining whether such individuals are employees or independent contractors, the criteria set forth in §§ 795.100 through 795.110 of this chapter are used.

* * * * *

PART 788—FORESTRY OR LOGGING OPERATIONS IN WHICH NOT MORE THAN EIGHT EMPLOYEES ARE EMPLOYED

■ 3. The authority citation for part 788 continues to read as follows:

Authority: Secs. 1–19, 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

■ 4. Amend § 788.16 by revising paragraph (a) to read as follows:

§ 788.16 Employment relationship.

(a) In determining whether individuals are employees or independent contractors, the criteria set forth in §§ 795.100 through 795.110 of this chapter are used.

* * * * *

■ 5. Add part 795 to read as follows:

PART 795—EMPLOYEE OR INDEPENDENT CONTRACTOR CLASSIFICATION UNDER THE FAIR LABOR STANDARDS ACT

Sec.

795.100 Introductory statement.

795.105 Determining employee or independent contractor classification under the FLSA.

795.110 Economic reality test to determine economic dependence.

795.115 Severability.

Authority: 29 U.S.C. 201–219.

§ 795.100 Introductory statement.

This part contains the Department of Labor’s (the Department) general interpretations for determining whether workers are employees or independent

⁶⁶⁰ 5 U.S.C. 603(c).

contractors under the Fair Labor Standards Act (FLSA or Act). See 29 U.S.C. 201–19. These interpretations are intended to serve as a “practical guide to employers and employees” as to how the Department will seek to apply the Act. *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944). The Administrator of the Department’s Wage and Hour Division will use these interpretations to guide the performance of their duties under the Act, unless and until the Administrator is otherwise directed by authoritative decisions of the courts or the Administrator concludes upon reexamination of an interpretation that it is incorrect. To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to determining who is an employee or independent contractor under the Act are inconsistent or in conflict with the interpretations stated in this part, they are hereby rescinded. The interpretations stated in this part may be relied upon in accordance with section 10 of the Portal-to-Portal Act, 29 U.S.C. 251–262, notwithstanding that after any act or omission in the course of such reliance, the interpretation is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. 29 U.S.C. 259.

§ 795.105 Determining employee or independent contractor classification under the FLSA.

(a) *Relevance of independent contractor or employee status under the Act.* The Act’s minimum wage, overtime pay, and recordkeeping obligations apply only to workers who are covered employees. Workers who are independent contractors are not covered by these protections. Labeling employees as “independent contractors” does not make these protections inapplicable. A determination of whether a worker is an employee or independent contractor under the Act focuses on the economic realities of the worker’s relationship with the worker’s potential employer and whether the worker is either economically dependent on the potential employer for work or in business for themselves.

(b) *Economic dependence as the ultimate inquiry.* An “employee” under the Act is an individual whom an employer suffers, permits, or otherwise employs to work. 29 U.S.C. 203(e)(1), (g). “Employer” is defined to “include[] any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. 203(d). The Act’s definitions are meant to encompass as employees all workers who, as a matter of economic reality, are

economically dependent on an employer for work. A worker is an independent contractor, as distinguished from an “employee” under the Act, if the worker is, as a matter of economic reality, in business for themselves. Economic dependence does not focus on the amount of income the worker earns, or whether the worker has other sources of income.

§ 795.110 Economic reality test to determine economic dependence.

(a) *Economic reality test.* (1) In order to determine economic dependence, multiple factors assessing the economic realities of the working relationship are used. These factors are tools or guides to conduct a totality-of-the-circumstances analysis. This means that the outcome of the analysis does not depend on isolated factors but rather upon the circumstances of the whole activity to answer the question of whether the worker is economically dependent on the potential employer for work or is in business for themselves.

(2) The six factors described in paragraphs (b)(1) through (6) of this section should guide an assessment of the economic realities of the working relationship and the question of economic dependence. Consistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive, and the weight to give each factor may depend on the facts and circumstances of the particular relationship. Moreover, these six factors are not exhaustive. As explained in paragraph (b)(7) of this section, additional factors may be considered.

(b) *Economic reality factors—*(1) *Opportunity for profit or loss depending on managerial skill.* This factor considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker’s economic success or failure in performing the work. The following facts, among others, can be relevant: whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space. If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee. Some decisions by a worker that can affect the amount of pay that a worker receives, such as

the decision to work more hours or take more jobs when paid a fixed rate per hour or per job, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.

(2) *Investments by the worker and the potential employer.* This factor considers whether any investments by a worker are capital or entrepreneurial in nature. Costs to a worker of tools and equipment to perform a specific job, costs of workers’ labor, and costs that the potential employer imposes unilaterally on the worker, for example, are not evidence of capital or entrepreneurial investment and indicate employee status. Investments that are capital or entrepreneurial in nature and thus indicate independent contractor status generally support an independent business and serve a business-like function, such as increasing the worker’s ability to do different types of or more work, reducing costs, or extending market reach. Additionally, the worker’s investments should be considered on a relative basis with the potential employer’s investments in its overall business. The worker’s investments need not be equal to the potential employer’s investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.

(3) *Degree of permanence of the work relationship.* This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration, continuous, or exclusive of work for other employers. This factor weighs in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities. This may include regularly occurring fixed periods of work, although the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification. Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, this factor is not necessarily indicative of independent contractor status unless the worker is

exercising their own independent business initiative.

(4) *Nature and degree of control.* This factor considers the potential employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship. Facts relevant to the potential employer's control over the worker include whether the potential employer sets the worker's schedule, supervises the performance of the work, or explicitly limits the worker's ability to work for others. Additionally, facts relevant to the potential employer's control over the worker include whether the potential employer uses technological means to supervise the performance of the work (such as by means of a device or electronically), reserves the right to supervise or discipline workers, or places demands or restrictions on workers that do not allow them to work for others or work when they choose. Whether the potential employer controls economic aspects of the working relationship should also be considered, including control over prices or rates for services and the marketing of the services or products provided by the worker. Actions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control. Actions taken by the potential employer that go beyond compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and

instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control. More indicia of control by the potential employer favors employee status; more indicia of control by the worker favors independent contractor status.

(5) *Extent to which the work performed is an integral part of the potential employer's business.* This factor considers whether the work performed is an integral part of the potential employer's business. This factor does not depend on whether any individual worker in particular is an integral part of the business, but rather whether the function they perform is an integral part of the business. This factor weighs in favor of the worker being an employee when the work they perform is critical, necessary, or central to the potential employer's principal business. This factor weighs in favor of the worker being an independent contractor when the work they perform is not critical, necessary, or central to the potential employer's principal business.

(6) *Skill and initiative.* This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative. This factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the potential employer to perform the work. Where the worker brings

specialized skills to the work relationship, this fact is not itself indicative of independent contractor status because both employees and independent contractors may be skilled workers. It is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor.

(7) *Additional factors.* Additional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themselves, as opposed to being economically dependent on the potential employer for work.

§ 795.115 Severability.

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof.

Signed this 2nd day of January, 2024.

Jessica Looman,

Administrator, Wage and Hour Division.

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